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## International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua

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# INTERNATIONAL HUMANITARIAN LAW AND THE ARMED CONFLICTS IN EL SALVADOR AND NICARAGUA

Robert Kogod Goldman\*

## INTRODUCTION

Since the early 1980s, forces opposed to the governments in El Salvador and Nicaragua have engaged in armed hostilities against those governments. Under both their domestic laws and international law, the Salvadoran and Nicaraguan governments have the right to use military force to defend themselves from violent overthrow. However, applicable laws and customs of war, i.e., international humanitarian law, impose normative restraints on the conduct of hostilities by the warring parties to these conflicts.

The purpose of this article is to identify and analyze the international humanitarian law regimes applicable to these ongoing Central American conflicts. Because the humanitarian law rules governing an international armed conflict vary significantly from the rules governing a non-international conflict, proper characterizations of the hostilities in El Salvador and Nicaragua are necessary to determine the applicable law. This article, after explaining the legal and factual reasons for these requisite characterizations, analyzes the key legal restraints on the choice of means and methods of combat available to the warring parties. It also identifies the protections that the parties are obliged to accord the civilian population and enemy combatants. The article focuses in particular on the applicable rules regulating the use of land mines, a major cause of civilian casualties in El Salvador and Nicaragua during the past four years.<sup>1</sup> Based on an examination of the relevant law, the article then identifies practices that the warring parties

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1. See *infra* note 70 (summarizing the use of land mines and similar devices in El Salvador and Nicaragua).

can legitimately employ, as well as other practices that violate the laws and customs of war.

### I. EL SALVADOR AND NICARAGUA: CASES OF NON-INTERNATIONAL ARMED CONFLICTS

Exercising their right under international law, the governments of El Salvador and Nicaragua have requested and received war materiel and military advisors from friendly states to help them fight dissident forces, namely the FMLN rebels in El Salvador<sup>2</sup> and the *contra* insurgents (*contras*) in Nicaragua.<sup>3</sup> For their part, the *contras* have received weapons, military training, and financial assistance primarily from the United States. In addition, Honduras and Costa Rica, although to a lesser extent in the past, have provided logistical support to the *contras*. The Honduran government permits the *contras* to establish and maintain bases and training camps within its territory from which the *contras* launch military operations and resupply their forces already in Nicaragua. Unlike the *contras*, FMLN forces operate exclusively within Salvadoran territory and have received war materiel from Cuba, the Soviet Union, and other Warsaw Pact members, as well as some logistical support from Nicaragua. Although these circumstances, from a purely political perspective, have unquestionably brought an international dimension to the hostilities in both El Salvador and Nicaragua, they do not make either conflict an international, i.e., interstate, one under international humanitarian law.<sup>4</sup>

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2. The Farabundo Martí National Liberation Front (FMLN) is the guerrilla organization that was formed in October 1980. It has links with the Democratic Revolutionary Front (FDR), the nonmilitary, political arm of the revolutionary opposition in El Salvador.

3. The *contras* (counter-revolutionaries) comprise the following armed groups: Fuerzas Democráticas Nicaragüenses (FDN) (National Democratic Forces), Alianza Revolucionaria Democrática (ARDE) (Revolutionary Democratic Alliance), a coalition formed in early 1982 between Movimiento Democrático Nicaragüense (MDN) (Nicaraguan Democratic Movement) and the Frente Revolucionario Sandino (FRS) (Sandino Revolutionary Front); and two groups representing the Miskito Indians, MISURASATA and KISAN. The umbrella organization for most of these armed groups is the United Nicaraguan Opposition (UNO).

4. The United States and Nicaraguan governments have made numerous public statements that, if taken literally, would mean that both states presently regard themselves as parties to an international armed conflict involving other states in the region. See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, paras. 20-21 (Merits Judgment of June 27). Nicaragua claimed in its suit against the United States that the United States is using military force against it, in violation of international law by *inter alia*, creating, training, arming, and financing an army of over 10,000 armed bands, or *contras*, who, from bases supplied to them in Honduras and Costa Rica, also in violation of international law, have attacked human and economic targets in Nicaragua. *Id.* President Reagan, in his February 1985 State

Under article 2 common to the four 1949 Geneva Conventions, an international armed conflict, by definition, must involve a declared war at the very least, or, in its absence, any other armed conflict between two or more states.<sup>5</sup> The official commentary to the 1949 Conventions broadly defines armed conflict as any difference between two states leading to the intervention of armed forces.<sup>6</sup> The requisite conditions for an international armed conflict have not yet been satisfied in either conflict because no state currently providing assistance to the warring parties has either declared war against El Salvador or Nicaragua or directly intervened with its armed forces on the side of either party to

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of the Union Address, said United States aid to the *contras* was justified as a legitimate "collective self-defense" measure under the charters of the United Nations and the Organization of American States in response to Nicaragua's "armed attack," i.e., supplying weapons to Salvadoran rebels, against the lawful government of El Salvador. The State of the Union Address Delivered Before a Joint Session of the Congress, 21 WEEKLY COMP. PRES. DOC. 140, 146 (Feb. 7, 1985).

Under both positions, the parties to such an international armed conflict would not be limited to the United States and Nicaragua, but would include El Salvador, Honduras, Cuba, and Costa Rica as well. Not surprisingly, neither the United States, Nicaragua, nor these other states have recognized the existence of such a conflict with its ensuing legal consequences under international humanitarian law, namely the application of the four Geneva Conventions and Protocol I to the conflict. Even in such an event, however, the humanitarian law regime governing relations *between* the Nicaraguan government and Nicaraguan *contras* would still be article 3 and the customary international law rules applicable to non-international conflicts, discussed later in this article. The I.C.J. found the conflict between the Nicaraguan government and the *contras* to be non-international in character and governed by common article 3. Military and Paramilitary Activities In and Against Nicaragua (*Nicar. v. U.S.*), 1986 I.C.J. 14, para. 219 (merits judgement of June 27).

Similarly, if another state intervened with its armed forces in the Salvadoran conflict, common article 3, customary international law, and Protocol II, as discussed *infra*, would continue to govern the legal relationship at least between the Salvadoran government and the FMLN rebels. The introduction of another state's armed forces in either Central American conflict would "internationalize" these non-international armed conflicts. *See also* Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U.L. REV. 145, 145-47 (1983) (discussing the legal issues posed by such interventions).

5. Article 2 common to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 3116, T.I.A.S. No. 3362, at 3, 75 U.N.T.S. 31, 32 [First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3220, T.I.A.S. No. 3363, at 4, 75 U.N.T.S. 85, 86 [Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3318, T.I.A.S. No. 3364, at 3, 75 U.N.T.S. 135, 136 [Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 3518, T.I.A.S. No. 3365, at 3, 75 U.N.T.S. 287, 288 [Fourth Geneva Convention] [all four collectively hereinafter 1949 Geneva Conventions].

6. COMMENTARY TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (J. Pictet ed. 1952).

these conflicts. Accordingly, the present nature of the hostilities between government and dissident forces in both El Salvador and Nicaragua is that of a noninternational, i.e., internal, armed conflict.

Because these conflicts are of a noninternational nature, they are governed by two sets of humanitarian law rules. First are those rules set forth in article 3 common to the four 1949 Geneva Conventions (article 3), to which El Salvador and Nicaragua are state parties.<sup>7</sup> Second are those customary international law rules applicable to internal armed conflicts. In the case of El Salvador, the warring parties are also bound by Protocol II additional to the 1949 Geneva Conventions (Protocol II).<sup>8</sup> While not directly applicable to the Nicaraguan conflict,

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7. 1949 Geneva Conventions, *supra* note 5, art. 3. Common article 3 states:

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, to 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 shall further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

*Id.* The International Committee of the Red Cross (ICRC) has stated that the provisions of article 3 now possess the character of *jus cogens*, a peremptory norm of international law, and thus are binding on all authorities claiming to exist in international law. Speech by Jacques Moreillon, Director for General Affairs and Directorate Member, ICRC, Inter-American Seminar on State Security, Human Rights and Humanitarian Law, San Jose, Costa Rica (Sept. 1982); *see also* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, Para. 220 (Merits Judgement of June 27) (indicating that common article 3 reflects general principles of humanitarian law or customary international law).

8. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),

Protocol II does contain rules providing authoritative guidance on the conduct of hostilities by the parties to that conflict. The Land Mines Protocol,<sup>9</sup> although expressly limited to interstate conflicts, is another appropriate source of rules that should be used to measure the conduct of the warring parties in both El Salvador and Nicaragua.

## II. ARTICLE 3 OF THE 1949 GENEVA CONVENTIONS

### A. ARTICLE 3'S MATERIAL FIELD OF APPLICATION

Article 3 of the 1949 Geneva Conventions is virtually a convention within a convention.<sup>10</sup> It imposes fixed legal obligations on the parties to an internal conflict for the protection of persons not, or no longer, taking an active part in the hostilities.<sup>11</sup> Unlike human rights law, which restrains violations inflicted only by a government and its agents, the obligatory provisions of article 3 expressly bind both parties to the conflict, i.e., government and dissident forces.<sup>12</sup> Moreover, the obligation to apply article 3 is absolute for both parties and independent of the obligation of the other party.<sup>13</sup>

Although article 3 automatically applies when a situation of internal armed conflict<sup>14</sup> objectively exists, the International Committee of the

*opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I and II (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

The ICRC has expressly recognized the applicability of Protocol II to the Salvadoran conflict. INT'L COMM. OF THE RED CROSS, 1983 ANNUAL REPORT 29 (1984) [hereinafter ICRC ANNUAL REPORT 1983].

9. Protocol on Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices (Protocol II), *annexed to* United Nations Conference on Prohibitions or Restriction of Use of Certain Conventional Weapons: Final Act, app. C, *opened for signature* Apr. 10, 1981, U.N. Doc. A/CONF.95/15 (1980), *reprinted in* 19 I.L.M. 1523, 1529 (1980) [hereinafter Land Mines Protocol].

10. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, *supra* note 6, at 48; *see* Junod, *Additional Protocol II: History and Scope*, 33 AM. U.L. REV. 29, 30 (1983).

11. *See* 1949 Geneva Conventions, *supra* note 7 (providing the text of article 3).

12. *Id.* *See generally* 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, 12 (1983). The generic term "dissidents" is used in this article to designate the party opposing governmental authorities in an internal conflict.

13. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE FIELD, *supra* note 6, at 51; *see* Junod, *supra* note 10, at 30.

