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## International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts

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# INTERNATIONAL HUMANITARIAN LAW: AMERICAS WATCH'S EXPERIENCE IN MONITORING INTERNAL ARMED CONFLICTS\*

Robert Kogod Goldman\*\*

## INTRODUCTION

Since the early 1980s, Americas Watch<sup>1</sup> has published numerous reports documenting serious abuses of basic civil and political rights committed by, *inter alia*, the Governments of Colombia,<sup>2</sup> El Salvador,<sup>3</sup> Guatemala,<sup>4</sup> Nicaragua,<sup>5</sup> and Peru.<sup>6</sup> During this period, thousands of

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1. The Americas Watch Committee, a division of Human Rights Watch, was established by the Fund For Free Expression in 1981 to monitor and observe internationally recognized human rights in the Western Hemisphere.

2. See generally AMERICAS WATCH, THE CENTRAL-AMERICANIZATION OF COLOMBIA? (Jan. 1986); HUMAN RIGHTS IN COLOMBIA AS PRESIDENT BARCO BEGINS (Sept. 1986); THE KILLINGS IN COLOMBIA (Apr. 1989); THE DRUG WAR IN COLOMBIA: THE NEGLECTED TRAGEDY OF POLITICAL VIOLENCE (Oct. 1990); POLITICAL MURDER AND REFORM IN COLOMBIA (Apr. 1992) (discussing individual human rights incidents and abuses in Columbia).

3. See generally AMERICAS WATCH, REPORT ON HUMAN RIGHTS IN EL SALVADOR (Jan. 1982) and its eleven Supplements, in particular: AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR (Jan. 1984); THE CONTINUING TERROR (Sept. 1983); THE CIVILIAN TOLL (Aug. 1987); NIGHTMARE REVISITED (Sept. 1988); CARNAGE AGAIN: PRELIMINARY REPORT ON VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN THE NOVEMBER 1989 OFFENSIVE IN EL SALVADOR (Nov. 1989); A YEAR OF RECKONING: EL SALVADOR A DECADE AFTER THE ASSASSINATION OF ARCHBISHOP ROMERO (Mar. 1990); EL SALVADOR AND HUMAN RIGHTS: THE CHALLENGE OF REFORM (Mar. 1991) (discussing individual human rights abuses and internal conflicts in El Salvador).

4. See generally AMERICAS WATCH, HUMAN RIGHTS IN GUATEMALA: NO NEUTRALS ALLOWED (Nov. 1982); CREATING A DESOLATION AND CALLING IT PEACE (May 1983); GUATEMALA: A NATION OF PRISONERS (Jan. 1984); LITTLE HOPE: CLOSING THE SPACE; HUMAN RIGHTS IN GUATEMALA: MAY 1987 - OCTOBER 1988 (Nov.

civilians have been killed in armed conflicts in these countries.<sup>7</sup> Concern about the number and frequency of these killings prompted Americas Watch to search for a sound legal basis to classify and assign responsibility for these civilian casualties. The resolution of this issue was crucial to the accurate gauging of the true level of violence against the civilian population in these war torn nations. Those of us at Americas Watch who were directly involved with solving the legal problems associated with civilian fatalities soon realized, however, that existing human rights law provided little guidance and, ultimately, no solution for several reasons.

The principal flaw in the application of human rights law to situations of armed conflicts is that, while technically applicable during such periods, human rights law was designed to govern in peacetime.<sup>8</sup> Thus, it contains no rules to regulate the means and methods of warfare.<sup>9</sup> During serious internal or external hostilities, governments that are bound by human rights treaties can lawfully suspend the great majority of rights they have pledged to respect, including most substantive and procedural fair-trial guarantees and the prohibition against arbitrary arrest.<sup>10</sup>

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1988); MESSENGERS OF DEATH: HUMAN RIGHTS IN GUATEMALA: NOVEMBER 1988 - FEBRUARY 1990 (Mar. 1990); GUATEMALA: GETTING AWAY WITH MURDER (Sept. 1991) (WRITTEN WITH PHYSICIANS FOR HUMAN RIGHTS) (summarizing individual human rights abuses in Guatemala).

5. See AMERICAS WATCH, REPORT ON HUMAN RIGHTS IN NICARAGUA (May 1982); HUMAN RIGHTS IN NICARAGUA (Apr. 1984); THE MISKITOS IN NICARAGUA 1981-84 (Nov. 1984); HUMAN RIGHTS IN NICARAGUA 1985-86 (Mar. 1986); HUMAN RIGHTS AUGUST 1987 - AUGUST 1988 (Aug. 1988); THE KILLINGS IN NORTHERN NICARAGUA (Nov. 1989) (discussing Nicaragua's human rights violations and specific atrocities).

6. See generally AMERICAS WATCH, ABDICATING DEMOCRATIC AUTHORITY: HUMAN RIGHTS IN PERU (Oct. 1984); HUMAN RIGHTS IN PERU AFTER PRESIDENT GARCIA'S FIRST YEAR (Sept. 1986); TOLERATING ABUSES: VIOLATIONS OF HUMAN RIGHTS IN PERU (Oct. 1988); IN DESPERATE STRAIGHTS: HUMAN RIGHTS IN PERU AFTER A DECADE OF DEMOCRACY AND INSURGENCY (Aug. 1990); PERU UNDER FIRE: HUMAN RIGHTS SINCE THE RETURN TO DEMOCRACY (June 1992); UNTOLD TERROR: VIOLENCE AGAINST WOMEN (Dec. 1992); HUMAN RIGHTS IN PERU ONE YEAR AFTER FUJIMORO'S COUP (Apr. 1993) (summarizing the human rights conflicts in Peru in the last ten years).

7. See *supra* notes 2-6 (discussing armed conflicts in Latin America and South America).

8. *Internal Disturbances and Tensions: A New Humanitarian Approach?*, 262 INT'L REV. RED CROSS 3, 4 (1988).

9. *Id.*

10. American Convention on Human Rights, Nov. 22, 1969, art. 27, 1144

Moreover, human rights law generally restrains the abusive practices of only one party to the conflict, namely the government and its agents.<sup>11</sup> Since only states are proper parties to human rights treaties, the governments of states alone are capable of committing *and* being internationally responsible for human rights violations.<sup>12</sup> Similar abuses committed by non-governmental actors, such as rebels or other dissident groups, do not constitute human rights violations.<sup>13</sup> Instead, these types of abuses are labeled as infractions of a country's domestic law.<sup>14</sup> Given these inadequacies, Americas Watch turned to the laws of armed conflict, *i.e.*, international humanitarian law, to find a methodological basis for dealing with the problematic issue of civilian casualties and to judge objectively the conduct of military operations by the respective parties.

The principal sources of international humanitarian law are the four 1949 Geneva Conventions,<sup>15</sup> the two 1977 Additional Protocols<sup>16</sup> there-

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U.N.T.S. 123. Article 27 provides:

In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

*Id.* See European Convention on Human Rights, Nov. 4, 1950, art. 15, 213 U.N.T.S. 221, *reprinted in* 1950 Y.B. ON HUM. RTS. 418 (stating that contracting parties to the Convention may derogate from their responsibilities during war or other national emergency); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 4, 999 U.N.T.S. 171 (allowing state parties to suspend human rights guarantees when confronted with substantive hostile acts originating from either inside or outside a state's borders). See also *supra* note 8, at 4 (noting that the exercise of human rights law is often lessened in the event of a conflict).

11. See generally *supra* note 8, at 4 (noting that current human rights legislation "defines the rights of the individual which the States have formally undertaken to implement and uphold").

12. *Id.*

13. *Id.*

14. *Id.*

15. 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, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 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, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365,

to, the Hague Conventions of 1899 and 1907,<sup>17</sup> and the customary laws of war. In contrast to human rights law, international humanitarian law applies to situations of armed conflict<sup>18</sup> and contains rules restricting the means and methods of combat in order to spare the civilian population from the adverse effects of hostilities.<sup>19</sup> Although human rights and

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75 U.N.T.S. 278 [all four collectively hereinafter 1949 Geneva Conventions].

16. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *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]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims on Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, U.N. Doc. A/32/144, Annex I, II (1977), *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

17. Hague Convention No. I of July 29, 1899, for the Pacific Settlement of International Disputes, 32 Stat. 1803, T.S. No. 392; Hague Convention No. II of July 29, 1899, with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, T.S. No. 403; Hague Convention No. III of July 29, 1899, for the Adaption to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864, 32 Stat. 1827, T.S. No. 396; Hague Convention No. IV of July 29, 1899, Prohibiting Launching of Projectiles and Explosives from Balloons, 32 Stat. 1839, T.S. No. 393; Hague Convention No. I of October 18, 1907, for the Pacific Settlement of International Disputes, 32 Stat. 2199, T.S. No. 536; Hague Convention No. II of October 18, 1907, Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 36 Stat. 2241, T.S. No. 537; Hague Convention No. III of October 18, 1907, Relative to the Opening of Hostilities, 36 Stat. 2259, T.S. No. 538; Hague Convention No. IV of October 18, 1907, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539; Hague Convention No. V of October 18, 1907, Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 36 Stat. 2310, T.S. No. 540; Hague Convention No. VIII of October 18, 1907, Relative to the Laying of Automatic Submarine Contact Mines, 36 Stat. 2332, T.S. No. 541; Hague Convention No. IX of October 18, 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2351, T.S. No. 542; Hague Convention No. X of October 18, 1907, for the Adaption to Maritime Warfare of the Principles of the Geneva Convention, 36 Stat. 2371, T.S. No. 543; Hague Convention No. XI of October 18, 1907, Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, 36 Stat. 2396, T.S. No. 544; Hague Convention No. XIII of October 18, 1907, Concerning the Rights and Duties of Neutral Powers in Naval War, 36 Stat. 2415, T.S. No. 545; Hague Convention No. XIV of October 18, 1907, Prohibiting the Discharge of Projectiles and Explosives From Balloons, 36 Stat. 2439, T.S. No. 546.

18. See Robert Kogod Goldman, *The Legal Regime Governing the Conduct of Operation Desert Storm*, 23 U. TOL. L. REV. 363, 365-66 (1992) (discussing the development and operation of international humanitarian law) [hereinafter *Operation Desert Storm*].

19. See *supra* notes 17-18 and accompanying text (noting that the four 1949

humanitarian law share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity,<sup>20</sup> the detailed provisions of humanitarian law afford victims of armed conflict far greater protection than general human rights guarantees.<sup>21</sup> The area of greatest convergence of these two branches of international law is in purely internal armed conflict situations.<sup>22</sup>

This Article will discuss the international humanitarian law regime generally applicable to internal armed conflicts. It will explain the critical distinction between civilians and combatants and the basic rules that protect civilians and civilian objects from direct and indiscriminate attacks. The Article will also seek to define the limited situations where civilians may be lawfully attacked by virtue of their hostile acts. Based on an examination of the relevant law, the Article will identify the key restraints and prohibitions under humanitarian law that parties to all internal armed conflicts should observe. Finally, the Article will discuss the impact that Americas Watch reports had on the behavior of the various parties to the armed conflicts in El Salvador and Nicaragua.

