Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts

John F. Murphy*

In his remarks as a member of the Types of NIACs and Applicable Law Panel at the Naval War College’s International Law Conference on Non-International Armed Conflict in the 21st Century, held from June 21 to 23, 2011, David Graham described the law of non-international armed conflict as being located at the “vanishing point of the law of war.”

This is not surprising, because, as Graham further noted, States resist the application of international law to their struggles with rebels. In particular, they resist according status to rebels by applying the law of armed conflict (LOAC) to them. Rather, they prefer to deal with rebels under their own national criminal laws, free from any constraints that might be imposed by the law of armed conflict. For example, Charles Garraway, speaking on the same panel as Graham, pointed out that the United Kingdom never acknowledged “the Troubles” in Northern Ireland as an “armed conflict” to which the law of armed conflict might apply.

From a historical perspective, express treaty law governing non-international armed conflict was formerly virtually non-existent. After the carnage of World War II, and the extreme brutality of the Nazi Germany forces, however, there was a

* Professor of Law, Villanova University School of Law. I want to acknowledge the excellent research assistance of Bernard G. Dennis and Megan L. O’Rourke, both second-year students at the Villanova University School of Law.
marked change of attitude. As reported by Gary D. Solis in his 2010 magisterial treatise:

The framers of the 1949 Conventions determined that there must be some minimal international humanitarian protections for the victims of internal armed conflicts—conflicts occurring within one state's borders, not involving a second nation. World War II revealed the stark absence of protections for civilians in wartime. To raise new protections would involve a departure from Geneva's previously uninterrupted fixation on conflicts between states and a certain disregard of the long-entrenched act of state doctrine. The international community was unanimous, however, that it could not stand by while depredations such as those committed by the Nazis took place in future conflicts, internal or not. Not even in the United Nations Charter is there a similar effort to regulate intrastate armed force.1

The result was Common Article 3 of the 1949 Geneva Conventions.2 It is the only article in the Geneva Conventions that covers internal armed conflict, and "when common Article 3 applies, no other part of the 1949 Geneva Conventions applies."3 Common Article 3 provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, at 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. . . .

As Solis notes, "There follows a brief list of prohibitions, acknowledged to be incomplete: violence to life and person, in particular murder, mutilation, cruel treatment, and torture; the taking of hostages; humiliating and degrading treatment; and the passing of sentences without previous judgments from regularly constituted courts."4 The positive obligation that Common Article 3 imposes on States parties to the Geneva Conventions is, in non-international armed conflicts, to treat those who are hors de combat (out of the fight) humanely. The drafters of Common Article 3 decided, however, not to elaborate on the meaning of "humane treatment."5

The International Committee of the Red Cross's (ICRC's) study of customary international law does provide generalized guidance as to what constitutes humane treatment:

The actual meaning of "humane treatment" is not spelled out. . . . The requirement . . . is an overarching concept. It is generally understood that the detailed rules found in
international humanitarian law and human rights law give expression to the meaning of "humane treatment." . . . However, these rules do not necessarily express the full meaning of what is meant by humane treatment, as this notion develops over time under the influence of changes in society.

By its terms, Common Article 3 applies only to non-international armed conflicts. As shall be seen below, however, international and national court decisions have declared that its humanitarian norms are so basic that, today, Common Article 3 extends to international armed conflicts as well.

At this early stage in this essay, it is important to note that the international and national jurisprudence that has declared Common Article 3 extends to international armed conflict illustrates a major difficulty with Common Article 3: because of its sparse wording and inherent ambiguities, Common Article 3 raises more questions than it answers, and, in particular, these include issues of when it applies and whether it can be the basis for criminal prosecutions in international or national tribunals.

Before we turn to some of these issues, we need to note the second primary source of treaty law on non-international armed conflicts, Additional Protocol II to the 1949 Geneva Conventions. Like Additional Protocol I, which concerns international armed conflicts, Additional Protocol II is a supplement to the 1949 Geneva Conventions and does not amend or replace any part of them. Although Additional Protocol II has 166 States parties, a number of major States, including the United States and Israel, for example, are not parties, and it is unclear what provisions, if any, of the Protocol represent customary international law. Moreover, Additional Protocol II is a good example of the unwillingness of States to be governed by international law in their internal conflicts with rebel groups. This is because the "threshold" of applicability of Protocol II to a non-international armed conflict is extremely high. Under Article 1(1), Protocol II only applies to conflicts between the armed forces of a State party "and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Paragraph 2 of Article 1 provides that the 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."

The result of these explicit limitations is that Additional Protocol II is basically a non-operational treaty. As one commentator has noted, the international criminal tribunals for the former Yugoslavia and for Rwanda
Will-o'-the-Wisp? The Search for Law in Non-International Armed Conflicts

have produced very little jurisprudence related to Additional Protocol II ... and no accused has been convicted for a violation of the Protocol. ... The limited categories of armed conflicts to which Additional Protocol II may be said to apply and doubts as to the extent to which it is now part of customary international law have deterred the Prosecution from entering the realm of Additional Protocol II with much enthusiasm, preferring instead to rely on common Article 3 ... .

Similarly, George Aldrich, who was the head of the U.S. delegation to the negotiations on the Protocols, has written dismissively: “Protocol II ... affords very limited protections and has escape clauses designed to make its applicability easily deniable. In the end, the only useful result of Protocol II may be to make it somewhat more likely that [Common] Article 3 ... may be found applicable in lieu of Protocol II.”

