W752 WILSON, R Events in the Solomon Islands...

Robyn Wilson

Events in the Solomon Islands placed in the context of International Humanitarian Law

LLM Paper
Public International Law 509
(Word Count 17,469)

LAW

Law Faculty
Victoria University of Wellington
2001

AS741
VUW
A66
W752
2001

W752 WILSON, R Events in the Solomon Islands...

Robyn Wilson

Events in the Solomon Islands placed in the context of International Humanitarian Law

LLM Paper
Public International Law 509
(Word Count 17,469)

Law Faculty
Victoria University of Wellington
2001

LAW

LS741
VUW
A66
W752
001

Victoria
UNIVERSITY OF WELLINGTON
Te Whare Wānanga
o te Ūpoko o te Ika a Māui

LIBRARY

CONTENTS

I Introduction

II The Solomon Islands Conflict
- A. Background
- B. Chronology of the conflict

III The Geneva Conventions of 1949 and Additional Protocols of 1977
- A. Background
- B. Implementation and compliance
- C. Characterisation of conflict

IV Solomon Islands Conflict
- A. Solomon Islands' national legislation and international law
- B. Applicability of Article 3 of the Geneva Conventions and Additional Protocol II
  1. Armed conflict
  2. The parties to the conflict
  3. Degree of intensity required
  4. Responsible command
  5. Ability to implement provisions
  6. Special agreements
  7. Summary of applicability discussion
- C. Protections provided by Article 3 and Protocol II
- D. Breaches of Article 3 and Protocol II
- E. The situation of police officers

V Amnesty From Prosecutions For Breaches Of Humanitarian Law In Internal Conflicts
- A Background
- B Applications of amnesties
- C Compliance with Geneva Conventions
- D Compliance with customary international law
- E Human rights, compensation and customary law in the Solomon Islands
- F Utility of amnesties
- G Necessity of Amnesties
- F Rome Statute

VI Conclusion

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

1. *INTRODUCTION*

The Solomon Islands is a small nation of less than half a million inhabitants spread across many islands. An armed conflict erupted there in 1998, with small-scale actions by one ethnic group eventually leading to a war between the two rival ethnic groups, leaving the machinery of the State ineffective. During the conflict both factions committed atrocities against each other and civilians. The police were also implicated in human rights abuses, with individual officers identifying with different factions depending on their ethnicity. Eventually a cease-fire was brokered and the Townsville Peace Agreement[1] (TPA) between the two warring groups and the government negotiated in October 2000. The most controversial aspects of the peace agreement were a blanket amnesty from prosecution for all actions during the period of the conflict and the continuation of employment for police officers who participated in the conflict.

The gaps in humanitarian law as it relates to internal conflicts and prosecuting those that breach the provisions are amply illustrated by the Solomon Islands conflict. It was a small-scale conflict in world terms attracting little attention on the world stage, but shares similarities with conflicts such as in the former Yugoslavia, Kosovo and Rwanda. Ethnic tensions were the root of the conflict, and ethnicity determined the fate of individuals. Thousands of Malaitan civilians were forced from their homes, either relocating to the island of Malaita, or to Malaitan enclaves on Guadalcanal. Many continue to require humanitarian relief to survive in a place they did not choose to live. Combatants and civilians were beaten, tortured and killed. Although the numbers of people affected are small compared to other conflicts, proportionate to the pre-conflict population of Guadalcanal, the harm caused to the civilian population was immense.[2] Despite documented breaches of international law, Amnesty International was alone in condemning the amnesty from prosecution given to those responsible.[3]

The humanitarian law of war provides for the protection of individuals affected by armed conflict, both civilians and combatants. The core of the law is found in the Geneva Conventions (the Conventions) of 1949 and the Additional Protocols of 1977. The major weakness in the theoretical basis of the Conventions is their lack of applicability, as a

---

[1] Signed 15 October 2000. The agreement is available at <http://www.commerce.gov.sb/Others> (last accessed 10 September 2001). Following this agreement, a further agreement relevant to the Marau area only, the Marau Peace Agreement was finalised.

[2] The pre-conflict population of Guadalcanal was approximately 100,000 and in Malaita 96,000. (Population figures from *Lonely Planet Guide to the South Pacific* (1 ed, Lonely Planet Publications Pty Ltd, Melbourne, 2000) 658, 690). Estimated displacement figures are of 20,000 Malaitans to Malaita and 12,000-18,000 within Guadalcanal. ("Experts Group Meeting on the Post Conflict Situation in the Solomon Islands" Session III, 2. Report available at <http://www.peoplefirst.net.sb/General/Reports/Experts_Group_2.htm> (last accessed 18 September 2001). Therefore, almost 40 per cent of the Guadalcanal population was displaced, half of these to another island.

[3] Amnesty International prepared the only report of incidences breaching humanitarian law, see "Solomon Islands: A forgotten conflict" (7 September 2000) *Amnesty International*. <http.://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last viewed 18 August 2001). It condemned the amnesty in media statements cited on page 25..

whole, to armed conflicts within states. Their practical weaknesses are lack of compliance and prosecution for non-compliance. While there has been a recent increase in prosecutions and a trend towards blurring the distinctions between international and internal conflicts[4], the reality is that many internal conflicts have and will continue to be resolved by states providing amnesties to combatants from prosecution. Amnesties can potentially render all efforts to punish those that breach humanitarian law useless, and so are deserving of more attention in the international arena.

The Rome Statute of the International Criminal Court (Rome Statute), assuming its success in setting up a permanent International Criminal Court (ICC), provides an opportunity for international law to throw more weight behind the principle of providing justice to victims of internal conflicts. The ICC may take action to prosecute individuals where states are unwilling or unable to do so. The potential for the ICC to prosecute regardless of an amnesty given by a state may encourage states and those involved in armed conflicts to accept constraints on the type of amnesties given. Amnesties may be necessary to end conflicts, but they can also provide alternative forms of justice. A just amnesty is arguably more likely to be recognised by the ICC.

This paper refers to the Solomon Islands conflict to provide an illustration of the theoretical difficulties in determining which provisions of the Conventions and Protocols are applicable in internal conflicts. The amnesty given to combatants in the Solomon Islands conflict is considered in relation to its compliance with the Geneva Conventions and Additional Protocols and other international human rights provisions. In light of the Rome Statute's potential to constrain the breadth of amnesties given for breaching humanitarian law, particular attention is given to the blanket amnesty from prosecution for all actions during the period of the conflict.

II THE SOLOMON ISLANDS' CONFLICT

A. Background

The Solomon Islands is a group of 990 islands spread over 1300 kilometres in the South Pacific, its nearest neighbour being Papua New Guinea. It is divided into nine provinces consisting of the larger settled islands of Guadalcanal, Saint Isabel, Choiseul, Malaita, Makira, and smaller clusters of islands, many of the which are uninhabited. The population is primarily Melanesian.

The islands' identity as a state began in the late 19th century when Britain gained control of the island group and named it the British Solomon Islands Protectorate. During World War II the Japanese invaded the Solomon Islands and began building an airfield on Guadalcanal. The United States Navy attacked, starting a battle for control of the Solomons that lasted six months, with the United States eventually gaining the upper hand. By the end of the war there was a large American base on Guadalcanal providing employment for Solomon Islanders. A pro-American movement opposing British rule

[4] Theodore Meron "The Humanization of Humanitarian Law" (2000) 94 Am J Int'l L 239,261.

started after the war but died down when the Americans withdrew in 1950. Britain introduced local government and eventually an elected governing council in 1970. In 1978 the Solomon Islands was granted independence and was relatively stable until the conflict in 1998.

The capital, Honiara, is situated on Guadalcanal. After WWII, people from the island of Malaita migrated to Honiara, attracted to work opportunities created by the United States base, and eventually dominating Honiara, causing resentment among the ethnic Guale. Honiara has a separate political status from the provincial government that represents the interests of the rest of Guadalcanal, and the ethnic Guale resented the influence the Malaitans had in their capital.

The country is relatively poor. It ranks 122 out of 174 countries on the 1997 UN Human Development Index, which measures longevity, literacy and the standard of living. There are significant disparities in income within and between geographical areas. The UN has accorded the Solomon Islands "least developed nation" status.[5] There had been longstanding demands to successive governments to compensate ethnic Guale for loss of land on Guadalcanal due to the location of central government in Honiara, and industrial developments on the island.

The 1998-2000 conflict was predominantly between the Isatabu Freedom Movement (IFM)[6] and the Malaitan Eagle Force (MEF). It attracted some international attention, mainly near neighbours who were members of from the Commonwealth of Nations.[7] The Red Cross provided humanitarian relief and Amnesty International sent an envoy to the Solomons to investigate and report on the conflict.[8]

The Office of the Prime Minister issued a series of statements in March 2000 suggesting an underlying cause for the conflict was the then new Government's attempts to reform economic systems that favoured a "network of cronies" who were the "real rulers" of the Solomon Islands. The report says the drive to reform the economy and rid the country of corrupt practices was a catalyst for the escalation in demands being put to the Government by the two ethnic groups and the opposition.[9]

At a meeting held in Brisbane soon after the TPA was negotiated, an advisor to the Solomon Islands Development Trust, Dr John Roughan, put forward several reasons

---

[5] United Nations Development Programme *Solomon Islands.* Available at <http://www.undp.org.fj/soi/solomonprog.htm> (last accessed 10 September 2001).

[6] The predecessor to this group was the Guadalcanal Revolutionary Army (GRA); the IMF was not formed until January 2000. See Australian Department of Foreign Affairs and Trade *Solomon Islands Country Brief*, (May 2001) 3. <http://dfat.gov.au/geo/Solomon_Islands_brief.htm>(last accessed 8 August 2001.

[7] The Commonwealth of Nations is a group of 54 countries, including the Solomon Islands, connected to each other, in some cases indirectly, through being governed at some stage by Britain.

[8] "Solomon Islands: A forgotten conflict" (7 September 2000) *Amnesty International*, 9. <http.://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last viewed 18 August 2001).

[9] 'Beneath Guadalcanal' in *The Underlying Cause of the Ethnic Tension* (1 ed, March 2000). <http://commerce.govt.gov.sb/Ministries/Beneath_ Guadalcanal_1.htm> (last accessed 9 September 2001).

for the conflict.[10] He refers to the influence of people from Bougainville who fled to Guadalcanal during the 10-year conflict in their country and similarities between the position of the people from Bougainville and the ethnic Guadalcanal people (Guale) in relation to the Malaitans in Honiara. The Bougainvillians and Guale are matrilineal societies; the Malaitans are patrilineal. The Bougainvillians had managed to drive away the Highlanders from Bougainville, and had taken on and beaten their government, and their experience encouraged the Guale's opposition to the Malaitans settled in Guadalcanal. Dr Roughan also cited growing poverty caused by successive mismanagement by governments, disaffection of the large youth population and the concentration of development in urban areas when the majority of people lived in villages as other causes for the conflict.

B. Chronology of the conflict

The preamble to the TPA begins by referring to events dating from early 1998:[11]

> Whereas since late April 1998, armed groups of Guadalcanal youths, angry about perceived government inaction in addressing their people's grievances (which dated back to 1988 through peaceful demonstration) engaged in activities forcing the eviction from Guadalcanal of settlers from other islands, especially Malaita settlers, and the displacement of approximately 20,000 Malaitans.

