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EDITORIAL

Pembaca yang budiman,

Segala puji dan ungkapan rasa syukur hanya tertuju kepada Allah SWT, sehingga atas perkenanNYA jualah maka JURNAL HUKUM HUMANITER ini dapat kembali terbit di tengah-tengah para pembaca sekalian.

Edisi ini berisi artikel utama yang masih memaparkan ulasan mengenai konsep dan masalah-masalah yang dihadapi dalam kontra-insurgensi dalam perang gerilya, serta masih meninjau mengenai sengketa-sengketa bersenjata yang berlangsung di dalam wilayah suatu negara, baik pada tingkat atau level yang lebih rendah seperti konflik-konflik yang bersifat horizontal di Indonesia, maupun mengenai pasukan pemberontak seperti Gerakan Aceh Merdeka, yang ditinjau berdasarkan hukum humaniter. Adapun sebagai artikel pendukung, akan disajikan ulasan mengenai metode dan cara berperang khususnya dalam peperangan di laut. Di samping itu, kali ini untuk pertama kalinya dikemukakan bahasan mengenai Pasukan Pemeliharaan Perdamaian, sebagai suatu topik yang berada dalam tataran 'ius ad bellum'; untuk melengkapi pembahasan-pembahasan mengenai 'ius in bello' sebagaimana telah dipaparkan dalam edisi-edisi yang terdahulu.

Adapun sebagai isi "Kolom", dipaparkan sejumlah perkembangan yang terjadi pada Mahkamah Pidana Internasional (*International Criminal Court*), semoga dapat menjadi masukan bagi para pembaca mengenai perkembangan terakhir yang terjadi dalam Mahkamah tersebut.

Atas terlaksananya penerbitan JURNAL HUKUM HUMANITER edisi kali ini, kami mengucapkan terima kasih kepada *International Committee of the Red Cross* (ICRC), yang tetap menjaga komitmennya dalam pengembangan hukum humaniter di tanah air. Akhirnya kami mengharapkan tulisan dari kalangan masyarakat pemerhati hukum humaniter, dan juga masukan dari pembaca berupa kritik maupun saran konstruktif lainnya. Selamat membaca.

Redaksi

DAFTAR ISI

INTERNATIONAL HUMANITARIAN LAW IN INTERNAL ARMED CONFLICT: IMPLEMENTING COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II TO THE GENEVA CONVENTIONS TO INTERNAL AND HORIZONTAL CONFLICTS IN INDONESIA[1]

Heru Susetyo[2]

Abstract

This research explores the applicability of Article 3 of the Geneva Conventions of 1949 and Additional Protocol II 1977 of the Geneva Conventions of 1949 through internal and horizontal conflicts, and the minimum threshold of 'internal armed conflict and internal civil disturbances' in Indonesia, such as in Kalimantan, Poso and Maluku.

A. Introduction

During 1996 to date several internal and horizontal conflicts occurred in Indonesia. The conflicts took place mainly in three areas in Indonesia, namely Kalimantan, Sulawesi, and Maluku. The other conflicts, commonly considered as internal and vertical conflict, are also occurred in Aceh, Papua, and East Timor (Timor Leste).[3]

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[1] This paper is a modification of a previous version written by the author for fulfilling the final assignment of International Criminal Law course at *International Human Rights Law* Master Program at Northwestern Law School, Chicago 2003.

[2] A lecturer and research associate at Faculty of Law University of Indonesia, Depok- Indonesia. Currently pursuing PhD degree in Human Rights and Peace Studies at Mahidol University, Bangkok – Thailand.

[3] It is important to distinguish the horizontal and vertical conflict in Indonesia, since they both have different characteristics as well as similarities. Horizontal conflict is internal conflict occurred among people or civilians coming from different groups such as ethnicities, religious and socio-economic groups.

Some humanitarian law questions usually come up following those severe unrests such as : how to protect civilian during internal and horizontal conflict as well as how to bring the perpetrators to justice? Does the provision of Common Article 3[4] and Additional Protocol II to Geneva Convention related to non-international armed conflict[5] apply to them? Should the internal and horizontal conflicts in Indonesia be treated as non-international armed conflict enshrined in Geneva Convention?

There is a notion that common article 3 and Additional Protocol II to Geneva Convention 1977 (hereinafter 'Protocol II') could be the principal applicable humanitarian law treaty to internal armed conflict, but they too have their limitations. They have limited coverage. For instance Protocol II provides more limited protections as compared to those of Protocol I. And it covers only some civil wars and not others. A close look at the wording of Protocol II suggests how it covers only vertical civil wars, and not horizontal civil wars. Thus, for example, Protocol II does not cover the current situation of the Maluku in Indonesia, because the conflict is primarily a horizontal one, between religious groups (Christians and Muslims - although many suspect covert state involvement).[6]

Another question is how to bring the perpetrators to justice? The recent internal and horizontal conflicts in Kalimantan, Sulawesi,

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Meanwhile, vertical conflict is a conflict between state and government with a certain group of people or civilians. However, they do have similarities. Horizontal and vertical conflict has caused the great humanitarian disaster. Millions people were lost their lives, being tortured, wounded, or displaced (Internally Displaced Persons).

[4] Convention Relating to The Status of Refugees, 189 U.N.T.S. 150, adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 *entry into force* 22 April 1954, Signatories: 19, Parties: 140.
Accessible at http://www.unhchr.ch/html/menu3/b/o_c_ref.htm

[5] Protocol relating to the Status of Refugees, 606 U.N.T.S. 267, The Protocol was taken note of with approval by the Economic and Social Council in resolution 1186 (XLI) of 18 November 1966 and was taken note of by the General Assembly in resolution 2198 (XXI) of 16 December 1966. In the same resolution the General Assembly requested the Secretary-General to transmit the text of the Protocol to the States mentioned in article V thereof, with a view to enabling them to accede to the Protocol *entry into force* 4 October 1967, in accordance with article VIII. Parties: 138. Accessible at http://www.unhchr.ch/html/menu3/b/o_p_ref.htm

[6] See Douglass Cassel, *Enhancing Human Right Protection*. Paper presented at Roundtable Discussion of Internally Displaced Persons, Chicago, March 2002.

and Maluku left great disaster for humanity, including weak law enforcement. To date, only a few alleged perpetrators have been brought to justice. Some of them were sentenced to death, life imprisonment, or serving years in prison. However, most of alleged perpetrators are still untouchable due to the weak law enforcement, lack due process of law, and lack of knowledge and understanding of law enforcement officers regarding prosecuting and trying people who allegedly committed crime in internal and horizontal conflicts.[7]

This research etries to find answer of :

a). Do Common Article 3 and Additional Protocol II of Geneva Convention have jurisdiction over internal and horizontal conflict in Indonesia? and

b). What is the minimum threshold of 'internal armed conflict' and 'internal civil disturbances' provided in Common Article 3 and Protocol II of Geneva Convention?

