



## University of Baltimore Journal of International Law

Volume 1 *Reflections On International Responsibility*

Volume I

Article 5

2012-2013

2012

### “Injustice Anywhere is a Threat to Justice Everywhere” Internal vs. International Armed Conflicts: Should the Distinction be Eliminated?

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Available at: <http://scholarworks.law.ubalt.edu/ubjil/vol1/iss1/5>

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LAURA CHAFEY

**“Injustice Anywhere is a  
Threat to Justice Everywhere”<sup>1</sup>  
Internal vs. International Armed Conflicts:  
Should the Distinction be Eliminated?**

**ABSTRACT:**

This article discusses international humanitarian law, particularly the Geneva Conventions and its Additional Protocols. It analyzes the rights of protected persons under the Geneva Conventions, such as prisoners of war and civilians, as well as the obligations of States during armed conflicts. Furthermore, the article points out the flaws in the Geneva Conventions, such as the discrepancy between the obligations of States during an international armed conflict vs. during an internal armed conflicts. It argues that this distinction between international and internal armed conflicts should be

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<sup>1</sup> Dr. Martin Luther King, Jr., *Letter from Birmingham Jail*, April 16, 1963, available at [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html) (Applying Dr. King’s quote referring to the civil rights issues in the United States during the 1960s, to international humanitarian law issues occurring in various countries in the world. The full quote reads: “Moreover, I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly. Never again can we afford to live with the narrow, provincial "outside agitator" idea. Anyone who lives inside the United States can never be considered an outsider anywhere within its bounds.”).

eliminated and that States' obligations should be the same for both conflicts.

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## Introduction

The Geneva Conventions are international treaties that govern the conduct of warfare, particularly the treatment of the victims of war.<sup>1</sup> These Conventions distinguish international armed conflicts from non-international armed conflicts, which is the cause of great concern in the field of international humanitarian law.<sup>2</sup> The law that governs non-international armed conflicts, Common Article 3<sup>3</sup> and Additional Protocol II,<sup>4</sup> affords significantly less protections for the victims of war and

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<sup>1</sup> Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

<sup>2</sup> See *Geneva Convention I supra* note 2; Geneva Convention II *supra* note 2; Geneva Convention III *supra* note 2; Geneva Convention IV *supra* note 2.

<sup>3</sup> Geneva Convention I, *supra* note 2, art. 3, 6 U.S.T. at 3116, 3118, 75 U.N.T.S. at 32, 34; Geneva Convention II, *supra* note 2, art. 3, 6 U.S.T. at 3220, 3222, 75 U.N.T.S. at 86, 88; Geneva Convention III, *supra* note 2, art. 3, 6 U.S.T. at 3318, 3320, 75 U.N.T.S. at 136, 138; Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 3, 6 U.S.T. at 3516, 75 U.N.T.S. at 287 [hereinafter Common Article 3].

<sup>4</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 4(2) (*adopted* June 8, 1977), 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

fails to provide for any enforcement mechanisms. However, victims of international armed conflicts receive an array of protections, and if grave breaches of these protections occur, states are obligated to prosecute such violations.<sup>5</sup>

This distinction of internal and international armed conflicts results in a discrepancy in protections and prohibited acts, based on where the armed conflict occurs. The resolution of such problem is to eliminate the distinction and apply the laws of international armed conflicts to all armed conflicts, regardless of where the conflicts occur. One should not receive less protection from the scourge of war, and one should not have impunity from heinous war crimes, simply because of the borders they are within. These injustices inherent in internal armed conflicts are threats to justice and peace in the international community. As such, internal conflicts should be treated as international conflicts.

## **I. Background: International Humanitarian Law**

International humanitarian law is simply the law of war.<sup>6</sup> Although in war there seems to be the absence of law and only chaos, there are treaties<sup>7</sup> and customary law<sup>8</sup> that

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<sup>5</sup> Geneva Convention I, *supra* note 2, art. 49, U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 2, art 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 2, art 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 2, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

<sup>6</sup> BARRY E. CARTER ET AL., INTERNATIONAL LAW 1033 (6th ed. 2011).

<sup>7</sup> For example the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW) or the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on

govern the conduct of warfare. Even in ancient Greek mythology there was a distinction between Ares, the god of mere violence, and Athena, the Goddess of warfare, in which warfare was understood “as an organized, disciplined, rationally conducted collective activity.”<sup>9</sup> Therefore, this idea that warfare should be restrained by law is ancient.

The laws of war originate in the *just war theory* developed by the great thinkers of our past, Saint Augustine (354-430) and Saint Thomas Aquinas (1225-1274).<sup>10</sup> The *just war theory* distinguishes between the justice of war, *jus ad bellum*, and the justice in war, *jus in bello*.<sup>11</sup> *Jus ad bellum* determines when resort to war is just and unjust.<sup>12</sup> Historically, a just war required that the cause be just, that war be the last resort, that it be authorized by a lawful government, that the violence be proportional to the cause, that the war be fought with rightful intention rather than a mere pretext, and that the war carry a possibility of

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Their Destruction (Ottawa Treaty) are examples of these types of treaties. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *open for signature* Dec. 3, 1977, 2056 U.N.T.S. 211; Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons which may be deemed Excessively Injurious or to have Indiscriminate Effects, *open for signature* Apr. 10 1981, 1342 U.N.T.S. 137.

<sup>8</sup> DAVID LUBAN ET AL., INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW 1039 (2010) (stating that the four bedrock principles of the rules of warfare are noncombatant immunity, proportionality, necessity, and no unnecessary suffering).

<sup>9</sup> STEVEN C. NEFF, WAR AND LAW OF NATIONS: A GENERAL HISTORY 16 (2005).

<sup>10</sup> GREGORY M. REICHBERG ET AL., THE ETHICS OF WAR: CLASSIC AND CONTEMPORARY READINGS (2006).

<sup>11</sup> LUBAN, *supra* note 9, at 1039.