14. Although the expression "an armed conflict of a non-international character" is not defined in the Geneva Conventions, Pictet states that "[t]he conflicts referred to in Article 3 are armed conflicts, with *armed forces* on either side engaged in *hostilities*-conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country." COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION RELATIVE TO THE TREATMENT

Red Cross (ICRC) is not legally empowered to compel the warring parties to acknowledge the article's applicability.<sup>15</sup> Thus, despite the fact that both the Salvadoran and Nicaraguan governments have permitted the ICRC to establish permanent delegations in their territory, neither government has publicly recognized the existence of an internal armed conflict as defined in article 3.<sup>16</sup> The fact that both governments allow the ICRC access to captured dissidents and to engage in civilian relief operations in combat zones, where ICRC delegates have come into contact with dissident forces,<sup>17</sup> however, suggests that both governments tacitly acknowledge the existence of another internal party to these conflicts.

Significantly, article 3 is the only provision of the four Geneva Conventions that directly applies to internal armed conflicts. The parties to such a conflict have no legal obligation to implement, enforce, or comply with the highly developed protections of the other articles of the Conventions that apply solely to an international armed conflict.<sup>18</sup>

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OF PRISONERS OF WAR 37 (J. Pictet ed. 1960). This concept of armed conflict excludes situations of internal disturbance and tensions characterized by sporadic acts of violence, riots, and widespread arrests. The legal regime governing such internal situations is the particular country's domestic law and, where applicable, international human rights law.

In situations of internal disturbances and tension, the ICRC has a "right of initiative" to offer its services to the government not based on the Geneva Conventions but based on its own statutes. For a detailed discussion of the need for new rules to govern situations of internal disturbances see Meron, *Editorial Comment, Towards a Humanitarian Declaration on Internal Strife*, 78 AM. J. INT'L L. 859, 860-68 (1984); Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1984).

15. See COMMENTARY TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD, *supra* note 6, at 51-52 (indicating that only the parties to the conflict are obliged to apply article 3).

16. See INT'L COMM. OF THE RED CROSS, 1986 ANNUAL REPORT 36-41 (1987) [hereinafter ICRC ANNUAL REPORT 1986] (discussing ICRC activities in El Salvador and Nicaragua).

17. *Id.*

18. See *supra* note 7 (providing the text of article 3); COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, *supra* note 14, at 37. The sole provision on implementation in article 3 provides only that the ICRC may offer its services to the parties to the conflict, but the parties are not legally required to accept such an offer. In contrast, the 1949 Geneva Conventions and Protocol I, which govern international armed conflicts, have mandatory provisions for the enforcement and implementation of their norms. These include supervision by protecting powers or an impartial humanitarian body, such as the ICRC, state responsibility for breaches, and individual responsibility for "grave breaches" that are made universal crimes within the jurisdiction of all parties to these Conventions and Protocol I. First Geneva Convention, *supra* note 5, arts. 6-11, 45-54; Second Geneva Convention, *supra* note 5, arts. 6-11, 46-53; Third Geneva Convention, *supra* note 5, arts. 7-12, 142-49; see also Protocol Additional to the Ge-

There are only two situations in which the Geneva Conventions could apply to the conflicts in El Salvador and Nicaragua. The first situation would arise if the government(s) recognized the belligerency of the dissidents. The second situation would arise if the government(s) and dissidents reached a special agreement to apply the Conventions under article 3, arrived at either directly or by similar declarations through the ICRC, or by unilateral declaration of the government(s).<sup>19</sup> Since neither government has done this, the warring parties in both countries are not legally required to apply rules contained in the Geneva Conventions relevant to the combatants's privilege and prisoners of war status. Under the Conventions and customary international law governing international armed conflicts, prisoner of war status flows directly from the combatants's privilege. A noted legal scholar writes that in essence "the combatants's privilege is a license to kill, maim, or kidnap enemy combatants; destroy military objectives; and cause unavoidable civilian casualties."<sup>20</sup> This privilege immunizes members of the armed forces from criminal prosecution by their captors for their violent acts that do not transgress the laws of war, but that might otherwise be crimes under domestic law.<sup>21</sup>

In an internal armed conflict, however, a government is not obliged to accord its armed opponents prisoner of war status because dissidents do not have the combatants's privilege.<sup>22</sup> Moreover, article 3 in no way

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neva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 5-7, 80-91, *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977), *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

In a noninternational armed conflict, violations of mandatory provisions in common article 3 are subject to enforcement under domestic law. If the state where the conflict occurs is also a party to a human rights treaty, the implementing procedures of the treaty can be used to redress violations of article 3, to the extent that the provisions in articles 3 are coextensive with rights guaranteed by the treaty. *See generally* Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U.L. REV. 936 (1982); Veuthey, *Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross*, 33 AM. U.L. REV. 83 (1983).

19. *See* Veuthey, *supra* note 18, at 92-93 (discussing some special agreements).

20. Solf, (Commentator on the subject of Non-International Armed Conflicts), in *The American Red Cross - Washington College of Law Conference: International Humanitarian Law*, 31 AM. U.L. REV. 927, 928 (1982); M. BOTHE, K. PARTSCH, & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949* 243 (1982) [hereinafter *NEW RULES*].

21. The combatants's privilege does not extend to war crimes. Solf, *supra* note 20, at 928.

22. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AM. U.L. REV. 53, 59 (1983). Solf states:



precludes a government from punishing these persons for the commission of crimes under its domestic laws.<sup>23</sup> Thus, the Salvadoran and Nicaraguan governments can try captured guerrillas who kill government soldiers for murder, treason, sedition, and other violent acts. Such trials must be conducted in accordance with the standards set forth in article 3 and, in the case of El Salvador, with the provisions of article 6 of Protocol II.<sup>24</sup> To ensure that the application of humanitarian guarantees in article 3 by the government is not legally construed as recogni-

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Governments, particularly those that may be affected by an emerging dissident or separatist movement, are unwilling to concur in any rule of international law that, in effect, would repeal their treason laws and confer on their domestic enemies a license to kill, maim, or kidnap security personnel and destroy security installations subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict.

*Id.*

23. COMMENTARY TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, *supra* note 14, at 40; *see* Solf, *supra* note 22, at 58-59 (indicating that states can often punish persons for security offenses, treason, or common crimes).

24. *See supra* note 7 (providing the text of article 3); Protocol II, *supra* note 8, art. 6. Article 6 states:

1. This Article applies to the prosecution and punishment of criminal offenses related to the armed conflict.

2. No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proven guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt.

3. A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

4. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children.

5. At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

*Id.*

tion of the dissidents's belligerence, the article unequivocally states that application of its provisions does not affect the legal status of the parties to the conflict.

#### B. PROTECTION OF THE CIVILIAN POPULATION UNDER ARTICLE 3

Unlike international treaty law governing international armed conflicts, article 3 contains no rules regulating the means and methods of warfare. In addition, the terms "civilian" and "combatant" do not appear in any of the provisions of article 3. Although article 3 does not provide explicit protection for the civilian population from attacks or their effects, its prohibition of "violence to life and person" against "persons taking no active part in the hostilities" may be broad enough to encompass attacks against civilians in territory controlled by an adverse party in an internal armed conflict. The primary purpose of article 3, however, is to absolutely ensure humane treatment of those persons who do not or no longer actively participate in the hostilities when they are in the power of a party to the internal conflict. Such persons are entitled to humane treatment without adverse distinction.

With regard to the conflicts in El Salvador and Nicaragua, persons protected by article 3 include members of both government and dissident forces who surrender, are found wounded, sick, or unarmed, or are otherwise captured by the other side. Individual civilians are similarly entitled to the guarantees contained in article 3 when they are captured by or subjected to the power of a warring party, even if they had fought for the opposing party, or indirectly participated in the hostilities by providing either party with food or other logistical support. Under these circumstances, if these persons die as a result of execution or torture inflicted by a party to the conflict, their deaths are tantamount to homicide.

### III. CUSTOMARY INTERNATIONAL LAW APPLICABLE TO INTERNAL ARMED CONFLICTS

Although article 3 does not by its terms prohibit attacks against the civilian population in noninternational armed conflicts, such attacks are prohibited by the customary laws of armed conflict. United Nations General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts* (United Nations Resolution 2444),<sup>25</sup> adopted by

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25. G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 164, U.N. Doc. A/7433 (1968) [hereinafter G.A. Res. 2444].

unanimous vote on December 19, 1969,<sup>26</sup> expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times. The preamble to this resolution clearly states that these fundamental humanitarian law principles apply "in all armed conflicts," meaning both international and internal armed conflicts.<sup>27</sup> Furthermore, the ICRC has long regarded these principles as basic rules of the laws of war that apply in *all* armed conflicts.<sup>28</sup> The United States government also has expressly recognized these principles as declaratory of existing customary international law.<sup>29</sup> These principles, therefore, constitute legal obligations for all the parties to the internal hostilities in El Salvador and Nicaragua.

#### IV. PROTOCOL II AND ITS APPLICATION TO INTERNAL ARMED CONFLICTS

##### A. THE PROTOCOL'S MATERIAL FIELD OF APPLICATION

Apart from customary international law, the principal source of rules

26. *See id.* at 29 (providing the numerical voting record of G.A. Res. 2444).

27. *Id.* art. 1. This resolution affirms, *inter alia*:

[T]he following principles for observance by all governmental and other authorities responsible for action in armed conflicts:

(a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

(b) That it is prohibited to launch attacks against the civilian population as such;

(c) That distinction must be made at all time between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible . . . .

*Id.*

28. *See id.* art. 1 (noting that the ICRC has recognized these principles since it first presented them in 1965 at the Twentieth International Conference of the Red Cross).

29. Letter from the General Counsel, United States Department of Defense to Senator Edward Kennedy (Sept. 22, 1968), reprinted in Rovine, *Contemporary Practice of the United States Relating to International Law*, 67 AM. J. INT'L L. 118, 122-25 (1973). The Armed Forces of the United States expressly recognizes the binding nature of the principle of civilian immunity from direct attack. *See* U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 25, at 16 (1956 & Supp. 1976) [hereinafter 1956 FIELD MANUAL 27-10] (indicating that "it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them"); U.S. DEP'T OF WAR, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 19, at 6 (1940 & Supp. 1944) [hereinafter 1940 FIELD MANUAL 27-10] (noting that "It is now universally recognized that hostilities are restricted to the armed forces of belligerents"); U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31 para. 5-3, at 5-7 (1976) [hereinafter U.S. AIR FORCE PAMPHLET] (outlining the rules that are observed to protect civilians against "dangers arising from military operations").

governing the conduct of hostilities for the protection of victims in internal armed conflicts is Protocol II.<sup>30</sup> Article 1, paragraph 1 of Protocol II limits that instrument's application to a noninternational armed conflict, "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."<sup>31</sup>

Protocol II develops and supplements article 3 without modifying that article's existing conditions of application. Thus, in those conflicts satisfying the conditions for its application, Protocol II applies cumulatively and simultaneously with article 3 because the scope of Protocol II is included in the broader scope of article 3. Protocol II's threshold of application, however, is both different from and clearly above that of article 3.<sup>32</sup> Protocol II introduces objective qualifications not found in article 3, such as the requirements that a state party's armed forces must participate in the conflict and that dissident armed forces or other organized armed groups must exercise control over a part of its territory. Moreover, as stated in the *Commentary on the Two 1977 Protocols (New Rules)*, "the qualifications of the armed conflict contained in the last part of the sentence [Art. 1 para. 1] beginning with 'which, under responsible command,' are principally designed to limit the application of Protocol II to serious cases of rebellions of 'other organized armed groups.'"<sup>33</sup> Thus, the objective conditions that must be satisfied to trigger Protocol II's application contemplate a situation of civil war essentially comparable to a state of belligerency under customary international law.