B. Internal and Horizontal Conflicts in Indonesia

Indonesia, the world's fourth most populated nation, is a vast archipelago with more than 3000 inhabited islands. With around 360 tribal and ethno linguistic groups and more than 250 different languages and dialects. Obviously, the country is far from homogenous. [8]

Following the political turmoil before and after resignation of President Suharto in 1998, various internal and horizontal conflicts occurred in Indonesia. The conflicts, mostly ethnic and religious conflict, occurred in Sumatera, Kalimantan, Sulawesi, Maluku, and Papua, not to mention East Timor (Timor Leste) which is –later on- considered as international conflict. The conflicts in Sumatra and Papua are vertical conflicts between the government and 'separatist movement.' Meanwhile, the conflicts in Kalimantan, Sulawesi, and Maluku are considered as internal and horizontal conflict between ethnics or religious groups.

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[7] This notion was drawn from observation and field investigation conducted by the researcher in Maluku (2000), Poso (2000 and 2001) and Kalimantan (2001 – 2002).

[8] Taken from Intervention Paper prepared by Heru Susetyo and Indonesian NGO Networks for UNHCHR annual meeting Geneva, 2002.

In Maluku, North Maluku, and Central Sulawesi, what appears to be a religious conflict between Muslim and Christian inhabitants was at its root most likely a conflict among powerful civil, military, and economic forces both within and outside the region. These forces have used religion to express distrust and fear between the two groups, creating a conflict that quickly spread to other regions. In Kalimantan, tribal clashes between Madurese on one side and Dayaks and Malays on the other resulted largely from Indonesia's transmigration policy –a factor in the other conflicts as well. [9]

1. Internal and Horizontal Conflict in Maluku

Violence between Christians and Muslims, which began in city of Ambon (Maluku) in 19 January 1999 and spreading over Central Maluku, Southeast Maluku and North Maluku, continued throughout 2000 and 2001. The first 18 months of the conflict displaced over half a million persons, approximately 75 percent of who remained in Maluku with most of the rest fleeing to the island of Sulawesi. Christians fled to Manado area (North Sulawesi) and Muslims fled to Buton (Southeast Sulawesi) and Makassar (South Sulawesi). The state of emergency imposed by the government in June 2000 remained in effect at the close of 2001, but had done little to stem the violence. By year 2001 end, more than 10.000 Maluku people were believed to have died since the conflict began. Members of Christian and Muslim communities have been both perpetrators and victims of the violence.[10]

As in other regions of the country, no single factor was responsible for the continued strife between communities that had coexisted peacefully for decades. National and local political and economic factors contributed to the conflict in Maluku, as did decades of 'transmigration' by which the government relocated some Indonesians, mostly Javanese, to less-populated islands. In addition, the Maluku-based Laskar Kristus (Jesus warrior) as well as Java-based Muslim warrior group Laskar Jihad (jihad warrior) continued to operate at will in the Maluku.[11]

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[9] See US Committee for Refugees, *World Refugee Survey 2002*.
[10] See Id. See also Heru Susetyo, *Laporan Investigasi Konflik Poso*, PAHAM Indonesia, 2001 (English translation: Field Investigation Report of Poso Conflict 2001), unpublished.
[11] See Id.

2. Internal Conflict in Poso – Central Sulawesi

The violence in Poso first erupted in December 1998, with other significant outbreaks in April and May 2000. Violence flared again in April 2001 after local court (Palu district court) ruled that three Poso-Christian led by Fabianus Tibo would be executed for their roles in earlier violence against Muslims and for 'inciting religious hatred'. The renewed conflict sent both Christians and Muslims fleeing : Muslim to Palu and Christians to both Tentena –about an hour from Poso- and Manado in North Sulawesi Province.[12]

Internal conflict in Poso has caused 86.000 persons displaced until the end of 2001. Close to 45.000 were displaced in and around the town of Poso and another 41.000 in the area of Palu. The clashes, though linked to local issues, were also related to the sectarian violence in Maluku. More than 2500 people have died since the violence began in 1998. In late December, in city of Malino, political and religious leaders from Poso signed the Malino declaration, pledging to end the fighting and to set up the commissions to address various social, economic, and legal problem.[13]

3. Internal Conflict in Kalimantan

The ethnic violence in Kalimantan Island occurred respectively in 1996-1997, 1999, and 2001. In 1996 – 1997 where Dayaks and Madurese inhabitants attacked each other in Sanggau Ledo, West Kalimantan. In 1999, Melayu inhabitants attacked and killed hundreds of their neighbor, Madurese inhabitants, in Sambas West Kalimantan, and in 2001 Dayaks inhabitants attacked Madurese inhabitants in Sampit and Palangkaraya, Central Kalimantan.

The Madurese were originally transmigrants (coming voluntarily since the beginning of 20th century) to Kalimantan from the tiny island of Madura, off the east coast of Java.[14] In Sampit conflict,

[12] See Id.
[13] See Id.
[14] See Kallie Szczepanski : *Comment : Land Policy and Adat Law in Indonesia's Forest*, Pacific Rim Law and Policy Journal, 2002, 11 Pac. Rim L. and Pol'y 231.

Dayak gangs torched Madurese homes and shops, chased Madurese into nearby jungles, and killed and decapitated those who could not escape. After two month of violence, which had overwhelmed the available Indonesian security forces, at least 500 persons –mostly Madurese- had been killed and some 140.000 to 180.000 Madurese displaced. The displaced had either fled the Central Kalimantan province or been evacuated by government troops.[15]

While security forces relocated some Madurese to West Kalimantan of Java, they took most to Madura, despite the fact that most of the ethnic Madurese –having relocated to Kalimantan decades earlier –were strangers to Madura Island. With scarce land and jobs, Madura was ill equipped to care for the new arrivals.[16] At the end of 2001, an estimated 57.000 Madurese were internally displaced in the province of West Kalimatan. The vast majority was from the coastal district of Sambas, which has experienced Dayak – Madurese ethnic clashes in 1999.[17]

C. The Provision of Non-International Armed Conflict in Geneva Conventions

The principal sources of international humanitarian law are (1) the four 1949 Geneva Conventions; (2) the two 1977 Additional Protocols; (3) The Hague Conventions of 1899 and 1907; and (4) the customary laws of war.[18]

[15] Kalie Szczepanski also mention (note 10) that the worst clash in recent history took place in Sampit, Central Kalimantan in 1997. Angry Dayaks, claiming that the Madurese immigrants had stolen their land and their livelihoods, went on a two-month long rampage of house burning, looting, and brutal killing. Madurese men, women, and children were hacked to death with knives and machetes; others were burned with the buildings in which they sought shelter. Many sources echoed claims that the Dayak had reverted to their ancient war-practices of headhunting and ritual cannibalism; certainly, headless bodies were discovered piled in the streets of Sampit. In all, the 1997 violence claimed an estimated 3,000 lives, mostly Madurese. As many as 80,000 Madurese refugees fled the island for an uncertain welcome in Java or Madura. Most of the refugee families had lived on Kalimantan for at least thirty years; overcrowded little Madura is not really home to them. Still, an awkward reunion with their island of origin was preferable to death by Dayak machete.