<sup>12</sup> *Id.*

success.<sup>13</sup> Since World War II, *jus ad bellum* is governed by the United Nations (UN) Charter, Article 2(4), which bans “the threat or use of force against the territorial integrity or political independence of any state.”<sup>14</sup> However, there are exceptions to Article 2(4), which allow war in cases of self-defense (Article 51) or when the UN Security Council authorizes it, provided they find a threat to or breach of international peace and security (Article 42).<sup>15</sup>

*Jus in bello*, on the other hand, determines whether combatants are fighting justly or unjustly.<sup>16</sup> There are four main principles that govern *jus in bello*: The principle of distinction, the principle of proportionality, the principle of necessity, and the principle to avoid unnecessary suffering.<sup>17</sup> The principle of distinction, or noncombatant immunity, distinguishes between civilians and combatants, in that combatants may be directly attacked, whereas civilians may not.<sup>18</sup> However, civilians are only protected against direct attack “unless and for such time as they take direct part in hostilities.”<sup>19</sup> In addition, combatants that have surrendered or become *hors de combat* (outside of combat), because of wounds or disease, are also protected from direct attacks.<sup>20</sup>

It is inevitable that some civilians will become collateral damage and be killed during war. However,

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<sup>13</sup> *Id.*

<sup>14</sup> U.N. Charter, art. 2, para. 4; LUBAN, *supra* note 9, at 1040.

<sup>15</sup> *Id.* at arts. 42, 51.

<sup>16</sup> LUBAN, *supra* note 9, at 1040.

<sup>17</sup> LUBAN, *supra* note 9, at 1040-42.

<sup>18</sup> *Id.* at 1041 (citing J.I. HENCKAERTS ET AL., CUSTOMARY INTERNATIONAL LAW OF WAR 3 (2005)).

<sup>19</sup> *Id.* (citing J.I. HENCKAERTS ET AL., CUSTOMARY INTERNATIONAL LAW OF WAR 3 (2005)).

<sup>20</sup> *Id.* at 1040.

collateral damage is permitted provided it is unintentional and is proportional to the military goals of such attack.<sup>21</sup> This is known as the principle of proportionality.<sup>22</sup> The next principle is the principle of necessity, which states that no violence is permitted unless militarily necessary, that is, unless it contributes to overcoming the enemy.<sup>23</sup> Lastly, there is a principle to avoid any unnecessary suffering, which states that no violence is permitted that would inflict suffering for its own sake.<sup>24</sup> The result of combatants complying with these *jus in bello* principles is that they receive belligerent privilege or immunity, and they will not incur criminal liability for killing or injuring the enemy, or even collateral damage, provided it was proportionate.<sup>25</sup>

Today, international humanitarian law is primarily governed by “Hague law” and “Geneva law,” as well as numerous treaties on specific subjects, such as prohibited weapons.<sup>26</sup> The International Committee of the Red Cross (ICRC) has been essential in the creation and maintenance of international humanitarian law. The ICRC was founded in 1859, when a Swiss businessman, Henri Dunant, visited a battlefield after the Battle of Solferino during the Second War of Italian Independence.<sup>27</sup> Appalled by the conditions of the wounded and dying men abandoned on the field and moaning in pain, Dunant founded the ICRC to aid and assist the victims of war.<sup>28</sup> In addition, the ICRC lobbied states to negotiate treaties regulating the conduct of war.<sup>29</sup> As a result, various states met at The Hague in 1899, and

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<sup>21</sup> *Id.* at 1041.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 1041-42.

<sup>26</sup> *Id.* at 1043

<sup>27</sup> *Id.* at 1042.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

again in 1907, to adopt The Hague Conventions, which codified the rules of war and most importantly, established the principle that the right of combatants to injury the enemy is not unlimited.<sup>30</sup> These conventions are often referred to as “Hague law.”<sup>31</sup> In 1949, again with the help of the ICRC, the Geneva Conventions were adopted to further specify the rules of war.<sup>32</sup> Since then, the ICRC has become a major interpreter of international humanitarian law and its commentaries on the Geneva Conventions have “semi-official standing.”<sup>33</sup> The Geneva Conventions were a significant development in the field of international humanitarian law.

## II. The Geneva Conventions

After World War II, states met in Geneva, Switzerland and adopted the four Geneva Conventions of 1949.<sup>34</sup> These Conventions regulate the treatment of “protected persons,” which are civilians and *hors de combat*, such as prisoners of war or sick and wounded combatants.<sup>35</sup> The first Geneva Convention deals with wounded and sick soldiers in the field, while the second deals with the wounded, sick, and shipwrecked at sea.<sup>36</sup> The third deals with the treatment of prisoners of war (POWs) and the fourth with the protection of civilians.<sup>37</sup>

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<sup>30</sup> *Id.* at 1043.

<sup>31</sup> *Id.* at 1043.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Geneva Convention I, *supra* note 2; Geneva Convention II, *supra* note 2; Geneva Convention III, *supra* note 2; Geneva Convention IV, *supra* note 2.

<sup>36</sup> *See* Geneva Convention I, *supra* note 2; Geneva Convention II, *supra* note 2.

<sup>37</sup> *See* Geneva Convention III, *supra* note 2; Geneva Convention IV, *supra* note 2.

The Geneva Conventions also distinguish between international armed conflicts and armed conflicts not of an international character, non-international or internal armed conflicts.<sup>38</sup> Article 3, common to all Geneva Conventions, is the only provision that applies in non-international armed conflicts, whereas the rest of the provisions apply to international armed conflicts.<sup>39</sup> In 1977, two additional protocols were adopted to supplement the Geneva Conventions and expand the protections of the victims of war.<sup>40</sup> These protocols also distinguished between international and non-international armed conflicts – Additional Protocol I only applied to international armed conflicts while Additional Protocol II only applied to non-international armed conflicts.<sup>41</sup>

Because the applicability of the Geneva Conventions depends on the type of armed conflict, it is important to note when an armed conflict is international and when it is non-international. An “international” armed conflict requires that two or more states be involved in the armed conflict.<sup>42</sup> In the reverse, a “non-international” armed conflict is an armed conflict that is not between two states, that is to say, an armed conflict within a state, such as a civil war or insurgency.<sup>43</sup> This distinction is significant because there are far more protections for those in international armed conflicts.

