THE CONCEPT OF BELLIGERENCY IN INTERNATIONAL LAW

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I. Introduction

The concept of belligerency in International Law deals with occurrences of civil war. Certain conditions of fact, arising during such armed conflicts, classically gave rise to recognition of belligerency. These facts include: the existence of civil war within a state, beyond the scope of mere local unrest; occupation by insurgents of a substantial part of the territory of the state; a measure of orderly administration by that group in the area it controls; and observance of the laws of war by the rebel forces, acting under responsible authority.[2] Traditionally, upon recognition of the status of belligerency, third party States assumed the obligations of neutrality regarding the internal conflict[3] and treated the two parties to the conflict as equals—each sovereign in its respective areas of control.[4] Furthermore,

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2. 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 249 (H. Lauterpacht ed., 7th ed. 1952) [hereinafter OPPENHEIM]; MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE 18-19 (1959); DIGEST OF INTERNATIONAL LAW 501-03 (Marjorie M. Whiteman ed., 1963); GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 703 (6th ed. 1992); Rosalyn Higgins, *Internal War and International Law, in* 3 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 81, 89 (Cyril E. Black & Richard A. Falk ed., 1971); JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 34 (1974); Dietrich Schindler, *State of War, Belligerency, Armed Conflict, in* 3 THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3 (Antonio Cassese ed., 1979).

3. PHILIP C JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 53 (1968); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 291 (1952).

4. LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION 39 (1978); Bond, *supra* note 2, at 51.

upon recognition of their belligerency, insurgents were afforded important benefits but also responsibilities. Captured members of the rebel armed forces, as well as soldiers of the incumbent government, were entitled to prisoner of war status.[5] Insurgent ships were admitted into the ports of recognizing States. These ships had the right to visit and search at sea.[6] Contraband could be confiscated and the ports of both parties to the conflict could be blockaded.[7] In fact, the conflict was viewed in terms of an international armed conflict rather than one that was internal[8] and the humanitarian laws of warfare became applicable to the hostilities.[9] The recognition of a belligerency was therefore of significance as it allowed the combatants and civilians affected by combat much wider protections than those granted to combatants and civilians during other internal armed conflicts.

Notwithstanding its implicit utilitarian advantages, the doctrine of belligerency has fallen into disuse. The American Civil War was the last conflict in which insurgents were positively recognized as belligerents. More than half a century later, during the Spanish Civil War of 1936-1939, a debate arose as to whether to grant the insurgents similar recognition; since that conflict the doctrine has not been applied to any of the internal armed conflicts in which it might have been relevant. It was not addressed directly in the post World War II Geneva Conventions[10] or in their supplementary 1977 Protocols.[11] Chapter II of this article will provide a short synopsis of the historical background of the doctrine to illustrate the milieu

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5. VON GLAHN, *supra* note 2, at 703; KELSEN, *supra* note 3, at 291.

6. CHARLES G. FENWICK, INTERNATIONAL LAW 146 (3rd ed. 1948).

7. *Id.*

8. GEORGE GRAFTON WILSON, HANDBOOK OF INTERNATIONAL LAW 46 (3rd ed. 1939); KELSEN, *supra* note 3, at 291-92.

9. Richard A. Falk, *Janus Tormented: The International Law of Internal War*, *in* INTERNATIONAL ASPECTS OF CIVIL STRIFE 185, 205 (James N. Rosenau ed., 1964); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1321 (YVES SANDOZ et al. eds., 1987) [hereinafter PROTOCOLS COMMENTARY].

10. The Geneva Convention for the Amelioration of the Wounded and Sick in the Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217; the Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316; the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516. Unless otherwise stated, in this article these conventions will be collectively referred to as the Geneva Conventions.

11. Protocol I Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts, *opened for signature* at Berne, 12

in which it was employed in the past and how, perhaps, it might still be employed in the future. This will be followed in Chapter III by a theoretical as well as practical examination of the preconditions for application of the doctrine. The relevant questions are whether insurgents can attain the status of belligerency merely by achieving the four preconditions stated above or whether some form of external recognition must accompany the realization of these criteria. Moreover, if some form of recognition is required, a further analysis will endeavor to suggest from whom such recognition should come.

An assumption will be made that the doctrine is still germane, particularly because it might serve to expand the legal protections bestowed on the victims of certain types of internal armed conflicts. If this is true, before it can be applied to any conflict, additional study will be necessary as to the viability of its use as a valid instrument of international law, bestowing the full spectrum of humanitarian law rights and privileges on the parties to relevant internal armed conflicts. Chapters IV and V will therefore focus on the post World-War II legal regimes created to deal with internal armed conflicts, specifically Article 3 common to the four Geneva Conventions (Common Article 3) and Protocol II. As will be shown, these important treaties might be interpreted as having effectively annulled the doctrine of belligerency. An attempt will be made to re-view these interpretations from both a theoretical and historical point of view to examine whether other interpretations, more conducive to the continued existence of the notion of belligerency are plausible.

Some sixty years have passed since the Spanish Civil War. Scholars assert that there is no practical need for discussion of the doctrine of belligerency because it is outdated,[12] particularly since modern civil wars tend to be less centralized, less territorial, and guerrilla in nature[13]and the four established criteria for its recognition seem not to cover contemporary situations. Therefore, some contend that recognition of the status has lost all practical significance[14] and that belligerency has become a dead letter in

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11. (continued) Dec. 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; and Protocol II Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 26 I.L.M. 561 (1987) [hereinafter Protocol II].

12. HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 165 (1992).

13. JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 268 (1979).

14. ROSALYN HIGGINS, INTERNATIONAL LAW AND CIVIL CONFLICT, *in* THE INTERNATIONAL

international law.[15] One author even titled a chapter in his work "The Decline of Belligerent Recognition: Desuetude in International Law."[16] Noting these remarks and others, one might question the need for any deliberation regarding this dormant notion of belligerency, particularly as the conditions that give rise to it are very uncommon in the reality of the current period. In Chapter VI an attempt will be made to examine whether this doctrine, or what is left of it after the post World War II conventions, might be applicable in the contemporary international environment. This will be done through an analysis of its potential application in different places around the globe in an effort to examine whether it can be legitimately utilized as a *sui generis* method of dealing with certain internal armed conflicts while using the legal tools applicable during international armed conflicts. As will be shown, a rather tentative argument can be made for the continued existence of belligerency as a salient international legal doctrine, even if only in the rare occurrences where it could be pertinent. As such it might still be used to expand the protections allowed belligerents in certain internal armed conflicts, protections that the accepted rules of intrastate warfare would not bestow upon them.

Traditionally the focus of most legal assessments of the doctrine has centered on the effect of third party recognition of belligerents on the neutrality of these third parties.[17] More recently these influences have received significant attention chiefly in the wake of the United Nations Charter, as questions arose about the effect of the Charter regime on interventionist policies.[18] These questions were important, especially during the Cold War era.[19] This article does not deal with these issues. Rather it

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14. (continued) REGULATION OF CIVIL WARS 169, 171 (Evan Luard ed., 1972).

15. Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43, 48 (1988).

16. ROSCOE R. OGLESBY, INTERNAL WAR AND THE SEARCH FOR NORMATIVE ORDER 100 (1971).

17. *See, e.g.*, LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 222-26 (1956) (recognizing third party implications of belligerency); OPPENHEIM, *supra* note 2, at 250-54; Falk, *supra* note 9, at 203-06; WILSON, *supra* note 8, at 47-49; OGLESBY, *supra* note 16, at 48-71, 100-14; VON GLAHN, *supra* note 2, at 703. Most of the debates regarding third party recognition or non-recognition of belligerencies focus on the issues arising from such recognition or non-recognition, including the substantive implications of neutrality. Some of the discussions centered on the timing of recognition. Premature recognition of the status of belligerency was considered an unlawful intervention in the internal affairs of the *de jure* government. Others focused on the inherently political nature of such recognition.

18. The drafters of the Charter were principally concerned with issues regarding international armed conflicts rather than intrastate violence. However, almost from the out-

endeavors to examine the current relevance of the belligerency doctrine with regard to the rights and obligations of the parties to internal armed conflicts. However, there will be a limited discussion of third party recognition of belligerency and its implications, if any, for the scope of legal protections to be granted the parties to a conflict.

