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Can Additional Protocols I & II apply to the same conflict & to different parties within that conflict?

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Memorandum for the
Office of the Prosecutor
International Criminal Tribunal for Rwanda

ISSUE #4: “Can Additional Protocols I & II apply to the same conflict & to different parties within that conflict?”

Case Western Reserve University School of Law
International War Crimes Prosecution Project
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May 2002

(In conjunction with the New England School of Law)

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“Reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories—international and non-international—into which international humanitarian law is divided.”¹

I. Introduction and Summary of Conclusion

a. Issues

In the popular press, the Rwanda Genocide is generally referred to as a tribal conflict between Tutsis and Hutus. Some longer articles refer to prior clashes, as originating through the policy of the former colonial power, Belgium imperialism, which was a classic case of divide and rule.² At the heart of the matter though, the conflict is one that is portrayed as ethnic and indigenous to Rwanda. The reality, in fact, is that the conflict is far more convoluted. It has been speculated, and perhaps even asserted that there were potential sources of outside influence in the conflict between the Hutus and Tutsis. Some articles claims that the Ugandans have supported the Tutsi rebels, and the Congolose supported Hutu extremists. This of course, changes the nature of the conflict

¹ George Aldrich, *The Laws of War on Land*, 94 AM. J. Int'l. L. 42. (Reproduced in the accompanying notebook at Tab 1)

² Belgian support for the powerful Tutsi minority waned in the 1950s when the Rwandan National Union pressed for independence. The Belgian government set up the Party of the Movement for the Emancipation of the Bahutu, sparking communal strife. In 1959 there was a war in which the Hutus drove out the Tutsis, and Rwanda declared a Hutu republic in 1962. A parallel situation developed in Burundi where the Hutus were suppressed. The Tutsis in Burundi attacked Rwanda in 1963. This resulted in 250,000 refugees, mostly Tutsi, living in Uganda, Zaire and Burundi. Once independence from the Belgians was declared, fighting flared over the decades. See, *Hutus and Tutsis/ Burundi Crisis* at <http://www.trincenter.com/WorldNews/Burundi.htm>. (Reproduced in the accompanying notebook at Tab 2)

from one that is strictly non-international, to perhaps one that could be seen as having international aspects.

Discovering the true scope of the conflict itself is not simply an academic exercise. International humanitarian law applies differently to international conflicts than it does to non-international (internal) conflicts. Article 3 of the Geneva Conventions³ and Additional Protocols I⁴ and II⁵ are often applied to such conflicts. Common Article 3 provides some minimum protections for victims of internal armed conflicts, while avoiding recognition of rebel forces or any rebel entitlement to prisoner of war status.⁶ It represented the first internationally accepted law that regulated a state's treatment of its own nationals in internal armed conflicts. Additional Protocol I extends to conflicts of an international nature to protect those of liberation movements, fighting against colonial domination, alien occupation, and racist regimes.⁷ Whereas, additional Protocol II defines a class of internal, "non-international" conflicts.⁸ Protocol II sets forth with more specificity than Common Article 3, the fundamental rights of noncombatants, that is, people who are not involved in the conflict, or who have ceased to take part in the

³ Article 3 Common to the Four Geneva Conventions, Protections of Victims of Non-International Conflict (Full text reproduced in accompanying notebook at Tab 3).

⁴ Protocol I, Additional to the Geneva Conventions, 1977 (Full text reproduced in accompanying notebook at Tab 4).

⁵ Protocol II, Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-international Armed Conflicts, 8 June 1977. (Full text reproduced in accompanying notebook at Tab 5).

⁶ See, Captain Daniel Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 Mil. L. Rev. 59 at 4. (Reproduced in accompanying notebook at Tab 7).

⁷See, Henry J. Richardson III, *Recent Struggles for Democracy Under Protocols I and II to the Geneva Conventions*, 6 Temp. Int'l & Comp. L. J. 13, at 2. (Reproduced in accompanying notebook at Tab 7).

⁸ *Id.*

hostilities; and offers qualifying combatants less protection than analogous person under Protocol I.

As more information is gathered on the scope of the Rwanda Genocide conflict, the question thus arises- can a conflict be both international and internal, such that both Protocols apply? If so, can Protocol I apply to certain parties and Protocol II to others or can a party be bound by both?

This memo will examine these issues. Part I of the memo lays out the language of Article 3 and the Protocols. Part II examines the concept of non-international law through this dichotomy of an internal and international conflict, as shown through legal theory and customary international law. Part III provides case studies of conflicts that have addressed similar issues.

b. Conclusion

The four Geneva Conventions of 12 August 1949 are international treaties, ratified or acceded to by virtually all States. They protect the wounded and sick in armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians who find themselves under the rule of a foreign power in the event of international conflict.⁹ Article 3, common to the four Geneva Conventions guarantees a minimum amount of protection to the victims of non-international conflicts.¹⁰ The 1949 Geneva Conventions neither provided for adequate protection of the civilian population against the effects of hostilities, nor did they cover modern forms of

⁹ See, *International Humanitarian Law, Treaties and General Information* at www.icrc.org

¹⁰ *Id.*

warfare.¹¹ The work of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, held in Geneva from 1974 to 1977, resulted in the adoption of two Protocols additional to the Geneva Conventions. Protocol I, applicable in international armed conflicts, protects civilians against the effects of hostilities and extends prisoner-of-war status to guerrilla fighters, while Protocol II gives increased protection to the victims of high-intensity non-international armed conflicts.¹²

The application of Article 3 and the Protocols are set out in its language. The guidelines as to whom and what type of conflict is protected under any of the three are laid out in the text. In practicality, though, recent conflicts have shown that the strife between parties do not neatly fit into either international or non-international conflicts. Thus, the applicability of Article 3 and the Additional Protocols also becomes more complex.