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Geneva Conventions and Additional Protocols I and II of 1977, the 1899 and 1907 Hague Conventions, and customary international law provide the legal foundation of international humanitarian law).

20. See Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 1 (1948) (stating that all human beings are entitled to the same rights). Article 6 of the Universal Declaration states that every human being has a legally procured right to life. *Id.* art. 6. According to the International Review of the Red Cross, those humanitarian rights which require mandatory compliance include:

. . . the right to life, the inherent dignity of the human being, the forbidding of murder, torture and other degrading forms of treatment, the taking of hostages, disappearances of persons, acts of terrorism and collective punishment, recourse to force out of proportion with the objectives sought, humane treatment of persons deprived of their freedom, the granting of fundamental legal guarantees, the rights of the child, protection of the wounded and sick and the search for missing persons.

*International Disturbances and Tensions: A New Humanitarian Approach?* 262 INT'L REV. RED CROSS 3, 6 (1988).

21. See *supra* notes 17-18 (detailing basic components of international humanitarian law).

22. *Id.* See *supra* note 8, at 4 (discussing the deficiencies in human rights law pertaining to internal armed conflicts).

## I. SITUATIONS OF INTERNAL TENSIONS AND DISTURBANCES

Before discussing the legal regime governing internal armed conflicts, it is useful to distinguish such conflicts from situations of internal tensions<sup>23</sup> and disturbances.<sup>24</sup> Examples of tensions and disturbances are riots, such as demonstrations without a concerted plan from the outset;<sup>25</sup> isolated sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups;<sup>26</sup> and other acts of a similar nature, including, in particular, large-scale arrests of persons for their activities or opinions.<sup>27</sup> A serious situation of internal tension, that can be the sequel of armed conflict or internal disturbance, characteristically involves large-scale arrests, a large number of political prisoners, probable existence of ill-treatment or inhuman conditions of detention, the suspension of fundamental judicial guarantees, and allegations of disappearances.<sup>28</sup> Such a situation, for example, occasionally prevailed

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23. See *I.C.R.C. Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law*, 262 INT'L REV. RED CROSS 9, 13 (1988) (stating examples of tensions). According to the International Committee of the Red Cross (ICRC), internal tensions refers to:

- a) . . . situations of serious tension (political, religious, racial, social, economic, etc.) or
- b) . . . sequels of an armed conflict or internal disturbances.

*Id.*

24. *Id.* The ICRC describes internal disturbances as involving:  
 . . . situations in which there is no non-international armed conflict as such, but there exists a confrontation within a country, which is characterized by a certain seriousness or duration and which involves acts of violence . . . . In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules. (footnote omitted).

*Id.*

25. See *id.* (detailing examples of tensions and disturbances).

26. *Id.*

27. See *id.* at 13 (specifying characteristics of a situation of internal tension).

28. *Id.* The ICRC suggests that internal disturbances and tensions may include any, or all, of the following characteristics:

- 1. mass arrests;
- 2. a large number of persons detained for security reasons;
- 3. administrative detention, especially for long periods;
- 4. probable ill-treatment, torture or material or psychological condi-

in Chile during the de facto Pinochet regime, except for a transitory period immediately following the 1973 coup when violent clashes occurred between the armed forces and various armed groups.<sup>29</sup>

Internal tensions and disturbances are *not* presently governed by international humanitarian law as they are covered by universal and regional human rights instruments.<sup>30</sup> Nevertheless, the International Committee of the Red Cross (ICRC) is empowered by its own statutes with a right of initiative to offer its services to assist the victims of such situations.<sup>31</sup> However, a government is not obliged to accept the ICRC's offer of services and, thus, may legitimately deny the ICRC access to the country.<sup>32</sup>

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tions of detention likely to be seriously prejudicial to the physical, mental or moral integrity of detainees;

5. maintaining detainees incommunicado for long periods;
6. repressive measures taken against family members of persons having a close relationship with those deprived of their liberty mentioned above;
7. the suspension of fundamental judicial guarantees, either by the proclamation of a state of emergency or by a de facto situation;
8. large-scale measures restricting personal freedom such as relegation, exile, assigned residence, displacements;
9. allegations of forced disappearances;
10. increase in the number of acts of violence (such as sequestration and hostage-taking) which endanger defenseless persons or spread terror among the civilian population.

*Id.*

29. See AMERICAS WATCH, CHILE SINCE THE COUP: TEN YEARS OF REPRESSION (Aug. 1983) (discussing human rights abuses committed by the government of General Augusto Pinochet following the violent overthrow of the Chilean Government in 1973).

30. See Hans-Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct*, 262 INT'L REV. RED CROSS 38, 42 (1988) (providing an overview of existing human rights legislation and offering a new approach to better protect human values in instances of international disturbances and tensions); Theodor Meron, *Draft Model Declaration in Internal Strife*, 262 INT'L REV. RED CROSS 59 (1988) (focusing on the general characteristics of international strife and providing a model declaration).

31. See *supra* note 8, at 4-5 (stating that the International Committee of the Red Cross may assist individuals and States confronting internal disturbances and tensions under the authority of the statutes and resolutions of the International Red Cross and Red Crescent Movement).

32. See *id.* (suggesting the limitations of the ICRC's powers).



## II. INTERNAL ARMED CONFLICTS

### A. ARTICLE 3

Article 3 common to the four 1949 Geneva Conventions (article 3)<sup>33</sup>

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33. See Geneva Conventions, *supra* note 17, art. 3 (stating that article 3 has remained constant in all four of the Conventions). Common article 3 asserts:

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 causes, 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 endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

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

*Id.* According to the ICRC, article 3 now possesses the status of *jus cogens*, a peremptory norm of international law, and is consequently obligatory on all entities claiming existence in international law. See Jacques Moreillon, Director for General Affairs and Directorate Member, ICRC, Speech at the 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 (Nicaragua v. United States)* 1986 I.C.J. 14, 114 Para. 220 (Merits Judgment of June 27) (suggesting that Article 3 reflects general international humanitarian or customary legal

refers to, but does not actually define, "an armed conflict of a non-international character."<sup>34</sup> In both fact and practice, article 3 is applicable to low intensity, open, and armed confrontations between relatively organized armed forces or armed groups occurring exclusively within the territory of a particular state.<sup>35</sup> Thus, article 3 does not apply to a mere act of banditry or an unorganized and short-lived rebellion. Typically, article 3 applies to armed clashes between governmental forces and organized dissidents.<sup>36</sup> It also governs cases in which two or more armed factions within a country violently confront one another *without* the involvement of governmental forces.<sup>37</sup> Examples of this type of confrontation include when an established government has dissolved or is too weak to intervene.<sup>38</sup>

The application of article 3 is automatic as soon as a situation of armed conflict exists objectively.<sup>39</sup> The article imposes on the parties to an internal conflict immutable legal obligations for the protection of those individuals who have not, or are no longer, actively participating in the hostilities.<sup>40</sup> In contrast to human rights law, which generally restrains violations inflicted only by a government and its agents,<sup>41</sup> article 3 expressly binds both government and dissident forces.<sup>42</sup> Further-

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norms).

34. See Geneva Conventions, *supra* note 17, art. 3 (referring to "an armed conflict of a non-international character," but failing to define the terms).

35. See COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (J. Pictet ed. 1960) (suggesting that article 3 applies to armed conflicts with the hostilities occurring entirely within one state).

36. See Geneva Conventions, *supra* note 17 (noting that article 3 seeks to obligate governments and its dissidents). See generally Charles Lysaght, *The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 AM. U. L. REV. 9, 12 (1983) (declaring that article 3 also seeks to obligate "any party to a non-international armed conflict, not just governments").

37. See Geneva Conventions, *supra* note 17, at 3 (finding that article 3 may also apply to non-international conflicts marked by a total absence of government forces).

38. *Id.* Such was the case in Lebanon for many years. *Id.*

39. See Geneva Conventions, *supra* note 17, art. 3 (suggesting that parties to the Geneva Conventions are required to apply the minimum provisions set forth in the article once an armed conflict exists).

40. See Geneva Conventions, *supra* note 17, art. 3 (stressing the legal duties assumed by parties to the Geneva Conventions).

41. See International Covenant on Civil and Political Rights, 1967, art. 2, 999 U.N.T.S. 171 (defining the scope of human rights law).

42. See Geneva Conventions, *supra* note 17, art. 3 (noting that the language of

more, the duty to implement article 3 is unconditional for both parties and operates independently of the other party's obligation.<sup>43</sup> Thus, a breach of article 3 by one party to the conflict cannot be invoked by the other party as grounds for its non-compliance with the mandatory provisions of the article.<sup>44</sup>

Article 3 is the only provision of the four Geneva Conventions that directly applies to internal armed conflicts.<sup>45</sup> The parties to such an internal armed conflict are not legally obligated to implement, enforce, or observe the highly developed protections of the other articles of the Geneva Conventions that exclusively apply to international, *i.e.*, interstate, armed conflicts.<sup>46</sup> Consequently, a government engaged in internal hostilities is not required to accord its armed opponents prisoner of war status.<sup>47</sup> This is because insurgents do not have the combatants' privilege,<sup>48</sup> whose applicability is limited under customary and conventional international law to situations of interstate or international armed conflict, as defined in common article 2 of the Geneva Conventions.<sup>49</sup> This

article 3 specifically applies to these parties).

43. See Geneva Conventions, *supra* note 17, art. 3 (noting that duties under article 3 are unconditional). See also Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 30 (1983) (stating that the application of article 3 legally begins once an armed conflict *de facto* exists).

44. See Vienna Convention on the Law of Treaties, *adopted* May 22, 1969, *opened for signature* May 23, 1969, art. 60 (5), 8 I.L.M. 679, 701 (1969) (noting that, in response to a material breach by another State, a State party must still observe provisions in treaties in international human rights law designed to protect persons).

45. See Geneva Conventions, *supra* note 17, art. 3 (emphasizing that, except for article 3, the Geneva Conventions are silent as to internal armed conflicts).

46. See *id.* (suggesting that the Geneva Conventions do not adequately address situations of international armed conflicts).

47. See Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic and Transnational Practice*, 33 AM. U. L. REV. 53, 58-59 (1983) (stating that neither the 1949 Geneva Conventions nor the 1977 Protocols Additional require States besieged by internal armed conflicts to acknowledge the combatants' privilege or grant prisoner of war status to belligerents).

48. See *infra* notes 50-51 and accompanying text (defining combatant's privilege).

49. *Id.* See Geneva Conventions, *supra* note 17, art. 2 (limiting applicability of combatant's privilege). Article 2 of the 1949 four Geneva Conventions asserts:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them . . . .

privilege is essentially a license to kill or wound enemy combatants, destroy other enemy military objectives and cause incidental civilian casualties.<sup>50</sup> In interstate armed conflicts, a lawful combatant possessing this privilege must be given prisoner of war status upon capture and immunity from criminal prosecution under the domestic laws of his captor for his hostile acts which do not violate the laws and customs of war.<sup>51</sup>

In contrast, a government engaged in an internal armed conflict is not precluded by article 3 from punishing armed dissidents for the commission of crimes under its domestic laws.<sup>52</sup> Thus, a government can try captured dissidents who kill government soldiers for murder, sedition and other violent acts.<sup>53</sup> Such trials, however, occur in accordance with the obligatory standards set forth in article 3 and article 6 of Protocol II, if applicable.<sup>54</sup>

There is, however, no rule of international law which prohibits a government during an internal armed conflict from according members of dissident armed groups prisoner of war or equivalent status.<sup>55</sup> For

Geneva Conventions, *supra*, art. 2.