At the request of the Solomon Islands Government, the Commonwealth, through its Secretariat, sent a Special Envoy headed by former Prime Minister of Fiji Sitiveni Rabuka to assist with bringing a peaceful solution to the conflict. In 1999 the UN Human Rights Commissioner also sent a representative to assist, but on-going assistance to the Government was limited to the Commonwealth nations, especially its Pacific neighbours of Fiji, Vanuatu, Australia and New Zealand. Police from Fiji and Vanuatu, also under the auspices of the Commonwealth, were sent to assist with re-establishing law and order in Guadalcanal.

Prior to the TPA several peace agreements were negotiated but failed to stop the conflict. The first of these agreements was signed in June 1999 between the Government and representatives of the provincial governments of Guadalcanal and Malaita as representatives of the people.[12] It stated that all organisations that had been using force to remove Malaitan people from Guadalcanal would be dissolved and that violence would no longer continue as a way to resolve the crisis. It also addressed land issues that concerned the people of Guadalcanal.

The conflict continued and the Government declared a state of emergency in June 1999, passing emergency regulations that gave the police special powers permitting the

---

[10] "Experts Group Meeting on the Post Conflict Situation in the Solomon Islands."(19-20 October 2000) Session III, 2. <http://www.peoplefirst.net.sb/General/Reports/Experts_Group_2.htm> (last accessed 18 September 2001).

[11] Townsville Peace Agreement, Preamble, para 1.

[12] The Honiara Peace Accord (28 June 1999) 1. <http://commerce.govt.gov.sb/Ministries/Beneath_Guadalcanal_3.htm> (last accessed 9 September 2001).

use of violence in the course of their duties, if acting in good faith.[13] The regulations also outlawed membership of organisations promoting the interests of ethnic populations by force. A second peace agreement[14] was made two months later between the police, the national Government and the Guadalcanal provincial government. It explicitly recognised the role of the police[15] in the conflict by promising to restrain their activities to the use of minimum force, and reiterated that illegal organisations formed with the purposes of advancing the interests of ethnic groups were to be disbanded. In October 1999, the Prime Minister publicly acknowledged for the first time that an organised pro-Malaitan armed force existed.[16] The conflict continued and a third agreement[17] in February 2000 addressed specific concerns of the Guale relating to the constitution, land, police activities and internal migration.

The third agreement was also ineffectual. The hostilities reached a peak when the MEF, with the assistance of police officers, held the Prime Minister Mr Ulufa'alu hostage for eight days. He was released only after he met the demand for his resignation on 13 June 2000.

Peace talks, facilitated by the Australian and New Zealand Governments and held on board naval vessels began in July 2000. The result was a cease-fire agreement on 3 September 2000 that included a provision for further peace negotiations to be concluded in 90 days. In October 2000, representatives of the Solomon Islands Government, militant groups and non-governmental organisations (NGOs) met in Australia. The TPA was signed on 15 October. It provided for an amnesty for all those involved in the conflict from prosecution for any criminal acts,[18] for offences in relation to possessing or stealing weapons,[19] as well as immunity from civil suit.[20] Police and paramilitary officers who had been involved in the conflict by assisting either of the militant groups were permitted to remain in the Royal Solomon's Islands Police Constabulary or the Paramilitary Force. The rebel forces and police officers were to surrender weapons and demilitarise Guadalcanal and other provinces. A Peace Monitoring Council was given the task of administering the agreement with assistance from an International Peace Monitoring Team.

---

[13] The Emergency Powers (Islands of Guadalcanal) Regulations 1999 of 14 June 1999 and amendments of 28 June 1999.

[14] The Panatina Agreement (12 August 1999) 3. <http://commerce.govt.gov.sb/Ministries/Beneath_Guadalcanal_3.htm> (last accessed 9 September 2001 Available at <http://commerce.govt.gov.sb/Ministries/Beneath_Guadalcanal_3.htm> (last accessed 9 September 2001.)

[15] The Solomon Islands Constitution uses the term 'disciplined forces' to refer to the police, paramilitary police and prison service.

[16] "Solomon Islands: A forgotten conflict" (7 September 2000) *Amnesty International*, 9. <http.://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last viewed 18 August 2001).

[17] The Guadalcanal Agreement (22 February 2000) 6. <http://commerce.govt.gov.sb/Ministries/Beneath_Guadalcanal_3.htm> (last accessed 9 September 2001).

[18] TPA, para 3(2).

[19] above, para 3(1).

[20] above, para 3(3).

III THE GENEVA CONVENTIONS OF 1949 AND ADDITIONAL PROTOCOLS OF 1977

A. Background

The International Committee of the Red Cross (ICRC) drafted the 1949 Geneva Conventions in response to the atrocities of WWII and following the Nuremberg trials. The First, Second and Third Geneva Conventions of 1949 expanded on existing law in relation to the sick and wounded in the armed forces or at sea or shipwrecked, and prisoners of war. They extended the protections and classes of persons protected, and improved the devices for implementation and enforcement. The Fourth Geneva Convention of the same year broke new ground by spelling out the rights of civilians during war.

In essence, the Conventions lay down specific rules for protecting combatants who are sick, wounded or taken as prisoners of war, and for civilians who are not taking part in the hostilities. The Conventions number 317 articles, some of which are common to all four Conventions.

The 1949 Geneva Conventions apply, with the exception of Article 3 common to all four Conventions, to international conflicts, that is, armed conflicts between two or more of the "High Contracting Parties", or an occupation of a state by another state. Article 3 provided minimum standards of humane treatment to conflicts simply referred to as "non-international conflicts" by prohibiting certain actions against those not actively involved in the hostilities.

Additional Protocols I and II were added to the Conventions in 1977. Protocol I recognised national struggles for self-determination against racist regimes, alien occupation and colonial domination as international conflicts and Protocol II provided additional protections for internal conflicts of a certain intensity. The new Protocol II definition means there are four types of internal armed conflicts, including those to which Protocol I apply. The various definitions leave room for debate as to their application to a particular conflict and as consequence, what, if any, provisions apply.

B. Implementation and compliance

The Conventions include a variety of measures intended to ensure compliance with the provisions in international conflicts which are absent from the provisions applicable to internal conflicts. In particular they define more serious breaches as "grave breaches" and impose a duty on states to prosecute individuals responsible for those breaches.

Grave breaches can be prosecuted by any of parties to the Conventions regardless of the nationality of the perpetuator or the location of the crime. States are required to enact legislation necessary to provide effective penal sanctions for person(s) committing or ordering the committing of grave breaches, search for persons alleged to have

committed or ordered the commission of grave breaches and, try such persons before their national courts, or hand them over to another contracting state that has made out a prima facie case.

Some states have enacted legislation to allow prosecutions of serious violations of Article 3 committed in territories other than their own despite the lack of a duty to do so.[21] The two ad-hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), were given jurisdiction to prosecute crimes in internal conflicts[22] and the ICC will also have jurisdiction to prosecute serious violations of Article 3. In addition, breaches will often be able to be prosecuted within the state they occurred, without recourse to international law, under the state's domestic criminal provisions. However, the lack of a duty to prosecute breaches in internal conflicts means perpetuators are more likely to escape punishment as states may be unable or unwilling to prosecute and relatively few conflicts will attract the international attention that led to the ICTY and ICTR being set up.

C. *Characterisation of conflict*

The attempts to extend humanitarian law after WWII to cover armed conflicts regardless of whether they are characterised as international or internal has been hampered by the notion of state sovereignty, that is, what states do within their own territories is governed by their laws and is not a proper subject of international law. It was not in the interests of states and state sovereignty to recognise that humanitarian law applied to conflicts within their territory. They recognised that applying international rules may have the effect of legitimising movements against states and provide the individuals involved with more favourable treatment than criminals or traitors. For example, a prisoner of war is entitled to be released at the end of hostilities, a criminal is not. It has also been suggested that liberation movements have everything to gain by being recognised in this way, in that they are usually the weaker party. Restrictions on the conduct of armed conflict, and protections for civilians on whom they often depend, would be in their interest rather than the state's, whose resources and power would be restricted.[23]

The ICRC attempted to have the Conventions apply to all armed conflicts regardless of type. In the end, Article 3 listed minimum humanitarian protections in all armed conflicts to persons not actively taking part in hostilities. It includes civilians and members of armed forces who are no longer taking part in hostilities. It requires these people to be treated humanely without discrimination, and prohibits specific acts, including the right to due process before any sentence or execution. This extension

---

[21] Thomas Graditzky "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts." (1998) 322 IRRC 29, 35. Legislation passed in Belgium in 1993 is described as the most innovative.

[22] ICTY Article 5 and ICTR Article 4.

[23] Antonio Cassese "Wars of national liberation and humanitarian law" in *Studies and essays in international humanitarian law and Red Cross principles in honour of Jean Pictet* (International Committee of the Red Cross, Geneva, 1984) 314.

reflects the 20th century trend to guarantee fundamental human rights that cannot be derogated from by the State. A glimmer of the desire to have the law extended can be seen in paragraph 3 of Article 3, "The parties to the [non-international armed] conflict should further endeavor to bring into force by means of special agreements, all or part of the other provisions of the present Convention". Naturally, the prospect of a state or other armed force making such an agreement with an adversary with less power while involved in armed conflict is minimal.

Non-international conflict was deliberately not defined; another indication of states' reluctance to allow international law to apply to conflicts that challenged their authority, legitimacy and/or existence. Article 3 also specified that application of these minimum humanitarian principles had no effect on the status of the parties. This meant the state could still treat participants as criminals, and application of the Convention did not mean internal dissidents would gain international status or legitimacy for their cause.

The push to expand the applicability of the Conventions to non-international conflicts continued as internal conflicts caused intensive and large-scale destruction. In 1968, the General Assembly requested the Secretary General by resolution to investigate the possibility of new conventions to better protect victims of war.[24]

The move to include certain types of internal conflicts came predominantly from Third World and socialist countries; they managed to have the first session of the 1974-1977 Geneva Diplomatic Conference adopt a provision equating laws of national liberation with international conflicts. The final vote in 1977 led to a provision in Protocol I including armed conflicts "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in their exercise of their right to self-determination,"[25] as international armed conflicts.[26]

Protocol II extended the protections available in internal armed conflicts. However, it did not merely extend the protections in Article 3 to all non-international conflicts, but defined a type of conflict to which the additional protections would apply. The ICRC's draft took into account views expressed in the earlier diplomatic conferences and was intended to provide objective criteria to determine when a non-international armed conflict existed. However, the end result was a compromise between groups that wished for a very high threshold of applicability and those at the other end of the spectrum.[27] The Pakistani amendment to the ICRC draft, requiring a high level of intensity, was the definition eventually accepted.[28]

---

[24] G.I.A.D. Draper "The Development of Humanitarian Law of War" in *International Dimensions of Humanitarian Law* (Henry Dunant Institute, Geneva, 1988) 67, 83.
[25] Article 1, para 4.
[26] Antonio Cassese, above, 317.
[27] Arturo Carrillo-Suarez "Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied in Internal Armed Conflicts" (1999) 15 Am. U. Int'L Rev. 1, 76.
[28] Georges Abi-Saab "Non-International Armed Conflicts" *International Dimensions of Humanitarian Law* (Henry Dunant Institute, Geneva, 1988), 217, 229.

