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MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

ISSUE: THE LEGAL STATUS, UNDER INTERNATIONAL HUMANITARIAN LAW, OF CAPTURED MERCENARIES IN INTERNAL CONFLICTS.

PREPARED BY RAJESH V. FOTEDAR
FALL 2003

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The law must be stable, but it must not stand still.

- Roscoe Pound (1870 - 1964)

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

1. The Issue.

This memorandum addresses the legal status of mercenaries captured during internal conflicts, under international humanitarian law. The first part of this memorandum briefly discusses the protected status captured mercenaries have enjoyed throughout history. The second part of this memorandum analyzes the current prisoner of war regime in international humanitarian law governing international conflicts, namely The Geneva Conventions and Protocol I, and the Protocol's possible status as customary international law. The third part performs the same analysis on current international humanitarian law governing internal armed conflicts. The fourth part discusses recent conventional law, in attempts to curb the use of mercenaries, produced by the United Nations and the Organization for African Unity. The fifth part discusses the definition of an armed conflict and defines the Rwandan conflict as an internal conflict, or a mixed conflict. The sixth part explains how the creation of new customary international law for internal conflicts by the International Criminal Tribunal for the former Yugoslavia creates standards for the treatment of captured mercenaries in Rwanda. The seventh part considers the concept of belligerency, its vitality, the problems associated with its reemergence, and its usefulness in the future. The eighth and final part of this memorandum offers the conclusion that mercenaries captured during the conflict in Rwanda are entitled to minimal protections currently recognized under customary international law.

2. Summary of Conclusions.

a) The Geneva Conventions Recognize Captured Mercenaries as Prisoners of War, while Protocol I Explicitly Denies Mercenaries Prisoner of War Status.

Protocol I to the Geneva Conventions contains a specific provision, Article 47, that explicitly denies mercenaries, captured during an international conflict, the status of prisoner of war. However, the pre-Protocol I laws governing international conflict codified in the Geneva Conventions make absolutely no mention of mercenaries. There is considerable scholarly commentary suggesting that mercenaries were not meant to be distinguished from regular combatants when applying the pre-Protocol I prisoner of war regime. Hence, before Protocol I ratification, mercenaries could qualify for prisoner of war status. The difference between the Geneva Conventions and Protocol I on the issue of mercenaries is stark and troublesome. Many critics of Article 47 believe the article itself is in disharmony with the basic principles of international humanitarian law. Furthermore, many feel that Article 47 employs an inadequate definition and offers mercenaries a disincentive from complying with the laws of war. In addition, while some legal scholars think many of the Protocol's provisions have ripened into customary international law, it is problematic to give Article 47 the same status. Finally, while the legal paradigm of an international conflict is not directly applicable to the Rwandan conflict, however, the difference between the Geneva Conventions and Protocol I is an obvious manifestation of the international community's growing contempt for mercenaries during the latter part of the twentieth century.

b) Article 3 of the Geneva Conventions and Protocol II have no Prisoner of War Regime, thus Granting Captured Mercenaries a Minimal Level of Protection.

Mercenaries captured in non-international conflicts are entitled to protections under international humanitarian law. Article 3 of the Geneva Conventions is one of the few parts of the conventions that provides standards for non-international conflicts. All parties to such a conflict are under obligation to observe Article 3 once hostilities begin. Article 3's purpose is to guarantee basic principles of humane treatment for all persons no longer involved in the conflict. Persons protected under the article's scope include the sick, wounded, and combatants no longer taking part in the hostilities. Captured mercenaries fit the latter criteria. Furthermore, Protocol II does not espouse a prisoner of war regime for non-international conflicts, emphasizing the notion that mercenaries are not to be distinguished from regular combatants or denied the basic protections enumerated in Article 3. Protocol II's purpose was to expand basic protections. For instance, detained persons cannot be subject to collective punishments, corporal punishments, or slavery. According to many legal writers, mercenaries who are captured during non-international conflicts are protected under the provisions of Article 3 and Protocol II.

c) The Conflict in Rwanda can be Defined Either as an Internal Conflict, or a "Mixed Conflict."

Defining a conflict as an international or internal armed conflict, determines which standards and provisions of international humanitarian law govern the conflict in question. The international armed conflict classification brings with it the full weight and force of international humanitarian law. In contrast, internal armed conflicts, or conflicts not of an international character, are primarily controlled by Article 3, common to all four Geneva Conventions, and Protocol II. According to Article 4 of the International Criminal Tribunal for Rwanda (I.C.T.R.)

Statute, the U.N. Security Council sought to classify the hostilities in Rwanda as an internal conflict, thereby triggering Article 3 and Protocol II. However, many legal scholars choose to characterize the events in Rwanda as a mixed conflict. Such a conflict has been described as an internal conflict that has been internationalized by foreign influences. Nonetheless, in the context of current international humanitarian law, the International Criminal Tribunal for Rwanda Statute acts as a definitive indication that the international community sees the Rwandan conflict as an internal conflict, and not as an international conflict.

d) The I.C.T.Y.'s decision in *The Prosecutor v. Tadic* Creates Customary International Law Applicable to Mercenaries Captured During the Rwandan Conflict.

In *The Prosecutor v. Tadic*, the International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.) encountered the issue of applying international humanitarian law to a modern-day mixed conflict. The Tribunal concluded that some of the provisions in the Geneva Conventions and the Additional Protocols had crystallized into customary international law. Specifically, the I.C.T.Y. found that those provisions protecting persons no longer involved in an internal conflict were to be afforded Article 3 and Protocol II protections as a matter of custom. On appeal, the I.C.T.Y. Appeals Chamber affirmed this evolution of customary law and articulated clearer standards. The Appeals Chamber indicated that all persons who had laid down their arms were now entitled to the new customary protections. Hence, it seems that the only way a captured mercenary can be subject to Article 47 of Protocol I is to be involved in what is clearly an international armed conflict. As long as a conflict escapes such a classification, the I.C.T.Y.'s customary law is controlling. Therefore, based on the I.C.T.Y.'s conclusions, it is probable that a captured mercenary has a legal right to Article 3 and Protocol II protections under customary international law in any non-international armed conflict.