II. Historical Background

Traditional international law provides three relevant statuses of internal strife: rebellion, insurgency and belligerency. Domestic violence is labeled rebellion "so long as there is sufficient evidence that the police forces of the parent State will reduce the seditious party to respect the municipal legal order."[20] International law does not purport to grant protections to participants in rebellions.[21] An insurgency occurs when there

18. (continued) set the United Nations has been involved in internal armed conflicts. Such involvement is seemingly precluded by the first part of Article 2(7) of the Charter, which prohibits United Nations intervention in matters "essentially within the domestic jurisdiction of any state." In Article 2(4) the Charter also expresses the objective of territorial integrity of member states. It prohibits the use or threat of external force against the territorial integrity of any state unless within the exception enunciated in Article 51 regarding the "inherent right of individual or collective self-defense" in the event of an "armed attack." As such it would *a priori* appear that the United Nations has no legal basis for intervention in matters arising from domestic insurgencies. However, the second part of Article 2(7) together with Article 39, in Chapter VII of the Charter, empower the Security Council to "determine the existence of any threat to the peace, breach of the peace or act of aggression." Once such a determination is made, Security Council enforcement measures become explicitly applicable even in circumstances of internal armed conflicts. These articles have served as the legal basis for the U.N.'s exercise of some form of control over intrastate conflicts when such conflicts have been perceived as threatening world peace and security. This authority addresses the feasibility of third party intervention in times of internal armed conflicts. *See, e.g.*, LINDA B. MILLER, WORLD ORDER AND LOCAL DISORDER: THE UNITED NATIONS AND INTERNAL CONFLICTS 22 (1967) (discussing the legality of the United Nation's role in intrastate conflicts, in view of several such examples); Oscar Schachter, *The United Nations and Internal Conflict*, *in* LAW AND CIVIL WAR IN THE MODERN WAR 401 (John Norton Moore ed., 1974); HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS, 19, 933-35 (1951); KOTZSCH, *supra* note 17, at 279-81; William Chip, *A United Nations Role in Ending Civil Wars*, 19 COLUM. J. TRANSNAT'L L. 15 (1981).

19. For example, during the Vietnam War some academic discussions arose as to whether the Viet Cong should be afforded belligerent status. *See* Lawrence C. Petrowski, *Law and the Conduct of the Vietnam War*, *in* 2 THE VIETNAM WAR AND INTERNATIONAL WAR 439, 476-77 (Richard A. Falk ed., 1969).

20. KOTZSCH, *supra* note 17, at 230.

21. *Id.* at 230-31; Falk, *supra* note 9, at 198.

is more sustained and substantial intrastate violence than is encountered during a rebellion. In such cases there is in effect "an international acknowledgment of the existence of an internal war", [22] but third parties "are left substantially free to determine the consequences"[23] of this acknowledgment. If they acknowledge the rebels as insurgents they are in fact "regarding them as contestants-in-law, and not as mere law-breakers."[24] However, in recognizing a state of insurgency third parties do not assume any obligation under international law[25] and they are still free "to help the legitimate government, but should desist from helping the rebels."[26] Furthermore, recognition of an insurgency does not provide the rebels with any international law protections.[27]

Belligerency can be achieved when an insurgency meets the four objective criteria described above.[28] As Kotzsch describes succinctly, when these preconditions are met, "recognition of belligerency gives rise to definite rights and obligations under international law."[29] While not conferring statehood, proper recognition of belligerency grants the rebels substantive protections under the laws of war.

It was therefore much to the chagrin of United States President Abraham Lincoln when, in 1861, near the outset of the American Civil War, the British government recognized the belligerency of the Confederate States that had unilaterally seceded from the Union.[30] This recognition caused the British to be neutral in the domestic American conflict and to aid neither the rebels nor the government.[31] Though he neither recognized the Southern States' claim to independence nor their claim to sovereignty over the territory of these States, during the war Lincoln ordered that the Confederates be treated as belligerents in all war-related matters. For instance, in April 1861 he proclaimed a blockade of the Southern ports, thus conferring on them and on Southern lands in general, the status of enemy territory. He also declared the subjects of the rebellious States alien enemies.[32]

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22. Falk, *supra* note 9, at 199.
23. HIGGINS, *supra* note 14, at 170.
24. *Id.*
25. KOTZSCH, *supra* note 17, at 232.
26. HIGGINS, *supra* note 14, at 170.
27. KOTZSCH, *supra* note 17, at 233.
28. *Supra* note 2 and accompanying text.
29. KOTZSCH, *supra* note 17, at 233.

It was the recognition of the Confederate *de facto* belligerency, among other factors, that also brought Lincoln to acknowledge that captured Confederate soldiers should be afforded prisoner of war status, even though the Civil War was not of an international character. Captured Union soldiers were granted similar protections and in general the two sides adhered to the laws of war as then understood.[33] That the United States had been prepared to treat its own civil war for many purposes[34] as if it were an international armed conflict, based mainly on recognition of the Confederate belligerency, undoubtedly had a powerful influence on the development of the law in this area.[35]

The most recent significant internal armed conflict during which the notion of belligerency was discussed as relevant was the Spanish Civil War. From 1936 to 1939 civil war raged in Spain as Franco and his fascist Nationalists attempted to unseat the incumbent government. An international debate arose about this war and the possibility that it might lead to a conflagration across all of Europe.[36] As Franco and the Nationalist forces advanced through the Spanish countryside, furthering their aims of ousting the existing regime, so too did an international diplomatic and legal debate

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30. Evan Luard, *Civil Conflicts in Modern International Relations*, *in* THE INTERNATIONAL REGULATION OF CIVIL WARS 7, 20 (Evan Luard ed., 1972).

It should be noted that the American Civil War was not the first civil war during which issues regarding the status of the belligerents were addressed. *See* Kotzsch, *supra* note 17, at 221 (discussing earlier conflicts). *See also* G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253 (1983). Draper provides a germane 18th century quote from M. de Vattel, who wrote: "[W]hen a Nation becomes divided into two parties absolutely independent, and no longer acknowledging a common superior, the state is dissolved, and the war between the two parties stands on the same ground, in every respect as a public war between two different nations." *Id.* at 258 (quoting M. DE VATTEL, THE LAW OF NATIONS 427 (Chitty-Ingraham transl. 1883)). *See also* FENWICK, *supra* note 6, at 145-48; Petrowski, *supra* note 19, at 476-78. Both authors note that in the first quarter of the nineteenth century there were debates as to whether the revolting colonies in North America were belligerencies, and the implications of this status.

31. *See* OGLESBY, *supra* note 16, at 34-35 (stating the chronology leading to the British government's act granting the Confederacy full belligerent rights). *See also* Quincy Wright, *International Law and the American Civil War*, 61 AM. SOC'Y INT'L L. PROC. 50, 52 (1967).

32. 2 A. BERRIEDALE KEITH, WHEATON'S INTERNATIONAL LAW 102 (7th ed. 1944) [hereinafter BERRIEDALE].

33. Howard J. Taubenfeld, *The Applicability of the Laws of War in Civil War*, *in* Moore *supra* note 18, 499, at 505-06. Taubenfeld notes that besides treating each other's soldiers as prisoners of war, persons and property in "occupied" territory were generally spared, and adherents of the Confederate government were not treated as traitors. *Id.*

34. Other purposes included judicial decisions handed down during and after the American Civil War in which the courts recognized that the hostilities between the Union

rage as to the pros and cons of recognizing the Nationalists as a belligerency.[37] This debate centered mostly on the third party States implications of such recognition, especially given the European geopolitical situation during that turbulent period.[38] It focused less on the ramifications of such recognition for the warring sides.[39] As noted, this was the

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34. (continued) and Confederacy amounted to a war between two sovereigns. During the war the Supreme Court upheld President Lincoln's proclamation of a blockade of the Southern States. The Court held that he was justified in so doing, on the ground that the existence of a state of war was purely a question of fact. *See* Prize Cases, 67 U.S. (2 Black) 635, 652.

The Court went on to state the conditions for recognition of such a war. Note the similarities to the belligerency criteria.

> A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war.

Id. After the Civil War the Supreme Court also handed down several decisions in which it discussed the post war status of the Confederate government's actions. In *Thorington v. Smith*, 75 U.S. (8 Wallace) 1, the Court dealt with claims that Confederate dollars and contracts in that currency were void. It held that after the war "the party entitled to be paid in these Confederate dollars can recover their actual value at the time and place of the contract, in lawful money of the United States." *Id* at 14. In *United States, Lyon et al v. Huckabee*, 83 U.S. (16 Wallace) 414, the Court recognized that upon the capitulation of the Confederacy, the title to any property it had owned became vested completely in the U.S. government.