I. Filling the Gaps in and Expanding the Coverage of Common Article 3

Jean-Philippe Lavoyer, a former head of the ICRC’s Legal Division, has contended that the current law of armed conflict is not the major problem, but rather it is the failure to implement it in good faith. This seems clear, but there are at least major differences as to interpretation of the existing rules, even among the leading experts of developed Western States, to say nothing of on a worldwide basis. Ideally, these ambiguities would be resolved by international negotiations to revise the existing law. However, as Dr. Lavoyer has noted, the risk of this route is that it might open Pandora’s box and result in a much less rather than more satisfactory law of armed conflict.

As to gaps in Common Article 3, it is important to note that neither the Geneva Conventions, including Common Article 3, nor Additional Protocol I contains a definition of an “armed conflict.” In contrast, as we have seen, Additional Protocol II, in paragraphs 1 and 2 of Article I, defines non-international armed conflicts in such a way as to sharply limit the scope of the Protocol. But in 1995, in the Tadić Interlocutory Appeal on Jurisdiction, the International Criminal Tribunal for the former Yugoslavia (ICTY) stepped into the breach and addressed the preliminary issue of the existence of an armed conflict in response to a contention by the defendant that there had been no active hostilities in the area of the alleged crimes at the relevant time:

[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International
humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.\(^\text{17}\)

This definition covers both international and non-international conflicts. There is a question whether under it, the U.S. conflict with Al-Qaeda qualifies as an armed conflict. As I suggested in another forum,

\[\text{[t]he only time this conflict could have qualified as an international armed conflict would have been when the United States invaded Afghanistan in 2001 and then only to the extent that Al-Qaeda forces were integrated into the Taliban forces, the de facto army of Afghanistan. At present . . . both the Taliban and Al-Qaeda are fighting as insurgents in Afghanistan, and it is arguable that the conflict there now is an internal armed conflict.}\(^\text{18}\)

By now it is well known that in \textit{Hamdan v. Rumsfeld}\(^\text{19}\) the Supreme Court rejected the assertion by the U.S. government that since Al-Qaeda was not a State and had not accepted that it would be governed by the rules set forth in the Geneva Conventions, its affiliates could not invoke their protections. Rather, a plurality of the Court held that the so-called “war on terror” was a non-international armed conflict, and therefore that at a minimum Common Article 3 applies to the conflict with Al-Qaeda. To be sure, this holding has been subject to considerable criticism, best illustrated perhaps by Yoram Dinstein’s argument that “from the vantage point of international law . . . a non-international armed conflict cannot possibly assume global proportions.”\(^\text{20}\) There are supporters of the Court’s holding, however, and there is no consensus on this issue.\(^\text{21}\)

In light of current developments, the distinction between international and non-international armed conflict may be becoming irrelevant, at least as long as an “armed conflict” is present. As Kenneth Watkin has noted, there is a “trend under humanitarian law to apply the established rules for governing international armed conflict to its non-international counterpart.”\(^\text{22}\) This trend, however, has not been based on the conclusion of new conventions, or even the revision of old conventions, on the law of armed conflict. Rather, it has been based on international judicial decisions, especially the decision of the ICTY Appeals Chamber in \textit{Prosecutor v. Tadić}, which claimed in 1995 that “it cannot be denied that customary rules have developed to govern internal strife.”\(^\text{23}\) The Tribunal identified some of these rules as covering
Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts

such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.\textsuperscript{24}

The ICRC has also actively promoted the idea of applying the rules governing international armed conflict to non-international armed conflict through the customary international law process, especially in its two-volume Customary International Humanitarian Law study.\textsuperscript{25} Customary international law has long played an important role in the development of the law of armed conflict, as illustrated by the Martens Clause, which was named after Frederick de Martens, a leading Russian international lawyer who was a Russian delegate to the Hague Peace Conferences of 1889 and 1907. The Martens Clause first appeared in the preambles of Hague Convention (II) of 1899 and Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land.\textsuperscript{26} A recent example of the Martens Clause may be found in Article 1(2) of Protocol I of 1977, which reads as follows: “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

It should be noted, however, that the nature of the customary international law process has become increasingly controversial. Patrick Kelly, a leading critic, has suggested that in many—perhaps most—instances of alleged customary international law norms, there may be little clear evidence that the vast majority of States have accepted the norm as a legal obligation.\textsuperscript{27} The result is that, according to Kelly, “much of international law is announced in books and articles with little input from nations . . . . Much of CIL [customary international law] is a fiction.”\textsuperscript{28} It should come as no surprise therefore that the methodology employed by the ICRC in its study of customary international humanitarian law has itself come under attack—most particularly, in the November 3, 2006 joint letter from John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense, to Dr. Jakob Kellenberger, the President of the ICRC, setting forth the U.S. government’s “initial reactions” to the ICRC’s study.\textsuperscript{29} The letter states that “based on our review so far, we are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules.” Although noting that “[g]iven the Study’s large scope, we have not yet been able to complete a detailed review of its conclusions,” the authors go on to state that they thought it would be “constructive to outline some of our basic methodological concerns and, by examining a few of
the rules set forth in the Study, to illustrate how these flaws call into question some of the Study's conclusions. A detailed discussion of the authors' concerns is beyond the scope of this essay. For present purposes it suffices to note that the letter finds fault with both the study's assessment of State practice and its approach to the *opinio juris* requirement. The authors also find fault with the study's formulation of the rules and its commentary. Significantly, the letter finds that these faults contribute to two more general errors in the Study that are of particular concern to the United States:

First, the assertion that a significant number of rules contained in the Additional Protocols to the Geneva Conventions have achieved the status of customary international law applicable to all States, including with respect to a significant number of States (including the United States and a number of other States that have been involved in armed conflict since the Protocols entered into force) that have declined to become a party to those Protocols; and

Second, the assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict notwithstanding the fact that there is little evidence in support of those propositions.

