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THE LAW AND INTERNAL ARMED CONFLICT: PAST, PRESENT AND FUTURE

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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THE LAW OF INTERNAL ARMED CONFLICT: PAST, PRESENT AND FUTURE

Abstract: The law of internal armed conflict is currently plagued with uncertainty regarding what laws apply and when they apply. Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II to the 1949 Geneva Conventions, and customary law apply in various situations. Nations have reluctant to apply any of these laws to their internal armed conflicts. They have argued that the struggles they are involved in do not rise to the level covered by these laws. It is my argument that Common Article 3 is sufficient to cover this area of the law. Its provisions are broad enough to cover all necessary aspects. This thesis examines where those laws came from and how they are applied. It examines current criminal proceedings applying those laws and speculates on their future effect. A method of determining what is an internal armed conflict and when Common Article 3 applies is proposed.

**THE LAW AND INTERNAL ARMED CONFLICT:
PAST, PRESENT AND FUTURE**

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I. INTRODUCTION.....	1
II. BACKGROUND	2
A. THE HISTORY OF LAWS GOVERNING WARS PRIOR TO 1860	2
1. <i>In the Beginning</i>	2
2. <i>Jus ad Bellum</i>	4
a. The Greeks	4
b. The Romans.....	5
c. Christianity.....	6
3. <i>Jus in Bello</i>	7
4. <i>War As Fact</i>	9
5. <i>Henry Dunant Begins A Revolution</i>	10
B. THE AMERICAN CIVIL WAR.....	12
1. <i>The Lieber Code</i>	12
2. <i>General Order 100</i>	13
3. <i>The Lieber Code's Effect</i>	16
C. THE RISE OF TREATIES.....	17
1. <i>Pre World War II</i>	17
a. The First Geneva Conventions	17
b. The Hague Conventions	19
c. The 1929 Geneva Conventions.....	21
2. <i>Post World War II</i>	23
a. World War II.....	24
b. Nuremberg Trials	24
c. The 1949 Geneva Conventions.....	26
3. <i>After the 1949 Conventions</i>	27
III. THE LAW APPLICABLE TODAY.....	28
A. CONVENTIONAL INTERNATIONAL HUMANITARIAN LAW	29

1. <i>International Armed Conflicts</i>	29
2. <i>Internal Armed Conflicts</i>	34
a. Common Article 3 - Geneva Conventions.....	34
b. Additional Protocol II.....	43
c. Other International Laws	47
B. CUSTOMARY INTERNATIONAL LAW.....	48
IV. THE EFFECT OF NON-GOVERNMENTAL AGENCIES ON THE LAWS	51
A. THE UNITED NATIONS.....	51
B. INTERNATIONAL COMMITTEE OF THE RED CROSS.....	54
C. OTHER ORGANIZATIONS	55
V. CIVIL WARS TODAY.....	57
VI. THE INTERNATIONAL TRIBUNALS PROSECUTING WAR CRIMES	58
A. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA	58
1. <i>Background of the Yugoslavian Conflict</i>	59
2. <i>The Tribunal Statute</i>	63
3. <i>The Tadić Case</i>	67
a. Dusko Tadić	67
b. The Jurisdictional Decision of the Appeals Chamber.....	69
c. Trial Court's Verdict	87
d. Celebici Case.....	90
B. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA	92
1. <i>Background on the Rwandan Conflict.</i>	92
2. <i>The Tribunal Statute</i>	94
3. <i>The Akayesu Case</i>	97
a. Jean-Paul Akayesu	97
b. Trial Court's Verdict	99
C. THE NEW INTERNATIONAL CRIMINAL COURT.....	100

VII.	WHAT SHOULD THE LAW BE?	104
A.	WHEN IS IT AN INTERNAL ARMED CONFLICT?	104
1.	<i>Should the concept of belligerency be used?</i>	105
a.	What is Belligerency?.....	105
b.	Does Belligerency have applicability?	106
c.	Should the distinction between International and Internal Armed Conflicts be maintained?	107
d.	What should be the definition of internal armed conflict?.....	108
B.	COMMON ARTICLE 3 SHOULD BE THE LAW USED FOR INTERNAL ARMED CONFLICT	108
C.	WHAT ABOUT ADDITIONAL PROTOCOL II?	112
VIII.	CONCLUSION.....	113

I. INTRODUCTION

Internal armed conflicts, also known as civil wars, have plagued man for centuries. The law affecting internal armed conflict has been developing throughout that time. It is only within the last fifty years that any sustained effort has been devoted to shaping these laws.

Currently, three bodies of international law govern internal armed conflicts. They are Common Article 3 of the 1949 Geneva Conventions,¹ Protocol II to the 1949 Geneva Conventions,² and customary international laws.³ Other international laws and treaties, such as the Chemical Weapons Convention⁴ and the Genocide Convention,⁵ affect the law of internal armed conflict. Many international groups and experts are insisting on the application of the laws of international armed conflict in internal armed conflicts.⁶

¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter GC IV].

² COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTION OF 12 AUGUST 1949 (YVES SANDOZ et al. eds. 1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

³ See Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 13 (1995).

⁴ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, January 13, 1993, 32 I.L.M. 800 [hereinafter Chemical Weapons Convention].

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (1951) [hereinafter Genocide Convention].

⁶ See *infra* note 171 and accompanying text. In fact, Common Article 3 itself attempts to impose the rest of the provisions of the Geneva Conventions to internal conflicts by suggesting that the parties in internal conflicts "endeavor to bring into force, by means of special agreements, all or part of the present Convention." GC I, *supra* note 1, at 3118; GC II, *supra* note 1, at 3222; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520.

Common Article 3 of the 1949 Geneva Conventions is sufficient for governing the armed forces engaged in internal armed conflicts. The complexities of Protocol II, the law of international armed conflict and additional measures imposed by other international laws and treaties add nothing to Common Article 3's requirements and are difficult to implement by either party involved in an internal armed conflict.

This paper analyzes the development of the law of internal armed conflict, the current trends, and what the law should encompass. This thesis will address the following issues: (1) what is the current law of internal armed conflict; (2) the results of the Yugoslavia and Rwanda International Criminal Tribunals; and (3) what law should apply to internal armed conflicts.

II. BACKGROUND

A. *THE HISTORY OF LAWS GOVERNING WARS PRIOR TO 1860*

1. In the Beginning

In order to understand the current state of the law of internal armed conflict, a general review of the origin of the law's status is helpful. Rules governing the conduct of armed

conflict reach back centuries. The early peoples and city-states conducted themselves according to certain rules of conduct that they imposed upon their own actions.⁷

There are many examples of the ancient civilizations regulating war. Around 2000 B.C., the Egyptians and Sumerians had rules for when war could be initiated.⁸ The Hittites of the fourteenth century B.C. required prescribed exchanges with the other side before the commencement of hostilities.⁹ Sun Tsu in fourth century B.C., wrote of the Chinese prohibition on injuring wounded men and striking elderly men.¹⁰ The Hindus of the fourth century B.C. had a set of rules regulating the use of certain weapons, such as those having barbs, on fire or tipped in poison.¹¹ These rules also forbade striking the wounded, the fleeing, those who were unarmed, those surrendering, and any noncombatant.¹² There are many other examples of this type of self-regulation.¹³

⁷ See JAMES E. BOND, THE RULES OF RIOT - INTERNAL CONFLICT AND THE LAW OF WAR 5-12 (1974).

⁸ I THE LAW OF WAR, A DOCUMENTARY HISTORY, HUGO GROTIUS ANDTHE LAW OF WAR 3 (Leon Friedman ed., 1972) [hereinafter HUGO GROTIUS]; LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 12 (1956). The Sumerians employed laws for starting and ending wars. See *id.*

⁹ See HUGO GROTIUS, *supra* note 8, at 3. The Hittites had rules for declaring war, they required a peace treaty at the end and they respected the inhabitants of capitulated cities. See KOTZSCH, *supra* note 8, at 13.

¹⁰ See HUGO GROTIUS, *supra* note 8, at 3.

¹¹ See *id.*

¹² See *id.*

¹³ See, e.g., BOND, *supra* note 7, at 8-9. The ancient Jews could be humane by respecting property and not slaying all non-combatants. They had rules about how to fight their immediate enemies and their remote enemies. The Babylonians respected prisoners and captured people. See HUGO GROTIUS, *supra* note 8, at 3-4; KOTZSCH, *supra* note 8, at 12. The Persians had rules by the 7th Century B.C. regarding treating enemy wounded like their own. See *id.* at 13.

The laws governing war have fallen into two lines of thought. The first is when is resorting to war permitted or “*Jus ad Bellum*.”¹⁴ The second is what restraints apply in waging war or “*Jus in Bello*.”¹⁵ As seen above, these lines of thought were more or less developing side by side.

2. *Jus ad Bellum*

a. *The Greeks*

The Greeks are given credit for creating the concept of "just war," also known as *Jus ad Bellum*. The Greeks required certain conditions before they would even resort to war,¹⁶ and demanded that there be a rationale to undertaking aggression.¹⁷ Self-defense was a valid

¹⁴ See ROBERT C. STACEY, *The Age of Chivalry*, in THE LAWS OF WAR 27, 30 (Michael Howard et al. eds., 1994).

¹⁵ See *id.* at 30.

¹⁶ See HUGO GROTIIUS, *supra* note 8, at 5.

¹⁷ See Commander Byard Q. Clemons & Major Gary D. Brown, RETHINKING INTERNATIONAL SELF-DEFENSE: THE UNITED NATIONS' EMERGING ROLE, 45 NAVAL L. REV. 217, 219 (1998) (citing M.A. Weightman, SELF DEFENSE IN INTERNATIONAL LAW, 37 VA. L. REV. 1095 (1951)).

cause for war.¹⁸ Greeks considered barbarians to be their natural enemies and therefore war with them was inevitable and just.¹⁹

b. The Romans

The Romans also believed that every war must be justified.²⁰ The Romans had two basic justifications for war: self-defense and to defend the honor of Rome.²¹ For example, Caesar took pains to ensure that the Roman people saw his campaigns in Gaul as a justified defense of Rome against the barbarians.²² Emperors who ignored these tenets did so at the risk of losing popular support for the war on the home front.²³

The Romans had a formalized procedure, which made war a last resort.²⁴ The Romans would dispatch envoys to the other side to resolve the differences, the envoys would return

¹⁸ See *id.* at 219.

¹⁹ See *id.* (quoting Plato's reasoning for fighting barbarians). See also KOTZSCH, *supra* note 8, at 26-27.

²⁰ See STACEY, *supra* note 14, at 27.

²¹ See Clemmons & Brown, *supra* note 17, at 219.

²² DONALD R. DUDLEY, THE CIVILIZATION OF ROME 95 (1962). Dudley points out that Caesar wrote his *Commentaries* to justify his conduct in Gaul. They were "designed to convince the reader that there had been no breach of the old rule that Rome undertook only defense wars." See *id.*

²³ See STACEY, *supra* note 14, at 27.

²⁴ See HUGO GROTIUS, *supra* note 8, at 5.

and thirty days would pass to allow the other side time to resolve the situation.²⁵ If the situation remained unresolved, only then would the Romans declare war.²⁶

c. *Christianity*

The rise of Christianity greatly affected the law of war. The Catholic Church believed killing was a sin and had to reconcile the beliefs of Christianity with the reality of war.²⁷ They accomplished this with the concept of "just war." Just wars protected and spread the faith.²⁸ A Christian could engage in a "just" war because it was permitted and not a sin.²⁹ By demanding that any wars that the people of the Church engaged in had to be "just" wars, the Church could maintain its moral sense and control the persons in the war.³⁰ For example, the Church required those that did engage in war, even if it was just, to do some penance for having killed another or for engaging in war.³¹

St. Thomas Aquinas outlined the conditions for a "just" war as follows: (1) it can only be declared by a competent authority; (2) it must be fought for a just cause; and (3) it must be

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.* at 30.

²⁸ See *id.* at 6. Crusades against non-Christians were "just wars" in the eyes of the church.

²⁹ See HUGO GROTIUS, *supra* note 8, at 5.

³⁰ See BOND, *supra* note 7, at 12-13.

³¹ See HUGO GROTIUS, *supra* note 8, at 7.

done with a proper intent, to advance good or avoid evil.³² This framework was supposed to restrain Christians from fighting each other.³³ However, Christian sovereigns still found ways to use the framework to justify their wars against each other.³⁴ However, the law of the church fell into disrepute because Christian princes continued to find ways and reasons to fight one another.³⁵

3. *Jus in Bello*

The concept of *Jus in Bello* pertains to controlling conduct during war. The Greeks had different rules that applied to the conduct of war depending on who their adversary happened to be.³⁶ In wars with other Greek city-states, the following rules applied: (1) the rules forbade attacking certain places and people; (2) war must be formally declared and ritual challenges must precede actual battle; (3) battles were to be fought only during the summer; and (4) noncombatants were not primary targets.³⁷ If the enemy was non-Greek, then there were few, if any, rules applicable before or during battle.³⁸ In contrast, once the Romans

³² See *id.* at 9-10.

³³ See *id.* at 9.

³⁴ See STACEY, *supra* note 14, at 29.

³⁵ See BOND, *supra* note 7, at 13.

³⁶ See Josiah Ober, *Classical Greek Times*, in THE LAWS OF WAR 12, 13-14 (Michael Howard et al. eds., 1994). See, e.g., HUGO GROTius, *supra* note 8, at 5-6.

³⁷ See Ober, *supra* note 36, at 13 (listing 12 conventions that applied in Greek warfare around 700 to 450 B.C.).

³⁸ See *id.* at 18.

began a war, there was very little restraint in its conduct. There were rules on sparing scared places and certain persons but not many other ones.³⁹

The Christian Church did try to regulate some conduct of the combatants. The Church issued decrees to uphold prohibitions on harming noncombatants and designated which days of the week fighting was permitted.⁴⁰ In addition, the Church attempted, without much success, to regulate the means of making war by outlawing the use of certain weapons such as crossbows.⁴¹

While the Church was concerned about the right to go to war, those who were fighting them were concerned about the actual conduct of war.⁴² The chivalric code arose out of these concerns about conduct. The code of chivalry governed the use of arms by knights against one another⁴³ and was binding on the sovereigns as well as the knights.⁴⁴ The code covered who could fight against whom; conditions for the ransom of officers; conditions for the captive knights; and the division of spoils.⁴⁵ It was not applicable to the common man

³⁹ See STACEY, *supra* note 14, at 27; BOND, *supra* note 7, at 9. Greeks and Romans respected poets, philosophers, artists and intellectuals. Temples and embassies were inviolable.

⁴⁰ See *id.*; HUGO GROTIUS, *supra* note 8, at 9.

⁴¹ See STACEY, *supra* note 14, at 30; BOND, *supra* note 7, at 12-13

⁴² See STACEY, *supra* note 14, at 30.

⁴³ See BOND, *supra* note 7, at 13-15.

⁴⁴ See HUGO GROTIUS, *supra* note 8, at 10.

⁴⁵ See *id.*

who was fighting.⁴⁶ If a knight engaged in an unjust war or violated the code, his protections under the code could be taken away.⁴⁷ A military or royal court could enforce the code.⁴⁸

4. War As Fact

Gradually the idea of “just” war faded away and the belief that war was a fact replaced it.⁴⁹ In part, this was due to several writers, notably Hugo Grotius.⁵⁰

It was 1625 when Hugo Grotius published his "Rights of War and Peace" after the Thirty-Year War.⁵¹ Grotius' Rights are considered to be the beginning of modern international law of war.⁵² This “instruction book” was the first real comprehensive listing of legal rules for engaging in and conducting war. It reviewed Church doctrine and the actual practice of states.⁵³ These “Rights” were principles of a natural order, which guided states on

⁴⁶ See STACEY, *supra* note 14, at 30. For example, the common foot soldiers were not knights and thus were expendable. Knights could slaughter foot soldiers indiscriminately. *See id.*

⁴⁷ See HUGO GROTIUS, *supra* note 8, at 10-11.

⁴⁸ See STACEY, *supra* note 14, at 31.

⁴⁹ See MICHAEL HOWARD, *Constraints on Warfare*, in THE LAWS OF WAR 1, 3 (Michael Howard et al. eds., 1994).

⁵⁰ See HUGO GROTTUS, *supra* note 8, at 14-15; KOTZSCH, *supra* note 8, at 38-39.

⁵¹ See BOND, *supra* note 7, at 15-19.

⁵² See HUGO GROTIUS, *supra* note 8, at 14.

⁵³ *See id.*

how to fight wars.⁵⁴ Grotius took the practice of states as evidence of natural laws governing war thereby emphasizing that the rules applied internationally.⁵⁵

Grotius' "Rights" concerned areas of permissible actions during war, treatment of non-combatants, use of poison, and excessive fighting among other things.⁵⁶ Many commanders over the years, including Napoleon Bonaparte and Gustavus Adolphus, used Grotius' "Rights" as the guide for conducting their military campaigns.⁵⁷

Under Grotius' view of war as fact, each sovereign had the right to wage war.⁵⁸ War was the continuation of a state's national policy aimed at achieving some desired end.⁵⁹ If the interests of the state seemed to demand it, the state had a right to go to war.⁶⁰

5. Henry Dunant Begins A Revolution

⁵⁴ See *id.* at 15.

⁵⁵ See *id.*

⁵⁶ See *id.* at 15.

⁵⁷ See *id.* at 22, 12 n. 22.

⁵⁸ See GEOFFREY PARKER, *Early Modern Europe*, in THE LAWS OF WAR 40, 42-3 (Michael Howard et al. eds., 1994); KOTZSCH, *supra* note 8, at 38.

⁵⁹ See HOWARD, *supra* note 49, at 3; CARL VON CLAUSEWITZ, ON WAR 13, 118-119 (Anatol Rapoport ed., Pelican Books 1968) (1832).

⁶⁰ See HOWARD, *supra* note 49, at 7.

Notwithstanding previous renderings of rules of combat, it was the chaos left in the wake of a 19th century war that eventually lead to the codification of the laws of war. In 1859, Henry Dunant witnessed the suffering of the casualties of the Battle of Solferino.⁶¹ In the span of fifteen hours, 38,000 men lay wounded or dead.⁶² This battle's aftermath profoundly affected Dunant. As a businessman traveling in the area, he literally stumbled into the battlefield.⁶³ He saw thousands of casualties who received no treatment from the enemy or from their own forces.⁶⁴ The armies left it up to local civilians to provide aid to the wounded if they could do so or if they chose to do so. Dunant realized that the parties to the conflict made no provision for caring for their own soldiers, thereby leaving them to a grisly fate.⁶⁵ Dunant published "Memory of Solferino" in 1861 recounting the horror of the wounded. In his pamphlet, Dunant called for the formation of an organization to aid war victims and for a treaty that would make nations respect the work of this organization during war.⁶⁶

Dunant's call for action resulted in an international conference convening in Geneva, Switzerland in 1863.⁶⁷ This conference would eventually lead to the first Geneva

⁶¹ See HENRY DUNANT, A MEMORY OF SOLFERINO (American Red Cross trans., International Committee of the Red Cross reprinted 1986). This battle occurred during the French and Sardinian conflict with Austria in 1859.

⁶² See BOND, *supra* note 7, at 19. See also G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 2 (1958).

⁶³ See generally Laura Lopez, Note, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflict*, 69 N.Y.U.L. REV. 916 (1994).

⁶⁴ See BOND, *supra* note 7, at 18. See generally DUNANT, *supra* note 61.

⁶⁵ See DUNANT, *supra* note 61.

⁶⁶ See *id.* at 116-128.

⁶⁷ The Swiss government called upon several European countries and the United States to attend an international conference on Dunant's proposals. I THE LAW OF WAR, A DOCUMENTARY HISTORY, TREATIES, CONVENTIONS, AND AGREEMENTS 149, 151 (Leon Friedman ed., 1972) [hereinafter TREATIES, CONVENTIONS, AND AGREEMENTS]; DRAPER, *supra* note 62, at 8.

Convention of 1864. However, it was events occurring half way around the world that would help shape the first Convention.

B. THE AMERICAN CIVIL WAR

1. *The Lieber Code*

The American Civil War began in 1861. Many of the senior military leaders and participants on both sides of the conflict shared common backgrounds and friendships. In fact, most of the senior military officers had attended West Point together. Members of both armies knew that they faced friends and family across the battlefield. President Abraham Lincoln and his staff found themselves struggling with questions on how to deal with Confederate guerillas, captured Confederate soldiers, and private property.⁶⁸ Lincoln's officers differed in how they handled situations and there was general confusion.⁶⁹ It was in this atmosphere that President Abraham Lincoln requested Dr. Franz Lieber of Columbia University to assist in drafting guidance on how to conduct the war.⁷⁰ In 1863, Lieber

⁶⁸ See DONALD A. WELLS, THE LAWS OF LAND WARFARE, A GUIDE TO THE U.S. ARMY MANUALS 1-2 (1992)

⁶⁹ See *id.* at 2.

