

# The Applicability of International Law to Armed Conflicts involving Non-State Armed Groups

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Between Status and Humanitarian Protection

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## **Abstract**

This is a thesis about the applicability of the *jus in bello* to armed conflicts involving non-state armed groups. The thesis focuses on the thresholds of applicability. These are the definitions of actors and situations that activate the applicability of the *jus in bello*. The aim is to illuminate and critique the regulatory rationales behind the different definitions of actors and situations in the different thresholds. The evolution of the thresholds is reviewed chronologically. Accordingly, the enquiry ranges from the 19<sup>th</sup> century doctrines of recognition of belligerency and insurgency, through common article 3 and Additional Protocols I and II, to the law developed by the ICTY and included in the Rome Statute for the International Criminal Court. While the thresholds constitute the centre of the enquiry, their meaning and function are further elucidated by the analysis of the process of their assessment, as well as the extent of the substantive legal regime they activate.

The central question of the thesis is whether there has been a gradual shift from a status-based rationale to one focused on the humanitarian protection of individuals, in the evolution of the thresholds of applicability. A status-based rationale fits with a system of horizontal regulation of state-like collective entities and allows considerations and perceptions of the ascription of status through legal regulation to determine the threshold of applicability. A humanitarian-protection rationale is more related to a system of vertical regulation irrespective of status and links the applicability of the law to the individual and her protection. The argument proposed is that such a gradual shift is indeed visible, if tempered by the continuous role that considerations of status have in conflict situations and the still largely decentralised system of assessment of the applicability of the law.

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## 1. Chapter 1: Introduction

### 1.1. The practical challenges

Armed violence that involves non-state armed groups has been increasingly prominent on the world stage since the Second World War. Today the majority of conflicts around the globe are of this nature.<sup>1</sup> This fact alone suffices to justify the practical importance of addressing the issues posed by such conflicts and, specifically, of trying to minimise some of their effects through legal regulation.

There are, moreover, characteristics of such conflicts that raise the stakes even higher. Conflicts involving non-state armed groups often coincide with or result in the collapse of state structures and social structures, especially when a conflict is between a recognised government and a group that seeks to overthrow it or secede.<sup>2</sup> Another such situation is where there is no effective government in the territorial state and non-state armed groups are battling each other in order to fill the vacuum.<sup>3</sup> The collapse of state and social structures can increase human and, particularly, civilian insecurity and suffering on many levels. Not only are the material conditions of civilian life dependent on the provision of organised services that can be interrupted in such circumstances; the breakdown of order may make the prevention and punishment of acts related to the conflict and which increase such suffering very difficult.

An additional characteristic of such conflicts is, all too often, their ferocity. Whether it is due to the proximity of the adversaries or to the perceived existential importance of the result, internecine struggles have long been understood to be particularly harmful to individual human beings.<sup>4</sup> Such conflicts can often result from or lead to dehumanising attitudes towards the enemy and its perceived supporters.<sup>5</sup> Such attitudes can lead to the

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<sup>1</sup> See, for relevant data, N. Gleditsch *et al*, 'Armed Conflict 1946-2001: A New Dataset' (2002) 39 *Journal of Peace Research* 615.

<sup>2</sup> Such conflicts seem to be the most frequent types. Examples include the conflicts throughout the period of decolonisation, such as the war in Algeria, but also conflicts such as the one in Kosovo in the late 1990s or some aspects of the ongoing conflict in the Democratic Republic of Congo.

<sup>3</sup> An example of this kind is the ongoing conflict in Somalia.

<sup>4</sup> See Thucydides, *Peloponnesian War*, Book III, par. 82-4, on the particular nature of conflicts within city states.

<sup>5</sup> See e.g. R. Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Arrow Books, 2004).

perpetration of heinous acts,<sup>6</sup> but also to the unwillingness or inability of existing structures to prevent or punish them.

The law of armed conflict,<sup>7</sup> as a protective and specialised legal regime, can play an important role in containing some of the consequences of such violence and in minimising human suffering.<sup>8</sup> However, some of the characteristics of conflicts that include non-state armed groups do not only cause humanitarian problems, they also contain practical obstacles for the application of this legal regime. Thus, for example, the fluidity of the conflict might make it difficult to discern the regulated actors; armed groups might change formations and appellations. Moreover they may show a limited willingness and ability to recognise and apply international rules. The breakdown of social order might seem to be incompatible with the application of a formalised legal regime to the extent that there are no channels and structures for the prevention and punishment of violations. It can be practically difficult to apply an international legal regime that was initially developed with highly organised and formalised structures of a state army in mind to a non-state armed group.<sup>9</sup> Importantly, in the case of a conflict between a non-state actor and a government, the government will often not recognise the existence of an armed conflict and try to block the applicability of a legal regime that limits its freedom of action and recognises its adversary as a party to the conflict.<sup>10</sup>

This stance, often adopted by governments, provides a link between the practical difficulties that need to be overcome with the conceptual issues that need to be understood. These conceptual issues are at the very core of the thesis.

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<sup>6</sup> A phenomenon that is particularly common in such conflicts are the deliberate attacks on the civilian population. See *Report of the Secretary-General on the Protection of Civilians in Armed Conflict* (28 October 2007) UN doc. S/2007/643. Another phenomenon is the practice of 'ethnic cleansing'. See, D. Petrovic, 'Ethnic Cleansing: An Attempt at Methodology' (1994) 5 *European Journal of International Law* 342.

<sup>7</sup> On terminology see below section 1.3.

<sup>8</sup> The law of armed conflict is not the only protective regime applicable. International human rights law also continues to apply in a complementary way. See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996), par. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (2004), par. 106. Indeed, the development of human rights has influenced the development of the law of armed conflict. See, e.g., T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239 (Meron, 'Humanization'). While the effects of this influence are relevant to this enquiry, the thesis focuses exclusively on the law of armed conflict as it has evolved.

<sup>9</sup> The 19<sup>th</sup> century *jus in bello* regime is discussed in chapter 2.

<sup>10</sup> The term 'party to the conflict' is discussed further in the context of common article 3 and Additional Protocol II in chapters 3, 5, and 8.

## 1.2. Conceptual issues

### 1.2.1. *The applicability of the law of armed conflict in a state-centric system*

The central conceptual and structural difficulty stems from the state-centric origins of international law.<sup>11</sup> The origins and development of the discipline shadow those of the modern (nation-)state system and, therefore, reproduce its structure. In the state-centric system, as expressed in the traditional 19<sup>th</sup>-early 20<sup>th</sup> century strict positivist view,<sup>12</sup> there is exclusively one type of entity – the state – recognised by the law as a legal person, a subject of rights and obligations.<sup>13</sup> All other entities are objects of the law and this includes not only other group entities but also natural persons, individuals.<sup>14</sup> This dualism meant that it was not structurally and conceptually possible for international law to directly regulate non-state entities.

Moreover, the process of acceptance of an actor into this (limited) community of subjects of international law was decentralised and non-mandatory. The actor had to be recognised as an equal by its eventual peers.<sup>15</sup> Once the actor was recognised as a state the legal regime of international law was activated and the actor became a subject with international rights and obligations. In that sense the process of recognition was, as Lauterpacht has put it,<sup>16</sup> declaratory of facts and constitutive of rights.<sup>17</sup> This meant that the existence of legal rights was a result of certain qualities of the actor as appreciated by

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<sup>11</sup> These settings are more extensively introduced in section 2.1.

<sup>12</sup> This view of the past may be of course *ex post facto* exaggerated and simplified. See D. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 *Quinnipiac Law Review* 99. (Kennedy, 'Nineteenth')

<sup>13</sup> See H. Wheaton, *Elements of International Law*, (Literal Reproduction of the 1866 edition, edited by R. Dana, Clarendon Press, 1936), 25 ff. (Wheaton); L. Oppenheim, *International Law* (Longmans, 1905) 341; See also H. Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 *American Journal of International Law* 605, 606 (Kelsen, 'Recognition'). Even the writers who conceded that other entities could, in certain circumstances, be considered as subjects stressed that the states are the most important, by far, subjects or that other entities only derivatively acquire rights and duties. See, for example, T. Lawrence, *Les Principes de Droit International* (Dotation Carnegie pour la Paix internationale, 1920), 55.

<sup>14</sup> See, for example, H. Triepel, *Droit International et Droit Interne* (Dotation Carnegie pour la Paix internationale, 1920, original of 1899), 20. For a history and critique of this approach see G. Manner, 'The Object Theory of the Individual in International Law' (1952) 46 *American Journal of International Law* 428.

<sup>15</sup> See, generally, on recognition H. Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947) (Lauterpacht, *Recognition*); Kelsen, 'Recognition'; T. Chen, *The International Law of Recognition* (Stevens & Sons, 1951) (Chen).

<sup>16</sup> Lauterpacht, *Recognition*, 6.

<sup>17</sup> See further J. Crawford, *The Creation of States in International Law*, (2<sup>nd</sup> ed., Oxford University Press, 2006), 19 ff.

the other members of the community of states. It was a process of acceptance, during which legal regulation was directly linked with the ascription of legal status. While the term 'legal status' might narrowly and neutrally simply connote the rights and obligations and the legal standing that a legal person has in a given system,<sup>18</sup> in a system that was built around the sovereignty of collective entities such status can only be that of a recognised subject of the law. The very application of international law to an entity was equated to its status as a subject of international law. Therefore, the status conferred had a symbolic, political force: it carried prestige.

Through this process the application of the legal regime is conceptually linked with the provision of status. This conceptual paradigm has significantly influenced the regulation of non-state groups involved in armed conflict. Indeed, its influence extends beyond the existence of the conceptual absolute of the subject/object dualism.<sup>19</sup> Even through the development of more functional and flexible approaches to the concept of international legal personality a link between legal regulation and the conferment of status can be found. This is reflected, for example, in Shaw's concise definition of international legal personality as 'participation plus some form of community acceptance.'<sup>20</sup> If transposed to a situation of conflict, this definition can point to the fact that the material qualities of a particular group have allowed it to conduct hostilities with some success, which leads the community to acknowledge the need to include the actor in its regulatory system.

### *1.2.2. The functions of status and their conflict with humanitarian protection*

Having discussed how the state-centric origins and characteristics of the system have influenced the link between applicability of international law and the ascription of status, it is important to set out the different kinds and functions of status in the context of an armed conflict.

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<sup>18</sup> For example 'status' in law is defined in the Oxford English Dictionary as "The legal standing or position of a person as determined by his membership of some class of persons legally enjoying certain rights or subject to certain limitations."

<sup>19</sup> See above fnns 13-14. See also H. Aufricht, 'Personality in International Law' (1943) 37 *American Political Science Review* 217, for further references.

<sup>20</sup> M. Shaw, *International Law* (Cambridge University Press, 2004), 177.

Such status may be military, political, or legal. Military status is the result of the success the group has achieved in the armed struggle and the extent to which it poses a military threat to the government. Political status is linked to military status but extends beyond the temporal and material confines of the conflict. It might signify the political power and influence that the group wields, not just in terms of military power, but also in terms of its influence in society, its level of social and political organisation, the extent to which the group is recognised as a political actor internationally, and so on.

Such political status during a conflict can signify the potential for success of the group in achieving the goals of its military struggle and its political viability beyond the conflict. Moreover achieving a certain political status may be more than incidental; a group's goals may include altered political and legal status. This can be the case where the armed group is fighting for greater autonomy or, especially, independence, but also when it is fighting to overthrow the government or alter the balance of power in a legally entrenched way. Accordingly, the acknowledgment of military and, especially, political status during the conflict can be perceived as signifying and leading to the eventual legal status the group is fighting for.

While the eventual or expected altered legal status can influence the behaviour of the actors in the conflict, there is also a question of the functions of legal status *during* a conflict. During a conflict legal status consists of the fact that the armed group is viewed in law as a party to the conflict. One aspect of this is relatively straight-forward: Legal status is commensurate to the specific substantive rules extended. This can be termed specific legal status or legal status *stricto sensu*. To the extent that a set of legal rules is extended to a non-state armed group, there is an alteration of the legal status of the non-state armed group with respect to the law of armed conflict. For example, to the extent that common article 3 applies, the non-state armed group is recognised in law as a party to the conflict; its members have rights and obligations in accordance with common article 3.<sup>21</sup>

Another aspect of legal status is, however, less straightforward. Being seen in law as a party to a conflict can be perceived to have wider implications of legal status beyond the

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<sup>21</sup> See Chapter 3.

conflict and beyond the law of armed conflict. In this sense, the legal regulation in the *jus in bello* translates as personality, subjecthood, and status in general public international law. The legal regulation extended becomes something more than the sum of the specific rules. It declares or constitutes an entity in the international legal structure. Such legal status can be termed general legal status or legal status *lato sensu*. It relates more directly to, and to some extent is conflated with, the political status of the group and its potential existence as an entity beyond the armed conflict. It exists more at the level of perception of both the group itself and the government it is fighting against. It is, as it were, where legal and political status are conflated. It is a result of a legal system built on the sovereignty of group entities. Accordingly, any regulation and any legal status conferred can be perceived as recognising such an entity.

This latter phenomenon is more acute in cases where the question is the application of the law of international armed conflict.<sup>22</sup> As we will see, however, this paradigm also influences how states perceive the applicability of the law in non-international armed conflicts.<sup>23</sup> Further elaboration of this function of status requires the prior analysis of the relevant instruments and legal regimes. This function relates to the approach of states in relation to the applicability of the law and the link between the very applicability of the law (legal status *stricto sensu*) and (the perception of) the ascription of state-like legal/political status (legal status *lato sensu*).<sup>24</sup>

The term ‘status-based rationale’ is used to denote situations where the application of the *jus in bello* has seemed to rest on such considerations. Both conceptually and in practice the effects that a status-based rationale will have on the (non-)applicability of the law are very important as they are related not only to the extent and content of the applicable protective rules but also to whether such conflicts are regulated by international humanitarian law at all. Accordingly, a status-based rationale for the applicability of the legal regime can be at odds with and frustrate a fundamental goal of the legal system; the protection of human beings.

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<sup>22</sup> See chapters 2 and 4.

<sup>23</sup> See chapters 3, 5, and 7.

<sup>24</sup> Discussion of how states perceive the applicability of the law will persist throughout the thesis, while more conclusive observations will be offered in section 8.3.

In contrast to this ‘status-based rationale’, is what will be referred to as the ‘humanitarian protection rationale’. ‘The principle of humanity’ is recognised as one of the fundamental principles of the law of armed conflict,<sup>25</sup> aiming to “alleviating as much as possible the calamities of war” as an early instrument puts it.<sup>26</sup> Accordingly, the humanitarian protection rationale is understood, in this thesis, as the impetus to extend legal regulation that protects individual human beings from the ‘calamities of war’. Structurally, this can also be understood as shifting the focus from a system of regulation that has collective entities at its centre to one that focuses on the individual and her protection. If it is the case that the considerations behind the applicability of the legal regime focus exclusively on the status of collective entities, the humanitarian protection of individuals is compromised.

The question at the heart of this thesis is whether in the application of the *jus in bello* to conflicts involving non-state armed groups a progression can be seen from a status-based rationale to a humanitarian-protection rationale. Whether there is a progression from a legal system that extends the applicability of international law because of the status that the non-state armed group has achieved, to a legal system that extends regulation in order to provide humanitarian protection irrespective of the respective status of the parties. The thesis looks into the evolution of the applicable regimes over time in order to detect whether such a progression exists and, if so, what its limits would be. In the following sections some terms will be clarified before the focus of the thesis is set out in more detail.

### 1.3. Clarification of certain terms

Different terms can be used for the law that governs the hostilities.<sup>27</sup> The Latin term *jus in bello* (law in war) is the relatively older term and carries connotations of the formalised,

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<sup>25</sup> J. Pictet, *Development and Principles of International Humanitarian Law* (Henri Dunant Institute, 1985) (Pictet, *Principles*); Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2004), 16 (Dinstein).

<sup>26</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November/11 December 1868 (St. Petersburg Declaration).

<sup>27</sup> See, generally, Dinstein, 12 *ff.*

status-based legal regime that developed in the 18<sup>th</sup> and 19<sup>th</sup> centuries. It is redolent of the concept of ‘war in the legal sense’ and notions of subjecthood and sovereignty. Strictly speaking, the term includes, in addition to the rules of humanitarian protection contained in the Geneva Conventions<sup>28</sup> and Protocols,<sup>29</sup> rules such as the rights and duties of third states.<sup>30</sup> The term ‘law of armed conflict’, on the other hand, denotes a more functional and technical approach in regulating armed violence and stems from the concept of ‘war in the material sense’. The terminological move from the *jus in bello* to the law of armed conflict mirrors the move from ‘war’ to ‘armed conflict’ as legal terms of art.<sup>31</sup> Finally, the term ‘international humanitarian law’ denotes the primacy of humanitarian protection as a rationale for the regulation of hostilities, although it is often defined simply as the law applicable in armed conflicts.<sup>32</sup> While the most apparently neutral term is the term ‘law of armed conflict’, all the paradigms co-exist, sometimes uneasily, in contemporary discussions of the legal system. In addition, to the extent that there has been a shift from one to the other, it is not always clear when exactly that took place. Accordingly, the terms will be mostly used interchangeably unless the attributes of the terms, mentioned above, are being discussed.

The topic of the thesis is the applicability of *jus in bello* regimes on non-state armed groups. A full positive definition of what is an armed group for this thesis is not possible at this stage in the thesis. This is partly because there is a variety of typologies of groups with which this thesis is concerned. It is also because the definition of these groups forms part of the subject matter of this thesis. That is, the questions what is an armed group and what is an armed conflict are central to determining when the legal regime is applicable and vice versa.

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<sup>28</sup> Geneva Convention I on Wounded and Sick in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention II on Wounded, Sick and Shipwrecked at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention III on Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention IV on Civilians, 12 August 1949, 75 UNTS 287.

<sup>29</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, 12 December 1977, 1125 UNTS 3; Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict, 8 June 1977, 1125 UNTS 609.

<sup>30</sup> Such questions, however, are also often subsumed under the general term ‘international humanitarian law’. See, for example, the contents of D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2<sup>nd</sup> ed., Oxford University Press, 2008) and criticism to that effect in A. Orakhelashvili, ‘Book Review’ (2008) 79 *British Yearbook of International Law* 371.

<sup>31</sup> See C. Greenwood, ‘The Concept of War in Modern International Law’ (1987) 36 *International and Comparative Law Quarterly* 283. (Greenwood, ‘Concept’)

<sup>32</sup> See article 2(b) of Additional Protocol I. See also *Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)* (26 January 1993) UN doc. S/25274, 13-15. See also fn 30 above.

Nevertheless, the types of groups that will primarily concern this thesis are groups that are fighting against the territorial government or against each other. These groups usually claim they are fighting collective grievances and possibly profess some aspirations of self-rule through secession, autonomy or the overthrow of the government.

Among the armed groups that are not the focus of this thesis are protesters, terrorists and private military companies (PMCs). As the thesis is concerned with the applicability of the law of armed conflict, protesters, even if armed, when participating in riots or internal disturbances are not included as far as the definition of an armed conflict is concerned. This is expressed in article 1(2) of Additional Protocol II.<sup>33</sup>

Terrorists and PMCs are categories of combatants not categories of belligerents.<sup>34</sup> They might be participants in a conflict but they are not parties to a conflict.<sup>35</sup> Terrorists and armed groups are not mutually exclusive categories. The legal category of terrorism is linked with the law of armed conflict in many respects. Primarily, terrorism can be a question of means and methods of combat.<sup>36</sup> Groups that routinely employ terrorist means and methods may come to be known as terrorist groups and such a group may be a party to an armed conflict. It can also form part of or be linked to the armed forces of a party to the conflict.<sup>37</sup> The determination of a group as ‘terrorists’, however, does not entail the existence of an armed conflict.<sup>38</sup>

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<sup>33</sup> Article 1(2) of Additional Protocol II defines “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” as not being ‘armed conflicts’.

<sup>34</sup> For the distinction see H. Meyrowitz, ‘Le statut des guérilleros dans le droit international’ (1973) 107 *Journal de Droit International* 875 (Meyrowitz).

<sup>35</sup> See common article 3 to the Geneva Conventions: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict...”

<sup>36</sup> It should be noted here that there is no yet widely accepted one definition of terrorism. See, generally, B. Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) and, on the relationship between ‘terrorism’ and international humanitarian law pp. 271 ff. The prohibition of terrorist methods in international humanitarian law has lead to some judicial consideration of such methods. See *Prosecutor v Galic*, Judgment, IT-98-29-A, 30 November 2006.

<sup>37</sup> An example would be the link between Al-Qaeda and the Taliban government of Afghanistan during the 2001 conflict against the US coalition.

<sup>38</sup> Nor is the terrorist nature of the acts significant for the determination of intensity for the existence of an armed conflict. See *Prosecutor v Boškoski and Tarčulovski*, Judgment, IT-04-82-T, 10 July 2008, par. 190. (*Boškoski*) See further, J. Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’ (2004) 75 *British Yearbook of International Law* 71, 82 ff. This is not to deny that the US Government has taken, and is still taking, a different view. See the speech by H. Koh, US Department of State Legal Advisor, ‘The Obama Administration and International Law’, 25 March 2010, reiterating the position that the US is involved in an armed conflict with Al Qaeda. Available at <http://www.state.gov/s/1/releases/remarks/139119.htm>

Similar considerations apply where PMCs are concerned. They can form part of the armed forces of a party to the conflict and their participation can lead to many interesting legal issues.<sup>39</sup> Alternatively, they might be sent by a state or employed by a government that is not the one of their state of nationality or the state of incorporation of the PMC. In any of these cases the PMC is a participant in the conflict but not a party to the conflict.

To put it differently, the question ‘what is an armed group’ is very closely linked to the question ‘what is an armed conflict’. These questions cannot be considered separately. Answering the former helps answer the latter and vice-versa.

#### 1.4. Focus and scope: a history of thresholds

To answer the central question on the evolution of rationale behind the application of the law to armed conflicts involving non-state armed groups this thesis focuses on thresholds of applicability. In the law of armed conflict the threshold of applicability sets the material field of application of a legal regime, whether it is the regime of a specific treaty or treaties or a customary law regime. The term ‘threshold’ is defined as a “border, limit (of a region); the line which one crosses in entering” or as “the magnitude or intensity that must be exceeded for a certain reaction or phenomenon to occur”.<sup>40</sup> The threshold will determine when a group is an armed group regulated by the legal regime and when a situation is an armed conflict and, therefore, calls for the application of a specialised, protective legal regime. It is the turning point where the law qualifies the material situation and the actors involved. By looking at the creation, interpretation and application of thresholds over time and over different legal regimes one can begin to understand the history of the regulation of armed conflicts involving non-state armed groups.

Moreover, through the criteria expressed or implicit in a threshold one can analyse the different approaches and rationales behind the regulatory regimes and the thresholds of

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<sup>39</sup> See the symposium in (2008) 19 *European Journal of International Law* 961-1074.

<sup>40</sup> Both definitions are from the Oxford English Dictionary.

their applicability. How such thresholds are constructed signifies the rationale behind the decision, on a general level, to extend legal regulation and everything – both practical and symbolic – that this entails. This is why the thresholds and the specific set of criteria of which they consist form the basis of this thesis.

Thresholds usually consist of a set of criteria that need to be satisfied before the legal regime is activated. These specific criteria may be more or less expressly stipulated. They may appear in the text of a treaty, as is the case of article 1(1) of Additional Protocol II.<sup>41</sup> Alternatively, they may be implicit and less clear, as is the case with common article 3 of the Geneva Conventions.<sup>42</sup> These criteria form the very centre of the enquiry as they will tell us what kind of actor and what kind of situation ‘merit’ a specific kind of regulation.

What the criteria tell us about the kinds of actors and situations that are regulated is supplemented by the consequences they entail and developed by the process of their application. The consequence of attaining a certain threshold is the applicability of a certain substantive legal regime. This tells us what legal regulation – what rights and duties, what privileges and limitations – pertain to the actor described through the criteria; what rules and measures of protection befit the situation at hand. In practice and in the perceptions of the actors there will have to be a certain balance between what the actor looks like and what rules apply to it. Such a balance can influence the acceptability and practicability of the legal construction. Therefore, the applicable legal regime can influence the process of formation of a specific threshold. This process can take the form, for example, of a diplomatic conference, alongside the formulation of the substantive legal regime.<sup>43</sup> Moreover, to the extent that the criteria that form the threshold are ambiguous, the legal regime activated, as we will see,<sup>44</sup> can influence the interpretation of the threshold. Accordingly, reference will be made to the legal rules activated, if only to the extent that this is necessary in understanding the function of particular thresholds.

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<sup>41</sup> Defining an armed conflict for the Protocol as one occurring “in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

<sup>42</sup> Speaking only of an “armed conflict not of an international character”.

<sup>43</sup> Interesting examples of the inter-relation of threshold and substance can be seen in the 1974-7 Diplomatic Conference that resulted in Additional Protocols I and II. See sections 4.3.3. and 5.3.3-5.

<sup>44</sup> See e.g. sections 5.4.4-5.

Finally, *how* the decision is made in the international system on whether a particular legal regime is applicable will also be influenced by and influence the threshold itself. This is because the number and the nature of criteria that have to be satisfied might have an effect on such a process of application.<sup>45</sup> For example, the complexity of the criteria or the difficulty in assessing their existence could have an effect on the process of their assessment.<sup>46</sup> Moreover, what kinds of actors are involved in this process is also significant.<sup>47</sup> The available mechanisms for application might influence the sorts of criteria considered acceptable, functional and practicable and develop their meaning accordingly. Finally, specific actors (and especially judicial institutions) can have an effect in the elaboration, refinement and legal certainty of the criteria contained in the threshold.<sup>48</sup>

Ultimately, questions of status, as will be seen, often play a role in the formation of the threshold, in the content of the legal regulation, and in the process of the application of the threshold and activation of the substantive rules. As thresholds provide the blueprint for the structure and function of the legal regime, they constitute a helpful focus-point for the analysis of the evolution of the rationales for applicability. As thresholds define – or avoid to define – the kind of actors and situations that ‘merit’ international regulation, probing these definitions can help illuminate the different rationales behind them and how these have evolved. Indeed, the thesis will adopt a roughly chronological sequence. It will analyse the thresholds of applicability as developed over time. It will do so by focusing on the criteria that form the different thresholds, in the context of the consequences and process of the application of the legal regime. Through the evolution of the systems of applicability the question will be whether there can be seen a shift from a status-based to an individual-protection based rationale.

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<sup>45</sup> For a juxtaposition between a non-defined threshold and one containing a number of restrictive criteria see chapters 3 and 5 on common article 3 and Additional Protocol II.

<sup>46</sup> This was an argument made in the context of the existence of a right to self-determination and its influence on the threshold of Additional Protocol I. See section 4.3.1.

<sup>47</sup> See, for example, section 3.4.1. for the framework of state practice, influencing the assessment of the applicability of common article 3.

<sup>48</sup> See especially sections 6.5. and 7.4.

### 1.5. Methodology

Although the thesis makes extensive use of the analyses and constructions of scholars, the methodology of the enquiry places primary sources at the very centre of research. This is not only because this author believes in the usefulness and importance of clarifying legal terms and instruments, as this is a requisite for communicating both within and about the law; it is also because an enquiry into concepts can only hope to minimise its arbitrariness and artificiality by looking as close as possible to the relevant behaviour of actors. Such behaviour, crystallised through legal instruments or accruing through state practice or institutional interpretation, will be analysed in this thesis.

Among the analysis of treaties, the courts' jurisprudence and the practice of states and armed groups,<sup>49</sup> it will be seen, an emphasis is placed on the narration and analysis of the *travaux préparatoires* of the instruments discussed. One reason for this is that, although supplementary means of interpretation,<sup>50</sup> *travaux préparatoires* often contribute to the elucidation of terms, a precise understanding of which is necessary for their application. The argument that the importance of *travaux* is greater than their formal position has a long pedigree.<sup>51</sup> Additionally, the narration of the *travaux* provides the link between history and law, shows the stakes behind abstract formulations,<sup>52</sup> and the potential dynamism of such moments of creation. Ultimately, as this thesis attempts to trace and comprehend the conceptual significance of the words that form the thresholds, the *travaux* give us a window into how states, through their agents, (mis)understand these words and their combinations.

### 1.6. Structure of the thesis

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<sup>49</sup> The analysis of the practice of armed groups will be useful irrespective of whether this practice can be considered to contribute to the formation of customary international law.

<sup>50</sup> As per article 32 of the Vienna Convention of the Law of Treaties.

<sup>51</sup> One of the first expositions was in H. Lauterpacht, 'Some Observations on Preparatory Work in the Interpretation of Treaties', (1935) 48 *Harvard Law Review* 549.

<sup>52</sup> Dealing with the political stakes involved in negotiations while writing about law might perhaps 'contaminate' the legal narrative. Indeed, Klabbbers has argued that the use of *travaux* in interpretation can lead to the selective use of the past. See J. Klabbbers, 'International Legal Histories: The Declining Importance of *Travaux Préparatoires* in Treaty Interpretation?' (2003) *Netherlands International Law Review* 267, 269.

In accordance with the chronological approach adopted in the thesis, the second chapter of the thesis attempts to situate and analyse the classical *jus in bello* regulatory paradigm by looking at the rise and fall of the legal categories of recognition of belligerency and insurgency. The expressly state-like nature of the criteria are analysed and put into the context of the decentralised and non-mandatory process of their assessment as well as their legal consequences. The conferment of status through recognition is at the centre of this paradigm.

The third chapter looks at the beginning of the modern era of regulation with the creation of common article 3 of the Geneva Conventions, which constitutes an important shift towards a humanitarian protection rationale. The non-definition of its threshold, it is argued, veils the tension between the conceptually still dominant status-based paradigm of belligerency and an attempt to depart from it. This tension is tracked through a discussion of the creation of the article. The attempt to depart from the past is manifested in the aspirations of its automatic applicability, without a process of recognition as such, as well as the modesty of its substantive regime. The successes and limits of the project are deduced from the relevant practice.

Chapters four and five concern a subsequent attempt at multilateral treaty-making. This occurred at the apex of the historical process of decolonisation and resulted in the two Additional Protocols to the Geneva Conventions. Chapter four looks at the inclusion of wars of national liberation in the category of international armed conflicts through article 1(4) of Additional Protocol I. The different rationales for this inclusion, and the prominence of status as their common ground, are analysed through the debate contained in the *travaux* of the 1974-77 Diplomatic Conference. Article 1(4) is analysed and its (non-)application tracked.

Chapter five examines the attempt, and its relative failure, to address some of the shortcomings of common article 3 through a new instrument, Additional Protocol II. The fate of this attempt was foretold in the *travaux*. The new threshold and its rather unbalanced nature are analysed and linked to the past and future of regulatory rationales.

Chapter six looks at how the institutionalisation of the process of applicability of the *jus in bello* regimes, through the creation and operation of courts and tribunals, has affected

the rationale for applicability. Some of the issues informing the chapter are the development of international criminal law, the creation of a customary law threshold, the expansion of the applicable substantive legal regime and the elaboration of the criteria for applicability. It is asked whether, through these developments, there has been a significant move in the paradigm and rationale for applicability.

Chapter seven tracks the creation and early stages of function of a permanent international judicial institution, the International Criminal Court. The tension between questions of status and the Court's function is analysed through the *travaux*. The new threshold(s), in article 8 of its Statute and as applied in the early jurisprudence of the Court, is analysed in an effort to see whether the Court constitutes the consolidation of a shift initiated by the development of the international criminal law regime and institutions. This is then related back to the *jus in bello* in order to answer the central question of this thesis.

## 2. Chapter 2: The law before 1949 – Recognition of Belligerency and Insurgency

### 2.1. Introduction

The history of modern international law is said to begin in 1648, with the treaty of Westphalia and the institution of the concept of state sovereignty as the cornerstone of the international system.<sup>1</sup> The basic concepts in this system, namely those of ‘states’ and ‘statehood’, gradually crystallised in the 18<sup>th</sup> and, especially, the 19<sup>th</sup> centuries. This was the result of both international relations and the development of the overall intellectual approach. Accordingly, while this era saw the effort for the construction of a stable state system,<sup>2</sup> it also gave birth to classical positivism.<sup>3</sup> This intellectual approach rested on strict and absolute dualisms and on the construction of clear conceptual hierarchies.<sup>4</sup> Moreover, the positivist approach meant that international law did not emanate from god or nature and apply *over* the various actors in the human community, but it was to be found in the relations *between* independent, sovereign states.<sup>5</sup> These sovereign states were the ultimate authority and the only subjects of the legal system.<sup>6</sup> There was nothing above them: no actor and no value. The status of a sovereign state was the measure of all in the legal system.

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<sup>1</sup> This is the widely accepted view today. See, e.g. A. Cassese, *International Law* (2<sup>nd</sup> ed., Oxford University Press, 2005), 24 ff; P. Malanczuk (ed.), *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> ed., Routledge, 1997), 11 ff.

<sup>2</sup> Especially since the Vienna Conference of 1815. See F. Münch, ‘Vienna Congress (1815)’ in R. Bernhardt *Encyclopedia of Public International Law vol. 7* (Max Planck Institute, 1984), 522-5.

<sup>3</sup> The ‘positivist tradition’ co-existed with, but completely dominated, rival approaches. See S. Neff, ‘A Short History of International Law’ in M. Evans (ed.), *International Law* (2<sup>nd</sup> ed., Oxford University Press, 2006), 29, 38 ff. (Neff, ‘History’) See also A. Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *Harvard International Law Journal* 1, 5 (Anghie, ‘Peripheries’); Kennedy, ‘Nineteenth’, 112.

<sup>4</sup> This is something very much present in the work of Auguste Comte, considered as the father of philosophical positivism, first developed through his work *Course on Positive Philosophy*, published between 1830 and 1842.

<sup>5</sup> See Neff, ‘History’, 39.

<sup>6</sup> See section 1.2 fns 13-14 for the exclusive subjecthood of states.

The primacy of sovereignty during the nineteenth century was reflected in the law of war. The ability to wage war became an attribute of state sovereignty.<sup>7</sup> There was no place for an assessment of whether a war was ‘just’ or ‘unjust’.<sup>8</sup> At the same time, however, this formalisation of war as an instrument of policy between sovereigns, allowed for the elaboration of a system of rules, a code of conduct,<sup>9</sup> agreed between sovereigns. This system of rules concerned various aspects of war – from the effects of war on third states to the mitigation of some of the horrors of war.<sup>10</sup> Moreover, the non-justiciability of the legality, or ‘justness’, of war cemented the separation of the *jus ad bellum* from the *jus in bello*, and the gradual emancipation of the latter from the former.<sup>11</sup> Once both sides were to be regulated irrespective of the merits of their goals, the rationale for regulation, whether practical or humanitarian, could be developed into detailed rules.

While it is easier to understand how absolute and formal state sovereignty can give rise to a code of conduct in war between states, the regulation of civil wars in that system seems paradoxical. In the same way that states were sovereign in their external relations, the state’s government was free to deal with armed threats to its authority in whatever fashion it deemed fit.<sup>12</sup> Nevertheless, the same era gave birth to a legal regime for the regulation of armed conflicts waged within states and to the term of art ‘civil war’.

While the most significant reason for this was, as will be seen in this chapter, the effects of such conflicts on the interests of third states,<sup>13</sup> on a more abstract level the crystallisation of the concept of statehood influenced the definition and regulation of non-state groups. On the one hand, the category of non-state armed groups can only be

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<sup>7</sup> This position persisted well into the 20<sup>th</sup> century. See, for example, See C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* vol. 2 (Little, Brown & Co., 1922) 189. (Hyde, *vol. 2*); “It always lies within the power of a State to endeavour to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.” See further S. Neff, *War and the Law of Nations* (Cambridge University Press, 2005), especially at 196 ff. (Neff, *War*)

<sup>8</sup> On the concept and doctrine of just wars see Neff, *War*, 29 and 50 ff. For its abandonment through the rise of positivism see *ibid* 177 ff.

<sup>9</sup> *Ibid*, 186 ff.

<sup>10</sup> Although, as we will see, at this stage the system was more concerned with the former than the latter aspects.

<sup>11</sup> On the different logic of the separation today see, for example, A. Roberts, ‘The Equal Application of the Laws of War: A Principle under Pressure’ (2008) 872 *International Review of the Red Cross* 931.

<sup>12</sup> The distinction between matters *between* and matters *within* states, and the regulation solely of the former, was at the very centre of the legal regime even from the time of Westphalia. See Neff, ‘History’, 34, on the regulation of religious matters.

<sup>13</sup> Hence the centrality of the law of neutrality. See below section 2.2.5. See R. Falk, ‘Janus Tormented: The International Law of Internal War’ in J. Rosenau (ed.), *International Aspects of Civil Strife* (Princeton University Press, 1964), 206 (Falk).

defined as armed groups that are *not a state*. Accordingly, the crystallisation of what is a state, in international relations and theory,<sup>14</sup> makes it easier to delineate what is not a state. On the other hand, the formalisation of what is a state lent the blueprint for what any collective actor should aspire to, in order to be a subject in the international legal system and achieve international legal status. Accordingly, both the negative and positive aspects of the definition of the non-state actor to be regulated are dependent and influenced by the dominant concept of statehood.<sup>15</sup>

This influence is still with us today. The conceptual paradigm of statehood and its influence on the rationale for the applicability of the legal regime on non-state armed groups have been central features in the international legal system. The tension between a status-based and a humanitarian-protection rationale, developed throughout the thesis,<sup>16</sup> is very much related to these features. The two legal innovations of the period, namely the doctrines of recognition of belligerency and recognition of insurgency offer an instructive starting point. This is why, although the practice of recognition of belligerency and insurgency today has largely fallen into desuetude,<sup>17</sup> it is important to discuss in detail the international legal regime that applied before the Geneva Conventions of 1949. The differences and similarities between the pre- and post-1949 legal regimes will help elucidate the evolution of the rationales for applicability as well as the limits of this evolution.

According to a widely accepted trichotomy armed conflicts in the pre-1949 legal regime, can be categorised, in ascending order of magnitude, as rebellion, insurgency, and belligerency. Categorisation of the armed conflict was intimately related to the status of the actors involved in it. The categories have been a fixture of legal doctrine for the last

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<sup>14</sup> Indeed, much of the writing in the period consists of detailed listing of the forms and permutations of statehood, and the legal consequences of this variety. See for example A. Rougier, *Les Guerres Civiles et le Droit des Gens* (Librairie de la Société du Recueil Général des Lois et des Arrêts, 1903), chapters 2 to 6 (Rougier).

<sup>15</sup> Moreover, it was the European ‘civilised’ nation-state that was the blueprint. See, e.g. Anghie, ‘Peripheries’, 70. See also Y. Onuma, ‘When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective’ (2000) 2 *Journal of the History of International Law* 1 (Onuma, ‘Intercivilizational’).

<sup>16</sup> And introduced in section 1.2.

<sup>17</sup> See J. Siotis, *Le Droit de la Guerre et les Conflits Armés d'un Caractère Non-International* (Librairie Générale de Droit et de Jurisprudence, 1958), 223 ff (Siotis). There are some exceptions, as will be seen.

250 years,<sup>18</sup> and are also adopted by more modern writers.<sup>19</sup> This is so, even though the terminology with respect to the first two categories, rebellion and insurgency, is often inconsistent and confusing.<sup>20</sup> Rebellion is where “there is sufficient evidence that the police forces<sup>21</sup> of the parent State will reduce the seditious party to respect the municipal legal order,”<sup>22</sup> and the punishment of the rebels is according to municipal law.<sup>23</sup> Accordingly, international law is not applicable and so not considered in this thesis.

Therefore, the two basic concepts relating to the international regulation of internal armed conflict in the pre-1949 legal regime are belligerency and insurgency. Of the two, belligerency developed more fully as a legal concept ensuing certain rights and obligations while insurgency never moved beyond a purely *ad hoc* practice.<sup>24</sup> In addition, the existence of these concepts and, especially, the practice related to them did not fully overlap temporally. Recognition of insurgency developed partly in order to address certain problematic aspects of the practice of recognition of belligerency as the latter gradually fell into desuetude.

As stated above,<sup>25</sup> the focus of this thesis is on the criteria forming the threshold for the applicability of the legal regime. These will be analysed and understood in the context of the substantive regime they activate and the process of their application.

## 2.2. Recognition of Belligerency

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<sup>18</sup> E. de Vattel, *The Law of Nations; or, The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns* (Carnegie Institution, 1916, first ed. 1758), 336. See also article 151 of the Lieber Code of 1863 See Instructions for the Government of Armies of the United States in the Field of 24 April 1863. See Rougier, 30 ff.

<sup>19</sup> See, for example, the analysis in Falk, 197; L. Moir, *The Law of Internal Armed Conflict* (Cambridge University Press, 2002), 4 (Moir); H. Wilson, *International Law and the Use of Force by National Liberation Movements* (Clarendon Press, 1988), 23. (Wilson)

<sup>20</sup> Hyde, for example, uses the terms ‘insurrection, rebellion, civil war’. See Hyde, *vol. 2*, 193. See also N. Padelford, *International Law and Diplomacy in the Spanish Civil War* (The Macmillan Company, 1939), 1. (Padelford, *Spanish*)

<sup>21</sup> Although, occasionally, reference is made to the military. See the definition given in *ibid.*, 1, using the terms ‘insurrection’ and ‘revolt’ to refer to what in this text is named ‘rebellion’. (My reference)

<sup>22</sup> L. Kotsch, *The Concept of War in Contemporary History and International Law* (Librairie E. Droz., 1956), 230; Y. Lootsteen, ‘The Concept of Belligerency in International Law’, (2000) 166 *Military Law Review*, 109, 113. According to Falk, 197, rebellion consists only of “sporadic challenge to the legitimate government”.

<sup>23</sup> Moir, 4.

<sup>24</sup> See, for example, Lauterpacht, *Recognition*, 270, “Belligerency is a relation giving rise to definite rights and obligations, while insurgency is not

<sup>25</sup> Section 1.4.

### 2.2.1. Introduction

The development of the concept of recognition of belligerency began gradually from the end of the 18<sup>th</sup> century<sup>26</sup> and, by all accounts, had achieved a certain degree of conceptual clarity by the mid-19<sup>th</sup> century with the American Civil War.<sup>27</sup> Although the practice had occurred with some consistency in the beginning of the 19<sup>th</sup> century in Latin America<sup>28</sup> as well as in Europe,<sup>29</sup> the concept was not dealt with in a doctrinal treatise until 1866, in a much celebrated footnote.<sup>30</sup> Belligerency can be described functionally as “a formalization of the relative rights and duties of all actors vis-à-vis an internal war”<sup>31</sup> or, defined descriptively as “an act of the parent government or of a foreign State by which a contending party in a civil strife is clothed with the legal qualification to make war, and the legal consequences of the international law of war flow from the moment such recognition is granted”.<sup>32</sup>

If the former statement helps us understand the purpose that the concept was meant to serve, the latter definition is very useful in delineating the pertinent elements and characteristics of the doctrine of belligerency. Indeed, it points out that the starting point for the activation of the legal regime is the recognising act. This is a very central feature of the doctrine and, as it will be seen, it influences many of its aspects and its function as a process of ascription of status.

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<sup>26</sup> See H. Wehberg, ‘La Guerre Civile et le Droit International’, (1938) *Recueil des Cours* 1, 13 ff placing the beginning of the formation of the concept at the war of American Independence of 1774-1783 (Wehberg). See also E. Castrén, *Civil War* (Suomalainen Tiedeakatemia, 1966), 40 (Castrén).

<sup>27</sup> See, for example, R. Oglesby, *Internal War and the Search for Normative Order* (Martinus Nijhoff, 1971), vii (Oglesby); H. Smith, *Great Britain and the Law of Nations* (P. S. King & Sons, 1932), 302 (Smith, *Great Britain*); A. MacNair, ‘The Law relating to the Civil War in Spain’, (1937) 53 *Law Quarterly Review* 471, 475 (MacNair, ‘Spain’); A. MacNair, *International Law Opinions vol. 1 Peace* (Cambridge University Press, 1956), 138 (MacNair, *Opinions*).

<sup>28</sup> The practice emerged in the context of the revolutions in Latin America especially in relation to Spanish Colonies. See especially J. Moore, *A Digest of International Law* vol. I (Government Printing Office, 1906), 170 ff; (Moore, *Digest*); Siotis, 64 ff.

<sup>29</sup> For the case of the Greek revolution see C. Eustathiadès, ‘La Première Application en Europe de la Reconnaissance de Belligérance Pendant la Guerre d’Indépendance de la Grèce’, in *En Hommage à Paul Guggenheim, Recueil d’études de Droit International* (Imprimerie de la Tribune de Genève, 1968), 22 (Eustathiadès); Siotis, 70 ff. Indeed, the Greek revolution is said to be the first important application of the doctrine after the American revolution. See Neff, *War* 262.

<sup>30</sup> The American jurist R. Dana added a footnote of the length of a short chapter in the 1866 edition of Wheaton’s *International Law*. See Wheaton, 29 ff, fn 15.

<sup>31</sup> Falk, 203.

<sup>32</sup> Chen, 303. The latter definition is also adopted by V. Duculesco, ‘Effet de la Reconnaissance de l’État de Belligérance par les Tiers, y Compris les Organisation Internationales, sur le Statut Juridique des Conflits Armés À Caractère Non-International’, (1975) 79 *Revue Générale de Droit International Publique*, 125, 127-8 (Duculesco).

These definitions also give us the main features of the doctrine, which will be analysed below. A non-state armed group is recognised as a belligerent by the parent government or a third state. When this occurs, the full legal regime that applies to wars between states is applicable. The process by which this happened and consequences thereof will be discussed below. Firstly, however, we need to address the question of threshold.

### 2.2.2. *Criteria for the applicability of the legal regime: War and the ability to wage it.*

The criteria for the applicability of the legal regime need to describe two closely interrelated elements: the actors and the situation. The doctrine of belligerency seems to prioritise the latter: the starting point is the material existence of a situation, the intensity of which amounts to a war. According to Wheaton, “the state of things between the parent State and insurgents must amount in fact to a *war*, in the sense of international law....[R]ecognition is of a fact.”<sup>33</sup> There must, therefore, exist a conflict of such a magnitude as to be perceived as a war. The magnitude of the conflict seems, therefore, logically to precede and contain the characteristics of the actors.<sup>34</sup>

A variety of factors can point to a sufficient magnitude of the conflict. Wheaton provides an indicative list.

The actual employment of military forces on each side, acting in accordance with the rules and customs of war,<sup>35</sup> such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent State as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral

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<sup>33</sup> Wheaton, 29, fn 15.

<sup>34</sup> As H. Smith, ‘Some Problems of the Spanish Civil War’, (1937) 18 *British Yearbook of International Law*, 17, 18 (Smith, ‘Spanish’) clearly puts it “[w]hat we call “belligerent recognition” is [...] the recognition of the existence of a war. The existence of a war is purely a question of fact.” The actors’ characteristics will be set out in this section, below.

<sup>35</sup> See, however, Chen, at 365, who points out the absurdity of the requirement of this factor *prior* to the activation of the legal regime.

vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war, before they are all ripened into activity.<sup>36</sup>

Another important factor is the occupation of a portion of the territory by the insurgents,<sup>37</sup> a factor which also serves as a criterion for statehood.<sup>38</sup>

The first factor to consider is the absence of the humanitarian effects of the hostilities. Matters like the number of victims or the overall effect of the hostilities on the civilian population do not directly affect the legal qualification of the conflict. This is also why the word ‘magnitude’ is more appropriate in this instance, rather than the term ‘intensity’, which, as will be seen in the following chapters, has come to contain humanitarian elements.<sup>39</sup> Indeed, the absence of humanitarian considerations among the criteria indicates that the humanitarian protection of individuals does not inform significantly the underlying rationale for the regulation of the conflict.<sup>40</sup>

Moreover, a related factor for the necessary magnitude is the predominance of maritime elements. Indeed, Wheaton points out that the situation will be “far more decisive where there is maritime war and commercial relations with foreigners.”<sup>41</sup> The question of magnitude, then, was to an extent viewed from outside the conflict and from the perspective of third states. There was sufficient magnitude to the extent that the hostilities could not be contained in the territory of the state and would extend beyond it, affecting third states. Where an internal armed conflict caused de facto obstacles to commercial relations, it became harder for third states to ignore. Finally, it will be noted that no express requirement of duration exists. While it is probable that a certain period

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<sup>36</sup> Wheaton, 30, fn 15.

<sup>37</sup> See, e.g., *The Prize Cases* (1864), 67 US 635. See also Hyde, *vol.* 2, 200, who adopts the language of the Court.

<sup>38</sup> See below fn 46.

<sup>39</sup> See sections 3.3.1 and 6.5.3.

<sup>40</sup> Occasionally, the argument that humanitarian considerations might be served by recognising belligerency – rather than that they are a legal criterion – was deployed. See the example of the British Foreign Secretary George Canning, conversing with the Austrian Chancellor Metternich and arguing for the recognition of the belligerency of the Greeks in Smith, *Great Britain*, 296. See, however, Lauterpacht, *Recognition*, 227-8, who refers to the specific case but goes on to argue that the “humanitarian argument is to a large extent deceptive”, as recognition does not seem to have a strong effect on the humanity of the conduct.

<sup>41</sup> Wheaton, 30, fn 15.

of time will have lapsed before the hostilities reach their magnitude, no additional duration is considered as a necessary separate criterion.<sup>42</sup>

The criterion relating to magnitude entails certain characteristics of the actors. These are related to their organization and their capacity to wage war. The armed group need to have the ability to occupy and control territory, to affect the maritime interests of third states, potentially even to wage maritime war, and to apply the full legal regime applicable to international wars. This ability necessitates a level of organisation that puts them on a par, as far as the war effort is concerned, with a state. The magnitude achieved is a tribute to the effectiveness of the group's war effort. The relative sophistication necessary to conduct maritime war, particularly, entails a level of military organisation. Accordingly, attributes of such *military* organisation are understood, in the writings of the time, through the issue of magnitude. In that sense, the actors' characteristics are logically subsumed in the characteristics of the situation. The status of the actors is achieved through the situation they have created. If 'war in the legal sense' can only be waged by sovereigns and the armed group has caused a conflict of the magnitude of war, they have the ability to support their claim to sovereignty.

This does not mean that organisation is not expressly considered. Wheaton requires "the existence of a *de facto* political organisation of the insurgents, sufficient in character, population and resources, to constitute it, if left to itself, a State among the nations, reasonably capable of discharging the duties of a State."<sup>43</sup> Two points may be made on this language and the reference to *political* rather than military organisation. The first one is the proximity of these criteria to those of statehood,<sup>44</sup> if not necessarily to the same degree. The second point is the *prospective* character of these factors. It accentuates how recognition of belligerency signifies more than the temporary application of a specialised legal regime. It also signifies the viability of the group and its prospects of achieving

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<sup>42</sup> The question of duration will be brought into the debate later, and especially through the language of Courts and Tribunals. See e.g. section 6.5.3.

<sup>43</sup> Wheaton, 30, fn 15. While Wheaton can be seen as the main authority on point, it is important to point out that there are writers that focused more narrowly on military organisation. See, for example, Rougier, 39.

<sup>44</sup> Cf. Article I of the Montevideo Convention on the Rights and Duties of States, 1933: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States". See also L. Oppenheim, *International Law vol. II. Disputes, War, and Neutrality* (7<sup>th</sup> ed., edited by H. Lauterpacht, Longman's, 1952), 250 (Oppenheim/Lauterpacht) "The principles...are essentially the same as those relating to the recognition of States and Governments."

sovereign status.<sup>45</sup> In that way the applicability of the *jus in bello* is linked to the legal status that the non-state armed group wants to achieve through and beyond the conflict. Furthermore, the centrality of political organisation reflects the importance of the political, and not just military, status that the group has achieved. Through the application of the *jus in bello* this political status is translated into state-like legal status during the conflict and the prospective legal status of statehood. The need for the humanitarian protection of individuals has no place in this rationale.

The above criteria gradually emerged both in the doctrine and in state practice. A particularly clear exposition of the interplay between the present facts and the potential of the insurgents for sovereignty is contained in US President Grant's message to the US Congress, justifying his refusal to recognise the belligerency of Cuba, in 1870.

The question of belligerency is one of fact and not to be decided by sympathies for or prejudices against either party. The relations between the parent state and the insurgents must amount, in fact, to war in the sense of international law. Fighting, though fierce and protracted, does not alone constitute war; there must be military forces acting in accordance with the rules and customs of war...and to justify a recognition of belligerency there must be, above all, a *de facto* political organization of the insurgents sufficient in character and resources to constitute it, if left to itself, a state among nations capable of discharging the duties of a state, and of meeting the just responsibilities it may incur as such toward other powers in the discharge of its national duties.<sup>46</sup>

Occasionally, the prospective element could also be understood as a political or strategic calculation. US President Monroe, referring, in 1822, to the revolutions in Latin America, was less circumspect in arguing that "as soon as the movement assumed such a steady and consistent form as to make the success of the provinces probable, the rights to which they were entitled by the law of nations, as equal parties to a civil war, were extended to

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<sup>45</sup> See also J. Moore, *Collected Papers vol. 2*, (Yale University Press, 1944), 100, arguing that "the insurgents must present the aspect of a political community or a *de facto* power, having a certain coherence, and a certain independence of position, in respect of territorial limits, of population, of interest and of destiny."

<sup>46</sup> Quoted in Moore, *Digest*, 194-5. Note the similarity of the language with the one employed in Wheaton four years earlier. See above fn 45 and text.

them.”<sup>47</sup> This element of political calculation qualifies the declared predominance of the present facts of the conflict. It identifies the applicability of the *jus in bello* with the expectation of sovereign status. Furthermore, it accentuates the role that the discretion and the political interests of the recognising actor have in granting the recognition.

### 2.2.3. *The role of the interests of third states*

This leads to the discussion of an additional, “subjective”<sup>48</sup> element in the doctrine. In accordance with the decentralized nature of the international legal system and the final decision on the existence of the factual criteria residing firmly on states, the existence of the factual criteria needs to be complemented by circumstances rendering it necessary for third states to grant recognition. Recognition of belligerency is fundamentally optional.<sup>49</sup> A third state will have, to the extent that the above criteria exist, the right but not the duty to grant recognition.<sup>50</sup> Conversely, to the extent that the above criteria do not exist a third state will have the duty to refrain from recognising the group as belligerents.<sup>51</sup> Accordingly, the existence of circumstances rendering the grant of recognition necessary for the recognising state can be considered, from the viewpoint of that state, to be an additional criterion.

In practice, this meant that recognition was granted predominantly to conflicts with a strong maritime element. As the central tenet of the activated legal regime was the law of neutrality, the necessity of activating the legal regime mostly arose when neutral commerce and navigation were threatened, especially due to the nature of transport at that time. This occurred particularly when the insurgents possessed and used a naval force or, at least and more commonly, when they controlled ports and adjacent waters.<sup>52</sup> Wheaton, for example, admitted that in the case of a conflict in a land-locked state

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<sup>47</sup> *Ibid.*, 170.

<sup>48</sup> Chen, 365.

<sup>49</sup> See Siotis 112 *ff.*

<sup>50</sup> As Wheaton puts it “The reason which requires and can alone justify this step by the government of another country, is, that its own rights and interests are so far affected as to require a definition of its own relations to the parties” adding that the exercise of this right may be made keeping in mind “the greater political good”. Wheaton, 29, fn 15.

<sup>51</sup> *Ibid.*, 30, fn 15; Lauterpacht, *Recognition*, 176.

<sup>52</sup> See MacNair, ‘Spain’, 476.

circumstances requiring recognition would be unlikely to arise, except being where the recognizing state was territorially contiguous and affected by land.<sup>53</sup>

If viewed as an additional criterion, however, recognition could be viewed as problematic in law. Although the need to grant recognition could be viewed as a form of measurement of the intensity of the conflict, the deference to the interests of third states as final arbiter added a further uncontrollable element of political expediency. It further distanced the rule from an objective understanding of the factual characteristics of the conflict, thus harming the certainty and cohesiveness of the rule. This element of political expediency bolsters the point made in the previous section on the prospective nature of the recognition, in accordance with the calculations of third states, on the eventual statehood of the group.

On the other hand, recognition can be viewed as a reflection of a central rationale of the legal regime; the regulation of the interests of third states through the ascription of status to the parties to the conflict, rather than the interests of the participants, or, indeed, the individuals, caught in the conflict. The interests of third states are central in determining the applicability of the law and the ascription of status to the parties.

These highly decentralized and subjective elements of the doctrine and practice, led to the perception that recognition of belligerency was deficient as a legal doctrine. To remedy this, different approaches were attempted. One was to focus on the existence of the factual characteristics of the actor and the conflict and, to the extent that the criteria were fulfilled, pronounce the granting of recognition as obligatory.<sup>54</sup> This approach reflected the effort to devise purely factual criteria and to move to a virtually automatic process of the granting of status and the application of the law.<sup>55</sup> It was, however, not supported by the practice of states.<sup>56</sup>

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<sup>53</sup> Wheaton, 29, fn 15. Wehberg, 23-6, supplies the examples of the Polish (1831) and Hungarian (1848) revolutions, arguing that the reason belligerency was never recognised concerned their land-locked nature.

<sup>54</sup> See Siotis, 128 ff. for a discussion of the opinions of authors like Fiore and Bluntschli, arguing for the obligatory nature of recognition of belligerency.

<sup>55</sup> Automatic application was central, as will be seen, in the change of paradigm attempted through common article 3.

<sup>56</sup> See for the interesting example of the Dominican revolt against Spain MacNair, *Opinions*, 141-2. See also, for further practice, MacNair, 'Spain', 482-3.

The above effort was central to the treatment of the subject by Lauterpacht. In this context it is important to recall Lauterpacht's formulation on the law of recognition: Recognition is declarative of facts and constitutive of rights.<sup>57</sup> In the context of belligerency this would mean that recognition would be declarative of the facts that make a group a contending party in a civil war and constitutive of the legal consequences of the international law of war, with the status that these carry. Furthermore, the relation between the existence of the facts, the assessment of the facts by the relevant actors and the constitution of legal rights<sup>58</sup> will determine the pre-eminence of the declarative or constitutive nature of the act. While the constitutive element of recognition acknowledges the power of the recognising actor in activating the net of rights and obligations included in the legal regime extended, the declarative element ensures that the recognising act will be based on pre-existing fact.

Lauterpacht summarizes the criteria as follows: (a) an armed conflict of a general character; (b) the insurgents must occupy and administer a substantial portion of national territory; (c) conduct the hostilities according to the laws of war through organized armed forces with responsible authority; (d) "circumstances making it necessary for outside states to define their attitude by means of recognition."<sup>59</sup> When these criteria are there third states have a *duty* to apply the law to the facts.<sup>60</sup> Indeed, this duty helps understand the role of criterion (d) for Lauterpacht. The 'necessity' in (d) could be interpreted as a question of interests of the third state. This, however, would make Lauterpacht's definition circular. If third states' interests make it necessary for them to recognise then there is not much sense in calling it a duty. For Lauterpacht's criteria to be commensurate with his general objectivist approach, the necessity in criterion (d) should only mean that states are forced to define their attitude. This significantly reduces the discretion of third states in their application of the law to the facts on the ground.

Indeed, in Lauterpacht's argument, (d) is less of a legal criterion and more of a form of jurisdiction, if that term can be used broadly. When certain interests of these states are

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<sup>57</sup> Lauterpacht, *Recognition*, 6.

<sup>58</sup> On the importance of the establishment (*la constatation*) of the facts by the relevant actors see Kelsen, 'Recognition', 606.

<sup>59</sup> Lauterpacht, *Recognition*, 176.

<sup>60</sup> See *ibid.*, 175: "The essence of that principle is that recognition is not in the nature of a grant of a favour or a matter of unfettered political discretion, but a duty imposed by the facts of the situation."

affected, they are empowered to take a position on the applicability of the law and, therefore, the ascription of status. Before that point, to recognise would be considered a “gratuitous demonstration of moral support”,<sup>61</sup> and “an international wrong as against the lawful government.”<sup>62</sup> When, however, they do take a position, they are bound to apply the facts to the law correctly.<sup>63</sup> For Lauterpacht, the recognising act is declarative of the facts of the conflict rather than of the interests of the third parties. Accordingly, if the facts are such third states have the *duty* to recognise the belligerency.

A similar approach to that of Lauterpacht was adopted by the Institut de Droit International, which attempted a codification of the legal rule in 1900.<sup>64</sup> Again, according to this approach, the interests of third states would not be viewed as a criterion but as an extra-legal variable that might activate the exercise of the legal right to grant recognition, to the extent that the other criteria are met, even though the Institut’s definition does not speak of a duty to recognise.

This debate highlights some of the problems of the doctrine and practice of belligerency as a decentralised process of ascription of status. It should also be seen, however, in the context of a wider debate in the *jus in bello* on the objective or subjective character of war.<sup>65</sup> While the former casts war as a material fact, the latter casts it as a legal regime brought into existence by the free will of a sovereign.<sup>66</sup> Moreover, insofar as states have full control over whether a material situation amounts to war, either by starting it or recognising it, there is little space for non-state actors to be regulated against the will of the states involved. Accordingly, the *jus ad bellum*, and the decline of the right of states to use force as they deemed fit, developed in parallel with the move from the legal concept of ‘war’ to that of an ‘armed conflict’, as an objective material situation.<sup>67</sup> The latter development, as will be seen in the next chapter, allowed the aspiration for an objective

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<sup>61</sup> Wheaton, 30, fn 15.

<sup>62</sup> Lauterpacht, *Recognition*, 176. On the other hand, less clearly, “[t]o refuse to recognise the insurgents as belligerents although these conditions are present is to act in a manner which finds no warrant in international law.

<sup>63</sup> See *ibid.*, 175.

<sup>64</sup> See Institut de Droit International, ‘Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers le gouvernements établis et reconnus qui sont aux prises avec l’insurrection’, Session de Neuchâtel, 1900, available at [http://www.idi-iil.org/idiF/resolutionsF/1900\\_neu\\_02\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1900_neu_02_fr.pdf) (IDI 1900). See also D. Schindler, ‘State of War, Belligerency, Armed Conflict’ in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 3 (Schindler).

<sup>65</sup> See Neff, *War*, 173-4.

<sup>66</sup> This is why a central element in that debate is the necessity or lack thereof of a declaration of war. See *ibid.*, 235-6.

<sup>67</sup> See *ibid.*, 335-6.

and automatic system of applicability of international legal rules on non-state armed groups.

Moreover, this move towards an objective system of applicability relates, as will be seen in the next chapters, to the move from a status-based to a humanitarian-protection-based rationale. The pairs subjective/objective and status/humanitarian-protection should not be seen as identical. Indeed, it is possible to have a subjective and decentralised system of assessing the need to apply humanitarian rules. Nevertheless, the move to an objective and centralised applicability can allow moving away from the interests of both third states and the territorial government in ascribing or not ascribing status to the non-state armed group through the applicability of the *jus in bello*.

#### 2.2.4. *The process of ascription of status – who grants recognition and how*

The process of granting recognition can help clarify the use of the above criteria in practice. An examination of the issue reveals the interplay and balance between the factual characteristics of the criteria and the optional nature of recognition. Recognition can be granted either by the incumbent government, against which the insurgents are fighting, or third states, deciding to take a position because of the circumstances of the conflict. In both cases, it is a question of the decision adopted by a particular actor when faced with a set of facts. The actors ascribing legal meaning to the facts,<sup>68</sup> will activate the legal regime of belligerency, and will do so in accordance with their interests. Accordingly, the existence of a state of war, as a matter of law, will be pronounced by these state-actors and can be deduced by their actions.

An aspect of the non-mandatory nature of the extension of recognition is that recognition by one actor does not bind another actor. If, for example, a third state recognises the belligerency of the armed group this act does not bind other third states. Similarly, even if the government recognises the belligerency of its adversary, this act does not bind third governments. Accordingly, the granting of recognition would create a

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<sup>68</sup> As put by Kelsen, 'Recognition', 606: "...there are no absolute, directly evident facts, facts "in themselves", but only facts established by the competent authority in a procedure prescribed by the legal order."

net of bilateral relations between the recognising state and the recognised belligerent that would not bind third states.<sup>69</sup> Therefore, although, in terms of the substantive law, recognition of belligerency would activate a coherent legal regime,<sup>70</sup> in terms of actors bound by this regime, it would generate a piecemeal net of bilateral relations.<sup>71</sup>

Explicit recognition, as an outright declaration of the existence of belligerent status, was rare.<sup>72</sup> What is more usual is for states to act in a way that would either activate or recognise the application of the legal regime activated through the recognition. Thus, by recognising the applicability of the legal regime, the state recognises the existence of the facts to which the legal status of the armed group corresponds.<sup>73</sup> The most common occurrence, and the closest thing to an explicit recognition of belligerency, is the declaration of blockade, by the legitimate government, and a declaration of neutrality,<sup>74</sup> by third states.<sup>75</sup> A 'blockade' means that the port is sealed and under the control of the belligerent imposing such blockade so that nothing can go in or out. A declaration of blockade can be understood as recognition of the fact that the insurgents are in control of the territory in the port that is being blockaded. By recognising their control over the territory and conceding the necessity of cutting them off from commercial contact with third states, the incumbent government, to the extent that it manages to impose an effective blockade, activates the laws of neutrality and recognises the belligerent status of the armed group. On the other hand, a declaration of neutrality on the part of a third state has the effect of activating the duty of absolute impartiality of that state and, therefore, the legal equality of the two parties, ascribing thereby belligerent status to the insurgents.<sup>76</sup>

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<sup>69</sup> See Siotis, 109-110.

<sup>70</sup> See section 2.2.5 below.

<sup>71</sup> The only necessary coherence is in relation to the position third states will adopt towards *both* belligerents. Therefore, while a third state is free to decide whether to activate the legal regime, it has to do so towards *both* actors.