[16] See Duane Ruth-Heffebower, *Indonesia : Out of One, Many?* The Fletcher Forum of World Affairs Journal, 2002, 26 Fletcher F. World Aff. 223, page

[17] Duane Ruth-Heffebower (note 12) also mentions that the crime the Madurese had committed, from the Dayak perspective, was to come and take land and business opportunities—severely interfering with the Dayaks' preferred lifestyle—and then keep to themselves rather than becoming more a part of the community they had invaded. Their exclusivity became a life-threatening issue. In a recent statement in response to government efforts to mediate the return of the Madurese, Dayak leaders said the Madurese could not come back unless they joined the Dayak community.

[18] Treaty law and customary international humanitarian law are the main sources of humanitarian law. Unlike treaty law, for example the four Geneva Conventions, customary international law is not written.

In contrast to international human rights law, international humanitarian law applies to situations of armed conflict and contains rules restricting the means and methods of combat in order to spare the civilian population from the adverse effects of hostilities. Although human rights and humanitarian law share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity, the detailed provisions of humanitarian law afford victims of armed conflict far greater protection than general human rights guarantees. The area of greatest convergence of these two branches of international law is in purely internal armed conflict situations.[19]

Internal armed conflict situation amounted to International Humanitarian Law regulated only in Geneva Convention, namely in Common Article 3 and additional protocol II to Geneva Convention. The Geneva Convention of 1949 and Additional Protocol of 1977 embody the ideals of humanitariasm formulated on battlefield, in concentration camps, and in bombed cities. Development in humanitarian law, however, has failed to adapt to the horrors of civil war, the most common type of armed conflict today.[20]

1. Common Article 3 to Geneva Conventions[21]

Article 3 is the only provision of the four Geneva Conventions that directly applies to internal armed conflicts (or 'conflict non international character' according to the wording of common article 3)[22]. The parties to such an internal armed conflict are not legally obligated to implement, enforce, or observe the highly developed

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A rule is customary if it reflects state practice and when there exists a conviction in the international community that such practice is required as a matter of law. In this context, "practice" relates to official state practice and therefore includes formal statements by states. A contrary practice by some states is possible because if this contrary practice is condemned by other states or denied by the government itself the original rule is actually confirmed. While treaties only bind those States which have ratified them, customary law norms are binding on all States
(See http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:Treaties_and_customary_law and http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57KJ2T?OpenDocument

[19] See Robert Kogod Goldman, *International Humanitarian Law: America's Watch's Experience in Monitoring Internal Armed Conflict*, The American University Journal of International Law and Policy, 1993, 9 Am. U.J. Int'l L. & Pol'y 49, page 2.

[20] See Laura Lopez, *The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, New York University Law Review 1994, 69 N.Y.U.L. Rev. 916, page 2.

[21] Article 3 Geneva Convention IV related to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950:

protections of the other articles of the Geneva Conventions that exclusively apply to international, i.e., interstate, armed conflicts. Consequently, a government engaged in internal hostilities is not required to accord its armed opponents prisoner of war status. This is because insurgents do not have the combatants' privilege, whose applicability is limited under customary and conventional international law to situations of interstate or international armed conflict, as defined in common article 2 to the Geneva Conventions. This privilege is essentially a license to kill or wound enemy combatants, destroy other enemy military objectives and cause incidental civilian casualties. In interstate armed conflicts, a lawful combatant possessing this privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic laws of his captor for his hostile acts which do not violate the laws and customs of war.[23]

Article 3 common to the four 1949 Geneva Conventions (article 3) refers to, but does not actually define, "an armed conflict of a non-international character." In both fact and practice, article 3 is applicable to low intensity, open, and armed confrontations between relatively organized armed forces or armed groups occurring exclusively within the territory of a particular state. Thus, article 3 does not apply to a mere act of banditry or an unorganized and short-lived rebellion. Typically, article 3 applies to armed clashes

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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, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
b) Taking of hostages;
c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
d) The passing of sentences and the carrying out of executions without previous 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. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other **provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.**

[22] See Common Article 3 to Geneva Convention, Note 20.

[23] See Laura Lopez, Supra, Note 19.

between governmental forces and organized dissidents. It also governs cases in which two or more armed factions within a country violently confront one another without the involvement of governmental forces. Examples of this type of confrontation include when an established government has dissolved or is too weak to intervene.[24]

The lack of an authoritative definition or interpretation of common article 3 may not, however, be a problem after all. It might even be a blessing in disguise. The 'no definition' school of thought believes that no definition, be it either general or enumerative, can be precise enough to cover all possible manifestations of a particular concept.[25]

2. Additional Protocol to Geneva Conventions relating to Protection of Victim in Non International Armed Conflict (Protocol II 1977)

Protocol II applies to a non-international armed conflict "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups." Protocol II does not alter article 3, but rather the two apply collectively and in conjunction with each other. In fact, the scope of Protocol II is within the broader scope of article 3.[26]

Protocol II is intended to expand and improve upon the basic humanitarian standards of Common Article 3 of the Geneva Conventions –of August 12, 1949 for the protection of victims of war, which governs non international armed conflicts.[27]

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[24] See Id at 3.

[25] See Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, 2002. Page 32.

[26] See Id at 4, see also the wording of article 1 of Protocol II:
(1). 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. (2). This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

[27] See Captain Daniel Smith, *New Protection for Victims of International Armed Conflicts : The Proposed Ratification of Protocol II by The United States*, Military Law Review, 1988, 120 Mil. L. Rev. 59, page 2.