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<sup>38</sup> See *Geneva Convention I supra* note 2; *Geneva Convention II supra* note 2; *Geneva Convention III supra* note 2; *Geneva Convention IV supra* note 2.

<sup>39</sup> Common Article 3, *supra* note 4.

<sup>40</sup> LUBAN, *supra* note 9, at 1043.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1044 & n. 3.

<sup>43</sup> *Id.* at 1060.

## A. “Grave Breaches”

The rules in the Geneva Conventions for international armed conflicts are extensive and complex, and therefore, our focus will only be on the violations that amount to grave breaches. “Grave breaches” are the most serious war crimes and core violations common to all four Geneva Conventions.<sup>44</sup> The grave breaches are, “any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health.”<sup>45</sup> Geneva Conventions I, II, and IV also add “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”<sup>46</sup> to the list of grave breaches. Other grave breaches include compelling prisoners of war (Geneva Convention III) or protected persons (Geneva Convention IV) to serve in the forces of a hostile power, and willfully depriving prisoners of war (Geneva Convention III) or protected persons (Geneva Convention IV) of their rights to a fair and regular trial.<sup>47</sup> Geneva Convention IV further declares that unlawful deportation or confinement of a

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<sup>44</sup> *Id.* at 1047.

<sup>45</sup> Geneva Convention I, *supra* note 2, art. 50, 6 U.S.T. at 3196, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 2, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 2, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Geneva Convention IV, *supra* note 2, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

<sup>46</sup> Geneva Convention I, *supra* note 2, art. 50, 6 U.S.T. at 3196, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 2, art. 51, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention IV, *supra* note 2, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

<sup>47</sup> Geneva Convention III, *supra* note 2, art. 130, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Geneva Convention IV, *supra* note 2, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

protected person, and taking hostages are grave breaches as well.<sup>48</sup>

Each state is required to criminalize grave breaches of the Geneva Conventions domestically, giving states universal jurisdiction over these specific violations.<sup>49</sup> States must “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.”<sup>50</sup> In addition, each state has an “obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” or “hand such persons over for trial to another High Contracting Party.”<sup>51</sup> This concept is also known as the “try or extradite” principle or *aut dedere aut judicare*.<sup>52</sup> Furthermore, all Geneva Conventions provide that no state party can be absolved of any liability incurred in regards to these grave breaches, meaning that no amnesties may be granted.<sup>53</sup>

Additional Protocol I to the Geneva Conventions not only expanded the protections applicable in international armed conflict, but also expanded the list of

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<sup>48</sup> Geneva Convention IV, *supra* note 2, art. 147, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

<sup>49</sup> See *Geneva Convention I supra* note 2; Geneva Convention II *supra* note 2; Geneva Convention III *supra* note 2; Geneva Convention IV *supra* note 2.

<sup>50</sup> See *Geneva Convention I supra* note 2; Geneva Convention II *supra* note 2; Geneva Convention III *supra* note 2; Geneva Convention IV *supra* note 2.

<sup>51</sup> See *Geneva Convention I supra* note 2; Geneva Convention II *supra* note 2; Geneva Convention III *supra* note 2; Geneva Convention IV *supra* note 2.

<sup>52</sup> CARTER, *supra* note 7, at 1120.

<sup>53</sup> *Id.* at 1117.

“grave breaches” that give rise to universal jurisdiction.<sup>54</sup> For example, Additional Protocol I added to the list of grave breaches prohibitions of acts, such as: making protected persons the object of attack, perfidious use of the red cross emblem, unjustifiable delay in repatriation of protected persons, apartheid and other inhuman and degrading practices involving outrages upon personal dignity, attacks on historic monuments, works of art, or places of worship.<sup>55</sup> In addition, Additional Protocol I states, “[a]ny willful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends...shall be a grave breach of this Protocol.”<sup>56</sup> While all provisions in the Geneva Conventions apply to international armed conflicts, only one article in the Geneva Conventions applies to non-international armed conflicts; Article 3.<sup>57</sup>

### **B. Common Article 3**

Article 3, common to all four Geneva Conventions, is specifically concerned with armed conflicts *not* of an international character, and is the only provision in the Conventions related to such internal conflicts.<sup>58</sup> Common Article 3 provides:

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<sup>54</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted by* June 8, 1977, 1125 U.N.T.S. 3, 41-42 [hereinafter Additional Protocol I].

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at art. 11, para. 4.

<sup>57</sup> Common Article 3, *supra* note 4.

<sup>58</sup> Anthony Cullen, *The Parameters of Internal Armed Conflict in International humanitarian law*, 12 U. MIAMI INT’L & COMP. L. REV. 189, 193 (2004).

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 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 endeavour 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.<sup>59</sup>

These protections are significantly less protective than those protections given in an international armed conflict. However, states attempted to fix this issue by adopting Additional Protocol II in 1977.<sup>60</sup>

### **C. Additional Protocol II**

Similar to Common Article 3, the Additional Protocol II to the Geneva Conventions only applies to armed conflicts of non-international character.<sup>61</sup> Additional Protocol II was intended to supplement Common Article 3 and advance the protections of persons

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<sup>59</sup> Common Article 3, *supra* note 4.

<sup>60</sup> Cullen, *supra* note 59, at 199.