Past conflicts have shown that its events have aspects of both international and internal conflicts. For example, in the case of the ICTY (specifically the *Tadic* case), it is indicated that all or some of the events should be regarded as occurring in an international conflict, other aspects indicate that all or some of the events should be regarded as occurring in an internal conflict.¹³ In such a case, the lines as to whether the conflict is international or non-international is blurry, and thus the question as to whether Protocol I or Protocol II applies, is raised.

¹¹ *Id.*

¹² *Id.*

¹³ See, W.J. Fenrick, *International Humanitarian Law and Criminal Trials*, 7 *Trnatl. & C. Pr.* 23 at 6. (reproduced in accompanying notebook at Tab 8)

In the text of the Geneva Conventions, and subsequently, Additional Protocols I and II, there is no language that explicitly prohibits or allows for the application of both Protocols in a situation described above.¹⁴ Thus, in determining whether there can be simultaneous application, one must turn to legal theory.

Where a conflict has aspects of both international and non-international events is a gray area in international humanitarian law. Gray areas in humanitarian law revolve around whether a given situation is an armed conflict, and if it is, whether it is internal or international.¹⁵

One concern is how to classify an internal situation falling in the gray zone between peace and war. The line separating particularly violent internal tensions and disturbances from low-level armed conflict may sometimes be blurred and not easily determined. Such situations typically involve riots, isolated and sporadic acts of violence resulting in mass arrests, the use of police, and, sometimes, the armed forces to restore order. The foregoing do not amount to what humanitarian law would call an armed conflict. Instead, they are governed by domestic and human rights law. A gray-zone conflict would actually be internal armed conflict if, at a minimum, it was protracted and involved armed clashes between government forces and relatively organized armed groups. Determining what counts as protracted and well organized requires a case-specific analysis of the facts.

Another form of internal conflict involves determining if, because of the disintegration of the State, there is any government entity with armed forces capable of

¹⁴ For partial text, see *Provisions Common to the Four Geneva Conventions and Protocol I*. (Reproduced in accompanying notebook at Tab 9). For full text of Basic Rules of the Geneva Conventions, see at, www.icrc.org.

¹⁵ For further information, see <http://www.crimesofwar.org/thebook/gray-area-ihl.html>

quelling civil strife between armed groups from different clans, religions, tribal, or ethnic groups. In a truly anarchic situation with minimal levels of organization, the applicable internal law is Common Article 3, which also applies to government clashes with armed insurgent groups. If, however, there is a conflict between a government and dissident armed forces, and the dissident group is organized under responsible command and exercises territorial control, then Common Article 3 is supplemented by Protocol II. To apply Protocol II, at least one of the parties to the conflict must be a government, defined as a generally recognized regime that has a right and duty to exert authority over a population and provide for its needs.

Another gray area involves whether a conflict is internal or international. History has shown that this internal/international distinction is often artificial. For example, troops from a foreign country may fight alongside rebels or government troops involved in internal hostilities. Where such foreign intervention occurs, it may be unclear whether the hostilities are governed by the internal or international armed conflict rules. Such a conflict is called an “internationalized internal conflict.” The recent hostility in Bosnia is an example of such mixed armed conflicts.

This question is less significant now, thanks to a decision by the International Criminal Tribunal for the former Yugoslavia (ICTY). In the *Dusko Tadic*¹⁶ case, the Appeals Chamber found that leading principles of international humanitarian law apply to both sorts of conflicts. The ICTY has recognized, in its two decisions in the *Tadic* case,¹⁷ that an international armed conflict can co-exist alongside a non-international one

¹⁶ *Prosecutor v Tadic*, 1995, I.C.T.Y. No. IT- 94-1- AR72, In re Dusko Tadic: Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, (Oct. 2)

¹⁷ *Id.*

and that the latter will be internationalized only if there is a clear relationship between the non-governmental party to that conflict and one of the States party to the international conflict. It is reasoned by the Appeals Chamber, that the mere fact that a conflict between States comes into being alongside a conflict within one of those States cannot, in and of itself, be sufficient to make the law of international armed conflicts applicable to the latter fighting. These specific principles and rules for international armed conflict, however, are not transposed word-for-word into the laws of internal armed conflict. It is, therefore, unclear whether certain provisions apply to both.

As the gray area of international law is being addressed, the concept of an “internationalized non-international conflict” is one that supports the notion that an international and non-international conflict can coexist. The basic concept is that when a non-international conflict is occurring, and there is any intervention by a third party who does not categorically fit as a national to that conflict, then the non-international conflict has become internationalized. Once the non-internationalized conflict has become internationalized, then the applicability of international law shifts to the provisions governing international conflicts.

