

Timelines, borderlines and conflicts

The historical evolution of the legal divide between international and non-international armed conflicts

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Abstract

Calls have been made in recent years for the legal distinction between international and non-international armed conflicts to be removed. Also as of late, confusion regarding the applicable legal regime has been created by so-called transnational conflicts involving non-state entities. These situations do not fit naturally into the two traditional types of armed conflict recognized by IHL from 1949 onwards. The present article centres on how the legal divide that still exists between international and non-international armed conflict can be explained historically. It aims to further the discussion on whether such a distinction is still relevant, as well as on how certain situations could be classified in the existing typology of IHL.



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March on, march on, since we are up in arms;
If not to fight with foreign enemies,
Yet to beat down these rebels here at home.

Shakespeare, *Richard III*, IV.iv. 459–461

In the summer of 2006, the world witnessed a situation that undoubtedly reached the threshold of armed conflict. As yet, however, the conflict between Israel and Hezbollah (or according to some, the conflict between Israel and Lebanon) has not conclusively been identified as one of the two (existing) types of conflict under international humanitarian law (IHL): as either an international armed conflict (IAC) or a non-international armed conflict (NIAC).¹ Nor have the incursions by Turkish armed forces into northern Iraqi territory to carry out raids on Kurdish strongholds been defined as one of the two types of conflict.

Whilst calls have been made in recent years for the legal distinction between international and non-international armed conflicts to be removed,² confusion as to the applicable legal regime has been created even more recently by the type of conflict situation referred to above, i.e. against non-state entities that operate beyond the borders of a single state. These so-called transnational armed conflicts do not fit naturally into the two traditional types of armed conflict recognized by IHL. In *Hamdan v. Rumsfeld*, the Supreme Court of the United States ruled that the fight against Al Qaeda, which is not limited to Afghanistan or Iraq but is conducted in essence outside the United States, is covered by Common Article 3 that applies to NIACs.³ This case is a striking example of the problems the present classification poses not only for lawyers but also for policymakers and potentially for members of the military.⁴

- 1 Neither Israel nor Lebanon took the standpoint that the hostilities constituted a non-international armed conflict. See Geoffrey S. Corn, 'Hamdan, Lebanon, and the regulation of hostilities: The need to recognize a hybrid category of armed conflict', *Vanderbilt Journal of Transnational Law*, Vol. 40, No. 2, 2007, p. 305. The International Committee of the Red Cross (ICRC) has not publicly qualified the conflict as either international or non-international in character, whereas the United Nations Commission of Inquiry on Lebanon named the situation a *sui generis* international armed conflict – *Report of the Commission of Inquiry on Lebanon, pursuant to Human Rights Council Resolution S-2/1*, UN Doc. A/HRC/3/2, 23 November 2006, paras 8–9 and 57.
- 2 e.g. James Stewart, 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict', *International Review of the Red Cross*, Vol. 85, No. 850, 2003; Deidre Willmott, 'Removing the distinction between international and non-international armed conflict in the Rome Statute of the International Criminal Court', *Melbourne Journal of International Law*, Vol. 5, Issue 1, 2004; Emily Crawford, 'Unequal before the law: The case for the elimination of the distinction between international and non-international armed conflict', *Leiden Journal of International Law*, Vol. 20, Issue 2, 2007.
- 3 United States Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), pp. 66–69.
- 4 Anthony Rogers notes that the division into international and non-international armed conflicts is important for practitioners, for example the 'military lawyer who has to advise a commander or the military chain of command [on the] applicable law'. See Anthony P.V. Rogers, 'International humanitarian law and today's armed conflicts', in Cindy Hannard, Stéphanie Marques dos Santos and Oliver Fox (eds), *Proceedings of the Bruges Colloquium: Current Challenges in International Humanitarian Law*, Collegium No. 21, ICRC/College of Europe, Bruges, October 2001, p. 20.

The present article aims to explain the legal divide that (still) exists between international and non-international armed conflict. How did this division come about, and was it meant to be exclusive? Did it not take into account situations now seen as problematic in terms of the legal regime applicable? This analysis is intended to further the discussion on whether such a distinction is still needed, and which situations should be classified as which (existing) types of conflict under IHL.

It starts with a short overview of what constitutes armed conflict, and more specifically what constitutes an international and a non-international armed conflict in present-day treaty law, and examines whether this distinction between the two can nowadays still be considered relevant. The discussion then centres on how this distinction can be explained historically and in particular whether, as Malcolm Shaw notes, it is historically ‘founded upon the difference between inter-state relations, which was the proper focus for international law, and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus in principle impervious to international legal regulation.’⁵

The logical point of departure in this regard obviously seems to be the emergence of the nation-state with the Peace of Westphalia. First, however, a look is taken at the period before 1648 and the influence of religion on the determination of types of armed conflict at that time. The various stages of NIAC prior to 1949, namely rebellion, insurgency and belligerency, are discussed next, followed by a survey of the practical implications of the non-regulation of non-international conflict situations by international law (except in situations in which belligerency was recognized), with reference to the American, Finnish and Spanish civil wars.

An in-depth overview is then given of the drafting history of Common Article 3, including negotiation of it at the 1949 Diplomatic Conference which illustrates what the drafters at that time understood as being an armed conflict not of an international character, and thus the difference between international and non-international armed conflicts. Finally, the relevance of state sovereignty in the distinction between international and non-international armed conflicts is put into perspective.

What is an armed conflict?

The key instruments of IHL, i.e. the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, distinguish between international and non-international armed conflicts by specifically prescribing which rules apply in which type of armed conflict. According to Common Article 2 of the Geneva Conventions, the provisions relating to international armed conflicts apply to ‘all cases of declared war or of any other armed conflict which may arise between two or more

5 Malcolm N. Shaw, *International Law*, Cambridge University Press, Cambridge, 2002, pp. 1068–1069.

of the High Contracting Parties’ and to ‘all cases of partial or total occupation’. Article 1 of Additional Protocol I further specifies that the said provisions also apply to ‘conflicts in which peoples are fighting against colonial domination [...] alien occupation and [...] racist regimes’; thus to situations that may seem to be of a non-international nature and were indeed regarded as such until 1977. However, neither the Geneva Conventions nor Protocol I contain a real definition of the expression ‘armed conflict’.⁶

Pictet provides some guidance by explaining in the *Commentary* on the Geneva Conventions that ‘any difference arising between States and leading to the intervention of members of armed forces is an armed conflict’.⁷ However, this phrase applies to international armed conflicts only. The International Criminal Tribunal for the former Yugoslavia (ICTY) furthermore established, in its *Tadić* ruling, that ‘resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’ is to be considered an armed conflict.⁸ This wording does address both IACs and NIACs and has been used by many as a definition when qualifying a situation as an armed conflict. It does not distinguish clearly, however, between the two types of conflict.

For its part, Common Article 3 lays down minimum humanitarian standards that apply in the case of ‘armed conflict not of an international character’, but without defining what is to be understood by this term.⁹ The minimum standards of this ‘convention within a convention’, or ‘mini-convention’,¹⁰ were later developed in greater detail by Protocol II because of the need to ensure better

6 The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), includes an article on ‘Definitions’ (Article 2), as well as one on ‘Terminology’ (Article 8), but the term ‘armed conflict’ is not defined therein.

7 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949 relative to the Treatment of Prisoners of War* (hereinafter *Commentary on GC III*), ICRC, Geneva, 1958, p. 23.

8 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, 2 October 1995, para 70. In *Haradinaj*, the Trial Chamber clarified the definition of non-international armed conflict that has been used by the ICTY since *Tadić* (see ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement (Trial Chamber), Case No. IT-04-84-T, 3 April 2008). In *Boskoski*, the Trial Chamber elaborated on this, gave a detailed overview of what constitutes such a conflict, and reviewed how the relevant elements of Common Article 3 that were recognized in *Tadić*, namely ‘intensity’ and ‘organisation of the armed group’ are to be understood (see ICTY, *Prosecutor v. Boskoski and Tarculovski*, Judgement (Trial Chamber), Case No. IT-04-82-T, 10 July 2008, paras 175–206).

9 Jelena Pejic writes: ‘What is known is that the omission of a definition in Article 3 was deliberate and that there is a “no-definition” school of thought which considers this to be a “blessing in disguise”’ (Jelena Pejic, ‘Status of conflict’, in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, p. 85; see also Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 32. According to Erik Castrén, who was present at the Diplomatic Conference in 1949, the omission of a definition in Common Article 3 was deliberate, because it was believed that such a definition could lead to a restrictive interpretation (Erik Castrén, *Civil War*, Suomalainen Tiedeakatemia, Helsinki, 1966, p. 85).

10 Pictet, *Commentary on GC III*, above note 7, p. 48.

protection for victims of NIACs.¹¹ Although it deals specifically with NIACs,¹² Protocol II does not define the term ‘non-international armed conflict’ either, but it limits the scope of application to 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 [Additional Protocol II].¹³

The San Remo Manual on NIACs, a document compiled to clarify the rules applicable to NIACs, implicitly acknowledges the ambiguity resulting from a general lack of definition of such conflicts by first and foremost providing one. It seems to be a combination of the various ‘definitions’ discussed above:

Non-international armed conflicts are armed confrontations occurring within the territory of a single State and in which the armed forces of no other State are engaged against the central government. ...¹⁴

The diverse ways in which the said type of conflict is defined above, using the terms ‘within a State’, ‘in the territory of one of the High Contracting Parties’, ‘in the territory of a High Contracting Party’ and ‘within the territory of a single State’, all create a restriction;¹⁵ some seem more restrictive (e.g. ‘a single State’) than others (‘a State’).¹⁶ In *Haradinaj*, the ICTY Trial Chamber elucidated the definition of NIAC used by the Tribunal since *Tadić*.¹⁷ In *Boskoski*, the Trial Chamber spelt it out further by giving a detailed overview of what constitutes an NIAC and reviewing how the relevant elements of Common Article 3 recognized in *Tadić*, namely ‘intensity’ and ‘organisation of the armed group’ are to be understood.¹⁸

11 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Preamble.

12 In IHL treaties, the term ‘non-international armed conflict’ (Protocol II) and the wording ‘not of an international character’ (Common Article 3) are used. The term ‘internal armed conflict’ is not found in any of the IHL instruments. In some cases, such as EU Council Directive 2004/83/EC, 29 April 2004, the latter is unfortunately used. Also some authors and some courts use the term ‘internal armed conflict’, which creates unnecessary confusion.

13 Protocol II, Article 1(1).

14 International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, San Remo, 2006, p. 2, available at <http://www.michaelschmitt.org/images/Manual%5B1%5D.Final.Brill..pdf> (visited 20 May 2009).