<sup>61</sup> Charles Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and other Human Rights Instruments*, 33 AM. U. L. REV. 9, 25 (1983).

taking no active part in hostilities.<sup>62</sup> Additional Protocol II includes all of the Common Article 3 protections and adds: order that there shall be no survivors, violence to the health and physical or mental well-being of persons, corporal punishment, collective punishments, acts of terrorism, rape, enforced prostitution, indecent assault, slavery, slave trade, pillage, and threats to commit any of the foregoing acts, to the list of prohibited acts towards protected persons.<sup>63</sup>

Children receive special protections in Protocol II, whereas they did not in Common Article 3. Although children may have fallen under Common Article 3 protections as persons taking no active part in hostilities, Additional Protocol II extends protections specifically for children and creates affirmative obligations regarding the treatment of children.<sup>64</sup> For example, children under the age of fifteen years shall not be recruited in the armed forces or groups, and should they take part in hostilities and are captured, children under the age of fifteen are still afforded special protection.<sup>65</sup> Also, those facing punishment of criminal offenses related to the armed conflict under the age of eighteen at the time of the offense shall not be given the death penalty.<sup>66</sup> Additionally, there are affirmative obligations to: provide children with care and aid, facilitate the reunion of families temporarily separated, and to remove children temporarily from areas where hostilities are taking place to a safer area.<sup>67</sup>

Those, whose liberty has been restricted, such as people interned or detained, also receive more protections

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<sup>62</sup> *Id.*

<sup>63</sup> Additional Protocol II, *supra* note 5, at art. 4(2).

<sup>64</sup> *Id.* at art. 4(3)(c)-(d).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at art. 6(4).

<sup>67</sup> *Id.* at art. 4(3)(b),(e).

under Additional Protocol II.<sup>68</sup> These protected persons shall “be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigors of the climate and the dangers of the armed conflict . . . allowed to practi[c]e their religion . . . if made to work, have the benefit of working conditions and safeguards . . . allowed to send and receive letters and cards . . . have the benefit of medical examinations,” among other protections.<sup>69</sup> Additional Protocol II also expanded upon the safeguards required during prosecutions and punishment of criminal offenses related to the armed conflict, and encourages authorities in power at the end of hostilities to “grant the broadest possible amnesty to persons who have participated in the armed conflict.”<sup>70</sup>

The most important advances of Additional Protocol II are the specific protections for civilian populations. Generally, civilian populations shall not be the object of attack, and “[a]cts or threats of violence[,] the primary purpose of which is to spread terror among the civilian population[,] are prohibited.”<sup>71</sup> Starvation of civilians as a weapon of war is prohibited. As such, it is prohibited to “attack, destroy, remove or render useless for that purpose, objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.”<sup>72</sup> Attacks against “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples . . .” are prohibited.<sup>73</sup> Displacement of civilian

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<sup>68</sup> *Id.* at art. 5(1)-(2).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at art. 6.

<sup>71</sup> *Id.* at art. 13(2).

<sup>72</sup> *Id.* at art. 14.

<sup>73</sup> *Id.* at art. 16.

populations shall not be ordered, unless the civilians' security is at risk or military necessity demands it, and in such case, conditions of shelter, hygiene, health, safety and nutrition must be satisfactory.<sup>74</sup> Additionally, the protection and care for the wounded, sick and shipwrecked, as well as medical and religious personnel, was also extended in Additional Protocol II.<sup>75</sup> Although Additional Protocol II expanded protections afforded in non-international conflicts, there are still many issues with international humanitarian law in non-international armed conflicts.

### **III. The Problem: International Humanitarian Law in Non-international Armed Conflicts**

The distinction between international and non-international armed conflicts in international humanitarian law is a growing problem. Steven Solomon, the Principal Legal Officer of the World Health Organization, agrees. He says, “[s]imply put, conduct which was prohibited in international warfare was not specifically prohibited in internal warfare. There was, in a word, a gap in the law and, consequently, a gap in the protections available for those caught up in non-international armed conflicts.”<sup>76</sup> One of the problems with international humanitarian law for non-international armed conflicts is the difficulty of the applying Common Article 3 and Additional Protocol II.<sup>77</sup> Another problem is that protected persons, particularly combatants that are captured, in non-international armed

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<sup>74</sup> *Id.* at art. 17.

<sup>75</sup> *Id.* at arts. 7-12.

<sup>76</sup> Steven Solomon, *Internal Conflicts: Dilemmas and Developments*, 38 GEO. WASH. INT’L L. REV. 579, 580 (2006).

<sup>77</sup> Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 67 (2005).

conflicts receive fewer protections than those of international armed conflicts.<sup>78</sup> But the most significant problem is the lack of enforcement mechanisms in international humanitarian law for non-international armed conflicts.<sup>79</sup>

### **A. The Applicability of Common Article 3 and Additional Protocol II**

It is difficult to determine exactly when Common Article 3 applies to a situation. Common Article 3 does not set out any standards to determine when an internal armed conflict is occurring and therefore there are no standards determining its applicability. This is an issue because the recognition of the existence of an armed conflict is then left to the discretion of the state hosting the conflict.<sup>80</sup> Therefore, the implementation of Common Article 3 is based on the willingness of that state to recognize the armed conflict. Should the state refuse to recognize the armed conflict, it avoids application of Common Article 3.<sup>81</sup> Thus, the problem is that “[i]ndividual states are . . . left with a *carte blanche* to decide when . . . [C]ommon Article 3 should be invoked.”<sup>82</sup> States are unlikely to recognize an armed conflict because it would limit the use of repressive measures in which the state could employ to

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<sup>78</sup> Laura Lopez, *Uncivil Wars: The Challenge of Applying International Humanitarian Law to Internal Armed Conflicts*, 69 N.Y.U. L. REV. 916, 933-36 (1994).

<sup>79</sup> Lysaght, *supra* note 62, at 27.

<sup>80</sup> Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, *supra* note 59, at 198.

<sup>81</sup> Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, *supra* note 78, at 108.

<sup>82</sup> *Id.* at 97.

suppress such conflict.<sup>83</sup> This results in Common Article 3 not applying in many situations in which it should.

