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Privileging Asymmetric Warfare (Part III)?:
The Intentional Killing of Civilians under International Humanitarian Law

Samuel Estreicher*

I. A SIMPLE TRUTH

The overarching objective of the law of armed conflict, also called international humanitarian law (IHL), is the minimization of harm to civilians during such conflicts.¹ Yet, at least in some circles, there is a reluctance to make evaluative judgments about non-state groups who, in a variety of contexts, intentionally target civilians as a tactic in pursuing their political or military objectives. Sometimes, such non-state actors target civilians affiliated with the enemy state simply as a way of demoralizing or harming the enemy. In other situations, these actors attack civilians living in the enemy state's (or a third party state's) territory without regard to whether they are citizens or otherwise affiliated with the enemy state.² As is true with regard to locating and deploying their military assets among dense civilian gatherings, the non-state group's purpose is to provoke a military response from the enemy state that will result in the death of civilians in the areas the non-state group controls or occupies. Such deaths help recruit

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¹ Article 51 of Additional Protocol I to the Geneva Conventions of 1949 recognizes that that "civilians shall enjoy general protection against danger arising from military operations"; "shall not be the object of attack"; and shall be free of "[i]ndiscriminate attacks." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UN Treaty Ser 3, 26 (1977) (API). Article 51.3 states that these protections are afforded to civilians "unless and for such time as they take a direct part in hostilities." *Id.* Whether this definition reflects customary international law and further issues concerning the line between civilians and noncombatants are beyond the scope of this paper. See generally Ryan Goodman and Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum*, 42 *NYU J Intl L & Pol* 637 (2010).

² See, for example, United Nations Assistance Mission in Afghanistan, *Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict*, *1-2 (July 2011), online at <http://unama.unmissions.org/Portals/UNAMA/Documents/2011%20Midyear%20POC.pdf> (visited Oct 21, 2011) (UNAMA Midyear Report):

UNAMA documented 1,462 civilian deaths in the first six months of 2011 The main trends that led to rising civilian casualties in early 2011 were increased and widespread use of improvised explosive devices [(IEDs)], more complex suicide attacks, an intensified campaign of targeted killings, increased ground fighting, and a rise in civilian deaths from air strikes, particularly by Apache helicopters. In total, 80 percent of all civilian deaths in the first half of 2011 were attributed to Anti-Government Elements IEDs and suicide attacks, tactics used by Anti-Government Elements, accounted for nearly half . . . of all civilian deaths and injuries.

new enlistees from the outraged civilian population and stoke outcry from certain sectors of the international community.

In an earlier article, I highlighted the duties of defenders to avoid locating their military forces among civilians in view of the fact that the risk of harm to civilians in armed conflicts is a joint product of what both defenders and attackers do and has to be regulated as such.³ In this article, I evaluate the status under IHL of the intentional killing of civilians during armed conflicts.

It might appear that the thesis of this article is so incontestable that there is no need to present it. Presumably, everyone knows that the intentional killing of civilians, whether during an armed conflict or not, is morally reprehensible; and if it occurs during a conflict between states or between a state and an armed non-state group, it must also violate applicable international law. But, at least with regard to non-state actors, this is often not the reaction, even among the otherwise well-informed. In the early days after the attack on the United States of Sept 11, 2001, Stephen Jukes, then of the Reuters news service, declared that Reuters would not use the word “terrorist” to describe the attackers, repeating the old adage: “One man’s terrorist is another man’s freedom fighter.”⁴ To avoid any perception of prejudging the morality or legality of the non-state actor’s intentional killing of civilians for political or military purposes, the established media prefer to call the perpetrators “attackers,” “militants,” “insurgents” or (when they are committed to dying) “suicide bombers.”

It is all very well to say that it depends on the operative definition whether non-state groups or individuals that kill civilians for political or military purposes are properly labeled “terrorists.”⁵ Whether that label fits is largely beside the point. What is clear, however, is that the

³ Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties under International Humanitarian Law*, 11 Chi J Intl L 425 (2011).

