KEY DEVELOPMENTS AFFECTING THE SCOPE OF INTERNAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW

ANTHONY CULLEN[1]

I. Introduction

This article's objective is to examine the concept of internal armed conflict,[2] focusing on four stages of its development in international humanitarian law. Specifically, this article analyzes the areas of continuity and divergence between each stage, highlighting changes in the scope of the concept and in the threshold for the application of international humanitarian law.

The first section of this article outlines the concepts of rebellion, insurgency, and belligerency in traditional international law. Here, the doctrine of recognition is examined, focusing on the grounds for acknowledging the existence of internal armed conflict. While the application of international humanitarian law is required in the case of belligerency, situations of insurgency are governed by the laws of war only when explicitly provided for in an act of recognition by either a third state or the *de jure* government. The concept of internal armed conflict in traditional international law signifies a situation governed exclusively by municipal law except in cases in which the recognition of belligerency has occurred.

The second section focuses on the effect of Article 3 common to the four Geneva Conventions of 1949[3] and explains the significance of

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[1] Ph.D. Candidate, Irish Centre for Human Rights, Nat'l Univ. of Ireland, Galway. B.A., 1996 (Milltown Inst., Dublin); M.A. 2000, LL.M., (N.U.I., Galway) 2002. The author would like to acknowledge funding received from the Irish Research Council for the Humanities and Social Sciences in the form of a research scholarship.

[2] For the purposes of this article, "internal armed conflict" is used synonymously with "non-international armed conflict."

[3] Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention

Common Article 3 as the first provision of international humanitarian law relating specifically to situations of non-international armed conflict. As customary international law, it is held to embody a set of standards universally applicable in all situations of armed conflict. Problems surrounding its application, such as the lack of a formula for its implementation, are also discussed.

The third section examines the influence of Additional Protocols I and II on the concept of internal armed conflict in international humanitarian law.[4] Additional Protocol II has effectively created another category of internal armed conflict, similar in certain respects to the concept of civil war in traditional international law. Additional Protocol I is shown to have removed wars of national liberation from the remit of international humanitarian law relating to situations of internal armed conflict.

The fourth section explicates the definition of internal armed conflict provided by the *Tadic* case,[5] reproduced in the Rome Statute of the International Criminal Court.[6] The application of the concept is scrutinized in the case law of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Its adaptation in Article 8(2)(f) of the Rome Statute is then studied. This represents a positive development of international humanitarian law, distinguishing with a greater degree of clarity the applicability of Common Article 3 in situations of low-intensity armed conflict.

The aim of the above approach is to critically appraise a number of key developments in the area of international humanitarian law relating to situations of internal armed conflict. Conditions determining the

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Relative to the Protection of Civilian Persons in Time of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* 8 June 1977, *entered into force* 7 Dec. 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[5] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 70 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

[6] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 18, 1998, as amended through Jan. 16, 2002, *entered into force* July 1, 2002 [hereinafter Rome Statute].

internationalization of internal armed conflicts are not discussed.[7] The issue of distinguishing situations of terrorism from ones constituting *de facto* armed conflict is also not considered.[8] The sole purpose of this work is to examine the development of internal armed conflict as a concept, concentrating on changes in its scope and also changes in the grounds for application of international humanitarian law.

II. The Practice of Recognition and the Application of Humanitarian Norms in Traditional International Law

The relevance of traditional international law to the concept of internal armed conflict is an area that is frequently overlooked.[9] It merits attention to the present discussion as the starting point for the development of internal armed conflict in international humanitarian law. The doctrine of recognition in traditional international law is studied in this section as a means of investigating the application of international

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[7] For reading on the distinction between international and internal armed conflict, *see* Christine Byron, *Armed Conflicts: International or Non-international?* 6 (1), J. CONFLICT & SECURITY L. 63 (2001); Bart De Schutter & Christine De Wyngaert, *Coping with Non-international Armed Conflicts: The Borderline Between National and International War,* 13 GA. J. INT'L & COMP. L. 279 (1983); Tom Farer, *Humanitarian Law and Armed Conflicts: Towards the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37 (1971); Hans-Peter Gasser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145 (1983).

[8] *See* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT (1996); Leslie C. Green, *Terrorism and Armed Conflict: The Plea and the Verdict*, 19 ISRAEL Y.B. HUM. RTS. 131 (1989); John Norton Moore, *A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, "Wars of National Liberation," Mixed Civil-International Wars, and Terrorism*, 31 AM. U. L. REV. 841 (1982).

[9] This occurs mainly for two reasons. First, international instruments such as the Geneva Conventions of 1949, *supra* note 3; the Additional Protocols I and II of 1977, *supra* note 4; and the Rome Statute, *supra* note 6, have overtaken this body of law in their provisions relating to non-international armed conflict. Second, the doctrine of belligerency, used in traditional international law for the recognition of internal armed conflict, has fallen into disuse and is now considered obsolete. For further reading on the concept of belligerency in traditional international law, *see* James W. Garner, *Recognition of Belligerency*, 32 AM. J. INT'L L. 106 (1938); Lieutenant Colonel Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (2000); P.K. Menon, *Recognition of Belligerency and Insurgency*, *in* P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 109 (1994); Vernon A. O'Rourke, *The Recognition of Belligerency in the Spanish Civil War*, 31 AM. J. INT'L L. 398 (1937); Dietrich Schindler, *State of War, Belligerency, Armed Conflict*, *in* THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3 (Antonio Cassese ed., 1979).

humanitarian norms to situations of non-international armed conflicts prior to the formulation of the Geneva Conventions. The purpose is to indicate the origins of the contemporary concept in traditional international law. Three discernible stages in the development of non-international armed conflict in traditional international law are examined: rebellion, insurgency, and belligerency. Particular attention is paid to the grounds for recognizing the existence of armed conflict in the second and third stages of its development. In doing so, the scope of internal armed conflict in traditional international law is shown to be limited to situations in which the belligerency of insurgents is recognized.

A. The Non-application of the Laws of War to Situations of Rebellion

The concept of rebellion in traditional international law refers to situations of short-lived insurrection against the authority of a state.[10] In part due to their brevity, situations of rebellion are considered to be completely beyond the remit of international humanitarian concern.[11] Rebels challenging the *de jure* government during a rebellion are afforded no protection under traditional international law. According to Professor Richard A. Falk, a situation of rebellion may be distinguished as "a sporadic challenge to the legitimate government, whereas insurgency and belligerency are intended to apply to situations of sustained conflict."[12] He states that situations qualify as rebellion "if the faction seeking to seize the power of the state seems susceptible to rapid suppression by normal procedures of internal security."[13] Lothar Kotzsch supports a similar position, stating that "domestic violence is called rebellion or upheaval so long as there is sufficient evidence that the police force of the parent state will reduce the seditious party to respect the municipal legal order."[14] Hence, provided the situation is quickly suppressed and does not develop into one of insurgency, the

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[10] *See* Richard A. Falk, *Janus Tormented: The International Law of Internal War*, *in* James N. ROSENAU, INTERNATIONAL ASPECTS OF CIVIL STRIFE 197-99 (1964). Heather Wilson defines rebellion as "a sporadic challenge to the legitimate government." HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 23 (1988).

[11] R.P. Dhokalia, *Civil Wars and International Law*, 11 INDIAN J. INT'L L. 219, 224 (1971).

[12] Falk, *supra* note 10, at 199.

[13] *Id.*

[14] LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 230 (1956).

treatment of rebels by the state authorities is beyond the remit of international law.

In traditional international law, a situation of rebellion may thus be characterized as a short-lived, sporadic threat to the authority of a state. Such situations may manifest as a "violent protest involving a single issue . . . or an uprising that is so rapidly suppressed as to warrant no acknowledgement of its existence on a[n] external level."[15] According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the lack of a provision in traditional international law relating situations of rebellion was due in part to the fact that states preferred to regard it as "coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction."[16] Falk comments that in situations of rebellion,

> external help to the rebels constitutes illegal intervention. Furthermore, the incumbent government can demand that foreign states accept the inconvenience of domestic regulations designed to suppress rebellion, such as the closing of ports or interference with normal commerce. . . . There is also the duty to prevent domestic territory from being used as an organizing base for hostile activities overseas. . . . Thus if an internal war is a "rebellion," foreign states are forbidden to help the rebels and are permitted to help the incumbent, whereas the incumbent is entitled to impose domestic restrictions upon commerce and normal alien activity in order to suppress the rebellion.[17]

As a matter of exclusive concern for the *de jure* government, a situation of rebellion is not considered to be subject to the laws of war.[18] Hence, Heather A. Wilson, states that where a rebellion takes place,

> the rebels have no rights or duties in international law. A third State might recognize that a rebellion exists, but under traditional international law a rebellion within the

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[15] Falk, *supra* note 10, at 197.
[16] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 96 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
[17] Falk, *supra* note 10, at 198.
[18] *Id.* at 194.

