論國際人道法適用於內戰之發展

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關鍵字:內戰、國際人道法、1949 年《日內瓦公約》共同第三條、1977 年《日內瓦公約第二 附加議定書》、檢察官訴塔迪奇案、檢察官訴阿卡蘇案、檢察官訴諾曼案。

Keywords: Civil Strife · International Humanitarian Law · Common Article 3 of the 1949 Geneva Conventions · Protocol II to the Geneva Conventions of 1949 · *Prosecutor v. Tadic* · *Prosecutor v. Akayesu* · *Prosecutor v. Sam Hinga Norman*.

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摘 要

本文旨在探討國際人道法適用於內戰之發展,除緒言與結論外,分別論述內戰、國際人道法、1949 年《日內瓦公約》共同第三條,1977 年《日內瓦公約第二附加議定書》,國際人道法在維持國家和平軍事行動中之適用,結論揭示中央政府為維護國家統一和領土完整得使用武力對抗分裂、國家希望藉主權來保持對於國內武裝衝突之控制、國家不願意將完整的國際人道法規則適用於國內武裝衝突、國際人道法由保護國家利益逐漸趨向保護平民利益、日內瓦第二附加議定書是對日內瓦公約共同第三條之補充、聯合國維持和平部隊在執行維持和平行動和武力執行行動中參與武裝衝突情況下,亦有遵循國際人道法之義務。國際人道法具有普世價值,適用於國際及國內武裝衝突。

The Development of International Humanitarian Law Applicable in Civil Strife

John K.T. Chao

Abstract

This article is mainly focus on the development of international humanitarian law applicable in civil strife, first examines civil war and international humanitarian law. It then examines Common Article 3 of the 1949 Geneva Conventions and the 1977 Protocol II to the Geneva Conventions of 1949. Final section concludes that the central government may use force to guard its national unity, territorial integrality and political independence against secession of State. State does wish to employ sovereignty in order to maintain and control internal armed conflict; it does not wish fully applicable International Humanitarian Law to internal armed conflict. The International Humanitarian Law begins from protection of national interest towards protection of civilian. The 1977 Protocol II to the Geneva Conventions of 1949 is a supplement to the Common Article 3 of the 1949 Geneva Conventions. The United Nations peacekeeping forces in situations of armed conflict involved in peacekeeping operations and enforcement action may oblige to observe international humanitarian Law; any violations of international humanitarian law shall lead to corresponding liabilities. The international humanitarian law is commonly accepted as with universal value and applicable in both international armed conflict and civil strife.

壹、緒 言

1998 年以來,全世界發生 27 次重大武裝衝突,其中有 25 次是國家內部的武裝衝突。內戰爆發頻繁,帶來巨大的人員傷亡及物質損害,成為嚴重的國際安全問題,引起國際社會的關切,根據國際人道法原則和規則解決內戰中的問題是國際人道法發展的必然趨勢和內在需要。

本文旨在探討國際人道法適用於內戰之發展,除緒言與結論外,分別論述內戰、國際人道法。1949年《日內瓦公約》共同第三條,1977年《日內瓦公約第二附加議定書》,國際人道法在維持國家和平軍事行動中之適用,結論揭示國際人道法具有普世價

值,適用於國際及國內武裝衝突的普遍化。

貳、內

戰

一、內戰或非國際性武裝衝突是一國主 權範圍內之事

一國的內戰(Civil Strife)¹稱非國際性 武裝衝突(Non-international Armed Conflict) 或國內武裝衝突(Internal Armed Conflict), 是一個國主權範圍之內的事情。²以往傳統國 際法面對國內武裝衝突無相關法令規範可資 遵循,惟國內武裝衝突進行的軍事行動,所 造成之人身和財產損害,與國際性武裝衝突 所造成之損害並無明顯差異;且因缺乏國際 人道法規之限制,內戰造成的損害,較國際

- It has been difficult to decide whether to use the term Civil War in title or to resort to the expression Civil Strife. At the Havana Conference of the American republics in 1928, a convention was signed on the Duties and Rights of States in the Event of Civil Strife. The phraseology civil strife was adopted by the Congress of the United States in the law of 1 May 1937. Speaking before the House of Common in July 1937, the First Lord of the Admiralty, Mr. Alfred Duff Cooper, remarked: "By every definition of civil war known to me, what is going on in Spain at the present time is civil war." With this conclusion most international lawyers would not be in entire agreement, inasmuch as belligerent rights were not accorded to the Spaniards by any foreign Power. Lacking such accordance, a legal state of war was not in existence. Norman J. Padelford, International Law and Diplomacy in the Spanish Civil Strife (New York: Macmillan Co., 1939), p. viii; J. Rosenau (ed.), International Aspects of Civil Strife (1964). Case No. 1. Spinney's (1948) Ltd. & Ors. v. Royal Insurance Co. Ltd., [1980] 1 Lloyd's Report 406, where Mustill J. The plaintiffs owned property in Beirut which was looted during the disturbances in Lebanon in January 1976. They claimed under insurance policies which exempted, inter alia, loss caused directly or indirectly by 'civil war'. Thus one question was whether the events in Lebanon in January 1976 amount to 'civil war' within the terms of the policies. The plaintiffs argued that the term 'civil war' was to be given the meaning it has in international law, and that the court should seek a certificate from the British Foreign Secretary as to whether the Lebanese conflict amounted to a 'civil war', either as defined in international law or generally.
- In Banco de Bilbao v. Sancha [1938] 2 K.B. 176, where the British Foreign Office Certificate to the solicitors stated: "The Government set up by General Franco in the Basque country...is now recognized by His Majesty's Government as the Government which exercises de facto administrative control over a considerable portion of the Basque country....It appears that notwithstanding recognition by His Majesty's Government of the facto position of General Franco's Government in this area, His Majesty's Government recognizes the Republican Government of Spain as the de jure government of the whole of Spain including the area in which it recognizes General Franco's Government as exercising de facto administrative control." From 'statement of facts taken from

性武裝衝突更加殘酷,是以國內武裝衝突也 應遵循一定的作戰守則與國際人道法規。³

二、國家實踐

(一)美國內戰 (The American Civil War)一利伯守則 (Lieber Code)⁴

利伯守則(Lieber Code),代碼是美國一般命令第 100 號(US General Orders No. 100),頒布的名稱是《美國政府陸軍訓令》(Instructions for the Government of Armies of the United States in the Field),係在美國南北戰爭期間,由法蘭西斯利伯(Francis Lieber)於 1863 年所草擬,將當時有關的戰爭法和習尚加以編纂,專為提供給美國內戰中的北方

軍事指揮官運用而制定,適用於作戰部隊, 雖無條約地位,但具有法規的重要性。1863 年 4 月生效的《利伯守則》為歐洲國家所接 受,也被納入 1907 年《海牙公約》(Hague Conventions),逐漸演變成為陸戰法規(Hague Convention IV respecting the Laws and Customs of War on Land, HC 4)。

> (二)西班牙內戰 (The Spanish Civil War, 1936-39)

國內武裝衝突也應遵循戰爭法規的觀點, 最早受到國家廣泛關注的是「西班牙內戰」。, 由當時西班牙總統曼努埃爾·阿扎尼亞(Manuel Azana)領導的共和政府軍與人民陣線左 翼聯盟對抗弗朗西斯科·佛朗哥將軍(Gen-

the judgment of Clauson L.J.' [1938] 2 K.B. at p. 181; Clauson L.J. delivering the judgment of the Court of Appeal, adopted this circumstantiated document without comment, stating: "The Court is bound to treat the acts of the government which His Majesty's Government recognize as the *de facto* government of the area in question as acts which cannot be impugned as the acts of a usurping government, and conversely the Court must be bound to treat the acts of a rival government claiming jurisdiction over the same area, even if the latter government be recognized by His Majesty's Government as the *de jure* government of the area as a mere nullity...." At p.195. For details, see A.B. Lyons, "The Conclusiveness of the Foreign Office Certificate," *British Year Book of International Law*, 23 (1946), pp. 241-281; "The Conclusiveness of the 'suggestion' and Certificate of the American State Department," *British Year Book of International Law*, 24 (1947), pp. 116-147.

- Leslie C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Manchester University Press, 2000), pp. 59-61.
- ⁴ The Lieber Code, a code on the law and usages of war intended for military commanders during the American Civil War prepared by Francis Lieber in 1863, can be found in US War Department, The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies, (Washington, D.C.: Government Printing Office, 1899), Series III, Volume 3, pp 148-164.
- 5 西班牙內戰是西班牙第二共和國發生在 1936 年 7 月 17 日 1939 年 4 月 1 日的一場內戰。For details, see Arnold D. McNair, "The Law Relating to the Civil War in Spain," *Law Quarterly Review*, 53 (1937), pp. 471-500. See also *Lord McNair: Selected Papers and Bibliography* (Leiden: A.W. Sijthoff/ Dobbs Ferry, New York: Oceana Publications, 1974), 117-145; Padelford, *supra*. note 1,pp. 196-202; Thomas and Thomas, "International Legal Aspects of the Civil War in Spain, 1936-39," R. Falk (ed.), *The International Law of Civil War* (1971), pp. 110-78; Antonio Cassese, "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts," Antonio Cassese, Dott. A. Giuffre (eds.), *Current Problems of International Law, Essays on U.N. Law and on the Law of Armed Conflict* (Milano, 1975), pp. 287-318; Frits Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts," *ibid.*, pp. 267-285.

eralissimo Francisco Franco)⁶ 領導國民軍和 長槍黨(Falange)⁷等右翼集團的反政府武裝 之間的衝突。蘇聯和墨西哥援助反法西斯 (Fascism)的人民陣線和共和政府,納粹德 國、義大利王國,葡萄牙支持佛朗哥的國民 軍,因西班牙意識形態的衝突和軸心集團與 共產勢力的代理戰爭,西班牙內戰時間之長、 程度之激烈、給平民傷害之慘痛,都達到相 當於國際性武裝衝突的程度。

法國援助共和政府。西班牙內戰爆發後, 法國總理萊昂·布魯姆於 1936 年 7 月 20 日召 開會議,做出援助西班牙共和政府的決定。 由於法國右翼人士的阻礙,直到 8 月 2 日才 開始輸送軍援的飛機。當時工黨(Labour Party)和自由黨(Liberal Party)則強烈支持共 和政府。英國保守黨(Conservative Party)首 相張伯倫因國內反戰聲浪和擔心蘇聯共產主 義的擴張威脅超過德義法西斯主義,不援助 西班牙內戰中的交戰任何一方。工黨和自由 黨則強烈支持西班牙共和政府。英國對法國 表示,若法國援助西班牙政府,當納粹德國 與法國交戰時,英國將不提供任何協助。法 國也因而終止對共和政府的一切支援,並在 同年8月擬定「不干涉協議」。⁸

英國首相張伯倫對西班牙內戰發表的三點聲明。英國對西班牙內戰發表的三點聲明,說明國際人道法或國際法規則應該如何適於用內戰,至少應該如同適用於海戰或陸戰一樣也適用於空戰:第一點、轟炸平民或對平民人口故意攻擊,無疑是違反國際法的;第二點、從空中進行攻擊時,攻擊目標必須是合法的軍事目標,並且必須識別民用物體;第三點、攻擊合法軍事目標時,應盡量避免轟炸周圍的平民人口。9