The Additional Protocols of 1977 supplement the protection of victims in armed conflict provided by the Geneva Conventions. Although the extensive provisions of Protocol I apply exclusively to the victims of international conflicts, Protocol II does attempt to address the inadequacies of Article 3 by enhancing the protections for victims in large-scale civil wars. The fundamental guarantees for civilians provided by Protocol II both reaffirm the rules set forth in Article 3 and expand their protections to include the prohibition of collective punishments, acts of terrorism, slavery, pillage, rape, and "threats to commit any of the foregoing acts." Protocol II further advances the protection of civilians by prohibiting any "order that there shall be no survivors," and by proscribing the starvation and forced movement of civilians. The Protocol elaborates upon the general obligation imposed by Article 3 of the Geneva Conventions to treat persons "humanely," and provides safeguards for "persons whose liberty has been restricted," such as mandatory medical examinations, decent working conditions, and the freedom to practice religion. Protocol II also expands the protection and care for the wounded, sick, and shipwrecked, and provides for the protection of medical and religious personnel, and, for the first time, children.[28]

Despite these advancements, Protocol II contains substantial limitations, due largely to the fear by state parties that a broader instrument would legitimize certain rebel groups. For example, like Article 3 of the Geneva Conventions, Protocol II stops short of requiring states to impose penal sanctions for grave breaches of humanitarian law. Additionally, the scope of Protocol II is limited by the fact that only 125 states are party to it as opposed to the 185 states that are party to the Geneva Conventions.[29]

Protocol II also differs from the 1949 conventions, which have effectively been universally ratified, by 189 states. A recent check found that Protocol II had been ratified by only 152 states. So again, about 40 states have not even signed on to Protocol II, much less taken steps to enforce it[30]

[28] See Id.
[29] See Id.
[30] See Supra, Note 5 (terhitung sejak tanggal 14 Januari 2007, telah terdapat 163 negara yang ikut serta sebagai Pihak pada Protokol II; Red).

3. Limitations of Common Article 3 and Protocol II

In its provision, Common Article 3 to Geneva Convention does not provide clear explanation regarding the scope and limitation of 'armed conflict not of an international character.'[31] However, Protocol II, which is a supplement as well as a development of Common Article 3[32], provides a somewhat clear of scope and its limitations.[33] The fact remain, however, that the protocol fails to provide guidance with respect to the main stumbling block of common article 3- namely the determination of whether an armed conflict not of an international character actually exists.[34] Additional Protocol II may contain a more concrete set of provisions outlining when an armed conflict comes within the scope of its terms, but the scope of Additional Protocol II is clearly narrower and more restrictive than that of common article 3.[35]. The conditions contained in Article 1 of the Protocol mean that it applies only to the most intense and large-scale conflicts.[36]

Article 1 (1) of Protocol II asserts that this protocol shall apply to (1) all armed conflicts which are not covered by Article 1 of the

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[31] In most internal conflicts, the Common Article 3 is dependent upon auto-implementation by the Parties to the conflict (See Michael A. Meyer, Infra, Note 30, at 108).

[32] See Lindsay Moir, Supra Note 24, Page 100.

[33] Protocol II, the law governing internal armed conflicts present a somewhat confused picture. Such conflicts can range from low level sporadic exchanges of armed violence between dissident elements and governments, to a full-scale armed confrontation such as the Spanish Civil War, 1936-1939, in which upwards of a million men and women were killed (See Michael A. Meyer and Hilaire McCoubrey (Eds.), *Reflection on Law and Armed Conflicts*, Kluwer Law International, The Hague, 1998, Page 107).

[34] In different words, Michaerl A. Meyer writes that *Protocol II expands and develops the humanitarian prohibition in Article 3, but does little to reinforce or contribute modes of implementation* (See Id, At 109).

[35] See Antonio Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, International and Comparative Law Quarterly, 30, page 244-245). Cassese presents four general features of additional protocol II, namely: (1) it does not apply to all internal conflicts, but only to those, which are prolonged, and of great intensity. It is therefore apparent that the protocol has a high 'threshold of application' , and in substance only covers those civil wars, which by their scale reach a level comparable to that of the Spanish war or the Nigerian conflict. All conflicts which fall short of the strict conditions required by article 1 without, however, being minor domestic incidents, are covered only by Common Article 3, which no doubt retains a much broader field of application than Protocol II; (2) It has an almost exclusively humanitarian content; in other words, it is primarily designed to protect 'victims' of the armed conflict; (3) It does not provide any machinery for its supervision or enforcement; (4) It is only open for signature and ratification, or accession by States, more specifically, by those States which are parties to the 1949 Geneva Convention (Articles 20 –22). No provision is made for the participation in the Protocol by rebels, when civil war breaks out on the territory of a contracting party (See Antonio Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, International and Comparative Law Quarterly, 30, page 244-245).

[36] See Id, Page 101.

Protocol I[37] and (2) 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, (3) under responsible command, (4) 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. In addition, this protocol shall not apply to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[38]

Armed conflict which are not covered by Article 1 of the Protocol II certainly are those conflicts which are within the scope of Article 1 (further elaborated in article 2) of the Protocol I, i.e.: (1) all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them (2) all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance (3) 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.

In accordance to such limitations, it will be easier to understand the scope and applicability of Common Article 3 and Protocol II by defining some crucial terminologies such as: 1. (Internal) Armed Conflict 2. Armed Forces (group) 3. Responsible Command 4. Exercise such control over a part territory. 5. Internal Disturbances and Tension.

1). Internal Armed Conflict

Internal armed conflict is situation in which there is no non-international armed conflict as such, but there exist a confrontation within a country, which is characterized by a certain seriousness or duration and which involves acts of violence. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed

[37] See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.
[38] See Article 1 (2) of Protocol II.

forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.[39] Another terminology within the scope of internal armed conflict is 'civil war'. The provisions of Protocol II and Article 3 suggest very different conceptions of the term. Protocol II applies to a civil conflict only when dissident armed forces exercise such control over the territory of a High Contracting Party "as to enable them to carry out sustained and concerted military operations." In addition, the Protocol specifically excludes "situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence."[40] Thus, only large-scale armed conflicts are covered, thereby depriving civilians of protections in other classes of armed conflicts. This high threshold for application limits the effectiveness of Protocol II because it allows states to argue that the low level of violence in an internal conflict is not sufficient to trigger its provisions. In addition, because Protocol II establishes no neutral institution to make such a determination, individual states are permitted to classify their internal disputes based on their own self-interests.[41]

By contrast, Article 3 leaves undefined the characteristics of "armed conflicts not of an international character." Authoritative ICRC commentary, however, states that the "conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities - conflicts, in short, which in many respects are similar to an international war, but take place within the confines of a single country." Thus, like Protocol II, Article 3 is not understood to address internal disturbances such as the riots in Los Angeles in 1992. Article 3 does apply, however, to some civil disputes, which are not within the ambit of Protocol II, such as when a dissident group engages in armed conflict but does not attain the requisite level of territorial control to trigger Protocol II.[42]

Ultimately, the definitions are unsatisfactory; Protocol II does not apply to a sufficiently broad spectrum of civil wars, and Article 3 does not articulate a clear definition, thereby leaving governments and rebels unsure which international norms apply to their conflict.

[39] See Robert Kogod Golman, Supra, Note 18.
[40] See Article 1 (2) of Additional Protocol II to Geneva Convention.
[41] See Laura Lopez, Supra, Note 19.
[42] See Id.