II. MERCENARISM: A BRIEF HISTORICAL REVIEW

Before setting forth an overview of current international humanitarian law, revealing the contempt and disregard modern international lawmakers have towards mercenaries, a quick study of the history of mercenarism brings to light a very different approach. Mercenaries have existed since the earliest recorded armed conflict.[1] Unlike today, mercenaries in ancient wars were not distinguished from other combatants. In fact, mercenaries were once respected professionals.[2] The Roman Empire often used mercenaries, especially after the first century A.D., to ward off Germanic Tribes from its borders.[3] Starting with the Treaty of Westphalia, which ended the Thirty Years War in 1648, mercenaries were treated no differently than other prisoners of war.[4] In the early fourteenth century, the Byzantium Empire employed the services of Spanish frontiersman.[5] In the fifteenth century, princes and dukes often employed German, Italian, or Swiss mercenaries to fight their wars.[6] By the 1700's, with the advent of large conscript armies, mercenaries were highly respected strategic advisors and were generally treated cordially when captured.[7] During the American Revolution, Hessian mercenaries, who fought for the British, were treated as prisoners of war as well.[8] Hence, there is substantial historical

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[1] Edward Kwakwa, *The Current Status of Mercenaries in the Law of Armed Conflict*, 14 HASTINGS INT'L & COMP. L. Rev. 67, 75 (1990). [Reproduced in the accompanying notebook at Tab 11.]

[2] Capt. John R. Cotton, Comment, *The Rights of Mercenaries As Prisoners of War*, 77 MIL. L. REV. 143, 149 (1977). [Reproduced in the accompanying notebook at Tab 10.]

[3] *Id.*

[4] Cotton, *supra* note 2, at 151. [Reproduced in the accompanying notebook at Tab 10.]

[5] Kwakwa, *supra* note 1, at 75. [Reproduced in the accompanying notebook at Tab 11.]

[6] *Id.*

[7] Cotton, *supra* note 2, at 150-1. [Reproduced in the accompanying notebook at Tab 11.]

[8] *Id.*

evidence available to support the treatment of mercenaries as protected prisoners when captured during armed conflict. Nevertheless, the current trend in international humanitarian law is to criminalize mercenarism, thereby stripping the mercenary of his historical protected status.

III. STATUS OF MERCENARIES UNDER INTERNATIONAL HUMANITARIAN LAW GOVERNING INTERNATIONAL ARMED CONFLICTS

The primary rules of international law which determine the rights and status to be accorded combatants who are captured by an opposing military force are stated in the Third Geneva Convention of 1949.[9] The main provision granting protection is Article 4(A) of the Geneva Convention Relative to the Treatment of Prisoners of War.[10] The text explains that prisoners of war (POWs) are persons, who have fallen into the power of the enemy, belonging to one of two categories. The first category defines those members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps. The second category focuses on members of other militias, volunteer corps, or organized resistance movements that belong to a Party to the conflict and operate in or outside their own territory, even if the territory is occupied. These second category militias must meet four criteria in order to qualify for POW status. They must be (1) commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognizable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws and customs of war. The second category suggests that

[9] Cotton, *supra* note 2, at 144. [Reproduced in the accompanying notebook at Tab 10.]

[10] *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 153. [Reproduced in the accompanying notebook at Tab 6.]

mercenaries who participate on behalf of one of the belligerents in an international conflict, and who satisfy the conditions, could be considered legitimate belligerents.[11]

1. The Geneva Conventions of 1949 Grant Prisoner of War Status to Captured Mercenaries.

"The Geneva Conventions of 1949 do not provide *expressis verbis* for mercenaries,"[12] and mercenaries are not specifically mentioned anywhere in Article 4(A).[13] Furthermore, there is no indication in the Convention Commentary that the subject of treatment of mercenaries was ever specifically addressed,[14] and there is no suggestion that the Article 4(A) criteria be explicitly applicable only to regular combatants.[15] It is possible that the Convention was intended to be general in character and that in light of historical precedent at the time of the drafting, mercenaries were assumed to fall within one of the protected categories.[16] Thus, the result was to retain the customary law application for regulars of recognized governments when dealing with irregular combatants.[17] This interpretation would appear to be supported by history because the provisions of the Convention have traditionally been considered general in nature and to be inclusive unless specifically exclusive in character.[18]

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[11] Kwakwa, *supra* note 1, at 86-7. [Reproduced in the accompanying notebook at Tab 11.]

[12] Kwakwa, *supra* note 1, at 86. [Reproduced in the accompanying notebook at Tab 11.]

[13] Cotton, *supra* note 2, at 155. [Reproduced in the accompanying notebook at Tab 10.]

[14] *Id.*

[15] W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Irregular Combatants under the International Humanitarian Law of Armed Conflict*, 9 CASE W. RES. J. INT. L. 39, 48 (1977). [Reproduced in the accompanying notebook at Tab 30.]

[16] Cotton, *supra* note 2, at 155. [Reproduced in the accompanying notebook at Tab 10.]

[17] Mallison, *supra* note 15. [Reproduced in the accompanying notebook at Tab 30.]

[18] Cotton, *supra* note 2, at 155. [Reproduced in the accompanying notebook at Tab 10.]

Hence, due to the lack of mention throughout the text, it can be easily asserted that mercenaries are accorded prisoner of war status upon capture under the 1949 Geneva Convention.[19] Article 4 provides that POW status is extended to those specified persons who have fallen into the power of the enemy.[20] Mercenaries are nearly always performing military duties at the time of detention and should usually satisfy either of the two Article 4 categories.[21] Once granted POW status, the mercenary taken captive is entitled to all protections the Convention affords.[22] As a POW, the mercenary cannot be charged with committing acts that are legal under the laws of land warfare, and is entitled to certain procedural safeguards such as the right to humane treatment, assistance of counsel, and the right against coercion.[23] Therefore, it can be extrapolated with certainty that the Geneva Conventions in no way criminalizes the fact of being a mercenary.[24]

2. Article 47 of Protocol I Explicitly Denies Mercenaries Prisoner of War Status.

In 1977, the mercenary's luck ran out. During the debates of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, a number of delegates affirmed that mercenaries should be denied combatant status.[25]

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[19] Marie-France Major, *Mercenaries and International Law*, 22 GA.J.INT'L & COMP.L. 103, 142-43 (1992). [Reproduced in the accompanying notebook at Tab 21.]

[20] Mallison, *supra* note 15. [Reproduced in the accompanying notebook at Tab 30.]

[21] Cotton, *supra* note 2 , at 157. [Reproduced in the accompanying notebook at Tab 10.]

[22] Cotton, *supra* note 2, at 159. [Reproduced in the accompanying notebook at Tab 10.]

[23] *Id.*

[24] Maj. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL.L.REV. 1, 21-2 (2003). (Discusses the relationship between international humanitarian law and private military companies.) [Reproduced in the accompanying notebook at Tab 20.]

[25] Major, *supra* note 19, at 145. [Reproduced in the accompanying notebook at Tab 21.]