## B. PROTOCOL II'S APPLICATION TO THE SALVADORAN CONFLICT

Despite the Salvadoran government's reluctance to officially recog-

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30. Protocol II, *supra* note 8.

31. *Id.* art. 1(1). Article 1(2) also expressly excludes from Protocol II's material field of application "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." *Id.* Such situations are similarly excluded from the scope of article 3 for various reasons previously stated. *See supra* note 7 (stating the reasons for excluding certain situations from the scope of article 3).

32. *See Junod, supra* note 10, at 35-38 (discussing the scope of Protocol II in relation to article 3); *NEW RULES, supra* note 20, at 623 (comparing Protocol II with article 3).

33. *NEW RULES, supra* note 20, at 627.

nize the applicability of Protocol II,<sup>34</sup> it is apparent that the hostilities there have met the Protocol's threshold for some time.<sup>35</sup> The FMLN rebels have controlled and exercised considerable influence over the civilian population in the northern Morazan, northeast Chalatenango, eastern Usulután, northern San Miguel, and areas of San Salvador, constituting substantial parts of five of the country's fourteen departments. The rebels' control over these areas has enabled them to engage in sustained military operations that they have undertaken in a systematic, coordinated manner.<sup>36</sup> It should be noted that full-fledged field battles are not necessary to make Protocol II applicable.

The FMLN also has pledged to the ICRC to respect international humanitarian law, particularly regarding the treatment of captured persons.<sup>37</sup> In addition to permitting the ICRC to undertake civilian relief activities, the FMLN has allowed ICRC delegates to occasionally visit captured combatants and civilian detainees and has released, in the past, some of these persons to the ICRC.<sup>38</sup> These actions indicate that the rebels are capable of applying the Protocol. Importantly, the ICRC expressly recognized the applicability of Protocol II to the Salvadoran conflict in its *1983 Annual Report*.<sup>39</sup>

### C. PROTOCOL II'S RELEVANCE TO THE NICARAGUAN CONFLICT

Nicaragua has signed, but not ratified, Protocol II. Therefore, the

34. AMERICAS WATCH, *THE CIVILIAN TOLL, 1986-1987, NINTH SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR 26* (Aug. 30, 1987) [hereinafter *THE CIVILIAN TOLL*]. The authors of *The Civilian Toll* state, "[I]t appears that the government of El Salvador, or at least important sectors of the government, have recognized the applicability of the Geneva Conventions and Protocol II . . . to the war in El Salvador." *Id.* The Salvadoran Armed Forces, however, continued to commit serious human rights and law of war abuses in 1986 and 1987. *Id.*

35. See ICRC ANNUAL REPORT 1983, *supra* note 8, at 37 (indicating that the ICRC recognizes that the hostilities in El Salvador satisfy the threshold in Protocol II).

36. See generally AMERICAS WATCH AND THE AMERICAN CIVIL LIBERTIES UNION REPORT ON HUMAN RIGHTS IN EL SALVADOR, A REPORT TO THE BOARD OF THE AMERICAN CIVIL LIBERTIES UNION 1-52 (1982) (describing rebel activities in El Salvador); AMERICAS WATCH AND THE AMERICAN CIVIL LIBERTIES UNION AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR 7-52 (4th Supp., Jan. 31, 1984); *THE CIVILIAN TOLL*, *supra* note 34; ORG. OF AMER. STATES, REPORT ON THE SITUATION OF HUMAN RIGHTS IN EL SALVADOR 32-164, OEA/ser. L/V/11.46, doc. 23 rev. 1 (17 November 1978).

37. See ICRC ANNUAL REPORT 1983, *supra* note 8, at 29 (noting that the FMLN has pledged to respect international humanitarian law). *But see* *THE CIVILIAN TOLL*, *supra* note 34, at 121-54 (noting that although the FMLN has recognized the Protocol's applicability to the conflict in El Salvador, it has committed serious violations of the laws of war); *THE CIVILIAN TOLL*, *supra* note 34 (listing reports on human rights abuses in El Salvador).

38. ICRC ANNUAL REPORT 1986, *supra* note 16, at 37-38.

39. *Id.*

terms of that instrument do not bind either the Sandinista government or the *contras*. Even if Nicaragua had ratified Protocol II, the present intensity of hostilities there falls significantly below the Protocol's high threshold. Although the *contras* have declared their adherence to international humanitarian law,<sup>40</sup> have engaged government forces primarily in parts of Zelaya, Jinotega, Matagalpa, Boaco, and Chontales provinces, and continue to maintain an organized command structure, they have been unable to control effectively these or other parts of Nicaraguan territory so as to enable them to carry out sustained and concerted military operations in that country.<sup>41</sup> Nevertheless, Protocol II is relevant to the conflict in Nicaragua.

The preamble of the Protocol contains a de Martens Clause that states "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity, and the dictates of public conscience."<sup>42</sup> The principle of humanity, which both complements and inherently limits the doctrine of military necessity, forbids direct attacks against the civilian population and those measures of violence that cause unnecessary suffering.<sup>43</sup> The deliberate allusion in Protocol II to the principle of humanity reaffirms the relevance in internal armed conflicts of the customary law principle of civilian immunity and the principle of distinction enshrined in United Nations Resolution 2444.

The implicit and explicit protection from direct attack accorded the

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40. Unpublished letter from Azunca Ferrey and Adolfo Calero, Directors of the Resistencia Nicaragüense to Orville H. Shell, Chairman of Americas Watch and Aryeh Neier, Vice-Chairman of Americas Watch, (Jan. 26, 1988) (copy of letter available from article author). These *contra* leaders state that in July of 1984 they advised the President of the ICRC in Geneva of their acceptance of the applicability of international humanitarian law to the conflict in Nicaragua and their commitment to observe the same. *Id.*

41. See generally AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985 (1985) (describing *contra* activity in Nicaragua); AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA 1981-1985 (1st Supp., June 1985); AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA 1985-1986 (1986).

42. Protocol II, *supra* note 8, preamble. This clause is named after Fyodor de Martens, the Russian jurist and diplomat who drafted the preambles to the Hague Conventions No. II of 1855 and No. IV of 1907 which codified much of the law of war. De Martens's formulation was intended to obviate the notion that any means or methods of warfare not expressly prohibited by treaty was permissible. The de Martens Clause thus affirms that customary laws of war remain in full force, except to the extent modified by treaty. Formulations similar to the original de Martens Clause appear in the four 1949 Geneva Conventions, Protocol I, and the United Nations Weapons Convention.

43. U.S. AIR FORCE PAMPHLET, *supra* note 29, para. 1-3(2), at 1-6; see also 1940 FIELD MANUAL 27-10, *supra* note 29, para. 4(b), at 2 (providing a similar definition for the principle of humanity).

civilian population, the effects of warfare under article 3, and these customary international law principles would be illusory guarantees without appropriate standards defining and distinguishing civilians and civilian objects from combatants and military objectives in internal armed conflicts. Protocol II contains various rules that provide authoritative guidance for the protection of the civilian population in the conduct of military operations. The same rules can provide interpretive standards for similar purposes in internal armed conflicts not directly governed by Protocol II, such as the hostilities in Nicaragua. In addition, many of the rules contained in Protocol I additional to the 1949 Geneva Conventions (Protocol I), which apply only to international armed conflicts and which are not generally replicated in Protocol II, also provide guidance for interpreting the substantive content of the similar, but less detailed, provisions in Protocol II.

#### D. CLASSIFICATION OF CIVILIANS AND THE CIVILIAN POPULATION IN INTERNAL CONFLICTS

The basic provision in Protocol II relating to civilian immunity is article 13.<sup>44</sup> This article merely refers to "individual civilians" and "civilian population" without explaining the meaning of these terms. Article 50 of Protocol I, however, defines the term "civilian population" as comprising "all persons who are civilians"<sup>45</sup> and defines a "civilian"

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44. Protocol II, *supra* note 8, art. 13. Article 13 states:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

*Id.*

45. Protocol I, *supra* note 18, art. 50(1) (defining a civilian as "any person who does not belong to one of the categories referred to in article 4(A)(1), (2), (3), and (6) of the Third Convention and in article 13 of this Protocol). Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention includes persons who are (1) members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces; (2) members of other militias and members of volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill certain conditions; (3) members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power; and (4) inhabitants of a nonoccupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. Third Geneva Convention, *supra* note 5, art.

negatively as anyone who is not a member of the armed forces or of an organized armed group of a party to the conflict. These definitions are also relevant for distinguishing civilians from combatants in internal armed conflicts governed by Protocol II and article 3.

Unlike article 43 of Protocol I, article 13 of Protocol II also does not explicitly define the term "combatants." Protocol II, however, contains the basic elements of the concept of armed forces in its allusion to the "armed forces of the High Contracting party" and to "dissident armed forces or other organized armed groups . . . under responsible command." The authors of *New Rules* state that "inferentially these terms recognize the essential conditions prescribed under art. 43 of Protocol I: that the armed forces be linked to one of the parties to the conflict; that they be organized; and that they be under responsible command."<sup>46</sup> They significantly conclude that "[i]t thus follows that civilians are all persons who are not members of organizations meeting these qualifications."<sup>47</sup> Accordingly, the civilian population comprises all other persons who do not actively participate in the hostilities, which means participating in an attack that the party intends to cause physical harm to enemy personnel or objects. In addition, the authors of the *New Rules* indicate that the term "civilian" also includes the following:

Persons directly linked to the armed forces, including those who accompany the armed forces without being members thereof, such as civilian members of military aircraft crews, supply contractors, members of labour units, or of services responsible for the welfare of the armed forces, members of the crew of the merchant marine and the crews of civil aircraft employed in the transportation of military personnel, material or supplies . . . .