Thus, in summary, although there is no specific language in the texts of the Geneva Conventions and the Protocols that would address when a conflict can be both international and non-international, certainly a conflict can have aspects of both (as held in the Tadic¹⁸ trial). Therefore, whether there can be joint application of the Protocols would depend on legal theory and case precedent.

¹⁸ See, Fenrick at Supra 13, for further analysis (Reproduced in accompanying notebook at Tab 8)

II. Background of Article 3 and Additional Protocols

A. Common Article 3 is a General Article Applicable to Protocols I & II

In order to fully understand the applicability of Protocols I & II (specifically II) of the Geneva Conventions, the backdrop of Article 3 must first be addressed:

Common article 3 is the outcome of a compromise hammered out at the 1949 Diplomatic Conference between those who believed that the Geneva Conventions should apply to all wars of a sufficient scale and those who felt that they should have no application except in armed conflicts between states. It affords victims of an 'armed conflict not of an international character' some protection, but much less protection than the remaining articles of the four Conventions prescribe for victims of international conflicts.¹⁹

Common article 3 simply established a few basic rules of humane treatment, and set forth certain minimal judicial guarantees. The rules of common article 3 apply to persons who do not take part in or who have ceased to take part in hostilities, and they

¹⁹ See Article 3 Common to the Four Geneva Conventions of 1949. Common article 3 provides: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

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

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

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions*¹² without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

must be respected by both sides.²⁰ Parties to an internal armed conflict have identical rights and obligations of purely humanitarian character under article 3, although the text of common article 3 specifies clearly that it does not affect the legal status of the parties.²¹ The application of article 3, therefore, in no way implies recognition of the rebellious party. Without this clause, there is no doubt that article 3 would not have been adopted.²²

From a legal point of view, the application of article 3 is automatic as soon as a situation of armed conflict *de facto* exists. Ideally, there should be no possibility of a discretionary assessment of the situation by the parties.²³ Article 3 refers simply to 'an armed conflict of a non-international character.' Although it gives no precise definition of such situations, the expression 'armed conflict' in itself provides objective elements for consideration. In fact, the concept of armed conflict is generally recognized as encompassing the idea of open, armed confrontation between relatively organized armed forces or armed groups.²⁴ Internal disturbances characterized by sporadic acts of violence and internal tensions characterized by widespread arrests are not considered armed conflicts.

A notable feature of this article is that it purports to impose obligations on any party to a non-international armed conflict, not just on governments. The juridical basis for imposing legal obligations on persons or bodies other than governments is

²⁰ See Common Article 3.

²¹ *Id.*

²² Sylvie Junod. *Additional Protocol II: History and Scope*; 33 Am. U. Law. R 29. (Reproduced in accompanying notebook at Tab 9)

²³ *Id.*

²⁴ *Id.*

questionable. It may be argued, however, that when a government ratifies a convention it does so on behalf of all its nationals, including those who may revolt against it.

Critics regarded article 3 as defective because it protected only those who were already victims of an armed conflict, such as prisoners and the sick or wounded. It was felt that provisions regulating the methods of combat in non-international armed conflict and, in particular, safeguarding the civilian population were needed. It was these considerations that gave rise to draft Protocol II which was placed before the Diplomatic Conference in 1974.

B. Protocol I Applies to Internationalized Armed Conflict

According to common Article 2 of the four Geneva Conventions, the Conventions apply to all cases of declared war or any other armed conflict that may arise between two or more of the contracting parties, even if the state of war is not recognized by one of them. The Conventions apply also to all cases of partial or total occupation of the territory of a contracting party, even if such occupation meets no armed resistance. It has been noted that Article 1(4) of Protocol I expands the above definition of international armed conflicts to include:

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²⁵

²⁵ Art. 1(4), Protocol I.

This extension, which has limited parameters,²⁶ applies only to those parties to the Geneva Conventions that are also parties to Protocol I. The Geneva Conventions and Protocol I state a great number of human rights applicable in international armed conflicts. While not all of the nonderogable rights under the Political Covenant have corresponding rights under the Geneva Conventions, the limited and inadequate catalog of nonderogable rights under the Political Covenant falls short of the totality of human rights recognized by humanitarian instruments.²⁷

Protocol I extends protection to liberation movements fighting against colonial domination, alien occupation, and racist regimes. It reflects the value choices already embedded in other doctrines of international law: the doctrine that colonial, alien, or racist regimes do not deserve full and presumptive sovereign immunity against lawful armed attack.²⁸

C. Protocol II Applies to Non-International Conflicts

Protocol II defines a class of internal, "non-international" conflicts.²⁹ For various policy reasons, this restrictive definition offers qualifying combatants less protection than

²⁶ For a detailed discussion, see Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, UN Doc. A/7720, at 22 (1969) [hereinafter cited as 1969 Report].

²⁷ For a detailed discussion, see 1969 Report.

²⁸ See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N.Doc. A/8028 (1970); see also Report of the Adhoc Committee on International Terrorism, U.N. GAOR, 28th Sess., Supp. No. 28, at 7, U.N.Doc. A/9028 (1973). This report is cited and discussed in A. James Armstrong, Mercenaries and Freedom Fighters, 30 JAG J. 125, 138-39 (1978).