Based on a seemingly visceral reaction towards their use during two decades of conflict in post-colonial Africa, mercenaries were branded as criminals, regardless of who employed them or on whose behalf they fought.[26] The result was the Protocol Additional to the Geneva Conventions (Protocol I).[27] Protocol I, to which Rwanda is a party, is the first convention that expressly deals with the legal status of mercenaries in the law of war.[28] Articles 43 through 47 of Protocol I form a section entitled "Combatant and Prisoner-of-War Status."[29] The basic concept of this section was to create a single and nondiscriminatory set of rules applicable to all combatants, regular and irregular alike.[30] Another aim was to prescribe limited exceptions for spies, mercenaries, and guerrillas.[31]

Article 47 explicitly states that a mercenary shall not have the right to be a combatant or a prisoner of war and creates a mercenary definition with six elements. The Protocol I definition describes a mercenary as any person who is specially recruited, locally or abroad, in order to fight in an armed conflict and actually takes a direct part in the hostilities. The mercenary must be motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation. Such compensation must be shown to be substantially in excess of that promised or paid to combatants of similar

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[26]Milliard, *supra* note 24, at 38. [Reproduced in the accompanying notebook at Tab 20.]

[27] *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977. (hereinafter "Protocol I") [Reproduced in the accompanying notebook at Tab 1.]

[28] Kwakwa, *supra* note 1, at 87. [Reproduced in the accompanying notebook at Tab 11.]

[29] George H. Aldrich, *New Life for the Laws of War*, 75 A.J.I.L. 764, 770 (1981). (Reviews the current status of international humanitarian law in terms of a variety of different types of conflicts.) [Reproduced in the accompanying notebook at Tab 12.]

[30] *Id.*

[31] *Id.*

ranks in the armed forces of that Party. The definition also requires that the mercenary is neither a national of a Party to the conflict, nor a resident of territory controlled by a Party to the conflict, and is not a member of the armed forces of a Party to the conflict. Finally, in order to complete the Protocol I definition, it must be found that the mercenary was not sent on duty as a member of the armed forces of a State not a Party to the conflict.

In very clear terms, there is no doubt that Article 47 of Protocol I condemns mercenary activities and deprives mercenaries of the protections afforded lawful combatants and prisoners of war.[32] However, it is important to note that a captured mercenary is nevertheless accorded some fundamental safeguards under the Protocol's Article 75.[33] Upon the drafting of Article 47, it was clear that international law was moving towards a new direction regarding the legal status of mercenaries captured during a conflict. Article 47 leaves the traditional practices of history behind, and denies mercenaries virtually every international humanitarian legal protection.[34] However, because a mercenary is deprived the status of combatant and POW, he becomes a civilian, and therefore can fall under Article 5[35] of the Fourth Convention.[36] One should note

[32]Milliard, *supra* note 24, at 41. [Reproduced in the accompanying notebook at Tab 20.]

[33] Kwakwa, *supra* note 1, at 90. [Reproduced in the accompanying notebook at Tab 11.] (Article 75, Protocol I, applies to persons who are in power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or Protocol I. Such persons "shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection by this Article, without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, or any other similar criteria. Article 75 also has 3 paragraphs detailing the minimum definition of humane treatment, including procedures for the prosecution of persons indicted for war crimes.) See Protocol I, art. 75. [Reproduced in the accompanying notebook at Tab 1.]

[34] Melysa H. Sperber, Note, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 195 (2003). (Discusses the tension between international humanitarian law and domestic criminal law as applied to nationals captured abroad while fighting with adversary forces.) [Reproduced in the accompanying notebook at Tab 22.]

[35] *Geneva Convention Relative to the Protection of Civilians Persons in Time of War*, art. 5, 12 August 1949, 75 U.N.T.S. 287. [Reproduced in the accompanying notebook at Tab 5.]

[36] Major, *supra* note 19, at 146. [Reproduced in the accompanying notebook at Tab 21.]

that before a mercenary can be deprived of POW status, there must be a decision based on the Article 47 definition that he is in fact a mercenary.[37] The general rule is that, pending a final determination by a competent tribunal, the accused person is presumed to be a POW and must therefore be protected by the Third Convention.[38]

3. Critics Consider Article 47 Inadequate and Incongruent with the Principles of Human Rights.

Some argue that Article 47 violates the basic principle underlying Protocol I that individuals who take an active part in hostilities should not be discriminated against on the basis of their motives for joining in the combat.[39] A more fundamental objection may be made based on the need to expand protection under the laws of war to as many combatants and conflicts as possible.[40] Arguments have been asserted that it seems counter-intuitive and contradictory to deprive mercenaries of combatant and POW status.[41] "As odious as the activities of mercenaries may be, it would accord with ordinary sense to grant them POW status if they complied with the laws of war."[42] This would serve as an incentive for mercenaries to comply with the laws of war.[43] In addition, denial of POW status is at variance with the principle of humanity and the

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[37] *Id.*

[38] *Id.*

[39] Guy Roberts, *The New Rules for Waging War: The Case Against the Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 138 (1985). (Argues that most participants in national liberation movements are almost always motivated by political conviction) [Reproduced in the accompanying notebook at Tab 13.]

[40] Kwakwa, *supra* note 1, at 88. [Reproduced in the accompanying notebook at Tab 11.]

[41] Kwakwa, *supra* note 1, at 88-9. [Reproduced in the accompanying notebook at Tab 11.]

[42] Kwakwa, *supra* note 1, at 89. [Reproduced in the accompanying notebook at Tab 11.]

[43] *Id.*

cause of human rights in general.[44] By encouraging mercenaries to comply with the laws of war, legal scholars feel the security of the civilian populace will ultimately be enhanced.[45]

Another problematic aspect of Protocol I often commented on is that the mercenary definition is "drawn so tight that hardly anyone, actually, will be so definable."[46] In other words, a hired soldier can avoid being labeled a mercenary by simply enlisting in the armed forces of the party on whose behalf he is fighting.[47] "A state or entity engaging the services of mercenaries will seek to avoid the characterization of the enlistees as mercenaries by declaring that they are members of its armed forces."[48] In addition, the definition's emphasis on motive, which introduces a psychological element, may be difficult to establish.[49] Critics claim that "although the definition requires that the enlistee be motivated essentially by private gain, it is well-known that monetary reward is not always the primary motivation which induces foreigners to enlist in an armed conflict."[50] For example, participants in national liberation movements are almost always motivated in part by political or religious convictions.[51] Nonetheless, "despite the numerous flaws discussed above, Article 47 is generally perceived as representing the most

[44] *Id.*

[45] *Id.*

[46] Kwakwa, *supra* note 1, at 73. [Reproduced in the accompanying notebook at Tab 11.]

[47] Kwakwa, *supra* note 1, at 73. [Reproduced in the accompanying notebook at Tab 11.]