Although Additional Protocol II has more protections than Common Article 3, as previously discussed, its application is much more limited than that of Common Article 3.<sup>84</sup> Additional Protocol II is limited to armed conflicts between High Contracting Parties' armed forces and "dissent 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."<sup>85</sup> There is no language in Common Article 3 stipulating as to the type of armed forces required for its application—it only requires that there simply be an "armed conflict" within the territory of a High Contracting Party.<sup>86</sup> Furthermore, Additional Protocol II "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."<sup>87</sup>

In *Prosecutor v. Tadić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined armed conflict, with regard to internal armed conflicts, as "protracted armed violence between governmental authorities and *organized armed groups* or between such groups within a State."<sup>88</sup> Therefore, there is a higher

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<sup>83</sup> Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, *supra* note 59, at 197.

<sup>84</sup> Lysaght, *supra* note 62, at 22.

<sup>85</sup> Additional Protocol II, *supra* note 5, at art. 1(1).

<sup>86</sup> Common Article 3, *supra* note 4.

<sup>87</sup> Additional Protocol II, *supra* note 5, at art. 1(2).

<sup>88</sup> *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) (emphasis added).

threshold to trigger the application of Additional Protocol II than there is for Common Article 3. Not only must the armed groups be “organized,” but they must be “under responsible command” and “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.”<sup>89</sup> Therefore, not all cases of non-international armed conflicts will be covered by Additional Protocol II. For example, Additional Protocol II will “probably not operate in a civil war until the rebels [are] well established and [have] set up some form of *de facto* government.”<sup>90</sup> In addition, only 166 countries are state parties to Additional Protocol II, compared to the 194 state-parties to the Geneva Conventions; therefore, the Additional Protocol II applies in fewer states than the Geneva Conventions.<sup>91</sup> The inability to trigger the application of these instruments leaves victims of non-international armed conflicts without protection.

## **B. No Status for Combatants**

Even when Common Article 3 and Additional Protocol II are triggered, combatants in non-international armed conflicts do not receive as much protections as combatants in international armed conflicts. Unlike combatants in international armed conflicts, combatants in non-international armed conflicts do not receive belligerent privilege or immunity, nor do they receive prisoner of war

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<sup>89</sup> Additional Protocol II, *supra* note 5, at art. 1(1).

<sup>90</sup> LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 66-67 (1999).

<sup>91</sup> International Commission of the Red Cross (ICRC), *The Geneva Conventions of 1949 and their Additional Protocols*, ICRC (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> and <http://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument>.

(POW) status if captured.<sup>92</sup> This refusal to recognize such a status for combatants in internal armed conflicts is exemplified by the provision in Common Article 3 declaring that it “shall not affect the legal status of the Parties to the conflict.”<sup>93</sup> The ICRC, commenting on this provision, confirms the lack of status for combatants of non-international armed conflicts, stating that “the Article does not give [the adverse party] any right to special protection or any immunity, whatever it may be and whatever title it may give itself or claim.”<sup>94</sup> As you may recall, belligerent privilege or immunity means that the combatant may not be held criminally liable for killing or injuring the enemy during an armed conflict, but can only be held accountable for gross violations of international humanitarian law.<sup>95</sup> Without such belligerent immunity, combatants in internal armed conflicts may be prosecuted and punished for violating any national laws during the conflict, unlike combatants in international armed conflicts.<sup>96</sup> Common Article 3 does not affect the legal or political treatment that the combatant may receive as a result of his behavior, that is, the article doesn’t affect the state’s right to prosecute, try and sentence adverse combatants for their crimes, according to its national laws.<sup>97</sup>

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<sup>92</sup> Lopez, *supra* note 79, at 933-34; *see also* Lysaght, *supra* note 62, at 21.

<sup>93</sup> Common Article 3, *supra* note 4.

<sup>94</sup> International Committee of the Red Cross (ICRC), Commentary on Art. 3 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, (Aug. 12, 1949), <http://www.icrc.org/ihl.nsf/COM/380-600006?OpenDocument>.

<sup>95</sup> LUBAN, *supra* note 9, at 1042.

<sup>96</sup> Cullen, *supra* note 78, at 86.

<sup>97</sup> Commentary on Art. 3 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, *supra* note 95.

In addition to not receiving belligerent immunity, combatants in non-international armed conflicts are not extended POW status if captured during the conflict.<sup>98</sup> Whereas all of the protections in the Geneva Convention III regarding the treatment of POWs apply to captured combatants of international armed conflicts, none of these protections are afforded to combatants captured in internal armed conflicts.<sup>99</sup> For example, POWs must be detained under special conditions and at the end of the conflict POWs must be repatriated, whereas captured combatants in non-international armed conflicts are not required to be repatriated after the conflict.<sup>100</sup>

In *Hamdan v. Rumsfeld*, the Supreme Court of the United States discussed which Geneva Convention protections applied to Hamdan, who was captured in 2001 during hostilities in Afghanistan.<sup>101</sup> The Court found the conflict to which Hamdan was involved to be “not of an international character” because this particular incident involved al Qaeda, a non-state actor, rather than the armed forces of Afghanistan, which would have made the conflict an international one.<sup>102</sup> Thus, the Court found that Common Article 3 applied to the situation. However, the Court noted that the article provides less protection for Hamdan than the rest of the Geneva Conventions, stating, “Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a non-signatory who are involved in a

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<sup>98</sup> Lopez, *supra* note 79, at 933-34.

<sup>99</sup> See Geneva Convention III, *supra* note 2 (listing the rights and protections of POWs captured in international armed conflicts).

<sup>100</sup> Roy S. Schndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT’L L. & POL. 1, 70 (2004).