The difficulty lies in constructing a definition that does not encroach upon a state's power to quell internal strife yet does not sacrifice the needed protections for civilians and combatants when such strife becomes "war." [43] Meanwhile, Jean Pictet summarized the elements of internal armed conflict as follows:[44]

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

2). Internal Disturbances and tensions

'Internal disturbances and tensions'[45] on the other hand, may include any, or all, the following characteristics: (1) mass arrest (2) a large number of persons detained for security reasons (3)

[43] See Id at 5.
[44] See Jean S. Pictet, *Commentary on The Geneva Conventions of 12 August 1949*, Volume III (Geneva, 1960) in Lindsay Moir, Supra Note 22, at 35.
[45] This terminology derived from article 1 (2) Protocol II to Geneva Conventions.

administrative detention, especially for long period (4) probable ill-treatment, torture or material or psychological conditions of detention likely to be seriously prejudicial to the physical, mental or moral integrity of detainees; (5) maintaining detainees incommunicado for long periods; (6). Repressive measures taken against family members of persons having a close relationship with those deprived of their liberty mentioned above; (7) the suspension of fundamental judicial guarantees, either by the proclamation of a state of emergency or by a de facto situation; (8). large-scale measures restricting personal freedom such as relegation, exile, assigned residence, displacements; (9). allegations of forced disappearances; (10). increase in the number of acts of violence (such as sequestration and hostage-taking) which endanger defenseless persons or spread terror among the civilian population.[46]

Instead of internal and international armed conflict, there is another terminology namely 'Internationalized non-international armed conflicts', a conflict characterized by the intervention of armed forces of a foreign power, are events within a country with international elements superimposed. They have special features that distinguish them from armed conflicts between states and from civil wars. Regrettably, the law of war has no special provisions applicable to this type of conflict. It might be desirable to develop international humanitarian law in this direction. [47]

3). 'Armed Forces' and 'Responsible Command'

Under customary international law, a member of an "armed force" is defined as including the army properly so called, including the militia, the national guards and other armed bodies which fulfill the following conditions: (a) that they are under the direction of a responsible command; (b) that they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps; (c) that they carry their arms openly.[48]

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[46] See Id at 19.

[47] See Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, The American University Law Review, 1983, 33 Am. U.L. Rev. 145, page 7.

[48] See Alex Obote Odora, *Africa at The Crossroads: Current Themes in African Law: Prosecution of War Crimes by the International Tribunal for Rwanda*, University of Miami International and Comparative Law Review, 10 U. Miami Int'l & Comp. L. Rev. 43, page 13.

The Third Geneva Convention defines members of the "armed forces" to include: members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteers corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly and (d) that of conducting their operations in accordance with the laws and customs of war.

Article 1 (1) of Additional Protocol II to the four 1949 Geneva Conventions defines "armed forces" to include the regular armed forces of a High Contracting Party, 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 Protocol II.[49]

D. IMPLEMENTATION OF COMMON ARTICLE 3 and PROTOCOL II GENEVA CONVENTION IN RWANDA AND YUGOSLAVIA CASES

1. Rwanda (International Criminal Tribunal for Rwanda - ICTR)

Article 4 of the Statute authorizes the Tribunal to prosecute persons who committed serious violations of Common Article 3, Additional Protocol II ("Protocol II"), and the four 1949 Geneva Conventions, in the Rwanda internal armed conflict that took place between January 1 and December 31 of 1994.[50]

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[49] See Id.

[50] See the complete text of Article 4 of the *Statute of International Criminal Tribunal for Rwanda*:
Violations of Article 3 Common to the Geneva Convention and of Additional Protocol II
The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
(a) Violence to life, health, and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;

In *Akayesu*[51], the Trial Chamber acknowledged the binding nature of the obligation, but focused upon customary international law as the source of this obligation rather than treaty law. With regards to Common Article 3 specifically, the Trial Chamber held that the "norms of Common Article 3 had acquired the status of customary law in that most states, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."[52] The ICTR jurisprudence is consistent with the view of the ICTY Trial Chambers and the ICTY Appeals Chambers stipulating that Common Article 3, beyond a doubt, form part of customary international law. [53]

In *Musema*[54], for instance, when dealing with the lack of definition of "armed conflict not of an international character," the Trial Chamber noted that the expression "armed conflict" introduces two important material conditions to be satisfied. First, the requirement of the existence of open hostilities between armed forces, which are organized to a greater or lesser degree. Second, the existence of situations in which hostilities break out between armed forces or organized armed groups within the territory of a single state.

In circumstances where the material requirements of applicability of Protocol II are met, it follows that those requirements also satisfy the threshold of the broader Common Article 3. The conditions to be met in order to satisfy the requirements of applicability of Protocol II at the time of the events alleged in Rwanda between January 1 and July 17 1994 are: first, that an armed conflict took place in Rwanda, between its armed forces and dissident armed forces or other armed groups and secondly, that the dissident armed forces or other organized armed groups were under responsible command, able to exercise such control over a part of their territory as to enable them

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(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
The passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

[51] See Prosecutor v. Akeyesu, Case No. ICTR-96-4-T, Judgment of 2 September 1998. 37 ILM 1399.
[52] See Id.
[53] See Id.
[54] See Prosecutor v. Musema, Case No. ICTR-96-13, Judgment of 27 January 2000.

to carry out sustained and concerted military operations, and able to implement Protocol II. The Protocol applies automatically as soon as the material conditions, as defined in Article 1 of Protocol II, are fulfilled.

Thus, it is reasonable to infer that in the Rwanda internal armed conflict and the killing of some Tutsi civilians by members or leaders of the Interahamwe, constitute a nexus between war crimes and internal armed conflict, and are therefore war crimes, while the killing of other Tutsi civilians may not constitute war crimes but crimes of genocide or crimes against humanity.[55]

2. Yugoslavia (International Criminal Tribunal for Former Yugoslavia – ICTY)

The most innovative development regarding the laws of internal armed conflict was brought about by the Appeal Chambers of the ICTY in Prosecutor v. Dusko Tadic (appeal on Jurisdiction) and particularly in that part of the judgment dealing with Article 3 of the Tribunal's Statute.[56]

The first is that an armed conflict (or a series of armed conflict) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words 'breach of the peace'. But even if it was considered merely as an 'internal armed conflict, it would still constitute a 'threat to the peace' according to the settled practice of the Security Council. [57]

The norms prohibiting them have a universal character, not simply a territorial one.[58]

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterized as 'ordinary crimes'. [59]

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[55] See Supra, Note 47.
[56] See Lindsay Moir, Supra, Note 31, at 135.
[57] See Id.
[58] See Id.
[59] See Id.