⁴ For a discussion of Jukes’ internal memorandum, see Susan D. Moeller, *A Moral Imagination: The Media’s Response to the War on Terrorism*, in Stuart Allan and Barbie Zelizer, eds, *Reporting War: Journalism in Wartime* 59, 68 (Routledge 2004). See also *Reuters Handbook on Journalism*:

We may refer without attribution to terrorism and counter-terrorism in general but do not refer to specific events as terrorism. Nor do we use the adjective word terrorist without attribution to qualify specific individuals, groups or events. Terrorism and terrorist must be retained when quoting someone in direct speech. When quoting someone in indirect speech, care must be taken with sentence structure to ensure it is entirely clear that they are the source’s words and not a label. Terrorism and terrorist should not be used as single words in inverted commas (e.g. “terrorist”) or preceded by so-called (e.g. a so-called terrorist attack) since that can be taken to imply a value judgment. Use a fuller quote if necessary. Terror as in terror attack or terror cell should be avoided, except in direct quotes.

Report the subjects of news stories objectively, their actions, identity and background. Aim for a dispassionate use of language so that individuals, organizations and governments can make their own judgment on the basis of facts. Seek to use more specific terms like “bomber” or “bombing”, “hijacker” or “hijacking”, “attacker” or “attacks”, “gunman” or “gunmen” etc.

Reuters Handbook on Journalism 417 (Reuters 2008).

⁵ There is currently no universally accepted definition of terrorism; rather, there are about a dozen anti-terrorism conventions which prohibit specific unlawful acts in particular contexts, such as hostage-taking, sabotage of aircraft and ships, attacks at airports, and so on. See generally Michael P. Scharf, *Defining Terrorism As the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence between International Humanitarian Law and International Criminal Law?*, 7 ILSA J Intl & Comp L 391, 392–93 (2001); Geoffrey Levitt, *Is “Terrorism” Worth Defining?*, 13 Ohio N U L Rev 97 (1986); Thomas M. Franck and Bert B. Lockwood Jr, *Preliminary Thoughts towards an International Convention on Terrorism*, 68 Am J Intl L 69 (1974). UN Security Council Resolution 1373 is an important document in highlighting international concern and urging international cooperation

value-neutral terminology that is used does not fit. Such non-state actors may as a matter of semantics be “attackers,” “militants,” “insurgents” or “bombers” but these terms are wholly inadequate. These individuals or groups have intentionally killed noncombatants; they are killers and murderers. Their intentional killing of noncombatants is not excused by morality or (to be developed below) by international law, whether or not their cause may one day prevail and the group on whose behalf they act may one day receive some form of international recognition.⁶

These murderers stand condemned under the domestic law of the victim’s country, but often their acts are not likely, as a practical matter, to be judged under that law. This result occurs because they operate from, or can readily repair to, a territory that they or a state that gives them shelter controls. International law provides a potent means for evaluating and judging such acts during such conflicts.

The fact that these acts stand condemned under international law as well as the domestic law of the victims’ country, even where the acts are in furtherance of an otherwise legitimate cause, also serves to undermine the claim that the intentional killing of civilians during an armed conflict is somehow less reprehensible than outright acts of murder. Mobilizing the moral educative force of international law to delegitimize this tactic of warfare is critical to realizing the underlying objective of IHL: minimizing harm to civilians during armed conflict.

The focus of this paper is on Common Article 3 of the Geneva Conventions of 1949—the strongest, least debatable basis for applying certain IHL principles to those who kill noncombatants during internal armed conflict. It seeks to demonstrate that Common Article 3 binds both a state and those seeking its violent overthrow or other seditious object. The binding force of Common Article 3 flows both from the positive premise that a state can legislate on behalf of all those within its territory, even its armed opponents, and from the fact that Common Article 3 reflects customary international law (CIL).