²⁹ See Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, June 8, 1977, 16 I.L.M. 1442

analogous persons under Protocol I. One policy reason is that international law, under this thinking, is held applicable only to states.³⁰ Therefore protection of persons by the laws of war must be restricted to international conflicts. Secondly, under a state's domestic law, sovereign states can punish insurgents against its government.³¹ A third reason is that the assignment of international legal validity to such insurgents would amount to either premature recognition of a regime not fully established or unlawful intervention in the domestic jurisdiction of that state.³² A final policy reason is that a sovereign state has sovereign power over any persons it may detain.³³

Article 1 reads as follows:

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

These limited protections under Protocol II³⁴ are further conditioned by three requirements pertaining to the conflict: (1) the conflict must take place within the

³⁰ Henry Richardson, *Recent Struggles for Democracy Under Protocols I and II to the Geneva Conventions*, 6 *Templ. Int'l & C. L.J.* 13. (Reproduced in accompanying notebook at Tab 7)

³¹ *Id.*

³² *Id.*

³³ Article 3(1) of Protocol II states:

Nothing in this Protocol shall be invoked for the purposes of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or reestablish law and order in the State or to defend the national unity and territorial integrity of the State.
Protocol II, *supra* note 7, art. 3(1).

³⁴ Protocol II Additional to the Geneva Conventions, Aug. 12, 1949, S.TREATY DOC. NO. 100-2, 100th Cong., 1st Sess. (1987)

territory of a contracting state; (2) the combatants must exercise effective control over at least part of the national territory; and, (3) such combatants must be capable of carrying out "sustained and concerted military operations." Further, Protocol II, though narrowing the scope of its coverage through these three conditions, does not incorporate the international legal value choices of Protocol I against the existence of alien, colonial, and racist regimes.³⁵ Any "dissident armed forces or other organized armed groups under responsible command" are given a lower level of protection and rights than analogous persons under Protocol I, but with the full sovereign legitimacy of the government assumed.³⁶

To avoid any doubts, Article 1(2) adds that those 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.³⁷ Protocol II is therefore inapplicable to such events.

The Link of Protocol II with Common Article 3

Article 1 describes the material field of application of the Protocol. Its first paragraph establishes the link between Protocol II and common article 3, and also, by reference to article 1 of Protocol I, the distinction between international and non-international armed conflicts.³⁸ It sets forth objective criteria that define situations in

³⁵ See David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 Am.J. Int'l L. 72, 286 (1978)

³⁶ See Protocol II Additional to the Geneva Conventions, Aug. 12, 1949, S.TREATY DOC. NO. 100-2, 100th Cong., 1st Sess. (1987).

³⁷ *Id.*

³⁸ *Id.*

which Protocol II is applicable. Its second paragraph formally excludes internal disturbances and tensions from the field of application of the Protocol.³⁹

Protocol II develops and supplements article 3 common to the Geneva Conventions 'without modifying its existing conditions of application.'⁴⁰ The Diplomatic Conference chose to adapt the scope of protection of Protocol II to the degree of intensity of the conflict.⁴¹ Thus, in those situations in which the conditions for the application of Protocol II are fulfilled, both Protocol II and common article 3 apply simultaneously, because the scope of Protocol II is included in the wider scope of common article 3. On the other hand, in a low- intensity conflict, which does not fulfill the conditions for the application of Protocol II, only common article 3 applies. In fact, article 3 retains an autonomous existence; its applicability is neither restricted nor subjected to the scope of Protocol II.

Protocol II completes and develops common article 3; it is an extension of article 3, and it is based on the same structural concept. Several common characteristics, included implicitly or explicitly in the text of the instruments, may be noted. For example, Protocol II and common article 3 apply automatically as soon as their conditions of application are objectively fulfilled.⁴²

Neither the application of common article 3, nor that of Protocol II modifies the legal status of an insurgent party, and neither implies recognition of insurgents. Neither Protocol II nor common article 3 recognizes the quality of combatant and neither confers

³⁹ *Id.*

⁴⁰ Sylvie Junod. *Additional Protocol II: History and Scope*; 33 Am. U. L.R. 29. (Tab 9)

⁴¹ *Id.*

⁴² *Id.*

any particular status on members of the armed forces or armed groups who have been captured. Members of armed forces detained by the adversary and civilians deprived of their liberty enjoy the same fundamental guarantees of humane treatment and judicial guarantees. National law is not suspended by Protocol II or by article 3. In fact, a member of an armed group can be brought to justice for having taken up arms. Protocol II and common article 3 grant all parties the same purely humanitarian rights and obligations. Although all mention of parties to the conflict has been eliminated from the text of Protocol II, all the rules it contains are based on the hypothesis of confrontation between two or more parties.⁴³

III. Legal Analysis- The concept of non-international law may actually be a myth in theory

A. The Dichotomy of Internal / International Conflicts

The distinctions between international and internal armed conflict tend to blur in most conflicts, such as in the case of Bosnia-Herzegovina⁴⁴ and the Gulf War in Iraq. Thus, whether Protocol I or II is applied and how it is applied is an issue that is not easily resolved. Some critics argue that in fact there is no distinction between an internal and international conflict and therefore an armed conflict can be both. In addition to this theory, there is also the fact of positive international humanitarian law, which concedes to the distinction by definition, while adding a third concept.⁴⁵ In congruence with this, in