35. Richard R. Baxter, *Ius in Bello Interno: The Present and Future Law*, *in* Moore, *supra* note 17, 518-19.

36. *See* Hugh Thomas, *The Spanish Civil War*, *in* Luard, *supra* note 14, at 26, 26-36 (providing a thorough examination of the Spanish Civil War, from an historical and interventionist perspective).

37. *See, e.g.*, James W. Garner, *Recognition of Belligerency*, 32 AM. J. INT'L L. 106 (1938), C.G. Fenwick, *Can Civil Wars Be Brought Under the Control of International Law?*, 32 AM. J. INT'L L. 538 (1938). Both authors discuss the political background for Britain's decision not to recognize the Nationalists as belligerents notwithstanding the fact that they were perceived at the time to have achieved the four objective belligerency criteria.

38. During that war both the Germans and Italians supported the Nationalists, headed by Franco. Because of this German-Italian support, the Americans, British, French and many other European nations, while recognizing the fact that an all-out war existed between the parties, did not formally recognize an insurgency and therefore only partially

last civil war in which issues relating to the doctrine of belligerency were in fact engaged.[40]

III. The Nature of Recognition

It has been noted that the present endeavor will not deal with the relationship between the doctrine of belligerency and third party treatment of belligerents. However, a discussion of the viability of the doctrine would not be complete without analyzing whether a belligerency exists only when recognized, or whether its existence is a matter of fact alone. The relevance of this issue is clear. If some form of recognition is required, be it by third party states or the *de jure* government, then insurgents need not only meet the belligerency criteria but must also create enough international or internal pressure so as to achieve such recognition. Conversely, if it is only a matter of fact, then the insurgents need only realize the criteria to enjoy their legal fruits.[41] Some notable scholars argue that belligerency does not exist without recognition[42] and that without such recognition "belligerency might be open to abuse for the purpose of gratuitous manifestation of sympathy with the cause of the insurgents."[43] It is further asserted that unless that recognition comes from the *de jure* administration, even third party recognition does not immunize insurgents from future

38. (continued) between the parties, did not formally recognize an insurgency and therefore only partially conceded belligerent rights with regard to the conflict. *See* H.A. Smith, *Some Problems of the Spanish Civil War*, 1937 BRIT. Y.B. INT'L L. 17, at 26-31 (discussing the problematic position of these third-party states).

39. Notwithstanding this debate, and the statements made at the time by the leaders of both sides that the rules of the law of war would be applied, in retrospect it is clear that neither side in this war particularly adhered to the laws of war. Neither side treated prisoners decently. They were often executed summarily. Furthermore, civilian populations faced attack and bombardment. Taubenfeld, *supra* note 33, at 506-09. It is notable in this respect that given their lack of respect for the laws of war, it is today questionable whether the Nationalist insurgents were in fact belligerents, as they did not meet this belligerency criteria.

40. *See also* OGLESBY, *supra* note 16, at 104-06 (discussing the issues relating to the principle of belligerency as enunciated during the Spanish Civil War).

41. This was the crux of the debate that arose in Britain in the late 1930's regarding that country position on the Spanish Civil War. Both legal scholars and politicians debated Britain's withholding of recognition of Franco's forces as a belligerency. The British government refrained from recognition because it did not want to become neutral in a conflict in which its European rivals, the Germans and Italians, had chosen to support the Nationalists.

42. OPPENHEIM, *supra* note 2, at 249-51; GREENSPAN, *supra* note 2, at 19.

43. OPPENHEIM, *supra* note 2, at 250.

prosecution as traitors under domestic law.[44] According to this view, while the existence of the different belligerency criteria is a prerequisite, the doctrine's full legal manifestation only rises if a belligerency is recognized, preferably by the insurgents' own enemies.

Others assert that recognition of belligerency is not required and that its existence is a question of fact based solely on the objective existence of the belligerency criteria.[45] Thus, recognition of belligerency "is nothing more than recognition of the fact of the existence of war"[46] and so long as the insurgents maintain "a certain degree of territorial and administrative effectiveness"[47] they enjoy certain rights. Furthermore, it is argued, once the conditions of belligerency are met it could be considered undue influence to refuse to recognize this status.[48]

The conclusion of this debate is not all-together moot. While it is clear that certain preconditions must prevail to justify the existence of belligerency, it is equally clear that such a factual situation does not exist within a vacuum, and that some form of recognition of this status is required. The scholars question whether this recognition should come from third-party states or from the incumbent administration. It could also come from the insurgents themselves, proclaiming their own belligerency. Such a declaration could certainly be viewed as self-serving—an invitation to the world to be recognized. If aimed, however, at the *de jure* government it could hypothetically be effective in ensuring that both parties abide by the rules of the laws of war. Be that as it may, it is evident that some form of recognition is necessary. Without such recognition the existence of the belligerency criteria will not suffice to grant the insurgents any rights whatsoever.

The need for some form of recognition leads to further questions. First, what is the required nature of such recognition? Must it be explicit or can it be tacit? The prevailing view appears to be that recognition might

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44. *Id*. at 251.

45. BERRIEDALE, *supra* note 32, at 101. That author quotes United States President Ulysses S. Grant, who in June 1870 declared: "The question of belligerency is one of fact not to be decided by sympathies for or prejudices against either parties. The relations between the parent State and the insurgents must amount, in fact, to war in the sense of international law." *Id.*

46. Garner, *supra* note 37, at 111.

47. CRAWFORD, *supra* note 13, at 254.

48. FALK, *supra* note 9, at 206.

be implicit and "can be deduced from government measures or attitudes towards an internal situation of conflict (for example, a blockade)."[49]

Second, for the belligerency standard to be relevant, its factual preconditions must be present. But who will decide if they exist? The insurgents, the existing government, third parties? The lack of an acceptable arbiter who might settle these matters has resulted in further criticism of the doctrine of belligerency.[50] Furthermore, even if such a judge could be found, in most conceivable occurrences of civil war it is questionable whether the *de jure* government would accept his or her judgment and afford the insurgents the protections of the full body of the laws of war. As several scholars have noted, without that government's acquiescence, any third party or external acknowledgment would be of little affect in providing such protections.[51]

One interesting proposal that might serve to overcome these and perhaps other obstacles is that recognition of a belligerency would be an act of the United Nations, just as new states are recognized by that organization.[52] However, as Jessup notes, this might lead to procedural problems. The natural organ of the United Nations to vote on such a matter, as it does when new states are recognized, would be the General Assembly. However, the exigencies of the conflict might not allow the necessary time to convene that body. It would therefore seem necessary for the Security Council to act. But that too may not be plausible given the veto politics common in that organ of the United Nations.[53] Even if these political hurdles could be overcome, with the legal mechanisms in place today under the United Nations Charter, a belligerency determination, if tabled in the General Assembly or Security Council, would likely be replaced by a res-

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49. PROTOCOLS COMMENTARY, *supra* note 9, at 1320-21.

50. *Id*. *See also* Petrowski, *supra* note 19, at 478. Petrowski notes the seemingly open-ended definitions within the four belligerency criteria, such as occupation, degree of orderly and effective administration, observance of the rules of war and responsible and ascertainable authority. Given that the government against whom the insurgents are fighting will naturally not view these definitions broadly, that author does not see such governments bestowing protection of the laws of war upon the rebels.

51. KOTZSCH, *supra* note 17, at 224; OPPENHEIM, *supra* note 2 at 251; GREENSPAN, *supra* note 2, at 20; DOCUMENTS ON THE LAW OF WAR 12 (Adam Roberts & Richard Guelff ed. 1982) [hereinafter DOCUMENTS].

52. JESSUP, *supra* note 3, at 54.

53. *Id.*

olution that a given conflict is a threat to or a breach of international peace and security.[54]

This calls for several tentative conclusions. For belligerency to occur a set of objective circumstances must come about. However, the mere existence of these conditions is not sufficient. They must be recognized by third party states, by the belligerents or by international organizations. If the *de jure* government does not recognize the insurgency as a belligerency, either tacitly or explicitly, all other forms of recognition would not in fact serve to bestow upon the insurgents any protections to which they would be entitled under the laws applicable during international conflicts. The cases in which an incumbent administration would agree to bestow such safeguards on persons they naturally view as traitorous citizens will be very rare. However, in reality only that government's recognition of its enemy's belligerency will serve to provide the rebels with the protections of the full body of the laws of war.

