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Justice for Rwanda: Toward a Universal Law of Armed Conflict

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COMMENT

JUSTICE FOR RWANDA TOWARD A UNIVERSAL LAW OF ARMED CONFLICT

INTRODUCTION

In 1994, an armed conflict raged in Rwanda between a non-state party and the Rwandan Government.¹ This armed conflict triggered the attempted extermination of the Tutsi ethnic group by the Rwandan Government. As a result of this appalling campaign, the United Nations (hereinafter “U.N.”) created the International Criminal Tribunal for Rwanda (hereinafter “ICTR”) to prosecute three categories of offenses against the law of nations, classified as human-rights violations, committed during the Rwandan conflict: genocide,² crimes against humanity,³ and violations of humanitarian law.⁴ Because of the

¹ S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., at P2, U.N. Doc. S/Res/955 (1994) [hereinafter *S.C. Res. 955*].

² Statute of the International Criminal Tribunal for Rwanda, art. 2, 33 I.L.M. 1602 [hereinafter *ICTR Statute*], available at <http://www.ictr.org/ENGLISH/basicdocs/statute.html>.

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.” *Id.*

³ ICTR Statute, *supra* note 2, at art. 3.

Crimes against humanity are any of the “following crimes when committed as part of a widespread or systematic attack against any civilian population on national, 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.” *Id.*

⁴ Statute of the ICTR, *supra* note 2, at art. 4.

serious nature of genocide and crimes against humanity, international law applies universally to these crimes regardless of where and how they occur.⁵ For political reasons, however, different standards of humanitarian law apply to crimes committed during international and non-international armed conflicts.⁶ Crimes committed during international conflicts are “war crimes” and are “grave breaches” of humanitarian law.⁷ Crimes committed during international conflicts are subject to the full extent of humanitarian law, whereas crimes committed during non-international conflicts are not “war crimes” and are governed by only limited portions of humanitarian law.⁸ This is not because crimes committed during non-international conflicts are less serious than war crimes, but because nation-states are apprehensive of applying strict international standards to internal wars for fear that it will legitimize rebel groups and thereby undermine the exclusive national authority of the state over its territory.⁹

Violations of humanitarian law in Rwanda constitute “committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: (a) Violence to 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) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; (h) Threats to commit any of the foregoing acts.” *Id.*

⁵ See generally Statute of the ICTR, *supra* note 2, at art. 2, 3, Statute of the International Criminal Tribunal, art. 4, 5, 32 I.L.M. 1192, 1195, available at <http://www.un.org/icty/legaldoc/index.htm> [hereinafter *Statute of the ICTY*].

⁶ VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, VOLUME 1* 207 (Transnational Publishers 1998).

⁷ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 Aug. 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, [hereinafter *Geneva Convention I*], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3?OpenDocument>.

⁸ *Id.*

⁹ *Id.* “The fear that the Protocol might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and that it might be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify the Protocol...[t]he restrictive definition of the material field of application in Article 1 will have the effect that Protocol II will be applicable to a smaller range of internal conflicts than Article 3 common to the Conventions of 1949.” International Committee for the Red Cross, *Introduction to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the*

The Rwandan conflict was categorized as a non-international conflict by the U.N. Security Council; therefore, only limited portions of humanitarian law apply.¹⁰ Humanitarian law for prosecuting crimes committed during non-international conflicts is less extensive than humanitarian law prosecuting crimes committed during international conflicts.¹¹ Accordingly, the judges at both the ICTR and its sister tribunal, the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") have worked to strengthen the laws governing internal armed conflicts.¹² As a result, the discrepancy of treatment between a non-international and an international armed conflict is being steadily eroded.¹³ The two tribunals are re-interpreting existing humanitarian law, lessening the distinction between internal and international armed conflicts.¹⁴ Despite new interpretations of the law, however, codified customary law continues to apply different standards to crimes committed during non-international conflicts and those committed during international conflicts.¹⁵ This Comment

Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) at <http://www.icrc.org/ihl.nsf/ff3d1abd6ef26cca41256739003e636c/aa0c5bcbab5c4a85c12563cd002d6d09?OpenDocument> (2004).

¹⁰ *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 935*, United Nations Commission of Experts ¶ 108 [hereinafter "*Commission of Experts Report*"] at S/1994/1405 (1994). The Commission of Experts is a U.N. body responsible for compiling the official report on the situation in Rwanda. *Id.*

¹¹ MORRIS & SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, *supra* note 6, at 141.

¹² *Id.*

¹³ *Id.*; *See also*, LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT*, 51 (Cambridge University Press 2002).

¹⁴ *See* Case IT-94-1, *Prosecutor v. Tadic*, Trial Chamber II (1997) ¶ 6.12 (where the appellate court held that Common Article Three applies to all armed conflicts regardless of whether non-international or international in nature). *Id.* ¶ 6.13 (where the court held that individual criminal responsibility applies in cases of non-international conflicts despite the lack of specific language in Common Article Three). Available at <http://www.un.org/icty/cases/jugemindex-e.htm>. *See also* Case ICTR-96-4-2, *Prosecutor v. Akayesu*, Trial Chamber I ¶ 615 (where the trial chamber held the above jurisprudence of the ICTY to be persuasive on the issue of individual criminal responsibility).

¹⁵ Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, Para 2, sec. (c) – (f), U.N. Doc. A/CONF.183/9 (1998). The Statute of the International Criminal Court divides armed conflicts according to whether they occurred during international or non-international conflicts. *Id.* *But see* LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT*, 166, in which he argues the Statute of

explores the means whereby the laws of armed conflict may be redrafted to incorporate the trend toward the universal treatment of armed conflicts established by the ICTR and the ICTY.

Section I of this Comment provides a history of the Rwandan armed conflict and a description of the laws of armed conflict. It focuses on the basic laws of armed conflict, the Geneva Conventions and Additional Protocols, and describes how these laws have been interpreted by the ICTY and ICTR.¹⁶ Section II addresses the classification of the Rwandan armed conflict as a non-international conflict. This section discusses Ugandan support for the invading Rwandan Patriotic Front (“hereinafter RPF”) and the murder of ten Belgian U.N. peacekeepers by Rwandan troops. The Section proposes changing the definition of an international conflict, thereby strengthening the coverage of humanitarian law.¹⁷

I. BACKGROUND

A. THE RWANDAN ARMED CONFLICT

Rwanda was a colony of Belgium until 1959.¹⁸ During Belgian colonial rule, the Roman Catholic Church and the Belgian Government institutionalized ethnic identities in Rwanda, issuing every citizen identity cards based on their ethnic group.¹⁹ The rationale for establishing ethnicity in Rwanda came from assumptions based on a nineteenth-century theory that Tutsis were members of a racially superior group called Hamites.²⁰ The Belgians viewed the Tutsi minority as being ethnically superior to the Hutu majority and a small Tutsi elite was supported by the Belgian Government and placed in a position of

the International Criminal Court represents a step toward unification of the laws of armed conflicts because of its detailed provisions on internal armed conflicts. *Id.*

¹⁶ *See generally* n. 18-96.