> borders of a sovereign State is the exclusive concern of that State. Rebels may be punished under municipal law and there is no obligation to treat them as prisoners of war. . . . Because rebels have no legal rights, and may not legitimately be assisted by outside powers, traditional international law clearly favours the established government in the case of rebellion, regardless of the cause for which the rebels are fighting.[19]

B. The Concept of Insurgency

When a rebellion survives suppression, it duly changes in status to a situation of insurgency.[20] The concept of insurgency in traditional international law is, however, ambiguous in the sense that its broad parameters are ill-defined. Falk describes it as a "catch-all designation" stating, "On a factual level, almost all that can be said about insurgency is that it is supposed to constitute more sustained and substantial intrastate violence than is encountered if the internal war is treated as a 'rebellion.'"[21] Wilson notes that

> there seems to be general agreement that recognition of insurgency is recognition of a "factual relation" or acknowledgement of the fact that an internal war exists. Beyond that, there is little explanation of the characteristics of the "fact." There are no requirements for the degree of intensity of violence, the extent of control over territory, the establishment of a quasi-governmental authority, or the conduct of operations in accordance with any humanitarian principles which would indicate recognition of insurgency is appropriate.

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[19] WILSON, *supra* note 10, at 23-24.

[20] According to Erik Castrén, "Recognition of insurgency means acknowledgement of the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful government to maintain public order and exercise authority over all parts of the national territory." ERIK CASTRÉN, CIVIL WAR 212 (1966). For further reading on the concept of insurgency in traditional international law, *see* Menon, *supra* note 9, at 109; William V. O'Brien, *The Jus in Bello in Revolutionary War and Counter-Insurgency*, 18 VA. J. INT'L L. 193 (1978); George Grafton Wilson, *Insurgency and International Maritime Law*, 1 AM. J. INT'L L. 46 (1907).

[21] Falk, *supra* note 10, at 199.

> Indeed, the only criterion for recognition, if one could call it that, is necessity.[22]

Recognition of insurgency occurs out of necessity when the interests either of the *de jure* government or a third state are affected by the conflict, requiring the establishment of relations with the insurgent party. This vague criterion of necessity referred to by Wilson abbreviates much of the ambiguity surrounding the concept of insurgency in traditional international law. As the conditions for the recognition of insurgency are not clearly defined, the legal situation arising from such acts of recognition differs in each case.[23] In regard to objective grounds for the recognition of insurgency, Professor Hersch Lauterpach states

> any attempt to lay down conditions of recognition leads itself to misunderstanding. Recognition of insurgency creates a factual relation in that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity and of economic interest.[24]

Although the legal effects of recognition differ according to each situation of insurgency, generally it is "an indication that the recognizing state regards the insurgents as legal contestants, and not as mere lawbreakers."[25] As noted by Lauterpacht, recognition of insurgency occurs due to a "desire to put their relations with the insurgents on a regular, although clearly provisional basis."[26]

The indeterminate scope of insurgency allows for the concept's

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[22] WILSON, *supra* note 10, at 24.

[23] Castrén states,

> [R]ecognition of insurgency includes as one of its principle elements the grant [sic] of certain rights [which vary] according to whether recognition has been received from the lawful Government of from a third State. It is thus impossible to define in advance the legal situation consequent on recognition of insurgency.

CASTRÉN, *supra* note 20, at 212.

[24] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 276-77 (1947).

[25] Rosalyn Higgins, *Internal War and International Law*, *in* C.E. BLACK & R.A. FALK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 88 (Black & Falk eds., 1971).

[26] *See* MENON, *supra* note 9, at 121.

manipulation by states wishing to define their relationship with insurgents. Third states may recognize the existence of insurgency without explicitly declaring an allegiance or adopting a position of neutrality towards the conflict.[27] An act recognizing the existence of belligerency would infer an obligation to refrain from offering assistance to either party.[28] In contrast, the recognition of insurgency may be utilized to tailor the position of the state according to its interests, avoiding the risks involved in explicitly joining the conflict and also the restrictions on behaviour resulting from neutrality. On this point, Falk comments the recognition of insurgency

> serves as a partial internationalisation of the conflict, without bringing the state of belligerency into being. This permits third states to participate in an internal war without finding themselves "at war," which would be the consequence of intervention on either side once the internal war had been identified as a state of belligerency. Interventionary participation in an insurgency may arouse protest and hostile response, but it does not involve the hazards and inconveniences that arise if a state of war is established with one or the other factions.[29]

The concept's indeterminate range of efficacy allows states the greatest measure of flexibility in defining their relationships with insurgents.[30] As an international acknowledgement of the existence of conflict by a third state, the recognition of insurgency leaves it "substantially free to

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[27] Recognition of insurgency was first employed by the government of the United States in relation to the situation in the Cuban Civil War of 1868-1878. *See* CASTRÉN, *supra* note 20, at 46-47.

[28] *See infra* Part II.A (text following note 45).

[29] Falk, *supra* note 10, at 200.

[30] Falk states,

> In general, the status of insurgency is a flexible instrument for the formulation of claims and tolerances by third states. If it is used to protect economic and private interests of nationals and to acknowledge political facts arising from partial successes by insurgents in an internal war, then it can adjust relative rights and duties without amounting to a mode of illegal intervention in internal affairs.

Id. at 200, 202.

control the consequences of this acknowledgment."[31] Possible motives for the recognition of insurgency are illustrated by Lauterpacht who states, "It may prove expedient to enter into contact with insurgent authorities with a view to protecting national interest in the territory occupied by them, to regularizing political and commercial intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities." It is important to recognize here that the concept of insurgency in traditional international law does not necessitate the application of humanitarian norms. Unless explicitly conceded, the *de jure* government is not obligated to adhere to such norms.[32] Any legal protection available to insurgents comes only from the provisions of municipal law unless the application of humanitarian standards is specifically provided for in the act of recognition.

International law now has evolved to require the application of minimum humanitarian standards in all situations of insurgency.[33] Before the formulation of the Geneva Conventions of 1949, the only form of internal conflict considered to necessitate the application of humanitarian norms was one involving the recognition of belligerency. The section that follows examines the concept of belligerency, enquiring into its range of efficacy and thus also into the conditions necessitating the application of humanitarian norms.

C. The Recognition of Belligerency and the Application of Humanitarian Norms in Civil War

The distinction in traditional international law between insurgency and belligerency is referred to in the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia.[34] It states the "dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands."[35] The distinction marks a line necessitating the application of international humanitarian law in situations of internal conflict. In traditional international law, the

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[31] *Id*. at 199.
[32] CASTRÉN, *supra* note 20, at 207-23.
[33] *See supra* Part II.A.
[34] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, paras. 96-97 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
[35] *Id.* para. 96.

recognition of belligerency demands that in all circumstances the laws of war are adhered to. As mentioned in the previous section, humanitarian norms may be applied to situations of insurgency, but only when specifically provided for in the act of recognition. Thus, Lauterpacht remarks, "The difference between the status of belligerency and that of insurgency in relation to foreign States may best be expressed in the form of the proposition that belligerency is a relation giving rise to definite rights and obligations, while insurgency is not."[36]

Prior to the formulation of the Geneva Conventions of 1949, any legal obligation to ensure a minimum standard of humane treatment for the victims of an internal conflict was essentially a matter of exclusive domestic concern. The International Committee of the Red Cross (ICRC) Commentary on the Additional Protocols states, "Positive law has very largely abstained from laying down rules governing non-international armed conflicts according to traditional doctrine, states were the only sovereign entities considered to be the subjects of international law; thus the laws of war were conceived to govern international relations, were not applicable to internal conflicts."[37] This, of course, has now changed with the codification of international humanitarian law relating to situations of non-international armed conflict.[38] Prior to this codification, traditional international law required that the belligerency of parties to an internal armed conflict be afforded either formal or tacit recognition before humanitarian obligations could be said to exist. According to Lindsay Moir,

> An examination of some major internal conflicts of the nineteenth and early twentieth centuries shows that, in those cases where the laws of war were accepted and applied by opposing forces, some form of recognition of belligerency has invariably taken place. In contrast, where recognition of belligerency was not afforded by the government, the laws of war tended not to be applied, leading to barbaric conduct by both sides.[39]

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[36] LAUTERPACHT, *supra* note 24, at 270.

[37] YVES SANDOZ, CHRISTOPHE SWINARSKI, & BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, 1320 (Yves, Swinarski, & Zimmerman eds., 1987).

[38] *See supra* Part III (providing an analysis of Article 3 common to the four Geneva Conventions of 1949).

[39] LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 345 (2002).

