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ARE THE ATROCITIES IN CHECHNYA GENOCIDE?

by

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INTRODUCTION

The armed conflict that the Russian Federation is conducting against the people of Chechnya has already been in progress for more than nine years with a two-year break in the middle. This unbelievably harsh, profoundly destructive and completely amoral conflict has led, in the opinion of some human rights defenders, to virtual genocide of the Chechen nation. In a written statement submitted by the Society for Threatened People to the UN Commission for Human Rights, the Society openly accused the Russian Army and the government of violating the Convention on the Prevention and Punishment of the Crime of Genocide[1] ("Convention" or "Genocide Convention").[2] Another non-governmental organization, the Committee on Conscience at the US Holocaust Memorial Museum has placed Chechnya on its Genocide Watch List.[3]

This means that there is serious potential for genocide and related crimes against humanity. The Committee's concern about genocide in Chechnya is based on the past persecution of the Chechen people,[4] the demonization of Chechens as a group within Russian society[5] and the level of violence directed against Chechen civilians by Russian armed forces.[6] Meanwhile, the situation in Chechnya has never been officially recognised by the United Nations or Western governments as genocide of

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951) [hereinafter Genocide Convention].

[2] E/CN.4/2001/NGO/171.

[3] Committee on Conscience U. S. Holocaust Memorial Museum, *Genocide Watch: Chechnya*, *at* http://www.ushmm.org/conscience/chechnya/pdf/chechnya.pdf.

[4] *See supra* note 40 and accompanying text.

[5] The Committee asserted that "persons of Caucasian nationality", and Chechens in particularly often are referred to pejoratively as "blacks" and are assumed by virtue of their ethnicity to be criminals or terrorists. Throughout the Russian Federation, particularly in larger cities, Chechens suffer discrimination in housing and employment and are subject to arbitrary arrest and harassment. Committee on Conscience U. S. Holocaust Memorial Museum, *Genocide Watch: Chechnya*, *at* http://www.ushmm.org/conscience/chechnya/pdf/chechnya.pdf.

[6] *See* Human Rights Watch "Welcome to Hell: Arbitrary Detention, Torture and Extortion in Chechnya" (October, 2000), "Glad to be Deceived": the International Community and Chechnya" (World Report 2004), *available at* http://www.hrw.org (describing human rights violations against Chechen people).

the Chechen people. At best, the United Nations carefully modulated statements of "alarm" and "concern" about what was going on. And what is more, the UN Human Rights Commission hasn't adopted any resolution condemning Russian authorities for abuses in Chechnya since 2001.

Is the United Nations reluctance to pass a resolution condemning Russia for the genocide of the Chechen people an official confirmation of the fact that the United Nations deliberately encourages the genocide and helps the Russian authorities to commit the unprecedented massacre of the entire nation? Or perhaps the accusations of genocide in Chechnya are exaggerated and politically and ideologically motivated? To clarify these and other questions about the possible crime of genocide in Chechnya, the author of this Essay will undertake a legal analysis of the situation, set out below.

HISTORY OF THE ARMED CONFLICT IN CHECHNYA

To understand the current crisis in Chechnya and to grasp the significance of the human rights violations and possible existence of a claim of genocide, it is helpful to outline the history of the armed conflict in Chechnya. When the Soviet Union dissolved in late 1991, Chechnya (until then the major part of the Chechen-Ingush Autonomous Republic in Northern Caucasus) declared itself independent. During the following three years Moscow made some attempts to force Chechnya back into the Russian Federation but could not do anything due to the unwillingness of the Chechen government to make any compromise with the Russian authorities about independence. Then in December 1994, after the failure of a Russian supported attempt by the pro-Russian opposition to overthrow the separatist regime, a regular Russian military intervention took place. In figures released by Russian's Human Right's Commissioner, Sergei Kovalev, the Chechens suffered 24,000 civilian casualties over the course of two months from 25 November 1994 to 25 January 1995.[7]

By February 1995, the capital city of Grozny had fallen to Russian troops. The destruction of Grozny has since been widely compared to the battle of Stalingrad in the Second World War.[8] The fighting between Russian and Chechen forces continued until August 1996. During the fighting between 30,000 and 90,000 civilians died.[9] It was during this period that human rights violations peaked.[10] Both sides fought the war without regard to the safety of civilians. Indiscriminate use of air and artillery bombardment left the capital, Grozny, in ruins. Eventually the Russian forces suffered a humiliating defeat and the Khasavyurt Peace Agreement brought an end to the hostilities. In January 1997 the Chechen Chief of Staff, Aslan Maskhadov, was elected as president of the Chechen Republic. A Peace Treaty was signed by Maskhadov and former Russian President Yeltsin

[7] *Telephone Interview with Eric Engleman*, Moscow Correspondent, Monitor Radio (Feb. 22, 1995).
[8] Glen Howard, *Chechnya: Quo Vadis?* Presentation at the Central Asia Caucasus Institute. Johns Hopkins University SAIS, 12 May 1999.
[9] Wendy Atrokhov, *The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis*, 32 Cornell Int'l L. J. 367,369 (1999).
[10] *See* Human Rights Watch. *Memorandum on Accountability for Humanitarian Law Violations in Chechnya* (20 October 2000), *at* www.hrw.org/campaigns/eu-summit/chech-memo-1020.htm (noting numerous human rights violations perpetrated by the Russian military against Chechen civilians).

in May of the same year. However, due to the devastation brought about by the armed conflict, external meddling by Islamic radicals, escalating crime and inter-Chechen rivalries, Chechnya degenerated into chaos. The inability of Maskhadov to control the situation in Chechnya undermined his legitimacy as a sovereign. Chechen "field commander" Shamil Basayev and his foreign brother-in-arms al-Khattab, in August 1999, lead an attack into neighbouring Dagestan in order to support radical Islamic groups there and with the declared purpose of establishing a Chechen-Dagestani Islamic Republic.

The attack was repelled by Russian and local Dagestani forces. However, the attack against Dagestan and series of apartment bombings that terrorised Russian citizens provided Moscow with justification to launch another armed conflict against the Chechen republic in 1999. Five months of indiscriminate bombing and shelling in 1999 and early 2000 resulted in thousands of civilian deaths.[11] This time the Russian government claimed success. Large-scale combat operation ended in Chechnya in 2000 and Russian troops controlled nearly all of the republic's territory.[12] In March 2003, a referendum "reiterated Chechnya's status as part of Russia".[13] A presidential election followed this referendum in October 2003, resulting in the election of Moscow's supported candidate Akhmad Kadyrov as president of Chechnya.[14] However, despite declaration that the armed conflict is over and won by Moscow, hostilitie continue in the form of guerrilla warfare with considerable losses on both sides and with no prospects for any peaceful solution.

IS THERE A CASE CLAIMING FOR THE CRIME OF GENOCIDE IN CHECHNYA?

In August 2000 the so-called Ministry of Foreign Affairs of the Chechen Republic of Ichkeria issued a press release indicating the Chechen Republic of Ichkeria had instituted legal proceeding against the Russian Federation before the International Court of Justice for violating every substantive provision of the Genocide Convention.[15] It alleged, in particular, that for the past six decades the Russian Federation and the former Soviet Union have ruthlessly implemented a systematic and comprehensive military, political, and economic campaign with the intent to destroy in substantial part the national, ethnical, racial and religious group known as the Chechen People and requested provisional measures of protection against the genocidal behavior of the Russian Federation.[16] Apparently the legal grounds for beginning of the proceedings are contained in Article

[11] *See* Human Rights Watch, *Glad to be Deceived: the International Community and Chechnya* (World Report 2004), *at* http://www.hrw.org/wr2k4.htm. It must be acknowledged that the information about the death toll during the two armed conflicts is very vague and contradictory. Chechens Rebel sources have argued about 250,000 civilians of Chechnya died (25% of the population). *See e.g., Russian People Pay the Price of War They Permit, Rebel Chechen Site said, available at* Lexis, BBC Monitoring International Reports, 10 Feb. 2004. Moscow Helsinki Group claims approximately 70,000 civilians died. Moscow Helsinki Group, *"Chechnya 2003: Political Process through the Looking Glass"*, p.12.
[12] Paul Starobin, *Life is Horrible*, Business Week, 16 December 2002, at 52.
[13] *Vote for the Devil*, The Economist, 11 October 2003, at 53.
[14] *Id.*
[15] *See* Press Release Ministry of Foreign Affairs of the Chechen Republic of Ichkeria, № 10-683, 1 August 2000, *available at* http://www.idee.org
[16] *Id.*

IX of the Convention, which confer the right to the Contracting Parties to submit the disputes relating to the interpretation, application or fulfillment of the Convention or state responsibility for genocide to the International Court of Justice.[17]

Obviously such a legal claim has never been tried at the International Court of Justice because the Chechen Republic is not an independent state recognized by the United Nations and correspondingly cannot be a Contracting Party to the Genocide Convention.[18] However, such an allegation of genocide is serious one and should not be made lightly. If allegations satisfy the requirements of the genocide definition in Article II of the Convention, that means that theoretically any Contracting Party to the Convention could bring legal proceeding against the Russian Federation. Furthermore, possible crimes of genocide in Chechnya could indicate the existence of a threat to world peace and security under Chapter VII of the United Nations Charter and accordingly could justify international intervention in Chechnya under the auspices of the United Nations. Recent developments in Rwanda, Bosnia and Kosovo support this.

Indeed, although the Genocide Convention is principally about the punishment of the crime, the treaty also imposes an obligation of "prevention" upon States.[19] Therefore it is important to clarify the issue of whether or not genocide has been committed against the Chechen people during the two armed conflicts.

DOES THE CHECHEN PEOPLE CONSTITUTES A GROUP PROTECTED BY THE CONVENTION?

Polish law professor Raphael Lemkin contemplated genocide as "directed against the … group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the … group".[20]

The chapeau of article II of the Convention states that the intent to destroy must be directed against one of four enumerated groups: national, racial, ethnical or religious. The list is exhaustive and does not refer to any other kind of groups such as "political", "linguistic" or "economic". For Schabas, the meaning of "racial group" encompasses national, religious and ethnic groups as well as those defined by inherited physical characteristics.[21] Such a broad definition implies that when considering whether the Chechen people constitute a racial group, the question must be envisaged in conjunction with the issue of whether they are a distinct national, religious and ethnic group.

[17] *See* Geneva Convention, art. IX, *supra* note 1.
[18] Only States can be Parties to the United Nations Conventions.
[19] Schabas, *Were the Atrocities in Cambodia and Kosovo Genocide?* Paper presented at the conference "International Jurisdiction: Myths, Realities and Prospects", New England School of Law, November 3, 2000, p.16.
[20] Raphael Lemkin, *Axis Rule in Occupied Europe* (Washington, 1944). p. 79.
[21] Schabas, *Genocide in International Law*, p. 123.

According to the ICTR, the term "national group" refers to "a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties".[22] Based upon this definition Chechen people can be referred to as a Russian national group because they possess Russian citizenship. However, killing of members of the perpetrator's own group or auto-genocide is unlikely to constitute genocide under the Convention's provisions. Firstly, that is because the purpose of the Convention was to protect national minorities from hatred crimes. Secondly, it is hard to imagine that perpetrators would kill members of their group having the intention to destroy their own group's existence.[23]

In the *Kayishema and Ruzindana* case, the International Criminal Tribunal for Rwanda ("ICTR") asserted that a "religious group includes denomination or mode of worship or a group sharing common beliefs".[24] Thus identifying Chechen people as a "religious group" involves identifying their religion. Officially Russian state religion is Russian Orthodox Christianity. Chechens, on the other hand, belong to Islam and practice Sunni Islam.[25] However, these characteristics do not render the Chechens to be "religious group" pursuant to Article II of Convention. The protected group must distinguish themselves from the rest of the population of the Russian Federation. In other words, Chechens would not be a "religious group" for the purposes of genocide if among the Russian population there are people who practice the same religion as Chechens but clearly were not targeted during the armed conflict. Ingush people who inhabit Ingushetia on the border of Chechnya belong to the Chechens' religious group by virtue of their practice of Sunni Islam.[26] However, in contrast to the Chechens, Ingush always have been loyal to the Russian authorities and have not been prosecuted either during Stalin's repressions in 1944[27] or during armed conflict in Chechnya. Hence, it can not be said that Chechens are the object of genocide for religious motives because of their practice of Sunni Islam.

Still "ethnic group" criterion may be relevant. The ICTR wrote: "An ethnic group is one whose members share a common language and culture; or a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others).[28] The Chechens are believed to have inhabited the North Caucasus for thousands of years.[29] Unlike the Russian people, Chechens are not Slavs. They distinguished themselves from Russian people and call themselves *vainakh*, translated "our people".[30] They speak

[22] *Prosecutor v. Akayesu* (Case № ICTR-96-4-T), Judgement, 2 September, 1998, para.511.
[23] An example of killing members of the group, to which perpetrators themselves belong, can be seen in the atrocities committed by the Khmer Rouge in Cambodia. According to Schabas, mass killing along the line of the crimes committed by the Khmer Rouge might be qualified as crimes against humanity but not genocide. Schabas, *Genocide in International Law*, p. 118-120.
[24] *Prosecutor v. Kayishema and Ruzindana* (Case № ICTR-95-1-T), Judgement, 21 May 1999, para. 98.
[25] See Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 Va. J. Int. 115, 120-124 (1999-2000).
[26] *Id.*
[27] For the discussion of the Stalin's repressions, *see supra* notes 40-44 and accompanying text.
[28] Prosecutor v. Kayishema and Ruzindana, para. 98.
[29] Anna Zelkina, *Islam and Society in Chechnya*, 7(2) Journal of Islamic Studies 240 (1996)
[30] Thomas D. Grant, *A Panel of Expert for Chechnya: Purposes and Prospects in Light of International Law*, p. 120-124.

a distinctive Caucasian language which is different from both the Slavic and the Turkish languages prevalent in the area. The Chechen tongue is part of the Ibero-Caucasian group.[31] Further, the Chechen culture and traditions are different from those of the Russians.[32] In addition, as was mentioned above they practice Sunni Islam.

Chechens are closely related to the Ingush but still belong to a different ethnic group. Despite being descended from the eastern branch of the *vainakh* people, the Chechens throughout history have distinguished themselves as *noxchi* and the Ingush as *galgai*.[33] Furthermore, Russians through early encounters with them observed differences in the two dialects of the *vainakh* and referred to them by different names.[34] The aforementioned indicates that the Chechen ethnic group has an objective existence.

In the opinion of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") "[i]t is more appropriate to evaluate the status of a national, ethnical or racial group from the point of view of those persons who wish to single that group out from the rest of the community."[35] In the eyes of the Russians, Chechens often are referred to pejoratively as "blacks" and are assumed by virtue of their ethnicity to be criminals, terrorists or bandits.[36] Therefore, one can argue that the subjective approach, favored by the ICTY, is met as well.

Hence, it can be said that Chechens accord to objective and subjective criteria, to constitute a distinct ethnic group in Russian society and can be contemplated as a protected group pursuant to Article II of the Convention.

Actus reus of genocide

Article 2 of the Convention comprises five exhaustive acts constituting the crime of genocide:

(a) Killing members of the group;
(b) Causing seriously bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent birth within the group;
(e) Forcibly transferring children of the group to another group.[37]

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[31] *Id.*
[32] Traditional social organization among Chechens is patriarchal, clan-based, as distinct from hierarchical, due to the absence of feudalism in Chechen history, and has the practice of blood feuding. *See, generally* Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, p. 120-124. V.B. Vinogradov & N.P. Gritsenko, *Chechen-Ingush Autonomous Soviet Socialist Republic*, 29 Great Soviet Encyclopedia (Macmillian, Inc. trans., 1982), p. 79.
[33] Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, p. 120-124.
[34] *Id.*
[35] *Prosecutor v. Jelisic* (Case № IT-95-10-T), Judgment, 14 December 1999, para 70.
[36] *See supra* note 5.
[37] Genocide Convention, art. 2

The Russian Criminal Code adds to the above list the forcibly resettling of the protected group.[38] This mainly reflects the stigmatization by Russian authorities of the historical events that occurred in the Soviet Union during Stalin's regime when people were forcibly deported from their homes to Central Asia and Siberia. Chechens were one of the groups who did not escape Stalin's great terror which virtually eliminated the educated leadership of Chechnya.[39] After Stalin ordered the deportation of Chechens en masse to Central Asia in 1944, as many as three out of every ten Chechens died during the transport, resettlement and first years of exile.[40] Not until 1957 were Chechens allowed returning home.[41] Such actions were subsequently condemned by the international community and the Russian State. These acts undisputedly constitute the crime of genocide, given the fact of mass extermination of the entire Chechen population and Stalin's intention to destroy Chechens as a whole.[42]

From the standpoint of the present armed conflict in Chechnya at least two acts constituting material elements of genocide may be imputed to Russian military forces – those listed in paragraphs (a) and (b) of Article II of Convention. Associating the acts of murder and causing seriously mental or bodily harm is not problematic, since according to different media and non-governmental reports numerous killings were committed by Russian forces against both Chechen insurgents and the civilian population.[43] Indiscriminate bombing and shelling during the first armed conflict and at the beginning of the second armed conflict resulted in thousands of civilian deaths.[44]

Also serious bodily and mental harm to members of the Chechen ethnic group was caused by arbitrary detention, ill-treatment and torture.[45] Such violent acts, and case law of international

[38] Russian Criminal Code, art. 347.
[39] John B. Dunlop, *Russia Confronts Chechnya: Roots of Separatism Conflict*, p. 39-56. The period of forced collectivization had a great impact on the Chechen population. The all-union census figures for 1937 and 1939 illustrate that in 1937 the figure for Chechens living in the Soviet Union was 435,992. Just two years later that figure had diminished to 400,344. *Id*, p. 56. The more terrible events happened during the second World War when Chechens organized an insurgence in an attempt to support the Nazis. *Id*, p. 58. As punishement Stalin decided to deport the Chechens en mass to Central Asia. *Id*, p. 61-72. He justified his action by claiming that all Chechens (not just the participants in the insurrection) were traitors and had supported the Nazis – an obviously false claim, particularly given that thousands of Chechens actively had enlisted in the Red Army. *Id*, p. 58-59.
[40] "*Genocide Watch: Chechnya*", Committee on Conscience, US Holocaust Memories Museum, *available at* www.ushmm.org/conscience/chechnya.
[41] *Id.*
[42] The European Parliament on 26 February 2004 adopted a declaration which officially recognized Stalin's deportation of the Chechen people on 23 February 1944 as an act of genocide. *Rebel President Urges Europe to Recognize Chechen War as Genocide, available at* Lexis, BBC Monitoring International Reports, 18 March 2004.
[43] Human Right Watch asserts three massacres have occurred in Chechnya that took the lives of at least 130 people. Human Right Watch, *"Glad to be Deceived": the International Community and Chechnya*" (World Report 2004), available at http://www.hrw.org
[44] *Id.*
[45] *Id.*

tribunals confirm it, may fall within the ambit of paragraph (b) of Article II, namely causing seriously bodily or mental harm to members of the Chechen group.[46]

Paragraphs (a) and (b) of Article II of the Convention specify that the victim must be a member of the protected group that is the target of the genocide in question. If the abovementioned acts were committed against individuals who were not members of Chechen ethnic community (e.g. Russian or Ingush ethnic group) the perpetrators would not be held responsible for genocide but for ordinary crimes under domestic law.

MENS REA OF GENOCIDE

Article 30 of the Rome Statute declares that the mens rea or mental element of genocide has two components: knowledge and intent.[47] According to the Statute "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.[48] Thus, the accused must have knowledge of the circumstances of the crime and for genocide to take place there must be a plan.[49] In Kayishema and Ruzindana, the ICTR assured that "although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out genocide without a plan or organization".[50] The requirement implies that at least a general plan to destroy the Chechen population exists and this plan must be known to the competent Russian authorities including top military personnel who were responsible for the operation in Chechnya. However, to the knowledge of the author of this Essay, there is no evidence that a plan to commit genocide in Chechnya has ever existed. Furthermore, the Russian policy in Chechnya during the first and second armed conflict was built on a plan to preserve Russia from disintegration and impose order and discipline in the region. In the absence of plan to commit genocide in Chechnya, in practice it would be impossible to prove knowledge/ awareness of the circumstances.

The second element of mens rea of genocide is intent. The Statute of the International Criminal Court states that a person has intent where, in relation to conduct, that person means to engage in the conduct; in relation to the consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.[51] But the words "with intent" that appear in the chapeau of Article II of the Genocide Convention do more than simply reiterate that genocide is a

[46] See, e.g. *Prosecutor v. Akayesu* (Case № ICTR-96-4-T), Judgment, 2 September 1998, para. 503 (the ICTR ruled the term "serious bodily or mental harm to mean act of torture, be they bodily or mental, inhumane or degrading treatment, persecution").
[47] "Rome Statute of the International Criminal Court", UN Doc. A/CONF.183/9, art. 30
[48] *Id*, art. 30 (3).
[49] William A. Schabas, *Genocide in International Law, Cambridge*, Cambridge University Press, 2000, p. 207. The requirement of a plan is supported by case law. In ruling on the sufficiency of evidence in the case law of *Karadzic and Mladic*, who were charged with genocide, the ICTY spoke of a "project" or "plan". *Prosecutor v. Karadzic and Mladic* (Case № IT-95-R61, IT-95-18-R61), Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, para.94.
[50] *Prosecutor v. Kayishema and Ruzindana* (Case № ICTR-95-1-T), Judgement, 21 May 1999, para. 94.
[51] "Rome Statute of the International Criminal Court", UN Doc. A/CONF.183/9, art. 30 (2).

crime of intent.[52] Article II of the Genocide Convention introduces a precise description of the intent, namely "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[53] The reference to "intent" in the text indicates that the prosecution in the alleged case of genocide in Chechnya must go beyond establishing that Russian authorities meant to engage in the unlawful act, and meant to cause victims' death or mental (or bodily) harm. The offender must also be proven to have a "specific intent" or *dolus specialis*[54] which means the specific intent to destroy, in whole or in part, the Chechen ethnic group by the acts specified in Article II of the Convention. Although some aspects of Russian actions seems to fall within the parameters of the genocide definition (e.g. material element of the crime), there was no indication that Russian decision-makers of the "counter-terrorism operation" in Chechnya possessed the requisite specific intent. Russian authorities deliberately targeted and exterminated Chechen fighters but not the civilian population. According to Margelov, the Russian spokesman on the conflict in Chechnya, "[w]hat Russia does in Chechnya is not fight against Chechens as a nation; it is to fight against terrorism".[55] Civilians were indiscriminately killed because they were suspected of being Chechen fighters or because they were in areas thought to be supporting guerrilla forces. Media and NGO reports confused the false proposition that the Russian armed forces killed Chechen civilians because they were Chechens with the true proposition that Chechen civilians were killed because they were in the way of the Russian armed forces or simply ignored the warnings about the evacuation from zones of combat.[56] Undoubtedly indiscriminate killings of civilians are illegal but it is the mental element that distinguishes genocide from homicide. The systematic and intentional murder of ethnic minorities, absent the intent to exterminate such group, remains punishable as mass murder under domestic law and as a crime against humanity and war crime under international law.

To some extent the fact that Russian authorities investigated and opened cases against those members of Russian armed forces who committed war crimes and crimes against humanity, indicates the lack of the intention to destroy the Chechen ethnic group.[57] The government blamed many of the crimes on soldiers' drunkenness, denying that their activities received any official authorization. In the view of the author of this Essay the killings of civilians occurred mainly due to the irresponsibility of the Russian military command, lack of elementary military preparation and insufficient training for troops. Even Russian president Putin admitted that many of the losses could have been avoided in Chechnya with better discipline, professionalism and responsibility.[58]

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[52] . Schabas, *Genocide in International Law, Cambridge*, p. 214.
[53] *Id.*
[54] *Id.*
[55] BBC News, *Chechnya: Is Russia in the Wrong?*, at http://www.genocideprevention.org/
[56] Such as in December 1999, before bombing Grozny, Russian aircrafts dropped leaflets over the city, warning civilians the Russian military would consider those remaining past December 11, "terrorists and bandits [who] will be destroyed by artillery and aviation" and suggesting their leave via "safe corridors". Abraham, Shara, *"Chechnya: Between War and Peace"* (2001) 8 Human Right Brief 9, p. 10.
[57] Lieutenant General Yury Jakovlev, first deputy prosecutor for the Ministry of Defense, claimed in October 2001 that his office had reviewed 1,700 criminal cases since the start of the second armed conflict. Evangelista, p.150.
[58] Crimes of War Project, *Chechnya: the World Looks Away*, p.7, available at http:// www.crimesofwar.org/archive/archive-russia.html

The mental state of mind of the Russian armed forces can be described as recklessness (or *dolus eventualis*) which is definitely excluded from the crime of genocide.[59] Recklessness is a state of mind where the person foresees that his action is likely to produce its prohibited consequences, and nevertheless takes the risk of so acting.[60] The scale of killings among Chechen civilians might indicate that the Russian authorities were aware of and consciously disregarded a substantial risk that result, namely the destruction of the Chechen ethnic group, would occur. In the view of the Essay, Russian military forces envisaged this result as possible or likely and took the risk of doing so; however they did not desire the result. The intent pursued by the Russian actors was the complete destruction of the Chechen rebel forces (not civilians) and they knew that they would achieve it by their actions. Hence, it can be proved that Russian forces intended to exterminate Chechen fighters;[61] however, there is absolutely no proof that killings of civilians was a "specific intent" to annihilate the whole Chechen population. So, can one argue that genocidal intention towards only Chechen fighters and their leaders is sufficient to produce the crime of genocide within the meaning of the Genocide Convention? In other words is it conceivable that an intention to destroy the group "selectively" by directly targeting exclusively Chechen insurgents is a crime of genocide?