¹⁷ *See generally* n. 97-146.

¹⁸ ORGANIZATION OF AFRICAN UNITY, INTERNATIONAL PANEL OF EMINENT PERSONALITIES TO INVESTIGATE THE 1994 GENOCIDE IN RWANDA AND THE SURROUNDING EVENTS [hereinafter *OAU Report*], 3.1 (2000), at <http://www.aegitrust.org/sections/reports/contents.asp?filter=ou>.

¹⁹ *Id.* § 2.10.

²⁰ PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES 51 (Picador 1998). *See generally*, MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS, Chapter Two (Princeton University Press 2001) (discussing the application to Rwanda of the theory of Hamitic descent).

leadership.²¹ Although there is little documented evidence of any racial difference between people that call themselves “Hutu” or “Tutsi,” the division became entrenched in Rwandan society.²²

After Rwanda gained independence from Belgium, the western world and many Hutu politicians saw democracy in Rwanda as requiring majority, or Hutu, rule.²³ The Hutu, however, were divided along regional and class lines.²⁴ Attempting to unify Hutu people by creating a common enemy, Rwandan politicians demonized the Tutsi by characterizing them as Hutu oppressors.²⁵ The Western world supported a Hutu-controlled government, despite the fact that violence against the Tutsi increased.²⁶ Between 1959 and 1967, 20,000 Tutsi were killed in Rwanda because of their ethnicity, and 300,000 Tutsi fled the country.²⁷

During the presidency of Juvenal Habyarimana,²⁸ who came to office in 1973, there was a decrease in anti-Tutsi propaganda,²⁹ but the Tutsi in Rwanda continued to be harassed and treated like second-class citizens.³⁰ As a result, Tutsi continued to flee the country during this period, and the number of exiled Tutsi in Uganda reached 200,000 by 1970.³¹ President Habyarimana claimed that Rwanda was too poor to allow the exiles to return.³²

²¹ OAU Report, *supra* note 18, § 2.11.

²² *Id.* § 2.3.

²³ *Id.* § 2.12.

²⁴ *Id.* § 3.9.

²⁵ *Id.* § 3.9, *See also* HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY (Human Rights Watch 1999), Introduction, available at http://www.hrw.org/reports/1999/rwanda/Geno1-3-01.htm#P6_41.

²⁶ OAU Report, *supra* note 18, § 3.14.

²⁷ *Id.*; *See also* HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY, The Strategy of Ethnic Division, *supra* note 25.

²⁸ HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY The Strategy of Ethnic Division, *supra* note 25. President Habyarimana, a Hutu, was a member of Rwanda’s sole political power, the MRND, which was dominated by politicians of the Hutu ethnicity. *Id.*

²⁹ OAU Report, *supra* note 18, § 4.2

³⁰ *Id.* § 4.1.

³¹ *Id.* § 6.4, *see also* MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS, *supra* note 20, at 164.

³² OAU Report, *supra* note 18, § 6.8.

On October 1, 1990, an army of exiled Rwandan Tutsi invaded Rwanda.³³ Although Tutsi refugees from Rwanda had settled in neighboring Burundi, Zaire, Uganda, and Tanzania, the invading army originated almost exclusively in Uganda.³⁴ Ill-treated by the Ugandan Government, the displaced Rwandans joined the rebel National Resistance Army (hereinafter "NRA"), where they received training in guerilla warfare. The NRA, under the control of Yoweri Museveni, took control of Uganda in 1986. At that time, Rwandan Tutsi made up almost one quarter of the NRA, and many top NRA officers were also Rwandan Tutsi.³⁵ After coming to power, President Museveni's government came under criticism for being "partial" to Rwandan Tutsi.³⁶ In order to counteract these claims, the new government marginalized Rwandan Tutsi within Uganda. On October 1, 1990, frustrated Tutsi soldiers from the NRA renamed themselves the Rwandan Patriotic Front (hereinafter "RPF") and invaded Rwanda from Uganda.³⁷

Despite the fact that there was little evidence of Rwandan Tutsi collaborating with the invading army, the Rwandan Hutu-controlled government chose to portray the invasion as a united effort on the part of all Tutsi to seize control of Rwanda.³⁸ Top Rwandan government officials conspired to decimate the Tutsi population within Rwanda.³⁹ In April 1994, President Habyarimana's plane was shot down en route to the capital.⁴⁰ The Rwandan government used the assassination as an excuse to begin massacres of Tutsi civilians in Rwanda.⁴¹ The day after the president's assassination, plans for the genocide went into operation and the massacres began.⁴² Jean Kambanda, Prime Minister of Rwanda at the time, stated,

³³ *Id.* § 6.2, *See also* HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY, The Strategy of Ethnic Division, *supra* note 25.

³⁴ OAU Report, *supra* note 18, § 6.1.

³⁵ *Id.* § 173.

³⁶ *Id.* § 180.

³⁷ *Id.* § 6.9.

³⁸ *Id.* § 6.22, *see also* HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY, PREPARATIONS FOR SLAUGHTER, *supra* note 25.

³⁹ OAU Report, *supra* note 18, § 14.4.

⁴⁰ *Id.* § 14.1, *see also* HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY, The Attack, *supra* note 25.

⁴¹ *Id.*; *See also* OAU Report, *supra* note 18, § 14.1.

⁴² *Id.* § 14.2.

“[T]here was in Rwanda in 1994 a widespread and systematic attack against the civilian population of Tutsi....”⁴³

In recognition of the serious events unfolding in Rwanda, the U.N. created a peace-keeping mission for Rwanda in 1993 called the U.N. Assistance Mission in Rwanda (hereinafter “UNAMIR”).⁴⁴ UNAMIR soldiers began arriving in Rwanda in February, 1993; one third of the 1,260 UNAMIR soldiers were from Belgium.⁴⁵ On the day after President Habyarimana’s plane crashed, Rwandan soldiers killed ten Belgian UNAMIR “Blue Helmets.”⁴⁶ The Blue Helmets had been sent to guard the Prime Minister of Rwanda, Agathe Uwilingiyimana, a moderate leader who was targeted for assassination by Hutu extremists within the Rwandan government.⁴⁷ The ten Belgian soldiers were originally assisted in their mission by five Ghanaian UNAMIR troops, who were separated from the Belgians after a rumor spread among the Rwandan troops that the Belgian soldiers were responsible for shooting down the president’s plane.⁴⁸ Thus, only the Belgian soldiers were killed.⁴⁹ After the murders, Belgium withdrew its troops from the UNAMIR mission.⁵⁰

In addition to acts of genocide and crimes against humanity, those responsible for the genocide are also charged with numerous war crimes, such as the murder of civilians not taking active part in the hostilities and the murder of opposition party members for political reasons.⁵¹ One hundred days after the genocide began, between 500,000 and one million people,

⁴³ *Id.* § 14.4.