It expressly did not modify the existing conditions of Article 3 which meant Article 3 protections still applied to the undefined "non-international conflicts" and Protocol II's additional protections only applied to internal conflicts which met the criteria. Protocol II's applicability is defined in Article 1(2) as:

- conflicts not covered by Article 1 of the Geneva Conventions, that is, conflicts between states,
- conflicts not covered by Protocol I, which defined wars against colonialism and racist regimes as international in character,
- armed conflicts which take place in the territory of a state between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of a territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol,
- conflicts not characterised as "situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other such acts of a similar nature".

Protocol II' s definition is commonly described in the literature as having a high threshold of applicability and being akin to a full-blown civil war. For example, [29]

> "Protocol II ...only applies to those conflicts that have reached the scale and intensity of the classical civil war, i.e. where two or more political authorities, with virtually de-facto governmental authority in their respective territorial areas of control are engaged in armed conflict with organised forces under effective command."

and "A very high threshold triggers the application of Protocol II. The Protocol applies to situations at or near the scale of a full-scale civil war.[30]

The threshold of applicability is criticised as a barrier to protecting victims of internal wars. While it is clear that it only applies to conflicts of a certain intensity, Arturo Carrillo-Suarez makes a convincing argument, with reference to the drafting history and plain words of the definition, that this common description puts the threshold of applicability higher than can be justified.[31] He quotes the Canadian delegation view of the vote as a summary of this issue:[32]

> Like any compromise, the text is subject to certain interpretations not always of the same nature. Some delegations argue that because of the number of qualifications contained in it, only conflicts of a very high threshold such as civil wars are covered. Others underline that these qualifications are a reflection of the factual and practical circumstances that would in fact have to be exist if a Party to the conflict could be expected to implement the provisions of the Protocol. Furthermore we do not agree that this necessarily means they could exist only in civil war situations.

---

[29] G.I.A.D. Draper "The Development of Humanitarian Law of War" in *International Dimensions of Humanitarian Law* (Henry Dunant Institute, Geneva, 1988) 67, 84.
[30] Theodore Meron, " The Humanization of Humanitarian Law" (2000) 94 Am J Int'l L 239, 261.
[31] Arturo Carrillo-Suarez, (1999), as above, 67-89.
[32] Arturo Carrillo-Suarez,(1999), as above, 78.

One definition of a civil war is:[33]

> Civil war, of all internal armed conflicts originating at the heart of the State, is the one most characterised by the widespread division of civil society and the military confrontation of one or more groups as well as being qualified by a certain duration of the conflict, the intensity of the military operations, the open character of the hostilities, the size and organisation of the armed groups and, finally, the dominion over a sizeable [notable] and significant part of the national territory.

Distinctions may be made between a civil war and one to which Protocol II may also apply. For example,

- where control over territory is not sizeable (but sufficient to carry out sustained military operations and to implement the Protocol),
- less division in civil society,
- smaller armed groups,
- a conflict of less duration and possibly,
- where the rebel group(s) does not assume, or aim for, powers of the State.

Protocol II also differs from Article 3 in that one of the parties to the conflict must be the state, that is the armed forces of the High Contracting Party.

Protocol II Article 1 (2) excludes "situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence"[34] as not being armed conflicts. This was initially drafted to define and restrict the meaning of non-international conflicts, (when the intention was to extend Article 3 protections without creating a new category of internal conflicts), but survived in the same form in Protocol II.[35] In the context of Protocol II, it has little meaning as such situations would clearly be ruled out by its field of applicability but its inclusion was wanted by some to restrict the ambit of common Article 3 of the Geneva Conventions.[36] Any effect on Article 3 is debatable as the first paragraph of Article 1 specifies it does not modify the existing conditions of Article 3. However most writers accept such situations would implicitly not be covered by Article 3.[37] Drawing on an ICRC explanation[38] of this term, Robert Goldman[39] gives examples of such situations as riots or demonstrations without a concerted plan from the outset, sporadic acts of violence as opposed to military operations carried out by armed forces,

---

[33] Mangos Martin "Conflictos Armados Internos y Derecho Internacional Humanitario" (1990), cited in Arturo Carrillo-Suarez, (1999), as above, 80.
[34] Article 1, para 2.
[35] ICRC *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, Geneva, 1987) 1354.
[36] Georges Abi-Saab "Non-International Armed Conflicts" *International Dimensions of Humanitarian Law* (Henry Dunant Institute, Geneva, 1988), 217, 229.
[37] For example see Theodore Meron, " The Humanization of Humanitarian Law" (2000) 94 Am J Int'l L 239,261 "Conflicts involving lower intensity violence …are implicitly distinguished form armed conflicts";
[38] "Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law" (1988) 262 IRRC 9,13.
[39] Robert Goldman " Americas Watch's Experience in Monitoring Internal Armed Conflicts" (1993) 9 Am U J Int'L & Pol'y 49, 54.

and serious states of tensions that result in large-scale arrests, suspension of fundamental guarantees, states of emergencies that are a sequel to an armed conflict.

The approach of the Conventions and Protocols to characterisation of conflict is losing some of its significance as other areas of international humanitarian law have developed. [40] The appeal chamber of the ICTY said in *Tadic*[41] that the distinction between international and non-international conflicts was losing its value in relation to human beings due to the development of human rights doctrines.

However, there remains four categories of internal armed conflicts and characterisation can still effect, particularly in relation to international prosecution for breaches, the purpose of protecting victims of war. The various definitions can be difficult to apply; they are not all mutually exclusive and leave room for debate as to if and when they apply. The distinction between a Protocol I and Protocol II conflict depends on the view taken of the legitimacy and reasons for the attack on the government. Article 3 will apply to conflicts that do not reach the threshold of a Protocol II definition and what may be excluded as being a situation of "internal disturbances and tensions" may progress to a non- international armed conflict (Article 3) and further to a Protocol II type armed conflict. The applicability of Protocol II can be further debated depending on whether it is viewed as requiring something akin to a classic civil war.

The specific elements of the Protocol II definition are discussed further in relation to the Solomon Island conflict as are the provisions of the Conventions and Protocols that apply depending on characterisation of the conflict.

IV APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW TO THE SOLOMON ISLANDS CONFLICT

A. Solomon Islands' national legislation and international law

The Solomon Islands acceded to the Conventions and Protocols I and II by succession in July 1981, with retrospective effect to 7 July 1978, the date of independence. The retention of the laws of the United Kingdom, until other provision is made, resulted in the Solomon Islands inheriting the Geneva Conventions Act 1957 (UK) which implements the 1949 Conventions. While lack of implementation of international humanitarian law into national law is often cited as a barrier to its effectiveness, this is not the case in the Solomon Islands. To a large extent, the Constitution, Penal Code, and

---

[40] For example see Theodore Meron, " The Humanization of Humanitarian Law" (2000) 94 Am J Int'l L 239, 261. He points to the trend to blur the applicability of the Conventions regardless of the characterisation of the conflict. He notes the 1997 ICRC study on the rules of customary humanitarian law makes only a basic distinction between international and non-international armed conflicts, rather than adopting the approach of the Conventions and Protocols. He also notes that most military manuals do not distinguish between types of conflict

[41] *The Prosecutor v Dusko Tadic* (Decision of 2 October 1995 in case No IT-94-1-AR72) 35 ILM [1996] para 97.

legislation permitting extradition implement the Conventions and other international instruments protecting human rights.[42] The law makes specific references to international obligations, and the Interpretation Act provides for interpretation of legislation in a manner consistent with international obligations.

The Constitution recognises a state of war in Article 4 "Protection of Right to Life" by providing an exception to the right to not be deprived of life in clause (2)(d), "If he dies as the result of a lawful act of war." The Constitution provides for the Governor General to make a declaration of public emergency in Article 15(5), and Article 16(1) includes war as a period of public emergency. Article 15 (7) deems actions taken in a period of public emergency, that are "reasonably justified in the circumstances of any situation arising or existing during the period" not to be inconsistent with, or in contravention of, the rights contained in section 5, 6(2), 9, 11, 12, 13, 14, or 15 of the Constitution. These are the rights to:

- personal liberty,
- not to be required to perform forced labour,
- of privacy of home and other property,
- freedom of conscience and expression,
- freedom of assembly and association,
- freedom of movement, and
- freedom from discrimination.

These fundamental human rights are relevant to situations of internal conflict as they apply to situations of internal disturbances and tensions and in times of other internal armed conflicts. The Constitution reflects the rights contained in the Universal Declaration of Human Rights and the International Convenant of Civil and Political Rights (ICCPR) including the escape clause in Article 4 of the ICCPR which permits certain derogations from rights in times of public emergency. In addition, the protections in the Constitution reflect fundamental human rights, some of which are recognised to apply as jus cogens, that is, are so fundamental that they cannot be derogated from by state and can apply whether or not a state has ratified a treaty or conventions and/or implemented legislation. The international crime of genocide is recognised in Section 52 of the Penal Code.

The Solomon Islands signed the Rome Statute on 3 December 1998 but has as yet ratified it. At the time of writing the writer has been unable to ascertain the government's intentions to ratify or implement the Rome Statute.

B Characterisation of Conflict in the Solomon Islands

Several aspects of the conflict in the Solomon Islands reflect the difficulties in characterising an internal conflict as being of a particular kind. As there was no

[42] This statement is an assumption based on the retention of UK law until other provision is made, and provisions in the Constitution. It has not proved possible to access current versions of all the relevant legislation.

involvement of other states the conflict is clearly not an international one within the meaning of the 1949 Conventions. Nor would it be covered by Protocol I, as the Solomon Islands government is not a colonial one, nor is it an occupied country or a racist regime.

1 Armed conflict

The first threshold to be passed for the Conventions or Protocol II to apply is whether the conflict is an armed conflict. This requires there to be at least two opposing armed forces and the use of, or threat of, force or violence by at least one party to impose its will on the other.[43] In the Solomon Islands this point could be said to have been reached once the GRA established itself as an organised force and used force or the threat of force to achieve its goals. The GRA emerged after a series of non-violent demonstrations, then riots by ethnic Guale and actions by armed groups of ethnic Guale on the island of Guadalcanal. In 1998, the Guadalcanal militants were estimated to number 500, and by the joint UN Assessment Mission between 300 and 2000 in 1999.[44] They were reputedly armed with hunting rifles, stolen police guns, explosives, traditional weapons and home-made pipe guns.[45] While force was used by to evict ethnic Malaitian before the establishment of the GRA, the concept of armed conflict requires some degree of an organised or recognisable force with a goal contrary to that of the established order to distinguish it from ordinary criminal activity using force.

However, while the formation of the GRA seems to be a point at which the conflict could be called an armed conflict within the meaning of the Geneva Conventions, it is clearly open to debate. The language of the government in the various peace agreements and declarations of emergency a year later, refers to "organisations formed for the purposes of pushing the demands of the people of Guadalcanal" and "criminal activities" as opposed to the name adopted by the group. The earlier peace agreements were negotiated with elected representatives of the Guadalcanal population as a whole rather than the Guale militants. While the government gave no formal statement of its view of the situation, the language suggests a 'playing down' of the situation to one below that of an internal war. The early peace agreements use the words "recent tensions". However, the activities of the Guale forces, which are acknowledged in the same documents, were more cohesive and extensive than 'riots, isolated and sporadic acts of violence' suggest. The Guale force had directly and indirectly caused thousands of Malaitan citizens to leave the island by that stage and the government's armed force had lost control of most of the rural areas. While the definitions were intended to provide objective criteria, a government with an interest in appearing to have control of the situation can present a conflict as less than an internal armed conflict.