50. See Solf, *supra* note 47, at 59 (noting the "[g]overnments . . . 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 . . . .")

51. See Solf, *supra* note 47, at 57-60 (discussing combatants' privilege).

52. See generally Dietrich Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, 31 AM. U. L. REV. 936 (1982) (noting that dissidents are always subject to punishment under domestic law of the respective country).

53. *Id.*

54. See AMERICAS WATCH, VIOLATIONS OF FAIR TRIAL GUARANTEES BY THE FMLN'S AD HOC COURTS (1990) (discussing the application of these standards to trials of offenses arising from non-international armed conflicts).

55. Geneva Conventions, *supra* note 17. In fact, paragraph 3 of common article 3 envisions government and dissident forces making special agreements to apply all or part of the other provisions of the Geneva Conventions to the internal armed conflict. Michel 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, 92-93 (1983) (discussing successful special agreements).

The ICRC appeals to the parties could also be followed by steps leading to the conclusion of special agreements between the parties to a non-international armed conflict. Paragraph 3 of common article 3 mentions the possibility for the parties, "to bring into force, by means of special agreements, all or part of the other provisions" of the 1949 Geneva Conventions.

example, during the Civil War, the Government of the United States gave limited prisoner of war treatment to captured rebel combatants without expressly according them immunity from prosecution for treason.<sup>56</sup>

To ensure that the government's application of humanitarian law guarantees, article 3 is not legally interpreted as recognition of the insurgent's belligerence, the article clearly states that the legal status of the parties to the conflict is not affected by application of the article's provisions.<sup>57</sup> Moreover, the ICRC is expressly empowered by article 3 to offer its services to the contending parties to assist and protect the victims of the conflict.<sup>58</sup>

### B. CIVILIANS UNDER ARTICLE 3

Article 3 fails to include rules that govern the means and methods of warfare,<sup>59</sup> and therefore does not explicitly protect the civilian population from attacks or effects of such attacks. Moreover, article 3 fails to mention the words "civilian" or "combatants" in any provision of the article.<sup>60</sup> Article 3, however, does explicitly prohibit "violence to life and person" against "persons taking no active part in the hostilities."<sup>61</sup> This prohibition may encompass attacks against civilians in areas under the control of an adverse party in an internal armed conflict. The principal aim of the article, however, is to ensure humane treatment of all persons who have not or are no longer actively participating in the hostilities when such persons are under the power of a party to the conflict.<sup>62</sup> Such persons, including civilians, are entitled to this humane treatment regardless of their subjugation by an adverse party.<sup>63</sup>

Article 3 protects all government and dissident forces who are cap-

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*Id.* at 92.

56. See U.S. DEPARTMENT OF WAR, INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD, General Order No. 100, arts. 152-54 (1863), reprinted in *THE LAWS OF ARMED CONFLICTS* 3 (Dietrich Schindler & Jiri Toman eds., 1981) (applying prisoner of war treatment to the Civil War).

57. Geneva Conventions, *supra* note 17, art. 3.

58. *Id.*

59. Robert Kogod Goldman, *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 AM. U. J. INT'L L. & POL'Y 539, 547 (1987).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

tured, wounded, sick, or surrender.<sup>64</sup> Moreover, article 3 grants civilians who are captured by a contending party or otherwise subjected to its power, the same guarantees.<sup>65</sup> The guarantees exist regardless of whether the individual civilian fought for the opposing party or merely participated in the hostilities indirectly.<sup>66</sup> Finally, if a civilian dies as a result of execution or torture inflicted by a party to the conflict, the death is commensurate with, and properly classified as, a homicide.<sup>67</sup>

### C. CUSTOMARY INTERNATIONAL LAW

Unlike article 3, the customary laws of armed conflict forbid attacks against the civilian population in non-international armed conflicts.<sup>68</sup> The United Nations recognized the customary rule of civilian immunity and the corresponding principle requiring belligerents to distinguish between civilians and combatants<sup>69</sup> in General Assembly Resolution 2444, "Respect for Human Rights in Armed Conflicts" (United Nations Resolution 2444).<sup>70</sup> These fundamental humanitarian law principles apply in both international and internal conflicts.<sup>71</sup> The ICRC adopted these principles as rules of war that govern all armed conflicts.<sup>72</sup> In addition, the United States acknowledged these principles as declaratory

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64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 545-48.

70. G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 164, U.N. Doc. A/7433 (1968) [hereinafter Resolution 2444]. Resolution 2444 affirms in pertinent part:

[T]he following principles for observance by all governmental and other authorities 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 . . . .

Resolution 2444, *supra* note 70, art. 1.

71. Resolution 2444, *supra* note 70, art. 1. See Goldman, *supra* note 59, at 548 (analyzing Resolution 2444 and its effect on international humanitarian laws).

72. See Resolution 2444, *supra* note 70, art. 1 (discussing ICRC recognition of humanitarian law principles); see also Goldman, *supra* note 59, at 548 (discussing the fundamental humanitarian law principles in conjunction with the role of the ICRC).

of customary international law.<sup>73</sup> Clearly, the customary principle of civilian immunity and its analogue requiring distinction between civilians and combatants must be adhered to in an internal armed conflict.<sup>74</sup>

#### D. PROTOCOL II

Protocol II applies to a non-international armed conflict "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups."<sup>75</sup> Protocol II does not alter article 3,<sup>76</sup> but rather the two apply collectively and in conjunction with each other.<sup>77</sup> In fact, the scope of Protocol II is within the broader scope of article 3.<sup>78</sup>

Protocol II, however, pertains to specific situations that are distinct from the conflicts covered in article 3.<sup>79</sup> The Protocol contains objective qualifications,<sup>80</sup> such as the requirement that there be control of part of

73. 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). See Goldman, *supra* note 59, at 548 (citations omitted) (affirming the United States acknowledgment of the principle of civilian immunity as declaratory of customary international law).

74. See, e.g., U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 25, at 16, (1956 & Supp. 1976) (noting acceptance of principle that civilians should not be directly subject to attack).

75. *Id.* art. 1(1).

76. Protocol II, *supra* note 16, art. 1(1).

77. See Sylvie Junod, *Additional Protocol II: History and Scope*, 33 AM. U. L. REV. 29, 35 (1983) (noting that when the conditions of operation in Protocol II are fulfilled, article 3 and the Protocol apply collectively since the field of application of the Protocol falls within the more expansive article) [hereinafter Junod].

78. *Id.*

79. See generally MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 (1982) [hereinafter NEW RULES] (differentiating the application of Protocol II and article 3). The *New Rules* state:

The field of application of Art. 1 is different from that of common Art.

3. It is narrower and the definition of the field of application introduces elements unknown to common Art. 3, among them the requirements that the armed forces of a High Contracting Party must be involved in the conflict, that dissident armed forces or other organized armed groups have to exercise a control over a part of its territory; this control is furthermore qualified.

*Id.*

80. *Id.*

the territory by opposition forces.<sup>81</sup> Furthermore, that control must be sufficient to enable the rebels to carry out "sustained and concerted military operations." Accordingly, the rebels, *inter alia*, must be able to detain prisoners, treat them humanely and give adequate care to the wounded and sick.<sup>82</sup> These criteria are primarily designed to restrict the application of Protocol II to serious cases of rebellion.<sup>83</sup> Because of these objective requirements, the Protocol most often applies to situations of civil war.<sup>84</sup> Interestingly, the civil war in El Salvador is the only conflict in the Americas to which both article 3 and Protocol II have applied.<sup>85</sup>

Both Protocol II and article 3 do not modify the legal status of the rebels, but still afford the rebels with the fundamental guarantees of humane treatment and judicial fairness.<sup>86</sup> Unlike article 3, Protocol II expressly protects individual civilians against direct attacks and inferentially protects them and civilian objects from indiscriminate or disproportionate attacks.<sup>87</sup> In addition, Protocol II does not alter the ICRC's right under article 3 to offer its assistance and protection to the victims of armed conflicts.<sup>88</sup>

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81. *Id.*

82. Goldman, *supra* note 59, at 549 (stating that dissident groups must be organized and under responsible command in order to maintain control over a party's territory).

83. *Id.*

84. *Id.*

85. *Id.* at 549-50 (discussing the conflict in El Salvador in relation to Protocol II).

86. Protocol II, *supra* note 16, arts. 4, 6 (discussing fundamental guarantees in human rights and penal prosecutions under the Geneva Conventions).

87. Protocol II, *supra* note 16, art. 13. Article 13 asserts:

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.*

88. See *supra* note 31 and accompanying text (discussing the ICRC's ability to offer assistance to persons in states confronting internal armed conflicts).



### III. PROTOCOL II'S RELEVANCE TO ARTICLE 3 CONFLICTS

As noted, within the Americas, El Salvador is the only state party to Protocol II which was engaged in an armed conflict directly governed by that instrument.<sup>89</sup> However, even if Columbia were a party to the Protocol, and notwithstanding Guatemala and Peru's ratification of this instrument, the present intensity of hostilities in these countries, perhaps with the exception of Peru, falls below the Protocol's high threshold.<sup>90</sup> This does not mean, however, that the Protocol is irrelevant to the conduct of hostilities in these countries.

The "de Martens clause"<sup>91</sup> included in the Protocol's Preamble suggests that although there are cases not protected under the Protocol, these instances are still subject to principles of humanity and the dictates of public conscience.<sup>92</sup> The principle of humanity compliments and limits the doctrine of military necessity by proscribing direct attacks against the civilian population and the use of violent acts which result in unnecessary suffering.<sup>93</sup> Protocol II refers to the principle of humanity in order to bolster the relevance of the customary law principle of civilian immunity and the principle of distinction in United Nations Resolution

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89. See Goldman, *supra* note 59, at 549-50 (discussing Protocol II and the conflict in El Salvador). See also *supra* notes 80-82 and accompanying text (explaining the necessity for control by dissident forces in order to warrant the application of the Protocol).

90. *States Party to the Geneva Conventions of 12 August 1949—States Party to the Protocols of 8 June 1977 (as at 31 December 1991)*, 286 INT'L REV. RED CROSS 105 (1992). Guatemala ratified both Protocol I and II on October 19, 1987. *Id.* Peru ratified both Protocol I and II on July 14, 1989. *Id.* As of the time of this writing, Colombia has not ratified either of the Protocols. Although it is arguable that the hostilities between government security forces and *Sendero Luminoso* in Peru meet Protocol II's threshold, neither party has recognized its applicability to the conflict, nor has the ICRC, either expressly or impliedly.

91. Protocol II, *supra* note 16, Preamble. The purpose of this clause, named for the Russian jurist Fyodor de Martens who drafted the preambles to the Hague Conventions No. II of 1855 and No. IV of 1907, is to affirm that the customary laws of war remain in full force except to the extent modified by treaty. *Id.*

92. *Id.*

93. U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31 para. 1-3(2), at 1-6 [hereinafter AIR FORCE PAMPHLET]. See Operation Desert Storm, *supra* note 18, at 366 (discussing the principle of humanity and military necessity), Goldman, *supra* note 59, at 551 (explaining correlation between principle of humanity and doctrine of military necessity).