⁷⁰ See *id.* at 3.

presented his “Instructions for the Government of the United States in the Field.”⁷¹ These instructions incorporated the laws and customs of war as they existed at that time.⁷² The Union forces received the instructions as General Order 100⁷³ and the Confederacy adopted a similar order shortly thereafter. Because of General Order 100, the armies generally followed the rules of law and humanity during the war.⁷⁴

2. *General Order 100*

Several provisions of General Order 100 are worth noting because their influence continues to this day. The Order had 157 Articles covering war with other nations as well as internal wars and conflicts.⁷⁵ There are six articles that bear closer examination for the purposes of this study.

⁷¹ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, reprinted in THE LAWS OF ARMED CONFLICTS 3-23 (Schindler & Toman eds. 3d ed. 1988). See generally DRAPER, *supra* note 62, at 4.

⁷² See Lieber, *supra* note 71, at 3.

⁷³ See *id.* See also JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 54 (1975).

⁷⁴ See WELLS, *supra* note 68, at 3.

⁷⁵ Although the Instructions do not specifically mention their scope of applicability, it is clear that the main body of the Instruction applies to wars with other nations. This interpretation is reasonable in light of Section X specifically declaring its applicability to Insurrections. See Lieber, *supra* note 71, at 21.

Article 4 states that military authorities, “in accordance with the laws and usages of war”, exercise Martial Law.⁷⁶ The article goes on to state the basis of limits on this authority:

As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity-virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.⁷⁷

Article 16 prohibited actions that caused needless suffering, any actions taken to carry out of revenge, the maiming or wounding outside of battle and any torture used to obtain confessions.⁷⁸ Article 23 decreed that private citizens could not be murdered, enslaved, or carried off to distant places and that they were to be disturbed as little as possible.⁷⁹

Articles 149 through 157 specifically dealt with civil war, insurrection and rebellion.⁸⁰ Article 152 through 154 stated the determination that if the United States applied the law and usages of war to any rebels, that application would not accord any acknowledgement of or legitimacy to the rebel government or power.⁸¹ During civil wars, the enemy consisted of combatants and noncombatants.⁸² The non-combatants were either loyal citizens or disloyal

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *id.* at 6.

⁷⁹ See *id.* at 7.

⁸⁰ See *id.* at 21-23.

⁸¹ See *id.* at 22. This non-legitimacy provision reappears in Common Article 3 of the Geneva Conventions and Additional Protocol II. The provision is vital to governments retaining domestic control over the rebels and preserving sovereignty. This provision ensures that rebel forces do not receive combatant immunity for their acts. Therefore, domestic laws can punish them for their acts committed during the rebellion. See *infra* Parts III.A.2.a and III.A.2.b.

⁸² See *id.*

citizens.⁸³ The military commander could subject disloyal citizens to greater restrictions of their civil rights than he could of the loyal citizens.⁸⁴ However, nothing abrogated the previous articles that accorded respect to civilians.⁸⁵

The Lieber Code is not a perfect instrument by today's standards. The Code permitted several practices now considered "inhumane". For example, under certain circumstances, it was permissible to kill prisoners of war.⁸⁶ Civilians were subject to imprisonment or could be used as an instrument of combat.⁸⁷

For its time, the Lieber Code was "complete, humane, and easily comprehensible to commanders in the field".⁸⁸ The U.S. Army continued to use the Lieber Code as its instruction as to proper behavior in times of war for fifty years.⁸⁹ Perhaps the most interesting aspect of the Lieber Code is that neither side to the conflict sat down and agreed with one another to apply it. Each side imposed it upon themselves.

⁸³ See *id.* Loyal citizens were those citizens in enemy territory who manifested their loyalty. Disloyal citizens were broken down in those who sympathized but gave no aid to the enemy and those who provided positive aid and comfort to the enemy. The later should endure the greater misfortunes of war per the Code. See *id.*

⁸⁴ See *id.*

⁸⁵ See generally Lieber, *supra* note 71, at 3-23 (nothing within the Instructions narrows the scope of Articles 4, 16, or 23).

⁸⁶ See Lieber, *supra* note 71, at 11-12. Article 58 permitted the killing of a prisoner if the other side enslaved the U.S. combatants. Article 66 also permitted the killing of prisoners who were members of a corps that gave no quarter.

⁸⁷ See *id.* at 6, 22. Article 18 permitted the military to drive back civilians fleeing from an area if it would hasten the other side's surrender. Article 156 permitted the imprisonment, expulsion, transfer, or fine for disloyal citizens who refused to take loyalty oaths.

⁸⁸ TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 152.

⁸⁹ See WELLS, *supra* note 68, at 5; I THE LAW OF WAR, A DOCUMENTARY HISTORY, FOREWORD xvii (Leon Friedman ed., 1972).

3. The Lieber Code's Effect

Many European nations adopted instructions for their armies based upon the Lieber Code.⁹⁰ The Lieber Code had a profound effect on the delegates meeting in Geneva when they drafted the 1864 Geneva Convention⁹¹ and it was followed in the 1874 Brussels Declaration Respecting the Laws and Customs of War on Land.⁹² Notably, many of the principles enumerated by Lieber reappeared in the Hague and Geneva Conventions of later years.⁹³

The idea of applying the principals of humanity to a civil war was revolutionary.⁹⁴ Historically, civil wars had not engendered any sense of constraint by the parties to the conflicts. It is ironic that the international community used the Code, created and applied during a civil war, to create the body of law governing international armed conflict.⁹⁵ The

⁹⁰ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 152; WELLS, *supra* note 68, at 5. The instructions adopted by these armies were for conducting international wars not internal conflicts.

⁹¹ See Lopez, *supra* note 63, at 920.

⁹² See DRAPER, *supra* note 62, at 4.

⁹³ See WELLS, *supra* note 68, at 4.

⁹⁴ See Lopez, *supra* note 63, at 920.

⁹⁵ THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 18 (Dieter Fleck, ed., Oxford University Press 1995). The Lieber Code was remarkable because it originated during a civil war when the United States Government was ardently insisting that the world not recognize the Confederacy. *See id.* "In that sense it was many years ahead of its time; even today the rules of humanitarian law applicable in internal armed conflicts are more limited in their scope than the provisions of the Lieber Code." *Id.* (This passage was written prior to the holdings in the Yugoslavia and Rwanda Tribunals).

rest of the world would refuse to apply the principals set out in the Code to internal conflicts for over eighty more years.⁹⁶

C. THE RISE OF TREATIES

1. Pre World War II

a. The First Geneva Conventions

The international conference that began in Geneva, Switzerland in 1863 resulted in the first Geneva Convention. Twelve nations agreed to the Geneva Convention of 1864.⁹⁷ The Convention established basic rules for the protection of sick and wounded soldiers.⁹⁸ Almost immediately after the signing of the 1864 Geneva Convention, there were calls for changes.⁹⁹

The Russian government approached the other European powers for a conference on war in 1873.¹⁰⁰ As a result, representatives from fifteen nations met to draft a declaration

⁹⁶ See *id.*

⁹⁷ See BOND, *supra* note 7, at 20

⁹⁸ See WELLS, *supra* note 68, at 6; BOND, *supra* note 7, at 20.

⁹⁹ See BOND, *supra* note 7, at 20.

¹⁰⁰ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 152.

concerning the laws and customs of war.¹⁰¹ The Brussels Declaration of 1874 never became a convention but it influenced the development of subsequent ones.¹⁰² The Hague Conventions would later incorporate the Declaration's two key ideas. The first idea is that a belligerent does not have an unlimited right to adopt means of injuring an enemy.¹⁰³ The second one is a belligerent is forbidden to employ arms, projectiles or materials which are calculated to cause unnecessary suffering.¹⁰⁴

The Swiss government took steps to update the 1864 Geneva Convention by requesting a conference.¹⁰⁵ The conference met in 1906 and produced The 1906 Geneva Convention, consisting of thirty-three articles.¹⁰⁶ Thirty-five nations approved it.¹⁰⁷ The new convention governed treatment of the wounded and sick and obligated the powers to search for them.¹⁰⁸ It also spelled out the rights of medical personnel and forbade the robbing of the dead.¹⁰⁹ A serious flaw in the convention was the fact that it was applicable only to the contracting

¹⁰¹ See *id.*

¹⁰² See KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 6 (1984).

¹⁰³ See *id.* at 6.

¹⁰⁴ See *id.*

¹⁰⁵ See DRAPER, *supra* note 62, at 4.

¹⁰⁶ See BOND, *supra* note 7, at 22.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

parties and the obligations were void if a non-contracting party was involved in the conflict.¹¹⁰

b. The Hague Conventions

In 1898, Tsar Nicholas II of Russia called upon the other great powers to attend a peace conference.¹¹¹ Russia was fearful of the technological advances made in weaponry and realized she was unable to keep up with her Western neighbors.¹¹² Not only was Russia falling behind in the arms race, but there existed a genuine fear that the advanced weapons being produced would "allow war to get out of hand".¹¹³ The Russians had several goals in mind for the conference. Some of these goals involved freezing the size of militaries and restrictions on the development of new technology for war¹¹⁴ and others dealt with codifying and revising the laws of war.¹¹⁵ Twenty-six states attended the 1899 conference in the

¹¹⁰ See DRAPER, *supra* note 62, at 4. Article XXIV reads as follows: "The provisions of the present convention are obligatory only on the contracting powers, in case of war between two or more of them. The said provisions shall cease to be obligatory if one of the belligerent powers should not be signatory to the convention." TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 266.

¹¹¹ See Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in THE LAWS OF WAR 119-120 (Michael Howard et al. eds., 1994) [hereinafter *Hague to Nuremberg*].

¹¹² See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 152.

¹¹³ See *Hague to Nuremberg*, *supra* note 111, at 120.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 121

Hague, Switzerland.¹¹⁶ While the conference achieved nothing regarding disarmament or on restrictions on the use of most weapons, it did achieve a lot in the area of the law of war, namely the creation of the 1899 Hague Convention on the Law and Customs of War on Land and a Convention on Maritime War.

The 1899 Hague Conventions with Respect to Laws and Customs of War revised the 1864 Geneva Convention and incorporated the 1874 Brussels Declaration. In addition, the principals within the 1864 Geneva Convention became applicable to maritime warfare.¹¹⁷ This resulted in three conventions: (1) treatment of the sick and wounded on land; (2) treatment of prisoners of war; and (3) maritime warfare. The conference also produced three prohibitory declarations. These declarations prohibited the discharge of explosives from balloons; projectiles diffusing asphyxiating gases; and dum-dum bullets.¹¹⁸ A notable passage in the conventions was the so-called “Martins’ clause”.¹¹⁹ This clause stated that in cases not included in the regulation, populations and belligerents would still have the protections of customary international law.¹²⁰

¹¹⁶ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 153.

¹¹⁷ See Lopez, *supra* note 63, at 920-921.

¹¹⁸ See *Hague to Nuremberg*, *supra* note 111, at 121

¹¹⁹ The Martins’ clause was named for Frodor de Martins, the Russian negotiator at the Hague Peace Conferences of 1899 and 1907. H. MCCOUBREY, INTERNATIONAL HUMANITARIAN LAW 190-91 (1990).

¹²⁰ See *Hague to Nuremberg*, *supra* note 111, at 122; Roberts, *supra* note 3, at 122. See also SUTER *supra* note 102, at 6. This clause indicates that the treaties were not to be the sole source of the law of war and confirmed the continuing existence of customary international law. It prevents the argument that if the treaty does not prevent an action, then it must be lawful. See A.P.V. ROGERS, LAW ON THE BATTLEFIELD 7 (1996).

The Tsar called for another conference in 1906.¹²¹ The Conference promulgated the Hague Regulations Respecting the Laws and Customs of War on Land in 1907.¹²² The Hague Regulations not only covered the means and methods of conducting war but also the humane treatment of prisoners of war, civilians and neutral persons.¹²³ The Regulations adopted provisions regarding unnecessary suffering and the limitation on means of warfare.¹²⁴

There was another conference planned for 1915 to work on the Regulations.¹²⁵ It never happened because World War I erupted in 1914.

c. *The 1929 Geneva Conventions*

World War I shocked and horrified the world with its unprecedented slaughter.¹²⁶ There were highly publicized violations of the Hague Regulations, namely release of poisonous gas

¹²¹ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 153; WELLS, *supra* note 68, at 7.

¹²² See BOND, *supra* note 7, at 22.

¹²³ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 153-54; WELLS, *supra* note 68, at 7.

¹²⁴ See WELLS, *supra* note 68, at 7.

¹²⁵ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 154.

¹²⁶ See Hague to Nuremberg, *supra* note 111, at 125.

and violations of neutrality law.¹²⁷ The powers did make efforts to comply with the Geneva Convention.

The problems encountered in World War I resulted not from the powers ignoring the conventions, but from the gaps that existed in the instruments themselves.¹²⁸ The texts of the conventions lacked precision.¹²⁹ There was a need to correct these deficiencies but the nations did very little after the war.¹³⁰ Fifteen nations tried to ban war altogether by signing the 1928 Kellogg-Briand Pact.¹³¹ The Pact banned war as an instrument of international policy.¹³²

The efforts to revise the law of war after World War I, did result in three treaties.¹³³ The 1925 Geneva Protocol on Gas and Bacteriological Warfare renounced the use of asphyxiating, poisonous gas along with analogous liquids and materials.¹³⁴ However, it did not prohibit the possession of such items so some powers reserved the right to use gas in

¹²⁷ See *id.* at 123-24. Germany violated Belgium's neutrality by invading it. The 1907 Hague Convention held the territory of neutral powers was inviolable. Germany opened canisters of gas on the battlefield and Britain later used a projectile to spread gas. The 1899 Hague Declaration on Asphyxiating Gases had forbidden projectile use of gas. Germany argued that opening cylinders of gas did not violate the Declaration because no projectile was used. See *id.*

¹²⁸ See *id.* at 124; BOND, *supra* note 7, at 23.

¹²⁹ See *Hague to Nuremberg*, *supra* note 111, at 124; BOND, *supra* note 7, at 23.

¹³⁰ See *Hague to Nuremberg*, *supra* note 111, at 127.

¹³¹ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 154.

¹³² See *id.*

¹³³ See *id.* at 127-8.

¹³⁴ See BOND, *supra* note 7, at 24.

retaliation.¹³⁵ The 1929 Geneva Convention on Wounded and Sick in Land Warfare enlarged the provisions of the earlier agreements on this matter.¹³⁶ The Geneva Convention Relative to the Treatment of Prisoners of War was designed to overcome the problems with the Hague provisions in this area.¹³⁷ The convention forbade reprisals against prisoners, spelled out the Protecting Power's role in protecting prisoners, and set the standard for prisoners' basic needs.¹³⁸ Article 2 eliminated the provision in the 1906 Geneva Convention that voided the obligations if a non-contracting party was involved.¹³⁹ However, the contracting parties were not required to apply the provisions when dealing with a non-signatory.¹⁴⁰ Forty-six nations agreed to the Prisoner of War Convention.¹⁴¹ The notable exceptions were Japan and the U.S.S.R. This would have tragic consequences in World War II.¹⁴² Despite the changes made in the law of war, they were no match for the fury of World War II.

2. Post World War II

¹³⁵ See *id.* at 24; *Hague to Nuremberg*, *supra* note 111, at 127-8.

¹³⁶ See BOND, *supra* note 7, at 24; *Hague to Nuremberg*, *supra* note 111, at 127.

¹³⁷ See *Hague to Nuremberg*, *supra* note 111, at 128. For example, reprisals and collective punishments were now prohibited. See *id.*

¹³⁸ See *id.*; BOND, *supra* note 7, at 24.

¹³⁹ See JEAN PICTET, HUMANITARIAN LAW AND THE PROTECTION OF WAR VICTIMS 51 (1975).

¹⁴⁰ See *id.*

¹⁴¹ See TREATIES, CONVENTIONS, AND AGREEMENTS, *supra* note 67, at 154.

a. World War II

World War II saw the shift of the ravages of war from combatants to non-combatants, namely prisoners of war and civilians.¹⁴³ Japan had not ratified the 1929 Geneva Convention of Prisoners of War,¹⁴⁴ and its treatment of prisoners was appalling.¹⁴⁵ Germany did not apply the Convention in respect to Russian prisoners because the U.S.S.R. had not ratified it.¹⁴⁶ Millions of Russian prisoners died in the hands of the Germans.¹⁴⁷ But the true nightmare rested on the civilians. Civilians were subjected to indiscriminate bombing operations, starvation sieges, reprisals for the actions of resistance movements, ethnic cleansing campaigns, and other actions.¹⁴⁸

b. Nuremberg Trials

¹⁴² See *Hague to Nuremberg*, *supra* note 111, at 128. For a discussion of these consequences, see discussion *infra* Part II.C.2.a.

¹⁴³ See generally *Hague to Nuremberg*, *supra* note 111, at 130-31. This was due in part to the changes in the technology of war as well as ideological and ancient hatreds. *See id.* at 130-32.

¹⁴⁴ *See id.* The Japanese and Russians viewed individuals who became prisoners of war as traitors. A soldier was not suppose to surrender but fight to the death. *See id.* at 128, 130.

¹⁴⁵ *See id.*

¹⁴⁶ *See id.* at 130

¹⁴⁷ *See id.*

¹⁴⁸ *See id.* at 131-32.

After the war, international war crimes trials were held in Nuremberg, Germany and Tokyo, Japan to try major Axis criminals.¹⁴⁹ The Tribunal developed several important principles that apply today.¹⁵⁰

The Charter for the Nuremberg Tribunal provided for trials of crimes against peace, war crimes, and crimes against humanity.¹⁵¹ The Nuremberg Trials established that individuals were accountable for committing violations of universal standards and that superior orders were no excuse for committed such violations.¹⁵² The Tribunal also declared the universal application of the Hague Convention as customary international law that binds all states.¹⁵³ The Nuremberg principals would influence future Tribunals, the United Nations, and the 1949 Geneva Conventions.¹⁵⁴

¹⁴⁹ See Reisman & Silk, *supra* note 196, at 22-23.

¹⁵⁰ See Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 46 (1996); Reisman & Silk, *supra* note 194, at 24; G.I.A.D. Draper, *The Development of International Humanitarian Law*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 68, 79 (UNESCO 1988) [hereinafter *The Development of International Humanitarian Law*].

¹⁵¹ See Charter of the International Military Tribunal, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Annex, arts. 6(a)-(c), 59 Stat. 1544, 1547, 82 U.N.T.S. 280, 286-88. Crimes against peace were essentially waging aggressive war. See John F. Murphy, *Crimes Against Peace at the Nuremberg Trial*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 141 (George Ginsburgs & V.N. Kudriavtsev eds., 1990). Crimes against humanity encompassed actions against one's own people as well as another State's. See Roberts, *supra* note 3, at 24-25; *The Development of International Humanitarian Law*, *supra* note 150, at 80. War crimes were violations of the laws or customs of war. See Roberts, *supra* note 3, at 23; Iu.A. Reshetov, *International Law and Crimes Against the Laws and Customs of War*, in THE NUREMBERG TRIAL AND INTERNATIONAL LAW 167 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

¹⁵² See Roberts, *supra* note 3, at 25; Newton, *supra* note 150, at 47-49.

¹⁵³ See Roberts, *supra* note 3, at 25.

¹⁵⁴ See *infra* Parts IV.A and VI.A.3.b(3)

c. *The 1949 Geneva Conventions*

The atrocities of World War II, as catalogued in the Nuremberg Trials, led to the revision of the 1929 Geneva Conventions.¹⁵⁵ The result was four conventions. They are: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GC II); Geneva Convention Relative to the Treatment of Prisoners of War (GC III); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).¹⁵⁶

GC I, GC II and GC III substantially expanded the extent of protections afforded to the wounded and prisoners of war.¹⁵⁷ They also improved implementation and enforcement mechanisms.¹⁵⁸ The fourth convention dealt solely with the protection of civilians located in enemy or occupied territory.¹⁵⁹.

¹⁵⁵ See Lopez, *supra* note 63, at 921-22; *The Development of International Humanitarian Law*, *supra* note 150, 80.

¹⁵⁶ See GC I, *supra* note 1, at 3116; GC II, *supra* note 1, at 3220; GC III, *supra* note 1, at 3318; GC IV, *supra* note 1, at 3518.

¹⁵⁷ See GC I, *supra* note 1; GC II, *supra* note 1; GC III, *supra* note 1; *The Development of International Humanitarian Law*, *supra* note 150, at 80.

¹⁵⁸ See *The Development of International Humanitarian Law*, *supra* note 150, at 80. This was done through the grave breaches provisions of the four Geneva Conventions which provided a system of mandatory penal repression. *See id.*

¹⁵⁹ See GC IV, *supra* note 1. *See also The Development of International Humanitarian Law*, *supra* note 150, at 80-81

The committee also created Common Article 3 of the Geneva Conventions.¹⁶⁰ Common Article 3 is the only part of all four Conventions that applies to internal armed conflicts. Common Article 3 expanded humanitarian principles to internal armed conflicts.¹⁶¹ It requires the parties to the conflict to observe specified minimum standards of conduct.¹⁶²

3. After the 1949 Conventions

Subsequent experiences with various conflicts after 1949 resulted in a call for further changes to the Conventions. The means of conducting war changed and most of the armed conflicts after World War II were internal or the Geneva Conventions did not seem to apply to the particular circumstances.¹⁶³ In 1977, Additional Protocols I and II to the 1949 Geneva Conventions were promulgated. Additional Protocol I concerns international armed conflict

¹⁶⁰ See *id.* at 81. Article 3 in all four conventions uses the same language and they referenced together as Common Article 3. See also Lopez, *supra* note 63, at 924.