2 Parties to the conflict

---

[43] Richard Baxter "The Law of The Hague" " *International Dimensions of Humanitarian Law* (Henry Dunant Institute, Geneva, 1988), 93, 94.
[44] Report on the UN Joint Assessment Mission to the Solomon Islands, 29 June-3 July 1999, para 7.
[45] "Solomon Islands: A forgotten conflict", as above, p 3.

Before the establishment of the pro-Malaitan force, the armed police units and the IFM, and its predecessors, were the parties to the conflict. From the passing of the emergency regulations, ordinary police officers, who were not normally armed became entitled to be armed in addition to the two armed units. Armed police are within the meaning of the armed force of the state.

Unlike Article 3, for Protocol II to apply, one of the parties to the conflict must be the armed force of the state. While armed police were certainly involved, the extent and to what point in time, they functioned as an agent of the state, can be questioned Once the MEF emerged, the state's armed forces had no semblance of being a united force engaged in hostilities against the IFM. The lack of a united armed force at this stage of the conflict, may mean, the Protocol, if applicable before, became inapplicable. In earlier drafts, the ICRC envisaged the Protocol should still apply if the government had disappeared, or was too weak to intervene, but "it appeared to the Conference that this was merely a textbook example and the provision was dropped."[46]

Although the state was ostensibly still functioning, individual officers were openly siding with the IFM or Malaitan vigilante groups or ineffective. The police's lack of success in controlling the situation should not logically be a reason to discount the applicability of Protocol II. The Multinational Police Monitoring Group, present from October 1999 to June 2000, left after the coup on the basis they had no mandate to assist the police units who were then formally working with the MEF. However, from the period of the coup to the signing of the TPA, it could be argued that the armed forces of the state were again engaged in the hostilities with the IFM, given the paramilitary force, acted in conjunction with the MEF.[47] The view as to whether they were agents of the state may also depend on views of the legitimacy of the party in power to govern. Conversely, in the confused political scene, its quite possible that the paramilitary force began acting as an undisclosed agent of the government, the new Prime Minister gained his position due to the MEF and the paramilitaries' actions in forcing his predecessor's resignation.

A more objective approach to this question is to simply ask whether the police, as the armed force of the state, were involved in the conflict, using force against one or more other armed groups, note that they used state resources, continued to be paid and employed as officers rather than analyse the legitimacy of their actions. Such an approach would lead to the conclusion that it was a conflict between the armed forces of the state and other armed groups.

3 *Degree of intensity required for Protocol II to apply*

A major difficulty in deciding applicability of Protocol II is the degree of intensity required. If one was to accept that Protocol II only applied to only classical civil war

---

[46] Yves Sandoz & Others (ed), above, (1987) 1351.

[47] The MEF announced the operations as those of the joint force of MEF/paramilitary operation. See Australian Department of Foreign Affairs and Trade *Solomon Islands Country Brief*, (May 2001) 3. http://dfat.gov.au/geo/Solomon_Islands_brief.htm (last accessed 8 August 2001

situations, it would be hard to view this conflict as being within the definition. Guadalcanal, while the most populated and important politically and economically, is only one of nine provinces in the Solomon Islands with about 25% of the total population. The IFM's control over Guadalcanal was substantial in area and duration but if the whole populated area of the Solomons is considered, far less substantial. The civilian population could not be described as being widely divided, again as the conflict was confined to Guadalcanal, and even along ethnic lines, there was not widespread approval, support or identification with the militant groups. The numbers actively involved in the two ethnic armed forces probably numbered less than four thousand at the peak of the conflict. Neither the IFM nor the MEF stated that they aimed to overthrow the state government. The IFM grievances surrounded the position of Guale people on their home islands in relation to land and in relation to the economic and social position Malaitans have gained on their island. The MEF was formed to protect Malaitans from the IFM. At best the IFM wanted more control and autonomy on Guadalcanal, rather than aiming to overthrow the national government.

Analysing the conflict in terms of the actual and ordinary meaning of Article 1 can lead to quite a different result. The control over territory required is not specified in size or duration, but by the ability to carry out the listed functions, that is, sustained and concerted military operations and to implement the Protocol. "[S]everal proposals were made with a view to specifying the {type and size] of control but they were not adopted by the Conference. The word "such" provides the key to the interpretation."[48] The issue is then the degree of co-ordination, organisation and continuity of the military effort. The only clearly identified military objective was to remove Malaitan people from Guadalcanal. The IFM also 'defended' itself and other Guale citizens by attacking and killing Malaitan civilians and opposing combatants in reprisal attacks whenever they were attacked which contributed to the climate of fear; many Malaitan left through fear of attack, rather than being forcibly removed.

Malaitans fled Guadalcanal over a period of a year and a half. In that period, and in the months after the TPA was signed, there was no period in which IFM control lapsed to the extent that Malaitans stopped leaving or returned from Malaita or Honiara to their homes. Forty per cent of civilians in Guadalcanal were displaced, half to Malaita, and the rest within Guadalcanal.[49] Throughout the conflict, the militant groups set up roadblocks and were able to control the movement of people and services, including relief provided by the Red Cross.

In that time, police and later MEF, control was limited to the capital, Honiara; the only area outside IFM control was a small province, Marau, the only other Malaitan enclave on Guadalcanal. The IFM worked in small groups, visiting villages to round up Malaitans by gunpoint. The commentary to the Article 1 states " In practical terms...the

---

[48] Yves Sandoz & Others (ed) *Commentary on the Additional Protocols of 8 June* 1987 (Martinus Nijhoff Publishers, Geneva, 1987) 1352.

[49] "Experts Group Meeting on the Post Conflict Situation in the Solomon Islands."(19-20 October 2000) Session III, 2. <http://www.peoplefirst.net.sb/General/Reports/Experts_Group_2.htm> (last accessed 18 September 2001).

extent of territory they can claim to control will be that which escapes the control of the government forces."[50] There is no information as to the planning and organisation of the IFM activities, but, judged by results, the IFM effort was concerted and continuous.

4 *Responsible command*

The dissident forces also have to be under responsible command. According to the commentary on Protocol II this simply implies some degree of organisation, but not necessarily a hierarchical system of military organisation similar to regular armed forces, but in addition to planning and carrying out military operations, of imposing discipline.[51]

The IFM clearly had a command structure, four regional supreme commanders represented it at the TPA negotiations and others listed as chief spokesperson/negotiator, commanders and assistant commanders, who all signed the agreement as parties or witnesses. At one stage the Government treated the leader of the Guadalcanal Provincial Government, Premier Ezebiel Alebua as representing IFM interests.[52] However, Amnesty International reported that members of the IFM were generally unaware of the Honiara Peace Accord negotiated on their behalf by the Premier Alebua.[53] It may be that leadership was unclear at that stage, or simply that it was not prudent for the leaders to be identified publicly. If Premier Alebua was acting on behalf of the IFM, or any of its organised predecessors, the lack of awareness of the Honiara Accord suggests the leadership of the IFM was not sufficiently organised to ensure members were aware of its provisions. However, this fragment of information does not establish the case either way; there may have been a responsible command structure in existence at an earlier stage. The lack of information as to the internal workings of the IFM during the conflict, mean it is not possible to analyse the ability of the leadership to impose discipline on the members. After the TPA was signed, the leadership structure stayed in place, but ostensibly, the members or former members, were no longer under control, refusing in some instances to return weapons despite calls by leaders to do so.

5. *Ability to implement provisions*

The ability to implement the Protocol is a fundamental criterion The Protocol II definition includes "the ability to implement its provisions". It has been suggested that the armed forces must be able to carry out, among other things, the requirements of Protocol II, such as detaining prisoners and caring for the wounded and sick before Protocol II applies.[54] It is unlikely that either rebel group had sufficient resources of their own (given the lack of resources in the country as a whole) to care for their or the other parties' sick and wounded, or to detain prisoners in humane conditions for any length of

---

[50] Yves Sandoz & Others (ed), above, 1987) 1353.
[51] Yves Sandoz & Others (ed), above, 1987) 1352.
[52] Premier Alebua negotiated the Honiara Peace Accord on behalf of the IFM and Guale people.
[53] "Solomon Islands: A forgotten conflict", as above, 3.
[54] Robert Kogod Goldman "International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua" 2 Am U J Int'l L & Pol'y 539, 547 (1987) p59.

time. However, the armed forces made use of the public resources such as hospitals and clinics for the wounded. If they had the ability to take the sick and wounded to places where they could be cared for, that should be sufficient to meet part of the criteria if the actual circumstances and resources of the country as a whole are taken into account.

Civilians and militants were detained at various times, but not kept as prisoners except by the State. The fact that prisoners were not held for any length of time should not rule out the applicability of the Protocol II. If the ability to implement is interpreted to exclude situations where certain provisions of the Protocol II were not implemented, for example, by killing rather than imprisoning civilians and unarmed combatants, it would lead to the absurd situation of the Protocol being inapplicable to any situation where it was not applied. This definition suggests the rebel armed forces, should have sufficient infrastructure and resources and on the face of it, does not allow for the ability to implement to be applied relative to the conditions present in undeveloped and economically disadvantaged states.

5 *Special agreements*

Article 3 includes provision for the parties to an internal conflict to "bring into force, by means of special agreements, all or part of the provisions of the present Convention." Various parties to the conflict concluded four agreements prior to the cease-fire of September 2000. Given these agreements were intended to stop the conflict, it is not surprising they did not include provisions agreeing to abide by the Conventions in the event the conflict continued.

6. *Summary of applicability discussion*

Aspects of three of the four types of internal armed conflict can be seen during the Solomon Islands conflict. The earlier stages have the appearance of internal disturbances and tensions but determining when it progressed from one stage to the next is difficult. In addition, while an objective view of the conflict suggests Article 3 applied from the formations of the Guale armed groups until the signing of the TPA, the government response midway through the conflict, indicated by its statements, suggests a situation less than an armed conflict. During the period prior to the collapse of the armed police and the IFM's actions in forcibly relocating large numbers of Malaitans it has all the hallmarks of a Protocol II conflict, although its ability to implement the Protocol can be questioned due to the likely lack of resources, particularly in regards to holding of prisoners in humane conditions.

Amnesty International clearly took the view that humanitarian law as it applies to internal conflicts applied to this situation, referring to specific breaches of the provisions of Article 3 and provisions only applicable to Protocol II throughout its report.[55] This is the only substantial report on the conflict and has been used as a basis for the Australian

---

[55] "Solomon Islands: A forgotten conflict" (7 September 2000) *Amnesty International*, 9. <http://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last viewed 18 August 2001).

and United States human rights reports on the conflict.[56] However, the report makes no attempt to analyse the conflict in terms of the type of conflict or which provisions were applicable at various times.

B. *Protections Provided by Article 3 of the Geneva Conventions and by Additional Protocol II*

Article 3 provides for minimum humanitarian provisions for "armed conflicts that are not of an international character." It follows the general principles of the Conventions by providing protections to those taking no part in hostilities, the armed forces who have laid down their arms or are sick or wounded, and civilians. Acts prohibited under subsection (1) are:
(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 cruel punishment,
(d) the passing of sentences and the carrying out of executions without [proper trial].

Subsection (2) requires the wounded and sick to be collected and cared for.