II. ARE NON-STATE ACTORS BOUND BY IHL?

to combat terrorism. See UN Security Council Resolution 1373, UN Doc No S/RES/1373 (2001). Unfortunately, it does not define the critical terms “terrorism” and “terrorist acts.” See *id.*

US law defines the term “international terrorism” to reach violent acts that (1) would be unlawful if committed in the United States, (2) “appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping,” and (3) “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum” 18 USC § 2331(1). For purposes of the Secretary of State’s reporting obligations, “terrorism” is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”; “international terrorism” is defined as “terrorism involving citizens or the territory of more than 1 country” 22 USC § 2656f(d)(1)–(2). The latter definition, less complicated than the former, comes close to the definition of “intentional killing of civilians” used in this paper.

⁶ The laws of war at present do not recognize a “just war” principle that overrides legal (and moral) strictures against the killing of civilians in armed conflict. Additional Protocol I to the Geneva Conventions has been criticized for introducing “jus in bello” considerations in its express inclusion of particular conflicts in defining “armed conflicts” (Art 1.4) and its broadening of the concept of armed combatants (Art 44.3). See Samuel Estreicher, *Privileging Asymmetric Warfare (Part I)?: Defender Duties under International Humanitarian Law*, 11 Chi J Intl L 425, 429 & n 7 (2011). For a discussion of the distinction between *jus in bello* and *jus ad bellum*, see Samuel Estreicher, *Privileging Asymmetric Warfare (Part II)?: The “Proportionality” Principle under International Humanitarian Law*, 12 Chi J Intl L 143, 147–50 (2011).

At one time it would have been difficult to find any basis in international law to judge the acts of non-state actors. Traditionally, the principal office of international law was to provide ground rules for interpreting treaties and discerning rules of custom governing the relationships between states. Partly in reaction to the atrocities committed during World War II and the immediate postwar era, IHL, as embodied in the Geneva Conventions of 1949, assumed some features of a regulatory regime—imposing obligations on state parties that do not depend on reciprocal actions by other states and that could not be enforced by armed reprisals. Through Article 3, which is common to all four of the Geneva Conventions (Common Article 3), IHL further imposed obligations on states and non-state actors engaged in conflicts internal to the state.

A. Common Article 3 of the Geneva Conventions of 1949

A truly remarkable advance in IHL, Common Article 3 provides in pertinent part:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) *violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture*

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

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁷

While Common Article 3 does not define the term “armed conflict,” the scope of the term should be informed by the overall purpose of the provision, which is to protect civilians during warfare between the state and armed non-state opposition groups. The International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case stated: “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between

⁷ Geneva Convention Relative to the Treatment of Prisoners of War (1949), 75 UN Treaty Ser 135 (1950) (emphasis added). As President Reagan stated in his message of January 29, 1987, to the US Senate transmitting Additional Protocol II of 1977, see note 9 below, which elaborates upon Common Article 3: “This protocol makes clear that any deliberate killing of a noncombatant in the course of a non-international armed conflict is a violation of the laws of war and a crime against humanity, and is therefore also punishable as murder.” *Message from the President of the United States Transmitting the Protocol II Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Noninternational Armed Conflict*, 100th Cong, 1st Sess (1987), 26 ILM 561 (1987).

governmental authorities and organized armed groups or between such groups within a State.”⁸ While the *Tadić* formulation is not perfect—it is not clear why a “protracted” conflict is required in every instance—the ICTY is right not to import into the definition of “armed conflict” any requirement that the non-state opposition group must exercise effective control over a territory, a requirement that does not seem relevant to the underlying offense.⁹

As the US Supreme Court has noted, Common Article 3 uses “[t]he term ‘conflict not of an international character’ . . . in contradistinction to a conflict between nations.”¹⁰ This provision applies “even if the relevant conflict is not one between signatories,”¹¹ and without regard to any principle of reciprocity. It is generally agreed that the reference to “each Party to the conflict” is not limited to “High Contracting Parties,” given that the very purpose of the provision is to deal with conflicts between a signatory and a non-state party occurring in the territory of one of the signatories.¹²

⁸ *Prosecutor v Tadić*, Case No IT-94-1-AR72, Appeal on Jurisdiction (ICTY Oct 2, 1995), 35 ILM 32, ¶ 70 (1996).