15 Particularly as regards the transnational situations mentioned above as being hard to qualify. Those situations, i.e. transnational armed conflicts, seem incompatible with the various aforesaid ‘definitions’ of the scope of application of international and non-international armed conflicts, and thus to be outside the established categories of armed conflict. Transnational armed conflicts thus seem *prima facie* not to be regulated by IHL, and people affected by these conflicts seem to fall outside the protection afforded by this body of law. This was in fact the position of the US government before the US Supreme Court ruled in *Hamdan* that as a minimum, Common Article 3 is applicable to these situations (see above note 3).

16 The fact that according to the said Manual NIACs do not ‘encompass conflicts extending to the territory of two or more States’ (p. 2) further illustrates the narrowness of the definition given in it.

17 See ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, above note 8.

18 See ICTY, *Prosecutor v. Boskoski and Tarculovski*, above note 8, paras 175–206.

These clarifications by the Tribunal help to determine when a situation reaches the threshold of NIAC and has to be considered a situation of armed conflict instead of e.g. internal disturbances. Despite the lack of a formal treaty-given definition, it seems reasonably clear nowadays what is to be considered an IAC or an NIAC, and thus what constitutes the distinction between the two types.

Is the distinction between the two categories still relevant?

Some authors have commented that the distinction between IAC and NIAC is ‘truly artificial’,¹⁹ ‘arbitrary’, ‘undesirable’ and ‘difficult to justify’, and that it ‘frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs’.²⁰ It can in fact be argued that the determination of an armed conflict as international or non-international is less important today. For example, almost all war crimes in both IAC and NIAC are included in the ICRC study of customary international humanitarian law²¹ and in the Rome Statute. The jurisprudence of the international tribunals and courts also seems to lessen the need for a distinction between the two types of armed conflict. Liesbeth Zegveld explains that:

... it is common practice for international bodies to read substantive norms of Protocol I and the Geneva Conventions into Common Article 3 and Protocol II. Common Article 3 and Protocol II contain few and simple provisions, which are not always suited to the complex realities of internal conflicts. International bodies have therefore resorted to Protocol I and the Geneva Conventions, which serve as a standard of interpretation of Common Article 3 and Additional Protocol II.²²

She concludes that international practice ‘thus demonstrates a trend to diminish the relevance of the distinction between the law applicable to international and internal armed conflicts’.²³

19 Rosemary Abi-Saab, ‘Humanitarian law and internal conflicts: The evolution of legal concern’, in Astrid J.M. Delissen and Gerard J. Tanja, *Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 209.

20 Stewart, above note 2, p. 313, quoting respectively René Jean Dupuy and Antoine Leonetti, ‘La notion de conflit armé à caractère non international’ in Antonio Cassese (ed), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1971, p. 258; Ingrid Detter, *The Law of War*, Cambridge University Press, Cambridge, 2002, p. 49; Colin Warbrick and Peter Rowe, ‘The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadić case’, *International & Comparative Law Quarterly*, Vol. 45, Issue 3, 1996, p. 698; W. Michael Reisman and James Silk, ‘Which law applies to the Afghan conflict?’, *American Journal of International Law*, Vol. 82, 1988, p. 465.

21 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Geneva/Cambridge, 2005.

22 Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, Cambridge, 2002, p. 33.

23 *Ibid.*, p. 34.

Some scholars also see proof of a convergence between the two types of armed conflict in the international agreements on weapon regulation and disarmament.²⁴ Such practice and writings, together with what is often referred to as the changing nature of armed conflicts, have led a number of authors to call for the distinction between IAC and NIAC to be removed altogether.²⁵

At present, however, it remains in place. Some authors, including Jelena Pejic, note that ‘the distinction between international and non-international armed conflicts remains relevant’.²⁶ The treaty rules applicable to IACs are vastly more developed than those that govern NIACs. Moreover, she notes, the status of the fighting parties is different.²⁷ The ICRC’s customary IHL study does not discuss the definition of armed conflict, and whilst many rules were found to be applicable in times of both international and non-international armed conflict, the progressive development of customary law as laid down in the study ‘has not led to a complete amalgamation’²⁸ of the rules for both types of conflict. Specific distinctions between the two still remain.²⁹

A similar argument can be advanced with regard to the weapons and disarmament conventions: stating specifically that a certain weapon is also inhumane in times of non-international armed conflict says more about the weapon than it does about the status of the conflict. If anything, this last observation seems to confirm that the distinction in question still remains.³⁰ Moreover, whilst some have argued that there should be only one type of armed conflict, others have even proposed a third, new type of armed conflict.³¹ Clearly, the distinction remains relevant today, but is not only of recent date. *Inter alia* religion created distinctions between various types of war and the ensuing application of rules or norms, as examined below.

24 See e.g. Christine Byron, ‘Armed conflicts: International or non-international?’, *Journal of Conflict and Security Law*, Vol. 6, No. 1, 2001; Frits Kalshoven, ‘From international humanitarian law to international criminal law’, *Chinese Journal of International Law*, Vol. 151, Issue 3, 2004.

25 See note 2 above.

26 Jelena Pejic, ‘Status of conflict’, see above note 9, p. 77. See further, *inter alia*, Heike Spieker, ‘The International Criminal Court and non-international armed conflicts’, *Leiden Journal of International Law*, Vol. 13, No. 2, 2000; Dieter Fleck (ed), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2008.

27 Pejic, ‘Status of conflict’, above note 9, p. 77.

28 Fleck (ed), above note 26, p. 627; Henckaerts and Doswald-Beck, above note 21.

29 *Ibid.*

30 See e.g. the amendment to Article 1 of the Convention on Certain Conventional Weapons, concluded on 21 December 2001 during the Second Review Conference of States Parties. Those particular weapons have been recognized as inhumane. The fact that the regulation of their use should therefore also apply in non-international armed conflict seems to follow from the inhumane effect of the weapons and not from the current state of IHL relating to the distinction between international and non-international conflict. Acts such as torture and collective punishment are prohibited in both types of conflict (see Protocol I, Art. 75; Common Article 3; Protocol II, Art. 4).

31 In particular, the difficulties in qualifying the situations mentioned at the outset have led to writings about so-called transnational armed conflicts, e.g. Corn, above note 1; Roy S. Schöndorf, ‘Extra-state armed conflicts: Is there a need for a new legal regime?’, *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2004; Robert D. Sloane, ‘Prologue to a voluntarist war convention’, *Michigan Law Review*, Vol. 106, 2007.

Before 1648 – the influence of religion

Religion was not just a reason to wage war³² – it was also influential in regulating the way that wars were to be waged. The Christian Church sought to impose limitations on wars – the Pax Dei movement, for example, can be seen as representing ‘an attempt to make sure that the treatment meted out to Christians would not resemble that reserved for heretics or heathens.’³³ This led to the Church taking an interest in the type of weapons used; indeed, it was ‘the Second Lateran Council, not some court of chivalry, that in 1139 banned the crossbow as suitable for use only against heathens.’³⁴

The power believed to be vested in the rulers by God, together with the belief in the inequality between Christians and heathens, structured the types of war identified by the scholars of that day and age. The Italian canonist Henricus de Segusio, better known by the name Hostiensis, wrote between 1239 and 1253 about the various types of war in his commentary *Summa aurea*. The section ‘*De treuga et pace*’ (On Truce and Peace) distinguishes seven types of war that can be divided into external wars, i.e. those fought by the Christians against ‘infidels’, and internal wars, i.e. those fought by Christian princes against each other. External wars were considered legitimate by Hostiensis, whilst internal wars would be legitimate only if waged to uphold the decision of a judge or, more generally, the authority of the law, or in self-defence against unwarranted attacks.³⁵

In the years that followed, the Christian tradition remained instrumental in developing rules for situations that could be qualified as international armed conflict; such a contribution was less apparent, however, for non-international armed conflicts.³⁶ The theory of just war imposed some constraints on the conduct of international wars,³⁷ but these could not easily be extended to non-international armed conflicts, as it was difficult for such situations to meet the conditions laid down by the just war theory. Furthermore, the interpretation of Biblical texts that served to justify support for an unlimited fight, or for constraints placed only upon rebels in situations of non-international violence, were also used for political purposes. A difference thus has to be made between a genuine Christian belief and a political reading of the relevant passages from the Bible.³⁸

Whilst Protestantism caused a shift in the way the Scriptures were interpreted, owing to the changing political context, the distinction between war

32 Religion was a reason to go to war both before and after 1648.

33 Martin van Creveld, *The Transformation of War*, Free Press, New York, 1991, p. 137.

34 *Ibid.*, p. 138.

35 ‘Hostiensis (ca 1200–1271): A typology of internal and external war’, in Gregory M. Reichberg, Henrik Syse and Endre Begby (eds), *The Ethics of War: Classic and Contemporary Readings*, Blackwell Publishing, Oxford, 2006, pp. 160–161.

36 Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts*, Martinus Nijhoff, Leiden/Boston, 2006, p. 2.

37 This theory was developed by Christian authors, such as St Augustine and Thomas Aquinas. See Perna, *ibid.*, p. 3.

38 *Ibid.*, p. 2.

(i.e. the use of force at the international level) and what was not to be considered a war and thus not subject to constraints (i.e. the use of force in internal situations, such as suppressing rebellion) was similar to that of earlier Christian times.³⁹ Martin Luther wrote in his *Open Letter on the Harsh Book against Peasants* that a ‘rebel is not worth rational arguments’ and that it is ‘God’s will that the king be honored and the rebels destroyed’.⁴⁰ He refused to consider the possibility of establishing rules, and even suggested conduct against rebels that at present would be considered as extrajudicial and as summary executions.⁴¹ Similarly, John Calvin held that rebellion could be justified as an extreme measure, and one of his followers, John Knox, further developed a theory that allowed the persecuted to wage war against their oppressors. It did not, however, lead to the development of any rules for this non-international conflict situation; the rebellion was, ‘at least on the part of the “justified” rebels [...] subject to no limitations.’⁴²

Further east, a view similar to that of Hostiensis prevailed (i.e. relating to the distinction between believers and non-believers). Islam was initially meant to spread until the whole of the earth was under Muslim rule. Consequently *jihad* was the only kind of relationship that could exist between those who believed in Islam and those who did not. However, as time passed, it became clear that the Muslim world would have to accept that non-Muslim states and empires would remain as neighbours, resulting in the appearance of other forms of war.⁴³ From the twelfth century on, an entire body of literature (partly religious, partly legal) that attempted ‘to define what Muslims might do to non-Muslims under what circumstances’⁴⁴ came into being.