The recognition of belligerency is the only institution in traditional international law necessitating the application of humanitarian norms to situations of internal conflict. In order for the existence of belligerency to be recognized, certain conditions need to be fulfilled. Lauterpacht lists the following four criteria for the recognition of belligerency:

> first, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[40]

The first condition refers to the scale of hostilities and requires that the character of the conflict is similar to that of an international war.[41] The second condition, stating the insurgent force must "occupy and administer a substantial portion of national territory," demands the existence of a quasi-governmental authority controlled by insurgents. The third condition necessitates insurgent adherence to laws governing the conduct of hostilities, ensuring respect for humanitarian norms. The fourth condition listed by Lauterpacht, requiring the act of recognition to be a diplomatic necessity, is included so that it is not "open to abuse for the purpose of a gratuitous manifestation of sympathy with the cause of the insurgents."[42] Without defining its position in relation to the situation, an act of recognition performed by a third state may be deemed "a premature and unfriendly act."[43]

When recognized as belligerents, parties to an internal armed conflict are, in traditional international law, to be treated in essentially the same way as states at war. The obligation to ensure respect for the humanitarian norms is equally binding on both insurgents and the authorities of the *de jure* government.[44] Falk states,

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[40] LAUTERPACHT, *supra* note 24, at 176.
[41] Falk, *supra* note 10, at 203.
[42] L.F.L. OPPENHEIM, 2 INTERNATIONAL LAW 249-50 (1905).
[43] Dhokalia, *supra* note 11, at 227.
[44] Daoud Khairallah, states, "The laws of war then become applicable to both parties in the conflict, not only with regard to the conduct of hostilities, but also for all other war

> International law treats an internal war with the status of belligerency as essentially identical to a war between sovereign states. This also means that an interventionary participation on behalf of either the incumbent or the insurgent is an act of war against the other. That is, as with a truly international war, a state is given the formal option of joining with one of the belligerents against the other or of remaining impartial.[45]

With recognition of belligerency, insurgents acquire the same rights and duties as a party to an international war. If recognition is bestowed by a third state, the government of that state is required to act as a neutral until the conflict's cessation. While neutral states are not permitted to offer assistance to insurgents, the benefits of third state neutrality for the insurgent party are manifold, including the right to obtain credit abroad, the maintenance of blockades, and the use of foreign ports.[46] By recognizing the belligerency of parties to an internal conflict, neutral states also obligate the application of humanitarian norms by both insurgents and the armed forces of the *de jure* government.

As a doctrine necessitating adherence to international humanitarian norms, the recognition of belligerency extends the law governing situations of international war to internal armed conflicts. The application of the humanitarian standards provided for by traditional international law is, however, contingent not only on a conflict meeting the criteria mentioned above but also on the willingness of states to recognize it as such. There appears to be little consensus among scholars as to whether the recognition of belligerency constitutes a duty when certain objective conditions are fulfilled or is fundamentally a matter of discretion for state authorities.[47] According to Falk, if the four conditions provided by Lauterpacht are fulfilled then "it is arguable that it is intervention to refuse recognition of insurgency as belligerency."[48] An alternative view is expressed by David A. Elder, describing the

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activities, such as the care for the sick and wounded, prisoners of war, etc." *See* WILSON, *supra* note 10, at 37 (quoting Daoud L. Khairallah, *Insurrection Under International Law: With Emphasis on the Rights and Duties of Insurgents* (1973)).

[45] Falk, *supra* note 10, at 203.

[46] *Id.* at 205.

[47] *See* CASTRÉN, *supra* note 20, at 173-77.

[48] Falk, *supra* note 10, at 206.

recognition of belligerency is "an act of unfettered political discretion."[49] Other areas of controversy surrounding the recognition of belligerency include the extent of territorial control required, the question of what constitutes a "responsible authority," and the nature of circumstances deemed to necessitate the act of recognition for third states.[50]

Given its high threshold of application, and the many grey areas that exist in the conditions for recognition, traditional international law is clearly inadequate as the legal regime governing situations of internal armed conflict.[51] In practice, the doctrine of recognition has served more to support the interests of states than to prioritise adherence to humanitarian norms.[52] The current total disuse of the belligerency doctrine arguably resulted from states resorting to the more flexible concept of insurgency. For many commentators, the non-recognition of the Spanish Civil War as a situation of belligerency by neighbouring states demonstrated the demise of the concept in traditional international law.[53] By recognizing the situation as one of insurgency, states avoided the restrictions on behaviour incurred by recognition of belligerency, allowing a greater degree of flexibility in defining relations with insurgents.

Irrespective of whether recognition of belligerency is regarded as a duty or as a matter of pure discretion, it is important to acknowledge that the act places obligations on each party to ensure respect for humanitarian norms and thus, despite its inadequacies, represents an important starting point for the development of international laws governing the situations of internal armed conflict.[54] Although the scope of belligerency is narrowed by its high threshold of application, its employment nevertheless represents a seismic shift in state practice, eroding the impermeability of state sovereignty in international law. The following section examines the significance of Common Article 3 as the first codification of international law applicable to all situations of non-international armed conflict.

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[49] David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L L. 37, 39 (1979).
[50] CASTRÉN, *supra* note 20, at 177-84.
[51] *See* Falk, *supra* note 10, at 191.
[52] *See generally* MENON, *supra* note 9 (regarding the doctrine of recognition).
[53] *See, e.g.*, Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43 (1988).
[54] *See* Lootsteen, *supra* note 9, at 114.

III. The Significance of Article 3 Common to the Geneva Conventions of 1949 as a Provision Relating to Situations of Internal Armed Conflict

As illustrated in the previous section, before the formulation of the four Geneva Conventions of 1949, no codification of international law existed specific to internal armed conflicts. Consequently, the application of international humanitarian law to a situation of internal armed conflict depended on it being fundamentally similar to an international armed conflict. This section illustrates the significance of Article 3 common to the four Geneva Conventions as the first codification of international law specific to situations of internal armed conflict. This is achieved first by highlighting why the common Article is to be understood as a point of departure from traditional international law. Next, the status of the common Article as a codification of customary international law is discussed. After doing so, the substance and scope of Common Article 3 is inspected. In this way, the significant import of the common Article as a development of international law relating to situations of non-international armed conflict is demonstrated.

A. Common Article 3 as a Point of Departure from the Position of Traditional International Law

The concept of internal armed conflict resulting from the formulation of Common Article 3 differs very significantly from that assumed by state practice in traditional international law. As illustrated in the previous section, in order for international humanitarian norms to be applied, recognition of belligerency was required by traditional international law. Arguably one of the greatest achievements of the common Article is that it lowers the threshold for the application of international humanitarian norms. It applies to all situations of non-international armed conflict, including situations of insurgency not reaching the threshold of a civil war. The concept of internal armed conflict that results is therefore much broader in scope than that assumed by traditional international law. Another significant development lies in the provisions of Common Article 3, which provide a set of humanitarian norms to be adhered to (as a minimum) in all circumstances. The text of Common Article 3 is as follows:

> 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 armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) Taking of hostages;
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> 2. The wounded and sick shall be collected and cared for.
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
> The Parties to the conflict 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.[55]

A further noteworthy departure from traditional international law is that the implementation of Common Article 3 does not, in principle, require reciprocity since it is binding irrespective of agreements (of lack thereof) between parties to an armed conflict. As customary international law, the common Article forms part of the strongest corpus of international

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[55] RICHARD GUELFF & ADAM ROBERTS, DOCUMENTS ON THE LAWS OF WAR 302 (3d ed. 2000).

law. The section that follows focuses on how this helps to prioritize its implementation in situations of non-international armed conflict.

B. Common Article 3 as Customary International Law

The strength of Common Article 3 as a provision relating to situations of non-international armed conflict is highlighted by its status as customary international law. The International Court of Justice (ICJ) in the *Nicaragua* case states,

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflict of a non-international character. There is no doubt that [. . .] these rules also constitute a minimum yardstick [. . .] and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."[56]

The ICJ's position on the customary status of Common Article 3 is supported by the ICTY's jurisprudence. The Appeals Chamber of the ICTY in the *Tadic* case referred to the common Article as a provision embodying "certain minimum mandatory rules."[57] These rules "reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character."[58] The Appeals Chamber goes on to state "customary international law imposes criminal responsibility for serious violations of Common Article 3."[59] This view of the common Article as customary international law is upheld in the subsequent case law of the ICTY.[60] It is also supported in the jurisprudence of the ICTY's sister

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[56] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4 para. 114 (Judgment of June 27) (Merits).

[57] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 102 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

[58] *Id.*

[59] *Id.* para. 134.