¹⁶¹ See *The Development of International Humanitarian Law*, *supra* note 150, at 81.

¹⁶² See *id.* See also discussion *infra* Part III.A.2.a.

¹⁶³ See *The Development of International Humanitarian Law*, *supra* note 150, at 81; Jean de Preux, *The Protocols Additional to the Geneva Conventions*, 320 INT'L REV. OF THE RED CROSS 473 (1997). International humanitarian law applies international rules to solve humanitarian problems which arise from international or internal armed conflicts.

and Additional Protocol II deals with internal armed conflicts.¹⁶⁴ The Protocols attempt to incorporate the principals of the Hague Conventions into the Geneva Conventions.¹⁶⁵

III. THE LAW APPLICABLE TODAY

International humanitarian law is the law of war.¹⁶⁶ The law of war has two sources: customary law and conventional or codified rules.¹⁶⁷ Customary law binds all parties¹⁶⁸ and conventional law binds only its signatories.¹⁶⁹ The law of war applies to international and internal armed conflicts, but there are distinctions between the two types of conflicts.¹⁷⁰

There are calls to abolish the distinction between international and internal armed conflicts

¹⁶⁴ See *id.*

¹⁶⁵ See *The Development of International Humanitarian Law*, *supra* note 150, at 83; Theodor Meron, Comment, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L. L. 678, 679 (1994) [hereinafter *The Time Has Come*].

¹⁶⁶ International humanitarian law applies international rules to solve humanitarian problems which arise from international or internal armed conflicts. See Jean Pictet, *International Humanitarian Law: Definition*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* xix n.1 (1988) [hereinafter *International Humanitarian Law: Definition*]. International humanitarian law should not be confused with Human Rights law. International humanitarian law governs the relationship between States or belligerents in times of armed conflicts. Human Rights law is concerned with the relationship between a State and an individual in peace. See Paul Kennedy & George J. Andreopoulos, *The Laws of War: Some Concluding Reflections*, in *THE LAWS OF WAR* 214, 220 (1994); Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 324 INT'L REV. OF THE RED CROSS 409, 410 (1998).

¹⁶⁷ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES § 102(1), Part I, Chapter 1 (1986) [hereinafter RESTATEMENT]; RICHARD I. MILLER, *THE LAW OF WAR* 9 (1975).

¹⁶⁸ See RESTATEMENT, *supra* note 167, § 102 cmt. d.

¹⁶⁹ See RESTATEMENT, *supra* note 167, § 102 cmt. f.

¹⁷⁰ See *International Humanitarian Law: Definition*, *supra* note 166, at xxi.

and treat all conflicts under the international rules.¹⁷¹ In order to understand these calls to extend the provisions of international armed conflict with their privileges and immunities to internal armed conflict requires a brief review of this area of the law.

A. CONVENTIONAL INTERNATIONAL HUMANITARIAN LAW

1. International Armed Conflicts

Conventional and customary international law affect international armed conflict.¹⁷² Conventional law of war, has for the most part, superseded customary law of war.¹⁷³ There are many war treaties but the three most influential conventional laws governing international armed conflict are the 1907 Hague Convention, the four 1949 Geneva Conventions, and the Additional Protocols to the 1949 Geneva Conventions.¹⁷⁴ The Hague

¹⁷¹ See *id.* at 465; Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts*, 278 INT'L REV. OF THE RED CROSS 409, 419 (1990); Lopez, *supra* note 63, at 950-1; W. Michael Reisman, *Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks by W. Michael Reisman*, 85 AM. SOC'Y INT'L L. PROC. 83, 90 (1991).

¹⁷² See Robert Kogod Goldman, *Internal Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts*, 9 AM. U.J. INT'L & POL'Y 49, 57-58, 61 (1993).

¹⁷³ See Richard R. Baxter, *The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* 97 (1988).

¹⁷⁴ See Goldman, *supra* note 172, at 52.

Regulations for the most part govern the means and methods of conducting war.¹⁷⁵ The Geneva Conventions are concerned with the treatment of the victims of war.¹⁷⁶

International humanitarian law applies when there is an international armed conflict.

Common Article 2 of the 1949 Geneva Conventions states:

...the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.¹⁷⁷

The provision takes into account situations where states might decide not to declare an official war.¹⁷⁸ Customary law only recognized traditionally declared wars occurring between states.¹⁷⁹ The Conventions apply to the Contracting Parties even if one of the states involved in the conflict is not a Contracting Party.¹⁸⁰ However, there is no definition of armed conflict.¹⁸¹ Jean Pictet explained that armed conflict is “[a]ny opposition between two States involving the intervention of their armed forces and the existence of victims, as defined by the Geneva Conventions, is therefore an armed conflict. Neither duration nor

¹⁷⁵ See *International Humanitarian Law: Definition*, *supra* note 166, at xx.

¹⁷⁶ See *id.*

¹⁷⁷ See GC I, *supra* note 1, at 3116; GC II, *supra* note 1, at 3220; GC III, *supra* note 1, at 3318; GC IV, *supra* note 1, at 3518.

¹⁷⁸ See Baxter, *supra* note 173, at 97.

¹⁷⁹ See *id.* Customary law had no definition of what triggered a war. In the past, there generally was a declaration of war by at least one party to the conflict. Customary law does not take into account situations where parties to the conflict might choose not to declare war but hostilities still exist. See *id.*

¹⁸⁰ See GC I, *supra* note 1, at 3116; GC II, *supra* note 1, at 3220; GC III, *supra* note 1, at 3318; GC IV, *supra* note 1, at 3518.

¹⁸¹ See PICTET, *supra* note 139, at 50.

territorial extent, nor the size of the forces involved is a decisive factor.”¹⁸² Therefore, the Conventions become applicable upon commencement of hostilities.¹⁸³ However, it is unclear how far down these go on the scale of violence.¹⁸⁴

Additional Protocol I expands Article 2’s scope of application. Article 1, Additional Protocol I declares:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹⁸⁵

This provision confers Article 2 status on certain insurgencies. For example, if rebels can assert that they are engaged in armed conflict with any type of government fitting the description, then they are entitled to all the rights and privileges under Additional Protocol I.

¹⁸² *Id.*

¹⁸³ See *id.* at 49.

¹⁸⁴ See MILLER, *supra* note 167, at 274-75.

¹⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3, *reprinted* in 16 I.L.M. 1391 (1977) [hereinafter Protocol I]. The U.S. has not ratified Protocol I. However, the United States has declared certain provisions as customary international law and therefore binding on the United States. See *The Time Has Come*, *supra* note 165, at 681.

An important concept under the law of war for international armed conflict is that lawful combatants have immunity for the legal acts of war.¹⁸⁶ Immunity applies to acts committed by combatants, which are consistent with the law of war.¹⁸⁷ Protocol I extends the combatant immunity to participants in separatist movements by including the conflict under Article 2.¹⁸⁸

Once Article 2 applies, the Conventions provide protections to persons protected by the Convention.¹⁸⁹ Protected persons are individuals who receive the maximum benefits under the Conventions.¹⁹⁰ Protocol I expanded the previous definition of protected persons to include persons engaged in wars of “colonial domination and alien occupation and against racist regimes”.¹⁹¹ This new definition encompasses persons previously thought of as rebels.¹⁹² Under Additional Protocol I, they receive the maximum benefits of the Conventions including prisoner of war status and combatant immunity.¹⁹³

¹⁸⁶ See Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practices*, 33 AM. U. L. REV. 53, 57-58 (1983).

¹⁸⁷ See Protocol I, *supra* note 185, at 1400. Combatant immunity means a combatant may not be criminally prosecuted for warlike acts, such as killing another, even when those acts are normally illegal under the civil system. The warlike act is justified and does not violate the laws of war. See Solf, *supra* note 186, at 58.

¹⁸⁸ See Solf, *supra* note 186, at 58.

¹⁸⁹ See GC I, *supra* note 1, at 3146; GC II, *supra* note 1, at 3250; GC III, *supra* note 1, at 3420; GC IV, *supra* note 1, at 3618.

¹⁹⁰ See GC I, *supra* note 1, at 3124; GC II, *supra* note 1, at 3228 ; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520.

¹⁹¹ See Protocol I, *supra* note 185, at 1397.

¹⁹² See *The Time Has Come*, *supra* note 165, at 679-80. However, they must meet certain requirements. The particular rebellion must comply with the type defined by the Protocol, the rebels must carry arms openly in the attack and they must agree to apply the laws of war.

¹⁹³ The United States has not ratified Protocol I. It has objected to making these conflicts automatically international and according these types of individuals protected status. See *The Time Has Come*, *supra* note 165, at 679.

The Geneva Conventions enumerate certain acts that constitute grave breaches of its provisions. These acts are grave breaches if they are committed against protected persons or property. Grave breaches are:

...any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destructions and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.¹⁹⁴

Protocol I reiterates the applicability of the grave breach provisions of the four Conventions and then adds violations of methods of warfare and additional humanitarian protections.¹⁹⁵

The Parties to the conventions are under a duty to find and prosecute persons who commit or order commission of grave breaches.¹⁹⁶ This obligation requires states to prosecute grave breaches against all persons, its own nationals or not, regardless of where the grave breaches occurred.¹⁹⁷ This obligation does not apply to other breaches of the conventions.¹⁹⁸

The Hague Conventions of 1907 does not specify the conditions when they become applicable other than during war between Contracting Parties.¹⁹⁹ The Parties must declare

¹⁹⁴ See GC I, *supra* note 1, at 3146; GC II, *supra* note 1, at 3250; GC III, *supra* note 1, at 3420; GC IV, *supra* note 1, at 3618.

¹⁹⁵ See Protocol I, *supra* note 185, at 1400, 1427-28.

¹⁹⁶ See GC I, *supra* note 1, at 3146; GC II, *supra* note 1, at 3250; GC III, *supra* note 1, at 3420; GC IV, *supra* note 1, at 3618; Protocol I, *supra* note 185, at 1428-29.

¹⁹⁷ See PICTET, *supra* note 139, at 71.

¹⁹⁸ See Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L. L. 554, 564 (1995) [hereinafter *International Criminalization of Internal Atrocities*].

¹⁹⁹ See Convention (III) relative to the Opening of Hostilities. Signed at the Hague, 18 October 1907, reprinted in THE LAWS OF ARMED CONFLICTS 57 (Schindler & Toman eds. 3d ed. 1988) [hereinafter *Convention (III)*]; Convention (IV) respecting the Laws and Customs of War on Land. Signed at the Hague, 18 October 1907,

war or issue an ultimatum with a conditional declaration of war.²⁰⁰ The war must be between two or more contracting parties and the conventions only apply when all belligerents are parties to the Conventions.²⁰¹

2. *Internal Armed Conflicts*

Currently there are two conventional cornerstones of law relative to internal armed conflict. They are Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II to the 1949 Geneva Conventions.²⁰² A third body of applicable law is customary international law. A brief overview of each source of the law follows.

a. *Common Article 3 - Geneva Conventions*

reprinted in THE LAWS OF ARMED CONFLICTS 63 (Schindler & Toman eds. 3d ed. 1988)[hereinafter *Convention (IV)*]; Baxter, *supra* note 173, at 97.

²⁰⁰ See *Convention (III)*, *supra* note 199, at 57.

²⁰¹ See *id.* at 53; Baxter, *supra* note 173, at 101.

²⁰² See W. Michael Reisman & James Silk, *Which Law Applies To The AFGAN Conflict?*, 82 AM. J. INT'L. L. 459, 466 (1988).

In general, all four Geneva Conventions deal with the conduct of international armed conflicts. Only Article 3, common to all four Conventions, deals specifically with “armed conflict not of an international character.”²⁰³ Common Article 3 was controversial when it was written because it made what was previously solely an internal matter subject to international law.²⁰⁴ However, intrusion by international law is limited. Common Article 3 requires each party to a non-international armed conflict to apply the following minimum provisions:

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

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above – mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for²⁰⁵

²⁰³ See GC I, *supra* note 1, at 3116; GC II, *supra* note 1, at 3220; GC III, *supra* note 1, at 3318; GC IV, *supra* note 1, at 3518.

²⁰⁴ See PICTET, *supra* note 139, at 55. International humanitarian law had been to protect the rights of sovereign states. Now it was being used to pierce the sovereignty of the states and tell them how to run domestic affairs.

²⁰⁵ GC I, *supra* note 1, at 3116, 3118; GC II, *supra* note 1, at 3220, 3222; GC III, *supra* note 1, at 3318, 3320; GC IV, *supra* note 1, at 3518, 3520.

Common Article 3 sets out fundamental principals of humanity that are applicable in internal conflicts.²⁰⁶ These minimum safeguards apply to all citizens within the country and even to the personnel who are trying to destroy the current government. However, some commentators believe Common Article 3 is inadequate to protect victims as it only forbids the most flagrant violations.²⁰⁷ They allege the provisions of Common Article 3 are so general and incomplete that they provide an inadequate guide for conduct.²⁰⁸ An analysis of its properties is necessary to discern whether the allegations have substance.

Both government and rebel forces must follow the guidelines of Common Article 3.²⁰⁹ This assertion has caused some controversy because some experts questions Common Article 3's application to rebel forces.²¹⁰ This is based on the following reasons: only governments are party to the Conventions, the rebels may not have been in existence at the time of the Conventions' ratification, and the rebels do not have an official ability to enter into international agreements.²¹¹ Other experts accept this assertion as the intent and purpose of

²⁰⁶ See PICTET, *supra* note 204, at 56. See also C.P.M. CLEIREN & M.E.M. TIJSSEN, *Rape and Other Forms of Sexual Assault in Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issue*, in THE PROSECUTION OF INTERNATIONAL CRIMES 283 (Roger S. Clark & Madeleine Sann eds., 1996). The International Court of Justice held in *Nicaragua v. U.S.*, that Common Article 3 principles were “elementary consideration of humanity” and could not be breached in internal or international armed conflict. *Nicaragua v. U.S.*, 1986 ICJ 4, 114 (June 27).

²⁰⁷ See Reisman & Silk, *supra* note 202, at 462, 466; Duncan Hollis, Note, *Accountability in Chechnya-Addressing Internal Matters With Legal and Political International Norms*, 36 B.C.L. REV. 793, 825 (1995).

²⁰⁸ DOCUMENTS ON THE LAW OF WAR 448 (Adam Roberts & Richard Guelff eds., 2d ed. 1989).

²⁰⁹ See PICTET, *supra* note 204, at 53; Goldman, *supra* note 172, at 57-8, 61; MILLER, *supra* note 167, at 276.

²¹⁰ See Charles Lysaght, *Conference: The American Red Cross – Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983: The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U. L. REV. 9, 12 (1983); MILLER, *supra* note 167, at 276.

²¹¹ See Lysaght, *supra* note 210, at 12; Louise Doswald-Beck, *Implementation of International Humanitarian Law in Future Wars*, 365 NAVAL WAR C. REV. 24, 38 (1999).

the Article. The official commentator to the Conventions wrote, “[t]hat expression “each party” confirms the stage of development reached without even requiring a rebel party to be a legal entity capable of entering into international commitments.”²¹² When a government ratifies the Common Article 3 of the Geneva Conventions, it does so on behalf of its entire people including the rebels.²¹³ The rebels are still citizens of their country and that country is still a party to the Conventions.²¹⁴ Therefore, the Conventions bind even the rebels.

Common Article 3’s dual applicability is logical and necessary. The entire purpose of Common Article 3 is to insert some humanitarian controls into internal armed conflicts. Any forces, which have risen above being criminal elements engaged in riot or internal disturbance, have reached a level of growth and/or organization where certain rights and obligations can be imposed upon them. For example, individuals in a “levee en mass” are obligated to perform certain duties and obligations under the Geneva Conventions.²¹⁵ Internal armed conflict is no different. One can easily argue that a “levee en mass” is less organized and less representative of a group purpose than a rebel organization. However, “levee en mass” is expected and required to abide by laws that it was not a party to and which came about prior to its existence. The policy that binds “levee en mass” participants should sufficiently cover rebel forces under Common Article 3.

²¹² PICTET, *supra* note 204, at 57. When a group organizes themselves in such a way to become a party to a conflict, then they have a “sufficient legal personality” to be subject to the obligations and rights of the Conventions. See DRAPER, *supra* note 62, at 17.

²¹³ See PICTET, *supra* note 204, at 57; Lysaght, *supra* note 210, at 12; MILLER, *supra* note 167, at 276.

²¹⁴ See MILLER, *supra* note 167, at 276.

²¹⁵ See GC I, *supra* note 1, at 3124; GC III, *supra* note 1, at 3322; DRAPER, *supra* note 62, at 17. Levee en Mass are non military persons who see the enemy approaching and spontaneously take up arms to resist the invasion forces. See GC I, *supra* note 1, at 3124; GC III, *supra* note 1.

In addition, if rebel groups want to become their own country or replace the current government, then they must act like a responsible government.²¹⁶ By imposing these guidelines on rebel forces, it encourages both sides to apply humanitarian considerations. It is illogical to impose restrictions only on the government forces in internal armed conflicts. This gives rebel forces free reign to engage in any sort of atrocity while government forces are restrained from responding in kind.²¹⁷

Common Article 3 clearly announces “[t]hat application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”²¹⁸ The language recalls Article 152 through 154 of the Lieber Code.²¹⁹ The drafters of this provision saw the inclusion of this clause as essential.²²⁰ The fear of many nations was that acknowledgment of any kind to a rebel force would grant some kind of legitimacy to anyone opposing the government. To that end, the design of the article ensures that it does not confer any type of status on the opposition forces. The government in power still considers and treats the rebels as criminals.²²¹

²¹⁶ See Lysaght, *supra* note 210, at 12; MILLER, *supra* note 167, at 276.

²¹⁷ See MILLER, *supra* note 167, at 276.

²¹⁸ See GC I, *supra* note 1, at 3120; GC II, *supra* note 1, at 3222; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520.

²¹⁹ See *supra* note 81 and accompanying text.

²²⁰ See PICTET, *supra* note 204, at 56. See, e.g., COMMENTARY ON III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 43 (JEAN S. PICTET ed. Geneva Int'l Comm. of the Red Cross 1960) [hereinafter COMMENTARY III].

²²¹ See Goldman, *supra* note 172, at 59.

The law of international armed conflict confers combatant immunity on those participating in the armed conflict.²²² Common Article 3 (and Additional Protocol II) specifically and rightfully refuses to confer such status on rebel forces.²²³ Nations are not willing to give immunity to those trying to destroy it from within.²²⁴ However, some critics have argued for applying combatant immunity to all rebels.²²⁵ They assert that this failure to give combatant immunity causes the rebels not to comply with Common Article 3.²²⁶ The argument is that without such protections, the rebels must win at all costs to avoid prosecution and it makes no sense to them to apply humanitarian provisions.²²⁷ This argument is tenuous. This grant of immunity for illegal acts against the state is tantamount to approval of rebellion and in fact encourages such acts.²²⁸ Critics ignore that Common Article 3 still affords rebels fundamental guarantees of humane treatment and judicial fairness.²²⁹ This is sufficient incentive to obtain compliance.

²²² See discussion *infra* Part III.A.1.

²²³ See Solf, *supra* note 186, at 59.

²²⁴ See Lysaght, *supra* note 210, at 21; Solf, *supra* note 186, at 60.

²²⁵ See Lopez, *supra* note 63, at 933; Plattner, *supra* note 171, at 409. See also *International Criminalization of Internal Atrocities*, *supra* note 198, at 555. This combatant immunity is extended to certain rebels under Protocol I. See discussion *infra* III.A.1.

²²⁶ See Lopez, *supra* note 63, at 933.

²²⁷ See *id.* at 934-35.

²²⁸ See *id.* at 935.

²²⁹ See Goldman, *supra* note 172, at 63. In other words, the rebels will be treated humanely when they are captured, given a fair trial and then serve whatever the sentence may be, even if it is death. There should be some penalty for trying to destroy the state. If there are no penalties, revolts would be encouraged by any disenchanted group. They would not have to resort to other non-violent measures and could engage in violence without fear of any serious repercussions. See *id.*

In addition, critics have alleged that the provisions of Common Article 3 are too vague and ambiguous.²³⁰ One problem is it that there is no clear definition of what type of armed conflict triggers the provision.²³¹ A definition is extremely difficult to come up with. The description in the article is couched as a negative - "armed conflict not of an international character."²³² The difference between internal violence and internal armed conflict is difficult to define, let alone determine. It was not the intent of the provision to apply to the use of force by police officers.²³³ It means "armed conflicts, with *armed* forces on either side engaged in *hostilities*-conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country."²³⁴ Another suggested definition is that internal armed conflict "takes the form of a struggle, within a State, between two or more parties, who have recourse to armed force and where the hostile actions on the part of each has a collective character and is marked by a measure of organization."²³⁵ This brings us no closer to a solution and we fair no better looking at the definition of internal disturbances.