⁴⁴ GERARD PRUNIER, *THE RWANDA CRISIS*, 194 (Hurst and Company 1995).

⁴⁵ OAU Report, *supra* note 18, § 15.9.

⁴⁶ *Id.* § 15.8.

⁴⁷ GERARD PRUNIER, *THE RWANDA CRISIS*, *supra* note 45, at 230.

⁴⁸ COMMISSION D’ENQUETE PARLEMENTAIRE CONCERNANT LES EVENEMENTS DU RWANDA, *RAPPORT FAIT AU NOM DE LA COMMISSION D’ENQUETE*, 405 [hereinafter *Rapport Fait au Nom de la Commission d’Enquete*] (Senat de Belgique 1997).

⁴⁹ *RAPPORT FAIT AU NOM DE LA COMMISSION D’ENQUETE*, *supra* note 48, at 405.

⁵⁰ OAU Report, *supra* note 18, § 15.9.

⁵¹ *See* Case ICTR-97-20, *Prosecutor v. Semenza*, Judgment and Sentence § 535, 551 (15 May 2003), for an example of the ICTR finding an accused guilty of murder and rape as violations of humanitarian law. *Id.* Semenza was not charged, however, because of the concurrence of the charges with charges of crimes against humanity. *Id.* § 536, 552. For a general description of crimes committed in Rwanda, *see generally* HUMAN RIGHTS WATCH, *LEAVE NONE TO TELL THE STORY*, *The Structure*, *supra* note 25.

mostly Tutsi and Hutu opposition party members, were dead.⁵² In July 1994, the RPF won the war, took power from the Hutu-controlled government, and put an end to both the armed conflict and the genocide.⁵³

B. THE LAWS OF ARMED CONFLICT: THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOLS

After the horrors committed during World War II, nation-states recognized the need for laws regulating armed conflict to prohibit future atrocities.⁵⁴ The Geneva Conventions were adopted in 1949 and bind their High Contracting Parties⁵⁵ to customary rules of humanitarian law.⁵⁶ There are four Geneva Conventions, each of which deals with a separate category of protected persons: wounded soldiers, prisoners of war, shipwrecked sailors and civilians.⁵⁷ The Geneva Conventions are made up of numerous articles, the majority of which deal exclusively with international armed conflicts.⁵⁸ Only Article Three of the Geneva Conventions (hereinafter “Common Article

⁵² OAU Report, *supra* note 18, § 14.2. The exact figure is in dispute. *Id.* See also HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY, Numbers, *supra* note 25.

⁵³ Avocats Sans Frontieres, *ASF au Rwanda*, available at <http://www.asf.be/FR/frameset.htm> (last visited Feb. 12, 2004). See also HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY, The End of Hutu Power, *supra* note 25.

⁵⁴ See generally, International Committee for the Red Cross, Advisory Service on International Law, *What is International Humanitarian Law?* (June 2002) at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/\\$FILE/What_is_IHL.pdf?OpenElement](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/57JNXM/$FILE/What_is_IHL.pdf?OpenElement).

⁵⁵ A High Contracting Party is a country, or sovereign state, that has signed the Geneva Conventions. For a list of signatory parties, see <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JMKH?OpenDocument>.

⁵⁶ Geneva Convention I, *supra* note 7. See also 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, 75 U.N.T.S. 85 [hereinafter *Geneva Convention II*], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977?OpenDocument>. See also Geneva Convention Relative to the Treatment of Prisoners of War, 12 Aug. 1949, 6 U.S.T. 3217, 75 U.N.T.S. 31, [hereinafter *Geneva Convention III*], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68?OpenDocument>. See also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter *Geneva Convention IV*], available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5?OpenDocument>.

⁵⁷ *Id.*

⁵⁸ *Id.*

Three”), present in all four conventions, applies to non-international armed conflicts.⁵⁹

The drafters of Common Article Three intentionally limited its scope in relation to the other articles of the Geneva Conventions.⁶⁰ Common Article Three, therefore, represents a “minimum humanitarian standard,” guaranteeing only the most basic of rights to victims of non-international armed conflicts.⁶¹ Those portions of the Geneva Conventions that apply only to international armed conflicts are more extensive and detailed than Common Article Three.⁶² The Geneva Conventions marginalize non-international armed conflicts, but many serious, non-international armed conflicts have taken place since the Geneva Conventions were drafted.⁶³ In recognition that Common Article Three is inadequate in light of the large number of serious non-international armed conflicts, the majority of U.N. member states adopted Additional Protocol II.⁶⁴

⁵⁹ Geneva Convention I, *supra* note 7, Art. 3. *See also* Geneva Convention II, *supra* note 56, Art. 3, Geneva Convention III, *supra* note 56, Art. 3, Geneva Convention IV, *supra* note 56, Art. 3.

⁶⁰ *See* International Committee for the Red Cross, Commentary to Article Three, Conflicts not of an International Character, 38, Geneva Convention I, (12 August 1949), *available at* <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/1919123e0d121fefc12563cd0041fc08?OpenDocument>, for examples of the concerns over state sovereignty raised during the drafting. *Id.* The Commentary notes the, “special obstacles arising out of the internal politics of the States in which the conflict raged. In a civil war the lawful Government, or that which so styles itself, tends to regard its adversaries as common criminals.” *Id.*

⁶¹ COMITE INTERNATIONAL DE LA CROIX-ROUGE, COMMENTAIRE A LA CONVENTION DE GENEVE RELATIVE AU TRAITEMENT DES PRISONNIERS DE GUERRE, 46 (Jean Pictet, ed. 1958). *See also* LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT at 46. *See also* Prosecutor v. Tadic ¶ 6.12 (where the court interpreted Common Article Three to be a minimum standard applying to all armed conflicts: “each of the prohibitions in Common Article 3...constitute, as the Court put it, ‘elementary considerations of humanity.’” *See also* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 14 (June 27), *available at* <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>.

⁶² Geneva Convention I, *supra* note 7, art. 16, 18. The Geneva Conventions contain many specific provisions that are not enumerated in Common Article Three. *Id.* Many of these provisions expressly criminalize conduct that occurred in Rwanda. *Id.* For example, Art. 16 affords special protection to expectant mothers, who were often the target of inhumane treatment during the genocide. *Id.* Art. 18 specifically exempts civilian hospitals from attack, but hospitals were targeted during the genocide as convenient places to round up and kill Tutsi. *Id.*; *See also*, MORRIS & SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, *supra* note 6, at 141.

⁶³ LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT at 1. The Red Cross estimates that eighty percent of victims of violence are victims of “non-international armed conflicts.” *Available at* www.icrc.org.