Protocol II reaffirmed and expanded on the protections provided in Article 3. There are 14 articles giving general and specific guarantees to those not taking part in hostilities, children, civilians, medical and religious personnel, objects required by civilians for survival, and forced movement of civilians. Those not taking part in hostilities are entitled to respect and to be treated humanely without adverse distinction. Acts generally covered by Article 3 and specifically prohibited by Protocol II are:

(a) violence to life, health and physical or mental treatment such as torture, mutilation or any form of corporal punishment,
(b) collective punishments,
(c) taking of hostages,
(d) acts of terrorism,
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault,
(f) slavery, and the slave trade in all forms,
(g) pillage, and
(h) threats to commit any of the foregoing acts.[57]

Specific protections for children include care and aid as well as receiving an education, facilitating the reunion of families separated and removing children from areas where hostilities are taking part. Children under 15 are not to be recruited into the armed

---

[56] Australian Department of Foreign Affairs and Trade *Solomon Islands Country Brief*, (May 2001) 3. <http://dfat.gov.au/geo/Solomon_Islands_brief.htm > (last accessed 8 August 2001 and US Department of State, "Country Reports on Human Rights Practises – Solomon Islands" (2000). Available at <http://www.State.gov>.

[57] Protocol II Article 4 (2).

forces or allowed to take part, and if they do take part, they are to be afforded the same protections if captured as children who do not take part.[58] Particular protections for civilians include to be protected from the dangers arising from military operations and, in particular, not to be the object of attack or acts or threats of violence intended to spread terror.[59]

If Protocol II applies to the Solomon Islands conflict, the number and types of breaches by the various groups would be higher than under Article 3. Article 17 of the Protocol prohibits forced movement of civilians unless for their security or due to a military imperative. If displacements are necessary, all possible measures are to be taken to ensure their shelter, hygiene, health, safety and nutrition.[60] There is a general prohibition on compelling civilians to leave their own territory.[61] In terms of effect, the prohibition against the forced movement of civilians, only included by Protocol II, is the most significant.

The main activities of the GRA and the IFM were to force civilian Malaitans to leave Guadalcanal. It appears that the political objectives to resolve longstanding land issues and to improve the economic situation of the ethnic Guale people translated into the military objective of ridding the island of Malaitans. There was certainly no attempt to ensure that those fleeing the island to Malaita were received in satisfactory conditions.

The general requirement for humane treatment without adverse distinction in Article 3 would mean that lack of humane treatment targeted at ethnic Malaitans or ethnic Guadalcanal civilians, because of their ethnicity, would also prohibited under Article 3.

Amnesty International has documented many breaches of Article 3 and Protocol II protections by members of the police acting in their official capacity and as members of either of the armed military groups, as well as members of the two main factions, the MEF and the IFM. Their report, *Solomon Islands: A forgotten conflict*, was compiled after the two-person delegation, Dr. Heinz Schurmann-Zeggel from Amnesty International in London and Reverend Akuil Yabaki, from Citizens' Constitutional Watchdog, a Fiji-based NGO, investigated human rights abuses. They arrived in the Solomon Islands in September 1999.[62] The following examples are provided to establish that all parties to the conflict violated the provisions of Article 3 and Protocol II.

- Police acting in their official capacity, before and after the passing of the emergency regulations were implicated in the fatal shooting of non-combatants,[63]

---

[58] As above, Article 4(3).
[59] As above, Article 13.
[60] As above Article 17(1).
[61] As above, Article 17(2).
[62] Amnesty International media release, 8 September 1999. AI index ASA 43/01/99.
[63] "Solomon Islands: A forgotten conflict" (7 September 2000) *Amnesty International*, 9. <http.://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last viewed 18 August 2001) 9, The killing of Robert Rosal.

indiscriminately firing at villagers[64] and ill treatment of prisoners and suspected militant Guadalcanal youths.[65]

- The MEF was accused of threatening nursing staff at the hospital in Honiara and shooting two wounded members of the IFM in their beds[66] and shooting at civilian patients at a rural health clinic in Visale, killing a 16-year-old and an elderly man.[67] In April 2000 there was a report of masked MEF gunmen killing a civilian and injuring two others as they tried to flee the gunmen, and in June 2000, a report of indiscriminate shooting at civilian targets.[68]
- The GRA killed two civilians while in the process of forcing all ethnic Malaitans to leave an oil plantation settlement. One of the men was trying to protect his child in his arms; she was injured but survived the attack.[69]
- Torture, ill treatment and hostage taking of civilians and combatants were also reported. Some specific incidents were reputedly revenge for civilians harmed by the rival group.[70]
- Red Cross official and volunteers were intermittently prevented by the MEF from taking medical supplies and food to people in rural Guadalcanal.[71]

F The situation of police officers

Actions undertaken by police while employed by the State raise considerations additional to breaches of Article 3 and Protocol II. Abuses by police against general human rights provisions are enforceable against the State. In addition, for the purpose of promoting and protecting human rights, the UN General Assembly passed a resolution[72] establishing a code of conduct for law enforcement officials.[73] The resolution recommends the code of conduct be used within the framework of national legislation or practice as a body of principles for observance by law enforcement officials.[74] Officers of the Solomon Islands police force have received training locally and overseas on human rights standards and on the provisions in the code of conduct relating to the use of firearms and force.[75] The ICRC also conducted at least one seminar on international humanitarian law and the human rights law applicable to armed conflicts during the period of the conflict.[76]

---

[64] above, 10. Reports from women of Takamboro.
[65] above, 9.
[66] above, 12.
[67] above,12.
[68] above, 14.
[69] above, 13.
[70] above, 18
[71] above, 20.
[72] UN General Assembly Resolution 34/169 adopted 17 December, 1979.
[73] Code of Conduct for Law Enforcement Officials (1980) 19 ILM 526.
[74] "Solomon Islands: A forgotten conflict", above, 2.
[75] "Solomon Islands A forgotten conflict", above, 7.
[76] "Solomon Islands A forgotten conflict" above, 7.

V AMNESTY FROM PROSECUTIONS FOR BREACHES OF HUMANITARIAN LAW IN INTERNAL CONFLICTS

A Background

Despite the two militant groups and the police force committing a whole range of humanitarian and human rights abuses that breached Article 3 and Protocol II, the TPA gave all involved in the conflict an amnesty. This included amnesty for all involved from criminal prosecutions and civil suit in exchange for surrendering firearms and returning stolen property. Police and paramilitary police were permitted to continue their employment.

Amnesty International called the passing of the Amnesty Act in the Solomon Islands "a black day for human rights"[77]. [78]

> Impunity for torture, rape and killing of civilians, including children, is an outrage and contributes nothing to peace or reconciliation. Sweeping amnesties have not bought peace in other conflicts and are likely to cast a deep shadow on the future of human rights in the Solomon Islands.

And reported in the Solomon Islands:[79]

> A blanket amnesty for virtually all crimes and human rights abuses committed during the two-year ethnic war may encourage future political torturers and killers to expect to get away with atrocities. Mr Asipara, press secretary to the Prime Minister said Amnesty [International] should understand that the Peace Agreement was negotiated from a Melanesian stand point of conflict resolution where compensation is paid to pave way for pardon and forgiveness.

Amnesties for perpetuators of human rights abuses have been a feature of many peace agreements over recent years and show no signs of declining. Amnesties have been called the price for peace when granted in exchange for the ending of hostilities. If they provide peace and prevent further abuses, an amnesty may be better bargain for victims, present and potential, than prosecution and punishment, which in terms of prevention, can only work as a deterrent. While only time, and to an extent speculation, can determine the utility of the Solomon Islands amnesty, on the face of it and with the benefit of some experience of events subsequent to the TPA, it appears to be insufficient achieve its goals past the immediate one of halting hostilities. However, the amnesty was the most contentious part of the peace agreement, and without it there would have been

---

[77] "Amnesty – Asipara" (22 December 2000) Solomon Islands Broadcasting Corporation, Headline News <http://www.commerce.gov.sb/Others/sibc_news_Dec2000.htm#fri 22> (last accessed 29 September 2001).

[78] "Black Day of Human Rights" Amnesty International Press Release (19 December 2000). Available at <http://web.amnesty.org> (last accessed 22 August 2001).

[79] "Amnesty – Asipara", above.

little incentive for the militants to cease hostilities. Had the conflict continued, there would have been no immediate prospect of the state regaining sufficient control of the police, or of the courts becoming effective to prevent further crimes and breaches of humanitarian law.[80] Although the Solomon Islands government received assistance from other states under the auspices of the Commonwealth, it was very unlikely that any assistance would have extended to providing armed forces to quell the militants and restore law and order to the Solomon Islands.

Although the incidences of national and international criminal prosecutions resulting from actions in internal conflicts are on the increase, there is still no clear obligation on states to prosecute breaches in these conflicts. Without evidence of compliance, too few prosecutions and the prevalence of amnesties, humanitarian law appears to provide not much more than the utility of words to criticise those that breach it in internal wars, and give some additional legitimacy to the provision of humanitarian relief by neutral agencies

B Applications of amnesties

The term 'amnesty' refers to a state granting of immunity from criminal prosecution to people for offences committed. In this particular context, immunity includes prosecution for breaches of humanitarian law, whether contained in a state's criminal legislation or specific legislation designed to implement the conventions.

Amnesties can be considered from several viewpoints, whether they comply with a state's international obligations, compliance with its own laws and in terms of utility. The immediate purpose is usually to stop hostilities in order to prevent further abuses. Other purposes can be to provide an alternative form of justice to prosecution with a focus on the rights of the victim, and to promote reconciliation within the state.

Amnesties have been widely used as a tool to end hostilities in armed conflicts. In recent years amnesties have been granted in Papua New Guinea[81], Argentina, Chile, Guatemala[82], Uruguay, Mozambique,[83] Uganda, Zimbabwe, Republic of Congo,[84] El

---

[80] "The police and prison service had disintegrated and the judiciary was completely dysfunctional, the magistrates had all left and the Director of Public Prosecutions was living in fear." Experts Group Meeting on the Post Conflict Situation in the Solomon Islands". Session III, 4. <http://www.peoplefirst.net.sb/General/Reports/Experts_Group_2.htm >(last accessed 18 September 2001).

[81] Lincoln Agreement on Peace, Security and Development of Bougainville (1998) Clause 10 "Amnesty and Pardon".<http://www.dfat.gov.au/geo/png/bougainville/png_lincoln.htm> (last viewed 10 September 2001).

[82] Douglass Cassel "Accountability For International Crime And Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities" (1996) 59 Law & Contemp. Probs. 197, 222.

[83] US Department of State, "Country Reports on Human Rights Practises – Mozambique" (1992). Available at http://www.State.gov>.

[84] US Department of State, "Country Reports on Human Rights Practices – Republic of Congo" (1999). Available at http://www.State.gov>.

Salvador, Haiti,[85] South Africa[86] and Sierra Leone.[87] Amnesties have been granted in a variety of circumstances and come in a variety of forms. In most cases amnesties are seen as a necessity, rather than a mechanism to allow deserving combatants relief from prosecution. However, amnesties are not always a complete escape from justice; some require the perpetuators of abuse to atone for their crimes and allow victims to receive some form of compensation for their losses.