In closing the letter the authors indicated their “appreciation for the ICRC's continued efforts in this important area, and hope that the material provided in this letter and in the attachment will initiate a constructive, in-depth dialogue with the ICRC and others on the subject.”

In July 2007, Jean-Marie Henckaerts responded to the Bellinger/Haynes letter. His response focused largely on methodological issues and, following the structure of the U.S. comments, addressed the following questions:

1. What density of practice is required for the formation of customary international law and what types of practice are relevant?

2. How did the Study assess the existence of *opinio juris*?

3. What is the weight of the commentaries on the rules?

4. What are the broader implications of the Study with respect to Additional Protocols I and II and the law on non-international armed conflicts in particular?
Because U.S. comments also addressed four particular rules of the study, Henckaerts’s response dealt with the main aspects of those comments as part of the discussion of the methodological issues. The rules included “Rule 31 (protection of humanitarian relief personnel), Rule 45 (prohibition on causing long-term widespread and severe damage to the environment), Rule 78 (prohibition of the use of antipersonnel exploding bullets) and Rule 157 (right to establish universal jurisdiction over war crimes).”

As with respect to the Bellinger/Haynes letter, this is not the time or place to set forth a detailed discussion of Henckaerts’s responses to the U.S. concerns. For present purposes, it suffices to note that the ICRC rejects the U.S. contention that there is little evidence to support the assertion that certain rules in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict. On the contrary, in the ICRC view:

[T]he conclusion of the Study that many rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in non-international armed conflict is the result of state practice to this effect . . .

There are developments of international humanitarian law since the wars in the former Yugoslavia and Rwanda point towards an application of many areas of humanitarian law to non-international armed conflicts. For example, every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflicts . . .

The criminal tribunals and courts set up, first for the former Yugoslavia and Rwanda and later for Sierra Leone, deal exclusively or mostly with violations committed in non-international armed conflicts. Similarly, the investigations and prosecutions currently under way before the International Criminal Court are related to violations committed in situations of internal armed conflict. These developments are also sustained by other practice such as military manuals, national legislation and case-law, official statements and resolutions of international organizations and conferences. In this respect particular care was taken in Volume I to identify specific practice related to non-international armed conflict and, on that basis, to provide a separate analysis of the customary nature of the rules in such conflicts. Finally, where practice was less extensive in non-international armed conflicts, the corresponding rule is acknowledged to be only “arguably” applicable in non-international armed conflicts.

When it comes to “operational practice” related to non-international armed conflicts, there is probably a large mix of official practice supporting the rules and of their outright violation. To suggest, therefore, that there is not enough practice to sustain such a broad conclusion is to confound the value of existing “positive” practice with the many
violations of the law in non-international armed conflicts. This would mean that we let violators dictate the law or stand in the way of rules emerging. The result would be that a whole range of heinous practices committed in non-international armed conflict would no longer be considered unlawful and that commanders ordering such practices would no longer be responsible for them. This is not what states have wanted. They have wanted the law to apply to non-international armed conflicts and they have wanted commanders to be responsible and accountable.35

The Bellinger/Haynes letter, in challenging the ICRC study’s assertion that certain rules contained in the Geneva Conventions and the Additional Protocols have become binding as a matter of customary international law in internal armed conflict, claims that “there is little evidence in support of those propositions.”36 The Henckaerts response attempts to provide such evidence. First, it correctly notes that “every humanitarian law treaty adopted since 1996 has been made applicable to both international and non-international armed conflict.”37 But none of these treaties extends any of the provisions of the Geneva Conventions or of the Additional Protocols to non-international armed conflict, so the relevance of this State practice to the issue is questionable at best.

Similarly, it is, of course, correct that the International Criminal Tribunals for the former Yugoslavia and Rwanda, as well as the globally focused International Criminal Court and the hybrid tribunal for Sierra Leone, deal exclusively or mostly with violations committed in non-international armed conflicts. The basic issue faced by these various tribunals is whether the concept of war crimes and grave breaches are applicable in internal as well as international armed conflict. Resolution of this issue in turn depends upon the statutes of the various tribunals and the tribunals’ interpretation of their terms.

As Gary Solis has noted, the ICTY Appeals Chamber, in its decision in the Tadić case, first answered the basic question in the negative. According to the Appeals Chamber, “[w]e must conclude that, in the present state of development of the law, Article 2 of the [ICTY] Statute [“Grave breaches of the Geneva Conventions of 1949”] only applies to offences committed within the context of international armed conflicts.”38 By its decision the Appeals Chamber reversed the Trial Chamber’s ruling to the contrary. At the same time, later in its decision, in dicta, the Appeals Chamber foreshadowed later change when it stated,