⁶⁴ Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), [herein-

Additional Protocol II was adopted to expand and clarify Common Article Three.⁶⁵ It adds several new provisions to protect civilians during non-international conflicts.⁶⁶ Additional Protocol II, however, fails to address several important problems inherent in Common Article Three.⁶⁷ The same political concerns that plagued the drafting of Common Article Three were raised by concerned member states during the drafting of Additional Protocol II.⁶⁸ Specifically, the Protocol fails to expressly provide for individual criminal responsibility for persons in a position of authority during an armed conflict, nor does it criminalize omissions--the failures of persons in authority to prevent crimes being committed under their command.⁶⁹ Finally, Additional Protocol II does not explain the difference between a non-international and an international armed conflict, making it difficult to determine when the Protocol should

after *Additional Protocol II*] 8 June 1977, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545?OpenDocument>. The member countries also adopted Additional Protocol I to update the laws applicable to international armed conflicts. Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), [hereinafter *Additional Protocol I*] 8 June 1977, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079?OpenDocument>. Rwanda acceded to both protocols. See International Committee of the Red Cross, States Parties & Signatories, at <http://www.icrc.org/ihl.nsf/WebNORM?OpenView>.

⁶⁵ Additional Protocol II, *supra* note 64, art. 1. For example, Additional Protocol II clarifies the meaning of "armed conflict". *Id.* "Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature," are not armed conflicts and are not subject to international law. *Id.*; See also LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* at 88.

⁶⁶ Additional Protocol I, *supra* note 64, art. 43, 44.

⁶⁷ COMITE INTERNATIONAL DE LA CROIX-ROUGE, *COMMENTAIRE DES PROTOCOLES ADDITIONNELS*, 1358 (Martinus Nijhoff 1986) [hereinafter *Commentaire des Protocoles Additionnels*].

⁶⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, General introduction to the Commentary on Protocol II, 4394, available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/0f47ae2f6a509689c12563cd004399df?OpenDocument>. "These debates, which were very intense, revealed a tendency to move towards a rather restrictive definition of non-international armed conflict which was in danger of no longer being fully in line with common Article 3." *Id.*

⁶⁹ *Commentaire des Protocoles Additionnels* at 1358. In contrast, Additional Protocol I (applying exclusively to international conflicts) criminalizes omissions and provides for individual criminal responsibility. Additional Protocol I, *supra* note 64, art. 86.

be applied.⁷⁰ Despite the improvements of Additional Protocol II, important differences still exist between the law of international armed conflict and the law of non-international armed conflict.

C. THE JURISPRUDENCE OF THE INTERNATIONAL TRIBUNALS

Recent jurisprudence from both the ICTY and the ICTR strengthens the laws applicable to non-international conflicts.⁷¹ For example, the ICTY, relying on the reasoning of the Nuremberg Tribunal,⁷² has imposed individual criminal responsibility for violations of humanitarian law committed during non-international armed conflicts.⁷³ The ICTR, calling the jurisprudence of the ICTY and the Nuremberg Tribunal “persuasive,” has imposed individual criminal responsibility for violations of humanitarian law committed during a non-international conflict.⁷⁴ These and other decisions by the ICTY and ICTR are slowly eroding the distinction between international and non-international armed conflicts.

1. *The Jurisprudence of the ICTY*

In addition to extending the principle of individual criminal responsibility to violations of humanitarian law committed during non-international conflicts, the ICTY has generated a considerable amount of jurisprudence on the difference between an international and a non-international conflict.⁷⁵ The

⁷⁰ Additional Protocol II, *supra* note 64. See also The International Committee of the Red Cross, General Introduction to the Commentary on Protocol II, (14 Feb. 2002), available at <http://www.icrc.org/ihl.nsf/b466ed681ddfcfd241256739003e6368/0f47ae2f6a509689c12563cd004399df?OpenDocument>. Additional Protocol I, however, drafted to expand the application of the Geneva Conventions to international conflicts, defines an international conflict as occurring “between two High Contracting Parties,” or sovereign states. Additional Protocol I, *supra* note 64.

⁷¹ MORRIS & SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, *supra* note 6, at 141. *Id.* at 128.

⁷² The Nuremberg Tribunal was created to prosecute crimes committed by German officials during World War II. See generally <http://www.yale.edu/lawweb/avalon/imt/imt.htm>.

⁷³ Case IT-94-1, Prosecutor v. Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) § 128.

⁷⁴ Case ICTR-96-4-T, Prosecutor v. Akayesu, Judgment and Sentence (2 Sept. 1998) § 612-615.

⁷⁵ Statute for the ICTY, *supra* note 5.

U.N. Security Council found the Yugoslav conflict contained both non-international and international elements.⁷⁶ The ICTY statute splits humanitarian law into two parts: Article Two of the ICTY Statute includes all of the Geneva Conventions relating to international conflicts, while Article Three of the statute gives the ICTY jurisdiction over Common Article Three and Protocol II.⁷⁷ It became necessary, therefore, for the ICTY to determine which portions of the Yugoslav conflict were non-international and which were international, in order to apply the correct statutory article.

The ICTY grappled with this problem in several cases.⁷⁸ *Prosecutor v. Tadic* was the first case in which a Trial Chamber considered the issue of whether an armed conflict was international or non-international.⁷⁹ The Geneva Conventions state that an international conflict occurs between two High Contracting Parties, or sovereign states, but the *Tadic* Court held that an international conflict may also exist when a foreign state exercises control over a non-state party to the conflict.⁸⁰

In reaching its conclusions, the *Tadic* Court looked to the decisions of other international courts that had interpreted the Geneva Conventions in the past.⁸¹ In particular, the Court considered *Nicaragua v. United States of America*, in which the International Court of Justice dealt with a similar issue.⁸²

⁷⁶ See <http://www.amnesty.org/ailib/aireport/ar99/eur70.htm> for a history of the Yugoslav conflict. A single country, Yugoslavia, fractured into several states during the course of the conflict. *Id.*

⁷⁷ Statute of the ICTY, *supra* note 5.

⁷⁸ See *Prosecutor v. Tadic*, *supra* note 14. See also *Prosecutor v. Mucic et al.*, Case No. IT-96-21, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1 available at <http://www.un.org/icty>. In *Tadic*, the accused was charged with murder, beatings and inhumane acts. The accused pled not guilty. See generally Press Release CC/PIO/190-E, The Verdict (7 May 1997), available at <http://www.un.org/icty/cases/jugemindex-e.htm>.

⁷⁹ *Prosecutor v. Tadic* at 112.

⁸⁰ *Id.* at 116.

⁸¹ *Id.* at 99.

⁸² See *Military and Paramilitary Activities (Nicar. v. U.S.)*, *supra* note 61, where Nicaragua accused the United States of funding and supporting a rebel military group within Nicaragua. *Id.*

The Court has taken the view that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself...for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. *Id.* ¶ 115.