1936 年 8 月 7 日,美國助理國務卿通知 所有在西班牙的美國領事代表,基於不干涉 他國內政政策的通例,不論在平時或內戰, 美國政府對西班牙發生的任何不幸情勢都將

- 6 法蘭西斯科·佛朗哥 (Francisco Franco, 1892年12月4日-1975年11月20日),西班牙政治家, 軍事家,23 歲擢升為少校,30 歲升為中校,32 歲為升為將軍,法西斯主義獨裁者,西班牙大元帥, 西班牙長槍党黨魁。
- 7 長槍黨(Falange),是由米格爾·普里莫·德·里韋拉的長子-荷西·安東尼奧·普里莫·德里維拉(Jose Antonio Primo de Rivera)於1933年所創立的右翼組織,類似義大利王國和納粹德國的法西斯政黨,長槍黨主張全體主義、民族主義和武裝叛變,並與其他右翼勢力前往德義兩國,獲得支持並取得大量武器。
- 8 「不干涉協議」,除瑞士和葡萄牙外,德國、義大利、蘇聯與其他 23 個國家均簽署同意。Declarations by the European Governments Constituting the Agreement Regarding Non-Intervention in Spain: Declaration by the French Government, 15 August 1936; Declaration by the United Kingdom, 15 August 1936; Declaration by the German Government, 17/24 August 1936; Declaration by the Italian Government, 21 August 1936; and Declaration by the U.S.S.R. Government, 23 August 1936.
- United Kingdom: Warning Issued by the Foreign Office of Enforcement of the Foreign Enlistment Act of 1870, 10 January 1937; Statement of Secretary Eden in the House of Commons, 10 March 1937; Declaration to be signed by Applicants for Special Visa to Spain, London *Times*, 7 April 1937; Arms Export Prohibition Order, 19 May 1931; Merchant Shipping (Carriage of Munitions to Spain) Act, 3 December 1936; and Arms Export Prohibition Order, 8 June 1937. The Spanish Civil War has not confined a limited hostilities to its national territory. Great Britain and France refused to grant belligerent rights while involved in an effort to restrict the Nationalists beyond what traditional international law required. D.P. O'Connell, *The Influence of Law on Sea Power* (Manchester University Press, 1975), p.124.

恪守原則,自我節制而不予干涉。 10

有關國內武裝衝突的國際法規則在國際 習慣法和條約法方面,相繼出現並相互支持 和補充,西班牙內戰中,將一些戰爭法原則 擴大施用於國內武裝衝突,即為明證。

參、國際人道法

一、國際人道法之發軔

《國際人道法》是由國際紅十字會所推動,是以 1864 年《日內瓦公約》(Convention for the Amelioration of the Condition of the Wounded in Armies in the Field)"、1868 年《聖彼得堡宣言》(St. Petersburg Declaration)"為發軔,透過 1949 年《日內瓦四公約》"及其 1977 年日內瓦兩個附加議定書"的組成,其中包括 1907 年《海牙十三個公約》"5在內的幾十項不斷修訂增刪的公約"。

- New York Times, August 23, 1936. The Non-Intervention policy of the United States was one of support of Britain and France and of their policies towards Spain, albeit by separate and parallel rather than by collective action. Cf. James W. Garner, "Spanish Civil War Neutrality Policy of the United States," British Year Book of International Law, 18 (1937), pp. 197-198; 'The United States "Neutrality" Law of 1937, 'British Year Book of International Law, 19 (1938), pp. 44-66; Padeloford, supra. note 1, pp. 174-188. Non-intervention often described as a fundamental principle of international law, which is enshrined as the domestic jurisdiction reservation in Article 2(7) of the UN Charter.
- Now it is replaced by the First Geneva Convention of 1949.
- 12 ! 868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 grammes Weight. Cf. 1856 Paris Declaration respecting Maritime Law; 1899 Hague Declaration 2 Concerning Asphyxiating Gases; 1899 Hague Declaration 3 concerning Expanding Bullets (DumDum Bullets).
- Geneva Four Conventions of 1949, viz.: I Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: II Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III Convention relative to the Treatment of Prisoners of War; IV Convention relative to the Protection of Civilian Persons in Time of War.
- Geneva Two Protocols, viz: 1977 Geneva Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1977 Geneva Protocol 2 Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.
- The Geneva Four Conventions 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.18 October 1907: Hague Convention (1) for the Pacific Settlement of international Disputes (HC 1); Hague Convention (2) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts; Hague Convention (3) relative to the Opening of Hostilities (HC 3); Hague Convention (4) respecting the Laws and Customs of War on Land (HC 4): Hague Convention (5) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (HC 5); Hague Convention (6) relating to the Status of Merchant Ships at the Outbreak of Hostilities (HC 6); Hague Convention (7) relating to the Convention of Merchant Ships into War-Ships (HC 7); Hague Convention (8) relative to the Laying of Automatic Submarine Contact Mines (HC 8); Hague Convention (9) concerning Bombardment by Naval Forces in Time of War (HC 9); Hague Convention (10) for the Adaptation to Naval War of the Principles of the Geneva Convention (now replaced by the Second Geneva Convention of 1949); Hague Convention (11) relative to Certain Restrictions with regard to Exercise of

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議定書與慣例法所累積而成的法律系統。

國際人道法是指國際紅十字會推動的以 日內瓦公約體系為主要內容的原則和規則, 也涵蓋海牙體系和日內瓦體系兩者的內容。" 鑒於第二次世界大戰後的國際性武裝衝突中, 大多數都沒有被宣布或被認為是法律上的戰 爭狀態,國際實踐中已將許多的傳統戰爭法 規和規則選擇不適用或適用於這種非戰爭的 武裝衝突中。

- (1)傳統戰爭法的第一部分內容,即關於 宣戰、媾和、中立等規則和制度,一 般不適用。
- (2)傳統戰爭法的第二部份內容,對作戰 手段的限制以及對人員的保護規則, 一般被適用,有些內容甚至被擴大適 用於非國際性武裝衝突中。

《國際人道法》是基於人道理由,尋求限

制武裝衝突所帶來後果的規則,可規範到「國際性武裝衝突」或「國內武裝衝突」即是內戰的國際法規總稱。法律意旨在於限制戰爭所用的方法及手段,並於和平及戰爭時期,保護沒有參與或已退出敵隊戰鬥,戰鬥能力的人員或建築物,包含平民、受傷或生病的士兵、戰俘、醫務人員、人道工作者、記者、宗教人士、醫院及救護車、文化及宗教場所、水壩及核子設施等人士或物件提供妥善的保護。解決因國際性或非國際性武裝衝突,所引發的人道問題。根據國際習慣法的原則,無論是否簽署日內瓦公約、或是國與國的戰爭或內戰,都適用國際人道法18。

二、《國際人道法》之幾項基本原則

《國際人道法》的基本原則如下:

1. 人道原則 (Principle of Humanitarian) 19:

the Right of Capture in Naval War (HC 11); Hague Convention (12) relative to the Creation of an International Prize Court (not entered into force); Hague Convention (13) Concerning the Rights and Duties of Neutral Powers in Naval War (HC 13).

- These include, inter alia, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, plus its two protocols, the 1972 Biological Weapons Convention, the 1980 Conventional Weapons Convention and its five protocols, the 1993 Chemical Weapons Convention, and the 1997 Ottawa Convention on anti-personnel mines.
- 17 朱文奇,〈論日內瓦公約體系〉《中國國際法年刊》,1992,頁15-45。
- International humanitarian law, applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting that conflict, is applicable to the conduct to hostilities once a State has resorted to the use of force (the *ius in bello*), that law cannot be properly understood without some examination of the separate body of rules which determine when resort to force is permissible (the *ius ad bellum*). The modern ius ad bellum is based upon Article 2 (4) and Chapter 7 of the UN Charter where the use of force in international relations is prohibited. Principles of international law governing civil wars involve looking at the general legal principles governing the law prohibiting intervention in internal armed conflicts (the *ius ad bellum*) and the law regulating and mitigating the conduct of hostilities in such conflicts (the *ius in bello*). Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press, 1995), p. 1.For details, see Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* (Aldershot, Hants: Dartmouth Publishing Co., 1990), pp. 171-186; Christopher Greenwood, "Historical Development and Legal Basis," Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press, 1995), pp. 1-38.

盡量減低戰爭殘酷性,對於敵人也不應施加與作戰目的不成比例的傷害,不應施加不必要的傷害。不應因國籍、種族、宗教信仰、階級或政治見解不同而對戰爭受難者有所區別。平民(非戰鬥員)享有普遍保護,免受敵對行為的影響;他們必須得到尊重、保護和人道待遇。

2. 中立原則 (Principle of Neutrality)

國際人道法中「受保護人員」必須在武裝衝突的任何時候,都嚴守中立,即不參予實際敵對行為。倘若放棄中立,則不再受到保護。任何團體或個人,只要繼續從事「有害於」敵方之行為,則不能主張受到保護。中立義務中包含,「不作為義務」不得直接或間接向交戰國提供軍事支持;「防止義務」應防止交戰國在其領土管轄範圍內從事戰爭;「容忍義務」需容忍交戰國根據戰爭法對其國家、人民採取有關措施。

3. 防止原則 (Principle of Prevention)

在戰爭與武裝衝突中,只需降伏對方, 應防止增加戰鬥員不必要之痛苦。

4. 區分原則 (Principle of Distinction)²⁰ 戰時必須對不同性質的目標和人員進行區分,並給予不同對待。區分包括:平民與軍事人員;武裝部隊中的戰鬥員 (Combatant) 和非戰鬥員 (Non-Combatant);有戰

鬥能力的戰鬥員與喪失戰鬥能力的戰爭受難者;軍用物體和非軍用物體;軍事目標和民用目標。得攻擊戰鬥員和軍事目標,但所造成的傷害和損害應儘可能的予以限制。任何一方的軍事行動只得以軍事目標為物件,不針對平民使用武力。按照1977年日內瓦公約第一附加議定書第51條第3款規定,平民非戰鬥員直接參與敵對行動就將喪失其受保護的平民地位。故民用空間設施只要被用於軍事用途,將自動喪失受保護的免受攻擊地位。

5.比例原則 (Principle of Proportionality) 21

要求作戰方法和手段的使用應與預期的、 具體的和直接的軍事利益相稱(或稱成比例),而禁止過分損害的攻擊行為以及引起 過分傷害和不必要痛苦性質的作戰手段和方 法。當保護不可能是絕對的時候,應秉承善 意,對人道原則和軍事必要原則要求互相制 約。

6. 軍事必要原則 (Principle of Military Necessity) 22

戰爭法規制定,為考量「軍事必要」為 前提,對部分「軍事情況許可時」之條件, 應從嚴解釋,並將其限訂在具有明文規定情 況和範圍內,不得解除當事國之義務。因為 戰爭法規的制定本身是以考慮了軍事必要為

- Constraints upon the conduct of hostilities, such as human shields, ethnic cleansing, feigned surrenders, collateral damage and proportionality, belligerent reprisals and weapons of mass destruction. For details, see J. Pictet, Development and Principles of International Humanitarian Law (The Netherlands: Martinus Nijhoff, 1985).
- 20 I.e. lawful and unlawful combatants, the distinction between combatants and civilians, legitimate military objectives, and the protection of the environment and cultural property etc.
- There has been considerable debate in the international community as to the legality of the forceful actions in Kosovo in 1999, Afghanistan in 2002 and Iraq in 2003 under the UN Charter. There has been consensus, however, that the use of force in all these situations had to be both proportional and necessity. For details, see Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004), pp. 85-137.
- ²² Ibid., pp. 138- 222.