These conclusions alone need not lead to discarding of the doctrine of belligerency as obsolete. As will also be discussed in later chapters, in an all-out civil war reaching the objective belligerency criteria, the *de jure* administration might well perceive that providing their own warriors with the full protections of the laws of war necessitates a formal recognition of its enemy as a belligerent. It may also act in a manner that would tacitly provide the rebels with recognition of their belligerency.

IV. The Relevance of Common Article 3

Assuming, therefore, that the significant obstacle of some form of *de jure* government recognition of the belligerency is surmountable, the next task requires an examination of the influence of the post-World War II international legal regimes on the doctrine. The analysis will commence with the first instrument of international law to attempt to provide some protections for the victims of internecine strife.

Almost immediately after the conclusion of the Spanish Civil War, the world was engulfed in World War II. The terrible price that humanity paid during this war, on and off the actual battlefield, led to the signing of the 1949 Geneva Conventions. The primary focus of the drafters of these

54. To paraphrase Article 39 of the United Nations Charter. *See supra* note 18 (discussing United Nations-related issues regarding the doctrine of belligerency).

Conventions was to create rules and regulations for the conduct of nations engaged in international armed conflicts and to ensure safeguards for the protection of different classes of victims of these conflicts.[55] Although not the primary focus of the Conventions, Common Article 3 was incorporated within each of the four treaties. This was a "Convention in miniature"[56] meant to deal with internal strife. It was considered highly significant and innovative because it was the first attempt to provide limited international law protections for the victims of internal armed struggles.[57] Because of its nature, questions arose about the relationship between it and the doc-

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55. These different groups included, *inter alia,* wounded and sick soldiers in the field, shipwrecked soldiers, prisoners of war, civilians and medical personnel aiding wounded and sick civilians and soldiers. The protections bestowed on all of these groups were addressed in the four Geneva Conventions. *Supra* note 10.

56. COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 34 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY IV].

57. Common Article 3 states:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages on personal dignity, in particular, humiliating and degrading treatment;
>
> (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

trine of belligerency. If this is a "Convention" enunciating the nature of protections granted the victims of internecine disorder, did it in fact annul the protections inherently provided during similar conflicts by the doctrine of belligerency, even though the latter offered the protections of the full scope of the laws of war? Some scholars believe that Common Article 3 established a basic written regime for the laws of internal armed conflict or *jus in bello interno*,[58] according to which, in times of armed conflicts not of an international character, each party is bound to apply, as a minimum, certain fundamental humanitarian provisions. According to these scholars, this new regime is now the *only* applicable law relating to internal armed conflicts. It is not dependent on recognition of belligerency, and did away with the need to discuss the existence of the four belligerency criteria. Others claim, however, that a thorough examination of the historical background of Common Article 3 leads to the conclusion that its drafters recognized the doctrine of belligerency and intended the Common Article to apply to internal armed conflicts not reaching the scope of the belligerency criteria.[59] They note that in the preparatory sessions before Common Article 3 was accepted, deliberations arose as to the triggering mechanism for its application. Those desirous of a narrow scope of application supported a notion that the Article should only be triggered in internal armed conflicts rising to the level of the four belligerency criteria. Elder suggests that the drafters recognized the need to establish a threshold that was not so low as to allow mere rioting or common criminality to enjoy the limited protections of the article.[60] However, they also recognized that demanding that the preconditions for belligerency be set as a threshold would serve to empty the Common Article of any substantive content. While a consensus arose that the Article would apply in cases of armed conflict not of an international nature that surpassed mere rioting or terrorism, in cases of belligerency, when an internal conflict is more analogous to an international armed conflict, "there remained persuasive sentiment amongst the draftsmen"[61] that the rules of international armed conflicts continuing to govern in their entirety.

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58. DOCUMENTS, *supra* note 51, at 12-13.

59. David A. Elder, *The Historical Background of Common Article 3 of The Geneva Convention of 1949*, 11 CASE W. RES. J. INT'L L. 37, 53 (1979). *See also* Eugene D. Fryer, *Applicability of International Law to Internal Armed Conflicts: Old Problems, Current Endeavors*, 11 INT'L LAW. 567 (1977). Fryer notes in this respect that "[t]he advent of recognized belligerency unquestionably triggers the application to the conflict of the full Geneva Conventions of 1949." *Id.* at 568 n.2.

60. Elder, *supra* note 59.

61. *Id.*

The latter argument seems much more persuasive, certainly from a strictly utilitarian point of view. However, an analysis of the official commentary to the four Geneva Conventions regarding Common Article 3, and the very definite language of the Article itself, do not support this conclusion.[62] It notes that Common 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." [63] It goes on to state:

> Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities—conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front.[64]

It appears from a reading of these and other sources[65] that the drafters of Common Article 3 were cognizant of the doctrine of belligerency and included its occurrence within the article. Belligerencies are internal armed conflicts "which are in many respects similar to an international war, but take place within the confines of a single country." Their existence not having been overlooked, it is difficult to assert that they continued to enjoy a unique status under the post Geneva Conventions international legal regime.

Difficult but not inconceivable. If a utilitarian goal of providing the most legal protection to the most people possible is desired, continued acknowledgment of the existence of the doctrine of belligerency is important as a unique means of treating the rare occurrences of civil wars that more closely parallel international armed conflicts. That these occurrences are atypical should not be a pretext for justifying the doctrine's abandonment. On the contrary, because the criteria that create a belligerency are so stringent, in the infrequent cases when these circumstances exist the bel-

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62. Bond, *supra* note 2, reaches a similar conclusion. After reading through the conventions' conference committee reports he concludes that one senses "that the delegates intended Article 3 to apply perhaps to insurgencies . . . , to belligerencies or civil wars . . ., but never to bandits or even to riots." *Id*. at 57-58.

63. COMMENTARY IV, *supra note* 56, at 34.

ligerents should be provided with the utmost safeguards that international law allows.

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64. *Id*. at 36. Furthermore, the Commentary lists several criteria for the application of Common Article 3, drawn from the various draft proposals:

> 1. That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> 2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
> 3. (a) That the *de jure* Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
> 4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate portion of the national territory.
> (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Id. at 35-36. The similarity between these criteria, particularly those listed in section 4 of the excerpt quoted above, and the accepted belligerency criteria cannot be mistaken.

65. *See supra* note 64 and accompanying text (showing a more complete text of the Commentary regarding the legislative history of Common Article 3). Furthermore, when the Commentary discusses the obligations placed on the parties of a conflict by Common Article 3 it notes with regard to the insurgents:

> Doubts have been expressed on this subject. 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.

COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 37 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III]. This language again reminds the reader of a possible belligerency scenario. Given that it is brought within a discussion of the obligations of the parties under Common Article 3, it lends further credence to an argument that this Article intended to include within its scope occurrences of belligerencies.

With that in mind, two arguments can be made for the continued adherence to the doctrine of belligerency, based on a practical interpretation of Common Article 3. First, the preamble to the substantive provisions of the Article states that it will apply to "armed conflict not of an international character." A conflict in which insurgents meet the four belligerency criteria is *ex definitio* an armed conflict of an international character. Therefore, the full body of the laws of war applies to it, and it is not within the material scope of Common Article 3.[66]

Second, the preamble also provides that the parties to a conflict shall apply these provisions "as a minimum." This language certainly allows the sides to apply a higher standard of protections to the conflict between them, but does not require them to do so. If that is so, when a belligerency in fact occurs, the practicalities of warfare might well require the sides to provide more than the minimum Common Article 3 protections. As the two historical examples of this doctrine provided above surely illustrate, when a civil war reaches the intensity of belligerency, the warring sides might have reasons enough to desire the application of the full spectrum of the laws of war to their conflict. Several good reasons can be given for this conclusion. As one scholar notes "[t]his is the result of considerations of general convenience and the fear of reprisals."[67] For instance, as such hostilities proceed, the parties to the conflict will start to amass prisoners of war. The *de jure* government and its forces will initially consider treating the insurgent prisoners as treasonous common criminals, but as another scholar notes "[t]he government may feel compelled to apply the laws applicable to international armed conflict because of the impracticability of prosecuting and executing all the insurgents."[68] Furthermore, once large numbers of government soldiers are also taken prisoners, as is to be expected in a conflict of this nature, it will be in the common interests of both parties to abide by the laws of war as they relate to prisoners of war. This might also serve to facilitate the eventual restoration of peace and to help heal the wounds of the nation.[69] Similar hypotheticals regarding the mutual concerns of the enemies will encourage them to expand the substantive protections provided to those affected by the fighting. This will

66. *See* KOTZSCH, *supra* note 17, at 238 n.73. Kotzsch notes that it can easily be seen from the preparatory works of the Geneva Conventions that this was the proper interpretation of Common Article 3. *Id.*

67. Draper, *supra* note 30.

68. 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. 279, 292-93 (1983).