[48] *Id.*

[49] Kwakwa, *supra* note 1, at 71. [Reproduced in the accompanying notebook at Tab 11.]

[50] *Id.*

[51] Roberts, *supra* note 39, at 138. [Reproduced in the accompanying notebook at Tab 13.]

successful attempt, to date, in creating a legal definition of the term mercenary."[52] Ultimately, it is apparent that Article 47 "denies mercenaries POW status as of right."[53]

4. Protocol I as Customary International Law and Current Trends in the Treatment of Captured Mercenaries.

An acknowledgement that Protocol I has ripened into customary international law would eliminate the tension between Protocol I and The Geneva Conventions on the issue of treatment of captured mercenaries. As of 2001, 155 States, including Rwanda, had ratified Protocol I, making it one of the most widely ratified treaties.[54] Its parties include seventeen of the nineteen members of NATO and three of the Permanent Members of the Security Council.[55] The Protocol has been frequently invoked in various conflicts by governments, U.N. investigative bodies, and the International Committee of the Red Cross.[56] Furthermore, although the United States has not yet ratified Protocol I, the United States has implemented the rules of the Protocol with the Defense Department generally regarding it as a codification of the customary practice of nations that is binding on all.[57]

Protocol I as customary international law governing international armed conflict would be a stunning reversal of historical practice regarding captured mercenaries. However, Edward

[52] Kwakwa, *supra* note 1, at 74. [Reproduced in the accompanying notebook at Tab 11.]

[53] Kwakwa, *supra* note 1, at 91. [Reproduced in the accompanying notebook at Tab 11.]

[54] Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS . 67, 93 (2001). [Reproduced in the accompanying notebook at Tab 24.]

[55] *Id.*

[56] *Id.*

[57] *Id.*,at 94. [Reproduced in the accompanying notebook at Tab 24.]

Kwakwa asserts that actual State practice on the Protocol is still in its formative stages.[58] In addition, while there is virtual agreement on the definition of a mercenary, there still seems to be conflicting attitudes regarding their treatment.[59] In fact, by 1991, there were no reported incidents of treatment accorded to any captured mercenary subsequent to the drafting of Protocol I.[60] Hence, while a clear argument can be made that most provisions of Protocol I may be customary international law, Kwakwa's analysis suggests that Article 47 is far from attaining that status. The tension between the Protocol and The Geneva Conventions, is far from eliminated.

IV. STATUS OF MERCENARIES UNDER INTERNATIONAL HUMANITARIAN LAW GOVERNING INTERNAL ARMED CONFLICTS

1. Article 3 of the Geneva Conventions Grants a Minimal Level of Protection to all Persons.

When the four Geneva Conventions were adopted in 1949, among the many hundreds of articles codifying and developing the laws applicable to the conduct of international armed conflict, only Article 3, common to all four conventions, set forth rules applicable to an "armed conflict not of an international character occurring in the territory"[61] of one of the Parties.[62] As soon as armed conflict is determined to exist, Article 3 automatically applies, imposing upon the

[58] EDWARD K. KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 127 (Kluwer Academic Publishers 1992) (1992). [Reproduced in the accompanying notebook at Tab 18.]

[59] *Id.*

[60] *Id.*

[61] *Geneva Convention for the Amelioration of the Condition of the Wounded and Stick in Armed Forces in the Field*, 12 August 1949, art. 3, 75 U.N.T.S. 31 (hereinafter "Article 3" or "Common Article 3") [Reproduced in the accompanying notebook at Tab 4.]

[62] Symposium, *The Hague Peace Conferences: The Laws of War on Land*, 94 A.J.I.L. 42, 59 (2000). [Reproduced in the accompanying notebook at Tab 28.]

Parties to an internal conflict the legal obligation to protect individuals who have not participated, or are no longer participating in the hostilities.[63] While of modest scope, Article 3 was a revolutionary development requiring humane treatment of all persons including prisoners, the sick or wounded.[64] Generally, the provisions of Article 3 emphasize basic humane treatment and minimum procedural guarantees.[65] The duty to implement Article 3 is unconditional for both Parties and operates independently of the other party's obligation.[66] A breach by one party cannot be invoked by the other party as grounds for its non-implementation of the mandatory provisions of the article.[67] In situations of non-international armed conflict, legal scholars claim that captured mercenaries must be given those protections provided by Article 3 of the Geneva Convention.[68]

2. Protocol II Expands Article 3's Scope of Protections and does not Create a Prisoner of War Regime.

During the 1970's, negotiations in Geneva created an opportunity to expand the law applicable in non-international armed conflicts by adopting a Protocol dealing with such conflicts.[69] The result was Protocol II to the Geneva Conventions of 1949, which applies together

[63] Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 ND J. L. ETHICS & PUB POL'Y 391, 417 (2001). [Reproduced in the accompanying notebook at Tab 9.]

[64] *Id.*

[65] Akinrinade, *supra* note 63, at 418. [Reproduced in the accompanying notebook at Tab 9.]

[66] Akinrinade, *supra* note 63, at 417. [Reproduced in the accompanying notebook at Tab 9.]

[67] *Id.*

[68] Major, *supra* note 19, at 143-44. [Reproduced in the accompanying notebook at Tab 21.]

[69] Major, *supra* note 19, at 143-44. [Reproduced in the accompanying notebook at Tab 21.]

with Article 3.[70] Protocol II applies to any non-international conflict "which takes place in the territory of a High Contracting Party between members of its armed forces and dissident armed forces or other organized armed groups."[71] The Protocol also substantially expands the protections provided by Article 3, notably by prohibiting collective punishments, corporal punishment, slavery, and orders to take no prisoners.[72] Such acts, among others, are listed in Article 4 of Protocol II, and are prohibited at all times and all places.[73]

In addition, Article 5 of Protocol II underscores the fact that there is no special prisoner of war regime in the Protocol.[74] This provision deals with "all persons deprived of, or restricted in, their liberty for reasons related to the conflict."[75] No distinction is made among the possible reasons for restricted liberty.[76] Hence, it is immaterial whether a person is captured while participating in hostilities, or on suspicion of espionage.[77] Therefore, under Article 3 of the Geneva Conventions and Protocol II, mercenaries who are detained or interned for reasons

[70] Akinrinade, supra note 63, at 419. [Reproduced in the accompanying notebook at Tab 9.] See *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977. (hereinafter "Protocol II") [Reproduced in the accompanying notebook at Tab 2.]

[71] *Id.*

[72] Symposium, *supra* note 62, 60. [Reproduced in the accompanying notebook at Tab 28.]

[73] Akinrinade, *supra* note 63, at 420. [Reproduced in the accompanying notebook at Tab 9.]