<sup>72</sup> See, to that effect, Lauterpacht, *Recognition*, 177. He mentions, however, as a rare exception, the recognition of the Chilean belligerency by the Government of Bolivia in May 1891. Duculesco, 129, mentions the recognition of Cuban belligerency by Peru in 1869.

<sup>73</sup> The contents of the legal regime extended, and therefore the legal status of the group, are discussed below in section 2.2.5.

<sup>74</sup> See, for example, Oglesby, 35. See section 2.2.5 below.

<sup>75</sup> See, e.g., R. Wilson, 'Recognition of Insurgency and Belligerency', (1937) 31 *American Society of International Law Proceedings*, 136, 141-2.

<sup>76</sup> See section 2.2.5.

It is therefore not surprising that the *locus classicus* of belligerent recognition consists of a combination of these two forms in the case of the American Civil War (1861-5).<sup>77</sup> On April 30, 1861, President Lincoln declared a blockade of the Southern States, following their attack on Fort Sumpter.<sup>78</sup> On May 14 of the same year, Great Britain issued a declaration of neutrality.<sup>79</sup> President Lincoln's action was explicit enough to convince, not only the British, but also the Supreme Court of the United States. In the seminal *Prize Cases*,<sup>80</sup> the Supreme Court found a state of war and, therefore, the belligerent status of the Southern States. It must be noted, however, that the Supreme Court did not find that a state of war existed *because* of President Lincoln's declaration of blockade. Rather, it viewed this declaration as declaratory of the existence of such a state of war.<sup>81</sup> Furthermore, in response to complaints by the US Government that the recognition by the British was premature and therefore constituted an intervention in the internal affairs of the country, the British Government used President Lincoln's declaration of blockade as proof that the factual characteristics of the conflict were present and Britain was free to declare its neutrality.<sup>82</sup>

Another interesting example of the interplay between declaration of blockade and declaration of neutrality is the case of the Greek revolution, arguably the first case of recognition of belligerency on the European continent. The case demonstrates the evolution of the attitude of third states with respect to the Greek challenge against the Ottoman Empire (1821-30).<sup>83</sup> In this case there was initially a proclamation of neutrality by the Senate of the Ionian Islands, then a British protectorate. This proclamation,

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<sup>77</sup> See Smith, *Great Britain*, 302 ff.; Oglesby, 33 ff.; Q. Wright, 'The American Civil War', in R. Falk (ed.), *The International Law of Civil War* (Johns Hopkins Press, 1971), 30, especially 42 ff.

<sup>78</sup> On the Confederate side, President Lincoln's declaration was matched by President Davis' proclamation inviting applications for letters of marque. See Oglesby, 35.

<sup>79</sup> For the advice of the British Foreign Office on the matter see the letter of 6 May 1881, from Lord John Russell to Lord Lyons extracted in MacNair, *Opinions*, 138.

<sup>80</sup> *The Prize Cases* (1864), 67 US 635.

<sup>81</sup> In an oft quoted passage, at 666, per Justice Grier, echoing in detail the abovementioned criteria for recognition, the Court said: "A civil war is never solemnly declared; it becomes such by its accidents – the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war." See also Smith, 'Spanish', 20.

<sup>82</sup> See J. Garner, 'Questions of International Law in the Spanish Civil War' (1937) 31 *American Journal of International Law* 66, 72-3 (Garner, 'Spanish'). Similarly, the Law Officers advised that the blockade imposed by the Spanish Government after the revolt of San Domingo in 1864 was an assertion of a state of war. See MacNair, *Opinions*, 140-1; Smith, *Great Britain*, 313 ff.

<sup>83</sup> See Smith, *Great Britain*, 281 ff.; Oglesby, 19 ff.; Wehberg, 18; Eustathiadès, 22.

however, was issued on 7 June of 1821, within few months of the beginning of the revolution and seems to have been considered “somewhat premature”.<sup>84</sup> Later on, however, the Greeks declared a blockade on Ottoman ports on the 25<sup>th</sup> of March of 1822 thus forcing third states to take a position with respect to the conflict. The basic question rested on whether the blockade was effective, justifying states interested in the conflict to apply the laws of neutrality. This led, especially in the case of Britain,<sup>85</sup> to the gradual elaboration of an attitude of impartiality and non-intervention that eventually developed into recognition of belligerency through a declaration of neutrality expressed in British diplomatic papers.<sup>86</sup>

In the cases of the American Civil War and the Greek Revolution the material criteria matched the interests of third states in the recognition of belligerency and the conferment of status. One aspect of these interests can be the potential statehood of the insurgent entity. The status elements of this aspect have been discussed above.<sup>87</sup> A second, and more direct, interest is the activation of the substantive legal regime, and particularly the rules of neutrality. To this, and its effects on the status of the entity, we will now turn.

#### 2.2.5. *The legal regime activated through recognition of belligerency*

Recognition of belligerency led to the activation of the full regime of the *jus in bello* applicable between states. To put it simply, by recognition of belligerency the adversaries are put on an equal footing in their relations with each other, as well as those with third states.<sup>88</sup> This had conceptual as well as practical dimensions. The fundamental change in the legal regime covering the relations of the insurgents with the incumbent government as well as with third parties is reflected in the function of the concept of ‘war’ as a legal

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<sup>84</sup> See Smith, *Great Britain*, 285.

<sup>85</sup> The belligerency of the Greek insurgents was also recognised by France and Russia. See Siotis, 75. Austria-Hungary, considered the Greeks as rebels and “not entitled to the same rights of war, as legitimate belligerents.” See Smith, *Great Britain*, 297, quoting Canning’s dispatch of the 31<sup>st</sup> of December 1824.

<sup>86</sup> See Lauterpacht, *Recognition*, 178-9; Smith, *Great Britain*, 297; Wehberg, 20; Siotis, 74, for the language used and the precise dates.

<sup>87</sup> As seen in section 2.2.2.

<sup>88</sup> See, for a clear exposition of the shift, Rougier, 21-8.

term. ‘The law of war’ or ‘state of war’ was a comprehensive regime of rules, clearly separated from ‘the law of peace’.<sup>89</sup> Indeed, for Grotius, war (‘bellum’) meant “non actio sed status”.<sup>90</sup> Moreover, the ability to wage war was viewed as an inherent feature of sovereignty. In a decentralized world, where the use of force was not prohibited by any international norm with constitutional aspirations, waging war was both a prerogative of states as well as a method to settle disputes between the only sovereign actors.<sup>91</sup> Accordingly, only subjects of international law had the legal capacity to wage war.<sup>92</sup> Recognising such a capacity in a non-state actor was to give it, albeit provisionally and for the specific purpose of waging war,<sup>93</sup> the legal status of a state.<sup>94</sup>

On the other hand, the change in legal status has important consequences for the legal relations of the actors. By far the most important and extensive changes come through the application of the legal regime of neutrality.<sup>95</sup> The laws of neutrality comprise an extensive and detailed array of rights and duties that, for the purposes of presentation, can be simplistically divided into two groups: on the one hand there is a duty of absolute impartiality on behalf of third parties; on the other hand both parties acquire certain legal rights in the exercise of their war effort.<sup>96</sup>

Neutrality as absolute impartiality means that third states have to refrain from any act or policy that could benefit either party to the conflict. Trade in materials that could benefit the military capacities, referred to as contraband, is prohibited.<sup>97</sup> In order to enforce this prohibition belligerents are given the right to intercept neutral vessels on the high seas,

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<sup>89</sup> See Schindler, 16. This was reflected in the separation of the two legal regimes in classical international law treatises. See Neff, *War*, 177 ff.

<sup>90</sup> “Not a series of actions but a state of affairs” (My translation). Quoted in Lord MacNair and A. Watts, *The Legal Effects of War* 4<sup>th</sup> ed. (Cambridge University Press, 1966), 3 (MacNair/Watts).

<sup>91</sup> L. Oppenheim, *International Law* (2<sup>nd</sup> ed. Longmans, 1912), 62, couldn’t be clearer: “To be considered war, the contention must be going on *between States*.” (Oppenheim)

<sup>92</sup> Indeed, the identification of the actor (states), with the situation (war) is obvious in many of the definitions of war attempted. See, apart from Oppenheim, C. Hyde, *International Law vol. III* (2<sup>nd</sup> ed. Little, Brown & Co., 1945), 1686 : “a condition of armed hostilities between States”.

<sup>93</sup> See Siotis 109 ; C. Zorgbibe, ‘De la Théorie Classique de la Reconnaissance de Belligérance à l’Article 3 des Conventions de Genève’, (1976) *Droit Humanitaire et Conflits Armés* 83, 86-7 who views the international personality conferred through recognition of belligerency as a ‘functional’ personality.

<sup>94</sup> See Oppenheim/Lauterpacht, 248.

<sup>95</sup> For a thorough investigation see S. Neff, *The Rights and Duties of Neutrals* (Manchester University Press, 2000). (Neff, *Neutrals*) See also R. Bindschedler, ‘Neutrality, Concept and General Rules’ in R. Bernhardt (ed.), *Encyclopedia of Public International Law* vol. 3 (Elsevier, 1997), 549.

<sup>96</sup> See, for example, Oppenheim, 347 ff.

<sup>97</sup> A codification of the law on contraband occurred with the Declaration of London of 26 February 1909. See Neff, *Neutrals*, 136-142; Oppenheim, 480.

check them for contraband and seize the ship as well as the cargo if contraband is found. These can then be confiscated as legitimate prize. An elaborate system of prize courts developed, being domestic courts of the belligerent entity applying rules of international law in order to determine whether the ship and cargo were lawfully seized and should be confiscated.<sup>98</sup> The belligerents are under the obligation to recognise the decrees of the prize courts of their adversary.<sup>99</sup> The non-state armed group acquires belligerent rights<sup>100</sup> and the right to enforce them.

Furthermore, belligerents can impose, and third states are obliged to respect, a blockade on the port controlled by another belligerent. The blockade must be effective to qualify. This rule<sup>101</sup> reflects the continuous dependence of belligerent rights on the effectiveness of the non-state armed group. To the extent that the belligerent cannot impose and maintain an effective blockade third parties do not have an obligation to respect it. As will be seen, the central and continuous role of effectiveness in relation to blockades is crucial for the existence of a state of belligerency.

The above rules demonstrate that neutrality imposes an obligation of impartiality that is qualitatively different to a policy of non-intervention. Impartiality in neutrality requires more than abstaining from intervention. It consists of specific positive obligations owed, to the same extent, to both parties to the conflict. This is not the case when a policy of non-intervention is followed, absent recognition of belligerency. Furthermore, even if third states decide not to stay impartial, to the extent that one party to the conflict is still the *de jure* government and the other consists of the non-state armed group, third states can assist the government in its effort while they cannot assist the armed group. Assistance to the government would be considered as a legitimate policy on the part of third states.<sup>102</sup> Assistance to the group, on the other hand, would qualify as intervention in the internal affairs of the state and would be rightly viewed by the territorial

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<sup>98</sup> Oppenheim, 238.

<sup>99</sup> See MacNair, *Opinions*, 139, for the reaction of the British government to the decision of the American government to disregard a Confederate Prize Court decree.

<sup>100</sup> See S. Neff, 'The Prerogatives of Violence - In Search of the Conceptual Foundations of Belligerents' Rights' (1997) 38 *German Yearbook of International Law* 41.

<sup>101</sup> The rule was codified at the Declaration of London (1909). See Neff, *Neutrals*, 138-9.

<sup>102</sup> A right but not a duty. See MacNair, 'Spain', 472-3.

government as an act of aggression.<sup>103</sup> The qualitative difference between neutrality and non-intervention directly relates to questions of status. The activation of the specific set of belligerent rights and the strict regulation of the net of bilateral relations between the belligerents and third states equates the status of the non-state armed group with that of the state, in the context of the conflict.

The recognition of status, however, also has some consequences of humanitarian importance, this time with respect to the relations between the belligerents. Another body of law activated through recognition of belligerency are the rules governing the treatment of prisoners of war (POWs).<sup>104</sup> Captured combatants are to be considered and treated as POWs. Again, the activation of these rules has practical as well as conceptual consequences. Initially, and importantly, the treatment of the captured members of the belligerent forces has to adhere to certain humanitarian standards. It is important to point out, however, that detailed rules mostly developed towards the end of the 19<sup>th</sup> century, initially through national legislation and eventually in the Hague Conventions of 1899 and 1907.<sup>105</sup>

Moreover, whatever humanitarian protection is extended through these rules is directly linked to the status of the entity. The status of POWs is qualitatively different to that of unrecognised rebels to the extent that they are not considered criminals. This relates to the idea that the status of the non-state group is directly related to the status of the government actor it opposes. The applicability of domestic criminal law is an affirmation of the superiority of the government actor, while the applicability of the *international* legal norms relating to POW status is an affirmation that the conflict cannot be seen as a purely internal affair. This is further reflected in that their detention can only last for the duration of the hostilities after the end of which they have to be released. Furthermore, such detention is not punitive in character but is only meant to preclude them from returning to belligerent action. Again, it should be noted that this status is provisional, as

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<sup>103</sup> G. Scelle, 'La Guerre Civile Espagnole et le Droit des Gens', (1939) 46 *Revue Générale de Droit International Public*, 197, 227 (Scelle). See also Falk, 203.

<sup>104</sup> A. Rosas, *The Legal Regime of Prisoners of War* (Soumalainen Tiedeakatemia, 1976), 59 ff (Rosas); S. Neff, 'Prisoners of War in International Law: The Nineteenth Century' in S. Scheipers (ed.), *Prisoners in War* (Oxford University Press, 2010).

<sup>105</sup> See Rosas, 69 ff.

is the entire status of belligerency. If one side prevails there is nothing to preclude it from trying the captured forces for treason.<sup>106</sup>

#### 2.2.6. *Belligerency: An overview*

The doctrine of recognition of belligerency is considered to be one of the most important legal innovations of the 19<sup>th</sup> century.<sup>107</sup> Through the analysis above, the predominant characteristics of the doctrine have been shown to relate to how third states treat a conflict between a government and a non-state armed group,<sup>108</sup> and to how the activation of the legal regime relates to the ascription of status, both legal and political, to the non-state actors.

In terms of legal criteria, the actors have to bring about a situation of the magnitude of war between states, while possessing not only the military but also the political level of organisation that will allow them to stand as states in the international system. In terms of the process of application, the practice is fundamentally decentralised and optional, and it leads to a net of bilateral relations. In terms of legal consequences, the legal regime activated is the full regime applicable to wars between states, with neutrality at its centre and, again, the temporary ascription of legal status to the armed group as its result.

Recognition of belligerency, through its criteria, process of application, and consequences, is linked directly to the ascription of state-like legal status. Moreover, the role of the political organisation and the prospective political viability of the entity, as a criterion for recognition, underlines the mutual relation between legal and political status. Ultimately, being recognised as a belligerent meant that the entity was not only a party to the conflict, but a subject of international law, in a legal system where only states were considered as such. Considerations of the humanitarian protection of individuals were largely absent from this rationale.

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<sup>106</sup> See Oppenheim, 69-70.

<sup>107</sup> Neff, *War*, 258.

<sup>108</sup> See, however, for a rare example, the *Opinion of the Queen's Advocate to Earl Granville of 29 September 1870* recognising the belligerency of two rival non-state armed groups, the African Chiefs at Bonny River and the Ja Ja group, in Lauterpacht, *Recognition*, 205.

By the time of the Spanish Civil War (1936-9), the practice of recognition of belligerency was already falling into disuse. Ever since its clearest exposition, in the American Civil War, recognition was not often granted, although it was discussed in the works of doctrine and the deliberations of governments. The dramatic shift in the legal status of the armed group, entailing a plethora of symbolic and practical consequences, made states unwilling to use it. Furthermore, the decentralized, piecemeal and, ultimately, arbitrary process of granting recognition allowed unwilling states to ignore the factual characteristics of conflicts meriting recognition. Recognition was often seen as impracticable and undesirable. This phenomenon found its peak in the case of the Spanish Civil War, discussed below.<sup>109</sup> However, it had already led to the development of a slightly different concept, doctrinally in the shadow of recognition of belligerency, but in practice more flexible and adaptable.

### 2.3. Recognition of Insurgency

#### 2.3.1. *Introduction*

The concept of recognition of insurgency developed subsequent to and in close practical and conceptual relation with that of recognition of belligerency.<sup>110</sup> The most prominent cases, which led to the development of the concept, arose in relation to the process of decolonisation in South America during the last decades of the 19<sup>th</sup> century, particularly the revolutions in Cuba (1868-1898) and Chile (1891).

A variety of issues led to this development. As mentioned, the use of the doctrine of recognition of belligerency had led to difficulties. The existence of a rigid set of criteria often did not fit well with the unreliable process of the ascription of the status through recognition. In addition, the activation of the full legal regime applicable to wars between states meant that the consequences of applying the criteria were rather sweeping.

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<sup>109</sup> See section 2.4.

<sup>110</sup> See E. Castrén, 'Recognition of Insurgency', (1965) 4 *Indian Journal of International Law*, 443 (Castrén, 'Insurgency'). According to Castrén, 42 fn 5, the Greek revolution "was the first instance of a distinction between recognition of belligerency and recognition of insurgency."

Furthermore, to the extent that recognition of belligerency was a matter of bilateral relations there was incongruence between the activation of a full legal regime reflecting an objective status on a bilateral basis and the non-existence of that status as a matter of general international law, since the recognition by some states did not bind others.

According to the doctrine of recognition of belligerency, the insurgent entity was either something of a proto-state or an unlawful entity of piratical character in the maritime context. There was no middle ground. The binary nature of the concept was put starkly by Wheaton: “If it is a war, the insurgent cruisers are to be treated[...]as lawful belligerents. If it is not a war, those cruisers are pirates, and may be treated as such.”<sup>111</sup> There was space for a middle ground, where the interests of third states could be protected without the immediate granting of the status of belligerent to the insurgents.<sup>112</sup> Moreover, third states or the parent government could have interests affected by the fighting that remained within the territory of the parent state and did not spill out into the sea. A way of addressing these issues without bringing into play the relatively expansive effects of the legal regime triggered by the recognition of belligerency was sought.

The most common phrase to describe the concept of recognition of insurgency, distinguishing it from the related concept of recognition of belligerency, is that the former is an *ad hoc* recognition of certain rights and duties, which the recognising state considers necessary under the circumstances, rather than the activation of a coherent legal regime. Accordingly, recognition of insurgency has been described as a “catch-all phrase”<sup>113</sup> encompassing a concatenation of such rights and duties. The rights and duties conferred in any particular case must be directly warranted by the situation and are limited with respect to their temporal scope. Therefore, specific rights and duties are granted for such a period in time, as can only be justified by the specific factual situation. Accordingly, the fundamental feature of insurgency, when opposed to belligerency, is that

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<sup>111</sup> Wheaton, 30-1, fn 15.

<sup>112</sup> Castrén, ‘Insurgency’, 443.

<sup>113</sup> Falk, 199.

it is an aggregate of specific rights and duties expressly conferred, rather than an activated legal regime.<sup>114</sup>

### 2.3.2. *Criteria*

The criteria for recognition of insurgency are, factually speaking, similar but of a lesser degree to those of recognition of belligerency.<sup>115</sup> The factual intensity of the armed conflict is considered to be something between mere disturbances and an actual civil war.<sup>116</sup> The same applies to the organisation of the insurgents.<sup>117</sup> Indeed, the two criteria seem usually to be correlative.

The exact level of the hostilities and the organisation of the actor that would warrant recognition of insurgency but not of belligerency were never expressed clearly. In effect, the distinction is left to the recognising actor. This is because a wide spectrum of factual situations lies between the two poles of internal riots and civil war and the exact factual characteristics of the necessary magnitude were not clarified.

A further element adding to the lack of clarity in the criteria for recognition of insurgency is that the interests of the actor in activating the regime, rather than the exact facts of the conflict, may account for the recognition of insurgency. However, some characteristics seem to divide insurgency from belligerency. For instance, the existence of a maritime element (or adjacent territory) often precipitated recognition of belligerency.<sup>118</sup> While the proposition that naval forces and hostilities constitute the step from insurgency to belligerency cannot be posited as a rule, the maritime element often played a role in necessitating the activation of the law of neutrality and therefore the recognition of belligerency.<sup>119</sup>

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<sup>114</sup> See Lauterpacht, *Recognition*, 270.

<sup>115</sup> See Castrén, 'Insurgency', 448.

<sup>116</sup> See also Chen, 407.

<sup>117</sup> This according to Castrén, 'Insurgency', 448, may be "defective", when compared to the organisation necessary for belligerency.

<sup>118</sup> See above section 2.2.2, especially fn 43 and text.

<sup>119</sup> One step before is the issue of blockades and quasi-blockades, which will be discussed below.

Accordingly, some authors viewed insurgency as belligerency without the recognition.<sup>120</sup> This formulation can only be sustained when the optional character of recognition of belligerency is brought to mind. Insurgency is then viewed as a factual situation that was seen by the recognising actors, for reasons that may have or may not have had to do with law, as not reaching the levels of belligerency. The logic of defining insurgency not as what it is but as what it is not is manifested in the language used by US President Grant in his 1875 message to US Congress, with respect to the Cuban War of Independence. He did not

find in the insurrection the existence of such a substantial political Organization, real palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own people and to other States...or to take the contest out of the category of a mere rebellious insurrection, or occasional skirmishes, and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it.<sup>121</sup>

In this statement by President Grant the prospective element in the legal qualification of facts is understated, but the predominance of the element of *political* organisation is again present.

The level of hostilities and the degree of organisation of the actor is likely to correspond to a loss of control by the *de jure* government over its territory.<sup>122</sup> This means, in effect, that the more the government loses control over the administration of the territory, the more the insurgents will begin to take control of areas, creating the factual characteristics that may lead third states to recognise them. Accordingly, the control of a portion of the territory of the state is a separate criterion for the recognition of insurgency, as in the case of belligerency. Indeed, the control of territory is a necessary criterion in both belligerency and insurgency as it represents the basic minimum for the actor to have a state-like appearance and claim state-like status in the *jus in bello* and beyond.

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<sup>120</sup> See Chen, 398-9, referring to authors such as Wilson and Hyde.

<sup>121</sup> See Moore, *Digest*, 196-7. See also Lauterpacht, *Recognition*, 271.

<sup>122</sup> See, with respect to recognition of belligerency, Scelle, 273, who sees the obligation of the state to have control and provide security in its territory as the flip side of its right to be recognised as the legitimate government in its external relations.

From the point of view of third states, the administration of territory means that they may have to deal with the insurgents in order to protect their interests in that territory. These might be financial and trade interests or the well-being of their nationals. In that sense, territory can play the role that naval conflict does in cases of belligerency and provide the link between the factual criteria of the magnitude of the conflict and the need for third states to acknowledge the situation, to the extent that their interests in that territory are threatened. The extent to which the political interests of third states are to be considered a formal criterion for the recognition of insurgency, follows the relevant debate<sup>123</sup> with respect to recognition of belligerency.<sup>124</sup> The crucial difference, however, seems to be between interests of third parties threatened on the high seas, in the case of belligerency, and in the territory controlled by insurgents, in the case of insurgency. As a consequence of the difference in interests a different set of rules will have to be activated, one not necessarily containing the law of neutrality.

### 2.3.3. *Process of recognition*

Recognition of insurgency can be granted either by the incumbent government or, more usually, by third parties.<sup>125</sup> It is granted to the extent that third parties find it necessary to deal with the insurgents and if one of the specific criteria or the necessary degree for the recognition of belligerency is not met. The considerations leading to the granting of recognition and the consequences that flow from it differ, however, from case to case. This flows from the *ad hoc* nature of such recognition. With respect to the considerations and rationales behind the decision to grant recognition, the incumbent government might opt for recognising the insurgency either for humanitarian reasons or for reasons related to international legal responsibility.

Accordingly, it has been argued that the recognition of the insurgents, and the application of some degree of international law to them, might be used for the application of

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<sup>123</sup> See above section 2.2.3.

<sup>124</sup> For an author who thinks it is a formal criterion, see R. Wilson, 'Insurgency and International Maritime Law', (1907) 1 *American Journal of International Law*, 46, 51.

<sup>125</sup> For the primary role of third states see also Castrén, 'Insurgency', 443.

minimum humanitarian standards leading to a tempering of the ferocity of the hostilities.<sup>126</sup> Indeed, recognition of insurgency, importantly, allows the extension of certain humanitarian protections without the conferral of the state-like status associated with belligerency.<sup>127</sup> This constitutes the first conceptual de-coupling of the applicability of rules of humanitarian protection from the full ascription of state-like legal status in the *jus in bello*. As will be seen below, however, the dominance of the paradigm of belligerency and the haphazard application of insurgency limit severely both the conceptual and practical effects of the de-coupling.

Apart from possible humanitarian considerations, to the extent that the legitimate government acknowledges the fact that it has lost control over the acts that are committed in or from this part of its territory, and that the said government is making efforts for the suppression of this insurgency, it eschews international responsibility for the acts of the insurgents in and from that territory.<sup>128</sup> This can be an important factor for both the legitimate government and third states to reach the decision to grant such recognition.

As far as third states are concerned, the granting of recognition will usually be related to their need to enter into relations with the insurgents, and in order to protect their interests, for example in the area of trade. Additionally, a formal declaration to that effect could provide guidance to their citizens, courts and administrative officials with respect to the dangers or consequences arising out of the insurgency.<sup>129</sup>

The dividing line between recognition of insurgency and belligerency is blurred. For instance, while it was stated above that a signifier of belligerency was often the existence of a maritime element in hostilities, such a factor has led third states to recognise insurgency as well. Most of the cases relevant to recognition of insurgency, as is the case with recognition of belligerency, pertain to maritime warfare and the capture and movement of insurgent vessels.<sup>130</sup> This poses a practical question: whether insurgent vessels are to be dealt with as piratical or whether they should be granted belligerent

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<sup>126</sup> See *ibid.*, 448; Falk, 201.

<sup>127</sup> The Institut de Droit International makes clear, in article 4(2) of its codification that the application of certain humanitarian rules does not constitute recognition of belligerency. See IDI 1900.

<sup>128</sup> Castrén, 42; Chen, 407.

<sup>129</sup> See Castrén, 'Insurgency', 448.

<sup>130</sup> See, for examples, Lauterpacht, *Recognition*, 298 *ff.*

rights pertaining to maritime warfare. Although earlier practice targeted insurgent vessels as piratical, this was gradually considered to be unreasonable, the distinguishing factor being the political motives of the insurgent vessels rather than what one authority calls *animus furandi* (the intention to steal), referring to the mental element corresponding to the perpetration of acts of piracy.<sup>131</sup>

An important function of the concept of insurgency is to demarcate the middle ground between internationally criminal acts of piracy and belligerent acts of war and, therefore, between the legal statuses of outlaw and belligerent. An example of where such a middle ground would be useful to states is where an armed conflict has reached a certain level of intensity and the actors have reached a certain level of organisation where it would not be appropriate to label the insurgent actor as a pirate but where other states do not want to recognise the belligerency of the non-state party.

This dilemma was manifest, for example, in the case of the Greek revolution. A few months into the revolution, in October 1821, before the creation of the provisional government of 1822 and the declaration of blockade in 1823, the British Foreign Office was grappling with the dilemma arising from the inadequacy of the categories of belligerency and piracy: “it would not be proper to consider Persons as *Pirates* [...] provided their intentions were in fact satisfactorily distinguished from the mere predatory character of Piracy, as considered in Law”.<sup>132</sup> On the other hand, declaration of blockades and the corollary acknowledgement of the effective nature of such blockades might signify the acknowledgment of belligerent status and therefore recognition of belligerency.

A decision to recognise the existence, through the acceptance of a limited and piecemeal conferral of rights and duties, of the insurgent actors under international law signifies a first and tentative undermining of the national legal order, as embodied in the *de jure* government. The insurgents cease to be ‘outlaws’ and, although still subject to the internal laws regarding their rebellion, assume a limited and temporary degree of

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<sup>131</sup> Castrén, ‘Insurgency’, 444. But see Lauterpacht, *Recognition*, 305 ff, arguing that the *animus furandi* is not an essential element of piracy. See Chen, 404 writing of a presumption of non-piratical character, which can be rebuffed if the vessels “commit depredation upon ships or property of foreign states.”

<sup>132</sup>See Smith, *Great Britain*, 284 – opinion of Sir Christopher Robinson, the Foreign Office Legal Advisor. This opinion is also referred to by Wehberg, 21.

personality under international law.<sup>133</sup> Accordingly, the emphasis in the construction and the exercise of the concept is placed on the provisional and piecemeal character of the rights conferred.

Moreover, this legal construct is important as it conceives of an actor that does not conform to a strict subject/object dualism. This allows the demarcation of a legal status *stricto sensu*, related specifically to the law of armed conflict, from the full legal status of a subject of international law. While belligerency was also concerned directly with the *jus in bello*, the extension of the full legal regime applicable to wars between states and the direct shift from non-entity to full subject meant that the legal status conferred could only be that of a subject of general public international law. While recognition of insurgency constitutes a first breach of that dualism it was too haphazard a practice to threaten the predominance of the belligerency paradigm.

#### 2.3.4. *Consequences: legal rules but not a legal regime*

Apart from the non-piratical character of the insurgent vessels, the consequences of the recognition of insurgency vary on a case by case basis and depend on whether the recognition is granted by the government or by a third state.<sup>134</sup>

To the extent that the recognition is granted by the government, it has been argued that the criminal laws of the state will no longer be applied to the insurgents. If captured, they can be treated as POWs, rather than subjected to the criminal laws of treason.<sup>135</sup> This might be viewed rather as an application of minimum humanitarian standards than an activation of the legal regime covering POWs, because of the *ad hoc* nature of the application of the rules. In any case, however, should the incumbent government prevail in the conflict, there is nothing to stop it from applying the laws of treason and rebellion, in order to punish the insurgents, as is also the case with belligerency.<sup>136</sup>

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<sup>133</sup> See Castrén, 'Insurgency', 446.

<sup>134</sup> See *ibid.*

<sup>135</sup> See *ibid.*, 449; Padelford, *Spanish*, 2. .

<sup>136</sup> See Castrén, 'Insurgency', 451, mentioning the importance of the 'outcome of the insurrection'.

Normally, the rights conferred will only be effective on the territory of the state<sup>137</sup> and not on the high seas.<sup>138</sup> The link between the exercise by the insurgents of rights in the territory and on the high seas can be seen in the practice relating to blockades. In the case of the Brazilian revolution of 1893, Great Britain and the United States initially denied the insurgents the right to blockade Rio de Janeiro.<sup>139</sup> Eventually, however, their earlier decision was tempered to the extent that the blockade could be proved effective “in connection with commercial warfare”.<sup>140</sup> The same approach was taken in the case of the Bolivian revolution of 1891.<sup>141</sup> The middle position would be that “rights may be exercised in the territorial waters of the state in insurrection in order to prevent carriage to the enemy of goods destined to serve warlike purpose.”<sup>142</sup>

Indeed, the case of blockade seems to connect recognition of insurgency and recognition of belligerency. This is because it is the link between the territorial occupation of the port, a material factor for, at least, insurgency, and the effects of this occupation on commerce on the high seas, through the control of shipping in and around the port. The effectiveness of the blockade can affect neutral commerce, leading third states to grant recognition. If they choose not to, however, they can, as a matter of practice, respect the control of insurgents in their territorial waters and allow them to intercept shipping.<sup>143</sup> This is the practice named quasi-blockade, and illustrates the *ad hoc* nature of recognition of insurgency and how the latter can be granted in situations where a good case for recognition of belligerency could also be made.

In this context, the role of the concept of territorial sovereignty in the relation to insurgency and belligerency should be discussed.<sup>144</sup> Territorial sovereignty, or the loss thereof, might be said to be reflected in the approach of international law in relation to the recognition of insurgency. The first bundle of rights accorded to insurgents will usually be in relation to individuals and assets present in the territory under their control.

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<sup>137</sup> See Chen, 405.

<sup>138</sup> See Padelford, *Spanish*, 3; Castrén, ‘Insurgency’, 446.

<sup>139</sup> See for the relevant practice Moore, *Digest*, 203 ff.

<sup>140</sup> Castrén, ‘Insurgency’, 444-5; P. Jessup, ‘The Spanish Rebellion and International Law’ (1936-1937) 15 *Foreign Affairs* 260, 271 (Jessup).

<sup>141</sup> See Moore, *Digest*, 203. See also Lauterpacht, *Recognition*, 274-5; Castrén, ‘Insurgency’, 444-445.

<sup>142</sup> See *ibid.*, 452.

<sup>143</sup> For the elaboration of the concept of quasi-blockade and the ‘factual’ rather than ‘legal’ character of the practice see MacNair, ‘Spain’, 487-8.

<sup>144</sup> See also Chen, 406.

Moreover, the conferment of such rights might be in the interests of the government. To the extent that the insurgents exercise control over part of the territory the government is released from international responsibility for acts of insurgents in that territory. Thus, the exclusivity of the link of territorial sovereignty to the lawful government is suspended. This suspension reflects the government's loss of control over territory. To the extent that international legitimacy of the government is the flip side of its obligation to exercise control internally,<sup>145</sup> recognition of insurgency on the grounds of insurgents' *internal* control begins a piecemeal suspension of responsibilities and rights of the government that increases the non-state group's *international* status.

Furthermore, third states can enter into relations with the insurgents, to the extent that this is necessary for their interests.<sup>146</sup> Such was the case, for example, with respect to the Bolivian insurrection of 1899, where the US entered into negotiations with the insurgents in order to safeguard American nationals.<sup>147</sup>

The *ad hoc* and piecemeal nature of the activation of legal rules is also reflected in whether the recognition of the specific rights and duties binds third states. Castrén argues that recognition of insurgency, to the extent that it does not create a status but only confers certain rights *envers* the recognising actor does not bind others. That is, recognition by the government would not necessarily bind third states to respect the rights conferred on the insurgents by the government,<sup>148</sup> although it can mean that the insurgents should not be treated as pirates. This is, however, a point of policy rather than a legal rule. Third states retain the right to make that decision for themselves.<sup>149</sup> Nor does recognition of the insurgents by third states bind the government to confer the corresponding rights in its territory.<sup>150</sup>

Finally, the nature of recognition of insurgency as an *ad hoc* practice is reflected in the modes of granting recognition. The character of the relations between the recognising

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<sup>145</sup> Cf. Scelle, 273.

<sup>146</sup> Lauterpacht, *Recognition*, 270; Castrén, 'Insurgency', 452. Chen, 406, considers such intercourse "inevitable".

<sup>147</sup> See Lauterpacht, *Recognition*, 275-6; Castrén, 'Insurgency', 445.

<sup>148</sup> See *ibid.*, 450.

<sup>149</sup> This was also the case, it is reminded, with respect to recognition of belligerency. See section 2.2.4. There, however, there was an incongruity between the activation of a cohesive legal regime and status, and the validity of this regime only among the states that have exercised their right to grant recognition.

<sup>150</sup> See *ibid.*, 453.

states and the insurgents militates against the use of formalized modes of recognition, even more so than with recognition of belligerency. Lauterpacht argues that, to the extent that the rights need to be expressly set out, there can be no implied activation of a legal regime.<sup>151</sup> However, since the conferral of rights can be *ad hoc* and piecemeal, the recognition of insurgency may amount to little more than the aggregate of such rights conferred, without it being necessary to be expressly labelled ‘recognition of insurgency’.<sup>152</sup> As far as the government is concerned recognition could be granted expressly, by stating the exact rights conferred, or tacitly, through the conferral of such rights.<sup>153</sup> For example, in the practice of the United States, the mode has been mainly through municipal law enactments.<sup>154</sup>

Ultimately, the *ad hoc* nature of the rights and duties extended, as well as the fundamentally optional nature of the practice, mean that recognition of insurgency cannot be described as a cohesive concept or as a practice creating a particular legal regime. “It is thus impossible to define in advance the legal situation consequent on recognition of insurgency...[E]ach case is to be judged separately on its merits.”<sup>155</sup> Nor is there a necessary connection between the facts of the conflict and the set of rules extended, because of the role that political calculations and the decentralised and optional process of application play.<sup>156</sup> In that sense, however, the flexible and *ad hoc* practice of recognition of insurgency can be said to fit better within the decentralised pre-1949 international system, than the unwieldy regime of belligerency.

### 2.3.5. *Insurgency: An overview*

Recognition of insurgency developed to balance some of the more problematic aspects of the practice of belligerency. These aspects related to the absolute dualisms of the

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<sup>151</sup> Lauterpacht, *Recognition*, 276.

<sup>152</sup> Thus Castrén, ‘Insurgency’, 449.

<sup>153</sup> *Ibid.*

<sup>154</sup> See *ibid.*, 444, adding that this practice “has made the American policy of recognition one of great elasticity, but concomitantly somewhat inconsistent.”

<sup>155</sup> See *ibid.*, 446.

<sup>156</sup> See Falk, 202.

positivist era as expressed in the law of war. According to the dualism between subjects and objects, when a group used force it would be viewed either as a state or as a criminal/pirate group. To the extent that the ascription of status was so central in the doctrine and so important as a result, this weighed heavily on the practice of belligerency.

The answer then was to create an *ad hoc* practice that closely followed the blueprint of belligerency, but allowed more flexibility and less finality in the actors' positions. In terms of criteria, insurgency mirrored but diluted those of belligerency. The magnitude of the conflict was again to be similar to that of war between states. The control of territory was seen as a minimum criterion, while magnitude was predominantly viewed through the interests of third states, as was the case in belligerency. One possible difference with belligerency was a less close link with maritime war, to the extent that third states opted for recognition of insurgency rather than belligerency often when they did not want to activate the regime of neutrality. More flexible practices, such as the respect of effective blockades and quasi-blockades were used instead. The haphazard nature of state practice, however, does not allow the stipulation of a general rule.

In terms of the process of application, the situation was, again, very similar to that of belligerency. The less dramatic consequences allowed more flexibility in the practice, but this also meant that there was even less coherence in the legal rules. Arguably, the practice was even more *ad hoc* and haphazard, than in the case of belligerency. This was the case with respect to which state would recognise and when it would do so. It was also the case with respect to what rules were extended.

Indeed, the biggest difference between insurgency and belligerency is to be found in terms of the legal rules activated. Recognition of insurgency led to an *ad hoc* concatenation of rules, rather to a regime. Importantly, it did not include the activation of the laws of neutrality. Again, the practice does not allow the identification of a standard set of rules. It can support the conclusion, however, that the rules extended led to a degree of international legal personality and status between the absolutes of piratical and state-like status.

To the extent that recognition of insurgency led to a limited legal status commensurate to the specific rules extended, rather than the full status of a state in the *jus in bello*, it is an

important episode in legal regulation. It showed that the absolute subject/object dualism was not workable in international practice and that international law could conceive of and regulate an entity without fully equating it with a state. The concept was, however -- in terms of criteria, process of application, and legal consequences -- very much in the shadow of the paradigm of belligerency, and functioned as an *ad hoc* substitute for it. In addition, the haphazard practice of its application meant that it never developed into a separate legal doctrine.

Finally, as has been shown, the practice of recognition of insurgency developed primarily to allow third states more flexibility in determining their relations with the armed group. It was therefore more a question of a more flexible accommodation of the process of ascription of status, than the development of a humanitarian-protection rationale, even though the practice occasionally allowed the extension of some humanitarian rules.

#### 2.4. Conclusion: Moving forward

Recognition of belligerency constitutes the first legal doctrine concerned with the regulation of conflicts involving non-state armed groups. It reflects the centrality of the concept of the state, as the only and absolute sovereign, in that it allows the regulation of non-state armed groups to the extent that they can be put on a par with states in the context and for the duration of the conflict. While it constitutes an important legal innovation, it carries the shortcomings of a practice of decentralised and optional ascription of status, which is both lacking in legal certainty and consistency and, importantly, excludes the protection of individual human beings from its rationale.

One factor that contributed to the move towards a system of humanitarian protection was the decline of the doctrines of belligerency and insurgency. The combination between the dramatic consequences of the recognition of belligerency and the decentralised and optional process of its application contributed to the gradual disuse of the concept. In the meantime, while the parallel development of the practice of recognition of insurgency had allowed some flexibility in the activation of specific legal

rules, the even more haphazard nature of that practice did not allow it to crystallise in a legal system.

The gradual decline of both doctrines can be seen in the absence of practice at the beginning of the 20<sup>th</sup> century and, particularly, in the absence of recognition of belligerency in the case of the Spanish Civil War (1936-9). The latter was a case where the criteria for belligerency were, without doubt, satisfied.<sup>157</sup> The insurgents controlled a significant portion of the territory, including ports. They commanded a large part of Spain's army and navy. They had a high level of both military and political organisation.<sup>158</sup>

While the criteria were there, there were also acts that could have been interpreted as an implicit recognition of belligerency and lead to the activation of the regime of neutrality. Indeed, blockades were imposed by both parties,<sup>159</sup> but were not accepted by third states.<sup>160</sup> These “uniformly denied the Spaniards the legal right to seize foreign vessels upon the high seas for passing or attempting to pass announced blockade lines.”<sup>161</sup> Interestingly, the denial of the legality of the blockades was not based on their ineffectiveness. Third states “did not, however, deny the right of either party to regulate foreign shipping inside of the three-mile limit or to prevent, therein, access of supplies to the enemy.”<sup>162</sup> For example, on 17 November 1936 the British forces were informed that the insurgent group was going to impose a blockade on the port of Barcelona. The Foreign Minister, when asked in the commons whether this would not be an act of piracy, drew a distinction between actions on the high seas and in ports controlled by the group.<sup>163</sup> This was an example of a quasi-blockade<sup>164</sup> accepting the authority of the armed group to control shipping within the territory under their sovereignty but not in the open seas and illustrating the dividing line between recognition of insurgency and belligerency. Recognition of belligerency never came.<sup>165</sup>

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<sup>157</sup> Oglesby, 38-9.

<sup>158</sup> Padelford, *Spanish*, 1.

<sup>159</sup> *Ibid.*, 9.

<sup>160</sup> Garner, ‘Spanish’, 72-3.

<sup>161</sup> Padelford, *Spanish*, 10.

<sup>162</sup> *Ibid.*, 13.

<sup>163</sup> See Garner, ‘Spanish’, 71-2.

<sup>164</sup> See MacNair, ‘Spain’, 487-8.

<sup>165</sup> For a list of acts that arguably constituted recognition of insurgency see Padelford, *Spanish*, 3.

The reason was that the majority of third states did not want to activate the regime of neutrality, with its strict rules of non-interference, but opted for a policy of non-intervention that allowed them a freer movement.<sup>166</sup> The regime of non-intervention did not allow the Government to benefit from its higher legal status on the one hand, and on the other, allowed states that had fewer scruples to disregard the agreement to offer military help to the insurgents.<sup>167</sup> This is why the Government of Spain protested that by adopting the policy of non-intervention, third states had effectively intervened against the government.<sup>168</sup> Moreover, the criticism was echoed in the work of authors,<sup>169</sup> to the effect that the refusal to apply the law to the facts constituted an act of omission.

As a primary focus of the doctrine of belligerency is to regulate the ascription of status and the relations between the parties to the conflict with third states, the case of the Spanish Civil War can be seen as a failure of the doctrine and a culmination of the gradual disuse of the doctrine of belligerency. Furthermore, although recognition of insurgency was used as a substitute in this case, the criticism mentioned above indicate that it was not viewed as a sufficient method of regulating the relations between the parties and third states.

However, the practice of recognition of insurgency can be viewed as a second factor in moving the legal system forward. It has been argued that recognition of insurgency moved towards a more objective and automatic application of the legal regime.<sup>170</sup> Nevertheless, a proper understanding of both doctrine and practice belies this. The haphazard nature of the practice shows that there is no move here towards the automatic application of a specific set of rules when a set of objective criteria are fulfilled. In that sense, recognition of insurgency cannot be viewed as a precursor of the legal regime initiated through common article 3 of the Geneva Conventions.

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<sup>166</sup> A non-intervention agreement and a Commission to implement it were created, but were ineffectual. See Jessup, 269-70. For the functions of the non-intervention system and the different mechanisms created see Padelford, *Spanish*, 53 ff. For a helpful summary of the regulations see Castrén, 62.

<sup>167</sup> See Wehberg, 11, quoting Talleyrand, who, when asked by a lady what the policy of non-intervention meant, replied: «Madame, non-intervention est un mot diplomatique qui signifie à peu près la même chose qu'intervention!»

<sup>168</sup> Smith, 'Spanish', 27-8.

<sup>169</sup> See, for example, Siotis, 170 ff.; Scelle, 197.

<sup>170</sup> See Neff, *War*, 274, following Sadoul.

What the practice of recognition of insurgency did show, however, was that there could be a space between no regulation and full regulation. While this space, in the case of insurgency, was negotiated on an *ad hoc* basis, the development of the practice showed that the absolute dualisms between subject and object or state and non-state were no longer tenable. Thus, the way was opened for such an agreement on a multilateral, objective, automatic level.

Such an agreement was facilitated by the gradual multilateralisation and institutionalisation of the international system at the beginning of the 20<sup>th</sup> century.<sup>171</sup> Finally, conflicts such as the one in Spain, but especially World War II, contributed to an increasing realisation of the horrors of war, internal or international, and the development of the regulation of humanitarian aspects of conflicts involving non-state armed groups. The shortcomings of the status-based rationale could allow the development and eventual emancipation of a humanitarian-protection rationale.

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<sup>171</sup> See, for example, D. Kennedy, 'The Move to Institutions', (1987) 8 *Cardozo Law Review* 841 (Kennedy, 'Institutions').

### 3. Chapter 3: Common article 3

#### 3.1. Introduction

In the previous chapter, it was suggested that the system regulating the conduct of armed conflicts in the 19<sup>th</sup> century was strongly influenced by status-based considerations. In this chapter a different, if not entirely unrelated, regulatory rationale will be examined. Apart from its concerns with state sovereignty, the 19<sup>th</sup> century also saw the beginnings of codification of rules of humanitarian content. These provided some protection and relief for both soldiers<sup>1</sup> and civilians.<sup>2</sup> The rules were confined to inter-state armed conflicts.<sup>3</sup> This seems to reflect that any concept of humanitarianism was strongly influenced by concerns of sovereignty. Moreover, humanitarian protections were sometimes dependent on the perceived level of ‘civilisation’ of the group.<sup>4</sup> This level of civilisation was presumed to the extent that the group had been accepted, as an independent nation-state, in the community of (mostly European) states.<sup>5</sup> In this way humanitarian protection was closely linked, both conceptually and in practice, with the artificial paradigm of the (nation) state.

Gradually, the protective rationale of the rules developed further, alongside the process of ascription of status that was described in the previous chapter. This was due both to the increased public sensitivity in relation to the horrors of war and to the development of the international institutional framework. New technological developments meant that war often led to results even more horrendous than those of the past, both in terms of

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<sup>1</sup> See the 1868 St.Petersburg Declaration. See also the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864.

<sup>2</sup> Some relevant rules were included in the Brussels Declaration (e.g. art. 38) and the 1880 Manual of the Law of War on Land. See *The Laws of War on Land*, Oxford, 9 September 1880, and *Project of an International Declaration concerning the Laws and Customs of War*. Brussels, 27 August 1874.

<sup>3</sup> With the exception of the 1863 Lieber Code.

<sup>4</sup> See, for example, E. Colby, ‘How to Fight Savage Tribes’ (1927) 21 *American Journal of International Law* 279. See also F. Megret, ‘From Savages to Unlawful Combatants: A Postcolonial Look at International Humanitarian Law’s ‘Other’ in A. Orford (ed.) *International Law and its Others* (Cambridge University Press, 2006), 265.

<sup>5</sup> See, e.g. Anghie, ‘Peripheries’, 70. See also Onuma ‘Intercivilizational’.

the suffering of combatants and the effect that the hostilities had on civilians.<sup>6</sup> Moreover, there was an increasingly widespread awareness of the suffering related to conflict, owing to the development of a popular press and to the fact that so many were affected by the World Wars of the first half of the twentieth century. This was also notably the case with the Spanish Civil War,<sup>7</sup> which saw the mobilisation of public opinion not only in relation to the outcome but also in relation to the suffering in the conflict.<sup>8</sup>

At the same time, there was a tendency to develop the international institutional framework in ways that placed new limits on the concept of state sovereignty, in an effort, albeit failed, to avert war.<sup>9</sup> Limits were placed on the prerogative of states to start wars, initially through the imposition of procedural safeguards<sup>10</sup> and eventually through a treaty, if not very widely ratified, and in practice ineffective, banning war altogether.<sup>11</sup>

Moreover, the development of the institutional framework and the gradual legal regulation of the *jus ad bellum* affected the regime of neutrality,<sup>12</sup> which was the main status-based legal consequence of the *jus in bello* regulation.<sup>13</sup> This was compounded by structural problems in the application of the legal regime that related to decentralisation and the non-mandatory character of recognition.<sup>14</sup> These factors gradually eroded the 19<sup>th</sup> century doctrine of recognition of belligerency and insurgency. One of the consequences of this was a decrease of importance in consideration of ascription of status. The erosion of the previous legal regime, allowed the development of a new one.

From the end of the nineteenth century into the beginning of the twentieth century, there was further development of the codification efforts. Indeed, the turn of the century was marked by a series of treaties regulating the conduct of hostilities,<sup>15</sup> the law of

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<sup>6</sup> See Neff, *War*, 201 ff.

<sup>7</sup> In a similar way, the battle of Solferino in 1859 had led Henry Dunant to write his *A Memory of Solferino* that led to the development of the Red Cross movement.

<sup>8</sup> See A. Beevor, *The Battle for Spain: The Spanish Civil War 1936-1939* (Phoenix, 2006), especially chapter 21.

<sup>9</sup> See Kennedy, 'Institutions', 856 ff.

<sup>10</sup> See articles 10 to 13 of the Covenant of the League of Nations of 28 June 1919.

<sup>11</sup> Pact of Paris (Kellog-Briand) of 27 August 1928, 94 LNTS 57.

<sup>12</sup> On the post-WWI development (and survival) of the law of neutrality see Neff, *Neutrals*, 145 ff.

<sup>13</sup> See section 2.2.5.

<sup>14</sup> See section 2.2.4.

<sup>15</sup> See, for example, Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907.

neutrality,<sup>16</sup> as well as the treatment of prisoners of war.<sup>17</sup> These rules were, however, only applicable to international armed conflicts. It took the Second World War for there to be sufficient humanitarian impetus to regulate non-international armed conflicts through treaties.

In the previous chapter the state-like characteristics of the criteria for the application of the legal regime were analysed, alongside the decentralised process of recognition and application of the full regime applicable to international wars. In the present chapter there will be an analysis, along the same lines, of the first step in the elaboration of a new legal regime for the regulation of armed conflicts involving non-state armed groups. This first step was made by codifying minimum humanitarian standards in common article 3 of the Geneva Conventions.

The chapter will begin with an analysis of the creation of common article 3 through the *travaux préparatoires*. The difficulties of extending regulation to non-international armed conflicts, chiefly because of the link between legal regulation and the ascription of status, will be seen in the negotiating process. The concept of non-international armed conflict will then be analysed, in an effort to define it and to see to what extent there has been a departure from the paradigm of war between states. Finally, there will be a discussion of state practice in order to see whether the new legal regime achieved its automatic applicability avoiding the decentralised process of application through recognition, as well as whether there is a departure from the paradigm of inter-state war.

### 3.2. The process of creation of common article 3

#### 3.2.1. *The International Committee of the Red Cross and early efforts in the extension of humanitarian protection*

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<sup>16</sup> See Hague Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, 18 October 1907.

<sup>17</sup> See the Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929.

A very significant role in the development and application of humanitarian rules, protecting both combatants and civilians, was played by the International Committee of the Red Cross (ICRC). The ICRC was created in 1859 with the goal of providing humanitarian relief and was the driving force behind the 1864 Geneva Convention.<sup>18</sup> The primacy of the humanitarian rationale in the work of the ICRC stood at odds with the extension of humanitarian rules only to international armed conflicts. Indeed, the ICRC energetically pursued its task in providing humanitarian relief as well as promoting extensive regulation of internal armed conflicts, attempting to influence states into developing a treaty regime.

An early effort was made in 1912 in the conference of state-parties to the 1864 and 1906 Geneva Conventions.<sup>19</sup> There the ICRC attempted to introduce a draft treaty on the role it could play in internal armed conflicts. While the draft was not even discussed at the time, the ICRC was more successful in the 1922 Red Cross Conference. There a non-binding resolution was passed providing for National Red Cross Societies to intervene and provide humanitarian protection. If this was not possible, the ICRC was empowered to do so.<sup>20</sup> A further initiative was taken in 1938, in the shadow of the Spanish Civil War, at an ICRC Conference taking place in London, in preparation for the scheduled for 1940 Conference to amend the 1929 Geneva Conventions. The ICRC, in proposing rules for the intervention of the organisation, advanced a trichotomy of armed conflicts, mirroring the traditional categories of rebellion, insurgency and belligerency.<sup>21</sup> The resolution finally adopted, however, dealt only with the application of certain humanitarian standards without addressing questions of threshold.<sup>22</sup> The outbreak of the Second World War prevented the 1940 Conference from taking place.

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<sup>18</sup> Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864.

<sup>19</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Geneva, 6 July 1906.

<sup>20</sup> On the basis of this resolution the ICRC attempted to persuade the parties to the Spanish Civil War to accept, to some extent, the principles of the Geneva Conventions. See J. Pictet (ed.) *The Geneva Conventions of 12 August 1949: Commentary, III Geneva Convention Relative to the treatment of Prisoners of War* (International Committee of the Red Cross, 1960), 29 (Pictet, *Commentary*) and G. Draper, 'Humanitarian Law and Internal Armed Conflicts' (1983) 13 *Georgia Journal of International and Comparative Law* 253, 261.

<sup>21</sup> See Siotis, 186.

<sup>22</sup> Resolution 14 called for the Red Cross societies to work for the respect of the humanitarian principles of the Geneva and Hague Conventions and their applications on the wounded and captured and the respect of the life and liberty of non-combatants. See *ibid.*

### 3.2.2. *The road to the 1949 Diplomatic Conference*

Immediately after the end of the Second World War, however, efforts for the extension of humanitarian rules to non-international armed conflicts were renewed and certain preliminary conferences took place. Notable examples were the 1946 Conference of National Red Cross Societies, the 1947 Conference of Government Experts, in Geneva, and, finally, the 1948 ICRC Conference in Stockholm. The negotiations in these conferences were concerned with the development of the Geneva Conventions. In each of them, there seemed to be a tension between an effort to apply the whole of the Geneva Conventions to internal conflicts, and the perceived effects that this would have on the legal status of the parties.<sup>23</sup> The text that ended up being submitted to the Geneva Diplomatic Conference of 1949 underwent various changes throughout these three preliminary Conferences. The main points of the evolution of the text are considered here.<sup>24</sup>

In the 1946 Conference of National Red Cross Societies the application of the entire Geneva Conventions to non-international armed conflicts was proposed, allowing however for the possibility of the parties to renounce such application.<sup>25</sup> The 1947 Conference of Government Experts did not accept this but did propose at least a partial application of the Geneva Conventions, allowing for ‘the *principles*’ of the Conventions to be applied, while dropping the possibility of renunciation. Importantly this was complemented by the stipulation/disclaimer that the application of this legal regime “shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status.”<sup>26</sup> This disclaimer was one of the few elements of the proposed article to generate solid support through the tumultuous process<sup>27</sup> of the creation of the

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<sup>23</sup> *Ibid.*, 187-191.

<sup>24</sup> For a concise presentation see D. Elder, ‘The Historical Background of Common Article 3 of the Geneva Convention of 1949’ (1979) 11 *Case Western Reserve Journal of International Law* 37, 42 ff (Elder).

<sup>25</sup> The text, quoted in Pictet, *Commentary*, 30, was as follows: “In the case of armed conflict within the borders of a State, the Convention shall also be applied by each of the adverse Parties, unless one of them announces expressly its intention to the contrary.”

<sup>26</sup> See *ibid.*, 31

<sup>27</sup> Indeed, as the Soviet delegate pointed out at the final Plenary Session: “No other issue has given rise to such long discussion and to such a detailed and exhaustive study.” See *IIB Final Record of the Diplomatic Conference in Geneva of*

final text. Its importance for the comprehension of the arrangement will gradually become apparent.

The text, which came to be known, inaccurately,<sup>28</sup> as the Stockholm proposal, was submitted to the 1948 XVII ICRC Conference, to be held at Stockholm. It was to be inserted in the last paragraph of common article 2, which dealt with the material application of the Conventions.<sup>29</sup> Article 2(4) read:

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 implementation of the principles of the present Convention shall be obligatory on each one of the adversaries. The application of this Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status.

There was an oscillation between, on the one hand, a maximalist position, aspiring for the application of the entire legal regime of the Geneva Conventions in internal armed conflicts, and, on the other hand, retaining a minimum in order to safeguard automatic applicability<sup>30</sup> of the provision. This oscillation would come to characterize the whole process of the creation of what came to be common article 3.

### *3.2.3. The 1949 Diplomatic Conference*

The text finally submitted to the Diplomatic Conference at Geneva for consideration also reflects the abovementioned oscillation. At Stockholm, the ICRC substituted the term *principles* with the term *provisions* marking a return to the effort to apply the whole

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1949 (Geneva, 1951), 325. (IIB) As will be seen, this will be the case in diplomatic conferences to come. See sections 5.3.2. and 7.2.3.

<sup>28</sup> Insofar as it was not the text that came out of the Stockholm Conference. See Elder, 43.

<sup>29</sup> See Pictet, *Commentary*, 31.

<sup>30</sup> See below fn 67 and text.

Conventions to internal conflicts, with the addition of a condition of reciprocity<sup>31</sup> for the 3<sup>rd</sup> (POWs) and 4<sup>th</sup> (Civilians) Conventions.<sup>32</sup> At the Diplomatic Conference, a Joint Committee of delegates was created to discuss the proposed article, then article 2(4), and, within that Committee, a Special Drafting Committee was further created. In the discussions of the Joint Committee, the problematic nature of the proposal to extend all of the provisions of the Conventions to internal armed conflicts was immediately apparent.

The Danish delegate pointed out that the application of the Conventions to insurgents who were ‘Parties to the conflict’ would affect their status “because it would obligate the State to apply in a civil war all the provisions...of international law.”<sup>33</sup> Accordingly, the Swiss Rapporteur of the Joint Committee assuaged the delegate’s fears by clarifying that “only certain stipulations expressly mentioned”, would apply. Importantly, “neutral states would have no obligations.”<sup>34</sup> The Soviet delegate proposed the application of “all the provisions of the Convention which involve the humane treatment of persons who should benefit by the protection of the Convention.”<sup>35</sup> The dilemma between full application of the Conventions and application of minimum humanitarian standards, expressed before at Stockholm in the oscillation between *provisions* and *principles*, had resurfaced.

The dilemma between applying the full provisions of the Conventions or the humanitarian principles had a flip side. To the extent that the former was to be attempted, it was necessary to stipulate the type of conflict, in which all of the provisions could apply. As with the criteria for the recognition of belligerency, the starting point was the magnitude of the conflict. Indeed, even though article 2(4) did not amount to

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<sup>31</sup> See below 3.3.3.

<sup>32</sup> This important shift, as pointed out in Elder, 43, seems to have been missed by the ICRC Commentary. See Pictet, *Commentary*, 32.

<sup>33</sup> *IIB*, 36.

<sup>34</sup> See *ibid.*, 36-37. The Danish Delegate returned to the issue at the next session suggesting a declaration/reservation stipulating that “relations between insurgents and parties outside the conflict...was to be decided in accordance with the general rules of international law...and was not governed by the Conventions.” *Ibid.*, 39. This point of contention persisted until the last days of the negotiations in the Plenary session and the Rapporteur had to reiterate that the rights and duties of neutrals were not governed by the Convention but by general international law. *Ibid.*, 332.

<sup>35</sup> See *ibid.*, 38.

recognition of belligerency, the link between the characteristics of the conflict and the actor and the justification of the application of the legal regime was dominant.

This was apparent in the first proposal that tried to set out specific criteria for the application of the full Conventions. The French proposal recalled the existence of factual criteria related to the doctrines of recognition of belligerency and insurgency.<sup>36</sup> The Greek delegate hastened to add the legal caveat that, even if those criteria were present and the full Conventions would be applied, there would be no effect on the legal status of the ‘belligerents’.<sup>37</sup> The proposal was criticized by the Australian delegate as begging the question of who would decide the existence of the proposed criteria.<sup>38</sup> In its own proposal, Australia referred directly to the process of recognition of belligerency, as a criterion for the application of the Conventions, albeit taking account of the development of the law of recognition and the possibility of collective recognition through the organs of the United Nations.<sup>39</sup> The Australian proposal’s rationale seems to have been to adapt the structure of the old regime to the new institutional framework. The empowerment of the *de jure* Government and the United Nations, however, was deemed problematic by the United States delegate.<sup>40</sup>

In the above deliberations, certain problematic features of the old regime, and the effort to incorporate it in an article of automatic applicability were apparent. The decentralised and non-mandatory nature of the legal characterisation and application of the law was, as

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<sup>36</sup> The full text of the French proposal is as follows: “In all cases of armed conflict not of an international character which may occur on the territory of one or more of the 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.” See Annex 12 in *III Final Record of the Diplomatic Conference in Geneva of 1949* (Geneva, 1951), 27. (*III Final Record*)

<sup>37</sup> *IIB*, 41.

<sup>38</sup> *Ibid.*, 42-43.

<sup>39</sup> The Australian proposal was as follows: “In the case of civil war in any part of the home or colonial territory of a Contracting Party the present Convention (or if this goes too far, “The Principles of the present Convention”) shall be applied between the Parties to the conflict, provided:

- (1) that the *de jure* Government has recognized the insurgents as belligerents; or
- (2) that the *de jure* Government has claimed for itself the rights of a belligerent; or
- (3) that the *de jure* Government has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
- (4) that the dispute has been admitted to the Agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.”

See Annex 11 in *III Final Record*, 27.

<sup>40</sup>See *IIB*, 42.

discussed,<sup>41</sup> one of the problematic features of the previous legal structure. A solution to this would be a structure where, once a set of characteristics relating to the actor and the situation had come about, the substantive rules would be automatically applicable. It seemed clear to the delegates that the full substantive regime of the Geneva Conventions, even if neutrality was not covered, could be applied only to actors with characteristics similar to those of a state. The assessment of these characteristics was, to a large extent, left either to the Government or third states. However, it was a sign of the changing, more institutional, times that United Nations organs were also mentioned as having a role in the assessment of characteristics.

The inability to stipulate workable criteria in combination with a process for their assessment, in order to apply the full Conventions, led to the proposal for the application of minimum humanitarian standards, while avoiding the stipulation of such a process and criteria. This can be understood as an effort to avoid the difficulties inherent in every step of the previous system. Firstly, the wide applicability of the legal rules required criteria that did not describe situations and actors almost identical to wars between states. Since the criteria that the delegates had so far proposed were clearly redolent of this blueprint, the avoidance of such a list could allow a lower threshold to emerge. It was hoped that such a low threshold could more easily be automatically applicable. Finally, limiting the substantive applicable rules could assuage the concerns of states with respect to the status conferred, as the non-state armed group would not be regulated as a state in terms of the substantive applicable law.

This strategy was not expressly or completely set out by any one delegate, but it provides a link between the obstacles so far encountered and the French proposal that followed.<sup>42</sup> This proposal called for the application, in all conflicts, of a set of minimum humanitarian standards, mentioned in the Preamble to the draft Civilians Convention.<sup>43</sup> The text was remarkably similar to what was to be common article 3.<sup>44</sup>

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<sup>41</sup> Section 2.2.4.

<sup>42</sup> *III Final Record*, Annex 13, 28.

<sup>43</sup> The preamble can be found *I Final Record of the Diplomatic Conference in Geneva of 1949* (Geneva, 1951), 113. (*I Final Record*)

<sup>44</sup> The full text of the Preamble was as follows:

The vacillation between the application of the entire Conventions and the application of minimum humanitarian standards led to a distinction being drawn *within* non-international armed conflicts. On the one hand, there would be non-international armed conflicts of the magnitude of international wars, where all the provisions would apply. On the other hand there would non-international conflicts, left undefined, where a minimum of humanitarian provisions would apply.<sup>45</sup>

This distinction is reflected in the first draft of a Working Party, created in order to incorporate the arguments advanced in the discussions at the Diplomatic Conference into a workable text. The Working Party expressed what it saw as the necessary approach by reporting that the Conference should “either restrict the cases of conflicts not of an international character to which the Conventions should apply – or restrict the contractual provisions to be applied in the case of a conflict which was not of an international character.”<sup>46</sup> The Working Party assembled the criteria proposed by the delegates for the application of the entire Conventions, while it provided for basic humanitarian standards to be applied to conflicts that would fail to meet the elaborate criteria.<sup>47</sup> The first part of the proposal was criticised as impracticable because of its high

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“The High Contracting Parties, conscious of their obligation to come to an agreement in order to protect civilian populations from the horrors of war, undertake to respect the principles of human rights which constitute the safeguard of all civilization and, in particular, to apply, at any time and in all places, the rules given hereunder:

- (1) Individuals shall be protected against any violation to their life and limb
- (2) The taking of hostages is prohibited
- (3) Executions may be carried out only if prior judgment has been passed by a regular constituted court, furnished with the judicial safeguards that civilized peoples recognize to be indispensable
- (4) Torture of any kind is strictly prohibited.

These rules, which constitute the basis of universal human law, shall be respected without prejudice to the special stipulations provided for in the present Convention in favour of protected persons.”

Elder, 45-46, erroneously refers to the proposal as an Italian proposal and quotes the text of the Preamble as the text of the proposal.

<sup>45</sup> This distinction is helpfully developed by the Swiss delegate in the Plenary session. See *IIB*, 334.

<sup>46</sup> *Ibid.*, 76.