Appellant claim that the subject matter jurisdiction under article 2, 3, 5 of ICTY statute is limited to crimes committed in the context of international armed conflict. He claimed that the alleged crimes, even if proven, were committed in the context of an internal armed conflict[60]. An agreement reached on 22 May 1992 between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects. The parties concerned regarded the armed conflicts as internal, but in view of their magnitude, agreed to extend to them some provisions of the Geneva Conventions that are normally applicable in international armed conflicts only.[61]

As the International Court of Justice stated in Nicaragua case, article 1 of the four Geneva Conventions, whereby the contracting parties 'undertake to respect and ensure respect' for the Conventions 'in all circumstances', has become a 'general principle' of humanitarian law to which the Conventions merely give specific expression (Nicaragua v. US) (Merits), 1986 I.C.J. Reports 14, at Para 220 (27 June).[62] Some requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3, it does not matter whether the 'serious violation' has occurred within the context of an international or an internal armed conflict.[63]

The emergence of international rules governing internal strife has occurred at two different levels: customary law and treaty law. Two bodies of rules have thus crystallized, which mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary international law.[64]

The international court of justice has confirmed that these rules reflect "elementary considerations of humanity' applicable under customary international law[65] to any armed conflict, whether it is of an internal or international character.[66] Common article 3 contains

[60] See International Criminal Tribunal for The Former Yugoslavia: Decision in Prosecutor v. Dusko Tadic, 34 I.L.M. 32 (1996) 2 October 1995 at The Hague, Para 65.
[61] See Id, Para 73.
[62] See Id, Para 93.
[63] See Id, Para 94.

[64] See Id, Para 98.
[65] Customary International Law : International law that derives from customary law and serves to supplement codified norms (Black's Law Dictionary, 7th edition, 1999).
[66] See ICTY Note 31 Para 218 in Nicaragua case.

not only the substantive rules governing internal armed conflict but also a procedural mechanism inviting parties to internal conflicts to agree to abide by the rest of the Geneva Conventions. As in the current conflicts...., parties to a number of internal armed conflicts have availed themselves of this procedure to bring the law of international armed conflicts into force with respect to their internal hostilities.[67] The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 Geneva Conventions and therefore is, and should be, a part of generally accepted customary law.[68]

The appeal chamber concludes that, under article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal of an international armed conflict.[69]

3. The Yugoslavia and Rwanda Statutes and Internal Atrocities

The Yugoslavia and Rwanda Statute, both constitute an extremely important development of international humanitarian law with regard to the criminal character of internal atrocities in Rwanda, and one may hope, in other conflicts as well. In contrast, Yugoslavia statute treats the ensemble of conflicts in the former Yugoslavia as international. The offenses listed in Articles 2 and 3 of the Yugoslavia Statute (grave breaches of the Geneva Conventions and violations of the laws or customs of war) indicate that the Security Council considered the armed conflicts in Yugoslavia as international (conflict). Treating the conflicts in Yugoslavia as international armed conflicts enhances the corpus of the applicable international humanitarian law and fully respects the principle of *nullum crimen sine lege*.[70]

Subject matter jurisdiction under the Rwanda statute encompasses three principal offenses. First, like the ICTY statute, the Rwanda statute grants the Tribunal the power to prosecute persons who have committed genocide, Second, power to prosecute

[67] See Id, Para 103.
[68] See Id, Para 117.
[69] See Id, Para 137.
[70] See Theodor Meron, *International Criminalization of Internal Atrocities*, American Journal of International Law (1995), page 301.

persons who have committed crime against humanity. The black letter of the statute itself gives the Tribunal competence over such crimes only when committed in international or internal armed conflict. The broad language of article 3 of the Rwanda statute both strengthens the precedent set by commentary to the Yugoslavia Statute and enhances the possibility of arguing in the future that crimes against humanity (in addition to genocide) can be committed even in peacetime.[71]

Clearly, crimes against humanity overlap to a considerable extent with the crime of genocide. Crimes against humanity are crimes under customary law. Genocide is a crime under both customary law and a treaty. The core prohibitions of crimes against humanity and the crime of genocide constitute jus cogens norms. [72]

In Rwanda circumstances, the crime of genocide and crimes against humanity appear to cover most of the murders that have been committed. Genocide, as we know, requires evidence of 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such.[73] Some killings and other violations might fall outside the specific offenses of the crime of genocide and crimes against humanity because of either of definitional difficulties or a failure to satisfy the burden of proof. Proof of systematic and deliberate planning, however, is not required to establish the violation of common Article 3 or Additional Protocol II.[74]

E. Applicability of Common Artikel 3 and Additional Protocol II to the Geneva Conventions to Internal and Horizontal Conflicts in Indonesia

Internal and horizontal conflicts in Indonesia, in this research, will be limited only to the conflicts in Kalimantan, Poso (Sulawesi), and Maluku, which qualify as internal and horizontal conflict. Conflict in Kalimantan is mainly conflict between ethnicities, meanwhile Poso and Maluku are mainly between religious groups. There is no clear evidence whether central or local government or military of Indonesia

[71] See Id, at 302.
[72] See Id, at 303.
[73] See Genocide Convention, See also Rwanda Statute.
[74] See Supra Note 68, at 303.

take part in those conflicts, however, based on field investigation conducted by researcher during 2000 – 2002 in three areas mentioned above, there was substantial ground that some of government officials took part in the conflicts. Nonetheless, the conflicts are largely a conflict among people or civilians.

Indonesia is a party to Geneva Convention[75], yet it has not ratified both of additional protocols to Geneva Convention. Does it mean Additional Protocol I and II simply not apply to internal and horizontal conflict in Indonesia? In determining whether Common Article 3 and Protocol II to Geneva Convention apply or not to the conflicts, the next tests highly likely would help us solving the problem: According to the definition of 'armed forces' provided in Geneva Convention[76], armed forces should meet the requirement as follows : (a) that they are under the direction of a responsible command; (b) that they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps; (c) that they carry their arms openly (d) that of conducting their operations in accordance with the laws and customs of war; (e) exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement Protocol II.

Do they operate under responsible command?

The ethnic conflict in Kalimantan, for sure, is not under responsible command. There is no 'the one and only commander'. Instead, there are a lot of groups who operating and attacking their enemies sporadically without any warrants nor command about when to start or finish the attack. Dayak ethnics consist of a lot of denominations as well as Madurese. They have no common bound except the overwhelming angriness to the opponent party.

The conflict in Poso, Sulawesi, seems to have the same condition. There is no responsible command. Muslim people in Poso at least have seven different mobs that run their groups individually without any coordination to the other groups. Christian people are the same. They do have a lot of groups scattered all around Poso and they

[75] Indonesia ratified Geneva Convention at 30 September 1958 (see http://www.icrc.org/Web/Eng/siteeng0.nsf/d268e7e7eea08ab74125675b00364294/f15b3c0ef9e0e637c1256b660059568f?OpenDocument)

[76] See page 765.

They do have a lot of groups scattered all around Poso and they seem do not recognize each other. Meanwhile, the parties in Maluku conflict are better organized rather than Kalimantan and Poso. However, they do not have responsible command as well.

Do the parties in conflict in Indonesia have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps ?