[74] *Id.*

[75] See *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, art. 5. [Reproduced in the accompanying notebook at Tab 2.]

[76] Akinrinade, *supra* note 63, at 420. [Reproduced in the accompanying notebook at Tab 9.]

[77] Akinrinade, *supra* note 63, at 420. [Reproduced in the accompanying notebook at Tab 9.]

related to the armed conflict must be accorded the minimum guarantees with respect to medical care, food, hygiene, safety, relief, religious practice, and working conditions.[78]

V. THE O.A.U. AND THE U.N.: INTERNATIONAL CONVENTIONAL LAW EXPLICITLY OUTLAWING THE PRACTICE OF MERCENARISM

1. The Organization for African Unity Creates the First Definition of a Mercenary.

The Organization for African Unity (O.A.U.) was one of the first organizations to arrive at a general definition of mercenaries.[79] From 1964 to 1971, the O.A.U. adopted a series of resolutions condemning the recruitment and use of mercenaries.[80] In 1972, the O.A.U. Committee of Experts presented its report, part of which was the draft Convention for the Elimination of Mercenaries in Africa.[81] The O.A.U.'s convention established mercenarism as a crime, "especially when directed against African Liberation movements."[82] Even though these resolutions and proposals had some moral effect upon the members of the O.A.U. in terms of framing the issue of mercenarism, they were completely irrelevant to non-O.A.U. states who promoted the recruitment of mercenaries for service in Africa.[83]

Through the years, U.N. resolutions echoed the same concerns of the O.A.U. In 1967, the Security Council adopted a resolution condemning any state which permitted or tolerated the

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[78] *Id.*

[79] Major, *supra* note 19, at 107. [Reproduced in the accompanying notebook at Tab 21.]

[80] L.C. Green, *The Status of Mercenaries in International Law*, 9 MANITOBA L. J. 201, 227 (1979). [Reproduced in the accompanying notebook at Tab 18.]

[81] *Convention for the Elimination of Mercenaries in Africa*, OAU Doc. CM/433/Rev.L, Annex I (1972). [Reproduced in the accompanying notebook at Tab 3.]

[82] Green, *supra* note 80. [Reproduced in the accompanying notebook at Tab 18.]

[83] *Id.*

recruitment of mercenaries.[84] A year later, the General Assembly passed Resolution 2395 which condemned Portugal for its failure to grant independence to the territories under its dominion, and appealed to all States to prevent the practice of mercenarism.[85] "A major step, however, was taken in 1968 when the General Assembly adopted Resolution 2465,"[86] declaring that the "practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and that mercenaries themselves are outlaws…".[87]

2. An Admirable Effort: The 1989 U.N. International Convention Against Mercenarism.

In 1980, the momentum towards the criminalization of mercenarism, embodied in Article 47 of Protocol I, reached its summit when the United Nations confronted the issue in response to member states' dissatisfaction with the Protocol's limited curtailment of mercenary activities.[88] After nine years of diplomatic, legal and political wrangling, the U.N. produced the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries (Mercenary Convention).[89] The Mercenary Convention was the product of an earnest attempt to create a comprehensive legal document that would define mercenaries, enumerate specific mercenary crimes, establish a regime of state responsibility, and create extradition procedures.[90]

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[84] Major, *supra* note 19, at 121. [Reproduced in the accompanying notebook at Tab 21.]

[85] *Id.*, at 122. [Reproduced in the accompanying notebook at Tab 21.]

[86] *Id.* [Reproduced in the accompanying notebook at Tab 21.]

[87] *Id.* [Reproduced in the accompanying notebook at Tab 21.]

[88] Milliard, *supra* note 24, at 57. [Reproduced in the accompanying notebook at Tab 20.]

[89] *U.N. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, G.A.Res. 44/34, U.N. GAOR 6th Comm., 44th Sess., 72d plen. Mtg.; Annex, Agenda Item 144, U.N. Doc. A/44/766 (1989), reprinted in U.N. GAOR, 44th Sess., Supp. No. 49, at 306, U.N.Doc. A/44/49 (1990). [Reproduced in the accompanying notebook at Tab 7.]

[90] Milliard, *supra* note 24, at 57-8. [Reproduced in the accompanying notebook at Tab 20.]

The Mercenary Convention provides an elaborate hybrid of a mercenary definition, and relies on the six cumulative requirements of Protocol I, Article 47, for its primary mercenary definition, but extends its coverage to all conflicts no matter how characterized.[91] The Mercenary Convention also implemented a secondary, complementary definition. The secondary mercenary definition, found in Article 1(2) of the U.N. Mercenary Convention, states that a mercenary is also any person who, in any other situation is specially recruited locally or abroad for the purpose of participating in a concerted act of violence for two purposes. Those two purposes are either overthrowing a Government or undermining the territorial integrity of a State. There are four remaining elements to the Mercenary Convention's secondary definition. The mercenary must (1) be motivated to take part essentially by the desire for significant private gain, (2) is neither a national nor a resident of the State against which such an act is directed, (3) has not been sent by a State on official duty, and (4) is not a member of the armed forces of the State on whose territory the act is undertaken. In addition to defining mercenaries, the Mercenary Convention imposes criminal liability on individuals who recruit, use, finance or train mercenaries, or who participate directly in hostilities or in a concerted act of violence, or attempt to do so, or who act as an accomplice to such actions.

Even though the Mercenary Convention is an exhaustive instrument that embodies the international community's disdain for mercenarism during the late-twentieth century, it is extremely important to note its overwhelming unpopularity. "The criticisms advanced in connection with Article 47 continue to be applicable under the Convention. Of particular disappointment is the fact that the question of motives was not further elaborated and that the Convention did not recognize that a mercenary need not be a foreigner. However, as is evident

[91] Milliard, *supra* note 24, at 58. [Reproduced in the accompanying notebook at Tab 20.]

from the Reports of the Ad Hoc committee, no Convention would have been adopted if the definition of mercenary had been all-encompassing. Despite these problems the Convention broadens and refines the definition of mercenary, and is therefore a welcome addition."[92]

The Mercenary Convention required twenty-two states parties before it would enter into force, but by 1998 only twelve nations had ratified it.[93] It is important to note that the Convention will be binding only on the states which agree to be a party to it.[94] On September 20, 2001, Costa Rica became the twenty-second state party, and the Convention entered into force the following month.[95] As of June of 2003, one-hundred and sixty-seven of the U.N. member states had opted to not become party to the Mercenary Convention;[96] this is not a ringing endorsement for the document or its legal validity. In addition, "the Committee's terms of reference also suggest that the Convention is more concerned with the *jus ad bellum* than the *jus in bello*."[97]

VI. INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO THE "MIXED CONFLICT" IN RWANDA

It is necessary to attempt to classify the Rwanda conflict in order to determine the liability of the various actors. Generally, armed conflicts can be international or non-international armed

[92] Major, *supra* note 19, at 116. [Reproduced in the accompanying notebook at Tab 21.]