<sup>47</sup> The, rather lengthy, text of the draft is as follows:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to implement the provisions of the present Convention, provided:

- (a) that the *de jure* government has recognized the status of belligerency of the adverse party, without restrictions, or for the sole purposes of the application of the present Convention, or
- (b) that the adverse party presents the characteristics of a State, in particular, that it possesses an organized military force, that it is under the direction of an organized civil authority which exercises *de facto* governmental functions over the population of a determinate portion of the national territory, and that it has the means of enforcing the Convention, and of complying with the laws and customs of war; application of the Convention in these circumstances shall in no way depend upon the legal status of the parties to the conflict. This obligation presupposes, furthermore, in all circumstances, that the adverse party declares itself bound by the present Convention, and, as is the *de jure* government, by the laws and customs of war (and that it complies with the above conditions in actual fact).

threshold and variety of criteria.<sup>48</sup> Accordingly, a second Working Party resisted the effort to apply the entire Conventions and, reflecting the French proposal,<sup>49</sup> provided a draft that, with minor changes,<sup>50</sup> was eventually accepted in the Plenary session as common article 3.

A final effort for the application of a substantial part of the Conventions was made in a proposal by the USSR, possibly the most ardent proponent of the application of the full Conventions to non-international armed conflicts among state delegates. The Soviet proposal focused on the humanitarian provisions of the Conventions, and would have extended the protection of many more provisions of the Geneva Conventions to non-state groups. For instance, the regime for POWs would have been applicable.<sup>51</sup>

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The provisions relating to the Protecting Powers shall, however, not be applicable, except in the instance of special agreement between the parties to the conflict. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer to the parties to the conflict to undertake the duties conferred by the present Convention on the Protecting Powers.

In the case of armed conflicts which do not fulfil the conditions as determined above, the parties to the conflict should endeavour to bring into force, by means of special agreements, all or part of the provisions of the present Convention, or, in all circumstances, to act in accordance with the underlying humanitarian principles of the present Convention.

In all circumstances stipulated in the foregoing provisions, total or partial application of the present Convention shall not affect the legal status of the parties to the conflict.”

See *ibid.*, 46-7.

<sup>48</sup> See the criticisms by France, the UK and the USSR in *ibid.*, 47-48.

<sup>49</sup> Above fn 44.

<sup>50</sup> The discussion of these changes does not affect the character of the provision and is, therefore, not considered necessary for the present analysis. Accordingly, the text of the second Working Party’s draft is omitted and the reader is referred to the text of common article 3.

<sup>51</sup> The Soviet Proposal was as follows:

A. Wounded and Sick and Maritime Conventions.

“In the case of armed conflict not of an international character occurring in the territory of one of the States, Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:

Humane treatment for the wounded and sick; prohibition of all discriminatory treatment of wounded and sick practised on the basis of differences of race, colour, religion, sex, birth or fortune.”

B. Prisoners of War Convention.

“In the case of armed conflict not of an international character occurring in the territory of one of the States, Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:

Humane treatment for prisoners of war; compliance with all established rules connected with the prisoners of war regime; prohibition of all discriminatory treatment of prisoners of war practised on the basis of differences of race, colour, religion, sex, birth or fortune.”

C. Civilians Convention

“In the case of armed conflict not of an international character occurring in the territory of one of the States, Parties to the present Convention, each Party to the conflict shall apply all the provisions of the present Convention guaranteeing:

Humane treatment for the civilian population; prohibition on the territory occupied by the armed forces of either of the parties, of reprisals against the civilian population, the taking of hostages, the destruction and damaging of property which are not justified by the necessities of war, prohibition of any discriminatory treatment of the civilian population practiced on the basis of differences of race, colour, religion, sex, or fortune.”

See *IIB*, 97-8.

Importantly, it omitted the legal caveat on the effect of the provision on the status of the parties as ‘redundant’.<sup>52</sup> This was too much for the other states to accept. The UK argued that it would be difficult to pick which provisions would be applied and could not bring itself to delete the status disclaimer.<sup>53</sup> France questioned the effect that the application of such extensive provisions would have on the sovereignty of the states, making particular reference to the issue of POW status.<sup>54</sup> Ultimately the Soviet proposal was defeated by 9 votes to 1.<sup>55</sup>

The Second Working Party draft was not easily accepted. It was attacked by both the proponents of greater regulation and those hostile to any regulation. This occurred both at the Special Committee, where it was presented,<sup>56</sup> and at the Plenary, when it was brought for a final vote. This was perhaps to be expected, since the draft constituted a compromise between the two ‘extreme’ positions of full Geneva Conventions protection and next to no protection.<sup>57</sup> The USSR criticized it to the extent that it did not provide enough humanitarian protection.<sup>58</sup> Mexico agreed.<sup>59</sup> At the other end, Burma was clear that it amounted to ‘international recognition of insurgency’, equating that to ‘recognition of aggression’. In its view, there was clearly no place for the Conventions in internal armed conflicts.<sup>60</sup> But there were other concerns among States forming the majority middle ground. The US and the UK were not pleased with the term ‘each Party to the conflict’, wanting to substitute it with the term ‘these Parties’, standing for the ‘High Contracting Parties’.<sup>61</sup> The Australian delegate wanted to return to the detailed criteria of the first Working Party draft.<sup>62</sup> Among these differences the Second Working Party

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<sup>52</sup> See *ibid.*, 98.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, 99.

<sup>55</sup> *Ibid.*, 100.

<sup>56</sup> The Draft was initially rejected at the Special Committee by six votes to five. See *ibid.* Then, at the Joint Committee it was adopted for consideration at the Plenary by twenty-one votes to, six against, with fourteen abstentions. See *Ibid.*, 129.

<sup>57</sup> As the delegate from the ICRC pointed out at the Plenary, mentioning that his organisation was in favour of the Stockholm proposal, but strongly urging the delegates to vote for the draft. See *Ibid.*, 336.

<sup>58</sup> See *ibid.*, 325-327.

<sup>59</sup> *Ibid.*, 333.

<sup>60</sup> See *ibid.*, 327-8.

<sup>61</sup> The ICRC delegate replied that “this would tend to distort the meaning of those who had framed this Article, and who wished to bind not only the legal Government, but also the insurgents.” See *ibid.*, 90. Later, at 93, the US returned to the point by suggesting the term ‘such Party’.

<sup>62</sup> *Ibid.*, 93.

proposal, drawing from the French one, was adopted as common article 3. The text is as follows:

Par. 1: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

Par. 2: The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

Par. 3: The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The four Geneva Conventions were signed by 65 states and came into force in 21 October 1950. They have now achieved almost universal membership with 194 states parties.<sup>63</sup>

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<sup>63</sup>[http://www.icrc.org/IHL.nsf/%28SPF%29/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/%28SPF%29/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf)

#### 3.2.4. *Analysing the travaux: a move away from status?*

The proposal which was eventually accepted reflects the process and the issues that arose at the Diplomatic Conference. The specific criteria that related to the organization of the actor and the magnitude of the conflict, as well as the process of ascertaining their existence, through individual or collective recognition, were abandoned. Instead, an approach of non-definition was adopted. These criteria had mirrored those leading to recognition of belligerency, without, however, in the case of the Geneva Conventions, the full consequences of recognition of belligerency. Nevertheless, there remained one basic criterion for the application of common article 3: the existence of an armed conflict. The term could not be defined by the delegates as the criteria proposed in the debates referred to the all too familiar criteria of belligerency and would, once more, beg the question of their assessment. However, it was understood that, as the Swiss Rapporteur put it, “an armed conflict, as understood in this provision, implies some form of organization among the Parties to the conflict.”<sup>64</sup>

Accordingly, the necessity for the existence of certain factual criteria was not avoided. Indeed, it could not be avoided. What was avoided was the process of recognition, as it occurred under the regime of belligerency and insurgency. To the extent that there still had to be some kind of process of assessment for the existence of certain factual criteria for the application of a legal regime, then the ascription, or the perception of ascription, of status, could not be entirely avoided. This is the case, even if this status is temporary and is granted only for certain purposes. This is because, as in the case of belligerency and insurgency, there is a factual situation and there is an actor bearing certain characteristics, whose participation is deemed important enough for international law to pierce the national legal order and acknowledge the actor’s existence in order to regulate.

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<sup>64</sup> See IIB, 335.

The paradigm of the status-based regime of belligerency was too potent to prevent the perception that the assessment would not have the status-related effects of recognition.<sup>65</sup>

The assessment that common article 3 calls for could only be achieved through attaching to the situation the ‘label’ of ‘armed conflict not of an international character’.<sup>66</sup> Common article 3 seems, however, to assume automatic recognition of the existence of the factual criteria that constitute an ‘armed conflict’. It seeks to obviate the process of recognition but to secure its effects: the application of the substantive law that covers the actors.

By moving away from the process of the ascription of status that occurred through the recognition of belligerency or insurgency, the automatic application of the legal regime seeks to avoid both the problems of the process of the granting of recognition and its consequences on the status of the non-state armed group.<sup>67</sup> The effort to secure automaticity depended either on the presence of an organ that would virtually automatically pronounce on the existence of the criteria or the virtual elimination of criteria. The former, it was clear, did not exist. Even if the presence of the UN affects the institutional structure, it was more as a forum than as an immediate and final assessor. Accordingly, common article 3 strives to achieve the virtual elimination of criteria. This, however, is impossible to the extent that a material situation has to be recognised. Ultimately, the applicability of common article 3 will relate directly to the factual existence of implicit or explicit criteria.

The paradox is replayed and compounded in the ICRC Commentary, which seems to rehearse every single criterion advanced at the Diplomatic Conference, rivalling the comprehensiveness of the first Working Party draft.<sup>68</sup> However, it stresses, “the scope of

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<sup>65</sup> See section 1.2.

<sup>66</sup> See on the process of application of common article 3 being a process of ‘labelling’ or ‘recognition’ A. Rubin, ‘The Status of Rebels Under the Geneva Conventions’, (1972) 21 *International and Comparative Law Quarterly* 472, especially 483 ff (Rubin, ‘Rebels’).

<sup>67</sup> Automaticity can be defined as the activation of the relevant legal regime automatically to the extent that certain facts occur or a material situation exists. Central in this notion is the need to obviate the role of the government of the state in whose territory the conflict occurs from assessing the existence of these facts. See, for an exposition of this principle, Y. Sandoz, C. Swinarski, and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff, 1988), 1348 (Sandoz, *Commentary*). Automaticity, more generally, can also be viewed as the automatically binding nature of certain legal rules on an actor who belongs to the legal system which contains these rules. For the rule applied to states and, more controversially, to new states irrespective of their expressed consent, see G. Fitzmaurice, ‘The General Principles of International Law Considered from the Standpoint of the Rule of Law (1957) *Recueil des Cours* 1, 16.

<sup>68</sup> Pictet, *Commentary*, 35-36. It considers these criteria “convenient”.

the application must be as wide as possible[...]Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side of the hostilities”; but then it hastens to add, again, “which are in many respects similar to an international war”.<sup>69</sup> This formulation reflects the tension between the need for a low threshold guaranteeing wide applicability, and the nature of the various criteria used, recalling the status-based paradigm of war between states.

Moreover, the uncertainty in the criteria has the potential to harm the article’s effects. This danger is reflected in Portugal’s reservation that

As there is no actual definition of what is meant by a conflict not of an international character, and as, in case this term is intended to refer solely to civil war, it is not clearly laid down at what moment an armed rebellion within a country should be considered as having become a civil war, Portugal reserves the right not to apply the provisions of article 3 in so far as they may be contrary to the provisions of Portuguese law in all territories subject to her sovereignty in any part of the world.<sup>70</sup>

However, there is one element in common article 3, shared by the whole of the Geneva Conventions regime, that can potentially affect the flexibility of its application. This is the move from “war” to “armed conflict”, as expressed in common article 2 of the Geneva Conventions. This is an element of fundamental importance. It has been discussed how the concept of the ‘state of war’ relates to war as a legal institution deliberately and freely brought about by sovereign states, as the only subjects of international law.<sup>71</sup> The new language decouples the *jus in bello* from the sovereign prerogative to wage war. The term ‘armed conflict’ refers to a material situation. This material situation does have legal consequences, but these legal consequences follow the very existence of the facts rather than the law-creating capacity of the sovereign.

This distinction significantly influences the process of application by allowing the drawing of legal distinctions closer to the facts. A ‘state of war’ has to be either declared

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<sup>69</sup> *Ibid.*, 36.

<sup>70</sup> See *I Final Record*, 351. Portugal, however, decided to withdraw its reservation upon ratification on 14 March 1961. See <http://www.icrc.org/IHL.nsf/NORM/663716D11E477ECFC1256402003F977C?OpenDocument>.

<sup>71</sup> Section 2.2.4.

or recognised. An armed conflict merely happens.<sup>72</sup> This reflects a shift in the competent assessor of the facts. It is no longer only states that can constitute the legal consequences of a conflict. These exist regardless. Moreover, they can be acknowledged by a third party, for example an international organisation,<sup>73</sup> by focusing on the factual element of the situation rather than on the recognition of the situation by a state.

The assessment of facts would then have a declarative, rather than a constitutive effect.<sup>74</sup> Furthermore, this assessment/declaration of the material situation can have an institutionalised, multilateral element, through the involvement of international organisations. This does not necessarily mean the absence of status as a rationale or a consequence of the application of the legal regime, but it is a step in the direction of the law of armed conflict not being an exclusively sovereign matter.

Furthermore, this approach may be used to develop the elements of the criteria through practice.<sup>75</sup> This, of course, was also the case in the old legal system. To the extent, however, that this practice would be influenced by the predominance of facts the hope was that it could lead to a more consistent definition of the threshold.

None of this, however, necessarily means that no status is ascribed or is seen to be ascribed through the process of assessment. If, in the case of the automaticity of common article 3, the implicit existence of factual criteria and the need for recognition of such criteria, may potentially harm its effect, the opposite seems to happen with respect to the caveat that the application of the article will have no effect on the legal status of the parties. The question that arises is whether such a disclaimer has any effect.

The necessity of the inclusion of the disclaimer relates directly to the effort to overcome the process and consequences of recognition in order to achieve automaticity of the obligations contained in the article. It seeks to dispel the perception of conferment of state-like status by the very fact that international law is applicable. This perception flows directly from the status-based horizontal system of regulation in the regime of

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<sup>72</sup> For the move from 'war' to 'armed conflict' and the current relevance of 'war' as a legal term see Greenwood, 'Concept'. But see MacNair/Watts, on the continuing importance of the legal term 'war' for effects on the legal position of private persons and, at 4 ff, on the use of the term even in some post 1945 treaties.

<sup>73</sup> This was a possibility suggested in the First Working Party Draft at *IIB*, 46-7.

<sup>74</sup> See section 1.2.1.

<sup>75</sup> For the importance of (state) practice in the clarification of the factual criteria inherent in common article 3 see Siotis, 208-9.

belligerency. Its survival will depend on the survival of the understanding that only state-like entities can be regulated by the *jus in bello*.

The substance and function of the disclaimer was not analyzed in depth during the debates, but its significance or insignificance appeared to be obvious to both the majority that clearly needed it and to those who opposed it. While, as seen above,<sup>76</sup> the Soviet delegate thought it “redundant”, his approach was unacceptable to the majority, which, as expressed by the UK delegate, “could not see their way to accepting the deletion of the paragraph.”<sup>77</sup> On the other side of the spectrum, the Burmese delegate, a staunch opponent of the inclusion of any legal regulation of internal armed conflicts in the Conventions viewed it as dangerous and hypocritical. It was only ‘a bait’; “the mere inclusion of this Article in an international Convention will automatically give the insurgents a status as high as the legal status which is denied to them.”<sup>78</sup>

Indeed, beyond the absolutes of the subject/object dualism, it seems that the legal status of the non-state armed group is commensurate with the regulation extended. To the extent that the members of the armed forces of that party, for example, are protected by the law and to the extent that the authorities of that party have the responsibility to apply the law, the party is acknowledged as an entity under international law. Accordingly, the status conferred may not extend as far as that conferred through belligerency, but it extends as far as the substantive law of common article 3.<sup>79</sup>

The paradox pointed out by the Burmese delegate, though denied by the majority of the participants as well as the ICRC Commentary,<sup>80</sup> is conceded elsewhere by Pictet: “In the interest of truth, we must nevertheless admit that when a government accepts the application of common article 3 it thereby acknowledges that there is an ‘armed conflict’ within its frontiers and that there is accordingly another ‘party to the conflict’ who becomes an entity in humanitarian law.”<sup>81</sup>

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<sup>76</sup> See fn 52 and text.

<sup>77</sup> See *IIB*, 98.

<sup>78</sup> See *ibid.*, 330.

<sup>79</sup> See also Siotis, 217-8.

<sup>80</sup> Pictet, *Commentary*, 43-44.

<sup>81</sup> Pictet, *Principles*, 60, fn 2.

This should be seen, however, in the light of a distinction drawn between the legal status, *stricto sensu*, contained in the substantive law of common article 3 and the perceived legal and political status, flowing from the acknowledgment of the existence of a party to the conflict. Such a perception of the equation of legal regulation with political status as well legal status under general international law, and the conflation of political and legal status, is commonly held by governments. It draws from the belligerency paradigm, when any legal regulation was closely linked to the state-like characteristics of the non-state armed group and its state-like potential.<sup>82</sup> As will be seen,<sup>83</sup> it leads to the denial of the existence of an armed conflict in practice. It is also reflected in the approach of the ICRC, which, in its humanitarian advances, often chooses not to mention common article 3, instead invoking general humanitarian principles, in order to not dissuade the states by referring to the application of the article.<sup>84</sup>

In addressing this conflation of legal and political status, influenced as it is with the old regime of *jus in bello*, the question remains, to what extent the doctrine of recognition of belligerency and recognition of insurgency have survived common article 3. Firstly, it has to be observed that, as a matter of state practice, recognition of belligerency has now arguably fallen into desuetude.<sup>85</sup> Even acts that, according to the doctrine of belligerency, imply such recognition have not been interpreted as recognising belligerency.<sup>86</sup>

Nowhere, however, in the *travaux préparatoires* of common article 3 is it suggested that the article is meant to substitute the process of recognition of belligerency.<sup>87</sup> To the extent that the substantive law applied through recognition of insurgency would be similar to the humanitarian provisions covered by common article 3, or to the law applied under special agreements which common article 3 exhorts, this might be the case. However, the

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<sup>82</sup> Section 2.2.2.

<sup>83</sup> Section 3.4.

<sup>84</sup> R.-J. Wilhelm, *Problèmes Relatifs À La Protection de la Personne Humaine Par Le Droit International Dans Les Conflits Armés Ne Présentant Pas Un Caractère International*, (1972) 137 *Recueil des Cours* 311, 336 (Wilhelm).

<sup>85</sup> See Oglesby, especially at 108 *ff.* There are, however, exceptions. In January 2008 President Chavez of Venezuela suggested for the Colombian rebel group FARC to be recognised as belligerent. See [http://www.eluniversal.com/2008/01/18/en\\_ing\\_art\\_chavez-proposes-to-c-18A1309641.shtml](http://www.eluniversal.com/2008/01/18/en_ing_art_chavez-proposes-to-c-18A1309641.shtml)

<sup>86</sup> See D. Schindler, 'The Different Types of Armed conflicts According to the Geneva Conventions and Protocols' (1979) *Recueil des Cours* 121, 145 *ff.* for examples (Schindler, *Types*). He mentions the case of Nigeria/Biafra, where a declaration of blockade was not interpreted as belligerency.

<sup>87</sup> Cf T. Farer, 'Humanitarian Law and Armed Conflicts: Toward the Definition of 'International Armed Conflict' (1971) 71 *Columbia Law Review* 37 (Farer) who argues that conflicts bearing the characteristics of belligerency should be considered international armed conflicts, covered by common article 2.

legal consequences of recognition of belligerency, and notably the activation of neutrality, are not fully covered by the Geneva Conventions.<sup>88</sup> Final doubts are dispelled by resolution 10, adopted at the Plenary: “The Conference considers that the conditions under which a Party to a conflict can be recognised as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions.”<sup>89</sup> The existence of the Geneva Conventions, creating a regime of automatic application of ‘objective’ criteria, is more a reflection of the reasons why the doctrine of belligerency has fallen into desuetude, rather than the cause.

### 3.3. Defining ‘armed conflict not of an international character’.

#### 3.3.1. *Intensity*

According to an oft-quoted statement of exasperation “[o]ne of the most assured things that might be said about the words ‘armed conflict not of an international character’ is that no one can say with assurance precisely what meaning they were intended to convey.”<sup>90</sup> The terms ‘armed conflict’ and ‘not of an international character’ reflect the material frame of application of common article 3 against its *geni proximi*,<sup>91</sup> the lower and upper thresholds, that of a situation not constituting an armed conflict and one constituting an armed conflict of an international character.

With respect to the lower threshold a variety of factors has been advanced. At the same time, the inherent difficulty of defining the exact characteristics that render the situation within the ambit of common article 3 has often been acknowledged.<sup>92</sup> As was the case

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<sup>88</sup> See also fns 34 *ff* and text on the position of delegates on the inter-relation of common article 3 and belligerency.

<sup>89</sup> International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949*, (ICRC, 1949), 228.

<sup>90</sup> Farer, 43. [Italics omitted.]

<sup>91</sup> See, for the use of the logical categories *genus proximum* and *differentia specifica* in the definition of the concept D. Ciobanu, ‘The Concept and Determination of the Existence of Armed conflicts not of an International character’ (1975) 58 *Rivista di Diritto Internazionale* 43, 51. (Ciobanu)

<sup>92</sup> See, for example, C. Zorgbibe, ‘Pour une réaffirmation du droit humanitaire des conflits armés internes’ (1970) *Journal du Droit International* 658, 661. (Zorgbibe)

with belligerency and insurgency<sup>93</sup> there are two fields of inquiry, the situation and the actor. These two categories can be expressed through the terms intensity and organisation. Indeed, it should be pointed out from the outset that the intensity and organisation of the violence are the two criteria that need to be satisfied, while the various sub-criteria or factors suggested will have an indicative nature.<sup>94</sup>

In terms of intensity, the violence must be armed and of “considerable proportions in both duration and the area involved.”<sup>95</sup> In contradistinction, a riot is “of short duration and local character.”<sup>96</sup> According to a 1962 Report by the International Committee of the Red Cross (ICRC) “one should take into account such factors as the length of the conflict, the number and framework of the rebel groups, their installation or action on a part of the territory, the degree of insecurity, the existence of victims,<sup>97</sup> the methods employed by the legal government to re-establish order, etc.”<sup>98</sup> Accordingly, the struggle must have “a collective character”<sup>99</sup> and, it has been argued, it must involve the government using the military rather than police forces.<sup>100</sup> This would reflect the seriousness of the situation and a more pervasive disturbance of civil order, at least in terms of the threat the insurgents pose to the government. A riot will usually be dispersed by the police. The latter factor also reflects the move from national criminal law to the international law of armed conflict.<sup>101</sup>

Another relevant factor is the measures that the government is forced to take in matters of legislation. Issuing emergency laws and decrees that would normally apply to situations

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<sup>93</sup> Sections 2.2.2 and 2.3.2.

<sup>94</sup> This is reflected in the Commentary’s characterisation of the ‘criteria’ it uses as merely “convenient”. The indicative nature of the criteria will be more clearly stated in the jurisprudence of the *ad hoc* Tribunals. See section 6.5.

<sup>95</sup> Castrén, 28. Note that the duration is a factor for the violence turning into (the legal category of) an armed conflict, and not that the armed conflict must be of a certain duration to fall under common article 3. The question of duration will be further discussed, and will pose some problems, in sections 6.5.3 and 7.4.1.

<sup>96</sup> Castrén, 30. See also, for a description of riots and internal tensions, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 24 May – 12 June 1971, vol. 5, 79. (Conference of Government Experts)

<sup>97</sup> On the importance of victims for the existence of an ‘armed conflict’ see also the argument made by the Algerian Office, *White Paper on the Application of the Geneva Conventions of 1949 to the French-Algerian Conflict* (Algerian Office: New York, 1960), 7. (Algerian Office) (My reference)

<sup>98</sup> See the 1962 Report by the ICRC (R. Pinto, Rapporteur) entitled ‘Humanitarian Aid to the Victims of Internal Conflicts’ and reproduced in (1963) *International Review of the Red Cross* 79, 82.

<sup>99</sup> See also Ciobanu, 56.

<sup>100</sup> See Pictet, *Commentary*, 36; J. Bond, ‘Internal Conflict and Article 3 of the Geneva Conventions’ (1971) 48 *Denver Law Journal* 263, 274 (Bond).

<sup>101</sup> There is, however, a variety of situations where the army is brought in to deal with matters that would not, otherwise, qualify as ‘armed conflicts’. See, for examples, Moir, 38-40.

of war, effecting alterations of domestic legislation, drafting, imposing extensive detentions etc,<sup>102</sup> point to an equal break-down of civil order.<sup>103</sup> Such acts by the government can be seen as declarative of the fact that the situation merits the legal rules regulating armed conflict. Inevitably, the fact that the non-state armed group has made it necessary for the government to resort to such dramatic administrative measures can be seen as reflecting its political status, or diminishing that of the government.

The above factors determining the intensity of the conflict have two overall characteristics that distinguish them to some extent from the criterion of magnitude as used in recognition of belligerency.<sup>104</sup> The first is that the intensity is mostly focused and required to occur within the territory of the state where the armed conflict occurs. The important factor here is that the state-actor that primarily experiences the intensity of the situation will be the government against which the non-state armed group is fighting,<sup>105</sup> and not necessarily third states. Accordingly, it is primarily the government that will need to acknowledge the material situation.<sup>106</sup>

The second characteristic of this new concept of intensity is the importance of the effects of the conflict on human beings, and particularly civilians. This is not unrelated to the characteristic mentioned in the previous paragraph. While in the case of belligerency and insurgency magnitude related to control of territory and ports and the effects that this had on the interests of third states, now the situation is focused on the intensity of the violence in the territorial unit. Some prominent factors, such as the number of victims directly reflect the harm on human beings. Others, such as the territorial extent of the hostilities or the weaponry involved, can also be understood as relating intensity to the threat and harm on human beings, therefore necessitating legal rules of humanitarian protection.

Importantly, one criterion used for recognition of belligerency that is not perceived as present in common article 3 by the literature is the effective control and administration of

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<sup>102</sup> See Bond, 274-5.

<sup>103</sup> See also this factor, taken further to argue for the internationalisation of the conflict, in M. Bedjaoui, *Law and the Algerian Revolution* (Publications of the International Association of Democratic Lawyers, 1961), 143-7. (Bedjaoui) Again, however, it can be the case that such measures are taken in a national emergency short of armed conflict.

<sup>104</sup> See section 2.2.2.

<sup>105</sup> Unless, of course, the conflict is between non-state armed groups.

<sup>106</sup> This is not to deny the important, if secondary, role of international organisations such as the UN. See below section 3.4.1.

territory.<sup>107</sup> Indeed, to do so would run contrary to the very logic of the creation of common article 3. As was discussed in the previous chapter,<sup>108</sup> the control of territory is the minimum necessary criterion and the starting point for the state-like character of the non-state actor. The effective control over territory was necessary for both the military and political viability of the actor. It was also necessary for the effect the actor had on the interests of third states, both when these interests were affected in that territory and when the territory was used as a basis for action on the open seas. As the content and rationale of common article 3 focus on humanitarian protection, that logic is no longer applicable.

### 3.3.2. *Organisation*

The shift in the concept of intensity does not mean that the characteristics of the non-state group are irrelevant to the finding of an “armed conflict not of an international character”. These are expressed in the necessary criterion of a certain degree of organisation of the group.<sup>109</sup> Some degree of organisation is a logical necessity to the extent that common article 3 speaks of a ‘party’ to the armed conflict. It is also a practical necessity, to the extent that the group will have to apply the legal rules itself.

Accordingly, in order to find the limits of the degree of organisation, and distinguish the level of organisation from that necessary for a party to a ‘civil war’ in the old system, one can turn to a functional approach. It has been suggested that the non-state armed group has to be organised enough in order to put into effect the substantive provisions of common article 3.<sup>110</sup> This would include both negative and positive obligations. Accordingly, the prohibition against “violence to life and person”<sup>111</sup> and “taking of hostages”<sup>112</sup> would necessitate the possibility of dissemination of the rules and the imposition of discipline on members on the group, therefore, the existence of a

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<sup>107</sup> See, for example, G. Draper, ‘The Geneva Conventions of 1949’ (1965) 114 *Recueil des Cours*, 63, 90 (Draper); Moir, 38. However, this is included in Pictet’s ‘convenient’ criteria. See ICRC *Commentary*, 36.

<sup>108</sup> See section 2.3.2 fn 124 and text.

<sup>109</sup> See for example Ciobanu, 56; Zorgbibe, 665; Moir, 36-8

<sup>110</sup> See Draper, 90.

<sup>111</sup> Par. 1(a)

<sup>112</sup> Par. 1(b)

responsible command, which will guarantee respect for these rules. Perhaps more demanding, in terms of organisation, would be the positive obligation to guarantee a “regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples”<sup>113</sup> for the passing of sentences. Perhaps even more importantly there should be a justice system for the imposition of discipline and prosecution of the violation of the rules by the fighters of the group.<sup>114</sup>

This should not mean that when a Party cannot carry out all of the obligations, the article does not apply. For example, if the non-state armed group does not have the organisation to carry out trials and sentencing procedures observing certain standards, they should refrain from doing so, but the humanitarian protections of the article should nevertheless apply.<sup>115</sup> Indeed, the need for a flexible approach on the applicability of the article results for the primacy of the humanitarian and protective rationale. It is also related, as will be seen in the next section, to the absence of *de jure* reciprocity.

Another factor is a certain “political goal”,<sup>116</sup> at least one that, in terms of national law, might amount to high treason.<sup>117</sup> This factor reflects the necessary turning point from ‘common banditry’ to political organisation, reminiscent of the debates on the line separating piracy from insurgency in the 19<sup>th</sup> century.<sup>118</sup> The shift of focus to a *political* rather than a solely *military* element in the organisation of the group can revert to a conception of a group as a legitimate contender for status in the international system. If the applicability of the law can depend on various actors’ perception of the goals of the group, the extension of humanitarian protection can be unduly influenced by considerations of conferment of status.

Finally, a focus on the political element can be used to refer to the political viability and potential for independence of the group, leading to the assessment of applicability being

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<sup>113</sup> Par. 1(d)

<sup>114</sup> See S. Sivakumaran, ‘Courts of Armed Opposition Groups: Fair Trials or Summary Justice?’ (2009) 7 *Journal of International Criminal Justice* 489. (Sivakumaran, ‘Courts’)

<sup>115</sup> See Draper, 91.

<sup>116</sup> See also the decision *Société Purfina contre la Nationale Incendie et autres* by the Appeals Court of Montpellier, 24 November 1959, using this criterion, quoted in J. Touscoz, ‘Étude de la Jurisprudence Interne sur les Aspects Internationaux de l’Affaire Algérienne’, (1963) 67 *Revue Générale de Droit International Public* 953, 967-8. (Touscoz)

<sup>117</sup> Castrén, 30.

<sup>118</sup> See also Ciobanu, 57.

perceived as a first step towards such goals.<sup>119</sup> The applicability of the law will then be more closely related to the alteration of political and possibly legal status that the group is seeking through and beyond the conflict. This will introduce wide status-based considerations. Accordingly, the element of the political organisation and goals of the group should only be relevant to the extent that they contribute to its cohesion as a military group, leading to the existence of an armed conflict.

### 3.3.3. *A move away from the paradigm of 'civil war' and belligerency?*

It is necessary to distinguish between the concepts of 'civil war' and 'non-international armed conflict'. Such a distinction would help the definition of the common article 3 threshold. It would also help understand what move there has been in the structure of the international legal system, through common article 3. 'Civil war', as a legal term of art, refers to the legal situation of a conflict akin to wars between states.<sup>120</sup> It entails the recognition of belligerency of the non-state armed group and the application of the full regime of the *jus in bello*.

Common article 3 imposes certain minimum humanitarian rules whereas the existence and acknowledgement of a 'civil war' generates the entire legal regime of the law of war, including neutrality. Moreover, as pointed out, the applicability of common article 3 is designed to be automatic and non-reciprocal, whereas the applicability of the regime of belligerency is activated through the decision of the government and/or third states.

There is a fundamental structural feature in common article 3 that contributes to the move away from a status-based system of applicability and opens the way for the development of a rationale of humanitarian protection of individuals. Common article 3 is a *vertical* rule of *public* international law, piercing the sovereignty of the state, whereas the regime of belligerency adds a new actor, albeit provisionally, into a *horizontal* structure of reciprocal rules of private law writ large.<sup>121</sup> The acceptance of this new actor was the

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<sup>119</sup> See section 2.2.2 fns 45-48 and text.

<sup>120</sup> See section 2.2.2. fns 34 ff. and text.

<sup>121</sup> The term 'private law writ large' used by T. Holland, *Studies in International Law* (Longmans, 1898), 152.

function of the process and doctrine of recognition of belligerency and its affinity with the recognition of statehood. There is a crucial difference between recognising an actor with (potential) law-creating sovereign status and assessing the applicability of public international law. This nature of the doctrine and practice of recognition of belligerency was one reason it was not possible to move to a mandatory recognition based on consistent and objective criteria. Conversely, the aspirations of automaticity of common article 3 fit within its function as a vertical rule of public international law.

This novel structural feature of common article 3 is expressed with relation to the issue of reciprocity.<sup>122</sup> Indeed, in a horizontal system, reciprocity will be a central element of the existence of legal obligation. Reciprocity has been a central feature in the law of war at the inter-state level,<sup>123</sup> as well as central in the concept of recognition of belligerency. In the Geneva Conventions, however, and specifically in common article 3, reciprocity does not have the same legal significance.<sup>124</sup>

This is because, although reciprocity can have a decisive effect in treaties of a more synallagmatic nature, in humanitarian instruments such as the Geneva Conventions as a whole, its effects are limited. The former are treaties of a more contractual bilateral or multilateral nature, whereas the latter can be seen as normative instruments which seek the protection of individuals. Whereas, in the former, the breach of an obligation by one of the contracting parties affects the legal obligation of the other party or parties, this is not the case with “treaties of a humanitarian character.” Therefore, although the Geneva Conventions are based in reciprocity to the extent that they bind states parties to them, according to common article 2(3), they constitute “treaties of a humanitarian character”, in the sense of article 60(5) of the Vienna Convention on the Law of Treaties.

This means that the non-observance of its rules by one party does not lead to the termination of the treaty and the release of the other party from its obligations. This, again, relates to the structure created through the Geneva Conventions of a public law

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<sup>122</sup> Reciprocity in this new structure, and the difference between *de jure* and *de facto* reciprocity will also help in the interpretation of the threshold of Additional Protocol II. See section 5.4.4.

<sup>123</sup> See T. Meron, *Human Rights in Internal Strife: Their International Protection* (Grotius Publications, 1987), 12-14, on the role of reciprocity in the development of the law. See also G. Fletcher, ‘The Law of War and its Pathologies’ (2007) 38 *Columbia Human Rights Law Review* 517, 522-3, who discusses this feature in relation to some aspects of the Israeli-Palestinian conflict.

<sup>124</sup> Reciprocity can play a part, however, in *ad hoc* agreements between the parties to bring into force part or all of the Geneva Conventions, as exhorted by par. 3 of common article 3.

which operates vertically and independently of the horizontal relations of states.<sup>125</sup> To the extent that one party is bound by such a vertical obligation, the acts of the other parties to the treaty do not affect the obligation.

Nevertheless, the partial overlap of the criteria for the existence of an ‘armed conflict’ with those for recognition of belligerency, their difference being one of degree,<sup>126</sup> reflects the difficulty of moving from the old horizontal structure to the new vertical one. It also suggests that the paradigm of civil war between state-like entities is still present. The confusion is obvious – and telling – in the process of the creation of common article 3, as recorded in the *travaux préparatoires*, as well as in the ICRC Commentary, which accompanies their interpretation. The process of creation of common article 3 unfolded on a double axis: the substantive law to be applied to ‘civil war’ or ‘non-international armed conflicts’ and the definition of the material field of application.

Part of the underlying confusion is related to the initial effort to apply the whole of the Geneva Conventions to internal conflicts, as was suggested in the initial ‘Stockholm draft’.<sup>127</sup> Although it became apparent very quickly that the delegates were not willing to apply the full Conventions to internal conflicts,<sup>128</sup> the proposals for the definition of armed conflicts reflected the criteria for belligerency. This is clearly indicated in the draft circulated by the first Working Party, which, for the application of the provisions of the Conventions, included most of the criteria suggested by individual delegations. In that draft there is also a distinction between a situation where the recognition has occurred and a situation where, although the material criteria are present, such recognition has not occurred. In the latter case, the caveat that the applicability of the article shall not affect the status of the parties is present.<sup>129</sup>

There is, therefore, the move towards a new structure for the legal regulation, independent of recognition by third parties. However, it still includes the criteria

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<sup>125</sup> See J. de Preux, ‘The Geneva Conventions and Reciprocity’, (1985) 244 *International Review of the Red Cross* 25, 27. See also the Trial Chamber of the ICTY in *Prosecutor v Kupreskić*, Case IT-95-16-T, 3 September 1999, par. 511 stating that “the defining characteristic of modern international humanitarian law is...the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.”

<sup>126</sup> See Zorgbibe, 664.

<sup>127</sup> See, for the text, Pictet, *Commentary*, 31. See above fn 28 and text.

<sup>128</sup> Although the parties to the conflict are encouraged to conclude bilateral agreements to bring into force all or part of the Geneva Conventions, in par. 3 of common article 3.

<sup>129</sup> For the full text of the first Working Party draft see above fn 47. See also *IIB*, 46-7.

applicable in the previous structure. As this was clearly incompatible with the aspiration of the Diplomatic Conference to create a text with automatic applicability, the suggestion to include such criteria was deemed impracticable.<sup>130</sup> The criteria could only be abandoned, at least as far as the text of the article was concerned, by limiting the substantive provisions applied to internal conflicts. This process was far from linear, as the interchange between *provisions* and *principles* and the ensuing effort in setting the specific principles demonstrates. The enumeration of specific criteria was gradually abandoned, as new drafts<sup>131</sup> limited the substantial provisions, leading to the creation of common article 3.

It is far from certain, however, that the omission of specific criteria in the text of common article 3 reflects the absence of such criteria in the minds of the drafters. Rather, the non-definition of an ‘armed conflict’ seems to be an effort to circumvent the all too real problems of assessment and applicability, in the absence of a neutral authoritative body, and to create a certain flexibility in its application, hoping that such flexibility will favour the widest possible applicability.<sup>132</sup> This seems to have been the aspiration of the ICRC and some delegates in the drafting process.<sup>133</sup>

As the foregoing sections have shown, this does not mean that specific criteria are absent in the concept of an ‘armed conflict’. The ICRC Commentary provides a useful example, offering a full concatenation of criteria, as included in the First Working Party draft, while characterising them as only ‘convenient’ and pronouncing of the applicability of common article 3, if an ‘armed conflict’ occurs.<sup>134</sup> It seems that the Conference sacrificed the legal certainty that a definition would offer,<sup>135</sup> in favour of the hope that practice would develop such a definition, one that would help the widespread applicability of common article 3. This, of course, assumes that a definition that would guarantee the

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<sup>130</sup> *Ibid.*, 49.

<sup>131</sup> The most important of which are the French draft and the Second Working Party draft. See, for the latter, *ibid.*, 83. See for the text of the draft, above, fn 44.

<sup>132</sup> See Draper, 87. As Farer, at 52, puts it, one possibility is that the indeterminacy of the language used served a dual purpose: on the one hand to allow governments to only grant limited protection to participants of such conflicts and, at the same time, “to incorporate within the Conventions a dynamic element which would facilitate their expansion coincident with the development among states of an enhanced sense of international community.”

<sup>133</sup> Ciobanu, 49.

<sup>134</sup> See Pictet, *Commentary*, 35-38.

<sup>135</sup> See, for example, Ciobanu, 49. See also M. Huber, ‘Quelques considérations sur une revision éventuelle des Conventions de la Haye relatives à la Guerre’ (1955) *International Review of the Red Cross* 430, 431, arguing for a strict definition, because of the highly contentious nature of the different claims in the law of armed conflict.

wide applicability of common article 3 was politically possible, at the time of the drafting. The *travaux préparatoires* suggest otherwise.

Accordingly, the problems stemming from the non-definition were meant to be solved in practice.<sup>136</sup> To this practice we shall turn in the next section. We have seen how the criteria for the applicability of common article 3 both stem and move away from the paradigm of belligerency and how these tensions relate to the evolution of the structure of the international system. Through the analysis of the process of application of common article 3 we will see how this new structure functioned in practice. The structural framework of practice will be first set out, followed by an overview of the practice.

### 3.4. Reluctant state practice – Modes of acceptance of applicability

#### 3.4.1. *The framework of state practice*

The practice of the application of common article 3 is determined by the structure of the legal regime. This, in turn, will influence the extent to which in the process of application of the article there has been a move away from considerations of ascription of status. The implicit existence of certain criteria, albeit undefined, necessitates a process of assessment and labelling.<sup>137</sup> The question then arises who will be the assessor. According to one interpretation, by virtue of article 1 of the Geneva Conventions, the government in the territory of which the armed conflict is occurring, is under the obligation of assessing and pronouncing the existence of such armed conflict.<sup>138</sup> This is because the state's obligation "to respect and to ensure respect" for common article 3 is activated automatically to the extent that the factual elements of an armed conflict are there.

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<sup>136</sup> See Farer, 51.

<sup>137</sup> See Rubin 'Rebels', 483 *ff*. See also above, on the inevitability of a process of assessment fn 66 and text.

<sup>138</sup> R. Pinto, 'Les Règles du Droit International Concernant la Guerre Civile' (1965) 114 *Recueil des Cours* 451, 526 (Pinto).

At the same time, third parties can also assess the existence of an armed conflict and often express their opinion in international fora. Nevertheless, it is the incumbent government's position that is most important in state practice. This is due both to the substantive law of common article 3 and to how this relates to the structure of the international system.

Common article 3 provides for a set of minimum humanitarian protections for “persons taking no active part in hostilities”; civilians and members of the armed group that are hors de combat. These are legal rules that need to be adhered to by the parties of the conflict. It is these parties and not third states that need to apply the rules. This is a departure from the previous legal regime of belligerency and insurgency where the law of neutrality, and questions of the protection of interests of third states in the territory of the conflict,<sup>139</sup> directly related to legal interests of third states.

Accordingly, third states more often take a position on the applicability of common article 3 in the context of international organisations, primarily the UN, to the extent that the legal and political mandate of these institutions allow this. However, when states act within the UN, notably the General Assembly and the Security Council, the terms of the debate will relate more broadly to the purposes of the UN, rather than strictly to the applicability of common article 3. The primary term will be the ‘maintenance of international peace and security’ and, therefore, whether a situation constitutes a ‘threat’ to these.<sup>140</sup>

The UN has increasingly considered ‘armed conflicts’ as such threats.<sup>141</sup> However, a transboundary element, such as the flow of refugees<sup>142</sup> and dangers to destabilisation of the region,<sup>143</sup> are commonly added factors for the internationalisation of concern. Even

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<sup>139</sup> See sections 2.2.2. and 2.2.3.

<sup>140</sup> See article 1(1) of the UN Charter.

<sup>141</sup> T. Flores Acuña, *The United Nations Mission in El Salvador : A Humanitarian Law Perspective* (Kluwer Law International, 1995), 7. See also O. Schachter, ‘The United Nations and Internal Conflict’, in K. Venkata Raman (ed.), *Dispute Settlement through United Nations* (Oceana, 1977), 301.

<sup>142</sup> An example where a finding of a threat was based on such flows of refugees is SC Resolution 688 (1991) on the Iraqi repression of the Kurds.

<sup>143</sup> An early case of such a ‘spillover’ effect was the internal conflict in Cyprus, the threat to international peace and security realised through the Turkish invasion. See SC Resolution 186 (1964). R. Gordon, ‘United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond’, (1994) 15 *Michigan Journal of International Law* 519.

though in many circumstances,<sup>144</sup> in order for the situation to be of such seriousness as to justify the finding of a threat to international peace and security and the activation of Chapter VII,<sup>145</sup> there will usually be an armed conflict unfolding, the existence of the latter is not a *conditio sine qua non* for such a finding.

Nevertheless, the maintenance of international peace and security is not the only purpose of the UN. “[S]olving international problems of a ... humanitarian character and ...promoting and encouraging respect for human rights...” also figure among the purposes of the organisation.<sup>146</sup> In this context there have been resolutions both of the General Assembly and the Security Council that have called for the respect of international humanitarian law in specific cases,<sup>147</sup> suggesting a prior determination of the existence of an armed conflict. Indeed, gradually, these purposes of the UN have translated in some relevant institutional practice. Some of this practice developed alongside the process of decolonisation,<sup>148</sup> whereas other practice is related to the development of international criminal courts and tribunals.<sup>149</sup> It is rare, however, especially in the first two decades of common article 3’s life, for states expressly to take a legal position on the applicability of common article 3 in particular conflicts. Ultimately, both with respect to the legal argumentation and the actual application of common article 3, the territorial government will be at the centre of the process of applicability. It is, accordingly, the actions and perceptions of territorial governments that influence the extent to which the application of common article 3 moves away from status-based considerations.

Nevertheless, there is another institution more directly involved in the assessment of the existence of an armed conflict. The ICRC, having as its mandate “the faithful application of international humanitarian law”,<sup>150</sup> will be directly concerned with the applicability of

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<sup>144</sup> Two such examples are the cases of the former Yugoslavia (e.g. SC Resolution 713 (1991)) and Somalia (e.g. SC Resolution 733 (1991)).

<sup>145</sup> As well as the perceived legitimacy of such a finding. See H. McCoubrey and N. White, *International Organisations and Civil Wars* (Aldershot, 1995), 39, who discuss the difference in support that resolutions on Yugoslavia and Somalia received as opposed to the one on the Kurdish repression of Iraq.

<sup>146</sup> See articles 1(3) and 55 of the UN Charter.

<sup>147</sup> This practice, however, has mostly developed after the end of the Cold War. See G. Nolte, ‘The Different Functions of the Security Council with Respect to Humanitarian Law’ in V. Lowe, A. Roberts, J. Welsh and D. Zaum (eds.) *The Security Council and War: The Evolution of Thought and Practice since 1945* (Oxford University Press, 2008), 519.

<sup>148</sup> See chapter 4.

<sup>149</sup> Covered in chapters 6 and 7.

<sup>150</sup> See article 4(c) of the ICRC Statute, available at [www.icrc.org](http://www.icrc.org).

common article 3. This does not mean, however, that every intervention and, importantly, the acquiescence of the government to such intervention, by the ICRC means the concession that there is an ‘armed conflict’ and that common article 3 is applicable.<sup>151</sup>

Firstly, the ICRC is not a judicial body and, even as a humanitarian actor, it does not always see its role as making legal pronouncements of that sort.<sup>152</sup> Indeed, it is often the case that the ICRC will not argue in favour of its intervention on the basis of common article 3. The rationale behind this is to avoid a refusal by the government, stemming from its unwillingness to accept the existence of an armed conflict.<sup>153</sup> Accordingly, the ICRC will argue for the provision of humanitarian relief, referring to general humanitarian principles or ‘principles of humanitarian law’,<sup>154</sup> in accordance with its traditional role, and irrespective of the existence of an ‘armed conflict’. Alternatively, a government can accept the intervention of the ICRC while explicitly stating that this does not mean that it has conceded the existence of an ‘armed conflict’.<sup>155</sup>

ICRC intervention is not determinative of the existence of an ‘armed conflict’ or of the assessment of the government that such a conflict exists and common article 3 is applicable, though it can serve as *prima facie* evidence of an armed conflict. It is, however, as the relation of common article 3 with the international structure stands, the most relevant actor in order to observe state practice in relation to the applicability of common article 3.

To conclude it is the territorial government that has the primary role in assessing the applicability of common article 3 in its territory, while third states and international organisations play, especially in the first decades after the Geneva Conventions, only a secondary role. In addition, the ICRC’s statements can also be useful in assessing state practice. It is the interrelationship of these actors that will indicate whether, in the process of application of the law of armed conflict, there is a move away from status

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<sup>151</sup> The same applies vice-versa: the refusal to accept the offer does not mean there is no armed conflict. See Draper, 91-2.

<sup>152</sup> See H.-P. Gasser, ‘International Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon’ (1982) 31 *American University Law Review* 911, 924. (Gasser)

<sup>153</sup> Wilhelm, 336.

<sup>154</sup> See Gasser, 924. Arguably, however, ‘principles of humanitarian law’, to the extent that humanitarian law must be applicable, can only mean the existence of an armed conflict.

<sup>155</sup> Bond, 271.

based considerations. The state practice reviewed in this chapter will be confined to the first decades after the signing of the Geneva Conventions in 1949, and when common article 3 was the only relevant instrument. The signing of the Additional Protocols in 1977 added new layers of regulation, discussed in the next two chapters.

### 3.4.2. *State practice*

There have been some efforts to amass state practice in a more or less organised way. Forsythe, for example, has produced a chart where he attempts to trace the acceptance of applicability of common article 3 between 1949 and 1975. He finds nine cases where the applicability of common article 3 was accepted and twenty-one “possible situations for the application” where it was not.<sup>156</sup> While this statistic gives us a general picture of the frequency of the invocation of common article 3, it is important to see how the application or non-application of common article 3 came about and to note any tensions in the practice. The situations discussed below generally consist of the necessary minimum of intensity and organisation, although the material factors justifying this cannot be analysed in this space.

The first effort to apply the Conventions was made during the civil war in Greece, in 1946-9. Although the Geneva Conventions had not come into force, the ICRC used the preparatory works of the Conference in order to convince the parties to observe the basic humanitarian protections provided in common article 3.<sup>157</sup> The government did not accept the existence of an armed conflict. A Special Commission, set up by the Security Council, “concluded that there was no state of actual civil war”, although “the situation

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<sup>156</sup> D. Forsythe, ‘The Legal Management of Internal War – The 1977 Protocol on Non-International Armed conflicts’ (1978) 72 *American Journal of International Law* 272, 275-6. (Forsythe) He also adds three conflicts, the Congo, 1960-4, Yemen, 1963-7, and Nigeria, 1967-70, where ‘the principles’ of the Geneva Conventions or the whole Geneva Conventions were said to apply. Forsythe’s sources vary from ICRC Reports to personal information.

<sup>157</sup> Bond, 271.

bore an extremely close resemblance to one.”<sup>158</sup> The ICRC did not succeed in persuading the parties to observe the Geneva Conventions.<sup>159</sup>

Soon after that situation, however, certain armed conflicts in Latin America arguably constitute the first examples of the acceptance of the applicability of common article 3. Accordingly, in, Guatemala (1954),<sup>160</sup> Costa Rica (1954-5), and Cuba (1958),<sup>161</sup> the ICRC, ‘in accordance with article 3 of the 1949 Geneva Conventions, offered humanitarian services which were accepted in all three of these insurrections.’<sup>162</sup>

In Yemen (1963-7) “by January 1963, both the Royalists and Republicans had agreed to “respect the principles” of the Geneva Conventions of 1949.”<sup>163</sup> However, the main legal questions with respect to Yemen related to whether the intervention of the United Arab Republic, in favour of the Republicans, and of Saudi Arabia, in favour of the Royalists, internationalised the conflict. Implicitly, however, the above statement seems to mean that an ‘armed conflict’ did exist.

Similar questions were raised with respect to the conflict in Biafra (1967-70). The Federal Government of Nigeria never accepted the applicability of common article 3,<sup>164</sup> although, in practice, steps were taken to abide by obligations contained in common article 3 and the Geneva Conventions. Accordingly, camps were created for the humane treatment of prisoners and a Code of Conduct was issued to the Nigerian soldiers containing extensive rules and obligations, in accordance with the Geneva Conventions. Moreover the ICRC was invited to inspect the facilities. “In general, the Code of Conduct was taken seriously and enforced by the commanders.”<sup>165</sup> When the Nigerian army was accused of indiscriminate bombing, it did not argue that it had no obligation to discriminate under common article 3 but denied the allegations and eventually managed to control its forces

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<sup>158</sup> Castrén, 67

<sup>159</sup> *Ibid.*; See also J. Campbell, ‘The Greek Civil War’ in E. Luard (ed.), *The International Regulation of Civil Wars* (Thames and Hudson, 1972), 37.

<sup>160</sup> The matter is not very clear, though. See, for example, Bond, 272, who argues that the ICRC intervened despite the non-acceptance of the applicability of common article 3. See also Siotis, 209-10.

<sup>161</sup> Siotis, 213.

<sup>162</sup> Castrén, 77-8.

<sup>163</sup> K. Boals, ‘The Relevance of International Law to the Internal War in Yemen’, in R. Falk (ed.), *The International Law of Civil War* (The Johns Hopkins Press, 1971), 303, 315.

<sup>164</sup> See, for example, Bond, 271.

<sup>165</sup> M. Bothe, ‘Article 3 and Protocol II: Case Studies of Nigeria and El Salvador’, (1982) 31 *American University Law Review* 899, 903. (Bothe, ‘Case Studies’)

to that effect.<sup>166</sup> The main legal issue, again, was whether the conflict was international, either through the recognition of belligerency, or because of the existence of a *de facto* regime in Biafra prompting the recognition of statehood of Biafra by some states.<sup>167</sup>

Issues of internationalisation were also raised in Korea (1950-3) and in the first phase of the Vietnam conflict (1946-54). In the former, according to Castrén,<sup>168</sup> there was a decision to apply common article 3 at the beginning of the conflict and by and large it was respected. In the latter situation both parties, but particularly France, seem to have hindered in practice the overview by the ICRC.<sup>169</sup>

In the case of the conflict in the Congo (1960-4),<sup>170</sup> the parties to the conflict, the Congolese government and Katanga, had a high level of organisation and even the control of territory.<sup>171</sup> Belgium, the former colonial power, had ratified the Geneva Conventions in 1952 and, accordingly, in the view of the ICRC, the Congo was bound by them. The ICRC added that a notification by the newly independent state that it considers itself bound would be 'advisable'.<sup>172</sup> The Congolese government sent a declaration to the ICRC on February 20, 1961, reaffirming the state's adherence to the Geneva Conventions.<sup>173</sup> President Tshombe, of Katanga, declared that he would adhere to the principles mentioned in an ICRC appeal to uphold the Geneva Conventions, and accepted visits by the ICRC.<sup>174</sup> This did not prevent certain atrocities, however, such as the massacre of the Baluba tribe in the Kasai province.<sup>175</sup> The Congo, in relation to the Katanga secession, however, was another conflict where the main legal issue was the right to self-determination and secession of the Katanga province. Statements and practice of

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<sup>166</sup> *Ibid.*

<sup>167</sup> See for example, D. Ijalaye, 'Was "Biafra" At Any Time a State in International Law?' (1971) 65 *American Journal of International Law* 551. (Ijalaye) Biafra was recognised by only four states. Bothe and Wodie argue that this was not enough for statehood. See Bothe, 'Case Studies', 903, also for the argument that the conflict was international because Biafra was a *de facto* regime. *Contra* R. Higgins, 'International Law and Civil Conflict' in E. Luard (ed.) *International Regulation of Civil Wars* (Thames and Hudson, 1972), 169, 170-1 (Higgins); F. Wodie, 'La Sécession du Biafra et le Droit International Public' (1969) 73 *Revue Générale de Droit International Public* 1018, 1036-8.

<sup>168</sup> Castrén, 70-2.

<sup>169</sup> *Ibid.*, 72-3.

<sup>170</sup> The situation in Congo included a variety of actors and conflicts ranging from the fight against remaining Belgian paratroopers, fighting within government factions and, most importantly, the conflict over the Katanga secession. See generally, D. McNemar, 'The Post-Independence War in the Congo', in R. Falk (ed.), *The International Law of Civil War* (The Johns Hopkins Press, 1971), 244. (McNemar)

<sup>171</sup> *Ibid.*, 258.

<sup>172</sup> See the ICRC's statement in (1962) *International Review of the Red Cross* 208.

<sup>173</sup> See (1962) *International Review of the Red Cross* 7.

<sup>174</sup> McNemar, 259-60. See also Moir, 74-8.

<sup>175</sup> McNemar, 265-7.

adherence to common article 3 by and large coincided with claims to international status. When the secession war was over, further rebel activities were treated as an internal matter and the applicability of common article 3 was not accepted.<sup>176</sup>

A final example where the applicability of common article 3 co-existed with claims for the internationalisation of the conflict is the Algerian war (1954-1962), between France and the Algerian Front de Libération Nationale (FLN).<sup>177</sup> Initially, for France, the situation constituted a 'domestic matter' and the increasingly extended French military action in its colony constituted 'police action'.<sup>178</sup> The FLN argued, since early in the conflict, for the applicability of common article 3.<sup>179</sup> By 1958 the Algerians had created a Provisional Government (GPRA) and, arguably, were gradually in control of certain areas.<sup>180</sup> Eventually France, in 23 June 1956 by a communiqué issued by the French Prime Minister's office to the ICRC, accepted, 'on the basis of common article 3', to allow it to intervene.<sup>181</sup>

Nevertheless, at the time when France was accepting the applicability of common article 3, the FLN was moving away from it. Accordingly, the Algerians argued that they possessed the status of belligerents and that such an implicit recognition had occurred. Their arguments were based both on factual characteristics of the conflict and the actors<sup>182</sup> as well as on actions by France that granted them this status.<sup>183</sup> By arguing for the application of belligerency, they excluded the application of common article 3. According to this argument, the status of belligerent could not coexist with paragraph 4 of common article 3, stipulating the non-effect to the legal status of the parties to the conflict.<sup>184</sup> At this point, it was in the interest of the Algerian side to argue exclusively for

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<sup>176</sup> *Ibid.*, 280-1.

<sup>177</sup> For the relevant facts see Bedjaoui and the articles by Flory cited below. See also A. Fraleigh, 'The Algerian Revolution as a Case Study in International Law', in R. Falk (ed.), *The International Law of Civil War* (The Johns Hopkins Press: Baltimore and London, 1971), 179. (Fraleigh)

<sup>178</sup> According to Flory France's actions were in the context of re-establishing order. Any extraordinary measures are explained as emergency rather than war measures. M. Flory, 'Algérie et Droit International', (1959) 5 *Annuaire Français de Droit International* 817, 830. (Flory (1959)) See also Algerian Office, 13

<sup>179</sup> See E. van Cleef Greenberg, 'Law and the Conduct of the Algerian Revolution' (1970) 11 *Harvard Journal of International Law* 37, 49. (van Cleef Greenberg)

<sup>180</sup> See Bedjaoui, 38-42.

<sup>181</sup> *Ibid.*, 213; Siotis, 210-1.

<sup>182</sup> See Bedjaoui 41, 50.

<sup>183</sup> See *ibid.*, 143-172. *Contra* Flory 831-2, Touscoz 955-7.

<sup>184</sup> See, for this argument, Bedjaoui, 215. The Algerian Office took a different position arguing that, "in urging its application, the Provisional Government of the Algerian Republic is not compromising its claim for recognition of

the internationalisation of the conflict in order to achieve statehood. The Provisional Government, accordingly, took the step of ratifying the Geneva Conventions.<sup>185</sup> It used this to portray itself as a subject of international law,<sup>186</sup> although, the Swiss depository of the Conventions made clear that the accession to the Conventions will only have effect against states which have recognised Algeria's statehood.

The conflict ended officially with the independence of Algeria in March 1962. The conflict reflects the difficulties of application of common article 3, between questions of 'domestic jurisdiction' and arguments for the internationalisation of the conflict. To the extent that the insurgent actor will not have achieved a political and military status which would threaten the incumbent government, the latter will argue for the non-existence of an armed conflict and will characterise its military effort as a 'police operation'. On the other hand, the factual characteristics that will make it necessary for the government to accept the existence of an 'armed conflict' and the applicability of common article 3 often occur at the point where the conflict is on the verge of being internationalised.

Finally, in a variety of conflicts, common article 3 was never accepted or applied. Some examples are: Rhodesia(1959), Laos(1961-2), Indonesia(1966-9), Ceylon(1971), Bolivia(1971), Burundi(1972), the Philippines(1972-), and Angola(1973-6).<sup>187</sup> In the cases of Kenya and Cyprus, Britain permitted the ICRC to visit detainees but it "made it clear that these invitations...arose not from any obligation under Article 3, but as a gratuitous act of sovereignty."<sup>188</sup> Ultimately, the dependence on the discretionary decision of the government for the applicability of common article 3 has rendered the relevant state practice fragmented and unsatisfactory.<sup>189</sup> Castrén is particularly dispirited: "Many legal questions have remained confused or completely open; efforts to solve them must rely on logic alone or on finding support in some general principles of law."<sup>190</sup> To conclude,

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its belligerent status or of the fact that the conflict in Algeria constitutes a war." See Algerian Office, 18. See also van Cleef Greenberg, 51, who notes the discrepancy.

<sup>185</sup> The Algerian Government's communiqué is reproduced in Algerian Office, 85.

<sup>186</sup> See also Bothe, 'Case Studies', 901, who draws a parallel, in terms of achieving international status, between accession to the Geneva Conventions and recognition of belligerency.

<sup>187</sup> See Bond, 270-2; Forsythe, 276.

<sup>188</sup> Higgins, 183.

<sup>189</sup> See also, for this conclusion, Bond, 272-3; Ciobanu, 66; Moir, 86. Rubin argues that whatever success the ICRC has had in persuading some sides to observe the common article 3 is partly due to its "slight" protections. See Rubin, 'Rebels', 484-5.

<sup>190</sup> Castrén, at 78-9, refers, in addition, to questions relating to recognition of belligerency and intervention.

the practice discussed above shows that the central role of the territorial government often leads either to the denial of the applicability of the article or to its precarious existence between ‘police operations’ and ‘international armed conflict’. These features will be further analysed below, and linked to a status-based rationale of applicability.

### *3.4.3. Analysis of state practice*

The central role of the government in pronouncing the applicability and actually applying common article 3 significantly affects the article’s function. It seems that states will not accept the applicability of common article 3 to the extent that they feel that they can quell the insurgency. The government will contend that the situation is an internal, police matter, within the exclusive jurisdiction of the state, and that international law and, specifically the law of armed conflict, is not applicable.

It is only when the authority of the government is already seriously threatened, that the application of common article 3 may occur.<sup>191</sup> A serious threat to the government’s authority will mean that politically and militarily the non-state armed group is already perceived to have achieved a certain status. This reality will also be reinforced by international pressure, to the extent that the government has not managed to end the conflict quickly. In practice, these elements are likely to be more present in conflicts that include control of territory, as was the case in Congo (Katanga) or Nigeria (Biafra). Another element that might contribute to the threat to the government, and also to the international perception and pressure on the matter is the question of duration. Prolonged conflicts, such as Nigeria (Biafra) and the conflict in Algeria, can include a gradual consolidation of the organisation of the non-state armed group as well as mounting pressure towards the government to accept the applicability of common article 3.

It seems, therefore, that, although common article 3 mandates the vertical application of humanitarian rules depending only on a minimum of intensity and organisation, in

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<sup>191</sup> Bond, 272-3.

practice the resistance of governments will have the effect that mostly conflicts that have reached a higher threshold will be regulated. States will not accept that the situation is not an ‘internal matter’ both because the application of common article 3 will in practice limit the means at their disposal, but also because in their perception the applicability of common article 3 would lead to the conferral of status to their opponents.

This perception of the conferral of status is by nature somewhat vague and straddles deferent kinds of statuses. Indeed, the legal status *strictu sensu*, the aggregate of rights and obligations contained in common article 3, is only the starting point for this perceived status conferred. This narrow legal status can be understood to be conflated with the perception of the conferral of a wider legal status; that of an entity recognised in international law. If seen from the perspective of a legal system dominated by the paradigm of belligerency, anchored in a subject/object dualism, and the absolute centrality of state sovereignty, it is difficult to conceive of a narrow legal status not conflated with that of a state-like subject of international law. Furthermore, the perception of such ‘recognition’ of the entity through international law can be linked, in the perception of both the government and the group, to the boosting of its political status.

Moreover, while the new language of the Geneva Conventions does not include the concept of belligerency, the relevant distinction in the new regime is the one between international and non-international armed conflicts. While belligerency is still present in the legal discourse,<sup>192</sup> the claims for status gradually referred to the concept of international armed conflict.<sup>193</sup> Indeed, in the state practice considered above, the clear majority of cases where common article 3 was either explicitly or implicitly respected, included legal and political questions of internationalisation of the conflict, either through the intervention of third states, or, more importantly for the present focus of the discussion, because of claims to statehood.<sup>194</sup> The tension present in the state practice is the one between a conflict unregulated by international law and left within the domestic jurisdiction of the state, and a conflict that tends to inter-national war.

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<sup>192</sup> The term was mentioned in Algeria and Biafra, but no recognition was made. For Algeria see Bedjaoui, 140 *ff*. For Biafra see Ijalaye, 555.

<sup>193</sup> See chapter 4.

<sup>194</sup> The former include Korea, Vietnam, Yemen. The latter include the Congo, Biafra, and Algeria.

Common article 3 sits uneasily in this tension. While the ‘objective’ criteria for its application were conceived as the criteria for the existence of a ‘civil war’, diminished by degree, its application occurred mostly where the conflict reached such levels of ‘civil war’. This is not to say that there was no applicability of common article 3 in situations where, for example, effective control of territory was not present. Nor is it to belittle the radical structural departure attempted by common article 3, characterised as the emancipation of the law of Geneva from the law of The Hague by one author.<sup>195</sup> It is, however, to point out its uneasy existence on the ground between ‘domestic matter’ and ‘international(ised) conflict’ and how this reflects the structure of the *jus in bello*. In this way, the fundamental move from a status-based to an individual-protection rationale attempted through common article 3, was often frustrated in practice. The precarious existence of the concept of ‘non-international armed conflict’ between police operation and international armed conflict is a reminder of the constant influence of status-based considerations in the application of a low threshold.