[60] *See* Prosecutor v. Mladen Naletilic, and Vinko Martinovic, No. IT-98-34-T, para. 228, (Mar. 31, 2003) (Trial Chamber Judgment); Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, & Dragoljub Prcac, No. IT-98-30/1-T, para 124 (Nov. 2, 2001) (Trial Chamber Judgment); Prosecutor v. Dragoljub Kunarac, Radomir Kovac, & Zoran Vukovic, No. IT-96-23-T & IT-96-23/1-T, para. 406 (Feb. 22, 2001) (Trial Chamber Judgment); Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, & Esad Landžo, No. IT-96-21-A, paras. 136-139 (Feb. 20, 2001) (Appeals Chamber Judgment); Prosecutor v. Dusko Tadic, No. IT-94-1-AR72, para. 609 (May 7, 1997) (Trial Chamber Judgment).

institution, the International Criminal Tribunal for Rwanda (ICTR). According to the *Akayesu* case before the ICTR, "It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."[61]

The Commentary of the ICRC on the Geneva Conventions of 1949 highlights the universality of rules enshrined in Common Article 3:

> [Common Article 3] merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.[62]

Although a consensus exists concerning the customary status of the Common Article 3, the grounds for its application have been fraught with controversy. The Article states that it applies "[i]n the case of armed conflict not of an international character." The Geneva Conventions, however, do not define or explain what an "armed conflict not of an international character" consists of. The absence of a definition has arguably undermined the implementation of the international humanitarian law, allowing states latitude to deny the existence of armed conflict.[63] Some scholars, however, consider this omission to be necessary. As illustrated by Lindsay Moir,

> The "no-definition" school of thought believes that no definition, be it either general or enumerative, can be precise enough to all possible manifestations of a

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[61] Prosecutor v. Akayesu, No. ICTR-96-4, para. 608 (Sept. 2, 1998) (Judgment).

[62] ICRC, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 50 (ICRC 1958) [hereinafter ICRC].

[63] Examples of armed conflicts in which the application of international humanitarian law has been denied include situations in the West Bank, Kuwait, and East Timor. The parties denying applicability in these situations are, respectively, Israel, Iraq, and Indonesia. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 261 n.119 (2000).

> particular concept. Furthermore, an overly strict definition might in fact result in consequences far removed from the intentions of the framers, the text becoming more restrictive the more complete the definition tries to be.[64]

According to Professor Erik Castrén, the common Article "deliberately avoids [a definition] primarily because this could lead to a restrictive interpretation."[65] At the Diplomatic Conference drafting Additional Protocol II, Jean Pictet remarked that the construction of a definition was "always difficult and could even be dangerous."[66] It was perhaps as a result of similar fears that the negotiators of the 1949 Geneva Conventions "deliberately refrained from defining the non-international armed conflicts which were the subject of Article 3 common to those Conventions."[67]

While allowing greater scope for the evolution of the law, the absence of a formula for the recognition of non-international armed conflict in the Geneva Conventions has effectively weakened the protection provided by Common Article 3. States wishing to avoid the obligations incurred by the common Article have commonly done so by refusing to recognize its applicability. Thus, in the words of Professor Richard R. Baxter, "the first line of defense against international humanitarian law is to deny that it applies at all."[68]

C. The Scope of Common Article 3

Common Article 3's field of application is broadened by the absence of a definition of non-international armed conflict. Indeed, Jean Pictet remarks,

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[64] MOIR, *supra* note 39, at 32.
[65] CASTRÉN, *supra* note 20, at 85.
[66] HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 41 (1987).
[67] JEAN S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 47 (1985); *see also* Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI IN'T & COMP L. REV 189 (2004).
[68] Meron, *supra* note 63, at 261; *see also* Richard R. Baxter, *Some Existing Problems of Humanitarian Law in* THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels) (1974).

> [T]he Article should be applied as widely as possible. There can be no reason against this. For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party.[69]

This broad interpretation of the common Article's applicability has been criticized for stretching its scope too far. According to Lindsay Moir,

> The danger with Pictet's viewpoint is that, without sufficient organisation on the part of the insurgents, the net application would be spread too wide, so that Article 3 would include those conflicts which are too limited or small-scale to have been intended. It is, after all, generally accepted that low-intensity internal disturbances and tensions are excluded from the ambit of the provision. . . . In seeking a wide application of Article 3, Pictet seeks to expand its scope further than intended.[70]

Pictet may have recognized his interpretation broadened the scope of the common Article beyond that assumed by its drafters. It is likely, however, that this position was held as a way of avoiding the problem of potential refusals by states unwilling to recognise the existence of armed conflict and thus to avoid the applicability of Common Article 3.[71] Nevertheless, in stretching the scope of Article 3, the problem of defining actions as war crimes is exacerbated.

According to the late Professor Colonel G.I.A.D. Draper, the lack of juridical precision in the formulation of Common Article 3 has left it

> open to much ambiguity of interpretation. As is so often the case with humanitarian law instruments, this is the

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[69] ICRC, *supra* note 62, at 50.

[70] MOIR, *supra* note 39, at 35-36.

[71] The following question by Pictet would appear to indirectly support this assumption: "What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages?" ICRC, *supra* note 62, at 36.

> outcome of the desire for maximum width for the play of the humanitarian norms, overriding the desire for that element of certainty which legal norms demand if they are to be effective.[72]

The ambiguity in the scope of Common Article 3 effectively allows states the opportunity to evade the responsibility to adhere to its provisions. States are often reluctant to recognize the applicability of the common Article due to the perception that it increases the authority of the insurgents. According to one Eldon V.C. Greenberg, a response is understandable if the political sensibilities of state authorities are taken into account: "In a revolutionary war . . . status is the prize for which fighting is waged. Thus, in spite of the plea contained in Article 3 of the Geneva Conventions to put aside (at least to some extent) questions of status, this politically is impossible."[73] Nevertheless, it is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion. The ICRC stated that "the ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria."[74] The kind of objective criteria which would provide grounds for the application of international humanitarian law is indicated by the ICRC stating, "the existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organization."[75] The extent of its collective character and the level of organization required for a situation to be recognized as an armed conflict is not clear, however. As noted by Moir, this presents obvious problems for its implementation:

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[72] G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983).

[73] Eldon van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT'L L.J. 37, 70-71 (1970), *as cited in* MOIR, *supra* note 39, at 66.

[74] *See* ICRC, *Working Paper* (29 June 1999), *available at* http://www/occmpw/prg/documents/precom/papersonprepcomissues/ICRCWorkPaperArticle8Para2e.pdf [hereinafter ICRC Working Paper]. This was submitted as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the International Criminal Court. *Id*.

[75] ICRC, *Commission of Experts for the Study of the Question of Aid to the Victims of Internal Conflicts*, *as cited in* G. Abi-Saab, *Non-International Armed Conflicts*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 225 (UNESCO 1988).

> Given the political factors which are bound to influence these circumstances, and common Article 3's silence as regards the party who is to determine the existence or otherwise of an armed conflict (and indeed the method by which this determination is to be made), decisions on the issue will inevitably be made by the State itself. Naturally reluctant to bind themselves to rules which could be perceived as favouring political opponents, States can therefore hide behind the lack of a definition to prevent the application of humanitarian law by denying the very existence of armed conflict.[76]

Moir also remarks, "The failure of the drafters to define the term 'armed conflict not of an international character' allowed States reluctant to hinder their ability to deal with insurrection by accepting any international humanitarian obligations simply to deny the existence of armed conflict, and thus the applicability of international regulation."[77] Aside from the absence of a definition, another feature of Common Article 3 making its application problematic is the wording of some provisions. The ICRC Commentary on Additional Protocol II states the concise wording of Common Article 3

> lays down the principles without developing them, which has sometimes given rise to restrictive interpretations. This particularly applies to the scope of judicial guarantees (paragraph 1(1)(d)) which does not go into details. The precarious position in which insurgent combatants find themselves requires that such guarantees should be clarified and reinforced for their benefit, particularly with regard to matters of judicial procedure. In fact, an insurgent combatant does not enjoy immunity when charged with having taken up arms, as do members of the armed forces in a conflict between States; on the contrary, he may be punished for having violated the national law.[78]

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[76] MOIR, *supra* note 39, at 34.
[77] *Id.* at 88.
[78] ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1325 (1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

Although the obligations incurred by Common Article 3 are minimal, it arguably represents one of the most important developments in the history of international humanitarian law. Jean Pictet describes the significance of Common Article 3 as "marking a decisive step in the evolution of modern law and tending to limit the sovereignty of the state for the benefit of the individual."[79] Rosalyn Higgins, comments that despite its shortcomings, Common Article 3 represents "a step in the right direction—its application is not based on reciprocity by the other party, nor does it depend upon the fulfilment of a technical definition of civil war."[80] Indeed, the achievement of the common Article as a universal standard applicable to situations of internal armed conflict ought not to go unrecognized. As noted by another scholar, Keith Suter, at the very least "it was useful in enabling governments to become accustomed to the principle of non-international armed conflicts being regulated by international law."[81] The significance of Common Article 3 as a step forward in ensuring a minimum degree of humanitarian protection is emphasised by Wilson:

> Article 3 of the Geneva Conventions was a milestone in the development of the law of war. Although the Article does not grant any legal status to the rebels, as evidenced by the final paragraph, its adoption affirmed that internal wars are not entirely beyond the scope of international law. Each of the States party to the Conventions has the right to demand that its provisions be respected by a government engaged in a civil war. To this degree at least, humanitarian protection in non-international armed conflicts was effectively internationalised.[82]

The progress embodied in Common Article 3 as a development of international humanitarian law is important to appreciate. As the first codification of international law specific to situations of internal armed conflict, it represents a major advancement into an area that had previously been taken as the remit of state sovereignty. The inclusion of insurgency in non-international armed conflict broadens the scope of international humanitarian law, ensuring the protection it provides covers

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[79] PICTET, *supra* note 67, at 47.
[80] Rosalyn Higgins, *International Law and Civil Conflict*, *in* EVAN LUARD, THE INTERNATIONAL REGULATION OF CIVIL WARS 183 (1972).
[81] KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 16 (1984).
[82] WILSON, *supra* note 10, at 44.

all situations of *de facto* armed conflict. Described by David A. Elder as an "initial but very important first step," the codification of Common Article 3 represents a development of tremendous value for the victims of internal armed conflict.[83] Its status as customary international law strengthens the protection it offers, helping to ensure the recognition of humanitarian provisions contained therein.