[93] Milliard, *supra* note 24, at 64. Reproduced in the accompanying notebook at Tab 20.]

[94] Kwakwa, *supra* note 1, at 85. [Reproduced in the accompanying notebook at Tab 11.]

[95] Milliard, *supra* note 24, at 64-65. [Reproduced in the accompanying notebook at Tab 20.]

[96] Milliard, *supra* note 24, at 66. [Reproduced in the accompanying notebook at Tab 20.]

[97] Kwakwa, *supra* note 1, at 85. [Reproduced in the accompanying notebook at Tab 11.] (*Jus in bello* denotes the rules applicable in an armed conflict, intended only to mitigate the pernicious effects of war, whereas the *jus ad bellum* refers to the authority to resort to force.)

conflicts, but they also can be a mix of the two.[98] Furthermore, there are lesser situations of internal disturbances which may not rise to the level of an armed conflict so as to trigger the provisions of international humanitarian law.[99] Therefore, a proper characterization determines which rules of international humanitarian law, if any, are applicable to the conflict at hand.[100]

1. How to Determine the Existence of an Armed Conflict.

A "classification as international armed conflict means that the whole weight of the laws of war will apply to the conflict. If the conflict is a non-international armed conflict, the rules of international humanitarian law contained in Common Article 3 of the Geneva Conventions and in Protocol II may be applicable, depending on the intensity of the conflict and whether or not the State is a party to Protocol II. However, it becomes a matter of debate whether all the provisions of the laws of war or international humanitarian law will be applicable."[101]

The conflict in Rwanda is certainly an armed conflict because the term covers armed confrontations between two ethnic factions within a State, the Hutus and Tutsis.[102]
In *The Prosecutor v. Tadic*, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (I.C.T.Y.) explained that an armed conflict exists "whenever there is ...protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until ... in the case of

[98] Akinrinade, *supra* note 63, at 408. [Reproduced in the accompanying notebook at Tab 9.]

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] Akinrinade, *supra* note 63, at 409. [Reproduced in the accompanying notebook at Tab 9.].

internal conflicts, a peaceful settlement is achieved."[103] According to the International Criminal Tribunal for Rwanda (I.C.T.R.), the term armed conflict in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent.[104] Hence, the conformity among both tribunals in the application of the "armed conflict" definition certainly gives weight to a conclusion that the hostilities that have taken place Rwanda rise above minor internal disturbances.

2. Rwanda's Internal Conflict and the Concept of "Mixed Conflict."

The I.C.T.R. Statute characterizes the situation in Rwanda as an internal armed conflict.[105] "Because the Security Council is not a legislative body, it had no competency to enact substantive law for the I.C.T.R. Instead, it authorized the I.C.T.R. to apply existing international humanitarian law applicable to non-international armed conflict."[106] Specifically, Article 4 of the I.C.T.R. Statute empowers the tribunal to prosecute persons committing or ordering to be committed serious violations of Article 3 and Protocol II. [107] Furthermore, "the humanitarian law included in the I.C.T.R.'s Statute consists of the Genocide Convention, which was ratified by Rwanda, crimes against humanity as defined by the Nuremberg Charter, Article 3 Common to the Geneva Conventions, and Additional Protocol II, also ratified by Rwanda."[108] Even so, Rwanda's 1994 war can also be categorized as a mixed conflict because of the

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[103] Akinrinade, *supra* note 63, at 409-10. [Reproduced in the accompanying notebook at Tab 9.]

[104] Akinrinade, *supra* note 63, at 410. [Reproduced in the accompanying notebook at Tab 9.]

[105] Paul J. Magnarella, *Expanding the Frontiers of Humanitarian Law: The International Criminal Tribunal for* Rwanda, 9 Fla. J. Int'l L. 421, 431 (1994). [Reproduced in the accompanying notebook at Tab 26.]

[106] Magnarella, *supra* note 105, at 428. [Reproduced in the accompanying notebook at Tab 26.]

[107] Magnarella, *supra* note 105.

[108] Magnarella, *supra* note 105, at 428. [Reproduced in the accompanying notebook at Tab 26.]

combination of internal tribal rivalry and foreign influence.[109]

Many conflict situations in the world today contain international and non-international aspects.[110] An internationalized internal armed conflict is a civil war in which the armed forces of a foreign power intervene.[111] However, this definition is not exhaustive.[112] "Such a conflict has been defined as a conflict which is internal in certain respects and international in others."[113] A non-international armed conflict may become internationalized if: (1) a State victim of an insurrection identifies the insurgents as belligerents; (2) one or more foreign States assist one of the parties with their own armed forces; [or], (3) the armed forces of two foreign States intervene, each in aid of a different party.[114] Also, while civil wars are solely internal, a mixed conflict can also occur when a foreign power intervenes in an existing civil war.[115] Unlike the two distinct categories of international and non-international armed conflicts, it should be noted that an internationalized internal armed conflict lacks specific international provisions.[116] While international humanitarian law has yet to fully address these types of armed conflicts, they occur

[109] Barnes, *infra* note 148, at 142. [Reproduced in the accompanying notebook at Tab 16.]

[110] Akinrinade, *supra* note 63, at 414. [Reproduced in the accompanying notebook at Tab 9.]

[111] Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145, 145 (1983). (This note is limited to the applicability of international humanitarian law to internationalized non-international armed conflicts, or civil wars, and does not discuss the legitimacy of foreign intervention in a civil war.) [Reproduced in the accompanying notebook at Tab 14.]

[112] Akinrinade, *supra* note 63, at 414. [Reproduced in the accompanying notebook at Tab 9.]

[113] Michael P. Roch, Article, *Forced Displacement in the Former Yugoslavia: A Crime Under International Law?*, 14 DICK. J. INT'L L. 1, 9 (1995). (Discussing what international humanitarian law is applicable to the forced displacement of the civilian population that occurred in the former Yugoslavia) [Reproduced in the accompanying notebook at Tab 23.]

[114] Akinrinade, *supra* note 63, at 414. [Reproduced in the accompanying notebook at Tab 9.]

[115] Barnes, *infra* note 148, at 132. [Reproduced in the accompanying notebook at Tab 16.]

[116] Akinrinade, *supra* note 63, at 414. [Reproduced in the accompanying notebook at Tab 9.]

with increasing frequency in the world today.[117] Though some scholars may prefer to analyze the Rwandan conflict via the "mixed conflict" concept, for purposes of applying international humanitarian law, it is best to use the I.C.T.R. Statute's finding of an internal conflict.