2444, to internal armed conflicts.<sup>94</sup>

In order to adequately protect the civilian population against direct attack and the effects of hostilities under article 3 and principles of customary international law, standards are needed that will differentiate civilians and civilian objects from military objectives and combatants.<sup>95</sup> Protocol II contains numerous rules that operate as authoritative guidelines for protecting the civilian population during military operations.<sup>96</sup> In countries with internal armed conflicts not directly governed by Protocol II, such as the hostilities in Columbia, Guatemala, and Peru, these rules can function as interpretive principles.<sup>97</sup> Even though the rules professed in Protocol I additional to the 1949 Geneva Conventions<sup>98</sup> only apply to international armed conflicts and are not reproduced in Protocol II, they may still be a useful interpretive tool for the substantive content of analogous, but less detailed, provisions in Protocol II.<sup>99</sup>

#### A. CIVILIANS IN INTERNAL CONFLICTS

Article 13 of Protocol II provides the primary statement relating to civilian immunity.<sup>100</sup> While referring to "individual civilians" and "civilian population," article 13 fails to define them.<sup>101</sup> Article 50 of Protocol I, however, defines "civilian population" as "all persons who are

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94. Goldman, *supra* note 59, at 551; Resolution 2444, *supra* note 70 and text accompanying notes 54-56 (discussing Resolution 2444 and civilian immunity).

95. Goldman, *supra* note 59, at 551-52.

96. See Protocol II, *supra* note 16 (delineating rules used as authoritative guidelines).

97. Goldman, *supra* note 59, at 552.

98. Protocol I, *supra* note 16.

99. Goldman, *supra* note 59, at 552.

100. Protocol II, *supra* note 16, art. 13. Article 13 states:

1. The civilian population and individual civilians shall enjoy general protection against the danger 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.*

101. Goldman, *supra* note 59, at 552.

civilians."<sup>102</sup> Moreover, article 50 negatively defines a "civilian" as anyone not a member of the armed forces or an organized armed group of a party to the conflict.<sup>103</sup> These two definitions are essential in order to differentiate combatants and civilians in internal armed conflicts that are governed by Protocol II and article 3.<sup>104</sup>

Article 13 of Protocol II, unlike article 43 of Protocol I,<sup>105</sup> fails to explicitly define "combatants."<sup>106</sup> In spite of this, Protocol II alludes to the concept of armed forces when it refers to the "armed forces of the High Contracting Party" or to "dissident armed forces or other organized armed groups . . . under responsible command."<sup>107</sup> The *New Rules*<sup>108</sup> suggest that by using this language, Protocol II has acknowledged the conditions prescribed under article 43 of Protocol I that define a combatant. These conditions require a link between the combatant and the armed forces in the conflict, and that the armed group be organized and under responsible command.<sup>109</sup> The authors of the *New Rules* conclude that by alluding to armed forces and acknowledging the conditions prescribed in article 43, the Protocol implicitly defined a civilian as anyone not involved with an organization meeting the conditions set forth in article 43 of Protocol I.<sup>110</sup> Consequently, all other persons not actively participating in the hostilities by intending to cause physical harm to enemy personnel or objects are considered part of the civilian population.<sup>111</sup>

102. Protocol I, *supra* note 16, art. 50(1).

103. Protocol I, *supra* note 16, art. 50(1) (noting that civilian status includes those individuals who do not belong to the categories expressed in article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention and in article 13 of Protocol I).

104. Goldman, *supra* note 59, at 554.

105. Article 43 of Protocol I defines armed forces of a party as including: 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 16, art. 43(1).

106. Protocol II, *supra* note 16, art. 13.

107. *Id.* See Goldman, *supra* note 59, at 553 (discussing the difference between "civilian" and "combatant" under Protocol I and Protocol II).

108. See Bothe, *supra* note 79 (commenting on Protocol I and Protocol II based on the drafting history of the Protocols and the experiences of the authors).

109. *Id.* at 672.

110. *Id.*

111. Goldman, *supra* note 59, at 553.

The classification of civilians under article 51 of Protocol I and article 13 of Protocol II includes not only the peaceable population, but also civilians who participate, or have participated in hostilities without combatant status.<sup>112</sup> While taking a direct or active role in hostilities, these individuals forfeit their immunity from direct attack, but retain their status as civilians.<sup>113</sup> Unlike combatants, once their participation ceases, these civilians may no longer be attacked, although they may be subject to trial and punishment by the adverse party for having assumed the role of a combatant.<sup>114</sup> Therefore, it is apparent that in both international and internal armed conflicts the only circumstance resulting in the loss of protection of civilians from direct individualized attack is when civilians take a direct part in hostilities.

According to article 50 of Protocol I, the presence within civilian populated areas of persons who do not qualify as civilians does not deprive the population of its civilian character.<sup>115</sup> The *New Rules* conclude that off-duty combatants or persons involved in business dealings with armed forces, will not cause a civilian population to lose its civilian status and protection from direct attack.<sup>116</sup>

Regrettably, the deliberate targeting of civilians, either through ignorance or flagrant disregard of the law, has been a commonplace occurrence, if not a practice, in virtually all the armed conflicts within the hemisphere.<sup>117</sup> For example, during the civil war in El Salvador, government forces at times regarded civilians who lived in territory controlled by the Farabundo Marti National Liberation Front (FMLN)<sup>118</sup> or

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112. Protocol I, *supra* note 16, art. 5.1 Protocol II, *supra* note 16, art. 13.

113. See Protocol I, *supra* note 16, art. 51(3) (noting that civilians have immunity unless and until they directly participate in hostilities).

114. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1972 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 619 (Yves Sandor et al. eds., 1987) [hereinafter ICRC COMMENTARY] (stating that once a civilian ceases direct participation in hostilities, he regains immunity against deliberate individualized attack under the Protocol).

115. Protocol I, *supra* note 16, art. 50(3).

116. See NEW RULES, *supra* note 79, at 296 (noting that such a community is protected from direct attack).

117. See Americas Watch, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1987 (Dec. 1987) (documenting the human rights problems in various countries throughout South America and the world).

118. *Id.* See AMERICAS WATCH, EL SALVADOR'S DECADE OF TERROR 3 (1991) (explaining that the Farabundo Marti National Liberation Front is a guerrilla organization that was formed in October 1980 and engaged in hostilities against governmental forces during the twelve year civil war in El Salvador). The FMLN was connected to

who allegedly provided the rebels with logistical support as legitimate military targets and attacked them accordingly.<sup>119</sup> For their part, the FMLN attacked or executed government officials and other civilians whom they believed to be part of the government's repressive apparatus and/or dangerous to the security of their combatants and sympathizers.<sup>120</sup> In both cases, government forces and the FMLN erroneously equated the vocations or other non-hostile activities of their victims with actual participation in combat, thereby justifying attacks against them.<sup>121</sup> Acceptance of either party's claims for attacking these and like civilians would utterly obliterate any meaningful distinction between civilians and combatants during hostilities and could lead to total, i.e., unregulated, warfare. The ICRC Commentary on the Additional Protocols makes the following pertinent observation on this general subject:

There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.<sup>122</sup>

#### B. THE DISTINCTION BETWEEN DIRECT AND INDIRECT PARTICIPATION IN HOSTILITIES

In light of comparable attacks against civilians by the parties to ongoing armed conflicts in the Americas, it is useful to clarify the distinction between "direct" and "indirect" participation by civilians in hostilities.

Despite the inherent ambiguities and imprecision in the terms "direct" and "indirect" participation in "hostilities", neither term is defined in

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the Democratic Revolutionary Front (FDR), the nonmilitary, political arm of the revolutionary opposition in El Salvador. *Id.*

119. See AMERICAS WATCH, PROTECTION OF THE WEAK AND UNARMED: THE DISPUTE OVER COUNTING HUMAN RIGHTS VIOLATIONS IN EL SALVADOR (Feb. 1984) [hereinafter PROTECTION OF THE WEAK AND UNARMED] (discussing the extent of human rights violations in El Salvador).

120. *Id.*

121. *Id.*

122. See ICRC Commentary, *supra* note 114, at 619 (exploring the extent of civilian protection from military attack afforded by Protocol I and commenting on the conditions upon which such protections shall be revoked).

either Protocol or the Geneva Conventions.<sup>123</sup> The authors of the *New Rules* indicate that the ICRC in its initial proposals to the Diplomatic Conference, which elaborated the final texts of the 1977 Protocols, attempted "to exclude from the definition of the civilian population those who directly participated in 'military operations' . . . while including within the [definition] those civilians whose activities contribute to the 'war effort' . . . or the 'military effort.'"<sup>124</sup> The ICRC defined military operations as "movements of attacks or defense by the armed forces"; and "war effort" as "all activities of civilians . . . [which] are objectively useful in defense or attack in the military sense, without being the direct cause of damage inflicted, on the military level."<sup>125</sup>

Under this proposal, civilians who are participating, or had participated, in hostilities without combatant status, as well as civilians *directly linked to military operations*, including those accompanying the armed forces without being members thereof, would not have been classified as part of the civilian population.<sup>126</sup> However, this proposal was discarded since it "was considered by some experts to be too explicit . . . [fearing] that it would create a new category of persons, who were neither combatants or civilians."<sup>127</sup>

The ICRC states in its Commentary to Article 51 of Protocol I (Civilian Immunity) that "[i]t seems that the word 'hostilities' covers not only the time that the civilian actually makes use of a weapon, but also, for example, the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon."<sup>128</sup> The ICRC Commentary also indicates that the term hostile acts "should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces."<sup>129</sup>

The *U.S. Air Force Pamphlet* adopts a similar interpretation by asserting that "taking a direct part in hostilities" includes "acts of war intended by their nature and purpose to strike at enemy personnel and material."<sup>130</sup> The *New Rules* indicates that this interpretation is effectively

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123. Goldman, *supra* note 59, at 553.

124. NEW RULES, *supra* note 79, at 294.

125. NEW RULES, *supra* note 79, at 294 n.6.

126. NEW RULES, *supra* note 79, at 293.

127. NEW RULES, *supra* note 79, at 294 (emphasis added)(defining scope of term "civilian").

128. ICRC COMMENTARY, *supra* note 114, at 618-19.

129. ICRC COMMENTARY, *supra* note 114, at 618.

130. U.S. DEP'T OF THE AIR FORCE, INTERNATIONAL LAW — THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS, AFP 110-31, para. 5-8 (1976) [hereinafter

"included within the term 'attacks', but it appears to be broader than attacks and includes, as a very minimum, preparation for combat and return from combat."<sup>131</sup>

In this connection, Article 49, paragraph 1 of Protocol I defines the term "attacks" as "acts of violence against the adversary, whether in offence [sic] or in defence [sic]."<sup>132</sup> The *New Rules* importantly points out that the term "acts of violence" denotes physical force.<sup>133</sup> Consequently, "attacks" do not include "dissemination of propaganda, embargoes or other non-physical means of psychological, political, or economic warfare."<sup>134</sup>

Thus, as applied to civilians, the phrase "direct participation in hostilities" means, as a practical matter, personally assuming the role of a combatant. The *New Rules* corroborates this assertion by stating "it is clear that civilians who personally try to kill, injure or capture enemy persons or to damage material are directly participating in hostilities."<sup>135</sup> When civilians prepare for, participate in, and return from combat they "present an immediate threat to the adverse Party, and, accordingly, they are subject to direct attack to the same extent as combatants . . . [while also] losing the benefits of precautions in attack . . . or against the effects of attack . . . pertaining to peaceable civilians."<sup>136</sup> The ICRC Commentary similarly notes that "[i]t is only during such [direct] participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to . . . protection . . . and he may no longer be attacked."<sup>137</sup>

Accordingly, in internal armed conflicts, a civilian can be considered to participate directly in hostilities when he actually takes part in fighting, whether singly or as a member of a group. Such participation, for example, would also include acting as a member of a weapons crew or providing target information for weapons systems "intended for *immedi-*

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U.S. AIR FORCE PAMPHLET].