Civilians employed in the production, distribution and storage of munitions of war, and

Civilians who are taking, or have taken, part in hostilities without combatant status. These persons, however, lose their [immunity from attack] while they are taking a direct part in hostilities.<sup>48</sup>

Article 50 of Protocol I also provides that "the presence within the civilian population of individuals who do not come within the definition

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4(A)(1), (2), (3), (6).

Article 43 of Protocol I, on the other hand, defines armed forces of a party as consisting of "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse party. Such armed forces shall be subject to an internal disciplinary system . . . ." Protocol I, *supra* note 18, art. 43(1).

46. *NEW RULES*, *supra* note 20, at 672.

47. *Id.*

48. *Id.* at 293-94.



of civilians does not deprive the population of its civilian character."<sup>49</sup> The point of this provision, according to the *New Rules*, is that "[t]he presence of a small number of off-duty combatants, or even of some engaged in the transaction of business for the armed forces within a community of civilians would not subject that community to attack."<sup>50</sup> Such a community, therefore, is similarly immune from direct attack.

#### E. DESIGNATION OF MILITARY OBJECTIVES

The definition of the term "military objective" in Protocol I inferentially applies to that term's usage in Protocol II. Article 52(2) of Protocol I defines military objectives only as they relate to objects or targets, rather than to personnel.<sup>51</sup> To constitute a legitimate military objective, the object or target, selected by its nature, location, purpose, or use, must contribute effectively to the enemy's military capability or activity, and its total or partial destruction or neutralization must offer a definite military advantage in the circumstances ruling at the time. Except for certain objects given special immunity, such as dykes and dams, Protocol I does not delineate specific categories of property or persons as military objectives.

It is clear, however, that legitimate military objectives do include enemy combatants, as well as their weapons, convoys, installations, and supplies. In addition, the *New Rules* states that "an object generally used for civilian purposes, such as a dwelling, a bus, a fleet of taxicabs, or a civilian airfield or railroad siding, can become a military objective if its location or use meets both of the criteria set forth in article 52."<sup>52</sup> For example, a defending party may organize an entire town or village as part of its defensive position, thereby making it a "defended locality."<sup>53</sup> The town or village thus constitutes a legitimate target. The civilians remaining in that locale, however, would retain the benefits of the rule of proportionality as it applies to collateral civilian casualties.<sup>54</sup>

Moreover, the *New Rules* points out that the criterion requiring military objectives to make an effective contribution to military action does not necessarily require their direct connection with combat operations.<sup>55</sup> A civilian object may become a military objective and lose its immunity from deliberate attack through use that only indirectly re-

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49. Protocol I, *supra* note 18, art. 50(3).

50. *NEW RULES*, *supra* note 20, at 296.

51. Protocol I, *supra* note 18, art. 52(2).

52. *NEW RULES*, *supra* note 20, at 306-07.

53. *Id.* at 307.

54. *Id.*

55. *Id.* at 324.

lates to combat action, but that nonetheless provides an effective contribution to the military aspect of a party's overall war effort.<sup>56</sup> Accordingly, industries or crops, whether publicly or privately owned, that are of fundamental importance for conducting the armed conflict are legitimate military targets. The *New Rules* notes, for example, that the destruction by Union forces of raw cotton in the South during the United States Civil War was justifiable. Raw cotton was a military target not because it had any value as an implement of war, but because it was the chief export of the Confederacy and thus the ultimate means of funding Confederate weapons and military supplies.<sup>57</sup>

#### F. DESIGNATION OF CIVILIAN OBJECTS

The definition of the term "civilian objects" in article 52(1) of Protocol I<sup>58</sup> should be accorded similar meaning for purposes of Protocol II. Article 52(1) negatively defines civilian objects as all objects that are not military objectives as defined in paragraph 2 of that same article, which sets forth the twofold test for military objectives. Therefore, article 52 implicitly characterizes all objects as civilian, unless they make an effective contribution to the enemy's military action and unless destroying, capturing, or neutralizing them offers a definite military advantage in the circumstances.

In doubtful situations, article 52 creates a presumption that objects normally dedicated to civilian use, such as churches, houses, or schools, are not employed to contribute effectively to military action.<sup>59</sup> This presumption attaches only to objects that ordinarily have no significant military use or purpose. For example, this presumption would not include objects that constitute legitimate military targets under the criteria established in article 52, such as transportation and communication systems.

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56. *Id.*

57. *Id.* at 329 n.15.

58. Protocol I, *supra* note 18, art. 52(1). Article 52(1) states:

Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

*Id.*

59. *Id.* art. 52(3). Article 52(3) states:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

*Id.*

G. PROTECTION OF CIVILIANS AND CIVILIAN OBJECTS FROM  
INDISCRIMINATE ATTACKS UNDER PROTOCOL II

Although article 13 of Protocol II accords the civilian population and individual civilians general protection against attack, it does not expressly provide them or civilian objects express protection against indiscriminate or disproportionate attacks. The *New Rules* indicates, however, that "the concept of general protection is broad enough to cover protections which flow as necessary inferences from other provisions of Protocol II."<sup>60</sup> In addition, the detailed rules in Protocol I designed to protect civilians and civilian objects from such attacks provide relevant guidance for interpreting the extent of similar protection for these persons and objects under Protocol II.<sup>61</sup>

For example, article 51(4) of Protocol I expressly protects the civilian population from indiscriminate or disproportionate attacks.<sup>62</sup> The article prohibits attacks that are not directed at specific military objectives or that employ a method or means of combat that a party cannot direct at a specific military objective. Thus, the article prohibits the parties from attacking military objectives and civilians or civilian ob-

60. NEW RULES, *supra* note 20, at 676.

61. Protocol I, *supra* note 18, art. 51(1), (2). Article 51(1) and (2) states:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

*Id.*

62. *Id.* art. 51 paras. 4, 5. Article 51(4) and (5) states:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
  - a. those which are not directed at a specific military objective;
  - b. those which employ a method or means of combat which cannot be directed at a specific military objective; or
  - c. those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
 and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
5. Among others, the following types of attacks are to be considered as indiscriminate:
  - a. an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
  - b. an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

*Id.*

jects without distinction.

Article 51(5)(a) characterizes an attack as indiscriminate when it treats a number of clearly separate and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects as a single military objective. An assault on a single military objective within that locale, on the other hand, would not constitute an unlawful indiscriminate attack. An attack on a populated area in order to destroy several military objectives that a party could have attacked separately, however, is indiscriminate. In addition, article 51(5)(b) also characterizes as indiscriminate an attack that might cause civilian casualties and damage disproportionate to the "concrete and direct military advantage anticipated."

The legitimacy of a target, however, does not provide unlimited license to attack it. The prohibitions on indiscriminate and disproportionate attacks affecting civilians limit the methods of attacking legitimate military targets located in the midst of a high concentration of civilian population. For example, an attack on an entire farm or cooperative in order to destroy a coffee-drying facility that could be separately attacked would be indiscriminate. The use of "blind" weapons can also constitute an indiscriminate attack.<sup>63</sup>

The *New Rules* also indicates that the absence of an explicit prohibition against indiscriminate attacks in article 13 is due merely to the simplification of the text of the article.<sup>64</sup> It argues, therefore, that "attacks against densely populated places which are not directed at military objectives, those which cannot be so directed, and the area bombardments prohibited by para. 5(a) of Art. 51 [Protocol I] are inferentially included within the prohibition against making the civilian population the object of attack."<sup>65</sup> The "principle of humanity," expressly stated in the preamble of Protocol II, also implicitly prohibits disproportionate or indiscriminate attacks against the civilian population in a non-international armed conflict.

## V. THE LAND MINES PROTOCOL

The principal source of international law rules governing the use of land mines and comparable explosive devices is the Land Mines Protocol,<sup>66</sup> annexed to the 1981 United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May

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63. NEW RULES, *supra* note 20, at 324.

64. *Id.*

65. *Id.*

66. Land Mines Protocol, *supra* note 9.

be Deemed to be Excessively Injurious and to Have Indiscriminate Effects (United Nations Convention).<sup>67</sup> Article 1 of the United Nations Convention, however, states that the Land Mines Protocol applies only to international armed conflicts and to a limited class of wars of national liberation.<sup>68</sup> El Salvador and Nicaragua are not legally bound by these instruments because neither state has ratified them.<sup>69</sup> Assuming, however, that both states had done so, the provisions of these instruments still would not directly apply as treaty obligations because neither conflict meets the threshold requirements of article 1 of the United Nations Convention.

The fact that the Land Mines Protocol is not directly binding on El Salvador and Nicaragua does not mean, however, that this instrument's authoritative rules are inappropriate to the conduct of military operations by the parties to the conflicts in both countries.<sup>70</sup> In this regard,

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67. United Nations Conference on Prohibitions or Restriction of Use of Certain Conventional Weapons: Final Act, *opened for signature* Apr. 10, 1981, U.N. Doc. A/CONF.95/15 (1980), *reprinted in* 19 I.L.M. 1523 (1980) [hereinafter U.N. Convention]. The Convention and its three Protocols entered into force on December 2, 1983. The Convention is an "umbrella" treaty to which are attached three optional protocol agreements, each containing specific limitations on the use of particular conventional weapons. *Id.* In addition to the Land Mines Protocol, the Convention incorporates the Protocol on Non-detectable Fragments (Protocol I) and the Protocol on Prohibitions or Restriction on the Use of Incendiary Weapons (Protocol III). *Id.* Under this structure, the provisions of the Convention apply to all three protocols. At the time a state ratifies or accepts the Convention, it must indicate its consent to become bound by at least two of these Protocols. *Id.* art. 4(3). Thereafter, the state can become a party to the other Protocol, if it so consents. *Id.* art. 4(4).

68. *Id.* art. 1.

69. See *Recent Actions Regarding Treaties to Which the United States is not a Party*, 20 I.L.M. 795 (1981) (noting that Nicaragua did, however, sign the United Nations Convention on May 20, 1981).

70. See THE CIVILIAN TOLL, *supra* note 34, 106-07 (summarizing the use of land mines and other explosive devices in El Salvador). See generally AMERICAS WATCH, LAND MINES IN EL SALVADOR AND NICARAGUA, THE CIVILIAN VICTIMS (Dec. 1986) [hereinafter LAND MINES] (detailing the use of land mines and other explosive devices in El Salvador). In El Salvador, mines have been used by both parties to the conflict in areas frequented by civilians. LAND MINES, *supra*, at 2. The armed forces in El Salvador use mines defensively to protect emplacements and training camps. THE CIVILIAN TOLL, *supra* note 34, at 106. The military also mine areas where guerrillas are expected to pass or camp. THE CIVILIAN TOLL, *supra* note 34, at 106. It appears, however, that the majority of civilian casualties in this area are caused by mines placed by the FMLN guerrillas. THE CIVILIAN TOLL, *supra* note 34, at 106; LAND MINES, *supra*, at 2.