VII. THE *TADIC* CASE: THE CREATION OF NEW CUSTOMARY LAW APPLICABLE TO NON-INTERNATIONAL CONFLICTS

In 1979, Professor L. C. Green asserted that mercenaries were still legally combatants, who were entitled to treatment as POWs and only liable to trial for such crimes against the law of war or the criminal law that they commit.[118] In making his conclusion, Green cited the fact that Protocol I was only in force for those ratifying, and that the essence of humanitarian law and the law of war was even-handed, so that even those engaged in an unlawful war remain protected.[119] Since then, the sheer amount of international jurisprudence has drastically increased. Actual case law now exists to supplement academic theory. In *The Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia directly dealt with the issue of applying international humanitarian law to a mixed conflict.

[117] Akinrinade, *supra* note 63, at 414. [Reproduced in the accompanying notebook at Tab 9.]

[118] Green, *supra* note 80, at 245. [Reproduced in the accompanying notebook at Tab 18.]

[119] *Id.*

1. The I.C.T.Y. Creates New Customary International Law Applicable to Conflicts Not of An International Character.

"The judgment in the first international war crimes tribunal since World War II was handed down on May 7, 1997" by the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor v. Tadic*.[120] "With the spotlight of the international media focused on the proceedings, the Yugoslavia Tribunal itself was on trial, just as the Nuremberg and Tokyo War Crimes Tribunals were the subject of intense international scrutiny in the years after the trials of the major Nazi and Japanese war criminals." [121] Dusko Tadic, the defendant, a Bosnian-Serb, stood on trial on thirty-one counts of Grave Breaches of the Geneva Conventions, violations of the laws and customs of war, and crimes against humanity.[122] "The three-judge Trial Chamber unanimously found Tadic guilty of eleven of the thirty-one counts and sentenced him to twenty years of imprisonment."[123] Both the Defendant and the Prosecutor appealed the Judgment.[124]

"The Tribunal concluded that some customary rules had developed to the point where they govern internal conflicts."[125] Those customary rules covered such areas as the "protection of all those who do not (or no longer) take active part in the hostilities."[126] "The Tribunal limited

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[120] Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. INTL'L L. & POL. 167, 167 (1998). (Analyzes the judgment of the International Criminal Tribunal for the Yugoslavia in the case of *The Prosecutor v. Tadic*.) [Reproduced in the accompanying notebook at Tab 25.]

[121] Scharf, *supra* note 120, at 168. [Reproduced in the accompanying notebook at Tab 25.]

[122] Scharf, *supra* note 120, at 167. [Reproduced in the accompanying notebook at Tab 25.]

[123] *Id.*

[124] Scharf, *supra* note 120, at 168. [Reproduced in the accompanying notebook at Tab 25.]

[125] Theodore Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 A. J. I. L. 238, 241 (1996). (Analyzes the effect the *Prosecutor v. Tadic* case before the I.C.T.Y., and the International Committee for the Red Cross have had on the development of customary international law.) [Reproduced in the accompanying notebook at Tab 29.]

[126] *Id.*

its reach of its holding to serious violations, stating that only a number of rules governing international armed conflicts have gradually been extended to apply to internal conflicts, and that the extension does not consist of a full and mechanical transplant, but of the general essence of those rules. These caveats are important but do not make it much easier to identify those rules and principles which have already crystallized as customary law."[127]

2. The I.C.T.Y Appeals Chamber Extends Article 3 and Protocol II Protections to all Persons No Longer Taking Part in Hostilities.

The Appeals Chamber's later decision in the *Tadic* case confirmed the presence of four streams of new customary international law for internal armed conflicts. First, rules initially stated in treaty provisions governing non-international armed conflicts, such as Article 3 and Additional Protocol II, were transformed into customary law.[128] Second, the decision constituted the first judicial affirmation that violation of Article 3 entails individual criminal responsibility under customary law.[129] Third, "general principles first developed for international wars, such as proportionality and necessity, may be extended through customary law to civil wars. Fourth, prohibitions on certain weapons and means of warfare such as poison gas and land mines can gradually be applied to internal armed conflicts through customary law."[130]

Of great importance to the issue of a captured mercenary, the Appeals Chamber explained that customary international humanitarian law extends protection to "persons taking no active part in the hostilities, including members of armed forces who have laid down there arms and those placed hors de combat by sickness, wounds, detention, or any cause…without any

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[127] *Id.*

[128] Meron, *supra* note 125, at 244. [Reproduced in the accompanying notebook at Tab 29.]

[129] Meron, *supra* note 125, at 244. [Reproduced in the accompanying notebook at Tab 29.]

[130] *Id.*

adverse distinction founded on race, colour, religion or faith."[131] Furthermore, "it is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time."[132]

Hence, the Appeals chamber essentially stated that where Article 3 and Protocol II once existed as conventional international law, they both now exist as customary law to be applied to all internal conflicts. Therefore, the only way a mercenary can be dealt with according to Protocol I, Article 47, is to have the conflict in question clearly defined as an international armed conflict. As long as a conflict avoids being classified as an international armed conflict, the I.C.T.Y.'s customary law governing internal armed conflict is controlling. This application of new customary law, coupled with the I.C.T.R. Statute's internal conflict characterization, covers captured mercenaries with a blanket of protection via Article 3 and Protocol II. To assert otherwise would be problematic since Article 4 of the I.C.T.R. Statute authorizes the prosecution of those who violate Article 3 and Protocol II. As discussed previously, these provisions do not implement a prisoner-of-war regime that distinguishes mercenaries from regular combatants. Thus, denying Article 3 and Protocol II protections to captured mercenaries would be in violation of the I.C.T.R. Statute itself, in addition to new customary law. It appears, then, that captured mercenaries dodge the explicit denial of protection found in Protocol I, and are entitled to the basic protections afforded under the I.C.T.Y.'s new customary laws, recognized by the U.N. Security Council as part of the I.C.T.R.'s subject-matter jurisdiction.

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[131] *International Criminal Tribunal for the Former Yugoslavia: Excerpts from the Judgment in Prosecutor v. Dusko Tadic, and Dissenting Opinion*, 36 I.L.M. 908, 934 (1997). (Presents an edited version of the Tribunal's opinion with additional analysis.) [Reproduced in the accompanying notebook at Tab 15.] (hereinafter *Tadic*.)

[132] *Tadic*, *supra* note 131, at 935. [Reproduced in the accompanying notebook at Tab 15.]