⁴³ *Id.*

⁴⁴ For further explanation of this see, Dorothea Beane. *After the Dusko Tadic War Crimes Trial: A Commentary on the Applicability of the Grave Breaches Provisions of the 1949 Geneva Conventions*; 27 Stet. L. Rev. 59. (NB Tab 10)

⁴⁵ The third concept is internationalized non-international conflict, which is further explained in this section.

relation to the applications of the Protocols and Article 3, legal theory shows that, in particular Protocol II and Article 3 overlap, thus aspects of internal strife are indirectly international conflicts as well.⁴⁶

Essentially, there are two general types of armed conflicts under positive international humanitarian law: (a) international, and (b) non-international, armed conflicts. There is also a third general type which is not foreseen by positive international humanitarian law and which bears both international and non-international aspects, ie, the internationalized non-international armed conflict.⁴⁷

B. Internationalized Noninternational Armed Conflict⁴⁸

The internationalized noninternational armed conflict covers situations where an internal armed conflict is internationalized by foreign interventions. Because positive international humanitarian law distinguishes only between international and noninternational armed conflicts, and because internationalized noninternational armed

⁴⁶ This theory is further explained in the latter portion of this section.

⁴⁷ Anwar Frangi. *The Internationalized Non-international armed conflict in Lebanon, 1975-1990: Introduction to Confligology*, 22 CAPU. L.R. 965. The author in this article addresses internationalized non-international armed conflict through the conflict in Lebanon. The following armed conflicts have been considered:

1. Syrian Army v. Lebanese Christians
2. Syrian Army v. Lebanese Army
3. Israeli Army v. Palestinians
4. Lebanese Christians v. Palestinians
5. Lebanese Shiite Amal v. Palestinians
6. Lebanese Alawite Arabian Knights v. Lebanese Tawheed Islami
7. Lebanese Shiite Amal v. Lebanese Shiite Hezbollah
8. Lebanese Moslems (in general) v. Lebanese Christians (in general)
9. Lebanese Shiite Moslems v. Lebanese Jews
10. Lebanese Christian Phalangists v. Lebanese Christian Tigers
11. Lebanese Christian Phalangists v. Zghorta Liberation Army (Frangie Family)

(Nb. Tab 11)

⁴⁸ On the question of internationalized noninternational armed conflicts, see Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 M.A.U.L.REV. 149 (1983); (NB 12). Dietrich Schindler, *International Humanitarian Law*

conflicts bear both international and noninternational aspects, it is normal for international humanitarian law scholars to break down the internationalized noninternational armed conflict into these two features, applying separately, to each aspect, those related provisions provided by positive international humanitarian law.⁴⁹ In other words, the internationalized civil war must be broken down into its international and its non-international components. The differentiation approach recognizes two international relationships: one is between the foreign states that intervene on behalf of the opposing sides of the civil war and the other is between the established government and the foreign state intervening on the side of the insurgents.

Accordingly, four different possible clashes covered by internationalized non-international armed conflicts can be distinguished:

- (i) Internal Faction v. Internal Faction, where, and only where, either faction or both is/are materially supported or backed by foreign States;
- (ii) Foreign State v. Foreign State, where, and only where, both States intervene for the support of internal factions;
- (iii) Foreign State v. Established State, where, and only where, the former intervene for the support of an internal faction, and the latter is in conflict with that internal faction; and
- (iv) Foreign State v. Internal Faction, where, and only where, the former assists the established State against the latter.⁵⁰

Armed conflicts falling under (i) and (iv) generally are considered to constitute the noninternational aspect of the internationalized noninternational armed conflict; those falling under (ii) and (iii) constitute its international aspect.

An armed conflict not of an international character constitutes two types of armed conflicts: that which is within the meaning of Common Article 3⁵¹ to the 1949 Geneva

⁴⁹ Anwar Frangi, *The Internationalized Non-international armed conflict in Lebanon, 1975-1990: Introduction to Confligology*, 22 CAPU. L.R. 965.

⁵⁰ Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 M.A.U.L.REV. 149 (1983).

⁵¹ See supra 3, for provisions of Article 3.

Conventions; and that which is within the meaning of Article 1 of Protocol II. Protocol II is only applicable to armed conflicts when the parties are opposing insurgents to an established government.⁵² Implicitly, therefore, all conflicts not of an international character, which do not meet the requirements of Article 1 of Protocol II, fall within the scope of Common Article 3. This would include the armed conflicts among different dissident groups, which the established State is not involved.⁵³ Whether the dissident groups involved in armed conflicts should be nationals or nonnationals, remains unanswered.⁵⁴

The second general type of armed conflict, the international armed conflict, can also be broken down into two categories of armed conflicts: (a) that which is within the meaning of Article 1(4) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts,⁵⁵ and (b) that which is within the meaning of Common Article 2 to the Geneva Conventions, and Article 1(3) of Protocol I.⁵⁶

⁵² Article 3 and, where relevant, Protocol II apply to the relationship between the established government and the insurgents, the original parties to the conflict.

⁵³ See Schindler, *supra* note 49, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, at 148.

⁵⁴ See Frangi, *supra* 49

⁵⁵ U.N.DOC. A/32/144, Annex I (1977) [hereinafter Protocol I]; Article 1(4) of Protocol I makes applicable two conditions: (i) an armed conflict in which people are fighting, *inter alia*, against alien occupation and this fight must be (ii) in the exercise of their right of self-determination. Four terms appear to be essential: (i) armed conflict, (ii) people, (iii) alien occupation, and (iv) self-determination. Since Article 1(4) does not define the term "armed conflict," proponents and opponents may agree to adopt, by analogy, the definition provided by Protocol II.