When the Muslim world broke up into states that often professed different versions of Islam and fought each other, it became necessary to distinguish not only between war against unbelievers and war against fellow Muslims, but also between Muslims themselves. In the tenth century, a scholar from Baghdad, al-Mawardi, divided war against Muslims into three categories: first, war against those who had abandoned faith (*ahl al ridda*); second, against rebels (*ahl al baghi*); and third, war against those who had renounced the authority of the spiritual leader (*al muharabin*). In each of these categories of war, different methods of warfare and a different set of obligations towards the enemy were prescribed. In the third category, for example, which concerned people considered to be part of the House of Islam (*dar al Islam*), the prisoners were not to be executed; nor were their houses to be burnt.⁴⁵

39 *Ibid.*, p. 7.

40 Martin Luther, ‘An open letter on the harsh book against the peasants’, reprinted in Albert Marrin (ed), *War and the Christian conscience: From Augustine to Martin Luther King, Jr*, Henry Regnery Company, Chicago, 1971, pp. 101–102.

41 Perna, above note 36, p. 7.

42 *Ibid.*, p. 8.

43 Van Creveld, above note 33, p. 139.

44 *Ibid.*

45 *Ibid.*, p. 140.

Religion thus created a distinction between wars fought against those of the same religion (e.g. Christian or Muslim) and against those of a different one. Wars fought within Christendom or within the Muslim world were subject to certain rules, whereas situations that were not considered to be wars lacked such rules. Quite remarkably, this much can also be learned from someone who was neither a theologian nor a lawyer, but for whom the distinction was quite apparent. The quotation from Shakespeare's *Richard III* reproduced at the outset⁴⁶ is an interesting demonstration of the fact that:

both at the time of the events Shakespeare described and at the time he wrote, the normative and legal rules in force recognized and highlighted the dichotomy between [internal and international] conflicts.⁴⁷

The famous playwright often dealt with armed violence in his various historical works, and produced:

an elaborate and well-defined enunciation of the legal distinctions between internal and international conflict and the different normative principles and chivalric obligations, or lack thereof, involved.⁴⁸

The words of Richard III encapsulate these differences: in international wars, one 'fights' against 'enemies' that are 'foreign'. In internal 'wars' that take place 'at home', one 'beats down' the 'rebels'.⁴⁹

The view that theologians should deal with moral questions rather than with legal and political ones emerged along with the nascent concept of state sovereignty at the end of the sixteenth century.⁵⁰ This is aptly illustrated by words used by a contemporary of Shakespeare, the Italian legal scholar and writer Alberico Gentili, who played a crucial part in the emergence of international law as an independent legal discipline:⁵¹ *Silente theologi in munere alieno*.⁵²

The Peace of Westphalia – the emergence of state sovereignty

The influence of religious ideas further declined after the Peace of Westphalia in 1648, the point in time that is generally considered to mark the inception of the

46 'March on, march on, since we are up in arms; If not to fight with foreign enemies, Yet to beat down these rebels here at home.' – Shakespeare, *Richard III*, IV.iv. 459–461.

47 Laurie Rosensweig Blank, 'The laws of war in Shakespeare: International vs. internal armed conflict', *NYU Journal of International Law and Politics*, Vol. 30, No. 1/2, 1998, p. 252.

48 *Ibid.*, p. 254.

49 *Ibid.*, p. 259.

50 Perna, above note 36, p. 8.

51 See *inter alia* Diego Panizza, 'Political theory and jurisprudence in Gentili's *De Iure Belli*: The great debate between "theological" and "humanist" perspectives from Vitoria to Grotius', Institute for International Law and Justice, *History and Theory of International Law Series*, Working Paper 15, 2005, available at <http://www.iilj.org/publications/documents/2005.15Panizza.pdf> (visited 20 May 2009).

52 Which can be translated as 'Theologians should keep silent in matters that concern others.'

modern sovereign nation-state.⁵³ Once the treaties were signed, the European rulers ‘mostly abandoned religion in favour of more enlightened reasons for slaughtering each other.’⁵⁴ Samuel von Pufendorf was one of the first post-Westphalian writers of his time to address war-related matters, and quickly became one of the most influential.⁵⁵ In his work *On the Duty of Man and Citizen*, he drew attention to the need for ‘prudential limits to what one should do in war’⁵⁶ by stressing that humanity requires⁵⁷ that ‘[o]ne should limit acts of violence to those that are actually necessary’.⁵⁸ Von Pufendorf determines that wars can normally be divided in two forms: declared and undeclared wars. While he does not denounce the latter category as unjust, he specifies that an ‘[u]ndeclared war is either war waged without formal declaration or war against private citizens. Civil wars also are in this category.’⁵⁹ He classified non-international situations as undeclared wars, but left open the option that the limits should also extend to this type of fighting.

That the Peace of Westphalia did not constitute a dramatic change in the way wars were perceived by international scholars is illustrated by comparing what Gentili wrote at the end of the sixteenth century with the writings of Hugo Grotius shortly before the Peace of Westphalia and those of Emmerich de Vattel during the eighteenth century.

Alberico Gentili, who taught at Oxford, observed in 1589 that the applications of the norms of international law stemmed from the presence of a sovereign power on each side. A legitimate ‘enemy’ had to meet requirements that are similar to those for today’s statehood or the criteria for United Nations membership.⁶⁰ Those who did not meet the requirements were not proper enemies, and thus ‘such men [did] not come under the laws of war’.⁶¹ He wrote in his *De Iure Belli Libri Tres* that:

those who do not have a [public cause] are not properly enemies, even although they conduct themselves as soldiers and commanders and meet the

53 See, *inter alia*, Richard A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective*, Transnational Publishers, New York, 1998, p. 4. The idea that the Peace of Westphalia ordained something new in terms of sovereignty is criticized by a number of authors – see e.g. Stéphane Beaulac, ‘The Westphalian model in defining international law: Challenging the myth’, *Australian Journal of Legal History*, Vol. 8, 2004; Andreas Osiander, ‘Sovereignty, international relations, and the Westphalian myth’ *International Organization*, Vol. 55, No. 2, 2001.

54 Van Creveld, above note 33, pp. 139, 141. The two Westphalian treaties, i.e. the Treaty of Osnabrück and the Treaty of Münster (24 October 1648) do both mention in their preambles that the agreement on the articles was reached partly ‘to the Glory of God’. Treaty texts available at http://avalon.law.yale.edu/17th_century/westphal.asp (visited 20 May 2009).

55 ‘Samuel von Pufendorf (1632–1694); War in an emerging system of states’, in Reichberg, Syse and Begby (eds), above note 35, p. 454.

56 *Ibid.*, p. 455.

57 *Ibid.*, p. 458 (Section 6 of Book 2, Chapter 16, of *On the Duty of Man and Citizen*).

58 *Ibid.*, p. 455.

59 *Ibid.*, p. 458 (Section 7 of Book 2, Chapter 16, of *On the Duty of Man and Citizen*).

60 Rosensweig Blank, above note 47, p. 258.

61 Alberico Gentili, ‘The three books on the laws of war’, in J.B. Scott (ed), *The Classics of International Law*, Clarendon Press, Oxford, 1933, p. 22.

attack of commanders of opposing legions. He is an enemy who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace. [...] For the word *hostis*, ‘enemy’, while it implies equality, like the word ‘war’ [...] is sometimes extended to those who are not equal, namely, to pirates, proscribed persons and rebels; nevertheless it cannot confer the rights due to enemies, properly called so, and the privileges of regular warfare.⁶²

Similarly, the Dutch scholar Hugo Grotius discussed the old division between public and private wars in his seminal work *De Jure Belli ac Pacis* in 1625.⁶³ Public wars (i.e. between sovereign powers) were to be fought in accordance with the constraints imposed by the laws of war:

The name of lawful war is commonly given to what is here called formal [war]. [...] Now to give a war the formality required by the law of nations, two things are necessary. In the first place it must be made on both sides, by the sovereign power of the state, and in the next place it must be accompanied with certain formalities. Both of which are so essential that one is insufficient without the other.⁶⁴

He went on to say that a war against private people ‘may be made without those formalities.’⁶⁵ One author observes that Grotius did not see the emerging theory of state sovereignty as precluding the possibility of regulation of situations of non-international armed conflict by international law. Grotius thus left open the possibility for the doctrine of natural law to shape the evolution of norms relating to non-international armed conflicts.⁶⁶

For his part, Emmerich de Vattel, a Swiss scholar who lived in the eighteenth century, held that an internal uprising that challenged the sovereignty of the state was the worst evil for an independent body. Thus when engaged in fighting the rebels, the sovereign did not have to respect the laws of war.⁶⁷ He wrote in his work *Droit des Gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*, that those ‘who rise up against their prince without cause deserve the severest punishment.’⁶⁸ The influence of the doctrine of natural law resulted in his advice not to conduct unlimited repression of rebels and to refrain from excessive and cruel punishments.⁶⁹ He furthermore recognized that

62 *Ibid.*, pp. 24–25.

63 Perna, above note 36, p. 17. Grotius described war in a general definition as ‘the state of contending parties’ – in this definition he included public as well as private wars. See Hugo Grotius, *On the Law of War and Peace*, (transl. A.C. Campbell), Batoche Books, Kitchener, 2001, p. 6.

64 Grotius, *ibid.*, p. 40.

65 *Ibid.*

66 See Perna, above note 36, p. 18.

67 *Ibid.*, p. 20.

68 Emmerich de Vattel, *The Law of Nations and the Principles of Natural Law*, Book III, Chapter XVIII, quoted in Perna, above note 36, p. 21.

69 Perna, *ibid.*, pp. 20–22.

in situations of such an intensity that it resembled an international war, the laws of war were to apply. In his chapter titled 'Civil wars', Vattel writes that:

When the nation is divided into two absolutely independent parties, who acknowledge no common superior, the State is broken up and war between the two parties falls, in all respects, in the class of public war between two different Nations. [...] The obligation upon the two parties to observe towards each other the customary laws of war is therefore absolute and indispensable, and the same which the natural law imposes upon all Nations in contests between State and State. [...] [I]t is perfectly clear that the common laws of war, those principles of humanity, forbearance, truthfulness, and honor [...] should be observed by both sides in a civil war.⁷⁰

The situation described above is similar to those that led about a hundred years later to recognition of the non-state party to conflict as a belligerent. The doctrine of belligerency may be seen as an encroachment on state sovereignty, because it would place a non-state party on the same level as a state if the conflict were sustained enough to resemble an international war. In essence, however, it seems to strengthen the concept of state sovereignty when the criteria that the enemy had to fulfil (as explained earlier by Gentili) are taken into account. Indeed, in the years after Vattel further developments in international law led to the doctrine of belligerency.⁷¹

This is further illustrated by the writings of Lassa Oppenheim, who at the beginning of the twentieth century still distinguished clearly between international wars and non-international conflict situations. Whilst the former were wars, Oppenheim did not consider the latter as such (unless the non-state party was recognized as a belligerent). His definition of war is often quoted and reads as follows:

War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.⁷²

He stated that neither a civil war⁷³ nor a guerrilla war were 'real war[s] in the strict sense of the term in International Law'⁷⁴ because '[t]o be considered war, the contention must be going on *between States*.'⁷⁵ As such:

a civil war need not be from the beginning, nor become at all, war in the technical sense of the term. But it may become war through the recognition of

70 'Emer de Vattel (1714–1767); War in due form', in Reichberg, Syse and Begby (eds), above note 35, pp. 516–517.