The Lome Accord negotiated at the end of eight years of civil war in Sierra Leone provided a complete amnesty for perpetuators of prolonged and systematic abuse of civilians. The Revolutionary Front of Sierra Leone (RUF) is known to have amputated limbs and mutilated civilians in a horrific campaign called "Operation No Living Thing". Rape of women and girls as well as abduction of children to join their forces was also widespread. While the Lome Accord peace agreement set up a Human Rights Commission and a Truth and Reconciliation Commission to investigate abuses and facilitate healing and reconciliation, the amnesty was granted without any requirement for the former combatants to participate in either of those processes.[88]

This can be contrasted with the amnesty granted in South Africa by the first democratically elected government after the end of apartheid in 1995. Individuals had to apply for an amnesty and would only be granted it if they fully disclosed the facts of their apartheid crimes.[89]

In Guatemala the amnesty negotiated in 1996 excluded genocide, torture, forced disappearances as well as any crimes for which amnesty is prohibited under its domestic law or international law.[90] Under the American Convention on Human Rights, which applies to Guatemala, this has been interpreted to apply to serious violations of human rights.[91]

The amnesty in the Solomon Islands provides for individual amnesties which are conditional on combatants, the police and their civilian advisors returning stolen weapons and property[92] by a set date.[93] There is no restriction on the type of crimes for which

---

[85] Michael P. Scharf " The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 Cornell Int'l L.J. 507,510.

[86] The South African Parliament created a Truth and Reconciliation Commission in 1995 that made amnesties available to individuals who applied and fully disclosed facts of their apartheid crimes.

[87] Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone July 7, 1999 ("The Lome Accord").

[88] See Karen Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 T. Jefferson L. Rev. 149,

[89] Michael P. Scharf " The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 Cornell Int'l L.J. 507,509.

[90] Douglass Cassel "Accountability For International Crime And Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities" (1996) 59 Law & Contemp. Probs. 197, 222.

[91] Douglass Cassel, as above, 223.

[92] Amnesty Act 2000 (S.I.) s 3.

[93] The date was set was 15 November 2000 in the TPA but at time of writing was extended to 30 September 2001.

LAW LIBRARY
VICTORIA UNIVERSITY OF WELLINGTON

amnesty is given. The amnesty for the IFM is for any acts "in connection or in association with the forceful eviction for the Province in Guadalcanal of certain persons".[94] The amnesty for MEF members is for acts "in retaliation against the forceful eviction of Malaitans from Guadalcanal."[95]

While the TPA provides for reconciliation by "face to face" dialogue, there is no requirement for those seeking amnesty to participate in the process. The wording is permissive, that is, "In order for reconciliation to be meaningful various parties to the conflict shall be allowed to involve themselves in face to face dialogue – at community, village, family, individual and organisational levels."[96]

C Compliance with Geneva Conventions

States are clearly obliged to prosecute and assist other states to prosecute grave breaches of the Conventions. An amnesty from prosecution given in the context of an international conflict would therefore be a breach of the Conventions. However, the same cannot be said for violations of Article 3 and Protocol II, which make no reference to a state's obligations in regard to prosecution.

Quite surprisingly, given the tenor of the Conventions as a whole, Protocol II arguably encourages states not to prosecute when the war is internal. Article 6 of Protocol II provides rules relating to trials and penalties for criminal offences related to armed conflicts and states: [97]

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those who have been deprived of their liberty for reasons related to the conflict, whether they are interned or detained.

There is some debate as to the meaning of this clause. One view is that the intention was only to encourage amnesties in line with "combatant immunity", that is actions taken by combatants that are lawful in war, such as killing an adversary combatant. The other view is that it refers to any actions during the conflict, including breaches of the Conventions and Protocol II.

Karen Gallagher[98] discusses the lack of the obligation to prosecute in internal conflicts and Article 6(5) of Protocol II. Her view is that the intention was to leave a broad discretion to states to grant amnesties, and supports this by reference to the Plenary Meeting Notes for Protocol II and the rejection of proposals to limit the amnesty provision.[99] The ICRC has put forward the opinion that the Article only refers to

---

[94] Amnesty Act 2000 (S.I.) s3 (2) (a).
[95] above s 3(2) (b).
[96] TPA, Part 5, (1) (a).
[97] Protocol II Article 6 para 5.
[98] "No Justice, No Peace: The Legalities and Realties of the Amnesty in Sierra Leone"(2000) 23 T. Jefferson L. Rev. 149,162.
[99] above, 162.

combatant immunity. Its argument is that the amnesty provision was only required in relation to non-international conflicts, because the Conventions require combatants in international conflicts to be repatriated at the end of hostilities, whereas in internal conflicts combatants can be prosecuted for crimes which would not be breaches of humanitarian law. This view was communicated to the Prosecutor of the ICTY.[100] Both of the above refer to an attempt by the Soviet delegation at the Diplomatic Conference in 1977 to limit the amnesty provision to exclude those guilty of crimes against humanity[101] from the amnesty provisions and provide for states to make rules for their punishment.[102] The defeat of the Soviet proposal to limit the provision to exclude crimes against humanity, which by definition widespread or systematic attacks, and the most serious type of violation, must have more weight than a statement of a point of view.

The combatant-only theory is better supported by reference to other articles and the principles of the Conventions and Protocols. There is a clear contradiction in prohibiting the listed acts in Article 4(2) of Protocol II "at any time and in any place", obliging states to repress all breaches of the Conventions, and then encouraging the state to give amnesties to those that ignore the prohibitions. If the provision was intended to be all encompassing there would be a conflict within the provisions in the event that parties to internal conflicts did make an agreement to bring all of the Geneva Conventions into effect as encouraged in Article 3. However, despite the seeming lack of logic in prohibiting acts and then encouraging states not to punish the violators, the plain meaning of words "broadest possible", do not indicate an intention to limit amnesties. There seems to be no reason for not using words such as "lawful acts of war" if that was the intention. The lack of an explicit obligation to prosecute breaches in internal conflicts can also be viewed as supportive of the legality of blanket amnesties

The South African Constitutional Court interpreted Article 6(5) to impose a requirement to grant amnesties. It upheld the constitutionality of the Truth and Reconciliation Commission's ability to grant amnesty after individual petition, disclosure, and investigation of the acts for which amnesty is requested.[103] The petitioners had argued, inter alia, that the grave breach provisions of the 1949 Geneva Conventions prohibited amnesty. The Court rejected the argument on the position of international law in South Africa's constitutional scheme being that international instruments were not part of the municipal law unless enacted[104] and, although the court doubted that Protocol II applied, it said "[P]rotocol II actually requires the authorities n power, after the end of hostilities, to grant amnesty to those previously engaged in the conflict. [105]

---

[100] Cited in Douglass Cassel "Accountability For International Crime And Serious Violations Of Fundamental Human Rights: Lessons From The Americas: Guidelines For International Response To Amnesties For Atrocities"(1996) 59 Law & Contemp. Prob 197, 218. However, the IRCR interpretation is apparently ambiguous in that it does not take the view that humanitarian law absolutely excludes amnesties. See Cassel , fn 128.

[101] The Rome Statute in Article 7 defines crimes against humanity as acts (as listed) committed as part of a widespread or systematic attack against any civilian population, with knowledge of the attack.

[102] Gallagher, above, 162.

[103] Azanian Peoples Org. (AZAPO) v. President of the Republic of S. Africa [1996] (4) SALR 671 (CC).

[104] *AZAPO*, above, para 26.

[105] *AZAPO*, above, para 29.

Other domestic courts have taken this view.[106] While such decisions are open to criticism, the ICRC view that it applies and was only intended to apply, to combatant immunity seems to lack a solid foundation. Article 6(5) may well have to be considered by the ICC should a prosecution be taken for an offence that is only an offence by virtue of Article 3 or Protocol II.

D Compliance with customary international law

Customary international law is sourced from the rules states follow out of a sense of legal obligation and their actual practice.[107] State practice can include treaties, legislation, policy statements and possibly, resolutions of the UN general assembly intended to be binding and adopted without objections from a significant group of states. Once a rule is accepted as customary law it is binding on all states unless they have consistently objected to it. Crimes against humanity are a creature of customary law.[108]

The actual practice of states does not support the contention that breaches of humanitarian law in internal conflicts should be prosecuted or that states should not grant amnesties. As already stated, many states have resolved internal conflicts by the granting of an amnesty and there are no signs that the practice is slowing despite protestations of human rights organisations. Prosecutions are the exception rather than the rule.[109]

The UN has passed several resolutions on amnesties. However, while they have been generally supportive of prosecutions, none can be viewed as evidence of customary international law as they were not accepted with overwhelming support and are advisory rather than mandatory in nature.[110] A recent Security Council resolution, Resolution 1325 on Women, Peace and Security, implicitly recognises the difficulties in outlawing amnesties by the use of the words "where feasible". Clause 11 reads:[111]

> Emphasises the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes, where feasible, from amnesty provisions.

The UN has on several occasions endorsed peace agreements where an amnesty has been a feature. It has also rejected the amnesty for serious violations of international

---

[106] See Naomi Roht-Arriaza, "Combating Impunity: Some Thoughts On The Way Forward" (1996) 93 AUT Law & Contemp Probs 93, 97.
[107] Restatement Third of Foreign Relations Law of the United States 102 (2) (1987).
[108] Michael P. Scharf "The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 Cornell Int'l L.J. 507,518.
[109] See Karen Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 T. Jefferson L. Rev. 149, 154. And for examples of prosecutions resulting from internal conflicts Thomas Graditzky "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts." (1998) 322 IRRC 29, 38.
[110] Karen Gallagher, above, 154.
[111] S/RES/1325 (2000) 40 ILM 2, 500.

humanitarian law in the case of Sierra Leone. Before signing the Lome Peace Agreement, the Special Representative of the Secretary–General, added a reservation: [112]

> The United Nations interprets the amnesty that the amnesty and pardon in article nine of this of the agreement shall not apply to the international crimes of genocide, crimes against humanity, war crimes and serious violations of international law.

Subsequently the Security Council has adopted a resolution requesting the Secretary General create a special court by negotiation with the government of Sierra Leone to bring accountability for the serious crimes committed in Sierra Leone.[113] This resolution may well have not arisen but for hostilities resuming and the ineffectiveness of the truth and reconciliation process provided for in the Lome Accord.

E Human rights, compensation and customary law in the Solomon Islands

The legalities of amnesties can be questioned in the broader context of human rights that apply whether or not there is a situation of armed conflict. Rights such as the right to life, the prohibition on torture and inhuman and degrading treatment are considered so fundamental that they apply in all situations[114]and cannot be derogated from. By implication, there is an argument that states can never legitimately declare national amnesties for violations of these rights. [115]

Although these treaties do not expressly require states to prosecute violators, they do obligate states to "ensure" the rights enumerated therein. There is growing recognition that the duty to ensure rights implies a duty to hold specific violators accountable and provide redress for victims.

The United Nations Human Rights Committee has held that amnesties are generally incompatible with states' obligations under Article 7 of the International Covenant on Civil and Political Rights (ICCPR).[116] The Universal Declaration on Human Rights in Article 8 provides that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law."