⁵⁶ *Id.*

C. Customary International Law is Applicable to Internal Conflicts

The parties to an armed conflict not of an international character, can be bound by customary rules, irrespective of their having declared publicly the application of positive international humanitarian laws.⁵⁷ Virtually all states in the modern world are parties to human rights instruments or have declared adherence to the principles embodied in such documents, and there has been constant reiteration of their significance in resolutions adopted by both the General Assembly and the Security Council, as well as other international organs, sufficient to maintain that these principles now amount to customary law and perhaps even *jus cogens*.⁵⁸ This means that, regardless of any obligations that might arise from Protocol II, there are certain obligations binding upon the parties engaged in a non- international conflict. Further, since the Protocol is additional to the 1949 Conventions, to which almost all states are party, the minimum rights embodied in article 3 of those agreements operate whatever be the position concerning Protocol II.⁵⁹ Finally, it should be borne in mind that much of Protocol II is little more than a reaffirmation of the basic principles of humanitarian law binding on all states, military authorities, and civilian populations, breach of which would in many instances amount to crimes against humanity.⁶⁰ When they do, all offenders, regardless of rank, status, or nationality, become amenable⁶¹ to trial by any state in the territory of

⁵⁷ *Id.*

⁵⁸ L.C. Green, *Low-Intensity Conflict and the Law*, 3 ILSA J. Int'l & Comp. L. 493 (tab 13), referring to see, e.g. Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989). (NB Tab 14)

⁵⁹ *Id.* See Green.

⁶⁰ *Id.*

⁶¹ See, e.g., Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am. J. Int'l. L (1987). (NB 14)

which they may be found, and this is especially so in the light of the extended interpretation now being given to crimes against humanity.

IV. Three Case Studies: Vietnam, Kosovo, Nicaragua

A. The Vietnam War

The United States, North Vietnam, and South Vietnam were all states parties to the 1949 Geneva Conventions. The United States wanted to treat all enemy combatants it captured as prisoners of war, whether they were members of the North Vietnamese armed forces or South Vietnamese irregulars, the Vietcong.⁶² The United States preferred this policy, both as helpful to its claim of POW treatment for its soldiers who were captured and as promoting the surrender of enemy troops. South Vietnam, on the other hand, wanted to continue to treat its citizens among the Vietcong as common criminals under its law. North Vietnam, while recognizing that it was involved in an international armed conflict with the United States, refused to acknowledge, at least for most of the war, that its armed forces were present in South Vietnam and refuse to treat its American captives as prisoners of war on the ground that it considered all of them war criminals.⁶³ Ultimately, the United States was able to persuade South Vietnam to treat all captured combatants as prisoners of war, but neither the American nor the South

⁶² See Aldrich, *supra* 1. Aldrich offers a detailed description of the Vietnam experience, stemming from direct involvement.

⁶³ North Vietnam's excuse was based on its reservation to Article 85 of the 1949 Geneva Convention No. III on prisoners of war, *supra* note 8 (a reservation made by all of the then-Communist states), which refused to accept continued POW status for prisoners of war tried and convicted of war crimes or crimes against humanity. In fact, North Vietnam simply stated that all American prisoners were war criminals; there were no trials or convictions. For a response, see George H. Aldrich, Entitlement of American Military Personnel Held by North Viet-Nam to Treatment as Prisoners of War Under the Geneva Convention of 1949 Relative to the Treatment of Prisoners of War, in JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* 635 (1972).

Vietnamese military personnel who were captured ever obtained POW status or treatment as required by the Third Geneva Convention of 1949.

According to Aldrich, whenever a state chooses to send its armed forces into combat in a previously noninternational armed conflict in another state—whether at the invitation of that state's government or of the rebel party—the conflict must then be considered an international armed conflict, and the rebel party must be considered to have been given, from the date of such intervention, belligerent status, which, as a matter of customary international law, brings into force all of the laws governing international armed conflicts.⁶⁴ If a state other than the state in which a civil war is occurring commits its armed forces to the battle on one side or the other, the nature of the armed conflict changes fundamentally.⁶⁵ Aldrich states, that “while one can understand that a government involved in a civil war in its territory might object to its internal enemy's acquiring belligerent status merely because another state has been induced to join the war, the armed conflict will certainly have become international, and it will be practically impossible to apply both the rules on international armed conflict and those on noninternational armed conflict⁶⁶ to what, in fact, is a single armed conflict with two warring sides.”⁶⁷

⁶⁴ See Aldrich, *supra* 1 for further summary of Vietnam War.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ One can, of course, imagine circumstances in which the intervening state is not allied with one side or the other, in which event it might still be possible to maintain that the law applicable to noninternational armed conflicts remains applicable to the conflict between the two original parties. In that event, there would be two armed conflicts, not one. One must also distinguish situations in which United Nations peacekeepers are present—but not as combatants—in the territory of a state in which an internal armed conflict is in progress. On that, see Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 Y.B. INT'L HUMANITARIAN L. 3 (1998).