前提的,對一些規則中「軍事情況許可時」 的條件,應從嚴解釋,並將其限定在具有明 文規定情況和範圍內。

7. 限制原則 (Principle of Limitation)

在戰爭與武裝衝突法尚無具體規則的情況下,有關衝突各方也不得為所欲為。根據戰爭法中的「馬爾頓條款」(Martens Claus e)²³,在國際協定未規定的情況下,作戰方法和手段的使用應與預期的、具體的和直接軍事利益成比例,同時限制某些手段和方法。平民和戰鬥員仍然受既定習慣、人道原則和公眾良心要求的國際法原則的保護,不得解除當事國之義務。

《國際人道法》的基本原則,適用於任何型式、團體的武裝衝突,包含內戰或國內武裝衝突,任何交戰的雙方均必須遵守,如有不遵守的一方,即需要負起違反武裝衝突法的責任,甚至被移送戰犯法庭處理。

- (1)喪失戰鬥能力的人,以退出戰鬥的人 及未直接參與戰鬥的人,其生命及身心 健全,均有權受到尊重。在任何情況 下,他們都應象徵人道(humanity)、 不偏袒(impartiality)、中立(neutrality)與獨立(independence)。²⁴
- (2)禁止殺害或傷害投降或已退出戰鬥的 敵人。
- (3)衝突各方應將集合在其控制下的傷者 和病者,加以照顧。保護對象尚應涵 蓋 醫護人員、醫療設施、醫務運輸、

及醫療設備等。「紅十字」(Read Cross)或「紅新月」(Red Crescent)的標誌,即為此種保護的符號,必須予以尊重。

- (4)在敵對一方控制下的被俘戰鬥人員和 平民,其生命、尊嚴、個人權利與信 念,均應受到尊重。他們應受到保 護,免受各種暴力與報復行為的傷 害。他們應有權與家人通信,以及接 受救援。
- (5)每個人都有權享受基本的司法保障。 任何人都不應為他沒有做的事情負 責,也不應遭受肉體上或精神上的酷 刑、體罰或殘酷、侮辱性的待遇。
- (6)衝突各方及其武裝部隊成員選擇戰爭 的方法與手段均受到其限制。使用具 有造成不必要損失或過度傷害性質的 武器或戰爭方法,均受禁止。
- (7)衝突各方在任何時候均應將平民群眾 與戰鬥員加以區分,以避免平民群眾 或平民財產受到傷害。不論是平民群 眾或平民各人們,都不應成為攻擊的 目標。攻擊應只針對軍事目標。

三、內戰亦適用國際人道法規則

規範武裝衝突的習慣法,同等適用於國際性與國內武裝衝突。就適用於敵對行為的 法律而言,各國在實踐中認可同樣的規則, 既適用於國際性武裝衝突,也適用於國內武

- ²³ Frederic de Martens, 1845-1909, Legal advisor to Russian Department of Foreign Affairs 1896-1909. Principal works include Consuls and Consular Jurisdiction in the Orient (1873); Collection of Treaties and Conventions concluded by Russia with Foreign Powers (15 Vols. 1874-1909); Treatise on International Law (1883-87); Peace Conference at The Hague (1901); Through Justice to Peace (1907).
- 24 中國對平民生命、財產安全在武裝衝突受影響和威脅深表關切,人道救援工作應堅持公正、中立、客觀和獨立原則,尊重當事國主權和領土完整,避免介入當地政治紛爭,或影響和平進程。〈第63屆聯合國大會中國之立場文件〉(2008年9月16日),《中國國際法年刊》,2008年,頁475,477。

裝衝突。

內戰(Civil Strife)25本屬於一國內部事務,內戰適用作戰規則的要求比國際性武裝衝突晚,內戰適用國際人道法規則受到重視的程度也遠不如國際性武裝衝突。國家避免干涉他國內政,許多國際性武裝衝突中適用的作戰規則及國際人道法規則往往要受到內戰國國內法的限制,否則會有干涉內政之嫌疑。

國際人道法規則適用於內戰,內戰亦適用國際人道法規則,但內戰適用「有關國際人道法規則」有別於「國際性武裝衝突」;內戰中適用作戰規則與國際人道法規的標準、範圍及具體措施上,與國際性武裝衝突相比,顯得十分有限,內容也很不完善;內戰有其特殊性,內戰對戰爭受難者的保護體制只涉及到某些特別重大問題的解決,將對國際人道法乃至國際和平與安全產生重大影響。

肆、1949年《日內瓦公約》共同第三條

一、1949 年《日內瓦公約》共同第三條 之誕生

戰爭係兩個或兩個以上國家,在戰場上 大規模的武裝對抗,交戰國在武裝衝突期間 平等施用所有戰爭法規。究竟中央政府與叛亂團體之間的武裝衝突是否全部或部分適用國際人道法?多年來各國對此均持保留態度,直至1949年《日內瓦公約》共同第三條的確立。在《日內瓦公約》的制定過程中,各國已經預見國內武裝衝突大量發生的現實,故對國內武裝衝突也應該有相應的規定。26於是在《日內瓦四公約》27共同第三條中規定了專門處理非國際性武裝衝突的條款。

二、《日內瓦公約》共同第三條之草本

《日內瓦公約》共同第三條最初的草本,是一種完全理想化的觀念的反映。最初的草本規定:「於本公約一個或多個締約國境內發生非國際性武裝衝突之情形,衝突各方有義務執行本公約之規定,上述義務之履行以敵對方執行本公約之規定為限。不論衝突各方的法律地位如何,本公約的規定均應該執行,且本公約之執行不損及衝突各方的法律地位。」這一規定顯然是出於人道的考慮,希望對非國際性武裝衝突中的受害者提供盡可能完備的保護。

三、叛亂團體與交戰團體之承認

傳統國際法對非國際性武裝衝突中反政

- ²⁵ Civil strife is protracted internal violence aimed at securing control of the political and legal apparatus of a State. Because it is protracted, it is possible to distinguish a civil war from a coup d'etat. Because it is internal it is possible to distinguish a civil war from external intervention. Because it involves protracted violence it is possible to distinguish civil war from a communal conflict. Frits Kalshoven, "Applicability of Customary International Law in Non-International Armed Conflicts," Current Problems of International Law 1975, pp. 267-285.
- Joyce A.C. Gutteridge, "The Geneva Conventions of 1949," British Year Book of International Law, 26 (1949), pp. 294-326.
- 27 Geneva Four Conventions of 1949, viz.: I Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: II Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; III Convention relative to the Treatment of Prisoners of War: IV Convention relative to the Protection of Civilian Persons in Time of War.

府一方有叛亂團體(Insurgent)²⁸ 或交戰團體(Belligerent)²⁹ 的區分,外國對叛亂團體或交戰團體的承認,在一定程度上,是對反政府武裝地位的一種確認,中央政府擔心反政府武裝藉此尋求國際奧援,而使國內武裝衝突國際化。³⁰

《日內瓦四公約》共同第三條的最初草本規定,執行公約不影響國內武裝衝突中各方的法律地位,惟國家對將國際性武裝衝突規則適用於非國際性武裝衝突中,仍有疑慮,且會帶來很多問題。一些國家不願意見到國內武裝衝突完全適用《日內瓦公約》條款。例如,國際性武裝衝突中,隸屬於衝突一方

而落入衝突另一方掌握之中的戰鬥員(Combatant),依《日內瓦第三公約》規定,應該 視為戰俘(Prisoner of War, POW),衝突一 方不得因其關押的戰俘曾經參與武裝衝突而 追究刑事責任。但在非國際性武裝衝突,反 政府武裝一方被中央政府視為叛亂者,叛平 叛亂之後,中央政府往往要追究叛亂者的刑事責任。

共同第三條的最終文本對衝突方的義務 已經大幅縮小,且其中亦包含不影響衝突各 方地位之規定。

四、《日內瓦公約》共同第三條之涵義

- The insurgents are in *de facto* control of a portion of the State's territory and population, have a political organization able to exert such control and maintain some degree of popular support, and conduct themselves according to the laws of armed conflict. The recognition of a status of insurgency by third State means that the rebellion has not yet gained control over a significant portion of the territory of the parent State. Band E. O'Neill, "Insurgency: Framework for Analysis", Band E. O'Neill, William R. Heaton, and Donald J. Alberts (eds.), *Insurgency in the Modem World* (Boulder, Colo.: Westview Press, 1988), pp.1-44.
- Belligerency exists when portion of the State's territory is under the control of an insurgent community seeking to establish a separate State. Recognition of belligerency elevates an insurrectionary movement to the status of a quasi-international person, granting it the rights and imposing upon it the duties of the laws of armed conflict. Evidence of a state of belligerency occurs when the State's central government blockades the rebelling portion of its territory and invokes rights of visit and search upon vessels. Two conditions should exist before an outside State extends belligerent recognition: (1) the insurgency should have progressed to a state of general war; and (2) the effects of that internal strife have spilled beyond the boundaries of the State and affected other State. J. W. Garner, "Recognition of Belligerency," American Journal of International Law, 32 (1938), p.106; F. Kalshoven, "Belligerent Reprisals Revisited," Netherlands Yearbook of International Law, 21(1990), pp. 43-80.
- The internment of a belligerent's own national during wartime is not covered by international humanitarian law. The international provisions concerning the protection of human rights, however, are applicable. In *Case No. 1. Spinney's (1948) Ltd.& Ors. V. Royal Insurance Co. Ltd.*, [1980] 1 Lloyd's Rep. 406, Mustill J. The plaintiffs owned property in Beirut which was looted during the disturbances in Lebanon in January 1976. They claimed under insurance policies which exempted, *inter alia*, loss causes directly or indirectly by 'civil war'. Thus one question was whether the Lebanese crisis in January 1976 amounted to 'civil war' within the terms of the policies. The plaintiffs argued that the term 'civil wear' was to be given the meaning it has in international law, and that the court should seek a certificate from the Foreign Secretary as to whether the Lebanese conflict amounted to a 'civil war', either as defined in international law or generally. Mustill J. held that the Lebanese circumstances did not disclose a 'civil war', but that the plaintiffs could not show their loss had not result from 'usurped power' or 'civil commotion' within the meaning of a further exemption in the policies.