The sentence of Article II of Convention says that an act of genocide must be committed with the intent to destroy a protected group in "whole or in part". The preparatory work of the Convention provides little guidance as to what the drafters meant by "in part". The French delegation argued that crime of genocide occurred as soon as an individual became the victim of acts of genocide.[62] New Zealand suggested that "in whole or in part" might imply genocide had been committed even where there was no intention of destroying a whole group.[63] The United States delegation, on the other hand, worried about "broadening" the concept of genocide to cases where "a single individual was attacked as a member of a group".[64] When it eventually ratified the Convention, in 1988, the United States attached a declaration affirming that the meaning of Article II is "in whole or in substantial part".[65]

The position of the United States was reproduced recently in the case law of the ICTY and ICTR. In *Kayishema and Ruzindana* the ICTR said "that "in part" requires the intention to destroy a considerable number of individuals".[66] Two cases from the ICTY have required that the alleged

[59] See, e.g. Schabas, *Genocide in International Law*, p. 212. Antonio Cassesse, International Criminal Law (Oxford: Oxford University Press, 2003), p. 103.
[60] Antonio Cassesse, International Criminal Law, p.168.
[61] In an interview on the Russian television network RTR, Putin claimed that "[T]his people [Chechen fighters] must be destroyed. There simply is no other response." Robyn Dixon, *Caucasus: as Tensions Mount, Putin Says '96 Peace Deal With Republic was a Mistake and Fighters Must be Crushed*, Los Angeles Times, 20 Sept. 1999, at A1. *available in* Lexis, Major World Newspapers.
[62] UN Doc. A/C.6/224. France's proposal "had the advantage of avoiding a technical difficulty … namely that of deciding the minimum number of persons constituting a group". UN Doc. A/C.3/SR.73 (Chaumont, France).
[63] UN Doc. A/C.6/SR.73 (Reid, New Zealand).
[64] UN Doc. A/C.6/SR.73 (Gross, United States).
[65] *See generally* Lawrence J. LeBlanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 78 Am. J. Int'l L. 369 (1984) (describing the complicated history of ratification in the United States).
[66] *See Prosecutor v. Kayishema and Ruzindana*, *supra* note 51, paras.81-2.

acts for which a defendant stands trial affect a "reasonably substantial number of the group relative to its total population" prior to making any inference of the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such."[67] It further divided "in whole or in part" into two possible forms. "In part" first refers to "desiring the extermination of a very large number of the members of the group" and/or secondly to "the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group."[68] The first form (quantitative dimension) would constitute an intention to destroy a group en masse.[69] That is exactly what happened in 1944 when Stalin deported entire Chechen people to Central Asia. However in the present case, as has been mentioned above, Russian authorities intended to destroy only Chechen fighters and their leaders. This select group constitutes a tiny proportion of the whole Chechen ethnic population and sources suggest they composed approximately 10,000-20,000 members. According to the 1989 census the total population of the Checheno-Ingush Autonomous Soviet Socialist Republic was made up of 1,275,500 people.[70] Out of the total population of 1,275,500, 734,500 were Chechens. There is no exact data about the ethnic composition of the population of Chechnya proper as of 1989. Cherkasov estimates this as 715,000.[71] A number of approximately 10,000-20,000 Chechen fighters out of total population 715,000 in the Chechen Republic would represent between 1,39% and 2,79% of the Chechens in the region. Can one argue that between 1,39% and 2,79 % potential victims may refer to substantial number of the Chechen group relative to its total population? As one can see the number of potential victims of genocide is negligible and it is very unlikely that such portion of the people can be regarded as substantial part of the whole ethnic group. In much the same way in the *Sikirica case* the ICTY considered that the number of victims "[b]etween 2% and 2,8% of the Muslims … would hardly qualify as a "reasonably substantial" part of the Bosnian Muslim group…".[72]

The second form of "in part" (qualitative dimension) requires a "significant section of a group such as its leadership" to be destroyed to constitute genocide.[73] Thus, it is important to determine whether discriminatory extermination of Chechen fighters would have an impact on the survival of the Chechen ethnic group as such. Obviously such people must be distinguished people of their nation (political, administrative, intellectual or religious leaders) whose killings would inevitably result in the physical disappearance of the Chechen ethnic population in Chechnya. The Chechen separatists represent the most radical group of the total ethnic group. Can one say that people who practice acts of terrorism[74], hostage taking (including foreign nationals)[75], kidnappings, drug

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[67] *Prosecutor v. Sikirica* (Case № IT-95-8-PT), Judgment, 3 September 2001, paras. 67-75 (analyzing genocidal intent of the defendant under ICTY Statute). *See* also *Prosecutor v. Jelisic*, *supra* note 36, paras. 66-77.
[68] *Prosecutor v. Jelisic*, *supra* note 36, paras. 81-82.
[69] *Id.*
[70] Alexander Cherkasov, "Book of Numbers – Book of Lost" in *Chechnya 2003: Political Process Through the Looking Glass* (Moscow Helsinki Group, 2004), p. 155-156.
[71] *Id.*
[72] *Prosecutor v. Sikirica*, para. 72.
[73] *Prosecutor v. Karadzic and Mladic* (Case № IT-95-18-R61, IT-95-5-R61), Transcript of hearing of 27 June 1996, p.15.
[74] Thus, the explosions of apartment houses in autumn 1999 in Buinaksk, Moscow and Volgodonsk resulted in mass human casualties of over 1500 people. Ushakov, Yury V., "*Humanitarian and Legal Aspects of the Crisis in Chechnya*" (1999-2000) 23 Fordham International Law Journal 1155, 1161.

trafficking and other criminal acts strictly prohibited under domestic and international laws are leaders of the Chechen nation? The level of violence committed by the Russian military forces is undeniable but the Chechen separatists were not better in their tactics. If nations associate themselves with criminal elements who are eliminating another nation it is hard to perceived that such a nation would have the right of self-existence in the eyes of the international community. The recent presidential elections in Chechnya proved somewhat different. In the course of election in Chechnya in 2003, the victorious candidate who won with 82,5% of the votes, opposed the Islamic extremism and terrorism and was unofficially supported by Russian authorities.[76] Doubts about the legitimacy of these elections were raised in media reports.[77] The most international organizations, e.g. OSCE, did not participate in observations and declined to send election observers. Despite this fact, the election results were not openly declared as unfair and invalid by international community. On the assumption that elections were legitimate and democratic, since it is not officially submitted otherwise, one can argue that the result of the elections proved that the Chechen people, tired by the conflict, at least distanced themselves from Chechen separatists. Many Chechens who formerly supported the Maskhadov regime have been alienated by the growing foreign Islamist influence in the insurgents' camps. They have voted for new political leaders. These elections, at some level, prove that the Chechen people do not regard the Chechen fighters as the leaders of the nation. Thus, the Chechen fighters cannot constitute the "significant section of a group" and their extermination by the Russian forces does not impact upon the mental element of the crime of genocide.

Another obstacle to holding Russian authorities culpable for the crime of genocide is a motive. There is no explicit reference to motive in Article II of the Genocide Convention, however, the words "as such" are meant to express the concept.[78] During the drafting of the Convention, the Soviet Union delegation stated that "a crime against a human group became a crime of genocide when that group was destroyed for national, racial or religious motives".[79] In the *Jelesic case*, the ICTY addressed this issue when it refered to "[a]cts committed against victims because of their membership in a national, ethnical, racial or religious group".[80] In other words, the crime must be motivated by hatred of the group.[81] The Russian government repeatedly insists it is conducting an anti-terrorist operation in Chechnya and preserving territorial integrity in the State. Even assuming that the intention of the Russian authorities is to destroy the Chechen ethnic group, it is more likely that such crimes are motivated by political ambitions (electorate support, etc.), economic (Chechnya is too rich in oil to abandon, etc.) and strategic interests (control over Caucasus region) in the region. Indeed, after the humiliating defeat in the first armed conflict, the second conflict in

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[75] According to the Ministry of the Interior, by the end of 1999 the number of hostages had totalled 506 persons,including 53 women, 8 children, and foreign nationals from six countries. Between 1991 and 1999, 46,000 were abducted and enslaved. Ushakov, Yury V., *"Humanitarian and Legal Aspects of the Crisis in Chechnya"* (1999-2000) 23 Fordham International Law Journal 1155, 1158.

[76] *See generally*, Moscow Helsinki Group, *"Chechnya 2003: Political Process through the Looking Glass"*,(Moscow, 2004)

[77] *Vote for the Devil*, The Economist, 11 October 2003, p. 53.

[78] Schabas, *Genocide in International Law*, p. 245.

[79] UN Doc. A/C.6/SR.75 (Morozov, Soviet Union).

[80] *Prosecutor v. Jelisic*, *supra* note 36, para. 66.

[81] Schabas, *Genocide in International Law*, p. 255.

Chechnya was accompanied by strong public support among the Russian population. The Russian territory was invaded by the Chechen separatists. This invasion was accompanied by acts of terrorism against Russian citizens. Public opinion held the government had a legal and moral right to crush the enemy. Obviously, those Chechen separatists, linked with international terrorist organizations, presented a real threat to Russian statehood and the security of Russian citizens. Therefore the motive for the crimes that Russia are committing in Chechnya every day is not reasoned by hatred to the Chechen people but grounded upon political and economic expediency to end the conflict. When people are targeted because of the political or economic interests of those who govern the State, it is not genocide. In particularly, Persecution on political grounds, on condition that other criterions are met, is a crime against humanity.

KOSOVO AND CHECHNYA: ARE THERE ANY DIFFERENCES?

In the view of the author of this Essay there is no clear parallel between genocide in Kosovo and the situation in Chechnya. Firstly, in Kosovo, Serbian leader Slobodan Milosevic basically ran the whole population out of the country based on their ethnic origin. In Chechnya**,** Russian military forces deliberately executed Chechen separatists and those associated with them. The war on terror and State sovereignty rather than ethnic origin is the motive of the crime in Chechnya. While there are no doubts that Muslims in Kosovo fought against the Serbians and that ethnicity largely divided the parties, it is more likely that the motive for action was the extermination by one of the other. Instead, it is entirely conceivable that the conflict, as in Chechnya, was a result of a nationalist agenda and an effort by the dominant Government to maintain control of a crumbling nation against increasing state defections.[82] Also, using the tactics, such as terrorism and hostage takings, the Chechen fighters provoked the Russian authorities into revenge against the Chechen population. Bill Clinton, when he made the distinction between the situation in Chechnya and Kosovo, underlined that rebellion forces "bear their share of responsibility. . . . I think some of them actually wanted the Chechen civilians attacked."[83] Secondly, the Russians have not gone from village to village rounding up civilians and forcing them to leave. They have instead bombed and shelled villages and cities from afar. One can argue that the effect has been much the same. However, similar tactics were used by NATO forces during the bombing campaign of the Former Yugoslavia. The result is well-known – the International Court of Justice declined to condemn such actions as genocide. Thirdly, unlike in Kosovo, there have been no reports of Russians massacring Chechen prisoners or civilians. At best, the data collected by the credible organizations may indicate torture and rape of Chechen prisoners.

[82] Geoff Larson, *The Right of International Intervention in Civil Conflict: Evolving International Law on State Sovereignty in Observance of Human Rights and Application to the Crisis in Chechnya*, 11 Transnat'l L. & Contemp. Probs. 252, 274 (2001).
[83] Clinton interview with CNN.com, *cited at* The Washington Post, 20 Feb., 2000, at B07.

CRIMES AGAINST HUMANITY AND WAR CRIMES?

Even if genocide has not been committed by the Russian authorities, crimes against humanity and war crimes may have been. Murder, torture, rape, enforced disappearance, lacking specific genocidal intent, when committed as a part of widespread and systematic attack on the civilian population, are listed as crimes against humanity in the Rome Statute of the International Criminal Court. The Russian Federation has signed the Statute but not ratified it. So, the International Criminal Court can not exercise jurisdiction over any crimes committed in Chechnya. Meanwhile, Russia is a party to the Geneva Conventions of 1949 and Additional Protocols to them. As a non-international armed conflict, the violence in Chechnya falls under Common Article 3 of the Geneva Conventions, which forbids the killing, ill-treatment and torture of those not taking part in hostilities. In addition, armed conflict in Chechnya is quite possibly covered by Additional Protocol II to the Geneva Conventions of 1977.[84] This forbids violence against those not taking part in hostilities, collective punishments, outrages against personal dignity and pillage.

CONCLUSION

As has been shown above there are no legal grounds to claim that the crimes committed by Russian forces amount to genocide. It is important to underline that by this statement the author of the Essay does not justify or try to excuse the atrocities committed by the Russian troops in Chechnya. Those specific acts, while horrible, do not rise to the threshold of genocide enshrined in the Article II of the Genocide Convention. Obviously, NGO and media reports are tempted to call Russian actions in Chechnya genocide because they are outraged by the level of violence against civilians, the number of dead and the methods employed by the military forces (e.g. aerial bombardment, etc.). However, in the case under discussion – Chechnya – the debate is about the use of the term genocide, and not about whether or not terrible atrocities have taken place. As any crime, the crime of genocide has a material and mental element. Meanwhile, the accusations of genocide in Chechnya are reasoned mainly by the material element – killings, torture, disappearance, etc. This Essay argues that atrocities in Chechnya lack a sufficient proof of intent to destroy the Chechen ethnic group in whole or in part to be labelled as a crime of genocide. In addition, this Essay claims the existence of legal grounds to claim that the systematic and widespread character of the crimes committed in Chechnya may be qualify as crimes against humanity or at least war crimes.

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[84] For discussion of the law that applies to the Chechen conflict, *see* Crimes of War Project: Expert Analysis, *Chechnya and the Laws of War*, *available at* http://www.crimesofwar.org/expert/chechnya.html

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WHAT LAW APPLIES TO THE CONFLICT IN CHECHNYA

THE LEGAL GAP OF CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW OF NON-INTERNATIONAL ARMED CONFLICTS

by

Yury Scherbich*

Introduction

What law applies to the situation in Chechnya? The determination of this question revolves around the issue whether or not armed conflict exists in Chechnya. On the one hand, if the situation in Chechnya has not reached the threshold of armed conflict, then it can be described as purely within the ambit of human rights law and thus domestic law enforcement measures come into play. On the other hand, if the threshold of armed conflict has been crossed that then international humanitarian law would govern the situation in Chechnya. In the last latter case the problem lies in the traditional dichotomy between international and internal armed conflicts and divergent extent of rules applicable to each situation. Although internal armed conflicts present the same horrors as international ones, they are governed by only a few, largely ineffective provisions in the Geneva Conventions of 1949 and their Additional Protocol II of 1977.[1]

These provisions offer little protection to combatants and civilians in internal strife, resulting in an unfortunate disparity between the protections afforded during international and internal conflicts. The States' concerns about sovereignty, and a lack of overall political will to create a satisfactory international law of internal conflicts, has blocked any substantial progress in addressing the horrors of such armed conflicts. Rather than accept the argument that civil conflicts are subject only to Article 3 common to four Geneva Conventions ("Common Article 3") and Protocol II, this thesis

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[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Person in Time of War, August 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] [collectively referred to hereinafter as "Geneva Conventions"]; Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, *reprinted in* 16 I.L.M. 1442 (1977) [hereinafter Protocol II]; Protocol Additional to the Geneva Convention of August 12 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Dec. 12, 1977, U.N. Doc. A/32/144, Annexes I, II, 1977, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

proposes, relying on new trends in international humanitarian law, that it is imperative for humanitarian law to be expanded to address such conflicts.

In chapter I of this thesis I will provide the general framework of international humanitarian law applicable to international and non-international armed conflicts within context of the Geneva Conventions and will assess material scope of law in Common Article 3 and Protocol II. Then I will then address the weakness of humanitarian law in non-international armed conflicts and illustrate the legal gap in its provisions compared to international armed conflicts. I will discuss the main flaws of the law of internal armed conflict – an absence of legal definition in the text of Common Article 3 of what constitutes an "armed conflict" and the restrictive criteria in Protocol II defining an "armed conflict" that insurgent groups cannot objectively fulfil in most cases. Guided by jurisprudence of the International Criminal Tribunal for Former Yugoslavia ("ICTY"), particularly in *Tadic* case,[2] and by the Statute of International Criminal Court ("ICC Statute"),[3] I will address the question of defining what an "armed conflict" is. Then I will discuss the restrictive character of the human rights regime applicable during internal armed conflicts and will conclude that its standards are insufficient to provide enough legal protection to the conflict's actors and civilian population.

In chapter II I will describe background of the conflict in Chechnya, its main actors and current human rights situation in the region. I will assess whether conflict in Chechnya constitutes struggle of national liberation within the meaning of Protocol I or a non-international armed conflict within the meaning of Protocol II or Common Article 3. I will conclude that due to restrictive qualifications in the aforementioned instruments, the situation in Chechnya can only be governed by Common Article 3. I will explore how Chechnya has fallen into legal gap of the law of internal armed conflict, with several vital areas of international humanitarian law, such as the protection of civilians, combatant status, methods and means of warfare, the respect for the International Committee of the Red Cross ("ICRC") and some others, finding no place in internal armed conflict in Chechnya. In doing so, I will argue that such state of affairs is unsatisfactory and inadmissible since the legal protection provide in such situations is usually only that which is circumscribed by Common Article 3. Finally, following recent developments in international humanitarian law, I will suggest some recommendations that can narrow legal gap in the regulation of internal conflicts and what possibly can be done in the future to enhance the legal protection of those who get stuck in these conflicts.

[2] *Prosecutor v. Tadic*, No. IT-94-1-AR72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Int'l Crim. Trib. for Former Yugoslavia Appeals Chamber Oct. 2, 1995), reprinted in 35 I.L.M. 32 (1996) [hereinafter *Tadic* Case].

[3] See Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 52d Sess., Annex II, U.N. Doc. A/CONF.183/9 (1998), reprinted in The Statute of the International Criminal Court: A Documentary History (M. Cherif Bassiouni ed., 1998) [hereinafter ICC Statute].

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1.1 APPLICATION OF INTERNATIONAL LAW TO ARMED CONFLICTS

Traditionally, international humanitarian law has sought to regulate the conduct of hostility and damage caused between rather than within States. The distinction was based on the premise that internal armed violence raises questions of sovereign governance, and domestic law regulation. On that basis, the 1899 and 1907 Hague Conventions respecting the Law and Customs of War on Land applied solely to international armed conflicts. An armed challenge to the established authority within a State was characterised by reference to three different stages, depending upon the scale and intensity of conflict: rebellion, insurgency and belligerency. The prevailing view was that humanitarian law was applicable to internal situations only upon the recognition of belligerency by the parent government or by some third State.[4] The absence of the recognition of belligerency in an internal conflict meant that international humanitarian law was not applicable and that the State could deal with rebellion at its discretion. This regulatory gap persisted until the end of World War II despite the considerable efforts of the ICRC and the Institute of International Law to draft and promote rules applicable in all armed conflicts.[5]

The atrocities perpetrated by the Nazi regime before and during World War II clearly demonstrated that internal matters presented grave threats to humanitarian principles.[6] The Spanish Civil conflict, which broke out in 1936, also made clear that the "recognition of belligerency" doctrine inadequately regulated internal armed conflicts[7] and that continuation of this policy would have held many dangers for the protection of those embroiled in internal hostilities. Against the backdrop of these events and the general humanitarian trajectory of international humanitarian law,[8] broad support for some sort of international regulation of internal armed conflicts crystallized prior to the Diplomatic Conference in Geneva in 1949.[9] In 1948 the ICRC presented a report recommending that the Geneva Conventions apply the full extent of international humanitarian law "[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts or wars of religion, which may occur in the territory of one or more of the High Contracting Party".[10] However, due to the fear of States that insurgent groups could claim international recognition and invoke equal status in relations with the States, this recommendation was declined. Thus, when the final draft was adopted at the Diplomatic Conference in 1949, it continued to very heavily favor regulation of inter-State rather than domestic warfare.

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[4] This amounted to a declaration by the recognizing party that the conflict has attained such a sustained level that both sides were entitled to be treated in the same way as belligerents in an international armed conflict. Lindsay Moir, *The Law of Internal Armed Conflicts* 4 (2002).

[5] *Id*, at 19-22; *See also* Georges Abi-Saab, *Non-International Armed Conflicts, in International Dimensions of Humanitarian Law* 218-222 (1988).

[6] *See*, e.g., Ratner & Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 5-14 (2d ed. 2001) (describing the importance of these events for the development of international humanitarian law).

[7] Vernon A. O'Rourke, *Recognition of Belligerency and the Spanish War*, 31 Am. J. Int'l L. 398 (1937).

[8] *See*, Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239 (2000).

[9] *See, e.g.*, Abi-Saab *supra* note 5, at 219 (stating that prior to the drafting of the Geneva Conventions, "it was strongly felt that a minimum of humanitarian legal regulations should apply in all armed conflicts, regardless of their internal or international character").

[10] J. Pictet, *Commentaries on the Geneva Conventions of 12 August 1949* 31 (1960).

The vast majority of the substantive provisions contained in the Geneva Conventions applying solely to international armed conflicts, which are defined under Article 2, common to all four Geneva Conventions ("Common Article 2") as "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties".[11] Because this definition is confined to conflict between High Contracting Parties, a conflict within the territory of one High Contracting Party, namely non-international armed conflict, is excluded by definition from the reach of most of the Geneva Conventions.

Only Common Article 3 applies in the case of an "armed conflict not of international character". This article extends the most basic principles of humanitarian protection to those persons taking no active part in hostilities and placed hors de combat.[12] Common Article 3 prohibits: (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.[13] Common Article 3(2) also requires treatment for the wounded and sick.[14]

The Additional Protocols of 1977 to the Geneva Conventions continued the distinction between international and non-international armed conflicts. Protocol I, dealing with national liberations movements, sought to reaffirm and develop rules affecting the victims of international armed conflicts, specifically indicating in Article 1 that "[t]his Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions".[15] Although the extensive provisions of Protocol I apply exclusively to the victims of international conflicts, Protocol II does attempt to address the inadequacies of Common Article 3 by enhancing the protection available for victims in internal armed conflicts.

The fundamental guarantees for civilians provided by Protocol II both reaffirm the rules set forth in Common Article 3 and expand their protection to include the prohibition of collective punishment, acts of terrorism, slavery, pillage, rape, and "threats to commit any of the foregoing acts."[16] Protocol II further advances the protection of civilians by prohibiting any "order that there shall be no survivors,"[17] and by proscribing the starvation and forced movement of civilians.[18] The Protocol elaborates upon the general obligation imposed by Common Article 3 to treat persons "humanely,"[19] and provides safeguards for "persons whose liberty has been restricted," such as mandatory medical examinations, decent working conditions, and the freedom to practice religion.[20]

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[11] Geneva Conventions *supra* note 1, art. 2. "High Contracting Parties" refers to the signatory States of the Geneva Conventions.
[12] Geneva Conventions *supra* note 1, art. 3.
[13] *Id.*
[14] *Id.*
[15] Protocol I *supra* note 1, art. 1.
[16] Protocol II *supra* note 1, art. 4(2)(h).
[17] *Id*, art. 4(1).
[18] *Id*, art. 14.
[19] Geneva Conventions *supra* note 1, art. 3(1).
[20] Protocol II *supra* note 1, art. 5.

Protocol II also expands the protection and care for the wounded, sick, and shipwrecked,[21] and provides for the protection of medical and religious personnel,[22] and, for the first time, children.[23]

Hence, as a result of two Additional Protocols, international humanitarian law now recognizes and regulates four distinct categories of armed conflict: inter-State armed conflict under Common Article 2; internal "struggle of national liberation" as defined in Protocol I; internal armed conflict as defined in Protocol II; and "armed conflicts not of an international character" under Common Article 3.

1.2 WEAKNESS OF HUMANITARIAN LAW IN INTERNAL ARMED CONFLICTS

With internal armed conflicts dominating the world stage,[24] reliance on the Geneva Conventions, developed for international armed conflicts, is extremely misplaced. Because only a minority of the protections provided in the Geneva Conventions and Protocols apply to civil conflicts,[25] civilians and combatants are not afforded the same protections as those involved in international armed conflicts. In addition, the law of The Hague, addressing methods and means of combatants of armed groups in the fields, is not applicable in internal armed conflicts.[26]

A literal interpretation of the Geneva Conventions and Protocols would suggest that a range of very significant disparities between the two regimes exists.

Firstly, Common Article 3 and Protocol II do little to protect civilians against the effects of hostilities. For example innocent civilians may be detained arbitrarily without the right to receive visitors from the ICRC and there are no safeguards that can prevent the arbitrary detention of civilians. The ICRC, therefore, does not have any absolute right to intervene in order to provide humanitarian aid to detainees; instead, relief actions, such as the monitoring of detention centers, are only possible with the consent of the parties.[27] By contrast, if this same scenario occurred during an international conflict, the detaining forces would be in violation of several provisions of the Geneva Conventions.[28]

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[21] *Id*, art. 7-8.
[22] *Id*, arts. 9-11.
[23] *Id*, art. 4(3).
[24] *See*, Ernie Regehr, *Warfare's New Face: Civil War Has Become the Norm in Warfare*, World Press Rev., Apr. 1994, at 14 ("Since 1980, the only truly interstate wars have been Britain's war with Argentina over the Falklands; Iraq's wars with Iran and Kuwait, both ostensibly over border disputes; and China's border skirmish with Vietnam.").
[25] The Geneva Conventions and the Protocols contain close to 600 Articles, of which only Common Article 3 and 28 Articles of Protocol II apply to internal conflicts. *See*, Sonja Boelaret-Suominen, *Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts?* 5 J. Conf. and Sec. L. 63 (2000).
[26] *Id*.
[27] Protocol II, *supra* note 1, art. 18 ("If the civilian population is suffering undue hardship ... relief actions for the civilian population ... shall be undertaken subject to the consent of the High Contracting Party concerned.").
[28] During an international armed conflict, "the internment or placing in residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary." *See* Geneva Convention IV, *supra* note 4, art. 42 In addition, "the representatives of religious organizations, relief societies, or any other organizations assisting

Secondly, Common Article 3 fails to define rules of distinction between military and civilian targets and makes no mention of the principle of proportionality in target selection.[29] Although Protocol II does address the protection of civilian population and objects indispensable to the survival of the civilian population, its coverage does not compare to the prohibitions on indiscriminate attack, on methods and means of warfare causing unnecessary suffering and on damage to the natural environment, that are applicable under Protocol I.[30]

Thirdly, there is no requirement in either Common Article 3 or Protocol II that affords combatants prisoners-of-war status in internal armed conflicts, nor is the anything preventing parties from prosecuting enemy combatants in those circumstances for having taking up arms. The Third Geneva Convention and Protocol I, with detailed provisions for the protection of prisoners-of-war in international conflicts, define them as combatants "who fall into the power of an adverse Party"[31] and include members of "all organized armed forces, groups and units" even if those forces represent a government or an authority not recognized by the adverse Party.[32] Prisoners-of-war may only be sentenced by military authorities and courts for acts that would be punishable if committed by a member of the armed forces of the Detaining Power.[33] The most salient feature of the system of prisoners-of-war protection is the prohibition of punishment solely on the grounds that a person has taken part in the hostilities, provided that the person in question has behaved in accordance with the laws of warfare. For example, under the Geneva Conventions, a State would not be able to prosecute a prisoners-of-war for treason because only war crimes, as opposed to warlike acts, are punishable with criminal sanctions. If the status of any combatants is in doubt, they "shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."[34]

Proposals that prisoners-of-war status be granted to combatants in internal conflict did not survive the drafting of either Common Article 3 or Protocol II.[35] As a result, States are not required to extend combatants' privileges to dissident armed forces in internal conflicts. Most significantly, rebels do not acquire prisoners-of-war status upon capture or defeat, and therefore may be tried under domestic treason law. Governments, particularly those that may be affected by an emerging dissident or separatist movement, are unwilling to concur in any rule of international law that, in effect, would repeal their treason laws and confer on their domestic enemies a license to kill, maim,

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the protected persons, shall receive from these Powers, for themselves or their duly accredited agents, all facilities for visiting the protected persons." *Id.* art. 142

[29] James G. Stewart, *Towards a Single Definition of Armed Conflict in International Law: A Critique of Internationalized Armed Conflict*, 85 IRRC 313, 320 (2003).

[30] *Id.*

[31] Protocol I, *supra* note 1, art. 44(1),

[32] *Id*, art. 43(1),

[33] Geneva Convention III, *supra* note 1, art. 8, 6

[34] *Id*, art. 5, 6.

[35] Asbiorn Eide, *The New Humanitarian Law in Non-International Armed Conflict*, in The New Humanitarian Law of Armed Conflict 277, 288 (Antonio Cassese ed., 1979) (noting that rejection of proposals occurred in part because "many governments ... considered it abhorrent to provide immunity to persons who had taken up arms against the government side").

or kidnap security personnel and destroy security installations, subject only to honorable detention as prisoners of war until the conclusion of the internal armed conflict.[36]

Although governments have argued that combatants' privileges would encourage rebellion by reducing the personal risk to the rebels and grant them a license to attack the governments security personnel and property,[37] the current system, under which insurgents are afforded none of the protections of international humanitarian law, is even more troubling. "Without the combatants' privilege and prisoner-of-war status, there is very little incentive for insurgents to comply with ... [the Geneva Conventions and Protocols] other than the realization that atrocities are politically and militarily counterproductive."[38] By refusing to accord the protections of the Geneva Conventions to insurgents, governments may well be ensuring that rebels will use brutal tactics against government troops and pro-government civilians. After all, if the usual protections against prosecution for treason do not apply to the rebels, then the usual criminal responsibility for violation of the Conventions is also inapplicable. Rebels therefore must win at all costs in order to avoid prosecution by their government for treason; without the Geneva Conventions either to protect them or restrain them, there is no reason for insurgents to comply with any of the Conventions' humanitarian provisions.

Fourthly, the acts prohibited by by the law governing non-international conflicts, compared with its international counterpart, are not designated as grave breaches giving rise to criminal sanctions. The ICC Statute reinforced this cumbersome international/ non-international legal differentiation. The ICC Statute limits the grave breaches regime to international conflicts. The serious violations of provisions of Common Article 3 that are applicable in “armed conflict not of an international character”, on the other hand, are both different and less comprehensive than their international counterparts.[39]

Lastly, and more importantly, the application of Common Article 3 and Protocol II is complicated due to ambiguity of the material scope of application in these instruments, namely the “armed conflict” threshold. The characterization of the conflict, or the thresholds, determines which rules of international humanitarian law, if any, will be applicable. While criteria for identifying international “armed conflict” is not usually a problem simply because “any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 [of the Geneva Conventions], even if one of the Parties denies the existence of a state of war”,[40] the determination of threshold of internal “armed conflict” is more problematic.

The situation is markedly different in internal armed conflict because State’s position in internal affairs is not analogous to its international relations. It is clearly unusually for a State to employ force in its relations with other States. In contrast, force is frequently used within the State’s own

[36] Waldemar A. Solf, *The Status of Combatants in Non-international Armed Conflicts Under Domestic Law and Transnational Practice*, 33 Am. U. L. Rev. 53, 59 (1983).
[37] See Waldemar A. Solf, *Problems with the Application of Norms Governing Interstate Armed Conflict to Non-international Armed Conflict*, 13 Ga. J. Int'l & Comp. L. 291, 292 (1983)
[38] *Id.*
[39] Stewart *supra* note 29, at 321.
[40] Jean C. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Volume 1, 32 (Geneva, 1952).

territory and against its own citizens, ranging from everyday police law enforcement actions against common criminals to large-scale operations aimed at quelling riots or other civil disturbances.