<sup>101</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

<sup>102</sup> *Id.* at 629.

conflict ‘in the territory of’ a signatory.’”<sup>103</sup> The case focused specifically on the judicial proceedings and guarantees required by Common Article 3. Common Article 3(1)(d) prohibits “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.”<sup>104</sup> Although Common Article 3 does not define the terms of this requirement, the Court understood the requirement to mean “at least *the barest* of those trial protections that have been recognized by customary law.”<sup>105</sup> The Court in the *Hamdan* case continued, saying that, “Common Article 3 obviously tolerates a great degree of flexibility in trying individuals captured during armed conflict; its requirements are general ones.”<sup>106</sup> The *Hamdan* case exemplifies the lack of protection, particularly judicial guarantees, provided to captured combatants in non-international armed conflicts. Captured combatants in non-international armed conflicts are also at a higher risk of harsh treatment while detained. Captured combatants in non-international armed conflicts are protected from “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture . . . outrages upon personal dignity, in particular, humiliating and degrading treatment” under Common Article 3.<sup>107</sup> However, POWs in an international conflict are protected from “willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health” under Article 130 and from “[a]ny unlawful act or omission by the Detaining Power causing death or

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<sup>103</sup> *Id.* at 630.

<sup>104</sup> Common Article 3, *supra* note 4.

<sup>105</sup> *Hamdan*, 548 U.S. 557 at 633 (emphasis added).

<sup>106</sup> *Id.* at 635.

<sup>107</sup> Common Article 3, *supra* note 4.

seriously endangering the health of a prisoner of war in its custody . . . physical mutilation or medical or scientific experiments of any kind . . . acts of violence or intimidation and against insults and public curiosity . . . [and] measures of reprisal against prisoners of war” under Article 13 of the Geneva Convention III, regarding the treatment of POWs.<sup>108</sup> POWs in international conflicts receive extensive protections compared to combatants of non-international conflicts. As such, even omissions that could endanger the health of POWs and acts of intimidation are violations of the Geneva Conventions.<sup>109</sup> In addition, the ICRC has permission to visit POWs in international conflicts to ensure compliance, whereas in non-international conflicts, the ICRC can merely offer its services, which can be rejected by the host state.<sup>110</sup>

This lack of status for combatants in non-international armed conflicts is an issue because these combatants receive all the burdens of being a combatant without any of the benefits of being a combatant. The burden is that these combatants do not receive civilian status and therefore may be directly targeted.<sup>111</sup> But these same combatants are still not given the benefit of POW status and all the protections that follow such status if captured. Therefore, combatants in non-international armed conflicts have no incentive to abide by the rules of war; they are neither protected nor restrained.<sup>112</sup>

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<sup>108</sup> Geneva Convention III, *supra* note 2, at art. 130.

<sup>109</sup> *Id.*

<sup>110</sup> Common Article 3, *supra* note 4.

<sup>111</sup> Common Article 3, *supra* note 4; LUBAN, *supra* note 9, at 1040-41 (citing J.I. HENCKAERTS ET AL., CUSTOMARY INTERNATIONAL LAW OF WAR 3 (2005)).

<sup>112</sup> Lopez, *supra* note 79, at 934.

### C. Failure to Enforce

The most significant failure of Common Article 3 and Additional Protocol II is that they lack an enforcement clause. While the Geneva Conventions for international armed conflicts require states to “enact any legislation necessary to provide effective penal sanctions” and “bring such persons, regardless of their nationality, before its own courts” or “hand such persons over for trial to another,” neither Common Article 3 nor Additional Protocol II call for such action in non-international armed conflicts.<sup>113</sup> Thus, states are not required to prosecute war criminals in non-international armed conflicts, like they are required to in international armed conflict. In fact, there is not even an article stating that parties shall ensure the observance of Common Article 3 or Additional Protocol II.<sup>114</sup> However, all Geneva Conventions include an article that requires state parties to “undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>115</sup> On the contrary, Common Article 3 states that it “shall not affect the legal status of the Parties to the conflict.”<sup>116</sup> ICRC commentary suggests that this provision means that Common Article 3 “is in no way concerned with the internal affairs of States” and “does not limit in any way the Government’s right to suppress a rebellion using all the means – including arms – provided for under its own

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<sup>113</sup> Geneva Convention I, *supra* note 2, art. 49, U.S.T. at 3146, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 2, art 50, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 2, art 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236; Geneva Convention IV, *supra* note 2, art. 146, 6 U.S.T. at 3616, 75 U.N.T.S. at 386.

<sup>114</sup> Lysaght, *supra* note 62, at 25.

<sup>115</sup> Geneva Convention I, *supra* note 2, at art. 1; Geneva Convention II, *supra* note 2, at art. 1; Geneva Convention III, *supra* note 2, at art. 1; Geneva Convention IV, *supra* note 2, at art. 1.

<sup>116</sup> Common Article 3, *supra* note 4.

laws.”<sup>117</sup> The result is that, not only are violators going unpunished, but also the parties are encouraged to engage in measures that violate international humanitarian law, thinking that they will not be held accountable.

The enforcement of Additional Protocol II is not any better than that of Common Article 3. Additional Protocol II not only promotes impunity with the lack of an enforcement provisions, but also encourages granting amnesty for criminal offenses related to the armed conflict. Article 6(5) of Additional Protocol II states that, “the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict.”<sup>118</sup> However, a state party in international armed conflicts is not allowed to absolve itself or any other state of any liability incurred for grave breaches, such as granting amnesty.<sup>119</sup> Furthermore, Additional Protocol II has an article dedicated specifically to the principle of non-intervention. Article 3 of Additional Protocol II declares: (1) Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State. (2) Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or

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<sup>117</sup> ICRC, *Commentary on the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, at 60-61 (Aug. 12 1949).

<sup>118</sup> Additional Protocol II, *supra* note 5, at art. 6(5).

<sup>119</sup> Geneva Convention I, *supra* note 2, art. 51, 6 U.S.T. at 3196, 75 U.N.T.S. at 62; Geneva Convention II, *supra* note 2, art. 52, 6 U.S.T. at 3250, 75 U.N.T.S. at 116; Geneva Convention III, *supra* note 2, art. 131, 6 U.S.T. at 3420, 75 U.N.T.S. at 238; Geneva Convention IV, *supra* note 2, art. 148, 6 U.S.T. at 3618, 75 U.N.T.S. at 388.

external affairs of the High Contracting Party in the territory of which that conflict occurs.<sup>120</sup>

Thus, Additional Protocol II cannot be used as a pretext or justification to intervene in an internal armed conflict.<sup>121</sup> States are discouraged from prosecuting war criminals in internal armed conflicts and are prohibited from intervening to help the victims of internal armed conflicts.