### 3.5. Conclusions

Common article 3 signifies a significant shift in the structure of the international legal system and the rationale for the regulation of conflicts involving non-state armed groups. It constitutes an attempt to move from a process of decentralised and optional conferment of status in a horizontal system of state and state-like actors, to a system of wide and automatic regulation for the provision of humanitarian protection, in a vertical system of public law. In that sense, it constitutes a fundamental structural shift from the previous legal regime. The combination of the narrow threshold, the aspirations of automatic applicability, and the explicit provision of a set of humanitarian rules for non-international armed conflicts, point to such a fundamental structural shift from a status-based to a humanitarian-protection rationale.

Nevertheless, the shadowy presence of the concept of belligerency, at the time of the drafting, meant that the criteria that were proposed reverted to the paradigm of state-like,

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<sup>195</sup> Siotis, 225-7.

status-bearing entities. In order for common article 3 to achieve wide and flexible applicability, an approach of non-definition was taken, together with assurances for the non-conferment of status and the extension of a minimum of humanitarian rules.

The attempt to define the threshold, mainly through the doctrine and the work of the ICRC, points to the two main criteria of intensity and organisation. Intensity focuses mainly on the military mobilisation inside the territory of the state, as opposed to its effects on third states' interests. The effects of the conflict on individuals are brought more to the forefront and this reflects the rationale of humanitarian protection. The criterion of organisation focuses on the military organisation of the non-state armed group, namely its ability to bring about the necessary intensity and apply basic humanitarian rules, and less so on its political organisation and prospects.

The central role that incumbent governments played in accepting the applicability of common article 3 meant that, in practice, the hopes for common article 3's automatic applicability were often frustrated. It was not only that governments did not care for the limitations on their actions imposed by the rules of common article 3. The minimum legal status contained in the substantive rules of common article 3 was conflated with conferment or acknowledgment of a wider legal status as well political and military status, and was often perceived by the incumbent government as a concession towards the political goals of the non-state armed group.

Accordingly, the applicability of common article 3 was often conceded only when the non-state armed group had already achieved, both internally and internationally, a significant level of political or military status. The consolidation of the control of territory, the long duration of the conflict, or the repeated discussion of the issue in fora such as the UN, functioned as indications of such status, without being necessary legal criteria for the applicability of common article 3.

On the side of the non-state armed groups, as seen in the example of the Algerian war, common article 3 was used as a first step towards achieving the status of a party to an international armed conflict. In that way, the paradigm of belligerency and the understanding that there is only room for state-like, status-bearing entities in the international legal system survived.

This understanding is at the centre of the next episode of regulation of non-state armed groups examined in the thesis: the applicability of the legal rules of international armed conflict to national liberation movements.

## 4. Chapter 4: Wars of national liberation

### 4.1. Introduction

The previous two chapters have tracked the move from the clearly status-based regime of belligerency and insurgency to the construction of a vertical, humanitarian-protection-based regime through common article 3. It has been argued that, while common article 3 constitutes a significant departure from the belligerency system, status-based considerations survive in the non-definition of the article as well as the process for the decision of its applicability.

The next two chapters will look at the regulatory output of the multilateral diplomatic conference, which occurred between 1974 and 1977. The historical context is significant. The period of decolonisation was nearing its end and a variety of new states,<sup>1</sup> formed through this struggle, were participating in the Diplomatic Conference. At the same time a number of wars of national liberation were still ongoing.

These new states had gone through the process of being labelled rebels and criminals according to the national law of the colonial state. They were eager to change the legal regime in order to confer a certain status to national liberation movements and extend the regulation of international humanitarian law to those fighting in such conflicts. However, at the end of the process, even though humanitarian protection is developed in detail throughout the Geneva Conventions and the document that became Additional Protocol I, internationalisation, namely the application of the law of international armed conflict to a conflict<sup>2</sup> remained a matter of conferring status to a specific kind of actor in a specific set of situations.

The outcome of the negotiations, article 1(4) of the 1977 Additional Protocol I, will be analysed here. The first part of the chapter will deal with the negotiating process. Before

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<sup>1</sup> By 'new states' what is meant is simply newly independent states. For a general discussion of the approach of new states towards the old international law regime see R. Anand, *New States and International Law* (Vikas Publishing House, 1972), particularly p. 45 ff. (Anand, *New States*)

<sup>2</sup> This kind of internationalisation *stricto sensu* should be distinguished from internationalisation *lato sensu*, which refers to the international interest and involvement in a conflict situation. In this chapter the term internationalisation will refer to the former meaning, unless otherwise specified.

that the development of the right to self-determination, a concept central to the ascription of status in article 1(4), will be considered. In the discussion of the *travaux préparatoires* special attention will be paid to the debate between the proponents<sup>3</sup> of internationalisation and their critics.<sup>4</sup> The different perspectives yield different opinions about the actors perceived to merit the application of the full regime, about the circumstances in which this can happen and about the status this process confers. The analysis will then turn to the threshold for wars of national liberation. Here, the focus is on the actor to whom status is conferred and the opponents of this actor, rather than the material situation. Finally, the process of application, and recognition of the actor, will be discussed through some relevant practice as well as the process set down by article 96(3) of Additional Protocol I.

## 4.2. The road to article 1(4)

### 4.2.1. *Self-determination and wars of national liberation before the Diplomatic Conference*

Central to the concept of wars of national liberation is the right to self-determination of peoples,<sup>5</sup> as this constitutes the basic criterion for the internationalisation of armed conflicts and the ascription of status. It is therefore important to track its development. Although a full exploration of the concept and its development is beyond the scope of this thesis, some significant milestones, especially with respect to the concept's relationship with the law of armed conflict, will be discussed.

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<sup>3</sup> By the term 'proponents', in this chapter, I will refer to a broad alliance of states, consisting mostly, but not exclusively, of 'new states' and 'third world' states and arguing, through their delegates in the Diplomatic Conference, for the internationalisation of wars of national liberation.

<sup>4</sup> By the term 'the critics' I will refer to those states who, through their delegates, opposed and criticised the inclusion of wars of national liberation in the category of international armed conflicts. These were mainly western states as well as states, like Israel, who were directly affected by the internationalised categories

<sup>5</sup> See generally A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, 1995) (Cassese, *Self-Determination*); J. Crawford, 'The Right to Self-Determination in International Law: Its Development and Future', in P. Alston (ed.) *Peoples' Rights* (Oxford University Press, 2001), 7 (Crawford, 'Self-determination'); M. Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice', (1995) 43 *International and Comparative Law Quarterly*, 241 (Koskenniemi, 'Self-determination'); R. McCorquodale, 'Self-Determination: A Human Rights Approach', (1994) 43 *International and Comparative Law Quarterly*, 857 (McCorquodale, 'Self-determination').

Initially conceived as a political principle<sup>6</sup> its legal evolution had, up to the time of the Diplomatic Conference, had led to its being widely considered a legal right.<sup>7</sup> Against this, the very dynamism of the concept and the potential effects that it could have on the formation of states<sup>8</sup> meant that its extent and legal consequences never ceased to be controversial.

The development of the right to self-determination has been associated with the UN General Assembly. The two General Assembly Resolutions recognised as seminal in the literature<sup>9</sup> are General Assembly Resolutions 1514 (XV)<sup>10</sup> and 2625 (XXV).<sup>11</sup> The latter contains a passage particularly relevant to the internationalisation of wars of national liberation:

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter

The language of the Resolution points to the centrality of the question of status in international law's approach to colonialism and decolonisation. Moreover, the language accentuates the territorial and separate nature of the colonial unit. As we shall see, these

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<sup>6</sup> See Cassese, *Self-determination*, 11 ff. See also A. Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 *International and Comparative Law Quarterly* 99.

<sup>7</sup> See ICJ, *Western Sahara*, Advisory Opinion, (1975) ICJ Reports 12; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, (1971) ICJ Reports 16. See Crawford, 'Self-determination', 18-19.

<sup>8</sup> See *ibid.*, 11-12, for the argument that there is a link between the non-regulation of the creation of states by international law and the non-existence of a right of self-determination.

<sup>9</sup> See, for example, Cassese, *Self-determination*, 70; Wilson, 61 ff.; Crawford, 'Self-Determination', 30

<sup>10</sup> UNGA Res. 1514 (XV), 14 December 1960, adopted by 89 in favour, none against, and nine abstentions. The resolution was entitled: "Declaration on the Granting of Independence to Colonial Countries and Peoples". Operative paragraph 2 of the resolution states: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

<sup>11</sup> UNGA Res. 2625 (XXV) 24 October 1970, entitled "The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations". This resolution marked the first time when western states did not abstain: the resolution was adopted by consensus.

elements served as both an argument for the internationalisation of the conflict<sup>12</sup> as well as a limitation of the categories of internationalised conflicts.<sup>13</sup>

As far as the *jus in bello* is concerned, the key General Assembly Resolution, which very closely preceded the Diplomatic Conference was Resolution 3103.<sup>14</sup> Invoking the UN Charter, the Declaration on Friendly Relations among States, and General Assembly Resolution 1514 (XV), the Resolution affirmed that “[t]he struggle of peoples under colonial and alien domination and racist regimes for the implementation of their right to self-determination and independence is legitimate and in full accordance with the principles of international law”.<sup>15</sup> Furthermore, referring directly to the *jus in bello* it extended the status and protections included in the international armed conflicts regime to combatants fighting in wars of national liberation. The Resolution proclaimed in operative paragraphs 3 and 4 that

3. The armed conflicts involving the struggle of peoples against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions, and the legal status envisaged to apply to the combatants in the 1949 Geneva Conventions and other international instruments is to apply to the persons engaged in armed struggle against colonial and alien domination and racist regimes.

4. The combatants struggling against colonial and alien domination and racist regimes captured as prisoners are to be accorded the status of prisoners of war and their treatment should be in accordance with the provisions of the Geneva Conventions relative to the Treatment of Prisoners of War, of 12 August 1949.

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<sup>12</sup> This was a recurring argument in the *travaux préparatoires*. See, for example, the Romanian delegate at CDDH/I/SR 2, par. 14.

<sup>13</sup> Below sections 4.4.1..

<sup>14</sup> UNGA Res. 3103 (XXVIII), 12 December 1973, entitled “Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes”. This was adopted by 82 votes in favour, 13 abstentions, and 19 votes against. This wasn’t the first General Assembly Resolution adopted on questions of wars of national liberation, but it is the clearest and most forceful one. See also, for example, UNGA Resolution 2444 (XXIII), which reiterates Resolution XXIII, adopted at the 1968 International Conference on Human Rights held in Teheran, and asked for fighters in wars of national liberation to be treated as prisoners of war.

<sup>15</sup> At operative par. 2.

The transformation espoused by the Resolution is clear. According to the prevailing view in international law<sup>16</sup> up to that point wars of national liberation were only considered to be covered by common article 3, as occurring in the territory of one of the High Contracting Parties. The above Resolution can be seen as an attempt to change that, rather than as a change in itself. This is because General Assembly resolutions are not binding on member states nor are they a formal source of law. They can however be viewed as one factor in the development of customary law, especially if they are accepted by a clear majority vote.<sup>17</sup>

Although the evolution of the right to self-determination had conferred political legitimacy to the struggle of colonial peoples,<sup>18</sup> it did not lead to a corresponding recognition of the collective legal status of parties to international armed conflicts. The opposition by many, especially western, states to the resolution and the attempted legal change was clear. As the representative of the US put it, in his view, the resolution was “wrong in virtually every paragraph as a statement of law.”<sup>19</sup>

It is important to note, however, that, with respect to the issues of POW status in paragraph 4 of the resolution, what it attempted to achieve as a matter of law had already often occurred as a matter of practice. In conflicts such as those of Algeria and Biafra states had grudgingly moved towards the conferment of POW status to combatants. Deliberately withholding the *opinio juris* element of customary law formation, they did so while refusing to concede that they did so as a matter of law.<sup>20</sup> At the same time, the General Assembly had, through a variety of Resolutions on the situations in the

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<sup>16</sup> See Sandoz, *Commentary*, 47. See also G. Draper, ‘Wars of National Liberation and War Criminality’, in M. Howard (ed.) *Restraints on War: Studies in the Limitation of Armed Conflict* (Oxford University Press, 1979), 149 (Draper, ‘War Criminality’). *Contra*, even before the Diplomatic Conference, G. Abi-Saab, ‘Wars of National Liberation and the Laws of War’, (1972) 3 *Annales d’études internationales* 93.

<sup>17</sup> See, among others, O. Schachter, ‘International Law in Theory and Practice’ (1982) 178 *Recueil des Cours* 10, 111 ff. See also for a reference to the customary merits of resolution 2625 with respect to the *jus ad bellum* ICJ, *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), [1986] ICJ Reports 4, par. 188.

<sup>18</sup> Indeed, it is characteristic that even those who opposed the resolution did not criticise the aims of national liberation movements. See the comments by Aldrich, Representative of the US, UNGAOR, 28<sup>th</sup> session, 6<sup>th</sup> Committee, 1451<sup>st</sup> meeting, 1 December 1973.

<sup>19</sup> Mr Evans (USA), UNGAOR, 28<sup>th</sup> session, 2197<sup>th</sup> plenary meeting, 12 December 1973. The resolution, however, did not draw criticism only from representatives of states. Scholars such as Kalshoven argued that the resolution was rushed through the sixth committee without much debate and constituted “an evident attempt to prejudge the issues in question before the Diplomatic Conference had even started.” See F. Kalshoven, ‘Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The First Session of the Diplomatic Conference, Geneva, 20 February – 29 March 1974’ (1974) 5 *Netherlands Yearbook of International Law* 3, 24 (Kalshoven, ‘First Session’).

<sup>20</sup> See, for example, Bothe, ‘Case Studies’, 901; Fraleigh, 195. See section 3.4.2.

Portuguese colonies, South Africa and Rhodesia, requested that such treatment be conferred.<sup>21</sup> Resolution 3103, attempted to crystallise such state practice. However, the often clear position of states that the treatment of enemy soldiers was not a result of legal obligation points to the non-existence of the necessary *opinio juris* for the formation of custom.

These developments show that the right of self-determination was very much at the centre of the political and legal international stage. On the one hand, self-determination had gradually been accepted as a legal right and not just as a principle for ordering the international system. On the other hand, the legitimisation of self-determination units that this entailed was used to confer status upon them as a matter of law in the context of the *jus in bello*. The latter consequence remained extremely controversial and polarised states. It did so at the ‘Conference of Government Experts’ of 1971 and 1972,<sup>22</sup> which convened by the ICRC in consultation with the UN Secretary General, in preparation for the Diplomatic Conference.<sup>23</sup> There, a discussion of “internationalisation” took place that dealt with three types of situations: Where the insurgent party has come to display many of the features of a State;<sup>24</sup> where there is foreign intervention;<sup>25</sup> and wars of national liberation. The latter was the most controversial.<sup>26</sup> Against this background the ICRC called for a Diplomatic Conference, to take place in Geneva in 1974.

#### 4.2.2. *The travaux préparatoires of the Diplomatic Conference*

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<sup>21</sup> See, for example, UNGA Resolution 2383(XXIII) and UNGA Resolution 2508 (XXIV) on Southern Rhodesia, UNGA Resolution 2547 (XXIV), on Southern Rhodesia, Portuguese colonies and Namibia, UNGA Resolution 2678 (XXV) on Namibia, UNGA Resolution 2871 (XXVI) on Namibia.

<sup>22</sup> See section 5.2. for a fuller account of the ICRC activity in preparation for the Conference.

<sup>23</sup> See Conference of Government Experts, 23 ff. See also F. Kalshoven, ‘Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts, 24 May – 12 June, 1971’ (1971) *Netherlands Yearbook of International Law* 68, 81 (Kalshoven, ‘Experts’); F. Kalshoven, ‘Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Conference of Government Experts (Second Session), 3 May – 2 June 1972’ (1972) 3 *Netherlands Yearbook of International Law* 18.

<sup>24</sup> Conference of Government Experts, 13 ff.

<sup>25</sup> *Ibid.*, 17 ff.

<sup>26</sup> Kalshoven, ‘Experts’, 81.

The first days of the Diplomatic Conference set the tone for the entire first session. The topics that dominated the agenda, even before the discussion of the proposed draft Additional Protocols submitted to the Diplomatic Conference by the ICRC, related to the invitation of Guinea-Bissau and North Vietnam as well as the invitation of national liberation movements to participate in the proceedings, albeit without a vote.<sup>27</sup> The participation of national liberation movements in international fora was a practice that had first developed in the UN context.<sup>28</sup> The practice of participation of these groups reflected the political status that they were being accorded and their expectations that it be transformed into legal status. When these matters were settled, and in the limited time that was left in the first session,<sup>29</sup> the topic that dominated the discussion was the inclusion of wars of national liberation in article 1 of Additional Protocol I, which set the scope of the Protocol, defining international armed conflicts.

In its draft, the ICRC had evaded the issue of the regulation of wars of national liberation<sup>30</sup> and had not included the term in Protocol I, except as a footnote in article 42. This dealt with the conditions to be fulfilled by combatants for the grant of POW status.<sup>31</sup> The material scope of Protocol I was set simply by referring to common article 2 of the Geneva Conventions.<sup>32</sup> Proponents of the inclusion of wars of national liberation

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<sup>27</sup> The national liberation movements that would be invited to participate were the ones “recognized by the regional intergovernmental organizations concerned”. See Resolution 3(I) Participation of National Liberation Movements in the Conference, at CDDH/55. See also Rule 58 of the Rules of Procedure at CDDH/2/Rev. 3. See also Kalshoven, ‘First Session’, 27-8.

<sup>28</sup> See R. Baxter, ‘Humanitarian Law or Humanitarian Politics? The 1974 Diplomatic Conference on Humanitarian Law’, (1975) 16 *Harvard International Law Journal* 1, 10. (Baxter, ‘Politics’)

<sup>29</sup> See *ibid.*, 11, arguing that “[o]ne single issue dominated the Conference and stood in the way of hard, concentrated work on the substance of international humanitarian law.” For the effects of this to the discussion of Additional Protocol II section 5.3.

<sup>30</sup> See G. Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’, (1979) 165 *Recueil des Cours* 365, 374 (Abi-Saab).

<sup>31</sup> The proposed text was as follows:

“In cases of armed struggles where peoples exercise their right to self-determination as guaranteed by the UN Charter and the “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations”, members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war for as long as they are detained.”

<sup>32</sup> Common article 2 reads as follows:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

in the Protocol immediately challenged the draft. The debate was conducted and largely concluded<sup>33</sup> at the Committee level and during the first (1974) session of the Diplomatic Conference.

The first text to be proposed was amendment CDDH/I/5, which was supported by the Socialist group (USSR, Poland, Czechoslovakia, German Democratic Republic, Hungary, Bulgaria) with the support of three African states (Algeria, Morocco and Tanzania). The amendment proposed the addition of a second paragraph to article 1 of the draft Protocol to read as follows:

The international armed conflicts referred to in Article 2 common to the Conventions include also conflicts where peoples fight against colonial and alien domination and against racist regimes.

The second proposed amendment, CDDH/I/11, was submitted the next day and supported by 15 states,<sup>34</sup> including African states (Egypt, Algeria, Libya, Sudan, Nigeria, Cameroon, Ivory Coast, Zaire), Asian states (Syria, Kuwait, Yemen, India, Pakistan) and with the support of Norway, Australia and Yugoslavia. It proposed, like the previous amendment, the addition of a second paragraph to article 1 reading as follows:

The situations referred to in the preceding paragraph include armed struggles waged by peoples in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.<sup>35</sup>

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<sup>33</sup> A brief debate took place again in the discussion at the final Plenary session (1977) and in the explanations of vote. In addition, article 96(3), which will be discussed below, was proposed and adopted at the last Committee session.

<sup>34</sup> Abi-Saab, at 375, argues that it was a product of the non-aligned movement.

<sup>35</sup> Indeed a similar amendment had been proposed in the Conference of Government Experts. See Kalshoven, 'Experts', 81; Abi-Saab, 439 fn 19.

Abi-Saab, introducing the amendment as delegate for Egypt, argued that the expression ‘wars of national liberation’ was omitted by the proposed amendment in order to adhere to the

generally-accepted legal concepts as a frame of reference...Participants were thus not being asked to accept something new; it was merely proposed that they should affirm explicitly in the field of humanitarian law what they had already accepted as binding law within the United Nations and within general international law.<sup>36</sup>

This was a position adopted by many of the proponents of the inclusion of wars of national liberation.<sup>37</sup>

On the same day, four western states (United Kingdom, Belgium, the Netherlands, West Germany), supported by Pakistan and Argentina, proposed an amendment (CDDH/I/12) suggesting a second and third paragraph to be included within Article 1, with the second paragraph reiterating common article 1 of the Geneva Conventions and the third paragraph containing a clause similar to the Martens clause.<sup>38</sup>

In cases not included in this present Protocol or in other instruments of conventional law, civilians and combatants remain under the protection and the authority of the principles of international law, as they result from established custom, from the principles of humanity and the dictates of public conscience.

The Western states meant this as a counter-proposal whereas Pakistan, as a sponsor of CDDH/I/11, only saw it as a useful addition.<sup>39</sup>

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<sup>36</sup> CDDH/I/SR 2, par. 8-11.

<sup>37</sup> See for example Yugoslavia (CDDH/I/SR 2, par. 17); Tanzania (CDDH/I/SR 2, par. 42); Romania (CDDH/I/SR 2, par. 53); USSR (CDDH/I/SR 3, par. 1); Norway (CDDH/I/SR 3, par. 34); Argentina (CDDH/I/SR 4, par. 32); FRELIMO (CDDH/I/SR 5, par. 15)

<sup>38</sup> See T. Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94 *American Journal of International Law* 78.

<sup>39</sup> Abi-Saab, 385.

What followed was a debate on the merits of regulating wars of national liberation as international armed conflicts. Strategically, the proponents tried to combine the amendments in order to achieve the necessary majority. Although it was argued by many that the amendments were fully compatible,<sup>40</sup> it can be argued that there were significant differences between the two. Indeed, where CDDH/I/11 referred to the right of self-determination, as defined in two major instruments, CDDH/I/5 referred to specific types of (oppressive) regimes. The latter criterion was significantly narrower than the former.<sup>41</sup> Their fusion would, of course, lead to the narrower result, thus affecting the scope and the continuing application of the article.<sup>42</sup> Indeed, western states have been criticised for not accepting the more “moderate” CDDH/I/11, a diplomatic stance that led to the eventual inclusion of the socialist group amendment.<sup>43</sup> Nevertheless, the merger of the amendments led to amendment CDDH/I/41, proposed by 32 states (with the absence of Norway and Australia):<sup>44</sup>

The situations referred to in the preceding paragraph include armed conflicts where peoples fight against colonial and alien domination and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

Finally, a group of Latin American states, suggested amendment CDDH/I/71, which added to CDDH/I/41 the Martens clause, as expressed in CDDH/I/12 and added a

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<sup>40</sup> See, for example, the USSR suggesting a merger of the amendments (CDDH/I/SR 3, par. 1). Mexico (CDDH/I/SR. 3, par. 20) and India (CDDH/I/SR 3, par. 24) agreed. However, it can be argued that the Socialist amendment, by referring only to specific regimes, was more limited in scope than the non-aligned one. See below Section... See also J. Salmon, ‘Les Guerres de Libération Nationale’ in A. Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 55, 67 (Salmon).

<sup>41</sup> See Salmon, 67; A. Cassese, ‘Wars of National Liberation and Humanitarian Law’, in C Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (Martinus Nijhoff, 1984), 320 (Cassese, ‘Liberation’).

<sup>42</sup> See below section 4.4.5.

<sup>43</sup> See D. Forsythe, ‘The 1974 Diplomatic Conference on Humanitarian Law: Some Observations’, (1975) 69 *American Journal of International Law* 77, 86 (Forsythe, ‘Observations’).

<sup>44</sup> The absence of Norway and Australia reflected their opposition to the inclusion of specific regimes in article 1(4).

slight modification of the language of CDDH/I/41, replacing ‘alien domination’ with ‘alien occupation’.<sup>45</sup>

The last western attempt was to suggest the creation of an inter-sessional group in order to work on a more precise definition of wars of national liberation.<sup>46</sup> This was opposed by the proponents of the amendments, since they felt that they should capitalise on the apparent majority. It was finally defeated as the chairman considered the proposal to go beyond the scope of the discussion of article 1. The article, in the form of CDDH/I/71, achieved, at committee level, a majority of 70 votes in favour, 21 against, with 13 abstentions. Three years later, at the plenary level, the result was even clearer: 87 in favour, 1 against, 11 abstentions.<sup>47</sup> As a consequence, Article 1(4) reads as follows:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

#### 4.3. The difference in perspective: an analysis of the arguments and counter-arguments for internationalisation.

The long and intense debate summarised above was about the appropriate criteria for the extension of the full regime of international humanitarian law. The internationalisation of the armed conflict through the application of this regime was seen, by both proponents and critics, as a question involving status. The main difference between the two groups of states pertained to the kind of actor that would be bestowed with such status. In the present sub-section, there will be an analysis of the arguments of the delegates in order to

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<sup>45</sup> This was thought to reflect the political sensitivities of their continent, as many governments were accused of being under ‘alien domination’. See Abi-Saab, 396. See below, section, for further discussion.

<sup>46</sup> CDDH/I/78. This was brought forth by Canada, supported by New Zealand, “proposing that a working group be set up to study the problem in depth before the Diplomatic Conference resumed in 1975.” See CDDH/I/SR 13, par. 2.

<sup>47</sup> CDDH/SR/36.

understand how this debate and its outcome fit with the developing legal regime and the themes explored in this thesis.

While critics wanted internationalisation and status to remain a result of formal statehood, proponents argued for the substantive legal right of self-determination to be a criterion of equal value. Around this main difference in perspective, the representatives of states (and some national liberation movements) used distinctions like political/legal criteria, objective/subjective criteria, international/non-international armed conflicts. These distinctions overlap and are often conflated. For example, the reference to a criterion for internationalisation as ‘political’, rather than ‘legal’, can overlap with its characterisation as ‘subjective’ rather than ‘objective’. This, in turn, could be viewed to lead to the concept of just wars and, therefore, discrimination in the application of the *jus in bello*. This confusion was probably aided by the polarisation of the participants,<sup>48</sup> and the poor grasp of legal concepts by some participants.<sup>49</sup> These concepts will be considered here in order to understand the position of states with respect to when and to whom status will be ascribed through legal regulation.

#### 4.3.1. *The nature of the criteria*

A central feature in the approach of the critics was their argument that the internationalisation of wars of national liberation was based on criteria that were of a political, vague, or subjective nature.

The accusation that the concept of self-determination is vague, in itself as opposed to in its specific formulation in the article, was a common phenomenon at the Diplomatic Conference.<sup>50</sup> The argument of many western critics was that a concept which is not clearly defined would not fit into a technical, objective legal system and would limit legal

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<sup>48</sup> See Forsythe, ‘Observations’, 82 who quotes delegates recognising that the opposed groups were “talking past each other”.

<sup>49</sup> *Ibid.*

<sup>50</sup> See, for example, the US (CDDH/I/SR 2, par. 51), speaking of the vagueness of “political concepts”; Ireland (CDDH/I/SR 4, par. 10), arguing that “[a]ny separatist movement, any band of armed criminals in a colonial territory might claim to be engaged in an armed struggle in furtherance of their people’s right to self-determination.”; Greece (CDDH/I/SR 4, par. 37); Italy (CDDH/SR 36, par. 60); UK (CDDH/I/SR 36, par. 83) arguing that the argument was “cast in political rather than legal terms.”

protection.<sup>51</sup> This perceived shortcoming does not, however, necessarily rely on a political/legal distinction. Legal concepts can be clear or unclear. As Abi-Saab put it, self-determination had been developed through legal instruments and could be interpreted in the same way other legal concepts are interpreted;<sup>52</sup> it was not less ‘legal’ than other concepts used.<sup>53</sup> Rather the approach disqualifies a legal concept by naming it political. This was seen as disingenuous by many proponents of the amendments who accused the critics of unjustified legalism.<sup>54</sup>

A related criticism was that self-determination was a subjective criterion, compared to other criteria for characterising a conflict. More specifically, it was based on viewing criteria like the existence of the right to self-determination as ‘subjective concepts’, rather than ‘objective facts’ like the magnitude and intensity of the conflict or the existence of state borders, within which a conflict was occurring. This distinction, as expressed by the critics, overlapped with the political/legal distinction. As the delegate for Switzerland put it: “[i]t would be dangerous, and against the spirit of humanitarian law, to classify armed conflicts on the basis of non-objective and non-legal criteria.”<sup>55</sup> The delegate from the Pan-Africanist Congress (PAC) retorted that the debated concepts “would be defined in the same way as definitions had been arrived at in the case of the 1949 Geneva Conventions and the earlier Conventions. In other words, the work would be done by legal experts and diplomatists.”<sup>56</sup>

There are two interrelated jurisprudential arguments here. The first one is that the internationalisation of the conflict should be based on objective facts that are immediately recognisable, rather than on the existence of legal rights, the identification of which could delay the application of the Protocol. In that respect, this argument is related to the criticism of vagueness discussed above: A legal concept will usually be vaguer or

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<sup>51</sup> See also Baxter, ‘Politics’, 15-6.

<sup>52</sup> This point was made by the delegate from the Pan-Africanist Congress (PAC), at CDDH/I/SR 6, par. 14.

<sup>53</sup> See Abi-Saab, 380.

<sup>54</sup> See the statement by the delegate from Tunisia at CDDH/I/SR 36, par. 125.

<sup>55</sup> CDDH/I/SR 3, par. 13. Canada (CDDH/I/SR 3, par. 16) agreed. So did the Netherlands, at CDDH/I/SR 3, par. 45. See also comments by France (CDDH/I/SR 2, par. 49) and the US (CDDH/I/SR 2, par. 51) complaining that the criteria would depend on the “political motivation or subjective judgment of one of the parties”.

<sup>56</sup> CDDH/I/SR 6, par. 14. See also Abi-Saab, 380, arguing that the amendments were not referring to the “intentions of liberation movements, but to their objective situation, and whether it warrants the application of the principle of self-determination or not.”

more difficult to assess than material facts.<sup>57</sup> The second is that one should not, in ascribing legal status, look into the motivations of the actor in the particular situation. Instead, focus should rest on the objective characteristics of the conflict. The retorts by the delegate from PAC and Abi-Saab address the latter argument, but do not fully address the former.

The assessment of the existence of a legal right can reasonably, albeit not necessarily, be expected to be more complex than the assessment of the existence of material facts, such as intensity and organisation. The process will be further complicated if the powerful legitimating effects –and, indeed, the de-legitimation of the colonial, racist, alien regime— of the internationalisation of the conflict are taken into account.<sup>58</sup> Such (de-)legitimation leads to considerations of status playing a central role in the assessment of applicability by any actor, whether this is the *de jure* government, third states or international organisations.

Ultimately, it is possible to identify similarities between a process of applying the law to facts which results in the conferment of legal status and belligerency. Although in the case of belligerency the criteria were based on the state-like organisation of the actor and the intensity of the conflict, underlying this substantive difference was the fact that both cases involve a process of recognition<sup>59</sup> that ends in the ascription of state-like legal status. Furthermore, the very logic of applying the *jus in bello* is often linked to the eventual recognition of the group's statehood.<sup>60</sup> Such a system is a departure from the aspirations of the automatic application of the law and the regulation of the conflict for reasons of protection rather than status. These criticisms, therefore, contain a valid point: formal criteria requiring intensity and organisation are easier to apply than criteria based on substantive legal rights.

However, there was more than concern about the efficacy of the legal regime and the automaticity of its application behind the critics' arguments: There was a fundamental preference for the status quo as regards the ascription of status. The formal criteria

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<sup>57</sup> This is related to the critique that law cannot be entirely 'objective' and 'neutral'. See R. Unger, 'The Critical Legal Studies Movement' (1983) 96 *Harvard Law Review* 563; M. Koskenniemi, *From Apology to Utopia* (Cambridge University Press, 2005), 16 ff.

<sup>58</sup> See below section 4.4.

<sup>59</sup> For this process see below section 4.5. See also sections 1.2. and 2.2.2-2.2.4.

<sup>60</sup> See section 2.2.6. Nevertheless, statehood is not the only outcome. See below fn 112 and text.

employed in the regulatory status quo were not limited to the intensity and magnitude of the conflict; they included a criterion relating to the location of a conflict. It was argued that conflicts taking place within the territory of a High Contracting Party,<sup>61</sup> without the intervention of another state, cannot be internationalised. International armed conflicts were those that pitted at least two recognised states against each other. In such a case, the process of ascription of status has already occurred. The ‘formal and objective’ criterion of statehood is the result of a process of recognition. Such a process is not purely factual, but includes legal concepts. It is, however, already completed and it represents the status quo. This status quo, perceived as formal and objective by the critics, was threatened by the internationalisation of wars of national liberation.

#### 4.3.2. *The separation between international and non-international armed conflicts*

This concern was at the centre of another criticism advanced by the opponents of the amendments. This was that the internationalisation of wars of national liberation would undo the system of the *jus in bello* which was based on the separation between international and non-international armed conflicts.<sup>62</sup> The brunt of the argument related to the compatibility of the Geneva Conventions with the organisational structure of states alone, and the alleged inability of national liberation movements to comply with the Geneva Conventions. This will be discussed in the next section.

First the observation should be made that, although the critics referred to the incompatibility of the Geneva Conventions with non-state actors they very rarely used the terms inter-state and non-inter-state.<sup>63</sup> It is argued that the language used signifies the limits of an approach which refers to objective and formal criteria for internationalisation. To the extent that the primary status-bearing unit, as reflected in the critics’ language, is the nation-state rather than merely the state, it is a very thin line in

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<sup>61</sup> As per common article 3.

<sup>62</sup> See the comments by the delegate for Italy (CDDH/I/SR 3, par. 37).

<sup>63</sup> One example can be found in France’s statement (CDDH/I/SR 36, par. 112), referring, however, to the distinction between non-inter-state conflicts considered as wars of national liberation and conflicts coming under Additional Protocol II.

extending status through international legal regulation to non-state entities bearing national characteristics and struggling for state status.

Furthermore, and more tangibly, the example of resistance movements, which, under paragraph 2 of common article 2<sup>64</sup> of the Geneva Conventions are covered by the legal regime applicable to international armed conflicts, supports this argument.<sup>65</sup> The difference between resistance movements and national liberation movements, at least using the historical examples from which this regulation has sprung, is that resistance movements possessed statehood before occupation, whereas national liberation movements often aspired to one. In structural terms, it is restoration not revolution. In relation to colonialism, this is a rather formalistic and myopic argument: It assumes that colonies had no existence or status whatsoever before their colonisation. The counter-argument is that colonial people, possessing a separate status,<sup>66</sup> can and should be treated similarly.<sup>67</sup> Accordingly, even if the Geneva Conventions system could support such an argument, 'new states' accused its proponents of legalism in support of colonial policies.<sup>68</sup>

In conclusion, the argument which is based on the separation of international and non-international armed conflicts can be broken into two parts. One part refers to the legal status of a state, a formal status which renders it able to wage war in the legal sense. As far as this argument is concerned it is argued that the concept of 'nation' plays a central role in the critics' understanding of the state-structure, as the use of the terms 'international' and 'non-international' betray. It is this centrality of the concept of the national that the proponents evoke in order to achieve the legal status of states with respect to the *jus in bello*. To the extent that this concept is already present in the legal system, and that both critics and proponents share the understanding that it is central, the arguments made by western states on the destabilising effects of the introduction of substantive criteria for internationalisation can be seen as self-serving.

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<sup>64</sup> See also article 4(A)(2) of Geneva Convention III.

<sup>65</sup> See Egypt at CDDH/I/SR 5, par. 8. See also Salmon, 74.

<sup>66</sup> As General Assembly Resolution 2625 (XXV) affirmed.

<sup>67</sup> Indeed, see Bedjaoui, 59 *ff* who draws a parallel between the Algerian revolution with the French resistance against the Nazis. By doing so he affirms both the separate status of the Algerian people against the occupiers and the democratic legitimization of the struggle.

<sup>68</sup> See Tunisia at CDDH/I/SR 36, par. 125.

The second part of the argument on the distinction between international and non-international armed conflicts relates to the actual capacity of non-state actors to abide by the obligations imposed by the legal regime regulating international armed conflicts. We shall now turn to this argument.

#### 4.3.3. *Guerrilla war and absence of reciprocity*

A final criticism of proposals to apply the whole system of the Geneva Conventions and Additional Protocols to national liberation movements was that there is a fundamental absence of *de facto* reciprocity between the parties because of the nature and level of organisation of national liberation movements that would lead to the non-application and observance of the Conventions and Protocols. As Baxter put it, the extension of the legal regime to wars of national liberation would eventually call “for an article-by-article analysis of the over 400 articles of the Geneva Conventions” as well as those of the Protocol eventually adopted.<sup>69</sup> This is because a regular feature of national liberation movements was their use of guerrilla warfare.

It was argued that some of the rules in the Geneva Conventions and Protocol I call for the existence of a level of organisation that cannot be possessed by national liberation movements. The extensive obligations pertaining to POWs, for example the obligation to keep them in separate camps away from the battle zone and to indicate the position of these camps<sup>70</sup> for monitoring of humanitarian rules of protection, are incompatible with the nature of guerrilla warfare. This is because control of territory is fluid and effective control over territory often non-existent.<sup>71</sup> Furthermore, national liberation movements tended not to possess anything approaching a judicial system, necessary to carry out the elaborate system of Geneva Convention III on “penal and disciplinary sanctions”.<sup>72</sup>

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<sup>69</sup> Baxter, ‘Politics’, 15.

<sup>70</sup> See for example article 23 of Geneva Convention III.

<sup>71</sup> Indeed, Salmon, at 73, offers an example where this obligation was not observed. In the case of Vietnam the Vietcong did not indicate the position where they kept American POWs for fear of attack by American commandoes.

<sup>72</sup> See part III of Geneva Conventions III, articles 82-108. On the difficulties when guerrilla groups have to abide by judicial rules, even with respect to the much more limited rules of common article 3 and Additional Protocol II see Sivakumaran, ‘Courts’.

Thus, according to Israel, to the extent that the rest of the articles were not re-written and national liberation movements did not possess such features as courts and tribunals “[w]hat remained were obligations without any international responsibility, a system which could not work”.<sup>73</sup>

This is a potent criticism. *De facto* reciprocity is an important element of the Geneva Conventions system.<sup>74</sup> If a state thinks that the national liberation movement will not be able to abide by its obligations, considering also the legitimization of the national liberation movement through the application of the Conventions, there will be very little incentive for the state to ratify the Protocol or apply it in practice.

This does not automatically disqualify a national liberation movement from the system, however, as a distinction can be made. Lack of organisation does not necessarily flow from the non-state nature of the actor. Rather it can be related to the method of the hostilities.<sup>75</sup> It is a question of whether the hostilities include guerrilla warfare and how a specific national liberation movement is organised and conducts its operations. Therefore, the question of compatibility of wars of national liberation with the Geneva Conventions system can be approached either in relation to the non-state status of the party or in relation to the nature of hostilities. The two can and should be separated: Identifying the absence of reciprocity with the non-state nature of the actor can lead to a rigid identification of reciprocity with status, rather than actual ability to implement.

Accordingly, even if in practice most national liberation movements used some form of guerrilla warfare because of the fundamental asymmetry between them and their state-enemy, it would be possible to address the issue by focusing on the method of the hostilities and the actual ability to implement, rather than the nature of the actors. Again the example of resistance movements in common article 2 is apposite. They constituted an armed group the material conditions of which were similar to those of many national liberation movements, yet they are considered parties to international armed conflicts.<sup>76</sup>

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<sup>73</sup> CDDH/I/SR 36, par. 63. See also G. Draper, ‘The Implementation and Enforcement of the Geneva Conventions of 1949 and the Two Additional Protocols of 1978’, (1979) 164 *Recueil des Cours* 1, 48, for extended criticism.

<sup>74</sup> See section 5.4.4.

<sup>75</sup> This was an argument made by the delegate from the FRELIMO national liberation movement, at CDDH/I/SR 5, par. 18. See also Salmon, 73.

<sup>76</sup> See Abi-Saab, speaking for Egypt, CDDH/I/SR 5, par. 8.

On this basis, if resistance movements can be seen as parties to international armed conflicts then why not national liberation movements?<sup>77</sup>

Reasons against the analogy can only be found if one approaches the matter as a question of status. To include resistance movements in the system means that the international community is not yet ready to assume the loss of the status of the state to which the resistance movement belongs. The regulation allows them to be considered as states, as far as the *jus in bello* is concerned, and while they are resisting. Conversely, in the case of national liberation movement the opponents of their inclusion were not ready to assume their state status, even in only *jus in bello* terms.

Salmon mentions paragraph 3 of common article 3, which encourages the parties to a non-international armed conflict to bring into force “by means of special agreement, all or part of the other provisions” of the Geneva Conventions. He argues that if it is envisaged that the whole of the Conventions could apply in a common article 3 conflict they could surely apply to wars of national liberation.<sup>78</sup> The answer to this argument, however, is straightforward and relates directly to the states’ perception of the existence of *de facto* reciprocity leading to the adoption of a legal obligation. If a state agrees to apply “all or part of” the Conventions it will mean that it believes that the non-state actor will be able to abide by these obligations.<sup>79</sup> The argument, however, is apposite in reminding us that it is the characteristics of the conflict and the actor rather than the state or non-state status that will determine the applicability of the Conventions.<sup>80</sup>

In conclusion, the argument on the absence of reciprocity is the most potent argument against the inclusion of wars of national liberation in the Geneva Conventions system or, rather, against including them without stipulating certain criteria that would justify the expectance of *de facto* reciprocity.<sup>81</sup> This reflects the fundamental difference between regulating state and non-state armed groups. In the case of non-state armed groups in relation to common article 3<sup>82</sup> and, as will be seen,<sup>83</sup> Additional Protocol II the

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<sup>77</sup> Salmon, 80.

<sup>78</sup> *Ibid.*, 77.

<sup>79</sup> See on earning the assumption of *de facto* reciprocity section 5.4.4.

<sup>80</sup> Which brings us to the question of the existence of criteria for the organisation of the actor and the intensity of the conflict. These will be discussed below in section 4.4.6.

<sup>81</sup> See also, for this argument, Kalshoven, ‘First Session’, 32-3.

<sup>82</sup> Section 3.3.2.

substantive contents of the legal regulation in fact influenced the characteristics of the actor which would lead to the expectance of *de facto* reciprocity. In the case of states it is assumed that they will be able to abide by their obligations because of their formal status of statehood.<sup>84</sup>

#### 4.3.4. Conclusion

The debate over what kind of conflicts will be regulated by the full regime of the Geneva Conventions and Protocols was predominantly a debate about the ascription of status. The rationale behind the proponents' arguments was less one of extending humanitarian protection and more one of equating the status of non-state self-determination units to that of states. The debate was intense and polarised and the various arguments used were often conflated. The difference in perspective, as analysed above, was that while critics of internationalisation favoured the status quo in the ascription of status, the proponents argued for, and achieved, the equation in the *jus in bello* of the substantive right to self-determination with the formal status of statehood.

Among the various criticisms, it has been argued that the most potent one is the potential lack of reciprocity, which, together with the legitimating effect on the non-state armed group, can seriously affect the applicability of the Protocol. Even if the paradigm of a national unit worthy of external self-determination is perceived to be the basis of the state system, this substantive element will have to be complemented by the necessary formal structure and organisation. National liberation movements claim to partake in the legal status of states, in the context of the *jus in bello*, on the basis of the existence of the substantive national element. To the extent, however, that the formal, structural organisation that commonly exists in states is not guaranteed for the application of the *jus in bello*, their claim is potentially problematic.

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<sup>83</sup> Section 5.4.4.

<sup>84</sup> Even if in some cases, as are those of micro-states, arguably, the degree of their organisation and the means at their disposal for applying the Conventions would not be very different from those possessed by some national liberation movements. See Salmon, 72, using the example of Danzig, and the Holy See, and arguing that if the Geneva Conventions could apply to them they could surely apply to national liberation movements.

On the other hand, the counter-position of critics, focusing on the existence of formal criteria of effectiveness and state status, is tempered and relativised to the extent substantive criteria of nationhood influence and legitimise the formal structures of the state system. It is argued then that despite the difference in perspective, borne out of the differing historical and geopolitical position of proponents and critics, there is an underlying point of convergence. This is the concept of a national unit perceived as worthy of collective legal status. This is, as will be seen below, the unit that is conferred status through legal regulation.

What follows is an analysis of article 1(4) in order to determine the kind of entity that is regulated and how this development fits in the Geneva Conventions system.

#### 4.4. The definition of wars of national liberation.

##### 4.4.1. *Actors: 'Peoples' and their Opponents*

Article 1(4) of Additional Protocol I specifies that the protocol applies to “peoples...fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations...” Accordingly, the conflicts cover a sub-category of the right to self-determination. In this part, the ‘self’, its characteristics and its opponents will be discussed. The section will seek to show how the ascription of status was central in the definition of the actors and the situation included in the Protocol.

##### 4.4.1.1. *The ‘self’: ‘Peoples’*

It is notoriously difficult to precisely define a ‘people’.<sup>85</sup> Indeed, this was one of the criticisms mounted against the inclusion of wars of national liberation in the Protocol.<sup>86</sup> This is conceded by the ICRC *Commentary*, which nevertheless goes on to provide a set of helpful criteria :

[A]part from a defined territory, other criteria could be taken into account such as that of a common language, common culture or ethnic ties. The territory may not be a single unit geographically or politically, and a people can comprise various linguistic, cultural or ethnic groups. The essential factor is a common sentiment of forming a people, and a political will to live together as such. Such a sentiment and will are the result of one or more of the criteria indicated, and are generally highlighted and reinforced by a common history. This means simultaneously that there is a bond between the persons belonging to this people and something that separates them from other peoples: there is a common element and a distinctive element.<sup>87</sup>

The above elements explain how the ‘self’ in the ‘self-determination of peoples’ is constituted. It is a group that has a set of common substantive characteristics which distinguish it, and separate it, from other groups. Moreover, there is often a territorial element to both commonality and separateness of the group. Finally, there is an element of self-identification.<sup>88</sup>

However, not all ‘peoples’ as defined above are ascribed the status of parties to an international armed conflict. The ‘people’ whose armed struggles are internationalised form a narrower category. The category is narrowed in two ways: through the reference to specific opponents<sup>89</sup> and through the reference to the UN Charter and the Declaration

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<sup>85</sup> See Crawford, ‘Self-Determination’, 18. On the futility of the search for an objective definition of the term ‘peoples’ and how this reflects the limitations of a ‘peoples’ approach to the right to self-determination see McCorquodale, ‘Self-determination’, 866-868.

<sup>86</sup> See for example the comment by the delegate from Spain, explaining his state’s abstention at the Plenary voting, at CDDH/I/36, Annex.

<sup>87</sup> Sandoz, *Commentary*, 52. These criteria are also reflected in the Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO, SNS–89/CONF.602/7, 22 February 1990.

<sup>88</sup> For the distinction between “subjective” and “objective” in identifying the unit with respect to self-determination see N. Berman, ‘Sovereignty in Abeyance: Self-determination and International Law’ (1988) 51 *Wisconsin International Law Journal* 51, 90 (Berman, ‘Abeyance’).

<sup>89</sup> This will be discussed in the next section.

on Friendly Relations.<sup>90</sup> Whereas the latter limits the peoples to those with the right to external self-determination,<sup>91</sup> the former further limits the category to more specific situations.

The Declaration on Friendly Relations prohibits “any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples...”<sup>92</sup> Accordingly, peoples are considered to have the right to external self-determination, either as a colony or, outside the colonial context, if their right to internal self-determination is severely and systematically violated.<sup>93</sup>

The focus on groups that have the right to *external* self-determination places some focus on the territorial element. Indeed, this is reflected in the “separate and distinct” territorial status that colonial territories have, according to the same Resolution.<sup>94</sup> Moreover, in some cases of so-called ‘salt water’ colonialism<sup>95</sup> there is an already conspicuous separateness between the colonised and the colonialists. Therefore, the closest that one gets conceptually to the paradigm of colonialism, the most prominent the territorial element can be seen.<sup>96</sup>

Accordingly, if article 1(4) determined its scope using only the Charter and Declaration on Friendly Relations, the ‘self’ and the internationalisation of armed conflicts would be traced in a conceptual continuum starting from the classical cases of ‘salt-water’ colonialism and following through to the lawful exercise of external self-determination. Indeed, this was the content of the amendment proposed by 15 states.<sup>97</sup> In this case article 1(4)’s effect would have had a continuous effect, extending the legal regime and status to self-determination units beyond the period of decolonisation. The merger of the

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<sup>90</sup> See Schindler, ‘Types’, 137-8.

<sup>91</sup> For the distinction between internal and external self-determination see Cassese, *Self-determination*, 67 ff.

<sup>92</sup> UNGA 2625 (XXV), under (e).

<sup>93</sup> See Crawford, ‘Self-Determination’, 47 ff, in the context of the Canadian Supreme Court’s opinion on the right of Quebec to secede.

<sup>94</sup> Above fn 14 and text.

<sup>95</sup> The ‘salt water’ being the sea that separates the colonised people from their colonisers.

<sup>96</sup> See Wilson, 80; Koskeniemi, ‘Self-determination’, 262.

<sup>97</sup> CDDH/I/11.

amendments, however, and the addition of the socialist amendment,<sup>98</sup> limiting the internationalisation to struggles against certain opponents, has arguably affected the article in more than one way.

#### 4.4.1.2. The opponents: colonialists, racists and alien occupiers

According to Article 1(4), conflicts are internationalised when peoples “fight against colonial domination and alien occupation and against racist regimes”. In making the internationalisation of the conflict dependent on the specification of the opponent, several effects are apparent. First of all it reflects a conception of self-determination directly linked with the element of ‘subjugation’, promoting an ‘equality theory’ of self-determination,<sup>99</sup> where the exercise of the right is against an oppressor in order to right a wrong and restore a balance. Indeed, ‘righting the wrong’ can be understood as central in the conferment of status to the non-state armed group. The conferral of the legal status of a party to an international armed conflict is meant to boost what is viewed as a struggle against the historical injustice perpetrated by a specific set of states/adversaries. Moreover, by sanctioning the characterisation of certain states as opponents in a legal instrument, the applicability of the Protocol is affected.

The first category, ‘colonial domination’, is widely viewed to be the easiest to define and the more uncontroversial.<sup>100</sup> The separateness applies not only to the ‘self’, the substantive characteristics that form the entity, the ‘people’, but it also applies specifically to the status of the colony, “a status separate and distinct from the territory of the State administering it...”, as the 1970 Declaration put it.<sup>101</sup> In any case, at the time of the Diplomatic Conference the only salt-water colonial power which had not yielded to the wave of decolonisation of the 1960s was Portugal. By the time the Protocol was signed at

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<sup>98</sup> CDDH/I/5.

<sup>99</sup> See Berman, ‘Abeyance’, 64, defining ‘equality theories’ as those “which view the right of self-determination as the right of a dominated peoples to achieve equality in relation to those who dominate them.” See also, at 67, quoting W. Ofuatye-Kodjoe for “the importance of “subjugation” as an element of the definition of the groups entitled to the right.”

<sup>100</sup> See Sandoz, *Commentary*, 55; Wilson, 167; Abi-Saab, 394 who considers it “self-evident”.

<sup>101</sup> UNGA Resolution 2625 (XXV).

the final Plenary session the Portuguese dictatorship had fallen and the new regime had abandoned its colonial wars.

The other two cases, ‘alien occupation and racist regimes’, share the conceptual nucleus of the domination of one people by another, often a minority. Abi-Saab uses the example of ‘colonies of settlement’, where “a group of people [are] emigrating and settling in another country...[and]...the colonies of settlement are established to the detriment of local populations”<sup>102</sup>

While the focus of this explanation is on the subjugation, there is an element of ‘alienness’ or separateness obvious here. The term ‘racist’ specifies the separateness both with respect to the difference between the ‘peoples’ and with respect to the type of subjugation, which is based on racial discrimination.

The term ‘alien occupation’ is broader, more dynamic and potentially more problematic. The original term used, in both CDDH/I/11 and the first consolidated amendment, CDDH/I/41, was ‘alien domination’. This reflected the more substantive question of subjugation and denial of self-determination by a ‘peoples’ ‘alien’ to the territory. This was changed to ‘alien occupation’ after a request by Latin American states, who feared that the term ‘alien domination’, because of the specific sensitivities in the area, would have a destabilising effect on many regimes.<sup>103</sup> The ICRC Commentary specifies further that the expression “covers cases of partial or total occupation of a territory which has not yet been fully formed as a State.”<sup>104</sup>

This interpretation, although it seems specifically tailored for the case of Palestine, has the merit of further distinguishing the term ‘alien occupation’ from ‘belligerent occupation’, in which by virtue of common article 2 the conflict would be international and, therefore, the new term would be redundant. Indeed, the term has been perceived as complementary to the concept of ‘belligerent occupation’, applicable in cases where common article 2 application is not clear or uncontroversial.<sup>105</sup>

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<sup>102</sup> Abi-Saab, 394. See also Schindler, ‘Types’, 138, who includes in the category of ‘colonies de peuplement’ (as well as racist regimes) the cases of Rhodesia/Zimbabwe and South West Africa/Namibia.

<sup>103</sup> This led to their submission of the compromised amendment CDDH/I/71.

<sup>104</sup> Sandoz, *Commentary*, 54.

<sup>105</sup> See Schindler, ‘Types’, 138 for examples.

Moreover, the ICRC Commentary reiterates the distinction between a case where the status of the actor was already there and where it is legitimately developing, as was the case in the distinction between wars of national liberation and resistance movements.<sup>106</sup> Finally, it mitigates the confusing effects of the term ‘occupation’. Subjugation, which was the concept behind the original term, ‘domination’, survives in the term ‘occupation’. As Abi-Saab puts it “[t]he import of this episode of legislative history is that “alien occupation” in Article 1, paragraph 4, has the same meaning as “alien domination” in the United Nations resolutions, namely colonies of settlement.”<sup>107</sup> Although Abi-Saab is surely right to link back to the concept of ‘domination’, it might be considered to be too restrictive an interpretation to stick to the mechanics of the colonies of settlement. Since this form of establishment of domination is not strictly referred to in the text this might be a case where a broader interpretation of the article is possible. Such an interpretation could move beyond the specific historical examples that have influenced the wording of the article.

Finally, the case of ‘racist regimes’ had as its historical paradigm the South African apartheid. The separateness of ‘selves’, if just ‘racial selves’,<sup>108</sup> is present and so is the issue of subjugation, since the racist element constitutes the regime. The regime element also calls for an institutionalisation of racism, a regime where “racial discrimination is part of the official policy of the government.”<sup>109</sup>

Accordingly it can be seen that the formulation of the article was informed by specific historical circumstances, namely the situations in the Portuguese colonies, South Africa and Israel. Furthermore, the three examples can be reduced conceptually to an element of subjugation and separateness. The separateness can further be broken down to more conspicuous cases of ‘salt-water’ colonialism, where it is accentuated by geography, and schematically less clear forms of substantive separateness, with one ‘self’ subjugating the other ‘self’. While the latter case, as expressed in the term ‘alien occupation’, seems the

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<sup>106</sup> See above section 4.3.2.

<sup>107</sup> Abi-Saab, 395.

<sup>108</sup> As Sandoz, *Commentary*, at 54, points out this situation does not necessarily imply “the existence of two completely distinct peoples” but it can also mean “a rift within a people which ensures hegemony of one section in accordance with racist ideas.”

<sup>109</sup> M. Bothe, K. Partsch, W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 1982), 50.

most malleable, the historical specificity of the article renders it difficult to use beyond its context. This does not mean that it is not possible to interpret the article as applicable beyond the context of colonialism but it helps explain why this has not occurred.<sup>110</sup>

These sections have tried to show what kind of entity the states that supported the article's formulation thought merited the ascription of status of a party to an international armed conflict. The characteristics discussed, both 'peoples' and their opponents, reflect the logic behind the ascription of status. The entity on which status is conferred shares characteristics of a 'people' that, additionally, has been subjugated. It seems from the article's formulation that status was intended for a narrow historical category of actors, very much linked with the context of colonialism. The group is invested with the status of a state with respect to the *jus in bello*. In the clear majority of cases in the context of decolonisation such status could be understood to lead to the eventual statehood of the self-determination unit.<sup>111</sup> As opposed to the doctrine of belligerency, in wars of national liberation internationalisation is attempted based on a substantive right, rather than on material features that resemble statehood. Accordingly, the territorial element in article 1(4) accentuates the 'separateness' of the unit and reflects the examples of 'salt-water' colonialism, rather than points to capacity to wage war.

While the characteristics of the 'peoples' and their opponents help account for the centrality that the ascription of status had in the drafting of article 1(4), they do not suffice to determine the necessary threshold. Indeed, the absence of the definition of the necessary intensity and organisation, as we will see in the next section, also reflects the centrality of status in the logic of the article.

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<sup>110</sup> See below section 4.6. For a statement to that effect after the Protocol came in force see Schindler, 'Types', 144. On the 'outdated' nature of the specific formulation of article 1(4) today see N. Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime – A Study of the South Moluccas and Aceh* (Martinus Nijhoff, 2010), 231. (N. Higgins)

<sup>111</sup> There were, however, exceptions. See R. McCorquodale, 'Rights of Peoples and Minorities' in D. Moeckli, S. Shah, and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford University Press, 2010), 365, 375: "For example, the British and the Italian Somaliland colonies joined into one state of Somalia, part of the British colony of Cameroon merged with the French colony of Cameroun to form the new state of Cameroon and the remaining part joined with the existing state of Nigeria, and Palau and a number of other Pacific Ocean islands formed a free association with the USA (that is, they had general self-government but their foreign affairs and defence were controlled by the USA)."

#### 4.4.2. *Intensity and Organisation*

‘Peoples’ constitute the entity to which the right of self-determination can be granted. The existence of a people is therefore a necessary, if not sufficient, condition for legal capacity and status to wage war. The *actual* waging, however, and the material elements that are relevant to the law in strict relation to the armed conflict, is done by national liberation movements. These, like governments in the case of states, *represent* and *organise* the people, the ‘self’. While the ‘people’ is the group that is seen to be entitled to status in order to achieve self-determination and statehood, with respect to the *jus in bello* national liberation movements are accorded with this status. Moreover, it is national liberation movements that bring the claim for self-determination to the (international) political sphere.<sup>112</sup>

Accordingly, the characteristics of national liberation movements are important in ascertaining whether the specific actors are acting in the exercise of the right of self-determination of a ‘people’, assuming that there is a ‘people’. They are also important to the extent that their quality and capacity are relevant for the application of the *jus in bello*. This, in turn, relates to the necessity, if any, for a certain level of organisation of the actor and intensity of the conflict.

Article 1(4) is silent on the matter and with good reason. As General Assembly Resolution 1514 put it: “Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.” To the extent that the rationale behind the article is substance over form, and because of the exacerbation of this rationale through the polarization of the debate, the internationalisation of the conflict is a matter of status emanating from a right and not from material facts.<sup>113</sup> To be more precise, the ‘facts’ that lead to the application of the article are the existence of a ‘people’ and the existence of an authority representing this

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<sup>112</sup> Some writers consider “obtaining access to the international arena” as a necessary legal precondition for asserting a claim to self-determination. See W. Ofuatye-Kodjoe quoted in Berman, ‘Abeyance’, 67.

<sup>113</sup> According to Abi-Saab, the requirement for a ‘high-intensity conflict’ would go “against the whole approach of the Conventions, which defines the international armed conflict not as a function of the degree of intensity of hostilities, but in terms of its parties and the type of relations existing among them.” See Abi-Saab, 413-4.

people. These facts would determine the existence of the legal right, which would internationalise the conflict.

This does not mean that there is no requirement relating to the intensity of violence. The very use of the term ‘armed conflict’ suggests a minimum. The UK declared upon signature that it “considered...that the term “armed conflict”...implied of itself a certain level of intensity of fighting which must be present before the Conventions or the Protocol would apply in any situation”.<sup>114</sup> This poses the question as to what would be the exact threshold: Specifically, whether the threshold was ‘armed conflict’ *tout court*, or an Additional Protocol II armed conflict.<sup>115</sup> The latter would entail some proto-state formal requirements, such as control of territory, to complement the substantive right contained in the article. The UK delegate required that “the armed conflicts to which Protocol I would apply could not be of less intensity than those to which Protocol II would apply. His delegation would accordingly interpret the term “armed conflict” as used in Protocol I in that sense.”<sup>116</sup> Australia expressed a similar position in explaining its (positive) vote on the article “understanding [...] that Protocol I will apply in relation to armed conflicts which have a high level of intensity.”<sup>117</sup>

Nevertheless, it seems that the above declarations cannot alter the logic of the article as discussed above. There seem to be no requirements apart from the existence of an armed conflict. At the time of the drafting of article 1(4) the threshold of Additional Protocol II had not been finalised and, in any case, the threshold of Additional Protocol II did not affect the term ‘armed conflict’ as per common article 3.<sup>118</sup> Accordingly, the requirements seem to be different from those of article 1 of Additional Protocol II, especially the absence of a requirement of effective control of territory.<sup>119</sup> The existence of an armed conflict would mean the exclusion of “situations of internal disturbances and tensions, *inter alia* riots, isolated and sporadic acts of violence”, as article 1(2) of Additional Protocol II stipulates.

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<sup>114</sup> CDDH/I/36, par. 87.

<sup>115</sup> On the latter’s threshold see section 5.4.

<sup>116</sup> CDDH/I/36, par. 88.

<sup>117</sup> CDDH/I/36, Annex.

<sup>118</sup> See section 4.3.3.

<sup>119</sup> See also Schindler, ‘Types’, 140; Wilson, 165-6; Sandoz, *Commentary*, 55.

Another criterion seems more in agreement with the logic of the article. To the extent that the national liberation movement represents the people and organises their struggle for self-determination it has to be both representative and organised. The issue of representation will be discussed below in the context of the application of the Protocol and the recognition of a national liberation movement as representative.<sup>120</sup> The criterion of organisation this can be considered from two points of view. One is organisation as contributing to the representative nature of the national liberation movement. The second is organisation as a faculty for applying the rules of the Protocol. This is the only material criterion retained related to *de facto* reciprocity. This form of reciprocity, as will be discussed, is very important for the ratification and actual application of the Protocol.<sup>121</sup>

It is characteristic of the “substance over form” approach for the internationalisation of wars of national liberation that there are no material organisational characteristics stipulated in article 1(4). Elsewhere, the Protocol provides some guidance where the conferment of legal status is linked to a particular form of organisation. Article 43 of Protocol I stipulates the criteria for POW status. However, it should be remembered that the organisational criteria for POW status would not necessarily be the same as for other aspects of the Protocol.<sup>122</sup> On the other hand, the logic of article 43 is that privileged combatancy will be recognised for individuals who fight within an organised group, which is sufficiently well structured in order to participate in international armed conflict. If the combatant group is properly organised then the legal status of the entity<sup>123</sup> is translated into legal protections for individual combatants.

The criteria for privileged combatancy can be deduced from the organisational characteristics that are assumed to exist in an organised entity such as a state. Their

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<sup>120</sup> Section 4.5.

<sup>121</sup> See section 5.4.4. The function of the criteria for organisation as interpreted in the context of common article 3 is in relation to the obligations imposed by that article and do not suffice for the existence of *de facto* reciprocity in the context of Additional Protocol I and the Geneva Conventions.

<sup>122</sup> A full analysis of criteria for privileged combatancy is not possible in this space. See for the regime in both the Geneva Conventions and Additional Protocol I Pictet, *Commentary*, 50 ff.; G. Draper, ‘The Status of Combatants and The Question of Guerrilla Warfare’ (1971) 45 *British Yearbook of International Law* 173; Dinstein, 27 ff.; R. Baxter, ‘The Privy Council on the Qualification of Belligerents’ (1969) 63 *American Journal of International Law* 290; Meyrowitz; N. Berman, ‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’, 43 *Columbia Journal of Transnational Law* (2004-2005), 1 (Berman, ‘Privileging’).

<sup>123</sup> For the distinction between the legal status of the entity and that of a specific military or para-military group See Meyrowitz, 878.

detailed stipulation, in article 4 of Geneva Convention III as well as article 43 of Protocol I, is necessitated by the inclusion of less organised units in the war effort of the state. Accordingly, it seems that the necessary characteristics for the acts of the individuals are to be deduced from the organisational characteristics of the state. In this case, however, the use of the criteria works the other way around. The necessary organisation of the national liberation movements is deduced from the criteria stipulated. Therefore, as article 43 stipulates, it is necessary that the national liberation movement possesses a “responsible command”, able to enforce an “internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.”<sup>124</sup>

The fact that very little was stipulated in article 1(4) with respect to the intensity of the conflict or the military organisation of the actor shows that the legislative focus was missing. The status conferred by the application/applicability of the *jus in bello* regime was a step towards the exercise of external self-determination, usually through statehood. Accordingly, a very important aspect of the actor was political organisation and representativeness. This can also be seen to reflect the kind of status that the proponents wanted to confer to national liberation movements. It was at the same time the state-like legal status of a party to an international armed conflict and the political status of an entity fighting for a ‘people’ against a set of adversaries. Political, rather than simply military, organisation and representativeness would contribute to the success of the struggle for decolonisation and the eventual external self-determination of the ‘peoples’ concerned. These aspects, crucial in the conferment of status, are analysed in the next section, which looks at the application of the Protocol.