There is neither specific uniform nor emblem worn by the parties in Kalimantan, Poso, and Maluku. They simply recognize each other by the color of headbands tied in their heads. In Poso and Maluku, red headband is belong to Christian people and white headband belong to Muslim people. In Kalimantan, the way of enemy identification is somewhat vague, strange and irrational. An informant told that Dayak people could identify Madurese people not only by exercising their territory but also by sniffing one's body odor.

Do they carry their arm openly ?

In Kalimantan, both Dayaks and Madurese generally does not have a modern arm or weapon. They carry traditional arm such as knife, poisoned arrow, sword, and spear. In Poso, some groups have a modern arm such as M 16, and the other have not. In Maluku, some groups have modern arm and the other have not.

Do they operate in accordance with the laws and custom of war?

Apparently not. Most of the parties in conflict in three areas are less educated and certainly do not know the rule of law, more specifically humanitarian law. They do not obviously comply with national law as well. Presumably, they have no idea of exercising some codes of conduct. If any, most likely, they come from religious and local values they adhered to.

Do they exercise such control over a part of territory?

The answer for this question is somewhat vague. People in the conflict initially living together in the same territory. They are neighbor. The conflict does them apart into two or more groups who occupy a territory called later as 'our territory.'

Does the conflicts in Kalimantan, Sulawesi, and Maluku qualify as internal disturbances or civil war?

In accordance with ICRC definition, internal disturbances should fulfill some requirements as follows:

Mass arrest (2) a large number of persons detained for security reasons (3) administrative detention, especially for long period (4) probable ill-treatment, torture or material or psychological conditions of detention likely to be seriously prejudicial to the physical, mental or moral integrity of detainees; (5) maintaining detainees incommunicado for long periods; (6). Repressive measures taken against family members of persons having a close relationship with those deprived of their liberty mentioned above; (7) the suspension of fundamental judicial guarantees, either by the proclamation of a state of emergency or by a de facto situation; (8). large-scale measures restricting personal freedom such as relegation, exile, assigned residence, displacements; (9). allegations of forced disappearances; (10). increase in the number of acts of violence (such as sequestration and hostage-taking) which endanger defenseless persons or spread terror among the civilian population ? Inasmuch the internal conflicts in Indonesia are ethnic and religious conflict which unqualified to be treated as 'modern war', the attributes espoused to the war as well as internal disturbances are simply unrecognized, such as mass arrest, detainment, forced disappearance, The parties of the conflicts know only how to kill and retaliate (or vendetta) their enemies based on, sometimes, a minor information they got that their brother or member of their groups had been brutally killed, raped, wounded or tortured.

Is there a grave breaches or gross violation of human rights occurred in the conflicts, if yes, what kind of the breaches?

The grave breaches of human rights, which qualify as genocide and crime against humanity, enormously occurred in the conflict. For instance, in 26 December 1999, about a hundred of Muslim villager living in Popilo village, Halmahera, North Maluku were killed and burned inside the mosque of Al Muhajirin when escaping from hot pursuit of another group. In Sintuwulemba village, Poso about a hundred students as well as teacher of Walisongo Islamic boarding schools were heinously killed and drowned up into the river on 28 May 2000. In Ambon, the capital city of Maluku, Muslim and Christian people attacked each other, ended up with a number of mosques as well as churches razed to the ground.

F. Conclusion

Do Common Article 3 and Additional Protocol II apply to internal and horizontal conflict in Indonesia? I would say that they should apply to internal and horizontal conflict in Indonesia. I do not say 'must' apply because, for some extent, the provision of article 3 as well as Protocol II need to be further criticized for the following reasons:

Article 3 Common to the four 1949 Geneva Conventions (article 3) refers to, but does not actually define, "an armed conflict of a non-international character." In both fact and practice, article 3 is applicable to low intensity, open, and armed confrontations between relatively organized armed forces or armed groups occurring exclusively within the territory of a particular state. Thus, article 3 does not apply to a mere act of banditry or an unorganized and short-lived rebellion.

Typically, article 3 applies to armed clashes between governmental forces and organized dissidents. It also governs cases in which two or more armed factions within a country violently confront one another without the involvement of governmental forces. Examples of this type of confrontation include when an established government has dissolved or is too weak to intervene.

Protocol II applies to a non-international armed conflict "which takes place in the territory of a high Contracting Party between its armed forces and dissident armed forces or other organized armed groups." Protocol II does not alter article 3, but rather the two apply collectively and in conjunction with each other. In fact, the scope of Protocol II is within the broader scope of article 3.

Common Article 3 to Geneva Convention does not provide clear explanation regarding the scope and limitation of 'armed conflict not of an international character.' However, Protocol II, which is a supplement as well as a development of Common Article 3, provides a somewhat clear of scope and its limitations. The fact remain, however, that the protocol fails to provide guidance with respect to the main stumbling block of common article 3- namely the determination of whether an armed conflict not of an international character actually exists.

Additional Protocol II may contain a more concrete set of provisions outlining when an armed conflict comes within the scope of its terms, but the scope of Additional Protocol II is clearly narrower and more restrictive than that of common article 3. The conditions contained in Article 1 of the Protocol mean that it applies only to the most intense and large-scale conflicts.

Article 1 (1) of Protocol II asserts that this protocol shall apply to (1) all armed conflicts which are not covered by Article 1 of the Protocol Iand (2) 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, (3) under responsible command, (4) 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. In addition, this protocol shall not apply to internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Obviously, based on clear interpretation and limitation of the provisions in common article 3 and Additional Protocol II to Geneva Convention, the internal and horizontal conflict in Indonesia are not covered by them, therefore the alleged perpetrators of the conflicts are not subject to prosecute for violating such provisions. Moreover, Indonesia is not a state party to Additional Protocol II to Geneva Convention.

Nevertheless, the ruling in Yugoslavia (Tadic case) and Rwanda Tribunal (Akayesu and Musema) presented some finding that:

In *Akayesu* and *Musema*, the Trial Chamber acknowledged the binding nature of the obligation, but focused upon customary international law as the source of this obligation rather than treaty law. With regards to Common Article 3 specifically, the Trial Chamber held that the "norms of Common Article 3 had acquired the status of customary law in that most states, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. The ICTR jurisprudence is consistent with the view of the ICTY Trial Chambers and the ICTY Appeals Chambers stipulating that Common Article 3, beyond a doubt, form part of customary international law

In *Tadic* case, the appeal chamber held that an armed conflict (or a series of armed conflict) has been taking place in the territory of the former Yugoslavia since long before the decision of the Security Council to establish this International Tribunal. If it is considered an international armed conflict, there is no doubt that it falls within the literal sense of the words 'breach of the peace'. But even if it was considered merely as and internal armed conflict, it would still constitute a 'threat to the peace' according to the settled practice of the Security Council. The norms prohibiting them have a universal character, not simply a territorial one.