[We] have no doubt that they [violations of rules of warfare in international law] entail individual responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect “elementary considerations of humanity” widely recognized as the mandatory minimum for conduct in armed conflicts of any kind.39
As Solis notes, six years later the Appeals Chamber took the step it had fore­s­shadowed in its dicta in Tadić. It ruled in the Celebici case that "to maintain a legal distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the differences in the nature of the conflicts would ignore the very purpose of the Geneva Conventions." Many commentators welcomed the Celebici ruling. Guénaël Mettraux, for example, opined that "[t]he acknowledgement by the ad hoc [Yugoslav and Rwanda] Tribunals that much of the law of international armed conflicts would apply in the context of internal armed conflicts may be one of their most significant jurisprudential achievements, as far as war crimes are concerned." For his part, Theodor Meron emphatically stated, "There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars." This commentator, however, is concerned that both the Yugoslav and Rwanda tribunals and commentators such as Mettraux and Meron may be setting forth the de lege ferenda rather than the lex lata. To put it somewhat differently, they may be failing to distinguish between the is and the ought. There would seem to be compelling reasons for applying much of the law of international armed conflict in the context of non-international armed conflicts, but it is not clear that States, acting through treaties or the customary international law process, have done so. Neither judges on the Yugoslav and Rwanda tribunals nor prominent scholars, despite the important roles they play in the international legal process in general, have been endowed with the capacity to make that extension of the law.

On the other hand, Solis may be on sounder ground when he reports that "[t]he domestic legislation of fifty-four states criminalizes serious violations of LOAC in internal armed conflicts." Such legislation is generally regarded as constituting a form of State practice that may contribute to the formulation of a customary international law norm. Moreover, the binding nature of such legislation in the domestic legal system of the acting State may supply evidence of opinio juris, acceptance of the practice as law, the second, and perhaps most important, element of customary international law.

Solis also points to the United Kingdom’s Manual of the Law of Armed Conflict in support of the proposition that customary international law provides for war crimes and grave breaches in non-international armed conflicts. He quotes the Manual as follows:

Although the treaties governing internal armed conflict contain no grave breach provisions, customary international law recognizes that serious violations of those treaties
can amount to punishable war crimes. It is now recognized that there is a growing area of conduct that is criminal in both international and internal armed conflict. . . .

Yoram Dinstein has applauded reliance on legislative codes and military manuals as illustrations of State practice: “Irrefutably, legislative codes and military Manuals (i.e., binding instructions to the armed forces) are invaluable sources of genuine State practice.” It is noteworthy, however, that Solis cites and quotes only the U.K. Manual. It is not clear, therefore, whether the position of the U.K. Manual has been adopted in the manuals of other major military powers.

In any event, it is likely that the challenges contained in the Bellinger/Haynes letter to the alleged two general errors in the ICRC study will not be successful. This is because the two positions of the ICRC study are so attractive as de lege ferenda that they will eventually be accepted as the lex lata. The reality is that Common Article 3 and Protocol II are clearly inadequate to govern non-international armed conflicts, and selective extension of the legal regime governing international armed conflicts to supplement the current law governing non-international armed conflicts makes enormous good sense. Ideally, of course, this extension should be effected by the conclusion of new—or the revision of current—global treaties. But if this method of extension is a mission impossible, as the evidence convincingly demonstrates, then customary international law methodology will have to be employed, even if there is continuing disagreement as to exactly what that methodology entails.

II. Rethinking the Possible Benefits of Additional Protocol II

Perhaps it is time for the United States to reevaluate the possible benefits of becoming a party to Additional Protocol II. As indicated above, the primary criticism of Additional Protocol II has been that its threshold of applicability is too high. It should be noted, however, that when President Ronald Reagan submitted Additional Protocol II to the Senate for its advice and consent to ratification, he did so with a declaration that read: “The United States declares that it will apply this Protocol only to those conflicts covered by Article 3 common to the Geneva Convention of 12 August 1949 and to all such conflicts, and encourages all other States to do likewise.” Secretary of State George P. Shultz’s Letter of Submittal to President Reagan of December 13, 1986 describes the reasons for the declaration:

The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations.
Will-o'-the-Wisp? The Search for Law in Non-International Armed Conflicts

This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that US ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions (and only such conflicts), which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.\textsuperscript{50}

The approach of the Reagan administration, therefore, would resolve the primary problem of Additional Protocol II by declining to follow the provisions of Article 1(1) of Additional Protocol II that would severely limit its applicability, opting instead to apply its other provisions to all non-international armed conflict covered by Common Article 3. It also would counter the most unacceptable—to the United States—aspect of Additional Protocol I by treating as non-international the "wars of national liberation" that are described and treated in Article 1(4) of Additional Protocol I as international armed conflicts. Such an approach might serve to turn Additional Protocol II from its current status as a basically non-operational treaty to one that could usefully be applied to many of the internal conflicts characteristic of today's armed conflicts, and a treaty that could enhance and strengthen the legal regime governing non-international armed conflicts.

The report of the Department of State on Additional Protocol II, transmitted by President Reagan with the Protocol to the Senate,\textsuperscript{51} contains a detailed analysis of the various provisions of the Protocol. In his Letter of Submittal to President Reagan, Secretary of State George Shultz spells out the ways in which the Protocol was designed to expand and refine the basic humanitarian provisions contained in Article 3 common to the four 1949 Geneva Conventions with respect to non-international conflicts. While the Protocol does not (and should not) attempt to apply to such conflicts all the protections prescribed by the Conventions for international armed conflicts, such as prisoner-of-war treatment for captured combatants, it does attempt to guarantee that certain fundamental protections be observed, including: (1) humane treatment for detained persons, such as protection from violence, torture, and collective punishment; (2) protection from intentional attack, hostage-taking and acts of terrorism of persons who take no part in hostilities; (3) special protection for children to provide for their safety and education and to preclude their participation in hostilities; (4) fundamental due process for persons against whom sentences are to be passed or penalties executed; (5) protection and appropriate care for the sick and wounded, and medical units which assist them; and (6) protection of the civilian population from military attack, acts of terror, deliberative starvation, and attacks against installations.
containing dangerous forces. In each case, Protocol II expands and makes more specific the basic guarantees of common Article 3 of the 1949 Conventions.\textsuperscript{52}