#### 4.5. Recognition of the national liberation movement and application of Protocol I

The application of the *jus in bello* regime to non-state armed groups is fundamentally a process of recognition. The Geneva Conventions, through common article 3, attempted a departure from the decentralised and unreliable process of recognition of belligerency

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<sup>124</sup> See also above, section 4.3.3.

and insurgency and required the automatic applicability of the law to the extent that the *fact* of an armed conflict existed.<sup>125</sup> As we have seen, in practice, this did not and could not obviate the need for a process of assessment of the existence of those facts. To the extent that the application of international legal regulation of the conflict was viewed as a question of status this assessment was complicated.<sup>126</sup> This led to the application of common article 3 being caught up in the tension between police operations and international armed conflict.<sup>127</sup>

In the case of wars of national liberation, the process of assessment was more complex still. The demonstration of the existence of an armed conflict had to be supplemented by necessity demonstration of the existence of a national liberation movement representing a people. At the same time, both the extension of the entire legal regime of the Geneva Conventions and Protocols and specifically rules providing legal status and protections linked with such status, make this process even more linked to status. The clear link between recognising a self-determination unit struggling for decolonisation and the eventual statehood of that unit serves to draw the assessment of facts and law more towards a process of recognition. Finally, such recognition does not result in the automatic application of the law. A process of accession, through a unilateral declaration has been put in place in article 96(3). These two phases of applicability, the recognition of a national liberation movement and the accession through article 96(3), will now be discussed.

#### *4.5.1. Recognition of national liberation movements: actors, process and criteria*

Article 1(4) is silent as to the process, actors or criteria for the recognition of the existence of a national liberation movement. During the Diplomatic Conference there were those that argued for the inclusion, as a criterion for the applicability of the Protocol, of the prior recognition of the national liberation movement by the appropriate regional organisation. Thus Turkey, in a proposed amendment, stated that:

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<sup>125</sup> See section 3.2.4 fn 67 and text.

<sup>126</sup> See section 3.4.

<sup>127</sup> See section 3.4.2-3.

The present Protocol shall also apply to armed conflicts waged by the national liberation movements recognised by the regional intergovernmental organisation concerned<sup>128</sup>

Although this did not attract support<sup>129</sup> Turkey reiterated this proposal during the debates at committee and plenary level.<sup>130</sup> Indeed, Turkey was not alone. Indonesia, in its explanation of vote, understood that the application of the article would be “limited only to those liberation movements which have already been recognised by the respective regional intergovernmental organisations concerned”, thus endeavouring “to insert an element of objectiveness in evaluating whether a movement can be regarded as a liberation movement or not.”<sup>131</sup> These statements reflected the need to identify a process and a relevant actor in order to apply the legal rule. It was thought that the ensuing ‘objectiveness’ would serve the applicability of the article. Moreover, the use of the law of armed conflict in the conferment of status could be controlled through regional structures.

The absence of any mention of regional organisations in the article, however, and the lack of support for the Turkish amendment indicate that there is no such formal criterion to be satisfied. The reasons for the lack of support of such an amendment are unclear. One explanation could be an aversion, on the side of the proponents of internationalisation, to fora where such status could have been denied or granted to states that had emerged from decolonisation. This, however, does not seem fully convincing as, in practice, regional organisations, such as the Organisation for African Unity (OAU), tended to support movements fighting against (European) colonial states, while withholding such support from movements fighting against newly independent states.<sup>132</sup> To the extent that the nucleus of the rationale behind the article was anti-colonial, for instance excluding

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<sup>128</sup> CDDH/I/42

<sup>129</sup> See See Abi-Saab, 440, fn 47.

<sup>130</sup> See CDDH/I/SR 5, par. 43. See also the Turkish explanation of vote, at CDDH/I/36, par. 55: “In its view, the article applied to armed conflicts recognised by regional intergovernmental organisations such as the League of Arab States or the Organisation of African Unity, which were universally and widely accepted.”

<sup>131</sup> CDDH/I/36, Annex.

<sup>132</sup> See, on the approach of the OAU, O. Kamanu, ‘Secession and the Right of Self-Determination: an O.A.U. Dilemma’, (1974) 12 *The Journal of Modern African Studies* 355 (Kamanu).

conflicts for self-determination in African states, this was reflected in the practice of recognition by regional organisations.<sup>133</sup> Relevant examples in this respect include Katanga,<sup>134</sup> Biafra<sup>135</sup> and Western Sahara<sup>136</sup> could be used in that respect.

Another explanation could be that the drafters wanted to stress, at least on a rhetorical level, that whether a group was a national liberation movement should be clear and self-evident. This reflects the approach of the proponents in considering the national liberation movement status a matter of undeniable natural right.<sup>137</sup> This explanation does not, however, solve the problem. The refusal to identify a process and actor does not mean that there is no need for one.

A solution could only be found if it is understood that the identification of a national liberation movement is not strictly a matter of the *jus in bello*. Indeed, the legal status of ‘national liberation movement’ can be conferred in a setting other than a war of national liberation. This means that recognition could be conferred within other legal structures. This seems to reflect the function of the status conferred as operating beyond the relatively narrow bounds of the specific rules of the Protocol and Conventions. It contains a suggestion of wider legal status as a subject, at least, of the *jus in bello* in general. This is suggested by the participation of national liberation movements in international organisations<sup>138</sup> and their participation (recognised by regional organisations) in the Diplomatic Conference, as discussed above.<sup>139</sup>

In both these fora the representativeness and effective organisation of the national liberation movement were crucial. To the extent that it was considered that the ‘people’ needed to be represented in these fora by virtue of the importance and legitimacy of their struggle for self-determination, the question to be asked was who would represent them effectively and legitimately. Both the organisations to which this decision was delegated

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<sup>133</sup> See section 4.5.1.

<sup>134</sup> See R. Lemarchand, ‘The Limits of Self-Determination: The Case of the Katangan Secession’, (1962) 56 *American Political Science Review* 404.

<sup>135</sup> See F. Wodje, ‘La Sécession du Biafra et le Droit International Public’ (1969) 73 *Revue Générale de Droit International Public* 1018.

<sup>136</sup> See T. Franck, ‘The Stealing of the Sahara’, (1976) 70 *American Journal of International Law* 694 (Franck, ‘Sahara’); J. Naldi, ‘The OAU and the Saharan Arab Democratic Republic’, (1982) 26 *Journal of African Law* 152 (Naldi, ‘Sahara’).

<sup>137</sup> CDDH/I/SR 5, par. 15 for the argument of the representative of liberation movement for Mozambique (FRELIMO) arguing that “unless we’re Portuguese” the conflict is an international one. See also Salmon, 70.

<sup>138</sup> See, for example, General Assembly Resolution 3237 (XXIX) of 1974 granting observer status to the PLO.

<sup>139</sup> Section 4.2.2.

and the criteria used to make it were chosen to address the representative and organisational effectiveness and legitimacy of the movement.

As demonstrated by the process of deciding which national liberation movements were to participate in the workings of the Diplomatic Conference, the movements considered to possess the requisite qualifications were the ones already recognised by the relevant regional organisation. Indeed, this was decided in accordance with the precedent practice in the context of the UN. The UN, in granting observer status, to national liberation movements in the General Assembly<sup>140</sup> or in other bodies,<sup>141</sup> eventually<sup>142</sup> delegated the decision making to the appropriate regional organisations, most notably the OAU. This was done for both technical and broader political reasons. Regional organisations were in closer proximity to, and could more easily visit, the area where the struggle was taking place. They were considered better able to assess the situation. On a broader political level, it can be argued that regional organisations, primarily the OAU, were given the authority to manage (and limit) the process of decolonisation. In that sense, the UN deferred to the organisations that had more interest and more knowledge to make the appropriate decisions.

Indeed, the OAU dispatched missions in areas where struggles of self-determination were taking place and developed the use of factors for deciding which organisation it was to include in its forum. Such factors were not stipulated from the beginning as set criteria but gradually developed through practice. These can be categorised as criteria relating to the representative nature of the national liberation movement and its efficiency in conducting the struggle.<sup>143</sup> These criteria were not limited to the armed struggle but were more broadly addressed to the capacity of the movement to generate and organise the support<sup>144</sup> of the people. This was not necessarily related to the political form of

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<sup>140</sup> See C. Lazarus, 'Le Statut des Mouvements de Libération Nationale à l'Organisation des Nations Unies' (1974) 20 *Annuaire Français de Droit International* 173, 190 ff (Lazarus).

<sup>141</sup> The first body to choose representatives was the Economic Commission for Africa. See Wilson, 139. For other examples see Lazarus, 184 ff.

<sup>142</sup> The initial approach adopted by the Economic Commission for Africa when considering the issue of Angola, Mozambique, Guinea-Bissau, and South West Africa, was to consult the African governments. See Wilson, 139.

<sup>143</sup> See the declaration by M. Sahnoun, Secretary for Political Affairs of the OAU, in Lazarus, 180.

<sup>144</sup> See M. Shaw, 'The International Status of National Liberation Movements', (1983) 5 *Liverpool Law Review* 19, 23. According to Shaw, the lack of support was the reason why the OAU in 1964 withdrew the recognition it had extended to the FNLA in Angola the previous year.

government that was to be expected by the organisation.<sup>145</sup> It was related more strongly to the effectiveness of conducting the struggle of the people, militarily and politically. Indeed, the effectiveness of the political and military struggle and the representativeness of the movement can be seen as the two main, and mutually reinforcing, criteria. This is concisely put by Abi-Saab: “a certain degree of continued effectiveness creates a presumption of representativeness”.<sup>146</sup>

The mediation of the OAU as a recognising agent, however, was not always considered successful or uncontroversial. For instance, the OAU would not grant recognition to movements fighting for self-determination against an African state. This was clear in the cases of Biafra<sup>147</sup> and Western Sahara.<sup>148</sup> Finally, although the OAU played an important role in identifying the most representative actors within struggles for self-determination in the continent, the role of regional organisations outside Africa was less prominent. Almost no national liberation movement outside Africa has been recognised by such an organisation or by the UN. This may have been because there was no relevant regional organisation or because the groups claiming to national liberation movements were not recognised by the relevant regional organisation, no national liberation movement outside Africa has been recognised by such an organisation or by the UN. The sole exception to this is the PLO which has been recognised by the League of Arab States<sup>149</sup> and the UN.<sup>150</sup>

This tends to support the conclusion that the regional organisations are not necessarily the solution in deciding which actor is a national liberation movement.<sup>151</sup> Moreover, the non-inclusion of regional organisations as formal decision makers in article 1(4) reflects the fact that the recognition of a national liberation movement is not strictly a matter of the *jus in bello*. Accordingly, the status conferred, both legal and political, was not understood to be confined to the *jus in bello*. Indeed, the practice had developed

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<sup>145</sup> See Lazarus, 180.

<sup>146</sup> Abi-Saab, 413.

<sup>147</sup> See, for example, Kamanu, 362, who discusses and criticises the argument that the Biafran secession was considered to be “incompatible with the goal of African unity”.

<sup>148</sup> See, for a historical narrative, Franck, ‘Sahara’, 694. See also Wilson, 113 *ff*.

<sup>149</sup> This occurred in a meeting in Rabat, Morocco, in 1974.

<sup>150</sup> See UNGA Resolution 3237 (XXIX) of 22 November 1974.

<sup>151</sup> See also, for this point, Salmon, 84. However, those recognised by regional organisations and/or the UN will be presumed to constitute such authorities. See Schindler, ‘Types’, 142.

independently and before wars of national liberation were included in the *lex lata* of the *jus in bello*. The practice was more about who represents the ‘people’ and carries its claim to external self-determination.

Uncertainty about the role of regional organisations is another reminder of the incompletely legalised process of recognition, both in terms of the recognising actors and the criteria used. The predominance of status in the process of recognition means that the criteria remain vague and malleable and the recognising actors vary depending on the political circumstance. These characteristics of the recognising process can be incompatible with a legal system aspiring for automatic vertical applicability aimed at individual protection.

Moreover, it can also be concluded that regional organisations, particularly the OAU, did play an important role in determining the internationalisation of the conflict. They decided on the claims to self-determination and the organisations who made them in processes that could lead to the recognition of a national liberation movement. The limitation of this role is that it was very closely linked to a historical circumstance, that of decolonisation and particularly in Africa. This does not mean that the practice cannot adapt to other self-determination conflicts, but it reflects the particular circumstances of the practice and of the creation of article 1(4). Ultimately, the practice of recognition suggests a return of a decentralised approach of ascribing wide legal and political status, very closely linked to specific historical circumstances.

#### *4.5.2. Application through accession: article 96(3)*

The process of recognition described above, however, is not the only departure from a system of vertical and automatic application of the law. A further requirement is stipulated in article 96(3) of the Protocol. This accentuates the gradual and horizontal process of applicability of the legal rules to wars of national liberation. The article requires a unilateral declaration of accession to the Protocol and the Geneva Conventions by the national liberation movement. The text of article 96(3) is as follows:

3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4, may undertake to apply the Conventions and this Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary. Such declaration shall upon its receipt by the depositary, have in relation to that conflict the following effects:

- (a) the Conventions and this Protocol are brought into force for the said authority as a Party to the conflict with immediate effect;
- (b) the said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and this Protocol; and
- (c) the Conventions and this Protocol are equally binding upon all Parties to the conflict.

This serves a dual purpose. The first is to assuage the fears of the critics about the discriminatory application of the law.<sup>152</sup> Indeed, this was part of a general criticism that the internationalisation of wars of national liberation followed the logic of the doctrine of just and unjust wars.<sup>153</sup> Part of this doctrine<sup>154</sup> was that the *jus in bello* did not bind the just party as it had a free hand to achieve its just aims.<sup>155</sup> This was expressed as a fear by many delegations,<sup>156</sup> even though it was not part of the proponents' rationale<sup>157</sup> for internationalisation.<sup>158</sup> Paragraphs (b) and (c) clearly state the equality of rights and obligations dispelling both fears and hopes of the relativisation of *jus in bello* obligation according to a just war doctrine. Such a stipulation was initially proposed informally by

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<sup>152</sup> See Abi-Saab, 405-6; Wilson, 168.

<sup>153</sup> See for the criticism for example CDDH/I/SR 4, par. 40 (Netherlands); CDDH/I/SR 5, par. 22 (Denmark). This criticism was also taken up in the literature, sometimes by writers who were members of the delegations at the Conference. See for example, Baxter, 'Politics', 17; See also Draper, 'War Criminality', 149; D. Graham, 'The 1974 Diplomatic Conference on the Law of War: a Victory for Political Causes and a Return to the Just War Concept of the Eleventh Century' (1975) 32 *Washington and Lee Law Review* 25.

<sup>154</sup> For the doctrine of just wars see J. von Elbe, 'The Evolution of the Concept of Just War in International Law', (1939) 33 *American Journal of International Law* 665; J. Kunz, 'Bellum Justum and Bellum Legale' (1951) 45 *American Journal of International Law* 528; A. Nussbaum, 'Just War – A Legal Concept?', (1944) 42 *Michigan Law Review* 453.

<sup>155</sup> See Neff, *War*, 64 ff. and 73 ff.

<sup>156</sup> See, for example, the delegate from Denmark at CDDH/I/SR 5, par. 22.

<sup>157</sup> See, for example, CDDH/I/SR 5, par. 8 (Egypt); CDDH/I/SR 4, par. 45 (Norway). See also Salmon, 78.

<sup>158</sup> But see, for the rather isolated Chinese view, CDDH/I/SR 12. China had already quite forcefully spoken in terms of just/unjust. See CDDH/I/SR 4, par. 17. See also N. Farina, 'The Attitude of the People's Republic of China', in A. Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 445.

the delegate of West Germany, Partsch.<sup>159</sup> However, it was dismissed by western states who were not yet resigned to the inclusion of wars of national liberation. By the last session of the Diplomatic Conference, it was clear that article 1(4) would remain in Additional Protocol I. After informal negotiations in a working party, Norway proposed an amendment to add a third paragraph to article 96 (then, article 84). The amendment was not referred to a working group and was adopted without debate, as it was judged that it “resulted in a delicately balanced compromise which the sponsors did not wish to jeopardise.”<sup>160</sup> At the end of the Diplomatic Conference it was renumbered to article 96(3).

Article 96(3) has a second purpose that aims to reconcile the regulation of national liberation movement with the structure of the Geneva Conventions. National liberation movements are formally brought within the Geneva Conventions system through a formal statement of their willingness to be bound. This can be juxtaposed to the structure that applies to the regulation of states. This is exemplified by two legal issues. The first is that, unlike the legal position in relation to states, there is no provision that stipulates that even if the national liberation movement has not acceded to the Protocol but, as a matter of fact, accepts and observes the rules of the Protocol and the Conventions, the state will be bound by these rules.<sup>161</sup> At the same time, as long as the national liberation movement has not acceded to the Protocol, the applicable law would be common article 3 or Additional Protocol II, unless it is accepted that national liberation movements are ‘powers’ as per common article 2,<sup>162</sup> or that they are international armed conflicts as a matter of custom.<sup>163</sup> This means that a national liberation movement is treated as such with respect to the *jus in bello* only after making an article 96(3) declaration.

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<sup>159</sup> See Abi-Saab, 386.

<sup>160</sup> See the UK and Norwegian statements at CDDH/I/SR. 67.

<sup>161</sup> According to article 96(2) the Parties to the Protocol “shall furthermore be bound by this Protocol in relation to each of the Parties [to the conflict] which are not bound by it, if the latter accepts and applies the provisions thereof.”

<sup>162</sup> The majority opinion is against this. See Schindler, ‘Types’, 136.

<sup>163</sup> Against the notion that wars of national liberation are international as a matter of custom see C. Greenwood, ‘Customary Law Status of the 1977 Geneva Protocols’, in A. Delissen and G. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven* (Martinus Nijhoff, 1991), 93, 111-2 (Greenwood, ‘Protocols’). In favour see Cassese, ‘Liberation’, 323; Abi-Saab, 372.

This relates to the continuing importance of the existence of *de facto* reciprocity.<sup>164</sup> The substantive right of self-determination does not suffice for national liberation movements to be treated as states with respect to the *jus in bello*. Between the presumption that a state is able to abide by its obligations and the need for an armed group to satisfy certain material criteria that correlate to its ability to carry out its obligations, a prospective national liberation movement will not be automatically presumed to be able to apply the rules. This will only be presumed after both the recognition of the group as a national liberation movement<sup>165</sup> and a declaration of its willingness and ability to be bound. In terms of reciprocity, this marks a difference between articles 96(2) and 96(3). Despite the existence of criteria that stem from the minimum of the existence of an armed conflict,<sup>166</sup> as per common article 3, and certain organisational characteristics, as per articles 43 and 44, a national liberation movement which is accepted as an authority through the process of recognition described above will be presumed to offer *de facto* reciprocity once it has made the relevant declaration.

The fear that national liberation movements, frequently waging guerrilla warfare, will be unable to abide by the extensive legal rules contained in the Geneva Conventions and Protocols was never entirely quelled. In order to examine this, we will now turn to the actual application of the Protocol to wars of national liberation.

#### 4.6. The (non-)application of article 1(4)

The effect of article 1(4) has been minimal. Armed groups, whether recognised as national liberation movements or not, have issued declarations of acceptance of all or some of the provisions of the Geneva Conventions even before the Protocol was agreed. It is therefore hard to maintain that the Protocol has had a great effect on the making or

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<sup>164</sup> See section 5.4.4.

<sup>165</sup> Indeed, a 96(3) declaration does not suffice to validate the particular group as an authority as per article 1(4). See the declarations, upon ratification, by Canada (1991) and South Korea (1982), also pointing out the role of regional organisations, available at [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic/note95.Par.0002.File.tmp/mt\\_070319\\_gennotif910116\\_e.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic/note95.Par.0002.File.tmp/mt_070319_gennotif910116_e.pdf) and [http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic/note85.Par.0008.File.tmp/mt\\_070207\\_notif820301\\_e.pdf](http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/warvic/note85.Par.0008.File.tmp/mt_070207_notif820301_e.pdf)

<sup>166</sup> See above section 4.4.2.

reception of such declarations. An example of a declaration pre-dating the Protocol was that of the Algerian Provisional Government in 1960.<sup>167</sup> Such claims, both before and after the Protocols were finalised, can be seen as an attempt to claim the status of parties to international armed conflicts through declarations of respect of the Geneva Conventions and Protocols.<sup>168</sup> Some of these declarations were broader than others. For example, the ANC, declared that

Whenever practically possible, the African National Congress of South Africa will endeavour to respect the rules of the four Geneva Conventions of 12 August 1949 for the victims of armed conflicts and the 1977 additional Protocol I relating to the protection of victims of international armed conflicts.<sup>169</sup>

The first three words of the declaration offered reasons for questioning its validity.<sup>170</sup> Other declarations were more specific. For example, SWAPO proclaimed on 15 July 1981 that

It intends to respect and be guided by the rules of the four Geneva Conventions of 12 August 1949 for the protection of the victims of armed conflicts and the 1977 additional Protocol relating to the protection of victims of international armed conflicts (Protocol I).<sup>171</sup>

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<sup>167</sup> See section 3.4.4. For the communiqué ratifying the Geneva Conventions see Algerian Office, 85. See, on the legal effects of this ratification Bedjaoui, 181 *ff.*

<sup>168</sup> Even though in some of these cases the territorial government had not ratified Protocol I. For the declarations from Polisario (1975), the parties in Rhodesia/Zimbabwe (1977), EPLF (Eritrea) (1977), FROLINAT (Chad) (1978), Abbo Liberation Front (Somalia) (1979), FLSN (Nicaragua) (1979), ANC (South Africa) (1980), UNITA (Angola) (1980), SWAPO (1981), ANLF (Afghanistan) (1981), MNLF (Philippines) (1981) see the ICRC Annual Reports of these years. See also Wilson, 171; D. Plattner, 'La Portée Juridique des Déclarations de Respect du Droit International Humanitaire qui Émanent de Mouvements en Lutte dans un Conflit Armé', (1984) 18 *Revue Belge de Droit International* 298, 298 fn 2 (Plattner); N. Higgins, 118 *ff.* It is important to note that virtually all such declarations occurred in the years immediately before or after the drafting of Protocol I.

<sup>169</sup> Declaration of 28 November 1980. The text is reproduced in Plattner, 303.

<sup>170</sup> See J. Dugard, 'The Treatment of Rebels in Conflicts of a Disputed Character: The Anglo-Boer War and the 'ANC-Boer War' Compared', *Netherlands International Law Review* 447, 452.

<sup>171</sup> The text is reproduced in Plattner, 304. For an earlier declaration by SWAPO see also J. Dugard, 'SWAPO : The Jus ad Bellum and the Jus in Bello' 93 *South African Law Journal* 144, 152.

Although, to the extent that such declarations signify willingness to comply with the rules and may convince the adversary to do the same, they are both practically and normatively important, they were not the result of the application of articles 1(4) and 96(3) of Protocol I. As Greenwood puts it “[n]o declaration under Article 96(3) has successfully been deposited.”<sup>172</sup> The reasons can vary. In some cases, it can be an issue of formally recognising a group as a national liberation movement. Ultimately, however, it was a question of the states being involved in such conflicts not having ratified the Protocol. It can be argued that the language used to formulate article 1(4) is partly to blame. As the delegate for Israel put it when explaining his state’s negative vote:

paragraph 4 had within it a built-in non-applicability clause, since a party would have to admit that it was either racist, alien or colonial – definitions which no State would ever admit to. By including such language, the Conference had, to his regret, ensured that no State by its own volition would ever apply the article.<sup>173</sup>

These terms accentuate the subjugation suffered by the peoples seeking self-determination. They reflect the activation of external self-determination because of the clear denial of self-determination within the existing internal structure. However, they also link article 1(4) to the specific historical period of decolonisation and to a struggle of a particular set of ‘peoples’ against a set of governments. Article 1(4) is meant to confer status on a particular set of actors. With the possible exception of the term ‘alien occupation’, as discussed above,<sup>174</sup> which can allow for broader interpretative use, the article narrows down its own applicability both in law and in practice. The narrow focus on the conferral of status to a set of actors, it is argued, has fatally limited the applicability and actual application of article 1(4).

#### 4.7. Conclusions

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<sup>172</sup> Greenwood, ‘Protocols’, 112.

<sup>173</sup> CDDH/I/SR 36, par. 61.

<sup>174</sup> See above fns 107-109 and text.

Article 1(4) was debated and created at a moment in time that has marked it indelibly. The central stake seemed to be the legitimisation, through the conferral of status of participants to international armed conflicts, of the entities that had emerged and were emerging through the process of decolonisation. Although it nominally extended the full protective regime of international humanitarian law to some situations, it has been argued that the article fails to contribute significantly to the development of the legal regime. At the same time, because of its exclusive focus on the conferral of status, it can be seen as moving away from the legal structure that was initiated with common article 3.

Article 1(4) was seen as posing a threat to the structure of the Geneva Conventions by internationalising conflicts where not all participants were states. *Prima facie* it reflects a revolutionary shift in the criteria for the conferment of status. In addition to the formal criterion of statehood, and the level of organisation that this is presumed to entail, the substantive right to external self-determination confers the status of participant to an international armed conflict.

This chapter has attempted to show that such a shift was actually more limited. There were substantive assumptions shared between critics and proponents on the centrality of the concept of the 'nation' with respect to the distinction between international and non-international armed conflicts. Moreover, the polarisation of the debate and the historical examples that served as blueprints led to the narrowing down of the scope of article 1(4) and to the non-ratification of the Protocol by many affected states. Indeed, the inclusion of a specific set of opponents in the definition reflects the function of the article as conferring status and legitimacy to a specific set of actors in a specific situation. The non-application of article 1(4) in practice reflects this.

This can also be seen in the threshold of article 1(4) as well as in the process of recognition of national liberation movements. The threshold focuses on the actor and not on the situation. The intensity of the violence, leading to a situation of armed conflict meriting humanitarian regulation, is not addressed by the article. Moreover, while the mutually reinforcing criteria of political representativeness and efficiency in conducting the struggle for self-determination developed in practice, their application depended on the practices and politics of mostly regional organisations, particularly the OAU. This

reinforced the historical limitations reflected in the language of the article, with the result that groups fighting for self-determination outside the colonial context were not recognised.

Finally, the predominance of the status-based rationale in the debate on the internationalisation of wars of national liberation reflects and reinforces the understanding that the law of armed conflict either regulates states and state-like entities or does not apply. It reflects the understanding that the question of legal regulation of conflict is a zero-sum game of conferral of status between the government and the non-state armed group. Indeed, once the proponents extended regulation through article 1(4) to a very limited category of non-state armed groups, there was little zeal to develop the regulation of non-international armed conflict. The result was Additional Protocol II and this is discussed in the next chapter.

## 5. Chapter 5: Additional Protocol II

### 5.1. Introduction

The fundamental structural shift attempted in common article 3 offered, for the first time, a legal means to apply humanitarian protection irrespective of the state-like nature of the non-state armed group. The non-definition of the threshold allowed flexible and, therefore, potentially wide applicability of the legal rules and these provided a set of fundamental humanitarian protections. However, the lingering perception that regulation of armed conflicts has implications for the status of the actors, and that regulation can only be extended to state-like entities that have already achieved a certain political status, meant that an armed conflict as per common article 3 existed precariously between the polar extremes of police operations and international armed conflicts.<sup>1</sup> The system remained mostly decentralised and the absence of a third-party to authoritatively decide whether common article 3 applied meant in practice that the incumbent government's practice was central in the applicability of the article.<sup>2</sup> This led to a status-centred and narrow application. Finally, common article 3 had provided only basic humanitarian protections as part of the agreed formula.

This chapter will analyse the next, chronologically, international instrument attempting to address these issues, the 1977 Additional Protocol II to the Geneva Conventions. There will be an overview of the run-up to the Diplomatic Conference, and the tentative initiatives preparing the ground. There will then be a detailed presentation and analysis of the *travaux préparatoires* of the 1974-7 Diplomatic Conference, where the stance of different actors will be related to the eventual result. An analysis of the new threshold will be followed by a brief review of state practice. The central question will be whether Additional Protocol II moves further away from or develops the status-based rationale surviving alongside common article 3.

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<sup>1</sup> Section 3.4.3.

<sup>2</sup> Section 3.4.1.

## 5.2. The period before the Diplomatic Conference and the role of the International Committee of the Red Cross

As discussed in the previous chapter, the international political environment before the Conference was dominated by the process of decolonisation.<sup>3</sup> At the same time there were also efforts for the development of humanitarian protection in conflicts. The Tehran International Conference on Human Rights requested the General Assembly to ask the Secretary General to study whether “additional humanitarian international conventions or possible revision of existing conventions” for the better protection of human rights in armed conflicts were needed and how they might be developed.<sup>4</sup> The General Assembly acted on the request,<sup>5</sup> leading to three reports by the Secretary General on ‘human rights in armed conflicts’.<sup>6</sup>

The Red Cross responded to these developments by calling its XXIst International Conference which asked the ICRC “to draft new rules, to consult governmental experts on these proposals, to submit them to governments for comments, and, if desirable, to recommend the convening of a diplomatic conference to adopt new legal instruments”.<sup>7</sup> This included the regulation of non-international armed conflicts. As seen in Chapter 3,<sup>8</sup> the shortcomings of common article 3 had been gradually articulated,<sup>9</sup> and the ICRC was conscious that there was a need to develop the legal regime.<sup>10</sup>

The ICRC had developed a strategy with the goal of defining common article 3.<sup>11</sup> It wanted to assert its automaticity,<sup>12</sup> and stretch its applicability downwards in the scale of

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<sup>3</sup> Section 4.1.

<sup>4</sup> Resolution XXIII, *Final Act of the International Conference on Human Rights*, UN Doc. A/CONF. 32/41 (1968), 18.

<sup>5</sup> General Assembly Resolution 2444 (XIII), 16 December 1968.

<sup>6</sup> Respectively of 1969, 1970, and 1971. See UN Doc. A/7720 (1969) ; UN Doc. A/8052 (1970) ; UN Doc. A/8370 (1971).

<sup>7</sup> Resolution XIII, *Reaffirmation and Development of the Laws and Customs applicable in Armed Conflicts*, XXIst International Conference of the Red Cross, Istanbul, September 1969. See also Baxter, ‘Politics’, 6.

<sup>8</sup> Section 3.3.2

<sup>9</sup> See, for a summary exposition of these problems, albeit from a later date, G. Abi-Saab, ‘Non-International Armed Conflicts’, in UNESCO, *International Dimensions of Humanitarian Law* (UNESCO and Martinus Nijhoff, 1988) 217, 225 (Abi-Saab, ‘Conflicts’). See also, for the inadequacy of the substantive law of common article 3, Baxter, ‘Politics’, 8.

<sup>10</sup> See, for example, for an early call to apply the wider regime of humanitarian law to non-international armed conflicts by legal advisers to a national Red Cross society, B. Jakovljević and J. Patrnogić, ‘The Urgent Need to Apply the Rules of Humanitarian Law to so-called Internal Armed Conflicts’ (1961) 5 *International Review of the Red Cross* 259.

<sup>11</sup> Abi-Saab, ‘Conflicts’, 224.

intensity, possibly covering internal disturbances that had not previously been considered 'armed conflicts'. This would have the effect of widening the applicability of humanitarian protection. Although the non-definition of an 'armed conflict' in common article 3 had provided for flexibility, the automatic application of the legal regime needed 'objective' criteria.<sup>13</sup> If 'armed conflict' was clearly defined, it was thought, it would be more difficult for states to deny the applicability of the legal regime.<sup>14</sup> The ICRC also wanted to keep the threshold of an 'armed conflict' as low as possible, in order to cover a wide spectrum of situations.

These objectives were pursued by setting up two Commissions which produced Reports on the protection of victims of internal armed conflicts in 1955<sup>15</sup> and 1962.<sup>16</sup> The latter Commission stated unequivocally that "the existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organisation."<sup>17</sup> This statement confirmed the direction the ICRC wanted to take. These efforts were furthered through the XXth Conference of the Red Cross held in Vienna in 1965<sup>18</sup> and the report of a group of experts in February 1969, laid before the XXIst International Conference in Istanbul.<sup>19</sup>

Eventually, the ICRC felt that the time was ripe for a new treaty. In preparation, "after due consultation with the Secretary General of the United Nations, [it] took the initiative of calling a meeting which would be something between a mere consultation of experts and a conference of Government representatives: it convened a conference of Government experts."<sup>20</sup> This was held in Geneva, in two sessions, in 1971 and 1972. The

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<sup>12</sup> See section 3.2.4. fn 67 and text.. See also Sandoz, *Commentary*, 1348.

<sup>13</sup> See section 3.2.4.

<sup>14</sup> See Wilhelm, 340.

<sup>15</sup> See M. Veuthey, 'Les Conflits Armés de Caractère Non International et le Droit Humanitaire' in A. Cassese (ed.), *Current Problems of International Law* (Dott. A. Giuffrè Editore, 1975) 179, 186-7, for discussion.

<sup>16</sup> See the 1962 Report by the ICRC (R. Pinto, Rapporteur) entitled 'Humanitarian Aid to the Victims of Internal Conflicts' and reproduced in (1963) *International Review of the Red Cross* 79.

<sup>17</sup> See *ibid*, 82.

<sup>18</sup> See Kalshoven, 'Experts', 70 .

<sup>19</sup> See Report by the ICRC entitled 'Protection of Victims of Non-International Armed Conflicts' (May 1969). See also Kalshoven, 'Experts', 70; Abi-Saab, 'Conflicts', 225-6.

<sup>20</sup> Kalshoven, 'Experts', 71-2.

Conference agreed that the Experts would not bind their governments and that they would not take decisions or vote, except “purely as an indicative measure.”<sup>21</sup>

The ICRC approached the Conference with bold aspirations, proposing a single, unified Protocol which would deal with international as well as non-international armed conflicts. Very quickly, however, this effort was defeated and a second Protocol was subsequently proposed by the ICRC.<sup>22</sup> Furthermore, it was agreed that common article 3 was unsatisfactory, because of the limits in its substantive law and the non-existence of a process to determine its applicability, but there was no agreement on how to remedy its defects.

In terms of the substantive applicable law, three approaches were possible: to do away with the distinction between international and non-international armed conflicts; to extend the category of international armed conflicts; and/or to develop the rules for non-international armed conflicts. The first option had already been defeated.<sup>23</sup> The second option was the internationalisation of wars of national liberation.<sup>24</sup> As far as the category of internal armed conflicts was concerned, the ICRC focused on the third option. This required a definition of the relevant threshold, the existing one in common article 3 being unsatisfactory.

In setting a functioning structure for non-international armed conflicts, it was necessary both to define a non-international armed conflict, setting the threshold clearly, and to find mechanisms to determine that the threshold had been reached. It was thought that this two-pronged approach would increase the possibility of applying the legal regime.<sup>25</sup> The former effort did not provide, however, anything other than “a limitative enumeration of specific situations, defined as accurately as possible in terms of objective

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<sup>21</sup> *Ibid.*, 72-3.

<sup>22</sup> *Ibid.*, 75. The ICRC did not give up, though. In an annex, it tried to provide the integral application of the Geneva Conventions in cases where “the ‘rebels’ possess a high degree of organisation and exercise effective control over part of the national territory, as well as (though with some qualifications) to cases of internal armed conflict with operational military intervention by a foreign power.” See Conference of Government Experts, 14 *ff.* This was not accepted and was omitted from the draft presented at the Diplomatic Conference. Another effort was a “Declaration of fundamental rights of the individual in time of internal disturbances or public emergency”, which reproduced and developed common article 3. This was also not popular. See Abi-Saab, ‘Conflicts’, 225-6.

<sup>23</sup> The only delegation that opposed, for humanitarian reasons, a distinction between international and non-international armed conflicts was the Norwegian one. See Kalshoven, ‘Experts’, 77.

<sup>24</sup> See section 4.2.1 fn 26 and accompanying text.

<sup>25</sup> See for the ICRC’s proposals on the mechanisms to assess whether the threshold has been met, Conference of Government Experts, 41 *ff.* See also, for an analysis of both these options and the ICRC’s approach, Wilhelm, 340.

characteristics”. As regards the establishment of mechanisms to determine the threshold, it was decided that states would not be willing to confer the power of assessment to any third body.<sup>26</sup>

Although the Conference of Experts was not meant to yield any results, their experience was instructive in testing how far states would be prepared to go in extending the legal regime to non-international armed conflicts.

### 5.3. The Diplomatic Conference, 1974-1977

#### 5.3.1. *Main Issues and ICRC strategy*

The two Conferences of Government Experts had prepared the ground for a Diplomatic Conference which, it was hoped, would resolve remaining disagreements and produce legally binding instruments. In preparation for the Diplomatic Conference, the ICRC produced two Draft Protocols in June 1973. One dealt with international and one with non-international armed conflicts. They were followed by a Commentary in October 1973.

The ICRC aimed at increasing the extent of humanitarian protection in non-international armed conflicts. Its strategy consisted of three main facets: to extend the substantive law to be applied in non-international armed conflicts, particularly by including provisions concerning the means and methods of war; to more broadly and clearly define the material scope of application and to maintain the separate existence of common article 3.<sup>27</sup> The last goal was very closely related to the scope of the Protocol. The ICRC considered the scope to be the key to the Protocol<sup>28</sup> in order to guarantee a correspondingly wide application of the legal regime. At the same time, however, the

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<sup>26</sup> It was ultimately conceded that, in the present circumstances, it was very hard to conceive of such an independent *ad hoc* body. See, for the conclusion, Conference of Government Experts, 41. Kalshoven, ‘Experts’, 78-9; Wilhelm, 342.

<sup>27</sup> See Moir, 91; S. Junod, ‘Additional Protocol II: History and Scope’, (1983-1984) 33 *American University Law Review* 29, 33 (Junod).

<sup>28</sup> Moir, 91.

substantive provisions would have to be developed. It was thought that the independent existence of common article 3 would allow it to further widen its scope through practice, including cases of internal disturbances in a wider definition of an ‘armed conflict’.<sup>29</sup>

Accordingly, the approach of the ICRC in delineating of the scope of the draft Protocol II was two-fold. On the one hand, it set the upper threshold, by defining the relation of draft Protocol II with international armed conflicts contained in draft Protocol I. On the other hand, it tried to define ‘non-international armed conflicts’ both positively and negatively. According to the draft, the material field of Protocol II related “to all armed conflicts not covered by Article 2 [of the Geneva Conventions]...taking place between armed forces or other organised armed groups under responsible command” and excluded “internal disturbances and tensions, *inter alia*, riots, isolated and sporadic acts of violence and other acts of a similar nature.”<sup>30</sup>

Despite this preparation, the beginning of the Conference did not address these matters. Apart from the invitation of national liberation movements, the most contentious issue to be dealt with<sup>31</sup> was the status of wars of national liberation as international armed conflicts.<sup>32</sup> As seen in the previous chapter, the “internationalisation” of wars of national liberation through their inclusion in Protocol I meant conferring the status of parties to international armed conflicts on national liberation movements and their members. This left a significant majority of new states uninterested or even hostile towards the development of the law regulating other internal conflicts. The drive of new states to

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<sup>29</sup> Abi-Saab, ‘Conflicts’, 228-30.

<sup>30</sup> Draft Protocol Additional to the Geneva Conventions of August 12, 1949, And Relating to the Protection of Victims of Non-International Armed Conflicts, article 1. See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (Geneva, 1974-1977), vol. 1, 33. The full text of the article 1 of the draft Protocol submitted by the ICRC is as follows:

Article 1. – *Material field of application*

1. The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organized armed groups under responsible command.
2. The Present Protocol shall not apply to situations of internal disturbances and tensions, *inter alia* riots, isolated and sporadic acts of violence and other acts of a similar nature.
3. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of August 12, 1949.

See also Kalshoven, ‘First Session’, 6 .

<sup>31</sup> See section 4.2.2.

<sup>32</sup> Kalshoven, ‘First Session’, 30-1.

internationalise wars of national liberation was in stark contrast with their unwillingness to extend international law to internal conflicts not qualifying as wars of national liberation. This is because, as discussed in the previous chapter,<sup>33</sup> the primary factor in extending or not the application of the law was status, rather than individual protection. This proved to be fatal for the material field of application, as well as for Protocol II as a whole.

### 5.3.2. *The negotiating positions of states*

The negative stance of a majority of new states from Asia and Africa first manifested itself in the discussions of the ICRC draft. Forsythe separates states into four categories: the maximalists (Sweden, Norway, the Holy See, and others); the moderates (most Western states, the USSR, Socialist states); the minimalists (some Third World<sup>34</sup> states such as Ghana); and the monkey-wrenchers (especially India).<sup>35</sup> As Forsythe puts it:

The maximalists were the pure humanitarians who desired extensive law on internal war at the expense of claims to national sovereignty....The moderates were the delegations which sought to resolve humanitarianism with national sovereignty...The minimalists were those who gave priority to claims to national sovereignty and domestic jurisdiction at the expense of humanitarianism, without rejecting the latter as a basis for law...The monkey-wrenchers were those prepared to “throw a monkey-wrench” into efforts to develop Protocol II.<sup>36</sup>

The ultimate compromises emerged as the ‘moderates’ gradually moved towards the ‘minimalist’ positions.

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<sup>33</sup> See, for this conclusion, section 4.3.4.

<sup>34</sup> The term was used at the time to denote states that did not belong to either of the two major political camps then identified, the “First World” of industrialised/capitalist states or the “Second World” of socialist/communist states. In this way it is used in this text irrespective of its continuing validity. For the term and the possible usefulness in its use today see A. Anghie and B. Chimni, ‘Third World Approaches to International Law and Individual Responsibility in Internal Conflicts’, (2003) 2 *Chinese Journal of International Law* 77, 78 (Anghie and Chimni).

<sup>35</sup> See also Junod, 33.

<sup>36</sup> Forsythe, 280-1. The latter expression presumably means that they were trying to undermine the Protocol.

The draft was attacked on many levels and in many fora. The Diplomatic Conference organised itself into Committees and Plenary sessions. Generally, in the Committees the material field of application was significantly narrowed, whereas the substantive provisions were extended, while in the Plenary the narrow scope was retained, but the substantive provisions were drastically cut, as shown below.

The states which were keen on developing Protocol II wanted to avoid scheduling the draft for consideration at the end of the Conference, which would have risked it not being discussed at all because of lack of time. Accordingly, they achieved the adoption of a procedural rule stating that the two draft Protocols would be negotiated together at the committee level.<sup>37</sup> “This procedure resulted in the adoption at the committee level of quite detailed rules for Protocol II, often patterned on those for Protocol I.”<sup>38</sup>

### *5.3.3. The Discussion at the Committee Level: Narrowing the Scope*

A concerted effort was waged at the Committee level to narrow the scope of the Protocol. Immediately after the ICRC revealed its proposal for the scope of the article,<sup>39</sup> many states expressed misgivings with the proposed formula and approached article 1 as a chance to criticize the whole of the Protocol.<sup>40</sup> Furthermore, the formulation of article 1<sup>41</sup> was attacked from two sides through a variety of amendments. The more radical suggestion was the stipulation that the government of the High Contracting Party was the only party fit to assess the existence of the criteria provided and, therefore, the

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<sup>37</sup> See CDDH/I/SR.1. The rule was adopted by 46 votes to 9, with 8 abstentions. It is interesting that states that throughout the negotiations were hostile to the very existence of Protocol II argued for the separate discussion of the Protocols with the argument that the Diplomatic Conference would then be able to “at least complete consideration of draft Protocol I”. See the statement of the representatives of India and Algeria at CDDH/I/SR.1, par. 10.

<sup>38</sup> Junod, 33.

<sup>39</sup> CDDH/I/SR. 22, par. 11-16.

<sup>40</sup> The first state to do so was Argentina, arguing that it was unrealistic and infringed upon state sovereignty. CDDH/I/SR. 22, par. 17. One of the most forceful critics of the whole project was India. India’s delegate said that “if national liberation movements were included under article 1, the application of draft Protocol II to internal disturbances and other such situations would be tantamount to interference with the sovereign rights and duties of States. The definition of non-international armed conflicts was still vague and no convincing arguments had been put forward to justify the need for draft Protocol II, the provisions of which would not be acceptable to his delegation.” See CDDH/I/SR. 23, par. 48.

<sup>41</sup> For the text of the draft article see fn 31 above.

application of the legal regime.<sup>42</sup> This effort would have undermined everything that the Protocol strove to achieve and was effectively resisted.<sup>43</sup> However, the insistence of a variety of states on this point, at both Committee and Plenary level, created pessimism for the application of the Protocol in practice.<sup>44</sup>

Article 1 was attacked successfully on another front. A variety of criteria narrowing the scope of the article were proposed through amendments.<sup>45</sup> The criteria ranged from the Spanish attempt to interpret the requirement of ‘responsible command’ so that it is “effectively exercised in such a way as to guarantee [the ‘insurgents’] readiness and ability to observe and enforce [the Protocol]”<sup>46</sup> to the enumeration of detailed criteria by the delegation of Pakistan.<sup>47</sup> The criteria proposed had the effect of significantly narrowing the scope of the Protocol by introducing a threshold approximating the one used in the older doctrine of recognition of belligerency. Criteria such as the “prolonged period” of the conflict<sup>48</sup> required the conflict to evolve before the legal regime could be applicable.<sup>49</sup> Importantly, the occupation of a “substantial”<sup>50</sup> or “non-negligible”<sup>51</sup> part of the territory reverted to the paradigm of insurgents of a proto-state quality.<sup>52</sup>

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<sup>42</sup> See, for example the amendment of Romania of 12 March 1974 (CDDH/I/30) adding the clause, at the end of paragraph 1, “in cases where the State, on whose territory the events are taking place, recognises the existence of the conflict, its character and its constituent elements.”

<sup>43</sup> See, for example, the critique by Mongolia, at CDDH/I/SR. 23, par. 49-55, quoted below. See fn 57-60 and text.

<sup>44</sup> See Forsythe, 285. See fns 65 and 69 below on similar attempts.

<sup>45</sup> This was the case especially with the amendments proposed by Pakistan (CDDH/I/26), Indonesia (CDDH/I/32), Spain (CDDH/I/33), Brazil (CDDH/I/79). At odds with these amendments was the one proposed by Norway (CDDH/I/218), which identified the material field of application of Additional Protocol II with that common article 3 deleting all criteria.

<sup>46</sup> CDDH/I/33

<sup>47</sup> CDDH/I/33. According to the Pakistani amendment the Protocol would be applicable in the case that: “(a) Organized armed forces engage in hostile acts against the authorities in power and the authorities in power employ their own armed forces in response; (b) the hostilities are of some intensity and continue for a reasonable period of time; (c) the armed forces opposing the authorities in power occupy a part of the territory of the High Contracting Party; (d) the armed forces opposing the authorities in power are represented by a responsible authority and declare their intention of observing the humanitarian rules laid down in Article 3, common to the Geneva Conventions, and in the present Protocol.”

<sup>48</sup> See also the amendment by Indonesia, CDDH/I/30.

<sup>49</sup> While duration of the *violence* can be seen as a factor contributing to intensity as a criterion for common article 3, duration of the *conflict* can be a factor leading in practice to the acceptance of applicability by the incumbent government. In the latter case, usually the non-state armed group has already achieved a level of political status, which in practice can translate into international pressure. Thus the government does not have much to lose by applying common article 3. See sections 3.3.1 and 3.4.3. In addition, the effect of this proposal would be to turn duration into a criterion, rather than an indicative factor. See further, on the confusing manifestations of the concept of duration, sections 6.5.3 and 7.4.1.

<sup>50</sup> CDDH/I/30 (Indonesia)

<sup>51</sup> CDDH/I/79 (Brazil)

<sup>52</sup> See, on the importance of the control of territory as the starting point of proto-state status, section 2.3.2 fn 123 and text and 3.3.1.

A variety of states, including western states, argued that the stipulation of additional criteria would complicate matters rather than provide a clearer definition.<sup>53</sup> A particularly articulate critique came from the delegate of Mongolia. She criticized some of the amendments proposed. She doubted whether the efforts of Pakistan and Brazil to define non-international armed conflicts were useful. It “was not clear who would decide whether or not the forces hostile to the Government exerted continuous and effective control over a non-negligible part of the territory” as the Brazilian amendment<sup>54</sup> proposed. The same applied to the Indonesian amendment<sup>55</sup> that referred to “a prolonged period”. The Pakistani suggestion<sup>56</sup> that the government should assess the criteria begged the question what was going to happen to the victims of the conflict until then.<sup>57</sup> Furthermore, the delegation of Egypt, which was influential among Third World states,<sup>58</sup> opposed the efforts to introduce control of territory as a criterion, as it would exclude most cases of armed conflicts and “severely limit its real significance and usefulness”.<sup>59</sup> The UK agreed that “if the level of application was set so high that only the ‘classical’ civil war was covered, Protocol II would be useless; if it was set so low that it covered police action against sporadic criminal or terrorist acts, it was unlikely to be accepted by States.”<sup>60</sup>

Nevertheless, Working Group B, which dealt with the matter,<sup>61</sup> eventually produced a report in which the criterion of territorial control was added.<sup>62</sup> This was eventually accepted by consensus, without a vote.<sup>63</sup> States who wanted a wider scope accepted this as a compromise. On the one hand, this seemed to fit with the more extensive approach in terms of substantive law, which was taken in the Committees. On the other hand, it was clear by then that there were a large number of states that were either outspoken

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<sup>53</sup> See CDDH/I/SR. 23, par. 10 (Austria), par. 21 (New Zealand), par. 31.(Germany), par. 41 (Netherlands). See also CDDH/I/SR. 24, par. 7 (Yugoslavia) and par. 25 (Algeria).

<sup>54</sup> CDDH/I/79

<sup>55</sup> CDDH/I/32

<sup>56</sup> CDDH/I/26

<sup>57</sup> CDDH/I/SR. 23, par. 50. The UK suggested that Mongolia’s points should be discussed in the Working Group.

<sup>58</sup> See Forsythe, 278.

<sup>59</sup> CDDH/I/SR. 24, par. 32.

<sup>60</sup> CDDH/I/SR. 24, par. 37.

<sup>61</sup> The Working Group’s deliberations were informal and are not included in the official volumes of the *travaux préparatoires*.

<sup>62</sup> See Report to Committee I on the Work of Working Group ‘B’, CDDH/I/238/Rev. 1, noting Brazil’s insertion that the High Contracting Party must recognise the existence of the criteria, noting that it was supported by ‘some delegations’. Romania agreed with Brazil. See CDDH/I/SR. 29, par. 9.

<sup>63</sup> CDDH/I/284, p. 20.

against the very existence of a second Protocol, or were prepared to do anything to limit its effectiveness to the point of non-existence. The proposal for a sentence stipulating that only the state would be competent to assess the criteria would certainly have had that effect.

Still, the consensus hid widespread dissatisfaction. States with maximalist aspirations, like Norway,<sup>64</sup> expressed their disappointment in the formula accepted.<sup>65</sup> Third World states argued that they had agreed to the article only in the spirit of cooperation, and some states were very outspoken on their criticism of the whole project.<sup>66</sup> For instance, Iraq argued that common article 3 “was not yet generally accepted or applied” and that to discuss 40 further articles was not a “development of humanitarian law; it was rather a complication”. The delegate asked for a “complete reassessment” and said that states “should not be in too great a hurry”.<sup>67</sup> Nor were western states happy with the result, but, since they had no vital interest in the widening of the scope of the Protocol they had gradually adopted an attitude of resignation and viewed the result as a necessary compromise.<sup>68</sup>

The goals of the ICRC were set back on another level as well. At the end of the negative part of the definition of the scope of application<sup>69</sup> it was suggested that the phrase ‘as not being armed conflicts’ would be added. On the one hand, this fit with the clear goal of maintaining the separate field of applicability of common article 3, which was also expressed through the phrase “without modifying its existing conditions of application” at the beginning of paragraph 1. The ICRC had initially proposed that a separate field of application should be maintained for common article 3 in order to be able gradually to

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<sup>64</sup> CDDH/I/SR. 29, par. 42.

<sup>65</sup> See CDDH/I/SR. 29, par. 14 (Netherlands), par. 24 (Italy). In any case, the latter’s delegate pointed out the objective nature of the criteria and said that “the applicability of the Protocol would...in no way depend on recognition of the existence of the conflict by anyone”. (par. 26) See also par. 40 (GDR).

<sup>66</sup> India’s delegate, as usual, made clear that his delegation was not happy with the compromise. He warned that he would return to the relevant issues at the Plenary. In addition, he expressed his full agreement with the delegations of Brazil and Romania on the government being the only capable to assess the applicability of the Protocol. See CDDH/I/SR. 29, par. 15. Indeed, the Indian delegation reiterated this point in the Plenary. Indonesia (par. 20), Iran (par. 36) and Burundi (par. 41) agreed with Brazil and Romania and would have voted for their proposals if they were put to a vote.

<sup>67</sup> CDDH/I/SR. 29, par. 17.

<sup>68</sup> See C. Lysaght, ‘The Attitude of Western Countries’ in A. Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 349, 384.

<sup>69</sup> Paragraph 2 of the ICRC draft stipulated, it is reminded, that “[t]he Present Protocol shall not apply to situations of internal disturbances and tensions, *inter alia* riots, isolated and sporadic acts of violence and other acts of a similar nature.”

develop it downwards widening its scope. This separation became a necessity when the higher threshold of article 1 was adopted.<sup>70</sup> Efforts by some states to argue for an identical threshold for Protocol II and common article 3,<sup>71</sup> or the deletion of the reference to common article 3 as unnecessary<sup>72</sup> failed.

This failure is to be welcomed. The success of these proposals would have meant that the narrow scope of Protocol II would have affected the scope of application of common article 3. To the extent that their separation would not be explicit, it would have allowed the argument that their scope was identical and that the more detailed criteria of article 1 of Protocol II constituted a specification of the term ‘armed conflict not of an international character’ in common article 3. On the other hand, however, the clear stipulation that the “situations of internal disturbances and tensions” were not armed conflicts, to the extent that it affects the definition of an ‘armed conflict’ beyond the Protocol, hindered the development of common article 3 downwards and the widening of its scope to include such instances.<sup>73</sup>

#### *5.3.4. The Plenary: Paring Down the substance*

When the draft Protocol reached the Plenary it bore little resemblance to the ICRC draft proposed at the beginning of the Diplomatic Conference. Its scope was narrow and the substantive provisions wide. The procedural approach of discussing the two Protocols in parallel had led to an ambitious Protocol. This was because of the higher percentage of western delegations – which tended to be either ‘maximalists’ or ‘moderates’ - in the Committees, and the possibility of adopting articles by majority rather than consensus.<sup>74</sup> It was very clear, however, that this would not be accepted in the plenary.

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<sup>70</sup> See also CDDH/SR.49, 59, 67 (Mexico).

<sup>71</sup> CDDH/I/SR. 23, p. 13 (GDR).

<sup>72</sup> CDDH/I/SR. 23, par. 12 (Romania).

<sup>73</sup> Abi-Saab, ‘Conflicts’, 228-30.

<sup>74</sup> F. Kalshoven, ‘Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977, Part I: Combatants and Civilians’ (1977) 8 *Netherlands Yearbook of International Law* 107, 110-1 (Kalshoven, ‘Combatants’).

At the start of the plenary session the President of the Conference admitted “many contacts and meetings of groups had taken place” since the last meeting “from which it would appear that there had emerged a general wish to reach agreement on a simplified version of draft Protocol II.”<sup>75</sup> Pictet, speaking for the ICRC, appealed in favour of the humanitarian protection rationale, while trying to assuage the status-based concerns of the delegates. He asked the delegates to not extinguish the hopes of the victims of conflicts and “stifle [Protocol II] from its birth.” He assured the delegates that Protocol II contained protections for state sovereignty and states that had misgivings could wait before ratifying it.<sup>76</sup>

The prospect of having no Protocol led the Pakistani delegation, using previous suggestions made by the Canadian delegation,<sup>77</sup> and in consultation with other delegations, to propose a simplified draft Protocol that could be accepted by the states present. This draft did not affect article 1, namely the material scope of the Protocol, as this had already been narrowed at Committee level. It introduced, however, radical changes in the substantive rules contained in the Protocol. The number of articles was reduced from 48 to 27.

The Pakistani draft all but eliminated provisions that dealt with means and methods of warfare. Furthermore, it completely eliminated the phrase ‘parties to the conflict’, including from article 3 which repeated the caveat present in common article 3 that the Protocol had “no effect on the legal status of the parties to the conflict.”<sup>78</sup> It was thought that the very mention of the term ‘parties’ might suggest the conferment of some status to the group. As a result the Protocol “[read] like a series of injunctions addressed exclusively to governments”.<sup>79</sup> This, however, does not affect the legal nature of the obligations nor the limited legal status conferred on the parties.<sup>80</sup> The effort to eliminate

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<sup>75</sup> CDDH/SR.49, par. 1.

<sup>76</sup> CDDH/SR.49, par. 6.

<sup>77</sup> Canada, from the beginning of the Conference had been very articulate arguing for a ‘small’ or ‘simplified’ Protocol II. It’s rationale for proposing a small Additional Protocol II, supplementing common article 3 could be summarised as follows: the provisions must be agreeable to all parties to the conflict; they “must be well within the perceived capacity of each party to apply them”; the Protocol should not affect state sovereignty and the responsibility of the government to maintain law and order, or facilitate outside intervention; “Nothing in the Protocol should suggest that dissidents must be treated legally other than as rebels”. (CDHH/212)

<sup>78</sup> On the effects of this caveat in common article 3 see 3.2.4 fns 78 ff and text. See also section 8.3.

<sup>79</sup> Abi-Saab, ‘Conflicts’, 231.

<sup>80</sup> *Ibid.* For a discussion of how the very applicability of legal rules entails a commensurate legal status, disclaimers notwithstanding, see section 3.2.4 fns 78 ff and text as well as section 8.3 below.

anything that could suggest interference with the sovereignty of the state was so thorough that the whole of Part VII of the Draft, which related to the “Execution of the Protocol”, and the role of the ICRC in providing humanitarian assistance was dropped.<sup>81</sup> Finally, another rule lost was the prohibition of the death penalty before the end of the conflict,<sup>82</sup> a rule perceived to limit the freedom of the state to repress the insurgency.

In making the case for his proposal the Pakistani delegate, Judge Hussain, expressed the feelings of many delegates when he said that “there was considerable dissatisfaction with the length of the text as well as with the fact that it ventured into domains which they considered sacrosanct and inappropriate for inclusion in an international instrument.”<sup>83</sup> His elaboration of the rationale behind the Pakistani proposal merits quotation in its entirety:

It was based on the following theses: its provisions must be acceptable to all and, therefore, of obvious practical benefit; the provisions must be within the perceived capacity of those involved to apply them and, therefore, precise and simple; they should not appear to affect the sovereignty of any State Party or the responsibility of its Government to maintain law and order and defend national unity, nor be able to be invoked to justify an outside intervention; nothing in the Protocol should suggest that dissidents must be treated legally other than as rebels; and, lastly, there should be no automatic repetition of the more comprehensive provisions, such as those on civil defence, found in Protocol I.<sup>84</sup>

The Pakistani proposal met with support. Egypt, a delegation that worked hard to gain agreement on a Protocol, admitted that Pakistan’s proposal was “deserving of gratitude”.<sup>85</sup>

Other delegations were less supportive. The USSR suggested that the Conference “should abide by its decisions and study the Pakistani text as a series of proposed amendments” rather than as the draft on which to vote. The USSR “was not opposed to

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<sup>81</sup> See, for a critique, Kalshoven, ‘Combatants’, 113.

<sup>82</sup> See Forsythe, 282-3.

<sup>83</sup> CDDH/SR.49, par. 10.

<sup>84</sup> CDDH/SR.49, par. 11.

<sup>85</sup> Canada also pledged its support. See CDDH/SR.49, par. 17.

a simplified draft *per se*” but thought the Pakistani draft had some deficiencies and the Conference should not distance itself from the spirit of the draft Protocol II.<sup>86</sup> This approach signified the retaining of the importance of the result from the Committee level and a tactical effort to resist some of the changes. The President of the Conference took the same view and this procedure was adopted.<sup>87</sup> The changes suggested through the Pakistani draft, however, were adopted.

Article 1, unchanged by the Pakistani draft, was adopted as it stood in the Committee draft, but only with 58 votes in favour, 5 against, and 29 abstentions.<sup>88</sup> The new threshold stipulated that the Protocol was applicable in armed conflicts

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

The result was very far from a consensus. As Mexico’s delegate put it “it would be truer to say that there had been approval by the majority and silence on the part of others”. Displaying little faith in the humanitarian protection function of Protocol II, he stressed the importance of preserving common article 3’s field of application.<sup>89</sup> A variety of states were not pleased with the result. In the discussions at the Plenary and in the written explanations of votes, various misgivings were expressed. Some states were unhappy about the narrow scope of the article and the practical problems this would mean for its application.<sup>90</sup> Others, however, made sure to state that they were still very concerned about the effects of the Protocol on their sovereignty. They believed that for

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<sup>86</sup> CDDH/SR.49, par. 18-20. See, for the USSR’s position, D. Ciobanu, ‘The Attitude of the Socialist Countries’ in A. Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 399 (Ciobanu, ‘Socialist’).

<sup>87</sup> CDDH/SR.49, par. 21-36.

<sup>88</sup> CDDH/SR.49, par. 65.

<sup>89</sup> CDDH/SR.49, par. 49-50.

<sup>90</sup> See for example Norway’s statement, who abstained in the voting because article 1’s “high threshold would so weaken Protocol II as to make its utility for humanitarian protection doubtful”. See CDDH/SR.49, par. 68. Also, Cameroon thought that the territorial control criterion would create an incentive to insurgents to control such territory. See CDDH/SR.49, Annex.

international law to apply directly to internal armed conflicts was an “internationalisation” of the situation<sup>91</sup> and a violation of state sovereignty.<sup>92</sup> This very clearly expressed the attitudes of states towards the effort as a whole and several states, although they voted yes in a spirit of cooperation<sup>93</sup> kept that in mind at the ratification stage.

Finally, and notably, Colombia led a last minute effort to bring back an amendment stating that the High Contracting Party was the only one to assess the existence of the objective criteria and the applicability of the Protocol. Its amendment asked for the insertion of the phrase that “the determination of the conditions...shall be a matter for the State in which the conflict occurs.”<sup>94</sup> Although it was explained that the amendment had already been proposed and defeated at Committee level, the suggestion found support from a variety of delegations. Some of those argued that they could not vote in favour, without the acceptance of Colombia’s proposal.<sup>95</sup> More worryingly some who had voted in favour of the article, unequivocally stated that this was their understanding of the Protocol and if Colombia’s amendment had been put to a vote they would have voted for it.<sup>96</sup> This stance reflected an opposition by a significant minority to basic structural features of both Additional Protocol II and common article 3. Moreover it fits with an overall perception that the applicability of international law, especially with a low threshold and extensive humanitarian protections, constituted an unacceptable ascription of status to the armed groups and a commensurate affront to state sovereignty. This stance, as reflected in the result, will be analysed below.

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<sup>91</sup> See CDDH/I/SR. 22, par. 12 (GDR). See also Ciobanu, ‘Socialist’, 438.

<sup>92</sup> See the Indian delegate’s comments who also argued that common article 3 was drafted and used in order for colonial powers to claim that wars of national liberation were ‘internal conflicts’ under that article. See CDDH/SR.49, par. 76-8. See also, for the latter point, Anghie and Chimni, 88.

<sup>93</sup> See, for example, the statement of Saudi Arabia, explaining that they voted in favour ‘purely for humanitarian reasons’. See CDDH/SR.49, par. 59, 70.

<sup>94</sup> See, for the discussion of Colombia’s effort, at this time, CDDH/SR.49, par. 37-56.

<sup>95</sup> See, for example, Chile, who voted against, at CDDH/SR.49, par 48. Most, however, abstained. One was, naturally, Colombia. Its delegate stated that Colombia abstained because nobody answered its question, namely, who would assess and determine whether the threshold was met. In addition it could not accept that the insurgents could be bound by these obligations. Kenya and Brazil abstained as it was uneasy at the possibility of ‘extraneous subjective interpretation’ given by the criterion of territorial control. Brazil had, it is recalled, expressed the same opinion in the Report of the Working Party that contained the definition of the threshold. See above fn 62. The Philippines and Tanzania would have voted yes only if the Colombian amendment was accepted. See CDDH/SR.49, Annex.

<sup>96</sup> In this spirit, Saudi Arabia voted yes ‘for purely humanitarian reasons and wished to make it clear that any definition of the terms of the article was solely the concern of the State on whose territory the armed conflict was taking place. Decision by any other country would constitute interference in the domestic affairs of the State concerned.’ See CDDH/SR.49, par. 67. The United Arab Emirates’ delegate, at par. 79, fully concurred.

### 5.3.5. *The Result: a lop-sided Protocol*

The result was the defeat of the efforts, by the ICRC and many states, to develop international humanitarian law applicable to non-international armed conflicts. This is not to say that there is nothing of value in Additional Protocol II. It develops certain fundamental humanitarian guarantees contained in common article 3,<sup>97</sup> and contains certain principles of the law relating to means and methods of warfare, such as the protection of civilians.<sup>98</sup> The latter is of particular importance as it demonstrates a link between the law of humanitarian protection and the rules that refer more directly to the conduct of military strategy, a distinction also known as Geneva versus Hague law.<sup>99</sup>

In any case, the reduction of articles from 47 in the draft adopted by Committee I, to 28 in total, corresponds to a drastic curtailment of substantive rules. Although, in the opinion of some authors little was lost because nothing revolutionary was there in the first place.<sup>100</sup> The elimination of certain rules, however, such as the prohibition of the death penalty before the end of the conflict and the rights of the ICRC and other relief organizations to visit and provide assistance, can be considered important.<sup>101</sup>

If this is coupled with the high threshold adopted in article 1, the picture that emerges is one of a particularly ‘lop-sided’<sup>102</sup> instrument. The material field of application corresponds to non-international armed conflicts of the greatest magnitude, where an armed group is in control of territory. This approximates the material situations that, under the ‘classical’ law of war, corresponded to the concept of belligerency, the

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<sup>97</sup> Parts II and III of the Protocol develop the protection of common article 3. See, for an analysis, Abi-Saab, ‘Conflicts’, 233-5.