69. *Id*. at 293.

be done by applying to the conflict more of the humanitarian provisions of the laws of war, including those relating to the wounded and sick and civilians on the one hand, and behavior on the battlefield on the other. Thus, while the language of Common Article 3 appears to limit the protections provided during occurrences of all types of internal armed conflicts, a practical argument can be made that in the rare cases of belligerencies, the caveat attached to the Common Article might not preclude expanded law of war protections. On the contrary, just as the inherent nature of a civil war attaining the scope, severity and duration required to meet the belligerency criteria may cause the incumbent government to recognize the insurgents as belligerents, so too might these circumstances encourage the parties to the conflict to raise the minimum standard set in Common Article 3 and to expand it to the full range of protections provided during international armed conflicts.

It is interesting to note that the commentary to Common Article 3 also appears to support this argument and takes it even farther; perhaps farther then it should be taken. In discussing the background for the words "as a minimum" in this Article it is noted:

> Care has been taken to state, in Article 3, that the applicable provisions represent a compulsory minimum. The words "as a minimum" must be understood in that sense. At the same time they are an invitation to exceed that minimum. The time may come when, in accordance with the law of nations, the adversary may be bound by humanitarian obligations that go farther than the minimum requirement stated in Article 3. For instance, if one Party to a conflict is recognized by third parties as being a belligerent, that Party would then have to respect the Hague rules.[70]

The implications of this statement must be understood within the context of the previous chapter's discussion. As noted there, in the realm of victims' protections, third party recognition of a belligerency can be of little or no significance so long as the *de jure* incumbent does not follow suit. Since the incumbent is not obliged to recognize the insurgents as belligerents, Pictet's conclusion that third party recognition will suffice to trigger the application of the entire body of the laws of war appears to be an overstatement. However, such third party recognition may undeniably serve to

70. Commentary III, *supra* note 65, at 38.

encourage or pressure the established authority to also bestow such recognition.

The language and legislative history of Common Article 3 do not support an assertion that the doctrine of belligerency continues to be viable. In almost all cases of belligerencies this Article will supplant the wider protections of the full body of the laws of war with the more limited protections afforded in Common Article 3. However, interpretation of this Article also provides that when a *de jure* government recognizes insurgents as belligerents, a convincing argument can be made for the continued utility of the legal notion of belligerency, and through it for the application of the wider standard of safeguards to the victims of the civil war.

V. Belligerency and Protocol II

The analysis to this point has endeavored to illustrate that the need for some form of recognition of a belligerency, preferably by the existing authority, as well as the limiting language of Common Article 3, create complex restrictions on the continued viability of the doctrine of belligerency. If that is the case, it might also be argued that Protocol II,[71] relating to the protection of victims of non-international armed conflicts, which was meant to supplement the rather general terms of Common Article 3, seems to have gone a long way in "driving another nail in the coffin" of the belligerency doctrine.

In setting its material scope of application, Article 1(1) of Protocol II states that it will apply in all conflicts not of an international nature:

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them

71. *Supra* note 11.

72. The full text of Article 1(1) of Protocol II states:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

> to carry out sustained and concerted military operations and to implement this Protocol.[72]

The conditions stated for application of the rules regarding internal armed conflicts seem to mirror those classically associated with belligerency as described above. Therefore, there appears to be a clear declaration by the parties to Protocol II that in the limited cases that would previously have required application of the rules of international warfare to a conflict that was internal in nature, even under the provisions of General Article 3, such conflict should now be regulated by the much more restrictive rules relating to internal armed conflicts.[73]

Several arguments should be considered, however, before "burying" the doctrine of belligerency only because of the apparent scope determination of Protocol II. First, and perhaps most importantly, it is questionable whether Article 1(1) of Protocol II has evolved into customary international law.[74] The current legal status of this Article, and Article 1(4) of

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72. (continued)

> International Armed Conflicts (Protocol I) and which take part in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

73. It is interesting to note in this respect that considerable discussions regarding the implications of the scope of applicability of Protocol II took place after its signing. Many scholars have remarked that it substantially revised the rules existing in this area under Common Article 3. The argument is that while Common Article 3 did not establish a definite threshold in demanding only "armed conflict" as a triggering mechanism, this threshold is considerably lower than all-out civil war. Article 1(1) of Protocol II set a much higher standard for its application, one that does resemble all-out civil war. As will be endeavored to illustrate, the latter threshold is not so high that it views occurrences of belligerency as falling within its scope. *See* BART DE SCHUTTER & CHRISTINE VAN DE WYNGAET, *Coping With Non-International Armed Conflicts: The Borderline Between National and International War*, 13 GA. J. INT'L & COMP. L. 279, 285 (1983) (discussing the differences in the scope of application of Common Article 3 and article 1(1) of Protocol II); SOLF, *supra* note 68, at 294-95; Asbiørn Eide, *The New Humanitarian Law in Non-International Armed Conflict, in* Cassese, *supra* note 2, 276, 307; DAVID P. FORSYTHE, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272, 285-86 (1979); Draper, *supra* note 30, at 273-76.

74. Protocol II has been ratified by 149 states, thirteen of which have recorded reservations regarding its different provisions. States that have not ratified it include

Protocol I, which will be discussed later in this chapter,[75] is not within the scope of the present article. However, it will suffice to state that if either of these provisions is not yet law, particularly Article 1(1) of Protocol II, the discussion of the contemporary status of the belligerency doctrine must revert to the previous discussion of the implications of Common Article 3.

Even assuming that Article 1(1) of Protocol II is customary international law, a textual argument can be made for the continued existence of the notion of belligerency. Although there are great similarities between the terms of Article 1(1) and the belligerency criteria, careful evaluation of

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74. (continued) India, Israel, Japan, Mexico, Morocco, Pakistan, Turkey, the United States and Viet Nam. *Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications. Accessions and Successions*, http://www.icrc.org/icrceng.nsf/ (last visited Mar. 30, 2000) [hereinafter ICRC Website]. Furthermore, if United States practice is important in the creation of customary international law, it is noteworthy that in referring Protocol II for the advice and consent of the Senate, President Reagan requested that the Senate act promptly on the matter "subject to the understandings and reservations that are described more fully in the attached report." The attached Letter of Submittal, signed by Secretary of State Shultz, noted:

> The final text of Protocol II did not meet all the desires of the United States and other western delegations. In particular, the Protocol only applies to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations. This is a narrower scope than we would have desired, and has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area. We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by article 3 common to the 1949 Conventions (and only such conflicts). Which will include all non-international armed conflicts as traditionally defined (but not internal disturbances, riots and sporadic acts of violence). This understanding will also have the effect of treating as non-international these so-called "wars of national liberation" described in Article 1(4) of Protocol I which fail to meet the traditional test of an international conflict.

Letter of Transmittal from President Ronald Reagan, PROTOCOL II ADDITIONAL TO THE 1949 GENEVA CONVENTIONS, AND RELATING TO THE PROTECTIONS OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at III (1987) [hereinafter Letter of Transmittal]. Based on this position and the assumption that United States acceptance is currently salient for the creation of customary rules of the laws of war, a persuasive argument can be made that Article 1(1) of Protocol II has not evolved into customary law.

75. *See infra* notes 79-84 and accompanying text.

the two leads to the conclusion that they do not mirror one another. The Protocol sets its applicability to "armed forces and dissident armed forces or other organized armed groups which . . . 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." Conversely, two of the belligerency criteria require occupation by insurgents of a substantial part of the state and a measure of orderly administration by that group in the area it controls. The belligerency requirements are more stringent than those in the Protocol in that they lend themselves to a group of rebels who have more than mere military control over part of the state. The belligerency conditions mandate its recognition when insurgents control a substantial part of the state. Furthermore, they also require that rebels establish some semblance of government or administration in the area under their control. The substantive distinction lies in the fact that upon attaining the objective criteria of belligerency, the insurgents achieve many of the characteristics of an independent state—they become in effect a *de facto* state.[76] This in turn justifies applying to them and to the conflict in which they are involved the body of rules meant to regulate international armed conflicts. On the other hand, the criteria established in Protocol II, while establishing a threshold that is considerably higher than mere civil unrest, is lower than state-to-state warfare. It more closely resembles the status of insurgency[77] previously described.[78] This amounts to a noteworthy dis-

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76. BOND, *supra* note 2, at 51. *Cf.* David Wippman, *Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict*, 27 COLUM. HUM. RTS. L. REV. 435, 442-44 (1996) (noting that during civil war, the presumption that the government speaks for the state "can only be overcome when the level of civil strife demonstrates objectively that the presumed congruity between the government and the people of the state either no longer exists, or exists only in relation to a portion of the state and its population").