In Nicaragua, both parties to the conflict use mines. LAND MINES, *supra* at 3. Mining by the *contras* has caused the majority of civilian casualties in Nicaragua; however, additional civilian casualties have occurred in Honduras as a result of Nicaraguan government mining. LAND MINES, *supra*, at 3. *Land Mines* summarizes this situation, stating:

In sum, government and rebel forces in both El Salvador and Nicaragua have used land mines indiscriminately; government forces of both countries have used

the third paragraph of the United Nations Convention's preamble declares that a basic purpose of this Convention and its Land Mines Protocol is to give effect to two fundamental customary principles of the laws of war, namely, that the rights of the parties to an armed conflict to adopt methods or means of warfare are not unlimited and the use of weapons, projectiles, or material calculated to cause superfluous injury or unnecessary suffering is prohibited.<sup>71</sup> Another customary principle of the laws of war — the protection of the civilian population against the effects of hostilities — is recited in the Convention's second preambulatory paragraph.<sup>72</sup> These principles of customary international law, as previously indicated, are expressly recognized in United Nations Resolution 2444. The inclusion of a de Martens Clause in the preamble of the United Nations Convention also reaffirms the relevance of these customary principles in all armed conflicts.<sup>73</sup>

Furthermore, if the provisions of the Land Mines Protocol embody, reaffirm, or implement these same principles, then states could regard those provisions, independent of that instrument, as part of the customary laws of war. As such, these provisions could directly bind the parties to internal armed conflicts. Accordingly, the following analysis of the provisions of the Land Mines Protocol will focus on this inquiry.

#### A. PURPOSES AND DANGERS OF LAND MINE WARFARE

Unlike other international agreements that limit the use of specific conventional weapons for the protection of both combatants and civilians, the Land Mines Protocol seeks essentially to protect civilians<sup>74</sup> from the dangers of land mine warfare.<sup>75</sup> It does not protect military personnel from the use of these and related devices and, furthermore,

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land mines sporadically and rebel forces have used them extensively in both countries; and the evidence suggests that the *contras* in Nicaragua probably have used mines deliberately against civilians.

LAND MINES, *supra*, at 4.

71. U.N. Convention, *supra* note 67, preamble para. 3.

72. *Id.* preamble para. 2.

73. U.N. Convention, *supra* note 67, preamble; *see also* note 42 and accompanying text (defining a de Martens Clause).

74. Carnahan, *The Law of Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73, 75 (1984).

75. Land Mines Protocol, *supra* note 9, art. 1. Article 1 of the Land Mines Protocol limits the material scope of application of the Protocol to "the use on land of the mines, booby-traps and other devices . . . including mines laid to interdict beaches, waterway crossings or river crossings, but does not apply to the use of anti-ship mines at sea or in inland waterways." *Id.* The Protocol, therefore, does not affect existing international laws governing mine warfare at sea. *Id.*

permits the use of land mines to achieve military objectives.<sup>76</sup>

Certain peculiarities specific to land mines differentiate their use from that of other conventional weapons.<sup>77</sup> A United States expert on the law of war notes in this regard:

Unlike ordinary munitions, land mines and booby-traps are not designed to explode when they approach the target. They are, instead, designed to lie dormant until enemy vehicles or personnel approach them. While most munitions are intended primarily to destroy enemy property or personnel, land mines are, in contrast, used primarily to impede enemy access to certain areas of land by requiring mine clearance before those areas are used. Militarily, mine fields are similar to ditches, tank traps, and concertina barbed wire in that they are obstacles to enemy movement.<sup>78</sup>

Thus, it is the particular area of land, rather than the vehicles or persons entering it, that is the object of attack by mines. If an area of land where mines are placed meets the test of a legitimate military objective, the deaths or injuries suffered by civilians as well as combatants who enter that mine field are collateral or secondary to the primary military purpose for the emplacement of the mines.<sup>79</sup>

Therefore, land mines pose two significant dangers particularly to civilians. First, a party to the conflict might place land mines in areas populated by civilians.<sup>80</sup> Second, the land mines constitute a continuing threat if they do not self-destruct, but remain active and in place after their military purpose has ceased.<sup>81</sup> The chief purpose of the Land Mines Protocol is to shield civilians from these and other dangerous effects of land mine warfare.<sup>82</sup> The provisions of articles 2 and 3 of the Land Mines Protocol implement this purpose in several ways. First, they define terms necessary for clarifying the obligatory distinction between civilians and civilian objects and combatants and other military objectives. Second, they impose legal restraints,<sup>83</sup> namely a prohibition of indiscriminate use<sup>84</sup> and the rule of proportionality, on land mine attacks directed against military objectives.<sup>85</sup> Third, they require parties to take precautionary measures when using these weapons to avoid or minimize civilian casualties or damage to civilian objects collateral

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76. *See id.* art. 3(3).

77. Carnahan, *supra* note 74, at 75.

78. *Id.*

79. *Id.*

80. *Id.* at 76.

81. *Id.*

82. *Id.*

83. Land Mines Protocol, *supra* note 9, art. 2.

84. *Id.* art. 3(3).

85. *Id.* art. 3(3)(c).

to attacks against military objectives.<sup>86</sup> In addition, the provisions of articles 4, 5, and 6 of the Land Mines Protocol detail other legal restrictions that vary with the type of mine or device.<sup>87</sup>

Before analyzing these articles, however, one should note that many of their provisions reaffirm or directly incorporate rules and principles found in comparable articles of Protocol I to the 1949 Geneva Conventions.<sup>88</sup> Thus, authoritative interpretations of the articles contained in Protocol I can provide relevant standards for interpreting and, possibly, broadening the content of the articles contained in the Land Mines Protocol. Further, to the extent that the provisions of Protocol I affirm or embody customary rules of the laws of war applicable to all armed conflicts, these provisions could be considered customary law. Accordingly, comparable provisions in the Land Mines Protocol also could constitute customary law and, therefore, are appropriate for application, where relevant, to the internal armed conflicts in Nicaragua and El Salvador.

#### B. GENERAL PROHIBITIONS AND RESTRICTIONS ON WEAPON USE

The fundamental rule in the Land Mines Protocol that immunizes civilians from direct attack is found in article 3(2). This article prohibits in all circumstances the "direct" use, "either in offense, defense or by way of reprisals," of "land mines," "booby-traps," and "other devices" against "the civilian population . . . or against individual civilians."<sup>89</sup> Article 2 of the Protocol defines the terms "mines," "booby-traps," and "other devices" as follows:

1. 'Mine' means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle and 'remotely delivered mine' means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.

2. 'Booby-trap' means any device or material which is designed, constructed or adapted to kill or injure civilians, civilian objects, and military objectives.<sup>90</sup>

Although the Land Mines Protocol itself does not define the terms

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86. *Id.* art. 3(4).

87. *See id.* art. 4(2) (placing restrictions on the use of mines, other than remotely delivered mines, booby-traps, and other devices in populated areas); *id.* art. 5 (placing restrictions on the use of remotely delivered mines); *id.* art. 6 (prohibiting the use of certain booby-traps).

88. Carnahan, *supra* note 74, at 74 n.6 (stating that "delegates to the Weapons Conference uniformly turned to the 1949 Geneva Conventions and the 1977 Protocols for definitions, terminology and basic principles of law").

89. Land Mines Protocol, *supra* note 9, art. 3(2).

90. *Id.* art. 2.



“civilian population” and “individual” civilians, article 50 of Protocol I does define and explain the meaning of these terms.<sup>91</sup> The same persons should be regarded as civilians for purposes of the Land Mines Protocol. In addition, Protocol I and the Land Mines Protocol define the term “civilian objects” identically as “all objects which are not military objectives.” By implication, therefore, the Land Mines Protocol considers all objects civilian in nature, unless they satisfy the twofold test for military objectives. Furthermore, as already noted, article 52 of Protocol I creates a presumption that objects normally dedicated to civilian use are not being employed to effectively contribute to military action. The Land Mines Protocol, like Protocol I, defines military objectives only as they relate to objects, rather than to personnel. It also does not designate specific categories of property or persons as military objectives.<sup>92</sup> The objects defined in article 52 of Protocol I that would qualify as military objectives should also qualify as such under the Land Mines Protocol. In view of the fact that an area of land is the usual object of a mine attack, such a land area also constitutes a legitimate military objective under both Protocols. Finally, objects generally used for civilian purposes that become a military objective also are amenable to direct mine attack in accordance with other provisions of the Land Mines Protocol.

### C. PROHIBITION OF INDISCRIMINATE WEAPONS USE

Article 3(3) of the Land Mines Protocol states the rules for protecting civilians and civilian objects from the collateral effects of land mines that parties use against military objectives. This article prohibits the “indiscriminate” use of these weapons that it defines as any placement of such weapons

- (a) which is not on, or directed at, a military objective; or
- (b) which employs a method or means of delivery which cannot be directed at a specific military objective; or
- (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>93</sup>

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91. Protocol I, *supra* note 18, art. 50.

92. Land Mines Protocol, *supra* note 9, art. 2(4); Protocol I, *supra* note 18, art. 52(2). Article 2(4) of the Land Mines Protocol and article 52(2) of Protocol I respectively define “military objective” similarly as “any objective which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time offers a definite military advantage.”

93. Land Mines Protocol, *supra* note 9, art. 3.

This definition adopts the prohibition against indiscriminate attacks found in article 51(4) and (5) of Protocol I. Article 3(3) of the Land Mines Protocol, like article 51(4) of Protocol I, does not prohibit all land mine use that would strike military objectives and civilians or civilian objects without distinction, but only that use which subparagraphs (a), (b), and (c) specify.<sup>94</sup> In this connection, the authors of the *New Rules* note that the reference in article 51(4)(b) to "methods [of attack] which cannot be directed at a specific military objective prohibits 'blind' weapons that cannot, with any reasonable assurance, be directed against a military objective."<sup>95</sup> Significantly, they state that "[I]and mines, laid without customary precautions, and which are unrecorded, unmarked, or which are not designated to destroy themselves within a reasonable time, may also be blind weapons in relation to time."<sup>96</sup>

Subparagraph 3(c) of article 3 expressly applies the principle of proportionality to attacks against legitimate military targets in order to protect civilians against their collateral effects. Thus, the use of land mines against a military objective when the party may expect such use to cause excessive civilian casualties and damages in relation to the concrete and direct military advantage would be a prohibited indiscriminate use by definition. This express codification of the rule of proportionality implements and clarifies the customary principle of humanity that is applicable to internal armed conflicts and to which the preamble of additional Protocol II alludes.<sup>97</sup>

#### D. FEASIBLE PRECAUTIONS REQUIREMENT

Article 3(4) of the Land Mines Protocol requires that parties to a conflict take all feasible precautions to protect civilians from the effects of weapons. The article defines such precautions as those "which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."<sup>98</sup> This requirement, although not expressly clarified by examples, refers inferentially to customary principles of the laws of war that require the attacking party to observe certain precautions when attacking military objectives in order to avoid or minimize collateral civilian casualties. It also refers to provisions in other articles of the Land

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94. *Id.*

95. *NEW RULES*, *supra* note 20, at 305.