非國際性武裝衝突人道法規範大多移植 日內瓦公約的有相關條款,實際上是人道考 慮和國家主權之間妥協之結果。這種妥協的 結果最終表現為1949年《日內瓦四公約》共 同第三條將適用於非國際性武裝衝突的規則, 規定如下:

「在一締約國之領土內發生非國際性的 武裝衝突之場合,衝突之各方最低限度應遵 守下列規定:

1. 不實際參加戰鬥之人員,包括放下武器之武裝部隊人員及因病、傷、拘留或其他原因而喪失戰鬥力之人員在內,在一切情況下應予以人道待遇,不得基於種族、膚色、宗教或信仰、性別、出身或財力或其他類似標準而有所歧視。

故對上述人員,不論何時何地,不得 有下列行為:

- (甲)對生命與人身施以暴力,特別如 各種謀殺、殘傷肢體、虐待及酷 刑;
- (乙)作為人質;
- (丙)損害個人尊嚴,特別如侮辱與降 低身分的待遇;
- (丁)未經具有文明人類所認為必須之 司法保障的正規組織之法庭之宣 判,而遽行判罪及執行死刑。
- 2.傷者、病者應予收容與照顧。公正的 人道主義團體,如紅十字國際委員 會,得向衝突各方提供服務。衝突之

各方應進而努力,以特別協定之方式,使本公約之其他規定得全部或部份發生效力。上述規定之適用不影響衝突各方之法律地位。」³¹

對於《日內瓦公約》共同第三條內容的 解釋如下:

- 第一、必須遵守的最低限度義務。共同 第三條規定的義務是衝突各方都 必須遵守的最低限度義務;
- 第二、受保護人範圍的界限。根據共同 第三條的規定,非國際性武裝衝 突中的人道待遇(humanitarian treatment)並不是授予所有人 的,只有「不實際參加戰鬥」 者,才得受有此等待遇。
- 第三、不得違反禁止之行為。共同第三 條包含了一否定清單,衝突任何 方或個人都不得違反列於該清單 之上的行為,否則將會引起嚴重 的法律後果。
- 第四、特別協議。共同第三條為國家以 及其他衝突方保留了將《日內瓦 公約》其他規定完全或部分適用 於內戰的權利,惟衝突各方須以 特別協議形式就適用的規則達成 一致。但不論對國家而言,或是 對其他反政府武裝而言,都非必 須的義務,移植適用《日內瓦公 約》的其他全部或部分規定,對 衝突雙方皆有好處,在此情況

Article 3 of the Geneva Convention is dealing with conflicts not of an international character which occur within the territory of a contracting nation. This article specifies the minimum standards that should regulate civil wars or rebellions which are essentially of a domestic character. It requires that persons not taking part in the hostilities be treated humanely including those taken as prisoners of war. *The Prisoner of War Problem*, 91st Congress, Second Session (American Enterprise Institute for Public Policy Research, December 28, 1970), Analysis No. 26, pp. 5-14.

下,直接適用公約其他規定是最 為有效的方式。

五、《日內瓦公約》共同第三條之法律 地位

【案例】在尼加拉瓜境內針對該國的軍事與 準軍事行動案(尼加拉瓜訴美國) (Military and Paramilitary Activities in and against Nicaragua) (Nicaragua v. USA) Case 32

由於《日內瓦公約》共同第三條規定的 行為規則是武裝衝突中各方都應該遵守最低 程度的要求,故大抵反映出習慣法的要求, 共同第三條可說是以條約的形式反映國際習 慣法下的行為規範。這點可以參考國際法院 在尼加拉瓜境內針對該國的軍事與準軍事行 動案中對共同第三條的性質的評價33:

在該案件中,美國支持尼加拉瓜的反政

- In Military and Paramilitary Activities in and against Nicaragua (Jurisdiction) (Nicaragua v. USA) [1984] ICJ Report 169; Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. USA) [1986] ICJ Report 14, where the ICJ ruled in favor of Nicaragua and against the United States and awarded reparations to Nicaragua. The Court held that the U.S. had violated international law by supporting Contra guerrillas in their rebellion against the Nicaraguan government and by mining Nicaragua's harbors. The United States refused to participate in the proceedings after the Court rejected its argument that the ICJ lacked jurisdiction to hear the case. The Court found in its verdict that the United States was "in breach of its obligations under customary international law not to use force against another State", "not to intervene in its affairs", "not to violate its sovereignty", "not to interrupt peaceful maritime commerce", and "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956." The Court had 16 final decisions upon which it voted. In 9 Statement the Court stated that the U.S. encouraged human rights violations by the Contras by the manual entitled Psychological Operations in Guerrilla Warfare. However, this did not make such acts attributable to the U.S. The U.S. later blocked enforcement of the judgment by the United Nations Security Council and thereby prevented Nicaragua from obtaining any actual compensation. After five vetoes in the Security Council between 1982 and 1985 of resolutions concerning the situation in Nicaragua, the United States made one final veto on 28 October 1986 (France, Thailand, and United Kingdom abstaining) of a resolution calling for full and immediate compliance with the Judgment. Nicaragua brought the matter to the U.N. Security Council, where the United States vetoed a resolution (11 to 1, 3 abstentions) calling on all states to observe international law. Nicaragua also turned to the General Assembly, which passed a resolution 94 to 3 calling for compliance with the World Court ruling. Two states, Israel and El Salvador, joined the United States in opposition. At that time, El Salvador was receiving substantial funding and military advisement from the U.S., which was aiming to crush a Sandinista-like revolutionary movement by the FMLN. At the same session, Nicaragua called upon the U.N. to send an independent fact-finding mission to the border to secure international monitoring of the borders after a conflict there; the proposal was rejected by Honduras with U.S. backing. A year later, on 12 November 1987, the General Assembly again called for "full and immediate compliance" with the World Court decision. This time only Israel joined the United States in opposing adherence to the ruling. The Nicaraguan government finally withdrew the complaint from the Court in September 1991, following a repeal of the law requiring the country to seek compensation, thus settling the matter. Common Article 3 clearly imposes several important prohibitions on the behaviour of parties to non-international armed conflicts, norms that were recognised as customary in the Nicaraguan case.
- 33 Common Article 3 clearly imposes several important prohibitions on the behaviour of parties to non-international

府武裝, 並在尼加拉瓜的主要港口以及港口 附近布下水雷。但美國並未就其在尼加拉瓜 港口或港口附近布雷的情況發出任何警告或 通知。國際法院認為有必要對美國這種行為 是否違反國際人道法作出判斷。國際法院判 決認為:「1949年《日內瓦公約》共同第三 條,對非國際性武裝衝突應該適用的確定規 則。毫無疑問,在國際性武裝衝突中,更為 精細的規則將適用於國際性武裝衝突,這些 規則同樣也構成最低程度的標準;本法院在 1940 年科孚海峽案 (Corfu Channel Case) 34 中所指出的共同第三條的規則反映「對人道 的最基本的考慮」。共同第三條的規則適用 於尼加拉瓜案的爭議,從而無須就美國提出 的關於多邊條約保留可能對相關條約產生的 影響作出決定。

在尼加拉瓜政府和反政府武裝之間的武裝衝突是非國際性武裝衝,故對反政府武裝對尼加拉瓜政府的舉動應該適用非國際性武裝衝突的規則;美國在尼加拉瓜境內及針對尼加拉瓜政府採取行動則應該由適用於國際性武裝衝突的規則來調整。由於適用於國際

性武裝衝突和非國際性武裝衝突的最低標準規則(minimum rules)是相同的,故無必要考察對這些行動適用何種類型的武裝衝突的規則。國際法院認為,就《日內瓦公約》共同第一條規定,在任何情況下,尊重公約,且對保證尊重公約之義務而言,美國應承擔責任,緣此一義務不僅源自公約,且源自國際人道法的一般原則,故《日內瓦公約》僅係一般原則作出特定之表達。

國際法院分析《日內瓦公約》共同第三條對國際性武裝衝突和非國際性武裝衝突兩種類型均適用,得採用類比的方法,將兩種類型的武裝衝突作一個類比,最終得出的結論是:共同第三條所創設的最低標準規則的適用與武裝衝突的性質無關。國際性武裝衝突與非國際性武裝衝突除了捲入衝突的各方不同之外,沒有任何不相同的地方。從效果來看,在國際性武裝衝突中,攻擊平民行為無疑屬於戰爭罪的範疇;而在非國際性武裝衝突中,衝突各方同樣可能攻擊平民,而且這種攻擊除了其所處的武裝衝突性質不同之外,與國際性武裝衝突中攻擊平民的行為並

armed conflicts, norms that were recognised as customary in the Nicaraguan case.

Corfu Channel Case (United Kingdom v. Albania) [1948] ICJ Report 15; [1949] ICJ Report 4. The Corfu Channel Incident refers to three separate events involving British Royal Navy ships in the Corfu Channel which its early episode took place in 1946. During the first incident, Royal Navy ships, HMS Orion and HMS Superb cross the Corfu Channel came under fire from Albanian fortifications. The second incident involved Royal Navy ships striking mines and the third incident occurred when the Royal Navy conducted mine-clearing operations in the Corfu Channel of the Albanian territorial waters. Albania complained about them to the United Nations. This series of incidents led to the Corfu Channel Case, where the United Kingdom brought a case against the People's Republic of Albania to the International Court of Justice. Because of the incidents, Britain, in 1946, broke off talks with Albania aimed at establishing diplomatic relations between the two countries. Diplomatic relations between the United Kingdom and the People's Socialist Republic of Albania were restored on 29 May 1991. On 8 May 1992, Britain and Albania announced that they had come to an agreement over the Corfu Channel case, jointly announcing that "Both sides expressed their regret at the Corfu Channel Incident of 22 October 1946". Only in 1996 following lengthy negotiations was the gold finally returned to Albania after it agreed to pay US \$2,000,000 in delayed reparations.

沒有任何區別,甚至可能比前述行為更殘忍、 更不人道。故國際人道法上適用於國際性和 非國際性兩種武裝衝突的類型,其規則和懲 治力度不同,最根本的是國家要自己掌握處 罰內部叛亂份子的政治意願,因而造成不同 的結果。

自安哥拉獨立時起所發生的敵對行為, 明顯是「非國際性武裝衝突」,但因第三方 軍事力量的介入而帶有國際性,故適用安哥 拉政府軍與安哥拉盟軍間關係的國際人道法 規則,只得是日內瓦四公約的共同第三條和 關於內戰的習慣規則。

伍、1977 年《日內瓦公約第二附加議定書》

一、《日內瓦公約第二附加議定書》適 用於內戰之人道法規則

在 1974 年至 1977 年於瑞士日內瓦召開 的外交大會上制定了 1949 年《日內瓦公約兩 個附加議定書》。³⁵ 其中第二附加議定書在 若干方面重申,並發展適用於非國際性武裝 衝突的人道法規則:

> (1)對於在非國際性衝突中未直接參加或 已停止參加敵對行動人,第二附加議 定書

進一步明確規定其應享有的人道待遇

的具體內容;

- (2)細化非國際性武裝衝突中對傷者、病者、遇船難者以及醫療、宗教人員的 保護規則;
- (3)強化在非國際性武裝衝突中平民的概念,以及對平民的保護規則。這個規則可看作是共同第三條的一個發展。³⁶

二、第二附加議定書之內容

《日內瓦公約》共同第三條只是提供適 用於非國際性武裝衝突最基本的標準, 而要完善保護非國際性武裝衝突中的人權及 限制作戰方法,僅依賴共同第三條有其不足 之處,表現在以下幾方面:

- (1)共同第三條僅規定保護「不實際參加 戰鬥的人」,這反映國際人道法的區 分原則之適用,但忽略國際人道法對 作戰方式方法的限制,例如禁止使用 化 學武器等,這是國際性武裝衝突 下國際人道法經常關注問題。
- (2)共同第三條沒有涉及非國際性武裝衝突中如何保護戰俘的問題,這在國際性武裝衝突中是非常重要的。事實上,在非國際性武裝衝突中,國家也希望己方武裝部隊成員被反政府武裝俘擴後得到完善的法律保護。例如,在國際性武裝衝突下,衝突一方強迫
- In 1977 the Diplomatic Conference on the Re-Affirmation and Development of International Humanitarian Law Applicable in Armed Conflicts formally adopted two Protocols additional to the Geneva Conventions of 1949. Protocol 1 is concerned with international armed conflicts, Protocol 2 with civil wars and rebellions. They should improve the protection of prisoners of war, as well as giving added protection to civilians and the environment in wartime. The Conventions and the Additional Protocols provide an internationally-accepted yardstick against which to judge behaviour in armed conflict. They form a basis on which the international community can respond to cases of inhumanity in war such as the former Yugoslavia, Iraq, like any law, they can never prevent illegal behaviour; their existence, however, can and does act as a deterrent to potential transgressors.
- ³⁶ Howard S. Levie (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (Dordrecht/Boston/Lancaster: Martinus Nijhoff Publishers, 1987); Green, supra. note 3, pp. 61-62.