77. This conclusion is supported by the PROTOCOLS COMMENTARY. In describing the definition of the material scope of Protocol II's application, the Commentary notes:

> By excluding situations covered by Protocol I, this definition creates the distinction between international and non-international armed conflicts. The entities confronting each other differ, depending on which category the conflict falls under; in a non-international armed conflict the legal status of the parties involved in the struggle is fundamentally unequal. Insurgents (usually part of the population), fight against the government in power acting in the exercise of the public authority vested in it. This distinction sets the upper threshold for the applicability of the Protocol.

PROTOCOLS COMMENTARY, *supra* note 9, at 1351. *But see* George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 60 (2000). Aldrich notes that the scope of application of Article 1(1) of Protocol II "is reminiscent of the standard in customary law for the

tinction between the material scope requirements of Protocol II and those of belligerency.

A further argument begins with the statement that Article 1(1) of Protocol II cannot be read apart from Article 1(4) of Protocol I.[79] In many respects Article 1(4) of Protocol I was as "revolutionary" in 1977 as Common Article 3 was in 1949. In 1949, Common Article 3 was innovative when it established international legal rules pertaining to internal armed conflicts. In 1977, Article 1(4) of Protocol I declared that henceforth "armed 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"[80] will be viewed as international armed conflicts. One might ask how this innovation impacts the legal status of belligerencies, if at all, especially as it is highly questionable whether this provision

77. (continued) recognition of belligerency and the consequent application of all customary laws of war. It is perhaps cynical, but doubtless true, to comment that this narrow applicability of [P]rotocol II explains why there are now 147 states party to it." *Id.* The *real politic* of this conclusion might be enticing. However, as noted above, a proper comparison between the Protocol II scope of applicability criteria and the accepted belligerency criteria leads to the conclusion that the latter create a higher threshold of applicability, which justifies the application of all customary laws of war.

78. *See supra* notes 22-27 and accompanying text.

79. *Supra* note 11.

80. The full text of Article 1 of Protocol I states:

> 1. The High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances.
> 2. In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.
> 3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in situations referred to in Article 2 common to those Conventions.
> 4. The situations referred to in the preceding paragraph include armed 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 in accordance with the Charter of the United Nations.

81. As noted, for the purpose of the present analysis of the contemporary status of the doctrine of belligerency, it has been assumed that both Article 1(1) of Protocol II and Article 1(4) of Protocol I are considered part of customary international law. If some uncer-

has become customary international law.[81] Nonetheless, assuming it has, an exercise in logic will attempt to illustrate the answer. It can be assumed that not all armed conflicts against colonial domination, alien occupation and racist regimes will be conflicts in which the insurgents might also be considered belligerents, according to the four objective belligerency criteria. If so, it can also be assumed that Article 1(4) of Protocol I now allows the victims of conflicts that are less all-inclusive then belligerencies the full protections of the laws of war. Conversely, as has been argued above, Article 1(1) of Protocol II provides limited protections to victims of internal armed conflicts not attaining the intensity of belligerency. Therefore,

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81. (continued) tainty might arise as to the status of Article 1(1) of Protocol II, this is certainly not the case with regard to Article 1(4) of Protocol I. This Protocol has been signed by 156 States, thirty-four of which have made reservations about its different provisions. Several important States have yet to ratify it, including France, India, Israel, Japan, Pakistan, Turkey, and the United States. ICRC Website, *supra* note 74. While Protocol I is generally viewed as a document reiterating customary humanitarian international law, several of its provisions, including Article 1(4), are considered very controversial. This article was one of the provisions regarding which the United States made a specific objection. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987). Protocol I was signed by United States during the Carter Administration. President Reagan, in his Letter of Transmittal of Protocol II for the advice and consent of the Senate, remarked that Protocol I was "fundamentally and irrevocably flawed," noting, among other things, the problematic language of Article 1(4). Letter of Transmittal, *supra* note 74. While not directly describing Article 1(4) of Protocol I as not in keeping with customary international law Levie notes:

> Obviously, this provision refers to civil conflicts, i.e., internal conflicts, which have always heretofore been considered to be governed by national law, not international law, except insofar as Common Article 3 of the 1949 Geneva Conventions may be said to govern civil conflicts—something that rebels have heretofore steadfastly denied, or disregarded.

Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS L.J. 469, 473 (1993).

Furthermore, state practice, traditionally identified as a precursor to the establishment of customary international law, has not evolved in this area. On the contrary, as Meron remarks, in the period of time since Protocol I came into force, "time has passed Article 1(4) by" and this Article has not been invoked as binding customary international law in the occurrences when it might have been relevant. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 683. *See also* Aldrich, *supra* note 77, at 45 (noting that the use of the terms "colonial domination," "alien occupation," and "racist regimes" in Article 1(4) of Protocol I "made the provision a dead letter from the moment it was adopted, as they ensured that no state would ever agree that it was such a regime, which meant that the provision would never be applied").

occurrences of belligerencies not fought against colonial domination, alien occupation or racist regimes fall between the two articles. If so, what law applies to such rare eventualities? The answer to this query is clear: the prevailing international legal doctrine of belligerency. Thus, if the factual preconditions of belligerency transpire, and if the *dejure* government recognizes it as such, the co-belligerents would enjoy the protections of the rules applying to international armed conflicts.[82]

This is also the response to those who claim that Article 1(4) of Protocol, and its recognition of wars of national liberation as international armed conflicts, is a new form of recognition of belligerency.[83] As has been demonstrated, Article 1(4) of Protocol I sets a low bar for the application of the full body of the laws of war—any armed conflict waged to achieve national self-determination. None of the belligerency criteria need exist in such a conflict for the rules of international armed conflict to apply. Nor is any sort of recognition required. Even today, in the post-colonial era, wars of national liberation are not uncommon and Article 1(1) of Protocol I could serve to protect the victims of these conflicts.[84] However, other wars are also possible, not necessarily nationalist in their nature—true civil wars that might throw brethren at each other's throats. Protocol I would not provide the victims of such conflicts any of the protections of the laws of war. The doctrine of belligerency might. If the insurgents meet the notion's pre-conditions it might serve to protect them, even though they would not be fighting a war for national self-determination.

The discussion above illustrates that even assuming they have evolved into customary international law, neither the restrictive language of Protocol II nor the expansive nature of Protocol I have invalidated the doctrine of belligerency. It survives between the two on a continuously narrowing wedge.

VI. Belligerency: Possible Future Practice

Potential contemporary application of the doctrine of belligerency is very limited. It is an historical fact that it has not been applied in any civil war for almost 140 years. It is thus an understatement to declare that it has in fact fallen into disuse. However, it has been shown that strictly speaking it still exists in international law. Neither Common Article 3 nor the Protocols to the Geneva Conventions of 1949 completely invalidated the doc-

trine. As the above analysis has exposed, for it to be applicable the following factual premises must be present:

1. The four belligerency criteria: a) civil war within a state, beyond the scope of mere local unrest. b) occupation by insur-

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82. Based on Common Article 3, Article 1(4) of Protocol I, and Article 1(1) of Protocol II, Solf describes four separate legal regimes which can be classified by the stage of the applicable conflict:

> 1. In situations in which tensions and disturbances within the state fall short of actual armed conflict, domestic law and international human rights principles are applicable.
> 2. In situations severe enough to constitute an armed conflict, but falling short of being a civil war, article 3 common to the 1949 Geneva Conventions, domestic law, and international human rights principles are all applicable. However, since common article 3 does not define "armed conflict", the determination of the threshold for the application of common article 3 is left to the government of the affected state.
> 3. A third stage of conflict is high intensity civil war in which the rebels have organized armed groups under a responsible command, and they have exercised control over a part of the national territory sufficient to enable them to carry out sustained and concerted military operations, and therefore sufficient to implement Protocol II. In such situations, 1977 Protocol II is applicable in addition to the norms applicable in situation 2 above. Despite the high threshold, which approaches the threshold for the application of the nineteenth century doctrine of recognized belligerency, there is no requirement for granting prisoner of war status.
> 4. In select struggles of self-determination, articles 1(4) and 96(3) of Protocol I operate to make most of the rules governing international armed conflict applicable. The parties to the conflict may also agree, expressly or impliedly, to make the rules of international armed conflict applicable.