131. NEW RULES, *supra* note 79, at 303.

132. Protocol I, *supra* note 16, art. 49, 16 I.L.M. at 1412.

133. NEW RULES, *supra* note 79, at 289.

134. NEW RULES, *supra* note 79, at 289 (emphasis added). Although Protocol II does not define "attacks," the *New Rules* explains that "the ICRC assumed that definitions established in Protocol I would govern the construction of the same term in Protocol II. *Id.* at 672.

135. NEW RULES, *supra* note 79, at 303.

136. See NEW RULES, *supra* note 79, at 301 (noting that participation may include preparation for and return from combat).

137. ICRC COMMENTARY, *supra* note 114, at 619.

ate use against the enemy, such as artillery spotters or members of ground observer teams.”<sup>138</sup> Similarly, a civilian providing *direct* logistical support for units actually engaged in battle by providing ammunition to a firing position directly participates in hostilities and thereby becomes a lawful military target.<sup>139</sup> The *New Rules* also indicates that civilians directly linked to, but without being members of the armed forces, such as civilian members of military aircraft crews, would probably be regarded as directly participating in hostilities if they repaired “a target acquisition or missile guidance equipment in the midst of battle.”<sup>140</sup>

In contrast, civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as working in defense establishments, munitions plants or engaging in the distribution or storage of military supplies in rear areas, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.<sup>141</sup> The *New Rules* confirms this view by noting that “[c]ivilians who support the armed forces (or armed groups) by supplying labour, transporting supplies, serving as messengers or disseminating propaganda may not be subject to direct individualized attack, but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies.”<sup>142</sup>

It is important to recognize that this critical distinction between direct and indirect participation in hostilities by civilians applies not only to conventional warfare, but also to the kind of guerrilla warfare that characterizes hostilities in the Americas. The ICRC Commentary notes that in guerrilla conflicts “combatant forces can be organized at different levels, while assuming some cooperation of the civilian population.”<sup>143</sup> Effectively distinguishing combatants from non-combatants may be as a result, more difficult but not impossible. Ultimately, to participate directly in hostilities suggests a “direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the

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138. NEW RULES, *supra* note 79, at 303 (emphasis added).

139. NEW RULES, *supra* note 79, at 303 (listing situations where civilians directly participate in hostilities).

140. NEW RULES, *supra* note 79, at 304.

141. NEW RULES, *supra* note 79, at 303 (explaining that civilians who provide only indirect support to military forces may not be subjected to attack).

142. NEW RULES, *supra* note 79, at 672.

143. See ICRC COMMENTARY, *supra* note 114, at 516 (citation omitted).



place where the activity takes place.”<sup>144</sup>

### C. MILITARY OBJECTIVES<sup>145</sup>

The expression “military objective” in Protocol I applies inferentially to Protocol II.<sup>146</sup> Military objectives are defined in article 52(2) of Protocol I not as they relate to personnel, but in relation to objects or targets.<sup>147</sup> To qualify as a legitimate military objective, the target selected—by its nature, location, purpose, or use—must advance the enemy’s military capacity or activity.<sup>148</sup> Additionally, the objective’s complete or partial destruction or neutralization must provide a definite military advantage in circumstances ruling at the time.<sup>149</sup> The requirement that military objectives effectively contribute to military action does not necessarily require a direct connection with combat operations. As the U.S. *Air Force Pamphlet* states, “the inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces in an armed engagement.”<sup>150</sup>

A civilian object also may become a military objective and forfeit its

144. ICRC COMMENTARY, *supra* note 114, at 516.

145. Sections C through H are adapted from previously published articles by the author: *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 AM. U. J. INT’L POL’Y 539 (1987); and *The Legal Regime Governing the Conduct of Operation Desert Storm*, 23 U. TOL. L. REV. 363 (1992).

146. See NEW RULES, *supra* note 79, at 672 (noting that the ICRC has applied the definitions of Protocol I to the terms of Protocol II).

147. See Protocol I, *supra* note 16, art. 52(2), 16 I.L.M. at 1414 (providing a principle source of international humanitarian law). Article 52(2) states:

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make 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.

*Id.* See also, ICRC COMMENTARY, *supra* note 114, at 635 (noting that the definition provided in article 52 is limited to objects).

148. See Protocol I, *supra* note 16, art. 52(2), 16 I.L.M. at 1414 (providing a principle source of international humanitarian law); ICRC COMMENTARY, *supra* note 114, at 635 (stating that military objectives include “the nature, location, purpose or use which makes an effective contribution to military action”).

149. See Protocol I, *supra* note 16, art. 52(2), 16 I.L.M. at 1414 (defining “military objectives”).

150. AIR FORCE PAMPHLET, *supra* note 93, at 5-9.

immunity from intentional attack through use that only incidentally relates to combat action, but which contributes effectively to the military aspect of a party's general war effort.<sup>151</sup> Thus, publicly or privately owned industries or crops, which are of fundamental importance for waging the armed conflict, are legitimate military targets.<sup>152</sup> For example, the *New Rules* suggests that the destruction of raw cotton in the South by Union forces during the United States Civil War was justifiable.<sup>153</sup> Raw cotton was a military target, not because it had inherent value as an instrument of war, but because it was the primary export of the Confederacy, and thus, the ultimate source of funding for Confederate military equipment and weapons.<sup>154</sup>

Not only must a military objective effectively contribute to the enemy's military action, but its destruction, neutralization or capture must also offer a "definite military advantage" to the attacking party in the "circumstances ruling at the time."<sup>155</sup> The ICRC Commentary suggests that the concept "definite military advantage in circumstances ruling at the time" means:

. . . it is not legitimate to launch an attack which only offers potential or indeterminate advantages. Those ordering or executing the attack must have sufficient information available to take this requirement into account; in case of doubt, the safety of the civilian population, which is the aim of the Protocol, must be taken into consideration.<sup>155</sup>

Furthermore, the *New Rules* similarly indicates that the word "definite," which modifies "[military advantage] . . . is a word of limitation denoting in this context a concrete and perceptible military advantage rather

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151. *But see* ICRC COMMENTARY, *supra* note 114, at 635 (noting that civilian objects can only become valid military objectives when the two elements of the definition of military objective, as provided in article 52(2) of Protocol I, are simultaneously present).

152. *See* NEW RULES, *supra* note 79, at 324 (suggesting that valid military objectives include "industries of fundamental importance") (citation omitted).

153. NEW RULES, *supra* note 79, at 324 n.15 (citation omitted) (explaining what constitutes an effective contribution to military action).

154. NEW RULES, *supra* note 81, at 324 n.15 (noting that claims for the destruction of British-owned cotton were rejected by an Anglo-American arbitration panel).

155. *See* Protocol I, *supra* note 18, at art. 52(2); ICRC COMMENTARY, *supra* note 116, at 635 (noting that both definitional elements must be simultaneously present for a legitimate military objective to exist).

156. ICRC COMMENTARY, *supra* note 116, at 636.

than a hypothetical or speculative one."<sup>157</sup> The requirement that the definite military advantage must be present "in circumstances ruling at [the] time" imposes an additional significant limitation on the attacker's target selection. In this regard, the *New Rules* states that "[t]his element emphasizes that in the dynamic circumstances of armed conflict, objects which may have been military objectives yesterday, may no longer be such today and vice versa. Thus, timely and reliable information of the military situation is an important element in the selection of targets for attack."<sup>158</sup>

A leading humanitarian law scholar, who was present at the drafting of Protocol I, endorses these interpretations.

The "definite military advantage" required under the definition must be present "in the circumstance ruling at the time." This element in the definition effectively precludes military commanders from relying exclusively on abstract categorizations in the determination of whether specific objects constitute military objectives ("a bridge is a military objective; an object located in the zone of combat is a military objective," etc.). Instead, they will have to determine whether, say, the destruction of a particular bridge, which would have been militarily important yesterday, does, in the circumstances ruling today, still offer a "definite military advantage": if not, the bridge no longer constitutes a military objective, and, thus, may not be destroyed.<sup>159</sup>

The definite military advantage required under prevailing circumstances from a particular attack "must be judged in the context of the military advantage anticipated from the specific military operation of which the attack is a part considered as a whole, and not only from isolated or particular parts of that operation."<sup>160</sup>

### 1. Types of Military Objectives

Except for specific objects accorded special protection, Protocol I fails to note specific categories of persons or property considered legitimate military objectives. Nevertheless, apart from those civilians who assume a combatant's role, members of government and dissident's armed forces, including regulars, irregulars, volunteers, and conscripts, are clearly

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157. NEW RULES, *supra* note 81, at 325-26.

158. NEW RULES, *supra* note 79, at 326.

159. Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977*, 9 NETH. Y.B. INT'L L. 107, 111 (1978).

160. NEW RULES, *supra* note 79, at 324-25.

legitimate military targets in internal armed conflicts.<sup>161</sup> As combatants, they are subject to direct attack at all times until captured, surrendered, or placed *hors de combat* by sickness, wounds, or other causes. Significantly, the law does not recognize the right of a combatant to alternate between combatant and civilian status.<sup>162</sup> Thus, the "part-time" combatant, typically an off-duty guerrilla fighter, does not lose his combatant status while pursuing his civilian occupation and, accordingly, remains a legitimate target of attack.<sup>163</sup>

Other undisputed military objectives include, *inter alia*, enemy weapons, convoys, installations and supplies. In this connection, the ICRC Commentary provides the following suggested list of military targets:

- (1) Armed forces . . . and persons who . . . take part in the fighting.
- (2) Positions, installations or constructions occupied by the forces . . . as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
- (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g., Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.
- (4) Stores of arms or military supplies [sic], such as munition dumps, stores of equipment or fuel, and vehicle parks.
- (5) Airfields, rocket launching ramps and naval base installations.
- (6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.
- (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance.
- (8) Industries of fundamental importance for the conduct of the war:
  - (a) industries for the manufacture of armaments . . . ;
  - (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;
  - (c) factories or plant constituting other production and

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161. See ICRC COMMENTARY, *supra* note 114, at 514-16 (stating that once a civilian ceases direct participation in hostilities, he regains immunity against deliberate individualized attack under the Protocol).