其控制之下的戰俘進行勞動是被嚴格禁止的,違反這一規定即被視為一種戰爭罪。而在共同第三條,對於不實際參加武裝衝突而落入衝突一方控制的人,卻沒有這樣的規定。這實際上是保護規則不完善的體現。

(3)共同第三條除了對「非國際性武裝衝突」做出規定之外,沒有作任何其他規定,實際上也就是對非國際性武裝衝突沒有作出明確界定,畢竟武裝衝突和一般的國家內亂、暴動或騷動行為有別,共同第三條對「非國際性武裝衝突」的判斷,實際上缺乏一客觀的操作標準。暴力衝突是否為武裝衝突裁量權掌握在國家或國際組織手中,因國家為其主權利益考量,而國際組織之判斷效率緩慢,國際人道法之規則有時無法從一開始就適用於非國際性武裝衝突。37

前南斯拉夫一國,分裂為克羅埃西亞、 斯洛維尼亞、塞爾維亞、蒙特內哥羅(黑山

共和國)、波士尼亞、馬其頓、科索沃等七 國,為處理前南斯拉夫武裝衝突問題,紅十 字國際委員會協助交戰各方建立起一套適用 於國內武裝衝突關係的規則體系。南斯拉夫 自 1979 年接受 1977 年日內瓦兩個議定書的 拘束,但其分裂後,無法決定究竟由那個新 獨立國家來繼承前南斯拉夫的條約義務,而 對這些武裝衝突是「國際性武裝衝突」或是 「國內武裝衝突」的定性問題,仍存在分 歧。38 為此,1991 年 11 月 27 日,克羅埃西 亞和南斯拉夫社會主義聯邦共和國的代表簽 署一份涉及日內瓦四公約和1977年日內瓦第 一議定書之協定,提到在衝突一方權力之下 的人員待遇、戰爭手段和方法,及對平民居 民的保護等相關規定,雖然其中許多條款在 武裝衝突中都遭踐踏,但各方未曾對其適用 性提出異議。在敵對的最後階段,國際紅十 字會認為有必要提醒衝突雙方應遵守的國際 人道法規則。除援引日內瓦四公約共同第三 條外,列舉完整的清單,列舉源於1977年兩 個議定書可適用於非國際性武裝衝突的習慣

- 37 「前南斯拉夫國際刑事法庭規約」第1條規定,前南斯拉夫國際刑事法庭的職權範圍是起訴自1991年 1月1日以來發生在前南斯拉夫境內的嚴重違反國際人道罪行。根據聯合國祕書長對前南斯拉夫國際 刑事法庭規約的報告,這一日期的選擇是中性的,不帶有任何政治異議。實際上安理會可起訴於1991 年1月1日之前武裝衝突在前南境內存在的嚴重違反國際人道罪行,惟安理會設立前南斯拉夫國際刑 事法庭僅是起訴該日期以後的罪行。至於該日期以前發生的許多嚴重違反國際人道法罪行則不予考 慮。Cf. The Prosecutor v. Tadic Case ICTY Case No.IT-94-1-A; The Prosecutor v. Tadic, ICTY Appeal decision, 2 October 1995.
- Was the conflict in Bosnia and Herzegovina a civil war or an inter-State conflict? States and writers were fundamentally divided on this issue. The natural of the conflict in Bosnia and Herzegovina changed over time with the dissolution of the formal Yugoslavia. The conflict in Bosnia and Herzegovina cannot be adequately understood in isolation from the conflict in the rest of the former Yugoslavia. But the stark choice between civil war and inter-State conflict is one that was put forward forcefully by the parties involved. The government of Bosnia and Herzegovina and States sympathetic to it argued that the conflict was an inter-State war and that Yugoslavia was the aggressor against Bosnia either directly or through the Bosnian Serbs and the Croatian Serbs. Yugoslavia (i.e. Serbia and Montenegro) insisted on the civil nature of the conflict. It would be justified that a civil war with outside intervention. Christine Gray, "Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences", *British Year Book of International Law*, 67 (1996), pp. 155-197.

規則,包括:(1)不得徵募 15 歲以下兒童參加 戰鬥 ";(2)不得攻擊平民和平民財產;(3)禁 止不區分的或對平民造成過度損害的攻擊; (4)不得破壞維持平民群眾生存所不可缺少的 供給;(5)在攻擊和防守時採取預防措施。

三、第二附加議定書之適用範圍及其與 《日內瓦公約》共同第三條之關係

第二附加議定書重申、發展的規則,多源自於 1949 年《日內瓦公約》針對國際性武裝衝突規定的雛形,對於完善受害者的保護規則,無疑具有極大的積極意義。第二附加議定書第一條第一款規定:「本議定書發展和補充 1949 年 8 月 12 日《日內瓦四公約》共同第三條而不改變其現有的適用條件,應適用於為 1949 年 8 月 12 日《日內瓦四公約》 期於保護國際性武裝衝突受難者的附加議定書(第一議定書)所未包括,而在締約一方領土內發生的該方武裝部隊和在負責統率下對該方一部分領土行使控制權,從而使其能進行持久而協調的軍事行動並執行本議定書的持不同政見的武裝部隊或其他有組織的武裝集團之間的一切武裝衝突。」

從第一條第一款分析,第二附加議定書 中相對於共同第三條更為完備的規則,其適 用比共同第三條門檻更高,包括:

- 第一、第二附加議定書意義上的非國際 性武裝衝突必須發生在一國領土 之內;
- 第二、該武裝衝突的雙方必須一方為中 央政府,另一方是持不同政見的

武裝部隊或其他有組織武裝集 團;

- 第三、反政府武裝必須已經控制了國家 的一部分領土;
- 第四、反政府武裝必須能夠進行持久且 協調的軍事行動,並執行本議定 書的規定。

綜合以上因素,第二附加議定書意義上 的非國際性武裝衝突實際上已經被囿於一個 相當狹小的範圍內。至少有兩個類型的非國 際性武裝衝突第二附加議定書沒有涵蓋:一 個國家內部同時有數個反政府武裝,雖然不 符合第一條第一款的條件,但也達到了武裝 衝突的層級,例如政府軍和游擊隊之間的衝 突,游擊隊沒有控制確定的領土,但其間的 衝突遠超過一般暴動的界限, 也屬於武裝衝 突的範籌,這也是第二附加議定書沒有涵蓋 的。故第二附加議定書適用範圍的限制,多 出於國家不願意將完整的人道法規則適用於 國內武裝衝突。惟第二附加議定書和共同第 三條相較之下,在適用條件上有很大的進展, 提出適用該議定書的一個客觀標準,如此一 來屬於該協定意義上的非國際性武裝衝突, 可以根據第一條來判斷;只要符合第一條的 客觀標準,第二附加議定書就得自動適用, 從而擺脫國家或國際組織的主觀判斷。這一 點是1949年《日內瓦公約》共同第三條不具 備的。無論如何,共同第三條由於兼具有條 約法和習慣法的法律性質,在任何情況下都 應該予以適用。40

^{39 《}第一附加議定書》第77條禁止徵募15歲以下兒童入伍;《第二附加議定書》第4條第3款第3項 也禁止15歲以下的兒童直接或間接參與敵對行動。1989年《兒童權利公約》第38條將《第一附加議 定書》第77條的適用範圍擴大到非國際性武裝衝突。2000年《兒童權利公約關於兒童捲入武裝衝突 的任擇議定書》,限制兒童餐與敵對行動,普遍加強武裝衝突中對兒童的保護。《國際刑事法院規約》 第8條第2款第7項禁止徵募15歲以下兒童入伍。

四、第二附加議定書中某些條款之習慣 法地位及其適用範圍之擴大

從條約效力分析,第二附加議定書適用於非國際性武裝衝突有嚴格的條件限制。只有在前南斯拉夫國際刑事法庭(The International Criminal Tribunal for the Former Yugoslavia, ICTY)⁴¹ 和盧旺達國際刑事法庭(The International Criminal Tribunal for Rwanda, ICTR)⁴² 成立後,國際社會始普遍接受內戰違反作戰規則的行為得承擔國際刑事責任,可見國家和國際刑事法院的實踐對這一點已經有所突

破。在武裝衝突期間緩期執行死刑,將死刑 延期至敵對行為之後。⁴³

【案例】

A.檢察官訴塔迪奇案 (Prosecutor v. Ta-dic)⁴⁴

塔迪奇(Dusko Tadic),波士尼亞塞爾維亞人,遭到前南斯拉夫國際刑事法庭(International Criminal Tribunal for the formal Yugoslavia, ICTY),訴以違反人道罪(crimes against humanity),其破壞戰爭習慣法規,嚴重違反 1949 年日內瓦公約 45。在審判和上訴時,其辯護之主要論據乃在前南斯拉

- 40 弗朗索瓦·比尼翁,〈習慣國際人道法〉《中國國際法年刊》,2008年,頁365-401。
- 41 On 25 May 1993, the UN Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY) under Chapter VII of the UN Charter in SC Res. 827 (25 May 1993) to prosecute natural persons accused of committing acts constituting grave breaches of the 1949 Geneva Convention for violations of International Humanitarian Law (IHL) in the former Yugoslavia carried out after 1 January 1991 (7 months before Slovenia became the first former Yugoslav State to declare independence). Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford: Oxford University Press, 2004).
- The International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council acting under Chapter VII of the UN Charter in SC Res. 955 (8 November 1994). The ICTR is the first international tribunal having competence over crimes committed in an internal armed conflict. Under its Statute, the ICTR has jurisdiction over natural persons accused of committing the crime of genocide, crime against humanity and violations of Common Article 3 of the 1949 Geneva Conventions and of Additional Protocol II on the territory of Rwanda or by Rwanda citizens on the territory of neighbouring States between 1 January 1994 and 31 December 1994. Payam Akhavan, "The Crime of Genocide in the ICTR Jurisprudence," Journal of International Criminal Justice, 3 (2005), p. 989; 凌岩,〈盧旺達問題國際法庭對非國際武裝衝突中戰爭罪的審判〉《中國國際法年刊》,2007年,頁 171-193。
- ⁴³ William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd (Cambridge: Cambridge University Press, 2002).
- 44 檢察官訴塔迪奇案(*Prosecutor v. Tadic*), ICTY Case No.IT-94-1-A; *Prosecutor v. Tadic* ICTY Appeal decision, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.凌岩,〈前南斯拉夫國際法庭:"塔蒂奇案"〉《中國國際法年刊》,1995年,頁 236-243;凌岩,〈起訴前南斯拉夫境內戰犯的國際法庭的《程序和證據規則》〉,《中國國際法年刊》,1994年,頁 194-204;《跨世紀的海牙審判:記聯合國前南斯拉夫國際法庭》(北京:法律出版社,2002年),頁 369;王秀梅等著,《國際刑事審判案例與學理分析》(第一卷),第 3 章,頁 152-201。
- 45 1949年《日內瓦公約》強調,犯有嚴重違反《日內瓦公約》的人,對此種違反應負個人責任。《前南斯拉夫問題國際法庭規約》第2條規定,法庭應有權起訴犯下或命令他人犯下嚴重違反《日內瓦公約》規定受到保護的人或財產的行為者:(a)故意殺害;(b)酷刑或不人道待遇,包括生物學實驗;(c)故意使