The appeal chamber of ICTY concludes that, under article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal of an international armed conflict.

Internal and horizontal conflict in Indonesia, in accordance with the ruling in Akayesu, Musema, and Tadic, are also have universal character since the crimes committed in the conflicts are 'international crime' such as genocide and crime against humanity. Genocide and crime against humanity, according to Brussels Principles[77] and Princeton Principles[78] are also a serious violations of human rights and international humanitarian law. Moreover, Genocide and crime against humanity in internal and horizontal conflicts in Indonesia are also real grave breaches breach and also threat of peace (as in Tadic), therefore, common article 3 as well as Additional Protocol II to Geneva Convention should apply to internal and horizontal conflict in Indonesia.

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Ringkasan Artikel

Konflik-konflik internal yang bersifat horizontal banyak terjadi di Indonesia seperti konflik antara penduduk yang beragama Islam dengan penduduk yang beragama Kristen, sebagaimana halnya yang terjadi di Maluku, Poso, atau konflik etnis yang terjadi antara suku Madura dan suku Dayak di Kalimantan, yang menimbulkan tidak saja banyak korban jiwa namun juga gelombang pengungsi internal. Berdasarkan Pasal 3 Konvensi Jenewa 1949 yang mengatur mengenai konflik yang bersifat non-internasional, maka kita dapat mengetahui bahwa pasal tersebut tidak memberikan penjelasan secara detail mengenai apa yang apa yang dimaksud dengan konflik yang bersifat non-internasional; demikian pula dengan siapa para pihak yang bersengketa di dalam konflik tersebut.

Adapun Protokol Tambahan II 1977 merupakan aturan pelengkap yang menyempurnakan ketentuan dalam Pasal 3 Konvensi Jenewa, yang mengatur tentang sengketa bersenjata non-internasional dan memberikan penjelasan detail mengenai ambang batas penerapannya; termasuk siapakah para pihak yang bersengketa, serta situasi-situasi yang bagaimanakah yang termasuk di dalam lingkup yurisdiksinya.

Walaupun demikian, Protokol Tambahan II tidak mengatur lebih jauh, terutama mengenai perang saudara yang memiliki spektrum yang lebih luas, serta mengeluarkan tipe konflik yang termasuk ketegangan dan kekerasan dalam negeri dari cakupannya.

Berdasarkan praktek-praktek negara, terutama dalam keputusan-keputusan Mahkamah ICTR dan ICTY, maka dapat ditemukan adanya pemberlakuan norma-norma dalam Pasal 3 Konvensi Jenewa 1949

serta Protokol Tambahan II dalam konflik yang terjadi di Rwanda dan negara bekas Yugoslavia. Putusan-putusan tersebut menegaskan bahwa sifat sebagai "hukum kebiasaan internasional" yang termuat dalam kedua instrumen hukum humaniter tersebut tetap mengikat kepada para pihak yang bersengketa dan merupakan norma-norma yang harus ditaati.

Dalam Kasus Musema misalnya, istilah 'sengketa bersenjata' dapat dikatakan telah ada jika telah terpenuhi dua syarat yakni adanya suatu pertempuran yang nyata antara Angkatan Bersenjata dengan pihak-pihak lainnya di suatu negara, yang memiliki struktur yang lebih rendah derajatnya; serta konflik tersebut terjadi di dalam wilayah suatu negara. Sementara dalam Kasus Tadic, telah terjadi suatu sengketa bersenjata yang bersifat non-internasional yang sifatnya, berdasarkan Resolusi Dewan Keamanan PBB, telah dianggap sebagai konflik yang dapat merupakan suatu ancaman terhadap perdamaian di kawasan tersebut, sehingga konflik itu tidak lagi dianggap hanya semata-mata berdasarkan kejadiannya di suatu wilayah/teritorial saja. Dalam hal ini konflik yang terjadi antara para pihak mencerminkan aspek-aspek internal, akan tetapi magnitudenya telah jauh melebih aspek-aspek konflik internal dan telah mencapai norma-norma yang telah ditentukan di dalam Konvensi Jenewa 1949 yang berlaku untuk konflik-konflik yang bersifat internasional. Sementara itu, dalam putusan Kasus Nicaragua, Mahkamah menyatakan bahwa norma-norma dalam Konvensi Jenewa 1949 telah menjadi prinsip-prinsip umum hukum humaniter dan berlaku pada semua pihak yang bersengketa, tidak peduli apakah hal tersebut berkenaan dengan konflik yang bersifat non-internasional ataukah internasional.

Dengan melihat beberapa keputusan mahkamah internasional di atas, maka kita dapat mengetahui bahwa putusan-putusan mahkamah tersebut mengukuhkan dan semakin menegaskan bahwa norma-norma yang terdapat di dalam Konvensi Jenewa 1949 merefleksikan norma-norma dasar kemanusiaan yang beraku berdasarkan hukum kebiasaan internasional pada setiap jenis konflik apapun. Adapun inti dari Protokol Tambahan II 1977 yang tentu saja juga merupakan penjabaran dari ketentuan Pasal 3, tentu saja harus dianggap sebagai bagian dari norma-norma yang umum berlaku sebagai suatu hukum kebiasaan internasional.

Akan tetapi, tinjauan dari sudut pandang yuridis formal, memang menggambarkan bahwa konflik-konflik internal yang terjadi di Indonesia tersebut, jilka ditinjau berdasarkan Konvensi Jenewa, memang belum memenuhi pesyaratan seperti unsur adanya seorang pimpinan yang bertanggung jawab terhadap anak buahnya; penggunaan seragam (walaupun dalam konflik internal yang bersifat horisontal tersebut telah digunakan ikat kepala merah dan putih untuk membedakan kelompok penduduk yang beragama Kristen dan Islam); demikian juga unsur penggunaan senjata secara terang-terangan (walaupun dalam kasus tersebut senjata yang digunakan adalah senjata tradisional). Namun, dilihat dari sudut pandang pelanggaran-pelanggaran hukum yang terjadi pada konflik-konflik yang telah dibahas, maka dapat dikatakan bahwa telah terjadi pelanggaran-pelanggaran Hak Asasi Manusia yang berat, yang dapat diklasifikasikan sebagai tindak pidana genosida dan tindaka pidana kejahatan terhadap kemanusiaan. Berdasarkan hal tersebut dan demikian juga dengan melihat putusan-putusan mahkamah internasiona mengenai konflik-konflik yang bersifat non-internasional, maka penulis ingin menyatakan bahwa ketentuan Pasal 3 Konvensi Jenewa 1949 maupun Protokol Tambahan II 1977 memang secara yuridis tidak dapat diberlakukan, namun seharusnya dapat berlaku dan diterapkan dalam konflik-konflik internal yang horisontal yang terjadi di Indonesia.