Nicaragua required that for a conflict to be deemed international, the foreign state must exercise “complete” control over the non-state party.⁸³ “Complete” control meant the foreign state had to order the non-state party to commit specific acts.⁸⁴ The *Tadic* Court, however, held this level of control to be unnecessarily high.⁸⁵ According to the *Tadic* decision, the foreign state need not give “specific instructions” to the non-state party.⁸⁶ The foreign state, however, must still exercise “overall control” over the non-state party, helping to plan its military campaign and sharing its military objectives.⁸⁷

Judge McDonald’s dissent in *Tadic* argued that an even lower standard of control should apply to prevent legal technicalities from changing the nature of a conflict.⁸⁸ The Court in *Prosecutor v. Mucic et al.* applied Judge McDonald’s reasoning, holding the conflict in that case to be international because the non-state party, though given a new name, remained under foreign-state control.⁸⁹ The “overall control” test continues to be the standard used by the ICTY for determining whether Article Two or Article Three of the ICTY Statute should be applied in a particular case.⁹⁰

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Prosecutor v. Tadic* at 157.

⁸⁶ *Id.* at 137.

Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. *Id.*

⁸⁷ *Prosecutor v. Tadic* at 157.

[I]t is not sufficient for the group to be financially or even militarily assisted by a State... In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. *Id.*

⁸⁸ Case IT-94-1, *Prosecutor v. Tadic*, Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, 15 (7 May 1997).

⁸⁹ Case IT-96-21, *Prosecutor v. Mucic et al.*, Judgment (16 November 1998) ¶ 233. See also JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS*, 68 (Transnational Publishers 2003).

⁹⁰ JOHN R. W. D. JONES, *THE PRACTICE OF THE INTERNATIONAL CRIMINAL TRIBUNALS* at 55.

2. *The Statute of the ICTR*

Article Four of the ICTR statute contains Common Article Three and Additional Protocol II.⁹¹ Unlike the ICTY statute, the ICTR statute does not include the rest of the Geneva Conventions or Additional Protocol I.⁹² The U.N. Security Council decided that the conflict in Rwanda was “internal” in nature.⁹³ The Security Council based its decision on the findings of the U.N. Commission of Experts.⁹⁴ The Commission of Experts conducted a survey of evidence gathered by human-rights organizations in Rwanda and found the armed conflict taking place in Rwanda between April 6 and July 15, 1994, to be a non-international armed conflict because foreign-state involvement was limited to “peacemaking and humanitarian functions rather than belligerent action.”⁹⁵ The courts of the ICTR, unlike courts in the ICTY, have never addressed the issue of international versus non-international armed conflicts in their deliberations.⁹⁶

II. ANALYSIS

It is a fundamental principle of law that similar crimes should be punished similarly, yet two sets of rules exist for violations of humanitarian law. Violations of humanitarian law occurring during an international conflict are war crimes, punishable by an extensive and detailed set of laws. The same acts, when committed during a non-international conflict, are

⁹¹ Statute of the ICTR, *supra* note 2, at art. 4.

⁹² Statute of the ICTR, *supra* note 2, at art. 2.

⁹³ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994) U.N. Doc. S/1995/134 [Hereinafter “Report of the Secretary-General”]. See also Helen Durham, *International Criminal Law and the Ad Hoc Tribunals*, in *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, 199 (Helen Durham & John McCormack, eds., 1999). “Whilst the ICTY also has jurisdiction over grave breaches of the Geneva Conventions and war crimes, the fact that the Rwandan conflict is not characterized as an international conflict has resulted in the exclusion of these two crimes from its Statute.” *Id.*

⁹⁴ Final Report of the Commission of Experts, *supra* note 10, ¶ 108. See also Report of the Secretary-General at 3.

⁹⁵ Final Report of the Commission of Experts ¶ 108. The speedy creation of the ICTR, “limited opportunities for lengthy debate on much of the legal technicalities.” Helen Durham, *International Criminal Law and the Ad Hoc Tribunals*, *supra* note 91, at 198.

⁹⁶ *Prosecutor v. Akayesu*, *supra* note 14, ¶ 601.

not war crimes and are subject to a lesser body of law. The circumstances surrounding a violation of humanitarian law, rather than the nature of the violation, determine the type of law to be applied. While basic humanitarian standards are upheld in Common Article Three and Additional Protocol II, a comparison of these instruments with the other Geneva Convention articles and Additional Protocol I cannot help but expose the marginalization of non-international conflicts.

Two points emerge from this analysis. First, as armed conflicts are often very complex, and the law applied to a conflict is determined by its nature, every aspect of a particular conflict must be thoroughly examined before the conflict can be categorized as international or non-international. If a non-international armed conflict could be reclassified as an international armed conflict, it should be so reclassified to obtain the full protection of the Geneva Conventions and Additional Protocols. The “overall control” test was developed by the ICTY to differentiate between international and internal armed conflicts occurring in the former Yugoslavia, but it could prove a useful tool in determining the nature of other complex armed conflicts. Is the Rwandan armed conflict, for example, actually international in nature? Is it, instead, a conflict made up of both international and non-international parts?

Second, the international community must work toward abolishing the distinction between the laws regulating international and non-international armed conflicts. Humanitarian law should apply with equal force to international and non-international armed conflicts. The applicability of humanitarian law to a particular act should not depend upon abstruse and technical distinctions between types of conflicts. Unfortunately, even if portions of the Rwandan armed conflict can be reclassified as international, much of the Rwandan armed conflict, the Yugoslav conflict, and, indeed, armed conflicts worldwide remain internal affairs, outside the scope of most humanitarian law.

A. APPLYING THE “OVERALL CONTROL” TEST TO RWANDA

Nothing like the “overall control” test created by the ICTY has been developed by the ICTR because the U.N. Security

Council and the U.N. Commission of Experts categorized the Rwandan conflict as non-international.⁹⁷ Two aspects of the Rwandan armed conflict, however, are potentially international in nature. The first is Ugandan financing and support for the RPF invasion. The second is the murder of ten Belgian peacekeepers by Rwandan troops.

1. *Invasion of Rwanda by the Rwandan Patriotic Front*

The RPF invasion is usually seen as the armed return of Tutsi refugees to Rwanda, but scholars have also pointed out that regional developments played a key role in sparking the Rwandan armed conflict.⁹⁸ The RPF, while not openly supported by President Museveni of Uganda, had his tacit support and received material aid from the Ugandan government.⁹⁹ To what extent the Ugandan Government supported, or even controlled, the RPF is debatable. President Museveni knew of the impending RPF attack on Rwanda, though not the exact date or circumstances under which it was to take place.¹⁰¹ President Museveni allowed the RPF to use weapons they had been given

⁹⁷ Final Report of the Commission of Experts, *supra* note 10, ¶ 108.

⁹⁸ MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS, *supra* note 20, at 159.