As there is no formula for the recognition of armed conflict in the Geneva Conventions, the implementation of Common Article 3 is largely dependent on the will of parties engaged in hostilities to acknowledge the applicability of international humanitarian law. This is perhaps the most problematic aspect of the law governing situations of internal armed conflict. Without a formula for the recognition of armed conflict, it is possible for states wishing to avoid the application of international humanitarian law to simply deny its relevance. A definition of non-international armed conflict was included in Additional Protocol II to the Geneva Conventions of 1949 to help avoid this problem. The following section examines how the definition contained in Additional Protocol II affected its scope after first investigating how Additional Protocol I narrowed the concept of internal armed conflict to exclude wars of national liberation.

IV. Changes in the Concept of Internal Armed Conflict Resulting from the Additional Protocols of 1977

After Common Article 3, the next major development in international humanitarian law was the formulation of two Additional Protocols to the Geneva Conventions of 1949.[84] This section, in two parts, examines each Protocol, focusing on consequent changes in the scope of internal armed conflict.[85] The first part studies Additional

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[83] Elder, *supra* note 49, at 68.

[84] Additional Protocol I, *supra* note 4; Additional Protocol II, *supra* note 4.

[85] Unlike the Geneva Conventions of 1949, the Additional Protocols of 1977 have yet to be ratified by all 191 member states of the United Nations. To date, 162 states ratified Additional Protocol I while 157 have ratified Additional Protocol II. The non-ratification of Additional Protocol I and II by states such as India, Pakistan, Indonesia, and the United States does not impact significantly on how the internal armed conflict is conceptualized contemporaneously in international humanitarian law. David J. Scheffer, the former U.S. Ambassador at Large for War Crimes Issues, in an address to I Corps Soldiers and Commanders on 4 May 2000 stated, "[W]e continue to recognize that many of the substantive provisions of both Protocol I and Protocol II, which covers internal armed conflicts, reflect the development of customary international norms." In the same

Protocol I, demonstrating how the concept of non-international armed conflict is narrowed to exclude wars of national liberation. The second part scrutinises Additional Protocol II, paying specific attention to provisions governing its application. The distinctions introduced into the notion of internal armed conflict by the Additional Protocols are held not to be advantageous to the cohesiveness of the concept.

A. Additional Protocol I

The significance of Additional Protocol I to the present discussion concerns its characterization of internal wars of national liberation as situations of international armed conflict. The title of the instrument states it relates to "the Protection of Victims of International Armed Conflicts."[86] Article 1(4) expands on this to include

> armed conflicts 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.[87]

Before the formulation of this instrument, wars of resistance against colonial powers were viewed through the lens of international humanitarian law as situations of internal armed conflict. Common Article 3 was thus considered to be the main applicable standard. Article 1(4) expands the laws governing the conduct of hostilities in wars of national liberation. According to Professor Leslie C. Green, "So long as an internal conflict is directed towards self-government, the Protocol provides for its recognition as an international conflict governed by the Conventions and the Protocol, as well as the ordinary law regarding

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speech he stated, "Thirteen years ago, President Reagan asked the Senate for its advice and consent to Additional Protocol II to the 1949 Geneva Convention, which governs internal armed conflicts. President Clinton renewed that request in January 1999." David J. Scheffer, Address to I Corps Soldiers (May 4, 2000) (transcript on file with author).

[86] Additional Protocol I, *supra* note 4.

[87] *Id.* art. 1(4).

international armed conflicts."[88] The drafters of the instrument, however, interpreted Article 1(4) more restrictively: the ICRC Commentary states the three cases recorded therein (colonial domination, alien occupation, and racist regimes), constitute "an exhaustive list" of internal armed conflicts deemed now to be international.[89] According to the Protocol drafters,

> [I]t must be concluded that the list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime. On the other hand, it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international.[90]

It is thus clear the protocol excludes the majority of internal armed conflicts, not fitting into any of the three narrow categories mentioned above. This very much constricts the remit of the instrument's application and is criticized by Professor Antonio Cassese for its narrowness:

> [F]rom a strictly humanitarian standpoint, extending the applicability of Protocol I to a larger category of armed conflicts could not but appear positive. Such an extension would involve the application of a greater number of humanitarian rules to these conflicts, and hence would mean greater safeguard of human life. . . . By considering wars of national liberation, other than those falling under Article 1, para. 4, as simple internal conflicts one merely places fewer restrictions on violence and thus attenuates to a much lesser extent the bitterness and cruelty of armed conflict. It may seem difficult for a State to treat insurgents fighting for self-determination as lawful combatants rather than as criminals; but it must be borne in mind that the

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[88] Leslie C. Green, *Strengthening Legal Protection in Internal Conflicts: Low-intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493, 503 (1997).
[89] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 54.
[90] *Id.* at 55-56.

> counterpart to such treatment is greater protection for the civilian population, a much more extensive restriction on methods and means of warfare and thus much greater humanitarian protection for all those embroiled in the armed conflicts.[91]

Despite the restrictions implicit in Article 1(4), its inclusion in the Additional Protocol represents a major victory for the third world countries participating in the negotiations at the Diplomatic Conference.[92] A side effect of this victory, however, was a lessening of interest in the formulation of Additional Protocol II. As the situations of colonial states were now deemed to be international, little impetus was left for the expansion of international humanitarian law governing the conduct of hostilities in internal armed conflict.[93] Indeed, many of the developing countries that participated in the Diplomatic Conferences were in favor of restricting the scope of Additional Protocol II so their situation would remain under the ambit of Additional Protocol I.[94]

B. Additional Protocol II

At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (1974 to 1977), Daniele Louise Bujard of the ICRC remarked upon the need to develop further the law governing situations of internal armed conflict:

> When put to the test . . . the rules of protection in [common] Article 3 had been shown to require elaboration and completion. Government and Red Cross experts consulted by the ICRC since 1971 had confirmed the urgent need to strengthen the protection of victims of non-international armed conflicts by developing international humanitarian law applicable in such situations.[95]

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[91] Antonio Cassese, Wars of National Liberation and Humanitarian Law, in ETUDES ET ESSAYS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIXROUGE, EN HONNEUR DE JEAN PICTET 319-20 (Christophe Swinarski ed., 1984).
[92] Elder, *supra* note 49, at 69.
[93] *See* MOIR, *supra* note 39, at 91.
[94] Elder, *supra* note 49, at 69.
[95] *See* MOIR, *supra* note 39, at 89.

Having recognized that the rules contained in Common Article 3 "needed to be confirmed and clarified,"[96] the drafters of Additional Protocol II sought to expand on the protection provided to the Geneva Conventions.[97] According to Professor Christopher Greenwood, it "goes a long way to putting flesh on the bare bones of Common Article 3 of the 1949 Geneva Conventions. In particular, Additional Protocol II contains the first attempt to regulate by treaty the methods and means of warfare in internal conflicts."[98] Professor Georges Abi-Saab comments that the Protocol provides a "much greater, and greatly needed, elaboration of the elliptic declarations of principle of common article 3, and through introducing new fundamental rules concerning the protection of civilians against the effects of hostilities, as well as the protection of medical personnel and transports."[99]

The concept of non-international armed conflict contained in Additional Protocol II, however, sets a much higher threshold of application than Common Article 3. While Common Article 3 applies to all situations of non-international armed conflict, Article 1(1) of Additional Protocol II states that it applies only to armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed 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.[100]

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[96] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 1325.

[97] Article 1(1) states the Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application." The first paragraph of the Preamble emphasises the importance of Common Article 3 stating, "that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949 constitute the foundation of respect for the human person in cases of armed conflict not of an international character." Additional Protocol II, *supra* note 4.

[98] Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, *in* HELEN DURHAM & TIMOTHY L.H. MCCORMACK, THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 3, 5 (1999).

[99] Abi-Saab, *supra* note 75, at 236.

[100] Additional Protocol II, *supra* note 4, art. 1(1).