²³⁰ See Susan L. Turley, Note, *Keeping the Peace: Do the Laws of War Apply?*, 73 TEX. L. REV. 139, 167 (1990); Hollis, *supra* note 207 at 825; Lysaght, *supra* note 210, at 14.

²³¹ See Lopez, *supra* note 63, at 928; MILLER, *supra* note 167, at 274-75.

²³² See GC I, *supra* note 1, at 3116; GC II, *supra* note 1, at 3220; GC III, *supra* note 1, at 3318; GC IV, *supra* note 1, at 3518.

²³³ See PICTET, *supra* note 139, at 57.

²³⁴ See COMMENTARY III, *supra* note 220, at 37. See also PICTET, *supra* note 139, at 57. The term armed conflict shows that it applies "solely to disturbances akin to war and does not cover ordinary crimes." *Id.*

²³⁵ Marion Harroff-Tavel, *Internal Violence*, 294 INT'L REV. OF THE RED CROSS 195 (1993).

Unfortunately, there is also no definition for internal disturbances.²³⁶ Internal disturbances are a “serious disruption of domestic order resulting from acts of violence which do not, however, have the characteristics of an armed conflict.”²³⁷ However, the precise threshold between internal disturbances and internal armed conflict remains undefined.

If we turn to the Commentaries to the four Geneva Conventions, they suggest the use of four criteria for determining applicability of Common Article 3.

- (1) That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obligated to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or
(b) that it has claimed for itself the rights of a belligerent; or
(c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
(d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
(b) That the insurgent civil authority exercise *de facto* authority over persons within a determinate territory.
(c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
(d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.²³⁸

²³⁶ See discussion *infra* Part III.A.2.b.

²³⁷ Harroff-Tavel, *supra* note 235.

²³⁸ COMMENTARY ON I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (JEAN S. PICTET ed. Geneva Int'l Comm. of the Red Cross 1960) [hereinafter COMMENTARY I].

These criteria were suppose to provide a guideline for distinguishing armed conflict from lesser types of conflict.²³⁹ However, use of the criteria is not binding. The comment states that this list of conditions is not complete and suggests that the Convention receive the widest application possible.²⁴⁰ While the comment does not eliminate all questions or cover all possible situations, it can be helpful in distinguishing types of conflict. A precise definition might not be helpful in any case. The delegates to the 1949 Diplomatic Conference to draft the 1949 Geneva Conventions tried to come up with a precise definition but abandoned the effort.²⁴¹ The best way to define internal armed conflict is to define much like pornography.²⁴² In other words, you know it when you see it.

Another complaint about Common Article 3 is that there is no enforcement mechanism.²⁴³ The article requires application but provides no penalties for violations. In other words, there are no grave breaches provisions for Common Article 3.²⁴⁴ Grave breaches apply only to protected persons which exist only under the international armed

²³⁹ *Id.* at 50

²⁴⁰ *Id.*

²⁴¹ See Commentaries I, *supra* note 238. at 49.

²⁴² See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)(J. Potter Stewart concurring).

I have reached the conclusion...that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hardcore pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it;...

²⁴³ See Lysaght, *supra* note 210, at 12.

²⁴⁴ See *id.*

conflict provisions.²⁴⁵ Therefore, there is no requirement that nations find and punish violators of Common Article 3. Many commentators see this as a major flaw of Common Article 3.²⁴⁶

However, this argument ignores the fact that there is no prohibition against enforcement either. There is no reason why any state cannot seek out and punish any violator of Common Article 3. Like the rest of the provisions of the Geneva Conventions, Common Article 3 mandates compliance. Nothing restrains a state from trying individuals who violate the article, this is especially true if Common Article 3 is viewed as customary international law.

b. Additional Protocol II

Additional Protocol II to the 1949 Geneva Conventions addresses internal armed conflict. It covers the treatment of non-combatants and combatants and requires both sides of the conflict to provide certain minimal treatment to all persons with whom they come into contact.²⁴⁷ Article 1 pronounces the Protocol applicability as follows:

²⁴⁵ See *id.* at 12-13.

²⁴⁶ See Lopez *supra* note 63, at 936.

²⁴⁷ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609, *reprinted* in 16 I.L.M. 1442 (1977) [hereinafter Additional Protocol II]. “All persons who do not take a direct part or who have ceased to take part in hostilities,...are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.” *Id.* at 1444.

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.²⁴⁸

The requirements for application of the Protocol can be broken down into the following: control over territory by the group in opposition to the government and the group's ability to apply the Protocol.²⁴⁹

Additional Protocol II is narrower in application than Common Article 3.²⁵⁰ Common Article 3 applies to all non-international armed conflicts, Additional Protocol II applies only to those conflicts that meet certain conditions.²⁵¹ Additional Protocol II does not "modify" Common Article 3's "existing conditions of application." This means that Common Article 3 still applies to those internal armed conflicts to which Additional Protocol II does not apply.²⁵²

²⁴⁸ *Id.* at 1443.

²⁴⁹ See Reisman & Silk, *supra* note 202, at 464.

²⁵⁰ See Lopez, *supra* note 63, at 928; Lysaght, *supra* note 210, at 22.

²⁵¹ See Reisman & Silk, *supra* note 202, at 464; GC I, *supra* note 1, at 3118; GC II, *supra* note 1, at 3222; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520; *supra* note 248 and accompanying text.

²⁵² See Reisman & Silk, *supra* note 202, at 464.

Critics argue that the stringent requirement prongs of Additional Protocol II make it inapplicable to “the broad spectrum of civil wars.”²⁵³ These experts feel that the requirements are so strict that is close to requiring a belligerent status.²⁵⁴ It is unlikely that States will recognize applicability of Additional Protocol II because it would mean that they were recognizing the extreme conditions required for the rebel force to operate.²⁵⁵ The requirement that the rebel forces should be able to implement the Protocol suggests reciprocity.²⁵⁶ This seems to indicate that if the rebels do not apply the Protocol, the government need not do so.²⁵⁷

Additional Protocol II does not apply to all internal conflicts. Article 2 of the Protocol states:

This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.²⁵⁸

Like Common Article 3, there is no precise definition of internal disturbances and tensions in the Additional Protocol.²⁵⁹ However, the requirements that a rebel force must meet to trigger

²⁵³ See Lopez, *supra* note 63, at 928.

²⁵⁴ See Theodor Meron, Note and Comment, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L. L. 589 (1983) [hereinafter *Inadequate Reach of Humanitarian and Human Rights Law*].

²⁵⁵ See *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 599-600. The majority of states have ratified the Protocol. However, few states have recognized the applicability of common article 3 let alone Protocol II.

²⁵⁶ See Lysaght, *supra* note 210, at 22.

²⁵⁷ See *id.*

²⁵⁸ Protocol II, *supra* note 247, at 1443.

²⁵⁹ See *id.* at 1354. See also discussion *supra* Part III.A.2.a.

Article 1 limits the Additional Protocol's application to those instances where the conflict has clearly risen above the internal disturbance and tension level.²⁶⁰

Once the conflict complies with the requirements of Article 1, Additional Protocol II, the humanitarian provisions are automatically applicable to persons not taking part in or having ceased to take part in the hostilities.²⁶¹ The Protocol specifically prohibits the following:

- (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel 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 their forms;
- (g) pillage;
- (h) threats to commit any of the foregoing acts.²⁶²

This prohibition applies at all times and all places for conflicts meeting the Article 1 definition.²⁶³

The application of Additional Protocol II does not equate to recognition of the rebels, however:

Nothing in this Protocol, shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all

²⁶⁰ See *id.*

²⁶¹ See Reisman & Silk, *supra* note 210, at 464; Protocol II, *supra* note 247, at 1444.

²⁶² Protocol II, *supra* note 247, at 1444.

²⁶³ See *id.*

legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.²⁶⁴

This provision denies combatant immunity to the rebels.²⁶⁵

Article 6 allows prosecution of criminals for offenses related to armed conflict.²⁶⁶

The article makes basic guarantees of a fair trial.²⁶⁷ Just like Common Article 3, there is no grave breaches provision in the Protocol.

c. Other International Laws

With increasing frequency, other treaties and agreements concerning weapons and human rights purport to apply to internal armed conflict. For example, the Chemical Weapons Convention forbids the use of chemical weapons as a method of warfare.²⁶⁸ Some experts believe that this method prohibition encompasses internal armed conflicts.²⁶⁹ Likewise, The Convention for the Prevention and Repression of the Crime of Genocide applies in internal

²⁶⁴ *Id.* at 1443.

²⁶⁵ See Lopez, *supra* note 63, at 933. Many experts to the Diplomatic Conference drafting the Additional Protocol II hoped to extend POW status to combatants in internal armed conflict. However, governments were unwilling to do away with the right to punish rebels. See Lysaght, *supra* note 210, at 21.

²⁶⁶ See Protocol II, *supra* note 247, at 1445.

²⁶⁷ *See id.*

²⁶⁸ See Chemical Weapons Convention, *supra* note 4.

²⁶⁹ See *International Criminalization of Internal Atrocities*, *supra* note 198, at 575 n.114. The U.S. State Department confirmed that the prohibitions on method of warfare in the CWC apply to internal armed conflict

conflicts.²⁷⁰ The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on their Destruction applies to internal conflicts.²⁷¹ Some of these laws codify customary international law.

B. CUSTOMARY INTERNATIONAL LAW

Customary international law is a major influence on the rules in internal and international armed conflicts. A general and consistent practice of states, which they follow from a sense of legal obligation, creates customary international law.²⁷² Hence, customary international law has two requirements: practice, and opinion of legal obligation or *opinio juris*.²⁷³

as well as international armed conflict. *Id.* Such an understanding is natural based upon the language which states that they shall not be used under any circumstances. *Id.*

²⁷⁰ *Id.*

²⁷¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personal Mines and on their Destruction (18 Sept. 1997), reprinted in 36 I.L.M. 1507 (1997) [hereinafter Ottawa Treaty]. The agreement prohibits the developing, producing, stockpiling, transferring or use of anti-personal mines. Stuart Maslen & Peter Herby, *An International Ban on Anti-Personnel Mines*, 325 INT'L REV. OF THE RED CROSS 693, 698-99 (1998). Columbia stated their understanding was that this applied to all parties who are subject to international humanitarian law including those required to apply Common Article 3 and Additional Protocol II. No other country disputed this understanding. *Id.* at 699. The United States has stated its opposition to the universal application of this treaty and retains anti-personal mines for limited uses. See President William Jefferson Clinton, Remarks on Land Mines at White House (Sept. 17, 1997) <<http://www.whitehouse.gov/WH/New/html/19970917-8619.html>>.

²⁷² RESTATEMENT, *supra* note 167, at § 102(2). The sense of legal obligation is also referred to as *opinio juris*.

²⁷³ See Major Timothy P. Bulman, *A Dangerous Guessing Game Disguised As Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War*, 159 MIL. L. REV. 152, 155 (1999); Jonathan I. Chaney, *Universal International Law*, 87 AM. J. INT'L. L. 529, 536 (1993).

The best proof of customary law is state practice.²⁷⁴ Actual acts, claims, diplomatic acts and instructions, declarations, official statements of policy, national laws, court judgments, other governmental acts and omissions provide evidence of the practice of states.²⁷⁵ In addition, acquiescence to actions of other states can build customary laws.²⁷⁶

However, under the second requirement of *opinio juris*, if a state follows a practice but considers it to be non-binding, it does not lead to that practice becoming customary.²⁷⁷ It is not necessary to show with explicit evidence that a state considers a practice obligatory, as *opinio juris* can be inferred from a state's acts or omissions.²⁷⁸

Many sources are used to determine customary law.²⁷⁹ The Restatement asserts that:

...substantial weight is given to:

- (a) judgments and opinions of international judicial and arbitral tribunals;
- (b) judgments and opinions of national judicial tribunals;
- (c) the writings of scholars;
- (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.²⁸⁰

²⁷⁴ See RESTATEMENT, *supra* note 167, at § 103, cmt. a.

²⁷⁵ See Michael Akehurst, *Custom As A Source of Source of International Law*, 47 BRIT. Y.B. INT'L. L. 18, 53 (1977); RESTATEMENT, *supra* note 167, at § 102, cmt. b.

²⁷⁶ See *id.* § 102, cmt. b.

²⁷⁷ See *id.* § 102, cmt. c.

²⁷⁸ See *id.*

²⁷⁹ See MILLER, *supra* note 167, at 11.

²⁸⁰ RESTATEMENT, *supra* note 167, § 103(2).

In addition, law and history books contain information indicating custom.²⁸¹ The teachings of the most highly qualified publicists are used to determine custom.²⁸² Military regulations and manuals reflect how states expect their forces to act.²⁸³ Additionally, resolutions by international organizations regarding the law provide guidance on custom.²⁸⁴

A relatively new development in customary international law is that certain acts are considered *jus cogens*.²⁸⁵ *Jus cogens* are a set of preemtory norms whose violation is considered *per se* illegal.²⁸⁶ These norms prevail over and invalidate international agreements and other rules of international law which conflict with them.²⁸⁷ These *jus cogens* actions include crimes against humanity and genocide.²⁸⁸

²⁸¹ See MILLER, *supra* note 167, at 11.

²⁸² See *id.*; RESTATEMENT, *supra* note 167, § 103 cmt. 1.

²⁸³ See *International Criminalization of Internal Atrocities*, *supra* note 198, at 564-65. United States, German and the Canadian draft manuals reflect the practice of the position of these three nations that Common Article 3 is customary international law.

²⁸⁴ See RESTATEMENT, *supra* note 167, § 103 cmt. 2. Examples of these types of organizations include the United Nations, NATO and OAS. See also Davis L. Brown II, *The Role of Regional Organizations in Stopping Civil Wars*, 41 A. F. LAW REV. 255 (1997).

²⁸⁵ See RESTATEMENT, *supra* note 167, § 702 cmt. n; Mark R. von Sternberg, *Yugoslavian War Crimes and the Search for a New Humanitarian Order: The Case of Dusko Tadic*, 12 ST. JOHN'S J.L. COMM. 351, 354 (1997).

²⁸⁶ See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, (in force Jan. 27, 1980), available in 8 I.L.M. 679 (1969); RESTATEMENT, *supra* note 167, § 702 cmt. n; Sternberg, *supra* note 285, at 355.

²⁸⁷ See RESTATEMENT, *supra* note 167, § 702 cmt. k.

²⁸⁸ See Lieutenant Commander Catherine Sue Knowles, *Life and Human Dignity, The Birthright of all Human Beings*, 45 NAVAL L. REV. 152, 191 (1998). *International Criminalization of Internal Atrocities*, *supra* note 198, at 558; RESTATEMENT, *supra* note 167, § 702 cmt. d.

Customary international law also recognizes some human rights law as applicable against state actions.²⁸⁹ The Hague Regulations are considered customary law.²⁹⁰ Several courts and agencies hold that Common Article 3 is now customary law.²⁹¹ All entities claiming an existence in international law are obligated to apply Common Article 3.²⁹²

IV. THE EFFECT OF NON-GOVERNMENTAL AGENCIES ON THE LAWS

A. THE UNITED NATIONS

The post World War II years saw the nations of the world determined to prevent another devastating world war. To that end, they created the United Nations. The United Nations

²⁸⁹ See *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 589; RESTATEMENT, *supra* note 167, § 702. The Restatement lists a limited number of human rights which reflect international customary law:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, or
- (g) a consistent pattern of gross violations of internationally recognized human rights.

Id. The list is not complete nor closed. *Id.* cmt. a.

²⁹⁰ See *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 590, 591; Roberts, *supra* note 3, at 25.

²⁹¹ See discussion *infra* Parts VI.A.3.b(3) and VI.B.3.b; Goldman, *supra* note 202, at 57, n. 33. The ICRC has opined that Common Article 3 is *jus cogens*. See Goldman, *supra* note 202. at 57.

Charter outlawed aggressive international war in its Charter.²⁹³ It did not, however, outlaw internal conflicts.²⁹⁴ The pertinent parts of the Charter are under Article 2:

....

3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.²⁹⁵

....

7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.²⁹⁶

The United Nations is prohibited from interfering with the domestic affairs of a State.

However, if those affairs would cause a threat to international peace, it can intervene.

²⁹² See Goldman, *supra* note 202, at 57.

²⁹³ E. Berkley Tompkins, *Introduction*, in THE UNITED NATIONS IN PERSPECTIVE xvii (1972).

²⁹⁴ This is because, due to the recent world war, the focus was more on preventing international armed conflict. See LINDA B. MILLER, WORLD ORDER & LOCAL DISORDER, THE UNITED NATIONS AND INTERNAL CONFLICTS 20-21 (1967). In addition, the colonial powers were very concerned with continuing their control over their colonies and did not want outside interference. See *id.* at 24, 26; Tom J. Farer, *The United Nations and Human Rights: More than a Whimper, Less than a Roar*, in UNITED NATIONS, DIVIDED WORLD 100 (Adam Roberts & Benedict Kingsbury eds. 1988)

²⁹⁵ HANS KELSEN, THE LAW OF THE UNITED NATIONS 840 (1951).

²⁹⁶ *Id.*

The United Nations has great influence on the application of law in internal conflicts. It has intervened in numerous civil wars since its creation.²⁹⁷ The United Nations has conducted more peacekeeping missions in the last decade than it did during its first four decades.²⁹⁸ These missions include keeping peace within countries that have experienced civil wars.²⁹⁹

The United Nations is influential in establishing customary international law. The Security Council and General Assembly issue resolutions regarding the law.³⁰⁰ It adopts legal conventions and holds international conferences.³⁰¹ It has various subject matter committees, which consider legal issues.³⁰² All of these pronouncements are important influences under customary law.³⁰³

The United Nations has also wielded power over the law through the International Court of Justice (ICJ) and *ad hoc* criminal Tribunals. The ICJ has issued opinions of the status of the law in armed conflict.³⁰⁴ Through the statutes creating the *ad hoc* tribunals, the United

²⁹⁷ See Evan Luard, *Civil Conflicts in Modern Internal Relations*, in THE INTERNATIONAL REGULATION OF CIVIL WARS 8, 23 (Evan Luard ed. 1972).

²⁹⁸ See Turley, *supra* note 230, at 150.

²⁹⁹ See *id.*

³⁰⁰ See Nagendra Singh, *The United Nations and the Development of International Law*, in UNITED NATIONS, DIVIDED WORLD 159, 167 (Adam Roberts & Benedict Kingsbury eds. 1988); Newton, *supra* note 150, at 54 n.259. One of the United Nations first acts was to adopt the Genocide Convention and affirm the principles of the Nuremberg Tribunal. *See id.*

³⁰¹ See Singh, *supra* note 300, at 167.

³⁰² See *id.*

³⁰³ See discussion *infra* Part III.B.

³⁰⁴ See Singh, *supra* note 300, at 178.

Nations Security Council has enumerated its consideration of what constitutes the law.³⁰⁵ In addition, the United Nations has worked with the International Committee of the Red Cross in developing the law.

B. INTERNATIONAL COMMITTEE OF THE RED CROSS

The International Committee of the Red Cross (ICRC) was originally a private charity in Geneva, Switzerland.³⁰⁶ After Henry Dunant called for the founding of a Red Cross in his book about the Battle of Solferino, it became the ICRC.³⁰⁷ The ICRC was involved in the first conference on the First Geneva Convention in 1863.³⁰⁸ Since then, the ICRC has been involved in the formation of all the Geneva Conventions, the Hague Conventions and the Additional Protocols to the Geneva Conventions.³⁰⁹ The Geneva Conventions mandate the ICRC presence by giving it special recognition and responsibilities.³¹⁰ The ICRC has also

³⁰⁵ See *supra* notes 376 and 577.

³⁰⁶ See FOUNDING AND EARLY YEARS OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (visited March 27, 1999) <<http://www.icrc.org/unicc/icrcnews.n.html>>.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ See SUTER, *supra* note 102, at 83-125.

³¹⁰ See, e.g., GC III, *supra* note 1, at 3412-16.

been influential in the adoption of other laws. For example, it supported and worked on the development of the Ottawa Treaty on banning land mines.³¹¹

The ICRC has a long history of involvement in internal armed conflicts. In fact, its first service was in an internal armed conflict.³¹² The organization has had and continues to have a profound effect on the interpretation of the Geneva Conventions, the Protocols and the view of what is customary law based upon practice.³¹³ The ICRC is currently compiling a study on what is international customary law.³¹⁴ It is also drafting the elements for the crimes that the International Criminal Court will have jurisdiction over.³¹⁵ The ICRC's comments, commentaries and articles have influence on the interpretation and evolution of the humanitarian law.³¹⁶ The ICRC works with the United Nations and with other Non-governmental agencies.

C. OTHER ORGANIZATIONS

³¹¹ See Doswald-Beck, *supra* note 211, at 48.

³¹² See PICTET, *supra* note 73, at 53.

³¹³ See Theodor Meron, Editorial Comment, *War Crimes Law Comes of Age*, 92 AM. J. INT'L. L. 462, 467 (1998) [hereinafter *War Crimes Law Comes of Age*]. See also Theodor Meron, Editorial Comment, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L. L. 238 (1996) [hereinafter *The Continuing Role of Custom*].