⁹⁹ MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS, *supra* note 20, at 183.

Years later, President Museveni told his fellow regional heads of state meeting in Harare that, while the [Rwandan Tutsi] in the NRA had informed him in advance 'of their intention to organize to regain their rights in Rwanda,' they had launched the invasion 'without prior consultation.' Significantly, he continued, even though 'faced with [a] fait accompli situation by our Rwandan brothers,' Uganda decided 'to help the [RPF], materially, so that they are not defeated because that would have been detrimental to the Tutsi people of Rwanda and would not have been good for Uganda's stability.' It was as candid an admission of complicity as any head of state could have made. *Id.*

¹⁰⁰ *Id.* "Years later, President Museveni told his fellow regional heads of state meeting in Harare that, while the [Rwandan Tutsi] in the NRA had informed him in advance 'of their intention to organize to regain their rights in Rwanda,' they had launched the invasion 'without prior consultation.' Significantly, he continued, even though 'faced with [a] fait accompli situation by our Rwandan brothers,' Uganda decided 'to help the [RPF], materially, so that they are not defeated because that would have been detrimental to the Tutsi people of Rwanda and would not have been good for Uganda's stability.' It was as candid an admission of complicity as any head of state could have made." MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS, *supra* note 18, at 183.

¹⁰¹ *Id.*

¹⁰² GERARD PRUNIER, THE RWANDAN CRISIS, *supra* note 42, at 97 (Hurst and Company 1995).

when serving as Ugandan soldiers.¹⁰³ The RPF invaded Rwanda with equipment from Uganda, including machine-guns, rocket-launchers, rifles, and other equipment.¹⁰⁵ The Ugandan government, however, put up roadblocks to prevent more NRA soldiers from deserting to join the RPF.¹⁰⁶ Later in the war, Museveni allowed the RPF to reenter Uganda to regroup and the RPF continued to receive arms from Uganda throughout the war.¹⁰⁷ The level of Ugandan involvement in the RPF invasion is still a matter of debate and the armed conflict can be seen either as a foreign invasion or a civil war.¹⁰⁸

The Rwandan government raised the issue of Ugandan support of the RPF before the Security Council.¹⁰⁹ In *Prosecutor v. Akayesu*, the court cited to the U.N. Security Council's characterization of the Rwandan conflict, which stated that it was non-international.¹¹⁰ In a later case, *Prosecutor v. Rutaganda*, the court stated only that due to the evidence presented by several expert witnesses, the conflict in Rwanda was a non-international conflict between the then-existing government of Rwanda and "dissident forces."¹¹¹ Was the involvement of the Ugandan government enough to qualify the RPF invasion as an international conflict?

The "overall control" test, outlined in *Tadic*, is as follows:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and fi-

¹⁰³ GERARD PRUNIER, *THE RWANDAN CRISIS*, *supra* note 45, at 97.

¹⁰⁴ OAP Report, *supra* note 16, Chapter 6

¹⁰⁵ *Id.* at 93.

¹⁰⁶ *Id.* at 94.

¹⁰⁷ *Id.* at 115.

¹⁰⁸ MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS*, *supra* note 20, at 160.

The answer is complex, but it seems that the two extreme positions, namely the official Ugandan line ('our good faith was surprised by cunning conspirators') and the Kigali propaganda line ('this is a planned invasion supported by the Ugandan government...') are both untenable. GERARD PRUNIER, *THE RWANDAN CRISIS*, *supra* note 45, at 97.

¹⁰⁹ MORRIS & SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA*, *supra* note 6, at 142 n.602.

¹¹⁰ *Prosecutor v. Akayesu*, *supra* note 14, ¶ 604. Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), U.N. Doc. S/1995/134 at 3.

¹¹¹ Case ICTR-96-3, *Prosecutor v. Rutaganda*, 435, Trial Chamber I (1999), available at <http://www.ictr.org/default.htm>.

nancing the group, but also by coordinating or helping in the general planning of its military activity.¹¹²

There is evidence that the RPF was financed and equipped by the Ugandan government, but did the Ugandan government coordinate or plan the military activity of the RPF? To a certain extent, the Ugandan government wanted the Rwandan refugees to return to Rwanda.¹¹³ Yet, a general desire that the Tutsi return to Rwanda and turning a blind eye to the organization and training of troops from its army are not the same as the Ugandan government actively participating in planning an invasion of Rwanda. Under the “overall control” test as defined in *Tadic*, it is unlikely Ugandan involvement in the RPF invasion would rise to the level of “overall control” needed to render the armed conflict international in nature.

Was the RPF, like the Serbian troops in *Mucic et al.*, merely part of the Ugandan army under a different name?¹¹⁴ The RPF troops were Ugandan troops under a new name, but the change of name cannot be called a ruse by the Ugandan government to avoid complicity in the invasion. The formation of the RPF was accomplished by a rogue group within the Ugandan army. The Ugandan leadership did not actively participate in forming the RPF. What is lacking in the relationship between Uganda and the RPF is the element of willful or intentional involvement in the RPF invasion by the Ugandan government.

Even if the conflict in Rwanda cannot be classified as a conflict between two sovereign states, the U.N. itself found that the conflict caused instability in the region.¹¹⁵ If a conflict occurring within one country affects neighboring countries, is the conflict international? The Trial Chamber in *Prosecutor v. Kanyabashi* concluded that a non-international conflict may have international repercussions, but that these repercussions

¹¹² *Supra* note 87.

¹¹³ *Supra* note 99.

¹¹⁴ *Prosecutor v. Mucic et al.*, *supra* note 78, ¶ 233. The Trial Chamber held that changing the name of the Government controlled group was an intentional attempt to, “mask the continued involvement of the [Government troops] in the conflict while its Government remained in fact the controlling force....” *Id.* ¶ 234.

¹¹⁵ MORRIS & SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, *supra* note 6, at 112, n.506.

do not make the conflict international.¹¹⁶ It is the causes of a conflict, and not its effects, that determine its nature. It can be seen from this analysis that in order for a conflict to be international, two Sovereign States must intentionally involve themselves in that conflict.