<sup>98</sup> This is attempted through Part IV of the Protocol. Although the term ‘combatants’ was not included, from fear it will confer status, the protection in article 13 of those who do not “take part in hostilities” introduces the principle of distinction. See Abi-Saab, ‘Conflicts’, 235-6.

<sup>99</sup> The appellations follow the main treaties dealing with the respective subject matters. See, for the distinction, F. Kalshoven, *The Law of Warfare* (A.W. Sijthoff, 1973), 26; H. McCoubrey and N. White, *International Law and Armed Conflict* (Aldershot, 1992), 217 ff (McCoubrey and White). It is reminded, see 3.4.3. fn 194 and text, that Siotis, 225, understood common article 3 as the emancipation of the law of Geneva from the law of the Hague. It could be argued that the accentuation of the humanitarian rationale in regulating means and methods is a step towards asserting Geneva-related protective rationale.

<sup>100</sup> See, for example, Moir, 94-5.

<sup>101</sup> Forsythe, 282-3.

<sup>102</sup> The term belongs to Frits Kalshoven. See Kalshoven, ‘Combatants’, 112.

recognition of which activated the totality of the laws of war. It is difficult not to think that the combination of the high threshold and the limited substantive provisions in Additional Protocol II constitutes a regression of international humanitarian law. Conceptually, it represents an assertion of the still surviving status-based paradigm of state-like entities, and without the applicability of the full legal regime.<sup>103</sup>

Furthermore, the automaticity of application, although forcefully argued by the ICRC and some states,<sup>104</sup> did not seem to meet the acceptance of a variety of states. This was not promising for the application of the Protocol, although it does not have any effect *de lege lata*. The reiteration of the understanding that only the government could assess the applicability of the Protocol, that third states would be interfering if they opined on its applicability, coupled with the hostility towards the offer of humanitarian services by the ICRC<sup>105</sup> showed the extreme sensitivity of the new states taking this position. Indeed, any application of international law in their territory, through obligations imposed upon the government was viewed as a form of interference. The only “internationalisation” acceptable was the *stricto sensu* internationalisation of wars of national liberation.<sup>106</sup>

This approach was informed by a status-based rationale for applicability of the *jus in bello*. The application of the full regime of international law, or even a regime more extensive than minimal humanitarian protections, could not be divorced from the perception of conferment of status to the insurgent party. Such status is not the strictly legal status which is co-extensive to the specific applicable rules.<sup>107</sup> Indeed, it is characteristic that the caveat on the effect of Protocol II to the legal status to the parties to the conflict was dropped from article 3, because it was feared that the very mention of the term ‘parties’ was problematic.<sup>108</sup> The perceived status conferred is the status of a (potentially)

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<sup>103</sup> See below section 5.4.

<sup>104</sup> See CDDH/I/SR. 29, par. 24.

<sup>105</sup> See Kalshoven, ‘Combatants’, 114-5.

<sup>106</sup> A statement by the Indian delegation at the Plenary is indicative of the stark contrast between these two forms of internationalisation as perceived by some Third World countries: It expressed doubts that Additional Protocol II was even necessary to the extent that national liberation movements had been included in Protocol I “since any other conflict taking place within the territory of a sovereign State would be an internal conflict, and any international instrument designed to regulate non-international conflicts might in actual application impede the settlement of the conflict and lead to external interference.” See CDDH/SR.29, par. 50.

<sup>107</sup> See section 3.2.4 fns 78-79 and text; 5.3.4 fn 78-80 and text; See also section 8.3.

<sup>108</sup> Abi-Saab, ‘Conflicts’, 231.

sovereign entity. It is the political status leading to the only international legal status understood according to this rationale, that of the sovereign subject of international law.

Accordingly, in terms of the extent of regulation, for the states adopting this approach, it was either everything or next to nothing. Either the regulated group is a quasi-sovereign or the application of any legal protections is at the government's discretion. This is reminiscent of the vanishing ground between police operations and international armed conflict in the application of common article 3.<sup>109</sup> The only change achieved through the Diplomatic Conference was one *within* the rationale of conferring status; that peoples fighting a war of national liberation were propelled, through legal fiction and for the duration of their struggle, to sovereign status. This was because of their collective substantive legal right to external self-determination.<sup>110</sup>

It is hard to deny that the rules of non-international armed conflicts were, at the time, perceived to affect mostly Third World states and to impose obligations on their governments without giving them much in return. The new states that had emerged through the process of decolonisation often consisted of plural communities with conflicting interests and were accordingly defensive of the unitary character of their state.<sup>111</sup> Beyond the historical specificities of the time, however, this attitude directly relates to the perceived absence of reciprocity in non-international armed conflicts.<sup>112</sup> According to Condorelli, who was present at the negotiations,<sup>113</sup> no state in Geneva was ready to accept that the insurgents would be bound by the obligations and, therefore, have international status. Accordingly, the obligations were viewed as essentially unilateral and, because of the all too real problems of Third World states in maintaining political stability, generated hostility towards these rules.<sup>114</sup>

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<sup>109</sup> See sections 3.4.3 and 3.4.4.

<sup>110</sup> See chapter 4.

<sup>111</sup> L. Condorelli, 'Les Pays Afro-Asiatiques' in A. Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, 1979), 386, 388 (Condorelli, 'Afro-Asiatiques').

<sup>112</sup> In this context, the statement of the delegate from Nigeria is interesting. He argued that Protocol II "was not law" because "law implied reciprocal obligations between States Parties". He continued that, initially, Protocol II had been 'designed to deal with international and quasi-international situations', which were now covered by Protocol I and the provisions of Protocol II that infringed the sovereignty of the state were a hang-over from this initial purpose. Cameroon concurred. See CDDH/SR.49, par. 22-24. See on common article 3's departure from reciprocity in the law of armed conflict, 3.3.3 also below section 5.4.4.

<sup>113</sup> As was the case with other academic commentators such as Forsythe, Draper, Partsch etc.

<sup>114</sup> Condorelli, 'Afro-Asiatiques', 388.

This led to an instance of particular conceptual polarisation in the perception of many new states of state sovereignty and non-intervention on the one hand and humanitarian protections on the other. Furthermore, the perception of state sovereignty as absolute and unitary and the deep suspicion against anything that could be perceived as interference and intervention was a particularly stark characteristic of the first generation of Third World politicians and even scholars.<sup>115</sup> This solidified the alliance of Third World states, including Asian, African and Latin American states<sup>116</sup> and, importantly, was not opposed vigorously by the states that, nominally, wanted a more expansive Protocol II.

The ‘Great Powers’ did not have particularly vital interests at stake, “ultimately, it was only a question of mitigating the suffering of the people of Third World countries”.<sup>117</sup> Their approach was marked by resignation, accommodation and, ultimately, complicity. The prospect of non-ratification of the Protocol by the majority of states provided a conclusive argument for resignation.<sup>118</sup> In view of all these factors, the Pakistani draft was viewed as a compromise by almost all of the delegates. Condorelli’s conclusion is disheartening: the consensus achieved in the end was a consensus for the non-development of international humanitarian law, and for the legitimisation of inhuman practices in non-international armed conflicts.<sup>119</sup>

In order fully to assess the nature and effect of Protocol II, however, one needs to clarify the characteristics of the material situation and of the actors involved, which article 1 requires in order for the Protocol to be applicable. Once this is attempted, the effect, if any, of the Protocol will be examined in practice.

#### 5.4. The threshold

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<sup>115</sup> For a distinction between the first generation of Third World scholars and a more recent tendency to criticize the formation and practice of Third World states see Anghie and Chimni, 82-3.

<sup>116</sup> Although the latter were not ‘new’, they shared many perceptions and political goals with the decolonized states of Africa and Asia. See Anand, *New States*, 4.

<sup>117</sup> Condorelli, ‘Afro-Asiatiques’, 389. The translation is mine.

<sup>118</sup> *Ibid.* In this respect their timidity was rewarded. As of 10 June 2010 165 countries have ratified Protocol II, although, with certain notable exceptions, such as the US, Israel, Turkey, Somalia, Sri Lanka, Myanmar, Iran, Iraq, India and Eritrea.

<sup>119</sup> *Ibid.*, 390.

#### 5.4.1. *Introduction*

An armed conflict covered by Protocol II will occur, according to art. 1(1),

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

As has been noted, the Protocol “develops and supplements” common article 3, without, however, “modifying its existing conditions and application”. The explicit independence of Protocol II from common article 3 both “constitutes one of the bases of the compromise”<sup>120</sup> and allows the definition of the criteria of article 1 to develop independently from common article 3.

There are, however, commonalities as well as divergence. Both common article 3 and Protocol II necessitate a degree of organisation high enough for the application of the substantive rules. In the present section there will be an attempt to define the terms used in article 1 of Protocol II, followed by a consideration of the question whether the changes introduced by Protocol II in relation to common article 3 qualitatively affect the nature of the legal structure or merely quantitatively develop the threshold of common article 3. A qualitative difference would be a reversion to a horizontal structure, based on reciprocity and a certain equality of status, whereas a quantitative difference would retain the basic, vertical, structure introduced through common article 3.

#### 5.4.2. *The ‘parties to the conflict’*

The ‘parties to the conflict’ regulated by Protocol II, although the term was explicitly erased in the final plenary session, are government “armed forces” and dissident armed

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<sup>120</sup> To the extent that many state would not have accepted the Protocol if it was to narrow the applicability of common article 3. See Sandoz, *Commentary*, 1350.

forces or “organised armed groups”. This leaves out conflicts between non-state armed groups, a rather important omission, which has drawn severe criticism from commentators.<sup>121</sup> Apparently at the Diplomatic Conference this was considered to be only a theoretical example with little practical significance.<sup>122</sup> Practice has shown, however, that the omission was significant<sup>123</sup> and, given the predominance of the notion of sovereignty and the attachment of formal sovereignty exclusively to the government, the omission can be said to reflect the ‘one-track mind’ approach of many delegations.

The term ‘armed forces’ is not defined in a satisfactory manner. Indeed, an effort by Committee I in its report began with a tautology,<sup>124</sup> describing as ‘armed forces’ “all armed forces – including those which under some national systems might not be called regular forces - ...” while it mentioned that many delegations excluded “other governmental agencies the members of which may be armed” such as the police and customs.<sup>125</sup> This, in turn, is refuted by the *Commentary* where it is said that the term should be understood “in its broader sense” in order to include armed forces “not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or other similar force)”.<sup>126</sup> The apparent conflicts of interpretation reflect the difficulties of setting *a priori* an exhaustive list of state organisations and formations, which can be said to participate in an ‘armed conflict’. It also reflects the tensions between the effort by some states to keep as many situations as possible in the area of ‘internal disturbances and tensions’ and the attempt to assess the material existence of an ‘armed conflict’ beyond the insignia of the forces participating.

The interpretative debate over what exactly constituted ‘armed forces’ also relates to the degree of organisation of those forces. The regular army would constitute the conceptual nucleus of organisation but the degree of organisation would have to exist in other groups as well. An interesting parallel can be drawn with the structure of article 4 of

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<sup>121</sup> For various authors see Moir, 103-4.

<sup>122</sup> Sandoz, *Commentary*, 1351-2.

<sup>123</sup> Such conflicts include the conflict in Angola since approximately 1975 where the two main factions (the MPLA and UNITA) were not governmental; the variety of Somali liberation movements especially since 1989; the Lebanese civil war from 1975 to 1991; the conflict in Liberia since 1989 and until, with variations in the actors, 2003; the on-going conflict in the Democratic Republic of Congo since the mid-1990s.

<sup>124</sup> See Moir, 105.

<sup>125</sup> CDDH/219/Rev. 1, 19, 40.

<sup>126</sup> Sandoz, *Commentary*, 1352.

Geneva Convention III, setting down the criteria for privileged combatancy, and the relation between paragraphs 4(a)(1) and 4(a)(2). There is a presumption, rebuttable or not,<sup>127</sup> that the regular armed forces of the state will satisfy the requisite criteria of organisation.

In relation to the insurgents, a certain degree of organisation is required the level of which can only be determined with functional criteria. Accordingly, even if there is no strict “hierarchical system of military organisation similar to that of regular armed forces”, the organisation must be “capable...of planning and carrying out sustained and concerted military operations... [and]...of imposing discipline in the name of a *de facto* authority.”<sup>128</sup> The language in the ICRC *Commentary* is indicative of the interplay between the organisation and intensity in article 1. It is also reflective of the inescapable assumptions of the state-like character of the insurgent party. A degree of organisation is expected that would guarantee the possibility of the Protocol to function.

#### 5.4.3. Territorial control

The most restrictive and controversial criterion introduced by article 1 of Protocol II is that of territorial control. The addition of this criterion has been rightly criticized as imposing too restrictive a scope and as being particularly incompatible with modern guerrilla warfare.<sup>129</sup> As Abi-Saab, speaking as the delegate of Egypt, put it in the Diplomatic Conference “[i]n armed conflict situations characterised by high mobility, territorial control continuously changes hands, sometimes altering between day and night, to the point of becoming meaningless.”<sup>130</sup> In any case, the key to the determination of the degree of control is once again functional and qualitative, relating to the ability to apply the Protocol.

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<sup>127</sup> See Dinstein, 36.

<sup>128</sup> Sandoz, *Commentary*, 1352. See also Moir, 105, who mentions organisations like ETA (in the Basque region) and the IRA (in Northern Ireland) as examples that do not fulfil this criterion.

<sup>129</sup> See also Kalshoven, ‘Combatants’, 112.

<sup>130</sup> CDDH/I/SR. 24, par. 32.

During the course of the Diplomatic Conference there were suggestions for words to be inserted that would set out quantitative criteria for measuring such control. It was suggested that the control should be over a “non-negligible part”<sup>131</sup> or a “substantial part”.<sup>132</sup> These criteria were abandoned. Failing to provide a specific quantitative criterion, the quantity of territorial control should be considered as an element of its quality. This quality will be understood as contributing to the implementation of the Protocol. A qualitative or functional criterion of territorial control will also have the benefit of linking such control to the purposes of applying the rules and not to the strictly proto-state character of the actor.<sup>133</sup>

The quality of such control can either be understood in relation to the control exercised by the government,<sup>134</sup> or to the capacity of the insurgent group reflected in the control of territory. The latter interpretation is the one most favoured by the language of the article: It calls for control of territory “*such ... as to enable [the group] to carry out sustained and concerted military operations and to implement this Protocol*”.<sup>135</sup> It is also the interpretation favoured by the ICRC *Commentary*<sup>136</sup> and the relevant literature.<sup>137</sup> There is some flexibility interpreted into the criterion,<sup>138</sup> in an effort to make it compatible with modern guerrilla warfare, but a minimum of territorial control is inescapable.<sup>139</sup>

In any case, the extent of control will be determined by its contribution to the application of the Protocol. Accordingly, the insurgents must be able to do more than restrict the access of the government to the areas under their control.<sup>140</sup> They must be able to implement the substantive provisions of the Protocol. For example, the insurgents “must be able to detain prisoners and treat them decently or to give adequate care to the sick

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<sup>131</sup> CDDH/I/79.

<sup>132</sup> CDDH/I/32.

<sup>133</sup> It is reiterated how, in the case of belligerency, the control of territory and the organisation of the actor were understood as a reflection of its potential statehood, thus influencing the assessment of the criteria. See section 2.2.2.

<sup>134</sup> This argument was advanced in relation to the control exercised by the FLN in Algeria, in the context, however, of recognition of belligerency. See Bedjaoui, 38 *ff.* Abi-Saab, at 410, uses this interpretation in the context of article 1(4) of Additional Protocol I. See also See Moir, 106.

<sup>135</sup> Italics provided.

<sup>136</sup> See Sandoz, *Commentary*, 1352-3.

<sup>137</sup> See, for example, Abi-Saab, ‘Conflicts’, 228.

<sup>138</sup> See for example D. Forsythe, ‘Three Sessions of Legislating Humanitarian Law: Forward March, Retreat, or Parade Rest?’, (1977) 11 *International Lawyer* 131, 136 (Forsythe, ‘Forward March’).

<sup>139</sup> Sandoz, *Commentary*, 1352-3.

<sup>140</sup> See, L. Green, ‘Low-Intensity Conflict and the Law’, (1996) 3 *ILSA Journal of International and Comparative Law* 493, 506 (Green, ‘Low-Intensity’).

and wounded.”<sup>141</sup> The examples chosen are indicative, however, of the imbalance between the level of the threshold and the substantive law whose application depends on achieving this threshold. The substantive law, being little more than an elaboration of humanitarian protections already stipulated in common article 3, does not seem to necessitate control over territory. Accordingly, as Greenwood argues, there is no reason why the APII threshold should be higher than common article 3.<sup>142</sup> This further supports the argument that the higher threshold can be better understood if the status- and sovereignty-based considerations discussed above are taken into account.

Territorial control is also supposed to reflect, and in the language of the Protocol is linked with, the material level of the hostilities and with the “sustained and concerted character of military operations”. According to the ICRC *Commentary* it is this criterion “which effectively determine[s] control of a territory”.<sup>143</sup> This makes more sense if one takes into account the meaning of the terms. According to the *Commentary*

[s]ustained” (in French the reference is to “*opérations continues*”) means that the operations are kept going or kept up continuously.<sup>144</sup> The emphasis is therefore on continuity and persistence. “Concerted” (in French: “*concertées*”) means agreed upon, planned and contrived, done in agreement according to a plan.<sup>145</sup>

Therefore, the word ‘concerted’ seems to refer back to the organisation of the group, necessitating operational capabilities, while also hinting at the intensity of the operations, in the sense of the magnitude of the military campaigns. Such strategy and planning can be related to an administrative apparatus, which in turn would benefit significantly from, if not require, a territorial basis. Meanwhile, the term ‘sustained’ (and the French ‘*continues*’) refers to the duration and the non-sporadic nature of the hostilities. This

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<sup>141</sup> Junod, 37.

<sup>142</sup> C. Greenwood, *International Humanitarian Law and the Laws of War* (Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899, pursuant to UN General Assembly Resolution. 52/154 of 15 December 1997 and UN Doc. A/C.6/52/3) (The Hague, 1999), paragraph 137. Quoted in Moir, 103.

<sup>143</sup> Sandoz, *Commentary*, 1353.

<sup>144</sup> The idea that the conflict should be of a ‘prolonged period’ (the French expression being, « pendant une longue période ») was included in the drafting Committee Report at the first Conference and supported at the second but ultimately abandoned as too prone to subjective interpretation. See Wilhelm, 349.

<sup>145</sup> Sandoz, *Commentary*, 1353. (reference added.)

means that at the beginning of an internal conflict Protocol II will rarely, if ever, be applicable. ‘Intensity’ and ‘duration’ were proposed as criteria<sup>146</sup> but were abandoned as too prone for subjective interpretation. According to the *Commentary* “the criterion whether military operations are sustained and concerted, while implying the element of continuity and intensity, complies with an objective assessment of the situation.”<sup>147</sup> It is difficult to see how the latter terms are more objective than the former.

The criterion of duration of the *conflict*, as opposed to the duration of the *violence*<sup>148</sup> can be seen as related to a status-based rationale. This is because it can allow governments to delay the applicability of the law until the point when the non-state armed group has achieved such political and military status, both internally and externally, that the government has ‘little to lose’ by conceding the applicability of international law to a ‘party to the conflict’.<sup>149</sup>

#### 5.4.4. *The ability to implement the Protocol and reciprocity*

The ability to implement the Protocol seems to be the key to the interpretation of the levels of all the other criteria provided, as well as the legal nature of the Protocol.<sup>150</sup> Indeed, this was so understood during the creation of the Protocol at the Diplomatic Conference and was expressed in the Canadian delegation’s statement that “[t]he key to the height of threshold we suggest lies in the expression ‘to implement this Protocol’, for the threshold of the Protocol will now clearly depend upon the contents of the Protocol.”<sup>151</sup>

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<sup>146</sup> CDDH/I/26; CDDH/I/32.

<sup>147</sup> Sandoz, *Commentary*, 1353. A similar approach was taken at the Conference of Government Experts. See Wilhelm, 349.

<sup>148</sup> See sections 3.3.1 and 3.4.3, where the link with status is further discussed.

<sup>149</sup> This concept of duration in Additional Protocol II has also influenced the interpretation of the Rome Statute. See section 7.4.1.

<sup>150</sup> According to the *Commentary* “[t]his is the fundamental criterion which justifies the other elements of the definition”. See Sandoz, *Commentary*, 1353. See also Junod, 38. The concern that “the provisions must be within the perceived capacity of those involved to apply them” was also one of the rationales behind the Pakistani draft at the Diplomatic Conference. See CDDH/SR.49, par. 11.

<sup>151</sup> See CDDH/I/SR. 49, par. 77.

This statement recalls the imbalance between the threshold and substantive contents of the threshold, begging the question why it was necessary to require territorial control for the implementation of almost purely humanitarian provisions. Furthermore, the centrality of the ability to implement the Protocol within the definition of the scope leads us to consider another fundamental point; namely, the nature and degree of reciprocity as a condition for the application of the Protocol. It has been argued that to the extent that “the adverse party” has to control a part of the territory ‘as to enable them...to implement this Protocol’ there “seems to be an obligation to do so.”<sup>152</sup> Furthermore, it has been argued, this constitutes a departure from common article 3 where there is no reciprocity or contractual obligation.<sup>153</sup>

Protocol II is an instrument of humanitarian character, rather than a synallagmatic treaty, as are the Geneva Conventions.<sup>154</sup> This satisfies the absence of *de jure* reciprocity. There is, however, a role for *de facto* reciprocity that is relevant to the interpretation of the threshold. As far as humanitarian instruments are concerned, there is the presumption that states, as recognised international legal subjects, are capable of observing the rules they have accepted.<sup>155</sup> Therefore, there is a presumption that the parties to an agreement share certain characteristics that will allow them to carry out the obligations to which they subscribe. The existence of these characteristics is necessary for the legal regime established by the treaty to function and the existence of the presumption allows states to ‘trust’ the regime and become members. There is an expectation of reciprocity which activates the legal regime, even if the frustration of this expectation does not deactivate it. In the case of non-international armed conflicts, this presumption has to be ‘earned’ by the non-state group, through the fulfilment of the criteria that constitute the threshold. If the material criteria are there, it ought to be expected that the insurgents will be able to carry out their obligations.

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<sup>152</sup> See P. Kooijmans, ‘In the Shadowland Between Civil War and Civil Strife: Some Reflections on the Standard-Setting Process’ in A. Delissen and G. Tanja (eds.), *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven* (Martinus Nijhoff, 1991), 225, 232 (Kooijmans).

<sup>153</sup> See *ibid.*, 232-3. See also C. Lysaght, ‘The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments’, (1983) 33 *American University Law Review* 9, 22 (Lysaght, ‘Scope’). See also section 3.3.3.

<sup>154</sup> See Junod and above section 3.3.3 fn 123 *ff.*

<sup>155</sup> See also, in relation to wars of national liberation, section 4.3.3.

It is only, however, the presumption that will have to be fulfilled. The language of the article is somewhat confusing, linking the control of territory with the ability to launch operations *and* implement the Protocol. The material conditions set down by the article refer exclusively to the military capabilities of the party. The Protocol accepts that the concerted and sustained military operations should actually be taking place. However, what is crucial with respect to the implementation is that a material situation exists that entails the ability to implement the Protocol. It is the *ability* rather than the actual *implementation* that is a criterion. The actual observance of the Protocol is not a criterion, the prior fulfilment of which will lead to the reciprocal coming into effect of the legal regime. There is no reciprocity *de jure*.

This does not mean, however, that there is no degree of reciprocity *de facto*. In fact, the insurgent group has to share with the government the common-denominator characteristics that correspond to the application of the Protocol. In that sense the contents of the Protocol do have an effect on its threshold irrespective of the actual implementation of the Protocol.<sup>156</sup> The effect that they do have, however, can be interpreted to bring the threshold ‘down to earth’, or, to put it differently, back to a functional understanding of the reality of the conflict. If the criteria of territorial control and duration are there only to guarantee *de facto* reciprocity for the observance of the very limited humanitarian rules contained in the Protocol, the assessment of their existence can be quite flexible. Such an interpretation can not entirely mitigate, however, the reversion to a paradigm of an actor that has, in time and space, achieved state-like status.

#### 5.4.5. Conclusion: a qualitative difference?

As discussed in chapter 3,<sup>157</sup> the move away from strict reciprocity and from a horizontal to a vertical structure for the applicability of the *jus in bello* constituted a fundamental structural feature of common article 3, which allowed it to develop a humanitarian protection rationale. The question is whether the situation under Additional Protocol II

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<sup>156</sup> See Moir, 107-8 who argues that this would be the case particularly if there was to be *de jure* reciprocity.

<sup>157</sup> Section 3.3.3.

is, because of the high threshold, significantly different. It is certainly quantitatively different, as the threshold is significantly higher, but not qualitatively different. Although in common article 3 there was an absence of both a definition of material criteria and mention of the need for the material ability of the insurgents to apply the article, arguably, any (necessary) interpretation of the article and its scope would be influenced by its *effet utile* and set the threshold appropriately.<sup>158</sup>

The elaboration of criteria in article 1 of Protocol II only reflects and accentuates the *de facto* reciprocity necessary for the application of the legal instrument. Therefore it is incorrect to say that the element of reciprocity in Protocol II is a significant departure from common article 3,<sup>159</sup> as, conversely, it would be incorrect to argue that Additional Protocol II introduces *de jure* reciprocity. The only difference is a quantitative one. This means that the legal structure introduced by common article 3 is still retained by Protocol II, as was the purpose of those advocating the Protocol.

However, the function of *de facto* reciprocity is frustrated by a threshold which is in imbalance with the substantive law it is meant to activate. This reflects the inherent tensions in the effort to develop a vertical legal structure which will not depend on horizontal *de jure* reciprocity between the parties. It further reflects the continuous effect of the status-based rationale in the regulation of situations of non-state armed groups and the difficulty of developing a legal regime based on the protection of individuals in situations that have developed partly due to the characteristics and political/military capacities of the group.<sup>160</sup>

Finally, a comparison to belligerency would further clarify whether Additional Protocol II constitutes a qualitative departure from the logic of common article 3 and a move to a state-like paradigm. Although the criterion of control of territory approximates the material situation required for the traditional category of belligerency,<sup>161</sup> it would be wrong to equate the two.<sup>162</sup> The state-like quality needed for the insurgents to be

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<sup>158</sup> See, e.g., Draper, 90.

<sup>159</sup> Though both common article 3 and Protocol II differ in this instance from human rights instruments. Cf Lysaght, 'Scope', 22.

<sup>160</sup> See section 1.2.2.

<sup>161</sup> See W. Solf, 'Comment on Non-International Armed Conflicts' (1982) 31 *American University Law Review* 927, 928-9 (Solf), at 931, who links the two thresholds. See also Green, 'Low-Intensity', 506.

<sup>162</sup> See Schindler, 'Types', 147.

recognised as belligerents calls for a level of administration and a degree of control more on a par with that of a government.<sup>163</sup> This is especially the case if the role of *political* organisation in the recognition of belligerency is taken into account.<sup>164</sup> As has been mentioned, there can be some containment of the proto-state quality of the group through a functional interpretation, linked to the reality of the conflict.

Ultimately, this does not affect the fundamentally lop-sided character of the Protocol. One hope in the initiation of the process to lead to an Additional Protocol had been to correct the deficiencies of common article 3 in relation to both the substantive rules and the difficulties in the application of the article, stemming from its non-definition of the term ‘armed conflict’. Both these corrections would have furthered the humanitarian protection rationale in the centre of common article 3. In both these cases the results are far from adequate. Some elaboration and fleshing out of the rules of common article 3 was achieved.<sup>165</sup> The definition, however, of ‘armed conflict’, could have the opposite effect from the one expected. It voiced the status-based rationale that common article 3 strove to avoid. It created a new layer of regulation, between common article 3 and international armed conflicts, which both complicates the legal regime and pulls it towards the paradigm of proto-state entities.

Indeed, states could interpret the criteria provided narrowly and refuse to acknowledge the applicability of the Protocol.<sup>166</sup> This was after all part of the argument of the ‘non-definition school’ in the case of common article 3.<sup>167</sup> The fact remains that the quest for ‘objective’ criteria is partly futile and partly, as in this case, dangerous. It is futile to the extent that there is no authoritative third party that will determine the application of the criteria and assess the material situation.<sup>168</sup> In this case, it proved dangerous for the development of humanitarian law as states used this quest in order to narrow the scope and limit the applicability of the new instrument. Because of these shortcomings of the

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<sup>163</sup> See for the exposition of both views A. Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law’ (2005) 183 *Military Law Review* 66, 96 (Cullen, ‘Developments’).

<sup>164</sup> See section 2.2.2. fn 45 *ff* and text.

<sup>165</sup> See Greenwood, ‘Protocols’, 113.

<sup>166</sup> See Cullen, ‘Developments’, 97. See also Forsythe, ‘Forward March’, 137.

<sup>167</sup> See section 3.2.4. See also Draper, 87; Farer, 52; Ciobanu, 49.

<sup>168</sup> See Solf, 931-2.

new instrument it is important that common article 3 continues to be applicable alongside it.

### 5.5. The application of the Protocol in practice

In practice Protocol II has been applied less often than common article 3. There are many reasons for this including the continuing existence of common article 3. It is sensible to expect that Additional Protocol II would have been applied more frequently if it was the only available instrument to regulate non-international armed conflicts. There have also been a number of conflicts to which the Protocol would not apply since the hostilities took place between two non-governmental armed groups.<sup>169</sup>

Since the coming into effect of the Protocol, there have been a variety of conflicts where the application of the Protocol was not mentioned by the parties,<sup>170</sup> or where the government had not ratified the Protocol.<sup>171</sup> Considerations of space do not allow a detailed review of whether the criteria of applicability were satisfied in these cases. In some cases, however, willingness to apply the Protocol was expressed by the parties, if with usually disappointing results. The present survey will focus on such instances.

A case in point is the armed conflict in El Salvador. The most significant period of the conflict started from 1979 and lasted until 1992 when a truce was concluded. The Protocol was ratified by El Salvador on 23 November 1978. The main forces in the conflict were the government troops, right-wing paramilitary groups and a leftist guerrilla group called Frente Farabundo Marti Para La Liberacion Nacional (FMLN).<sup>172</sup>

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<sup>169</sup> See fn 123 above.

<sup>170</sup> See Moir, 120, who mentions Angola, Namibia, Mozambique, Afghanistan, Sri Lanka, Haiti and Nicaragua. In the Sri Lankan conflict, however, the rebel group LTTE pledged the application of 'the Geneva Conventions and their Additional Protocols'. See S. Sivakumaran, 'Binding Armed Opposition Groups', (2006) 55 *International and Comparative Law Quarterly* 369, 388.

<sup>171</sup> This was, for example, the case with Chad. Although, both the Government and the insurgents (Frolinat) had recognised the existence of an 'armed conflict' Chad had not ratified Protocol II. See Junod, 39.

<sup>172</sup> See the 'Annual Report of the Inter-American Commission on Human Rights' (1987-8), available at <http://www.cidh.org/annualrep/87.88eng/chap4a.htm>

The conflict developed very quickly in both organisation and intensity.<sup>173</sup> According to one observer

The FMLN controlled mainly unpopulated areas but they “engage[d] in military operations for a certain time, arguably “sustained,” and they apparently ha[d] done so in a systematic, coordinated way, arguably “concerted.” Full-fledged field battles are not necessary in order to make Protocol II applicable. Regular harassment operations from rather remotely situated areas controlled by rebels also can constitute “sustained and concerted military operations” within the meaning of the Protocol.” Moreover, the FMLN had built “a certain administrative and military structure” that made them comparable to the armed forces of a government.<sup>174</sup>

He concludes that the threshold of applicability of Additional Protocol II, to which El Salvador is a party, arguably, had been reached.<sup>175</sup> Other observers were not convinced: For instance, Solf argued, at the same point in time, that the insurgents in El Salvador, by not controlling “a single town”, do not control “sufficient territory” for the applicability of Additional Protocol II.<sup>176</sup> Indeed, the territorial control achieved by the rebels seemed to be fleeting as they had to abandon territory gained in favour of mobility. This case illustrates the difficulties in the applicability of the territorial control criterion in internal armed conflicts even of a great magnitude.<sup>177</sup>

The government initially accepted the applicability of common article 3 but not of Additional Protocol II.<sup>178</sup> Eventually, though it did not admit that Protocol II was applicable as a matter of law, it vowed to apply it on the basis that “its provisions merely developed and completed the provisions of common article 3.”<sup>179</sup> The FMLN made a

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<sup>173</sup> See Interim Report of the Special Representative of the UN Commission on Human Rights, UN Doc. A/36/608 and Final Report of the Special Representative of the UN Commission on Human Rights, UN Doc. E/CN.4/1502.

<sup>174</sup> See Bothe, ‘Case Studies’, 906.

<sup>175</sup> *Ibid.* As Bothe points out, however, the Protocol was not applicable between the FMLN and the right-wing paramilitaries.

<sup>176</sup> Solf, 932.

<sup>177</sup> See also Junod, 39-40.

<sup>178</sup> *Ibid.*, 39.

<sup>179</sup> See Moir, 120-1.

statement in 1988 to the effect that its combat methods would comply with both common article 3 and Additional Protocol II.<sup>180</sup>

Another case where there was some willingness to abide by the Protocol was the conflict in the Southern Philippines. The conflict occurred between the government and two main rebel groups,<sup>181</sup> a left wing (National Democratic Front or NDF) and an Islamist one (Moro Islamic Liberation Front or MILF). The conflict first developed in the 1970s and remains ongoing.<sup>182</sup> After a particularly brutal attack on civilians by the NDF in July 1988 the rebel group declared that it would discipline the perpetrators and stated that “guerrilla fighting forces and supporters were being “educated” on provisions of [common] article 3 and Protocols 1 and 2 of the Geneva Convention.”<sup>183</sup> Through the efforts of various actors, including the church and NGOs, an international conference was convened that produced a Code of Behaviour based on Additional Protocol II.<sup>184</sup> The code expressly re-stated the basic humanitarian protections present in common article 3 and Protocol II, and referred to those instruments as well as the Universal Declaration of Human Rights.<sup>185</sup> Although the government accepted the draft code, neither insurgent party did so. The rebels did promise to educate their fighters on the laws of war.<sup>186</sup>

The case of Chechnya provides an interesting example of a variety of assessors and assessments. The former Soviet Republic declared independence in 1991 and the conflict between the separatist rebels and the Russian Federation took place in two phases. The first one lasted from 1994 to 1996, costing around 80,000 lives, while fighting broke out again in 1999.<sup>187</sup> Russia ratified Additional Protocol II on 29 September 1989.

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<sup>180</sup> See, however, *ibid.*, 122, on compliance.

<sup>181</sup> Although more groups have emerged over time.

<sup>182</sup> For a presentation of the main timeline and the main actors see the BBC ‘Guide to the Philippines conflict’ available at <http://news.bbc.co.uk/2/hi/asia-pacific/1695576.htm>.

<sup>183</sup> R. Myren, ‘Applying International Laws of War to Non-International Armed Conflicts: Past Attempts, Future Strategies’ (1990) 37 *Netherlands International Law Review* 347, 368 (Myren).

<sup>184</sup> Kooijmans, 230-2.

<sup>185</sup> See, for a summary of the code, Myren, 369.

<sup>186</sup> See Moir, 131 fn 206, using the ICRC Annual Report 1991: “Filipino insurgents told the ICRC on 15 August 1991 of their desire to comply with common article 3 and Additional Protocol II, although Asia Watch in 1990 had concluded that, while they were operating under responsible command and capable of launching operations in all provinces, their capacity to implement the due process requirements in Article 6 of the Protocol was doubtful.”

<sup>187</sup> For a brief historical introduction see. F. Sperotto, ‘Law in Times of War: The Case of Chechnya’, (2008) 8 *Global Jurist* 1, 1-5 (Sperotto, ‘Chechnya’). For a more extensive survey see C. Gall and T. De Waal, *Chechnya* (New York University Press, 2000).

During the first phase of the conflict, the issue came before the Russian Constitutional Court which, called on to adjudicate alleged violations committed by Russian forces, opined that Additional Protocol II was applicable to the Chechen conflict.<sup>188</sup> The Court, however, did not elaborate on the existence of the material criteria. Although the Court argued that it could not pronounce on the actual conduct of Russian armed forces, it conceded that violations were probably made but put these down to the non-incorporation of the Protocol in Russian domestic law.<sup>189</sup>

Eventually, the Russian government accepted that the 1994-6 conflict was an ‘armed conflict’, without, however, admitting the applicability of Protocol II. A Russian domestic law “providing additional compensation for those troops sent on particularly hazardous missions was amended in 1997 to cover those who had ‘carried out assignments under the conditions of a non-international armed conflict in the Chechen Republic.’”<sup>190</sup>

In relation to the second phase, the government claimed its campaign was anti-terrorism action,<sup>191</sup> although certain statements implied the recognition of the existence of an ‘armed conflict’.<sup>192</sup> The Chechen armed group called ‘the Chechen Republic of Ishkeria’ claimed that both common article 3 and Additional Protocol II were applicable.<sup>193</sup> A panel of experts in the Crimes of War Project<sup>194</sup> argued unanimously that common article 3 was applicable.<sup>195</sup> The matter was more complicated, however, as far as Additional Protocol II was concerned: four of the six experts could not pronounce on its

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<sup>188</sup> See P. Gaeta, ‘The Armed Conflict in Chechnya Before the Russian Constitutional Court’, (1996) 7 *European Journal of International Law* 563.

<sup>189</sup> See *ibid.*, 568.

<sup>190</sup> Moir, 128.

<sup>191</sup> Russia initially claimed that the applicable law was The Federal Law on Defence of 1996 and The Federal Law on Combating Terrorism of 1998. See Sperotto, ‘Chechnya’, 6. The government also succeeded in amending a report by the UN Secretary General, to the effect that the hostilities did not constitute an armed conflict and that the Chechen groups were ‘illegal armed groups’. See W. Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 *European Journal of International Law* 741, 743 (Abresch, ‘Chechnya’).

<sup>192</sup> See B. Tuzmukhamedov, at [www.crimesofwar.org/chechnya](http://www.crimesofwar.org/chechnya), who quotes Russian President Putin who stated to the *Financial Times* that Russia was “strictly complying with its obligations concerning the provisions of international humanitarian law.”

<sup>193</sup> See Abresch, ‘Chechnya’, 754.

<sup>194</sup> These were independent academics consulted by the project in their private capacity.

<sup>195</sup> See [www.crimesofwar.org/chechnya](http://www.crimesofwar.org/chechnya). The project describes itself as “a collaboration of journalists, lawyers and scholars dedicated to raising public awareness of the laws of war and their application to situations of conflict.” See “[www.crimesofwar.org/about/about.html](http://www.crimesofwar.org/about/about.html)

applicability, partly due to the criterion of territorial control.<sup>196</sup> Other observers have argued that the conflict had the necessary elements of Additional Protocol II, particularly during the period that they held Grozny,<sup>197</sup> while others considered that no humanitarian law applies.<sup>198</sup>

Moreover, international institutions offered assessments of the situation. The Council of Europe declared that the Russian actions were in contravention with basic principles of humanitarian law, therefore implying the existence of an armed conflict.<sup>199</sup> The UN Commission on Human Rights adopted a resolution evoking specifically common article 3 and Additional Protocol II, among other rules of international law.<sup>200</sup> The ECHR also dealt with the conflict, applying exclusively human rights law.<sup>201</sup>

Other cases of conflicts where the material situation arguably fulfilled the criteria of Protocol II are the conflicts in Rwanda (1994) and the former Yugoslavia (1991-1995).<sup>202</sup> The conflict in Rwanda occurred between the Hutu government and the Tutsi Rwandan Patriotic Front (RPF). The Rwandan Patriotic Front “stated to the [ICRC] that it was bound by the rules of International Humanitarian Law.” Furthermore, according to the ICTR, they possessed increasing “control over the Rwandan territory”. They were “disciplined and possessed a structured leadership which was answerable to authority.”<sup>203</sup>

The conflict in the former Yugoslavia had both internal and international aspects. As the ICTY put it “[t]o the extent that the conflicts had been limited to clashes between

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<sup>196</sup> C. Bassiouni argued that both common article 3 and Additional Protocol II was applicable. At the other end, according to B. Tuzmukhamedov, although common article 3 was applicable, as far as Protocol II goes “data that appears reliable do not prove that armed groups opposing Federal forces meet all requirements of the Protocol's Art.1 para 1. Individual groups may have elements of internal structure and discipline. It is less certain that there is centralized control or responsible command. It is doubtful that they are capable of coordinated action. They definitely do not “exercise such control over a part of [its] territory as to enable them to carry out sustained and concerted military operations”.” A. Rogers and F. Hampson could not pronounce on the applicability of Protocol II. See [www.crimesofwar.org/chechnya](http://www.crimesofwar.org/chechnya).

<sup>197</sup> See Abresch, ‘Chechnya’, 754.

<sup>198</sup> See, for an unconvincing analysis, S. Byrne, A. Mauro and S. Rudoi, ‘Russia’s Chechnya and America’s Afghanistan Geo-political Interests in the Region and International Humanitarian Law’ (2006) 18 *Sri Lanka Journal of International Law* 41, 55 ff.

<sup>199</sup> See Council of Europe, *Declaration on Chechnya*, 10 December 1999.

<sup>200</sup> Resolution 2000/58 on the Situation in the Republic of Chechnya of the Russian Federation, UN Doc. E/CH.4/RES/2000/58, 25 April 2000.

<sup>201</sup> See Abresch, ‘Chechnya’, 741. Other actors, such as the European Union, the Organisation for Security and Cooperation in Europe, and the International Monetary Fund also expressed their concern, without, however, a specific assessment of applicability. See Moir, 129-30 for references to press sources.

<sup>202</sup> The conflict in Kosovo will be discussed in detail in the next chapter. See section 6.5.

<sup>203</sup> See *Prosecutor v Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, par. 627 (*Akayesu*). See further Moir, 123-5.

Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal.”<sup>204</sup> To the extent that the conflict was internal the ICTY found that Protocol II was applicable at a minimum. However, the parties agreed on 22 of May 1992 to apply common article 3, though not Protocol II.<sup>205</sup>

This review of state practice is only partial and dealing with situations where the applicability of Protocol II was an issue of relative visibility. The relative rarity of examples suggests that the stipulation of specific criteria for the definition of an ‘armed conflict’ did not facilitate the application of the instrument. As the structural deficiencies of the system persist, the governments concerned are free to either deny the existence of an armed conflict, as is the case in common article 3, or deny the existence of the material criteria required for Protocol II. Where the issue of territorial control played some part, it was to narrow the applicability of the Protocol, although not reverting to a fully proto-state paradigm. What little state practice there is shows that Additional Protocol II compounded common article 3’s shortcomings, while not offering much in return.

## 5.6. Conclusions

The efforts to develop the humanitarian protection rationale of common article 3 through a new instrument were largely unsuccessful. While Additional Protocol II does not effectively reverse the vertical structure introduced through common article 3, it reflects potent status- and sovereignty-based concerns by many states. Indeed, a status based approach was present at the 1974-7 Diplomatic Conference and manifested itself, in different ways, in the drafting of both Protocols I and II.

While the ascription of state-like status to national liberation movements led to article 1(4), the fear of ascribing status to armed groups outside the colonial context led to

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<sup>204</sup> *Prosecutor v Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 72 (*Tadić* Appeal).

<sup>205</sup> *Ibid.*, par. 73. In view of the conflict’s intensity the Parties also agreed “to apply certain provisions of the Geneva Conventions concerning international conflicts.”

significant resistance in the drafting of Additional Protocol II. This manifested itself both in the narrowing of the proposed threshold and the paring down of substantive humanitarian provisions. The result is a flawed creation, reflecting a lingering paradigm of status-based regulation and a specific historical circumstance, favouring absolute and unitary sovereignty. Indeed, the position of many states can be understood in relation to a conflation of legal status *stricto sensu*, the very extension of a set of rules to a non-state armed group, with a wider legal and political status, which is in direct conflict with state sovereignty. While such a position, if taken to its logical extreme, would mandate no international regulation of conflicts involving non-state armed groups, in this case status-based concerns only managed to narrow the applicability of humanitarian protection, by instituting a high threshold.

The new threshold, if not fully reverting to belligerency, uses key elements of the proto-state paradigm, most notably the criterion of territorial control. The armed groups that governments agreed to include in the legal regime must have already achieved, in time and space, a certain political and military status. Importantly, however, a functional interpretation of the threshold, based on its language and *de facto* reciprocity allows the assessment to focus more narrowly on the military capabilities, rather than political organisation. Even so, the applicability of the Protocol is affected by the high threshold. This is compounded by the inability to correct the structural deficiencies that allow the incumbent government such a prominent role in the assessment of applicability. This prominence continues to hamper the aspirations of automatic application of the article and allow a status-based rationale to be exercised in the process of assessment of applicability.

Overcoming this deficiency required a different set of actors. International courts and tribunals applying a different, if related, legal regime – international criminal law – were to contribute to the development of the humanitarian protection rationale from the early 1990s and onwards. This is the topic of the next, and final, chapters.

## 6. Chapter 6: The applicability of the *jus in bello* through International Courts and Tribunals

### 6.1. Introduction

The previous chapters have discussed the different thresholds created through international treaties, for the applicability of different regimes of the *jus in bello* to armed conflicts involving non-state armed groups. The discussion has yielded some tentative conclusions, central to which is the point that the thresholds are influenced by a status-based rationale. This, compounded with the decentralised and incompletely legalised process of assessment, leads to problematic results as far as the protective potential of the rules is concerned. These regulatory shortcomings were heightened by the limited protective rules activated in case the applicability of one of the above instruments was established. Again the unwillingness of states to develop the substantive regime has been shown, particularly through the examination of *travaux préparatoires*, to be related to the above sovereignty- and status-based rationale. This is where the law stood at the beginning of the 1990s when the Security Council, responding to the atrocities committed in conflicts which included non-state armed groups, established the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY)<sup>1</sup> and Rwanda (ICTR).<sup>2</sup>

The creation of international judicial institutions<sup>3</sup> has had a significant effect on the determination of what is to be the threshold for the application of the *jus in bello* as well as for extension of the applicable legal regime. Indeed, it will be argued that these two aspects are interrelated. The *ad hoc* Tribunals contributed vastly to the development of

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<sup>1</sup> Security Council Resolution 780 (1992) created a Commission to investigate alleged international crimes in the former Yugoslavia, Resolution 808 (1993) contained the statute of the Tribunal recommended by the Secretary-General and Resolution 827 (1993) adopted this statute.

<sup>2</sup> Security Council Resolution 935 (1994) created a Commission and Resolution 955 (1994) the Tribunal.

<sup>3</sup> This chapter will focus primarily on the ICTY, and secondarily to the ICTR and to the Special Court for Sierra Leone (SCSL), in accordance with their contribution to the elaboration of the threshold. For the latter, see Security Council Resolution 1315(2000) which led to an agreement between the Secretary General and the Government of Sierra Leone on 16 January 2002.

the, then, rudimentary regime of international criminal law<sup>4</sup> and influenced the movement for the creation of a permanent International Criminal Court (ICC).<sup>5</sup>

As international institutions, international courts and tribunals constitute a move away from the decentralised system of states. Courts and tribunals are, moreover, *judicial* institutions, and this adds an important element of legalisation: Decisions on the applicability and the application of the legal rules are less influenced by political and status-based considerations. This applies both to the definition and clarification of what is the threshold and on the assessment of whether the threshold is met in a specific case. In this chapter and the next there will be an analysis and discussion of the (continuing) contribution of the *ad hoc* tribunals and the ICC in the development of the definition of the threshold for the application of the *jus in bello*. This jurisprudence has developed for the determination of the applicability of the law on war crimes.<sup>6</sup>

The central question is whether the work of courts and tribunals has fundamentally altered the rationale for the application of the *jus in bello*. More specifically, there will be an effort to discern whether there has been a decisive move away from status-based considerations that influenced, in different ways, the thresholds discussed so far and towards humanitarian protection as the fundamental rationale. A key element in this discussion is the development of international criminal law and its similarities and differences with the *jus in bello* regime. Furthermore, this chapter will consider the effects of the fact that the regime of international criminal law has been applied and developed by judicial institutions. The analysis will focus on the refinement and clarification of the criteria and factors that satisfy the threshold. This line of enquiry is pursued in this chapter through the discussion of the jurisprudence of the *ad hoc* Tribunals and in the next chapter through the analysis of the legal regime of the ICC.

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<sup>4</sup> See A. Cassese, *International Criminal Law* (Oxford University Press, 2003), 17 (Cassese, ICL).

<sup>5</sup> On the process for the creation of the ICC see section 7.3.

<sup>6</sup> This is because for there to be genocide or crimes against humanity there need not necessarily exist an armed conflict. See R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *International Criminal Law and Procedure* (Cambridge University Press, 2007), 167 and 191 (Cryer et al).

## 6.2. The concept of ‘war crimes’ and the relation between international criminal law and the *jus in bello*.

### 6.2.1. *Introduction: similarities and differences*

The law of ‘war crimes’ displays a significant affinity, notwithstanding certain differences, to the law of armed conflict. The central link between these two legal regimes is the temporal and logical primacy of the law of armed conflict. This has been expressed doctrinally in Bothe’s formulation that ‘war crimes’ are “secondary rules in relation to the primary rules concerning behaviour which is prohibited in case of an armed conflict.”<sup>7</sup> Moreover, ‘war crimes’ are considered to be a ‘dynamic’ concept insofar as the substantive applicable rules under that headline can change alongside a change in the primary rules in the *jus in bello*.<sup>8</sup> This means that the development of the law of armed conflict, for example the extension of substantive protective rules to non-international armed conflicts, *can* have an effect on the law of war crimes.

A ‘war crime’ cannot exist unless the behaviour is already proscribed in the applicable *jus in bello*. Conversely, this also means that when there is an agreement that certain conduct constitutes a war crime, it follows that the conduct is proscribed in the law of armed conflict. This is particularly the case when the rule is valid beyond the legal instrument that formulates it and is accepted as customary law. Accordingly, the *jus in bello* is affected by the development of the substantive law by the *ad hoc* tribunals, as well as in the Rome Statute, to the extent that they reflect customary international law or contribute to the creation of custom.

On the other hand, “not every act prohibited under the primary rules also constitutes a war crime”.<sup>9</sup> Even though the law of war crimes and the law of armed conflict share a common basis they are not identical concepts or legal regimes. There is an additional element that renders a conduct not just proscribed in the *jus in bello*, but also leading to

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<sup>7</sup> M. Bothe, ‘War Crimes’, in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary vol. 1* (Oxford University Press, 2002), 379, 381 (Bothe).

<sup>8</sup> See *Prosecutor v. Kunarac*, Case No. IT-96-23 & 23/1-A, Judgment, 12 June 2002, par. 67; Bothe, 381; G. Mettraux, *International Crimes and the ad hoc Tribunals* (Oxford University Press, 2005), 29 (Mettraux).

<sup>9</sup> Bothe, 387. Thus also *Tadić* Appeal, par. 94.

the individual criminal liability of its individual perpetrator. Understanding the elements that differentiate the species of ‘war crimes’ from the genus of proscribed behaviour in armed conflict can help us understand how the developments discussed in these two chapters affect the overall regulation of conflicts involving non-state armed groups.

Furthermore, although the relationship between primary and secondary rules relates more directly to the substantive legal regime, the analysis of the concepts and the juxtaposition between international criminal law and the *jus in bello* relates to the overall rationale for the applicability of these regimes. This can be of help in understanding the effect that international criminal law has had and can have on the question of threshold(s) of applicability and on whether they contribute to an individual-protection rationale.

Finally, a history of the concept of ‘war crimes’ would be beyond the scope of this chapter. Suffice it to say that beginnings of the modern concept<sup>10</sup> are usually traced to the First World War and the consequent Leipzig trials,<sup>11</sup> while its formalisation, through its inscription in a treaty, occurred with the Nuremberg<sup>12</sup> and Tokyo<sup>13</sup> Tribunals. The concept was further developed through the provisions for ‘grave breaches’ in the Geneva Conventions,<sup>14</sup> and the list of ‘grave breaches’ was supplemented and broadened in Additional Protocol I, as well as explicitly recognised as ‘war crimes’ in article 85(5). After the end of the Cold War ‘war crimes’ were included in the statutes of the *ad hoc* Tribunals, as discussed below.

#### 6.2.2. *Distinguishing features of war crimes: an emphasis on the individual*

One point of comparison between international criminal law and the law of armed conflict has to do with the role of different actors in these legal regimes. One

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<sup>10</sup> For the pre-20<sup>th</sup> century history of war crimes see T. McCormack, ‘From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime’ in T. McCormack and G. Simpson, *The Law of War Crimes* (Kluwer, 1997), 286.

<sup>11</sup> See Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference* (1920) 14 *American Journal of International Law* 95.

<sup>12</sup> Article 6(b) of the Nuremberg Charter provided for: “War crimes: namely, violations of the laws or customs of war. Such violations shall include...”

<sup>13</sup> Article 5.(b) Jurisdiction Over Persons and Offenses. See N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford University Press, 2008), chapter 7.

<sup>14</sup> See articles 41, 51, 130 and 147 of Geneva Conventions I-IV.

distinguishing feature of the concept of war crimes is that it marks a shift in the structure of international law towards the individual as a subject of rights and obligations. The centrality of the individual has been expressed in one of the canonical texts of international criminal law, the decision of the International Military Tribunal at Nuremberg:

[C]rimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced...<sup>15</sup>

This is not to say that international criminal law applies exclusively to individuals.<sup>16</sup> The practice however has focused almost exclusively on the criminal liability of the individual. This has been the focus of international criminal judicial institutions. This distinction was clearly stated by the ICTY in *Tadić*: “the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law.”<sup>17</sup>

The above sentence also points out that the individual obligations are present already under the law of armed conflict and that international criminal law serves to enforce them. In the law of armed conflict there is an element of a contest between two entities, as well as an element of individual action and protection from suffering. The former is closer to questions of status and reciprocity while the latter follows the rationale of the humanitarian protection of individuals and imposes obligations on individuals to minimise the suffering caused by the conflict. In that sense international criminal law can be seen as accentuating the latter element already present in the law of armed conflict.

Accordingly, international criminal law can be seen as the development of a legal and institutional regime for the enforcement of the individual-protection rationale of the law

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<sup>15</sup> ‘Nuremberg IMT: Judgment and Sentence’ (1947) 41 *American Journal of International Law* 172, 221

<sup>16</sup> See generally N. Jørgensen, *The Responsibility of States for International Crimes* (Oxford University Press, 2000); A. Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’ (2008) 6 *Journal of International Criminal Justice* 899.

<sup>17</sup> *Prosecutor v Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, 7 May 1997, par. 573 (*Tadić* TC).

of armed conflict. The focus shifts from a contest between two entities to the relationship between the perpetrator of a violation and the victim(s) of that violation.

### 6.2.3. *Distinguishing features of war crimes: the seriousness of humanitarian values*

Aside from similarities and differences between the *actors* involved in the law of armed conflict and international criminal law, there are also similarities and differences with respect to the *acts* that constitute violations of the two areas of law. In this respect, an important point concerns the distinguishing factors that make some acts prohibited by the law of armed conflict war crimes and not others.

Initially, it should be said that, as conceded by the ICTR, “[t]he line between those forms of responsibility which may engage the criminal responsibility [...] and those which may not can be drawn in the abstract only with difficulty”.<sup>18</sup> This is not least because of the fragmentary and haphazard way in which the states have decided or not on the criminalisation of certain forms of behaviour.<sup>19</sup> It might therefore be that the search for a definite element or principle which renders a violation of the law of armed conflict criminal is futile.<sup>20</sup>

Nevertheless, it is not impossible to discern some central elements. The ICTY Appeals Chamber offers a starting point. The *Tadić* Interlocutory Appeal decision set certain conditions for a crime to exist:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];

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<sup>18</sup> See also *Prosecutor v Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001, par. 36 (*Bagilishema*).

<sup>19</sup> See R. Cryer, ‘The Doctrinal Foundations of International Criminalisation’ in C. Bassiouni (ed.), *International Criminal Law vol. 1* (3<sup>rd</sup> ed., Martinus Nijhoff, 2008) 107, (Cryer, ‘Doctrinal’), 118. This is indeed shared with the *jus in bello*. See C. Bassiouni, ‘The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities’, (1998) 8 *Transnational Law and Contemporary Problems* 199.

<sup>20</sup> Or, indeed, dangerous, as leading to subjective and moralist approaches. See Cryer, ‘Doctrinal’, 111-3.

(iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...]

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>21</sup>

While condition (i) seems to be a formulation of *nullum crimen sine lege*,<sup>22</sup> as well as acknowledging the dependence of war crimes from the *jus in bello*, condition (ii) limits the sources to treaty and custom. Condition (iv) has been criticised as redundant. It has been argued that evidence for individual criminal responsibility, due to the lack of relevant proceedings, is sparse and that, in truth, this condition is subsumed in condition (iii) which provides for the 'seriousness' of the violation. Thus all 'serious' violations are criminalised.<sup>23</sup> Nevertheless, condition (iv) serves to accentuate the shift of focus to the individual discussed in the previous sub-section

Therefore, the word that remains as our sole guide for distinguishing criminal from non-criminal violations of the *jus in bello* is the word 'serious'. 'Serious' might sound vague or 'question-begging',<sup>24</sup> but it is not beyond interpretation. Indeed, the Appeals Chamber, in the above definition, provided both an explanation of the term, stating that "[the violation] must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim" as well as an example of a distinction between a serious and a non-serious violation:

(iii) [...] Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a "serious violation of international humanitarian law" although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations

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<sup>21</sup> *Tadić* Appeal, par. 94.

<sup>22</sup> See M. Shahabudeen, 'Does the Principle of Legality Stand in the Way of the Progressive Development of Law?' (2004) 2 *Journal of International Criminal Justice* 1017.

<sup>23</sup> See, generally, Cryer et al, 226; Indeed rule 156 of the ICRC Customary International Humanitarian Law Study does not include condition (iv). See J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules* (Cambridge University Press, 2005), 568 ff and 571 (ICRC, *Customary*). See also R. Cryer, 'Prosecutor v. *Galić* and the War Crime of Terror Bombing' (2005) 2 *IDF Law Review* 73, 93-5, discussing, in the context of the *Galić* Judgment, the reasons in support of condition (iv) offered in *Tadić*.

<sup>24</sup> Thus G. Abi-Saab, 'The Concept of War Crimes' in S. Yee and W. Tieya (eds.), *International Law and the Post-Cold War World: Essays in Memory of Li Haopei* (Routledge: London), quoted in Cryer et al, 226.

(and the corresponding rule of customary international law) whereby "private property must be respected" by any army occupying an enemy territory;<sup>25</sup>

Indeed, 'seriousness' seems to be a combination of the values protected and the consequences of the violation for these values. It is argued here that these values are fundamentally humanitarian. This can be seen in the above example in terms of both values and consequences. The centrality of humanitarian values is reflected in the discussion in both judicial practice and the doctrine.<sup>26</sup>

The centrality of humanitarian values, can also be seen in the approach taken by the ICRC study on customary international humanitarian law:

A deductive analysis of the actual list of war crimes found in various treaties and other international instruments, as well as in national legislation and case-law, shows that violations are in practice treated as serious, and therefore as war crimes, if they endanger protected persons or objects or if they breach important values.<sup>27</sup>

Despite the syntax of the above passage it should be clear that the protection of civilians and civilian objects is a central value of the legal regime.<sup>28</sup> 'Important values' is further exemplified by the study by such acts as "abusing dead bodies, subjecting persons to humiliating treatment ... recruiting children..." and so on.<sup>29</sup>

In conclusion, even though it is very difficult to draw a clear line between criminalised and non-criminalised violations of the *jus in bello* or to find one definite element leading to criminalisation, it can be argued that the protection of humanitarian values is a central rationale in the system. This suggests that the process of criminalisation draws from and accentuates the humanitarian protection rationale which is present in the law of armed conflict. Viewed historically it seems to be the evolution, consolidation, and

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<sup>25</sup> *Tadić* Appeal, par. 94. See also *Prosecutor v Aleksovski*, Case No. IT-95-14/1-A, Appeals Chamber Judgment, 24 March 2000, par. 30-38 for the consideration of whether a series of acts of mistreatment of detainees by the defendant were of a sufficiently serious nature

<sup>26</sup> See also Mettraux, 51.

<sup>27</sup> See ICRC, *Customary*, 569.

<sup>28</sup> See also Mettraux, 51 translating 'important values' into humanitarian values, among others.

<sup>29</sup> See ICRC, *Customary*, 570.

institutionalisation of the focus on humanitarian protection that exists alongside considerations of status.

Common article 3 and the efforts to transcend the status-based conundrum that blocked the protection of individuals in non-international armed conflicts were at the very heart of this project. It is therefore not surprising that the development of the individual-protection rationale through the international criminal law regime would bear some of its more impressive fruits in the context of non-international armed conflicts. This, as will be seen, is the case both with respect to the expansion of the substantive law applicable, and the development of the vertical structure of applicability and the formulation of a low threshold. The creation and jurisprudence of the *ad hoc* Tribunals, analysed below, constitutes a significant move in that direction.

### 6.3. The creation of the *ad hoc* Tribunals

The conflicts occurring in the first half of the 1990s in the territory of the former Yugoslavia and in Rwanda deeply affected public opinion<sup>30</sup> and led to significant initiatives against the impunity of those suspected of committing crimes. In the former Yugoslavia, the egregious violations of the law of armed conflict, especially in the conflict in Bosnia,<sup>31</sup> led to the Security Council Resolutions urging compliance with international humanitarian law<sup>32</sup> and, eventually, creating a Commission of Experts to report on grave breaches of international humanitarian law.<sup>33</sup> There was the implicit understanding that the Commission would serve as a first step to an international tribunal, were the parties to continue the violations.<sup>34</sup> Indeed, the Security Council requested<sup>35</sup> the Secretary General to prepare a report, within 60 days, on the establishment of a Tribunal. The Secretary General annexed to the report the Statute of the new Tribunal, drafted, after

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<sup>30</sup> Cassese, ICL, 335.

<sup>31</sup> D. Shrager and R. Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' (1994) 5 *European Journal of International Law* 360, 360 (Shrager and Zacklin).

<sup>32</sup> See, e.g., SC Resolutions 713 (1991), 764 (1992), 771 (1992).

<sup>33</sup> Created through SC Resolution 780 in October 1992.

<sup>34</sup> Shrager and Zacklin, 361.

<sup>35</sup> SC Resolution 808 (22 February 1993), operative paragraph 2.

wide consultation,<sup>36</sup> by the Secretariat's Office of Legal Affairs.<sup>37</sup> The Security Council accepted the Secretary General's recommendations and established the Tribunal under Chapter VII of the UN Charter, through Resolution 827, on 25 May 1993.

The Security Council Resolutions, and the Commission of Experts<sup>38</sup> and Secretary General Reports,<sup>39</sup> did not conclusively determine the nature of the armed conflict in the former Yugoslavia, although there seemed to be little doubt that an armed conflict existed at the time. It seems, however, that there was a widely held assumption that the armed conflict was of an international character.<sup>40</sup> This can be viewed in, and led to, the drafting of the crimes under the jurisdiction of the Tribunal.

Articles 2 and 3 of the Statute provide that the Tribunal has jurisdiction over grave breaches of the Geneva Conventions and over other 'violations of the laws and customs of war.'<sup>41</sup> Reference to violations of the law of non-international armed conflicts was not expressly made. This approach meant that when the Tribunal found that certain parts of the conflict were of a non-international character<sup>42</sup> there was a legal hurdle to surmount in order to find that it had jurisdiction over war crimes committed in such conflicts.

Shortly after the establishment of the ICTY, the short but extremely brutal conflict in Rwanda convinced the Security Council to adopt a similar approach. In this case, there was no preparatory report. The Tribunal's Statute was prepared and negotiated by New Zealand and the United States<sup>43</sup> and adopted by the Security Council in Resolution 955,

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<sup>36</sup> Shraga and Zacklin, 362.

<sup>37</sup> L. Johnson, 'Ten Years Later – Reflections on the Drafting of the Statute' (2004) 2 *Journal of International Criminal Justice* 368, 369 (Johnson).

<sup>38</sup> See *Interim Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)* (26 January 1993) UN doc. S/25274; *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)* (27 May 1994), UN doc. S/1994/674. In the latter report, however, at par. 43-5, the Commission did consider the question, arguing that it would be for the Tribunal to settle, while arguing for the Commission's approach to apply the law of international armed conflicts.

<sup>39</sup> See *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, UN doc. S/25704.

<sup>40</sup> This is argued, for example, by Meron, writing before the ICTY issued its first decision. See T. Meron, 'War Crimes in Yugoslavia and the Development of International Law', (1994) 88 *American Journal of International Law* 78, 80-1 (Meron, 'Crimes'); T. Meron, 'International Criminalisation of Internal Atrocities' (1995) 89 *American Journal of International Law* 554, 556 (Meron, 'Criminalisation').

<sup>41</sup> Grave breaches included violations such as wilful killing, torture or inhuman treatment, extensive destruction of property, or the taking of hostages. Violations of the laws or customs of war included employment of prohibited weapons, attacks on civilian targets or destruction of cultural property.

<sup>42</sup> This was the case early on, in the first annual report by the Tribunal. See UN doc. A/49/342-S/1994/1007, par. 19. It was certified and developed in the Tribunal's first decision. See *Tadić Appeal*, par. 72.

<sup>43</sup> R. Lee, 'The Rwanda Tribunal' (1996) 9 *Leiden Journal of International Law* 37, 39.

on 8 November 1994. Moreover, in the case of the ICTR the circumstances of the conflict resulted in a different approach in terms of applicable law.