1.3 INTERNAL ARMED CONFLICT DEFINITION

The text of Common Article 3 states that it is applicable "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties".[41] The text, however, do not provide a definition of "armed conflict". There is, as yet, no universally accepted definition of the term, and Common Article 3 helps only in so far as it defines those conflicts to which it applies in negative way, stating what they must not be (i.e. "international in character") without offering further guidance as to their precise definition.[42] The vital question is, therefore, what is exactly is meant by "armed conflict not of an international character"?[43]

Protocol II arguably clarified the meaning of internal "armed conflict" by providing a more developed definition of the concept in the treaty's text. On its terms, Protocol II is applicable to armed conflicts between forces of a High Contracting Party and other armed forces that are "under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."[44] The scope of Protocol II is further clarified in Article 1(2), which provides: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[45]

A careful analysis of the criteria established in Article 1 Protocol II indicates that it has a very high threshold of application and that the instrument is inapplicable to most internal armed conflicts. Analysis of the conflict in Chechnya will reaffirm this below. As one commentator suggests, "it is perhaps cynical, but doubtless true, to comment that this narrow applicability of Protocol II explains why there are now 147 States party to it".[46] The ineffectiveness of Protocol II definition of armed conflict lies in the upper threshold of its applicability which is so high and qualified that it is objectively unlikely ever to be crossed by insurgent parties. As some delegates stated during the Diplomatic Conference 1974-1977, Protocol II "include[s] no safeguard clause providing for a mechanism or reasonable objective parameters for determining in each case whether the conditions for the application of the Protocol has been met".[47] Such rigorous conditions, as for example, the ability to implement the Protocol's provisions[48] and responsible command (i.e. ability of the

[41] Geneva Conventions *supra* note 1, art. 3.
[42] Moir *supra* note 4, at 32.
[43] Geneva Conventions *supra* note 1, art. 2. *See also* Derek Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. 1 (2003) (arguing that hostilities between States are governed by the Geneva Conventions irrespective of intensity, duration or scale of conflict).
[44] Protocol II *supra* note 1, art. 1(1).
[45] Protocol II *supra* note 1, art. 1(2).
[46] George H. Aldrich, *The Laws of War on Land*, 94 Am. J. Int'l L.42, 60 (2000).
[47] From the explanation of vote by Argentina, CDDH/SR.49 Annex.
[48] It is unclear whether ability to implement Protocol II implies total obedience by its provisions and any single act of murder of civilian by rebels will automatically render Protocol II inapplicable. Protocol II also fails to clarify whether

insurgent's leader to impose internal discipline among subordinates) can lead to a government's easy contest of its application. In doing so, it leaves the State authorities a wide margin of discretion in assessing situations such as riots or internal disturbance. In effect, therefore, Protocol II is so narrowly construed that it eliminates its usefulness.

It must be submitted that two important recent legal developments have arguably clarified the definition of "non-international armed conflict": the judgment of the ICTY in *Tadic* case and the ICC Statute.

1.3.1 ICTY Appeals Chamber Judgment in Tadic case

In *Tadic* case, the Appeals Chamber defined the contours of the "armed conflict" requirement within the meaning of the Geneva Conventions. Specifically, the Appeals Chamber held that:
"Armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups … within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."[49]

Three aspects of this definition could be understood to represent important contributions to the definition of "armed conflict." First, the definition might be read to imply that an "armed conflict" exists if the insurgent group is an organized armed group. One might assume, taking into consideration the humanitarian purpose of Common Article 3, that a minimum level of organization is required to meet the threshold, excluding random groups of looters, rioters and mere banditry. Second, the definition might be read to classify internal hostilities as an "armed conflict" only if the armed violence is "protracted." Requirement that violence must be protracted hints that it must have reached a certain level of intensity, although expressed in terms of duration rather than the scale of violence.[50] Third, regarding the territorial field of application, the Appeals Chamber underlined that humanitarian law applies only in the territory under control of insurgent party. Literal interpretation of Appeals Chamber decision implies in my view that in those parts of the territory that is under exclusive control of the government authority, humanitarian law is inapplicable. Such interpretation is based on the words that "international humanitarian law continues to apply … in the case of internal conflicts, [in] the whole *territory under the control of a party*"[51] (emphasis added). The word "party" supposedly refers to insurgent group but not to State. The test employed by Appeals Chamber is ambiguous and obscure. Territorial control in fact is a very subjective condition, providing government with considerable room to maneuver. States may contest the claim by

dissident armed forces must apply the Protocol or if their mere capacity to apply it is sufficient to trigger Protocol II's protections.
[49] *Tadic* case *supra* note 2, para. 70.
[50] Moir, *supra* note 4, at 43.
[51] *Tadic* case *supra* note 2, para. 70.

insurgents that a territory has come under their control. The absence of a fact finding body competent to ascertain the facts of the situation, may encourage the game of claim and counter claim of controlling territory, only for the sole political motivation – do not recognize the existence of armed conflict within State. Internal armed conflict situations are characterized by high mobility and territorial control changing hands, sometime alternatively between day and night to the point becoming meaningless. Is it necessary that insurgents have gained a certain degree of stability in controlling the area? If territorial control had once been fulfilled and international humanitarian law was supposedly applied, would it later cease to apply if the insurgents lost control of the territory? The Appeals Chamber judgment does not provide the answer on these questions. It is also unclear whether territorial control is analogous to that required by international law for the application of the laws of occupation, i.e. should there be some kind of administration set up in occupied territory?

The internal armed conflicts, as a rule, involve military and organizational superiority on the side of government troops. It is also true that insurgent party are frequently reluctant to engage in direct military hostility and traditional methods of warfare, prefering to employ guerilla tactics,[52] and as a matter of tactical advantage do not seek to attach themselves to any specific area. It is unlikely that territorial control requirement implies permanent physical or military presence of insurgent party or their *de jure* administration of the territory. Therefore, territorial control is *de facto* effective control.

In my view if insurgents can influence a territory's population, and have support among them with the latter demonstrating some level of loyalty to insurgent party, one can argue the insurgents' effective control. Limitation of government authorities' access to the territory under the question and their loss of ground control can also demonstrate that the insurgents exercise control over the area. In the case of Northern Ireland the question was raised of whether or not effective control was exercised by Irish Republican Army in limiting the capacity of the State, by forcing its agents to limit their mode of operation in the area.[53] It was questionable in certain areas, where normal community policing was suspended, alternative mechanisms of social control such as paramilitary punishment shootings replaced law enforcement, and the social order was partially controlled by paramilitary organizations. The British army felt it unsafe for its personnel to travel overland through parts of the country even in armoured vehicles. And the view has been advanced that the building of numerous watchtowers on the hilltops of the region bordering the Irish Republic throughout the 1980s, to which soldiers were ferried into and out by military helicopters, was a response to the fear that a claim might be made for loss the ground control.[54]

[52] Abi-Saab describes the aspect of guerilla warfare as follows:"[g]uerilla tactics being based on invisibility and mobility, the freedom fighters have to hide among the masses and depend on their passive support by not being denounced by them, and on the active support of the most politically conscious and active segment of the population in the form of food, shelter and information as well as new recruits". Statute of International Criminal Court ("ICC Statute"). Abi-Saab, *Wars of National Liberation and the Laws of War*, 3 Annales d'Etudes Internationales 93, 114 (1972).
[53] Fionnula Ni Aolain, *The Politics of Force. Conflict Management and State Violence in Northern Ireland* 238 (2000).
[54] *Id*, 237-238.

All three requirements – organization of insurgents, protracted armed violence and effective control test - would impose restrictions on the conditions under which Common Article 3 applies, although not so onerous as under Protocol II.

First, the Appeals Chamber's definition neither requires that armed groups exercise control over the whole territory within the State nor that territorial control enable them to carry out sustained and concerted military operations and implement humanitarian law.

Second, the "protracted" armed violence requirement, properly understood, does not restrict the application of humanitarian law in any appreciable way. The nature of the finding contemplated by the ICTY Appeals Chamber suggests that most instances of internal strife would satisfy this requirement. Whether internal armed violence is "protracted" or not is assessed by reference to the entire period from the initiation to the cessation of hostilities. Few, if any, putative internal armed conflicts would fail to satisfy this requirement. Moreover, jurisprudence of the International Criminal Tribunal for Rwanda ("ICTR") suggests that armed violence extending over only a few months satisfies the "protracted" requirement and given the intensity of the violence, it constitutes an "armed conflict" within the meaning of Common Article 3.[55]

Third, the Appeals Chamber definition does not include "ability to implement relevant humanitarian provisions" and "responsible command" upon insurgent party. Indeed, whether armed conflict exists should not depend on whether the insurgent party is able to implement humanitarian law, that in itself depends on the content of the latter. As one commentator argues:

The actual provisions of the [humanitarian law] thus have a major effect on the threshold of its application, confusing the issue of [armed conflict's] threshold with the [humanitarian law] content. [The condition] therefore seems to shift the onus unnecessarily onto the dissidents, instead of both sides being obliged to afford maximum protection to non-combatants at all times.[56]

1.3.2 ICC Statute

The ICC Statute also provides a more elaborate definition of internal "armed conflict" than Common Article 3. The ICC Statute identifies several acts as war crimes when committed in internal armed conflict. Specifically, the Statute criminalizes "serious violations of Common Article 3" committed in "armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[57] The Statute also criminalizes a much broader range of conduct characterized as "other serious violations of the laws and customs applicable in armed conflicts not

[55] See, e.g., *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, paras. 619-27 (Judgment) (Int'l Crim. Trib. for Rwanda Trial Chamber II Sept. 2, 1998), available at http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgment/akay001.htm.
[56] Moir *supra* note 4, at 108.
[57] ICC Statute, *supra* note 36, art. 8(2)(d).

of an international character, within the established framework of international law."[58] The criminal prohibitions identified in this provision apply in:
"Armed conflicts not of an international character and […] [They apply] to armed conflicts that take place in the territory of a State when there is protracted armed violence between governmental authorities and organized armed groups or between such groups."[59]

The ICC Statute's approach in identifying internal "armed conflict" is important. It adopts ICTY Appeals Chamber "protracted armed violence" and "organized armed groups" formulation but does not require insurgents to exercise effective control into the State's territory. It also defines lower threshold of internal "armed conflict", codifying the Protocol II view that internal "armed conflicts" do not include "situations of internal disturbances and tensions, such as riots, [and] isolated and sporadic acts of violence."[60]

CONCLUSION

Guided by the ICTY jurisprudence in *Tadic* case and ICC Statute one may formulate a definition of non-international armed conflict. Such definition must contain upper and lower thresholds. At the lower spectrum of this definition are cases of internal disturbances and tensions, such as riots, mere acts of banditry and other isolated and sporadic acts of violence. As these are precluded from the regulation of international humanitarian law, they are the concern of domestic law enforcement measures. At the upper threshold there are cases of protracted armed violence, involving organized non-governmental armed groups who exercise some level of effective control over territory. These cases, having attributes of internal "armed conflict", must be governed by humanitarian law standards. The presence of such circumstances as insurgent's responsible command, the death toll, the level of violence and human rights abuses can be supplementary indicators of the existence of armed conflict in the territory of State.

1.4 Human rights law restrictions

As has been mentioned above, contemporary humanitarian law is inadequately governing situations of internal armed conflict in comparison to international armed conflict. If this is so, would it be a better to apply a human rights regime in situations where internal armed conflict exist? Of course, there is considerable legal authority establishing that the promotion and protection of fundamental human rights are always and everywhere matters of international concern. However, reliance on the protection of human rights law during armed conflicts is illusory and deceptive for the following reasons.

First, in the Advisory Opinion of the International Court of Justice ("ICJ") in the 1996 Nuclear Weapons Case[61] ("the Advisory Opinion"), while determining that human rights law continues to

[58] ICC Statute, *supra* note 36, art. 8(2)(e).
[59] ICC Statute, *supra* note 36, art. 8(2)(f).
[60] Protocol II *supra* note 1, art. 1(2).
[61] *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226.

apply during armed conflict**,** the ICJ gave formal primacy to international humanitarian law, acting as *lex specialis*. It means that human rights standards are applied during armed conflicts as far as they do not contradict to the Geneva Conventions and Protocols to them.

Second, international humanitarian law directly regulates the conduct of non-state actors.[62] While substantial evidence suggests that human rights law is evolving to cover private conduct in some circumstances, current human rights treaties directly regulate State action only.[63] As human rights obligations supposedly have no binding force for insurgents, this addresses the concern for the protection of government troops at the hands of insurgents.

Third, most human rights can be suspended through the mechanism of derogation, which permits States to avoid certain human rights obligations for reason such as national security or a declared state of emergency. Although no derogation is possible from, e.g. right to life and freedom from torture, neither International Covenant on Civil and Political Rights nor European Convention on Human Rights make the right to a fair trail, freedom of movement and protection from arbitrary detention non-derogable. This means that, if a situation of internal conflict justifies invoking the derogation clauses (i.e., a threat to the organized life of the community of which the State is composed), there is the possibility that States may legitimately restrict the exercise of human rights. Humanitarian law rules, on the other hand, cannot be derogated under any circumstances and it is impossible for States during armed conflicts to make a case for not upholding all of the protection of Geneva Conventions.

Fourth, human rights law neither contains provisions that describe methods and means of warfare causing unnecessary suffering nor mentions rules of distinction and principle of proportionality.

Finally, the extent to which the military are educated on the provisions of each regime are also differs. Troops are generally educated to some degree on the content of international humanitarian law, representing the rules of engagement by which the military operations are to be carried out. The level of education afforded on the protection of human rights is significantly lower, and the majority of the low rank armed forces probably know relatively little of human rights law except to the extent that it happens to coincide with international humanitarian law.

It follows that the normative framework and context of application of human rights standards cannot fully replace humanitarian provisions in the times of internal armed conflict in order to adequately regulate such situations. Clearly, both, human rights law and Common Article 3/Protocol II do not offer a rational answer as to how to prevent infringements on the basic dignity and integrity of all people in times of internal armed conflict. The shortcomings of the law of internal armed conflicts are more strikingly illustrated with crisis in Chechnya, where the Russian

[62] See e.g., *Abella v. Argentina* (Report No. 55/97, Case 11.137, Inter-American Commission on Human Rights Annual Report 1997 (were the Commission stated in paragraph 174 that "Unlike human rights law which generally restraints only the abusive practices of State agents, Common Article 3's mandatory provisions expressly bind and apply equally to both parties to internal conflicts, i.e., government and dissident forces").
[63] See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2(1), S. Exec. Doc. E, 95-2, at 1 (1978), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

forces and Chechen fighters have been committing abuses and crimes against each other and against the civilian population with impunity and no humanitarian law mechanism exists to restrict such behavior.

2.1 BACKGROUND OF THE CHECHEN CONFLICT

2.1.1 Russia and Chechnya: a history of conflict

The Chechen Republic is situated in Southern Russia and North-Eastern part of the Caucasus, with a mostly Muslim population of approximately 1.1 million.[64] It neighbors the Russian Republics of Ingushetia, North Ossetia, and Dagestan and shares its Southern border with Georgia.

The Chechens are a native nation of the Northern Caucasus and there is a long history of tension and outright hostility between the Russia and Chechnya, from invasion and conquest during the Tsarist era through mass deportations and repression under Stalin.[65] Russia annexed the territory of Chechnya in 1859 after almost thirty years of fierce fighting. During the Second World War, Stalin accused the Muslim populations of the Caucasus region of collaborating with the Nazis and deported over 380,000 Chechens in 1944 to Central Asia. Approximately 200,000 people perished during these years of exile, which lasted until 1957.[66]

The question of Chechnya's independence resurfaced in the context of the Soviet Union dissolution. In October 1991, Djokhar Dudaev, a former general in the Soviet Army, was elected president of Chechnya and unilaterally proclaimed Chechnya's independence in November 1991. During the following three years Moscow made some attempts to force Chechnya back into the Russian Federation but could not do anything due to the unwillingness of the Chechen government to make any compromise with the Russian authorities about independence. In 1994, the internal situation prevailing in Chechnya was close to an armed conflict between Dudaev's supporters and pro-Russian groups supported by both the Russian government and the Russian Secret Service.

2.1.2 The first conflict in Chechnya

In December 1994, after the failure of a Russian supported attempt by the pro-Russian opposition to overthrow the separatist regime, a regular Russian army entered Chechnya in an attempt to restore Russian sovereignty over the territory. The conflict that ensued was devastating for Chechnya and it lasted for almost two years due to the strong resistance by Chechen fighters. This conflict had almost unanimous support among Chechen population for the reason of aspiration of a majority of Chechens for complete independence from Russia and was absolutely unpopular among the Russian

[64] Estimated population is drawn on the basis of the census results of October 2002. *See*, Moscow Helsinki Group, *Chechnya 2003: Political Process Through the Looking Glass* 154 (2004)
[65] Mathew Evangelista, *The Chechen Conflicts: Will Russia Go the Way of the Soviet Union* 12 (2002).
[66] *Rebel Chechnya - A Thorn in Russia's Flesh*, Reuters World Service, Dec. 1, 1994, *available in* LEXIS, World Library, Curnws File.

people for the reason of casualty tolls.[67] From the beginning the conflict had quite clearly developed into open warfare. Estimates report that around 400,000 persons were displaced, while the conflict led to massive destructions of Chechens towns and villages. The destruction of the capital, Grozny, has since been widely compared to the battle of Stalingrad in the Second World War.[68] In figures released by the Russian's Human Right's Commissioner, Sergei Kovalev, the Chechens suffered 24,000 civilian casualties over the course of two months from 25 November 1994 to 25 January 1995.[69] The fighting between Russian and Chechen forces continued until August 1996. During the fighting between 30,000 and 90,000 civilians died.[70] It was during this period that human rights violations peaked.[71] Both sides fought without regard to the safety of civilians. Indiscriminate use of air and artillery bombardment left the capital, Grozny, in ruins. Eventually the Russian forces suffered a humiliating defeat and on 31 August, 1996, the Khasavyurt Peace Agreement brought an end to the hostilities. The agreement provided for the retreat of Russian troops from the Chechen territory and the final settlement of the status of Chechnya by 31 December, 2001. Between January 1997 (when the last Russian troops left Chechnya) and October 1999, Chechnya enjoyed self-rule and *de facto* independence. In January 1997 the Chechen Chief of Staff, Aslan Maskhadov, was elected as president of the Chechen Republic, in an election judged "free and fair by the [Organization for Security and Co-Operation in Europe] observers".[72]

A Peace Treaty was signed by Maskhadov and former Russian President Yeltsin in May of the same year. However, due to the devastation brought about by the armed conflict, external meddling by Islamic radicals, escalating crime and inter-Chechen rivalries, Chechnya degenerated into chaos and state of lawlessness. During this period, Chechnya experienced rising crime rates, corruption, kidnapping (some of the victims were Chechens themselves) and hostage-takings (including foreigners). Many of the leading Chechen field commanders refuse to support Maskhadov or recognize his authority despite the fact that he was elected by the majority of the population. The inability of Maskhadov to control the situation in Chechnya undermined his legitimacy as a sovereign. By 1998 was the growth of a movement by the groups of international Muslim radicals in alliance with a number of Chechen commanders led by Shamil Basayev, basically to carry the "holly war" against Russia beyond Chechnya's borders and to conduct a jihad for the liberation of the Muslim parts of the North Caucasus from Russian rule and creation of a Dagestani/Chechen Islamic Republic. Chechen "field commander" Basayev and his foreign brother-in-arms al-Khattab, in August 1999, lead an attack into neighbouring Dagestan in order to support radical Islamic groups there and with the declared purpose of establishing a Dagestani/Chechen Islamic Republic.

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[67] The Russian army lost between 4,000 and 10,000 soldiers. *See Chechnya: No Means to Live* 16 (Geneva, 2004).
[68] *See*, Glen Howard, *Chechnya: Quo Vadis?* Presentation at the Central Asia Caucasus Institute. Johns Hopkins University SAIS (1999).
[69] *Telephone Interview with Eric Engleman*, Moscow Correspondent, Monitor Radio (Feb. 22, 1995).
[70] Wendy Atrokhov, *The Khasavyurt Accords: Maintaining the Rule of Law and Legitimacy of Democracy in the Russian Federation Amidst the Chechen Crisis*, 32 Cornell Int'l L. J. 367,369 (1999).
[71] *See* Human Rights Watch. *Memorandum on Accountability for Humanitarian Law Violations in Chechnya* (20 October 2000), *at* www.hrw.org/campaigns/eu-summit/chech-memo-1020.htm (noting numerous human rights violations perpetrated by the Russian military against Chechen civilians).
[72] Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 Va. J. Int'l L. 117, 134 (1999-2000).

2.1.3 The second conflict in Chechnya

The second armed conflict broke out in September 1999 in the wake of August invasion by Shamil Basaev and al-Khattab's troops in Dagestan, along with a series of bombings, attributed to Chechen "terrorists" that took place in Moscow and other parts of Russia. The Russians alleged that the Chechen government had connections to the group that invaded Dagestan and stated that the invasion and the bombings were the work of "Chechen terrorists". As such, the second armed conflict was presented as an "anti-terrorist operation". Unlike the first armed conflict in Chechnya – which very nearly led to the former President Yeltsin's impeachment – this one was popular among Russians.[73] Support for the conflict effort stemmed first from its apparent defensive origins and second from the fact the Chechen invasion coincided with a series of terrorist bombings on Russian territory.[74]

The second conflict has been described as occurring in several phases. The first phase, beginning in September 1999, witnessed the massive mobilisation of at least 100,000 Russian troops and indiscriminate bombing of Chechnya with extreme casualties suffered by the civilian population.[75] During this phase the Russian forces relied on heavy armor, artillery and ground attack aircraft. By March 2000, the conflict had entered a second phase where the bombing campaigns decreased but the military attacks remained constant. The Russian forces were present in all parts of Chechen territory but had not succeeded in gaining effective control over the area. In the third and more recent phase, since 2002, when the Federal Security Service ("FSB", former KGB) took control from the military army over operations in Chechnya, the Russian government has been claiming that the situation in Chechnya is "normalised". In efforts to assert effective control over Chechnya and to demonstrate that the region has returned to normality, two votes have been organized over the past year in Chechnya. In March 2003, there was a constitutional referendum, which approved a constitutional establishing Chechnya as an autonomous Republic within the Russian Federation. The legitimacy of the referendum has been doubted by some experts and Organization for Security and Cooperation in Europe ("OSCE") declined to send election observers. A presidential election followed this referendum in October 2003, resulting in the election of Moscow's supported candidate Akhmad Kadyrov as president of Chechnya.[76]

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[73] Evangelista, *supra* note 65, at 64.
[74] *Id.*
[75] *See* Human Rights Watch, *Glad to be Deceived: the International Community and Chechnya* (World Report 2004), *at* http://www.hrw.org/wr2k4.htm. It must be acknowledged that the information about the death toll during the two armed conflicts is very vague and contradictory. Chechens Rebel sources have argued about 250,000 civilians of Chechnya died (25% of the population). *See e.g., Russian People Pay the Price of War They Permit, Rebel Chechen Site said, available at* Lexis, BBC Monitoring International Reports, 10 Feb. 2004. Moscow Helsinki Group claims approximately 70,000 civilians died. Moscow Helsinki Group, *Chechnya 2003: Political Process through the Looking Glass* 12 (2004).
[76] Similarly, doubts were expressed about this election as many of the serious opposition candidates were forced out of the race. The number of voters was determined on the basis of 2002 Census, the results of which had been overstated. With respect to the actual process there were no election monitors because OSCE and Council of Europe refused to send international observers and the UN Human Rights Committee noted that the elections did not meet relevant international standards. *See generally*, *Chechnya 2003: Political Process through the Looking Glass*, *supra* note 75.

However, despite declaration that the conflict is over and won by Moscow, reports indicate that the current situation in Chechnya is anything but normal, with continued "cleansing" operations, arbitrary arrest, torture and disappearances, on the side of the Russian forces, as well as guerrilla warfare including assassinations of civil servants cooperating with the pro-Moscow Chechen administration of Chechnya, ambushes and detonation of land mines against federal soldiers, on the side of the Chechen fighters.

2.1.4 The main actors of the conflict in Chechnya.

There are at least three main actors who operate in Chechnya at the present phase. First, FSB, which officially took over control from the military army as the organ heading up the operation in Chechnya. Second, Chechen civilian administration supported by Moscow and represented by recently assassinated Chechen President Kadyrov. This actor was accused with growing regularity of being responsible for human rights abuses and disappearances of dozens of Chechens, backed by attempts to build regime based more on fear and resignation than positive feelings.[77] Disproportionate brutal attacks targeting civilians, tortures, disappearances and other atrocities committed by abovementioned actors has actually been generating more and more hostility among ordinary Chechens and mean that they have created more and more enemies within Chechnya.

The third (non-State) actor, namely Chechen fighters, mainly consists of two factions: (1) moderate Chechen separatists, headed by Aslan Maskhadov; and (2) Islamic extremists, headed by Shamil Basaev and until recently by al-Khattab, who was killed by Russian forces. Having common purpose – to create independent Chechen Republic, these factions are distinguished by the means employed to achieve the goal. The former waging guerrilla warfare against Russian Federal forces and Moscow's influenced civil administration in Chechnya by the means that mostly are not prohibited by the international law during the armed conflict.[78] The later uses the tactics of terrorism, hostage-taking and killing of the civilian population, and targeting Muslim clerics belonging to the traditional religious establishment.[79] However, as a result of success of the Russian army intervention and the need for unified coordinated command against Russian troops, commentators suggest that modern Chechen separatists and Islamic extremists are intertwined and in alliance.[80]

2.2 CLASSIFICATION OF THE CONFLICT IN CHECHNYA UNDER INTERNATIONAL HUMANITARIAN LAW

Determining whether conflict in Chechnya can be classified at all under humanitarian law, two questions must be clarified. First, whether conflict in Chechnya is armed conflict. This question is difficult because it touches upon a complex political problem. The political problem arises around

[77] *Kadyrov's death poses questions for the Kremlin*, Financial Times, 10 May 2004, at 6.
[78] E.g., killing of the soldier of the opposite side is not unlawful under Geneva Conventions.
[79] CW Blandy, *Chechnya: Federal Retribution "Encirclement, Forceful Intervention and Isolation* 7 (March 2001).
[80] *Id.*

States resistance of any international regulation of internal strife. States are eager to classify such situations as mere banditry or terrorist activity and thus shielding it from scrutiny of international community. Chechnya is a clear example of Russian's reluctance to recognize the existence of armed conflict within the meaning of international law. The political atmosphere around Chechnya has changed dramatically after the 11 September, 2001 attacks in the United States. Russia, which had since 1999 called the conflict in Chechnya a "counter-terrorist operation", soon began to argue that the conflict in Chechnya was its contribution to the United States-led global campaign against terrorism. Furthermore, if in 2000 and 2001 the UN described violence in Chechnya in the terms of the "provisions of Common Article 3 and Protocol II",[81] that in succeeding years it failed to pass any resolution condemning international humanitarian law abuses in the rebellion region. For instance, on 20 April 2004 the UN in a report on children exploited by armies, guerillas and terrorists granted the Russia's demand to describe the situation in Chechnya as "not an armed conflict" within the meaning of international law.[82] Following the Russian demands for change, the UN also altered its reference in the report to "Chechen insurgency groups" to read "Chechen illegal armed groups".[83]

Second, if it is armed conflict that within which of four categories it falls: inter-State conflict; or struggle of national liberation; or internal armed conflict as defined by Protocol II; or armed conflict within the meaning of Common Article 3.

2.2.1 Existence of armed conflict in Chechnya.

Despite the political reluctance of the Russian State and the UN to recognize the situation in Chechnya as "armed conflict" I argue that if the formal threshold of "armed conflict" has been crossed, existence of "armed conflict" in Chechnya in legal sense is proved.

The ICTY Appeals Chamber in *Tadic* case has identified three elements - protracted character of armed violence, organization of the insurgent groups and insurgents effective control under territory, as the key criteria signaling the existence of armed conflict. There is no doubt that current state of affairs in Chechnya satisfies the criteria of the protracted violence and the minimum organization of insurgents.[84] There is no doubt that the resistance of Chechen fighters' is not the actions of isolated individuals but rather of collective character. Obviously the scale and intensity of the conflict in Chechnya is very high. The Russian Government failed to resolve the crisis rapidly and in order to suppress the rebellion has exercised large-scale military operations in Chechnya.

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[81] *See* The Situation in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/RES/2000/58, UN Doc. E/CN.4/RES/2001/24.