71 Perna, above note 36, p. 23.

72 Lassa Oppenheim, *International Law: A Treatise*, Vol. II, *War and Neutrality*, Longmans, Green and Co., London, 1906, p. 56.

73 Oppenheim described a civil war as a situation 'when two opposing parties within a State have recourse to arms for the purpose of obtaining power in the State or when a large fraction of the population of a State rises in arms against the legitimate Government.' (*Ibid.*, p. 65.)

74 *Ibid.*, p. 67.

75 *Ibid.*, p. 58 (emphasis in original).

each of the contending parties or of the insurgents, as the case may be, as a belligerent Power.⁷⁶

The state-centric approach explains that a conflict between a state and a non-state entity (that nowadays could qualify as a non-international armed conflict) was not considered to constitute a war. This phenomenon, which according to Oppenheim did not exist in his time, did not qualify as a war in his view. He says that:

in the Middle Ages wars were known between private individuals, so-called private wars, and wars between corporations, as the Hansa for instance, and between States.⁷⁷ But such wars have totally disappeared in modern times. It may, of course, happen that a contention arises between the armed forces of a State and a body of armed individuals, but such contention is not war.⁷⁸

Before the adoption of Common Article 3 (and later the Additional Protocols) as part of international law, a non-international contention could thus only come within the scope of international (humanitarian) law if the insurgents were recognized as belligerents.⁷⁹ The recognition of belligerency and the preceding stages of civil strife will be discussed in the following section.

Various stages of non-international armed conflict prior to 1949⁸⁰

As mentioned above, a non-international armed conflict prior to the adoption of the 1949 Geneva Conventions only came within the scope of international law if those taking up arms against the government were recognized as belligerents. Before reaching the stage of belligerency, the law and practice distinguished two other stages in civil strife: rebellion and insurgency.⁸¹

Rebellion

In traditional international law, rebellion (or upheaval) was considered to be a situation of domestic violence in which only a sporadic challenge to the legitimate

⁷⁶ *Ibid.*, p. 65.

⁷⁷ The fourth and later editions have a slightly different but clearer phrasing: '[in] the Middle Ages wars between private individuals, so-called private wars, were known, and wars between corporations – ... the Hansa, for instance – and States.' (4th edition, p. 117, and 7th edition, p. 203.)

⁷⁸ Oppenheim, above note 72, p. 58.

⁷⁹ Dietrich Schindler, 'The different types of armed conflicts according to the Geneva Conventions and Protocols', *Recueil des cours*, Vol. 163, Issue 2, 1979, p. 145.

⁸⁰ For a well-structured outline of the three stages, see Anthony Cullen, 'Key developments affecting the scope of internal armed conflict in international humanitarian law', *Military Law Review*, Vol. 183, 2005, pp. 69–79.

⁸¹ Lothar Kotsch, *The Concept of War in Contemporary History and International Law*, Thesis No. 105, University of Geneva, Geneva, 1956, p. 230.

government was noticeable.⁸² The situation was only a short-lived insurrection against the authority of the state⁸³ and within the ability of its police force to 'reduce the seditious party to respect the municipal legal order'.⁸⁴ If the government was rapidly able to suppress the rebel faction 'by normal procedures of internal security',⁸⁵ the situation did not fall within the scope of international law.⁸⁶ The rebels challenging the *de jure* government had no legal rights or protection under traditional international law,⁸⁷ and whilst foreign States were entitled to assist the government in its efforts to suppress the rebels, they were to refrain from giving support to the rebel party, for to do so would constitute illegal intervention.⁸⁸

The ICTY observed in *Tadić* that States:

preferred to regard internal strife as rebellion, mutiny and treason 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. This 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.⁸⁹

So under traditional international law 'a rebellion within the borders of a sovereign State is the exclusive concern of that State'⁹⁰ and was not considered subject to the laws of war.⁹¹

Insurgency

Whereas a rebellion is 'a sporadic challenge to the legitimate government, [...] insurgency and belligerency are intended to apply to situations of sustained conflict'.⁹² Consequently, when a rebellion is able to 'survive' suppression and cause longer-lasting and more substantial intrastate violence, its status duly changes into that of an insurgency.⁹³ The recognition of insurgency can be seen as an indication that the government granting it 'regards the insurgents as legal contestants, and not

82 Heather A. Wilson, *International Law and the Use of Force by Liberation Movements*, Oxford University Press, Oxford, 1988, p. 23.

83 Richard A. Falk, 'Janus tormented: The international law of internal war', in James N. Rosenau (ed), *International Aspects of Civil Strife*, Princeton University Press, Princeton, 1964, pp. 197–199.

84 Kotzsch, above note 81, p. 230.

85 Falk, above note 83, p. 199.

86 See New York District Court, *United States v. Ambrose Light*, 25 Fed. 408 (1885).

87 Kotzsch, above note 80, p. 231, and Cullen, above note 80, p. 69.

88 Hersch Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge, 1947, p. 230; Falk, above note 83, p. 197.

89 ICTY, *Prosecutor v. Dusko Tadić*, above note 8, para 96.

90 Wilson, above note 82, p. 23.

91 Falk, above note 83, p. 198.

92 *Ibid.*, p. 199.

93 Cullen, above note 80, p. 71; Falk, above note 83, p. 199.

as mere lawbreakers'.⁹⁴ In traditional international law, the recognition of insurgency did not require the application of humanitarian norms unless these were expressly conceded by the legitimate government.⁹⁵ The state concerned was free to determine the consequences of this acknowledgement.⁹⁶ As such, it seems that the recognition of insurgency was more relevant to states than to the insurgents themselves.

During the Spanish Civil War, for example, the major European powers demonstrated the limitations that are meant to be set by the recognition of insurgency. On the high seas, both sides were barred from exercising belligerent rights against foreign ships and an international convention prohibited the export of war-related materials to either side.⁹⁷ Foreign states also played a role in the Spanish Civil War. This can be explained by Richard Falk's observation that:

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.⁹⁸

Whereas a recognition of insurgency served as a partial internationalization of the conflict, recognition of that same party as a belligerent would lead to a full internationalization of it.

Belligerency

When a non-international armed conflict reached such a sustained level that both sides should be treated alike as belligerents, the parent government or a third state could, by declaration, grant the insurgents recognition as a belligerent party.⁹⁹ Oppenheim notes that whilst insurgents might not legally be able to wage a war, their actual ability to do so explains why insurgents may become belligerents. He goes on to say that any state can recognize insurgents as a belligerent power as long as the following three criteria are met: (1) the insurgents have taken possession of part of the territory of the (legitimate) government; (2) they have set up a government (system) of their own; (3) they fight in accordance with the laws of war.¹⁰⁰

94 Rosalyn Higgins, 'Internal war and international law', in Cyril E. Black and Richard A. Falk (eds), *The Future of the International Legal Order*, Princeton University Press, Princeton, 1971, p. 88.

95 Anthony Cullen, *The Concept of Non-International Armed Conflicts in International Humanitarian Law*, unpublished PhD thesis, 2007, p. 20 (to be available from Cambridge University Press at the end of 2009), referring to Castrén, above note 10, pp. 207–223. Hersch Lauterpacht explains that States can intercede with insurgents to ensure measures for a humane conduct of hostilities. See Lauterpacht, above note 88, pp. 270–271.

96 Higgins, above note 94, p. 88.

97 Kotsch, above note 81, p. 233.

98 Falk, above note 83, p. 200.

99 Moir, above note 9, p. 5.

100 Oppenheim, above note 72, p. 86. See also the 'Règlement' that was adopted by the Institut de Droit International, in *Annuaire de l'Institut de droit international*, 1900, p. 227.

Lauterpacht held that four criteria existed, the fourth of which stated that ‘there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency’, and was a real additional requirement to those just mentioned.¹⁰¹

International law treated an internal war with the status of belligerency in essentially the same way as a war between sovereign states. When recognized as a belligerent, the non-state party to a non-international conflict was consequently under traditional international law, to be treated essentially like a state at war,¹⁰² and had the same rights and duties. The obligation to ensure respect for the humanitarian norms was then equally binding for the non-state party (i.e. the insurgents). The laws of war were applicable both to the authorities of the *de jure* government and to the insurgents. So the legitimate government’s recognition of belligerency brought the entire body of the laws of war into effect between the government and the insurgents,¹⁰³ and not only the rules governing the conduct of hostilities but also those for all other war-related activities, such as care for the sick and wounded and respect for prisoners of war.¹⁰⁴

The doctrine of belligerency thus extended the humanitarian norms of international law to a situation of non-international conflict. Anthony Cullen comments that there appears to have been little consensus among scholars as to whether the recognition of belligerency, and hence of the application of the international humanitarian norms, constituted a duty when certain objective conditions (such as the above-mentioned criteria) were fulfilled, or whether it was purely up to the discretion of the state authorities concerned.¹⁰⁵

Recognition of belligerency by the United States and the United Kingdom occurred on a number of occasions in relation to (former) Spanish colonies in South and Central America. A famous situation in which belligerency was recognized is of course, the American Civil War. In the twentieth century, however, the doctrine seemed to have become obsolete. For example, the non-recognition of the insurgents in the Spanish Civil War as belligerents is proof to many of the demise of the concept of belligerency.¹⁰⁶ There were some situations that came close to recognition of the insurgents as belligerents, for instance the Nigeria-Biafra

101 Lauterpacht’s first criterion deals with the scale of the conflict, whilst his second combines Oppenheim’s first and second criteria: ‘[F]irst, 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.’ (Lauterpacht, above note 88, p. 176)

102 Falk, above note 83, p. 203.

103 Moir, above note 9, p. 5.

104 See *inter alia* Daoud L. Khairallah, *Insurrection under International Law: With Emphasis on the Rights and Duties of Insurgents*, Lebanese University, Beirut, 1973.

105 Cullen, above note 95, p. 31. In *United States v. the Three Friends*, a case concerning aid given to Cuban insurgents, the US Supreme Court stated that ‘it belongs to the political department to determine when belligerency shall be recognized’. (United States Supreme Court, *United States v. The Three Friends* et al. (1897) 166 U.S.1, p. 63).