162. See ICRC COMMENTARY, *supra* note 114, at 515 (stating that once a civilian ceases direct participation in hostilities, he regains immunity against deliberate individualized attack under the Protocol).

163. See ICRC COMMENTARY, *supra* note 114, at 515-16 (discussing non-recognition of combatant status on "demand").

manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature or purpose is essentially military;

- (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)-(c);
  - (e) installations providing energy mainly for national defence [sic], e.g., coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
- (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.<sup>164</sup>

While elaborated for purposes of interstate armed conflict, the list should also guide combatants in determining what constitutes a legitimate military target in non-international conflicts.

#### D. CIVILIAN OBJECTS

The meaning attributed to "civilian objects" in article 52(1) of Protocol I<sup>165</sup> applies similarly to Protocol II. Article 52(1) negatively defines "civilian objects" as "all objects that are not military objectives as defined in paragraph 2"<sup>166</sup> of that same article, which establishes the two-fold test of military objectives.<sup>167</sup> Thus, article 52 treats all objects as civilian unless they simultaneously make an effective contribution to the adversary's military action and unless their destruction, capture, or neutralization provides a definite military advantage in the circumstances.<sup>168</sup>

There are, however, certain objects which have "dual-uses" or "functions" in that they simultaneously facilitate the needs of the civilian population while effectively contributing or advancing the enemy's military action. Characteristically, chemical and other factories, bridges, power plants, fuel storage depots, railroad and other transportation fa-

164. ICRC COMMENTARY, *supra* note 114, at 632-33 n.3.

165. See Protocol I, *supra* note 16, art. 52(1) (stating that "[c]ivilian objects shall not be the object of attack or of reprisals"). Article 52(1) subsequently suggests that "[c]ivilian objects are all objects which are not military objectives as defined in paragraph 2." *Id.*

166. Protocol I, *supra* note 16, art. 52(1).

167. See *supra* note 147 (providing text of art 52(2)).

168. See Protocol I, *supra* note 16, art. 52(2) (detailing basic components of international humanitarian law). See also ICRC COMMENTARY, *supra* note 114, at 635 (stating that both elements of article 52(2)'s definition must be present in order for military objective to exist).

cilities, vehicles, and communication facilities are examples of dual use objects. The *Air Force Pamphlet* candidly acknowledges that "controversy exists over whether, and the circumstances under which, . . . objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives."<sup>169</sup>

Article 52, however, creates a presumption, which suggests that, "[i]n case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house . . . or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."<sup>170</sup> Importantly, the presumption applies only to objects which ordinarily have no substantial military use or purpose.<sup>171</sup> As a result, the presumption does not apply to "dual use" objects. As the *New Rules* suggest, "[t]he test as to such objects—unaffected by presumptions on either side of the equation—remains the two-pronged test [of military objectives] established in para. 2 [of article 52]."<sup>172</sup>

#### E. CIVILIAN PROTECTION AGAINST INDISCRIMINATE ATTACKS

While article 13 of Protocol II affords the civilian population and individual civilians general protection against attack, it does not provide express protection to civilians or civilian objects from an indiscriminate or disproportionate attack. Nevertheless, the *New Rules* state that "the concept of general protection is broad enough to cover protections which flow as necessary inferences from other provisions of Protocol II."<sup>173</sup> The more specific rules in Protocol I that protect civilians and civilian objects from such attacks are appropriate referents for determining the extent of similar protection for these persons and objects under Protocol II.

Article 51(4) of Protocol I, for instance, expressly states that indiscriminate or disproportionate attacks should not target the civilian population.<sup>174</sup> Attacks not directed at specific military objectives are forbid-

169. See AIR FORCE PAMPHLET, *supra* note 95, at 5-9, ¶ 5-3(b)(2).

170. Protocol I, *supra* note 18 art. 52(3). See ICRC COMMENTARY, *supra* note 116, at 637 (discussing civilian purpose presumption).

171. See NEW RULES, *supra* note 81, at 326.

172. NEW RULES, *supra* note 81, at 326.

173. NEW RULES, *supra* note 79, at 676.

174. See Protocol I, *supra* note 16, art. 51(4). Article 51(4) states:

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

den under the article, as are attacks utilizing a method or means of combat that a party cannot direct at a specific military objective.<sup>175</sup> Thus, the article forbids belligerents from attacking military objectives, civilian objects, or civilians without distinction. Article 51(5)(a) considers an attack indiscriminate if it "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."<sup>176</sup> On the other hand, an assault on a single military target within that locale would not be an unlawful, indiscriminate attack. However, if a party attacks a populated area to eliminate several military objectives that could have been attacked separately, such an action would be indiscriminate.

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- (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.

*Id.* Furthermore, article 51(5) provides guidance on what types of attacks are to be considered indiscriminate:

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.* art. 51(5).

175. See ICRC COMMENTARY, *supra* note 114, at 619-23 (noting that article 51(4) developed in response to certain Second World War practices designed to "destroy all life in a particular area or to raze a town to the ground" without any military advantage).

176. Protocol I, *supra* note 16, art. 51(5)(a).

## F. THE RULE OF PROPORTIONALITY

The fact that an object may be a legitimate military target under article 52 does not grant an unlimited license to attack it. The principles of military necessity and humanity, which are deeply rooted in the customary law of war, require that the party attacking such a target avoid or minimize civilian casualties, and, thus, preclude disproportionate and indiscriminate attacks.

The first codification of the customary rule of proportionality as it relates to collateral civilian casualties and damage to civilian objects, is found in articles 51(5)(b) and 57(2)(iii) of Protocol I. In article 51(5)(b), this rule is defined as "[a]n 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."<sup>177</sup> According to the *New Rules*:

The Rule of proportionality clearly requires those who plan or decide upon attack must take into account the effects of the attack on the civilian population in their pre-attack estimate. They must determine whether those effects are excessive in relation to the concrete and direct military advantage anticipated. Obviously this decision will have to be based on a balancing of:

- (1) the foreseeable extent of incidental or collateral civilian casualties or damage, and
- (2) the relative importance of the military objective as a target.<sup>178</sup>

The *Air Force Pamphlet* states the following on the rule of proportionality:

Attacks are not prohibited against military objectives even though incidental injury or damage to civilians will occur, but such incidental injury to civilians or damage to civilian objects must not be excessive when compared to the concrete and direct military advantage anticipated. Careful balancing of interests is required between the potential military advantage and the degree of incidental injury or damage in order to preclude situations raising issues of indiscriminate attacks violating general civilian protections.<sup>179</sup>

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177. Protocol I, *supra* note 16, art. 51(5)(b). See generally, Lt. Col. William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91 (1982) (examining the rule of proportionality as expressed in Protocol I).

178. NEW RULES, *supra* note 79, at 310.

179. AIR FORCE PAMPHLET, *supra* note 93, at 5-10, ¶ 5-3(c)(2)(b). See *United*



## G. CONCRETE AND DIRECT MILITARY ADVANTAGE

The rule of proportionality, as noted by the *New Rules*, imposes "an additional limitation on the discretion of combatants in deciding whether an object is a military objective under para. 2 of article 52."<sup>180</sup>

Should an attack be expected to cause incidental civilian casualties or damage, the requirement of an anticipated "definite" military advantage under article 52 is elevated to the more restrictive standard of a "concrete" and "direct" military advantage in article 51(5)(b).

According to the *New Rules*:

"Concrete" means specific, not general; perceptible to the senses. Its meaning is therefore roughly equivalent to the adjective "definite" used in the two-pronged test prescribed by Art. 52(2). "Direct," on the other hand, means "without intervening condition of agency." Taken together the two words of limitations raise the standard set by Art. 52 in those situations where civilians may be affected by the attack. A remote advantage to be gained at some unknown time in the future would not be a proper consideration to weigh against civilian losses.<sup>181</sup>

Similarly, the *ICRC Commentary* states that "[t]he expression 'concrete and direct' was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded."<sup>182</sup> While the *ICRC Commentary* provides for a

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*States Department of the Navy, The Commander's Handbook on the Law of Naval Operations* para. 8.1.2.1 (Annotated Supp. 1989) (footnotes omitted) which states that:

[i]t is not unlawful to cause incidental injury or death to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage should not, however, be excessive in light of the military advantage anticipated by the attack. Naval commanders must take all practicable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the absolute minimum consistent with mission accomplishment and the security of the force. In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.

*Id.*

180. *NEW RULES*, *supra* note 79, at 360.

181. *See NEW RULES*, *supra* note 79, at 365 (noting that use of the terms "direct" and "concrete" are words of limitation which raise the standard of article 52 in cases where civilians may be affected).

182. *ICRC COMMENTARY*, *supra* note 114, at 684.

relatively broad margin of judgment, it also notes:

even in a general attack the advantage anticipated must be a military advantage and it must be concrete and direct; there can be no question of creating conditions conducive to surrender by means of attacks which incidentally harm the civilian population. A military advantage can only consist in ground gained and in annihilating or weakening the enemy armed forces. In addition, it should be noted that the words "concrete and direct" impose stricter conditions on the attacker than those implied by the criteria defining military objectives in Article 52 . . . .<sup>183</sup>

The phrase "'concrete and direct military advantage' . . . refers to the advantage anticipated from the specific military operation of which the attack is a part taken as a whole and not from isolated or particular parts of that operation."<sup>184</sup>

#### H. EXCESSIVE COLLATERAL DAMAGE

Another aspect of the proportionality equation requires that foreseeable injury to civilians and damage to civilian objects not be disproportionate or "excessive" to the anticipated "concrete and direct military advantage."<sup>185</sup>

Since excessive damage is a relational concept, it is not quantifiable to a fixed number of civilian casualties or injuries, or houses destroyed. As a general principle, such damage need not "shock the conscience" of the world. Instead, avoiding excessive damage requires a good faith

183. ICRC COMMENTARY, *supra* note 114, at 685.

184. NEW RULES, *supra* note 81, at 311 (footnote omitted); *see* NEW RULES, *supra* note 81, at 364-65 (stating that requirement in article 57 of a "concrete and direct" military advantage represents a codification of the principle of proportionality). *See* ICRC COMMENTARY, *supra*, note 114, para. 2212 at 684 (noting that proportionality, in article 57, is "concerned with incidental effects which attacks may have on persons and objects, as appears from the reference to 'incidental loss' in the article). According to the *New Rules*,

"Concrete" means specific, not general; perceptible to the senses. Its meaning is therefore roughly equivalent to the adjective "definite" used in the two pronged test prescribed by Art. 52(2). "Direct", on the other hand, means "without intervening condition of agency." Taken together the two words of limitation raise the standard set by Art. 52 in those situations where civilians may be affected by the attack.

NEW RULES, *supra* note 79, at 365.

185. *See* NEW RULES, *supra* note 79, at 360 (stating that Article 51 of Protocol I prohibits attacks in which the civilian casualties foreseeably will be greater than the expected "direct military advantage").

balancing of the foreseeability of collateral damage and the comparable importance of a particular military target.<sup>186</sup> Consequently, destroying a village in order to eliminate a single sniper or machine gun post would be clearly excessive in comparison to the low importance of the target.<sup>187</sup>

The *ICRC Commentary* furnishes examples of what may constitute "excessive" damage. For instance, "the presence of a soldier on leave obviously cannot justify the destruction of a village," yet "if the destruction of a bridge is of paramount importance for the occupation or non-occupation of a strategic zone, it is understood that some houses may be hit, but not that a whole urban area be leveled."<sup>188</sup>

Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail . . . .<sup>189</sup>

However, the *ICRC Commentary* makes it clear that civilian casualties can never be justified.