[82] The UN initially said that Chechnya is an area in Russia where "Chechen insurgency groups" recruit or use children in armed conflict. But Russia objected to this qualification, saying its forces merely respond in Chechnya to attack by "terrorists". *See e.g.*, Lawrence Uzzell, *Moscow Pressures UN over Chechen Conflict*, Chechnya Weekly, 17 Mar 2004.

[83] *Id.*

[84] *See* e.g., Nezavisimaya Gazeta, No 200 (2015), 23 Oct. 1999, at 2 (claiming that Chechen armed formations in the region consisted of 20,000 men, 15 tanks, 3 artillery SP equipments, 5 Grad systems, up to 40 missile complexes and around 500 antitank means).

The total Russian casualties from August 1999 to August 2002 were officially acknowledged to be 4302 killed and 12417 wounded; of those 2486 dead and 6192 wounded belonged to Ministry of Defense units.[85] The character of the violence is neither sporadic nor isolated but rather sustained, widespread and multitudinous, with both sides responsible for numerous human rights abuses. It also has lasted since 1994, except for the term of truce between 1996 and 1999.

A more problematic issue is to determine whether Chechen fighters possess territorial control. In my view there is no doubt that insurgents have exercised effective control during the first armed conflict and the first and second phases of the second armed conflict in Chechnya. Whether they exercise control over the areas during the current, third phase is questionable. One cannot seriously take into account presidential elections and referendum that occurred in the region in 2003 simply because the results could not be free and fair in the environment of the *de facto* existing state of emergency and the Russian military presence in the region.[86] The Chechen civil authority, the *de jure* administration in Chechnya, is dependent on Russian military presence in the region and does not possess credible legitimacy among population. An important factor in determining the effective control exercised by the Chechen fighters is the level of abuse committed by Russian troops against civilians. Virtually all observers agree "that the continuing abuse of civilians by the Russian military and security forces is the main source of support for the rebel movement – helping it to recruit more young men and women to fight for the cause to revenge dead relatives".[87] The more Russians forces oppress local population and make their lives unbearable, the more they turn the population against their presence and increase the legitimacy of Chechen fighters in the region. Chechen fighters are also capable to organizing permanent military counter-offensive in the region against Russian soldiers and strategic objects. They have also successfully executed assassinations of top officials. The latest example is of the bomb blast targeting the Chechen President Kadyrov in May 2004.[88]

It is hard to believe that without public support among Chechen population such actions of the Chechen fighters could have ever been happened. Another factor that may indicate Chechen fighters' territorial control is the suggestion that Russian forces have lost ground control in some of the areas. Credible information exists to suggest that Russian soldiers are transferred from Russian airbases to Chechen area by helicopters and fixed-wing aircrafts do not land on Chechen soil because of the direct threat posed by insurgents.[89] Within those areas, the Chechen fighters have virtually complete control and use this territory to launch attacks on Russian military objects and neighboring Russian territories. Hence, there is no doubt that Chechen fighters exercise *de facto* control over Chechnya, which at least tacitly allowed by Chechen civilian population.

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[85] Jane's Defense Weekly, 18 Sept. 2002.
[86] *See also supra* note 76 and accompanying text.
[87] Crimes of War Project, *Chechnya: The World Looks Away* 6 (2002), *available at* http://www.crimesofwar.org/chechnya.
[88] *See, President of Chechnya is Assassinated in Bomb Blast*, Financial *Times*, 10 May 2004, at 6.
[89] See Felgenhauer, *Combatants or Civilians?* Moscow Times, 7 Aug. 2003 (Felgenhauer gives an example when in 2002 the Chechen fighters shot down a large military Mi-26 transport helicopter as it approached the Chechen zone with the loss of some 130 lives and argues that since then only smaller Mi-8s helicopters that carry up to 10 passengers fly inside Chechnya).

The extradition case of the Chechen deputy Prime Minister Akhmed Zakaev illustrates the attitude of the British judge toward the existence of the armed conflict in Chechnya. The Russian Federation had sought before the Bow Street Magistrate's Court to extradite Zakaev on a series of charges including murder.[90] The crimes were allegedly committed in 1995-1996 during the first conflict in Chechnya. The British judge needed to examine whether the charges were extraditable offences under European Convention on Extradition and whether the conduct for which Mr. Zakaev was to be extradited amounted to crimes in the United Kingdom.[91] The defence argued that the charge of murder could not stand if an armed conflict took place in Chechnya. This is because the killing of combatants in times of armed conflict would not amount to the crime of murder and consequently cannot be prosecuted. Therefore, the Magistrate Court needed to examine whether an armed conflict occurred in Chechnya in 1995-1996. The Court pointed at the "scale of the fighting", "the recognition of the conflict in the terms of cease fire and peace treaty" and that "the alleged victims in those cases should have had the protection of Article 3 of the Geneva Convention in so far as they were civilians." The Chief Magistrate said, in particularly:

I am quite satisfied that the events in Chechnya in 1995 and 1996 amounted in law to an internal armed conflict. Indeed, many observers would have regarded it as a civil war. In support of that decision I have taken into account the scale of fighting - the intense carpet bombing of Grozny within excess of 100,000 casualties, the recognition of the conflict in the terms of a cease fire and a peace treaty. I was unable to accept the view expressed by one witness that the actions of the Russian Government in bombing Grozny were counter-terrorist operations.[92]

The Court concluded that "those crimes which allege conspiring to seize specific areas of Chechnya by the use of armed force or resistance are not extraditable crimes because the conduct in those circumstances would not amount to a crime in this country." Finally, the judge stated that he believed that Mr. Zakaev would be subjected to torture if return to Russia and declared that Mr. Zakaev should not be returned to face trial in the Russian Federation.

Acknowledgement of the existence of armed conflict in Chechnya is implicit in the opinion of the Russian Parliament legislators. In the law providing additional compensation for servicemen on mission to particularly dangerous and arduous areas, adopted prior the first Chechen conflict and then amended in 1997 to include those military who "carried out assignments under the conditions of a non-international *armed conflict* in the Chechen Republic".[93]

Another point which deserves to be highlighted is the decision of the Constitutional Court of the Russian Federation where the Court scrutinized the constitutionality of the former Russian President Yeltsin's Decrees and Resolution of the central government in the execution of the first Chechen

[90] The original decision of the Bow Magistrate Court *available* at http://eng.kavlaz.memo.ru/print/enganalytics/id/611249.html.
[91] Extradition is allowed only if the acts, stipulated in the request, are also categorised as criminal by the domestic law of the requested State. *Id.*
[92] *Id.*
[93] Federal Law of the Russian Federation № 146-FZ of 19 Nov. 1997, in *Sobraniye Zakonodatelstva Rossiyskoy Federatsii* № 47, Art. 5343, 24 Nov. 1997.

conflict.[94] The Court determined that at the international level the provisions of Protocol II were binding on both parties to the *armed conflict* and that the actions of the Russian armed forces in the conduct of the Chechen conflict violated Russia's international obligations under Protocol II.[95] The Court, however, did not specify why in its view the Chechen conflict came within the scope of Protocol II and did not dwell on this matter. Despite the Court's decision surrounding controversy of whether first Chechen conflict had fulfilled the conditions required by Article 1 Protocol II, the Court clearly spelled out that actions of the Russian government was not merely *"counter-terrorist" operation* but *armed conflict*.

It is therefore no doubt about existence of armed conflict in Chechnya. Whether Chechen fighters are terrorists or not is a political motivated subjective-value judgment, wholly immaterial to the determination of the existence of armed conflict within the meaning of international humanitarian law. What is needs to be done next is to examine under which category of armed conflict it can be attributed.

2.2.2 Is it inter-State conflict, struggle of national liberation, internal armed conflict as defined by Protocol II or armed conflict within the meaning of Common Article 3?

It must be clear from the beginning that conflict in Chechnya is not an international armed conflict. First, according to paragraph 1 Article 2 of the Geneva Convention, "[t]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two … High Contracting Parties".[96] In the case of Chechnya, only Russia qualifies as a High Contracting Party, having signed and ratified the Geneva Conventions as well as both Protocols.[97] Secondly, by ratifying the Geneva Conventions**,** a State agrees to apply the Conventions' standards in armed conflicts with a "Power" not a party to the Conventions if the latter accepts and applies the relevant provisions.[98] Despite Russia's ratification to the Geneva Conventions, its provisions are not applicable if the adversary party, namely Chechen fighters, do not constitute "Power" under international law. The *travaux preparatoires* of the Geneva Conventions and scholarly opinion both indicate that a "Power" refers only to States,[99] although it also could refer to a civil conflict if the

[94] Decision of the Constitutional Court of the Russian Federation on the constitutionality of Presidential Decree № 2137 of 30 November 1994 on measures for restoration of the Constitution and the rule of law on the territory of the Chechen Republic, of Presidential Decree № 2166 of 9 December 1994 on repression of the activities of illegal armed units within the territory of the Chechen Republic and in the zone of the Ossetino-Ingushetian conflict, of Resolution № 1360 of 9 December 1994 on ensuring the security and territorial integrity of the Russian Federation, the principle of legality, the rights and freedoms of citizens, and disarmament of illegal armed units within the territory of the Chechen Republic and contiguous regions of the Northern Caucasus, and of Presidential Decree № 1833 of 2 November 1993 on the basis provisions of the military doctrine of the Russian Federation, in *Sobranie Zakonodatelstva Rossiyskoy Federatsii*, 1995, № 33, Art. 3424.

[95] The Court however excuse the failure to respect the rules of Protocol II because unduly national implementation of its provisions. *Id*. The Court also declined to examine the concrete actions of the parties during first conflict from the point of view of respect of Protocol II due to the lack of competence. *Id.*

[96] Geneva Conventions *supra* note 1,art. 2(1).

[97] *See* 15 Hum. Rts. L.J. 56, 62-63 (1994) (listing Russian ratifications to Geneva Conventions and both Protocols).

[98] *See* Geneva Conventions**,** *supra* note 1, art. 2.

[99] Gerald I. A. Draper, *The Red Cross Conventions of 1949*, 16-17 (1958).

legitimate government recognizes a state of belligerency.[100] As Russia has never recognized a state of belligerency with Chechen fighters, the question of recognition of the Chechen insurgents as a "Power" revolves around determination of whether an entity like Chechnya is an independent State.

Despite the fact that Chechnya unilaterally declared independence from the Russian Federation in 1991, there are rationales that explain why Chechnya does not constitute State under international law.

Chechnya is a historical integral part of Russia since 1864 when it was incorporated into Russian empire. Russia acquired the territory of Chechnya as a result of conquest when the Chechen State had not existed.[101] It appears plausible that because of the length of time Russia had control over the area, the absence of protest by Chechen authorities[102] and third States[103] over this time regarding Russian rule, and taking into consideration that acquisition of the territory by the use of force was not illegal under the law of nineteenth century (compare to contemporary law forbidding the use of force in international relations), Russia gained legal title to the Chechen lands in the middle of the nineteenth century.[104] Recent developments in international law and State practice do not recognize a general right to unilateral secession.[105] Furthermore, it seems hard to maintain the presence of statehood in this case while the secession of Chechnya from the Russia has never been recognized by the international community.

No country officially recognized Chechnya as an independent State and in fact most States and key international organizations made it clear that they recognized that Chechnya belonged to the Russian federation and that they respected the territorial integrity of Russia. The UN Commission on Human Rights in calling for a cease-fire indicated that any resolution of the conflict would have to respect the territorial integrity and the Constitution of Russia.[106] From the beginning of the conflict, world leaders have maintained that "(Chechnya) is an internal Russian affair,"[107] and that

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[100] Some scholars also argue that where recognition of belligerency of the insurgents has been awarded by the legitimate Government, the conflict becomes subject to all four Geneva Conventions. Lassa F.I. Oppenheim, *International Law* (1952). Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements, 45* (1988).

[101] Thomas D. Grant, *Current Development: Afghanistan Recognizes Chechnya,* 15 Am. U. Int'l Rev. 869, 878-879 (2000) (noting that while it is unclear whether Muslim States expressly recognized Chechnya, it is clear that no western State recognized the nineteenth century Chechen claim to statehood).

[102] Protest might be identified in continuing armed resistance to Russian control since conquest, but historical records seems to show that the twenties century witnessed at least some periods of quite in the region. Grant *supra* note 72, at 161 ("If resistance did in fact at times wane, the element of persistence required for protest to defeat title would be lacking").

[103] Grant argues that review of the history during Tsarist and Soviet periods does not reveal any third State protest. Gtant *supra* note 72, at 163.

[104] *See* Grant *supra* note 72, at 153-175.

[105] *See generally* Reference re secession of Quebec, [1998] 2 S. C. R., 295 (Can.) (Examining the relationship between the two competing concepts, self-determination and territorial integrity, the Court came to a conclusion that the latter override the former).

[106] *See* The Situation in the Republic of Chechnya of the Russian Federation, *supra* note 86.

[107] Charles Hecker, *Europe Condemns Slaying of Civilians,* Moscow Times, Jan. 5, 1995, *available in* LEXIS, News Library, MOSTMS File (statement by French Foreign Minister Alain Juppe).

Russia has the right to defend its territorial integrity.[108] The Kasavyurt Agreement of 1996 and Peace Treaty of 1997 signed by Russian authorities with Chechen separatist leader, Maskhadov, postponed the question of the status of Chechnya until 31 December, 2001. These documents stipulated that Russia and Chechnya would regulate relations in accordance with international law. Lanskoy argues what Maskhadov probably was suggesting at the time of signing the Peace Treaty, for Chechnya to be a part of the Russian Federation and at the same time a subject of international law.[109] This status would be similar to that enjoyed by Ukraine and Belarus during the Soviet period – not an independent State, but sovereign republic within Soviet Union, recognized in the UN and having international representation.[110] Finally, the referendum on the status of the region that was held in 2003 reiterated the status of Chechnya as a federal part of a Russia.[111]

Even supposing that Chechnya somehow qualifies as a State under Common Article 2 of the Geneva Conventions, it still has to meet the second criteria: accept and apply the provisions of the Geneva Conventions. There are two conditions must be fulfilled under this criteria - (a) acceptance and (b) the *de-facto* application of the Geneva Conventions.[112] The ICRC argues that "acceptance" can be explicit declared by a non-contracting State as well as by tacit intention.[113] Maskhadov in his letter to the Sweden Federal Council on May 2001 stated that the Republic Chechen-Ichkeria is a party to the Articles and Protocols of the Geneva Convention and the Chechen armed forces would abide by the principles of humanitarian law.[114] However, in terms of whether Chechen fighters actually applied the Geneva Conventions, it is reported by Human Rights Watch and other competent sources that Chechen fighters not only targeted civilians with ambushes, bombs, land-mines and hostage-taking,[115] but also used captured soldiers as shields during the Russian attacks.[116] As a result, despite Chechen insurgents' *de jure* acceptance of the Geneva Conventions, there're is

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[108] *Remarks at White House Conference on Trade and Investment in Central and Western Europe in Cleveland*, Ohio, 31 Weekly Comp. Pres. Doc. 51, 54 (Jan. 13, 1995). Clinton compared the conflict in Chechnya with American civil conflict where "Abraham Lincoln gave his life for that no state had a right to withdraw from our union". *Quoted in* David Hoffman and John Harris, Clinton, *Yeltsin Gloss over Chechen War*, The Washington Post, Apr. 22, 1996, at A1.

[109] Miriam Lanskoy, *Chechnya's Internal Fragmentation, 1996 -1999*, 27 Fletcher F. World Aff. 185, 188 (2003).

[110] Ukraine and Belarus, though no independent States, had occupied UN seats in their own names since 1945 upon Soviet Union insistence and were original parties to the UN Charter. *Id.*

[111] *Vote for the Devil*, The Economist, 11 Oct., 2003, at 53 (96% voted *"pro"*, as well as 95% turnout). The referendum was very controversial and was strongly opposed by human rights groups and international organisations. Several international organisations, among them the OSCE, declined to send observers. *Chechnya 2003: Political Process Through the Looking Glass supra* note 75, at 14-20.

[112] *See ICRC Commentaries on the Geneva Conventions and Additional Protocols* (ICRC, Geneva), *available at* www.icrc.org [hereinafter ICRC Commentaries].

[113] *Id.*

[114] *See* Human Rights Watch, *"Welcome to Hell" Arbitrary Detention, Torture, and Extortion in Chechnya* (October, 2000).

[115] Le Monde, Oct. 17, 2002, at 23. Chechens rebels were widely believed to be responsible for a wave of assassinations of local civil servants and religious leaders who were reported targeted for their cooperation with the Russian government. *See*, Human Rights Watch, *World Report: Russia Federation*, February, 2002. In 2001, those murdered included at least 18 leaders of districts and town administrations, at least 5 religious leaders and numerous police officers, teachers, and lower ranking civil servants. *Id*.

[116] In treatment of captured soldiers, separatists did not actually conform to the rules for international conflicts relating to prisoners of war. *See Human Rights Body Rebukes Both Sides in Chechnya*, Reuters World Service, Jan. 19, 1995, *available in* LEXIS, World Library, Curnws File

sufficient proof that actual application of the standards enumerated in the four Geneva Conventions was ignored by them.

One could still consider the Chechen conflict as an international armed conflict under the provisions of Protocol I, if the fighting in Chechnya constitutes a struggle of national liberation. Article 1(4) Protocol I describes the conflict of national liberation as "[a]rmed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (the "Declaration on Friendly Relations") in accordance with the Charter of the United Nations."[117]

This definition requires 4 conditions to be met: 1) existence of armed conflict; 2) existence of a group of distinct people; 3) this people are fighting against decolonisation, foreign occupation and racist regimes; 4) people must possess a right of self-determination as enshrined in the Declaration on Friendly Relations and UN Charter.

The first condition, namely the existence of armed conflict in Chechnya has been examined and acknowledged in the previous Chapter.

It might be suggested that Chechens are a "group of people" under the second condition. Indeed, they have an ethnic, religious and linguistic identity distinct from the rest of Russia. Officially Russian State religion is Russian Orthodox Christianity. Chechens, on the other hand, belong to Islam and practice Sunni Islam.[118] Unlike the Russian people, Chechens are not Slavs. They distinguished themselves from Russian people and call themselves *vainakh*, translated "our people".[119] They speak a distinctive Caucasian language which is different from both the Slavic and the Turkish languages prevalent in the area. Further, the Chechen culture and traditions are different from those of the Russians.[120]

The third condition requires the fighting of people against specific dominance regimes. Article 1(4) covers all possible circumstances in which people are struggling for the exercise of their right to self-determination.[121] The list includes three cases: decolonisation, foreign occupation and racist regimes. The ICRC describes them as follows:
"[c]olonial domination" certainly covers the most frequently occurring case in recent years, where a people has had to take up arms to free themselves from the domination of other people; it is not necessary to explain this in greater detail here. The expression "alien occupation" in the sense of this paragraph -- as distinct from belligerent occupation in the traditional sense of all or part of the

[117] *See* Protocol 1, *supra* note 1, art. 1.
[118] See Grant *supra* note, at 120-124.
[119] *Id.*
[120] Traditional social organization among Chechens is patriarchal, clan-based, as distinct from hierarchical, due to the absence of feudalism in Chechen history, and has the practice of blood feuding. *See, generally* Grant *supra* note 72, at 120-124.
[121] However, Australian delegation at the Diplomatic Conference in the explaining their vote that their supported Article 1 Protocol I, declared that the enumeration of the three categories was not exhaustive. *See* CDDH/SR. 22, para. 14.

territory of one State being occupied by another State - covers cases of partial or total occupation of a territory which has not yet been fully formed as a State; finally, the expression "racist régimes" covers cases of régimes founded on racist criteria. The first two situations imply the existence of distinct peoples. The third implies, if not the existence of two completely distinct peoples, at least a rift within a people which ensures hegemony of one section in accordance with racist ideas."[122]

As one can see from the above clarification the case of "racist regimes" clearly does not fit the conflict in Chechnya. The drafters of Article 1(4) listing "racist regime" intended to cover the situations such as in South Africa where the black, indigenous people were oppressed by a white minority. Chechnya is absolutely different case. There cannot be racial oppression in the Chechen case simply because both peoples (Russian and Chechens) belong to the same race.

The threshold requirement for colonial status is that the territory in question (1) be geographically separate from the metropolis and (2) be inhabited by the "people".[123] The Chechens have a strong case for the latter requirement, but geography distinguishes Chechnya from every situation addressed under UN decolonization law. Therefore under UN practice and law to date, Chechnya is not territorial unit eligible for treatment under "colonial occupation" definition.

ICRC opinion regarding "alien occupation" is a quite vague. What ICRC meant referring to "cases of partial or total occupation of a territory which has not yet been fully formed as a State"[124] is unclear. Does it cover, for example, the cases when people are suffering from economic exploitation? Cassese argues that in practice, States have agreed to limit the concept of "alien occupation" to intervention by use of force and military occupation.[125] The support of this position can be found in *travaux preparatories*. In the course of the drafting of the Protocol I, the inclusion of the phrase "alien domination" in Article 1(4) was replaced, at the instigation of the Latin States, by the more restrictive "alien occupation".[126] Although, when some delegates during the Diplomatic Conference in 1974-1977 raised the question that the term of "alien occupation" is ambiguous and had not defined in international law, the Romanian delegation suggested that the word "foreign occupation" meant military occupation.[127] Furthermore, the careful reading of the ICRC Commentaries[128] suggests that ICRC implied the cases when the territory in question (non-State entity) was involved in the belligerency and was later occupied in the course of this belligerency. In other words, "alien occupation" duplicate the case enumerated in paragraph 2 Article 2 of the Geneva Conventions (occupied territories), expanding the scope of the application of the later to the situations when the occupied, subjugated territory is not High Contracting Party to the Geneva Conventions. It must not be forgotten the times when the Protocol I was drafted – during the

[122] ICRC Commentaries, *supra* note 112, at 54.
[123] *See e.g.*, Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 (e) of the Charter of the United Nations, G.A. Res. 1541, UN Doc. A/4684 (1960). Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ 16.
[124] ICRC Commentaries, *supra* note 112, at 54.
[125] Cassese, *Self-Determination of Peoples*, 92-94 (1995).
[126] See G. Abi_Saab, *Wars of National Liberations in the Geneva Conventions and Protocols*, 165 HR 395 (1979-IV).
[127] Levie I., Howard S., *Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva, 1974-1977*, vol.1, 16 (1979).
[128] ICRC Commentaries, *supra* note 112, at 54.

escalation of Arab-Israel conflict – and the pressure that was put by the Arabs States to cover the struggle of the people in Palestine/ Occupied Territories ("P/OT") within the ambit of Protocol I as much as possible. Indeed, the situation in P/OT excellently fit into the definition of "alien occupation"[129] - Israel State dominates the people of a P/OT using military means; there was no Palestinian State prior to occupation; and the P/OT can be regarded "alien", i.e. without legal title, relative to Israel State because the law when the P/OT were seized forbade acquisition of territory by the use of force. So, if one can show similarity between PO/T and Chechen case, it may manifest as a strong evidence of labeling conflict in Chechnya as a struggle of national liberation.

The legal status of the P/OT has been in dispute ever since Israel first occupied the West Bank and Gaza in 1967 after the Arab-Israel conflict. As the sovereignty of Jordan over the West Bank was questionable and Egypt never asserted sovereignty over Gaza, the Government of Israel took the view that there was no sovereign power at whose expense it would occupy these territories. As for the P/OT right to self-determination, the Israel position was that the Palestinians Arabs have already achieved their self-determination in their own State, namely Jordan; consequently, it is false to maintain that the Palestinian Arabs do not have a State of their own and the demand for establishing "Palestinian State" would amount to requesting the creation of "a second Palestinian Arab State".[130] In the view advanced by the Palestinians after the 1967 conflict, Israel illegally occupied Arab territories, which are now subject to foreign domination.[131] The position of the UN was expressed in numerous UN Resolutions, recognizing the right of the Palestinian people to self-determination and proclaiming that the people of Palestine were "entitled to equal rights and self-determination, in accordance with the Charter of the UN".[132]

Notwithstanding the question of whether Palestinian people have the right to self-determination it seems undisputable that P/OT can be regarded as "alien occupation" within the meaning of Article 1(4) Protocol I.

Article 2(4) of the UN Charter, adopted before occupation of the P/OT forbids the use of force or threat of force in international relations. Accordingly, acquisition of P/OT in the course of warfare, by the use of force is illegal under the UN Charter. It appears, moreover, that acquisition of territory by force is illegal in any form, even when the use of force was arguably lawful in its first instance (i.e., cases of self-defense or anticipatory self-defense). The Declaration on Friendly Relations provides: "The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal"[133] and Security Council Resolution 242, adopted during the Arab-

[129] It is curiously to note that the Palestinian-Israel conflict has been bracketed with the anticolonial cases in some UN resolutions, despite the fact that contestable territory bordered upon Israel State. See UN Res. 2787, 26 UN GAOR Supp. (29) at 16, UN Doc. A/8429 (1972).
[130] Cassese *supra* note 125, at 235-236 (citing the opinion set out by the Israel delegate, Professor Blum, in his speech of 2 December 1980 to the UN General Assembly)
[131] *Id*, 238
[132] See UN Resolutions 2672/C(XXV) of 8 December 1970, 3089D(XXVIII) of 7 December 1973.
[133] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., Supp. No. 28, at 124, U.N. Doc. A/8028 (1970) [hereinafter Declaration on Friendly Relations].

Israel conflict, stressed "the inadmissibility of the acquisition of territory by war".[134] The law is clear today that Israel could have not acquired legal title to West Bank and Gaza through the use of force and thus the status of P/OT may describe as "alien occupation".

It follows that the crucial moment in determining of whether or not Chechen case constitutes "alien occupation" depends on the issue of possession of legal title by Russian Federation over Chechnya. A widespread, though not unanimous view, is that questions of territorial status are decided on the basis of the law in force at the time the status was established. According to Jennings, the current disposition of vast territories would be thrown into doubt, if the view were accepted that changes in the rules governing territorial acquisition had retroactive effect on acquisitions accomplished under older rules.[135] Thus, territorial acquisition by methods that violate today's law would nonetheless be treated as valid if done at a time when those methods were legal. In other words, an act that would not convey valid title under modern rules might have conveyed valid title under older rules.[136] It is a foundation principle that law should lend stability to human relations. Nobody doubts acquisition of Australian lands from indigenous peoples and westward expansion of the United States into native lands. Given the fact that Russia conquered Chechnya around 1859 and that the law to be applied in assessing whether Russia's title in Chechnya was created by conquest is the law of mid-nineteenth century and that the law of mid-nineteenth century allowed creation of title by use or threat of force one can argue that Chechnya is not the case of "alien occupation".

The fourth condition refers to right to self-determination as defined in Declaration on Friendly Relations and UN Charter. Both documents take a restrictive approach to the issue, limiting the right to self-determination to the context of decolonization and the only situation in which self-determination has unambiguous legal status is that of non-self-governing territories (non-contiguous, separate territorial units).[137] To date the non-self-governing territories regime has never been extended to territories geographically integral to a State.[138] It has been restricted to non-contiguous colonial possessions.[139] The Declaration on Friendly Relations does not, however, extend this right to minority groups living within an established State possessing a representative government because of the principle of *uti posseditis juris* - the notion that the territorial integrity of

[134] *See* S.C. Res. 242, UN SCOR 22d Sess. 1382 mtg., at 8-9, UN Doc. S/8247 (1967)
[135] Robert Jennings, *Acquisition of Territory in International Law* 53-56 (1963).
[136] This view was supported by the ICJ in the *Western Sahara* Advisory Opinion, Western Sahara, 1975 ICJ, at 12.
[137] Duncan B. Hollis, *Accountability in Chechnya - Addressing Internal Matters with Legal and Political International Norms*, 36 B. C. L. Rev 793, 820 (1995). Other UN documents and state practice have adopted a similar approach, such that a people's right to self-determination now requires a connection to a defined space of territory, separated from an already sovereign state. *See, e.g.*, Heather A. Wilson, *International Law and the Use of Force by National Liberations Movements* 88 (1990) (concluding that trust territories, mandates, non-self-governing territories and geographically distinct territories possess right to self-determination); R. Emerson, *Self-Determination*, 65 Proc. A. S. I. L. 459 (1971) (stating that self-determination applies only to overseas colonialism and that all peoples do not have the right); Laurence S. Hanauer, *The Irrelevance of Self-Determination Law to Ethno-National Conflict: A New Look at the Western Sahara Case*, 9 Emory Int'l L. Rev. (1995) (in addition to being ethnically or culturally distinct, people possessing right to self-determination must also possess connection to defined territory, which is not organized within already sovereign state); Hurst Hannum, *Rethinking Self-Determination*, 34 Va. J. Int'l L. 1, 32-33 (1993) (only situations where European Power dominated non-contiguous territory in which a majority of population was indigenous or non-metropolitan, has that territory been considered to have absolute right of self-determination).
[138] Grant *supra* note 72, at 177
[139] *Id.*

existing States must be maintained.[140] As the former UN Secretary General Boutros Boutros-Ghali stated that "if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve."[141] Minority group may enjoy international legal protection, including a right to internal self-determination (e.g., to enjoy their own culture, to use their own language), but a right to external self-determination is not one of them.