96. *Id.*

97. *See* Protocol II, *supra* note 8, preamble.

98. Land Mines Protocol, *supra* note 9, art. 3(4).

Mines Protocol that call for actually warning the civilian population of the deployment of land mines on or in an area containing a military objective. This feasible precautions requirement, thus, complements the obligation of the attacking party to respect the principle of distinction set forth in article 3(2) of the Land Mines Protocol.

Article 57(2) of Protocol I contains a systematic codification of these customary precautionary rules providing "combatants with uniformly recognized guidance as to their responsibility to civilians and civilian objects in carrying out attacks against military objectives."<sup>99</sup> In this regard, the authors of the *New Rules* note that article 57(a)

imposes three distinct duties on commanders who decide upon attacks and staff officers who plan an attack: (1) verify that the target of an attack is a lawful military objective, (2) avoid, or in any event, minimize civilian casualties, and (3) ensure that any unavoidable civilian casualties are not excessive in relation to the concrete and direct military advantage anticipated.<sup>100</sup>

They add that in drafting subparagraph 2(a)(i) dealing with verification of legitimate military targets and the rule of proportionality, "the word 'feasible' . . . was preferred to 'reasonable' and that it is understood to mean 'that which is practicable or practically possible.'"<sup>101</sup> In

99. NEW RULES, *supra* note 20, at 360; Protocol I, *supra* note 18, art. 57(2).

100. NEW RULES, *supra* note 20, at 362. Article 57(2) states:

With respect to attacks, the following precautions shall be taken:

(a) those who plan or decide upon an attack shall:

- (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection, but are military objectives within the meaning of para. 2 of Art. 52 and that it is not prohibited by the provisions of this Protocol to attack them;
- (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
- (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

(b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

(c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.

Protocol I, *supra* note 18, art. 57(2).

101. NEW RULES, *supra* note 20, at 364; *see id.* at 363 (explaining that the obligation to do everything feasible includes a continuing obligation to collect, collate, evalu-

fact, several delegations at the Conference expressed "understandings to the effect that as used in Protocol I, 'feasible' means that which is practical or practically possible taking into account all the circumstances at the time, including those relevant to the success of military operations."<sup>102</sup> This is essentially the same terminology the Land Mines Protocol uses to define "feasible precautions."

The obligations imposed on parties in article 57(2)(a) of Protocol I to avoid collateral civilian casualties and, thus, to refrain from launching attacks that could do so reinforce the principle of proportionality and the protection of the civilian population from the indiscriminate use of land mines in article 3 of the Land Mines Protocol.<sup>103</sup> In addition to these precautionary measures, article 57(2)(b) requires an attack to be suspended or cancelled if it becomes evident that the target is not a military objective. This precaution is also appropriate to land mine warfare because its observance is indispensable to compliance with the requirement under article 3(a) that these weapons only be used on or directed against military objectives.<sup>104</sup> Finally, the following discussion of specific restrictions on the use of different kinds of weapons notes those measures necessary for warning civilians of the presence of land mines.

#### E. RESTRICTIONS ON NONREMOTELY DELIVERED LAND MINES, BOOBY-TRAPS AND OTHER DEVICES

Article 4(2) of the Land Mines Protocol prohibits the use of mines which are not "remotely delivered," namely hand-delivered mines, "booby-traps," and "other devices," in

any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

(a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party, or

(b) measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.<sup>105</sup>

This prohibition does not extend, therefore, to any city, town, or village where combat between ground forces is taking place or where such combat appears imminent. Moreover, even if such combat were not oc-

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ate, and disseminate timely target information).

102. *Id.* at 362.

103. Land Mines Protocol, *supra* note 9, art. 3.

104. *Id.* art. 3(a).

105. *Id.* art. 4(2).

curing or imminent, these mines and other explosive weapons could, nonetheless, be used "on or in the vicinity close to a military objective belonging to or under the control of an adverse party."<sup>106</sup> Burrus Carnahan writes that this particular exception "would, for example, permit the destruction of an enemy military objective, located in a city, by a commando force using demolition charges. Alternatively, the raiders could lawfully place mines or booby-traps around the object to prevent its use."<sup>107</sup>

In addition, parties can deploy these weapons in peaceable civilian locales if "measures are taken to protect civilians from their effects, for example, the posting of warnings or the provision of fences."<sup>108</sup> Carnahan notes that this language "requires that *some* measures be taken to protect civilians, but does not guarantee the 'effectiveness' of the measures."<sup>109</sup> Although these exceptions largely obviate the basic prohibition against the deployment of these weapons in peaceable civilian concentrations, their permissible use under article 4 still remains subject to the substantive restraints and prohibitions imposed on their use by article 3 of the Protocol.

#### F. RESTRICTIONS ON REMOTELY DELIVERED MINES

Article 5 of the Land Mines Protocol establishes a special regime regulating the use of remotely delivered mines.<sup>110</sup> Article 2(1) defines a

106. *Id.*

107. Carnahan, *supra* note 74, at 81.

108. Land Mines Protocol, *supra* note 9, art. 4(2).

109. Carnahan, *supra* note 74, at 81. Government delegations to the Protocol conferences "believed that guerrilla fighters could meet the requirements of [article 4(2)(b)] by orally informing the civilian population of the location of mines and booby traps, without disclosing the location of these munitions to enemy troops." *Id.* at 81-82.

110. Land Mines Protocol, *supra* note 9, art. 5. Article 5 of the Land Mines Protocol states:

1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:

(a) their location can be accurately recorded in accordance with Article 7(1)(a); or

(b) an effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

2. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit.

*Id.* art. 5(1), (2). Delayed action bombs may well come within the definition of re-

remotely delivered mine as any mine "delivered by artillery, rocket, mortar or similar means or dropped from an aircraft."<sup>111</sup>

Article 5(1) prohibits the use of these mines except "within an area which is itself a military objective or which contains military objectives." Furthermore, parties cannot use them unless "their location can be accurately recorded in accordance with" the Land Mines Protocol, or unless each mine has a "self-actuating" or a "remotely-controlled" mechanism that will render the mine harmless or cause its self-destruction when the mine no longer serves its intended military purpose. Paragraph 2 of article 5 imposes the additional requirement of effective advance warning of any delivery or dropping of these mines that may affect the civilian population. These restrictions are in addition to the general restrictions and prohibitions enumerated in article 3 of the Land Mines Protocol.<sup>112</sup>

The recording requirement alluded to in article 5 is stated in article 7(1)(a) of the Land Mines Protocol. The provision states that "[t]he parties to a conflict shall record the location of . . . all pre-planned mine fields laid by them."<sup>113</sup> Although the Land Mines Protocol does not define the term "preplanned," Carnahan notes:

Since 'preplanned' means more than 'planned,' a 'preplanned' minefield is, by its nature, one for which a detailed military plan exists considerably in advance of the proposed date of execution. Naturally, such a detailed military plan could not exist for the vast majority of minefields placed during wartime. In the heat of combat many minefields will be created to meet immediate battlefield contingencies with little 'planning' or 'preplanning.'<sup>114</sup>

The advance notification requirement in article 5(2) of the Land Mines Protocol is a verbatim incorporation of article 57(2)(c) of Protocol I. This requirement reinforces the argument that the precautionary rules contained in Protocol I can provide authoritative guidance for interpreting the "feasible precautions" requirements of the Land Mines

motely delivered mines. Carnahan, *supra* note 74, at 79 n.29.

111. Land Mines Protocol, *supra* note 9, art. 2 para. 1. The term "aircraft" includes "helicopters, drones, remotely-piloted vehicles and balloons." Carnahan, *supra* note 74, at 79 n.29.

112. See generally Carnahan, *supra* note 74, at 79 (noting that given the rapidity with which remotely delivered mines can be laid behind enemy lines, there were fears that their indiscriminate emplacement could threaten the civilian population). There was, therefore, "an express understanding that all the general restrictions on mine warfare in Article 3 also applied to remotely-delivered mines." *Id.* at 80.

113. Land Mines Protocol, *supra* note 9, art. 7(1)(a).

114. Carnahan, *supra* note 74, at 84. The recording requirement applies only to the location of preplanned minefields, not to the location of individual mines therein, or to the composition or configuration of the mines within the field. *Id.*

Protocol.<sup>115</sup> Carnahan suggests that "among the 'circumstances' which might not permit prior warning would be the necessity for tactical surprise or guarding the safety of the aircraft dropping remotely delivered mines."<sup>116</sup>

### G. PARTICULAR RESTRICTIONS ON BOOBY-TRAPS

Article 2(2) of the Land Mines Protocol defines booby-traps as "any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act."<sup>117</sup> In addition to the general restrictions in articles 3 and 4 of the Protocol, article 6 places specific prohibitions on the use of certain booby-traps. For example, article 6(1)(a) prohibits the use of "any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached."<sup>118</sup> This rule forbids the use of mass-produced prefabricated booby-traps<sup>119</sup> as well as remotely delivered booby-traps dropped *en masse* from aircraft.<sup>120</sup> Paragraph 1(b) of article 6 prohibits booby-traps in any way attached to or associated with:

- (i) internationally recognized protective emblems, signs or signals;
- (ii) sick, wounded or dead persons;

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115. *Id.* at 80-81. Consequently, the Working Group on Land Mines drafted the following nonbinding technical annex of recording guidelines that, if complied with, will meet the recording obligations under Article 7:

Whenever an obligation for the recording of the location of minefields, mines, and booby-traps arises under the Protocol, the following guidelines shall be taken into account.

1. With regard to pre-planned minefields and large-scale and pre-planned use of booby-traps:

(a) maps, diagrams or other records should be made in such a way as to indicate the extent of the minefield or booby-trapped area; and

(b) the location of the minefield or booby-trapped area should be specified by relation to the co-ordinates of a single reference point and by the estimated dimensions of the area containing mines and booby-traps in relation to that single reference point.