As the conflict there appeared to be non-international, the jurisdiction of the Tribunal was framed accordingly. Article 4 of the ICTR Statute provides that the Tribunal has jurisdiction over violations of common article 3 and Additional Protocol II. The criminalisation of internal atrocities, even though safely based on rules contained in treaty instruments, was hailed as progressive at the time.<sup>44</sup>

The fact that the ICTR Statute based the Tribunal's jurisdiction expressly on treaty sources, however, was of no help to the ICTY. It seemed to support the argument that if the Security Council had wanted to confer jurisdiction on, or recognise the criminal nature of, violations of the laws of armed conflict in a non-international armed conflict, it would have done so expressly.<sup>45</sup> This argument also seemed to follow the prevailing legal opinion of the time, which very much doubted the customary nature of war crimes in non-international armed conflicts. Indeed, this opinion was shared by the Commission of Experts in their Report,<sup>46</sup> by the ICRC,<sup>47</sup> as well as many scholars.<sup>48</sup>

The lack of reference to violations of the law in non-international armed conflicts and the uncertainty over their criminalisation constituted significant hurdles to the extent that the ICTY had to deal with such conflicts. As we will see in the next section, the Appeals Chamber's approach was to rely on and develop an expansive understanding of custom. This strategy was consistent with the Tribunal's overall approach on the wide applicability of rules of humanitarian protection and with its approach on re-defining the threshold for the existence of an armed conflict.

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<sup>44</sup> See Meron, 'Criminalisation', 558.

<sup>45</sup> See Johnson, 370. This would be even more the case in relation to rules not included in common article 3 or Additional Protocol II. See *Prosecutor v Tadić*, Case No. IT-94-1-AR72, Dissenting Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (*Tadić* Li Dissent).

<sup>46</sup> Final Report of 27 May 1994 of the Commission of Experts established pursuant to Security Council resolution 780 (1992), UN doc. S/1994/674, par. 42. This was used by Judge Li in his dissent.

<sup>47</sup> See 'Preliminary Remarks on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia', DDM/JUR/442 b, 25 March 1993, para. 4.

<sup>48</sup> See P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) 90 *American Journal of International Law* 501, 503. See, generally, W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, 2006), 232 (Schabas, *Tribunals*). See also T. Hoffmann, 'The Gentle Humanizer of Humanitarian Law: Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts' in C. Stahn and L. van den Herik, *Future Perspectives on International Criminal Justice* (TMC Asser, 2010) 58, 60-1 (Hoffmann) for further references to pre-1995 literature.

#### 6.4. The beginning: *Tadić*

##### 6.4.1. *Substantive Law through Custom*

The first decision of the Appeals Chamber<sup>49</sup> provided a new start for the perennial question of ‘what is an armed conflict’ and what rules are applicable in a non-international one. The defendant had filed a motion on jurisdiction alleging *inter alia* that the Tribunal did not have jurisdiction over the acts described in articles 2 and 3, when occurring in a non-international armed conflict. The Trial Chamber argued that neither article specifies whether the conflict should be international.<sup>50</sup> Moreover, it argued that article 3 violations are to be grounded in custom<sup>51</sup> and that rules such as the ones included in common article 3 constitute customary law.<sup>52</sup>

This approach was further pursued by the Appeals Chamber. The Appeals Chamber’s decision can be viewed as a bold assertion of judicial power in an area of law in particular need of enforcement mechanisms. This stance was manifested on many legal issues, such as the determination of the Court’s institutional competence-competence,<sup>53</sup> and its extended findings on the existence and applicability of substantive legal rules in non-international armed conflicts as a matter of custom.<sup>54</sup>

The difficulties contained in the drafting of the Statute, discussed above, posed a problem for the Tribunal in discharging its mandate. One way to resolve this was to consider the entire conflict as an international one, as it was viewed by many

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<sup>49</sup> *Tadić* Appeal.

<sup>50</sup> *Ibid.* par. 50 and 59. See further C. Greenwood, ‘International Humanitarian Law and the *Tadić* Case’ (1996) 7 *European Journal of International Law* 265, 268 (Greenwood, *Tadić*).

<sup>51</sup> *Tadić* Appeal, par. 60 *ff.*

<sup>52</sup> *Ibid.*, par. 65 *ff.*

<sup>53</sup> See *Ibid.*, par. 9-48. See J. Alvarez, ‘Nuremberg Revisited: The *Tadić* Case’, (1996) 7 *European Journal of International Law* 245; C. Warbrick and P. Rowe, ‘The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case’, (1996) 45 *International and Comparative Law Quarterly* 691, 691 *ff.* (Warbrick and Rowe).

<sup>54</sup> As well as individual criminal responsibility for breaches of these rules. See *Tadić* Appeal, par. 96 – 127 and 128-137. See also T. Meron, ‘The Continuing Role of Custom in the Formation of International Humanitarian Law’ (1996) 90 *American Journal of International Law* 238 (Meron, ‘Custom’).

commentators at the time.<sup>55</sup> Nevertheless, the Appeals Chamber took the position that the conflicts in Bosnia and Herzegovina contained both internal and international elements.<sup>56</sup> This approach was closer to the facts. It also reflected the Appeals Chamber's stance to not shy away from difficulty and its willingness to develop the law, by taking on the issue of applicable customary rules. This was understood even by commentators who had argued for an overall 'international armed conflict' approach.<sup>57</sup>

While the Appeals Chamber, unlike the Trial Chamber,<sup>58</sup> conceded that the grave breaches regime, referred to in article 2 of the Statute, was only applicable in international armed conflicts,<sup>59</sup> it extended the application of article 3 of the Statute to non-international armed conflicts.<sup>60</sup> This was attempted through the argument that the rules were customary not only insofar as international humanitarian law was concerned but also in terms of individual criminal responsibility.<sup>61</sup> Moreover, the fact that article 3's enumeration was not exhaustive, "but merely illustrative"<sup>62</sup> gave the Tribunal free hand in deciding what constitutes validly proscribed conduct.<sup>63</sup>

Moreover, the Tribunal's analysis of *opinio juris* reflected and supported its overall approach and rationale. The Tribunal began its analysis by arguing that the international/non-international "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."<sup>64</sup> The Tribunal went on to state the basic tenet of its philosophy:

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<sup>55</sup> See, for example, Meron, 'Crimes', 80-1; Meron, 'Criminalisation', 556; J. O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', (1993) 87 *American Journal of International Law* 639, 647-8.

<sup>56</sup> See *Tadić* Appeal, 72.

<sup>57</sup> This is conceded by G. Aldrich, 'Jurisdiction of the International Criminal Tribunal for the former Yugoslavia' (1996) 90 *American Journal of International Law* 64, 69 (Aldrich). See also Meron, 'Custom', 239.

<sup>58</sup> See *Prosecutor v Tadić*, Case No. IT-94-1-TR72, Decision on the Defence Motion on Jurisdiction, 10 August 1995, par. 46-56.

<sup>59</sup> *Tadić* Appeal, par. 79-85. But see in *ibid.* the Separate Opinion of Judge Abi-Saab, par. 5, arguing that the grave breaches regime *was* applicable to non-international armed conflicts.

<sup>60</sup> *Ibid.*, par. 86 – 137.

<sup>61</sup> See *ibid.*, par. 94 for the development of the four stages discussed above fn 21 and text.

<sup>62</sup> *Ibid.*, par. 87. Indeed, the Tribunal concluded that article 3 "may be taken to cover *all violations* of international humanitarian law other than the "grave breaches" of the four Geneva Conventions falling under Article 2". (emphasis in the original)

<sup>63</sup> See also R. Cryer, *Prosecuting International Crimes* (Cambridge University Press, 2005), 265.

<sup>64</sup> See *Tadić* Li Dissent, par. 96.

A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. [...] It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>65</sup>

In the above passage the humanitarian protection rationale present in the *jus in bello* is expressed and accentuated. The court argued for the replacement of status-based considerations with what is the primary focus of the legal regime: humanitarian protection. The Tribunal went on to offer some instances of state practice that ground the application of a set of principles and rules to both international and non-international armed conflicts: "principles designed to protect *civilians or civilian objects* from the hostilities or, more generally, to protect *those who do not (or no longer) take active part in hostilities*" as well as rules regulating means and methods of warfare.<sup>66</sup> Finally, the Appeals Chamber completed its syllogism by qualifying the transposition of custom to non-international armed conflicts by conceding that

[t]he emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.<sup>67</sup>

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<sup>65</sup> *Tadić* Appeal, par. 97.

<sup>66</sup> *Ibid.*, par. 119. (emphasis in the original)

<sup>67</sup> *Ibid.*, par. 126.

This is another iteration of the effort to extend rules applicable to international armed conflict to non-international armed conflict. The effort was previously seen particularly in the design of common article 3 to contain the *principles* rather than the *provisions* of the Geneva Conventions.<sup>68</sup> One difference is that in this case the extension and detail provided to ‘the essence of the rules’ is to be determined by a Tribunal with a mandate to minimise impunity and not by states with vested interests.

The Tribunal’s project was realised in three steps: article 3 of the Statute was found to apply to non-international armed conflicts; it was found to be virtually open-ended; its set of rules was gathered around certain humanitarian principles. This rationale, as expressed openly by the Tribunal,<sup>69</sup> was to transcend sovereignty- and status-related considerations in determining the applicable rules in non-international armed conflicts for the protection of human beings.

The result was both innovative and controversial. Indeed, the general stance,<sup>70</sup> and the specific dicta it led to,<sup>71</sup> were criticised at the time. Nevertheless, other commentators received the decision with more enthusiasm<sup>72</sup> and its innovation and ambition are now recognised for their significance. As Schabas puts it “[i]t is now beyond question that there is international criminal responsibility for war crimes committed during non-international armed conflict and this undoubtedly thanks to the bold initiative of the four judges of the majority in the Appeals Chamber in the *Tadić* jurisdiction decision.”<sup>73</sup>

This shows how the humanitarian-protection rationale, present in the law of armed conflict is developed in international criminal law and was applied by an international judicial institution. While, at the time, the expansion of substantive law was the feature of

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<sup>68</sup> See chapter 3.2.2.

<sup>69</sup> See above fn 66 and text.

<sup>70</sup> See, for example, M. Sassoli and L. Olson, ‘Prosecutor v *Tadić*’ (2000) 94 *American Journal of International Law* 571, 578, pointing out that “one has the impression that the ICTY often rushes ahead to clarify every legal issue that it *can*, whereas other courts decide only the issues that they must.” See also Greenwood, ‘*Tadić*’, who points out, at 278, the use of *obiter dicta*.

<sup>71</sup> On the interpretation of article 3, for example, Rowe exclaimed that the Tribunal sent “a coach and four through the traditional distinctions between an international and a non-international armed conflict.” See Warbrick and Rowe, 701. See also G. Watson, ‘The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in *Prosecutor v Tadić*’ (1995-1996) 36 *Virginia Journal of International Law* 687.

<sup>72</sup> See, for example, Aldrich, 68-9 See also L. Maresca, ‘The Prosecutor v *Tadić*: The Appellate Decision of the ICTY and Internal Violations of Humanitarian Law as International Crimes’, (1996) 9 *Leiden Journal of International Law* 219.

<sup>73</sup> Schabas, *Tribunals*, 236.

the Tribunal's jurisprudence that received more notice, and understandably so, the *Tadić* approach also yielded a new start in the setting of the threshold. The Tribunal's approach in this matter is fully compatible with its overall approach.

#### 6.4.2. *The re-setting of the threshold*

The Appeals Chamber further contributed to the legal regime by setting a new definition for the threshold of an armed conflict. In paragraph 70 of this important decision it proclaimed:

Therefore, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.<sup>74</sup>

A striking feature of the Appeals Chamber's definition is that there is no preliminary discussion or analysis of why this threshold and particular phrasing was chosen: It is not clear why this is what an 'armed conflict' is. The Appeals Chamber did not expressly base itself on the interpretations of common article 3 or on the threshold of Additional Protocol II. It did not discuss the importance of or the reasons for excluding a reference to reciprocity or territorial control in the definition.

Nevertheless, the basic criteria of "protracted armed violence" and "organized armed groups" are firmly based on and abstracted from the history of the debate and the main criteria of intensity and organisation.<sup>75</sup> At the same time, their formulation is consistent with the Appeals Chamber's rationale of providing a minimum threshold that will offer maximum applicability. This approach was developed by the Tribunal in later cases, as will be seen in the analysis of the development of the criteria in the next subsection. Furthermore, the avoidance of expressly basing the formulation of the threshold on

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<sup>74</sup> *Tadić* Appeal, par. 70.

<sup>75</sup> See sections 2.2.2., 3.3.1-3.3.2, 5.4. This was indeed the Trial Chamber's interpretation once the case went back to the Trial Chamber. See *Tadić* TC, par. 562.

common article 3 and Additional Protocol II also serves the primacy given to customary law. This does not mean that the threshold in custom has to be *different* from that in a treaty. It is only necessary that it is *separate* and existing alongside the treaty.<sup>76</sup> Indeed, the creation of a customary law threshold was the first step to overcoming the shortcomings of the previous instruments in terms of substantive law.<sup>77</sup>

While the reformulation of the threshold through a customary law approach allowed the emancipation of substantive law, it also allowed the Court to develop a jurisprudence that would address those deficiencies in the instruments that were directly related to the setting of the threshold. These deficiencies related to a dilemma between a non-definition that attempted to leave the threshold low and flexible (common article 3) and a definition that, when agreement could be achieved on specific criteria, was set very high (Additional Protocol II). The *ad hoc* Tribunals, and primarily the ICTY, developed a jurisprudence that offered and analysed a wealth of factors, while forming a threshold that would guarantee a wide applicability of the substantive law developed. This will now be analysed.

## 6.5. The development of the criteria by the *ad hoc* Tribunals

### 6.5.1. *Introduction*

The *Tadić* threshold proved very influential. The ICTY Trial Chambers, bound by the precedent set by the Appeals Chamber, treated it as a starting point in every single case,<sup>78</sup>

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<sup>76</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] ICJ Reports 4, par. 178.

<sup>77</sup> See above section 6.4.1 above for the focus on custom. For a detailed analysis of areas of substantive law covered by *Tadić* and subsequent ICTY jurisprudence see S. Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to All Armed Conflicts' (2000) 13 *Leiden Journal of International Law* 619, 637 ff (Boelaert-Suominen).

<sup>78</sup> See, for example, *Prosecutor v Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, par. 43; *Prosecutor v Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, par. 536 (*Blagojević*); *Prosecutor v Delalić, Mucić, Delić, Landžo, (Čelebići)*, Case No. IT-96-21-T, Judgment, 16 November 1998, par. 183 (*Čelebići*); *Prosecutor v Haradinaj*, Case No. IT-04-84-T, Judgment, 3 April 2008, par. 37 (*Haradinaj*); *Prosecutor v Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment on Acquittal, 16 June 2004, par. 16 (*Milošević*); *Prosecutor v Martić*, Case No. IT-95-11-T, Judgment, 12 June 2007, par. 41.

even where a finding for the existence of an armed conflict was not necessary.<sup>79</sup> The definition was adopted in the same way by the other *ad hoc* Tribunals.<sup>80</sup> These Tribunals, especially the ICTY, did not merely quote the formula followed by a finding. They developed, systematised and interpreted the *Tadić* definition, providing a sophisticated understanding of the material facts that merit and justify the applicability of the legal regime. Indeed, and not surprisingly, this was the case when the controversy concerned the very existence of an armed conflict,<sup>81</sup> rather than its nature as international or non-international armed conflict.<sup>82</sup>

The systematisation and development of criteria is based on the understanding that the existence or absence of an armed conflict is of an objective nature.<sup>83</sup> This approach reverts back to that of the drafters of common article 3, and fits with the paradigm of vertical rules automatically applicable.<sup>84</sup> However, it was not possible to provide absolute and inflexible criteria that would provide an exhaustive and cumulative check list to be completed by the assessor. This meant that the *Tadić* Chamber broke down the *Tadić* definition into two flexible criteria; organisation and intensity.<sup>85</sup> These two criteria were then understood, interpreted and assessed through an illustrative set of indicative factors.<sup>86</sup> The Trial Chambers showed consistency and thoroughness, referring widely to decisions of other Trial Chambers,<sup>87</sup> as well as to these of other courts and tribunals,<sup>88</sup>

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<sup>79</sup> In many cases the existence of an armed conflict was not disputed by the parties to the case. See, e.g. *Blagojević*, par. 549.

<sup>80</sup> See *Akayesu*, par. 620; *Prosecutor v Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 December 1999, par. 92; *Prosecutor v Brima, Kamara and Kanu*, Case No. SCSL-04-16-T, Judgment, 20 June 2007, par. 243; *Prosecutor v Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgment, 2 August 2007, par. 124; *Prosecutor v Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, Judgment, 2 March 2009, par. 95.

<sup>81</sup> This concerns primarily the cases relating to the conflict in Kosovo as well as the one case in FYROM. For example in *Čelebići*; *Haradinaj*; *Prosecutor v Limaj, Bala and Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005 (*Limaj*); *Boškoski*.

<sup>82</sup> This was the case with respect to the cases concerning the conflict(s) in Bosnia and Herzegovina, which dominated the first years of the ICTY's work.

<sup>83</sup> See *Limaj*, par. 89; *Akayesu*, par. 624; *Bagilishema*, par. 101.

<sup>84</sup> Section 3.2.4.

<sup>85</sup> See *Tadić* TC, par. 562.

<sup>86</sup> These factors are often also referred to as criteria. This can be confusing but, it seems, not easily avoided. In any case, the adjective 'indicative' has the effect of subjugating these factors to the two main criteria.

<sup>87</sup> In one case a summary of the various findings and factors used in previous judgments preceded the detailed findings of the Trial Chamber. See *Haradinaj*, par. 41 *ff*.

<sup>88</sup> *Boškoski*, par. 179-182.

and attempting to abstract an accurate understanding of the factors leading to a finding of armed conflict.<sup>89</sup>

The analysis of the criteria of organisation and intensity in the jurisprudence of the Tribunals will now be discussed. It is noted, however, that organisation and intensity do show some degree of overlap in some cases, with the result that what is viewed as a factor pointing at the organisation of the party can be also viewed as a factor of intensity of the conflict. An example would be the use of heavy weaponry. While it points to the seriousness of the fighting and of the threat that the group poses to the government because of its organisational ability to use such weaponry, it also shows the organisational qualities of the group in training its fighters and operating such weaponry. Another example could be the existence of extended and effective military operations. While the mounting of such operations points to intensity, it also reflects the logistical and organisational capacity of the group.

Finally, the elaboration of the criteria that constitute the threshold in custom aimed at distinguishing an ‘armed conflict’ from situations that are not an ‘armed conflict’. This is distinct from the purpose of creating a new threshold for an armed conflict for the specific purposes of the ICTY or, indeed, international criminal law as distinct from international humanitarian law. This can be seen in the Trial Chamber’s dictum, in *Tadić*, that the

test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 [is using the above] “closely related” criteria solely for the purpose, as a minimum, to distinguish an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.<sup>90</sup>

Accordingly, the elaboration and refinement of the criteria as well as their grounding in custom should not be seen to create a threshold separate from that of common article 3. Rather, it is a move towards the clarification of the basic concept of non-international

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<sup>89</sup> See, e.g., in *ibid.*, par. 199-203.

<sup>90</sup> *Tadić* TC, par. 562, quoting the ICRC Commentary. See also *Limaj*, par. 89.

armed conflict.<sup>91</sup> In contrast, in some parts of its analysis the ICTR develops the criteria for the application of Additional Protocol II, which refers to territorial control, ‘sustained and concerted military operations’ and the ability to implement the Protocol.<sup>92</sup>

#### 6.5.2. Organisation

The organisation necessary for the criterion to be satisfied seems to be relative to the capability and effectiveness in waging an armed conflict. While this level of organisation is presumed to exist in the case of a state army, a variety of *indicative* factors are resorted to in order to assess its existence in armed groups.<sup>93</sup> The level of organisation is flexible, which is evident from phrases such as ‘organised to a greater or lesser extent’<sup>94</sup> or ‘some degree of organisation’<sup>95</sup> that have been used by the Tribunals.

A set of factors has been developed to illustrate the degree necessary. The ICTY’s approach in *Boškoski* is illustrative of the methodical approach of the Trial Chambers. The Trial Chamber collected indicative factors for the existence of a requisite amount of organisation and split them into five groups: Those indicating the presence of a command structure;<sup>96</sup> the ability of the group to carry out operations in an organised manner;<sup>97</sup> factors indicating a level of logistics;<sup>98</sup> a level of discipline and the ability to implement “the basic obligations of common article 3”;<sup>99</sup> and the ability to speak with one voice.<sup>100</sup>

Indeed, one element of organisation is the existence of a system of authority,<sup>101</sup> although the authority need not be civilian.<sup>102</sup> The focus on the strictly military nature and function

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<sup>91</sup> This important element is particularly relevant with respect to the situation as developed, and complicated, by the Rome Statute. See section 7.3.

<sup>92</sup> See *Akayesu*, par. 626.

<sup>93</sup> *Haradinaj*, par. 60.

<sup>94</sup> *Akayesu*, par. 620 ; *Prosecutor v Musema*, Case No. ICTR-96-13-A, Judgment, 27 January 2000, par. 248: ‘greater or lesser degree’.

<sup>95</sup> *Boškoski*, par. 196 and fn 785.

<sup>96</sup> *Ibid.*, par. 199.

<sup>97</sup> *Ibid.*, par. 200.

<sup>98</sup> *Ibid.*, par. 201.

<sup>99</sup> *Ibid.*, par. 202.

<sup>100</sup> *Ibid.*, par. 199-203.

<sup>101</sup> *Ibid.*, par. 195.

of the authority differentiates this factor from criteria used in both the doctrine of belligerency<sup>103</sup> and the case of wars of national liberation.<sup>104</sup> In both these cases the *political* rather than just military character of the authority was taken into account. It has been argued in those sections that this reflected the influence of eventual statehood in the application of the legal regime and that it brought considerations of status problematically close to the process of application. In the elaboration of the criteria by the Tribunals, in contrast, the clear focus is on the *military* function of the authority.

Nevertheless, this authority can play a dual role: It both commands and organises the struggle inside the group and it is able to present a unified identity outside of the group. Factors demonstrating the existence of such an authority include the ability to identify specific individuals as the leaders of a group which are recognised as such by all other members.<sup>105</sup> Structures for governing, controlling, and leading the people, and the existence of areas under such authority, might point towards an element of stability and of consolidation of the structure of the group. More strictly, military elements such as the existence of operational headquarters,<sup>106</sup> the operational dividing of the territory where combat is taking place<sup>107</sup> and the ability to organise extensive military operations within the territory are relevant.<sup>108</sup> This can also be indicated through the issuing of orders and communiqués.<sup>109</sup>

A further illustrative factor of military organisation is the ability to unite disparate pockets of fighters into one unified group system. Indeed, a turning point in the identification of the existence of an armed conflict might be when outbreaks of violence emanating from a variety of individuals and local groups can be said to be orchestrated and led by a unifying centre.<sup>110</sup>

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<sup>102</sup> *Milošević*, par. 34.

<sup>103</sup> See section 2.2.2.

<sup>104</sup> See section 5.3.2.

<sup>105</sup> But see *Limaj*, par. 131-2., where some statements by western officials to the effect that they knew nothing about KLA's structure and could not find interlocutors are countered by the argument that this does not prove the non-existence of organisation but the secrecy which was necessary since the KLA was an underground movement.

<sup>106</sup> See *Milošević*, par. 23.

<sup>107</sup> *Ibid*; *Limaj*, par. 95-6.

<sup>108</sup> *Prosecutor v Halilović*, Case No. IT-01-48-T, Judgment, 16 November 2006, par. 166 (*Halilović*).

<sup>109</sup> *Haradinaj*, par. 88; *Bošković*, par. 269; *Limaj*, par. 103.

<sup>110</sup> *Prosecutor v Milutinović et al*, Case No. IT-05-87-T, Judgment, 26 February 2009, vol. 1, par. 816 (*Milutinović*) Sociologically, but not necessarily in law, this can be seen to have parallels with the conception of the monopoly of

Organisational capability can also be expressed through the ability of the group to procure weapons,<sup>111</sup> uniforms, and other elements necessary for the waging of the conflict and the military life of its fighters.<sup>112</sup> The ability of the group to recruit,<sup>113</sup> equip,<sup>114</sup> and train<sup>115</sup> fighters is of significance for its dynamism as a contender in the area and the longevity of its struggle. Military discipline is another important factor. The existence of discipline will show that the group can be viable as a group and will not split into anarchic sub-groups.

Furthermore, and importantly for the applicability of the legal regime, discipline also relates to the issuing of rules and regulations,<sup>116</sup> in the training of the fighters to abide by these rules and regulations and in the ability of the group to enforce such rules.<sup>117</sup> Explicit proof of elaborate disciplinary and judicial procedures, however, does not seem to be required.<sup>118</sup> In addition, according to one Trial Chamber, the organisational capacity in enforcing the rules seems only to be considered necessary in relation to the minimum humanitarian standards of common article 3.<sup>119</sup> This has the advantage of avoiding piecemeal and complex evaluations of applicability of specific rules. It is also a manifestation of limited role of reciprocity even in its *de facto* form in the applicability of the regime. Although this reading can be challenged if the Tribunal's expansive approach with respect to the applicable rules is taken into account.

An important and controversial factor for organisation (and for intensity) is the control of territory. As a criterion *sine qua non*, this has been criticised as referring back to the concept of belligerency and reverting to a clearly status-based approach to the regulation of armed conflict.<sup>120</sup> The Tribunals have been clear, and this is one of the most important

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violence as a distinguishing feature of the state. See M. Weber, 'Politics as a Vocation', Lecture at Munich University, 1918, available at <http://media.pfeiffer.edu/lridener/dss/Weber/polvoc.html>

<sup>111</sup> *Haradinaj*, par. 76 ff.

<sup>111</sup> *Ibid.*, par. 76; *Milutinović* par. 819 Indeed, the smuggling of weapons from Albania was necessary for the viability of the KLA.

<sup>112</sup> Financial support is also very important. See *ibid.*, par. 834.

<sup>113</sup> *Haradinaj*, par. 83 ff.

<sup>114</sup> *Ibid.*, par. 76 ff.

<sup>115</sup> *Boškoski*, par. 284; *Limaj*, par. 119-22.

<sup>116</sup> *Ibid.*, par. 98.

<sup>117</sup> *Ibid.*, par. 111-2.

<sup>118</sup> See S. Sivakumaran, 'Identifying an armed conflict not of an international character', in C. Stahn and G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill, 2008), 363, 368 (Sivakumaran). See also *Boškoski*, par. 274 finding "a basic system of discipline within the NLA that allowed it to function with some effectiveness."

<sup>119</sup> *Ibid.*, par. 196, referring to the ICRC Commentary, and par. 202.

<sup>120</sup> See, in the context of Additional Protocol II, section 5.4.3.

clarifications of this process, that it is not a necessary criterion for the applicability of the *jus in bello* and international criminal law.<sup>121</sup> This suggests a move away from state-like characteristics. Nevertheless, it is telling that in almost every case a certain element of territorial control, however fleeting or subject to the ebb and flow of guerrilla operations,<sup>122</sup> has been found to exist.<sup>123</sup> The consolidation of authority over an area seems to be very closely linked to the ability of the group to wage an organised struggle.

Accordingly, territorial control survives in the current discussion but with two important differences. The first is that it is only an indicative factor and not a criterion *sine qua non*, as in the threshold of Additional Protocol II. The second is that territorial control is understood as more flexible and relative to that of the state. Accordingly, territorial control, as an indicative factor, can consist of ebbs and flows and not a clearly defined area stably and consistently controlled by the group.<sup>124</sup> Moreover, such control exists to the extent that the ability of the government to operate in the given area is curtailed.<sup>125</sup> Even if the fighters are not able to set and maintain stable headquarters in a specific place the fact that the area is not easily used by the government signifies their ability to operate in it.<sup>126</sup>

Finally, as hinted at above, another indication of the necessary level of organisational and command structure is the extent to which the group speaks with one voice both within the conflict and internationally.<sup>127</sup> This is linked to the political status of the group. The ability of international actors who might mediate in the conflict to identify the apex of the organisational structure and deal effectively with the group can indicate that the group has achieved the *de facto* standing to be a party to an armed conflict. It is evident that such a factor directly relates to the *de facto* if not *de jure* legitimisation of the actor; the sufficient degree of respect that allows the group to be an interlocutor in an international

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<sup>121</sup> See *Milošević*, par. 36.

<sup>122</sup> *Milutinović*, par. 827.

<sup>123</sup> *Halilović*, par. 162; *Milutinović*, par. 801; *Milošević*, par. 37; *Bošković*, par. 242; *Limaj*, par. 158.

<sup>124</sup> *Bošković*, par. 288: “The overall picture is of an increasing NLA effectiveness at loosening the control of the FYROM government and its forces over what had become more obviously defined geographic areas, mainly in the north-west of the country.”

<sup>125</sup> *Akayesu*, par. 626.

<sup>126</sup> *Milutinović*, par. 795; *Haradinaj*, par. 73.

<sup>127</sup> *Ibid.*, par. 60; *Bošković*, par. 203.

conversation because of its effectiveness in using violence.<sup>128</sup> It is important to stress the indicative nature of the factor and the fact that it is merely a reflection of its military organisation.

In conclusion, the indicative factors that are used for assessing the criterion of organisation point to the emergence of an actor within the territorial entity that is developing structures and capacities that are militarily challenging those of the state. Factors related to the organisation of the group are not unrelated to connotations of status: The existence of a unified authority, the control of territory, or the participation in international negotiations, can be understood pointing to the capability of the group to achieve its political and military goals and further its collective status. Indeed, it would be impossible to completely avoid such connotations as they reflect the fact that the application of the law will be the result of collective entities fighting for such status.

Nevertheless, in the 'Tribunals' jurisprudence these factors are related strictly to the applicability of the law. The focus is on *military rather than political* organisation. Moreover, the necessary level of organisation is rather *low*, while its assessment is *flexible* and can be satisfied through the use of indicative factors, rather than more or less strict and extensive requirements, as is the case in Additional Protocol II. This mitigates the role of political status and, significantly, its conflation with a legal status *lato sensu*. It will be sufficient that there is a distinctive group, more or less organised, and that poses a military challenge to the government. Ultimately, both the low level of organisation necessary and its military focus shift the focus from the actor as a status-bearing entity, and place it on the situation of the conflict. The centrality of the situation, rather than actor, is significant in moving away from status as a central rationale for applicability. The necessary attributes of the situation are then specified through the criterion of intensity.

### 6.5.3. *Intensity*

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<sup>128</sup> See *Limaj*, par. 129, for the conclusion that "by July 1998 the KLA had become accepted by international representatives, and within Kosovo, as a key party involved in political negotiations to resolve the Kosovo crisis."

The criterion of intensity refers less directly to the qualities of the group *qua* group and more to the situation that has been developed, partly, of course, due to these qualities. If the criterion of organisation refers to the organisational ability of the group to militarily challenge the authority of the state in the territorial unit, the intensity of the conflict looks at the effects of that challenge. It is these effects that necessitate the applicability of a specific set of rules. The basic question then is whether the situation on the ground, the social situation within the territorial unit justifies the application of the *jus in bello* and international criminal law. To put it differently, the question is whether society is sufficiently affected, so that the *jus in bello* is the most appropriate regime to apply for the protection of individuals.<sup>129</sup>

Initially, it can be said that confusion has arisen with respect to the relation between the words ‘protracted’ and ‘intensity’. While the *Tadić* Appeals Chamber spoke of ‘protracted armed violence’, this was translated as ‘intensity’ once the case reverted back to the Trial Chamber to apply the definition to the facts.<sup>130</sup> Ever since then the vast majority of Trial Chambers have taken the organisation/intensity pair as the starting point of their analysis.<sup>131</sup> This throws into doubt the status of the term ‘protracted’. It is not clear whether it is a criterion *sine qua non*, like organisation and intensity, or whether it is another indicative factor that demonstrates the intensity of the conflict. It is also unclear whether the duration of factual circumstances that call for the application of the *jus in bello* for the purposes of the Tribunals is to be considered. Moreover, it is not obvious what the extent of any such duration would have to be.

It seems that an element of duration is generally necessary. One example to the contrary is to be found outside the context of the *ad hoc* Tribunals, in the jurisprudence of the Inter-American Commission on Human Rights. In the *Abella* case a single ‘battle’ that lasted for only a few hours was considered to be an armed conflict the Commission.<sup>132</sup>

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<sup>129</sup> Not that the *jus in bello* is always and exclusively applied for that reason. However, this rationale for application is arguably at the centre of the judicial assessment of the applicability of the *jus in bello* through international criminal law.

<sup>130</sup> *Tadić* TC, par. 562.

<sup>131</sup> See, e.g., *Haradinaj*, par. 40.

<sup>132</sup> *Juan Carlos Abella*, Case 11.137, Inter-American Commission on Human Rights, 18 November 1997, OEA/Ser.L/V/II.98, Doc. 6 rev, 13 April 1998, par. 152.

This decision has been rightly criticised.<sup>133</sup> It is not by chance that in every conflict discussed by the Tribunals, particularly the conflicts in Kosovo and FYROM, the duration was measured in months.<sup>134</sup> Furthermore, these situations manifested a gradual process of development of the social situation *into* an armed conflict.<sup>135</sup> This may reflect the differences between inter-state and intra-state conflict. The process of the organisation of violence is more gradual. If one refers to the concept of the militarization of a certain territorial unit, even if actual conflict occurs in pockets of it, then it is difficult to see how a conflict could exist in a few hours.

On the other hand, a scenario in which a group is clandestinely organised and suddenly unleashes wide-scale military attacks and is immediately engaged with by the armed forces could be seen as meeting the necessary intensity, if with very little duration. Alternatively, it is possible for a non-state armed group to cross a border with similar results.<sup>136</sup>

It is important to note that even if it was accepted that duration is necessary and not just indicative, duration refers to the *violence* rather than the *conflict* in general. Accordingly, once protracted armed violence has reached the intensity of an armed conflict there need not be a protracted armed conflict to activate the legal regime. In that sense, the duration here should be distinguished from the implicit use of duration seen in the application of common article 3. In that case, it served more as a period for the government to accept that it had little to lose with respect to status by accepting the applicability of common article 3.<sup>137</sup> In that sense, while duration of the violence will contain the necessary process for the intensification of such violence and the military organisation of the group, duration of the conflict can be used to link the applicability of the law to questions of status.

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<sup>133</sup> L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002), 138.

<sup>134</sup> See for example *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, Judgment, 17 December 2004, par. 341. Arguably, the shortest duration of violence before the determination of the existence of an armed conflict in the Tribunals' jurisprudence is the case of FYROM which was less than two months. See *Boškoski*, par. 287 *ff*.

<sup>135</sup> See, e.g., *Boškoski*, par. 288.

<sup>136</sup> See *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) on the Charges, Pre-Trial Chamber II, ICC-01/05-01/08, 15 June 2009, par. 247 *ff*. (*Bemba*), where the ICC seems to find the existence of an armed conflict at the date when the non-state armed group in question enters the territory of the Central African Republic. It goes on, however, to require the existence of a 'protracted armed conflict'. See section 7.4.1. See also ICJ, *Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of Congo v Uganda)*, 19 December 2005.

<sup>137</sup> See for the examples of Algeria and Nigeria, section 3.4.3.

Accordingly, duration of the violence should be understood as a usually necessary factor leading to the necessary intensity for there to be an armed conflict.<sup>138</sup> The interplay between the concepts of intensity and duration are found in the Trial Chambers' analysis. Indeed, the gradual intensification of hostilities, the frequency of incidents and the gradual spread of the fighting in the territorial unit, beyond isolated pockets, are frequently taken as indicative factors.<sup>139</sup> The fighting can be of guerrilla nature, with ebbs and flows, even periods of relative calm, as long as there is fighting and a degree of effectiveness. Moreover, the magnitude of military operations, the weapons used,<sup>140</sup> and, importantly, the destruction caused, particularly the effects of the fighting on the civilian population, are important factors. The latter is a factor used quite often in the Tribunals' case law.<sup>141</sup> This relates to the rationale for the applicability of the legal regime. The government is militarily challenged by the non-state armed group to the extent that society is affected and civilians suffer. This is central to the activation of the legal regime.

Accordingly, the above factors lead to the understandable perception that the society is militarized and at war. At times, this can be clearly implied, or even explicit, in the acts of the government. The use of the army, general mobilisation,<sup>142</sup> and the use of military laws or decrees<sup>143</sup> might indicate that the government, for all practical purposes, considers itself at war. This is an interesting parallel with the situation in the doctrine of belligerency, the difference being that the legal characterisation of the situation does not depend on a declaration by either the government or third state. It also does not depend on actions, statements, and decisions by international organisations<sup>144</sup> or other international actors,<sup>145</sup> though they too can be a helpful indication. Ultimately, the legal assessment is of a factual situation, declarative of the application of the legal regime.

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<sup>138</sup> As put by the Trial Chamber in *Haradinaj*, par.49, "The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration."

<sup>139</sup> *Limaj*, par. 168; *Boškoski*, par. 214.

<sup>140</sup> E.g. *ibid.*, par. 220.

<sup>141</sup> *Ibid.*, par. 181 and 213.; *Haradinaj*, par. 94-99. *Limaj*, par. 134 and 171-3.

<sup>142</sup> See e.g. *Milutinović*, par. 808.

<sup>143</sup> *Boškoski*, par. 246.

<sup>144</sup> *Ibid.*, par. 192; *Akayesu*, par. 621. For contrast see the role that international organisation had in the decision for the applicability of article 1(4) at section 4.5.1.

<sup>145</sup> *Boškoski*, par. 216, for the ICRC evacuating civilians.

In conclusion, for the assessment of the existence of this criterion the Tribunals adopted a flexible approach, through the use of indicative factors. While the level of the hostilities needs to reach the necessary intensity to pose a military threat to the government and to affect individuals, there is no need for full mobilisation or a regular army. In this case, the criterion of intensity refers to the situation in the territorial unit. The situation has been brought about partly due to the organisational qualities of the group. This might suggest a link to the status-based rationale. On the other hand, the situation also affects individuals and it is this that necessitates the activation of the protective qualities of the *jus in bello* and international criminal law. This shows that there is no necessary relation with the status-based rationale. In the jurisprudence of the Tribunals, the qualities of the actor are partly subjugated to the reality of the situation. Even though the conflict is, to some extent, made by the actor, it is the conflict and not the actor that is the primary measure. This is because the rationale behind the applicability of the legal regime, both *jus in bello* and international criminal law, is the individual and her protection.

## 6.6. Conclusion

The development of the regime of international criminal law and its application by the *ad hoc* Tribunals have accentuated and developed the humanitarian-protection rationale so that it is at the centre of the law of armed conflict. International criminal law shifts the focus from a relationship between status-bearing entities to that between an individual perpetrator and the victims of his acts. It is activated when there is a violation of the law of armed conflict that is serious in the values it harms and the consequences it has. Values of a humanitarian nature and consequences on individuals are central to this rationale.

This legal regime was applied by *ad hoc* Tribunals, the most important of which, in this context, is the ICTY. In *Tadić*, the Tribunal provided a minimal and flexible definition that helped clarify the basic threshold for the existence of an armed conflict. While this definition clarified the concept of ‘non-international armed conflict’ of common article 3,

it did so on the level of custom. This allowed the Court to develop significantly the substantive legal regime applicable.

Moreover, the definition was consolidated, elucidated and refined by the further work of the Tribunals, again, primarily the ICTY. The two criteria of organisation and intensity, present since the beginning of the debate, were elucidated in detail while retaining an element of flexibility through the use of indicative factors. The degree of organisation is flexible and is focused on its military aspect. It is an organisation capable of militarily challenging the government rather than becoming a state. Territorial control is only useful as an indicative factor and not understood as a necessary proto-state quality. Thus, the status connotations of factors of organisation are tempered and these factors are interpreted strictly with respect to the applicability of the law.

At the same time, the focus shifted from the entity to the situation and the intensity of the violence. Such violence, which might need a minimum of duration to intensify, has as a consequence the military challenge posed to the government and the effects that this situation has on individuals. This necessitates the activation of the regime.

The quality of the clarification of the relevant criteria, the flexibility of their application and the fact that the threshold is set low, with a wide spectrum of applicability, further the humanitarian protection rationale in both the law of armed conflict and international criminal law.

Nevertheless, the factors used to determine the necessary level of organisation and the intensity of the conflict carry traces of their provenance in the status-based paradigm that focuses on the construction of an actor. To a certain extent this is inevitable as this actor is the one that is effective into rallying people for the exercise of collective violence. The struggle for collective status is always a part of the conflict and the law cannot fully insulate itself, even when the primary rationale is protective. Accordingly, while the *ad hoc* Tribunals have managed to formulate and use the criteria in a manner consistent with an individual-protection rationale, the tension between the status-based and the humanitarian-protection paradigms can still be detected. The consolidation and refinement of the law is something that a permanent judicial institution can perhaps

contribute to, even more than *ad hoc* ones. Accordingly, the next chapter will look at the role of the International Criminal Court.

## 7. Chapter 7: The International Criminal Court

### 7.1. Introduction

The analysis of the jurisprudence of the *ad hoc* Tribunals showed that the development of international criminal law and its application through judicial institutions led to significant progress with respect to the development of the legal regime for conflicts involving non-state armed groups. The existence of judicial institutions helped to transcend or moderate the effects of the status-based rationale that had influenced the legal regime. Through the Tribunals' jurisprudence, and especially that of the ICTY, there was a significant erosion of the paradigm of a status-based rationale in the determination of the threshold, the process of its application, and the extent of the legal regime extended. A humanitarian-protection rationale is accentuated by the legal regime of international criminal law and was central in the ICTY's approach on a variety of issues. These included the formulation of the threshold of applicability. The Trial Chambers' analyses clarified the concept of a non-international armed conflict first introduced through common article 3. The threshold defined through a minimum of organisation and intensity, assessed through a set of flexible indicative factors. The result was a low, clear, and flexible threshold, largely informed by a humanitarian-protection rationale for wide applicability.

At the same time, elements of a status-based paradigm survive in the criteria and indicative factors used in the jurisprudence of the Tribunals. It was argued<sup>1</sup> that this could not be avoided, as the actors involved in such conflicts were collective entities using force to achieve some form of political status. The tension is unavoidable and a careful and skilful balancing approach is necessary for an individual-protection based application. As the creation of a permanent international criminal court can be seen, historically and conceptually, as the evolution and culmination of the process of institutionalisation of the international criminal law regime, it is important to consider how the ICC might approach this tension.

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<sup>1</sup> See section 6.6.

A prominent claim of this thesis is that the threshold for the applicability of the *jus in bello* and the contents of the substantive law extended depend on the nature of the forum where the rules are created and the forum where they are applied.<sup>2</sup> In this context, a difference between the ICC and the *ad hoc* Tribunals should be mentioned: Negotiations among states rather than Security Council action led to its creation. We have already seen, in the case of the conferences drafting the Geneva Conventions and the Additional Protocols,<sup>3</sup> how negotiations between states can refer to and perpetuate certain conceptual stances, very much affected by a sovereignty- and status-based approach.

Furthermore, the actors that participated in the negotiations would be potentially subject to the jurisdiction of the institution they were creating. Cryer has distinguished between the process of creation of a ‘safe tribunal’, “which is not likely to exercise jurisdiction over the creating States” and an ‘unsafe tribunal’, which might exercise such jurisdiction. “Different considerations apply in each situation, with the narrowest forms of the relevant law tending to be created in the last of these situations.”<sup>4</sup> The creation of the ICC is very different from the creation of the *ad hoc* Tribunals, where the existence of an armed conflict was a fact of common knowledge of such potency as to mobilise international actors. While the *ad hoc* Tribunals were created to deal with concrete situations of conflict already taking place,<sup>5</sup> the ICC was created *in abstracto* and for situations arising in the future.<sup>6</sup> Its activities would not necessarily be dependent on the prior existence of sufficient international political agreement.

This chapter will look at how the characteristics of the process of creation of the ICC have influenced the threshold of applicability in the Statute, and how this threshold has been applied in practice. It will consist of four parts. The first part will be a discussion of the *travaux préparatoires* of the ICC Statute. After a brief summary of the process of creation of the Court, the language of the delegates will be looked at more closely. This

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<sup>2</sup> See e.g. section 6.1.

<sup>3</sup> See sections 3.2.3, 4.3.2, and 5.2.3.

<sup>4</sup> Cryer, ‘Doctrinal’, 119.

<sup>5</sup> An exception to this would be the conflicts in Kosovo and the Former Yugoslav Republic of Macedonia with which the ICTY eventually became concerned.

<sup>6</sup> See article 11 of the Rome Statute stipulating that “1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute. 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State...” The Statute came into force on 1 July 2002.

will help discern states' approaches to the inclusion of non-international armed conflicts in the Statute, as well as clarify the new threshold for such conflicts. The second part will look at the threshold *itself*. The third part will turn to the analysis of the jurisprudence of the Court so far, enquiring how the Court fares in the interpretation and application of the threshold. The analysis in these sections will help build an understanding how the creation and jurisprudence of the Court, particularly in setting a threshold, fit in the gradual emphasis towards a humanitarian-protection regime, where there is a clear, low and flexible threshold of applicability. The chapter will then conclude with a look at how the developments in international criminal law can be linked to the *jus in bello*.

## 7.2. The making of the Rome Statute

### 7.2.1. *The general process of creation of the International Criminal Court*

The post-World War II efforts<sup>7</sup> to establish either a Draft Code of Crimes or a permanent judicial institution were frustrated by the realities of the Cold War.<sup>8</sup> With the end of the latter the UN General Assembly once more requested the International Law Commission (ILC) "to address the question of establishing an international criminal court".<sup>9</sup> The ILC adopted a Draft Statute in 1994.<sup>10</sup> This process coincided with that of the creation of the *ad hoc* Tribunals by the Security Council, and the latter's work contributed to the preparation of both state and public opinion for a permanent institution for the prosecution of core crimes.<sup>11</sup> The ILC Draft was sent back to the General Assembly, which created the 1995 *ad hoc* Committee and, eventually, the 1996 Preparatory Committee on the Establishment of an International Criminal Court

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<sup>7</sup> See, generally, A. Cassese, 'From Nuremberg to Rome: International Military Tribunals to the International Criminal Court' in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary vol. 1* (Oxford University Press, 2002), 3 (Cassese, 'Nuremberg').

<sup>8</sup> *Ibid.*, 10.

<sup>9</sup> UN GA Res. 44/39 (1989).

<sup>10</sup> Report of the International Law Commission on its Forty-Sixth Session, Draft Statute for an International Criminal Court, 2 May–22 July, 1994, General Assembly, 49<sup>th</sup> Session, Supplement No. 10 (A/49/10) 1994 (ILC Report). See J. Crawford, 'The Work of the International Law Commission' in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary vol. 1* (Oxford University Press, 2002), 23.

<sup>11</sup> See Cassese 'Nuremberg', 16.

(PrepCom).<sup>12</sup> The latter submitted a Draft Statute at the Diplomatic Conference, which was held in Rome between 15 June and 17 July 1998.

The main organs of the Conference were the Plenary, the Committee of the Whole and the Drafting Committee.<sup>13</sup> The Plenary dealt with organisation, general political statements and the final adoption of the Statute. The development of the Statute was the responsibility of the Committee of the Whole, which debated the articles and then delegated them to working groups or sub-committees.<sup>14</sup> When approved by the Committee of the Whole, articles were sent to the Drafting Committee to be refined and then were, again, approved by the Committee of the Whole. On the final day of the Conference, the final report of the Committee of the Whole, with the full draft of the Statute, was sent to the Plenary and approved.<sup>15</sup>

### 7.2.2. *A summary of the process and the main issues*

In the ILC Report on a future international criminal court, war crimes in non-international armed conflicts were not included.<sup>16</sup> This was the case, as discussed above,<sup>17</sup> because the customary status of the criminal nature of such violations was at the time still disputed and, therefore, such an inclusion could jeopardise the success of the project. The opposition of many states to the very inclusion of war crimes committed in non-international armed conflicts was also evident in the report submitted by the Preparatory Committee in 1996.<sup>18</sup> It is perhaps a tribute to the influence of the

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<sup>12</sup> See A. Bos, 'From the International Law Commission to the Rome Conference (1994-1998)' in A. Cassese, P. Gaeta and J. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary vol. 1* (Oxford University Press, 2002), 35.

<sup>13</sup> See P. Kirsch and J. Holmes, 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) 93 *American Journal of International Law* 2, especially at 3 (Kirsch and Holmes).

<sup>14</sup> The Committee of the Whole was headed by a Bureau, which consisted of the representatives of Canada, Argentina, Romania, Lesotho, and Japan.

<sup>15</sup> Kirsch and Holmes, 3. For the final days see also A. Cullen, 'The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)', (2008) 12 *Journal of Conflict and Security Law* 419, 434 (Cullen).

<sup>16</sup> See ILC Report.

<sup>17</sup> See section 6.4.1.

<sup>18</sup> See Report of the *Ad Hoc* Committee on the Establishment of an International Criminal Court; General Assembly, 50<sup>th</sup> Session, Supplement No. 22 (A/50/22) 1995, par. 74. See also Cullen, 420 *ff.* for more on the development of the issue prior to the Rome Conference.

jurisprudence of the *ad hoc* Tribunals that this position changed and the draft submitted for consideration to the Rome Conference by the Preparatory Committee included such crimes.<sup>19</sup>

These were divided in sections C and D of article 8,<sup>20</sup> which provided for the Court's jurisdiction on war crimes. While the substantive crimes covered by sections C and D were taken from common article 3 and Additional Protocol II respectively,<sup>21</sup> they were under a common chapeau which defined 'armed conflict' only negatively, as excluding situations of internal disturbances and tensions, as per article 1(2) Additional Protocol II. The draft further provided the delegates with five options on these sections. Whilst the first two options concerned the role that "a plan or policy" in the commission of the crimes would have for the jurisdiction of the court,<sup>22</sup> the fourth and fifth concerned the deletion of section D or both C and D respectively. Only the third option addressed directly the threshold, by suggesting the deletion of the chapeau. No option was provided for the addition of criteria and the setting of the threshold higher than the existence of an armed conflict. This state of affairs would survive until the last week or so of the Rome Conference<sup>23</sup> when the Chairman of the Committee of the Whole, Philippe Kirsch, asked the delegates to offer comments on, among other issues, "the need for a threshold for war crimes".<sup>24</sup>

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<sup>19</sup> Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, A/CONF.183/2/Add.1, 18 April 1998. This did not mean, however, that divisions were overcome and the delegates at Rome were conscious of this. See, for example, the delegate for the Netherlands, at A/CONF.183/C.1/SR.4, par. 41, pointing out that "[a]s to whether sections C and D should be included at all, most, but not all, delegations in the Preparatory Committee had favoured their inclusion."

<sup>20</sup> The text of the chapeaus of sections C and D is as follows:

C. In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts...

D. Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts...

See, *Draft Statute for the International Criminal Court, Part 2: Jurisdiction*, A/AC.249/1998/CRP.8, 2 April 1998.

<sup>21</sup> Although, in the case of section D, not exclusively.

<sup>22</sup> This is relevant for our discussion only insofar as, as discussed above, the very existence of an armed conflict is sufficient for triggering the legal regime, rather than the added criteria in the cases of crimes against humanity and genocide.

<sup>23</sup> Although some delegates expressed unease with the lack of definition. See Turkey, at A/CONF.183/C.1/SR.5, par. 107.

<sup>24</sup> A/CONF.183/C.1/SR.25, par. 2. Kirsch was referring to a discussion paper prepared by the Bureau of the Committee of the Whole. See A/CONF.183/C.1/L.53.

Many delegates' comments recalled some of the spectres that had haunted the Conferences of 1949 and 1974-7<sup>25</sup> and led to a proposal by the Bureau of the Committee of the Whole evoking, for section D, the higher threshold of Additional Protocol II:

Section D of this article applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances or tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in a territory of a State Party between its armed forces and dissident armed forces or other organised 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.<sup>26</sup>

The limitations of the provision, because of the forbiddingly high threshold, were obvious to many delegates. Sierra Leone, a state facing a non-international armed conflict at the time, acted against this danger, by offering a counter-proposal on the threshold for section D which was eventually adopted, leading to the final formulation of what is now article 8 of the Statute. Thus, article 8 provides:

2. For the purpose of this Statute, 'war crimes' means:

- (c) In case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 1949, namely [...]
- (d) Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely [...]
- (f) Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there

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<sup>25</sup> Such comments will be discussed in more detail below.

<sup>26</sup> A/CONF.183/C.1/L.59.

is protracted armed conflict between governmental authorities and organised armed groups or between such groups.<sup>27</sup>

In the following there will be first an exposition and analysis of the stance that the delegates held and the language they used with respect to the main issues at stake in the regulation of non-international armed conflicts. Then, turning to the text of article 8, the *travaux* will still be helpful, in tackling the question of whether there are two separate thresholds.

### 7.2.3. *Sovereign talk: An analysis of the travaux préparatoires*

As we have seen in the previous chapters, the extension of the applicability of the *jus in bello* to non-international armed conflicts has always been one of the most controversial issues in diplomatic conferences, evoking sovereignty- and status-based concerns.<sup>28</sup> The Rome Conference was no exception. The criminalisation of violations of the *jus in bello* in non-international armed conflicts was one of the more contentious issues in the Rome Conference.<sup>29</sup> The controversy extended well beyond the issues of threshold and even questioned the propriety of an international court adjudicating acts committed in such conflicts. Before the delegates were asked to express their position with respect to a threshold, they had the opportunity to position themselves in relation to the very inclusion of war crimes committed in non-international armed conflicts in the Statute. The delegates' position on the topic ranged from whole-hearted support for the inclusion of all the rules contained in sections C and D, to a readiness to accept only those in section C which reflected common article 3 and considered of a customary nature, to downright opposition to the extension of the Court's jurisdiction to non-international armed conflicts.

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<sup>27</sup> As of May 2010 there have been 111 states that have ratified the Statute. See <http://www.icc-cpi.int/Menus/ASP/states+parties/>.

<sup>28</sup> See Sections 3.2.2. and 4.3.2.

<sup>29</sup> Kirsch and Holmes, 7; T. Graditzky, 'War Crime Issues Before the Rome Diplomatic Conference On the Establishment of an International Criminal Court' (1999) 5 *UC Davis Journal of International Law and Policy* 199, 208; E. La Haye, 'Violations of Common Article 3' in R. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, 2000), 207, 207; Sivakumaran, 363.

Nevertheless, the inclusion of non-international armed conflicts was supported by a clear majority of states.<sup>30</sup> The extension of the jurisdiction of the Court to such conflicts was seen as central to the function of international criminal institutions; a term repeatedly used by proponents was the adjective ‘essential’.<sup>31</sup> States in favour might have “attached great importance”<sup>32</sup> to this extension of jurisdiction because of the fact that non-international armed conflicts have grown to constitute the majority of conflicts in the world.<sup>33</sup> This directly affected the relevance<sup>34</sup> of the Court in the contemporary circumstances and the credibility<sup>35</sup> that it would have as a judicial institution, in order to deter the commission of crimes and end impunity. Moreover, it can be argued, from the prominence of the adjective ‘essential’, that the very essence of the institutional project was not unrelated to transcending sovereignty-based obstacles. If its jurisdiction were to be hampered at this early stage with the exclusion of non-international armed conflicts, the Court’s “*raison d’être*”<sup>36</sup> and “integrity and rationale”<sup>37</sup> would suffer.

Not all states were in favour, of course. A significant minority was opposed to the inclusion of non-international armed conflicts in the Statute to a greater or lesser extent.

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<sup>30</sup> In response to a question by the Chairman of the Committee of the Whole on the inclusion of non-international armed conflicts in the Statute 73 states were reported to be in favour as opposed to only 16 against. See D. Momtaz, ‘War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court’ (1999) 2 *Yearbook of International Humanitarian Law* 177, 179 fn 14, quoting *Terra Viva*, Nr. 21, Rome 13 July 1998.

<sup>31</sup> See A/CONF.183/C.1/SR.25, par. 52 (Norway); A/CONF.183/C.1/SR.25 par. 62 (Trinidad and Tobago); A/CONF.183/C.1/SR.25, par. 68 (UK); A/CONF.183/C.1/SR.25, par. 71 (Germany); A/CONF.183/C.1/SR.25 par. 78 (Australia); A/CONF.183/C.1/SR.25 par. 80 (Senegal); A/CONF.183/C.1/SR.26, par. 69 (Italy); A/CONF.183/C.1/SR.26, par. 111 (Netherlands); A/CONF.183/C.1/SR.27, par. 34 (Israel); A/CONF.183/C.1/SR.27, par. 49 (Denmark); A/CONF.183/C.1/SR.35, par. 67 (Canada). See also A/CONF.183/C.1/L.53 for the use of the term by the ICRC. See also A/CONF.183/C.1/SR.26, par. 107 (Ireland), arguing that the inclusion was “fundamental”.

<sup>32</sup> As was avowed by Italy. See A/CONF.183/C.1/SR.5, par. 64. Guinea-Bissau viewed the matter as of “prime importance”. See A/CONF.183/C.1/SR.28, par. 77. Many other states “strongly favoured” or “strongly supported” the inclusion of non-international armed conflicts. See A/CONF.183/C.1/SR.25, par. 55 (Sierra Leone); A/CONF.183/C.1/SR.25, par. 76 (Croatia); A/CONF.183/C.1/SR.26, par. 44 (Lithuania); A/CONF.183/C.1/SR.26, par. 116 (Georgia); A/CONF.183/C.1/SR.27, par. 17 (Finland); A/CONF.183/C.1/SR.27, par. 44 (Bosnia and Herzegovina) Slovenia thought the inclusion was “necessary”. See A/CONF.183/C.1/SR.27, par. 23. Others viewed a failure to do so as “unacceptable”. See A/CONF.183/C.1/SR.26, 38 (Lichtenstein); A/CONF.183/C.1/SR.25, par. 19 (New Zealand); The Austrian delegate viewed the matter as “a sine qua non for his delegation”. See A/CONF.183/C.1/SR.27, par. 8.

<sup>33</sup> A/CONF.183/C.1/SR.4, par. 72 (Denmark); A/CONF.183/C.1/SR.25, par. 10 (South Africa speaking for SADC); A/CONF.183/C.1/SR.25, par. 76 (Croatia); A/CONF.183/C.1/SR.26, par. 66 (Mali); A/CONF.183/C.1/SR.26, par. 131 (Slovakia); A/CONF.183/C.1/SR.27, par. 27 (Hungary); A/CONF.183/C.1/SR.28, par. 4 (Ethiopia).

<sup>34</sup> A/CONF.183/C.1/SR.4, par. 72 (Denmark); A/CONF.183/C.1/SR.4, par. 74 (Sweden); A/CONF.183/C.1/SR.26, par. 123 (Greece).

<sup>35</sup> A/CONF.183/C.1/SR.26 (Togo).

<sup>36</sup> A/CONF.183/C.1/SR.26, par. 54 (Republic of Korea).

<sup>37</sup> A/CONF.183/C.1/SR.26, par. 97 (US).

Among these were states which argued that, “as a matter of principle”<sup>38</sup> the Court should have no jurisdiction over war crimes committed in such conflicts.<sup>39</sup> These states adopted an approach based on a traditional and rigid concept of sovereignty.<sup>40</sup> Often, and interestingly, the inclusion of such crimes in the Statute was viewed as interference in the internal affairs of the state, in contravention with the guarantees provided in common article 3 and Additional Protocol II.<sup>41</sup> Others viewed any such inclusion as against the principle of complementarity.<sup>42</sup>

There were some states that drew a distinction between sections C (criminalising the rules contained in common article 3) and D (containing rules primarily taken from Additional Protocol II). Thus, it was argued that while the crimes included in section C had achieved customary status, those included in section D had not.<sup>43</sup> States not party to Additional Protocol II did not want to be bound to it through the Statute.<sup>44</sup> Such arguments were usually followed by a preference to completely delete section D,<sup>45</sup> rather than simply raise its threshold. Indeed, many of the states that were arguing for a provision of a (higher) threshold wanted it to apply to both sections C and D,<sup>46</sup> or even only C.<sup>47</sup> Occasionally,

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<sup>38</sup> A/CONF.183/C.1/SR.26, par. 87 (India); A/CONF.183/C.1/SR.26, par. 102 (Iran, ‘*in principle*’).

<sup>39</sup> A/CONF.183/C.1/SR.4, par. 65 (China); A/CONF.183/C.1/SR.4, par. 66 (UAE); A/CONF.183/C.1/SR.4, par. 70 (Bahrain); A/CONF.183/C.1/SR.5, par. 115 (India); A/CONF.183/C.1/SR.5, par. 120; A/CONF.183/C.1/SR.27, par. 2 (Iraq); A/CONF.183/C.1/SR.27, par. 46 (Burundi); A/CONF.183/C.1/SR.27, par. 60 (Indonesia, arguing that C and D could be punished under crimes against humanity); A/CONF.183/C.1/SR.27, par. 65 (Vietnam, “strongly advocating” the exclusion of C and D); A/CONF.183/C.1/SR.28, par. 9 (Pakistan); A/CONF.183/C.1/SR.28, par. 51 (Thailand); A/CONF.183/C.1/SR.28, par. 104 (Libya).

<sup>40</sup> As the representative for India put it, referring to both sections C and D, “there could not be a homogeneous structure for treatment of international and non-international armed conflicts so long as sovereign States existed.” At A/CONF.183/C.1/SR.5, par. 115.

<sup>41</sup> See A/CONF.183/C.1/SR.26, par. 115 (Egypt); A/CONF.183/C.1/SR.27, par. 5 (Algeria).

<sup>42</sup> See A/CONF.183/C.1/SR.27, par. 80 and A/CONF.183/C.1/SR.35, par. 44 (Sri-Lanka); A/CONF.183/C.1/SR.35, par. 57 (Qatar). These states clearly allowed sovereignty- and status-related concerns to conflate a question of admissibility with one of overall jurisdiction of the Court. But see, below fn 49 *ff* and text, on how the preoccupation with complementarity in this context fits with the understanding of the ‘total collapse of the state’ including its judicial mechanisms as the only acceptable threshold.

<sup>43</sup> A/CONF.183/C.1/SR.26, par. 102 (Iran); A/CONF.183/C.1/SR.28, par. 20 (Russia). Although see China’s position, at A/CONF.183/C.1/SR.25, par. 36, who wanted the deletion of both C and D, “as not being in keeping with international customary law”. In addition some states pointed out that they were not parties to Additional Protocol II. But see A/CONF.183/C.1/SR.26, par. 41 (Switzerland), arguing that C reflected customary law, and section D excluded some Additional Protocol II rules, since many states were not parties.

<sup>44</sup> A/CONF.183/C.1/SR.4, par. 76 (Sudan); A/CONF.183/C.1/SR.25, par. 59 (Azerbaijan); A/CONF.183/C.1/SR.25, par. 65 (Mexico); A/CONF.183/C.1/SR.27, par. 73 (Nepal).

<sup>45</sup> A/CONF.183/C.1/SR.25, par. 59 (Azerbaijan); A/CONF.183/C.1/SR.25, par. 65 (Mexico); A/CONF.183/C.1/SR.26, par. 102 (Iran); A/CONF.183/C.1/SR.28, par. 20 (Russia).

<sup>46</sup> A/CONF.183/C.1/SR.25, par. 49 (Syria, applying the ‘total collapse of the country’ criterion); A/CONF.183/C.1/SR.28, par. 64 (Sudan).

<sup>47</sup> A/CONF.183/C.1/SR.26, par. 115 (Egypt “could consider section C if safeguards such as non-interference in the internal affairs of States, a higher threshold and the guarantees contained in Additional Protocol II to the Geneva

the threshold suggested was that of Additional Protocol II,<sup>48</sup> but most states were not so specific.

Many states did not refer to a specific threshold, but accepted the inclusion of war crimes only when “the total collapse of the state” had already occurred.<sup>49</sup> This phrasing reflects the approach of some states and their conception of the limits of regulation by international (judicial) supervision. One side to this relates to the concern with complementarity as a strictly objective concept: This means that the jurisdiction of the Court would be triggered only in the absence of judicial mechanisms within a the state and not when the state, exercising sovereign prerogatives, would be unwilling to conduct genuine proceedings, as determined by someone outside that state.<sup>50</sup> This allows the sovereignty concerns that underpin the principle of complementarity to spread and conflate a question of admissibility with a question of jurisdiction.

The sovereignty-related basis of this conflation relates to a wider understanding of the incompatibility of internationally regulating a conflict between a state and a non-state armed group. Accordingly, the collapse that would allow regulation has to be total, not just partial, and it has to be *political*.<sup>51</sup> This would mean that the political status of the government has already suffered significantly, to the extent that it is either non-existent or down to a level of a non-state armed group. Before this point regulation is seen as subtracting status from the government.

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Conventions of 1949 were stipulated.”); A/CONF.183/C.1/SR.28, par. 40 (Bangladesh); A/CONF.183/C.1/SR.33, par. 33 (Syria)

<sup>48</sup> A/CONF.183/C.1/SR.27, par. 21 (Bahrain).

<sup>49</sup> A/CONF.183/C.1/SR.25, par. 49 (Syria, “total collapse of the country’s central regime”); A/CONF.183/C.1/SR.28, par. 92 (Oman); A/CONF.183/C.1/SR.35, par. 54 (Pakistan).