SOLF, *supra* note 68, at 294-95. In describing the third of the four regimes he proposes, Solf notes the high threshold of the doctrine of belligerency but seems to derogate the notion in its entirety to the nineteenth century. In keeping with both historical and legal analyses proffered in Chapter II and in this chapter of this article, a fifth regime might be suggested to fit between Solf's third and fourth. In line with the Solf"s choice of language the new stage 4 would state:

> 4. A fourth stage of conflict is high intensity civil war in which the rebels, who observe the laws of war, have organized armed groups under a responsible command, and have exercised control over a substantial part of the territory of the state sufficient to enable them to carry out sustained and concerted military operations as well as an orderly administration of the territory under their control. The doctrine of belligerency would make the rules governing international armed conflict applicable.

> gents of a substantial part of the territory of the state. c) a measure of orderly administration by that group in the area it controls. d) observance of the rules of the laws of war by the rebel forces, acting under responsible authority.
> 2. Tacit or explicit recognition by the *de jure* government of the insurgents' belligerency.
> 3. The armed conflict is not one in which a people are fighting against colonial domination, alien occupation or a racist regime, in the exercise of their right to self determination.

The seemingly most obvious contemporary conflict in which the doctrine of belligerency might be viewed as potentially relevant is that which exists between China[85] and Taiwan.[86] Taiwan certainly meets the four objective belligerency criteria and under the "one China" positions offi-

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83. Schindler, *supra* note 2, at 6. He writes:

> The recognition of wars of national liberation as international armed conflicts has been considered as a new form of recognition of belligerency. It must be emphasized, however, that this form differs from the traditional recognition of belligerency in several respects. First, the law of war is to apply automatically in wars of national liberation; no recognition of belligerency by the incumbent government or by third States is necessary. Second, the traditional conditions of recognition of belligerency (particularly the occupation of certain part of national territory), are no longer important; the claim to be recognized as a belligerent is exclusively based on the right of self-determination. Third, foreign States are no longer obliged to observe the laws of neutrality; on the contrary, according to General Assembly Resolutions and Declarations, their duty is to promote the realization of self-determination. Fourth, no formal state of war comes into existence in wars of national liberation.

As is demonstrated, Protocol I cannot replace the doctrine of belligerency in every factual situation, particularly in civil wars that are not national liberation in nature. It should also be re-emphasized in this regard that the expanded scope application of Article 1(4) of Protocol I has yet to attain the status of customary international law and therefore it is pretentious to claim that it has annulled the beligerency doctrine. *See supra* note 81 (discussing Article 1(4)'s customary law status).

84. "Could" and not "would" since in most actual occurrences of such conflicts states are loathe to provide their own rebellious citizens with anything but the hard hand of domestic law. This is true since the application of any international legal protections might imply that those citizens also enjoy some political rights.

85. Reference is to the Peoples' Republic of China, also commonly known as mainland China.

86. Known officially as the Republic of China. Taiwan is also known as Formosa.

cially espoused by both sides,[87] the conflict might still be viewed as internal. Therefore, if the conflict evolves into an armed conflagration might the doctrine provide the parties the protection of the full body of humanitarian international law? Probably not and for several reasons. There is a growing trend which views Taiwan as a *de facto* independent state no longer interested in unifying with the rest of China.[88] Thus, if war broke out, the Taiwanese could hypothetically argue that the laws of war apply directly to the conflict as in war between two states, with no need to rely on the belligerency doctrine. They could also assert that the conflict is being waged in the exercise of their right to self-determination[89] and that therefore, in light of Article 1(4) of Protocol I, the clash is to be viewed as an international armed conflict. This position would also exclude reliance on the doctrine of belligerency. It is very doubtful that China would accede to either of these arguments. If the rules governing international armed conflicts could not be applied directly to the conflict, it is also very unlikely that China would recognize Taiwan's belligerency. As has been suggested above, without such recognition, the doctrine of belligerency could not be applied and the conflict would be viewed as purely internal.

Is there any other contemporary global "hot-spot" to which these conditions might be applicable? The answer to this question seems to be negative. The most prominent internal disputes taking place today are in Chechyna, Kosovo and East Timor, as well as continuing struggle of the

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87. The "one China" policy is also the stated policy of most other states with regard to the Taiwan-China conflict, including the United States. *See, e.g.*, Lung-chu Chen, *Taiwan's Current International Legal Status*, 32 NEW ENG. L. REV. 675, 682-83; Hong-jun Zhou, *The Legal Order on Both Sides of the Taiwan Strait and the Current Sino-Vietnam Relation*, 87 Am. Soc'y Int'l L. Proc. 61, 61-63; Mark S. Zaid, *Taiwan: It Looks Like It, But Is It a State? The Ability to Achieve a Dream Through Membership in International Organizations*, 32 NEW ENG. L. REV. 805, 809.

88. According to this view, the recent democratization of Taiwan has produced a growing demand for an independent Taiwan based on a "one China, one Taiwan" policy. Eighty-five percent of the island's population is native Taiwanese, while fifteen percent are refugees from mainland China, who arrived in 1949. Ralph N. Clough, *The Status of Taiwan in the New International Legal Order in the Western Pacific*, 87 AM. SOC'Y INT'L L. PROC. 73, 75. *See* Chen, *supra* note 87, at 675-80; Zaid, s*upra* note 87, at 809-10.

89. The argument is that Taiwan meets the basic requirements for statehood: a permanent population, control over a defined territory, and a government capable of governing effectively internally and acting responsibly in external relations. Chen, *supra* note 87, at 677-79. *But see* Valerie Epps, *Self-Determination in the Taiwan/China Context*, 32 NEW ENG. L. REV. 685, 692-93 (noting the need for a new international norm of self-determination to fit the Taiwan-China situation and that the longer separation between the two entities continues, the stronger Taiwan's claim to self-determination will become).

90. *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to*

Kurds in Turkey and Syria. While the Chechans, Kosovars, East Timorese[90] and Kurds intuitively appear to be engaged in conflicts against colonial domination, alien domination or racist regimes in the exercise of their right to self determination, convincing legal arguments can and are made against such suppositions.[91] Therefore, for the sake of the present discussion it will be assumed that none of these conflicts is a struggle for self-determination. If that is the case, might it still be possible to apply the belligerency doctrine to them based on the suggested factual premises? Arguably not. Questions arise as to each of these examples meeting the four belligerency criteria. However, even assuming that each of these internal conflicts meets the four pre-conditions this would not be sufficient to advance these cases of possible belligerency. The most daunting of the belligerency premises proffered does not exist in any of these cases. None of the metropolitan governments in these conflicts, the Russian, Yugoslav, Indonesian, Turkish or Syrian, have recognized the legitimacy of the rebels' causes and certainly have not recognized their belligerency.[92] This is perhaps based on the enduring presumption that recognition of their enemies' status as belligerents will advance their arguments as international, and not internal, players.

This conclusion inevitably leads to the next beckoning question. If the doctrine in its diminished form is not relevant to these conflicts, are there any other internecine conflicts for which it might still be germane as a tool for expansion of victim protections under international law rules of conflict management? If the answer to this query is also negative, serious reservations would, and should, arise as to the continued utility of the doctrine of belligerency and as to the justification for not relegating it to a rightful place in the dust heap of international law history.

While there is no conclusive answer to this question, particularly as there do not appear to be any current conflicts that might fit the mold of the

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90. (continued) *International Law*, 94 AM. J. INT'L L. 102, 105-08 (2000) (describing the East Timorese conflict and the United Nations and United States reaction to it).

91. *See, e.g.*, Duncan B. Hollis, *Accountability in Chechnya—Addressing Internal Matters With Legal and Political International Norms*, 36 B. C. L. REV. 793 (1995). Hollis analyzes whether the Chechnyan-Russian conflict is an internal armed conflict or an international armed conflict. After examining the impact of both the Geneva Conventions and Protocol I, he arrives at the conclusion that this war is an internal armed conflict. With regard to Article 1(4) of Protocol I he found that the Chechnyan war is not in fact a struggle for self-determination as this is defined in the Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among Nations. *Id*. at 818-19.