夫國際刑事法庭的合法性及管轄權。針對這兩項法律爭點,他質疑前南斯拉夫國際刑事法庭的合法性,認為法庭只對國際武裝衝突具有管轄權,惟其所涉案者乃是國內武裝衝突,法庭對此沒有管轄權,並重申國家法院優先於前南斯拉夫國際刑事法庭。審判法庭宣布:

- (a)前南斯拉夫國際刑事法庭乃依聯合國 憲章的適當程序而建立,並對公正審 判提供保障;法源依據係聯合國安全 理事會第827號決議案(1993年), 法庭之逮捕令是聯合國安理會為維持 國際和平與安全的一項執行行動,各 國條《國際法院規約》第二九條及 《聯合國憲章》第一〇三條均有移交 罪犯的義務,凡聯合國成員國都應執 行法庭的逮捕令。
- (b)法庭之管轄權範圍,包括破壞和平罪、 戰爭罪、違反人道罪等。除非國內武 裝衝突的當事方另有其他協議,通常 在國內武裝衝突中,僅「違反人道 罪」與「滅絕種族罪」受國際管轄。46 對違反人道罪,不僅在國內法院管 轄,也受制於國際刑法秩序,不論是 國內武裝衝突或國際武裝衝突,這兩 種型態的武裝衝突並無歧異,犯罪者

均應承擔個人刑事責任。前南斯拉夫境內發生之武裝衝突不論屬於國內或國際武裝衝突性質,按照聯合國安理會的實踐及會員國的一般理解都構成和平的威脅或破壞,法庭審判在前南斯拉夫境內違反國際人道法的罪犯,目的在迫使武裝衝突各方遵守國際人道法。上訴分庭肯定國際法庭優於國內法庭原則,判定塔迪奇違反人道罪名成立,嚴重違反日內瓦公約,判處有期徒刑 20 年至 25 年監禁。上訴分庭對塔迪奇的前律師科以罰金,蓋其蔑視並提交兩名證人之虛假意見書。

B.檢察官訴阿卡蘇案(Prosecutor v. Akayesu Case) 47

1994 年《盧安達國際刑事法院規約》(Statute of International Criminal Tribunal for Rwanda)條規定嚴重違反《日內瓦公約》共同第三條及第二附加議定書的戰爭罪刑。由於盧安達國際刑事法庭 ⁴⁸ 起訴的是發生在盧安達一國國內的武裝衝突中的國際罪行,實際上規定的是非國際性武裝衝突下的戰爭罪。該條文全為如下:「違反日內瓦公約共同第三條和第二附加議定書的行為,盧安達國際刑事法庭有權起訴犯下或命令他人犯下嚴重違反 1949 年 8 月 12 日各項《關於保護戰爭

身體或健康遭受重大痛苦或嚴重傷害;(d)無軍事上之必要,而以非法和蠻橫方式,對財產進行大規模的破壞或佔用;(e)強迫戰俘或平民在敵對國軍隊中服務;(f)強迫戰俘或平民在敵對國軍隊中服務;(g)故意剝奪戰俘或平民應享有的公允及合法審訊的權利;(h)劫持平民作人質。Luc Reydams, "Belgium Reneges on Universality: The 5 August 2003 Act on Grave Breaches on International Humanitarian Law," *Journal of International Criminal Justice*, 1 (2003), p. 679.

- ⁴⁶ Roger O'Keefe, "Universal Jurisdiction: Clarifying the Basis Concept," *Journal of International Criminal Justice*, 2 (2004), p. 735.
- 47 Prosecutor v. Akayesu, Trail Judgment, No. ICTR-96-4-T, 2 September 1998; Prosecutor v. Akayesu, Appeal Judgment, 1 June 2001.
- ⁴⁸ International Criminal Tribunal for Rwanda was established by the Security Council in November 1994. S/ RES/955(1994), 9 November 1994.

受害者的日內瓦公約》共同第三條和 1977 年 6 月 8 日日內瓦公約第二附加議定書的行為 的人。違法行為包括但不限於:

- (a)強暴對待人的生命,健康以及身體或精神福祉,特別是謀殺以及諸如拷打、截肢或任何形式得體罰等酷刑;49
- (b)集體處罰;
- (c)劫持人質;
- (d)恐怖主義行為;
- (e)殘害人性尊嚴,特別是羞辱和貶損、 強姦、迫良為娼以及任何形式的粗鄙 攻擊;
- (f)劫掠;
- (g)事先未經過正規組成的提供文明人所 承認且不可或缺的司法保證的法院審 判而逕行宣判和執行:
- (h)威脅要犯下上述的任何行為。」

此一條款列舉的行為有些直接源自《日 內瓦公約》共同第三條中的禁止性規定,另 一些則直接源自第二附加議定書的某些條款, 但《盧安達國際刑事法院規約》並未對其適 用範圍給予任何提示性規定。

盧安達國際刑事法庭在檢察官訴阿卡蘇 案(*Prosecutor v. Akayesu* Case) ⁵⁰ 中,被告 人珍·保祿·阿卡蘇(Jean Paul Akayesu)被 指控的第六項、第八項、第十項和第十二項 罪行中,是對《日內瓦公約》共同第三條的 違反,而指控第十五項罪行是對第二附加議 定書的違反。故若要使阿卡蘇違反《日內瓦 公約》第二附加議定書的罪名成立,則檢察 官需要能夠證明阿卡蘇觸犯這些被指控的罪 名時,其行為發生在盧安達內戰,是《日內 瓦公約》第二附加議定書適用的非國際性武 裝衝突。

分析被併入《盧安達國際刑事法庭規約》 第四條和《日內瓦公約》第二附加議定書的 相關條款,是否與共同第三條皆具有習慣法 的性質?盧安達國際刑事法庭認為,《盧安 達國際刑事法庭規約》第四條和第二附加議 定書的相關條款均源自《日內瓦公約》第二 附加議定書第四條(基本保證)第二款係對 《日內瓦公約》共同第三條內容的重申和發 展,性質與共同第三條的習慣法無疑;《日 內瓦公約》第二附加議定書第四條也應該屬 於現行國際習慣法的範疇。盧安達國際刑事 法庭透過法律解釋,消除共同第三條、《盧 安達國際刑事法庭規約》,以及《日內瓦公 約》第二附加議定書第四條在適用範圍上的 分歧。

C.檢察官訴諾曼案 (Prosecutor v. Sam Hinga Norman) 51

在檢察官訴諾曼 (Prosecutor v. Sam Hin-

- ⁴⁹ The use of torture by certain States as a normal method of treatment of those deemed subversive to state authority, or for certain types of criminality. Torture, formerly permitted in order to extort information, or accepted as a form of punishment. The last few decades have seen increasing international awareness of the persistence of such practices as torture, abduction ('disappearance') and arbitrary, summary and extrajudicial execution, committed or tolerated by state agents or officials. The international community has been developing a set of rules aimed at ensuring the humane treatment of prisoners of war, and torture become illegitimate, prohibited, and absolute banned. *The Prisoner of War Problem*, 91st Congress, Second Session (American Enterprise Institute for Public Policy Research, December 28, 1970), Analysis No. 26, pp. 5-14; Nigel Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press, 1987), pp. 110-143.
- ⁵⁰ Prosecutor v. Akayesu, Judgment, No. ICTR-96-4-T (2 September 1998)
- ⁵¹ Prosecutor v. Sam Hinga Norman, No.SCSL-2004-14-AR72 (E). Decision on Preliminary Motion Based on

ga Norman) 案中,獅子山特別法庭根據第二 附加議定書第四條第三款C項規定,判決徵 募年齡在15歲以下的兒童入伍或利用童兵參 加敵對行動應被制止。《獅子山特別法庭規 約》指出徵募童兵的行為就構成戰爭罪。52 在諾曼案中,獅子山特別法庭上訴庭對徵招 童兵行為作為國際法下的罪刑提出解釋,但 特別法庭的裁定引起爭議。法律爭點在於諾 曼被指控觸犯徵募童兵罪的時候係在1998年 《國際刑事法院羅馬規約》(Rome Statute of International Criminal Court) 制定之前,是否 是國際習慣法的罪行?但根據獅子山特別法 庭的判決,《日內瓦公約》第二附加議定書 的某些條款可以被認為是習慣法規則體現, 其適用範圍再次被擴大到和《日內瓦公約》 共同第三條相同。這是另一個反映出《日內 瓦公約》第二附加議定書的某些規則具有國 際習慣法性質的實例。53《國際刑事法院羅馬 規約》第八條第五項的適用前提條件。

上述盧安達國際刑事法庭和獅子山特別 法庭都是透過擴張解釋條約來解決《日內瓦 公約》第二附加議定書中某一條款,而《國際刑事法院羅馬規約》第八條戰爭罪,則明顯擴大了第二附加議定書的適用範圍。

- 第二附加議定書的下列條款被併入《國際刑事法院羅馬規約》第八條第二款第五項,違反這些條款均應被視 為戰爭罪:
- 第二附加議定書第十三條第二款:平民 不應成為武力攻擊目標;
- 第二附加議定書第十一條第二款、第十 二條:醫療隊和醫療運輸工具不應 成為攻擊的對象以及特殊標誌的保 護;
- 第二附加議定書第十六條:文物或宗教 場所不受攻擊;
- 第二附加議定書第四條第二款第七項: 禁止搶劫行為;
- 第二附加議定書第四條第三款第三項: 禁止徵募年齡 15 歲以下兒童入伍或 利用其參加敵對行動; 54
- 第二附加議定書第四條第一款:禁止強

Lack of Jurisdiction (Child Recruitment).