⁹ In Additional Protocol II of 1977 to the Geneva Conventions (AP II), which deals with noninternational armed conflicts, the definition of “armed conflict” does contain such an element. Article 1(1) provides that AP II reaches armed conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed group which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Art 1, 1125 UN Treaty Ser 609, 611 (1979) (AP II). Moreover, Article 1(2) states that AP II does 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.” *Id.* See generally Sandesh Sivakumaran, *Identifying an Armed Conflict Not of an International Character*, in Carsten Stahn and Göran Sluiter, eds, *The Emerging Practice of the International Criminal Court* 363 (Martinus Nijhoff 2009). Professor Sivakumaran maintains that the ICTY’s practice is to apply the principles of AP II while ignoring this threshold requirement. See Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict*, 22 Eur J Intl L 219, 254 (2011) (“Customary rules of Additional Protocol II have been applied to all internal armed conflicts and not simply those meeting the Additional Protocol II threshold.”). On March 7, 2011, US Secretary of State Hillary Rodham Clinton informed the Senate Foreign Relations Committee of the Administration’s intention to seek the Senate’s advice and consent regarding ratification of AP II, “which elaborates upon safeguards provided in Common Article 3 and includes more detailed standards regarding fair treatment and fair trial.” Hillary Rodham Clinton, Secretary of State, *Reaffirming America’s Commitment to Humane Treatment of Detainees*, Press Statement (Mar 7, 2011) PRN 2011/343, online at <http://www.state.gov/secretary/rm/2011/03/157827.htm> (visited Oct 15, 2011). See also White House Press Office, *New Actions on Guantanamo and Detainee Policy* (Mar 7, 2011), online at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guantanamo-and-detainee-policy> (visited Oct 15, 2011).

¹⁰ *Hamdan v Rumsfeld*, 548 US 557, 629 n 62 (2006), citing Jean S. Pictet, ed, *Commentary on the III Geneva Convention Relative to the Treatment of Prisoners of War* 37 (Intl Comm Red Cross 1960). For an early assessment of the *Hamdan* ruling, see Samuel Estreicher and Diarmuid O’Scannlain, *Hamdan’s Limits and the Military Commissions Act*, 23 Const Commentary 403 (2006).

¹¹ *Hamdan*, 548 US at 629.

¹² As a purely textual matter, conceivably a non-state group engaged in conflict with a High Contracting Party might be regarded as a High Contracting Party once it becomes a state and accedes to the Conventions; under this view, Common Article 3 would apply only after such an accession occurred. This reading is difficult to square, however, with the penultimate paragraph of the Article, which envisions “special agreements” between “[t]he Parties to the conflict” to bring the Convention into force. It is also difficult to reconcile with the applicable commentary: Article 3 “applies to non-international conflicts only, and will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention.” Pictet, ed, *Commentary on the III Geneva Convention* at 34 (cited in note 10). Consider also the attempted accession, in June, 1989, of the Palestine Liberation Organization (PLO), on behalf of the Government of the State of Palestine, to the Geneva Conventions and the Additional Protocols of 1977. On

How can a non-state group, especially a group committed to the military overthrow of the authority of a signatory state, be bound by an agreement of that state to an international convention? One answer often given lies in the principle of legislative jurisdiction: the signatory state has authority to bind the state and all who are within its territory.¹³ But that answer is not fully satisfying, as it suggests one can be a responsible agent for one's armed adversary.