Hence, application of Additional Protocol II to non-international armed conflicts would greatly strengthen the humanitarian protections of Common Article 3, and, as President Reagan suggested in his Letter of Transmittal, "[i]f these fundamental rules were observed, many of the worst human tragedies of current internal armed conflicts could be avoided."\textsuperscript{53}

It is worth noting that on March 7, 2011, the Obama administration issued a White House press release in which it indicated its strong support for the ratification of Additional Protocol II and its intention to apply the principles of Article 75 of Protocol I to "any individual it detains in an international armed conflict."\textsuperscript{54} In pertinent part, the press release reads as follows:

**Support for a Strong International Legal Framework**

Because of the vital importance of the rule of law to the effectiveness and legitimacy of our national security policy, the Administration is announcing our support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions.

Additional Protocol II, which contains detailed humane treatment standards and fair trial guarantees that apply in the context of non-international armed conflicts, was originally submitted to the Senate for approval by President Reagan in 1987. The Administration urges the Senate to act as soon as practicable on this Protocol, to which 165 States are a party. An extensive interagency review concluded that United States military practice is already consistent with the Protocol's provisions. Joining the treaty would not only assist us in continuing to exercise leadership in the international community in developing the law of armed conflict, but would also allow us to reaffirm our commitment to humane treatment in, and compliance with legal standards for, the conduct of armed conflict.

Article 75 of Additional Protocol I, which sets forth fundamental guarantees for persons in the hands of opposing forces in an international armed conflict, is similarly important to the international legal framework. Although the Administration continues to have significant concerns with Additional Protocol I, Article 75 is a provision of the treaty that is consistent with our current policies and practice and is one that the United States has historically supported.

Our adherence to these principles is also an important safeguard against the mistreatment of captured U.S. military personnel. The U.S. Government will therefore choose
Will-o'-the-Wisp? The Search for Law in Non-International Armed Conflicts

out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.\footnote{55}

The comments of the Reagan administration and more recently of the Obama administration would seem to belie the dismissive remarks of George Aldrich regarding the value of Additional Protocol II, reported earlier in this essay.\footnote{56} In sharp contrast to the Aldrich position, both the Reagan and Obama administrations state forcefully that ratification of Additional Protocol II would greatly expand on and strengthen the humanitarian provisions of Common Article 3 of the Geneva Conventions. President Reagan pointed out that Additional Protocol II \textit{“makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.”}\footnote{57}

In another part of his message President Reagan foreshadows the approach more specifically adopted by the Obama administration with respect to Additional Protocol I. While emphatically rejecting ratification of Additional Protocol I, he stated at the same time a desire to

device an alternative reference for the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts. We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.\footnote{58}

It appears that President Reagan never advised the Senate of the results of his administration’s initiative. For its part, the Obama administration appears to have acted without consulting allies—although this is not clear—in deciding to treat Article 75 of Additional Protocol I as binding on the United States and choosing to \textit{“treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict,”} and expecting \textit{“all other nations to adhere to these principles as well.”}\footnote{59} If this policy is implemented by the Obama administration, this would greatly strengthen the argument that Article 75 is part of customary international law.

As to whether the Senate will finally give its advice and consent to U.S. ratification of Additional Protocol II, it is hard to be optimistic, because the Senate has so many other issues before it that are likely to receive higher priority. But it appears the Reagan and Obama administrations have set forth a convincing case for the Senate’s giving its advice and consent to ratification.
John F. Murphy

U.S. ratification of Additional Protocol II and application of its substantive provisions to any armed conflict covered by Common Article 3 would also make law in non-international armed conflict much less of a will-o’-the-wisp. This would be an important step because, as Eyal Benvenisti has noted in a recent provocative essay, there is currently an emerging struggle between “states engaged in transnational armed conflict [read non-international asymmetric warfare] and third parties—courts, international institutions, NGOs, and civil society—in developing and enforcing the law.”

III. Who Shall Determine the Law in Non-International Armed Conflicts?

As noted earlier in this essay, the International Criminal Tribunal for the former Yugoslavia has concluded in its decisions that “customary rules have developed to govern internal strife.” For his part, Benvenisti states emphatically that the applicability of international criminal law to internal armed conflicts must be attributed to the jurisprudence of the International Criminal Tribunal of the former Yugoslavia (“ICTY”), which has in only a few years of adjudicating war crimes in the former Yugoslavia virtually rewritten the law on internal armed conflicts. By formally asserting the law’s customary status, the ICTY overcame years of governmental resistance to regulating methods for fighting insurgents.