According to Professor Leslie C. Green, this definition of internal armed conflict sets such a high threshold of application that it would "probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government, as has been the case with the nationalist revolution in Spain."[101] The ICRC Commentary on the Additional Protocols states that Article 1, determining Protocol II's material field of application, constitutes "the keystone of the instrument. It is the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it until it was finally adopted in the plenary meetings of the Conference."[102]

The decision to include a definition of non-international armed conflict, enabling the instrument's implementation on the basis of objective criteria, had the result of narrowing its application:

> The ICRC proposed a broad definition based on material criteria: the existence of a confrontation between armed forces or other organized armed groups under responsible command, i.e., with a minimum degree of organization. As its representative submitting the draft article in Committee explained, the intention was "to specify the characteristics of a non-international armed conflict by means of objective criteria so that the Protocol could be applied when those criteria were met and not be made subject to other considerations." Although the basic idea underlying the proposal was approved, it turned out to be very difficult to achieve a consensus as to what criteria should be used in the definition . . . . The three criteria that were finally adopted on the side of the insurgents i.e. - a responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the Protocol - restrict the applicability of the Protocol to conflicts of a certain degree of intensity. This means that not all cases of non-international armed conflict are covered, as is the case in common Article 3.[103]

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[101] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 66-67 (1999).
[102] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 1348.
[103] *Id.* at 1349.

The creation of a new, distinct threshold of application in international humanitarian law was required not only to ensure agreement at the Diplomatic Conference, but also to safeguard the common Article from any restrictions in its future application.

While Article 1(1) provides a positive definition of non-international armed conflict, Article 1(2) of the Protocol provides a negative definition. This provision states that the protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[104]

The clause in Article 1(2) providing for the exclusion of internal disturbances and tensions was retained from the original draft of the Protocol, which assumed the same threshold of application as Common Article 3. According to the ICRC Commentary on the Protocol, the purpose of this provision "was to define the lower threshold of the concept of armed conflict, assuming that the field of application of common Article 3 and the Protocol would be identical. The paragraph was not questioned and was retained and adopted without lengthy debates."[105]

Given the list of objective criteria in Article 1(1), it would appear unnecessary to include a further provision excluding situations of internal disturbance. The inclusion of Article 1(2) is significant, however, as it demarcates the lower threshold of non-international armed conflict and thus the application of Common Article 3. Commenting on the distinction between situations of non-international armed conflict and internal disturbances, Professor Dietrich Schindler lists the following four conditions determining the existence of armed conflict:

> In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of

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[104] Additional Protocol II, *supra* note 4.

[105] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 1354.

> organisation. Their armed forces should be under responsible command and be capable of meeting humanitarian requirements. Accordingly, the conflict must show certain similarities to a war without fulfilling all conditions necessary for the recognition of belligerency.[106]

It should be emphasized, however, that the distinction between situations of internal disturbance and internal armed conflict is not always apparent. The conditions outlined by Schindler, above, approximate those contained in Article 1(1) of Additional Protocol II. Situations of low-intensity armed conflict outside the remit of the Protocol, necessitating the application of Common Article 3, are more difficult to differentiate.[107]

The narrowing of the scope of Additional Protocol II according to the objective criteria set out in Article 1(1) may be viewed as a negative development for a number of reasons. First, all situations of armed conflict that do not reach a threshold of intensity similar to that of a civil war are excluded from its application. Second, situations of high intensity armed conflict between organized armed groups, not involving the armed forces of a *de jure* government, are also excluded.[108] Third, the threshold set by Article 1(1) creates a distinction in international humanitarian law between situations of internal armed conflicts covered by Common Article 3 and ones that come under the remit of the common Article and Additional Protocol II. This distinction between situations of high intensity non-international armed conflict covered by Additional Protocol II and all other cases of internal armed conflict has arguably a negative effect on the cohesiveness of the concept in international humanitarian law. Although the provision governing the remit of Additional Protocol II does not effectively weaken the protection offered in situations governed only by Common Article 3, the disparity created by this distinction has the effect of undermining aspirations towards

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[106] DIETRICH SCHINDLER, THE DIFFERENT TYPES OF ARMED CONFLICTS ACCORDING TO THE GENEVA CONVENTIONS AND PROTOCOLS 163 (1979); 163 RECUEIL DES COURS 117, 147.

[107] *See* JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 52 (1974).

[108] These points will be revisited in section four when the scope of the definition contained in Additional Protocol II is contrasted with that of the Rome Statute of the International Criminal Court.

universality in the application of humanitarian standards.[109] The restrictive definition of non-international armed conflict contained in Article 1(1) is perhaps the greatest failing of the instrument, imposing a threshold similar in certain respects to that stipulated by the recognition of belligerency in traditional international law. Commentator Medard R. Rwelamira states, "Protocol II has in effect restated the general rule of international law relating to the status of belligerency."[110]

Rwelamira's comment is not, however, entirely accurate. Although there is some similarity, the grounds for the application of Additional Protocol II are not identical to those required by the recognition of belligerency. As Lieutenant Colonel Yair M. Lootsteen has noted, "[T]he criteria established in Protocol II, while establishing a threshold that is considerably higher than mere civil unrest, is lower than state-to-state warfare."[111] Before recognition of belligerency may occur, insurgents must be in command of an administration similar to that of a government. This requirement is not included in Additional Protocol II. According to Lootsteen, the main difference in the conditions required for the recognition of belligerency is in the scale of insurgent organization and control over territory:

> 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 . . . 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.[112]

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[109] Many scholars are of the view that one body of law should apply to all situations of armed conflict, irrespective of their characterisation as internal or international. *See, e.g.*, Judge G.K. McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30 (1998); James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003).

[110] Medard R. Rwelamira, *The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949*, *in* Swinarski, *supra* note 91, at 234-35.

[111] Lootsteen, *supra* note 9, at 130.

[112] *Id.*

The threshold determining the application of Additional Protocol II is lower than that required for the recognition of belligerency. The scope of the Protocol, albeit restrictive in comparison with that of Common Article 3, requires a significantly lower threshold for the recognition of armed conflict than that stipulated in traditional international law.

The criteria contained in Article 1(1) of Additional Protocol II do not assist, as originally intended, in determining the existence of armed conflict. Indeed, it is arguable that this provision, far from helping to ensure adherence to standards of humane treatment, has effectively created more loopholes for governments wishing to avoid the implementation of international humanitarian law.[113]

Each of the Additional Protocols created a distinction in international humanitarian law that previously had not existed. Article 1(4) of Additional Protocol I, providing for the internationalization of wars of national liberation, has effectively narrowed the concept of internal armed conflict, and, in doing so, lessened interest in the development of applicable laws.[114] The creation of a new threshold of application by Article 1(1) of Additional Protocol II is, however, a much more regressive development—rather than bolstering the implementation of international humanitarian law, the heightened threshold serves to strengthen the discretionary power of states to deny the existence of armed conflict. As pointed out by Medard R. Rwelamira, "Individual states are . . . left with a *carte blanche* to decide when the Protocol or common Article 3 should be invoked."[115] The following section examines the notion of internal armed conflict propounded by the ICTY, highlighting the conceptual framework provided for in the application of international humanitarian law.

V. The Concept of Internal Armed Conflict Propounded in the Tadic Jurisdiction Decision

This section examines two of the most significant recent developments in the concept of internal armed conflict in international

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[113] Similarly to the way in which the recognition of belligerency could be avoided due to the absence of a required condition, it is also possible to escape the jurisdiction of the Protocol by narrowly interpreting the criteria contained in Article 1(1).

[114] Elder, *supra* note 49, at 69.

[115] Rwelamira, *supra* note 110, at 236.

humanitarian law. The first development concerns the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia. The definition of internal armed conflict employed by the tribunals is examined in order to explore its scope. The second development is the inclusion of the formula provided by the *Tadic Jurisdiction Decision* in Article 8(2)(f) of the Rome Statute. The drafting of this provision is examined to illustrate how its current form was agreed upon. In conducting this study, in light of its broad scope and low threshold for application, the concept of internal armed conflict emerging from the Rome Statute represents a positive point of departure from the definition given in Additional Protocol II.

A. *Tadic*: A Formula for the Recognition of Armed Conflict

On 2 October 1995, the appeals chamber of the ICTY issued its decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (the *Tadic* Jurisdiction Decision).[116] This decision concerning the first case before the tribunal considerably influenced the development of international humanitarian law. The decision affected many aspects of international humanitarian law—the discussion here is restricted to the definition of armed conflict provided in that decision:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[117]

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[116] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 70 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
[117] *Id*. para. 70.