#### **IV. Resolution: No Distinction**

In 1977, during the Diplomatic Conference which produced the Additional Protocols, Norway proposed that there should no longer be a distinction between international and non-international armed conflicts.<sup>122</sup> This proposal was based on the idea that “victims in all situations of armed conflict, whatever their nature, are subject to the same suffering and should be helped in the same way.”<sup>123</sup> From 1990 to 2000, there were fifty-three non-international conflicts and just three international armed conflicts.<sup>124</sup> There continues to be significantly more non-international armed conflicts in the world than there are international armed conflicts. So, today there are more victims of war with less protection than when the Geneva Conventions were created and when international armed conflicts were more prevalent. This result cannot possibly be the intent of international humanitarian law, or the intent of the states when they gathered at Geneva in 1949. The way to resolve this issue, as the Norwegians

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<sup>120</sup> Common Article 3, *supra* note 4.

<sup>121</sup> *Id.*

<sup>122</sup> Solomon, *supra* note 77, at 581.

<sup>123</sup> ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, at 1328 n. 31.

<sup>124</sup> Solomon, *supra* note 77, at 579.

proposed, is to no longer distinguish non-international from international armed conflicts.<sup>125</sup> International humanitarian law of international armed conflicts should then be applied to all armed conflicts, regardless of where the conflict occurs and by whom the conflict is fought.

How can the elimination of this distinction be effectuated? International law is created either by international conventions or treaties and international custom, a general practice accepted as law.<sup>126</sup> It is highly unlikely that states would agree to amend the Geneva Conventions or adopt a new instrument that would eliminate this distinction because such actions would threaten their sovereignty.<sup>127</sup> This is evidenced by the lack of signatories (including the United States) to Additional Protocol II, which sought to extend protections to victims of internal armed conflicts.<sup>128</sup> The Restatement (Third) of Foreign Relations Law defines customary international law as resulting “from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>129</sup> Although it is argued that Common Article 3 is considered customary international law, there is no evidence that the rest of the provisions in the Geneva Conventions—those applying to international conflicts—have been applied to internal armed conflicts. In order for the elimination of the distinction to become customary law, states must apply international humanitarian law of international conflicts to their internal conflicts in a

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<sup>125</sup> *Id.* at 581.

<sup>126</sup> Statute of the International Court of Justice, art. 38, para.1, available at [http://icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=ff1ae5b7c3b59702f0c5f132cc7cc2e1#CHAPTER\\_III](http://icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&PHPSESSID=ff1ae5b7c3b59702f0c5f132cc7cc2e1#CHAPTER_III).

<sup>127</sup> Lopez, *supra* note 79, at 950.

<sup>128</sup> *1949 Conventions & Additional Protocols*, *supra* note 92.

<sup>129</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

consistent way, and do this in the belief that they are legally obligated to.<sup>130</sup> However, states have been reluctant to take the steps necessary to effectuate the elimination of the distinction by way of custom. For example, in *Hamdan v. Rumsfeld*, the United States refused to give a combatant of a non-international conflict any more protections than what was required by Common Article 3.<sup>131</sup> So we must ask, is there a higher law that can govern this issue?

### **A. Saving *All* Victims from the Scourge of *All* Wars**

The United Nations (UN) Charter declared that the peoples of the UN are “determined to save succeeding generations from the scourge of war . . . and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>132</sup> Notice that in the UN Charter—which is arguably the constitution of the world and at the top of the hierarchy of international conventions—there is no distinction between international wars or non-international wars. Stated simply, the purpose of the UN is to save people from “the scourge of war” in general, implying all wars.<sup>133</sup>

The Charter goes on to reaffirm the “dignity and worth of the human person,” that is to say all people.<sup>134</sup> Additionally, the Charter notes the equality of “nations large and small,” further eliminating a distinction based on geography.<sup>135</sup> If the ultimate goal of all states in the world is to save all people from the scourge of all wars in all

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<sup>130</sup> *Id.*

<sup>131</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

<sup>132</sup> U.N. Charter pmb1.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

territories, why is there a difference in the protection of these people depending on the type of war or where it is fought? Logically, a distinction does not make sense.

Furthermore, Article 103 of the Charter states, “[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>136</sup>

Thus, the Charter trumps any treaty provisions inconsistent with its purpose and principles, such as Common Article 3 and Additional Protocol II, which claims there is a distinction between the international and internal wars, and the protections afforded in each.

## **B. Internal Conflicts *are* International Conflicts**

Another way to eliminate the distinction between international and internal armed conflict is through creative interpretation. The UN’s purpose is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”<sup>137</sup>

Under Chapter VII, the UN Security Council determines when a threat to or breach of international peace and security exists and then decides which measures to take, whether it involves armed force (Article 42) or not (Article 41).<sup>138</sup>

Throughout history, the Security Council has declared many internal conflicts as threats to and breaches of international peace, and continues to do so. In 1993, the Security Council, in response to the internal armed conflict

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<sup>136</sup> *Id.* at art. 103.

<sup>137</sup> *Id.* at art. 1.

<sup>138</sup> *Id.* at art. 39, 41-42.

occurring in Yugoslavia, adopted Resolutions 808 and 827, both “[d]etermining that this situation constitutes a threat to international peace and security.”<sup>139</sup> A year later, the Security Council adopted Resolution 955, declaring the internal conflict in Rwanda as constituting a threat to international peace and security.<sup>140</sup> The Security Council declared the internal conflict in Darfur, Sudan a threat to international peace and security in multiple resolutions.<sup>141</sup> And in 2011, the Security Council declared the internal conflict in Libya as constituting a threat to international peace and security through Resolution 1973.<sup>142</sup>

It is clear that internal conflicts can rise to the degree constituting a threat to international peace and security, calling for international measures to be taken. Therefore, it be said that such internal conflicts become international conflicts when they threaten or breach international peace and security. By threatening the peace and security of other states, internal conflicts become a problem for other states, thus becoming an international conflict. International humanitarian law of international conflicts can then be applied to the situation.