A more satisfactory answer might be found in the status of the international law rule or principle in question. If the rule or principle is accepted as a matter of customary international law (CIL), its binding force flows not from any exercise of putatively delegated authority of a state to rule for its nationals and residents, but from the settled expectations of the community of nations.¹⁴ Although custom is, at bottom, also a product of state action, a CIL-based approach avoids the anomaly of a state acting directly as agent for its sworn enemy.¹⁵

It is widely agreed that Common Article 3 reflects binding international custom.¹⁶ Customary law is created by the interplay of two elements: (1) the widespread opinion of the nation states that they are bound by a particular rule or principle as a matter of legal obligation (*opinio juris*); and (2) the concrete reflection of this opinion in the practice of the states. The *opinio juris* element would seem amply evidenced by the nearly universal accession of world's nations to the Geneva Conventions, including to Common Article 3.

International tribunals have recognized the provision's status as customary law. In the *Nicaragua* case, the International Court of Justice (ICJ) called Common Article 3 "a minimum

September 13, 1989, the Swiss Federal Council stated that it was not in a position to decide whether the PLO's letter constituted an instrument of accession, "due to the uncertainty within the international community as to the existence or non-existence of a State of Palestine." See *Palestine and the Geneva Conventions*, 30 Intl Rev Red Cross 64, 64 (1990).

¹³ Jean Pictet's explanation seems to turn on the fact that the insurgent group seeks to represent the same territory as the signatory state: "How could insurgents be legally bound by a Convention which they had not themselves signed? But if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country. The 'authority' in question can only free itself from its obligations under the Convention by following the procedure for denunciation laid down in Article 142." Pictet, ed, *Commentary on the III Geneva Convention* at 37 (cited in note 10).

The relevant considerations here are ably assessed in Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford 2006); Sandesh Sivakumaran, *Binding Armed Opposition Groups*, 55 Intl & Comp L Q 369 (2006); Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge 2002); Michael Bothe, *War Crimes in Non-International Armed Conflicts*, in Yoram Dinstein and Mala Tabory, eds, *War Crimes in International Law* 293, 302–03 (Martinus Nijhoff 1996); Yoram Dinstein, *The International Law of Civil Wars and Human Rights*, 6 Israel YB Hum Rts 62 (1976).

¹⁴ I criticize the conceptual underpinnings of CIL in *Rethinking the Binding Effect of Customary International Law*, but I take more of a realist perspective in *A Post-Formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes*. Compare Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 Va J Intl L 5 (2003), with Samuel Estreicher, *A Post-Formation Right of Withdrawal from Customary International Law?: Some Cautionary Notes*, 21 Duke J Comp & Intl L 57 (2010).

¹⁵ Some non-state groups, though with a less-than-perfect record of adherence to Common Article 3, purport to obey aspects of the laws of war. See, for example, *The Islamic Emirate of Afghanistan: The Layha [Code of Conduct] for Mujahids*, 93 Intl Rev Red Cross 103, 107–08 (2011) (Intl Comm Red Cross, trans), discussed in 2011 UNAMA Midyear Report at v–vi (cited in note 2).

¹⁶ There is no reason to believe that recognition of the obligations of armed non-state groups to adhere to the basic principles of Common Article 3 necessarily confers lawful combatant status on those groups. Common Article 3 does not itself confer combatant immunity. See Pictet, ed, *Commentary I on the III Geneva Convention* at 50 (Common Article 3 "does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party.").

yardstick” reflecting “elementary considerations of humanity.”¹⁷ And in the *Tadić* case, the ICTY recognized that “Common Article 3 contains . . . the substantive rules governing internal armed conflict”;¹⁸ “customary law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict”;¹⁹ and that

it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks . . . 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.²⁰

To be sure, violations of Common Article 3 do not constitute a “grave breach” under the Geneva Conventions; hence, states are under no obligation to prosecute such violations.²¹ However, such violations are plainly criminal offenses under other international instruments. Thus, the Statute of the ICTY treats the “willful killing” of persons protected under the Geneva Conventions as a grave breach of those Conventions, in violation of Article 2 of the Statute, and it regards “murder,” “when committed in armed conflict, whether international or internal in character, and directed against any civilian population,” as a “crime against humanity” in violation of Article 5 of the Statute.²² Further, the Statute of the International Criminal Tribunal for Rwanda (ICTR), created to deal with genocide within the country, criminalizes violations of Common Article 3.²³