The Solomon Islands Constitution embodies internationally recognised fundamental human rights. The Honiara Peace Accord, one of the three agreements that failed to stop the conflict, recorded, "In the case of those that committed particular offences the process of law will take its course, there being no constitutional provision

---

[112] The reservation was added so close to signing that it does not appear in early copies of the Lome Accord. Human Rights Watch, " The Sierra Leone Amnesty Under International Law" Human Rights Watch (1999), available at http://www.hrw.org/campaigns/sierra/int-law2.htm.
[113] UN Security Council Resolution 1315 (2000) 40 ILM 248.
[114] ICCPR, Articles 6 and 7 in combination with Article 4.
[115] Kristin Henrard "The Viability of National Amnesties In View of The Increasing Recognition of Individual Criminal Responsibility at International Law"(1999) 8 MSU-DCL J. Int'L 595, 615.
[116] United Nations Human Rights Committee, General Comment No 20.

for amnesty."[117] The perceived problem was ostensibly overcome by amending the Constitution[118] to remove the power of the Director of Prosecutions to prosecute those who have been granted an amnesty.[119] The amending act also states that members of the Solomon Islands police force and prison services would not be subject to discipline for actions carried out in connection with security operations between 5 June and 15 October 2000.[120]

The amendment does not refer to the issue of compensation for victims of breaches of fundamental rights nor has legislation yet been passed to cover civil immunity for those given an amnesty as recorded in the TPA.[121] The Constitution provides for compensation to be paid if rights have been contravened by way of application to the High Court, which determines the amount of compensation payable.[122] The TPA provides for compensation to be provided for loss of life on a customary basis. However, the provision is only permissive, rather than obligatory, "Customary means may be agreed between concerned persons and communities in connection with killings of persons during the course of the crisis."[123]

Assuming the TPA is fully implemented, victims have no right as such to compensation or any other effective remedy as required by Article 8 of the Universal Declaration of Human Rights. The government has agreed to make all efforts to secure assistance from its development partners to pay compensation for damage to or loss of property including businesses, employment and investments.[124] It has accepted claims for loss of lives and abuses, but this process has been ongoing and is not a directly related to the TPA or the conflict. Earlier pay-outs to the Guale as compensation for killings since independence and other payments to Malaitan parents who claimed their children were raped at boarding school on Guadalcanal led to a precedent of SI $100,000[125] a life for deaths during the conflict. Compensation was paid for people killed in the pre-conflict period, even though those responsible had been prosecuted.[126] There are many other instances of the government paying on "kastom"[127] basis due to the location of government in Honiara, including to Malaitans.[128]

---

[117] The Honiara Peace Accord (6) (i) < http://www.commerce.gov.sb/ministries/Beneath_Guadalcanal_3.htm> (last accessed 9 September 2001).
[118] Constitution (Amendment) Act 2001 (SI).
[119] above, s 2.
[120] above, s 3.
[121] Information gained from several informal sources.
[122] The Constitution of the Solomon Islands, Art 17.
[123] Loss of Lives and Property [1] (b).
[124] as above, [2].
[125] This equates to $18,540 USD or $45,756 NZD using exchange rate on 27 September 2001.
[126] This information is from Bob Pollard of the Civil Society Peace Office in Solomon Islands. Email retained by author dated 24 September 2001.
[127] Kastom is the Pidgin English word for customary.
[128] See generally David Akin "Compensation and the Melanesian State: Why the Kwaio Keep Claiming" (1999) 11 Contemporary Pacific Journal 35. The article is specifically about Kwaio people, indigenous to Malaita but includes some reference to more recent claims based on events in Honiara or Guadalcanal.

As part of the cease-fire agreement made prior to the TPA, the parties agreed to stop making claims on the government for compensation and there have been statements made by the government since then to the effect that there will be no more compensation claims accepted. While the issue of compensation and reconciliation on a customary basis is beyond the scope of this paper, not all claims that have been accepted by the government have been paid out due to lack of funds. Compensation payments continue to be controversial. There are media reports of money for compensation going missing from the government coffers and inadequate investigation for claims made for losses, and compensation payments have been blamed for the government having no funds to pay salaries to public servants. From the information available, there have been several incidents since the TPA where individuals have made compensation claims at gunpoint to the government and individuals but no substantial payments have been made by individuals to victims.[129]

While customary law has been preserved by the Constitution, it is only to the extent that no other provision is made by Parliament.[130] In *R v Loumi and others* [1984] SILR 51, the Court of Appeal rejected the argument that the customary "payback" amounted to a legal duty to kill, and therefore the charge of murder should be reduced to manslaughter on the basis it was inconsistent with the right to life embedded in the Constitution. The concept of retaliation or paying back is certainly not unique to Melanesian culture. However, such customary means of justice appear to have more legitimacy than they have in more developed countries. In the Solomon Islands customary law is still the most relevant law.[131]

Although victims may receive compensation through the government, and some may share the view that the government is an adversary and can be blamed for losses, the process seems to be well short of being an effective remedy. Those who committed human rights abuses have the same access to compensation as those that took no part in the hostilities or acted lawfully, and as previously stated, there is no nexus with the right to compensation and breaches of humanitarian law during the conflict. Victims' families are not entitled to receive information about what happened to family members who were lost or have an apology or other form of reconciliation with the perpetuators. While there have been some public displays of reconciliation and forgiveness, not all former combatants have participated in these[132] and there has not been a formal or public investigation into events during the conflict. To date the Amnesty International investigation, completed part way through the conflict, is the only report detailing events and recording statements of witnesses.[133]

On the face of it, the process outlined in the TPA does not provide victims with an acceptable level of justice. It is contrary to internationally accepted fundamental rights and the Solomon Islands Constitution that guarantees the same rights.

---

[129] Bob Pollard, above.
[130] The Solomon Islands Constitution, Article 76.
[131] The Law Reform Commission *Annual Report 1996* (Honiara, 1996) 10.
[132] Bob Pollard, above.
[133] "Solomon Islands: A forgotten conflict" Amnesty International (7 September 2000) <http://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last accessed 18 August 2001).

F Utility of amnesties

Regardless of the legalities of the Solomon Islands amnesty, it could be justified on moral grounds if it was effective in stopping the conflict and preventing further human rights abuses. However, there is a view, supported by some experience, that amnesties encourage further abuses. A study by Louis Joint, Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities concluded that unresolved human rights abuses can lead to contempt for the law and further abuses.[134] Fact-finding missions in Chile and Uruguay indicated that amnesties and lack of prosecution contributed to increases in human rights abuses.[135] In Sierra Leone, abuses by the RUF continued after the signing of the Lome Accord. However, there was a substantial reduction in abuses in the first year after the signing of the accord.[136] The leader of the RUF was arrested after taking UN peacekeepers hostage and killing civilian protesters in May 2000; the amnesty only related to events up to the signing of the accord.[137]

The amnesty granted following the election of the first democratically government in South Africa received mixed reviews. It, however, can not be compared to amnesties such as the one in Sierra Leone and the Solomon Islands. In South Africa the Truth and Reconciliation Commission functioned as intended and people who may have been convicted of serious crimes but for the amnesty participated in the processes of the Commission. In all the circumstances of South Africa it is reasonable to take the view that the amnesty and its associated processes probably reduced potential harm, rather than increasing the likelihood of further human rights abuses. Mozambique, which granted an amnesty to combatants after 16 years of civil war, is an example of peace, eventually, following such a settlement.[138]

It is too early to say whether the amnesty in the Solomon Islands will achieve its purpose, although the signing of the TPA has been more effective, in at least pausing hostilities, than the earlier negotiated peace agreements. The terms of the amnesty as far as requirements on combatants are minimal. The only requirements for amnesty are to return stolen property and relinquish arms to the International Peace Monitoring Team by the set date. There is a recommendation that the date be extended to 30 September 2001, some 10 months later than the original date set of 15 November 2000. However, a breakout of further violence, including the killing of an IFM commander by the MEF in September 2001[139], has resulted in a suspension of the second review of the TPA process.

---

[134] Report to the General Assembly UN Doc. E/CN.4/Sub2/1997/20.

[135] See Douglass Cassel "Accountability For International Crime And Serious Violations Of Fundamental Human Rights: Lessons From The Americas: Guidelines For International Response To Amnesties For Atrocities"(1996) 59 Law & Contemp. Prob 197,215.

[136] Karen Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 T. Jefferson L Rev 149,162.

[137] Karen Gallagher, as above, 157.

[138] Karen Gallagher, as above, 167.

[139] " Police Hunt Killers" (24 September 2000) *SIBC Headline News*. <http://commerce.gov.sb/Others/sibc_news_September2001.htm>(last accessed 2 October 2001).

The report on compliance with the terms of the TPA by the Peace Monitoring Council, completed in July 2001, estimate there are 500 high powered weapons, out of an estimated 1500, that have not been returned.[140] The guns have been used to threaten and at least on one occasion, kill. No one has been arrested for actions during the conflict because they have failed to obtain an amnesty or failed to comply with its terms.[141] Reportedly some combatants are keeping weapons for protection, fearing revenge for actions taken during the conflict, some do not believe the conflict is over and others that a scheme may be introduced whereby the weapons will be purchased from them.[142]

Combatants have been paid for work connected with other aspects of the TPA; for example, former militant commanders were paid by the government for a period of time to collect weapons. The report states that when funds stopped flowing so did collection activities as well as information about the location of weapons, something the militant leaders undertook to provide in the TPA.[143] The payments coupled with individuals who committed breaches only being required to return stolen property and weapons must contribute to a sense of impunity. The combatants who, for example, threatened nursing staff and shot two hospitalised combatants in a hospital ward[144] and beat an 80-year-old civilian without provocation[145] have been treated no differently than those who acted humanely. This view is admittedly one from the outside, but is based on a belief in some universal similarities in human nature.

Compounded with this lack of distinction between types of actions taken in the conflict, there are no indications that non-compliance, with even these basic terms, may lead to prosecutions. No actions have been taken against those who have not returned weapons used for offences during the conflict; the amnesty has clearly not worked as a sufficient incentive for those holding a third of the weapons.

The media reports on the Solomon Islands show the tensions are not over, but the incidents involving firearms have been relatively isolated and the situation over the last year has been more settled than it was during the conflict. Former MEF militants have used guns outside the Prime Minister's Office to demand compensation payments they believed were due to them from the government.[146] This incident revealed an interesting side to the post-conflict situation, partial respect for process by other MEF militants (also armed in defiance of the TPA). They arrested the two men and delivered them to the police station. One assumes the 'arresting' MEF militants were not prosecuted. In

---

[140] Peace Monitoring Council *TPA: Compliance by the Parties* (13 July 2001) 22. Copy held by author.
[141] However, there have been some arrests for illegal possession of weapons. The PMC reports that the treatment of those still in possession of weapons is erratic and inconsistent, with some cases clearly being ignored. Peace Monitoring Council, above, 21.
[142] Peace Monitoring Council, above, 23.
[143] Peace Monitoring Council, above, 22.
[144] "Solomon Islands: A forgotten conflict" Amnesty International (7 September 2000) 12. <http.://www.web.amnesty.org/ai.nsi/index/ASA430052000> (last viewed 18 August 2001).
[145] "Solomon Islands: A forgotten conflict" above, 17.
[146] "Threats Continue" *SIBC* Headline News (7 September 2001) <http://commerce.gov.sb/Others/sibc_news_September2001.htm>(last accessed 10 September 2001).

another incident an armed militant interrupted a government meeting demanding a cheque be given to him, but was persuaded to leave without shots being fired by an explanation of the government's financial situation. Most weeks over the last year have reports of threats, arsons and general lawlessness linked with former militants. More serious incidents include the ambush and shooting of Ezekiel Alebua, Premier of the Guadalcanal Provincial Government on 1 June 2001. Six to 12 masked men in military attire ambushed his vehicle and fired several shots. Premier Alebua survived the attack.[147]

One of the more ominous signs has been the slaying and mutilation of an IFM Commander on 27 September by a special constable.[148] The arrested man was released a few days later, the only explanation given by the prison service being that it was for his safety.[149] Despite the assurances and attempts to play down the latest killing as unconnected with the conflict, the peace agreement appears to be unravelling.