VIII. THE RECOGNTION OF A STATE OF BELLIGERENCY: AN ALTERNATIVE APPROACH FOR THE FUTURE OR A DEAD LEGAL CONCEPT?

According to the I.C.T.Y., it is an established principle of international law that all Parties are bound by the whole of international humanitarian law applicable to armed conflicts when there is a recognition of a state of belligerency.[133] The concept of belligerency in international law deals with occurrences of civil war.[134] "Traditional international law of war puts internal wars into three categories: rebellion, insurgency, and belligerency. Rebellions are small-scale, localized conflicts which are usually solved with police measures."[135] A state of belligerency may be declared when four elements are met: (1) the conflict is more widespread than a local dispute; (2) the opposition controls a significant portion of territory; (3) the opposition administers the occupied land; and (4) the opposition is obeying the international laws of war.[136] "An insurgency is a conflict that lies somewhere between a rebellion and a state of belligerency."[137]

Upon recognition of a state of belligerency, insurgents are afforded important benefits but also responsibilities.[138] Captured members of the rebel armed forces, as well as soldiers of the incumbent government, are entitled to prisoner of war status.[139] In fact, the conflict is viewed in

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[133] Akinrinade, *supra* note 63, at 423. [Reproduced in the accompanying notebook at Tab 9.]

[134] Lt. Col. Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 109 (2000). [Reproduced in the accompanying notebook at Tab 19.]

[135] Robert w. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 46 (1988). (Discusses the viability of the U.S. Congress using the doctrine of belligerency when determining foreign aid to foreign insurgents.) [Reproduced in the accompanying notebook at Tab 27.]

[136] *Id.*

[137] *Id.*

[138] Lootsteen, *supra* note 134,at 110. [Reproduced in the accompanying notebook at Tab 19.]

[139] *Id.*

terms of an international armed conflict rather than one that is internal and the humanitarian laws of warfare become applicable to the hostilities.[140] Intuitively, this would lead an international lawyer to conclude that the explicit prohibition of conferring POW status to mercenaries in Protocol I, Article 47 would be enforced in the doctrine of belligerency. However, such a conclusion would be improper and problematic.

A captured mercenary would most likely still have the I.C.T.Y.'s Article 3 protections under new customary international law. This conclusion is bolstered by the fact that some scholars believe that Article 3 is the only applicable law relating to internal armed conflicts.[141] Since Article 3 is not dependent on recognition of belligerency, some feel that it did away with the need to discuss the existence of the four belligerency criteria.[142] In addition, nations have ignored the formality of declaring a state of belligerency in recent wars, including those in the Congo, Yemen, and Algeria.[143] In fact, the last time the concept of belligerency was seriously applied was during the American Civil War.[144] The last time it was even debated as applicable to an internal armed conflict was more than sixty years ago, during the Spanish Civil War.[145] This has led some scholars to assert that the concept no longer comports with the realities of modern civil war.[146] However, as future conflicts continue to manifest in ways the drafters of current international humanitarian law would not have anticipated, the concept of belligerency

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[140] *Id.*

[141] Lootsteen, *supra* note 134,at 120. [Reproduced in the accompanying notebook at Tab 19.]

[142] *Id.*

[143] Gomulkiewicz, *supra* note 135, at 47. [Reproduced in the accompanying notebook at Tab 27.]

[144] *Id.*

[145] Lootsteen, *supra* note 134,at 139. [Reproduced in the accompanying notebook at Tab 19.]

[146] Gomulkiewicz, *supra* note 135, at 47. [Reproduced in the accompanying notebook at Tab 27.]

may serve as a future alternative legal mechanism for determining when regular and irregular combatants are afforded certain protections under the international laws of warfare.

IX. CONCLUSION: MERCENARIES ARE ENTITLED TO THE MINIMAL PROTECTIONS CONTAINED IN ARTICLE 3 AND PROTOCOL II.

At one time, internal conflicts were once considered outside the purview of international law since they were regarded as totally within the domestic jurisdiction of the state in which they were being waged.[147] The Geneva Conventions, specifically Article 3 and Protocol II, modified international law in order to afford some protections to victims of internal strife. Since the end of World War II, civil wars have outnumbered international conflicts two-to-one.[148] "In general, the international community has reacted slowly, unwilling or unable to take action to end violence that has essentially consumed nations."[149] As the conflict in Rwanda shows, future, modern conflicts will most likely continue to test the effectiveness and vitality of international humanitarian law as it stands today. The issue this note addresses, the legal status of captured mercenaries in intra-national conflicts, certainly brings to light the need to update the international law of war to modern realities.

While Protocol I explicitly denies captured mercenaries the protections garnered by being granted prisoner of war status, it does so only in international conflicts. Article 3 and Protocol II created minimum protections afforded all those who no longer played an active role in the

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[147] L.C. Green, *Strengthening Legal Protections in Internal Conflicts: Low-Intensity Conflict and the Law*, 3 I.L.S.A. J. INT'L. & COMP. L. 493, 493 (1997). (Discusses the inadequacy of the term non-international conflict in establishing humanitarian protections in low-intensity conflicts.) [Reproduced in the accompanying notebook at Tab 17.]

[148] Kimberley D. Barnes, Note, *International Law, the United Nations, and Intervention in Civil Conflicts*, 19 SUFFOLK TRANSNAT'L L. REV. 114, 117 (1995). (Discusses in the inadequacies of current international law in dealing with civil conflicts.) [Reproduced in the accompanying notebook at Tab 16.]

[149] Barnes, *supra* note 148, at 118. [Reproduced in the accompanying notebook at Tab 16.]

hostilities of a conflict. According to the I.C.T.R. Statute, the Rwandan conflict is an internal armed conflict, while some legal writers feel it is best described by the emerging concept of a mixed conflict.

In *The Prosecutor v. Tadic*, the International Criminal Tribunal for the former Yugoslavia declared that the protections created in Article 3 and Protocol II had crystallized into customary law. These protections emphasize humane treatment, human dignity, and certain procedural safeguards. The I.C.T.Y. added that this new form of customary law even applies to all combatants no longer playing an active role in the hostilities. Acknowledging that the international community opted to classify the Rwandan conflict as an internal conflict, it is clear that the I.C.T.Y.'s customary law entitles captured mercenaries the protections created in Article 3 and Protocol II. To assert otherwise would be counter-intuitive because Article 4 of the I.C.T.R. Statute itself seeks to prosecute those who violate Article 3 and Protocol II. Therefore, denying these protections to captured mercenaries would be in violation of the I.C.T.R. Statute and new customary international law. Therefore, the only way a mercenary could lawfully be treated under the strict Protocol I, Article 47 standards, would be if he was captured while participating in a conflict that could be clearly classified as an international armed conflict. Such a classification is inapplicable to the Rwandan conflict.