The idea has been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol; in particular it conflicts with article 48 (*Basic Rule*) and with paragraphs 1 and 2 of the present Article 51. The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.<sup>190</sup>

Compliance with the rule of proportionality ultimately depends on the subjective decisions of military commanders. Recognizing that these decisions are made in battle conditions "under circumstances when clinical certainty is impossible and when the adversary is striving to conceal

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186. See NEW RULES, *supra* note 79, at 360-61 (discussing the requirement imposed by Protocol I that military commanders weigh the possibility that civilian casualties may exceed the anticipated military advantage as a precautionary measure to an attack).

187. See W. Hays Parks, *Air War and the Law of War*, 32 A. F. L. REV. 1, 168 (1990) (discussing air war strategy).

188. ICRC COMMENTARY, *supra* note 114, paras. 2213-14 at 684.

189. ICRC COMMENTARY, *supra* note 114, para. 1979 at 626.

190. ICRC COMMENTARY, *supra* note 114, para. 1980 at 626.

the true facts, to deceive and to confuse,"<sup>191</sup> the *New Rules* suggests that

[t]he standard for judging the actions of commanders and others responsible for planning, deciding upon or executing attacks, must be based on a reasonable and honest reaction to the facts and circumstances known to them from information reasonably available to them at the time they take their actions and not on the basis of hindsight.<sup>192</sup>

In light of the subjective aspect of such decisions, the *New Rules* states that "[p]arties to the conflict . . . should curtail the limits within which commanders of operating units exercise their discretion by issuing rules of engagement tailored to the situation prevailing in the area of conflict involved."<sup>193</sup>

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, such as unmarked land mines, can also constitute an indiscriminate attack.<sup>194</sup>

The *New Rules* also indicates that the absence of an explicit prohibition against indiscriminate attacks in article 13 of Protocol II is due merely to the simplification of the text of that article.<sup>195</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 paragraph 5(a) of article 51 of Protocol I are inferentially included within the prohibition against making the civilian population the object of attack.<sup>196</sup> The "principles 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.<sup>197</sup>

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191. NEW RULES, *supra* note 79, at 279.

192. NEW RULES, *supra* note 79, at 279-80.

193. NEW RULES, *supra* note 79, at 310-11.

194. See NEW RULES, *supra* note 79, at 305 (discussing the use of blind weapons as an indiscriminate means of warfare).

195. See NEW RULES, *supra* note 79, at 676 (asserting that it is possible to infer specific protections against attack from the general protections stated in Article 13).

196. NEW RULES, *supra* note 79, at 677.

197. Protocol II, *supra* note 16, preamble. See generally ICRC COMMENTARY,

## VI. APPLICATION OF INTERNATIONAL LAW TO INTERNAL ARMED CONFLICTS

Based on the preceding discussion of relevant legal rules and principles, it is possible to draw the following conclusions regarding application of these rules and principles to internal armed conflicts.<sup>198</sup>

### A. CIVILIANS

The following persons generally should be considered civilians and, thus, not subjected to individualized attack:

1. The peaceful population not directly participating in hostilities, even though their activities may contribute to the war effort.
2. (a) Persons providing only indirect support to a party to the conflict by, *inter alia*, working in defense plants, distributing or storing military supplies outside of combat 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. However, if they are present in or near military targets, they implicitly assume the risk of death or injury incidental to direct attacks against such military targets.  
(b) Persons providing such indirect support to *dissident* forces are clearly subject to prosecution by the government for giving aid and comfort to the enemy. Such prosecutions must conform to the obligatory fair trial guarantees set forth in common article 3 and, where applicable, article 6 of Protocol II.
3. Persons, other than members of a party to the conflict's armed forces, who take a direct part in the hostilities. They, however, temporarily lose their immunity from attack while they assume a combatant's role.

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*supra* note 114, paras. 4419-35 at 1338-42 (discussing text of Protocol II preamble).

198. The recommendations and discussion contained in the following section are based, in part, upon those submitted by the author in *International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua*, 2 AM. U. J. INT'L L. & POL'Y 539, 572-77 (1987).

## B. CIVILIAN OBJECTS

In internal armed conflicts the following should be considered civilian objects immune from direct attack:

1. Structures and locales, such as houses, churches, dwellings, schools, farm villages, and cooperatives, that in fact are dedicated exclusively to civilian purposes and, in the circumstances prevailing at the time, do not make an effective contribution to military action.
2. 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 action.

## C. MILITARY OBJECTIVES

While not an exhaustive list, the following persons and objects generally constitute legitimate military objectives subject to direct attack in internal armed conflicts:

1. Members of a party to a conflict's armed forces and groups.
2. Civilians while they assume a combatant's role.
3. Weapons, other war material, army, navy and air force establishments, supplies, vehicles, campsites, fortifications, fuel depots and stores, and those other objects set forth in the list of proposed military targets in the *ICRC Commentary*.
4. Dual use objects that effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities, airfields and ports.
5. Industries and export crops and goods that, while not directly connected with combat operations, are fundamentally important to the ability of a party to conduct hostilities.

## D. PROHIBITED ATTACKS AND WEAPONS USE

Although not all encompassing, the following kinds of attacks are prohibited in the conduct of internal hostilities:

1. Direct attacks against individuals or groups of unarmed civilians where no legitimate military objective, such as enemy

combatants or war material, is present. Such attacks are indiscriminate.

2. Direct attacks against civilian objects dedicated to civilian purposes, such as towns, villages, dwellings, or buildings, where no military objective is present. This type of attack is similarly indiscriminate.
3. Direct attacks against military targets where the expected injury to civilians, damage to civilian objects, or a combination thereof, would be disproportionate to the concrete and direct military advantage anticipated. Such attacks are also indiscriminate.
4. Attacks, and threats of such acts, that are launched or threatened with intent to terrorize the civilian population. To the extent that attacks are launched or threatened solely or primarily for political ends, they are unlawful and violate the principles of civilian immunity, humanity and proportionality.
5. 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.
6. 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.
7. The use of booby-traps designed to cause superfluous injury or unnecessary suffering, such as hidden pits containing poisoned objects.
8. Direct attacks 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.

#### E. OTHER PROHIBITED POLICIES

Again, while not an all-encompassing list, applicable humanitarian law rules prohibit the following kinds of practices, orders, or action in internal conflicts:

1. The use of civilians and/or civilian objects to shield military

objectives from attack.

2. Orders to combatants that there shall be no survivors, such threats to combatants, or direction to conduct hostilities on this basis.
3. Attacks against combatants who are captured, surrender, or are placed *hors de combat*.
4. Attacks, destruction, removal, or rendering useless objects indispensable for the survival of the civilian population, such as, *inter alia* foodstuffs, crops, livestock and drinking water installations.
5. Torture and other cruel treatment of persons under any circumstances.
6. The taking of hostages.
7. The infliction of humiliating or degrading treatment on civilians or combatants who are captured, have surrendered, or are *hors de combat*.
8. Assassination of civilian officials, such as judges or political leaders.
9. The execution of civilians or combatants without previous and proper trial by independent and impartial courts.

#### F. CLASSIFICATION OF CIVILIAN CASUALTIES

1. The appropriate labeling and attribution for the deaths of civilians killed in military operations conducted by the parties to the conflict will depend on the circumstances of death. However, civilian casualties under the following circumstances may be classified properly as homicides or felonious assaults attributable to the responsible party to the conflict:
  - (a) Deaths of or injuries to civilians as a result of prohibited or indiscriminate attacks or weapons use as indicated above.
  - (b) Deaths of civilians as a result of summary execution, torture, or injuries resulting from torture. In addition to violating international humanitarian law, such homicides and assaults, if attributable to members of governmental forces, would constitute human rights violations for which the perpetrator's government would be internationally responsible. In contrast, the same acts while clearly violating humanitarian law, if committed by members of dissident forces, would not be human rights violations, but



rather are infractions of the particular country's domestic laws.

2. Deaths of or injury to civilians under the following circumstances should be classified as legitimately combat related:
  - (a) Deaths of and injuries to civilians when they directly participate in hostilities. Such persons forfeit their immunity from direct attack while assuming the role of a combatant.
  - (b) Deaths of 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, proportional 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 "gray area" between these two extremes. These deaths, therefore, must be excluded from the tallies of killings that are regarded as homicides by international humanitarian or human rights law.

#### VII. THE IMPACT OF THE AMERICAS WATCH REPORTS ON THE CONDUCT OF THE PARTIES TO THE SALVADOREAN AND NICARAGUAN CONFLICTS<sup>199</sup>

In the early 1980's, Americas Watch determined that international humanitarian law provided the only viable legal basis for classifying and assigning responsibility for civilian casualties, as well as objectively assessing the conduct of hostilities by the various parties to the internal armed conflicts in the hemisphere.<sup>200</sup> Stylistically, the reports issued by Americas Watch, focusing on countries with ongoing hostilities, consist of an introductory section or appendix which characterizes and describes the legal regime applicable to the particular conflict.<sup>201</sup> This is followed

199. The material from this section is drawn from an essay by Anne Manuel, Associate Director of Americas Watch, entitled *Central America, HUMAN RIGHTS WATCH'S, Monitoring Violations of the Laws of War in Internal Armed Conflicts* (Human Rights Watch, Washington, D.C.), Summer 1990, No. 3, at 8-9.

200. See *supra* notes 18-22 and accompanying text (discussing why international humanitarian law is more applicable than human rights law).

201. See, e.g., AMERICAS WATCH, REPORT ON HUMAN RIGHTS IN EL SALVADOR, *supra* note 3 (containing appendices detailing Salvadorean human rights laws).

by chapters with relatively detailed descriptions of specific kinds of violations, such as indiscriminate attacks, perpetrated by all parties to the conflict.<sup>202</sup> Investigating and ultimately attributing responsibility for violations of humanitarian law, apart from requiring a working knowledge of the law, is methodologically more sophisticated than establishing infractions of human rights law. Such investigations generally require on-site investigation and extensive testimony from victims and witnesses. These requirements figured prominently in the Americas Watch decision to open an office in San Salvador in 1985, under the direction of attorney Jemera Rone. That office continues to operate today, albeit on a part-time basis.

In 1984, Americas Watch published the first report on El Salvador which applied humanitarian law. The title of the report was *Protecting the Weak and Unarmed*.<sup>203</sup> Its purpose was to refute the Reagan Administration's claim that so-called *masas*, those persons living in FMLN controlled territory and/or indirectly participating in hostilities by providing the rebels with food and other logistical support, were legitimate military targets subject to direct attack by the Salvadorean air force.<sup>204</sup> The report clearly demonstrated under humanitarian law that while many of these persons implicitly assumed the risk of death or injury by virtue of their proximity to legitimate targets (the FMLN), they were not combatants and, therefore, could not be directly attacked.<sup>205</sup> Thus, as the report concluded, civilian casualties resulting from such direct attacks were tantamount to homicides and properly classified as human rights violations attributable to the government.<sup>206</sup> In conjunction with the important work of the ICRC in El Salvador, *Protection of the Weak and Unarmed* was instrumental in President Duarte's decision in late 1984 to issue "rules of engagement," prohibiting aerial attacks against civilians.<sup>207</sup> While such air attacks continued

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202. See *id.* (documenting violations of fundamental rights by both parties to the Salvadorean conflict, with separate chapters devoted to violations of specific rights).