G Necessity of amnesty

The Solomon Islands amnesty has the hallmarks of an agreement where the militants set the terms and the third party, the government, had very little bargaining power. A New Zealand official who observed the negotiations in Townsville in the latter days said the negotiation process appeared to be between the two militant groups rather than one where the government was also a party.[150] This raises question of the degree to which there was any real choice as to its terms. The justice system had disintegrated and the police force no longer had an identity distinct from the militants. While there was assistance from New Zealand and Australian governments during the peace negotiations, this was limited to the provision of neutral facilities to conduct the negotiations. The former Prime Minister, Mr Ulufa'alu, has a more cynical view, "[D]eposed Prime Minister Ulufa'alu rails against what he calls "an old-style criminal mafia whose members, he claims, "designed this ethnic tension, were rewarded with government, and are now millionaires."[151]

Amnesties that are granted as a result of the government being powerless to effect any alternative, or self-amnesties, those granted by the same people who will benefit from them, are the least likely to provide an effective alternative to prosecution. In the first case, which may well be true of the Solomon Islands', the government, independently of the goodwill of the combatants, will probably also be powerless to enforce any provisions that limit the breadth of the amnesty. Self-amnesties are the class of amnesty naturally viewed as the most repugnant to justice.

---

[147] "Broken Nation: With a peace deal in tatters, the Solomon Islands remains divided, its economy shattered and its people held to ransom by lawless gunmen" Time International (20 August 2001).
[148] "Police in Solomon Islands arrest man over IFM Commander killing" World News From Radio Australia (27 September 2001). Available at http://www.abc.net.au. (last accessed 2 October 2001).
[149] "Prisoner Released" *SIBC* Headline News (2 October 2001) <http://commerce.gov.sb/Others/sibc_news_October2001.htm>(last accessed 2 October 2001).
[150] Conversation with author (25 September 2001).
[151] "Broken Nation: With a peace deal in tatters, the Solomon Islands remains divided, its economy shattered and its people held to ransom by lawless gunmen" *Time International* (20 August 2001).

H Rome Statute

Questions have been raised during[152] and after the formulation of the Rome Statute as to how a prosecutor acting for the ICC would respond to an amnesty given by a state.[153] The preamble to the Rome Statute includes the following as the purpose of the ICC: "Affirms the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured." Once a crime qualifies as "most serious" and "of concern to the international community as a whole" it is clear that the intention is for prosecution and punishment to be effected. An amnesty from prosecution is not listed as a defence in the Rome Statute; it contains no reference to amnesties. However, there are means by which amnesties can be considered.

Prosecutions must be preceded by an investigation by the Prosecutor for the ICC. Investigations can be initiated in one of three ways; by referral for a State that is party to the Rome Statute, by referral from the Security Council or by the Prosecutor's own initiative.[154] None of the methods require consent of a state party on whose territory the crime occurred or the State of which the individual to be investigated is a national. Consent is only required from a State which is not a party to the treaty.[155] Therefore, once a State is a party to the treaty it no longer has the power to prevent a prosecution of its nationals who commit crimes within the territory.[156]

However, if a matter is referred for investigation, the investigation or prosecution can be halted by a resolution of the Security Council or by way of the Prosecutor's discretion. A resolution of the Security Council to prevent an investigation or prosecution should be made in conformity with the principle and provisions of the United Nations Charter,[157]

> [N]amely: (1) where the Security Council has determined the existence of a threat to the peace, a breach of the peace, or an act of aggression under Article 39 of the Charter;
>
> (2) Where the resolution requesting the court's deferral is consistent with purposes of and principals of the United Nations maintaining peace and security, resolving threatening situations in conformity with the principles of justice and international law, and

---

[152] The United States presented a paper at the preparatory conference for the establishment of the ICC advocating the Court should take into account amnesties when deciding whether to prosecute. See Michael P. Scharf " The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 Cornell Int'l L.J. 507, 508 and fn 7.

[153] See Dr Kristen Henrard "The Viability of National Amnesties in View of the Increasing Recognition of Individual responsibility At International Law" (1999) 8 MSU-DCL J Int'l L 595; Michael Scharf "The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 Cornell J Int'l L 507; Charles Villa-Vicencio "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet" (2000) 49 Emory L J 205.

[154] Rome Statute, Article 13.

[155] Article 12 (3).

[156] Article 126 (3) prohibits reservations.

[157] Michael P Scharf " The Amnesty Exception to the Jurisdiction of the International Criminal Court" (1999) 32 Cornell Int'l L J 507, 523.

promoting respect for human rights and freedoms under Article 24 of the UN Charter.

Michael Scharf suggests the factors listed below be considered when determining whether an amnesty should be recognised:[158]

- the existence of an international obligation to prosecute
- the necessity of the amnesty to end a conflict
- the existence of a mechanism to attribute individual responsibility and discover the truth about victims
- provision of reparation or compensation to victims
- provisions to ensure breaches of humanitarian law and human rights abuses do not reoccur
- any steps that have been taken to punish the guilty with non-criminal sanctions.

A prosecutor could also consider the above factors when exercising his or her discretion. The prosecutor's discretion, after investigation to not prosecute, is "if prosecution is not in the interests of justice, taking into account all of the circumstances".[159]

A state could also ask for any case to be dismissed on the basis it was investigating or prosecuting the same offence.[160] If, for example a State had set up a truth commission as South Africa did, its grounds for requesting an investigation be halted would the effectiveness of its truth commission as an investigation into crimes. The Rome Statute does not limit such a request only to situations where there is or will be a prosecution.

The consequence of these provisions could bolster the power of states when faced with negotiating an amnesty to end an internal conflict. If the decision to prosecute is not exclusively within the power of that State and there is a perception that other states, the Security Council or the Prosecutor may decide to take action and disregard an amnesty, the ICC could act as a powerful incentive to negotiate an amnesty that is acceptable to the international community and in accordance with internationally recognised principals of justice. The potential for prosecution to be initiated externally may also act as an incentive for individuals who are given an amnesty to abide by its terms. States that have the will to provide justice but lack a functioning criminal justice system can point to the possibility of an international prosecution to ensure there is a just alternative to prosecution put in place. Even governments that lack the will to provide justice in the form of prosecution may temper their actions to avoid the prospect of investigations and prosecutions.

When conditions of an amnesty have not been complied with and the State post-conflict still lacks the resources to prosecute, a referral or threat of a referral to the ICC could also provide some necessary means of either enforcing the amnesty conditions or

---

[158] Scharf, as above, 526.
[159] Rome Statute Article 53 (2).
[160] Article 17(a).

encouraging compliance. Again, another state, which may have nothing to lose politically, can provide the threat or referral to the ICC.

The Rome Statute has no immediate relevance to the Solomon Islands conflict as it will only come into effect when 60 countries have ratified it,[161] and crimes committed prior to ratification will not be covered. However, the ICC, if and when operational, may be able to affect the granting of amnesties by virtue of its power to prosecute serious breaches of Article 3 in future conflicts.

VI CONCLUSION

It is difficult to see the utility of expanding the application of the Geneva Conventions to apply in their entirety to internal conflicts. To believe an extension of the Conventions' application would make any real difference to the treatment of protected persons would ignore the events of the last 50 years. In addition, many of the provisions sit more comfortably with the bygone era of wars being conducted, not only between states, but also by regular armies. In internal conflicts, it is less likely that combatants on both sides will be professional soldiers. In recent internal conflicts, the objectives have included the removal or eradication of civilians of a particular ethnicity. Attempting to ensure such combatants do not harm those civilians, let alone treat them without distinction based on their ethnicity, by updating the law that legalises killing the same people should they resort to arms, appears to be an absurd and a futile exercise.

Even if all the theoretical and practical problems of determining the type of internal conflict it would not prevent states granting amnesties in the hope they would end hostilities.

Provisions for or about amnesties do not exist in any international treaties or other instruments bar Article 6 of Protocol II. However guidelines for amnesties have been articulated for use in specific regions and promoted for adoption on an international basis. For example, Douglass Cassel lists 10 guidelines drawn from the rulings from the Inter-American Court and Commission on Human Rights and inter-American human rights treaties, for use in the Americas.[162] Madeline Morris has advocated for guidelines for preventing impunity, presumably in the form of a treaty, which would include specific reference to the ICC as a backup or failsafe mechanism.[163] A soft-law approach, drawing on principles gleaned from international instruments and the jurisdiction of international criminal tribunals and courts, has the advantage of flexibility, as does the discretion to prosecute in the ICC. However, if the crime is only a crime that can be prosecuted because it is a breach of Article 3 or Protocol II, the existence of Article 6(5) may

---

[161] Article 126.

[162] Douglass Cassel "Accountability For International Crime And Serious Violations of Fundamental Human Rights: Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities" (1996) 59 Law & Contemp. Probs. 197, 227.

[163] Madeline H Morris "International Guidelines Against Impunity: Facilitating Accountability"(1996) 59 AUT Law and Contemp. Probs. 29, 34.

continue to be a thorn in the side of attempts to prosecute despite all the reasons that may be advanced to support the principle that amnesties should be consistent with internationally recognised principle of justice.

The case concerning the extradition of the former head of state of Chile,[164] General Pinochet, is a recent example of national amnesty being regarded as ineffective where there is a duty to prosecute.[165] However, that principle only applies to international crimes such as genocide and crimes against humanity where the duty, despite the lack of a consistent practice, is established. These crimes can occur in the context of an internal armed conflict, but identical actions, on a smaller scale in an internal conflict do not trigger a duty to prosecute. Not only is there no duty to prosecute in Article 3, Protocol II's Article 6(5) positively encourages states to give amnesties. Any internationally agreed guidelines for prosecution would be wise to specifically overcome the plain meaning interpretation of Article 6(5) and restrict the granting of amnesties to combatant immunity or ensure they are not excluded from examination as to their conformity with principles of justice. A prosecution in the ICC could also by stymied by Article 6 (5) in cases where an amnesty had been granted.

The potential of the ICC jurisdiction to influence amnesties will depend more on the willingness of states, possibly in regional organisations with the state in conflict, to refer or threaten to refer to the ICC, in situations when unjust amnesties may be negotiated. It will also depend on a change of perception and practice that only the most serious and publicized cases of human rights abuses are worthy of international prosecution.

---

[164] *R v Bow Street Metropolitan Stipendiary Magistrates Court & Others, ex parte Pinochet Ugarte* (No 2) [1999] All ER 577.

[165] Although Pinochet's immunity as a former Head of State was the more prominent of issues considered by the House of Lords when considering the extradition request from the Spanish government, the decision also confirms that the amnesty given to Pinochet in 1978 was ineffective. The crime alleged was one where there is a clear international duty to prosecute, that is, torture that as so widespread it constituted a crime against humanity.

AS741
VUW
A66
W752
2001

LAW LIBRARY
A Fine According to Library Regulations is charged on Overdue Books

VICTORIA UNIVERSITY OF WELLINGTON
LIBRARY

AU 3203627
PLEASE RETURN BY
05 MAY 2008
TO W.U. INTERLOANS

VICTORIA UNIVERSITY OF WELLINGTON LIBRARY
3 7212 00705811 6