From the time that the Geneva Conventions were adopted in 1949 until the present, the world has become more globalized and states have increasingly become more interconnected and dependent upon each other. President Mohammed Bedjaoui in the advisory opinion on the

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<sup>139</sup> S.C. Res. 808, ¶ 7, U.N. Doc. S/RES/808 (Feb. 22, 1993); S.C. Res. 827, ¶ 4, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>140</sup> S.C. Res. 955, ¶ 5, U.N. Doc. S/RES/955 (Nov. 8, 1994).

<sup>141</sup> See S.C. Res. 1556, ¶ 21, U.N. Doc. S/RES/1556 (July 30, 2004); S.C. Res. 1564, ¶ 14, U.N. Doc. S/RES/1564 (Sept. 18, 2004); S.C. Res. 1591, ¶ 17, U.N. Doc. S/RES/1591 (March 29, 2005); S.C. Res. 1706, ¶ 12, U.N. Doc. S/RES/1706 (Aug. 31, 2006); S.C. Res. 1769, ¶ 16, U.N. Doc. S/RES/1769 (July 31, 2007).

<sup>142</sup> S.C. Res. 1973, ¶ 20, U.N. Doc. S/RES/1973 (March 17, 2011).

*Legality of the Threat or Use of Nuclear Weapons*  
discusses this issue:

It scarcely needs to be said that the face of contemporary international society is markedly altered . . . the progress made in terms of the institutionalization, not to say integration and “globalization”, of international society is undeniable. Witness the proliferation of international organizations, the gradual substitution of an international law of co-operation for the traditional international law of co-existence, the emergence of the concept of “international community” . . . A token of all these developments is the place which international law now accords to concepts such as obligations *erga omnes*, rules of jus cogens, or the common heritage of mankind. The resolutely positivist, voluntarist approach of international law still current at the beginning of the century... has been replaced by an objective conception of international law, a law more readily

seeking to reflect a collective  
juridical conscience and  
respond to the social  
necessities of States  
organized as a community.<sup>143</sup>

So, a conflict in one state will inevitably affect other states because of their interconnectedness, and possibly the international community as a whole. Thus, an armed conflict in one state is a conflict in other states, making such a conflict an international one. Internal conflicts are international conflicts, and should be treated as such.

### **C. All States Owe a Duty during Internal Armed Conflicts**

Some rules by their very nature are “the concern of all states,” and thus, “all states can be held to have a legal interest in their protection.”<sup>144</sup> Such rules are referred to as obligations *erga omnes*, and each state owes a duty to the international community as a whole to fulfill such obligations.<sup>145</sup> Because all states owe a duty to the international community with regard to these obligations and all states have an interest their observance, matters involving such obligations are no longer solely within the domestic jurisdiction of the state in question.<sup>146</sup>

The ICRC, commenting on Geneva Convention IV regarding the protection of civilians, stated that “the spirit which inspires the Geneva Conventions naturally makes it

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<sup>143</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 270 (July 8).

<sup>144</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

desirable that they should be applicable ‘erga omnes.’”<sup>147</sup>  
In addition, the International Court of Justice (ICJ), in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and its judgment in the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), declared international humanitarian law as having obligations *erga omnes*.<sup>148</sup>  
Obligations *erga omnes* are so significant that Judge Bruno Simma, in his separate opinion in the *Case Concerning Armed Activities on the Territory of the Congo*, believed that:

If the international community allowed such interest to erode in the face not only of violations of obligations *erga omnes* but of outright attempts to do away with these fundamental duties, and in their place to open black holes in the law in which human beings may be “disappeared” and deprived of any legal protection whatsoever for indefinite periods of time, then international law, for me,

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<sup>147</sup> ICRC, *Commentary on the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, at 16 (Aug. 12, 1949)

<sup>148</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 199 (July 9); *Case Concerning Armed Activities on the Territory of the Congo* (Dem. Rep. of the Congo v. Uganda), 2005 I.C.J. 168, 349 (Dec. 19).

would become much less worthwhile.<sup>149</sup>

Therefore, the obligations delegated by international humanitarian law are so important that they concern *all states*, *all states* have an interest in them, and *all states* owe such obligations to *all other states*. For such fundamental obligations, it seems strange that such obligations would vary depending on the type of circumstances involved, in this case the type of armed conflict involved. Furthermore, if the protection of civilians during war and the special treatment of POWs are so essential as to be the concern of all states, the lack of such protection or special treatment in non-international conflicts would seem to defeat the purpose of making them *erga omnes* obligations. In order to properly fulfill the obligations *erga omnes* of international humanitarian law, the rules governing international armed conflicts must be applied to all armed conflicts, including non-international armed conflicts.

## Conclusion

By their nature, the protections afforded to victims of war and the prohibited acts in warfare are of international concern and interest. Thus, the absence of these protections and the occurrence of such prohibited acts in internal armed conflicts, create a conflict for the international community as a whole. As such, internal armed conflicts should be treated like international armed conflict, in which all provisions of the Geneva Conventions apply. There should be no distinction between international and internal armed conflicts when it comes to the application of international humanitarian law. War is

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<sup>149</sup> *Case Concerning Armed Activities on the Territory of the Congo*, *supra* note 149, at 350 (2005) (Simma, J., in a separate opinion).

horrific no matter where it occurs and victims of internal armed conflicts suffer as much as victims of international armed conflicts. The outdated notion that victims of war should receive less protection, and that perpetrators of war crimes should go free, merely because the armed conflict was internal to one state, is an injustice to that state and those victims. Such injustice is a threat to all states and to the stability of the international community, and therefore should no longer be tolerated.