203. PROTECTION OF THE WEAK AND UNARMED, *supra* note 119.

204. See *id.* at 2 (noting the State Department belief that El Salvadorean civilians in FMLN territory, or "masas," were not entirely innocent noncombatants). See also EL SALVADOR'S DECADE OF TERROR, *supra* note 118, at 64-70 (discussing the FMLN in El Salvador).

205. See PROTECTION OF THE WEAK AND UNARMED, *supra* note 119, at 30-45 (defining the status of various civilian groups under international humanitarian law).

206. See *id.* at 45 (concluding that the killing of civilians, who are not intermingled with combatants or legitimate military targets, constitutes murder).

207. See EL SALVADOR'S DECADE OF TERROR, *supra* note 118, at 54 (summa-

to occur from time to time, most had ended by 1987.<sup>208</sup> From 1984 until the end of open hostilities in early 1992, every bi-annual report on El Salvador contained a section exclusively dedicated to humanitarian law violations by government and FMLN forces.<sup>209</sup>

Americas Watch published in April 1984 its first report detailing humanitarian law abuses perpetrated by the counter-revolutionary forces (*contras*) in Nicaragua.<sup>210</sup> At that time, there were public revelations that the CIA had written a manual for the *contras*, entitled "*Psychological Operations in Guerilla Warfare*." The manual recommended violations of humanitarian law, such as assassinations of civilian government representatives. Disclosure of the manual existence focused considerable attention on abuses by these United States funded insurgents.<sup>211</sup>

By March 1985, Americas Watch issued an important, comprehensive report entitled *Violations of the Laws of War (between 1981-85) By Both Sides in Nicaragua*.<sup>212</sup> It marked the first time that any human rights group had comprehensively set forth the legal rules governing internal armed conflicts and applied them to judge the conduct of hostilities by the contending parties. Supplements to this report were periodically published throughout the duration of the *contras*' insurgency.

These reports, which documented systematic violations of humanitarian law by the *contras*, had an impact on the debate in the United States Congress over funding and arming that force. The Americas Watch investigation of humanitarian law abuses by the Sandinista government established only sporadic violations, except for the deadly campaign against the Miskito Indians in 1981-82 and abuses in Jinotega in 1983-84.<sup>213</sup> In contrast, the Americas Watch characterization of humanitarian law violations by the *contras* dramatically contradicted the Reagan

rizing Duarte's rules of engagement).

208. See *id.* at 54-58 (attributing the decline in the number of aerial attacks by the Salvadorean Air Force to the changing conditions of the conflict).

209. See generally REPORT ON HUMAN RIGHTS IN EL SALVADOR and its eleven Supplements, *supra* note 3 (describing humanitarian law violations committed by both sides in the Salvadorean conflict).

210. AMERICAS WATCH, HUMAN RIGHTS IN NICARAGUA (Apr. 1984).

211. See *Rebel Training Book Linked to Casey Visit to Honduras*, N.Y. TIMES, Dec. 3, 1984, at A6 (reporting that parts of the manual euphemistically advocated assassination of selected Nicaraguan government officials). The article uses the word "selective violence to neutralize Nicaraguan officials." *Id.*

212. AMERICAS WATCH, VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES IN NICARAGUA (Between 1981-1985) (Mar. 1985) [hereinafter VIOLATIONS].

213. See *id.* at 57-64 (documenting several incidents in the Nicaraguan government campaign against the Miskitos).

Administration's depiction of the record of this insurgent group.<sup>214</sup>

In 1986, Americas Watch released a report on the high number of civilian casualties resulting from the indiscriminate use of land mines by the parties to the conflicts in El Salvador and Nicaragua.<sup>215</sup> This report, based on extensive interviews with victims and travel to both countries, contained a detailed analysis of the complex legal rules governing the use of mines and like weapons.<sup>216</sup> It found that in El Salvador, the FMLN was responsible for a greater number of civilian casualties from indiscriminate land mine use and the armed forces were responsible for a smaller number of such casualties.<sup>217</sup> In Nicaragua, the report's findings indicated that the *contras* not only had used these weapons indiscriminately, but probably had used them deliberately against civilians.<sup>218</sup>

Americas Watch also engaged in a sharp public debate with the Reagan Administration and the *contras* over the legality of *contra* attacks against rural cooperatives protected by armed guards.<sup>219</sup> The administration had tried to justify the large number of civilian casualties resulting from these attacks on the ground that these cooperatives served a "dual military-economic purpose."<sup>220</sup> Americas Watch recognized that coffee drying facilities located within many of these coops and armed personnel guarding them were legitimate targets—conclusions that were disputed by the Sandinista government. Americas Watch nevertheless maintained that the *contras* could not attack them in disregard of the protection against indiscriminate attacks enjoyed by civilians and civilian ob-

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214. See *id.* at 41-55 (reporting violations of humanitarian law by the *contras*). See also *id.* at 93 (recording President Reagan's praise of the *contras*).

215. AMERICAS WATCH, LAND MINES IN EL SALVADOR AND NICARAGUA: THE CIVILIAN VICTIMS (Dec. 1986) (discussing the use of land mines in El Salvador and Nicaragua).

216. See *id.* at 5-10 (interpreting the rules in the United Nations Land Mines Protocol, U.N.G.A. Doc. A/Conf. 95/15, 19 I.L.M. 1534 (1980)).

217. See *id.* at 18-21 (providing statistics on the number of civilian deaths from land mines in El Salvador).

218. See *id.* at 50 (asserting that the *contras* were laying the mines that were injuring civilians in Nicaragua).

219. See e.g., HUMAN RIGHTS WATCH, THE REAGAN ADMINISTRATION'S RECORD ON HUMAN RIGHTS IN 1987 at 148-49 (Dec. 1987) [hereinafter REAGAN ADMINISTRATION'S RECORD] (reporting *contra* boasts about the elimination of a number of these cooperatives, and accusing the Reagan Administration of engaging in a propaganda campaign with regard to human rights in Nicaragua).

220. See *supra* note 204 and accompanying text (describing a similar dispute regarding the Salvadorean *masas*).

jects located within these cooperatives.<sup>221</sup> The organization found that indiscriminate attacks by the *contras* against these facilities were so frequent and widespread as to constitute a clear policy.<sup>222</sup>

During the prolonged civil war in El Salvador, Americas Watch maintained a frank and, at times, very public dialogue with both the Salvadorean government and the FMLN over violations of humanitarian law committed by their respective forces. For example, the FMLN regularly initiated meetings with Americas Watch personnel to discuss the specific charges made against their forces in the organization's bi-annual reports. The FMLN objected repeatedly to Americas Watch criticism of their indiscriminate use of land mines, their attacks against civilian government officials and their practice—which the organization has labeled as “summary executions”—of trying and executing members of civil defense groups, elected officials, and other persons they considered to be government collaborators. This criticism, together with that of other groups, undoubtedly influenced the FMLN to decide in March 1990 to suspend attacks against civilian government officials and other civilians, except for those whom the rebels regarded as closely tied to the armed forces.<sup>223</sup> Americas Watch continued to strongly condemn the rebels' claim that such civilians, who did not directly participate in hostilities, were lawful military targets.

The FMLN particularly rejected criticism of their trials of persons whom they considered to be government informants. The rebels attempted to justify these trials under international humanitarian law, citing various Americas Watch reports to support their position. In response, Americas Watch issued in May 1990 a special study entitled *Violations of Fair Trial Guarantees by the FMLN's Ad-Hoc Courts* which gave a detailed and analytical explanation of the reasons for condemning these trials under humanitarian law.<sup>224</sup> This study concluded that these courts organizationally were neither independent, nor impartial, and that their procedures denied defendants basic due process guarantees in flagrant violation of the non-derogable provisions of com-

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221. See REAGAN ADMINISTRATION'S RECORD, *supra* note 219, at 149 (describing attacks on cooperatives).

222. See *id.* (noting the *contras*' claim that they had eliminated seventeen cooperatives).

223. See *Salvador Rebels Agree to Conditions for Peace Talks*, L.A. TIMES, Mar. 14, 1990, at A9 (reporting that the FMLN agreed to halt most attacks on civilians as a gesture, prior to the start of a new round of peace talks).

224. AMERICAS WATCH, VIOLATIONS OF FAIR TRIAL GUARANTEES BY THE FMLN'S AD-HOC COURTS (May 1990).

mon Article 3 and Article 6 of Protocol II.<sup>225</sup> The study also recommended that the FMLN should refrain from imposing the death sentence particularly given the lack of due process in their trial procedures.<sup>226</sup> Moreover, Americas Watch called on the rebels to renounce the death penalty because, in the event they succeeded in displacing the existing government, the FMLN would nonetheless be prohibited by the international law rules of government succession from applying that sanction to persons guilty of crimes related to the hostilities.<sup>227</sup>

It should be reiterated that other Americas Watch reports routinely documented and condemned summary executions of noncombatants committed by Salvadorean government security forces and death squads.<sup>228</sup>

### CONCLUSION

The Americas Watch reports on humanitarian law violations in the Salvadorean and Nicaraguan conflicts had a positive impact, at times, on persuading the contending parties in both countries to modify their conduct of military operations. Moreover, by regularly reporting on abuses committed by both sides to these conflicts, Americas Watch enhanced the credibility of its reporting and was able to deflect charges that it was favoring one side over the other. This even handed reporting was influential in helping shape public opinion in the United States and congressional debate over Reagan Administration policies in Central America. For example, public knowledge of *contra* abuses from the outset of their insurgency, documented in these reports and those of other groups, constituted a blow from which the *contras* never fully recovered, despite President Reagan's fervent propagandizing on their behalf.

One purpose of these Americas Watch reports was to foster an awareness of the relevance of humanitarian law among the contending parties and civilian populations in El Salvador and Nicaragua. What is abun-

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225. See *id.* (detailing the flaws in the FMLN's system of *ad hoc* courts and trials).

226. See *id.* at 37 (demanding that the FMLN cease using the death penalty).

227. See *id.* at 36 (commenting on the anomaly of FMLN use of a sanction that they could not legally impose if and when they succeeded in overthrowing the Salvadorean government).

228. See, e.g., REPORT ON HUMAN RIGHTS IN EL SALVADOR, *supra* note 3 (providing, with its supplementary volumes, a comprehensive summary of atrocities committed by the Salvadorean government and the death squads).

dantly clear is that humanitarian law came to figure prominently in political discourse in both countries, as it has in other hemispheric nations still beset by armed conflict. The Americas Watch introduction of humanitarian law reporting in El Salvador and Nicaragua has not only become the *modus operandi* for sister committees of Human Rights Watch, but arguably has shaped a new and important direction for the entire human rights movement.