B. Federal Republic of Yugoslavia (FRY) and Kosovo Liberation Army (KLA/UCK)

The question that arose in this conflict is to what extent the hostilities between the FRY and the KLA were governed by international humanitarian law. There is little doubt that, even before the start of Operation Allied Force, an armed conflict existed in Kosovo between the FRY and the KLA/UCK. The existence of such a conflict was impliedly recognized by the Security Council as early as March 1998, when it urged the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia “to begin gathering information relating to the violence in Kosovo that may fall within its jurisdiction”.⁶⁸ Since the Tribunal’s jurisdiction is largely confined to crimes committed in armed conflict,⁶⁹ this invitation appears to have proceeded on the basis that, at least, an armed conflict might already exist. The events of early 1999 also strongly suggested that an armed conflict existed within Kosovo.⁷⁰

At least until 24 March 1999, that conflict was of a non-international character, since it consisted of “protracted armed violence between governmental authorities and organized armed groups ... within a State.”⁷¹ As such, it was governed by the provisions

⁶⁸ Security Council Resolution 1160 (1998), para. 17.

⁶⁹ The existence of an armed conflict is an inherent feature of grave breaches (Article 2 of the Tribunal’s Statute) and war crimes (Article 3); it is also expressly required as a condition for jurisdiction over crimes against humanity (Article 5). Only genocide (Article 4) can be prosecuted in the Tribunal without the need to demonstrate the existence of an armed conflict.

⁷⁰ See the indictment against Slobodan Milosevic and others issued by the Prosecutor on May 22, 1999 and confirmed by Judge Hunt on May 24, 1999 (IT-99-37-I). Note also the ICRC statement of January 18, 1999 regarding the massacre at Racak, which called on “both sides to comply with international humanitarian law and to spare those not, or no longer, involved in the fighting”. ICRC Press Release 99/04, Jan. 18, 1999, available at <http://www.icrc.org>.

⁷¹ The definition of a non-international armed conflict given by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in *Tadic*, *supra* note 16.

of common Article 3 and the customary law applicable to non-international conflicts.⁷² Although the KLA/UCK has at times claimed to be a national liberation movement, so that its struggle for self-determination would constitute an international armed conflict under Article 1(4) of Additional Protocol I, that claim has not been accepted by the international community.⁷³

The question is whether the intervention of NATO on 24 March 1999 “internationalized” that conflict, so that all the hostilities became subject to the law applicable to international armed conflicts considered above. The International Criminal Tribunal for the Former Yugoslavia has recognized, in its two decisions in the *Tadic* case,⁷⁴ that an international armed conflict can co-exist alongside a non-international one and that the latter will be internationalised only if there is a clear relationship between the non-governmental party to that conflict and one of the States party to the international conflict. While the reasoning of the Appeals Chamber on the nature of that relationship is open to criticism, the requirement that some kind of relationship exist is surely right – the mere fact that a conflict between States comes into being alongside a conflict within one of those States cannot, in and of itself, be sufficient to make the law of international

⁷² It is more doubtful whether Additional Protocol II applied. Until the closing stages of the fighting, it is unclear whether the KLA/UCK exercised sufficient control over a defined area of territory to meet the requirements of Article 1(1) of Additional Protocol II.

⁷³ It is noticeable, for example, that none of the NATO States argued that the KLA/UCK was a national liberation movement or that the population of Kosovo had a right to self-determination, nor is such a view reflected in the various Security Council resolutions regarding Kosovo. The Prosecutor has not charged Slobodan Milosevic with grave breaches under Article 2 of the ICTY Statute – the only offense within the jurisdiction of the Tribunal which can only be committed in an international armed conflict (*Tadic, supra* note 7) – in respect of Kosovo, even though some of the incidents in Kosovo in early 1999 (such as the massacre of forty-five villagers at Racak on January 15, 1999, United Nations Doc. S/PRST/1999/2) would appear to have qualified as a grave breach had there been an international conflict.

⁷⁴ Prosecutor v. Tadic, *supra* 16.

armed conflicts applicable to the latter fighting.⁷⁵ At least until the end of May 1999, however, NATO kept its distance from the KLA/UCK and even after that time it is far from clear whether the relations between them were sufficiently close for the conflict between the KLA/UCK and the FRY to be regarded as part of the international armed conflict, rather than a separate internal conflict governed by a different set of rules.⁷⁶

The issues raised, and subsequently the procedural manners as to how the conflict was addressed, warrants the conclusion that international humanitarian law applies to a conflict between two or more States irrespective of what that conflict is called or the cause for which force is used; and the use of force by way of humanitarian intervention is no different in this respect from the use of force for other purposes. Further, members of the armed forces of a party to an international conflict who find themselves in the power of the enemy are prisoners of war, irrespective of the purpose for which the conflict is waged, whether prisoner of war status is claimed on their behalf or how or where they were captured.⁷⁷

C. Guerrilla Movement in Nicaragua⁷⁸

The International Court of Justice has found that the customary law and the laws of humanity apply to internal armed *conflicts*.⁷⁹ In the Nicaragua case, the ICJ expanded the

⁷⁵ See Greenwood, *Supra*. 53.

⁷⁶ On the subject of prisoners captured by the KLA and handed over to NATO forces, see, Charles Lewis Nier III, *The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World*, 10 DICK. J. Int'l L. 303. (NB Tab 15)
See also, Greenwood.