It is particularly telling that the Rome Statute establishing the International Criminal Court (ICC), which has a broader jurisdiction than either the ICTY or the ICTR, makes criminal

¹⁷ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar v US)*, 1986 ICJ 14, ¶ 218 (June 27, 1986), quoting *Corfu Channel (UK v Alb)*, 1949 ICJ 4, 22 (Apr 9, 1949). The ICJ’s reasoning in *Nicaragua* regarding the customary status of Common Article 3 is challenged in Theodor Meron, *The Geneva Conventions as Customary Law*, 81 Am J Intl L 348 (1987).

¹⁸ *Tadić*, 35 ILM 32, ¶ 103 (cited in note 8).

¹⁹ *Id.* at ¶ 134.

²⁰ *Id.* at ¶ 127. The *Tadić* opinion should be evaluated in light of Article 3 of the Statute of the ICTY, which gives the ICTY authority “to prosecute persons violating the laws and customs of war.” See Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, Art 3 (Sept 2009), online at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf (visited Sept 21, 2011) (compiling resolutions authorizing the ICTY). The Tribunal, in turn, has read Article 3 of its Statute to incorporate, among other sources, “violations of common Article 3 and other customary rules on internal conflicts.” *Tadić*, 35 ILM 32, ¶ 89 (cited in note 8). See generally Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 Am J Intl L 238 (1996).

²¹ See *Tadić*, 35 ILM 32, ¶ 79 (cited in note 8); Bruno Simma and Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 Am J Intl L 302, 311 (1999) (“[T]he Geneva Conventions and [the 1977] Protocols I and II do not include violations of common Article 3 (which deals with internal conflicts) in the regime of ‘grave breaches.’”).

²² Updated Statute of the ICTY, Arts 2, 5 (cited in note 20).

²³ See Statute of the International Criminal Tribunal for Rwanda (1994), Art 4, online at <http://www.unictr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> (visited Oct 16, 2011) (compiling resolutions authorizing the ICTR). The offense here is separate from Articles 2 and 3, which deal with genocide and crimes against humanity, respectively, and instead includes, according to Article 4(a), “[v]iolence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment”

“serious violations of article 3 common to the four Geneva Conventions of 12 August 1949,” and includes, inter alia, the following acts committed against noncombatants: “Violence to life and person, in particular murder of all kinds, mutilations, cruel treatment and torture”²⁴ The related ICC *Elements of Crimes* sets forth in Article 8(2)(c)(i)-1 the war crime of murder. The elements of this crime are:

1. The perpetrator killed one or more persons.
2. Such person or persons were either *hors de combat*, or were civilians, medical personnel, or religious personnel taking no active part in the hostilities.
3. The perpetrator was aware of the factual circumstances that established this status.
4. The conduct took place in the context and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.²⁵

Not every violation of Common Article 3 is prosecutable. The institutional capacity of the various international criminal tribunals necessarily limits prosecutions to serious, systemic offenses. But the texts of the statutes establishing the ICTY and ICTR, and of the Rome Statute, are sufficient in themselves to provide evidence both of *opinio juris* and state practice.²⁶ In sum, given the foregoing and the evidence of state practice applying international humanitarian rules to internal conflicts, there is a more than sufficient basis to brand the intentional killing of civilians by states and non-state actors during armed conflicts as violations of international law.

B. Other Sources

It should be emphasized that Common Article 3 should be read together with the remainder of the Geneva Conventions of which it is a part as well as the 1977 Additional Protocols I and II (AP I and II). In particular, many of the provisions of AP I, which is in terms

²⁴ Rome Statute of the International Criminal Court, United Nations, Art 8(2)(c), 37 ILM 1002, 1008 (July 17, 1998). See generally Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)*, 12 J Conflict & Sec L 419 (2008).