2. With regard to other minefields, mines and booby-traps laid or placed in position:

In so far as possible, the relevant information specified in paragraph 1 above should be recorded so as to enable the areas containing minefields, mines and booby-traps to be identified.

*Id.* at 84-85.

116. *Id.* at 80.

117. Land Mines Protocol, *supra* note 9, art. 2(2).

118. *Id.* art. 6(1)(a).

119. Carnahan, *supra* note 83, at 90 n.59.

120. *Id.* at 90 n.60.

- (iii) burial or cremation sites or graves;
- (iv) medical facilities, medical equipment, medical supplies or medical transportation;
- (v) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- (vi) food or drink;
- (vii) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (viii) objects clearly of a religious nature;
- (ix) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;
- (x) animals or their carcasses.<sup>121</sup>

Although these prohibitions may appear unrelated, they share "a common policy of reinforcing the respect and protection that international law already accords to civilians, cultural property and the sick and wounded."<sup>122</sup> For example, attaching these booby-traps to such objects would clearly violate the care and protection that the Geneva Conventions, the two 1977 Protocols, and common article 3 guarantee to the wounded and sick. Paragraph 1 of article 6 of the Land Mines Protocol would also prohibit the use of these devices against or on medical and religious personnel and on medical units and transports displaying the Red Cross or the Red Crescent emblem. Moreover, booby-trapping medical transports is tantamount to using them "to commit hostile 'acts harmful to the enemy,' outside of their humanitarian function."<sup>123</sup> Such actions would deprive these objects of their protection under the Second Geneva Convention and both 1977 Protocols.<sup>124</sup>

Paragraph 1(b)(i) also reinforces the protection of the civilian population from the catastrophic effects of warfare. This provision prohibits the use of these devices in or on internationally recognized signs.<sup>125</sup> Thus, it would forbid the placement of booby-traps on dams, dikes, and nuclear power stations entitled to be marked with "a special sign"

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121. Land Mines Protocol, *supra* note 9, art. 6(1)(a).

122. Carnahan, *supra* note 74, at 91. For example, clauses (a)(i)-(iv) of article 6 "reinforce the respect which parties to the First Geneva Convention of 1949 owe to medical personnel and the sick, wounded, or dead." *Id.*

123. *Id.* at 91.

124. Second Geneva Convention, *supra* note 5, art. 39; Protocol I, *supra* note 18, art. 23; Protocol II, *supra* note 8, art. 11. Such conduct would violate the explicit guarantee in common article 3 that "the wounded and sick shall be . . . cared for." 1949 Geneva Conventions, *supra* note 5, art. 3. Carnahan observes, regarding paragraph (a)(i) of article 6, that "[t]he reference to objects using protective 'signals' would apply . . . to medical aircraft using radio or light signals as authorized by Article 18 of the 1977 First Protocol." Carnahan, *supra* note 74, at 91.

125. Land Mines Protocol, *supra* note 9, art. 6(1)(b)(i).



under article 56(7) and article 15 of Protocols I and II, respectively.<sup>126</sup> Under both Protocols, these installations enjoy protections against attacks that might release "dangerous forces" with consequent "severe losses among the civilian population."<sup>127</sup> This protection, however, does not extend to attacks using antipersonnel weapons that could not release such forces. For example, under the circumstances, defenders could use defensive mines and booby-traps against an infantry attack.

The prohibitions against booby-trapping articles ordinarily used by civilians contained in paragraphs 1(b)(v), (vi), and (x) also strengthen existing legal restraints on means and methods of warfare designed to protect civilians in all armed conflicts.<sup>128</sup> For example, the forbidden use of these devices on "food or drink" or "animals" implements the policy underlying article 14 of Protocol II that prohibits attacking or destroying "foodstuffs" and "other objects indispensable to the survival of the civilian population" for the specific purpose of denying sustenance.<sup>129</sup>

#### H. OTHER RESTRICTIONS FOR SPECIALLY PROTECTED OBJECTS

El Salvador and Nicaragua are bound by other treaties to give special protection to the cultural and religious objects mentioned in clauses (viii) and (ix) of paragraph 1(b), article 6 in the Land Mines Protocol. Article 16 of Protocol II prohibits the parties to the Salvadoran conflict from committing "any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort."<sup>130</sup> The *New Rules* states, however, that this effort must meet the test for military objectives before a party can attack protected objects.<sup>131</sup>

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126. Carnahan, *supra* note 74, at 93. Unlike article 56(7) of Protocol I, article 15 of Protocol II is silent on the use of the international sign for identification purposes. According to the *New Rules*, however, the absence of an express provision does no harm. "As there is no restriction on the use of the sign in peacetime, there can be no objection to its use in time of internal armed conflict for the purpose of facilitating recognition of protected status." *NEW RULES*, *supra* note 20, at 685.

127. Protocol I, *supra* note 18, art. 56(7); Protocol II, *supra* note 8, art. 15.

128. Although not defined in the Land Mines Protocol, articles 14 and 38 of the Fourth Geneva Convention and article 77 of Protocol I refer to children "who have not attained the age of fifteen years." Fourth Geneva Convention, *supra* note 5, arts. 14, 38; Protocol I, *supra* note 18, art. 77. Inferentially, paragraph 1(b)(v) of article 6 of the Land Mines Protocol also applies to individuals under fifteen. Carnahan, *supra* note 74, at 92.

129. Protocol II, *supra* note 8, art. 14.

130. *Id.* art. 16.

131. *NEW RULES*, *supra* note 20, at 333. The *New Rules* discusses the application

The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict,<sup>132</sup> to which Nicaragua is a party, incorporates protections that the parties to the internal conflict in Nicaragua must accord these objects.<sup>133</sup> Article 19 of this Convention, like common article 3 of the 1949 Geneva Conventions, obligates each party to a noninternational conflict to apply as a minimum, the provisions of the Hague Convention that relate to respect for cultural property.<sup>134</sup> In contrast to article 16 of Protocol II, however, which covers a limited class of objects that are "part of the cultural and spiritual heritage of mankind,"<sup>135</sup> the 1954 Hague Convention requires the warring factions in Nicaragua to give greater protection to a far broader scope of cultural and artistic objects.<sup>136</sup> Furthermore, the Hague Convention

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of article 53, and inferentially, its analysis applies to article 16 of Protocol II. *Id.*

132. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215, 240 [hereinafter Convention for the Protection of Cultural Property].

133. *Id.* art. 4. These obligations are stated in article 4 as follows:

1. The High Contracting Parties undertake to respect cultural property situated within their own territory by refraining from any use of the property and its immediate surroundings or of the appliances in the use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict and by refraining from any act of hostility directed against such property.

2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

3. The High Contracting Parties further undertake to prohibit, prevent, and, if necessary, put a stop to any form of theft, pillage, or misappropriation of, and any acts of vandalism directed against, cultural property.

4. They shall refrain from any act directed by way of reprisals against cultural property.

*Id.*

134. *Id.* art. 19; AMERICAS WATCH, PROTECTION OF THE WEAK AND UNARMED: THE DISPUTE OVER COUNTING HUMAN RIGHTS VIOLATIONS IN EL SALVADOR 30-45 (1984).

135. Protocol II, *supra* note 8, art. 16.

136. Convention for the Protection of Cultural Property, *supra* note 132, art. 1. Under article 1 of the Convention, the term "cultural property" includes the following, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art of history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books, and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a);

(c) centres containing a large amount of cultural property as defined in sub-

prohibits reprisals in internal hostilities, whereas Protocol II does not. Thus, the booby-trapping of cultural objects would violate the prohibition against their use for military purposes.

Article 6(2) of the Land Mines Protocol forbids the use of booby-traps "designed to cause superfluous injury or unnecessary suffering."<sup>137</sup> The unqualified application of this fundamental principle of the law of war to booby-traps would clearly prohibit their use for this purpose in all internal armed conflicts.<sup>138</sup> In addition, article 7(1)(6) requires parties to a conflict to record the location of "all areas in which they have made large-scale and preplanned use of booby-traps."<sup>139</sup>

It is apparent that the provisions of the Land Mines Protocol prohibiting both the direct use of these explosive weapons against the civilian population and individual civilians and the indiscriminate use of these weapons against military objectives reaffirm and implement the obligatory rules stated in United Nations Resolution 2444, which is itself declaratory of existing customary laws of war applicable to internal armed conflicts. These provisions, therefore, constitute legal obligations binding on the parties to the internal hostilities in Nicaragua and El Salvador. Furthermore, the express recognition of the principle of humanity in the preamble of the United Nations Weapons Convention also requires application of the principle of proportionality when using these weapons against military objectives in internal armed conflicts.

## VI. APPLICATION OF THE RELEVANT LAW TO THE ARMED CONFLICTS IN NICARAGUA AND EL SALVADOR

Based on the preceding examination of relevant legal rules and principles, one can make the following statements regarding application of these rules and principles to the armed conflicts occurring in Nicaragua and El Salvador.

### I. Civilians.

The following persons in Nicaragua and El Salvador should be considered civilians and thus not be subjected to direct attack by combatants or by land mines, booby-traps, and related devices:

- A. The peaceful population not directly participating in hostilities.
- B. 1. Persons providing only indirect support to the Salvadoran or Nicaraguan armed forces by, *inter alia*, working in defense

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paragraphs (a) and (b), to be known as "centres containing monuments."  
*Id.*

137. Land Mines Protocol, *supra* note 9, art. 6(2); Carnahan, *supra* note 74, at 90.

138. See Carnahan, *supra* note 74, at 90.

139. *Id.* at 89.

plants, distributing or storing military supplies behind conflict areas, supplying labor and food, serving as messengers, or disseminating propaganda. These persons may not be subject to direct individualized attack because they pose no immediate threat to the adversary. They assume, however, the risk of incidental death or injury arising from attacks and the use of these weapons against legitimate military targets.

2. Persons providing such indirect support to the *contras* in Nicaragua or to the FMLN rebels in El Salvador are clearly subject to prosecution under domestic laws of their respective countries for giving aid and comfort to the enemy.
- C. Persons, other than members of the parties's armed forces, who do not actually take a direct part in the hostilities by trying to kill, injure, or capture enemy combatants or to damage material. These civilians, however, temporarily lose their immunity from attack any time they assume a combatant's role. Included in this category are armed civilian members of the Nicaraguan self-defense groups who guard rural cooperatives, farms, and plants against *contra* attack.