92. *Id.* at 814 n.135 (regarding the Russian view of the Chechnyan belligerency).

suggested belligerency criteria, upon further consideration it appears that the doctrine's assignment to the annals of international law history is still premature. It is from the two historical examples described in Chapter II that a lesson can be learned about the potential use of the notion. In both the American and Spanish civil wars the conflicts did not focus on one or the other belligerent's right to self-determination but rather on enormous ideological schisms which had developed within mostly homogeneous societies. In the American example, these schisms led the belligerents to secede from the federal entity of which they had been a part. In the Spanish example it led the belligerents to attempt, and succeed, to wrest power from the existing government and to replace it. In both of these cases widespread civil wars broke out, fought by armies under responsible command. The rebels in both conflicts quickly gained control of large areas of the state and were able to administer them. Furthermore, in both wars, and especially the American, the sides fought by the rules of the laws of war as applicable at the time, or at least had pretensions of doing so. However, there were also significant differences between the two wars and it is perhaps because of these dissimilarities that the outcomes of both conflicts with regard to belligerency were also different. In the American war the North begrudgingly recognized the South's belligerency. In the Spanish, foreign powers got embroiled in the fighting, violating the codes of neutrality and effectively destroyed any hope that the insurgents would be recognized as belligerents. The result was that the American North recognized the South's belligerency while in Spain no such recognition emerged.

Are there any similar wars or conflicts ready to be fought today between brethren within the same state? Apparently not. Does the potential exist? Possibly. Might one conjecture that a state or province or a group of states or provinces may opt to leave say the American,[93] Australian, Canadian[94] or German federations? While it seems unlikely, it is certainly not impossible, particularly during an era of burgeoning economic regionalism. If such a movement were to develop and lead to any form of military conflicts in which the four belligerency criteria would occur, it is suggested that the doctrine of belligerency might still find some utility. The assumption being that the parties to these conflicts might have a common desire to bestow the protections of the rules of international armed warfare upon the victims of these conflicts. Is it with Western superciliousness that such a premise is proffered? The idea that only Western nations might respect their brethren enough to provide each other with expanded protections is far from certain, and the German experience of World War II does not bode well for this premise. But it is suggested that

if some form of recognition of an enemy's belligerency is not possible within a possible Western internal conflict, then the notion of belligerency should in fact be discarded.

VII. Conclusion

As generally accepted today, the full spectrum of the rules of the laws of war, primarily articulated in the Geneva Conventions and their Protocols, apply during international armed conflicts. The doctrine of belligerency served to expand the application of humanitarian international law to internal armed conflicts in which four factual preconditions existed. Historically speaking, the doctrine was last applied to a conflict in the American Civil War. Its application to any internal armed conflict was last debated more than sixty years ago, during the Spanish Civil War. Since

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93. Even today there are several self-styled independence movements in different regions and states in the United States, from New England in the east to Hawaii in the west, and from the southern states to Alaska. *See, e.g.*, *The New England Confederation—Principles and Vision*, http://www.metro2000.net/~ stabbott/NEconfederation.htm (last visited Nov. 3, 2000); *Hawai`i—Independent & Sovereign*, http://hawaii-nation.org/nation/ (last visited Nov. 3, 2000); *League of the South: Declaration of Cultural Independence*, http://www.dixienet.org/ (last visited Nov. 3, 2000); *The Second Republic of Texas*, http://www17.geocities.com/CapitolHill/1842/ (last modified July 27, 1998); *Home of the Alaskan Independence Party*, http://www.akip.org/ (last modified Nov. 1, 2000). It is interesting to note that none of these proponents of some form of political independence from the United States base their demands on economic reasoning. They all appear to be desirous of maintaining what they believe to be the unique history and culture of their region or state. The only "movement" noted that advocates independence based mainly on its economic strength and not on an historical "right" is that advocating independence for the State of California. *See Free the Bear! The First California Secession Movement Online! Independence for California*, http://www.geocities.com/CapitolHill/Senate/1029/ (last visited Nov. 3, 2000).

94. Within the context of the hypothetical Canadian scenario, it is not the struggle of Quebec to separate from the Canadian confederation that would be relevant to the present discussion. While there is still peace between Canada and Quebec, were there to be a conflagration of this dispute it might well be more in line with the self-determination analysis described above. The notion might be relevant if one of the other provinces were to choose to secede for economic reasons. It is interesting to note in this respect the existence of self-proclaimed movements for the political independence of the provinces of Ontario, Alberta, and of Western Canada in general. *See, e.g.*, *Ontario Independence League Homepage*, http://ourworld. compuserve.com/homepages/Ontario_Independence (last visited Nov. 3, 2000); *The Alberta Independence Party*, http://www.albertaindependence.com/ (last visited Nov. 3, 2000); *What is the Western Canada Concept?*, http://www.westcan.org/what.htm (last visited Nov. 3, 2000). All three "independence" movements describe, amongst other things, the economic benefits their province or region would attain from secession from Canada.

then it was not directly addressed by the framers of the major post World War II conventions of relevance. It is with this historical background that this article endeavored to examine whether there is any reason not to consign the doctrine to the pages of legal history.

Before analyzing the current legal viability of the notion, a utilitarian presumption was made—that combatants in internal conflicts and the civilian populations affected by them should be provided with the widest possible legal protections. These are granted today by the laws of war as they pertain to international armed conflict. Since the notion of belligerency purports to provide these same protections to victims of certain internal armed conflicts, an examination of its continued utility was deemed worthy.

Because the focus of the analysis was an attempt to expand the legal protections given the combatants and civilians involved in internal wars, the examination of the doctrine of belligerency was directed at the relations between the parties to the conflict. Much less attention was given to the third party implications of the notion, which have traditionally been the central focus of most discussions of the issue.

Prior to a thorough examination of the doctrine in light of existing conventions of international law, another assessment was necessary. When is a conflict assigned the status of belligerency? If it is conditioned on the existence of certain factual criteria, who is to decide if these criteria actually exist? It was discovered that unless the parties to the conflict come to some form of understanding, whether tacit or open, this issue is not likely to be resolved. Furthermore, only it's resolution through the *de jure* government's recognition of rebels as belligerents will lead to the application of the full body of the laws of war to the conflict.

Having reached this conclusion and through it the understanding that a belligerency determination will only be accorded in very rare circumstances, a further examination was required. Even in a situation justifying its application, based on these very narrow factual premises, might not suffice under the innovative international legal regimes created by Common Article 3 and expanded by Protocol II. These provisions purport to govern internal armed conflicts. It was, therefore, also necessary to determine whether belligerency falls within the material scope of these documents. If it does, the doctrine could no longer exist independently to provide the full spectrum of law of war protections during relevant internal armed con-

flicts. An analysis of both Common Article 3 and the Protocols led to a conclusion that belligerency had survived the two, but just barely.

Based on all of the previous suppositions, a three part test was suggested to resolve whether a belligerency exists—the factual occurrence of the four belligerency criteria, recognition of the belligerency by the incumbent government, and the existence of a conflict not being fought in the exercise of a nation's right to self-determination.

Reaching this theoretical conclusion was not enough, and the proposals were put to the test. As was shown, there do not appear to be any contemporary internal struggles that meet the very narrow pre-conditions suggested, particularly because most on-going conflicts involve nations struggling to achieve some form of self-determination. Whether they are of this genre or not, or whether they have in fact achieved the four required criteria was found to be moot since the probability that one of the incumbent governments involved in those conflicts will recognize the insurgents as belligerents is extremely unlikely.

Upon reaching this practical conclusion, it became further necessary to explain why the doctrine of belligerency should not be consigned to legal history. Before doing so, it was tentatively proffered that the notion might still be of some utility in some future civil war in which a geographic part of a nation might opt to secede from the federal entity of which it was a part for ideological or economic reasons and not because of nationalist aspirations. This was based in no small measure on the historical background provided, particularly of the American Civil War. This proposal might certainly be challenged because it has limited practical and theoretical foundations.

Given the foregoing conclusions a final query arises. Was the entire foregoing exercise indispensable? Arguably not, especially with the very limited potential fruits of the endeavor. If it has any redeeming function it was in the analysis of the current status of the doctrine of belligerency and the understanding that while it is not all together obsolete, in the future it could only be applied in very narrowly defined circumstances. Since even in such conditions it would serve to expand the protections afforded combatants and civilians during some occurrences of civil war, this exercise has not been completely superfluous.