²⁵ *Report of the Preparatory Commission for the International Criminal Court: Addendum Part II Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/1/Add.2 at 37–38, Art 8(2)(c)(i)-1 (2000). Similarly, the US regards the commission of murder during armed conflict by a member of the US armed forces as a “grave breach of common Article 3” and a prosecutable “war crime.” See 18 USC § 2441(c)–(d). “Murder” is defined as follows: “The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.” 18 USC § 2441(d)(1)(D).

²⁶ See Simma and Paulus, 93 Am J Intl L at 312–13 (cited in note 21) (citations omitted):
We know of no case in which a national, let alone an international, tribunal prior to the ICTY’s establishment has exercised jurisdiction over war crimes in internal conflicts irrespective of the nationality of the victim and the perpetrator. On the other hand, the Tribunals create further international practice. Moreover, widespread acceptance of the jurisprudence of the Tribunals represents evidence that the punishment of perpetrators of offenses against international humanitarian law in internal offenses is nowadays permitted by a general principle of law.

limited to interstate armed conflicts, are widely treated as reflecting CIL. A central provision is Article 51, which provides in pertinent part:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.
4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
 - (a) Those which are not directed at a specific military objective;
 - (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;and consequently, in each such case, are of a nature to strike military objectives and civilians . . . without distinction.²⁷

Moreover, Article 75 of AP I, which the United States (a non-signer of AP I) has stated it will apply out of a “sense of legal obligation” and thus suggests may reflect CIL,²⁸ lists “murder” as among the acts that “are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilians or by military agents.”²⁹

Article 51 principles of protecting civilians and adhering to the distinction between civilians and combatants during armed conflicts and Article 75’s prohibition of murder of civilians during armed conflict “in any place whatsoever” are widely recognized as reflecting customary law. In the *Nuclear Weapons* advisory opinion, the ICJ stated in pertinent part:

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population . . . and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.

...

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and “elementary considerations of humanity” . . . that the Hague and Geneva

²⁷ AP I, Art 51 (cited in note 1). Similarly, Art 13(2) of AP II states: “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack.” 1125 UN Treaty Ser at 615 (cited in note 9).

²⁸ See White House Press Office, *3 (cited in note 9). John Bellinger, the Bush Administration’s Legal Advisor to the State Department, believes the US and “other nations should apply Article 75 as a legal obligation in all conflicts.” John B. Bellinger III and Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 Am J Intl L 201, 207 (2011).

²⁹ AP I, Art 75.2 (cited in note 1).

Conventions have enjoyed broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.³⁰

Although the ICJ speaks in terms of the obligations of states, it does so to identify customary rules binding on non-consenting states and non-state groups.

In 2005, the International Committee of the Red Cross (ICRC) published an extensive survey of state practice, finding that the principles of protecting civilians and distinguishing between civilians and combatants are widely followed as a matter of customary law, whether the conflict is international or wholly internal in scope:

Military manuals which are applicable in or have been applied in non-international armed conflicts specify that a distinction must be made between combatants and civilians to the effect that only the former may be targeted. To direct attacks against civilians in any armed conflict is an offence under the legislation of numerous States.

...

No official contrary practice was found with respect to either international or non-international armed conflicts.³¹

The 2005 study has been properly criticized for undue reliance on *opinio juris* but it is doubtful that as to these central principles there is any official contrary practice.³²

III. WHAT IS TO BE DONE?

The following five concrete steps that should be considered. These five steps directly address the media and public perception of the killing of civilians. First, in law—and to the extent law hopes to play a moral, educative role—it is important that we call things by their proper name. The first step is intellectual honesty. Whether one favors the merits of the underlying cause or not, the intentional killing of civilians is a moral and legal wrong, and when it occurs, it should be called murder, not militancy, not political agitation, not insurgency, not attacks. It may in some sense be any or all of those things but it is, in its relevant sense, murder, even if it is politically motivated murder.