106 Cullen, above note 95, p. 34.

conflict in 1967 or the Algerian War, but the states concerned held that these were not formal recognitions.¹⁰⁷ As will be shown below, the doctrine of belligerency and the accompanying criteria nevertheless proved to be of great importance during the negotiations on the 1949 Conventions.

Civil wars

The following three civil wars show how the stages of non-international armed conflict set forth above were applied in practice before 1949. These and other civil wars in the latter half of the nineteenth and the first half of the twentieth century helped shape the law governing such conflicts.

The American Civil War

The American Civil War (1861–1865) began after first seven and then another four states declared their secession from the Union, the federal state, to form the Confederate States of America. The Federal government opposed the secession and a large army was mobilized to suppress the rebellion.¹⁰⁸ The conflict that followed undeniably had features of an international war.¹⁰⁹ Oppenheim held that although according to the constitution of a federal state, a war between member states or between one or more member states and the federal state would be illegal (and from the constitutional standpoint, a rebellion), these conflicts were nevertheless wars for the purposes of international law.¹¹⁰ He also considered that the ‘War of Secession within the United States between Northern and Southern member-States in 1861–1865 was [a] real war’.¹¹¹ However, David Turns explains that in using the term ‘civil war’ in the designation most widely given to the conflict, i.e. the American Civil War, history and the English language ‘have unequivocally confirmed it as a conflict that was fundamentally non-international in nature.’¹¹²

Soon after the outbreak of hostilities, President Lincoln imposed a naval blockade on the entire Southern coast; this was seen as an implied recognition of belligerency vis-à-vis the South.¹¹³ It was followed by proclamations of neutrality

107 Schindler, above note 79, pp. 145–146.

108 See Michael Harris Hoffman, ‘The customary law of non-international armed conflict: Evidence from the United States Civil War’, *International Review of the Red Cross*, No. 277, 1990, pp. 322–344.

109 David Turns, ‘At the “vanishing point” of international humanitarian law: Methods and means of warfare in non-international armed conflicts’, *German Yearbook of International Law*, Vol. 45, 2002, p. 118.

110 Oppenheim, above note 72, p. 59.

111 *Ibid.* David Turns notes that to this day, the US states that were formerly part of the Confederacy rarely refer to the conflict as the American Civil War. Substitutes include the ‘War between States’, ‘War of Secession’, and War for Southern Independence’. (Turns, above note 109, p. 118)

112 Turns, above note 109, p. 118.

113 This was confirmed by the US Supreme Court in December 1862. See Quincy Wright, ‘The American Civil War, 1861–65’, in Richard A. Falk (ed), *The International Law of Civil War*, John Hopkins Press, Baltimore, 1971, p. 42.

and recognitions of the Confederate States by the United Kingdom and a number of other countries. During a discussion some months later the British government voiced the opinion that '[a]n insurrection extending over nine States in space, and ten months in duration, can only be considered as a civil war, and that persons taken prisoners on either side should be regarded as prisoners of war.'¹¹⁴ By virtue of the recognition of belligerency during the Civil War, both parties were bound to respect the laws of war,¹¹⁵ and they were in fact generally observed.¹¹⁶ Members of both armies were given prisoner-of-war status and distinction was made between military objectives and civilian objects.¹¹⁷

Besides the effect the conflict had on world politics and issues such as slavery, it also helped to shape the laws of war. It is even affirmed that '[t]his war was unquestionably the critical incident for the development of a full and complete law of civil conflict.'¹¹⁸ The recognition of the Confederate States as belligerents led to numerous court cases, thereby contributing to the doctrine of belligerency; it has also been widely discussed in legal doctrine and state practice, which in turn contributed to the development of the law of non-international armed conflict.¹¹⁹

It was moreover during the American Civil War that Professor Francis Lieber drew up the famous Lieber Code, which is regarded as a foundation of contemporary international humanitarian law.¹²⁰ Together with a board of Union officers he prepared a set of rules concerning the conduct of hostilities on land, the *Instructions for the Government of Armies of the United States in the Field – General Orders No. 100*,¹²¹ which were issued to the Union's armed forces by President Lincoln. The Code has served as a basis for later treaties dealing with international conflicts, such as the Hague Regulations, the wording of which sometimes closely follows the articles of the Lieber Code. It is often called ironic that the first set of rules of modern IHL was drafted for a non-international armed conflict,¹²² but the Code was essentially drafted for an international situation, or at least a situation rendered 'international' by the recognition of belligerency. Lieber was hesitant to include the nine articles of Section X entitled 'Insurrection – civil war – rebellion', wanting to avoid giving the impression that the Code was

114 *Fontes* No. 2469, quoted in Kotsch, above note 81, p. 228.

115 Perna, above note 36, p. 31.

116 Moir, above note 9, p. 24. Leslie Green observed that the parties in the American Civil War 'behaved *inter se* as if they were involved in an international conflict.' (in *The Contemporary Law of Armed Conflict*, Juris Publishing, New York, 2008, p. 66).

117 Hoffman, above note 108, pp. 322–344.

118 Roscoe Ralph Oglesby, *International War and the Search for Normative Order*, Martinus Nijhoff, The Hague, 1969, p. iv. The same author further held that '[p]revious civil wars such as the American Revolution, and the Spanish Colonial Wars for Independence provided the needed experimental background for the development of norms governing such conflicts, but it remained for the American Civil War to give them definitive form.' (pp. vi–vii).

119 Lauterpacht, above note 88, p. 187; Kotsch, above note 81, p. 226.

120 Turns, above note 109, p. 118.

121 Full text of the Lieber Code available at <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument> (visited 20 May 2009).

122 Turns, above note 109, p. 118.

applicable only to such situations rather than to international wars.¹²³ In that section it is stated that applicability of the rules of war to rebels in times of war within a state is induced by humanity,¹²⁴ as opposed to obligations under international law.¹²⁵

The Finnish Civil War

On 6 December 1917 Finland, until then part of Russia, declared its independence. In the weeks that followed it was recognized as an independent state by the Bolshevik government of Russia and by Sweden, Germany, France, Norway and Denmark.¹²⁶ The political situation in Finland was tense: the revolutionary Reds, representing the lower classes, opposed the Whites, representing the bourgeois political forces.¹²⁷ The Red rebellion succeeded in taking over power in the urban south (including the capital Helsinki) and the White government and army withdrew north. Finland – and its population – were divided, with both regimes enjoying considerable support.¹²⁸

The Finnish Civil War certainly reached the modern threshold for an armed conflict. Essentially non-international in nature, Germany's intervention on the side of the government, and – more importantly – that of Russia on the rebel side would by present-day standards have internationalized the conflict.¹²⁹ However, the White government did not recognize the Reds as insurgents or belligerents; instead it 'treated them merely as criminals and traitors' and viewed the situation as a purely internal matter.¹³⁰ Although the term 'civil war' would thus not have been applicable officially, this was *de facto* clearly a situation that would have met the criteria.¹³¹

123 Theodor Meron, *War Crimes Law Comes of Age: Essays*, Oxford University Press, Oxford, 1998, p. 138. Rosemary Abi-Saab explains, however, that at that time in Europe the Lieber Code was seen as closely associated only with the American Civil War. As such, 'it was seen as a Code that could apply only in similar cases of civil war.' Rosemary Abi-Saab, 'Humanitarian law and internal conflicts: The evolution of legal concern', in Delissen and Tanja, above note 19, p. 209.

124 Lieber Code, Article 152.

125 Perna, above note 36, p. 32.

126 Lauri Hannikainen, Raija Hanski and Alan Rosas, *Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland*, Martinus Nijhoff, The Hague, 1992, p. 8.

127 *Ibid.*, pp. 8–9.

128 *Ibid.*, pp. 9–10. For a general account see Anthony F. Upton, *The Finnish Revolution 1917–1918*, University of Minnesota Press, Minneapolis, 1980.

129 Germany contributed some 12,000 soldiers to the White government's war effort. Russia did not officially authorize its soldiers to fight on the side of the Reds, but called upon volunteers to do so. In addition, Russia gave assistance to the Reds in the form of military equipment – it is maintained that the Reds fought primarily with weapons given by Russia. See Hannikainen, Hanski and Rosas, above note 126, p. 11.

130 *Ibid.*, pp. 13, 28. Hannikainen, Hanski and Rosas note that based on the factual situation and the criteria for recognition of belligerency, it would have been lawful for third states to recognize the Reds as a belligerent party (p. 13).

131 cf. Schindler, above note 79, p. 145.

There was great loss of life during the conflict, but only partly at the front: a large number of people were either executed or died in prison camps.¹³² The crimes committed during the civil war are referred to as the ‘White terror’ and ‘Red terror’, respectively. Most of the crimes committed by the Whites were out of revenge and feelings of hatred for those who had ‘betrayed’ Finland. Dubious orders were issued by the military staff, including orders on many occasions that no quarter be given.¹³³ It is, however, also reported that both parties sometimes referred to international law when condemning acts by the adversary, for instance when both the Whites and the Reds alleged that the other side had violated the 1868 St Petersburg Declaration by using a prohibited type of explosive bullet.¹³⁴ In addition, some of the prisoners (on both sides) were granted prisoner-of-war status, and ambulances, field hospitals and Red Cross workers seemed to be respected by both parties.¹³⁵ As a young nation, Finland had not yet ratified any of the relevant law of war treaties, but the reference to provisions dealing with protection and means and methods of warfare shows that the parties felt a certain need for regulation of the conflict. As with most conflicts in which a government fights against an opposition group, the refusal to see the opponent as entitled to protection under the laws of war showed the heart of the problem of non-international armed conflicts occurring before 1949.¹³⁶

The Spanish Civil War

The Spanish Civil War (1936–1939) was fought between the Republican government and the Nationalists under the command of General Franco. Like the Finnish Civil War, it can be considered internationalized by present-day standards because of foreign involvement.¹³⁷ It was a bitter and savage ‘non-international conflict’, in which no recognition of belligerency was given to the Nationalist rebels. However, while not legally obliged to do so, both parties claimed that they would respect the laws of war.¹³⁸ The Republican government stated, for example, that it would treat

132 See Finnish National Archives, *War Victims of Finland 1914–1922*, available at <http://vesta.narc.fi/cgi-bin/db2www/sotasurmaetusivu/main?lang=en> (visited 20 May 2009).

133 See Hannikainen, Hanski and Rosas, above note 126, pp. 16–24. Contrary to IHL today, the Lieber Code actually also held in Article 60 that the ban on ordering that no quarter be given was not absolute, but was subject to military necessity. See Meron, above note 123, p. 137.

134 Hannikainen, Hanski and Rosas, above note 126, p. 16.

135 *Ibid.*, pp. 27–31.