It also must be submitted that most commentators, describing Chechnya in the context of right to self-determination, concluded that Republic does not have such a right.[142] Ahrens defining the right of self-determination points out that although all peoples may have a right of internal self-determination – right to enjoy some level of autonomy within a parent State – only in rare, extreme circumstances (e.g., control by a colonial power, human rights abuses) will that translate into a right to secede – a right to external self-determination.[143] He contends even though there may be a right to secede for Chechen people subject to significant human rights violations in the past, it seems that right exists only after the exhaustion of remedies short of full independence (i.e., exploring opportunities for significant levels of autonomy within the parent State).[144] By the time the Soviet Union collapsed, Russia purportedly was ready to offer its constituent part a substantial part of autonomy.[145] Chechnya did not agree and unilaterally declared independence.[146] Ahrens argues that given that Russia was and is willing to give Chechnya a significant degree of autonomy, the Chechens do not have a legal right of self-determination under UN Charter.[147] Only if Russia's offer of autonomy proves to be illusory would the Chechen people perhaps gain such a right.[148] Ahern concludes:

If the Chechens have been denied their right of internal self-determination, their use of some level of force in order to assert that right would be legitimate. Whether their current use of force is illegal is not satisfactory addressed by international law. Because their declaration of independence from Russia was ultra vires, they are still part of the Russian Federation under international law. Therefore the armed conflict is an internal affair.[149]

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[140] Duncan *supra* note 137, at 819-820

[141] *Agenda for Peace*, U.N. Doc. S/24111, P17 (1992) (Boutros Boutros-Ghali).

[142] *See e.g.*, Jonathan I. Charney, *Self-Determination: Chechnya, Kosovo and East Timor*, 34 Vand. J. Transnat'l L. 455 (2001), Thomas D. Grant, *A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law*, 40 Va. J. Int'l L. 117 (1999-2000), Duncan B. Hollis, *Accountability in Chechnya - Addressing Internal Matters with Legal and Political International Norms*, 36 B. C. L. Rev. 793 (1995).

[143] Brandt Ahrens, *Chechnya and the Right of Self-Determination*, 42 Colum. J. Transnat'l L. 575 (2004).

[144] *Id*, at 608.

[145] The success of the Russian federal relationship with Tatarstan, when substantial autonomy was granted, suggests that it may be a useful model for an eventual settlement with Chechnya. *Id*, at 613.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id*, at 609. *See* also Federal Germany Government Reply on Chechnya to the German Bundestag, Document 13/718, 13th legislative period, 9 March, 1995, *cited in* Marco Sassoli, *How Does Law Protect in War* 1404 (ICRC, 1999) (where the Federal Germany Government rejects the idea that Protocols I applies to the situation in Chechnya).

On the basis of this analysis, one can conclude that the fighting in Chechnya does not constitute the struggle of national liberation. Chechnya lacks the specific dominance regimes and the right to self-determination under Article 1 (4) Protocol I to invoke the set of provisions provided by Protocol I. This conclusion does not mean, however, that no rules of international humanitarian law apply to the fighting in Chechnya. Both Protocol II and Common Article 3 establish international legal standards of conduct for non-international armed conflicts.

The conditions to be met to fulfill the material requirement of applicability of Protocol II are as follow:

1) an armed conflict that is taking place in Chechnya is between State's armed forces and dissenting organized armed groups;
2) the dissident organized armed groups are:
a) under responsible command;
b) able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
c) able to implement Protocol II.[150]

I will examine only two conditions that in my view dissident armed groups, namely Chechen fighters, failed to meet: responsible command and ability to implement Protocol II.

Responsible command means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a *de facto* authority.[151] As submitted by most commentators, Maskhadov is the man who represents *de facto* authority of Chechen fighters. Despite the fact that Maskhadov's authority is capable to planning and carrying out sustained military operations it is less certain that he is imposing discipline on individual insurgent groups. Data that appears reliable does not prove that individual armed groups opposing Russian forces are capable of coordinated actions and submitting themselves to Maskhadov de facto authority. These armed groups of fighters were loyal primarily to particular field commanders but not Maskhadov's authority.[152] An example of this is when Chechen fighters, led by field commanders Shamil Basaev and Khattab, had invaded Russian territory in Dagestan in August 1999.[153] This operation was initiated without the knowledge of Maskhadov and was condemned by him.[154] However, he failed to impose any disciplinary actions and heavily relied subsequently on Basaev and Khattab in Chechen insurgency.[155] Another example is developments in October 2002 when Chechen fighters seized a theatre and took 900 people hostage. Basaev, a Chechen commander, asserted responsibility for the theatre attack. However, the leader of Chechen

[150] Protocol II *supra* note 1, art. 1.
[151] ICRC Commentaries *supra* note 112, at 1353.
[152] Miriam Lanskoy, *Chechnya's Internal Fragmentation, 1996 – 1999*, 27 Fletcher F. World Aff. 185, 190 (2003)
[153] Evangelista *supra* note 65, at 63-65. The Russian authorities initiated the second Chechen war as a result of this incursion. *Id.*
[154] *Id*, at 68 (The Chechen president had attempted to discredit the supporters of the incursion into Dagestan. In particular, he issued a degree removing Basaev's ally Udugov from Chechnya's National Security Council).
[155] *Id*, at 69. Author admitted that Maskhadov was powerless to do something because field commanders dominated considerable influence. *Id.*

separatists, Maskhadov, disavowed such an attack.[156] At this point one can argue that Chechen insurgency does not possess the sufficient level of responsible command to meet the criteria of Protocol II.

According to ICRC, the insurgents must be in position to implement Protocol II.[157] Cassese argues that Protocol II begins to apply when rebels prove to able to, and do in fact, implement it.[158] This condition is too onerous for the insurgent and I have some doubt whether it can ever be met in practice. Even ICRC Commentary acknowledges that threshold seems fairly high.[159] In practice, insurgents are not willing to live up to international standards they have not accepted. And even if the obligations are not particularly onerous for the insurgents in the sense of compliance, "they will still see a certain lack of reciprocity in the government's having been afforded the opportunity to determine whether to assume the obligations of the Conventions while they, the rebels have not been given the occasions for a like decision".[160] The tactic of kidnapping for ransom, the use of civilians and captured Russian soldiers as shields, taking of hostages and acts of terrorism, including suicide attacks, more than indicate the Chechen rebels' inability to abide by Protocol II. As Kawai suggests, "the willingness of the [Chechen] rebels to observe Protocol II remained somewhat obscure, and therefore the Protocol might not have been applicable".[161]

Clearly Chechen fighters do not satisfy at least two objective conditions required by Article 1 Protocol II and it becomes apparent that no legal basis exists for labeling the Chechen conflict as an internal armed conflict within the meaning of Protocol II.

It seems that considering a collective character of organized Chechen resistance, existence of protracted armed violence and ability of Chechen fighters to exercise effective control within Chechnya, the only humanitarian law provision applicable to Chechnya is Common Article 3.

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[156] Peter Baker, *In Russia, Terrorism becomes a fact of life*, Washington Post, 19 Dec. 2003, *available in* LEXIS, Major World News. The paper claims many analysts said they believe Maskhadov does not control all of the movement's factions. *Id.*

[157] ICRC Commentaries *supra* note 112, at 1354

[158] Antonio Cassese, *The Status of Rebels under 1977 Geneva Protocol*, 30 Int'l and Comp. L. Q. 416, 424 (1981).

[159] ICRC Commentaries *supra* note 112, at 1354. *Travaux preparatoires* clearly indicate States intention to make the threshold of the application of Protocol II as high as possible by qualifying it "to the ability to implement Protocol II". *Id.* A number of States led by Columbia and Brazil wanted Protocol II to apply only when, in addition to the other conditions specified in the final version, the established government expressed its acceptance to the application of the Protocol II. *See*, CDDH/I/SR.29, at 4ff and CHHH/SR.49, at 11ff. Moreover, some delegates such as Pakistan thought a heavy obligation would fall on dissident parties to apply the law first, as an inducement for the government to apply Protocol II. *See*, CDDH/I/SR.23, at 20.

[160] Baxter, *Jus in Bello Interno: the Present and the Future Law in Law and Civil War in the Modern World* 528 (1974).

[161] Kawai, *1977 Protocol II Additional to the 1949 Geneva Conventions and Customary International Law* (May 2001). *See also Chechnya and the Laws of War, available at* http://www.crimesofwar.org/chechnya (Tuzmukhamedov tended towards the view that Protocol II was probably not applicable, doubting whether the Chechen fighters met the necessary requirements, in particularly, willingness to implement Protocol).

2.3 LEGAL GAP OF HUMANITARIAN LAW IN THE CONTEXT OF CHECHNYA

Chechen conflict does not fit comfortably into the framework of the Geneva Conventions and Protocols. Clearly, from the point of view of the actual or potential victims, this is an unsatisfactory state of affairs. Material scope of Common Article 3 is narrow and inadequate, with several vital areas of humanitarian law, such as the protection of civilians, methods and means of warfare, the respect for the ICRC and some others, finding no place in its provisions.

According to Common Article 3, Russian forces are not explicitly obliged to distinguish between civilians and combatants and between civilian objects and military objectives and direct their operations only against military objectives, the principle enshrined in Article 48 Protocol I. Russian military tactics adhere to a pattern of directly targeting civilians. As has been stated by Human Rights Watch, three massacres occurred in Chechnya during the second conflict, which have taken at least 130 peoples.[162] In 2003 local officials also admitted the existence of 49 mass-graves containing the remains of 3,000 civilians.[163] However, in practice, there are no international rules that prohibit such behavior of the Russian troops in internal armed conflict.

According to Chechnya's insurgent Health Minister Russian forces has been using weapons of mass distruction against Chechen fighters and civilians.[164] In particularly, it was alleged that military troops had used bombs packed with poisonous substances, vacuum bombs and mines, which detonations have caused health suffering to civilians.[165] Despite rules in Article 35 Protocol I that ban "to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering",[166] there are no corresponding rules in the context of internal armed context that prohibit similar behavior.

Both sides in the conflict between Chechnya and Russia have alleged ill-treatment and summary executions of captured combatants.[167] Because humanitarian law does not discern the status of prisoner of wars in internal armed conflicts, such ill-treatment, however, would not be considered a violation of Common Article 3.

One can only guess how to protect people who are the subject of widespread so-called cleaning up or mopping operations, conducted by Russian forces in Chechnya and resulted in arbitrary detention and disappearances. Such mopping operations, when a Chechen town or village is completely surrounded and blocked off and house-to-house searches and ID checks are conducted, may

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[162] Human Rights Watch, *Glad to be Deceived: the International Community and Chechnya* (2004), *available at* http://www.hrw.org
[163] *Id.*
[164] *Chechen Minister Accuses Russians of Using Chemical Weapons against Civilians*, BBC Monitoring Int'l Reports, 23 Nov. 2003.
[165] *Id.*
[166] Protocol I *supra* note 1, art. 35.
[167] See Alessandra Stanley, *Rebels' Hopes for a Truce with Moscow Collapsing*, N.Y. Times, Jan. 19, 1995, at A6 ("There are no reliable estimates of the number of Russian and Chechen prisoners of war, but each side has accused the other of summary executions and ill-treatment.").

smoothly fall within law enforcement measures prescribed by domestic law but absolutely intolerable under Geneva Conventions and Protocol I.

Indiscriminate attacks are prohibited by the law of international armed conflicts. These include attacks not directed at a specific military target as well as attacks by means which cannot be limited to military targets. An attacks which may be expected to cause civilian loses that are "excessive in relation to the direct and concreted military advantage anticipated"[168] is considered to be indiscriminate. Most if not all of these rules appear to have been violated by Russia's bombardment of Grozny – often at night and with weapons that lack pinpoint accuracy. Furthermore, once an attack is launched, it must be cancelled or suspended if it becomes apparent – as in Grozny – that civilian losses are excessive in relation to military gain. In other words, acting within its own borders, Russian forces can pound civilian cities without clear violations of international humanitarian law.

In addition, Common Article 3 does not contain provisions governing their enforcement and implementation. The text of Common Article 3 is silent about of whether sanctions against lawbreakers can be enforced at all in internal armed conflict. The law of international armed conflicts, in contrast, requires States-Party "to provide effective penal sanctions for persons committing or ordering to be committed, any of the grave breaches" listed in the Geneva Conventions and Protocol I and "to search for persons alleged to have committed or to have ordered to be committed, such grave breaches and shall bring such persons, regardless of their nationality, before [their] own courts".[169] The Russian authorities have perfectly availed of this loophole in practice. As Human Rights Watch points out, Russia "has refused to establish a national commission to investigate charges of serious abuses by Russian troops against Chechen civilians" and "has directly flouted the resolutions of the UN Commission on Human Rights, including by refusing to allow UN monitors access to Chechnya".[170] As far as is known, no high- ranking Russian officer has been meaningfully punished for the participating in the abuse of civilians or the mistreatment of Chechen fighters who have been taken prisoner. In December 2002 the most publicized and celebrity case of a Russian officer to face charges over conduct in Chechnya – the prosecution of the tank brigade Commander Colonel Yuri Budanov, accused of raping and strangling to death an 18-year old Chechen girl – ended with the defendant acquitted on the ground of temporary insanity.[171]

It is obvious that the law of Common Article 3 cannot effectively address the behavior of the actors in Chechnya. This ambiguity has lead to the point when violations and abuses became the norm in the ravage region. Both sides employ the methods of conduct that are illegal within the context of an international armed conflict but are not explicitly prohibited in an internal armed conflict. The conflict in Chechnya reveals the undesirable state of humanitarian law today that there are different laws between international and non-international armed conflicts. This is a strange phenomenon, considering the fact that international humanitarian law should be applicable equally. What is the sense then of Geneva Conventions and Protocols if people in Chechnya during armed conflict can

[168] Protocol I *supra* note 1, art. 51.
[169] Roberts and Guelff, *Documents on the Laws of War* 16 (2000).
[170] *Cited* from Evangelista *supra* note 65, at 155
[171] *See* Evangelista *supra* note 65, at 152 (describing Budanov case).

be abused and deprived of their lives with impunity and there are no clauses that outlawing such behavior? The equal treatment to all persons affected by an armed conflict, enshrined in Article 2 Protocol II, sounds futile when there is discrimination in treatment among victims suffered from international armed conflicts and those from internal armed conflicts defined by Common Article 3 and Protocol II.

2.4 NEW TENDENCY IN HUMANITARIAN LAW AND RECOMMENDATIONS

Like all international treaties, Geneva Conventions and Protocols were products of their period about the nature of conflict. Dichotomy contains significant gap lines that limit their effectiveness in restraining the excesses of contemporary conflict. The shifting nature of armed conflicts means that the Geneva Conventions cannot address much of the atrocities committed in internal conflicts – and where Geneva Conventions do address it, some of their inherent weaknesses are particularly exposed.

A recent and welcome trend is blurring the difference of international and internal armed conflicts. The legal commentators argue that distinction is arbitrary and no more reflects the needs of the involved actors and civilian population as well.[172]

The ICRC study on rules of customary humanitarian law, for example, makes only the basic distinction between international and non-international armed conflicts and seeks a broader recognition that many rules are applicable to both international and non-international conflicts.[173] Most military manuals do not explicitly distinguish between rules applicable in non-international conflicts and in international conflicts and expands the provisions of the Geneva Conventions to internal conflicts.[174] Some armed forces now recognize that the same rules of international humanitarian law should be applicable in all situations involving armed conflict. Thus, an instruction issued by the chairman of the U.S. Joint Chiefs of Staff states that the "Armed Forces of the United States will comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized."[175]

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[172] *See e.g.,* Stewart *supra* note 29, at 341 ("The absence of any coherent basis for determining the temporal or territorial scope of humanitarian law in territories containing conflicts … stems from uncomfortable relationship between the standards applicable in international and non-international armed conflict"); Boelaert-Suominen *supra* note 25, at 69 ("It is common ground that there is a wide regulatory gap between the two main categories of armed conflicts. The number speaks for themselves: the 1949 Geneva Conventions and the 1977 Protocols alone contain close to 600 articles; of these only [Common] article 3 …, and the 28 articles of [Protocol II], apply to internal conflicts"); Michael W. Reisman and J. Silk, *Which Law Applies to Afghan Conflict?* 82 Am. J. Int'l L. 465 (1988) ("The "distinction" between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law…[P]aying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs").

[173] Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239, 262 (2000).

[174] In the *Tadic* case the Appeal Chamber cited provisions from 1992 German Military Manual to illustrate, *inter alia*, that Germany considers violations of Common Article 3 by their army punishable as grave breaches. *See Tadic* case, *supra* note 2, at para. 131.

[175] Chairman, Joint Chiefs of Staff, Instruction 5810.01, Implementation of the DOD Law of War Program (1996), quoted in Corn, *When Does the Law of War Apply: Analysis of Department of Defense Policy on Application of the Law of War*, ARMY LAW., June 1998, at 17.

The recent regulations promulgated by the Secretary-General of the United Nations on the observance by United Nations forces of international humanitarian law[176] restate a broad set of protective norms borrowed from the Geneva Conventions without making any distinction between the international and non-international conflicts in which UN forces are involved.

Strikingly but this modern approach is reflected in the attitude of many of the delegations to the Diplomatic Conference 1974-1977 during the drafting of Protocols to the Geneva Conventions. For example, the Finnish delegate argued that "the same level of protection should be given to the civilian population in all conflict situations … [and] whenever possible the two Protocols should be on identical lines".[177] The Swedish delegate was of the same view that "all armed conflicts, whatever their magnitude, should be subject to the same humanitarian rules".[178]

In recent years, remarkable progress has been made in the identification of customary rules and the willingness of States to recognize the extension of Geneva Conventions rules to non-international armed conflicts**.** This progress is mostly attributable to the ICTY, which suggested that customary rules had developed to govern both the internal and international armed conflicts.[179] The Appeals Chamber of the ICTY in the *Tadic* case held that customary rules governing internal conflicts include:
"protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities."[180]

It also held that prohibition of these customary rules entail individual criminal responsibility regardless of the nature of the conflict.[181]

The Martens clause, which originally appeared in Hague Convention IV of 1907 and now incorporated in Geneva Conventions and Protocols refers to the "protection and authority of the principles of international law derived from established custom".[182] ICRC explains that the "principles of international law apply in all armed conflicts according to Martens clause"[183] and whether or not there is the Martens clause in humanitarian treaty, custom is applicable to all States.[184] What are these "principles of international law"? Rogers describes them as military necessity, humanity, distinction and proportionality.[185] The "general principles of international law" can play an important part in ameliorating victims of internal strife. The significance of these

[176] UN Secretary-General, Bulletin on the Observance by United Nations Forces of International Humanitarian Law, UN Doc. ST/SGB/1999/13, *reprinted in* 38 ILM 1656 (1999).
[177] CDDH/SR.18, at para. 15.
[178] CDDH/SR.14, at para. 7. See also the Norwegian delegate at CDDH/SR.10, at para. 3.
[179] *Tadic* case, *supra* note 2, at para. 127
[180] *Id.*
[181] *Id*, para. 129.
[182] Protocol I *supra* note 1, preamble.
[183] ICRC Commentary, para. 4435
[184] *Id*, para. 56.
[185] A.P.V. Rogers, *Law on the Battlefield*, 1-26 (1996).

principles that they can be applicable to areas of internal conflict which are not regulated by specific rules based on Common Article 3/ Protocol II.

The then President of the ICTY, Antonio Cassese, opined that "there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts…".[186] This position reflects the reality that national legislation,[187] international legal instruments[188] and judicial decisions[189] all show that the disparity between the laws applicable to international and non-international armed conflicts is becoming outmoded and eroding. Indeed, as Moir points out "what will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict exists *per se*".[190]

It follows that if intensity of armed conflict similar to those adopted by *Tadic* case or ICC Statute has been triggered, the whole body of humanitarian law must be applied. This approach would exclude internal disturbance, riots and mere banditry from the scope of single body of international humanitarian law, preserving the State's ability to maintain law and order by the means of police law enforcement means, while still including high level intensity conflicts between government forces and insurgents. Furthermore, parties to the conflict will be restricted by the methods and means of conducting warfare, as well as by prohibition of indiscriminate attacks against non-military objects (including civilians). Since the threshold of armed conflict is crossed, insurgent party members should be allowed a specific status, such as exists in international armed conflicts (i.e., combatants and prisoners-of-war).

As has been mentioned in previous Chapter, unlike during inter-State conflict, where captured members of armed forces are entitled of prisoner-of-war status, insurgents may face penal punishment under domestic law for mere participation in the internal conflict. This leaves little incentive for the insurgents like Chechen fighters to attempt to abide by international humanitarian law. Rather, they will be more likely to use whatever means necessary to "win" the conflict in the hope that as the victorious party they will avoid punishment, both for participating in the conflict and for any violations they might commit along the way. Granting prisoner-of-war status to insurgents would imply that better protection of States' own soldiers can be expected. The governments could also appeal to the international community by stating that it treats captured insurgents humanely in accordance with humanitarian treaties, thereby enhancing their public support in waging internal conflict. It is important to consider the possibility of a granting immunity for participation in the armed conflict. As ICRC report indicates this may be achieved

[186] Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court, *cited in* Moir, 51.
[187] *See* Belgium Law of 16 June 1993 concerning repression of grave breaches of the Geneva Conventions and their Additional Protocols; Spain Codigo Penal Law 1995;Article 6 of the United States War Crimes Act 1996; The Dutch Law of War Crimes 1952; Chapter 22, Section 11, of the Swedish Penal Code 1986, *all cited in* Boelaert-Suominen *supra* note 25, at 89-93.
[188] The amended Protocol II of 1996 to the 1980 UN Weapons Convention, the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines and the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict all apply equally to international and non-international armed conflicts.
[189] *See* Boelaet-Suominen *supra* note 25, at 93-96.
[190] Moir *supra* note 4, at 51.

through the granting combatant status or amnesty for insurgents.[191] Alternatively, during a trial of insurgent members, the level of respect for humanitarian law may be taken into consideration when deciding upon punishment or sentences. The granting of these kinds of benefits to insurgents inevitably lead to enhance compliance by non-State actors with humanitarian law and save lives of civilians. Otherwise, if one did not afford Geneva Conventions' protection to those who got stuck in internal conflicts, the governmental authorities would be feeling free to conduct hostility by whatever means they want, to restrict civil liberties and impose arbitrary punishments. There is no valid reason for denying the civilian population protection of the whole body of the Geneva Conventions and Protocols simply because the conflict in which they have found themselves has not met objective criterion of the material scope of application. As ICTY stated in *Tadic* case regarding blurring the line between inter-State and civil conflicts:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[192]

If the conflict in Chechnya achieves nothing else besides civilian suffering, let at least apply the same humanitarian rules to all armed conflicts, internal as well international. Whether or not borders are crossed, the color of the blood is the same.

[191] *Improving Compliance with International Humanitarian Law*, ICRC Expert Seminar (Oct., 2003)
[192] *Tadic* case *supra* note 2, para. 97.

CONCLUSION

The purpose of this thesis was to show, by the example of the Chechen conflict, inadequacy of contemporary international humanitarian law applicable to internal armed conflicts. Because Chechen fighters cannot satisfy the criterion of "High Contracting Party" within the meaning of Common Article 2 of the Geneva Conventions, definition of "national liberation movement" within the meaning of Article 1 Protocol I and failed to meet threshold of Article 1 Protocol II, the Chechen conflict get stuck into legal gap of Common Article 3. Clearly, the only way to give the real international legal protection for those find themselves in ravage Chechnya is in rejecting the traditional dichotomy between international and internal armed conflicts and favoring the application of uniform set of rules applicable in all armed conflicts, regardless of their nature. Otherwise, in the age of increasing numbers of internal conflicts and decreasing numbers of inter-State conflicts, there is a danger that Geneva Conventions and Protocols will be absolutely useless documents and violations of international humanitarian law will became something exceptional, giving to States legal and moral justification in attempt to excuse tremendous atrocities committed during internal conflicts. Hence in the perspective the revision of international humanitarian law should be achieved (e.g. through the adoption of new humanitarian treaties), and in the process of revision, the distinction between international and non-international armed conflicts should be abolished.

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LES CONFLITS ARMÉS À CARACTÈRE NON-INTERNATIONAUX « INTERNATIONALISÉS »

par

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L'arrestation de Slobodan Milosevic, ex-président de la Serbie, le samedi 31 mars 2001, démontre le développement radical du droit international humanitaire applicable dans les conflits armés depuis les dernières dix année. Une différence marquée dans l'application du droit apparaît ainsi d'une manière contrastante si l'on compare le travail des tribunaux de juridiction internationale tels le Tribunal pénal pour l'ex-Yougoslavie (TPIY) et le Tribunal pénal international pour le Rwanda (TPIR) avec les travaux de la Commission sur la responsabilité de la guerre (1919) qui déclara que le Kaiser Wilhelm II n'était pas coupable de crime de guerre mais d'un crime moral contre l'humanité. Pour le seul TPIY, 58 accusés sont mis au banc.

Toutefois, ces actions juridiques de la communauté internationale ne sont font pas sans heurts. En effet, le TPIY et le TPIR sont confrontés à plusieurs difficultés. Ils doivent adopter des solutions nouvelles du fait de l'évolution du droit international humanitaire, particulièrement avec l'application des *Conventions de Genève du 12 août 1949* et de leurs *Protocoles additionnels de 1977*. Ceux-ci divisent les régimes de droit applicables en deux catégories qui, si elles représentaient la réalité lors de leurs rédactions, ne se conforment que partiellement à la réalité de la période de l'après-guerre froide.

Cette problématique s'est imposée au TPIY dans l'affaire *Le Procureur c. Dusko Tadic alias « Dule »*[1]. Confronté à une situation où le régime de droit applicable dépendait du type de conflit armé en cause, le TPIY a dû longuement déterminer les faits de l'affaire en vue de pouvoir établir si l'accusé était coupable de violations graves des *Conventions de Genève*. La détermination de la Chambre d'appel, dans son arrêt[2], fut la qualification de l'existence d'un conflit armé non-international « internationalisé » par l'intervention de tiers-États.

Si ce jugement ne compromet pas la nature des conflits décrits dans les instruments de droit international humanitaire, il porte néanmoins le problème de la détermination de la nature du conflit à un niveau beaucoup plus technique. Or, le type de conflits tels que ceux qui ont ravagés et ravagent toujours les Balkans sont le prototype même des conflits inter-ethnies qui secouent plusieurs autres régions du monde. Pour ces raisons, la compréhension du conflit armés à caractère

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*** Editor, Eastern European Law Journals.**

[1] *Procureur c. Dusko Tadic* (1995), Affaire n° IT-94-1-AR72 (Tribunal Pénal International pour l'ex-Yougoslavie, Chambre de 1ère instance), en ligne : Nations Unies <http://www.un.org/icty/tce14.htm> (date d'accès : 28 novembre 2000) [ci-après *Tadic*].

[2] *Procureur c. Dusko Tadic*, (1999), Affaire n° IT-94-1-AR72, (Tribunal Pénal pour l'ex-Yougoslavie, Chambre d'appel), en ligne : Nations Unis <http://www.un.org/icty/tadic/appeal/judgement/main.htm>, (date d'accès : 30 novembre 2000) [ci-après *Tadic, Chambre d'appel*].

non-international « internationalisé » s'avère d'une importance majeure puisque ce sera en toute probabilité le type de conflit prédominant des vingt prochaines années.

Pour être en mesure de connaître le régime de droit international humanitaire applicable, un examen approfondie de ce nouveau genre de conflit, dit « mixte », la présente recherche visera à établir les situations où il est applicable.

Dans ce but, il sera d'abord examiné les deux catégories de conflits armés reconnus dans les instruments de droit international humanitaire et leurs régimes respectifs. Ensuite, le développement d'un conflit armé non-international « internationalisé » sera analysé au travers de la doctrine, puis au travers de l'affaire du *Nicaragua*. Finalement, l'affaire *Tadic* sera analysée au regard de la jurisprudence précédente pour expliquer les éléments qui composent le conflit armé à caractère non-international « internationalisé ».