- Each year, many thousands of child civilians are killed, injured or otherwise physically and psychologically damaged as a result of armed conflict. There is a considerable body of international law which aims to minimize the harm inflicted on these children, and yet little of it is acknowledged, or observed. During the 1996 hostilities in Iraq children were once more exposed to the hazards of armed conflict, and the international community took scant notice of their particular needs or entitlements under international law. Children in situations of armed conflict will never receive the best that mankind has to give, but perhaps they may be better shielded from the worst. Cf. 1989 Convention on the Rights of Child. For details, see Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Oxford: Clarendon Press, 1997).
- 53 關於核武器的威脅或使用是否合法的諮詢案(Legality of the Threat or Use of Nuclear Weapons) (Advisory Opinion) Case [1966] ICJ Report 66, the Court affirmed that the rules contained in the 1949 Geneva Conventions constitute "intransgressible principles of customary international Law"(para.95). 國際法院認為,威脅或使用核武器一般是違反適用於武裝衝突的國際法規則,特別是人道主義法的原則和規則。威脅或使用核武器,必須符合武裝衝突中所適用的國際法的要求,包括國際人道主義法的要求並須符合國際條約或公約關於核武器規定的明示義務。鑑於當前的國際法的狀況和國際法院面對的事實,不能得出肯定的結論說在極端情況下和在受害國處於危急存亡之際,威脅或使用核武器是否合法。
- 54 《第一附加議定書》第77條禁止徵募15歲以下兒童入伍;《第二附加議定書》第4條第3款第3項

制遷移平民。

上述條款為第二附加議定書之一部分, 其適用應受第二附加議定書第一條之限制。 《國際刑事法院羅馬規約》之條文適用限制 為:「適用於一國境內發生的武裝衝突,倘 若政府當局與有組織之武裝集團間,或武裝 集團相互間長期進行武裝衝突。」這在一定 程度上擴大了第二附加議定書的適用範圍。

陸、陸、國際人道法在維持國家和平軍 事行動中之適用 ⁵⁵

一、國際人道法適用於聯合國維持國家 和平部隊之爭議

在國際性武裝衝突或國內武裝衝突中⁵⁶,聯合國維持和平軍事行動遵守國際人道法的 討論始於 1950 年韓戰時期,維持和平部隊在 執行行動中適用國際人道法的問題就已確 定 ⁵⁷。但對維持國家和平行動中是否及如何 適用國際人道法的討論卻延續至今。其爭議 主要集中於兩方面:

○維持國家和平行動之特殊性質

支持聯合國適用國際人道法者認為 1928 年《巴黎非戰公約》(Pact of Paris)禁止戰爭 作為實行國家政策的工具後,在聯合國集體 安全體制下,一國無權對他國使用武力,除 非是在對武裝干涉或攻擊的區域安全或集體 自衛。聯合國與成員國與非成員國之間在使 用武力的權力問題上,處於管理與被管理的 不平等關係。但無理由認為,兩者在國際人 道法的適用上也不平等。且 1907 年《海牙公 約》與 1949 年《日內瓦公約》亦無針對一方 的保護多過另一方之規定。事實上,在武裝 衝突中,聯合國維持國家和平部隊雖屬中立 方,但應與衝突各方處於平等之法律地位, 聯合國維持國際和平與安全之責任並不能解

也禁止 15 歲以下的兒童直接或間接參與敵對行動。1989 年《兒童權利公約》第 38 條將《第一附加議定書》第 77 條的適用範圍擴大到非國際性武裝衝突。2000 年《兒童權利公約關於兒童捲入武裝衝突的任擇議定書》,限制兒童餐與敵對行動,普遍加強武裝衝突中對兒童的保護。《國際刑事法院規約》第 8 條第 2 款第 7 項禁止徵募 15 歲以下兒童入伍。

- 55 Louis B. Sohn, "The Role of the United Nations in Civil Wars," *Proceedings of the American Society of International Law 1963*; Nikolai B. Krylov, "International Peacekeeping and Enforcement Actions After the Cold War," Lori Fisler Damrosch & David J. Scheffer (eds.), *Law and Force in the New International Order* (Boulder/San Francisco/ Oxford: Westview Press, 1991), pp.94-100; David Brown, "The Role of the United Nations in Peacekeeping and Truce-Monitoring: What are the Applicable Norm," *Revue Belege de Droit International*, 2 (1994), p. 569; Joseph "Dutch" P. Bialke, "United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict," *Air Force Law Review*, 50 (2001), pp.1-63. 孫萌著,《聯合國維和行動違法責任研究》(北京:知識產權出版社,2006年),頁 24-32。
- ⁵⁶ For international and non-international armed conflict, see L.C. Green, The Contemporary Law of Armed Conflict (Manchester and New York: Manchester University Press, 1993), pp. 52-66; Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (Cambridge: Cambridge University Press, 2004).
- 57 The use of military measures by the United Nations includes, inter alia, UN Action for, or Authorization of, Enforcement Measures for Humanitarian Purposes, Support UN Resolutions. L. Goodrich, "Korea: Collective Measures against Aggression," International Conciliation, 494 (1953), p. 157; Rosalyn Higgins, Problems & Process: International Law and How We Use it (Oxford: Clarendon Press, 1995), pp. 254-259.

除其部隊遵循國際人道法的義務。⁵⁸ 若聯合 國在維持國家和平行動中不適用國際人道法, 必招致衝突各方亦不適用國際人道法之後果, 如此將嚴重毀損國際人道法之價值。

持相反觀點者則主張國際人道法為適用 於國家間衝突的法律,而維持國家和平行動 中,維持國家和平部隊是執法者而非敵對方, 即便聯合國部隊為維持國家和平介入武裝國 家衝突中,其與戰爭之目的及性質迥異,不 得適用國際人道法;且若在維持國家和平行 動中適用國際人道法,將使履行維持國家和 平使命的聯合國部隊降至與侵略國同等地位。 又《巴黎非戰公約》以戰爭解決國際爭端的 做法視為非法,侵略國早已喪失與被侵略國 平等的法律地位及享受法律權益的權利,故 維持國家和平部隊不必遵守國際人道法。

無持國家和平行動職能的有限性及軍事行為之特殊性

有主張國際人道法組成部分之《日內瓦四公約》及其議定書的適用是以共同第二條所規定「戰爭或武裝衝突的情況」之發生為適用前提。若據此判斷,維持國家和平行動中並無武裝衝突發生。維持國家和平部隊之法律地位為中立,非衝突之一方,維持國家和平人員亦非戰鬥員,而公約中指向之適用對象僅有戰鬥員。且《聯合國人員和有關人員安全公約》(Convention on the Safety of

United Nations and Associated Personnel) 59,明確規定維持國家和平人員應受到與平民同等的保護,不得作為攻擊目標,故對維持國家和平人員適用國際人道法並不妥適。

反對者則以為:儘管聯合國部隊在多數維持國家和平行動中並未參與敵對雙方間的戰爭或武裝衝突,但並不影響國際人道法適用於聯合國維持國家和平部隊。根據檢察官訴塔迪奇案(The Prosecutor v. Tadic)⁶⁰之判決,對《日內瓦公約》共同第二條所規定之武裝衝突重新做出界定,即武裝衝突是訴諸武力的行為。準此,既然國際人道法之適用不再取決於衝突方正式宣戰,而為武裝衝突發生之事實,則國際人道法對聯合國維持國家和平部隊之適用亦毋須拘泥於是否滿足對戰爭狀態規定之法律條件。故聯合國維持國家和平部隊的特殊性並不影響國際人道法對其之適用。

在第二代維持和平行動中,動用武力的情形頻繁發生,維持國家和平部隊的中立性亦隨之動搖,維持國家和平人員也因攻擊性武力的使用轉變為戰鬥員,因此對前者適用國際人道法並無異議。就傳統的維持國家和平行動而言,《聯合國人員和有關人員安全公約》中,維持國家和平人員應受到與平民同等保護之規定,並不意味維持國家和平人員不需遵守國際人道法的一般性法律原則及

International humanitarian law, applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting that conflict, is applicable to the conduct to hostilities once a State has resorted to the use of force (the *ius in bello*), that law cannot be properly understood without some examination of the separate body of rules which determine when resort to force is permissible (the *ius ad bellum*). The modern *ius ad bellum* is based upon Article 2 (4) and Chapter 7 of the UN Charter where the use of force in international relations is prohibited. Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (New York: Oxford University Press, 1995), p. 1.

^{59 1994}年12月9日,於紐約簽訂。

⁶⁰ 檢察官訴塔迪奇案(The Prosecutor v. Tadic), ICTY Case No.IT-94-1-A.

精神,特別在其動用武力自衛的情形下更是如此,此可於國際法院對國家動用自衛權的解釋中得到驗證。在使用核武器之合法性案(Legality of the Use by a State of Nuclear Weapons in Armed Conflict) ⁶¹ 中,法官對自衛與國際人道法的關係作出分析如下:「行使自衛權需受必要性和成比例兩條件之限制,此為國際慣例。為合法使用武力行為,尚需遵守武裝衝突法之規定,尤其是其中之人道原

則與規定。」⁶² 可見自衛並不排除遵守國際 人道法的義務。

聯合國在剛果(Congo) ⁶⁵、賽浦路斯(Cyprus) ⁶⁴、柬埔寨(Cambodia) ⁶⁵ 及索馬利亞(Somalia) ⁶⁶ 等多次維持國家和平行動中,其與派遣國簽訂之派遣協議及相關法律文件中皆規定有遵守國際人道法之條款,聯合國與派遣國皆承諾遵守適用於軍事人員的國際人道法之一般原則及精神;而盧安達維

- 61 Legality of the Use by a State of Nuclear Weapons in Armed Conflict [1996] I.C.J. Rep. 66.
- 62 [1996] I.C.J. Rep. 266.
- ⁶³ Congo was inadequate preparation before its independence. During 1960-1964, original the United Nations Operation in Congo was technical assistance with elections, later, changed to restoration of law and order. G. Abi-Saab, *The United Nations Operation in the Congo* (Oxford: Oxford University Press, 1978).
- ⁶⁴ Cyprus developments after independence, ethnic conflicts between Greek and Turk-Cypriots, removal of veto right, in 1964 the United Nations Peacekeeping Force assistance resorting law and order in Cyprus.
- Super powers support for different interest. Under the Paris Agreement, in 1992 the United Nations Transitional Authority in Cambodia to monitor free elections and control transition. Institution building of the Supreme National Council was aiming for repatriation and resettlement. For details, see Michael W. Doyle, UN Peacekeeping in Cambodia: UNTAC's Civil Mandate (Boulder/London: Lynne Rienner Publishers, 1995); Michael W. Doyle and Ayaka Suzuki, "Transition Authority in Cambodia," Thomas G. Weiss (ed.), The United Nations and Civil Wars (Boulder/London: Lynne Rienner Publishers, 1995), pp. 127-149.
- 66 Both Somalia previously an Italian colony and the north of the country, Somaliland, were integrated under British rule after World War II. After being a British protectorate since 1884, Somaliland became an independent country on 26 June 1960. Although devasted by the civil war, Somaliland consolidated administrative structures and restored some semblance of order despite the increasing chaos surrounding it. In 1988, a full-scale civil war broke out between the Mogadishu-based government and Somaliland rebels. In May 1991, as Somalia descended into anarchy with the fall of the government of Gen. Mohamed Siad Barre, Somaliland declared itself independent. In 1992, the Somaliland, led by the Somali National Movement, proclaimed unilateral declaration of an independent. In 1992-1993, the United Nations Operation in Somalia, was to monitor cease-fire among struggling clans together with Organization of American Unity (OAU), the League of Arab States (LAS) and Organization of the Islamic Conference (OIC) - Transition United Nations Operation in Somalia (UNOSOM I) to United Nations Unified Task Force (UNITAF) to UNOSOSOM II- change to peace enforcement under Chapter 7 of the UN Charter. For details, see Newton Bowles, "Somalia: Learning the Hard Way," Eric Fawcett and Hanna Newcombe (eds.), United Nations Reform: Looking Ahead After Fifty Years (Toronto: Science for Peace, University College, University of Toronto, 1995), pp. 131-137; Debarati G. Sapir and Hedwig Deconinck, "The Paradox of Humanitarian Assistance and Military Intervention in Somalia," Thomas G. Weiss (ed.), The United Nations and Civil Wars (Boulder/London: Lynne Rienner Publishers, 1995), pp. 151-172; Captain (N) Leif Ahlquist, Co-operation, Command and Control in UN Peace-Keeping Operation (Sweden: Department of Operations, Swedish War College, 1996).