136 Since 1949, many governments have continued to refuse to accept that such a situation should be qualified as a non-international armed conflict, but – at least for the legal qualification – the test is now only a factual one. The test can be applied whether or not a government accepts the existence of an armed conflict within its territory.

137 For example, Germany and Italy provided troops and material support to the Nationalists, whilst Portugal allowed the Nationalists to use its territory and ports and provided them with arms and troops. At the same time Russia and Mexico, and for a short period France too, gave material support to the Republicans (see e.g. Ann van Wynen Thomas and A.J. Thomas Jr, ‘The civil war in Spain’, in Richard A. Falk (ed), above note 113, pp. 113–120).

138 Perna, above note 36, p. 39.

the captured opponents according to the military code for prisoners of war,¹³⁹ and the Nationalists declared that they would respect the laws and customs of war ‘with the utmost scrupulousness’.¹⁴⁰

It should be noted that a few years earlier Spain had signed and ratified the 1929 Geneva Convention relative to the Treatment of Prisoners of War.¹⁴¹ During the war the American scholar Padelford remarked that the announcements made by the government with regard to prisoners, as well as the designation of certain areas as zones of war and subject to blockades, constituted a recognition of belligerency of the Nationalists.¹⁴² If that was so, the 1929 Geneva Convention would have been applicable to the prisoners.

The use of safety or demilitarized zones, which was later codified in international humanitarian law in Articles 23 and 14, respectively, of the First and Fourth Geneva Conventions of 1949, first occurred during the Spanish Civil War.¹⁴³ Yet there were ‘only a few bright spots’ as regards compliance with humanitarian law.¹⁴⁴ In 1938, the League of Nations passed a resolution condemning the bombing of open towns and described this conduct as contrary to international law,¹⁴⁵ and Nationalist air raids on the civilian population were denounced by the League as contrary ‘to the conscience of mankind and to the principles of international law.’ Notwithstanding the ‘uncivilized and inhuman practices’ that were the order of the day, the references made by the parties and the League of Nations show an emerging concept of international rules being applicable to a non-international conflict despite the lack of recognition of belligerency.¹⁴⁶

These three civil wars illustrate the problems surrounding the recognition of belligerency and the resulting absence of any formal application of international rules regulating such wars. The *de facto* situation showed a need for the laws of war to be applied, and at the same time the statements by and agreements between the parties (and with international and humanitarian organizations) showed an understanding that extension of the rules to the situations discussed above was indeed necessary.

139 Van Wynen Thomas and Thomas, above note 137, p. 122.

140 *Ibid.*, p. 124.

141 Spain signed the Convention on the day of its adoption, 27 July 1929, and was the first state to ratify it (on 6 August 1930). See <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=300&ps=P> (visited 20 May 2009).

142 Van Wynen Thomas and Thomas, above note 137, p. 140.

143 Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, p. 143.

144 Van Wynen Thomas and Thomas, above note 137, p. 135.

145 League of Nations, *Official Journal*, 19th Assembly – Plenary Meetings, Special Supplement No. 183, 1938, pp. 135–136.

146 For further details see Antonio Cassese, ‘The Spanish Civil War and the development of customary law concerning internal armed conflict’, in Antonio Cassese (ed), *Current Problems of International Law: Essays on UN Law and on the Law of Armed Conflict*, 1975.

From formal to factual application

The applicability of the laws of war was subject to formal declarations, e.g. declarations of war and belligerency. Situations in dire need of application of these rules were not regulated by treaty law unless formally recognized by such declarations as being within the scope of the laws of war, thus as an (international) war. This system was replaced by inclusion of the notion of ‘armed conflict’ in the 1949 Geneva Conventions, which addressed the actual situation on the ground. Humanitarian law thus became applicable on the basis of material aspects of conflict instead of formalities.

Prior to the adoption of the 1949 Geneva Conventions, no substantive provision specifically dealing with situations of non-international armed conflict existed in IHL.¹⁴⁷ This changed in 1949 with ‘the embodiment of [the idea on which the Red Cross is based] in international obligations’.¹⁴⁸ The inclusion – primarily in response to the brutal civil wars in the years between the two world wars, such as that in Spain,¹⁴⁹ – of Common Article 3 ‘in which the whole of the rules applying to non-international conflicts are concentrated’ was ‘almost unhoped-for’.¹⁵⁰ This important development, not only for the protection of people affected by armed conflict but also for the legal distinction between the two types of armed conflict, is discussed in the following section.

The drafting history of Common Article 3

As Pictet points out in his *Commentary*, until 1949 the Conventions were designed ‘to assist only the victims of wars between States.’ In 1864, for example, the first-ever Geneva Convention for the protection of wounded or sick soldiers was brought into being on the initiative of the Geneva Committee, the future International Committee of the Red Cross. ‘[I]n logical application of its fundamental principle’, the Red Cross later called for the law to be extended to other categories of victims of war, i.e. prisoners of war and civilians,¹⁵¹ for ‘[t]he same logical process could not fail to lead to the idea of applying the principle to all cases of armed conflicts, including those of an internal character.’¹⁵²

The Red Cross had long before tried to help ‘the victims of internal conflicts, the horrors of which sometimes surpass the horrors of international wars

147 Cullen, above note 95, p. 36.

148 Pictet, *Commentary on GC III*, above note 7, p. 28.

149 Corn, above note 1, p. 305.

150 Pictet, *Commentary on GC III*, above note 7, p. 28.

151 Jean Pictet, *Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (hereinafter *Commentary on GC I*), ICRC, Geneva, 1952, p. 38.

152 *Ibid.*

by reason of the fratricidal hatred which they engender.¹⁵³ However, its work was often hampered by domestic politics: in non-international conflicts the lawful government sometimes viewed the relief it gave to victims on the insurgents' side as aid to criminals. Indeed, applications by a foreign Red Cross Society or by the ICRC were more than once treated as interference in the internal affairs of the state concerned.¹⁵⁴ At the 9th International Conference of the Red Cross, held in 1912, a draft convention on the role of the Red Cross in times of civil war or insurgencies was submitted, but the subject eluded any discussion whatsoever.¹⁵⁵

The ICRC was more successful in this regard after World War I. In 1921 it was able to include the issue on the agenda of the 10th International Conference of the Red Cross, and this time a resolution was passed 'affirming the right to relief of all victims of civil wars or social or revolutionary disturbances in accordance with the general principles of the Red Cross.'¹⁵⁶ In the uprising that followed the plebiscite in Upper Silesia that same year and during the Spanish Civil War, this resolution enabled the ICRC 'to induce both sides to undertake more or less to respect the principles of the Geneva Convention.'¹⁵⁷

At the 14th International Conference of the Red Cross in 1938, a resolution was passed that supplemented and strengthened the resolution of 1921. By adopting the 1938 resolution, the International Conference 'was [...] envisaging, explicitly and for the first time, the application to a civil war, if not of all the provisions of the Geneva Conventions, at any rate of their essential principles.'¹⁵⁸ This development, together with the results achieved in the non-international armed conflicts in Upper Silesia and Spain, encouraged reconsideration by the ICRC of possibly inserting into the Conventions provisions relating to civil war.¹⁵⁹

At various conferences leading up to the 1949 Conference, the Red Cross Movement tried to have the provisions of the proposed new conventions applied to armed conflicts 'within the borders of a State',¹⁶⁰ but there proved to be a divergence of interests between the Movement, which advocated individual rights and protections, and the states that wanted to protect their sovereign rights.¹⁶¹ As was feared by the ICRC, the latter objected to the imposition on states of international obligations relating to their internal affairs.¹⁶² After a proposal by the Conference of

153 *Ibid.*, p. 39. The *Commentary on GC III* uses slightly different wording, namely, 'to aid the victims of *civil wars and internal armed conflict*' (Pictet, above note 7, p. 28, emphasis added).

154 Pictet, *Commentary on GC I*, above note 151, p. 39.

155 *Ibid.*

156 *Ibid.*, p. 40. One author notes in relation to the categories of conflict mentioned (i.e. civil wars, social or revolutionary disturbances), that: 'Given the timeframe, the ICRC doubtless had in mind, inter alia, the violent events in post-World War I Germany and the Bolshevik Revolution (and ensuing civil war) in Russia when it drafted the 1921 resolution; hence, the terms used.' Robert Weston Ash, 'Square pegs and round holes: Al-Qaeda detainees and Common Article 3', *Indiana International & Comparative Law Review*, Vol. 17, Issue 2, 2007, p. 279.

157 Pictet, *Commentary on GC I*, above note 151, p. 40.

158 *Ibid.*, p. 41.

159 *Ibid.*

160 *Ibid.*, pp. 41–42.

161 Ash, above note 156, p. 280.

162 Pictet, *Commentary on GC I*, above note 151, p. 42.

Government Experts,¹⁶³ the ICRC then submitted to the 17th International Conference of the Red Cross, held in Stockholm in 1948, a revised version of the article in question of the Draft Conventions for the Protection of War Victims. Interestingly, Pictet's *Commentary* states that the text submitted by the ICRC was as follows:

In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the *principles* of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise depend on the legal status of the Parties to the conflict and shall have no effect on that status.¹⁶⁴

The revised text was approved at the Stockholm Conference with the omission of the words 'especially cases of civil war, colonial conflicts, or wars of religion'.

However, rather than weakening the text, the said omission actually enlarged its scope.¹⁶⁵ Whilst Pictet notes that '[i]t was in this form that the proposal came before the Diplomatic Conference of 1949,'¹⁶⁶ the text of the Final Record reveals that the wording of the proposal actually read:

In all cases of armed conflict which are not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the *provisions* of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.¹⁶⁷

The *Commentary* fails to mention that 'important change',¹⁶⁸ which would entail a more elaborate protection in conflicts not of an international character. This latter proposal – in line with the Movement's earlier view – thus suggests a full

163 In 1947, the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims had drafted an article that proposed that 'the principles of the Convention were to be applied in civil wars by the Contracting Party, provided that the adverse Party did the same'. (*Ibid.*)

164 *Ibid.*, pp. 42–43 (emphasis added).

165 *Ibid.*, p. 43.

166 *Ibid.*

167 *Final Record of the Diplomatic Conference of Geneva of 1949* (hereinafter *Final Record*), Vol. I, p. 47 (emphasis added). This was paragraph 4 of the Draft Common Article 2. A separate Common Article 3 only came into existence later, i.e. during the Diplomatic Conference. All volumes of the *Final Record* can be viewed online at http://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec-Dipl-Conf-1949.html (visited 22 May 2009).