³¹⁴ See Doswald-Beck, *supra* note 211, at 37; *The Continuing Role of Custom*, *supra* note 313, at 238, 249.

³¹⁵ See Marie-Claude Roberge, *The New International Criminal Court*, 325 INT'L REV OF THE RED CROSS 671, 676 (1998).

³¹⁶ See *The Continuing Role of Custom*, *supra* note 313, at 248.

Other non-governmental organizations (NGOs) also influence the law concerning both international and internal armed conflicts.³¹⁷ The ICRC met with thirty-eight NGOs when it was creating the draft for the 1977 Protocols to the Geneva Conventions.³¹⁸ Their expertise was used to craft portions of the provisions.³¹⁹ The International Campaign to Ban Landmines was invited along with the ICRC to the Diplomatic Conference that led to the Ottawa Treaty.³²⁰ Other NGOs were involved in the Ottawa Treaty process.³²¹ Regional Security Organizations have helped to influence the development of the law as well.³²²

The NGOs have been involved in the enforcement area as well. The United Nations Security Council received comments from the ICRC and nine NGOs when it was creating the Yugoslavia Tribunal Statute.³²³ Over two hundred NGOs participated in the Conference by the United Nations Preparatory Committee that worked on establishing an international

³¹⁷ See Rachel Brett, *Non-Governmental Human Rights Organizations and International Humanitarian Law*, 324 INT'L REV. OF THE RED CROSS 531, 532-535 (1998).

³¹⁸ See SUTER, *supra* note 102, at 115.

³¹⁹ See *id.*

³²⁰ See Doswald-Beck, *supra* note 211, at 48.

³²¹ See *id.*

³²² See Brown, *supra* note 284. The article discusses the effect that regional organizations had on the developing humanitarian intervention doctrine.

³²³ U.N. SCOR, 48th Sess. 3217th mtg., U.N. Doc. S/RES/827 (1993), reprinted in 32 I.L.M. 1159, 1167 (1993) [hereinafter Yugoslavia Tribunal Statute]; (visited Mar. 26, 1999) <<http://www.un.org/icty/basic/I-bencon.htm>>.

criminal court.³²⁴ In addition, over eight hundred NGOs were part of a coalition working to quickly establish such a court and ensure that it would be effective and independent.³²⁵

V. CIVIL WARS TODAY

Currently, there are several civil wars raging all over the world. The Congo is experiencing various acts of violence.³²⁶ Sierra Leon is fighting a war with the Revolutionary United Front.³²⁷ Sri Lanka has been embroiled in a war for years with the Tamil Tigers.³²⁸ The list goes on and changes daily.

The question is what effect has international humanitarian law had on the conduct of internal armed conflict. During the twentieth century, many countries have undergone civil wars of tremendous ferocity.³²⁹ These countries include Russia, China, Spain, the Congo,

³²⁴ See Christopher Keith Hall, *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L. L. 548, 555 (1998).

³²⁵ See *id.* at 555.

³²⁶ See BBC, *World: Africa New Massacre in Congo* (visited April 1, 1999) <http://news.bbc.co.uk/hi/english/world/africa/newsid_301000/301974.stm>.

³²⁷ See Agence France-Presse, *Sierra Leonean Rebels Warns of Government Offensive* (visited April 1, 1999) <<http://www.yahoo.com.sg/headlines/250399/world/922307700-90324203536.newsworld.html>>.

³²⁸ See BBC, *Sri Lanka's Unwinnable War* (visited April 1, 1999) <http://news.bbc.co.uk/hi/english/special-report/1998/sri-lanka/newsid_183000/183765.stm>.

³²⁹ See Roberts, *supra* note 3, at 12. See generally Richard C. Schneider, Jr., *ASIL Insight: Geneva Conventions, Protocol II: The Confrontation of Sovereignty and International Law*, in THE AMER. SOC. INT'L. L. NEWSLETTER (NOV. 1995).

Lebanon, Chechnya, and Yugoslavia/Bosnia just to name a few.³³⁰ Until Common Article 3 came into being in 1949, each side decided what measures they would employ.³³¹

After World War II, the prior civil wars of the century and most importantly, the Spanish Civil War, demonstrated the need to address the applicability of some sort of rules for internal armed conflicts.³³² It was clear from the experiences within the first half of the century, that civil wars could affect the international community due to their possible effects on world peace. In this atmosphere, the Common Article 3 was born and in turn Additional Protocol II. However, the parties to the conflicts were required to enforce the provisions themselves which they failed to do.³³³ That self enforcement mechanism for internal conflicts changed when the United Nations acted in regards to the conflicts in the former Yugoslavia and in Rwanda.

VI. THE INTERNATIONAL TRIBUNALS PROSECUTING WAR CRIMES

A. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

³³⁰ See Luard, *supra* note 297, at 23. See generally Hollis, *supra* note 207, at 798-810.

³³¹ See PICTET, *supra* note 204, at 53-55.

³³² See Georges Abi-Saab, *Conflicts of a Non-International Character*, in INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 217, 219 (1988).

³³³ See Hollis, *supra* note 207, at 830-31.

1. Background of the Yugoslavian Conflict

Bosnia and Herzegovina have been multi ethnic countries for centuries.³³⁴ Both areas were a part of the Ottoman Empire and formed the border with Austria-Hungary.³³⁵ The Serbs, Croats and Muslims all share a common ethnic background as Slavs.³³⁶

On June 28, 1389, the Ottoman Turks defeated Serbian forces at the battle of Kosovo Polje.³³⁷ Thereafter, the Ottomans ruled the eastern portion of the Balkans. The Serbs had been Christian but many converted to Islam after the Ottoman Empire took over the region.³³⁸ The Hapsburg Empire absorbed the Catholic Slovenes and Croats.³³⁹

Until 1878, the Ottoman Empire ruled the region. Two wars raged in the Balkans in 1912 and 1913, which liberated the Balkan peninsula from the Ottoman Empire.³⁴⁰ Austria-Hungary Empire annexed Bosnia and Herzegovina in 1908, but the Serbs wanted liberation.³⁴¹ It was a Bosnian Serb who assassinated the Austrian Archduke Ferdinand and

³³⁴ MICHAEL P. SCHARF, BALKAN JUSTICE 21-22 (1997); Prosecutor v. Tadić, No. IT-94-1-T (May 7, 1997), reprinted in 36 I.L.M. 908 (1997) [hereinafter Tadic Judgment]; Prosecutor v. Tadić (visited Mar. 26, 1999) <<http://www.un.org/icty/tadic/trialc2/judgement-e/1970507jt.htm>> [hereinafter Tadic Judgment web site].

³³⁵ See Knowles, *supra* note 288, at 184.

³³⁶ See SCHARF, *supra* note 334, at 21.

³³⁷ See *id.* at 21-22. Kosovo is a sacred place to the Serbs and is viewed as the center of their culture and existence. See ROBERT D. KAPLAN, BALKAN GHOSTS 35-40 (1997).

³³⁸ See SCHARF, *supra* note 334, at 22. The Orthodox Serbs have never forgiven these Muslims for converting from the Orthodox religion.

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ See *id.*

plunged the world into World War I.³⁴² Due to the breakup of the Austria Hungarian Empire after World War I; the Kingdom of Serbia was created.³⁴³ In 1929, it became Yugoslavia.³⁴⁴

Germany and Italy invaded Yugoslavia in 1941.³⁴⁵ The country was undergoing a civil war at the time with the three ethnic factions struggling for control.³⁴⁶ The Germans placed the Croats in charge of the government.³⁴⁷ Once in power, the Croats proceeded to massacre over five hundred thousand Serbs.³⁴⁸ Marshall Tito's forces eventually won control of the country after bitter fighting with the government forces and the invading armies.³⁴⁹ Tito's partisans extracted revenge against the Croats by executing 100,000 Croat soldiers.³⁵⁰

Tito suppressed any nationalist tendencies of the three groups during his reign.³⁵¹ He organized the country into six republics and two autonomous providences (Kosovo and

³⁴² See *id.* The assassination occurred on the anniversary of the Battle of Kosovo, 28 June 1914.

³⁴³ See Tadic Judgment web site, *supra* note 334, para. 58.

³⁴⁴ See *id.*

³⁴⁵ See *id.* para. 60.

³⁴⁶ See *id.* para. 61. The three factions were the Serbian, Croatian and Muslim ethnic groups.

³⁴⁷ See SCHARF, *supra* note 334, at 23.

³⁴⁸ See *id.*; Tadic Judgment web site, *supra* note 334, at para. 62. The Croats invented the term "ethnic cleansing". See SCHARF, *supra* note 334, at 23. Before the war, there were two million Serbs in Yugoslavia. The Croats and Axis powers murdered over 1/2 million Serbs and forced another 1 million to leave the country. See *id.*

³⁴⁹ See *id.*

³⁵⁰ See SCHARF, *supra* note 334, at 24; WILLIAM T. JOHNSON, DECIPHERING THE BALKAN ENIGMA: USING HISTORY TO INFORM POLICY 35 (Strategic Studies Institute U.S. Army War College 1993).

³⁵¹ See SCHARF, *supra* note 334, at 24. Tito was Croatian himself. See *id.*; JOHNSON, *supra* note 350, at 36. Many Serbs felt that he favored Croats over any others in his government. Dušan Cotic, *Introduction, in THE PROSECUTION OF INTERNATIONAL CRIMES* 6 (Roger S. Clark & Madeleine Sann eds., 1996); JOHNSON, *supra* note 350, at 34.

Vojvodina) within the Republic of Serbia.³⁵² The enforced peace continued even after Tito's death in 1980.³⁵³ All of that changed in 1991.

The economic crisis of the 1980s developed into political problems in Yugoslavia.³⁵⁴ With the fall of the Berlin Wall, Eastern European nations experienced internal discord which lead to disintegration.³⁵⁵ Serbia ended the autonomy of Kosovo providence in 1988.³⁵⁶ Political infighting continued. Finally on June 25, 1991, Slovenia and Croatia declared independence.³⁵⁷ However, Serbia through the Yugoslavia People's Army (JNA) opposed this independence and launched military offensives against Slovenia and Croatia.³⁵⁸ Fighting was fierce. After the Serbs encountered some setbacks in Slovenia, they entered a cease fire agreement with Slovenia.³⁵⁹ Fighting continued in Croatia until 1992.³⁶⁰ The European community recognized Slovenia and Croatia on January 15, 1992.³⁶¹ In March 1992, Bosnia

³⁵² See SCHARF, *supra* note 334, at 24.

³⁵³ See *id.*

³⁵⁴ See Tadic Judgment web site, *supra* note 334, at para. 70.

³⁵⁵ See SCHARF, *supra* note 334, at 24.

³⁵⁶ See *id.* at para. 71; JOHNSON, *supra* note 350, at 54.

³⁵⁷ See SCHARF, *supra* note 334, at 26.

³⁵⁸ See *id.* at 26.

³⁵⁹ See *id.*

³⁶⁰ See *id.* at 27.

³⁶¹ See *id.*

Herzegovina declared its independence and Europe and the United States recognized it in April.³⁶² Macedonia declared its independence in September 1992.³⁶³

In Bosnia Herzegovina, the Bosnian Serbs boycotted the March election to protest the action calling for independence.³⁶⁴ After Bosnia and Herzegovina declared independence, the Bosnian Serbs with the help of the Yugoslavian Serb forces (JNA) launched an attack in April 1992.³⁶⁵ The JNA forces left the country in May to avoid United Nations sanctions.³⁶⁶ Bosnian JNA officers and much of the JNA equipment stayed behind.³⁶⁷ Fighting between the Bosnian Serbs, Muslims and Croats continued until the Dayton Peace Accord.³⁶⁸

Throughout the struggle between the three factions, humane treatment of the people on the other sides was the exception not the rule. Soldiers and civilians on all sides were murdered, raped, beaten, and tortured based upon their ethnic background.³⁶⁹ Constant news reports flowed out of the area to the world reporting mass killings resulting in mass graves.³⁷⁰ The news services ran pictures of half starved prisoners standing behind barbed wire fences

³⁶² See *id.*

³⁶³ See *id.*

³⁶⁴ See *id.*

³⁶⁵ See *id.*

³⁶⁶ See *id.* at 28.

³⁶⁷ See *id.*

³⁶⁸ See *id.*

³⁶⁹ See *id.* at 29; S. Zaid, *Trial of the Century? Assessing the Case of Dusko Tadic Before the International Criminal Tribunal for the Former Yugoslavia*, 3 ILSA J. INT'L & COMP. L. 589, 590 (1997). In fact, forces sometimes committed atrocities on their own people to sway public opinion against the other side. Cotic, *supra* note 351, at 10.

³⁷⁰ See SCHARF, *supra* note 334, at 30.

invoking images of the Nazi holocaust.³⁷¹ Thousands of people forced from their homes and many of them sent to concentration camps.³⁷² These camps were unsanitary and inadequate for their needs.³⁷³ Military forces targeted the civilian population and hundreds of people killed.³⁷⁴ Finally in 1992, the three sides came together and signed the Dayton Peace Accord.³⁷⁵

2. *The Tribunal Statute*

In 1993, the Security Council of the United Nations created the International Criminal Tribunal for the Former Yugoslavia pursuant to its power under Chapter VII of the United Nations Charter.³⁷⁶ The Security Council appeared to believe that the conflict in the former Yugoslavia was international armed conflict.³⁷⁷ The Yugoslavia Tribunal Statute consists of

³⁷¹ See *id.*; Zaid, *supra* note 369, at 590.

³⁷² See SCHARF, *supra* note 334, at 29-30

³⁷³ See *id.* at 29.

³⁷⁴ See *id.* at 28.

³⁷⁵ See *id.* at 86-87

³⁷⁶ See Yugoslavia Tribunal Statute, *supra* note 323, at 1204.

³⁷⁷ See *International Criminalization of Internal Atrocities*, *supra* note 198, at 556; Lopez, *supra* note 63, at 937, 941. But see George H. Aldrich, *Comment: Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L. L. 64, 65-67. The Security Council Resolutions regarding grave breaches and the opinion of the commission of experts indicate international. On the other hand, the Security Council never expressly said it was all international conflict. Article 5 causes ambiguity because it mentions international and internal armed conflicts. See *id.*

thirty-four articles, four of which actually list the criminal violations that are punishable under the statute.

Article 1 provides the tribunal with the power to prosecute persons for serious violations of international humanitarian law.³⁷⁸ The offense must have taken place in what was the territory of the former Yugoslavia and must have occurred since 1991.³⁷⁹

Article 2 deals with Grave Breaches of the 1949 Geneva Conventions.³⁸⁰ The Tribunal may prosecute persons who committed or ordered the commission of grave breaches of the Geneva Conventions.³⁸¹ The article specifically lists what acts constitute grave breaches.³⁸² The acts itemized in the article repeat the same list in the grave breach sections of the four Geneva Conventions.³⁸³

Article 3 empowers the Tribunal to prosecute violations of the law or customs of war. This section lists covered violations. Specifically,

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

³⁷⁸ See Yugoslavia Tribunal Statute, *supra* note 376, at 1192.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ *Id.*

³⁸² *Id.*

³⁸³ Compare Yugoslavia Tribunal Statute, *supra* note 376, at 1192, with GC I, *supra* note 1, at 3146; GC II, *supra* note 1, at 3250; GC III, *supra* note 1, at 3420; GC IV, *supra* note 1, at 3618.

- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art science;
- (e) plunder of public or private property.³⁸⁴

The article states that these listed violations are not the only possible ones that can be prosecuted.³⁸⁵

Article 4 covers the crime of Genocide.³⁸⁶ The article specifically defines genocide in paragraph 2 of the article as follows:

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
 - a) Killing members of the group;
 - b) Causing serious bodily or mental harm to members of the group;
 - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d) Imposing measures intended to prevent births within the group;
 - e) Forcibly transferring children of the group to another group.³⁸⁷

Article 4 makes committing genocide as defined above and committing the following acts punishable: the actual act of genocide; the conspiracy to commit genocide; the direct and public incitement to commit the crime; the attempt to commit genocide; and complicity in genocide.³⁸⁸ The Security Council used the Genocide Convention to frame the language and definitions of the article.

³⁸⁴ See Yugoslavia Tribunal Statute, *supra* note 376, at 1192-3.

³⁸⁵ See *id.* at 1192.

³⁸⁶ See *id.* at 1193. The Security Council patterned the article after the Genocide Convention.

³⁸⁷ *Id.*

³⁸⁸ *Id.*

Article 5 makes crimes against humanity punishable by the Tribunal.³⁸⁹

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- a) murder;
- b) extermination;
- c) enslavement;
- d) deportation;
- e) imprisonment;
- f) torture;
- g) rape;
- h) persecutions on political, racial and religious grounds;
- i) other inhumane acts.³⁹⁰

It is important to note that the statute gives the Tribunal authority to prosecute crimes of humanity when they were committed in an armed conflict.³⁹¹ The armed conflict can be either international or internal.³⁹² These crimes must be directed against a civilian population.³⁹³

Article 7 assigns individual criminal responsibility for the crimes contained in Articles 2 through 5.³⁹⁴ “A person who planned, instigated, ordered, committed or otherwise aided or

³⁸⁹ See *id.* at 1193-4.

³⁹⁰ *Id.*

³⁹¹ See *id.* at 1193. This nexus to an armed conflict is not required for crimes against humanity and genocide in general. See *id.* The Security Council grafted this requirement onto the crime thereby limited the scope of the Tribunal’s jurisdiction. See *id.*

³⁹² See *id.*

³⁹³ See *id.*

³⁹⁴ See *id.* at 1194.

abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”³⁹⁵

Another important article is Article 9. Article 9 grants the Tribunal concurrent jurisdiction with national courts over these crimes.³⁹⁶ In addition, the Tribunal has primacy over national courts and can request that national courts defer a case to the Tribunal at any stage of the procedure.³⁹⁷

After some initial problems, the Tribunal was set up and began running.³⁹⁸ The first significant case was Tadić.

3. *The Tadić Case*

a. *Dusko Tadić*

Dusko Tadić was born in 1955 in the village of Kozarac, Bosnia.³⁹⁹ His father, grandfather and two uncles fought with Tito’s partisans in World War II.⁴⁰⁰ The village of

³⁹⁵ *Id.*

³⁹⁶ *See id.*

³⁹⁷ *See id.*

³⁹⁸ See SCHARF, *supra* note 337, at 63-73; Geoffrey R. Watson, *Comment: The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in Prosecutor v. Tadic*, 36 VA. J. INT’L L. 687, 690 (1996).

³⁹⁹ *See id.* at 93.

Kozarac was mostly Muslim but the Muslims appeared to have respected Tadić and his family before 1991.⁴⁰¹ Tadić served a required 14-month enlistment with the JNA in 1977.⁴⁰² He moved around after that and even lived in Libya for about one year.⁴⁰³ He returned to his hometown in 1989, opened a pub, and taught karate.⁴⁰⁴ Tadić's neighbors thought he was not very bright and easily prone to violence.⁴⁰⁵

Sometime in 1990, it appears that Tadić's attitude toward his Muslim neighbors began to change. He had borrowed money from Muslim friends to build his pub and they were asking for repayment.⁴⁰⁶ Ethnic tensions in the region were rising. In August 1990, Tadić joined the Serbian Democratic Party.⁴⁰⁷

Fighting broke out in the region on April 30, 1992.⁴⁰⁸ On May 14, the Serbs began an assault on the town.⁴⁰⁹ Shelling began on the 24th with Tadić allegedly helping to pick

⁴⁰⁰ See *id.*

⁴⁰¹ See *id.* See also Watson, *supra* note 398, at 690.

⁴⁰² See SCHARF, *supra* note 337, at 93.

⁴⁰³ See *id.* at 94.

⁴⁰⁴ See *id.*

⁴⁰⁵ See *id.* See also Watson, *supra* note 398, at 690.

⁴⁰⁶ See SCHARF, *supra* note 337, at 94.

⁴⁰⁷ See *id.*

⁴⁰⁸ See *id.* at 95.

⁴⁰⁹ See *id.*

targets.⁴¹⁰ The town surrendered on May 26, 1992 and Tadić alleged pointed out prominent Muslims for execution.⁴¹¹ The remaining people of the town were sent to concentration camps.⁴¹² Tadić became a traffic cop after the village's surrender but supposedly spent much of his time visiting the concentration camps to torture, rape and murder the detainees.⁴¹³

Tadić left Bosnia sometime in the fall of 1993 to live with a brother in Germany.⁴¹⁴ The German authorities arrested him in February 1994 on suspicion of committing war crimes and genocide.⁴¹⁵ The Tribunal requested jurisdiction of Tadić and he was turned over to the Tribunal on April 24, 1995.⁴¹⁶

The *Tadić* case before the International Tribunal can be broken into three phases. First was the trial court's decision on the defense motion on jurisdiction, then the Appellate court's decision on that motion, and lastly the judgment. I will deal with the Appellate decision and the final judgement.

b. The Jurisdictional Decision of the Appeals Chamber

⁴¹⁰ See *id.*

⁴¹¹ See *id.* See also Watson, *supra* note 398, at 690.

⁴¹² See SCHARF, *supra* note 337, at 95.