## II. Civilian Objects

For purposes of both armed conflicts the following should be considered civilian objects immune from direct attack by combatants, as well as by land mines, booby-traps, and related devices:

- A. Structures and locales, such as houses, churches, dwellings, schools, farm villages, and cooperatives, that in fact are exclusively dedicated to civilian purposes and, in the circumstances prevailing at the time, do not make an effective contribution to military action.
- B. In El Salvador, those historic monuments, works of art, or places of worship constituting the cultural or spiritual heritage of peoples, provided they are not used to support the enemy's military effort.
- C. In Nicaragua, those buildings, monuments and other objects defined as "cultural property" by the 1954 Hague Convention for the Protection of Cultural Property, provided that imperative military necessity does not require waiver of their special protection.

## III. Military Objectives.

While not an exhaustive list, the following persons, groups, and objects may be regarded as legitimate military objectives subject to direct attack by combatants and those weapons specified in the Land Mines Protocol:

- A. In Nicaragua

1. Members of the Popular Sandinista Army and Militias.
  2. Members of *contra* groups, namely ARDE, FDN, KISAN, and MISURASATA.
- B. In El Salvador
1. Members of the Salvadoran combined armed forces and civil defense forces.
  2. Members of the FMLN.
- C. In both countries, weapons, other war material, military works, military and naval establishments, supplies, vehicles, camp sites, fortifications, and fuel depots or stores, that are, or could be, utilized by either party to the conflict.
- D. In both countries, objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities, airfields, ports, and otherwise nonmilitary industries of importance to the ability of a party to the conflict to conduct military operations, such as raw or processed coffee in Nicaragua destined for export.

#### IV. Prohibited Attacks and Uses of Land Mines and Related Devices

Although not an all encompassing list, the following kinds of attacks and uses of land mines, booby-traps, and related devices should be prohibited in the conduct of hostilities in both countries:

- A. Direct attacks, by ground or air, and direct use of these weapons against individuals or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war material, is present. Such attacks and uses of these weapons are indiscriminate.
- B. Direct attacks, by ground or air, and such direct weapons use against civilian objects dedicated to civilian purposes, such as towns, villages, dwellings, or buildings, where no military objective is present. This type of attack and weapons use is similarly indiscriminate.
- C. Direct attacks, by ground or air, against unarmed civilians either prior to, during, or immediately after their receipt of supplies essential for survival, i.e., food and medicine, from relief societies. Such attacks are also indiscriminate.
- D. The use of any remotely delivered mine that is not effectively marked and has no self-activating or remotely controlled mechanism to cause destruction or neutralization of the mine once its military purpose has been served. Such mines are "blind weapons" and their use is indiscriminate in terms of time.

- E. The use of hand-delivered mines, such as those of the Claymore variety, and booby-traps in or near a civilian locale containing military objectives, if those devices are deployed *without* any precautions, markings or other warnings or do *not* self-destruct or are *not* removed after their military purpose has been served. Such uses are also indiscriminate.
  - F. The use of mass produced, prefabricated booby-traps or remotely delivered booby-traps dropped *en masse* from aircraft.
  - G. The use of booby-traps in the guise of "letter bombs." Such a use is indiscriminate.
  - H. The use of booby-traps designed to cause superfluous injury or unnecessary suffering, such as hidden pits containing poisoned objects.
  - I. Direct attacks and use of booby-traps against medical and religious personnel, medical units and transports, particularly when they are recognized as such by the display of the distinctive emblem of the Red Cross or Red Crescent.
  - J. The use of booby-traps either attached to or associated with:
    - 1. sick, wounded, or dead persons including combatants who are captured, surrendered or *hors de combat*;
    - 2. burial or cremation sites or graves;
    - 3. medical facilities, equipment, supplies, or transport;
    - 4. articles ordinarily used by or for the care, hygiene, health, or education of children under fifteen years of age;
    - 5. food or drink, animals, or their carcasses.
  - K. The use of booby-traps:
    - 1. to defend those dams, dikes, and nuclear power stations entitled to be marked with internationally recognized signs;
    - 2. in El Salvador, to protect those historic monuments, works of art, or places of worship constituting the cultural or spiritual heritage of peoples;
    - 3. in Nicaragua, to protect those buildings, monuments and other objects the 1954 Hague Convention for the Protection of Cultural Property defines as "cultural property."
  - V. Other Prohibited Practices
- Again, while not an all-encompassing list, applicable international law rules prohibit the following kinds of practices, orders, or action:
- A. Orders to combatants that there shall be no survivors, such threats to combatants, or direction to conduct hostilities on this basis.
  - B. Attacks against combatants who are captured, surrender, or are placed *hors de combat*.

- C. Use of "blind" weapons that cannot be directed with any reasonable assurance against a specific military objective.
  - D. Torture and other cruel treatment of persons under any circumstances.
  - E. The taking of hostages.
  - F. The infliction of humiliating or degrading treatment on civilians or combatants who are captured, have surrendered, or are *hors de combat*.
  - G. Assassination of civilian officials, such as judges or political leaders.
  - H. The execution of civilians or combatants without previous and proper trial by regularly constituted court.
- VI. Classification of Civilian Casualties
- A. The appropriate labeling of and attribution for the deaths of civilians killed in military operations conducted by the warring parties in El Salvador and Nicaragua depend on the circumstances of death. In both conflicts, the deaths and injuries to civilians under the following circumstances may be properly classified as homicides or felonious assaults attributable to the responsible party to the conflict:
    1. Death or injuries to civilians as a result of prohibited or indiscriminate attacks or weapons use as indicated above.
    2. Death to civilians as a result of summary execution or torture and injuries resulting from torture. In addition to violating international humanitarian law, such homicides and assaults, if attributable to members of El Salvador's or Nicaragua's armed forces, would constitute human rights violations for which the perpetrator's government would be internationally responsible.<sup>140</sup> In contrast, the same acts, if

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140. Both El Salvador and Nicaragua have ratified the American Convention on Human Rights. American Convention on Human Rights, Treaty Series No. 36, OEA/ser. L/V/II.23, doc. 2, rev. 6, O.A.S.O.R., OEA/ser. K/XVI/I.1, doc. 65 rev. 1, corr. 2 (Jan. 7, 1970), *reprinted in* 9 I.L.M. 673 (1970); *see* The American Convention on Human Rights: Signatures, Ratification, Texts of the Instruments of Ratification and Adhesion, *reprinted in* OAS HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS 83, 99, OAS doc. OEA/ser. L/V/II.65, doc. 6 (1985) (listing the instruments of ratification of these countries). Both have also ratified the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, G.A. Res. 2200 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967), *reprinted in* 6 I.L.M. 368 (1967); *see also* Report of the Human Rights Committee, 38 U.N. GAOR Supp. (No. 40) at 98, 99, U.N. Doc. A/3840 (1983) (noting that El Salvador and Nicaragua have ratified the Covenant). Because only states are proper parties to these treaties and thereby bound to comply with the terms thereof, the governments of states alone can be internationally responsible for the acts or omissions of its agents which violate the human rights recognized in these instruments. Acts constituting homicides or assaults under applicable

committed by members of the FMLN or *contras*, would not be human rights violations, but rather are infractions of the particular country's domestic laws.<sup>141</sup>

- B. Death or injury to civilians under the following circumstances should be classified as legitimately combat related:
1. The deaths and injuries to civilians when they directly participate in hostilities. Such persons forfeit their immunity from direct attack.
  2. The deaths and injuries to civilians who, because they are near or located within a legitimate military objective, are killed or injured as a result of direct attack or weapons use against such objectives. Because such persons assume the risk of death or injury arising from such attacks, their deaths and injuries are collateral or incidental to the primary purpose of these attacks.

Deaths resulting from situations in which attending circumstances are unclear or unknown and proper attribution, consequently, is not possible, fall within a "grey area" between these two extremes. These deaths, therefore, must be excluded from the tallies of killings that are regarded as homicides by international humanitarian law or human rights law.

## VII. CONCLUSION

Internal armed conflicts are historically among the bloodiest and most cruelly fought wars. The conflicts in El Salvador and Nicaragua, unfortunately, are not exceptions to this trend.

The minimum guarantees of common article 3 and customary princi-

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humanitarian law could similarly violate comparable nonderogable rights in these human rights treaties. Whereas the governments of El Salvador and Nicaragua have committed serious human rights abuses, government and dissident forces in both countries have been guilty of violating international humanitarian law. THE CIVILIAN TOLL, *supra* note 34; AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA 1986, (Feb. 1987); AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA 1985-86, (Mar. 1986); WASHINGTON OFFICE ON LATIN AMERICA, NICARAGUA, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES (1st Supp., Jan.-Mar. 1986); AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA, 1981-85 (1st Supp., June 1985); D. FOX & M. GLENNON, REPORT TO THE INTERNATIONAL HUMAN RIGHTS LAW GROUP AND THE WASHINGTON OFFICE ON LATIN AMERICA CONCERNING ABUSES AGAINST CIVILIANS BY COUNTERREVOLUTIONARIES OPERATING IN NICARAGUA (Apr. 1985); AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR (4th Supp., Jan. 31, 1984); AMERICAS WATCH, REPORT ON HUMAN RIGHTS IN EL SALVADOR (1982).

141. It is important to note that the same acts if committed in an *international* armed conflict would constitute "grave breaches" of the Geneva Conventions and Protocol I and thereby subject the perpetrator to prosecution for universal crimes within the jurisdiction of all state parties to these treaties.



ples of war codified in United Nations Resolution 2444, which constitute part of the law governing both conflicts, purposefully seek to "humanize" these conflicts for the benefit of civilians and combatants. Many articles in Protocol I and Protocol II to the Geneva Conventions implement this purpose by strengthening and clarifying both the principle of civilian immunity and the principle of distinction and by placing legal restraints on methods and means of warfare. As general restatements of these basic customary rules, these articles in the two Protocols should also be regarded as customary law.

Additionally, many provisions of the Land Mines Protocol are patterned on or directly incorporate the customary rules found in these articles of Protocol I and Protocol II. Thus, the provisions of the Land Mines Protocol that incorporate or reinforce these provisions of Protocol I and II should similarly be regarded as customary law and applied, where appropriate, to the internal armed conflicts in El Salvador and Nicaragua. Finally, to insure their compliance with those provisions of the two 1977 Protocols and the Land Mines Protocol constituting customary law, the parties to these Central American conflicts should respect and implement other normative rules in these instruments in the expectation that these rules will eventually become part of the customary laws of war. As the late Waldemar Solf wisely observed, "[s]ince war, whether civil or international, is never viewed as a permanent condition, compliance with the laws and customs of war facilitates the eventual restoration of peace and helps heal the wounds of the nation."<sup>142</sup>

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142. Solf, *Problems With the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict*, 13 GA. J. INT'L & COMP. L. 291, 293 (1983).