168 Moir, above note 9, p. 23. Moir notes that the *Commentary* 'fail[s] to mention this [...] change – an important one, returning to the original proposal of the Preliminary Conference.' David A. Elder pointed this oversight out in 1979 – see David A. Elder, 'The historical background of Common Article 3 of the Geneva Convention of 1949', *Case Western Reserve Journal of International Law*, Vol. 11, 1979, p. 43.

application of the Conventions to such conflicts.¹⁶⁹ For the present analysis it is relevant to observe that up to the convening of the Diplomatic Conference, the aim of those taking part in it (i.e. the Red Cross Movement and importantly, states) was for the new Conventions as a whole to extend to non-international armed conflicts. Essentially, this would have meant that the distinction that existed between the two types of conflict prior to 1949 would (in effect) have been eliminated. Whereas before the distinction lay not so much in the legal framework (since the latter did not officially apply to non-international armed conflicts), this meant *de facto* that a clear distinction did exist: between those conflicts that were governed by IHL, namely real wars – international armed conflicts; and those that were not, namely non-international armed conflicts. Extending the application of IHL to the latter would create a single category: situations to which IHL applied, i.e. armed conflicts, be they international or non-international in nature.

In light of the contemporary challenges to IHL, another phrase also becomes relevant.¹⁷⁰ Both the wording of the *Commentary* and that of the Final Record contain the phrase ‘in the territory of one or more of the High Contracting Parties’.¹⁷¹ Common Article 3, as it finally appeared in the Geneva Conventions of 1949, uses the well-known wording ‘[i]n case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. The meaning of ‘one’ in this phrase of Common Article 3 is rather ambiguous and was a subject of the debate surrounding the ‘war’ waged by the United States against Al Qaeda.

In *Hamdan v. Rumsfeld* the US Supreme Court considered whether ‘one’ should be read in its literal sense (which was the then view of the Bush administration) and ruled that it should not. In agreeing with this finding by the Court, Marco Sassòli explains that ‘[i]f such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not “non-international armed conflicts”, there would be a gap in protection.’¹⁷² The present prevailing view seems to be that ‘one’ should be read as ‘a’.¹⁷³ The question

169 Cullen, above note 95, p. 40.

170 See Pictet, *Commentary on GC I*, above note 151, p. 42 and *Final Record*, Vol. I, p. 47.

171 Emphasis added.

172 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, p. 9. In a 2008 opinion paper, the ICRC, proposed – as part of a definition reflecting ‘the strong prevailing legal opinion’ – that non-international armed conflicts arise ‘on the territory of a State’. See ICRC, ‘How is the term “armed conflict” defined in international humanitarian law?’, Opinion Paper, March 2008, p. 5, available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/\\$file/Opinion-paper-armed-conflict.pdf](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf) (visited 22 May 2009).

173 Article 1 of Protocol II uses the wording: ‘the territory of a High Contracting Party’. Treaties can only be signed by states and only apply to states that are party to them. The wording of Common Article 3 and Protocol II seems to express only that the place where the conflict takes place needs to come within the formal scope of application of IHL. ‘As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur “in the territory of one of the High Contracting Parties” has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.’ (ICRC, *ibid.*, p. 3).

as to whether the difference between the draft that was submitted and the final article was in fact intentional is dealt with below.

The Diplomatic Conference (1949)

The Diplomatic Conference convened in 1949 to revise the existing Geneva Conventions and established four primary committees, each of which focused on a different issue. One of these issues was 'Provisions common to all four Conventions'. As this phrase suggests, the relevant committee (the so-called Joint Committee) also dealt with what was to become Common Article 3.¹⁷⁴ The text of that article was one of the most controversial sections of the draft prepared by the ICRC.¹⁷⁵ The content of the debate in Geneva shows what type of conflict the drafters understood to be an 'armed conflict not of an international character'.

The Joint Committee was composed of delegates from all states present at the Diplomatic Conference. A divergence of views immediately became apparent.¹⁷⁶ The United Kingdom delegation was strongly against the adoption of draft Article 2 as it stood, because it would 'strike at the root of national sovereignty' and pose a threat to national security. The UK also held that Article 2(4) would extend the application of the Conventions to situations that 'were not war'.¹⁷⁷ In similar fashion, the French delegation feared that it would be possible for 'forms of disorder, anarchy, or brigandage to claim protection under the Convention'¹⁷⁸ and thus proposed an amendment to protect the rights of the state. In particular, it tabled the following alternative to the fourth paragraph of Article 2:

In all cases of armed conflict not of an international character which may occur on the territory of one or more High Contracting Parties, each of the Parties to the conflict shall be bound to implement the provisions of the present Convention, if the adverse Party possesses an organized military force, an authority responsible for its acts acting within a defined territory and having the means of observing and enforcing the Convention.¹⁷⁹

This French proposal still made use of the wording 'on the territory of one or more High Contracting Parties', and was supported by Spain, Italy and Monaco.¹⁸⁰

However, the ICRC was of the opinion that it set too high a threshold: on earlier occasions the total or partial application of the Conventions had been achieved, but those same situations would not have reached the threshold set by the

174 Pictet, *Commentary on GC III*, above note 7, p. 7. See also *Final Record*, Vol II-A, Minutes of Plenary Meetings, 4th meeting (25 April 1949), pp. 71–74.

175 See, *inter alia*, Ash, above note 156, p. 281.

176 Pictet, *Commentary on GC I*, above note 151, p. 43.

177 *Final Record*, Vol. II-B, Summary Records of the Joint Committee, 1st Meeting (26 April 1949), p. 10.

178 *Ibid.*

179 *Final Record*, Vol. III, Amendment proposed by France (26 April 1949), Annex 12, p. 27.

180 *Final Record*, Vol. II-B, above note 177, pp. 11–14.

amendment.¹⁸¹ It considered that the most practical and straightforward approach would be to have uniform application of the Conventions to all types of armed conflict and not to set an additional threshold.¹⁸²

Whilst the French proposal implicitly stated the condition for recognition of belligerency, the American, Australian and Greek delegations felt that this did not go far enough and proposed (in various forms) that the material conditions warranting the recognition of belligerency and thus the application of IHL be specifically stated.¹⁸³ The Greek proposal went so far as to say that the majority of the UN Security Council would need to recognize the belligerency.¹⁸⁴

Canada agreed that recognition of belligerency should be the criterion, while a second group accepted that the draft article might be less than perfect, but supported its inclusion on the basis of humanitarian considerations.¹⁸⁵ Norway (backed by the Soviet Union, Romania, Mexico, Denmark and Hungary) expressed its support for draft Article 2 because it would constitute a step forward in international law. It commented, too, that the term ‘armed conflict in a situation of civil war’ should not be understood as ‘individual conflict’ or ‘uprising’, but as ‘a form of conflict resembling international war, but taking place inside the territory of a State.’¹⁸⁶ It furthermore hoped for agreement at that Conference ‘that purely humanitarian rules should be applied in armed conflicts independently of any recognition of belligerency.’¹⁸⁷

It became clear in the Joint Committee that no easy conclusion could be reached. Pursuant to the Swiss delegation’s proposal, a sub-committee (the ‘Special Committee’) was therefore created to deal with the definition of armed conflict and the provision on non-international armed conflicts. Its meetings lasted for eleven weeks, but ended without any real agreement.¹⁸⁸

Given the clear divergence of views on draft Article 2, the Special Committee took two votes before starting its discussions. These showed that the delegations were in favour: (1) of extending the application of the Conventions to armed conflicts not of an international character; and (2) of rejecting the Stockholm draft of Article 2 and determining more clearly the non-international cases to which the Conventions were to apply.¹⁸⁹ The Committee felt that it had

181 *Ibid.*, Vol. II-B, Summary Records of Special Committee of the Joint Committee, 3rd Meeting (9 May 1949), p. 43.

182 Cullen, above note 95, p. 44.

183 *Ibid.*, p. 46, referring to James E. Bond, *The Rules of Riot: Internal Conflict and the Law of War*, Princeton University Press, Princeton, 1974, pp. 52–53. For the various proposals see *Final Record*, Vol. II-B, Summary Records of the Joint Committee, 2nd Meeting (27 April 1949), pp. 12–16.

184 *Final Record*, Vol. II-B, above note 177, p. 16.

185 Moir, above note 9, p. 24.

186 *Final Record*, Vol. II-B, above note 177, p. 11.

187 *Ibid.*

188 Cullen, above note 95, p. 50. The Special Committee consisted of Australia, Burma, France, Greece, Italy, Monaco, Norway, the Soviet Union, Switzerland, the United Kingdom, the United States of America and Uruguay.

189 *Final Record*, Vol. II-B, Summary Records of the Special Committee of the Joint Committee, 3rd and 4th Meetings (11 May 1949), p. 45.

two options: it could either limit the situations of non-international violence to which the Conventions were to apply, or it could limit the amount or extent of the provisions that would be applicable to conflicts not of an international character.¹⁹⁰

Over the weeks that followed, smaller working groups (so-called Working Parties) were formed from the delegations taking part in the Special Committee. A total of three proposals for what was meanwhile called Article 2A were put forward, but none of them gained enough support, so all three were submitted to the Joint Committee.

While the French proposal before the Joint Committee at the end of April still contained the wording 'one or more High Contracting Parties', by May and June the three aforesaid proposals drafted during the Special Committee meetings all used the wording 'one of the High Contracting Parties' (or, in the case of the Soviet proposal, 'one of the States Parties').¹⁹¹ The records do not show any deliberation on this subject and no mention is made of the reason for omitting 'or more'. It is possible that so-called off-the-record 'hallway diplomacy' gave rise to this change, but it seems more plausible, in view of the recorded discussion in the Special Committee, that at some point the words 'or more' were felt to be void because everyone seemed to agree that the type of armed conflict being discussed was purely internal in character.

The draft Article 2A completed by the second Working Party, consisting of the exact wording of the present Common Article 3, received the most support in the Joint Committee and was then submitted to the Plenary Assembly. This latest draft text did not include any reference to the criteria for recognition of belligerency; delegations previously wanting these criteria included thus either underwent a radical change of opinion, or the recognition of belligerency was deemed to be an implicit condition for the provision's application to non-international armed conflicts.¹⁹²

The report on the work of the Joint Committee, submitted together with the draft articles to the Plenary Assembly, gives a good overview of what the delegations considered to be the type of conflict mentioned in this draft Article 2A. As for what was to be understood by 'armed conflict not of an international character', the report states that:

It was clear that this referred to civil war, and not to a mere riot or disturbances caused by bandits. States could not be obliged, as soon as a rebellion arose within their frontiers, to consider the rebels as regular belligerents to whose benefit the Conventions had to be applied.¹⁹³

190 *Final Record*, Vol. II-B, Seventh Report drawn up by the Special Committee of the Joint Committee (16 July 1949), p. 122.

191 *Ibid.*, pp. 123–127.