⁴¹³ See *id.* at 95-96.

⁴¹⁴ See *id.* at 96.

⁴¹⁵ See *id.* at 97.

⁴¹⁶ See *id.* at 99, 100. See also Watson, *supra* note 398, at 691. The Tribunal asked Germany to defer its prosecution and hand over Tadić pursuant to Article 9(2) of the Tribunal's Statute. See *id.* The Tribunal indicted Tadić on February 13, 1995. See *id.*

The Appeals Chamber of the International Tribunal for the Former Yugoslavia issued its seminal decision on October 2, 1995.⁴¹⁷ The defendant, Dusko Tadić, filed an interlocutory appeal from the Trial Chamber's denial of a motion to dismiss for lack of jurisdiction.⁴¹⁸ The decision of the Appeals Chamber dealt with the jurisdiction of the Tribunal but its ramifications encompass the applicability of international law to areas of armed conflict.

The Appeals Chamber reviewed Tadić's three challenges. These arguments were (1) that the Tribunal had not been validly established; (2) that the primacy of the Tribunal's jurisdiction over national courts was illegal; and (3) that the Tribunal lacked subject matter jurisdiction because the conflict was internal and not international.⁴¹⁹ The Appeals Chamber rejected the accused's assertions as to each argument.

(1) Validity of the Tribunal's Establishment

Tadić attacked the validity of the Tribunal's establishment. The Appeals Chamber sharply disagreed with the Trial Chamber on the accused's right to challenge the validity of

⁴¹⁷ Prosecutor v. Tadić, No. IT-94-1-AR72 (October 2, 1995), *reprinted in* 35 I.L.M. 32, 35 (1996) [hereinafter Tadić Appeals Decision].

⁴¹⁸ See *id.*; Watson, *supra* note 398, at 692.

⁴¹⁹ See Tadić Appeals Decision, *supra* note 417, at 38.

the Tribunal. The Trial Court had dismissed the accused's challenge to the validity of the Tribunal by holding that it did not have the authority to decide such a question.⁴²⁰ However, the Appeals Chamber held that it is an inherent function of the judicial review process to determine the legitimacy of the court's existence.⁴²¹ Therefore, the Appeals Chamber had jurisdiction to examine the validity of the Tribunal's creation.

Next, the Prosecutor argued and the Trial Court held that the legitimacy of the Tribunal's establishment was a political question and thus non-justiciable.⁴²² The Appeals Chamber found that the doctrine of political questions and non-justiciable issues had all but faded from present-day international law.⁴²³ As long as the legal question in a case is capable of a legal

⁴²⁰ See *id.* at 40.

[I]t is one thing for the Security Council to have taken every care to ensure that a structure appropriate to the conduct of fair trials has been created; it is an entirely different thing in any way to infer from that careful structuring that it was intended that the International Tribunal be empowered to question the legality of the law which established it. The competence of the International Tribunal is precise and narrowly defined; as described in Article 1 of its Statute, it is to prosecute persons responsible for serious violations of international humanitarian law, subject to spatial and temporal limits, and to do so in accordance with the Statute. That is the full extent of the competence of the International Tribunal. *Id.* (quoting the decision of the trial chamber).

⁴²¹ See *id.* at 40. The Chamber cited cases concerning the jurisdictional authority of the United Nations Administrative Tribunal and the International Court of Justice. See *id.* at 39,40. These cases held that the court or tribunal had to determine their own jurisdiction even when the documents creating them did not provide for such action. The Security Council of the United Nations has broad discretionary powers under the United Nations Charter but those powers are not unlimited. See *id.* at 41. The wider the discretion, the narrower the scope of review by the International Tribunal. However, it never entirely disappears and there may be situations where the Security Council's actions contradict the Charter. See *id.*

⁴²² See *id.*

⁴²³ See *id.*

answer, the court is obliged to exercise its jurisdiction regardless of any political or non-justiciable issues.⁴²⁴

Finally, the actual validity question dealt with whether the Tribunal was duly established by law. The accused argued that "the International Tribunal should have been created either by treaty, the consensual act of nations, or by amendment of the Charter of the United Nations, not by resolution of the Security Council."⁴²⁵ The Appeals Chamber found that the Security Council had the authority to determine when Chapter VII of the Charter applies in a situation and what response it would take under Chapter VII.⁴²⁶ The Appeals Chamber conceded that Articles 41 and 42 of the United Nations Charter did not specifically mention a criminal tribunal as an enforcement mechanism.⁴²⁷ However, the Tribunal does fit within the principles of Article 41.

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may

⁴²⁴ See *id.* at 41.

⁴²⁵ *Id.* at 42.

⁴²⁶ See *id.* Chapter VII of the United Nations Charter, Article 39, reads as follows:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Id. (quoting the UN Charter). The Security Council determines if the situation warrants the use of the powers granted under Chapter VII and then it determines what response it will take under the Chapter. The Chamber found that the armed conflict within the former Yugoslavia was a breach of the peace or at the least a threat to the peace regardless of whether it was internal or international armed conflict. *See id.* at 43. Once the Security Council makes such a determination of a threat or breach, it has a wide discretion in choosing what action to take against the parties involved. *See id.*

⁴²⁷ See *id.* at 44. Article 42 deals with military measures and Article 40 concerns provisional measures designed to act as emergency police actions. *See id.*

include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations.⁴²⁸

Therefore, the power to establish the Tribunal is entirely within the Security Council's powers under Article 41.⁴²⁹

The Appeals Chamber refused to determine the appropriateness of this measure based upon whether it achieved its ends.⁴³⁰ The Chamber held that determining the success of achieving the goal was not the criteria for determining the legality of the measure chosen.⁴³¹ The Security Council used the Tribunal and other measures to try to achieve its goal.⁴³² Therefore, the Tribunal was lawfully established under Chapter VII.

The next issue was whether the Tribunal was "established by law". The International Covenant on Civil and Political Rights provides that an individual charged with a crime is entitled to a "fair and public hearing by a competent, independent and impartial tribunal established by law."⁴³³ The Appeals Chamber pointedly disagreed with the accused's

⁴²⁸ *Id.* (quoting Article 41, UN Charter). The listing of examples is illustrative only and not exclusive. *See id.*

⁴²⁹ *See id.* The Security Council can set up a subsidiary organ with judicial powers despite the fact that it does not have any such powers itself. *See id.* at 45. By creating this tribunal, the Security Council exercised its primary function of maintaining peace and security. The Appeals Chamber cited the fact that the General Assembly had no military and police powers yet established a United Nations Emergency Force in 1956. In addition, the General Assembly has no judicial functions or powers but it established the United Nations Administrative Tribunal in order to exercise its power to regulate "staff relations." *See id.*

⁴³⁰ *See id.* In this case, the Security Council had decided that the restoration of peace was a goal in establishing the Tribunal.

⁴³¹ *See id.*

⁴³² *See id.* at 46.

⁴³³ *See id.* The European Convention on Human Rights and the American Convention on Human Rights echo this. *See id.*

argument that “established by law,” meant established by a legislature.⁴³⁴ The most reasonable interpretation was that the establishment must be in accordance with the rule of law.⁴³⁵ The Tribunal was set up in accordance with international standards and provides “all guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”⁴³⁶ Accordingly, the International Tribunal was “established by law.”⁴³⁷ Based upon the aforementioned, the first basis of the appeal was dismissed.

(2) Primacy of the Tribunal’s Jurisdiction Over National Courts

The second ground for appeal was whether the primacy of the Tribunal's jurisdiction over national courts was legal. Article 9 of the Statute of the International Tribunal announced that the International Tribunal and national courts had concurrent jurisdiction but the Tribunal would have primacy over national courts.⁴³⁸

⁴³⁴ See *id.* The Appeals Chamber said this interpretation is inapplicable in the international setting or the United Nations and is only applicable to municipal systems.

⁴³⁵ See *id.* at 47.

⁴³⁶ See *id.* Based upon a review of the Statute, the Rules of Procedure and the Rules of Evidence, the Chamber concluded that the guarantees were present. See *id.*

⁴³⁷ See *id.* at 48.

⁴³⁸ See *id.* This jurisdiction was granted to prosecute persons who had committed serious violations of international humanitarian law in the former Yugoslavia after January 1, 1991.

Tadić had been pending an investigation instituted by a court in the Federal Republic of Germany (FRG) when the Tribunal requested deferral.⁴³⁹ The accused argued that the proceedings in FRG were equivalent to pending trial but the Appeals Chamber upheld the Trial Chamber finding that it was an investigation not a trial.⁴⁴⁰ The accused also argued that Bosnia-Herzegovina had the right to exercise its jurisdiction in this matter and had done so by prosecuting some of those charged with crimes against humanity.⁴⁴¹ However, this did not settle the question.⁴⁴²

The Trial Chamber had refused to allow the accused to assert violation of a state's sovereignty as a defense.⁴⁴³ The Appeals Chamber held that the defendant could assert this defense because to hold otherwise in an international tribunal would deprive the accused of a proper defense and would be contrary to international law.⁴⁴⁴ However, in this case, the Republic of Bosnia-Herzegovina approved of the International Tribunal trying these cases.⁴⁴⁵ In addition, the nature of the alleged crimes was such that they affect more than one state's

⁴³⁹ See *id.* at 49. The FRG eventually handed Tadić over to the Tribunal.

⁴⁴⁰ See *id.*

⁴⁴¹ See *id.* at 49-50.

⁴⁴² See *id.*

⁴⁴³ See *id.* at 50.

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.* at 50- 51. The Bosnia-Herzegovina President's letter to the Secretary-General of the United Nations, a decree on deferral to the International Tribunal, and a letter from the liaison officer from Bosnia-Herzegovina to the International Tribunal demonstrated this approval. See *id.*

interests and they were not crimes that were merely domestic in nature.⁴⁴⁶ As such, international tribunals created for prosecuting such crimes must have primacy.⁴⁴⁷

Lastly, the accused argued he had the right to be tried by his national courts under his national laws.⁴⁴⁸ The Appeals Chamber agreed but held that the right was not exclusive.⁴⁴⁹ The right's goal was to avoid the creation of special political courts during times of unrest without the guarantees of a fair trial.⁴⁵⁰ The creation of an international tribunal that could impartially consider the matter does not infringe on the accused's rights.⁴⁵¹ The sovereignty assertion was thereby dismissed.

(3) Lack of Subject Matter Jurisdiction

The last ground for appeal was lack of subject matter jurisdiction over the alleged crimes. The accused argued that Articles 2, 3 and 5 of the Statute of the International Tribunal were limited to crimes committed in an international armed conflict and the armed conflict in the

⁴⁴⁶ See *id.* at 51.

⁴⁴⁷ See *id.* at 51-52.

⁴⁴⁸ See *id.* at 52.

⁴⁴⁹ See *id.* at 52-53.

⁴⁵⁰ See *id.* at 52.

⁴⁵¹ See *id.* at 53

former Yugoslavia was internal armed conflict.⁴⁵² At the appellate level, the accused also alleged that there was no armed conflict in the region where the crimes allegedly took place so the articles were inapplicable to any actions that occurred there.⁴⁵³

The Appeals Chamber of the International Tribunal proceeded to review the status of international humanitarian law and its applicability to the conflict within the former Yugoslavia.⁴⁵⁴ The Chamber started with the fundamental question of what was an armed conflict and what was the scope of the laws affecting such conflicts.⁴⁵⁵ The Chamber reviewed the language of the Geneva Conventions and the Additional Protocols and found the documents do not mention the geographic scope of the conventions.⁴⁵⁶ However, it was clear that certain provisions of the conventions and protocols applied to the entire territory of a Party to the conflict.⁴⁵⁷ Furthermore, the applicable rules reach beyond the temporal and geographical scope of actual hostilities.⁴⁵⁸ The Appeals Chamber concluded that:

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a

⁴⁵² See *id.* The Trial Chamber ruled that international armed conflict was not a jurisdictional criterion for Article 2 and that Article 3 and 5 applied to internal and international armed conflicts. Therefore, the Trial Chamber concluded that it did not need to decide what type of conflict existed in former Yugoslavia. See Tadic Appeal Decision, *supra* note 417, at 53.

⁴⁵³ See *id.*

⁴⁵⁴ See *id.* at 53-71.

⁴⁵⁵ See *id.* at 54.

⁴⁵⁶ See *id.*

⁴⁵⁷ See *id.* Based upon the language and the nature of the Conventions, their provisions must apply throughout the territories of the parties to the conflict or it would defeat their purpose. This is applicable to the provisions involving internal as well as international armed conflict. See *id.*

⁴⁵⁸ See *id.*

State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁴⁵⁹

Based upon this definition, the Chamber concluded that there was armed conflict in the former Yugoslavia, which started in 1991 and continued through the date of the opinion.⁴⁶⁰ The hostilities in the former Yugoslavia exceeded the intensity requirements for both international and internal armed conflict.⁴⁶¹ Actual hostilities in the local region are irrelevant provided there is a close connection between the alleged crimes and hostilities in territory controlled by the parties.⁴⁶² The Chamber held that based upon the facts before it, the alleged crimes were committed in an armed conflict.⁴⁶³

The Chamber next turned to whether the International Tribunal's statute referred only to international armed conflicts. The language of Article 2 and 3 did not refer to their applicability in international or internal armed conflict.⁴⁶⁴ On the other hand, Article 5 clearly proclaimed itself applicable to international and internal armed conflicts.⁴⁶⁵ For that

⁴⁵⁹ *Id.*

⁴⁶⁰ *See id.* at 54-55.

⁴⁶¹ *See id.* at 55. Unfortunately, the court does not recount what it considers the minimum triggering point for either internal or international armed conflicts.

⁴⁶² *See id.*

⁴⁶³ *See id.*

⁴⁶⁴ *See id.*

⁴⁶⁵ *See id.*

reason, the Chamber reviewed the objective and purpose of the Statute.⁴⁶⁶ The Chamber noted that the Security Council knew the conflict in the former Yugoslavia could be considered either internal or international.⁴⁶⁷ In addition, the parties to the various conflicts entered into agreements which reflected the changing nature of the conflicts. The agreement between the Federal Republic of Yugoslavia, the Republic of Serbia and the Republic of Croatia referenced the Geneva Conventions and Additional Protocol I.⁴⁶⁸ On the other hand, the agreement between the factions fighting in the Republic of Bosnia-Herzegovina based their agreement on Common Article 3.⁴⁶⁹ The Chamber noted that the ICRC helped with the latter agreement.⁴⁷⁰ Based upon its analysis of the Security Council's intent to include either context, the Statute was construed to give that effect.⁴⁷¹

Article 5 is the only article that expressly refers to the type of conflict needed for the crime. Article 5 requires a nexus between crimes of humanity for the Tribunal, although

⁴⁶⁶ See *id.*

⁴⁶⁷ See *id.* The Security Council's references in various resolutions was to both grave breaches, which are considered linked to international conflicts, and to other violations of humanitarian law. When the statute was adopted, the Secretary General's Report stated that there was no judgment as to the international or internal character of the conflict. *See id.* at 56. At the meeting on the adoption of the Statute, three members indicated their understanding that Article 3 of the statute included any humanitarian law agreements in force in the former Yugoslavia. The United States referenced Common Article 3 and Additional Protocol II as applicable and stated that the other members of the Security Council shared that view. *See id.* at 57.

⁴⁶⁸ See *id.* at 55-56. The Chamber stated that the parties specifically refrained from mentioning Common Article 3 and Additional Protocol I.

⁴⁶⁹ See *id.* at 56. Using the provisions of Common Article 3, the parties also agreed to apply some provisions of the Geneva Conventions applicable to international armed conflicts. *See id.*

⁴⁷⁰ See *id.* The Appeals Chamber also noted that the ICRC had actually initiated as well as helped with this agreement. If the ICRC had believed that the matter was not an internal conflict, then it would have violated the requirements under the Geneva Conventions by allowing this agreement. This is because the Geneva Conventions do not permit parties to agree to ignore its provisions and only applying Common Article 3 in an international armed conflict would have been such a violation.

⁴⁷¹ See *id.* at 57.

customary law does not require such a nexus.⁴⁷² It would defeat the Security Council's purpose if the Chamber read into the other articles a requirement for a nexus to international armed conflict.⁴⁷³

However, the Chamber reasoned that the logical interpretation of the provisions of Article 2 indicates that there must be an international conflict.⁴⁷⁴ The explicit terms of the Article and the Report of the Secretary General shows that the 1949 Geneva Conventions are the basis of the Article.⁴⁷⁵ The Chamber analyzed the grave breaches sections of the Geneva Conventions and found that the international armed conflict requirement was a necessary limitation on the grave breaches system due to the mandatory universal jurisdiction requirement.⁴⁷⁶ The reference in Article 2 to "protected persons or property" refers to those protected under the Geneva Conventions.⁴⁷⁷ The strict conditions of "protected persons or property" under the Geneva Conventions require that the person or property be caught up in an international conflict.⁴⁷⁸ This requirement is borne out in the Secretary-General's Report

⁴⁷² See *id.* Customary international law does not require a nexus between crimes against humanity and an armed conflict.

⁴⁷³ See *id.*

⁴⁷⁴ See *id.* at 60.

⁴⁷⁵ See *id.* at 58.

⁴⁷⁶ See *id.* at 59.

⁴⁷⁷ See *id.*

⁴⁷⁸ See *id.*

where Article 2's meaning of grave breaches references international armed conflicts.⁴⁷⁹

This interpretation is the only one warranted by the Statute and the Geneva Conventions.⁴⁸⁰

The Appeals Chamber noted that there are arguments for extending the grave breaches of Article 2 to internal armed conflicts.⁴⁸¹ The U.S. argued in an *amicus curiae* brief that the grave breaches provisions apply to both types of conflict but was unsupported by any authority. While this is the legal opinion of only one permanent member of the Security Council, if other states and international bodies were to share this view then *opinio juris* would change and the scope of grave breaches would expand.⁴⁸² Based upon its review, the Appeals Chamber determined that Article 2 requires the context of an international armed conflict.⁴⁸³ Therefore, the place and timing of the offense is critical in determining whether the conflict is international and if grave breaches can be prosecuted⁴⁸⁴

⁴⁷⁹ See *id.*

⁴⁸⁰ See *id.*

⁴⁸¹ See *id.*

⁴⁸² See *id.* The Appeals Chamber suggests that *opinio juris* on the scope of grave breaches may be changing. The Chamber notes that a German Military Manual holds that grave breaches include some violations of Common Article 3. In addition, the agreement of the parties in Bosnia-Herzegovina internal conflict agreement provided for the prosecution of grave breaches. Lastly, the Chamber noted a Danish case against a Croatian accused of crimes in Bosnia. The court rendered a judgment based on grave breaches but never addressed the question. This may indicate that some national courts are taking the view that grave breaches operate regardless of the conflict being internal or international. See *id.*

⁴⁸³ See *id.* at 60.

⁴⁸⁴ See Knowles, *supra* note 288, at 191. See generally Olivia Swaak-Goldman, *International Decisions: Prosecutor v. Rajic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence*. No. IT-95-12-R61. International Criminal Tribunal for the Former Yugoslavia, September 13, 1996, 91 AM. J. INT'L. L. 523, 524 (discusses the actual application of the ruling in the *Radjic* case and the finding of the start of the international conflict)

The facts plainly dictate this conclusion and it is certainly logical. There is nothing to indicate that customary international law has expanded grave breaches to internal conflicts.⁴⁸⁵ The practice of nations does not clearly show that an extension has occurred.⁴⁸⁶ In fact one indication that it has not extended is that grave breaches are contained only within the context of international conflicts in the 1977 Protocols.⁴⁸⁷ States still see and want international and internal armed conflicts dealt with differently.⁴⁸⁸ In other words, the Appeals Chamber was correct in finding that Article 2 did not apply to internal armed conflict.

Article 3 of the Statute refers to a broad category of offenses, “violations of the laws or customs of war.”⁴⁸⁹ This terminology and listing of offenses was used in order to ensure that the 1907 Hague Regulations would be considered part of the Tribunal’s jurisdiction.⁴⁹⁰ The Chamber stated that the terminology equates to humanitarian international law and therefore applied to all violations of humanitarian law.⁴⁹¹ The delegates in the Security Council acknowledged that Article 3 covered all applicable international humanitarian law.⁴⁹² Therefore, Article 3 is a general clause covering all violations of humanitarian law falling

⁴⁸⁵ See Watson, *supra* note 398, at 708.

⁴⁸⁶ See *id.* at 709.

⁴⁸⁷ See ADDITIONAL PROTOCOL I, *supra* note 185.

⁴⁸⁸ Some evidence of this is the refusal of states to apply international armed conflict rules to internal conflicts and the fact that the International Criminal Court statute still characterizes the conflicts differently. See discussion *infra* Part VI.C.

⁴⁸⁹ See Tadić Appeals Decision, *supra* note 417, at 60.

⁴⁹⁰ See *id.*

⁴⁹¹ See *id.* at 60-61.