Benvenisti believes that the increased involvement of various third-party actors, including domestic courts, foreign governments and courts, international organizations and international tribunals, humanitarian NGOs, and domestic and global civil society, in indirect monitoring, lawmaking and enforcement functions constitutes a major challenge to States. As Benvenisti suggests:

[The intensified involvement of third parties creates a new conflict between the conventional armies that fight insurgents or terrorists and seek more discretion and fewer constraints and the third parties who insist on maintaining and even increasing constraints in warfare. We might call it a conflict between the “IHL camp,” that emphasizes the humanitarian aim of the jus in bello, which they refer to as International Humanitarian Law, and the “LOAC camp,” that wishes to point out that the Law of Armed Conflict is primarily designed to regulate the relations between fighting armies and therefore must take military concerns seriously into account. The LOAC camp insists that this “lawfare” is not only hypocritical but also perilous: that the IHL camp is being manipulated by the terrorists, who endanger the population on whose behalf they ostensibly fight by their abuse of civilian immunities. In a sense, and certainly unwillingly, the IHL camp becomes a strategic ally of the terrorists because the terrorists benefit indirectly from whatever constraints the IHL camp would impose.]
Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts

It is worthwhile quoting Benvenisti’s summary of the arguments of the third-party actors at some length, because they couldn’t be more in sharp contrast to the arguments advanced by governments, and their supporters, engaged in the asymmetric warfare characteristic of non-international armed conflict:

In general, third party actors, and certainly third party norm entrepreneurs, suggest that the legal restraints on transnational conflict must treat the stronger party as responsible for positively protecting the population in the theater of operation from harm because the stronger party often exclusively, has effective—even if only virtual—control over the population. In fact, with recourse to new types of weaponry and reconnaissance tools, with 24/7 presence of unmanned aerial vehicles (“UAV”) over foreign territory, contemporary armies often have the capacity to control some of the activities of the population on the ground effectively as an occupying power. Such control can perhaps be regarded as virtual occupation. As the law stands, during conventional international armed conflict, obligations to occupied populations are more demanding than those toward foreign civilians in the combat zone.

This last point requires explanation: in symmetric warfare, the attacker’s power does not amount to an ability to fully control the lives of the enemy’s population. The defending government is still in control and in fact forcefully resists the attacker’s effort to gain exclusivity. Lacking such exclusive control, there is no basis to impose an obligation on the attacking army to ensure enemy civilians’ lives (protecting them, for example, from internal ethnic conflicts). Their army, which is still in control, has the duty to ensure their rights. Instead, before and during the attack, the attacking army owes a duty to respect enemy civilians’ lives, consisting of the duty to avoid unnecessary harm. In contrast, the same army will assume the duty to ensure the rights of enemy civilians when they become subject to its effective control as prisoners of war or “protected persons” in occupied territories. An obligation to ensure the civilians’ rights is fundamentally different from an obligation to respect them, applicable to parties to symmetric conflicts. The vertical power relations that exist in transnational asymmetric conflicts, particularly against non-state actors, seem to call for recognizing positive duties towards those civilians, like in an occupation. Such a duty will reflect the nature and scope of the power that the “attacking” army (during an on-going, indefinite “attack”) has over the attacked population.

The obligation to protect in transnational asymmetric armed conflict, if recognized, would be quite demanding. It would call for three specific obligations. First, it would require the consideration of alternatives to military action and the determination of whether the decision to use force against legitimate military targets rather than exploring non-forceful, or less-forceful alternatives, was justified under the circumstances. In fact it would imply injecting jus ad bellum considerations, or human rights law, into jus in bello analysis. Secondly, if there were no available alternatives, a second requirement would demand that the army invest significant resources to minimize harm to
John F. Murphy

civilians. Finally, the army would be required to conduct a transparent and accountable investigation after the use of force.

A case in point concerns the dispute about targeted killing. This policy treats individuals as military targets per se, given the paucity of conventional non-human military targets of an irregular fighting force. The LOAC camp argues that armies that target individual combatants regard them as legitimate targets in war, as there is no distinction between human and non-human military targets. But the alternative view is sensitive to the fact that the laws regarded the killing of combatants as a legitimate means to achieve military goals, rather than a goal in and of itself. As the 1868 St. Petersburg Declaration envisioned, war was not about killing combatants; wars were understood to be fought to achieve non-human military goals and fighting was to be conducted against an abstract, collective enemy. Therefore, it was possible to stipulate that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That [sic] for this purpose it is sufficient to disable the greatest possible number of men." Although war always involved the killing of combatants, killing the adversary was never the goal. Applying this logic to the effort to preempt individuals from engaging in an attack would require a consideration of whether it is possible to disable rather than kill them. This explains why the IHL camp insists on pausing to consider alternatives to targeted killing; something that is viewed by the LOAC camp as injecting irrelevant requirements of human rights law into jus in bello analysis.

The tension between governments engaged in transnational warfare and third parties can therefore not be starker: whereas governments seek to deny or dilute the applicability of conventional warfare obligations to transnational asymmetric conflicts, third parties insist on their applicability and lean toward imposing even more stringent constraints, which governments regard as impermissibly endangering their troops and irresponsibly immunizing non-state fighters. Only time can tell if and how this tension can be resolved.65

In the rest of his article Benvenisti argues that the growing involvement of third parties in the monitoring and assessment of military decisions "raises a third challenge to the legal regulation of warfare: how to regulate the exercise of discretion by the military commander."66 He suggests that in conventional, symmetric warfare the parties to the conflict are presumed to promote their self-interests and not the interests of the other government involved in the conflict. But with the pressure from third parties to positively protect enemy civilians it has arguably become necessary for governments involved in non-international armed conflicts to consider interests other than their own. He notes that the greatly increased access to information about such conflicts afforded by technical advances in technology and improved intelligence allows third parties to assess the exercise of discretion by the military commander. He adds,
Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts

If we accept that attacking armies in transnational asymmetric conflicts have a “duty to ensure” the lives of civilians in the area they attack then perhaps they are expected to treat all civilians with similar respect (obviously, such blindness would relate only to the human rights of the relevant civilians and not to the national interests of the foreign state). It can be expected, however, that the LOAC camp will resist such a conclusion, stating that there is no moral or legal basis for the obligation to consider other-regarding considerations in the absence of reciprocity and mutuality of obligations, when there is no assurance that others are equally committed to act selflessly.67

In the conclusion to his article, Benvenisti states that

[i]t is beyond the scope of this essay to assess if and how such a cleavage between two visions of the law can be bridged and how the law would look in the future. Much depends on the continued ability of courts, both domestic and international, to assert positions independent of governments and the continued commitment of global civil society to constrain conventional armies. . . . Even the domestic courts of those governments that engage in such conflicts resist the demand to yield authority to the executive. If these attitudes persist, it can be expected that the recourse to third parties as partners in the regulation of transnational armed conflicts will expand.68

By way of initial comment on some of the points made by Benvenisti, it should be noted that, although the domestic courts of some governments that engage in non-international asymmetric armed conflict have asserted positions independent of their governments on the regulation of such conflicts,69 other domestic courts, including those of the United States, have been quite deferential to the executive branch’s decisions with respect to the conduct of hostilities in such conflicts.70 A good recent example of such deference by U.S. courts is the December 7, 2010 decision of the District Court for the District of Columbia dismissing a suit brought to enjoin the targeted killing of U.S. citizen Anwar Al-Aulaqi, who was operating out of Yemen.71 The court ruled that the plaintiff (Al-Aulaqi’s father) did not have standing to bring the suit and that the political question doctrine barred the court from considering the merits of the plaintiff’s suit.

In describing the arguments of third-party actors, Benvenisti states that “the legal restraints on transnational conflict must treat the stronger party as responsible for positively protecting the population in the theater of operation from harm because the stronger party often exclusively, has effective—even if only virtual—control over the population.”72 In many cases involving asymmetric non-international armed conflicts, however, the stronger party has no such control over the population. In Afghanistan, for example, the Taliban and Al-Qaeda forces embed themselves among the general population. Moreover, in Afghanistan, it is important to note, the sovereign power is not the U.S. government or coalition forces, but the
Afghan government of President Karzai. Increasingly, the Karzai government has demanded that there be no civilian casualties from drone or airplane attacks, thus denying the coalition forces an important military advantage.

Moreover, to impose an obligation on U.S. and coalition forces, as demanded by some third parties, to ensure that there are no civilian casualties in asymmetric non-international armed conflicts would be a dramatic change in the law of armed conflict and would ensure the failure of U.S. and coalition forces in Afghanistan and in other theaters where the Taliban and Al-Qaeda are operating. The reality is that so-called "collateral damage" to civilians is unavoidable in armed conflict, and especially in the asymmetric non-international armed conflict characteristic of today's wars. The current test under the law of armed conflict is whether the collateral damage is expected to be "excessive" in relation to the concrete and direct military advantage anticipated. 73

In a recent essay, Samuel Estreicher has helpfully emphasized that "[d]angers to civilians during armed conflict are a joint product of both attackers and defenders, and minimization of such harm—presumably the overriding mission of IHL—requires establishing the right incentives for both attackers and defenders." 74 Estreicher also quotes the observation of W. Hays Parks in his "classic" article, "Air War and the Law of War," that

Protocol I constitutes an improvement in the law of war in recognizing that an attacker should, in most cases, give consideration to minimization of collateral civilian casualties. The issue is the degree to which an attacker should assume this responsibility. If the new rules of Protocol I are to have any credibility, the predominant responsibility must remain with the defender, who has control over the civilian population. 75

Estreicher elaborates on Parks's point by noting that

[it] it is clear that attackers cannot, because of defender violations, claim excuse for their non-compliance with, say, their duty to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects" under AP I, Article 57(2)(a)(i). But the feasibility inquiry under Article 57(2)(a)(i), or the proportionality inquiry under Article 57(2)(a)(iii), necessarily requires that account be taken of whether defenders have disguised military operations as civilian operations or have deliberately embedded their military assets in close proximity to civilian areas, all in violation of defender obligations under IHL. 76

In a subsequent, follow-up essay, 77 Estreicher focuses on the "so-called principle of 'proportionality.'" He explains that he uses
the qualifying adjective “so-called” because “proportionality” in this context is a misnomer. The actual obligation, as set forth in Articles 51(5)(b) and 57(2)(b) of AP I, speaks in terms of prohibiting (and deferring) attacks expected to cause incidental civilian losses “which would be excessive in relation to the concrete and direct military advantage anticipated.” . . . [T]he “excessive loss” formulation is not only truer to the text of AP I but provides a sounder, more principled basis for judging violations than the more elastic, manipulable “proportionality” formulation. 78

The “excessive loss” formulation is a fortiori a more principled basis for judging violations than the requirement reportedly proposed by some third parties that parties to asymmetric warfare “positively protect” enemy civilians. 79 To hold a military commander to such a standard would be grossly dysfunctional, as well as grossly unfair if violations of this standard would subject the military commander to possible criminal or civil penalties. Hence, it is certain that despite pressure that may be brought to bear by third parties to asymmetric armed conflicts, this standard will be rejected by the governments of States that are engaged in such conflicts, including most particularly that of the United States.