The appeals chamber in the *Tadic* case related the above concept to the situation in the Prijedor region of Bosnia-Herzegovina. In doing so, the chamber clarified grounds for asserting the existence of "a legally cognizable armed conflict,"[118] triggering the application of international humanitarian law:

> Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. . . . There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[119]

The existence of armed conflict is interpreted in broad terms by the appeals chamber, which states, "[t]he temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities."[120] This position, which strengthens the reach of international humanitarian law, is also voiced by the trial chamber in the *Delalic* case: "whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable."[121] Furthermore, the use of the term "protracted" in the tribunal's definition of non-international armed conflict ("protracted armed violence between governmental authorities

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[118] *Id*. para. 66.
[119] *Id.* para. 70.
[120] *Id.* para. 67.
[121] Prosecutor v. Delalic, Mucic, Delic, & Landzo, No. IT-96-21-T, para. 185 (Nov. 16, 1998) (Trial Chamber Judgment); *see also* Prosecutor v. Blaskic, No. IT-95-14-T, Trial Chamber Judgment, P 100-101 (Mar. 3, 2000). The *Blaskic* case before the ICTY refers to the definition provided by the *Tadic* Appeals Chamber as a criterion applicable "to all conflicts whether international or internal. It is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part." *Blaskic*, No. IT-95-14-T, para. 64.

and organized armed groups or between such groups"), implies that hostilities need not be continuous.[122] As interruptions in fighting do not suspend the obligations of the parties under international humanitarian law, the use of this term allows for a broad, practical interpretation of internal armed conflict.

The *Tadic* Trial Chamber applied the concept of armed conflict introduced by the appeals chamber.[123] In doing so, it posited the following interpretation of the definition provided by the appeals chamber:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.[124]

The two aspects of internal armed conflict stated by the *Tadic* Trial Chamber—the intensity of the conflict and the organization of parties to the conflict—provide grounds for the recognition of *de facto* armed conflict (and thus also for the application of Common Article 3). The trial chamber in the *Delalic* case supports this interpretation of non-international armed conflict, stating that "in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved."[125] The ICTR also employs this approach: In

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[122] *See* Andreas Zimmermann, *War Crimes Committed in an Armed Conflict Not of an International Character*, *in* Otto TRIFFTERER, COMMENTARY ON STATUTE OF THE INTERNATIONAL CRIMINAL COURT 285 (1999).

[123] *See* Prosecutor v. Dusko Tadic, No. IT-94-1-AR72, para. 628 (May 7, 1997). The ICTY has consistently employed this test in determining the existence of armed conflict. *See* Prosecutor v. Kunarac, Kovac & Vukovic, No. IT-96-23, para. 56 (June 12, 2002) (Appeals Chamber Judgement); Prosecutor v. Jelisic, No. IT-95-10-T, paras. 29, 30 (Dec. 14, 1999) (Trial Chamber Judgment); Prosecutor v. Furundzija, No. IT-95-17/1, para. 59 (Dec. 10, 1998) (Trial Chamber Judgment).

[124] *Tadic*, No. IT-94-1-AR72, para. 562.

[125] *Delalic,* No. IT-96-21-T, para. 184.

determining the existence of armed conflict in Rwanda, the tribunal held that it is "necessary to evaluate both the intensity and organization of the parties to the conflict."[126]

Besides being utilized to determine the applicability of international humanitarian law in the former Yugoslavia and Rwanda, the formula propounded in the *Tadic* Jurisdiction Decision has also been applied to a number of other situations. These include the Occupied Palestinian Territories of the Middle East and Somalia. The UN Special Rapporteur on the situation of human rights in the Palestinian territories, John Dugard, has used the *Tadic* formula repeatedly in evaluating the status of the situation in the Palestinian territories under Israeli occupation. In a report issued on 4 October 2001, he stated the situation could be characterized, "on an irregular and sporadic basis," as an armed conflict due to the "frequent exchanges of gunfire between the Israel Defense Forces and Palestinian gunmen."[127] Mona Rishmawi, an independent expert of the Commission on Human Rights, applied the *Tadic* formula to the situation in Somalia to determine the existence of armed conflict and thus the application of international humanitarian law. She held that,

> as long as the faction leaders, the militias and other irregular armed forces continue their conflict in Somalia and until a peaceful settlement is reached, international humanitarian law related to internal armed conflict applies in the whole territory of Somalia irrespective of whether the specific area is engulfed in active fighting.[128]

Providing a basis for determining the existence of armed conflict, the *Tadic* formula now arguably forms part of the conceptual framework for the application of international humanitarian law to situations of internal armed conflict. The section that follows examines how it has been adapted in the Rome Statute of the International Criminal Court,

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[126] Prosecutor v. Akayesu, No. ICTR-96-4, para. 620 (Sept. 2, 1998) (Judgment).

[127] *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967* para. 13, U.N. Doc. A/56/440 (2001).

[128] *See Report on the Situation of Human Rights in Somalia, Prepared by the Independent Expert of the Commission on Human Rights, Mona Rishmawi, Pursuant to Commission Resolution 1996/57 of 19 April 1996* para. 54 U.N. Doc. E/CN.4/1997/88 (1997).

highlighting the broad scope of non-international armed conflict as a positive development of the law.

B. The Adaptation of the Tadic Formula in Article 8(2)(f) of the Rome Statute

The ICTY's characterization of non-international armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups" has had a significant impact on its contemporary conceptualization in international humanitarian law. Perhaps the strongest evidence of this influence is the adaptation of the formula in the Rome Statute of the International Criminal Court. Although the issue of jurisdiction over non-international armed conflicts was one of the most controversial to be dealt with at the Rome Conference,[129] its inclusion in the statute of the court eventually was agreed upon despite opposition from countries including India, China, Turkey, Sudan, and the Russian Federation.[130]

A question that subsequently arose at the Rome Conference concerned the scope of the Court's jurisdiction over non-international armed conflicts. The wording of Article 1(2) of Additional Protocol II received general approval when proposed as part of a definition of internal armed conflict and is now included in Article 8(2)(f) of the Rome Statute. This clause provides for jurisdiction over war crimes committed in "armed conflicts not of an international character" and thus notes the exclusion of "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[131] The second sentence of Article 8(2)(f) (stating that the Statute applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups"),[132]

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[129] Darryl Robinson & Herman von Hebel, *War Crimes in Internal Conflicts: Article 8 of the ICC Statute*, 1999 Y.B. INT'L HUMANITARIAN L. 193, 198 (1999).

[130] *Id*. at 198 n.37.

[131] Rome Statute, *supra* note 6, art. 8(2)(f).

[132] *Id*. The wording of this definition of non-international armed conflict differs slightly from that provided by the *Tadic* Jurisdiction Decision. Instead of "protracted armed violence," the term "protracted armed conflict" is used in the Rome Statute. This, however, is not to be interpreted as either changing the scope of internal armed conflict or creating a threshold of applicability distinct from that of the *Tadic* definition. *See* Meron, *supra* note 63, at 260; THEODOR MERON, WAR CRIMES LAW COMES OF AGE 309 (1998); Clause Kress, *War Crimes Committed in Non-International Armed Conflict and the*

originated in a proposal submitted by the Sierra Leone delegation.[133] This proposal adapted the *Tadic* formula to provide a positive definition of non-international armed conflict.

Sierra Leone's proposal received support as an alternative to the one restricting the Court's jurisdiction according to the text of Article 1(1) of Additional Protocol II. As elucidated in the previous section, this article defines situations of non-international armed conflict as taking place

> in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[134]

If accepted as a positive definition of non-international armed conflict, this provision would have imposed an excessive restriction on the Court's jurisdiction, effectively excluding situations of internal armed conflict such as those in Liberia and Somalia.[135]

The adaptation of the *Tadic* formula in Article 8(2)(f) of the Rome Statute has had the effect of lowering the threshold of intensity required for the recognition of internal armed conflict. This has been welcomed by a number of commentators. According to Adriaan Bos,

> this threshold lowering is important because it reduces the chances that a situation arises in a state that can be qualified neither as an internal conflict nor as an emergency as provided for in the human rights

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Emerging System of International Criminal Justice, 2001 ISRAEL Y.B. ON HUM. RTS. 103, 117-18; ICRC Working Paper, *supra* note 74.

[133] U.N. Doc. A/CONF.183/C.1/L.62 (on file with author).

[134] Additional Protocol II, *supra* note 4, art. 1(1).

[135] *See* ICRC, *Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva* (Jan. 19-23, 1998), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/02CED570ABFDD384C1256B66005C91C6 [hereinafter ICRC, Armed Conflicts Linked to the Disintegration of State Structures].

> conventions. A better protection of human rights may be achieved because of this reduction.[136]

For Professor Theodor Meron, the recognition of *de facto* armed conflict as possibly existing between organized armed groups is "both welcome and realistic."[137]

In contrast to the restrictive standard set by Article 1(1) of Additional Protocol II, the inclusive breadth of Article (8)(2)(f) is highlighted by Andreas Zimmerman, pointing to its coverage of the following three situations: Armed conflicts between governmental authorities and dissident authorities; armed conflicts between governmental authorities and organised armed groups; and armed conflicts between several organised armed groups.[138]

The use of the term "governmental authorities" has further broadened the parameters of the provision. According to Zimmerman, the term "has to be understood as including not only regular armed forces of a State but all different kinds of armed personnel provided they participate in protracted armed violence, including, where applicable, units of national guards, the police forces, border police or other armed authorities of a similar nature."[139] The less restrictive nature of the definition contained in Article 8(2)(f) is further demonstrated by the absence of any requirement for the existence of responsible command, sustained and concerted military operations or effective control over part of the territory of a State. Zimmerman remarks this was due to the "experiences of the last twenty years after the adoption of the Second Add[itional] Prot[ocol]."[140] In contrast to Article 1(1) of Additional Protocol II, it is also worth noting that the concept of internal armed conflict in Article 8(2)(f) does not require organised armed groups to have the ability to implement international humanitarian law.