2. *The Murder of Ten Belgian Solders from the U.N. Assistance Mission in Rwanda*

Why does the involvement of U.N. troops in Rwanda, who are clearly under the control of a sovereign, foreign body, not render portions of the Rwandan conflict international? Ten Belgian UNAMIR solders were killed protecting the Prime Minister of Rwanda.¹¹⁷ Unlike the RPF, the U.N. peacekeepers were clearly under the command and control of a foreign body, the U.N. In *Prosecutor v. Bagasora*,¹¹⁸ the murders were tried as violations of Common Article Three and Additional Protocol II of the Geneva Conventions, but questions were raised on behalf of the government of Belgium as to whether the murders were actually an international incident.¹¹⁹ It can be argued that an international conflict occurred between UNAMIR, a fighting force controlled by the U.N., and Rwandan troops.¹²⁰ The issue then becomes whether peacekeepers can be party to an armed conflict. A legal expert, Eric David, filed a brief on behalf of the Kingdom of Belgium that outlines both sides of the argument.¹²¹

David begins with the argument that the killing of the ten Belgian solders was one event during the course of a non-international armed conflict, stating that this conclusion is supported by both fact and law.¹²² First, David points out that

¹¹⁶ Case ICTR-96-15-T, *Prosecutor v. Kanyabashi*, ¶ 19 (Trial Chamber Decision on the Defense Motion on Jurisdiction) 18 June 1997. The court held, “[T]he conflict in Rwanda as well as the stream of refugees had created a highly volatile situation in some of the neighboring regions.” *Id.*

¹¹⁷ *Supra* note 46.

¹¹⁸ Bagosora is charged with ordering the murder of the UNAMIR troops and of Prime Minister Uwilingiyimana. Case ICTR-96-7, *Prosecutor v. Bagosora*, Indictment (1998) ¶ 1.24.

¹¹⁹ Intervention de la Belgique au titre d’Amicus Curiae en l’aff. Bagosora n° ICTR-96-7-T [hereinafter “Amicus Curiae brief”].

¹²⁰ Amicus Curiae brief, *supra* note 119, at 12.

¹²¹ *Id.*

¹²² *Id.*

both Rwanda and UNAMIR were parties to all the Geneva Conventions and both Additional Protocols.¹²³ This could be interpreted to mean the two parties considered an eventual conflict taking place between themselves to be potentially either non-international or international.¹²⁴

David then looks to the facts, finding that only the Belgian forces, and not the Ghanaian soldiers, were attacked by Rwandan troops.¹²⁵ David says one could draw the conclusion that the Belgian troops were attacked because they were Belgian and not because they were representatives of the U.N.¹²⁶ The U.N. itself was not attacked, therefore, it was not a party to the conflict. There are two problems with this theory. Firstly, other motives for the killings have been suggested. For example, the Belgian troops may have been targeted precisely because they were U.N. peacekeepers, because the Rwandan government wanted Belgium to withdraw its troops from Rwanda, crippling the peacekeeping effort.¹²⁷ Secondly, even if David's interpretation of the event is correct, the motives behind the killings do not change the fact that U.N. troops were killed in the course of performing their duties. The motive behind the killings is not relevant in determining whether the incident was international in nature.

David does not actually provide an argument in favor of finding the Rwandan conflict to be international. Instead, he focuses on the fact that UNAMIR was signatory to all of the Geneva Conventions and both Additional Protocols, explaining that Common Article Three is a minimum standard applicable to both non-international and international conflicts.¹²⁸ David notes that regardless of the nature of the conflict, the U.N. intended to apply at least the minimum standard of humanitarian law.¹³⁰

¹²³ *Id.* at 13.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ GERARD PRUNIER, *THE RWANDAN CRISIS*, *supra* note 45, at 229.

¹²⁸ *Amicus Curiae* brief, *supra* note 119, at 15. David quotes to sources arguing in favor of finding Common Article Three applicable to all armed conflicts. *Id.*; *See also supra* note 61.

¹²⁹ *Amicus Curiae* brief, *supra* note 114, at 15. David quotes to sources arguing in favor of finding Common Article Three applicable to all armed conflicts. *Id.* *See also supra* note 50.

¹³⁰ *Amicus Curiae* brief, *supra* note 119, at 21.

What are the arguments in favor of finding that an international conflict existed in Rwanda? The issue in this case is whether a peacekeeping force can be party to an armed conflict. A "party to a conflict" must be an aggressor in that conflict and peacekeepers are not aggressors.¹³¹ If peacekeepers are not a party to a conflict, their involvement cannot be used to qualify the conflict as international. In its official report on the murders, the Belgian Senate states that the soldiers were involved in a "peacekeeping" mission.¹³² The peacekeepers were deployed to protect the prime minister from harm.¹³³ UNAMIR was not an aggressor in the conflict but merely observed and maintained the peace. Indeed, one of the biggest criticisms of UNAMIR is that it remained completely disengaged from the conflict taking place around it.¹³⁴

It is clear from the above analysis that an international conflict must involve either two state parties, or a state party and a fighting force that is both an aggressor in the conflict and under the control of a sovereign foreign body. Neither the RPF invasion nor the UNAMIR killings meet both these criteria. The Rwandan armed conflict does not fall within the current definition of an international conflict. The majority of humanitarian law cannot be applied to many serious crimes committed during the Rwandan armed conflict.

B. REDRAFTING THE LAWS OF ARMED CONFLICT

Codified international law, such as the Geneva Conventions and Additional Protocols, treats differently violations of humanitarian law committed during international conflicts and

¹³¹ The U.N. defines peacekeeping as "a means by which the international community can encourage the establishment of sustainable peace in places and situations where conflict threatens or has been recently subdued." At <http://www.un.org/Depts/dpko/dpko/ques.htm>. See also GARTH J. CARTLEDGE, *LEGAL CONSTRAINTS ON PEACEKEEPING OPERATIONS*, 128 (1999), reprinted in HELEN DURHAM AND TIMOTHY L.H. MCCORMACK, *THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW*, (Martinus Nijoff 1999), in which the author states, "the Geneva Conventions themselves cannot be said to apply to a peacekeeping operation unless there is an actual armed conflict applicable to the United Nations forces themselves. Peacekeepers are not normally engaged in armed conflict...." *Id.*

¹³² Rapport de la Commission d'enquete parlementaire concernant les evenements du Rwanda, Senat de Belgique, Session de 1997-1998, 6 Decembre 1997 at 403.

¹³³ GERARD PRUNIER, *THE RWANDAN CRISIS*, *supra* note 45, at 230.

¹³⁴ See generally, GERARD PRUNIER, *THE RWANDAN CRISIS*, *supra* note 45, Chapter 6.

those committed during non-international conflicts. Any such distinction is artificial, because similar humanitarian violations occur during international and non-international conflicts. The Rwandan armed conflict is an example of the serious non-international conflicts existing in the world today. Such conflicts deserve to be treated under more than a “minimum humanitarian standard.” International courts, such as the ICTY and ICTR, are moving away from treating differently non-international and international armed conflicts. Treating international and non-international armed conflicts with different rules is confusing and serves no purpose in the effective application of the law. The existence of two separate bodies of law is, essentially, a political creation that has little legal justification.¹³⁵ Humanitarian law should be redrafted to create a single body of law that applies to all armed conflicts.