⁷⁷ *Id.* See, Nier.

⁷⁸ For detailed facts of the Nicaragua case see, William Walker, *The International Law Applicable to Guerilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives*, 21 NYU J. Int'l L. & Policy 147. (NB 16)

ruling of the preceding Corfu Channel case⁸⁰, and ruled to apply to non-international armed conflicts.⁸¹ The Court noted that the 1949 Geneva Conventions "are in some respects a development, and in other respects no more than the expression" of "fundamental general principles of humanitarian law."⁸² It found that Common article 3 of the Geneva Conventions, which contained such fundamental principles and "elementary considerations of humanity," applied as a "minimum yardstick" to both internal armed conflicts and international armed conflicts.⁸³ Thus, these elementary considerations of humanity apply to both the contras and the United States in Nicaragua. The ICJ justified this conclusion by recognizing that "the minimum rules applicable to international and to non-international conflicts are identical."⁸⁴

The ICJ demonstrates in the Nicaragua case that some international humanitarian rules are so fundamental that they must apply to internal armed conflicts as minimum

⁷⁹ United Nations General Assembly Resolution 2444, entitled "Respect for Human Rights in Armed Conflicts," recognizes "the necessity of applying basic humanitarian principles in all armed conflicts;" William Walker, *The International Law Applicable to Guerilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives*, 21 NYU J. Int'l L. & Policy 147, cites "A letter from the General Counsel of the United States Department of Defense found that the general rules of humanitarian law specifically enumerated in that resolution are "existing customary international law" to be obeyed by "attacking forces." The notion of customary law applying to internal armed conflicts has therefore been internationally confirmed and approved by individual states and their leaders. Letter of September 22, 1972, reprinted in Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 Am. J. Int'l L. 118, 122 (1973). Americas Watch further argues that customary humanitarian law applies to internal armed conflicts, and specifically to the conflict between the contras and Sandinistas. *Americas Watch Committee(US) , Land Mines in El Salvador and Nicaragua: The Civilian Victims 77,96, (1986)*.

⁸⁰ In the Corfu Channel case, an international dispute between Albania and the United Kingdom arose after British warships struck mines in the Corfu Channel in Albanian waters. The ICJ found that Albania had a duty to warn British warships passing through its territorial waters about mines that it had planted. The Court based its ruling partly on "elementary considerations of humanity. See William Walker, *Id.*

⁸¹ *Military and Paramilitary Activities In and Against Nicaragua(Nicaragua v US) 1986 I.C.J. 3.*; cited in Walker.

⁸² *Id.* at 113.

⁸³ *Id.* at 114.

⁸⁴ *Id.*

norms of conduct, whether as customary law or the laws of humanity. Not all international law regulating international armed conflicts apply to internal armed conflicts, because they involved different troops, leadership, and combat methods. Where the ratio legis of customary law and the laws of humanity applicable to international conflicts applies to situations arising in internal ones, however, this law should be applied to internal armed conflicts.⁸⁵

Therefore, guerrillas cannot ignore humanitarian law on the basis of the argument that humanitarian instruments do not apply specifically to guerrillas forces. They may not pick and choose which humanitarian rules apply to their activities. Instead, international law compels them to adhere to relevant customary law and to rules of international law constituting "elementary considerations of humanity."⁸⁶

V. Final Note

The lines as to when a conflict can be both of non-international and international, is one that is almost invisible. Legal theory, including customary international law would

⁸⁵ See generally Goldman, *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 Am. U.J. Int'l L & Policy 539, 578 (1987), as cited in Walker.

⁸⁶ Nicaragua, 1986 I.C.J. at 114 (citation omitted). "Irrespective of the qualification of the conflict as an internal or international conflict, the codes of conduct are not fundamentally different." *Protocols Commentary*, supra note 27, at 1341-42 (citing Kalshoven, *Applicability of Customary International Law in Non-International Armed Conflicts*, in *CURRENT PROBLEMS OF INTERNATIONAL LAW* 268 (1975)). There is thus no real problem in applying most of the customary rules which have arisen in the context of international armed conflicts, including those rules codified in humanitarian treaties such as Geneva Convention IV and Protocols I and II, to internal armed conflicts.

For further comment on application of laws of war to guerrillas in internal armed conflicts, see Penna, *Customary International Law and Protocol I: An Analysis of Some Provisions*, in *STUDIES AND ESSAYS*, supra note 45, at 201, 203 (application to guerrillas of law concerning prisoners of war); KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 14 (1987); Bindschedler-Robert, *A Reconsideration of the Law of Armed Conflicts*, in *THE LAW OF ARMED CONFLICTS* 3, 39 (1971).

The contras established a human rights commission to curb contra abuses of human rights and humanitarian law. *N.Y. Times*, Sept. 15, 1985, at A6, col. 1; Americas Watch Committee (U.S.), *Human Rights in Nicaragua*, 1986, at 49-52 (1987). This in itself argues that international humanitarian law applies to them. See Baxter, supra note 25, at 283

assert that a non-international conflict in its undefined terms would at the least have some aspects of international conflict. Although treaties and conventions do not make it clear as to which situation both Protocol I or II applies, conventional theory would argue that the majority of armed conflicts encompasses attributes of both.