LE RÉGIME APPLICABLE DANS LES CONFLITS ARMÉS INTERNATIONAUX ET NON-INTERNATIONAUX

Le droit international humanitaire n'est pas chose nouvelle : depuis le *General Order no. 100*[3], aujourd'hui appelé « Code Lieber » du nom de son auteur, des efforts constants de codification des us et coutumes de la guerre ont été fait pour limiter les souffrances résultant de l'usage des armes lors de conflits[4]. Le développement du droit de la Haye[5], concernant les règlements des méthodes et

[3] *Instruction for the Government of Armies of the United States in the Field*, Washington, 24 avril 1863.
[4] Le code Lieber fut en large partie l'élément déclencheur du développement du droit international humanitaire. Son influence sur le *Projet de Déclaration de Bruxelles concernant le droit et la coutume de la guerre*, Bruxelles, 27 Août 1874 et de celle-ci sur les *Conventions de la Haye de 1899* (*Acte final de la Conference Internationale de la Paix*), 26 Martens Nouveau Recueil (sér. 2) 258 est claire.
[5] Dont les conventions aujourd'hui applicables sont principalement : *Déclaration à l'effet d'interdire l'usage de certains projectiles en temps de guerre. Saint Petersbourg*, 18 Martens Nouveau Recueil (sér. 1) 474, 138 R. T Consol. 297, entré en vigueur le 29 Novembre/11 Décembre, 1868 *Convention (IV) concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre*, 3 Martens Nouveau Recueil (sér. 3) 461, 187 R. T. Consol. 227, entrés en vigueur le 26 janvier 1910 ; *Règles concernant le contrôle de la radiotélégraphie en temps de guerre et la guerre aérienne fixées par une Commission de Juristes à La Haye, décembre 1922 - février 1923* ; *Protocole concernant la prohibition d'emploi à la guerre de gaz asphyxiants, toxiques ou similaires et de moyens bactériologiques*, Genève, 94 R.T.S.N. 65, entré en vigueur le 8 février 1928 ; *Procès-verbal concernant les règles de la guerre sous-marine prévues par la Partie IV du Traité de Londres du 22 avril 1930*, 173 R.T.S.N. 353, entré en vigueur le 6 novembre 1936 ; *Convention pour la prévention et la répression du crime de génocide*, 78 U.N.T.S. 277, entré en vigueur le 12 janvier 1951 ; *Convention pour la protection des biens culturels en cas de conflit armé*, La Haye, 14 mai 1954 ; *Convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bactériologiques (biologiques) ou à toxines et sur leur destruction. Ouvert à la signature à Londres, Moscou et Washington*, 10 avril 1972; *Convention sur l'interdiction d'utiliser des techniques de modification de l'environnement à des fins militaires ou toutes autres fins hostiles*, 10 décembre 1976; *Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination*, Genève, 10 octobre 1980 (et ses protocoles) ; la Convention sur l'interdiction de la mise au point, de la fabrication, du stokage et de l'emploi des armes chimiques et sur leur *destruction*, Paris, le 13 janvier 1993 et le *Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, 18 septembre 1997.*

moyens de combat et du droit de Genève[6], concernant quant à lui la protection des victimes des conflits armés, démontre toutefois que ces efforts de codification concernaient principalement les conflits armés opposant des États entre eux, même si les conventions de la Haye ont abordé succinctement la question des combattants irréguliers[7].

Au sortir de la deuxième guerre mondiale, cet état du droit se voit confirmer dans les *Conventions de Genève du 12 août 1949*. Ainsi, la première résolution de la Conférence diplomatique de 1949 affirme clairement le caractère international des conventions en encourageant les Hautes Parties Contractantes à régler leurs différents par le processus judiciaire de la Cour Internationale de Justice[8]. Les Hautes Parties Contractantes n'étant que les États, l'intention d'appliquer ces conventions entre eux est sans conteste. De plus, les conventions déclarent leurs champs d'application au travers des articles 1 et 2 communs aux quatre *Conventions de Genève* dans les mêmes termes[9]. Suivant l'article 1, ce sont donc les Hautes Parties Contractantes qui ont

[6] Dont les conventions aujourd'hui applicables sont principalement : *Convention de Genève pour l'amélioration du sort des blessés et des malades dans les forces armées en campagne*, 75 U.N.T.S. 31, entrée en vigueur le 21 octobre1950 ; *Convention de Genève pour l'amélioration du sort des blessés, des malades et des naufragés des forces armées sur mer*, 75 U.N.T.S. 85, entrée en vigueur le 21 octobre 1950 ; *Convention de Genève relative au traitement des prisonniers de guerre*, 75U.N.T.S. 135, entrée en vigueur le 21 octobre 1950 ; *Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949*, 75 U.N.T.S. 287, entrée en vigueur le 21 octobre 1950 [ci-après *les Conventions de Genève*]; *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I)*, 1125 U.N.T.S. 3, entrée en vigueur le 7décembre 1978; *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés non internationaux (Protocole II)*, 1125 U.N.T.S. 609, entrée en vigueur le 7 décembre 1978 [ci-après *les Protocoles additionnels*].

[7] *Règlement concernant les lois et coutumes de la guerre sur terre*, 3 Martens Nouveau Recueil (sér. 3) 461, 187 R. T. Consol. 227, entré en vigueur le 26 janvier 1910, arts. 1, 2 et 3. Ceux-ci reprennent *verbatim* le contenu des mêmes trois articles de la *Convention (II) concernant les lois et coutumes de la guerre sur terre et son Annexe: Règlement concernant les lois et coutumes de la guerre sur terre*, 26 Martens Nouveau Recueil (sér. 2) 949, 187 R.T. Consol. 429, entrée en vigueur le 4 septembre 1900 qui édictent :

« Article 1 - Les lois, les droits et les devoirs de la guerre ne s'appliquent pas seulement à l'armée, mais encore aux milices et aux corps de volontaires réunissant les conditions suivantes :
1°. d'avoir à leur tête une personne responsable pour ses subordonnés ;
2°. d'avoir un signe distinctif fixe et reconnaissable à distance ;
3°. de porter les armes ouvertement et
4°. de se conformer dans leurs opérations aux lois et coutumes de la guerre.
Dans les pays où les milices ou des corps de volontaires constituent l'armée ou en font partie, ils sont compris sous la dénomination ' d'armée '.
Article 2 - La population d'un territoire non occupé qui, à l'approche de l'ennemi, prend spontanément les armes pour combattre les troupes d'invasion sans avoir eu le temps de s'organiser conformément à l'article premier, sera considérée comme belligérante si elle respecte les lois
et coutumes de la guerre.
Article 3 - Les forces armées des parties belligérantes peuvent se composer de combattants et de non-combattants. En cas de capture par l'ennemi, les uns et les autres ont droit au traitement des prisonniers de guerre. »

[8] *Résolutions de la conférence diplomatique*, Genève, 12 août 1949 à la résolution 1.

[9] *Les Conventions de Genève*, *supra*, note 6, aux articles 1 et 2 communs aux quatre conventions :

« Article 1 - Les Hautes Parties contractantes s'engagent à respecter et à faire respecter la présente Convention en toutes circonstances. »

« Article 2 - En dehors des dispositions qui doivent entrer en vigueur dès le temps de paix, la présente Convention s'appliquera en cas de guerre déclarée ou de tout autre conflit armé surgissant entre deux ou plusieurs des Hautes Parties contractantes, même si l'état de guerre n'est pas reconnu par l'une d'elles.

l'obligation de respecter et de faire respecter ces conventions. Ces conventions, en vertu de l'article 2, s'appliquent dès le temps de paix et en temps de guerre ou de conflit armé, déclaré ou non, même si l'état de guerre n'est pas reconnu, ou encore lors de l'occupation de tout ou d'une partie du territoire d'une Haute Partie Contractante. Toutefois, le paragraphe 2 de cet article spécifie clairement que les conventions ne sont applicables que si cet état de guerre ou de conflit armé surgit entre deux ou plusieurs Hautes Parties Contractantes. En conséquence, les conflits internes où seule une Haute Partie Contractante est confrontée à un conflit armé impliquant des forces organisées composées de ressortissants de cet État ne peuvent être considérés comme soumis aux pleines règles des *Conventions de Genève*.

Le droit de Genève reconnaît donc *a priori* les conflits armés à caractère internationaux et en font l'objet premier de son régime juridique. Subsidiairement, les *Conventions de Genève* reconnaissent l'existence de situation ou les parties au conflit ne rencontrent pas les critères de l'article 2 commun à ces conventions. Ainsi, à l'article 3 commun aux quatre conventions, on retrouve les « …conflit armé ne présentant pas un caractère international et surgissant sur le territoire de l'une des Hautes Parties contractantes… »[10]. On retrouve donc deux catégories distinctes de conflit : les conflits armés internationaux et les conflits armés à caractère non-international. Or, il est important de cerner avant toute autre chose ce qu'est un conflit armé. Selon la Chambre d'appel du TPIY, un conflit armé est : «… un recours à la force armé entre États ou un conflit prolongé entre les autorités gouvernementales et des groupes armés ou entre de tels groupes au sein d'un État. »[11]

Ceci porte à distinguer le type de conflit selon la qualification des parties qui y prennent part. Il ressort clairement de cette définition qu'un conflit armé, qu'il soit à caractère international ou non, se caractérise à la base par une lutte prolongée dans le temps et l'espace, en termes de *rationae*

La Convention s'appliquera également dans tous les cas d'occupation de tout ou partie du territoire d'une Haute Partie contractante, même si cette occupation ne rencontre aucune résistance militaire.
Si l'une des Puissances en conflit n'est pas partie à la présente Convention, les Puissances parties à celle-ci resteront néanmoins liées par elle dans leurs rapports réciproques. Elles seront liées en outre par la Convention envers ladite Puissance, si celle-ci en accepte et en applique les dispositions. »

[10] *Ibid*, à l'article 3: « Article 3 En cas de conflit armé ne présentant pas un caractère international et surgissant sur le territoire de l'une des Hautes Parties contractantes, chacune des Parties au conflit sera tenue d'appliquer au moins les dispositions suivantes:
1) Les personnes qui ne participent pas directement aux hostilités, y compris les membres de forces armées qui ont déposé les armes et les personnes qui ont été mises hors de combat par maladie, blessure, détention, ou pour toute autre cause, seront, en toutes circonstances, traitées avec humanité, sans aucune distinction de caractère défavorable basée sur la race, la couleur, la religion ou la croyance, le sexe, la naissance ou la fortune, ou tout autre critère analogue. A cet effet, sont et demeurent prohibés, en tout temps et en tout lieu, à l'égard des personnes mentionnées ci-dessus: a) les atteintes portées à la vie et à l'intégrité corporelle, notamment le meurtre sous toutes ses formes, les mutilations, les traitements cruels, tortures et supplices; b) les prises d'otages; c) les atteintes à la dignité des personnes, notamment les traitements humiliants et dégradants; d) les condamnations prononcées et les exécutions effectuées sans un jugement préalable, rendu par un tribunal régulièrement constitué, assorti des garanties judiciaires reconnues comme indispensables par les peuples civilisés.
2) Les blessés et malades seront recueillis et soignés. Un organisme humanitaire impartial, tel que le Comité international de la Croix-Rouge, pourra offrir ses services aux Parties au conflit. Les Parties au conflit s'efforceront, d'autre part, de mettre en vigueur par voie d'accords spéciaux tout ou partie des autres dispositions de la présente Convention. L'application des dispositions qui précèdent n'aura pas d'effet sur le statut juridique des Parties au conflit. »

[11] *Tadic, Chambre d'appel, supra*, note 2 au par. 561.

temporae et *loci*. Il doit concerner l'intérêt d'au moins une partie possédant la pleine capacité juridique internationale[12].

LES CONFLITS ARMÉS INTERNATIONAUX

Dans le cas de conflit armé international, le régime de l'article 2 commun aux quatre conventions prévoit la pleine application de ces instruments. À ceci doit s'ajouter le premier *Protocole additionnel de 1977*. Celui-ci s'applique dans toutes les situations prévues à l'article 2 commun des *Conventions de Genève de 1949*[13]. À ces applications, on doit aussi ajouter les situations spécialement prévues par le paragraphe 1(4) du Protocole 1, qui permet l'application de l'ensemble des Conventions de Genève et du premier Protocole additionnel lors de conflit armé en vue de l'exercice du droit à l'autodétermination des peuples. Ces conflits sont concernant un peuple lutte contre la domination coloniale et l'occupation étrangère et contre les régimes racistes[14]. Bien que le conflit puisse avoir lieu sans la présence de deux ou plusieurs Hautes Parties Contractantes, le régime en place combattu par un peuple dans les situations précitées est considéré comme une puissance étrangère occupant le territoire. Cette logique s'inscrit dans le cadre de la situation d'occupation de tout ou partie du territoire de l'article 2 commun aux quatre *Conventions de Genève* et permet ainsi l'application de l'ensemble des conventions ainsi que du premier *Protocole additionnel*. Les conflits armés internationaux peuvent donc être subdivisés entre ceux où seules les *Conventions de Genève* sont applicables, ceux où les *Conventions de Genève* et le premier *Protocole additionnel* sont applicables du fait de son article 1 au paragraphe 3 pour les États qui l'ont ratifié et finalement ceux où les *Conventions de Genève* et le premier *Protocole additionnel* sont applicables du fait de son article 1 au paragraphe 4 permettant l'exercice du droit à l'autodétermination. Dans tous ces cas, le régime applicable prévoit une obligation de respecter et de faire respecter ces conventions et ce protocole et sanctionne criminellement sous le titre de violations graves les transgressions à ces obligations[15]. Ces violations sont donc des crimes de guerre.

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[12] K. Boustany, « La qualification des conflits en droit international et le maintien de la paix », (1990) 6 Rev. Québ. D. Int'l. à la p. 51.

[13] *Protocole 1*, *supra*, note 6 au paragraphe 3 de l'article 1 : « 3. Le présent Protocole, qui complète les Conventions de Genève du 12 août 1949 pour la protection des victimes de la guerre, s'applique dans les situations prévues par l'article 2 commun à ces Conventions. »

[14] *Ibid*., au paragraphe 4 de l'article 1 : « 4. Dans les situations visées au paragraphe précédent sont compris les conflits armés dans lesquels les peuples luttent contre la domination coloniale et l'occupation étrangère et contre les régimes racistes dans l'exercice du droit des peuples à disposer d'eux-mêmes, consacré dans la Charte des Nations Unies et dans la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies. »

[15] Les violations graves sont celles énumérées aux articles : 50 de la première Convention, 51 de la deuxième Convention, 130 de la troisième Convention et 147 de la quatrième Convention pour les quatre Conventions de Genève. Ces violations graves diffèrent quelque peu suivant le champ d'application de la convention, mais elles regroupent principalement : 1) dans le cas des blessés, malades et naufragés « …l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique ou à la santé, la destruction et l'appropriation de biens, non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire… » ; 2) dans le cas des prisonniers de guerre « …l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves

LES CONFLITS ARMÉS À CARACTÈRE NON-INTERNATIONAL

La situation diffère largement dans le cas de conflits armés à caractère non-international. D'abord, parce que l'article 3 commun aux quatre *Conventions* présente une définition *a contrario* de ce qu'est un conflit armé à caractère non-international. Ce type de conflit n'est pas expliqué en soit et doit se comprendre comme n'ayant pas deux ou plusieurs Hautes Parties Contractantes qui y prennent part et nécessite une interprétation de l'intensité du conflit et de l'organisation des parties qui distancent l'usage de la force armée du banditisme, d'insurrections inorganisées et de courte durée ou d'activités terroristes qui relèvent quant à eux du droit interne[16]. L'ensemble de ces facteurs est interprété sur la base de la territorialité, puisque ce conflit doit prendre part sur le territoire d'une partie contractante, contrairement au conflit armé international qui s'analyse en

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à l'intégrité physique ou à la santé, le fait de contraindre un prisonnier de guerre à servir dans les forces armées de la Puissance ennemie, ou celui de le priver de son droit d'être jugé régulièrement et impartialement… » ; et 3) dans le cas des personnes protégées « …l'homicide intentionnel, la torture ou les traitements inhumains, y compris les expériences biologiques, le fait de causer intentionnellement de grandes souffrances ou de porter des atteintes graves à l'intégrité physique ou à la santé, la déportation ou le transfert illégaux, la détention illégale, le fait de contraindre une personne protégée à servir dans les forces armées de la Puissance ennemie, ou celui de la priver de son droit d'être jugée régulièrement et impartialement selon les prescriptions de la présente Convention, la prise d'otages, la destruction et l'appropriation de biens non justifiées par des nécessités militaires et exécutées sur une grande échelle de façon illicite et arbitraire… ». À toutes ces violations graves doivent être adjointes celles du *Protocole 1*, soient : « qu'ils entraînent la mort ou causent des atteintes graves à l'intégrité physique ou à la santé, sont considérés comme des infractions graves au présent Protocole :

a) soumettre la population civile ou des personnes civiles à une attaque; b) lancer une attaque sans discrimination atteignant la population civile ou des biens de caractère civil, en sachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui sont excessifs au sens de l'article 57, paragraphe 2 a (iii); c) lancer une attaque contre des ouvrages ou installations contenant des forces dangereuses, ensachant que cette attaque causera des pertes en vies humaines, des blessures aux personnes civiles ou des dommages aux biens de caractère civil, qui sont excessifs au sens de l'article 57, paragraphe 2 a (iii); d) soumettre à une attaque des localités non défendues et des zones démilitarisées; e) soumettre une personne à une attaque en la sachant hors de combat; f) utiliser perfidement, en violation de l'article 37, le signe distinctif de la croix rouge, du croissant rouge ou du lion-et-soleil rouge ou d'autres signes protecteurs reconnus par les Conventions ou par le présent Protocole.

4. Outre les infractions graves définies aux paragraphes précédents et dans les Conventions, les actes suivants sont considérés comme des infractions graves au Protocole lorsqu'ils sont commis intentionnellement et en violation des Conventions ou du présent Protocole : a) le transfert par la Puissance occupante d'une Partie de sa population civile dans le territoire qu'elle occupe, ou la déportation ou le transfert à l'intérieur ou hors du territoire occupé de la totalité ou d'une Partie de la population de ce territoire, en violation de l'article 49 de la IVe Convention; b) tout retard injustifié dans le rapatriement des prisonniers de guerre ou des civils; c) les pratiques de l'apartheid et les autres pratiques inhumaines et dégradantes, fondées sur la discrimination raciale, qui donnent lieu à des outrages à la dignité personnelle; d) le fait de diriger des attaques contre les monuments historiques, les oeuvres d'art ou les lieux de culte clairement reconnus qui constituent le patrimoine culturel ou spirituel des peuples et auxquels une protection spéciale a été accordée en vertu d'un arrangement particulier, par exemple dans le cadre d'une organisation internationale compétente, provoquant ainsi leur destruction sur une grande échelle, alors qu'il n'existe aucune preuve de violation par la Partie adverse de l'article 53, alinéa b, et que les monuments historiques, oeuvres d'art et lieux de culte en question ne sont pas situés à proximité immédiate d'objectifs militaires; e) le fait de priver une personne protégée par les Conventions ou visée au paragraphe 2 du présent article de son droit d'être jugée régulièrement et impartialement.

5. Sous réserve de l'application des Conventions et du présent Protocole, les infractions graves à ces instruments sont considérées comme des crimes de guerre. »

[16] *Tadic - Chambre d'appel*, *supra*, note 2, au par. 562.

vertu de la pluralité des Hautes Parties Contractantes comme belligérants. L'article 3 commun aux *Conventions de Genève* ne considère pas la qualité des parties comme facteurs de détermination, autre que du fait qu'il n'y a pas plus d'une Haute Partie Contractante prenant part au conflit. Des groupes sectaires, politiques ou militaires organisés sont tous sujets aux obligations et protections de cet article, pour autant que le conflit rencontre l'intensité requise pour en justifier l'application. Or, cette intensité est définie comme rencontrée dès qu'une attaque est lancée, qu'un non-combattant est affecté par le conflit ou qu'une portion de territoire est capturée[17].

À ces dispositions, le deuxième *Protocole additionnel* s'applique si les conditions de son article 1 sont rencontrées. Toutefois, ces conditions sont beaucoup plus restrictives que celles de l'article 3 commun aux *Conventions*. En effet, l'article 1 du *Protocole II* pose dans son paragraphe 1 des préalables nécessaires à son application, soit : qu'il doit s'agir d'un conflit ne rencontrant pas les critères de l'article 2 communs aux *Conventions* ou ceux de l'article 1 du *Protocole I*; que ce conflit doit prendre part sur le territoire d'une Haute Partie contractante entre les forces gouvernementales et des forces dissidentes ou des groupes organisés; que ces forces ou groupes doivent avoir un commandement responsable et qu'elles doivent exercer sur une partie du territoire un contrôle tel qu'il permet de conduire des activités militaires continues et concertées[18]. Si les premières conditions sont en grande partie les mêmes que celles que nécessite l'article 3 pour être applicable, la dernière impose une barrière juridique et matérielle extrêmement difficile à franchir. La question du contrôle sur un tel territoire en est une de contrôle effectif qui est rarement rencontré dans le développement d'une force de guérilla ou dissidente. Particulièrement dans le cas de la guérilla urbaine, le protocole devient inapplicable puisque la force de ces guérilleros est la capacité de pouvoir se fondre dans la population civile alors que le territoire est contrôlé par les forces gouvernementales.

De droit positif, les combats entre groupes sectaires, sans participation de l'autorité gouvernementale, excluent l'application du *Protocole II*, celui-ci ne s'appliquant que dans ce rapport de force[19]. La seule exception qui permettrait de croire que l'article 4[20] du *Protocole II*,

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[17] A. Bouvier et M. Sassoli, *How Does Law Protect in War ?*, Genève, Comité International de la Croix-Rouge, 2000 à la p. 93.

[18] *Protocole II*, *supra*, note 6 à l'article 1 : « *Article premier -- Champ d'application matériel*
1. Le présent Protocole, qui développe et complète l'article 3 commun aux Conventions de Genève du 12 août 1949 sans modifier ses conditions d'application actuelles, s'applique à tous les conflits armés qui ne sont pas couverts par l'article premier du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), et qui se déroulent sur le territoire d'une Haute Partie contractante entre ses forces armées et des forces armées dissidentes ou des groupes armés organisés qui, sous la conduite d'un commandement responsable, exercent sur une partie de son territoire un contrôle tel qu'il leur permette de mener des opérations militaires continues et concertées et d'appliquer le présent Protocole.
2. Le présent Protocole ne s'applique pas aux situations de tensions internes, de troubles intérieurs, comme les émeutes, les actes isolés et sporadiques de violence et autres actes analogues, qui ne sont pas considérés comme des conflits armés. »

[19] A.T. Frangi, « The Internationalized NonInternational Armed Conflict in Lebanon, 1975-1990 : Introduction to Conflictology », (1993) 22 Capital U. L. Rev. à la p. 974.

[20] *Protocole II*, *supra*, note 6 à l'article 4 : « Garanties fondamentales
1. Toutes les personnes qui ne participent pas directement ou ne participent plus aux hostilités, qu'elles soient ou non privées de liberté, ont droit au respect de leur personne, de leur honneur, de leurs convictions et de leurs pratiques

adjoignant plusieurs obligations de respect et de traitement des personnes ne prenant pas ou ne prenant plus part aux hostilités, ferait maintenant partie intégrante de la coutume internationale est l'article 4[21] du *Statut du tribunal pénal international pour le Rwanda*[22]. Or, même si cela s'avérait, l'inclusion de ces protections au sein de la coutume internationale comme base de reconnaissance de la responsabilité criminelle n'entraîne pas l'application de l'ensemble du *Protocole II*, mais seulement des principes qui sont reconnus comme faisant partie de cette coutume. La plupart des juristes continuent d'interpréter le *Protocole II* comme étant inapplicable entre factions qui ne combattent pas les autorités gouvernementales[23].

Il résulte de ces différences d'application que plusieurs types de conflits armés à caractère non-international peuvent survenir. Ainsi, il y a d'abord les conflits où l'autorité étatique n'est pas impliquée, d'où l'application unique de l'article 3 commun aux *Conventions* entre les belligérants. Ensuite, il y a ceux où les forces gouvernementales sont impliquées, mais où les forces dissidentes ou groupes armés organisés ne contrôle pas suffisamment de territoire pour rencontrer l'application du *Protocole II* et où seules les garanties de l'article 3 commun aux *Conventions* sont applicables. Il y a ensuite les situations où toutes ces dispositions s'appliquent. Finalement, il y a les situations où les belligérants décident d'appliquer l'ensemble des *Conventions de Genève* et le *Protocole I* par déclaration unilatérale, malgré le caractère non-international du conflit[24].

De ces situations, on doit identifier les différentes formes de conflits du type non-international. Ceux-ci peuvent être classifiés en quatre formes, soient les conflits ayant lieu : dans un État

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religieuses. Elles seront en toutes circonstances traitées avec humanité, sans aucune distinction de caractère défavorable. Il est interdit d'ordonner qu'il n'y ait pas de survivants.
2. Sans préjudice du caractère général des dispositions qui précèdent, sont et demeurent prohibés en tout temps et en tout lieu à l'égard des personnes visées au paragraphe 1: a) les atteintes portées à la vie, à la santé et au bien-être physique ou mental des personnes, en particulier le meurtre, de même que les traitements cruels tels que la torture, les mutilations ou toutes formes de peines corporelles; b) les punitions collectives; c) la prise d'otages; d) les actes de terrorisme; e) les atteintes à la dignité de la personne, notamment les traitements humiliants et dégradants, le viol, la contrainte à la prostitution et tout attentat à la pudeur; f) l'esclavage et la traite des esclaves sous toutes leurs formes; g) le pillage; h) la menace de commettre les actes précités.
3. Les enfants recevront les soins et l'aide dont ils ont besoin et, notamment: a) ils devront recevoir une éducation, y compris une éducation religieuse et morale, telle que la désirent leurs parents ou, en l'absence de parents, les personnes qui en ont la garde; b) toutes les mesures appropriées seront prises pour faciliter le regroupement des familles momentanément séparées; c) les enfants de moins de quinze ans ne devront pas être recrutés dans les forces ou groupes armés, ni autorisés à prendre part aux hostilités; d) la protection spéciale prévue par le présent article pour les enfants de moins de quinze ans leur restera applicable s'ils prennent directement part aux hostilités en dépit des dispositions de l'alinéa c et sont capturés; e) des mesures seront prises, si nécessaire et, chaque fois que ce sera possible, avec le consentement des parents ou des personnes qui en ont la garde à titre principal en vertu de la loi ou de la coutume, pour évacuer temporairement les enfants du secteur où des hostilités ont lieu vers un secteur plus sûr du pays, et pour les faire accompagner par des personnes responsables de leur sécurité et de leur bien-être. »

[21] *Statut du Tribunal criminel international chargé de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'États voisins entre le 1er janvier et le 31 décembre 1994*, Rés.CS 995, Doc. off. CS NU, 3453e sess., (1994).

[22] J.E. Alvarez, « Rush to Closure : Lessons of the Tadic Judgment », (2001) 96 Mich. L. Rev. à la p. 2076. L'auteur précise avec force que cette vision est loin de faire l'unanimité parmi les juristes.

[23] Frangi, *supra*, note 19 à la p. 974.

[24] Ceci est permis tout au moins au paragraphe 2 de l'article 3 commun aux *Conventions de Genève*.

unitaire; dans un État fédératif, qui sont assimilables à la situation d'un État unitaire; entre des États membres d'une fédération ou d'une confédération, sans participation du pouvoir central ; et finalement entre les États membres d'une fédération ou d'une confédération et l'autorité fédérale ou confédérale[25].

Lors de conflit au sein d'un État unitaire ou d'un État fédératif ou confédératif, l'usage de la force armée par des groupes armés entre eux, sans participation de l'autorité centrale, en fait un conflit armé à caractère non-internationale qui enjoint l'application de l'article 3 commun aux *Conventions* et peut amener l'application du *Protocole II*, si les conditions sont rencontrées.

Dans le cas de conflits entre États membres d'une même fédération ou confédération, le type de conflit pourrait varier et être assimilable à la situation de conflit armé international. En effet, il est proposé par certains que la rupture des liens constitutionnels permettrait un retour de la qualité de sujet intégral du droit des gens à chacun de ces États, faisant de ces États des Hautes Parties Contractantes en soi[26].