⁴⁹² See *id.* at 61.

outside of Article 2 and not covered by Articles 4 and 5.⁴⁹³ Article 3 achieves the primary purpose of the Statute, which is to punish any person guilty of serious violation of international humanitarian law.⁴⁹⁴

The Appeals Chamber next specified the conditions under which Article 3 applied. For an offense to be punished:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim....
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁴⁹⁵

The Chamber looked specifically at the existence of customary international rules governing internal conflict and whether violation of those rules results in individual criminal responsibility.⁴⁹⁶

The Appeals Chamber reviewed the history of what customary rules apply to international humanitarian law. The Chamber mentions how civil strife has become more large scale and has involved outside States indirectly or directly.⁴⁹⁷ The Chamber alleges

⁴⁹³ See *id.* This includes violations of the Hague law on international conflicts; violations of the Geneva Conventions other than grave breaches; violations of Common Article 3 and other customary rules on internal conflicts; and violations of agreements binding on the parties such as treaties. *See id.*

⁴⁹⁴ *See id.*

⁴⁹⁵ *Id.* at 62.

⁴⁹⁶ *See id.*

⁴⁹⁷ *See id.* at 62-63.

that the differences between international and internal conflict are losing value.⁴⁹⁸ In order to determine customary law, the Chamber would rely on official pronouncements of States, military manuals and judicial decisions because actual practice was too difficult to discern.⁴⁹⁹

The Appeals Chamber began its review of customary law by examining the Spanish Civil War of 1936-1939.⁵⁰⁰ The Spanish Civil War had elements of internal and international armed conflict.⁵⁰¹ The government and outside states refused to recognize the insurgents as belligerents but certain rules still applied.⁵⁰² The rules included prohibiting bombing of civilians and non-military targets.⁵⁰³ The Appeals Chamber discusses the League of Nations' assertion of certain applicable rules in the Spanish War and the Chinese-Japanese War.⁵⁰⁴ Rules evolving from the Spanish War were concerned with protecting civilians.⁵⁰⁵ Subsequently, the States specified certain rules in Common Article 3 of the Geneva Conventions.⁵⁰⁶ The Appeals Chamber recounts those states and insurgents who publicly announced their application of Common Article 3 and the general principles of humanity.⁵⁰⁷ In addition, the ICRC actions to promote parties to apply these principles, United Nations

⁴⁹⁸ See *id.* at 63.

⁴⁹⁹ See *id.*

⁵⁰⁰ See *id.*

⁵⁰¹ See *id.*

⁵⁰² See *id.*

⁵⁰³ See *id.* at 63-64.

⁵⁰⁴ See *id.* at 64.

⁵⁰⁵ See *id.*

⁵⁰⁶ See *id.*

⁵⁰⁷ See *id.* at 64-65.

General Assembly resolutions, declarations by member States of the European Union, Additional Protocol II, and military manuals, all help to form customary rules.⁵⁰⁸ All of these forms developed the prohibitions on certain means and methods of warfare and the protections toward civilians and those who no longer take part in the conflict during internal armed conflicts.⁵⁰⁹

This decision regarding customary international law is misguided and disturbing. Some experts applaud the expansion of international armed conflict rules to internal⁵¹⁰ while others are concerned over the convoluted manner that the Chamber used to make the expansion.⁵¹¹ The decision is mistaken for several reasons.

The Appeal Chamber's determination to disregard the practice prong for customary international law is wrong. Practice can change custom, in fact, it is practice that helps create customary law.⁵¹² The Chamber may have been with confronting actual practice because it might have had to concede that the norms have not expanded at all.⁵¹³ It is possible to determine when troops violate humanitarian law.⁵¹⁴ For example, genocide is against customary international law but many countries over the past twenty years continue to

⁵⁰⁸ See *id.* 65-67.

⁵⁰⁹ See *id.* at 67-70.

⁵¹⁰ See *War Crimes Law Comes of Age*, *supra* note 313, at 464-466.

⁵¹¹ See Sternberg *supra* note 285, at 376-383;

⁵¹² See RESTATEMENT, *supra* note 167, § 102.

⁵¹³ See generally Watson, *supra* note 398, at 713 (describes some atrocities committed during several wars).

⁵¹⁴ See *id.* The evidence was detected in such civil wars as Rwanda, Liberia, Chechnya, Somalia and Bosnia. See *id.* Of course, if it is so difficult to determine what troops do in the field how can the Chamber pass judgment on an individual's actions in the field like the cases before it?

engage in the behavior.⁵¹⁵ Ironically, the Chamber tries to disregard practice yet uses it to try to back up their position. For example, the Chamber mentioned the practices during the Spanish Civil War, the 1960s Congo civil war, the Biafran conflict in Nigeria, Nicaragua in the 1980s and El Salvador in the 1980s-early 1990s.⁵¹⁶ Three of the five occurred before the 1977 Protocols. The Protocols re-emphasized the differences between international and internal yet the Chamber never addresses the fact that nations continued to see a dichotomy.

The Chamber fails to mention let alone discuss the conflicts where the parties expressly denied the applicability of the rules or principles of international armed conflict and internal armed conflict.⁵¹⁷ The Chamber tried to bolster its argument with examples but ignored the vast majority of civil wars where they did not follow or agree to applicability of even CA3. A few examples where the parties in a very few number of states apply such rules does not make it customary for all states. In actuality, the large number of states not practicing the principles make it more likely to be customary law to not apply those principles.⁵¹⁸

Lastly, Common Article 3 has no reference to criminal liability for its violation.⁵¹⁹ The Appeals Chamber applied the Nuremberg conclusions that absence of provisions for

⁵¹⁵ See *id.* Examples include Rwanda, Bosnia, and Iraq.

⁵¹⁶ See *id.* at 63.

⁵¹⁷ The irony is that the Chamber's example of El Salvador is very poor. While the parties made noise about the applicability of Common Article 3, it was not applied. CITE. In addition, the applicability of international or internal armed conflict law was denied in Afghanistan, Chechnya. CITE

⁵¹⁸ In fact, the ICRC declared that war crimes applied to international armed conflict only. See Watson, *supra* note 398, at 714.

⁵¹⁹ See *id.* at 70.

punishment in a treaty does not bar criminal liability.⁵²⁰ Under several military manuals, violations of Common Article 3 entail individual criminal responsibility.⁵²¹ National legislation implementing the Geneva Conventions implies that violations of internal armed conflict rules are punishable.⁵²² Also important was Security Council resolutions stating those breaching humanitarian law in Somalia would be held individually responsible.⁵²³ To the Appeals Chamber, these meant that there is criminal liability for serious violations of Common Article 3, other general principles and rules protecting victims and for breaching certain fundamental rules on means and methods of warfare in civil conflict.⁵²⁴ In addition, the parties agreed to punish those responsible for violations of international humanitarian law.⁵²⁵ Based on its discussion, the Chamber found individual liability.⁵²⁶ Individual liability is desirable. However some experts do not believe that individual criminal liability applies.⁵²⁷

c. Trial Court's Verdict

⁵²⁰ See *id.*

⁵²¹ See *id.* The Appeals Chamber also referred to the German, British and U.S. military manuals.

⁵²² See *id.* at 70-71. The Appeals Chamber cites to laws of the Socialist Federal Republic of Yugoslavia and Belgium.

⁵²³ See *id.* at 71.

⁵²⁴ See *id.*

⁵²⁵ See *id.*

⁵²⁶ See *id.*

⁵²⁷ See Watson, *supra* note 398, at 715.

The Trial Court handed down the verdict in the case of *Prosecutor v. Tadić* on May 7, 1997.⁵²⁸ Tadić was convicted of eleven counts of crimes under Article 3 and 5 of the Tribunal Statute.⁵²⁹ The Trial Court first characterized whether an armed conflict existed during the time of the alleged acts and whether the alleged crimes were committed in the context of the conflict.⁵³⁰ The Court found that the conflict was intense and highly organized.⁵³¹ It now turned to Article 2.

Article 2 required grave breaches against protected persons. The Trial Court determined that the question was if the victims were protected persons.⁵³² The JNA forces agreed to leave Bosnia-Herzegovina but left behind officers, tanks, personnel carriers and artillery for the Republic of Srpska's army.⁵³³ The officers continued to be paid by the Federal Republic of Yugoslavia (FRY).⁵³⁴ The Court determined that the Serb forces in Bosnia-Herzegovina were not so controlled by the JNA that it could impute the acts to the FRY.⁵³⁵ Therefore, the

⁵²⁸ See Tadić Judgment, *supra* note 334.

⁵²⁹ See *id.* at 969-70.

⁵³⁰ See *id.* at 920.

⁵³¹ See *id.* at 921.

⁵³² See *id.* at 925.

⁵³³ See *id.* at 929.

⁵³⁴ See *id.*

⁵³⁵ See *id.* at 933. The Court used the standard set by the ICJ for outside States acting through de facto agents, namely rebels. In *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 1986 ICJ Reports 14 (June 27), the court held that to impute the actions of the rebels (contras) to the outside State (U.S.) it must be proved that the outside State had effective control of the rebel military in the course of which the violations occurred. See *id.* at 927.

conflict was internal armed conflict and the victims were not protected people under the definition because they were the same nationality as the parties to the conflict.⁵³⁶ Therefore, Tadic could not be guilty of these offenses.

The Trial Court turned to Article 3. The Trial Court held that an armed conflict existed, the victims were civilians and the offenses occurred in the context of the conflict.⁵³⁷ The Court found that the crimes that the accused committed were serious and involved grave consequences for the victims.⁵³⁸ It confirmed the customary status of Common Article 3 of the Geneva Conventions and that the accused could be held individually responsible.⁵³⁹

The Trial Court now turned to Article 5. It confirmed that crimes against humanity applied in international and internal armed conflicts.⁵⁴⁰ Because of the wording of the Statute, it was required to prove that the crimes occurred during an armed conflict even though the customary law did not require that.⁵⁴¹ The nexus was proven in this case.⁵⁴² In

⁵³⁶ See *id.* at 927-33. But see Tadic Judgment, *supra* note 334, at 971. Judge Gabrielle Kirk strongly disagreed with the other members' ruling. She argued Article 2 was applicable because the conflict was international. She felt that the majority misapplied the Nicaragua standard. She felt the standard is "dependency and control" not effective control. Even with the stricter standard she would have found the Bosnian army was an agent for the JNA and therefore the victims were protected persons. See *id.* at 971-79. See also Judge Gabrielle Kirk McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30 (1998).

⁵³⁷ See Tadić Judgment, *supra* note 334, at 934-35.

⁵³⁸ See *id.* at 934. This finding was necessary to satisfy the third requirement for Article 3 under customary law. The Appeals Chamber had set out the four requirements to satisfy Article 3 of the Statute. See *supra* text accompanying note 495.

⁵³⁹ See *id.* at 934.

⁵⁴⁰ See *id.* at 936-37.

⁵⁴¹ See *id.* at 938.

⁵⁴² See *id.*

addition, it took an expansive view as to what civilians were and included those who may have been actively involved in the conflict.⁵⁴³

Tadić was found guilty under counts of crimes against humanity and violations of the laws and customs of war.⁵⁴⁴ He was found not guilty of grave breaches of the Geneva Conventions.⁵⁴⁵

d. Celebici Case

The *Celebici Case* was recently decided by another trial chamber of the Yugoslavia Tribunal.⁵⁴⁶ The case involved the prosecution of Croatians who had run a prison camp for Bosnian Serbs.⁵⁴⁷ The Trial Chamber acknowledged the possibility that customary law may have extended the application of the “grave breaches” system to internal conflict.⁵⁴⁸ However, the court did not deal with that issue because it found that an international armed conflict existed in Bosnia and Herzegovina during the relevant time period.⁵⁴⁹ This finding is

⁵⁴³ See *id.* at 941. See also *War Crimes Law Comes of Age*, *supra* note 313, at 464.

⁵⁴⁴ See *id.* at 936

⁵⁴⁵ See *id.*

⁵⁴⁶ Prosecutor v. Delalic, Mucic, Delic, & Landzo, IT-96-21-T (November 16, 1998) <<http://www.un.org/icty/supp1-e/celebici.htm>> [hereinafter Celebici Case]. The popular name is the Celebici case derived from the name of the prison camp in Celebici, Bosnia.

⁵⁴⁷ See *id.* para. Introduction.

⁵⁴⁸ See *id.* para. 1

⁵⁴⁹ See *id.* para. 1.

exactly the opposite of the one in the *Tadić Judgment*. This Trial Chamber found that the international armed conflict existed as of April 6, 1992 when Bosnia and Herzegovina was recognized as a State.⁵⁵⁰ From that date on, an international armed conflict existed in the territory including the municipality where the crimes allegedly occurred.⁵⁵¹

The Trial Chamber found that the involvement of the JNA with the Army of Serbian Republic of Bosnia-Herzegovina was enough to show the involvement of the Federal Republic of Yugoslavia in the conflict.⁵⁵² Therefore, it was an international armed conflict.

The Trial Court also found that protected persons under the grave breaches of Geneva Convention IV includes persons who have indicated that they no longer want to be the same nationality as the power holding them.⁵⁵³ The Court ruled that Common Article 3 was customary international law and that violating it attached individual criminal responsibility.⁵⁵⁴ The norms in the Hague Regulations are part of customary international law.⁵⁵⁵ The Court found that torture and rape are against customary international law.⁵⁵⁶

⁵⁵⁰ See *id.*

⁵⁵¹ See *id.*

⁵⁵² See *id.*

⁵⁵³ See *id.* The definition of a protected person requires that they be in the hands of a party to the conflict of which they are not a national. The court disagreed with the *Tadic* court's ruling that if they were the same nationality then they were not protected. The Court found "the granting of nationality had occurred within the context of the dissolution of a State during armed conflict and that the Bosnian Serbs had clearly expressed the wish no to be nationals of Bosnia and Herzegovina." See *id.* The Court determined that a broader concept of protection under the GC IV was needed. The victims were not prisoners of war, but they were protected persons under GC IV. See *id.*

⁵⁵⁴ See *id.* para. 3.

⁵⁵⁵ See *id.*

⁵⁵⁶ See *id.* para. 3.

Lastly, the Court held that the principle of superior responsibility for failing to act to prevent crimes is customary law.⁵⁵⁷

B. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

1. Background on the Rwandan Conflict

Apparently, the Tutsi population arrived in Rwanda sometime in the fifteenth century.⁵⁵⁸ They found the Twa and Hutus people already inhabiting the area. Over time, the Tutsi subjected the Hutu to a feudal system with Tutsi at the head.⁵⁵⁹ The Germans took over the area in 1894.⁵⁶⁰ The Belgians took over from the Germans in 1915 and remained more or less in control until 1962.⁵⁶¹ At first, the Belgians supported the Tutsi dominance until the Tutsi tried to assert political independence.⁵⁶² Support then switched to the Hutus who were

⁵⁵⁷ See *id.*

⁵⁵⁸ See Knowles, *supra* note 288, at 194. See generally GERARD PRUNIER, THE RWANDA CRISIS (1995). Prunier gives an excellent account of the history of Rwanda and the genocide that occurred there.

⁵⁵⁹ See Knowles, *supra* note 288, at 194.

⁵⁶⁰ See PRUNIER, *supra* note 558, at 23-26.

⁵⁶¹ See Knowles, *supra* note 288, at 194-95.

⁵⁶² See *id.* at 195. See generally PRUNIER, *supra* note 558, at 26-40.

attempting to overcome the Tutsi political dominance. Upon Independence in 1962, the Hutus ruled and the Tutsis alternated between inter-tribal warfare and fleeing the country.⁵⁶³

The Hutus ruled the country after Independence but the government was corrupt. President Juvenal Habyarimana seized power in a coup in 1973 in the midst of violence against Tutsis. The regime encouraged ethnicity. The exiled Tutsis formed the Rwandese Patriotic Front (RPF) with the goal of returning to Rwanda.⁵⁶⁴ Civil war began in 1990 when Tutsis who were in neighboring countries came in mass across the border.⁵⁶⁵ The fighting continued until the 1993 peace treaty.⁵⁶⁶

On April 6, 1994, President Habyarimana died in a plane crash allegedly due to his own troops purposely shooting his plane down.⁵⁶⁷ He had been attending a peace conference where he agreed to honor a power sharing agreement with the Tutsis.⁵⁶⁸ Hutu soldiers murdered the Hutu Prime Minister and President of the Constitutional Court immediately after the plane went down.⁵⁶⁹ The RFP resumed open warfare on the 8th.⁵⁷⁰ The RFP advanced steadily and took the capital on July 18, 1994.⁵⁷¹

⁵⁶³ See Knowles, *supra* note 288, at 195.

⁵⁶⁴ See PRUNIER, *supra* note 558, at 73.

⁵⁶⁵ See Knowles, *supra* note 288, at 195.

⁵⁶⁶ See *id.*

⁵⁶⁷ See *id*

⁵⁶⁸ See *id*

⁵⁶⁹ See *id*

⁵⁷⁰ See PRUNIER, *supra* note 558, at 268.

⁵⁷¹ See *id.* at 299.

On April 6, the Hutus initiated a genocidal campaign against the Tutsis people and those Hutus who supported peace.⁵⁷² Based on estimates, the Hutus murdered one million people between April 6th and early July 1994.⁵⁷³ Men, women and children were slaughtered simply because they were Tutsi.⁵⁷⁴ Two million people fled the country. The dead and displaced accounted for 40% of the Rwandan population.⁵⁷⁵ Appallingly, although the genocide was organized and directly by the government, the main agents of genocide were ordinary citizens.⁵⁷⁶

2. *The Tribunal Statute*

In 1994, the Security Council of the United Nations concluded that based upon the reports of systematic and flagrant violations of international humanitarian law in Rwanda, there existed a threat to international peace and security.⁵⁷⁷ Consequently, the Security Council determined that it was necessary to establish an international tribunal to prosecute the persons responsible so that reconciliation, restoration, and maintenance of peace could

⁵⁷² See *id.* at 231.

⁵⁷³ See Knowles, *supra* note 288, at 196.

⁵⁷⁴ See PRUNIER, *supra* note 558, at 231.

⁵⁷⁵ See Knowles, *supra* note 288, at 196.

⁵⁷⁶ See PRUNIER, *supra* note 558, at 247.

⁵⁷⁷ U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), reprinted in 33 I.L.M. 1598, 1601 (1994) [hereinafter Rwanda Tribunal Statute].

occur within Rwanda.⁵⁷⁸ The Security Council established the International Criminal Tribunal for Rwanda under its Chapter VII powers.⁵⁷⁹ On its face, the statute presumes that the conflict in Rwanda was a non-international armed conflict.⁵⁸⁰

The statute contains twenty articles. Article 1 declares that the Tribunal has the power to prosecute persons who, between January 1, 1994 and December 31, 1994, committed serious violations of international humanitarian law.⁵⁸¹ This included crimes committed within Rwanda and those committed by Rwandan nationals in the territories of neighboring states.⁵⁸² There are only four specific articles enumerating the actual crimes over which the Tribunal has authority.

Article 2 is the Genocide article.⁵⁸³ This article mirrors Article 4 of the Statute of the International Tribunal for the Former Yugoslavia.⁵⁸⁴ It provides the same definitions and the same type of acts are punishable as the Yugoslavia Tribunal Statute.

Article 3 is the crimes against humanity article.

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national,

⁵⁷⁸ See Rwanda Tribunal Statute, *supra* note 577, at 1601.

⁵⁷⁹ See *id.*

⁵⁸⁰ See *id.* at 1600-13; *International Criminalization of Internal Atrocities*, *supra* note 198, at 556.

⁵⁸¹ See Rwanda Tribunal Statute, *supra* note 577, at 1602.

⁵⁸² See *id.*

⁵⁸³ See *id.* at 1602-03.

⁵⁸⁴ Compare Rwanda Tribunal Statute, *supra* note 577, at 1602-03 with Yugoslavia Tribunal Statute, *supra* note 376, at 1193.

political, ethnic, racial or religious grounds:

- a) Murder;
- b) Extermination;
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- I) Other inhumane acts.⁵⁸⁵

Unlike the Yugoslavia Tribunal Statute, there is no requirement that the crimes be committed in an armed conflict.⁵⁸⁶

Article 4 covers violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II.⁵⁸⁷ The Tribunal may prosecute persons who committed or ordered others to commit serious violations of Common Article 3 and Additional Protocol II.⁵⁸⁸ The article reiterates the same prohibitions listed in Article 4 of Additional Protocol II.⁵⁸⁹ In addition, it forbids “[t]he passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁵⁹⁰ This article is very different from Article 3 of the Yugoslavia Tribunal Statute which covers violations of laws and customs of war. The Yugoslavia Tribunal incorporation Common Article 3 through

⁵⁸⁵ Rwanda Tribunal Statute, *supra* note 577, at 1603.

⁵⁸⁶ Compare Rwanda Tribunal Statute, *supra* note 577, at 1603 with Yugoslavia Tribunal Statute, *supra* note 376, at 1193.

⁵⁸⁷ See Rwanda Tribunal Statute, *supra* note 577, at 1604.

⁵⁸⁸ *See id.*

⁵⁸⁹ Compare Rwanda Tribunal Statute, *supra* note 577, at 1604 with Part III.A.2.b.

⁵⁹⁰ *Id.* at 1604.

the customary law whereas the Rwanda Tribunal based it upon actual jurisdiction under the statute.