In order to reassure states with concerns over the broadness of the provision and its low threshold of application, Article 8(3) states that none of the provisions in the Statute relating to non-international armed

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[136] Adriaan Bos, *The Universal Declaration of Human Rights and the Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 229, 233 (1998).
[137] Theodor Meron, *Classification of the Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236, 237 (1998).
[138] Zimmermann, *supra* note 122, at 286.
[139] *Id.*
[140] *Id.*

conflicts "shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."[141] This clause is taken from Article 3(1) of Additional Protocol II and serves to emphasise that the Statute's provisions on internal armed conflict may not be interpreted as intruding on state sovereignty.[142]

The concept of internal armed conflict provided by *Tadic* and its adaptation in Article 8(2)(f) of the Rome Statute arguably represent progressive developments in international humanitarian law. Providing a basis for the application of Common Article 3, the formula distinguishes broadly the terms for determining the existence of armed conflict, showing it to be distinct from situations of internal disturbance. As previously illustrated, prior to the *Tadic* Jurisdiction Decision the only standard provided by international humanitarian law demarcating situations of internal armed conflict was that contained in Article 1(1) of Additional Protocol II. The high threshold of application set by the Protocol had proved problematic, measuring the existence of armed conflict according to a standard similar, in certain respects, to that required in traditional international law for the recognition of belligerency.

The lowering of the threshold requirements posited by Article 1(1) of Additional Protocol II has resulted in the broadening of the concept of internal armed conflict to include situations of insurgency that until now were not recognised as requiring the application of international humanitarian law. Common Article 3 is now a recognized applicable standard in situations of guerrilla warfare where hostilities take place between organized armed groups without the involvement of government authorities. Prior to the *Tadic* Jurisdiction Decision, the characterization of such situations as manifestations of *de facto* armed conflict would have been inappropriate due to non-involvement of *de jure* state authorities. This development of international humanitarian law to include situations where state structures have disintegrated, takes into account the experiences of countries such as Somalia and Liberia.[143]

Implicit in the *Tadic* formula is the fact that situations of insurgency are now included within the concept of internal armed conflict,

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[141] Rome Statute, *supra* note 6, art. 8(3).
[142] Additional Protocol II, *supra* note 4, art. 3(1).
[143] ICRC, *supra* note 136.

necessitating the application of international humanitarian law. The *Tadic* Jurisdiction Decision summarizes succinctly four reasons for the historical extension of international humanitarian law to cover situations of insurgency:

> First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled . . . . Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.[144]

The move from a state-sovereignty approach to a human-being-oriented approach is to be welcomed as it allows for and supports a greater degree of humanitarian protection for the victims of non-international armed

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[144] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 97 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

conflicts. The adaptation of the *Tadic* formula in the Rome Statute represents a positive development which strengthens this protection, helping to ensure accountability for crimes committed in situations of internal armed conflict.

VI. Conclusion

The objective of this article has been to examine the development of the concept of internal armed conflict employed in international humanitarian law. It is hoped that by doing so, changes in the scope of the concept, and the nature of some problems surrounding its application, have been illuminated. As the course of its development has not been straightforward, it is useful here to recapitulate its evolution.

Prior to the formulation of the Geneva Conventions of 1949, situations of internal armed conflict were generally viewed as falling outside the remit of international law. Situations analogous to international armed conflict were exceptions only when recognition of belligerency had taken place. In traditional international law, the existence of insurgency was not viewed as necessitating the application of international humanitarian law. It was through the recognition of belligerency, either by the *de jure* government or by a third state, that parties to an internal armed conflict were categorically obligated to comply with the laws of war. Soon after the Spanish Civil War, the doctrine of belligerency was viewed to be redundant because of the absence of acts recognizing the existence of armed conflict in the practice of states.[145] The strict criteria governing the recognition of belligerency, together with its high threshold of application, were undoubtedly considerations for the drafters of Common Article 3.

The formulation of Common Article 3, despite its failings, has come to be recognized as the first major achievement in the codification of a universally acceptable standard specific to situations of internal armed conflict. Now recognized as customary international law, the common Article embodies a set of minimum standards of humane treatment to be adhered to in all circumstances. The cardinal problem with the application of Common Article 3, however, is not with its humanitarian provisions, but with the actual recognition of the existence of armed conflict. As there is no set of criteria indicating conditions manifesting

[145] *See* Lootsteen, *supra* note 9, at 111.

an armed conflict "not of an international character" in the Geneva Conventions, the implementation of the common Article is based on the willingness of parties to recognize its applicability. When a state refuses to recognize the existence of armed conflict, it also avoids the application of the common Article. As discussed earlier, the lack of a formula for determining the existence of armed conflict has in many ways facilitated states wishing to avoid the application of international humanitarian law.

In the process of drafting the Additional Protocols of 1977, it is likely that delegates were mindful of how the absence of a formula weakened the efficacy of Common Article 3. The drafters of Additional Protocol II attempted to strengthen the instrument by including a set of criteria demarcating its field of application. This resulted, however, in the establishment of an excessively high threshold for its implementation and also effectively created another category of internal armed conflict in international humanitarian law. Additional Protocol I, relating to situations of international armed conflict, narrowed the concept of internal armed conflict by internationalizing internal wars of national liberation. As a consequence, situations of internal armed conflict against racist regimes or colonial occupation were now viewed as wars governed by the Geneva Conventions in their entirety and not by Additional Protocol II. Both Protocols had the effect of creating new, and in certain respects, problematic distinctions in the concept of internal armed conflict. The distinction created by Additional Protocol II delineated situations of a particular threshold, excluding completely from its remit internal armed conflicts of low intensity. Additional Protocol I distinguished particular kinds of *prima facie* internal armed conflict as international on the grounds of their cause or intended outcome. These distinctions were included due to the pragmatism of drafters, responding to the political pressure exerted during negotiations. Now accepted features of international humanitarian law, they narrow the notion of internal armed conflict, further exacerbating problems that surround the formulation of a cohesive concept. For this reason, the formula propounded in the *Tadic* Jurisdiction Decision and adapted in Article 8(2)(f) of the Rome Statute of the International Criminal Court is an especially welcome development.

The concept of internal armed conflict as "protracted armed conflict between organized armed groups and government authorities or between such groups" is welcome for a number of reasons. It expands the concept of internal armed conflict beyond that contained in Additional Protocol II and, in doing so, provides a basis for the application of

Common Article 3. The formula is broad enough to include situations of low intensity armed conflict and yet exclude situations of internal disturbance. By realistically defining the concept of internal armed conflict in broad terms, Article 8(2)(f) of the Rome Statute expands the protection offered by international humanitarian law in such situations. The practice of guerrilla warfare may now be included in the concept of armed conflict as a result of the provision's lower threshold of application. The definition provided in Article 8(2)(f) lacks the excessive restrictions imposed by Article 1(1) of Additional Protocol II such as the existence of territorial control, responsible command over troops, and the use of sustained and concerted military operations by insurgents. Furthermore, the definition in Article 8(2)(f) specifically provides for the existence of armed conflict between warring factions without the involvement of a *de jure* governmental authority. Before the *Tadic* Jurisdiction Decision, such situations, irrespective of their scale, were generally not recognised in international humanitarian law as constituting armed conflicts. The broad, inclusive language of the definition is of significant help in ensuring a greater degree of protection to the victims of such situations.

The more recent developments outlined in this article show an expansion of the concept of internal armed conflict in international humanitarian law. This is to be welcomed as it enables a greater degree of humanitarian protection. The progress that has been achieved in the area of international humanitarian law governing situations of internal armed conflict has been slow, attained by progressively pulling against interests of state sovereignty. Although the concept of internal armed conflict codified in Article 8(2)(f) of the Rome Statute is a significant attainment, further development is required for its evolution into a more substantive measure for determining the existence of armed conflict. It is important to recognize, however, that there should not be a quantitative threshold set for either intensity of hostilities or the organization of insurgents, as flexibility in the application of the formula could well be stifled by such an action. The concept being phrased in an abstract manner will allow future case law to develop without being constricted by the kind of restrictive stipulations set out in Additional Protocol II. This is vital. In order for the formula to strengthen the application of international humanitarian law, it must possess an optimum degree of flexibility. The concept is a positive contribution to the body of law governing internal armed conflict and no doubt will be further utilized in the future to ensure a greater degree of humanitarian protection in situations once deemed to be the exclusive concern of state sovereignty.