Le conflit entre un ou des États membres d'une fédération ou d'une confédération contre l'autorité centrale pourrait quant à lui être assimilable à un conflit de caractère international, si ce ou ces États disposent d'une capacité juridique internationale reconnue par certains ou tous les États membres de la communauté internationale. Ainsi, ce sera le facteur de souveraineté externe de l'État qui déterminera la qualité du conflit[27]. Inversement, ce sera un conflit à caractère non-international si aucune forme de reconnaissance n'a été démontrée. Toutefois, il existe toujours un potentiel d'internationalisation du conflit si un ou des États tiers parties au conflit interviennent.

Au regard du droit positif, le régime applicable dans les conflits armés internationaux est donc fonction premièrement de la qualité des parties au conflit, alors que dans le cas des conflits armés non-internationaux, ce sera le facteur de territorialité qui déterminera de façon prédominante le régime applicable[28].

LES COMPOSANTES DU CONFLIT ARMÉ À CARACTÈRE NON-INTERNATIONAL « INTERNATIONALISÉ »

De la même façon que la guerre de manœuvre est fluide et constamment en évolution, la nature d'un conflit change au gré des alliances et des combats. Ainsi, un conflit au départ à caractère international peut voir le retrait des troupes étrangères transformer sa nature en conflit intra-étatique. Toutefois, dans le contexte des conflits armés par combattants interposés de la guerre froide, la situation inverse dominait la scène politique et militaire. Un conflit de caractère non-international a souvent vu sa nature évoluée en tout en en partie en un conflit armé international du fait de la participation de troupes étrangères ou d'organisations internationales au conflit. Cette internationalisation du conflit peut prendre quatre formes, soient : entre les factions d'un conflit

[25] Boustany, *supra*, note 12 à la p. 51.
[26] J. Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international*, Paris, L.G.D.J., 1958 à la p. 32.
[27] *Ibid.*, à la p. 32.
[28] Boustany, *supra*, note 12 à la p. 51.

armé non-international auxquels ces règles s'appliquent ; entre les États intervenants en faveur des parties au conflit ; entre le gouvernement et un État intervenant en faveur des forces dissidentes ; et entre l'État prêtant main-forte à l'autorité gouvernementale contre des forces dissidentes[29].

Concernant les factions entre elles, de même que le cas des États prêtant un support à l'autorité gouvernementale reconnue, certains croient que le droit des conflits armés à caractère non-international serait le droit applicable. Dans les relations entre les États interventionnistes entre eux ainsi que dans les cas où un tiers-État supporte une force dissidente contre un gouvernement sur le territoire de ce dernier, l'ensemble des *Conventions* et le *Protocole I* serait applicable[30].

Toutefois, cette division ne peut englober toutes les situations et ne semble pas prendre compte de toutes les circonstances du conflit, incluant seulement la qualité des parties et non pas le facteur de territorialité comme l'application du droit des conflits armés à caractère non-international détermine normalement un conflit.

Certains auteurs proposent une troisième voie plus souple qui s'inscrirait dans une nouvelle science : « *conflictology* » - « conflitologie », ou la science des conflits. On propose ainsi que l'étude de la nature des conflits devrait se voir séparée en quatre avenues : les conflits armés internationaux, les conflits armés à caractère non-international, les conflits armés internationaux « intra-nationalisés » et les conflits armés non-internationaux « internationalisés »[31].

Alors que le conflit armé non-international « internationalisé » comporte un élément d'extraterritorialité du fait de l'intervention étrangère, le conflit armé international « intra-nationalisé » se forme lorsqu'un conflit, armé ou non, entre États génère un conflit armé non-international sur le territoire de l'une de ces parties. L'exemple présenté est celle du conflit au Liban entre 1975 et 1990 qui s'inscrit dans le cadre global de l'expulsion des Palestiniens du monde arabe alors que se produit le conflit israélo-arabe. Le résultat serait un conflit « intra-nationalisé » alors que sa source est véritablement internationale[32].

On explique que cette caractérisation quant à la véritable source du conflit permet de refléter objectivement la réalité du conflit en cause. Toutefois, on présente par la même occasion un plaidoyer selon lequel ce type de conflit devrait être régi que par un seul régime de droit : celui des conflits armés internationaux[33]. Une telle approche mérite d'être analysée, mais elle tend à confondre le conflit dans la situation globale sans tenir compte de la situation sur le terrain.

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[29] D. Schindler, « The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols », (1979) 163 Recueil des cours de l'académie de droit international à la p. 150. Frangi, supra, note 19 à la p. 967, supporte une vision parallèle en présentant comme division les cas l'application du droit entre: les factions internes sont supportés par de tiers-États ; les États qui interviennent en support des factions ; les tiers-États supportant une force dissidente et l'autorité gouvernementale reconnue ; un tiers-État supportant un gouvernement reconnu contre une faction. Pour Frangi, le deuxième et le quatrième cas sont des cas d'internationalisation du conflit alors que les deux autres sont d'un caractère non-international.

[30] *Ibid*.

[31] Frangi, *supra*, note 19 à la p. 1037.

[32] *Ibid*. à la p. 1038.

[33] *Ibid*. aux p. 1038-1039.

Prenons en exemple les cas de l'Afghanistan, du Cambodge et du Liban. La question du régime applicable s'est posée dans ces cas du fait de la source du conflit et de la qualité des parties qui y sont intervenus sur le territoire de l'autorité gouvernementale combattant des forces dissidentes.

La situation afghane se caractérise par un conflit armé non-international suivit d'une invitation du gouvernement afghan aux forces soviétiques d'intervenir dans le conflit. Le Comité International de la Croix-Rouge (CICR) a, dans un premier temps, reconnu l'existence d'un conflit armé non-international où les garanties de l'article 3 commun aux *Conventions de Genève* étaient applicables. Une fois l'intervention soviétique effectuée, le CICR n'a pas pris d'autres positions quant à la nature du conflit, l'invitation afghane ayant potentiellement réglée la question[34].

Or, la situation après l'invasion soviétique démontre clairement l'implication de troupes de l'Armée rouge dans les combats et la puissance même de la force en présence démontre le contrôle de Moscou sur une grande partie du territoire. Or, l'article 2 commun aux *Conventions de Genève* est clair à son paragraphe 2 : les *Conventions* sont applicables si tout ou une partie du territoire est occupée, avec ou sans résistance. Le verbe utilisé n'est pas permissif, mais bien obligatoire dans l'expression «… s'appliquera également… ». Des forces étrangères au territoire afghan étaient en position de contrôle effectif du territoire et une partie des forces locales étaient incorporée sous leur commandement. En conséquence, il apparaît que le conflit est passé d'un conflit armé non-international à un conflit armé « internationalisé », auquel s'applique tout au moins les *Conventions* dans les relations entre les *mujahidins* et les forces soviétiques[35].

Dans la situation cambodgienne, les forces armés de l'Armée populaire du Vietnam ont envahi le territoire cambodgien en 1978 et capturé Phnom Penh le 7 janvier de cette année. Pour les années qui suivent, les forces vietnamiennes combattent périodiquement les forces rebelles Khmers Rouges qui subsistent sur une bonne partie du territoire et qui demeurent le gouvernement en exil reconnu aux Nations Unies, malgré l'instauration d'un gouvernement provisoire cambodgien sous occupation vietnamienne.

La première phase du conflit entre le Vietnam et les forces cambodgiennes de l'autorité centrale Khmer Rouge est certainement un conflit armé international, répondant aux conditions du paragraphe 1 de l'article 2 commun aux *Conventions de Genève*. Il s'agit d'un cas où des forces étrangères interviennent en support à des forces dissidentes contre une autorité gouvernementale reconnue. Cette intervention contrevient certainement à l'intégrité territoriale et l'autonomie politique du Cambodge, faisant d'elle un conflit armé non-international « internationalisé ».
La seconde phase du conflit est plus ambiguë. Une fois les Khmers Rouges repoussés, ils continuent d'exercer des activités militaires continues et concertées sur une partie du territoire. Un contrôle effectif est exercé sur cette partie de territoire. Puisque les combats se poursuivent entre les forces vietnamiennes et les Khmers Rouges, entre le gouvernement provisoire cambodgien et les Khmers Rouges, et entre les différentes factions Khmers, la question est de savoir quel droit s'applique à qui[36].

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[34] P.-H. Gasser, « International Non-International Armed Conflicts : Case Studies of Afghanistan, Kampuchea, and Lebanon, (1982) 31 Am. U. L. Rev. à la p.916.
[35] M.W. Reisman, « Which Law Applies to the Afghan Conflict ? », (1988) 82 A.J.I.L. à la p. 483.
[36] Gasser, *supra*, note 34 à la p. 920.

Entre les forces vietnamiennes et les Khmers Rouges le droit des conflits armés internationaux continuent de s'appliquer entre ces parties. Toutefois, entre les forces du gouvernement provisoire et les Khmers Rouges, seul l'article 3 commun aux *Conventions de Genève* est applicable, comme dans les combats entre les factions Khmers entre elles. Le statut de prisonnier de guerre n'est donc pas accordé à ces combattants, puisque le régime de l'article 3 commun prévoit des garanties de traitement, mais pas l'acquisition de ce statut et de ces protections[37].

La phase suivante, où le gouvernement provisoire devient reconnu par les Nations Unies, change la situation. Puisque les forces vietnamiennes sont invitées sur le territoire par ce gouvernement, le conflit « internationalisé » au départ deviendrait « intra-nationalisé ». D'après une majorité des commentateurs de l'époque, le conflit serait alors soumis qu'aux seules dispositions de l'article 3 commun des *Conventions de Genève*[38].

Or, cette possibilité de limiter la protection offerte au début du conflit « internationalisé » en le transformant en conflit « intra-nationalisé » ne sert aucunement les objectifs du droit international humanitaire, c'est-à-dire la protection des victimes du conflit. L'établissement d'un gouvernement provisoire, même reconnu par la communauté internationale, ne change en rien la situation d'occupation et de contrôle des forces locales par une puissance étrangère comme dans le cas de l'Afghanistan[39]. Si la situation de mixité produite dans la première phase, où le droit s'applique selon le régime des conflits armés internationaux ou non-internationaux d'après la qualité des parties, est au départ difficile à réconcilier avec la situation sur le terrain, elle permet tout de même un élargissement de la protection des victimes. Au contraire, la capacité de reconnaître une révision à la baisse du conflit par le simple changement de gouvernement produit des conséquences dramatiques qui sont irréconciliables avec les objectifs du droit international humanitaire. D'autant plus que l'article 47 de la quatrième *Convention de Genève* édicte sans ambages que :

> « Les personnes protégées qui se trouvent dans un territoire occupé ne seront privées, en aucun cas ni d'aucune manière, du bénéfice de la présente Convention, soit en vertu d'un changement quelconque intervenu du fait de l'occupation dans les institutions ou le gouvernement du territoire en question, soit par un accord passé entre les autorités du territoire occupé et la Puissance occupante, soit encore en raison de l'annexion par cette dernière de tout ou partie du territoire occupé. »[40]

Il est clair que le changement institutionnel ne change en rien la présence de forces étrangères sur le territoire cambodgien et que la participation au conflit de ces forces entraîne l'occupation du territoire. Le droit des conflits armés internationaux devait donc s'appliquer.

Quant à la situation libanaise, le conflit comportait au départ des combats entre des forces dissidentes contre les forces armées du gouvernement en place ainsi que des combats entre factions.

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[37] *Ibid*. à la p. 921.
[38] *Ibid*.
[39] Tel qu'exprimé par Reisman, *supra*, note 35.
[40] *Convention de Genève relative à la protection des personnes civiles en temps de guerre du 12 août 1949*, *supra*, note 6 à l'article 47.

La nature du conflit était clairement à caractère non-international. L'article 3 commun aux *Conventions de Genève* était donc le seul applicable.

Toutefois, l'intervention de contingents de maintien de la paix de la Ligue des États arabes change la donne, particulièrement avec l'avènement du contingent syrien, qui participe de façon toujours plus prépondérante au conflit en support de l'autorité gouvernementale libanaise. L'opinion des auteurs diffère largement sur la conséquence de cette intervention. Gasser argumente que le conflit demeure à caractère non-international, alors que Frangi le déclare international.

Leurs conclusions respectives diffèrent suivant l'importance qu'ils accordent au critère de nationalité. Gasser ne semble pas attribuer de valeur probante à ce critère en affirmant que l'on ne peut comparer les forces syriennes à une force d'occupation puisque le caractère inamical de la population envers ces forces était absent dès l'intervention et que ces forces étaient sous le commandement direct du président libanais[41]. Tout à l'opposé, Frangi déclare que l'intervention syrienne résulte en une internationalisation du conflit et que, par conséquent, l'ensemble des *Conventions de Genève* y était applicable[42]. Cette conclusion apparaît comme étant la plus apte, particulièrement du fait de l'intervention subséquente d'Israël.

Ces exemples démontrent que le conflit armé non-international « internationalisé » peut prendre plusieurs formes et qu'il peut se développer même avec la coopération du gouvernement en place ou du gouvernement établit des suites du conflit. Ils démontrent aussi que l'approche proposée de reconnaître des conflits des conflits « intra-nationalisés » auxquels le droit des conflits armés internationaux s'appliquerait est superflue, voire dangereux, car la reconnaissance de la nature du conflit demeure sujette à interprétation.

On retrouve dans ces trois cas des conditions d'application à la fois similaires et différentes. Néanmoins, des éléments communs ressortent. Ainsi, on peut affirmer que le conflit armé non-international internationalisé résulte de la fusion d'éléments politiques internes et externes[43] ; que le facteur de nationalité importe dans la caractérisation du conflit lorsqu'une intervention étrangère brime l'intégrité territoriale et la souveraineté étatique[44] ; et que les modifications institutionnelles internes n'altèrent en rien la nature même du conflit[45].

La question est maintenant à savoir quel régime de droit international humanitaire est véritablement applicable dans ces situations et à quelles conditions factuelles et légales. Trois voies furent proposées des suites de la guerre civile espagnole (1936-1939) lors de la rédaction des *Conventions*

[41] Gasser, *supra*, note 34 à la p. 922.
[42] Frangi, *supra*, note 19 à la p. 970.
[43] R. Bierzanek, « Quelques remarques sur l'applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés » dans *Études et essais sur le droit international humanitaire et les principes de la Croix-Rouge en l'honneur de Jean Pictet*, La Haye, Martinus Nijhoff, 1984 à la p. 283 : « *'the phenomenal increase in the number of unstable new States' et 'intertwining of civil and international conflict : in all of the major intenral conflicts of recent years which have provoked international tension and intervention (…) there have been genuine and major elements of internal rebellion reflecting the deep social and political turmoil, but they have been obscured and distorted by the outside intervention and counterintervention dictated by strategic and political reasons'…* ».
[44] Reisman, *supra*, note 35 à la p. 483.
[45] *Ibid*. et Gasser, *supra*, note 34 à la p. 921.

de Genève et des *Protocoles additionnels*. C'est lors de ce conflit que fut constaté 'officiellement' le caractère frauduleux de qualification de guerre civile d'un conflit entre grandes puissances par combattants interposés[46], mais ce n'est que lors de la rédaction des textes récents de droit international humanitaire qu'une solution légale pouvait être adoptée. On pouvait ainsi appliquer à ces conflits seulement l'article 3 commun aux *Conventions* et le *Protocole II* ; l'ensemble des *Conventions de Genève* et le *Protocole I* ; ou encore, étant donné la mixité du conflit, l'application selon la relation entre les belligérants[47].

Or, c'est précisément cette relation entre les belligérants qui est la source du problème d'applicabilité, particulièrement dans les cas de conflits armés non-internationaux. Il est important de se rappeler le contexte de la rédaction des *Conventions de Genève* et des *Protocoles additionnels*. Dans le cas des *Conventions*, l'article 3 visait les cas de conflits internes, telle la guerre civile espagnole. Dans le cas des *Protocoles*, il s'agissait de guerres civiles dans un contexte de décolonisation. Dans les deux cas, il s'agissait d'étendre la protection aux victimes de guerres civiles. Cette définition a perdurée jusque dans les années 1980[48]. Or, comme le fait remarquer l'ex-ambassadeur de la République fédérale socialiste de Yougoslavie à la Communauté européenne, Mihailo Crnobrnja, :

> « *The character of the war fought in Yugoslavia defies easy description. All the media and many politicians have called the bloody fighting in Yugoslavia a civil war. Actually it was and it is not the type of confrontation best described as a civil war. It has no ressemblance to the civil war fought in Spain or the United States, for example. The ethnic, rather than civil components were and are predominant in the Yugoslav case. Yet, it started of as some kind of 'civil' war in the sense that it was an internal confrontation of the people of one country…* »[49]

Il est aujourd'hui certain que l'expression « guerre civile » est dépassée, les conflits ne correspondant plus seulement en un choix du type d'État désiré par différentes factions d'une population, mais bien souvent en un désir d'annihilation de « l'autre » sur la base de l'ethnie[50]. Cette caractérisation des conflits armés non-internationaux n'est certes pas globale et plusieurs conflits ont gardé le caractère de guerre civile sur la base d'un choix politique, mais l'explosion des revendications nationalistes à la suite de la chute du communisme permet certainement de qualifier la plupart des conflits armés internes sur la base de l'ethnie. Que ce soit en Somalie, au Soudan, au Rwanda, en ex-Yougoslavie ou en Indonésie, il ne s'agit plus tant d'un choix politique, mais bien de revendication de droits pour un territoire sur la base de la nationalité. Ces conflits sont rarement restreints à une portion de la population et du territoire. Ils tendent plutôt à s'étendre, le but de ces mouvements étant d'obtenir une reconnaissance internationale pour donner une légitimité à leur revendication. L'aide matérielle, techniques ou militaire à proprement parler est souvent une

[46] C. Rousseau, « La non-intervention en Espagne », (1938) Rev. de D. Int'l et Lég. Comp. à la p. 474.
[47] R. Bierzanek, *supra*, note 43 à la p. 283.
[48] Gasser, *supra*, note 34 à la note de bas de page 1 de la page 911, datant de 1982, défini le conflit armé non-international « internationalisé » comme « *…a civil war characterized by the intervention of the armed forces of a foreign power…* ».
[49] M. Crnobrnja, *The Jugoslav Drama*, Montréal, McGill-Queen's University Press, 1996 à la p. 160.
[50] Bouvier et Sassoli, *supra*, note 17 à la p. 89.

caractéristique majeure de ces conflits, car sans cette aide ces mouvements ne pourraient en toute probabilité pas réussir à accomplir leurs objectifs.

L'AFFAIRE DU *NICARAGUA*

Dans le cas du conflit yougoslave, cette aide fut un des facteurs déterminant à savoir quel régime de droit était applicable. En vue d'évaluer l'importance de ce facteur, le TPIY s'est d'abord basé sur la jurisprudence de la Cour Internationale de Justice (CIJ).

La CIJ s'est en effet déjà prononcée sur ce type de conflit dans l'affaire du *Nicaragua*[51]. Bien que cette affaire porte d'abord sur la question de la responsabilité étatique, la CIJ s'est aussi penché sur la question de la qualification du conflit pour déterminer si des violations graves du droit international humanitaire étaient imputables.

Le raisonnement de la CIJ fut d'abord d'établir la relation entre les rebelles *Contras* contre le régime sandiniste du Nicaragua, ainsi que celle entre les États-Unis et les *Contras*. Dans le premier cas, la relation est claire : il s'agit de toute évidence d'un conflit armé non-international entre une force de guérilla et des forces gouvernementales.

Dans le second cas, la CIJ s'intéresse au lien de subordination potentiel des *Contras* face aux États-Unis. La question est de savoir si le support américain est assez important pour attribuer la responsabilité des actes des *Contras* au gouvernement américain. Pour établir ce lien, la CIJ utilise le test « d'agence »[52], c'est-à-dire de contrôle effectif :

> « …si les liens entre les *contras* et le Gouvernement des États-Unis étaient à tel point marqués par la dépendance d'une part et l'autorité de l'autre qu'il serait juridiquement fondé d'assimiler les *contras* à un organe du Gouvernement des États-Unis ou de les considérer comme agissant [pour lui]… »[53]

Selon la CIJ, ce test comporte deux critères. D'abord, l'État tierce-partie au conflit doit exercer un contrôle effectif sur le groupe militaire ou paramilitaire. Concurremment, pour que la responsabilité des actions de ce groupe soit imputable au Gouvernement des États-Unis, ce contrôle doit être exercé durant l'opération pendant laquelle les violations sont commisses[54].

Suivant cette interprétation, le degré de contrôle requis est tel qu'il requiert la participation directe d'agents américains sur le terrain pour la direction et l'exécution des violations reprochées. La CIJ déclare :

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[51] *L'affaire des activité militaires et paramilitaires au Nicaragua et contre celui-ci, (Nicaragua c. États-Unis)*, [1986] C.I.J. Rec. 1086 [ci-après *Nicaragua*].
[52] *Ibid*. au paragraphe 75.
[53] *Ibid*. au paragraphe 109.
[54] M. Sassoli et L. Olson, « Prosecutor v. Tadic (Judgement) », (2000) 94 A.J.I.L. à la p. 572.

> « …même prépondérante ou décisive, la participation des États-Unis à l'organisation, à la formation, à l'équipement, au financement et à l'approvisionnement des *contras*, à la sélection de leurs objectifs militaires ou paramilitaires et à la planification de toutes leurs opérations demeure insuffisante en elle-même, d'après les informations dont la Cour dispose, pour que puissent être attribués aux États-Unis les actes commis par les *contras* au cours de leurs opérations militaires ou paramilitaires au Nicaragua. Toutes les modalités de participation des États-Unis qui viennent d'être mentionnées, et même le contrôle général exercé par eux sur une force extrêmement dépendante à leur égard, ne signifierait pas par eux-mêmes, sans preuve complémentaire, que les États-Unis aient ordonné ou imposé la perpétration des actes contraires aux droits de l'homme et au droit humanitaire allégués par l'État demandeur. Ces actes auraient fort bien pu être commis par des membres de la force *contra* en dehors du contrôle des États-Unis. Pour que la responsabilité juridique de ces derniers soit engagée, il devrait en principe être établi qu'ils avaient le contrôle effectif des opérations militaires et paramilitaires au cours desquelles les violations en question se seraient produites… »[55]

En conséquence, la CIJ a jugé que les *Contras* n'avaient pas agit à titre d'agents du Gouvernement américain. Les seules violations reconnues perpétrées par les États-Unis furent celles de la violation des principes de la *Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unis*[56] et celles concernant la menace d'usage de la force, contraire à l'article 2(4) de la *Charte des Nations Unies*[57]. Pour que les États-Unis aient pu être imputables de toute autre responsabilité concernant les violations graves commises durant le conflit, les *Contras* auraient dû être payé par l'État américain ou encore reçu de cet État des ordres ou instructions les enjoignant de commettre ces violations. Dans le cas d'espèce, la CIJ prend la position que ces gestes peuvent avoir été commis de façon indépendante par des *Contras* et que rien dans les preuves présentées ne permet de croire en des directives qui feraient des États-Unis des parties prenantes à ces violations.

Ce faisant, la CIJ distingue deux conflits à l'intérieur des frontières du Nicaragua. Elle juge que le conflit est dualiste, au sens où un gouvernement est engagé simultanément dans un conflit armé à

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[55] *Nicaragua*, *supra*, note 51 au paragraphe 80.

[56] *Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unis*, Rés. AG 2625 (XXV), Doc. off. A.G.N.U., 25, 24 octobre 1970.

[57] *Charte des Nations Unies*, 26 juin 1945, R.T. Can. 1945 n° 7 à l'article 2(4) : « Les Membres de l'Organisation s'abstiennent, dans leurs relations internationales, de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies. ». Cette violation est intéressante en soi, car la CIJ établie ainsi un niveau très élevé d'intervention pour déterminer s'il y a emploi de la force. Ainsi, dans le cas du Nicaragua, elle conclue que l'armement, l'entraînement, le financement et l'organisation de forces rebelles ne se caractérise pas comme étant une attaque armée, donc l'emploi de la force. Elle affirme au contraire que la violation américaine est en fait celle de la menace d'utilisation de la force. T.J. Farer, « Nicaragua v. United States (Merits) », (1987) 81 A.J.I.L. à la p. 113 affirme : « … *anything other than a high and conpicuous treshold between an armed attack justifying the exercice of self-defense and lesser forms of intervention that transiently threaten freedom of choice but not the long-term territorial integrity or political independence of the state, would invite internationalization of essentially civil conflicts.* »

caractère non-international contre les rebelles *contras* et dans un conflit armé international contre les États-Unis. Il en résulte que :

> « … Le conflit entre les forces *contras* et celles du Gouvernement du Nicaragua est un conflit armé 'ne présentant pas un caractère international'. Les actes des contras à l'égard du Gouvernement du Nicaragua relèvent du droit applicable à de tels conflits, cependant que les actions des États-Unis au Nicaragua et contre lui relèvent des règles juridiques intéressant les conflits internationaux… »[58]

Cette position est la même que celle adoptée par le CICR[59], de même que par plusieurs auteurs[60], dans des conflits présentant des conditions similaires[61]. Le raisonnement de la CIJ va à l'encontre de plusieurs décisions, tel l'affaire de *Kenneth P. Yeager*, l'affaire *Stephens* et l'affaire *Loizidou c. Turquie*[62], mais il s'inscrit toutefois dans la logique de sa propre décision dans *Téhéran*[63].

Dans cette affaire, la question était à savoir si les étudiants révolutionnaires avaient agis comme agents de l'État iranien. La cour a déterminé que la responsabilité du Gouvernement iranien ne découlait pas des actions des étudiants lors de la prise de l'ambassade américaine et de la détention du personnel de l'ambassade comme otages, mais bien du fait que l'État iranien a clairement sanctionné ces gestes rétroactivement. D'après la CIJ, les étudiants devinrent alors agents *de facto* de l'Iran[64]. Toutefois, ceci concerne la responsabilité étatique et non pas la responsabilité individuelle dans un conflit armé. Or, la question de la responsabilité individuelle jouit d'une jurisprudence garnie par le comportement nazi et japonais durant la deuxième guerre mondiale.

La question des agents de l'état fut notamment évaluée en profondeur dans l'affaire *Eichmann*[65]. Dans cette affaire, l'accusé tenta de s'absoudre de ses actes sous la défense d'ordres supérieurs. La Cour du district de Jérusalem rejeta d'emblée cette défense sur la base du *Justice Trial*[66]. Ceci fut

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[58] *Nicaragua*, *supra*, note 51 à la p. 3.
[59] CICR, *Rapport annuel du CICR pour l'année 1988*, Genève, CICR aux p. 16 et 17 dans le cas de l'Angola.
[60] Gasser, *supra*, note 34 concernant les cas de l'Afghanistan, du Cambodge et du Liban.
[61] C. Greenwood, « International Humanitarian Law and the Tadic Case », (1999) 7 Eur. J. Int'l L. à la p. 271.
[62] Respectivement : *Kenneth P. Yeager v. Islamic Republic of Iran*, 17 Iran-U.S. Claims Tribunal Reports, 1987, vol. IV, 92, *United States v. Mexico (Stephens Case)*, Reports of International Arbitral Awards, vol. IV, pp. 266-267, *Loizidou v. Turkey (Merits)*, Eur. Court of H. R., jugement du 18 décembre 1996 (40/1993/435/514).
[63] *Personnel diplomatique et consulaire des États-Unis à Téhéran (États-Unis c. Iran)*, [1980] C.I.J. Rec. 1.
[64] *Ibid*. à la p. 17.
[65] *Attorney-General of the Government of Israel v. Adolf Eichmann*, jugement du 12 décembre 1962, (1968) 36 Int'l. L. Rep. à la p. 12.
[66] *In re Altstötter and Others*, (1947) 14 Annual Digest à la p. 286 : « *(6) Pleas of Superior Orders and of Obedience to the Law of the State. The Tribunal pointed out that the accused submitted that they should not be found guilty, because they had acted within the anthority and by the command of German Law and decrees, but that Control Council Law no. 10, Article II, 1 (c), provided that crimes against humanity should be punished whether or not the acts were in violation of the domestic laws of the country where perpetrated. Article II, paragraph 4 (b), also provided : 'The fact that any person acted pursuant to the order of his government or of a superior order does not free him from responsibility for a crime, but may considered in mitigation (…) We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge.* »

confirmé par la Cour Suprême d'Israël[67], mais avec une distinction claire entre les actes d'agents de l'État et la défense d'ordres supérieurs. La Cour voit trois différences importantes. D'abord, la défense d'acte étatique réfère au fait que l'agent de cet État ne peut être tenu personnellement responsable de l'acte commis et que l'État en assume la responsabilité. La défense d'ordre supérieur signifie que la personne qui commet l'acte est effectivement la personne responsable mais que cette responsabilité est absoute ou diminuée parce qu'elle a agit sous la contrainte d'un ordre émit par une autorité compétente à laquelle cette personne est subordonnée, justifiant ainsi son acte[68].