IV. Conclusion

The title of this essay states there is a search for law in non-international armed conflicts. Perhaps, however, a more precise way to describe the current situation is as a struggle for law in non-international armed conflicts. As noted by Eyal Benvenisti, this is a struggle between States that are actively involved in non-international armed conflict and a wide array of third-party actors, such as domestic courts, foreign governments and courts, international organizations and international tribunals, humanitarian NGOs, and domestic and global civil society. Some of these third-party actors are promoting an agenda that, if adopted as law, could severely restrict the military capacity of the armed forces of States to deal effectively with Al-Qaeda and other non-State actors employing various strategies to negate the military superiority of the States they are fighting against.

At least to some extent, these third-party actors have been able to be influential because of the inability of States to reform and develop the law applicable to non-international armed conflicts through the conclusion of global treaties that would update the law in such a way as to resolve the tension between humanitarian considerations and the need for military efficiency. The recent efforts of the Obama administration to carry forward the position of the Reagan administration to have the United States finally ratify Additional Protocol II, while issuing a declaration that it will not apply the high threshold requirements of the Protocol and will urge other States parties to follow suit, may be a first step toward overcoming the barriers
to expanding and improving the law of non-international armed conflict. Should the United States take this step, and other States follow suit, at a minimum it should allow like-minded States to cooperate to improve the efficiency of efforts to deal with the challenge they face in conducting asymmetric warfare, and could perhaps lead to State practice that evolves eventually into norms of customary international law applicable to non-international armed conflict. Failure of States like the United States and its allies to win this struggle for law in non-international armed conflicts with these third-party actors would have extremely negative effects on their national security.

Notes

3. SOLIS, supra note 1, at 99 (emphasis in original).
4. Id. at 98.
5. In his treatise, id., Solis cites and quotes Jean Pictet’s commentary on the Geneva Conventions that it is pointless and even dangerous to try to enumerate things with which a human being must be provided [to constitute humane treatment] . . . or to lay down in detail the manner in which one must behave towards him in order to show that one is treating him “humanely” . . . . The details of such treatment may, moreover, vary according to circumstances . . . and to what is feasible.

9. See SOLIS, supra note 1, at 129.
11. For an example of a provision in Additional Protocol I that is almost surely not representative of customary international law, see Article 13(3). Paragraph 3 of Article 13 provides
Will-o'-the-Wisp? The Search for Law in Non-International Armed Conflicts

that civilians lose protection from being the object of armed attack, only "for such time as they take a direct part in hostilities." In The Manual on the Law of Non-International Armed Conflict, the authors state that

this limitation is not confirmed by customary international law. Such an approach would create an imbalance between the government's armed forces on the one hand and members of armed groups on the other, inasmuch as the former remains legitimate targets (under international law) throughout the conflict. Moreover, the proposition is impractical to implement on the ground. Ordinary soldiers would be required to make complex and immediate assessments as to whether an individual's participation in hostilities is ongoing, at a time when the facts available are incomplete or unclear.


15. See Lavoyer, supra note 14, at 302.


17. Id., ¶ 70.


21. For brief discussion of the conflicting views, see Murphy, supra note 18, at 17–18.


24. Id.

25. See I CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, supra note 6, at xxix.


30. *Id.*

31. *Id.* at 516.

32. *Id.*


34. *Id.* at 474.

35. *Id.* at 485–87.


39. Prosecutor *v.* Tadić, *supra* note 16, ¶ 129, cited and quoted in SOLIS, *supra* note 1, at 100. Solis adds, in footnote 120, quoting the Appeals Chamber’s decision in paragraph 30, that the migration of war crimes from international armed conflicts to non-international cannot take place “in the form of a full and mechanical transplant of those rules to internal conflicts [but instead] the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”

40. See SOLIS, *supra* note 1, at 100.


42. See METTRAUX, *supra* note 12, at 132.


46. SOLIS, *supra* note 1, at 101.


Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts


50. Letter of Submittal from Secretary of State George P. Shultz to President Ronald Reagan (May 10, 1988), reprinted in id. at vii-viii.

51. See Message from the President, supra note 49, at 1.

52. Id. at vii.

53. Id. at iii.

54. White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy 3 (Mar. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/03/07/new-actions-guantanamo-bay-and-detainee-policy [hereinafter Fact Sheet]. It is also worth noting that the same plurality of the Supreme Court that held the “war on terror” to be a non-international armed conflict held that the principles of Article 75 were customary international law. Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006).

55. Fact Sheet, supra note 54, at 3.

56. See Aldrich, supra note 13 and accompanying text.

57. Id.

58. Id. at iv.

59. See Fact Sheet, supra note 54, at 3.


61. Id. at 342.

62. See supra note 23 and accompanying text.

63. See Benvenisti, supra note 60, at 347.

64. Id. at 348.

65. Id. at 350–52 (emphasis in original) (citations omitted).

66. Id. at 353.

67. Id. at 356 (citation omitted).

68. Id. at 359.


70. To be sure the Supreme Court has handed down several decisions against the U.S. government in cases involving the use of military commissions to prosecute alleged terrorists. See Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 553 U.S. 723 (2008). But the Supreme Court has refrained from sitting in judgment on the executive branch’s conduct of military hostilities.


72. See Benvenisti, supra note 60, at 350.

73. Additional Protocol I, supra note 8, arts. 51(5)(b) & 57(2)(b).

75. Id. at 432 n.20 (emphasis in original). See also W. Hays Parks, Air War and the Law of War, 32 AIR FORCE LAW REVIEW 1, 153–54 (1990).

76. Estreicher, supra note 74, at 435 (citations omitted).


78. Id. at 146.

79. See Benvenisti, supra note 60, at 353.