持國家和平行動(Rwanda Peacekeeping Operation)中,聯合國維持國家和平部隊亦承諾遵守國際人道法之一般法律原則及精神;在聯合國頒布的《維持和平行動部隊地位協定範本》(Model Status-of-Forces Agreement for Peace-keeping Operations)67第二十八條中亦有相同規定。

國際人道法適用於聯合國部隊之法源為一般國際習慣法,而非國際條約,因聯合國並非《海牙公約》與《日內瓦公約》及其議定書等主要國際人道法公約之締約方,聯合國也不傾向成為其締約方。由於傳統的維持國家和平人員並非戰鬥員,適用公約將改變其於衝突中之被保護地位,威脅其人身安全;且聯合國部隊尚需考慮非締約方成員國之立場與態度,但這不影響國際人道法公約中部分條款成為具有拘束力的國際習慣法,適用於聯合國及其專門機構,不論其締約與否。

1956年10月29日,聯合國派往埃及的緊急部隊(United Nations Emergency Force in Egypt, UNEFI) "建立,國際紅十字委員會便致函聯合國要求其遵守《日內瓦公約》,之後,並於多次維持和平行動中,敦促聯合國將其維持和平人員使用武力之行為置於國際人道法規範之下。對此,聯合國的態度始終為要求武裝部隊盡可能謹慎遵守《日內瓦公約》的一般性法律原則,"理由為聯合國職能有限,公約中許多條款無法適用於維持

國家和平行動,故無法遵守公約中所有義務。 聯合國將國際人道法的一般性法律原則及精神確定為維持國家和平部隊之行為標準,雖 為其設定一定的行為規範,但於實踐中仍存在許多不確定因素。

三、聯合國部隊遵守國際人道法之秘書 長公告

聯合國在維持國家和平行動中出?使用武 力之情形,維持和平人員違反國際人道法之 行為日漸增加, 國際社會呼籲聯合國維持和 平部隊適用國際人道法的聲浪更加強烈,維 持和平部隊承諾遵守國際人道法之一般性法 律原則及精神的確定性日益明顯,於是聯合 國自1995年與國際紅十字會合作起草適用於 聯合國部隊的國際人道法規則。1997年國際 紅十字會將草案提交聯合國;1999年8月6 日,聯合國祕書長安南發布《聯合國部隊遵 守國際人道法秘書長公告》(Secretary-General's Bulletin Observance by United Nations Forces of International Humanitarian Law), 公 告中闡明聯合國部隊應遵守的國際人道法規 則,並規定上述規則適用於「聯合國維持和 平部隊執行維持和平行動和武力執行行動中 參與武裝衝突的情況」,其中涵蓋保護平民、 限制性作戰方法與手段、平民和戰爭受難者 的待遇與保護傷者、病者及衛生救援人員等 內容。70 故《聯合國部隊遵守國際人道法秘

^{67 1990}年10月9日簽訂。

⁶⁸ 因蘇伊士運河危機而於 1956 年 8 月建立,目的在停止敵對行動,並令各國武裝部隊撤出埃及領土;撤軍後,聯合國緊急部隊充當埃及和以色列間的緩衝機制。D. W. Bowett, *United Nations Forces: A Legal Study* (New York/Washington: Frederick A. Praeger Publishers, 1966), pp. 90-109; Mona Ghali, "United Nations Emergency Force I," William J. Durch (ed.), *The Evolution of UN Peacekeeping: Case Studies and Comparative Analysis* (London: Macmillan Press, 1993), pp. 104-130.

⁶⁹ Umesh Palwankar (ed.), "Applicability of International Humanitarian Law to United Nations Peacekeeping Operations," *International Review of the Red Cross*, No. 294 (1993), p. 229.

書長公告》雖在聯合國部隊遵守國際人道法 上有所邁進,但尚非完整解決方案。可見國 際人道法在聯合國維持和平行動中適用於不 同國家的情況,有助確定聯合國維持國家和 平行動應遵循之國際人道法的義務,聯合國 維持國家和平行動一旦違反國際人道法之義 務就要承擔相應責任。

柒、結 論

一、中央政府為維護國家統一和領土完整得使用武力對抗分裂

國際法基於尊重國家主權和領土完整原則,中央政府為維護國家統一和領土完整,得使用武力對抗分裂;倘若他國插手,援助或支持叛亂團體,都屬於干涉內政,中央政府有權對其實施自衛。除非叛亂團體已被承認為交戰團體,內戰的任何一方均不得在公海上,截留或搜索外國商船;叛亂團體一旦取得交戰團體的地位,便有權在公海上干預外國商船與中央政府控制下的地區貿易一旦叛亂演變成為內戰,國際法禁止任何國家襄助內戰中的任何一方,例如:派遣武裝力量或志願軍、指導人員、技術人員;訓練非常備軍;提供任何武器或可做為軍事行動的基地,補給、避難或部隊或裝備運輸等通過。

二、國家希望藉主權來保持對於國內武 裝衝突之控制

國際人道法賦予所有交戰者完全相同的

權利與義務,不論是國際性武裝衝突或國內 武裝衝突。綜觀適用於非國際性武裝衝突的 1949年《日內瓦公約》共同第三條及 1977年 日內瓦第二附加議定書,可以歸納出適用於 國內武裝衝突的國際人道法規則遠不如適用 於國際性武裝衝突的國際人道法規則來得完 善,造成如此明顯的分野並非源於法律體系 內部的不和諧,而是國家希望以主權來保持 對於國內武裝衝突的控制。

三、國家不願意將完整之人道法規則適 用於國內武裝衝突

國際人道法不創造國際性武裝衝突或國內武裝衝突,也不影響交戰雙方的法律地位,但許多國家不願意將完整國際人道法規則適用於國內武裝衝突,國家若發現行將捲入或已經捲入國際武裝衝突或國內武裝衝突,往往出於擔心而不願加入1977年兩個日內瓦附加議定書,以免承擔國際人道法義務,甚至將國際人道法義務作為談判籌碼,使國家得以自行決定在何時適用日內瓦附加議定書的義務。

四、國際人道法由保護國家利益逐漸趨 向保護平民利益

發生在兩國或兩國以上之間的國際性武裝衝突中,國際人道法既要保護平民免遭交戰雙方敵對行動的殃及,亦要限制使用大規模殺傷性武器(weapon of mass destruction, WMD)⁷¹,避免對平民及非軍事目標造成不

⁷⁰ 對此,有學者批評此公告忽略維持和平行動與執行行動的差別,僅提供單一解決方案,亦無規定上述規則何時適用於維持和平部隊的操作性問題。

⁷¹ In *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep. 226, where on 8 July 1996 the Court advised, inter alia, (a) (unanimously) that a threat or use of force by nuclear weapons that was contrary to Article 2 (4) of the UN Charter, the prohibition on the use or threat of force, and that did not meet the requirements of Article 51, concerning self-defense, was unlawful; (b) (unanimously) that a threat or use of

必要的損害,國際人道法的價值由保護國家 利益逐漸趨向保護平民利益。根據聯合國憲 章和國際人道法,在武裝衝突中保護平民工 作重在預防,而其責任首先在於當事國政府。 在一國境內發生的武裝衝突,國際人道法卻 鮮能對受害者提供有效保護。當考慮武裝衝 突法中人道利益的時候,國際戰爭和內戰之 間的界限正逐漸喪失其原有的差異。從保護 戰時受害者之角度出發,國際人道法原本適 用於國際性武裝衝突的規則亦逐漸適用於內 戰。

五、日內瓦第二附加議定書是對日內瓦 公約共同第三條之補充

內戰係指發生在一個國家內兩個或多個 政治團體間為爭取分離、獨立或統一的武裝 衝突。《日內瓦公約》的締約國將國際武裝 衝突的法律規範延伸至非國際性武裝衝突, 國際人道法基本原則擴大適用於內戰或爭奪 一國的政權,而不論交戰狀態是否已獲得承 認。日內瓦第二附加議定書旨在保護內戰受 害者,係對日內瓦共同條款第三條之補充, 亦是專門規定在內戰或國內武裝衝突中,對 個人實施保護及對限制使用武力的普遍性條 約。通過協商一致,《第二附加議定書》草 案刪除有關戰鬥員特權地位關於敵對行為、 救助、醫療職責和實施機制等問題。議定書 詳細列舉人權與基本自由保障,受到限制者 權利、司法保障,皆大幅超過人權法最核心 的要求。

六、聯合國維持和平部隊有遵循國際人道法之義務

聯合國維持和平部隊在執行維持和平行 動和武力執行行動中參與武裝衝突情況下, 亦有遵循國際人道法之義務,一旦違反國際 人道法之義務就要承擔相應責任。

七、國際人道法適用於國內武裝衝突之 普遍化

國際人道法的精神已成為普世價值,目的在於保護傷病兵及平民,避免不必要的傷害。世界各國理當竭盡全力保護武裝衝突的受害者,促進《日內瓦公約》及其《第一、第二兩個議定書》的普遍遵循。"但凡簽署1949年《日內瓦公約》及其1977年《附加議定書》之各締約國承諾其在所有情況下均履行其所作的承諾,尊重這些國際法規並確保其被尊重。在條約法上只有國家可以成為國際條約的締約方,這一點對《日內瓦公約》

force by nuclear weapons should coincide with the requirements of international law applicable in armed conflict, especially the rules and principles of international humanitarian law, as well as treaty provisions and other rules involving nuclear weapons; (c) (7 to 7)that the threat or use of nuclear weapons would generally contradict the rules of international law applicable to armed conflict, especially the principles and rules of humanitarian law. The UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be deemed to be excessively injurious or to have indiscriminate effects on 10 October 1980 adopted a Convention on Prohibitions or Restrictions on the use of such weapons together with Protocols on Non-Detectable Fragments; Mines and Booby Traps; and Incendiary Weapons together with a Resolution on Small-Calibre Weapon System. 阿瑟·H·專斯汀,淺之、徐明譯,《大規模毀滅性武器與環境》,北京:科學技術文獻出版社,1998 年,頁 1-57。

72 瑞內·科瑟爾尼柯, 〈1997年議定書:國際人道主義法發展史中的一座里程碑〉, 《國際人道主義法文選》(北京:法律出版社,1999年), 頁83-112。

及其《附加議定書》也同樣適用。截至 2004 年底,世界上 192 個國家都是《日內瓦公約》 的締約國。《日內瓦公約》得到最大多數國 家接受的事實證明其普遍性。關於《日內瓦 附加議定書》的情況是:截止至同一日期, 有 162 個國家批准《第一議定書》,成為第 一議定書的締約國; 國際社會近 3/4 的國 家都已加入這兩個議定書,獲得國際社會廣 泛接受,可見國際人道法適用於國際及國內 武裝衝突的普遍化,故然武裝衝突各方,不 論是國家或非國家參與者,都受到國際人道 法的拘束。

八、在武裝衝突期間緩期執行死刑

在武裝衝突期間緩期執行死刑,將死刑延期至敵對行為之後。《關於保護面臨死刑的人的權利保障措施》第3條規定,對非國際性武裝衝突落入敵方勢力的參戰者,除戰爭罪和違反人道罪外,如其犯罪屬於輕罪情節者,或僅參與,並充分確定為參與武裝衝突者,廢除死刑。不得對孕婦判處死刑,禁止對新生兒母親判處或執行死刑;不得對於未滿15歲參與武裝衝突犯罪者判處死刑,此一保護亦擴展至幼童的母親,在武裝衝突期間不得對幼童的母親或照顧幼童負有責任的婦女判處或執行死刑。

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