The “overall control” test, developed by the ICTY, has proved useful in the classification of armed conflicts.¹³⁶ The test requires that the *causes* of an armed conflict be international, because an international conflict is defined in the Geneva Conventions and Additional Protocols as a conflict “between High Contracting Parties.”¹³⁷ Only when two High Contracting Parties cause a conflict will that conflict be classified as international. The “overall control” test excludes many of today’s armed conflicts, because many conflicts do not involve two High Contracting Parties. Despite the involvement of only one High Contracting Party, many of these conflicts have a considerable *effect* on neighboring countries.¹³⁸ Rwanda is an example of such a conflict.¹³⁹

¹³⁵ MORRIS & SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, *supra* note 6, at 207.

¹³⁶ *Supra* note 90.

¹³⁷ Geneva Convention I, *supra* note 7.

¹³⁸ Commission of Experts ¶ 109. For example, the influx of Rwandan refugees (many of whom were involved in the genocide) has added to the instability of the Democratic Republic of Congo. Human Rights Watch, Human Rights Developments, Zaire (1994), at http://www.hrw.org/reports/1995/WR95/AFRICA-11.htm#P581_209577. “The security situation in the refugee camps in Goma, Zaire became increasingly volatile by the end of 1994 due to the activities of former Rwandan army troops and militia members, most of whom were still armed...” *Id.* The Rwandan armed conflict has had an effect on other neighbors, such as Burundi. Human Rights Watch, Human Rights Developments, Burundi (1994), available at http://www.hrw.org/reports/1995/WR95/AFRICA-02.htm#P87_30999. “The influx of thousands of Rwandan refugees after the genocide began in their country in early April heightened tensions, particularly in those parts of northern Burundi near the frontier.”

Many important armed conflicts occurring in the world today are made up of a complex mixture of international and non-international conflicts.¹⁴⁰ The nature of potential foreign-state involvement is often difficult to quantify.¹⁴¹ Equally difficult to discern is the intentions of the foreign government regarding the armed conflict.¹⁴² The level of foreign-state involvement in many such conflicts does not rise to the threshold of international involvement.¹⁴³ Nonetheless, many of these conflicts have unquestionably had a serious effect on neighboring states.¹⁴⁴ The regional effects of many non-international armed conflicts are easily observable and widely documented.

Id.; See also Human Rights Watch, Eastern Congo Ravaged: Killing Civilians and Silencing Protest (May 2000), available at <http://www.hrw.org/reports/2000/drc/Drc005.htm#TopOfPage>. “The Interahamwe, originally a Rwandan Hutu militia which helped lead the 1994 genocide in Rwanda, now include the remnants of that group plus others, both Rwandan and Congolese Hutu, who have joined with them in fighting the current government of Rwanda.” *Id.*

¹³⁹ *Supra* note 138.

¹⁴⁰ See generally Human Rights Watch, Overview of Human Rights Developments, Angola, 2002, Democratic Republic of Congo, 2001, and Liberia 2003, available at <http://hrw.org/doc/?t=africa>, for examples of other complex African “civil wars.” *Id.* In particular, the recently concluded “civil war” in the Democratic Republic of Congo [hereinafter “DRC”] contains many international aspects that have yet to be fully explored. See Human Rights Watch, D.R. Congo: U.N. Must Address Corporate Role in War (October 27, 2003), available at <http://hrw.org/press/2003/10/drc102703.htm>.

Since August 1998, the DRC has been enmeshed in one of Africa's most widespread wars, directly involving six other countries. The armies of Rwanda, Uganda and Burundi along with Congolese rebel groups were pitted against the DRC government, supported by Zimbabwe, Angola and Namibia. Under increasing international pressure, the bulk of the foreign armies have withdrawn from Congo in the past year but they left behind many vested interests and a network of economic ties. Illicit economic exploitation reportedly continues through armed groups linked to neighboring countries and corrupt government officials. *Id.*

¹⁴¹ For example, the armed conflict in the DRC involves both the direct and indirect involvement of Angola, Zimbabwe and Rwanda. A blurred line exists between criminal groups exploiting the conflict and armed forces ensuring regional stability. See generally Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo (16 October 2002) [hereinafter “Panel Report on the DRC”], S/2002/1146, § 13 – 17, available at <http://www.uni-gruppe.de/deutsch/psfeb03/documents/s2002.pdf>.

¹⁴² For example, the Rwandan government argues its troops in the DRC serve a peacekeeping function, while the Commission of Experts accuses the Rwandan government of plunder. Panel Report on the DRC § 65, 66.

¹⁴³ Geneva Convention I, *supra* note 7, Preamble, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3?OpenDocument>.

¹⁴⁴ *Supra* note 138. Acknowledging the interrelatedness of armed conflicts throughout central Africa, the U.N. is working toward a “Conference on the Great Lakes Region.” Progress Report of the Secretary-General on the recommendations of the Security-Council mission to Central Africa, S/2004/52 (January, 20 2004) § 55.

Regional conflicts, or conflicts having a serious and documented effect on neighboring states, should be categorized as international conflicts because of their international consequences. Additional Protocol I would then cover both conflicts occurring between sovereign states and conflicts having a serious and document regional effect. Additional Protocols I and II would, in effect, be merged to create a new Protocol applying to all serious armed conflicts.¹⁴⁵ State sovereignty would be ensured by retaining the language of Additional Protocol II, which excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”¹⁴⁶ This language excludes purely internal incidents that do not effect neighboring states. Were a new definition of international armed conflicts adopted, all serious armed conflicts would be equally covered by international law. No longer would the nature of an armed conflict determine the applicable law.

III. CONCLUSION

Currently, different sets of laws exist for violations of humanitarian law committed during non-international conflicts and for those committed during international conflicts. Identical crimes are treated to different sets of laws, depending upon the nature of the conflict during which the crimes took place. A change in the definition of an international conflict is required to do away with this discriminatory treatment. The Rwandan armed conflict is not classified as an international conflict under the current definition. The Rwandan conflict, however, like many serious conflicts involving non-state parties, affects the stability of the entire region surrounding Rwanda. Nevertheless, the Rwandan armed conflict is covered by only the bare minimum of humanitarian law. The Additional Protocols

¹⁴⁵ *Supra* note 64. See also THE INSTITUTE OF INTERNATIONAL LAW, THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW AND FUNDAMENTAL HUMAN RIGHTS IN ARMED CONFLICTS IN WHICH NON-STATE ENTITIES ARE PARTIES, (The Institute of International Law 1999). “Therefore it is desirable and necessary that States, the United Nations and competent regional and other international organizations...draft and adopt a convention designed to regulate all armed conflicts and protect all victims, regardless of whether such conflicts are international, non-international or of a mixed character.” *Id.*

¹⁴⁶ See Additional Protocol II, *supra* note 64, art. 1.

¹⁴⁷ See Additional Protocol II, *supra* note 62, art. 1.

should be merged into one Protocol, covering not only armed conflicts taking place between two High Contracting Parties, but also armed conflicts involving only one High Contracting Party but having a serious effect on neighboring states. All serious armed conflicts would be covered by the full extent of humanitarian law.

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