Second, the international community has gone far in branding torture as an intransgressible international wrong, an absolute wrong not admitting of any justification. This

³⁰ Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, 1996 ICJ 226, ¶¶ 78–79 (July 8, 1996).

³¹ Jean-Marie Henckaerts and Louise Doswald-Beck, eds, 1 *Customary International Humanitarian Law* 6 (Cambridge 2005). See also Jean-Marie Henckaerts and Louise Doswald-Beck, eds, 2 *Customary International Humanitarian Law Part 1* (Cambridge 2005); Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 Intl Rev Red Cross 175 (2005).

³² For initial criticism of the ICRC study, see W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 Am Socy Intl L Proc 208 (2005); Letter from John Bellinger III, Legal Adviser, US Dept of State, and William J. Haynes, General Counsel, US Dept of Defense, to Dr. Jakob Kellenberger, President, Intl Comm of the Red Cross, Regarding Customary International Law Study (Nov 3, 2006), 46 ILM 514 (2007).

branding occurred well before the widespread adoption of the Convention against Torture.³³ As one court noted, “the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.”³⁴ Like treatment has to be accorded to states and non-state opposition groups that intentionally kill civilians in the course of armed strife.³⁵

Third, the United States and like-minded countries should not limit their reporting³⁶ and moral suasion activities to “terrorism,” a spectral term that has defied international consensus.³⁷ Although states may have their own reasons for targeting terrorism, from the vantage of the overall objective of IHL the central task is to minimize harm to civilians during armed conflicts. From this standpoint, it is extraneous to ask whether the non-state group that targets civilians as part of its armed campaign against the enemy also intends to spread terror or demoralize the enemy. Rather, we can safely assume they intend to accomplish the likely consequences of their acts.

Fourth, states that provide refuge or a territorial base for non-state groups that routinely violate Common Article 3 should be the subject of appropriate sanctions.³⁸

Fifth, members of the UN Security Council and other states with peacekeeping responsibility must always factor into their deliberations the needs of international peace and order, which may require recognizing the claims of non-state groups that emerge victorious in internal conflict, irrespective of whether they have violated international norms. However, the quest for recognition should turn not only on whether the group effectively controls its territory and is capable of meeting future international obligations, but also on its record in according human rights to persons under its control and in respecting humanitarian law during the course of its struggle. If the overarching objective of IHL is to minimize harm to civilians during armed conflict, the international community has to cautiously consider those to whom it bestows international legitimacy.³⁹

IV. CONCLUSION

This paper is a call for moral and legal clarity. Politically inspired murder of civilians during armed conflict is murder, pure and simple, and should be regarded as such by the world. Such acts, whether they occur in interstate or wholly internal armed conflicts, violate not only the domestic law of the victim’s state and of the state where the acts occur, but also well-

³³ General Assembly Resolution 39/46, UN Doc A/RES/39/46 (1984) (Convention against Torture).

³⁴ *Filartiga v Pena-Irala*, 630 F2d 876, 890 (2d Cir 1980).

³⁵ Although it could well qualify for such status, there is no need in the present context to decide whether the intentional killing of civilians has been recognized as a “jus cogens” or peremptory norm overriding contrary treaty provisions. See Vienna Convention on the Law of Treaties (May 23, 1969), Art 53, 1155 UN Treaty Ser 331, 344 (1980): “A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

³⁶ The reporting mandate of the UNAMA is a good first step. See UNAMA Midyear Report at *5 (cited in note 2).

³⁷ See note 5.

³⁸ See generally Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (Hart 2006).

³⁹ See generally Oona Hathaway and Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 Yale L J (forthcoming 2011).

established treaty and customary law. Murder of civilians is not a legitimate part of armed struggle, and cannot be justified by pleas of needing to right wrongs suffered at the hands of other states, or equalizing the balance of forces between the weak and the strong. The murderer of civilians, like the pirate, slave trader, or torturer, merits the condemnation of all organized society, of all mankind.