Ensuite, alors que la défense d'acte étatique repose sur la base de l'autorité suprême de l'État qui ordonne ou autorise un acte, celle de la défense d'ordre supérieur n'implique pas nécessairement cette forme d'autorité. Elle justifie simplement l'acte sur la base de l'ordre d'un supérieur immédiat à la personne qui commet l'acte et qui est requise d'obéir[69].

Finalement, alors que l'acte étatique présume une marge discrétionnaire pour l'application de directive émanent de l'autorité étatique, la défense d'ordre supérieur résulte *ex hypothesis* dans l'absence d'alternative de la personne qui commet l'acte[70]. On doit donc comprendre que si l'individu dépasse les demandes de l'État qui a émit une directive ou qui a omis d'en émettre à

Puis, à la p. 289 : « *(12) Act of State and Responsibility for War Crimes. 'Each defendant has pleaded in effect as a defense the act of State as well as superior orders in justification or mitigation of any crime he may have committed (…) The basis for individual liability for crimes committed and the law relating thereto was clearly and ably declared by the I.M.T. judgment, which reads as follow : 'It was submitted that international law is concerned with the actions of sovereign States, and provided for no punishment for individuals ; and further, that where the act in question as act of State, those who carry it out are not personally responsible, but are protected by the doctrine of sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as States has long been recognised (…) As we have said, the defendants are charged with specific overt acts against named victims : they are charged with criminal participation in governmentally organised atrocities and persecutions unmatched in the annals of history (…) We shall, in pronouncing snetence, give due consideration to circumstances of mitigation and to the proven character and motives of the respective defendants…* ». Cette dernière citation reprend le paragraphe 1 de la quatrième partie du jugement du Tribunal militaire international dans *In re Goëring and Others*, (1946) 13 Annual Digest à la p. 221, mais exclut toutefois la portion suivante *in fine* : « *…In the recent case Ex Parte Quirin (1942, 317 U.S. 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage. The late Chief Justice Stone, speaking for the Court, said : 'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.' (…) Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.* ».
Cette interprétation du droit fut appliqué de manière identique dans le cas du Tribunal militaire international de Tokyo. Dans *In re Takashi Sakai*, (1946) 13 Annual Digest à la p. 223, le Tribunal militaire chinois des crimes de guerre a reconnu l'accusé coupable de crime de guerre contre la population chinoise en affirmant : « *(2) Plea of Superior Orders. – 'Agressive war is an act against world peace. Granted that the defendant participated in the war on orders of his Government, a superior order cannot be held to absolve the defendant from liability for the crime.* »

[67] *Attorney-General of the Government of Israel v. Adolf Eichmann*, jugement d'appel du 29 mai 1962, (1968) 36 Int'l. L. Rep. à la p. 277.

[68] *Ibid*. à la p. 313.

[69] *Ibid*.

[70] *Ibid*. et dans *In re Goëring and Others*, *supra*, note 65 à la p. 222. Le Tribunal militaire international exprime clairement l'importance de l'alternative en affirmant : « *…The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible…* ».

l'encontre d'actes contraires aux obligations étatiques, la responsabilité étatique est acquise si l'État tolère le comportement de cet individu.

Dans le cas de l'affaire de *Téhéran* et dans l'affaire du *Nicaragua*, la logique de la CIJ veut que la responsabilité iranienne soit contractée par l'approbation et le support public du gouvernement iranien des activités des étudiants révolutionnaires contre les ressortissants américains[71]. Cette logique suit mal les principes établis par le Tribunal militaire international de Nuremberg et les jugements subséquents. En ne reconnaissant la responsabilité iranienne que lors de l'approbation publique des actes révolutionnaires en 1979 et en ne reconnaissant aucune responsabilité américaine pour les actes des contras au Nicaragua en 1986, la CIJ applique les critères concernant les ordres supérieurs à des cas où ce sont les actes étatiques qui sont en cause. Elle va ainsi à l'encontre de la seule jurisprudence applicable portant sur le droit international humanitaire et la responsabilité individuelle et étatique, établissant un contre-courant concernant la responsabilité étatique.

Alors que la CIJ reconnaît clairement la participation américaine dans le financement, l'entraînement, l'équipement, l'armement et l'organisation des forces *contras*, elle fixe le contrôle opérationnel comme étant le seuil de la responsabilité étatique[72]. Pourtant, suivant la doctrine des actes étatiques, il est facile d'interpréter les actions prouvées comme un mandat ou tout au moins un accord tacite du Gouvernement américain aux forces *contras* pour mener un conflit armé à son profit contre un gouvernement reconnu. Si cela n'entraîne pas une démonstration de la volonté américaine de voir des forces commettre des infractions graves au droit international humanitaire dans le but d'accomplir ses objectifs géostratégiques, cette interprétation démontre clairement le caractère international d'un conflit non-international au départ.

L'AFFAIRE *TADIC*

L'arrêt *Tadic* reprend ces principes lors du procès en Chambre de première instance du TPIY. Pour considérer la nature du conflit, la Chambre de première instance fonde son argumentation en large partie sur les conclusions de l'affaire du *Nicaragua*. Dans *Tadic*, les questions factuelles étaient de savoir qui étaient les belligérants, quels étaient leurs liens avec les États qui supportaient leurs causes respectives et quel était le conflit en cause. Il faut d'abord mentionner que l'affaire *Tadic* concerne le conflit en Bosnie-Herzégovine et non pas les conflits serbo-croates au Krajina ou les courtes guerres de sécession de la Slovénie et de la Croatie contre l'autorité centrale Yougoslave[73].

En juillet 1991, la Slovénie et la Croatie ont déclaré unilatéralement leurs indépendances respectives de l'autorité centrale de la République fédérale socialiste de Yougoslavie. Les conflits ont crée des mouvements importants de migrations (souvent forcées) et de multiples atrocités ont été rapportées. La Bosnie-Herzégovine, géographiquement prise entre les parties à ce conflit, a reçu un important nombre de ces réfugiés. Devant la crise politique yougoslave, le gouvernement de Bosnie-Herzégovine a considéré en octobre 1991 de déclarer aussi son indépendance. La population

[71] *Personnel diplomatique et consulaire des États-Unis à Téhéran (États-Unis c. Iran)*, *supra*, note 63 à la p. 17.
[72] F.V. Boyle, « Appraisal of the ICJ's Decision : Nicaragua v. United States (Merits) », (1987) 81 A.J.I.L. à la p. 86.
[73] Pour une description complète des causes et de la chronologie de ces conflits, voire M. Crnobrnja, *supra*, note 49 et S.P. Ramet, *Balkan Babel*, Oxford, Westview Press, 1996.

serbe, habitant 50% du territoire bosniaque et déjà aliénée par la situation dans les deux républiques ayant déclarée leur indépendance, s'est fortement opposée à une telle déclaration. Durant l'automne de 1991, plusieurs « républiques autonomes » furent auto-proclamées par les résidents serbes. Le Gouvernement de la République de Bosnie-Herzégovine a alors tenté de rétablir son autorité sur ces territoires. Les résidents serbes ont défendu leurs positions par la force des armes. Il s'est alors produit un conflit armé non-international prolongé pendant lequel les deux parties se sont réorganisées et ont cherché des appuis extérieurs, combattant rarement mais violemment.

D'abord, la République de Bosnie-Herzégovine, puissamment encouragée par l'Allemagne sous le principe du droit à l'autodétermination, a cherché la reconnaissance internationale. Dans ce but, elle a réorganisé son système politique et monétaire ainsi que créé sa propre armée. Quant aux Serbes résidant en Bosnie-Herzégovine, ils ont progressivement constitué une milice armée permettant de combattre les forces de l'autorité bosniaque sous une autorité politique dirigée de Banja Luka (qui changera ensuite pour Pale) et nommée *Republika Srpska* (RS).

Le but de la Bosnie-Herzégovine était d'obtenir la reconnaissance internationale avec son territoire intact, alors que celui des Serbes était de garder un lien constitutionnel avec la République fédérale socialiste de Yougoslavie.

À la fin de mars 1992, le Parlement de la République de Bosnie-Herzégovine a déclaré son indépendance. Des bandes armées serbes ont alors posé des barricades dans la capitale Sarajevo. Plusieurs tirs de franc-tireurs firent quelques dizaines de victimes. Toutefois, le conflit ne prit véritablement d'ampleur qu'avec la reconnaissance de l'État de Bosnie-Hézergovine une semaine après. Les forces de l'Armée Populaire de Yougoslavie (JNA) ont tenté d'intervenir pour rétablir l'autorité yougoslave et le conflit a dégénéré rapidement.

Le 19 mai 1992, suite a plusieurs bavure de la JNA, la pression internationale a forcé le retrait de cette force. Lors de ce retrait, plusieurs officiers et soldats serbes et monténégrins décident de demeurer en *Republika Srpska* et joignent l'armée nouvellement formée par cette autorité politique, la VRS. Le 22 mai 1992, les Nations Unies ont reconnu la République de Bosnie-Herzégovine[74]. La question du type de conflit en cause est d'autant plus compliquée du fait de l'implication et du retrait de la JNA, lors duquel elle change son nom pour VJ (armée yougoslave). Lorsque celle-ci est partie au combat sur le territoire d'une république reconnue par quelques États, doit-on considérer le conflit comme international ou comme ayant un caractère non-international ? Les théories vues ci-haut permettraient potentiellement d'assimiler ce type de conflit à une situation de conflit armé « internationalisé », mais rien n'assure cette conclusion. Ceci est compliqué davantage par le retrait de ces forces. Le conflit deviendrait-il alors un conflit armé international « intra-nationalisé » ? C'est ce problème que le TPIY a dû résoudre dans l'affaire *Tadic*.

[74] *Tadic*, *supra*, note 1 au paragraphe 118 : « Malgré le retrait de la JNA de Bosnie-Herzégovine annoncé en mai 1992, des éléments actifs de l'ex-JNA, devenue la VJ, coopérèrent avec la VRS en Bosnie-Herzégovine. Des avions et des pilotes de la VJ notamment restèrent en Bosnie-Herzégovine après le retrait du mois de mai et travaillèrent avec la VRS tout au long de 1992 et 1993. Le général Ratko Mladic, anciennement commandant du 2e District militaire de la JNA, basé à Sarajevo, devint le commandant de la VRS à la suite de l'annonce du retrait. »

Dusko Tadic était un résidant serbe de Bosnie-Herzégovine, tenancier d'un café et activiste politique (nationaliste serbe) qui a joint volontairement la VRS. Il a été arrêté en février 1994 en Allemagne, sous l'inculpation d'avoir commis, en juin 1992 dans le camp d'Omarska en ex-Yougoslavie, des infractions comprenant notamment le meurtre, le viol, la torture et la complicité de génocide[75]. Toutefois, la culpabilité de *Tadic* ne pouvait être établie, pour certains crimes, que si un conflit armé international existait au moment de la commission de ces actes, puisque le régime applicable aux conflits armés à caractère non-international ne peut reconnaître de caractère criminel qu'aux actes qui sont reconnus comme partie de la coutume internationale sur la base de l'article 3 commun aux *Conventions de Genève*. La Chambre de première instance :

> « …[d]evrait-elle conclure à l'existence du degré nécessaire de contrôle effectif exercé par la République fédérale de Yougoslavie (Serbie et Monténégro) sur les opérations militaires des forces armées de la *Republika Srpska* ? Si oui, malgré les changements intervenus dans la structure hiérarchique des forces des Serbes de Bosnie après le 19 mai 1992 et, en particulier, l'établissement d'une force armée séparée - la VRS - à cette date ou postérieurement, la conclusion appropriée serait que la VRS n'était rien de plus qu'un organe ou agent *de facto* du Gouvernement de la République fédérale de Yougoslavie (Serbie et Monténégro). »[76]

Pour déterminer ce contrôle effectif sur la base de l'affaire du *Nicaragua*, la Chambre de première instance s'est attardée à trois éléments : le lien entre le Gouvernement de la *Republika Srpska* et la République fédérale socialiste de Yougoslavie (devenue République fédérale de Yougoslavie le 27 avril 1992) ; la création de la VRS et le transfert de responsabilité de la JNA (VJ après le 22 mai 199) ; et le lien entre la VRS et la République fédérale de Yougoslavie.

La Chambre de première instance examine le premier lien en affirmant d'emblée que la VRS et la *Republika Srpska* sont des entités juridiques distinctes de la VJ et du Gouvernement de la République fédérale de Yougoslavie, à tout le moins en date du 19 mai 1992[77]. Elle présente toutefois la possibilité de la responsabilité du Gouvernement yougoslave, si les forces et le Gouvernement serbe de Bosnie-Herzégovine agissent comme agent de cet État. Elle applique donc le test de contrôle effectif de l'affaire du *Nicaragua*. Elle distingue toutefois ces deux situations par la description des forces en présence. Dans le cas des *Contras*, il s'agissait d'une force armée effectuant des coups de main, alors que la VRS étaient une force d'occupation. Ensuite, la question était de savoir si, par le retrait de la JNA du territoire bosniaque et la création de la VRS, le gouvernement yougoslave s'était suffisamment distancé pour qu'il ne soit pas imputable des actes commis par ces forces. Quant à connaître le lien entre la VRS et la JNA/VJ, la Chambre de première instance reconnaît la force probante de la preuve et juge que la JNA a joué un « …rôle d'importance cruciale dans la dans création, l'équipement, le ravitaillement, l'entretien et la dotation en effectif … » de plusieurs unités de la VRS[78]. Mais, fidèle au jugement de l'affaire *Nicaragua*, elle affirme que cela n'est pas suffisant. Elle énonce clairement que :

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[75] *Ibid.* au paragraphe 7.
[76] *Ibid*. au paragraphe 600.
[77] *Ibid*. au paragraphe 584.
[78] *Ibid*. au paragraphe 585.

> « …il n'est ni nécessaire ni suffisant de démontrer simplement que la VRS était dépendante, et même complètement dépendante, de la VJ et de la République fédérale de Yougoslavie (Serbie et Monténégro) pour les nécessités de la guerre. Il faut aussi démontrer que la VJ et la République fédérale de Yougoslavie (Serbie et Monténégro) exerçaient le potentiel de contrôle inhérent à cette relation de dépendance ou que la VRS s'était elle-même placée sous le contrôle du Gouvernement de la République fédérale de Yougoslavie (Serbie et Monténégro). »[79]

Elle s'attarde plutôt à la question de la direction et du contrôle des opérations. Bien que la preuve démontre clairement une coopération établie entre l'état-major de l'armée yougoslave et de l'état-major général de l'armée de la *Republika Srpska*, par laquelle ces deux forces coordonnaient leurs opérations, la Chambre de première instance reste dans le sillon des critères de direction et de contrôle effectif durant les opérations. Pour cette raison, elle conclut :

> «… Coordination n'a pas la même signification que direction et commandement. Le seul autre élément de preuve présenté par l'Accusation était que, en plus du passage de toutes les communications de l'échelon supérieur de la VRS par des dispositifs de protection contre le décodage à Belgrade, une liaison pour les communications quotidiennes était établie et maintenue entre le quartier général de l'état-major général de la VRS et l'état-major général de la VJ à Belgrade. L'Accusation n'a présenté aucun autre moyen de preuve sur la nature de ce lien… »[80]

Elle fonde de plus ce raisonnement sur la différence factuelle de l'affaire du *Nicaragua* où les commandants et dirigeants politiques *contras* étaient choisis et nommés par les États-Unis, alors que dans le cas des Serbes de Bosnie-Herzégovine ces responsables politiques ont été élus au suffrage universel par la population serbe de cet État[81].

En conséquence, et en l'absence de ce qu'elle juge être une absence de preuves directes suffisantes pour démontrer le lien de contrôle effectif des autorités de Belgrade sur le comportement serbe de *Republika Srpska*, la Chambre de première instance juge que les actes reprochés ne peuvent être considérés comme ayant été commis pour le compte de la République fédérale de Yougoslavie[82]. Elle considère plutôt que les objectifs de ces deux entités étaient largement complémentaires et que, de ce fait, il n'était pas nécessaire pour cet État d'exercer un contrôle effectif, mais simplement de coordonner ses activités avec la *Republika Srpska*[83]. Pour la Chambre de première instance :

> « … Si l'on peut dire ainsi que la République fédérale de Yougoslavie (Serbie et Monténégro), par l'intermédiaire de la dépendance de la VRS à l'égard du ravitaillement en matériel par la VJ, avait la capacité d'exercer une influence

[79] *Ibid*. au paragraphe 588.
[80] *Ibid*. au paragraphe 598.
[81] *Ibid*. au paragraphe 599.
[82] *Ibid*, au paragraphe 602.
[83] *Ibid*. au praragraphe 604.

> considérable et peut-être même un contrôle sur la VRS, aucun élément de preuve ne permet à cette Chambre de conclure que la République fédérale de Yougoslavie (Serbie et Monténégro) et la VJ ont jamais dirigé ou, pour cette raison, jamais ressenti la nécessité d'essayer de diriger les opérations militaires effectives de la VRS, ou d'influencer ces opérations au-delà de ce qui aurait découlé naturellement de la coordination des objectifs et activités militaires par la VRS et la VJ aux échelons supérieurs. En bref, tandis que, comme dans l'affaire *Nicaragua*, les éléments de preuve dont dispose cette Chambre de première instance montrent clairement que les "diverses formes d'assistance apportées" aux forces armées de la *Republika Srpska* par le Gouvernement de la République fédérale de Yougoslavie (Serbie et Monténégro) étaient "cruciales pour la poursuite de leurs activités" et, comme durant les premières années d'activité des *contras*, ces forces dépendaient presque entièrement du ravitaillement de la VJ pour exécuter leurs opérations offensives, la preuve que la République fédérale de Yougoslavie (Serbie et Monténégro) par l'intermédiaire de la VJ, y compris, dans certaines circonstances, un soutien militaire direct, "a utilisé le potentiel de contrôle inhérent dans cette dépendance" est de même insuffisante. »[84]

La Chambre de première instance considère donc que la VRS et la *Republika Srpska* ne peuvent être considérées comme organes ou agents de l'État yougoslave. La conséquence juridique de cette détermination est évidemment que la Chambre de première instance considère que la nature du conflit après le 19 mai 1992 est celle d'un conflit armé à caractère non-international. Puisque seul l'article 3 commun aux *Conventions de Genève* s'appliquent, excluant donc l'application du concept de personne protégée de la quatrième *Convention de Genève*. Elle absout donc *Tadic* d'une douzaine de chefs d'accusation[85]. Elle retient toutefois sa culpabilité sur la base du droit international coutumier qui reconnaît, suivant l'*Arrêt de la Chambre d'Appel* que :

> « …Tous ces facteurs confirment que le droit international coutumier impose une responsabilité pénale pour les violations graves de l'article 3 commun, complété par d'autres principes et règles générales sur la protection des victimes des conflits armés internes, et pour les atteintes à certains principes et règles fondamentales relatives aux moyens et méthodes de combat [d]es conflits … »[86]

Il apparut évident aux Procureurs du TPIY que cette décision, si elle n'était pas contestée, aurait des ramifications extrêmement importantes quant à qualification des conflits armés et diminuerait ainsi les chances de voir justice être rendue. Ils ont donc porté ce jugement en appel. Un appel interlocutoire fut aussi fait par la défense. La Chambre d'Appel du TPIY a reçu de plein droit ces appels.

Elle analyse l'appel sur deux motifs de fond : la nature du conflit et le statut des victimes de *Tadic*. Dès ses premières pages, la Chambre d'Appel reconnaît certains faits juridiques. D'abord, que seul

[84] *Ibid*. au paragraphe 605.
[85] *Ibid*. au paragraphe 608.
[86] *Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence*, Case No.: IT-94-1-A, 15 October 1998.

un conflit armé international peut entraîner l'application de l'article 2 de son *Statut*[87], pour des violations graves aux *Conventions de Genève* et aux *Protocoles additionnels*, lorsque ces derniers sont applicables. Elle reconnaît de plus que un conflit armé non-international peut devenir internationalisé ou encore avoir lieu pendant qu'un conflit armé international a lieu[88]. Elle reconnaît que la nature du conflit en Bosnie-Herzégovine avant le 19 mai 1992 était de nature internationale et que le test adéquat pour établir si la nature du conflit après cette date était de caractère non-international est celui du test d'agence[89]. De ce point, elle diverge toutefois des critères choisis par la Chambre de première instance et sur la conclusion juridique à porter. Elle précise que le test de l'affaire du *Nicaragua* n'est pas convaincant sur deux aspects : parce que ce test ne respecte pas la logique de la responsabilité étatique et parce qu'il diverge de la pratique juridique et de la pratique des États.

En ce qui concerne la logique de la responsabilité étatique, elle affirme que la pratique des États est claire quant à l'inclusion des forces irrégulières sous l'expression de combattants appartenant à une partie au conflit[90] et que cette inclusion réfère implicitement au test de contrôle. Néanmoins, elle énonce que les critères composants ce test quant au degré de contrôle requis pour imputer la responsabilité sont plus souples que ceux avancés dans l'affaire du *Nicaragua* et soutenus par la Chambre de première instance dans l'affaire *Tadic*[91].

La Chambre d'Appel distingue ainsi trois situations où un individu ou un groupe peut entraîner la responsabilité étatique d'un tiers-État. Elle mentionne d'abord le cas d'individus chargés officiellement par un État d'exécuter un acte illégal sur le territoire d'un autre État. Ensuite, il y a le cas où un individu ou un groupe est chargé par un État de commettre des actes légaux sur le territoire d'un autre État, mais où cet individu ou ce groupe commettent une violation aux obligations de l'État mandant. Finalement, il existe les cas où un groupe d'individus structurellement organisé en hiérarchie qui agissent pour le compte d'un État sans instructions spécifiques de la part de cet État, sur le territoire d'un autre État[92].

Dans le cas d'individus chargés officiellement, la Chambre d'Appel affirme que le lien de subordination, soit des instructions spécifiques prouvant qu'il a agit *de facto* comme agent de cet État, doivent être émises pour entraîner la responsabilité de cet État[93].

Pour les individus chargés de poser des actes légaux, sur la base d'une analogie de la responsabilité des États pour les actes commis par leurs représentants, l'État mandant serait tenu responsable des

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[87] *Statut du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie*, 25 mai 1993, publié dans le *Rapport du Secrétaire-Général en accord avec le paragraphe 2 de la Résolution du Conseil de Sécurité 808* (1993), (S/25704) et approuvé par la Résolution du Conseil de Sécurité 827 (1993), 25 mai 1993.
[88] *Tadic –Appel*, supra, note 2 au paragraphe 84.
[89] *Ibid*. au paragraphe 87.
[90] *Ibid*. au paragraphe 94.
[91] *Ibid*. au paragraphe 96.
[92] *Ibid*. respectivement aux paragraphes 118, 119 et 120.
[93] *Ibid*. au paragraphe 118.

actes légaux et *ultra vires* de ses mandataires[94]. La preuve de ce mandat n'est pas difficile à faire, puisque la capacité officielle des individus est reconnue publiquement.

Quant aux groupes organisés qui agissent pour le compte d'un État sans instructions spécifiques, la Chambre d'Appel voit une situation où le lien de dépendance doit en effet être démontré. Toutefois, ce lien ne concerne pas l'individu en soi, mais le groupe dans son ensemble. Ainsi, elle affirme :

> « *…If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State...* »[95]

La Chambre d'Appel base son raisonnement sur l'article 10 et 7 du *Projet d'articles de la Commission de droit international sur la responsabilité des États*[96]. Dans les cas envisagés par ces articles, la responsabilité étatique est imputable lorsqu'une personne dûment reconnue sous la loi applicable d'un pays contrevient à ses obligations. Par extension du raisonnement, les individus agissant *ultra vires*, ou les groupes sujets au contrôle d'un État et qui contreviennent aux obligations internationales entraînent la responsabilité de l'État ayant autorité sur eux[97].

En ce qui a trait aux divergences de la décision de la CIJ dans l'affaire du *Nicaragua* face à la pratique juridique et celle des États, la Chambre d'Appel est très critique face au test de contrôle. Elle affirme que la pratique étatique a déjà envisagé le cas où un degré de contrôle moindre que celui que la CIJ a requis. Elle énonce que la pratique distingue clairement entre les cas de groupes d'individus inorganisés de ceux où il y a des groupes organisés.

Alors que dans les premiers cas des instructions spécifiques doivent être prouvées, dans le cas des groupes organisés tels des groupes militaires ou paramilitaires une telle preuve n'est pas requise[98]. La Chambre d'Appel maintien que le support financier et matériel n'est effectivement pas une preuve décisive qui permet d'établir le lien d'agent d'État, mais que la preuve d'un contrôle sur l'ensemble des opérations et la coordination des activités militaire était déterminante pour déclarer

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[94] *Ibid*. au paragraphe 119.
[95] *Ibid*. au paragraphe 120.
[96] *Projet d'articles de la C.D.I. sur la responsabilité des États* aux articles 10 et 7.
[97] *Tadic-Appel*, *supra*, note 2 au paragraphe 123. Il est à noter que, même si la Chambre d'Appel ne fait pas de référence au Tribunal militaire international de Nuremberg, l'article 9 de l'*Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal*, 82 R.T.N.U. 280, entrée en vigueur le 8 août 1945 prévoyait la responsabilité criminelle individuelle pour des groupes étatiques jugés criminel dans les termes suivants : « … *Art. 9. At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization. After receipt of the Indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organization will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organization. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard…* ». Il est logique que le raisonnement inverse soit tout aussi valable quant à la commission de crime de guerre ou de crime contre l'humanité. Ce fut d'ailleurs le cas dans de multiples affaires que la Chambre d'Appel énumère, dont *In re Ohlendorf and Others (Einzatzgruppen Trial)*, (1948) 15 Annual Digest à la p. 667
[98] *Tadic – Appel*, *supra*, note 2 au paragraphe 125.

le conflit « internationalisé »[99]. Conséquemment, la Chambre d'Appel a renversé les conclusions de la Chambre de première instance et a reconnu Dusko Tadic coupable de neuf des douze chefs d'accusation dont il avait été acquitté.

CONCLUSIONS

L'arrêt de la Chambre d'Appel du TPIY pose des jalons forts appréciables concernant les conflits armés non-internationaux « internationalisés ». D'abord, elle en reconnaît l'existence. Selon elle, les conflits armés non-internationaux « internationalisés » peuvent exister de façon mixte ou de façon globale. C'est-à-dire qu'il peut exister à la fois un conflit international et un conflit non-international sur le territoire, ou encore que l'internationalisation du conflit est telle que l'ensemble du conflit peut être considéré comme international.

Ensuite, elle énonce que le critère de qualification du conflit dépend du lien de dépendance et de contrôle d'un tiers-État sur des individus ou des groupes partis au conflit. Elle quantifie ce lien de dépendance comme étant un lien de contrôle et/ou de coordination sur l'ensemble des opérations dans le cas de groupes organisés et hiérarchisés. Elle ne retient le critère élevé de contrôle effectif durant la conduite des opérations que lorsqu'il s'agit de groupes désorganisés auquel des instructions spécifiques auraient été donnés, auquel cas ces instructions doivent être prouvées.

Finalement, la Chambre d'Appel démontre clairement la dualité du TPIY comme avant-gardiste et tributaire des Tribunaux militaires internationaux. Si elle interprète différemment certains critères de responsabilité criminelle sur la base de son *Statut*, elle base son raisonnement juridique en grande partie sur les cas de la deuxième guerre mondiale.

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[99] *Ibid*. au paragraphe 131. Elle base cet argument sur les cas des affaires *Kenneth P. Yeager*, *Stephens* et *Loizidou c. Turquie*, *supra*, note 62, ainsi que sur celle de l'affaire du *Personnel diplomatique et consulaire des États-Unis à Téhéran*, *supra*, note 63, tel que discutées ci-haut. Ce raisonnement a déjà été appliqué dans l'affaire *Jorgic*, Federal Court of Justice (Bundesgerichtshof), jugement du 30 avril 1999, (3 StR 215/98), (non-publié) p. 19-20 and 23, archivé à la bibliothèque Tribunal international, où la Cour fédérale maintien le l'arrêt de la *Oberlandesgericht* de Dusseldorf concluant à l'existence d'un conflit armé non-international internationalisé du fait de cette coordination militaire. La Chambre d'Appel conclue que : « …*Where the question at issue is whether a single private individual or a group that is not militarily organised has acted as a de facto State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved ex post facto by the State at issue. By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts…* ».

Cette continuité s'inscrit bien dans le développement constant, quoique parfois trop lent, du droit international humanitaire et augmente les chances que justice soit rendue aux victimes des conflits armés.

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