192 Cullen, above note 95, p. 57.

193 *Final Record*, Vol. II-B, Report drawn up by the Joint Committee and presented to the Plenary Assembly, p. 129.

Anthony Cullen notes that the terms ‘civil war’ and ‘armed conflict not of an international character’ were thus understood by the drafters as having an equivalent threshold. The former presupposes the existence of hostilities that are similar to an international conflict and, for the purposes of applicability of the Conventions, thus requires the same scale and intensity.¹⁹⁴ If the report submitted to the Plenary Assembly accurately describes the views held by the delegates, there must then have been broad agreement that the threshold required for the application of IHL (as laid down in the Conventions) was similar to the level that was traditionally set for recognition of belligerency.¹⁹⁵

The debate on Article 2A continued at the Plenary Assembly, but it was finally adopted unchanged as Common Article 3 by 34 votes to 12 (with one abstention). According to the Swiss delegation, the text represented the only possible balance between the claims of idealism and the rights of realism,¹⁹⁶ and was a compromise between the Asian bloc (represented by Burma), which was still opposed to the inclusion of a provision on non-international situations, and the Soviet view that the humanitarian protection afforded by this article was too limited.¹⁹⁷

The ICRC would have preferred the more extensive protection of the Stockholm draft, but accepted that a compromise was inevitable. It gave its full support to the article, which contained a simple and clear text and ‘has the merit of ensuring, in the case of a civil war, at least the application of the humanitarian rules which are recognized by all civilized peoples’, provides at least a minimum of protection and at the same time gives humanitarian organizations, such as the ICRC, the means for intervention.¹⁹⁸

After several years in preparation and many weeks of negotiation, the extension of treaty law to non-international armed conflicts was thus accomplished. While this was a great achievement insofar as it extended a number of provisions to such conflicts and – as the ICRC noted – allowed humanitarian agency bodies to offer their services, it also created a legal distinction between those conflicts and the situations referred to in Common Article 2, i.e. international armed conflicts, to which the Conventions applied in their entirety.¹⁹⁹

Concluding remarks

Differences between situations of armed conflict existed even before the rise of the nation-state as a concept in international law. Religion was a reason to treat enemies of another religion differently, and also to accord those daring to challenge

194 Cullen, above note 95, pp. 57–58.

195 *Ibid.*, p. 58.

196 *Final Record*, Vol. II-B, Minutes of 19th Plenary Meeting (29 July 1949), p. 336.

197 Moir, above note 9, p. 24.

198 *Final Record*, Vol. II-B, Minutes of 19th Plenary Meeting, above note 196, pp. 336–337.

199 It can also be said that the distinction was confirmed rather than created. See the discussion below on this issue.

the power of the sovereign a treatment outside the confines of any law. Wars against other sovereigns belonging to the same religion i.e. wars between equals, were the only 'real wars' and therefore the only situations subject to regulation.²⁰⁰

With the rise of the nation-state, war came to be characterized as an inherent sovereign right. Indeed, the right to wage war was even believed to be the main characteristic of sovereignty. Yoram Dinstein comments in this regard that:

When observed through the lens of legal theory, the freedom to indulge in war without thereby violating international law seemed to create an egregious anomaly. It did not make sense for the international legal system to be based on respect for the sovereignty of States, while each State had a sovereign right to destroy the sovereignty of others.²⁰¹

He explains, too, that the states (and statesmen concerned) did not consider the freedom of waging war to constitute a problem in relation to international law; nor did they find it inconceivable that each state could – in the name of sovereignty – legitimately challenge the sovereignty of other states.²⁰² The ambiguity of sovereignty is also illustrated by the doctrine of belligerency. Since only sovereign States could wage war, a non-international armed conflict was considered to fall within the realm of international law (and thus the laws of war) only in cases where it actually resembled an international war. The recognition of belligerency was thus the only way to make the laws of war applicable to non-international situations, but if such was the case, the fighting parties were placed on an equal footing – the sovereign state and the insurgents who received recognition as belligerents.

Similarly, the Geneva Conventions were only meant to apply in non-international situations that closely resembled international armed conflicts. The 1949 Geneva Conventions expanded the frontiers of IHL: the first three Conventions updated existing treaties and the fourth broke new ground by making detailed provisions for the treatment of civilians, but '[t]he major novelty was Article 3 common to all four Conventions, which for the first time introduced the principles of the Geneva Conventions into the domain of non-international conflicts.'²⁰³ While it is also said that the Geneva Conventions marginalize non-international armed conflicts,²⁰⁴ they did break 'through the obstacle posed by considerations of national sovereignty to impose a legal framework on internal conflicts.'²⁰⁵

200 It is interesting to note that the present-day jihadist philosophy, in referring to the other party as a sort of 'modern-day heathens', denies those belonging to that party basic rights (under IHL). It can be argued that to some extent the counter-terrorism strategy does the same when denying the application of IHL to those described as 'terrorists'.

201 Dinstein, Yoram, 'The legal status of war', in David Kinsella and Craig L. Carr (eds), *The Morality of War: A Reader*, Lynne Rienner Publishers, London, 2007, p. 101.

202 *Ibid.*

203 ICRC, 'The ICRC since 1945: The Geneva Conventions of 1949', 2005, available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/icrc-genevaconventions-revision-1949> (visited 22 May 2009).

204 Heather Alexander, 'Justice for Rwanda: Toward a universal law of armed conflict', *Golden State University Law Review*, Vol. 34, 2004, p. 435.

205 ICRC, above note 203.

However, this divergence from the original scope of application has not created a completely new distinction between international and non-international armed conflicts. As mentioned above, this distinction existed long before 1949. The non-regulation of situations of a non-international nature in itself creates a distinction: between situations that fall under the protection of humanitarian law and situations outside the scope of that body of law. The international community had a chance to nullify this distinction in 1949, but rather than making the whole of IHL applicable to all types of armed conflict (international and non-international), the states that negotiated the Conventions not only decided to retain the previously existing distinction by creating two separate regimes instead, but also – given the fact that the situations to be governed by Common Article 3 were similar to those that could previously have received a recognition of belligerency – inadvertently created a situation in which less protection and fewer laws would be in place than before.

In addition, a fundamental difficulty that arose after creation of that distinction was how to classify conflicts into one of the two categories, since a new dimension was added to simply differentiating prior to 1949 between ‘wartime’ and ‘peacetime’.²⁰⁶

On the one hand, situations that in earlier times fell short of belligerency (which required a party to be able to engage in sustained violence), and would thus probably have been called rebellion, today come under headings such as internal disturbances and tensions and isolated and sporadic acts of violence and are still considered to be outside the scope of IHL protection.²⁰⁷ Article 1(2) of Additional Protocol II and Article 8(2)(d) of the Rome Statute of the International Criminal Court have adopted wording that is very similar to how rebellion falling short of insurgency or belligerency could be described.

Situations not clearly coming within one of the two categories, e.g. transnational situations, were never discussed when the distinction between international and non-international armed conflicts came into being. Because non-state groups were not a sovereign power and would never be able to meet the criteria for recognition of belligerency,²⁰⁸ those situations were outside the scope of traditional international law. During the drafting process of Common Article 3, at no time was reference made to a potential transnational situation. The only reference that could have indicated that the drafters had considered the possibility of such a situation, namely ‘or more’, was omitted without explanation. The drafting and negotiations dealt exclusively with the use of internal armed force within a State.²⁰⁹

Conversely, the scope of application of Common Article 3 has nowadays been extended. As one author notes, that article is being distorted and applied in

206 Christophe Swinarski, ‘On the classification of conflicts as a factor of their dynamics’, in Hannard, Marques dos Santos and Fox (eds), above note 4, p. 30.

207 This does not mean that those situations are beyond any form of law. National law and, unlike in earlier times, human rights law does apply to them.

208 For example, control of part of the territory of the state against whose government such a group has taken up arms. If a non-state entity in a transnational conflict has control over any territory, this is (normally) not in the state against which it is fighting.

209 cf. Ash, above note 156, p. 275.

direct contradiction to what the drafters anticipated and agreed upon in 1949,²¹⁰ for whereas it was meant to apply in situations that were similar to the other type of conflict referred to in the Conventions, i.e. international armed conflicts, it now applies as a minimum yardstick to all situations of armed conflict that are not international in character.²¹¹

The sensitivity of states to third-party interference in matters to do with their internal security and sovereignty is cited as the reason why the law of non-international armed conflict has been neglected and under-regulated for so long.²¹² The sovereignty of states remains an important international value, but at the same time the prerogatives it confers have been limited. Insistence upon a traditional concept of state sovereignty would thus be anachronistic. Sovereignty has been redefined to accommodate newly recognized values of international human rights²¹³ and a number of international legal developments, including the appearance of international tribunals and courts.²¹⁴ In its first case of one of these tribunals, the ICTY showed its desire to extend humanitarian protection in like measure to victims of non-international armed conflicts,²¹⁵ but in its subsequent case-law it has time and again confirmed the existence of a legal distinction between non-international and international armed conflicts. In order to make this distinction, it has developed criteria to assess whether a given situation corresponds to one type of conflict or the other.

At present, the distinction between the two types of conflict still forms part of positive law, for the states negotiating the 1949 Geneva Conventions (and later the 1977 Additional Protocols) were not willing to place a situation that concerned their internal affairs, and thus their sovereignty, on an equal footing with international armed conflicts. The willingness of judicial bodies to extend the scope of application of the law of non-international armed conflicts can hence be viewed as a promising development. However, for international humanitarian law to achieve its aim of providing the best possible protection for those affected by armed conflict, the desired outcome in resolving the question of application of this branch of law is naturally the one that brings into play the largest set of rules – those related to international armed conflict – that protect *all* victims of war.

210 *Ibid.*

211 See International Court of Justice, *Nicaragua v. United States of America, Judgment*, ICJ Reports 1986, p. 14; United States Supreme Court, *Hamdan v. Rumsfeld*, above note 4. Pictet's commentary states that Common Article 3 should be applied as widely as possible – Pictet, *Commentary to GC I*, above note 151, p. 50.

212 As in, among others, Kolb and Hyde, above note 143, p. 257.

213 Bartram S. Brown, 'Nationality and internationality in international humanitarian law', *Stanford Journal of International Law*, Vol. 34, 1998, p. 395.

214 Natalie Wagner, 'The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia', *International Review of the Red Cross*, Vol. 85, No. 850, 2003, pp. 374–375.

215 The Trial Chamber noted that 'what is inhumane, and consequently prohibited, in international wars, cannot but be inhumane and inadmissible in civil strife.' ICTY, *Prosecutor v. Dusko Tadić*, Judgment (Trial Chamber), Case No. IT-94-1-AR72, 2 October 1995, para 119.