Article 6 assigns individual criminal responsibility to any “person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4....”⁵⁹¹ The Tribunal shares the same Appeals Chamber with the Yugoslavia Tribunal per Article 12.⁵⁹²

3. The Akayesu Case

a. Jean-Paul Akayesu

Jean-Paul Akayesu was a bourgmestre in Taba commune from April 1993 until June 1994.⁵⁹³ The bourgmestre is the most powerful person in the commune.⁵⁹⁴ He had exclusive control over the police and was responsible for the execution of the laws and administration

⁵⁹¹ *Id.*

⁵⁹² See *id.* at 1606.

⁵⁹³ Prosecutor v. Akayesu, ICTR-96-4-T (September 2, 1998) para. 3, <<http://www.ictr.org/english/judgements/akayesu.html>>[hereinafter Akayesu Judgment].

⁵⁹⁴ See *id.* The position is equivalent to a mayor or governor.

of justice within the commune.⁵⁹⁵ Akayesu's position made him responsible for maintaining law and order in the commune.⁵⁹⁶

On April 19, 1994, a Tutsi teacher in Taba was killed by a group of men who claimed he associated with the RPF and was plotting to kill Hutus.⁵⁹⁷ Later that same day, Akayesu lead a meeting where he sanctioned the murder and urged people to eliminate accomplices of the RFP, meaning Tutsis.⁵⁹⁸ During the meeting, Akayesu named several Tutsi by name and said they had to be killed.⁵⁹⁹ The killings in Taba began after the meeting.⁶⁰⁰

Akayesu participated in house to house searches and burning down Tutsi homes.⁶⁰¹ Tutsis were interrogated, beaten and killed.⁶⁰² Akayesu watched or participated in some of these incidents.⁶⁰³ He ordered the murder of detainees, intellectuals and influential people.⁶⁰⁴

Between April 7th and the end of June, 1994, hundreds of people, mostly Tutsi, sought refuge at the bureau communal.⁶⁰⁵ Women were subjected to sexual violence, people were

⁵⁹⁵ See *id.* para. 4, 100.

⁵⁹⁶ See *id.* para. 12.

⁵⁹⁷ See *id.* para. 13.

⁵⁹⁸ See *id.* para. 14.

⁵⁹⁹ See *id.* para. 15, 41.

⁶⁰⁰ See *id.* para. 14.

⁶⁰¹ See *id.* para. 16, 18.

⁶⁰² See *id.* para. 16, 17, 23.

⁶⁰³ See *id.* para. 16, 18.

⁶⁰⁴ See *id.* para. 19, 20.

⁶⁰⁵ See *id.* para. 12A.

beaten and others killed near the bureau premise.⁶⁰⁶ Akayesu knew that these things were happening but he did nothing.⁶⁰⁷ Sometimes he encouraged these actions or he participated in them.⁶⁰⁸ Over 2000 Tutsis were killed in Taba in the three month period.⁶⁰⁹

b. Trial Court's Verdict

The Rwandan Tribunal Trial Court issued its first verdict in *Prosecutor v. Akayesu*.⁶¹⁰ The accused was found guilty of seven counts of crimes against humanity,⁶¹¹ direct and public incitement to commit genocide,⁶¹² and genocide.⁶¹³ He was found not guilty of violating Common Article 3 and Additional Protocol II and of complicity in genocide.⁶¹⁴

The court held that individuals are individually responsible for crimes against humanity, genocide, Common Article 3 and the Additional Protocol II.⁶¹⁵ It also determined that

⁶⁰⁶ See *id.* para. 12A, 177.

⁶⁰⁷ See *id.* para. 12B.

⁶⁰⁸ See *id.*

⁶⁰⁹ See *id.* para. 340.

⁶¹⁰ See Akayesu Judgement, *supra* note 593.

⁶¹¹ See *id.* para. 65, 81, 101, 121, 147, 149, 241.

⁶¹² See *id.* para. 105.

⁶¹³ See *id.* para. 221.

⁶¹⁴ See *id.* para. 49, 221

⁶¹⁵ See *id.*

Common Article 3 and Additional Protocol II could be the source of criminal sanctions and that crimes against humanity did not need an international nexus.⁶¹⁶

However, Akayesu was not guilty of violating Common Article 3 and Additional Protocol II. The court found that the conflict between the Government of Rwanda and the Rwandan Patriotic Front was an internal armed conflict within the meaning of the Convention and Additional Protocol.⁶¹⁷ Notwithstanding, the court found the accused not guilty because he was not a member of the armed forces nor was he mandated and expected as a person vested with public authority or as a representative of the Government to support and carry out the war effort.⁶¹⁸ There was no nexus between his actions and the armed conflict.⁶¹⁹ As such, Common Article 3 and Additional Protocol II did not apply to his actions.

C. THE NEW INTERNATIONAL CRIMINAL COURT

The International Criminal Court may soon wield its influence in this area. From 15 June to 17 July 1998, a United Nations Diplomatic Conference met to consider the establishment

⁶¹⁶ See *International Criminalization of Internal Atrocities*, *supra* note 198, at 558.

⁶¹⁷ See Akayesu Judgement, *supra* note 593, para. 15.

⁶¹⁸ See *id.* para. 45, 47.

⁶¹⁹ See *id.* at 47.

of an international criminal court.⁶²⁰ One Hundred Forty-eight delegates attended the conference.⁶²¹ They created a statute for a standing international criminal court with jurisdiction over certain crimes.⁶²² Included in those crimes were violations of Common Article 3.

Under Article 8, the court has jurisdiction over war crimes.⁶²³ The article proceeds to define what are war crimes. Paragraphs 2(c), (d), (e) and (f) apply to armed conflict not of an international character.⁶²⁴ Specifically, paragraph 2(c) states:

In case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;
- (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.⁶²⁵

⁶²⁰ UN ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (adopted July 17, 1998), *reprinted in* 37 I.L.M. 999, 1002 (1998) [hereinafter INTERNATIONAL CRIMINAL COURT].

⁶²¹ *See id.* at 999.

⁶²² *See id.* at 1003-09.

⁶²³ *See id.* at 1006.

⁶²⁴ *See id.* at 1008-09.

⁶²⁵ *Id.* at 1008.

A careful reading of the above wording reveals that the language almost mirrors the original text of Common Article 3.⁶²⁶ This categorization under paragraph 2(c) does not apply to “internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”⁶²⁷

The statute makes serious violations of laws and customs applicable in internal armed conflicts a war crime. Under Article 8, 2(e):

- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the law of armed conflict;
 - (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - (v) Pillaging a town or place, even when taken by assault;
 - (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - (vii) Conscription or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
 - (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;

⁶²⁶ Compare INTERNATIONAL CRIMINAL COURT, *supra* note 622, at 1008 with *supra* note 205 and accompanying text.

⁶²⁷ See INTERNATIONAL CRIMINAL COURT, *supra* note 622, at 1008.

- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.⁶²⁸

These crimes are not applicable to internal disturbances and tensions.⁶²⁹ It is applicable to “protracted armed conflicts within the territory of a state between government authorities and organized armed groups or between groups.”⁶³⁰

The statute is careful to recognize that Common Article 3 and the laws and customs of internal armed conflict are not applicable to riots, isolated acts of violence or other internal unrest.⁶³¹ Paragraph 3 of Article 8, specifically declares that the above paragraphs do not affect a Government’s responsibility to “maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”⁶³² Once again, the States are clearly concerned about interference with strictly internal matters and the parameters pretty much follow previous disclaimers.

When the court begins operating, it will have to deal with many of the same issues that the Appeals Chamber of the International Tribunal for the Former Yugoslavia dealt with in

⁶²⁸ See *id.* at 1008-09.

⁶²⁹ See *id.* at 1009.

⁶³⁰ See *id.*

⁶³¹ See *id.* at 1008-09.

⁶³² See *id.* at 1009.

its decision. The court will have to review its own legitimacy under international law. It will have to determine its actual authority and jurisdiction over individuals belonging to states not party to the statute.⁶³³

The court will have to struggle with the same questions about what is international humanitarian law as the International Tribunals have done. It may rely upon the interpretations of the International Tribunals or it might come up with something different.

VII. WHAT SHOULD THE LAW BE?

A. WHEN IS IT AN INTERNAL ARMED CONFLICT?

The first question is what is an internal armed conflict. Few countries that have undergone civil wars since 1949 have acknowledged the applicability of Common Article 3 let alone the Additional Protocol to their internal conflicts.⁶³⁴ Common Article 3 of the Geneva Conventions and Additional Protocol II apply when there is an armed conflict not of

⁶³³ See *id.* at 1013. Article 19 mandates that the Court will satisfy itself that it has jurisdiction in any case brought before it.

⁶³⁴ See *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 598.

an international character.⁶³⁵ Nations have been reluctant to say internal disorders within their own borders are armed conflicts within the meaning of Common Article 3 even when they clearly are so.⁶³⁶ This reluctance even extends to outside nations and the United Nations, all of whom have hesitated or refused to characterize another countries' conflicts as such.⁶³⁷ So how do you know when it is internal strife verses internal armed conflict? In the past, the concept of belligerency was used to determine what was "armed conflict not of an international character."⁶³⁸

1. *Should the concept of belligerency be used?*

a. *What is Belligerency?*

Belligerency is: (1) armed conflict of a general character (not just localized in one area); (2) insurgents occupy and administer a substantial portion of national territory; (3) insurgents conduct hostilities in accord with the rules of war and do so through organized armed forces acting under responsible authority; and (4) there are circumstances which make it necessary

⁶³⁵ GC I, *supra* note 1, at 3118; GC II, *supra* note 1, at 3222; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520. See also COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 2, at 1347.

⁶³⁶ See *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 598.

⁶³⁷ See Hollis, *supra* note 207, at 808-09. See also Reisman & Silk, *supra* note 202.

⁶³⁸ See Lysaght, *supra* note 210, at 9.

for outside states to define their attitude by means of recognition of belligerency.⁶³⁹ Once an insurgency is recognized as a belligerency, the norms of international law of war have full application.⁶⁴⁰

b. Does Belligerency have applicability?

Belligerency has no place in today's world. Not only is it difficult to apply the concept of belligerency to today's conflicts, the criteria is not acknowledged even when it is met.⁶⁴¹ There are several reasons why this is so.

It is difficult to argue that control over substantial territory is vital in determining what is an internal armed conflict. What is "substantial" territory? Surely, the Palestinians would have argued against that qualification as well as the IRA in Northern Ireland. Is ownership of land sufficient to qualify for this prong, e.g., an insurgent owes acres of land. Is that ownership equal to control? Many rebel groups stay in neighboring countries and stage raids from there. Another question is what is sustained and concerted operations? If the rebels only conduct one or two operations a year, is that enough? If they spend their time training, consolidating resources and raising funds, is that sufficient? Once you achieve the necessary

⁶³⁹ See Richard A. Falk, *Janus Tormented: The International Law of Internal War*, in INTERNAL ASPECTS OF CIVIL STRIFE 185, 205-6 (James N. Rosenau ed. 1964).

⁶⁴⁰ See *id.* at 203.

⁶⁴¹ See Hollis, *supra* note 207, at 816. Chechnya never was recognized by outside states as a belligerent even though it had met all objective criteria. Other states cannot be forced to accept an insurgency as a belligerent. See *id.*; Falk, *supra* note 639, at 204.

level, it is too late. The need for the protections began long before this stage is reached. Recognition by outside States is impossible. Today's conflicts do not fall within the strict parameters of belligerency and therefore it has no applicability.

c. Should the distinction between International and Internal Armed Conflicts be maintained?

There have been some suggestions that there is no reason for a distinction between international and internal armed conflicts.⁶⁴² The laws of international armed conflict would restrict both rebels and governments too much. Bestowing combatant immunity on rebel forces has the effect of protecting the rebels for their acts of violence, riot and rebellion. Few people would argue that bestowing combatant immunity on individuals such as Timothy McVeigh or the Montana Militamen is a good idea. To require this would rob the state of the ability to enforce order within its borders and results are chaos.

If the international armed conflict standards were applied, the burdens on the rebel forces would be at such a high level, you can almost guarantee that they would be ignored.⁶⁴³ The rebel goals are to destabilize the current government. The rules would require that targets be military objectives only. This could serve to immunize governmental sources whose destruction would allow the rebels to accomplish their goal of destabilization. Such things as

⁶⁴²See Plattner, *supra* note 171, at 409; Lopez, *supra* note 63, at 933. See also *International Criminalization of Internal Atrocities*, *supra* note 198, at 555.

⁶⁴³See MILLER, *supra* note 167, at 276. The provisions do not adapt to internal conflict. Miller also questions the ability of rebels to meet even the minimal requirements of Common Article 3.

the postal system or banking system should be legitimate targets. Applying international armed conflict rules is resource intensive. Rebels are usually strapped for any resources and even some governments may find themselves unable to comply.⁶⁴⁴

d. What should be the definition of internal armed conflict?

As discussed previously in this thesis, the precise definition of internal armed conflict is difficult to determine.⁶⁴⁵ Internal armed conflict should be recognized in the following instances: (1) where anti-government forces have sufficient organization and/or resources to engage in protracted armed conflict; (2) violent conflict occurs; and (3) there is a need to protect victims of the conflict. This is not a standard written in concrete. It should be flexible enough to apply to a variety of situations. The most important thing is that it must be applied in every instance. The world can not afford to ignore its application simply because the conflict is in a particular nation or involves a particular ally or ideology.

B. COMMON ARTICLE 3 SHOULD BE THE LAW USED FOR INTERNAL ARMED CONFLICT

⁶⁴⁴ See Bond, *supra* note 7, at 123-126.

⁶⁴⁵ See discussion *infra* Part III.A.2.a.

Common Article 3 of the Geneva Conventions is sufficient as the law of internal armed conflict. The only problem with the Common Article 3 is the intellectual dishonesty that has occurred with its application. This problem is not unique to Common Article 3, it reaches to the entire spectrum of the law of war.⁶⁴⁶ “It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is ‘satisfactory’ or not, but rather how to secure or compel compliance with the law at all.”⁶⁴⁷ Hence, there is nothing wrong with Common Article 3, other with those who refuse to apply it.

Common Article 3 states the basic standards which apply to internal armed conflicts. Common Article 3 is customary law.⁶⁴⁸ Humane treatment should be defined by current standards. The article is broad enough to embrace the changing norms of acceptable humane behavior and provides a workable minimum standard that all parties can adhere to and achieve.

Common Article 3 provides the minimum standard of behavior for all parties. These principals apply to both the rebels and the current government. Clearly, the intent was to cover both.⁶⁴⁹ The rebels must be held to the same standard as the government or there is no reason to hold the government to that standard. If the rebels want to become their own

⁶⁴⁶ See Roberts, *supra* note 3, at 15.

⁶⁴⁷ *Id.* at 15.

⁶⁴⁸ See discussion *infra* VI.A.3.b(3).

⁶⁴⁹ See Schneilder, *supra* note 329; Reisman & Silk, *supra* note 202, at 465; discussion *infra* Parts III.A.2.a.

country or replace the current government, then they need to act like a responsible government.⁶⁵⁰ These requirements are not so onerous that they would destroy the rebel's ability to function.

The Chemical Weapons Convention, the Genocide Conventions, the Ottawa Treaty and other international treaties and agreements are all nice additions to area but Common Article 3 covers these areas as well. If a party is acting humanely, it does not use inhumane methods. The more laws that you insert into this area, the less likely that there will be compliance. These laws have multiple layers of restrictions and requirements. This makes it extremely difficult for rebel forces that may have had no previous military training or government experience. The compliance with these laws requires a rather sophisticated person to implement. Expecting a rebel force to understand these concepts and apply them is wishful thinking. The standing governments owe their own citizens certain human rights. Compliance with Common Article 3 is not a burden for them because the government should by applying these principals anyway.

In addition, Common Article 3 applies at all times to any parties. This includes situations involving United Nations peacekeepers. One of the complaints concerning United Nations peacekeeping missions is that the peacekeepers have no laws protecting them when they become involved in armed conflict and that they are not bound to apply any laws in respect to their behavior.⁶⁵¹ These assumptions have a basic flaw. They are based upon the notion that the United Nations is not a nation per se and therefore is not a party to the Geneva

⁶⁵⁰ See DRAPER, *supra* note 62, at 17.

⁶⁵¹ See Brian D. Tittemore, *Belligerents in Blue Helmets: Applying international Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61 (1997).

Conventions. Granted, it is neither of these. However, Common Article 3 does not require all parties to an armed conflict not of an international character to be a party to the Conventions.⁶⁵² For example, the rebels are not a party to the Geneva Conventions. Yet, Common Article 3 still covers them.⁶⁵³ The rule should be that once United Nations peacekeepers pursuant to a Title VII action are involved in an armed conflict, they become a party in an armed conflict. Common Article 3 applies in all armed conflicts not of an international nature. Therefore, they are bound to apply Common Article 3 at a minimum. Certainly, peacekeeping between two forces engaged in a civil war equates to an armed conflict not of an international nature.

The armies of some nations are applying Common Article 3 to situations other than war as a matter of course. The U.S. military applies the principles of the law of war to all operations other than war.⁶⁵⁴ Common Article 3 is one of the principles applied.

Common Article 3 is enforceable. Common Article 3 violations do not rise to grave breaches because the grave breaches section only applies to “protected persons.”⁶⁵⁵ However, there is no reason not to treat violations of Common Article 3 as a serious crime. Common Article 3 is *jure gentium* and is subject to trial for its violation.⁶⁵⁶ The Tribunal for the Former Yugoslavia and other courts has held that Common Article 3 is the minimum

⁶⁵² See generally, GC I, *supra* note 1, at 3118; GC II, *supra* note 1, at 3222; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520.

⁶⁵³ See PICTET, *supra* note 139, at 54.

⁶⁵⁴ See DEP’T OF DEFENSE DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM.

⁶⁵⁵ See Plattner, *supra* note 642, at 414.

⁶⁵⁶ See *International Criminalization of Internal Atrocities*, *supra* note 198, at 564-565.

yardstick for all armed conflicts whether they are international or internal.⁶⁵⁷ The International Committee of the Red Cross has opined that Common Article 3 is *jus cogens* and all entities that claim any existence in international law are obliged to apply it.⁶⁵⁸ Personal criminal liability attaches. The article is enforceable.

C. WHAT ABOUT ADDITIONAL PROTOCOL II?

Additional Protocol II adopted parts of the old view of belligerency to define its applicability but it has a much lower threshold for applicability.⁶⁵⁹ The Additional Protocol specifically lays out what a rebel force must do in order for its provisions to apply. The forces arrayed against the government must (1) be under responsible command; (2) able to exercise control over a substantial part of the country's territory; (3) be able to conduct sustained and concerted operations; and (4) be able to implement the Protocol's conditions.⁶⁶⁰

Additional Protocol II is inadequate and unnecessary. It adds too many restrictions to its applicability.⁶⁶¹ As such, it does not cover all situations when humanitarian law is needed.

⁶⁵⁷ *Id.* at 560.

⁶⁵⁸ See Goldman, *supra* note 172, at 57.

⁶⁵⁹ See *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 598.

⁶⁶⁰ COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 2, at 1347.

⁶⁶¹ See discussion *supra* III.A.2.b.

This is especially true in light of the types of internal conflicts which are most likely to occur in this day and age. Additional Protocol II adds nothing to Common Article 3 because Common Article 3 is broad enough to encompass all of the protocol's provisions. For example, Additional Protocol II, Article 85, 3(a) forbids the making of civilian populations or individuals the subject of attack.⁶⁶² Common Article 3 forbids violation to life and person and targeting civilians definitely would violate this provision. If you follow Common Article 3 and do not commit acts of violence on persons who have no part in hostilities, you have complied with Protocol II.⁶⁶³ Additional Protocol II can not compel compliance any more than Common Article 3 can.⁶⁶⁴

VIII. CONCLUSION

The law of internal armed conflict slowly developed over time. However, the last fifty years have seen the evolution of the law. Even with this evolution, the actual law itself is confusing.

⁶⁶² Protocol II, *supra* note 247, at 1428.

⁶⁶³ See GC I, *supra* note 1, at 3118; GC II, *supra* note 1, at 3222; GC III, *supra* note 1, at 3320; GC IV, *supra* note 1, at 3520.

⁶⁶⁴ See generally, Schneilder, *supra* note 329 (Schneilder admits that the parties to the current conflicts do not feel bound by Additional Protocol II. However, he feels that the more countries that ratify the Additional Protocol, the more likely they will follow it. This belays logic since most nations have ratified Common Article 3 but compliance is still sketchy.). See also PICTET, *supra* note 73, at 58; Schneider, *supra* note 329; *Inadequate Reach of Humanitarian and Human Rights Law*, *supra* note 254, at 599-600 (unlikely that many states will acknowledge Additional Protocol II's applicability even when conditions are met).

Common Article 3 is sufficient for governing internal armed conflicts. It is broad enough to cover the ever changing environment surrounding internal armed conflicts. Further regulation of this area would be unproductive. Common Article 3 is simple enough that all parties to an internal armed conflict can apply it and international courts or tribunals are capable of enforcing its provisions.