<sup>50</sup> The current relevant formulation in the Statute for the admissibility of the case is included in article 17(1)(a) and considers a case admissible, when “the State is unwilling or unable genuinely to carry out the investigation or prosecution.” Some states, when talking about the collapse of the state did refer in particular to its judicial organs. See for example the representative of Sri Lanka arguing that “unless there were a complete breakdown of the judicial and administrative structure, due regard should be paid to the principle of complementarity”, at A/CONF.183/C.1/SR.27, par. 80. See also India, at A/CONF.183/C.1/SR.33, par. 37: “where a State’s administrative and legal machinery had ceased to function”; A/CONF.183/C.1/SR.35, par. 57 (Qatar, “could not accept the jurisdiction of the Court over internal conflicts, except in cases of total collapse of a State’s judicial system, and wished to reaffirm the principle of complementarity between national systems and the Court.”; A/CONF.183/C.1/SR.36, par. 20 (Oman). See also A/CONF.183/C.1/SR.35, par. 44 (Sri Lanka, who maintained its opposition on these grounds, even after the Bureau proposal.)

<sup>51</sup> See the previous fns and see A/CONF.183/C.1/SR.27, par. 71 (Yemen: “the Court’s jurisdiction began when the political structure of a State collapsed totally, not just partially.”).

This approach is informed by the understanding of the conflict as a zero sum game of status and the understanding that the application of international law depends on the existence of such status. From this perspective, international legal regulation is only possible on a horizontal plane among entities of equal or similar political status and denies its role as a vertical system of rules. It reflects the rationale that allows regulation only through internationalisation *stricto sensu* and that has, to some extent, trapped the application of common article 3 between the overpowering concepts of police operations and international armed conflict.<sup>52</sup> It further reflects the conflation of the narrow legal status commensurate with the specific rules extended with a wider political/legal status, which is in direct conflict with that of the state.

Since most of the opponents of the regulation of non-international armed conflicts were either absolutely against any regulation or had such a conception of ‘total collapse’ as an acceptable threshold,<sup>53</sup> it was not easy for a negotiating coalition to be built that would achieve a higher threshold for one or both sets of war crimes. The closest the opponents got was through the use of the Additional Protocol II threshold.<sup>54</sup> This threshold required territorial control, sustained (rather than just prolonged) conflict and an applicability limited to conflicts between governments and non-state armed groups and not between such groups. As such, it can be seen as an attempt to combine a status-based rationale with a preference for a relatively inactive court.

However, Additional Protocol II was not an acceptable solution. Widespread reactions against this new proposed threshold meant that the last minute limitation of the scope of the treaty was not achieved. Critics of the higher threshold pointed out that the introduction of a high threshold would unacceptably limit the function of the Court,<sup>55</sup> since conflicts reaching the Additional Protocol II threshold were rare and most conflicts would be excluded.<sup>56</sup> Opposition was voiced specifically against the requirement of

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<sup>52</sup> See section 3.4.3.

<sup>53</sup> Above fns 49 *ff* and text.

<sup>54</sup> See section 5.4.

<sup>55</sup> A/CONF.183/C.1/SR.34, par. 22 (New Zealand); A/CONF.183/C.1/SR.35, par. 49 (Tanzania).

<sup>56</sup> A/CONF.183/C.1/SR.33, par. 24 (US); A/CONF.183/C.1/SR.33, par. 80 (UK); A/CONF.183/C.1/SR.35, par. 68 (Denmark); A/CONF.183/C.1/SR.35, par. 76 (Estonia); A/CONF.183/C.1/SR.36, par. 30 (Slovenia); A/CONF.183/C.1/SR.36, par. 42 (Bosnia and Herzegovina).

territorial control,<sup>57</sup> as well as the non-applicability of the threshold to conflicts involving armed groups fighting each other.<sup>58</sup> For these states, it was clear that the ‘essence’ of the whole project was incompatible with such a high threshold.<sup>59</sup> As Robinson and von Hebel remark “the intense reaction by an overwhelming majority to the shortcomings of the Additional Protocol II definition, only twenty years after its adoption, is particularly interesting.”<sup>60</sup>

This shift might be related to the limited effect that Additional Protocol II has had. This explanation is suggested by the criticisms that such a threshold would severely limit the function of the Court. The rejection of the high Additional Protocol II threshold also reflects the significant development of the international approach on the justiciability of war crimes committed in non-international armed conflicts, especially because of the work of the *ad hoc* Tribunals. It might also reflect a difference of approach to the extent that the rules and thresholds that would be the outcome of the negotiations concerned the creation of an independent judicial institution and their application would depend primarily on such an institution and not exclusively on states. These explanations could follow from the wide-spread understanding that the ‘essence’ of the Court, as a judicial institution battling impunity, necessitated its role in non-international armed conflicts.

Finally, the unacceptability of the restrictive threshold is reflected potently in the fact that the delegation that solved the impasse belonged to a country that was facing, at the time, a conflict below that threshold. As the delegate of Sierra Leone put it, he

had reservations[...]regarding the chapeau[...]which referred to organised armed groups that exercised “control over a part of [a State party’s] territory”. That wording was very restrictive: in his own country, for example, the rebel forces did not occupy a territory. Thus, as presently drafted, section D would exclude the type of internal conflict presently taking place in Sierra Leone.<sup>61</sup>

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<sup>57</sup> A/CONF.183/C.1/SR.34, par. 34 (Spain); A/CONF.183/C.1/SR.34, par. 107 (Australia) ; A/CONF.183/C.1/SR.35, par. 23 ; A/CONF.183/C.1/SR.36, par. 37 (Costa Rica).

<sup>58</sup> A/CONF.183/C.1/SR.34, par. 34 (Spain); A/CONF.183/C.1/SR.34, par. 60 (South Africa); A/CONF.183/C.1/SR.34, par. 107 (Australia) ; A/CONF.183/C.1/SR.34, par. 94 (Sudan) ; A/CONF.183/C.1/SR.35, par. 80 (Solomon Islands); A/CONF.183/C.1/SR.36, par. 37 (Costa Rica).

<sup>59</sup> See, again, for the use of the word A/CONF.183/C.1/SR.35, par. 67 (Canada).

<sup>60</sup> See D. Robinson and H. von Hebel, ‘War Crimes in Internal Conflicts: Article 8 of the ICC Statute’ (1999) 2 *Yearbook of International Humanitarian Law* 193, 208 (Robinson and von Hebel).

<sup>61</sup> A/CONF.183/SR.35, par. 8.

To conclude, in this Diplomatic Conference, as in the others examined in this thesis, certain themes were re-played by the representatives of states. Just as the concept of state sovereignty was seen by some delegates as in principle opposed to the regulation of armed violence within the state, now it was seen as opposed to judicial oversight of that violence, even when it had reached the level of an armed conflict. The negotiations suggest that there was, in the perception of many states, little ground between the existence of an armed conflict, the propriety of a second opinion on whether the law of armed conflict is observed, and the internationalisation *lato sensu*<sup>62</sup> of the whole matter in violation of state sovereignty. This meant, in practice, that there was little ground between the states that considered the regulation of non-international armed conflicts as essential and of fundamental importance for the function and relevance of the court and those that were opposed, on principle of sovereignty, to any such regulation.

The states that tried to position themselves in the middle could not easily find firm ground. The Additional Protocol II threshold, while seemingly conciliatory, in truth was much closer to the opponents of inclusion of non-international armed conflicts to the Statute than to the proponents: Practically speaking, it excluded the majority of conflicts and conceptually speaking it was a step towards the paradigm of status. In the case of the Rome Conference, however, unlike in the negotiations that led to Additional Protocol II, there didn't seem to be a clear middle ground where 'moderates' and 'minimalists'<sup>63</sup> could coalesce and produce a threshold of high-intensity and territorial control. Too many states understood that it was essential for the new institution to have a wide threshold of jurisdiction.

Accordingly, the suggestion by some states of an Additional Protocol II threshold can be seen less as a well-supported and organised attempt to limit the applicability of the Statute and more as a last minute defensive position. This might explain its failure. Moreover, as will be further discussed in the next section, it is one reason why there was arguably not an understanding of a threshold that fell short of Additional Protocol II but was higher than the one in common article 3, *Tadić*, and article 8(2)(d). This is important to bear in mind while interpreting the threshold(s) of applicability of article 8.

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<sup>62</sup> See section 4.1. fn 2.

<sup>63</sup> See, in the context of Additional Protocol II, section 5.3.2.

### 7.3. The result: Article 8

#### 7.3.1. *The dangers of having two thresholds*

Even if the Sierra Leone proposal<sup>64</sup> allowed the avoidance of the language of the threshold of Additional Protocol II, some difficulties still remain. It is reminded that, while section 8(2)(d) simply mentions “armed conflicts not of an international character” section 8(2)(f) refers to “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups.” The structure of the article, by providing two threshold provisions for two different sets of substantive rules, seems to introduce a difference in these thresholds for the crimes included in sections (c) and (e) respectively.<sup>65</sup> This may lead to the conclusion that, as far as non-international armed conflicts are concerned, there are now three different thresholds provided for in international instruments: In ascending narrowness there are, common article 3 (and article 8(2)(d) of the Statute), article 8(2)(f), and Additional Protocol II. Nevertheless, it may be possible to avoid the creation of another threshold through the interpretation of the provisions, by doctrine or the Court’s jurisprudence.

This possibility would enable two interrelated dangers to be avoided: The further complication of the thresholds of applicability and, more centrally for this thesis, the limitation of the applicability of the legal regime contained in article 8(2)(e) through the creation of a threshold above that of the mere existence of an armed conflict.

Conceptually, a new, higher, threshold would allow a pull towards a status-based understanding of applicability. Requiring more than an armed conflict as reason enough for the applicability of a set of war crimes, suggests a movement from a situation-based

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<sup>64</sup> See section 7.2.3. above

<sup>65</sup> See C. Kress, ‘The 1999 Crisis in East Timor and the threshold of the Law on War Crimes’ (2002) 13 *Criminal Law Forum* 409, 419 (Kress, ‘Timor’): “Taken literally, this can hardly be denied.” See also L. Condorelli, ‘War Crimes and Internal Conflicts in the Statute of the International Criminal Court’ in M. Politi and G. Nesi, *The Rome Statute of the International Criminal Court: A challenge to impunity* (Ashgate, 2001) 107, 112 (Condorelli); Sivakumaran, 373.

threshold to one based on the characteristics of the actors involved. The direction of such a move is that of Additional Protocol II and the understanding of an actor that has developed state-like characteristics, especially through territorial control. Even if the difference is limited to an element of duration of the conflict, rather than the violence, such duration can be seen to have the function of requiring the consolidation of political/military status of the group, beyond what is necessary for the existence of an armed conflict.

It will be argued that the language of the article does not really support such a move, and not only because of the lack of a criterion of territorial control. Ultimately, even if an independent concept of armed conflict between common article 3 and Additional Protocol II is conceivable, such a concept does not emerge from either the language of the article or the *travaux préparatoires*.

In interpreting the article, there are two inter-related problems: the departure of the 8(2)(f) definition from the customary law definition in *Tadić* and the higher threshold of 8(2)(f) in relation to 8(2)(d). The former is a question of clarity and consistency of the relevant area of international law. Space does not permit an extensive analysis of the language of 8(2)(e) and its essential reiteration of *Tadić*. However it is necessary to mention that the difference between the two is the phrase ‘protracted armed conflict’ in 8(2)(e) rather than ‘protracted armed violence’ in *Tadić*.<sup>66</sup> There will be however an attempt below to argue against the narrowing of the threshold. The argument will be that a higher threshold, reflecting considerations of status, is not reflected in the overall approach by states at the Rome Conference.

### 7.3.2. *Reconciliation between articles 8(2)(f) and 8(2)(d)*

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<sup>66</sup> For the argument that there is little sense in interpreting ‘protracted armed conflict’ as different from ‘protracted armed violence’ see Sivakumaran, 373 ff; Condorelli, 113. See also, on the identical nature of the *Tadić* and 8(2)(f) thresholds, Bothe, 423; Kress, ‘Timor’, 419; C. Kress, ‘War Crimes committed in non-International Armed Conflict and the Emerging System of International Criminal Justice’ (2001) 30 *Israel Yearbook on Human Rights* 103, 118 (Kress, ‘Crimes’); Cryer et al, 237-8.. See also section 7.4.1 below.

The article contains two separate substantive parts dealing with non-international armed conflicts that are covered by two separate and differently phrased thresholds. The second threshold came about after some delegates proposed an Additional Protocol II threshold, being dissatisfied with the common article 3 one, and in order to cover substantive war crimes that they considered not part of the common article 3 or customary regime. If the article 8(2)(f) threshold came about as a compromise between a common article 3 and an Additional Protocol II threshold, then surely it must be somewhere in between or, at least, it cannot be identical to one of the two. This section will attempt to disprove this.

Throughout the negotiations, although there was the realisation of the different provenance contained in the rules in sections (c) and (e), the approach was to trigger both sections with one threshold. Firstly, it is important to point out that, before the Bureau proposal that suggested an Additional Protocol II threshold,<sup>67</sup> sections C and D (to be 8(2)(d) and (f)) shared the same threshold. Therefore, even though the substantive war crimes were not taken only from common article 3 and even though they were divided into two paragraphs, one and the same threshold was initially envisaged. This is apparent in the statement of the German delegate, who opposed the higher threshold by saying that he “continued to believe that the same standards should apply in section D as in section C...”<sup>68</sup> Furthermore, the clear majority of states that were arguing for a higher threshold,<sup>69</sup> or just the clarification of the threshold,<sup>70</sup> wanted it to apply to both sections C and D.

Moreover, whereas the proposed higher threshold caused significant opposition in the Conference, it did not find enough support. Most states that were hostile to the inclusion of non-international armed conflicts in the jurisdiction of the Court did not want such conflicts included at all.<sup>71</sup> The raising of the threshold was not going to alter this

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<sup>67</sup> A/CONF.183/C.1/L.53.

<sup>68</sup> A/CONF.183/SR.33, par. 68.

<sup>69</sup> See, for example, Bahrain, at A/CONF.183/C.1/SR.27, par. 21, who “found the thresholds in sections C and D difficult to accept because there was no positive definition of non-international armed conflicts.”

<sup>70</sup> See Uruguay, at A/CONF.183/C.1/SR.27, par. 11, arguing that “bearing in mind the concerns of some countries, the scope of those crimes in sections C and D should be more precisely defined” See also the US, at A/CONF.183/C.1/SR.26, par. 97, who “hoped that the concerns of certain delegations could be accommodated by appropriate wording, in the chapeau or elsewhere, that clearly established the high threshold to be covered by those two sections.” See also A/CONF.183/C.1/SR.27, par. 5 (Algeria).

<sup>71</sup> See above fn 38 *ff* for states hostile to any inclusion of non-international armed conflicts.

fundamental position,<sup>72</sup> although in one case this did alter the state's position.<sup>73</sup> This meant that no consensus could be achieved on the Bureau proposal.

This opened the space for the Sierra Leone proposal. The delegate expressed his wish for the inclusion of both sections C and D and his uneasiness about the high threshold that was proposed. The reasons that Sierra Leone gave for its proposal were not that this was a middle ground between a minimal and a maximal threshold, but that the elements contained in the Bureau proposal were unacceptable as they would unduly limit the jurisdiction of the Court. The delegates that supported the Sierra Leonean proposal spoke on similar grounds, especially focusing on the restrictive element of territorial control.<sup>74</sup> It can be therefore argued that the Sierra Leone proposal was 'righting the wrongs' of the Bureau proposal, rather than suggesting a compromise.<sup>75</sup>

Furthermore, the Sierra Leone proposal allowed for the clarification of a definition that had hitherto been merely negative. While 8(2)(d) contains the negative definition of an armed conflict, namely that it "does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature", the proposal made sure that this is complemented in sub-paragraph (f) by a positive definition.<sup>76</sup> If article 8 is to be viewed as a whole, the fact that there are two sub-paragraphs dealing with thresholds can be put down to the mechanics of the negotiations rather than the substance of the article. This haphazard element in the drafting of the Statute is also reinforced by the fact that the discussion on thresholds was

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<sup>72</sup> See, for example, China's reaction, at A/CONF.183/C.1/SR.33, par. 40. See also A/CONF.183/C.1/SR.34, par. 48 (Turkey who "preferred the new wording for the chapeau of section D but, for the time being, maintained his position that sections C and D should be deleted."); A/CONF.183/C.1/SR.34, par. 63 (Iran); A/CONF.183/C.1/SR.34, par. 82 (Russia); A/CONF.183/C.1/SR.34, par. 85 (Thailand); A/CONF.183/C.1/SR.35, par. 31 (Algeria); A/CONF.183/C.1/SR.35, par. 54 (Pakistan). Some states, interestingly, continued to express their opposition specifically on section D thus showing that the logic of applying a separate and higher threshold on section D, as opposed to section C, had little effect. See, for example, A/CONF.183/C.1/SR.35, par. 4 (Egypt).

<sup>73</sup> A/CONF.183/C.1/SR.35, par. 35 (Indonesia), without, unfortunately, explaining the rationale behind this change of position.

<sup>74</sup> See above fn 56 *ff* for states expressing this criticism.

<sup>75</sup> Although this seems not entirely in accordance with the understanding of at least one delegate: Bosnia and Herzegovina "was concerned about raising the threshold for war crimes under article 5 quarter, section D, but thought that, if a different threshold had to be established, the wording proposed by the delegation of Sierra Leone would be acceptable." A/CONF.183/C.1/SR.36, par. 42.

<sup>76</sup> See for this approach Robinson and von Hebel, 204-5. See also Cryer et al, 236-7.

conducted on the last days of the Conference and the Sierra Leone delegate proposed the final text on the final day dedicated to the matter.<sup>77</sup>

Therefore, although it was undoubtedly the intention of some of the participants to raise the threshold and limit the jurisdiction of the Court, as had occurred in the negotiations that resulted in Additional Protocol II, in this case they failed. Moreover, this failure resulted not in a compromise solution but in a clarification. Once it was clear that Additional Protocol II was too high, and in the hasty circumstances of the last days of the Conference, it was not possible for a coherent negotiating position to be found. Ultimately, a separate, identifiable concept of a non-international armed conflict between that of common article 3 and Additional Protocol II did not emerge from the Rome Conference.

To conclude, it is possible and, indeed, necessary to interpret article 8(2)(f) in accordance with both article 8(2)(d), as well as the customary definition of what is an armed conflict. As such article 8, as a whole,<sup>78</sup> builds on the concept of non-international armed conflict initiated by common article 3 and developed by the jurisprudence of the Tribunals. Its threshold is what has been accepted as the customary clarification of common article 3 and its substantive contents include the legal regime initially included in common article 3 and subsequently developed through the jurisprudence of the Tribunals. It is a further step in entrenching a regulatory structure that provides a low and flexible threshold of applicability and expansive humanitarian protection. Although, a status-based rationale is always present and was expressed in some of the concerns of states in the negotiations, it seems that it was clear to the majority of states that an individual-protection rationale is a necessary feature for the function of the Court.

#### 7.4. The Jurisprudence of the Court

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<sup>77</sup> See Cullen, 434, who provides some illuminating detail and also points out that the lack of time, as the new threshold had to be incorporated to the text sent to the Committee of the Whole on the same day, is to blame for the fact that there was no further discussion of the Sierra Leone proposal and no more recorded comments. See also Kress, 'Crimes', 119.

<sup>78</sup> That is, its parts dealing with non-international armed conflicts.

The Court's Pre-Trial Chambers I and II have now treated the issue of the existence of an armed conflict in four decisions, three being on the confirmation of charges<sup>79</sup> and one on the issue of an arrest warrant.<sup>80</sup> In this section, there will be a discussion of three inter-related issues. The first concerns the use of the term 'protracted armed conflict' and the path that the Court seems to have taken in affirming a higher threshold for article 8(2)(f). The second issue concerns a seemingly divergent approach to the criterion of organisation, as a result of the use of Additional Protocol II. The third issue is the unfortunate step towards territorial control and its subsequent correction.

#### 7.4.1. *Intensity*

The starting point of the Pre-Trial Chamber's examination of the elements of a non-international armed conflict as per article 8(2)(f) was, problematically, Additional Protocol II. After pointing out that this "sets out the criteria for distinguishing between non-international armed conflicts and situations of internal disturbances and tensions",<sup>81</sup> the Chamber set out its criteria, namely that

the armed groups must: i) be under responsible command implying some degree of organisation of the armed groups, capable of planning and carrying out sustained and concerted military operations and imposing discipline in the name of a *de facto* authority, including the implementation of the Protocol; and ii) exercise such control over territory as to enable them to carry out sustained and concerted military operations.<sup>82</sup>

The Chamber then juxtaposed this definition with that in *Tadić* and concluded that "the ability to carry out sustained and concerted military operations is no longer linked to

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<sup>79</sup> *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-01/06, 29 January 2007 (*Lubanga*); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, Pre-Trial Chamber I, ICC-01/04-01/07, 30 September 2008 (*Katanga*); *Bemba*.

<sup>80</sup> *Prosecutor v Omar Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, ICC-02/05-01/09, 4 March 2009 (*Al Bashir*).

<sup>81</sup> *Lubanga*, par. 231. See Sivakumaran, 378: "While true this is hardly the purpose Article 1, paragraph 1 seeks to serve."

<sup>82</sup> *Lubanga*, par. 232.

territorial control.”<sup>83</sup> Finally, referring back to article 8(2)(f)’s reference to “protracted armed conflict between [...] [organised armed groups]” it concludes, in light of the above, that “this focuses on the need for the armed groups in question to have the ability to plan and carry out military operations *for a prolonged period of time*.”<sup>84</sup> The added phrase seems to betray a perception of a higher degree of duration in article 8(2)(f). This is mitigated if one considers the, original, French text in combination with the language in *Tadić*:

The original, French, text of *Lubanga* refers to “prolongée”, the same word used in the French text of *Tadić*, the English original of which was “protracted”. So “protracted” was translated as “prolongée”, which was translated back as “prolonged”. Thus, for these purposes, the words “protracted” and “prolonged” were considered interchangeable and as has already been seen, the *Tadić* definition contains an element of protraction, albeit as part of the broader notion of intensity.<sup>85</sup>

In the end, the Pre-Trial Chamber’s conclusion that “an armed conflict of a certain degree of intensity and extending from at least June 2003 to December 2003 existed on the territory of Ituri”<sup>86</sup> is similar to the formulations of ICTY judgments, based on *Tadić*, and does not clearly refer to an element of added duration.

Unfortunately, the same argument cannot be made with respect to the subsequent decisions of the Pre-Trial Chambers, which consolidated this linguistic confusion in their English original. While *Katanga* does not refer to duration,<sup>87</sup> the formula introduced in *Lubanga* is the starting point for the same Pre-Trial Chamber’s decision on the issuing of an arrest warrant for Sudan’s President Omar Al Bashir. The Pre-Trial Chamber quoted in full *Lubanga*’s thought-process, including the attention given to Additional Protocol II<sup>88</sup> and the phrase ‘for a prolonged period of time’.<sup>89</sup> The phrase found its way in the

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<sup>83</sup> *Ibid.*, par. 233.

<sup>84</sup> *Ibid.*, par. 234. (emphasis added)

<sup>85</sup> Sivakumaran, 379.

<sup>86</sup> *Lubanga*, par. 235.

<sup>87</sup> The Court there found that “between August 2002 and May 2003, an *armed conflict* took place in the territory of Ituri between a number of local organised armed groups”. See *Katanga*, par. 239. This decision, however, is not without its problems, as will be seen below.

<sup>88</sup> *Al Bashir*, par. 59.

<sup>89</sup> *Ibid.*, par. 60.

initial conclusion on the question of intensity,<sup>90</sup> while, finally, the more general conclusion on the fulfilment of article 8(2)(f)'s criteria speaks of a 'protracted armed conflict'.<sup>91</sup> Still, it can be argued that the use of the phrase 'for a prolonged period of time' merely carries on *Lubanga*'s confusion, without clarifying and affirming that the use of the phrase requires added duration. Similarly, the reference to 'protracted armed conflict' in article 8(2)(f) is unavoidable as this is the applicable legal formula.

Another blow was dealt by the most recent decision of the Court on the matter. In the case against Jean-Pierre Bemba, Pre-Trial Chamber II distinguishes between article 8(2)(d) and the first sentence of article 8(2)(f) on the one hand, which require "any armed conflict not of an international character to reach a certain level of intensity which exceeds that of internal disturbances,"<sup>92</sup> and the second sentence of article 8(2)(f) on the other hand.<sup>93</sup> The Court 'is mindful' of the difference in language between (d) and (f) and argued that

this can be seen to require a higher or additional threshold to be met[...]The argument can be raised as to whether the requirement can nevertheless be applied also in the context of article 8(2)(d) of the Statute. However, irrespective of such a possible interpretive approach, the Chamber does not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as "protracted" in any event.<sup>94</sup>

The Court, in this passage, not only acknowledged that the term "[protracted armed conflict] can be seen to require a higher or additional threshold to be met" but also raised the question whether this higher threshold should be applied to article 8(2)(e). As the conflict had been going on for five months, it is protracted and therefore the issue need not have been addressed. The Court here seems to attempt to reconcile (d) and (f) but by

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<sup>90</sup> *Ibid.*, par. 65.: "As a result, the Chamber concludes there are reasonable grounds to believe that, since at least March 2003, both the SLM/A and the JEM had, as required by article 8(2) (f) of the Statute, the ability to carry out sustained military operations for a prolonged period of time."

<sup>91</sup> *Ibid.*, par. 70.: "In conclusion, the Chamber finds that there are reasonable grounds to believe that from March 2003 to at least 14 July 2008, a protracted armed conflict not of an international character, within the meaning of article 8(2)(f) of the Statute, existed in Darfur between the GoS and several organised armed groups, in particular the SLM/A and the JEM."

<sup>92</sup> *Bemba*, par. 225.

<sup>93</sup> *Ibid.*, par. 226. See above fn 28 for the text of article 8.

<sup>94</sup> *Ibid.*, par. 235.

raising the former rather than lowering the latter. It is not clear why the Court would take this approach. In any case, it later clearly concluded that

[g]iven the concurring views of the parties on the time-frame of approximately five months during which those armed hostilities lasted, and its own assessment..., the Chamber finds that the armed conflict is to be characterised as “protracted” within the meaning of article 8(2)(f) of the Statute.<sup>95</sup>

Were it not for that final conclusion, the Court’s language would perhaps allow some interpretive leeway. The impressionistic effect of the phrase “can be seen to require” as well as the Court’s abstention from concluding its proposed “interpretive approach” would have allowed the matter to remain unsettled. This could still have been claimed although the linguistic confusion which began in the drafting of article 8 has taken the Court down a slippery slope to complication and the narrowing of the threshold. However, the centrality of the finding that the armed conflict is protracted in the conclusion makes clear that the Court’s understanding in *Bemba* is that it does not suffice to find that an armed conflict exists but it is necessary to find that this is protracted.

This shift of focus to the duration is also seen in terms of the application of the law to the facts. In *Lubanga* when the Court was analysing the relevant factors that indicated the necessary intensity of the conflict, it did not seem to focus on duration as something separate from the overall intensity.<sup>96</sup> Indeed, the Court mentioned a series of factors such as the number of attacks, the number of victims and the involvement of the UN Security Council.<sup>97</sup> Similarly, in *Al Bashir* it applied the *Lubanga* definition<sup>98</sup> to the facts finding that the armed groups involved had mounted “numerous military operations” against the government,<sup>99</sup> while the government mobilised the militia<sup>100</sup> and mounted a full counter-insurgency campaign.<sup>101</sup>

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<sup>95</sup> *Ibid.*, par. 255.

<sup>96</sup> Sivakumaran, 379.

<sup>97</sup> *Lubanga*, par. 235.

<sup>98</sup> Above fn 115-7 and text.

<sup>99</sup> *Al Bashir*, par. 63, giving specific examples.

<sup>100</sup> *Ibid.*, par. 66.

<sup>101</sup> *Ibid.*, par. 67.

This approach changed in *Bemba*. While the Court discusses certain attacks,<sup>102</sup> the number of soldiers and battalions involved<sup>103</sup> as well as the mounting of joint operations<sup>104</sup> and the spread of the operations,<sup>105</sup> under a section entitled ‘the existence of an armed conflict’,<sup>106</sup> it then dedicated a separate section on the “duration of the armed conflict”.<sup>107</sup> There the Court discussed the evidence at its disposal in order to determine the date on which the Mouvement pour la Libération du Congo (MLC) soldiers entered the territory of the Central African Republic, marking the beginning of the conflict. This allows the Court to reach the aforementioned conclusion, satisfying what it perceives to be the necessary, separate criterion of duration.

The approach applied in this case appears to find an ‘instantaneous’ beginning of an armed conflict, marked with the entry of the MLC soldiers, rather than a gradual culmination of intensity and organisation as was the case with the ICTY’s treatment of the conflicts in Kosovo<sup>108</sup> and former Yugoslav Republic of Macedonia (FYROM).<sup>109</sup> Accordingly, an armed conflict is not seen as ‘protracted armed violence’, but an armed conflict erupts and then must become protracted in order to fall under article 8(2)(f). Even if the facts of the *Bemba* case justify the abrupt beginning of an armed conflict, it would be interesting to see how this approach would work in a case where there was a gradual increase of organised violence and its gradual effects on society in the territorial unit.<sup>110</sup> The Court then would have to discuss the time-frame for both the existence of an armed conflict *and* its sufficient duration. Then the formula ‘protracted, protracted’ would have to be applied and the result can possibly be even more confusing.

It is telling that the Court has not explained in general terms how much time needs to go by for a conflict to be protracted. No absolute answer is given nor is the relation between duration and intensity addressed. It is also interesting to look at the facts of the cases that the ICC has dealt with and compare them with the cases dealt with by the *ad hoc*

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<sup>102</sup> *Bemba*, par. 240 *ff.*

<sup>103</sup> *Ibid.*, par. 240 and 242.

<sup>104</sup> *Ibid.*, par. 242.

<sup>105</sup> *Ibid.*, par. 243.

<sup>106</sup> *Ibid.*, par. 240 *ff.*

<sup>107</sup> *Ibid.*, par. 247 *ff.*

<sup>108</sup> See, for example, *Limaj*; *Haradinaj*.

<sup>109</sup> See *Bošković*.

<sup>110</sup> See section 6.5.3.

Tribunals. How would five months in *Bemba* compare with the duration of the conflict in Kosovo<sup>111</sup> or Rwanda,<sup>112</sup> or FYROM?<sup>113</sup> If it is accepted that the conflicts that article 8(2)(f) is meant to cover under ‘protracted armed conflict’ are not significantly different in nature than the conflicts that the *ad hoc* Tribunals were covering under plain ‘armed conflict’, it can be argued that ‘protracted armed conflict’ is just a different, and inaccurate, way of referring to an ‘armed conflict’.

Ultimately, one has to relate to what would be the rationale for deciding on a particular threshold. The creation of the *ad hoc* Tribunals have brought into the fore-front a rationale for applicability of the *jus in bello* and the criminalisation of its violations that is based on humanitarian protection rather than the status achieved by the parties. The element of duration of the armed conflict, rather than just the armed violence, can be used to argue for the applicability of the legal regime only at the point when the non-state armed group has achieved such an incontrovertible political status that the government would have nothing to lose by accepting the applicability of the law. While it is possible that there is such duration without a clear move to the consolidation of the group’s position and its military/political status, it is one of the functions that duration *can* have. Such a rationale for applicability conforms to a status-based, defensive approach taken by many embattled governments, but not to the approach of a judicial institution applying objective criteria leading to wide applicability.<sup>114</sup>

A status-based rationale, as discussed above, was not achieved by some states that gave indications of desiring one in the Rome Conference. Nor is it fair to conclude that the Court, in its early jurisprudence, was consciously following such an approach. It has not expressed such a regulatory philosophy nor, as an international judicial institution, does it have such an interest. Arguably, it is more a case of an insufficient understanding of the language used. The Court’s jurisprudence seems to have undertaken this course due to a number of factors. One such factor is the admittedly confusing formulation of article 8,

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<sup>111</sup> *Limaj*, par. 171 ff; *Haradinaj*, par. 100 ff.

<sup>112</sup> The conflict in Rwanda had already started before the genocide, which lasted three months. The ICTR has not determined its precise duration.

<sup>113</sup> Things are more borderline in the conflict in FYROM. While the ICTY found that at the times material for the indictment, August 2001, there was an armed conflict, its discussion of intensity shows that the criteria were only beginning to be fulfilled by mid-2001. Would the conflict fail the ICC’s test? See *Boškoski*, par. 287 ff.

<sup>114</sup> See, in the context of the ‘Tribunals’ jurisprudence, section 6.5.3, and, in the context of the application of common article 3, section 3.4.3.

which gives the impression that there are two separate thresholds for non-international armed conflicts in article 8. Another factor is the slippery slope of *Lubanga*'s reliance on Additional Protocol II. Finally, matters came to a head through the peculiar circumstances of the 'instantaneous' armed conflict in *Bemba*, which meant that the duration of the conflict could no longer be conflated with the duration of the violence. In any case, adding an undefined element of duration is not in accordance with the will of the drafters, potentially narrows down the Court's jurisdiction, and, leads to confusion. It is hoped that the Court will alter its course.

#### 7.4.2. Organisation

The treatment of the organisation of the parties by the Pre-Trial Chambers has followed in the path carved out by the *ad hoc* Tribunals. The indicative factors that were used to define the necessary organisation of the armed groups involved were the existence of responsible command and an operative internal disciplinary system;<sup>115</sup> the ability to act as a unitary group resulting in issuing statements<sup>116</sup> and reaching agreements between the groups and the government,<sup>117</sup> as well as the control of towns<sup>118</sup> and, in general, territory.<sup>119</sup>

A particularity in the emerging ICC jurisprudence on the matter springs from the prominent use that was given to the Additional Protocol II definition in *Lubanga*. As seen, *Lubanga* began by quoting Additional Protocol II which states that the armed groups should "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."<sup>120</sup> While *Lubanga* made sure to point out that, after *Tadić*, territorial control was taken out of this definition, it adopted the latter formulation to the effect that "protracted armed

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<sup>115</sup> *Katanga*, par. 239; *Bemba*, par. 234.

<sup>116</sup> *Lubanga*, par. 236.

<sup>117</sup> *Al Bashir*, par. 68.

<sup>118</sup> *Lubanga*, par. 236.

<sup>119</sup> *Katanga*, par. 239; *Al Bashir*, par. 60. More on this below.

<sup>120</sup> Quoted in *Lubanga*, par. 231.

conflict” “focuses on the need for the armed groups in question *to have the ability to plan and carry out military operations* for a prolonged period of time.”<sup>121</sup>

It is important, however, to differentiate between Additional Protocol II and article 8(2)(f). While in the Additional Protocol II phrasing the ability is linked to territorial control and is exercised in *sustained and concerted* military operation, these terms are not contained in the *Lubanga* definition. Moreover, even if one accepts a certain duration of the conflict as a criterion, the term sustained<sup>122</sup> means a continuous intensity throughout a duration, thus adding the element of constancy of the operations.<sup>123</sup> This results in the ‘ability to plan and carry out military operations’ to be the abstract quality of the ability to reach intensity, achieved through territorial control.<sup>124</sup> As pointed out by Sivakumaran, however, as was the case with Additional Protocol II,<sup>125</sup> such ability will not be interpreted in the abstract but seen in the actual conduct of operations.<sup>126</sup> These issues of interpretation point to the complication and confusion that derives from the prominent use of Additional Protocol II by the Chamber. In any case, the phrasing has survived, as has most of the *Lubanga* approach, into the subsequent decisions of the Court.<sup>127</sup>

While this consequence of the reliance on Additional Protocol II does not add to the clarity of the Court’s work, another consequence is more dangerous. As already noted, in Additional Protocol II the groups are ‘enabled’ to carry out military operations by their control of territory. While *Lubanga* avoided this link, it was unnecessarily taken up in an *obiter* remark by the Court in *Katanga*. The Pre-Trial Chamber had already found the existence of an international armed conflict because of the involvement of Uganda.<sup>128</sup> Nevertheless it went on to pronounce on the criteria for armed groups required to

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<sup>121</sup> *Ibid.*, par. 234. (emphasis added)

<sup>122</sup> In the French text ‘continues’. See Sandoz, *Commentary*, 1353. See also Wilhelm, 349, pointing out that the idea that the conflict should be of a ‘prolonged period’ (the French expression being, « pendant une longue période » was included in the drafting Committee Report for Additional Protocol II at the first Conference (1974) and supported at the second but ultimately abandoned as too prone to subjective interpretation. See above 5.4.3.

<sup>123</sup> See Sandoz, *Commentary*, 1353. See also A. Zimmermann, ‘Preliminary Remarks on para. 2(c)-(f) and para.3: War crimes committed in an armed conflict not of an international character’ in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court* (2<sup>nd</sup> ed., Verlag C.H. Beck oHG, 2008) 475, mn 348. See also Boelaert-Suominen, 635.

<sup>124</sup> See Sandoz, *Commentary*, 1352-3, on the link between territorial control and the other criteria. See also section 5.4.3.

<sup>125</sup> See *Akayesu*, par. 626.

<sup>126</sup> Sivakumaran, 379-80.

<sup>127</sup> *Al Bashir*, par. 63; *Bemba*, par. 233.

<sup>128</sup> *Katanga*, par. 240.

establish the existence of a non-international armed conflict. Among these was “the capacity to plan and carry out sustained the concerted military operations, *insofar as* they held control of parts of the territory of the Ituri District.”<sup>129</sup>

This logic was taken up by the Court again in *Al Bashir*. The Pre-Trial Chamber found that, at the relevant time, the groups “controlled certain areas of the territory in the Darfur region. *As a result...*since at least March 2003, both the SLM/A and the JEM had, as required by article 8(2)(f) of the Statute, the ability to carry out sustained military operations for a prolonged period of time.”<sup>130</sup> This is another example of the Court using legal language without thorough reflection. The danger of using territorial control as anything but an indicative factor can result in the narrowing of the jurisdiction of the Court and the shifting to a status-based paradigm of applicability, *Al Bashir* has been criticised on this basis.<sup>131</sup> In any case, the Court has changed course on this issue with the decision in *Bemba* stating that the Chamber “wishes to clarify” that territorial control “is not a requirement under the Statute”.<sup>132</sup>

## 7.5. Conclusions

The fundamental importance that the creation and jurisprudence of the *ad hoc* Tribunals have had in setting a clear, low, and flexible threshold for the applicability of an extensive legal regime to non-state armed groups has been, with reservations, carried forward with the ICC. The creation of the ICC through multilateral negotiations and its character as an ‘unsafe’ tribunal<sup>133</sup> did lead to a clash between different rationales in the Rome Conference. Nevertheless, a significant majority of states saw the establishment of a low threshold as an essential feature for the function of the new institution. States denying any jurisdiction to the Court in non-international armed conflicts were in a minority, the effort to set a high and limiting threshold failed, and a new threshold between those of

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<sup>129</sup> *Ibid.*, par. 239. (emphasis added)

<sup>130</sup> *Al Bashir*, par. 64-65. (emphasis added)

<sup>131</sup> R. Cryer, ‘The Definition of International Crimes in the *Al Bashir* Arrest Warrant Decision’ (2009) 7 *Journal of International Criminal Justice* 283, 285-6.

<sup>132</sup> *Bemba*, par. 236.

<sup>133</sup> Above fn 4 and text.

common article 3 and Additional Protocol II, it has been argued, was not created. As this chapter has attempted to show, the end result, article 8 of the Statute insofar as it deals with non-international armed conflicts, can and should be interpreted, despite its confusing formulation, as creating a single threshold. This single threshold is low and flexible and thus consolidates the humanitarian-protection approach reflected in both common article 3 and the *Tadić* definition, and entrenches this rationale in a permanent international judicial institution.

The Court has only issued a handful of decisions, all at a very early stage in the process of a case. It has not had the time to go into great detail and to develop a coherent approach on the level of the threshold and on the particulars of its constitution. In practice, it has not denied the applicability of the legal regime due to the construction of a high threshold. The first decisions by the Pre-Trial Chambers, however, give cause for concern. The Court has shown a tendency to use the language contained in the various definitions unreflectively, starting from the one in article 8(2)(f), a tendency that seems to acquire momentum of its own and could soon form the Court's approach.

As it is still very early in the life of the Court, it is quite possible for this process to be reversed. Questions relating to the correct interpretation of article 8, the *de lege ferenda* advisability of a low threshold and the practical conundrums of adding duration should be entertained more thoroughly and systematically. As the opposition of some states in the Diplomatic Conference did not frustrate the emphasis on the humanitarian protection rationale that the development of international criminal law and the jurisprudence *ad hoc* Tribunals achieved, this rationale should further inform and be developed by the Court's jurisprudence.

## 7.6. Closing the circle?: The effect of international criminal law and institutions on the *jus in bello*.

### *7.6.1. Introduction*

As has been shown throughout the analysis of the various thresholds discussed in this thesis, status-based and individual-protection-based rationales co-exist and are often in tension. The *jus in bello* and international criminal law purport to regulate a material situation that consists of collective entities violently vying for political status. At the same time, some of the very characteristics that contribute to a non-state armed group achieving success on the battlefield and to increasing political status, are the same ones that enable it to apply legal rules. As has been seen, there is a fine line between, on the one hand, setting out some minimum criteria that allow, and necessitate, the application of the legal rules, and, on the other hand, the construction of a state-like actor.

These last two chapters have looked at how this balance has been approached by international judicial institutions applying international criminal law. The results have been of fundamental importance, if not uniformly satisfactory. It is important to remember, however, that the structure of the international system is still, to a large extent, state-based and decentralised. Moreover, international criminal law is applied by judicial institutions often *ex post facto*. A fuller answer to the question how the rationale for applicability of legal rules has developed necessitates a look back to the *jus in bello* outside international judicial institutions.

#### 7.6.2. *The influence of international criminal law thresholds on the jus in bello*

The question of thresholds is a question of the applicability of different sets of rules. This signifies the importance of identifying a customary threshold as well as the complexity and difficulty in doing so. It is reflective of this difficulty that the ICRC study on customary international humanitarian law does not include the question of threshold in its findings,<sup>134</sup> although doing so would have added to the contribution of the study.<sup>135</sup>

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<sup>134</sup> See J. Pejić, 'Status of Armed Conflicts' in E. Wilmshurst and S. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007), 77. The study also does not discuss questions of internationalisation of armed conflicts, although Pejić, at 78, suggests that, on the one hand, this fits in with the study's overall approach to identify most of the rules as applicable to both kinds of conflicts. Pejić's remark, however, at 100 that a definition could "create a straight-jacket that would not be more useful than the currently existing criteria" should be contrasted to the use of non-definition by states in denying the applicability of protective rules.

<sup>135</sup> International Law Association, *Initial Report on the Meaning of Armed Conflict*, (2008), 18 (ILA Report).

This does not mean that the question whether the development of international criminal law has had an effect on the level of thresholds on the *jus in bello* cannot be addressed. It can be addressed in two respects: the first one concerns the specific definition set down in *Tadić*, while the second one concerns the overall question of rationale for applicability.

The formula set in *Tadić*, as a customary law elaboration of the concept of non-international armed conflict first introduced through common article 3, has had a significant impact beyond international criminal courts and tribunals. It has also been applied in the reports of UN Special Rapporteurs<sup>136</sup> and UN Commissions of Inquiry,<sup>137</sup> as well as national courts<sup>138</sup> and other international bodies.<sup>139</sup> One can agree with the International Law Association 2008 Report on the Meaning of Armed Conflict that the *Tadić* definition is today considered as authoritative.<sup>140</sup>

Things are less cut and dried when one looks at the practice of states outside of international organisations, and especially the practice of governments in the territory of which armed violence occurs. A variety of situations that qualify as armed conflicts occur at present and they range from cases where the existence of an armed conflict is uncontroversial<sup>141</sup> to cases where it is not accepted.<sup>142</sup> The latter cases recall the patterns

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<sup>136</sup> See *Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmani, pursuant to Commission resolution 1996/57 of 19 April 1996* (3 March 1997), UN doc. E/CN.4/1997/88, par. 54; *Report of the Special Rapporteur on the human rights situation in the Sudan* (11 January 2006), UN doc. E/CN.4/2006/111, par. 8; *Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of human rights in the Palestinian territories occupied by Israel since 1967*, (6 March 2002), UN doc. E/CN.4/2002/32, par. 18; *Specific Human Rights Issues: New Priorities, in particular Terrorism and Counter-Terrorism, Final Report of the Special Rapporteur Kalliopi K. Koufa*, (25 June 2004), UN doc. E/CN.4/Sub.2/2004/40. See also *Report of the Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K Goldman*, (7 February 2005) UN doc. E/CN.4/2005/103. See also *Interim report on the situation of human rights in Afghanistan, prepared by the Special Rapporteur of the Commission on Human Rights*, (30 September 1999) UN doc. A/54/422 at par. 52, not quoting *Tadić per se* but referring to the term 'protracted armed conflict'.

<sup>137</sup> See *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, pursuant to Security Council Resolution 1564 of 18 September 2004* (1 February 2005), UN doc. S/2005/60, par. 74; *Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*, (23 November 2006), UN doc. A/HRC/3/2, par. 51.

<sup>138</sup> See *HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v Secretary of State for the Home Department*. CG [2008] UKAIT 00022, especially the analysis at par. 257 ff.

<sup>139</sup> See European Commission for Democracy Through Law (Venice Commission) *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Persons*, 17 March 2006, Op. no. 363/2005, CDL-AD (2006)009.

<sup>140</sup> ILA Report, 2 and 13.

<sup>141</sup> This is the case, for example, with the conflicts in Pakistan and Afghanistan. For an analysis of the parties to the conflict in Pakistan and their adherence to the law see N. Shah, 'War Crimes in the Armed Conflict in Pakistan' (2010) 33 *Studies in Conflict and Terrorism* 283. For the official British position on the existence of an armed conflict in Afghanistan see *GS (Existence of Internal Armed Conflict) Afghanistan v. Secretary of State for the Home Department*, CG [2009] UKAIT 00010, United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, 23 February 2009, available at: <http://www.unhcr.org/refworld/docid/49a3b4242.html>.

of state behaviour developed before the establishment of judicial institutions and discussed in chapters 3 and 5.<sup>143</sup> As far as territorial governments are concerned, practice is ultimately inconclusive in determining a specific direction on the acceptance of applicability. Moreover, even when states do accept the existence of an armed conflict they very rarely, if ever, mention the criteria that they have used for their determination. They do not refer to a specific definition of an armed conflict and their practice cannot be used to determine the argument advanced above on the existence of *one* basic threshold in both custom and treaties.

The argument for a common threshold, however, in both international criminal law and the law of armed conflict, is supported by the international organisations and other bodies that have adopted the *Tadić* definition. Importantly, in the application of the *Tadić* definition, these bodies did not distinguish between the law of armed conflict and international criminal law. To this one should add the complete lack of authority for the proposition that the *Tadić* definition applies *only* to international criminal law and not to law of armed conflict. Indeed, if one looks at the ICTY's language in setting<sup>144</sup> and analysing<sup>145</sup> the *Tadić* definition it is manifestly the case that the threshold for the determination of an 'armed conflict' is one and the same for both international criminal law and the law of armed conflict. This approach conforms with the understanding that international criminal law rules constitute secondary rules to those in the law of armed conflict.<sup>146</sup> The result is that the specific definition set out in *Tadić*, to the extent that it does in fact reflect custom and is accepted as such, applies to both international criminal law and the law of armed conflict.

This relationship between international criminal law and the *jus in bello* can also help us understand the development of the legal regime on a more conceptual level. It has been argued that international criminal law develops and accentuates the humanitarian-

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<sup>142</sup> See for the example of the conflict in Chechnya section 5.5. See also for the example of the conflict between Turkey and the Kurdish Workers' Party (PKK), K. Yildiz and S. Breau, *The Kurdish Conflict: International Humanitarian Law and Post-Conflict Mechanisms* (Routledge, 2010), especially chapters 3 and 4.

<sup>143</sup> Sections 3.4. and 5.5.

<sup>144</sup> See the *Tadić* Appeals Chamber talking of the existence of an armed conflict for the applicability of 'international humanitarian law'. *Tadić* Appeal, par. 70.

<sup>145</sup> See, e.g., the *Tadić* Trial Chamber using the criteria to distinguish between an armed conflict per *Tadić* and situations of banditry etc, "which are not subject to international humanitarian law". See *Tadić* TC, par. 562, using the ICRC Commentary. See also *Limaj*, par. 89. See section 6.5.1.

<sup>146</sup> See Bothe, 381. See section 6.2.1.

protection rationale already present in the law of armed conflict.<sup>147</sup> Indeed, the *Tadić* definition, its clarification by the Tribunals, and its entrenchment in the Rome Statute, can be understood to constitute developments not *outside* the law of armed conflict but *of* the law of armed conflict. Accordingly, to the extent that the practice of courts and tribunals has led to a low and flexible threshold, which focuses on wide applicability and reflects a rationale of humanitarian protection, such practice develops and accentuates the humanitarian-protection rationale for the applicability of the *jus in bello* in general.

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<sup>147</sup> Section 6.2.

## 8. Chapter 8: Conclusions

### 8.1. Introduction

The thesis has posed a question about whether a progression can be seen from a status-based rationale to a humanitarian-protection rationale in the application of the *jus in bello* to conflicts involving non-state armed groups. This question concerns the applicability of a legal regime that contains rules protective of individual human beings in a practical and conceptual context where questions of group status are central and often in conflict with such protection. The focus of the analysis has been on the various thresholds that have been constituted over time to activate the relevant legal regimes. Through the analysis of thresholds, seen in the context of the substantive law they activate and the processes of their assessment, there has been an effort to discern the characteristics of actors and situations that lead to the application of the law. These characteristics help us understand the rationale behind the systems of applicability of the *jus in bello*. Each chapter has focused on one such regime and system of application. The sequence of chapters is more or less chronological. This allows the mapping of the evolution of the rationale, while reflecting the developments in the international legal system.

### 8.2. The stages of the argument: from belligerency to international courts and tribunals.

The second chapter of the thesis begins the enquiry at the first set of thresholds developed for the regulation of conflicts involving non-state armed groups, through the doctrines of recognition of belligerency and insurgency. Recognition of belligerency was first developed in the second half of the 18<sup>th</sup> century, was crystallised throughout the 19<sup>th</sup> century and gradually fell into desuetude throughout the 20<sup>th</sup> century. It was developed in state practice, especially in the context of the interests of third states in relation to the

activation of the regime of neutrality. As it developed in a purely horizontal legal system where states were understood to be the only subjects of international law it served the purpose of elevating the non-state armed group to the level of subjecthood for the purpose and duration of the conflict. This approach fit with the concept that 'war in the legal sense' could only be waged by sovereign entities. Accordingly, legal regulation was identified with quasi-sovereign status.

The status-based rationale was clearly reflected in the criteria that needed to be fulfilled for the recognition to occur. These focused on the situation and the actor, initiating the concepts of intensity and organisation as the constitutive elements of war/armed conflict. The hostilities had to be of a certain magnitude, but a central measure of such magnitude was the effect the conflict had on the interests of third states. This effect was indicated in criteria such as the maritime aspects of the conflict or the control of territory by the armed group. With respect to organisation, the criteria were those necessary for the actor to wage war of the requisite magnitude, but were not confined to that. They included a level of political organisation - akin to that of a state - which enabled the recognising state to envisage the eventual statehood of the non-state armed group. Both in terms of intensity and organisation the non-state armed group had to assert its role militarily and politically, affecting the interests of third states and convincing them of its potential for statehood. Accordingly, recognition of belligerency was often seen as a first step towards the recognition of statehood.

Status was also reflected in the legal regime activated, which was the full legal regime applicable to war between sovereign states. Neutrality, the central legal institution in this regime, obliged third states to treat government and insurgent forces on an equal level for the duration of the conflict and for matters related to it. Moreover, the process of assessment of the criteria was akin to recognition of statehood. It was entirely decentralised, allowing each state to assess independently both the criteria of magnitude and organisation, but also the extent to which its interests were affected. The latter factor was seen by some to constitute a separate criterion for recognition. This reflected a political and arbitrary element in the process of assessment.

As an often arbitrary process of conferment of status, recognition of belligerency was gradually seen as unwieldy. This led to a parallel development towards, in the second half of the 19<sup>th</sup> century, the doctrine of recognition of insurgency. The practice of recognition of insurgency showed that there could be a space between no regulation and full regulation and between full-subjects of international law and entities of piratical character. It did so by providing the possibility of ad hoc recognition of specific rights and duties rather than the full legal regime. The criteria forming the necessary threshold were similar to those of belligerency but with a difference of degree. Status was still very much at the centre of the doctrine, but some flexibility with respect to the rules activated was introduced. As it was the first legal doctrine for the regulation of an actor in the *jus in bello* without the conferment of full legal status for the purposes of the conflict, it can be seen as a forerunner of later attempts in incremental regulation. Nevertheless, decentralisation and arbitrariness in the assessment of the criteria continued to be central in the system and contributed to gradual dysfunction of the doctrines. This dysfunction of the system of ascription of status was particularly prominent in the case of the Spanish civil war (1936-9), a sign of the gradual desuetude of the doctrines.

The Spanish civil war, because of a combination of new military technology the role of the popular press, was a turning point in the interests of the international community in the humanitarian aspects of civil war. Such concerns were not at all central in the rationale behind belligerency and insurgency. After World War II, however, a new effort to address the humanitarian aspects of all conflicts, including non-international ones, led to the drafting of the 1949 Geneva Conventions. Common article 3 to these Conventions constituted a compromise between those advocating the extension of the full humanitarian regime to non-state armed groups and those wanting no regulation for fear of ascription of status to such groups and limitation of the options of governments. This coincided with the move from the concept of war to that of armed conflict, the latter being a material situation rather than an entirely separate formal legal regime activated at will by sovereign entities.

Common article 3 attempted a central structural move from a horizontal regime of regulation of sovereign actors, which has status as its main rationale, to a vertical regime of automatic application to protect humanitarian rules. It extended a minimum

humanitarian regime, without, however, expressly spelling out the criteria that form its threshold. The non-definition approach aspired to provide a low and flexible threshold and the automatic application of the rules as soon as an armed conflict occurs. It is clear from the *travaux* that a wide application of the article was intended through a minimal level of organisation and intensity that allowed *de facto* reciprocity with respect to the humanitarian rules extended. Moreover, overtly narrow criteria, such as the control of territory, were not seen as necessary for the threshold.

Nevertheless, common article 3 did not fully succeed in overcoming the status-based approach of the past. The non-definition of the threshold, together with the necessity for assessment in a still decentralised system where the territorial governments had a central role in the application of the rules, meant that the aspirations of automaticity were not fulfilled. In practice, considerations of status often led to common article 3 existing precariously between police operations and international armed conflict, thus limiting its application. Common article 3, however, constitutes a shift of paradigm and a clear advancement of a humanitarian protection rationale.

The next step in the regulation of conflicts involving non-state armed groups, however, was less successful. The 1974-7 Diplomatic Conference, leading to the two 1977 Additional Protocols to the Geneva Conventions occurred in the context of the process of decolonisation. The questions of the legal status of anti-colonial struggles, and the armed movements that fought them, as well as the defence of the sovereignty of newly independent states were central considerations in the approach of a significant portion of actors at the negotiations.

The Conference led to the internationalisation of wars of national liberation. The application of the full humanitarian regime to a specific set of non-state armed groups, namely national liberation movements, was achieved through article 1(4) of Additional Protocol I. However, a narrow status-based rationale, limited to a specific historical and political context meant that the humanitarian protection provided through this development never materialised. Whereas in the doctrine of belligerency status was conferred partly through the material prospects for statehood of the insurgent group, national liberation movements were conferred status as they were seen to be exercising

the right to external self-determination of a people. The latter concept was further limited by the specification of the opponent against whom the people were struggling. Status was to be conferred to a specific set of actors struggling against a specific set of opponents. This further anchored the concept of wars of national liberation to the process of decolonisation and contributed to the non-ratification of the Protocol by states concerned that this conferment of status led to their delegitimation.

After the internationalisation of wars of national liberation was achieved in the Diplomatic Conference, states concerned with the conferment of status that legal regulation of non-state armed groups would result in were hostile to extensive regulation of non-state armed groups outside the colonial context. This led to a significant narrowing of the threshold and the limitation of the substantive regime extended through what became Additional Protocol II to the Geneva Conventions. This was reflected in the inclusion of the criterion of territorial control and the creation of a high threshold not justified by the limited substantive rules, in terms of the *de facto* reciprocity necessary for the application. The system of application remained decentralised and together with the limitations imposed by the threshold, this meant that status considerations limited the application of the protective rules in practice.

While the International Committee of the Red Cross played, and is still playing, a significant part in the application of an individual protection rationale, and the United Nations and regional organisations played a role in the development of the right of self-determination and the recognition of national liberation movements, it was judicial institutions that contributed to the next step in the regulation of conflicts involving non-state armed groups. The creation of international judicial institutions, by the UN Security Council, to try serious violations of international humanitarian law in the conflicts in the former Yugoslavia and Rwanda, led to the development of the regime of international criminal law and to a new threshold of 'armed conflict' based in custom.

International criminal law as a legal regime separate but linked to the *jus in bello* accentuates and develops the individual protection rationale in the latter. At the same time, the new definition of armed conflict by the ICTY Appeals Chamber in the seminal *Tadić* case, and extensively refined by the tribunals, clarified the basic criteria of

organisation and intensity of common article 3. The emphasis was placed on the intensity of the violence in the territorial unit, resulting in the need for the activation of the legal regime. The assessment of the characteristics of the actors consisted of a minimum degree of organisation, allowing them to apply rules of humanitarian protection. At the same time, while the characteristics of the actors fit with the state-like paradigm, such as a hierarchical organisation able to speak internally and externally with one voice, the focus was placed solely on the military ability to enforce minimum rules, rather than the political prospects of the actor. Overall, the threshold that was developed by the tribunals was low, clear and flexible thus facilitating the application of protective rules. Moreover, an extensive substantive legal regime based on custom was applied by the ICTY, while the application of the rules through a judicial organ excluded status-based considerations in the assessment of the applicability of the legal regime.

These trends were challenged but ultimately consolidated through the creation of the International Criminal Court. While in the Rome Conference, which led to the creation of the Court, status- and sovereignty-based concerns were once more present, there was a clear majority that was in favour of a threshold guaranteeing wide applicability and jurisdiction. Nevertheless, the circumstances of the drafting contributed to a slight variation in language from the *Tadić* definition in article 8(2)(f) of the Rome Statute and the *prima facie* impression that two different thresholds are created. Such an understanding seems to have informed the early jurisprudence of the Court, leading to the addition of an element of duration to an existing armed conflict, for the application of article 8(2)(e). It has been argued that such an approach leads to problematic results and that the better argument supports the reconciliation between the thresholds in 8(2)(f) and 8(2)(d), both being essentially identical to the *Tadić* definition. The breadth of the threshold, its clarity of assessment and application, and its flexibility through the use of indicative factors contribute to the accentuation of the humanitarian-protection rationale in the system of applicability.

Finally, the link between the international criminal law and international humanitarian law regimes means that the above developments in the former can translate in a clarification of the overall threshold in the latter. The *Tadić* definition, even though not expressly invoked by governments in relation to conflicts in their territory, has been widely

considered as authoritative and used by international organisations, national courts and other bodies. Ultimately, the development and accentuation of the humanitarian-protection rationale through international criminal law can be seen as reflecting the development of the rationale for the regulation of non-state armed groups in the law of armed conflict. This conclusion should be seen in the context of – and qualified by – the continuing tension between status-related goals and characteristics of the actors involved in armed conflicts and the still decentralised system of applicability.

### 8.3. The function of the concept of status and its tension with humanitarian protection.

How different functions of status influence the thresholds of applicability of the various legal regimes, and the assessment of whether the threshold is met, has been at the centre of this thesis. In the introduction<sup>1</sup> different functions of status, and specifically *legal* status, were suggested. The more straightforward aspect of legal status is what has been called legal status *stricto sensu*, which is simply the aggregate of the legal rules contained in the legal regime, activating certain rights and obligations for the parties to the conflict. For example, to the extent that common article 3 applies, the rights and obligations contained in that article apply and the group is dealt with by the law as a party to the conflict. In that sense, the caveat in common article 3 that the article does not alter the legal status of the parties can be seen as moot.<sup>2</sup>

There is, however, a more complicated and vague form of status, which has been called general legal status or legal status *lato sensu*. This, it has been argued, can be described as conflating the general legal status of a ‘subject’ of international law with state-like political status. It straddles legal and political status and exists more in the perception of various actors, namely the non-state armed group and, particularly, the territorial government. It can be understood as a result of a system originally based on a subject/object dualism.

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<sup>1</sup> Section 1.2.2.

<sup>2</sup> Cf Pictet, *Principles*, 60, fn 2. See section 3.2.4 fn 81 and text.

The result is that any legal regulation can be perceived as moving towards the ascription of such general state-like legal status.

This latter phenomenon is more obvious in cases where the question is the application of the law of international armed conflict. Then the equation of the non-state armed group with a state for the purposes of an armed conflict both recognises an entity with state-like legal status for the purposes of the conflict and evokes its eventual legal status, beyond the legal status *stricto sensu* contained in the specific rules and regulations extended. This paradigm is further reinforced to the extent that a state-centric system, where states are the only subjects to be regulated by international law, constituted the context of the first doctrine of regulation of non-state armed groups, that of belligerency. The more recent equivalent of international armed conflict involving non-state armed groups, that of wars of national liberation, substitutes the substantive legal right for external self-determination for the material criteria of belligerency. It follows, however, the same logic of regulating the armed conflict in accordance with the general and expected political and legal status of the collectivity.

This paradigm also influences the application of the law of non-international armed conflict. The legal status *stricto sensu*, extended through instruments such as common article 3 or Additional Protocol II, can be perceived, particularly by the territorial government, as legal status *lato sensu* for two reasons. One is that the nature of the situation will be that the non-state armed group will have to have displayed some effectiveness in waging armed violence and some consistency in its structure to have created a situation of sufficient intensity. This can be seen as military and political status in the context of the conflict, pointing to the potential success and legal status of the group. The other reason why legal status *stricto sensu* is conflated with legal status *lato sensu* is the predominance of the paradigm of a horizontal system where international law only regulates states and state-like entities, reflected in the fact that the first doctrine of regulation of non-state armed groups fit this paradigm. These factors can explain why governments can be seen to be reluctant to accept the applicability of even a limited set of international legal rules. Such reluctance will exist in addition to the unwillingness of the government to 'have its hands tied' by rules of humanitarian protection.

It is this conflation that a caveat such as the one contained in common article 3 can be understood to try to avoid. However, the conflation of these two kinds of legal status is often too powerful in the perception of states for such a caveat to have a convincing effect. This was manifested in the common article 3 *travaux* in the comments of delegates hostile to any regulation,<sup>3</sup> and it was manifested again in the decision of states to drop a similar caveat from Additional Protocol II, because of the perception that the effects of the term ‘parties to the conflict’ could not be remedied by such a caveat.<sup>4</sup>

Accordingly, many governments will in practice conflate legal status *stricto sensu* with legal status *lato sensu* and will see any regulation as conferring the latter on the group. This approach will fit with an understanding that international law can only regulate state or state-like entities. Accordingly, with respect to the creation of thresholds for the applicability of international law states adopting this approach will create legal regimes that provide for the application of the law of armed conflicts only in situations where the non-state armed group has already achieved a state-like political and military status and when the government has little to lose on the symbolic and conceptual level. This does not necessarily mean that the non-state armed group is on a certain path to achieving statehood, but that the territorial government cannot but recognise the political status of the non-state armed group. This is one of the functions of the criterion of territorial control, at least as understood as a separate and substantial part of the territory of the state. Alternatively, an element of duration can mean that the non-state armed group has consolidated its military presence as seen both within the state and in the international (institutional) arena. This factor was present in the process of application of common article 3.<sup>5</sup>

This rationale links the applicability, and the assessment of applicability, of the law with the perception that political status or legal status *lato sensu* is conferred on the non-state armed group. Such a status-based rationale in deciding when the law is applicable can lead to the non-application of humanitarian protection that can have a significant effect in minimising the atrocities that usually follow war, especially of the civil kind. It is then necessary to de-couple such considerations of status from the assessment of when the

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<sup>3</sup> See, e.g., section 3.2.4. fn 78 and text for the comments of the delegate from Burma.

<sup>4</sup> See sections 5.3.4 fn 78-80 and text; 5.3.5. fn 108.

<sup>5</sup> See section 3.4.3.

law is applicable. It is necessary to move from an understanding of a horizontal system of virtually equal group actors to a vertical system of humanitarian protection irrespective of the status perceptions of the parties to the conflict. The central rationale for such a system is the protection of individuals affected by the conflict. This thesis has attempted to trace the history of thresholds, as formulations describing what kinds of actors and situations merit a particular kind of legal regulation, to see whether there is a move towards the centrality of humanitarian-protection over status.

The answer is one of cautious optimism. It seems that the need for humanitarian protection has been increasingly understood and this has led firstly to the paradigm-shift of common article 3 and then, through a gradual evolution, to international judicial institutions and the elaboration of a low, clear and flexible threshold that reflects an individual-protection rationale. It has not been a clear and unhindered evolution. It has been argued, for example, that the 1977 Additional Protocols are, in some respects and in different ways, reflective of a regression to status. Moreover, the positive legal developments of the *ad hoc* Tribunals and the ICC can prove to be linked too closely with this form of international institutional practice and not translate to a wider acceptance of a low, clear and flexible threshold by states. Ultimately, as long as status-based considerations are a central element in armed conflicts, and as long as the assessment of the applicability of the law remains decentralised, a status-based rationale in the applicability of the *jus in bello* will always be present. This will be the case not only in the process of assessment of the applicability of the law in specific cases but also in possible future multilateral negotiations.

Ultimately, as questions of collective status are often central among the reasons why organised armed violence occurs, they form a part of the structure of the rules that govern the exercise of such violence. As such they permeate the law of armed conflict and can lead to tension with efforts to protect the individuals caught up with it. The *jus in bello* is both about channelling violence,<sup>6</sup> and about humanitarian protection.<sup>7</sup> The role of status and its tension with humanitarian protection in the creation and application of the

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<sup>6</sup> Berman, 'Privileging'.

<sup>7</sup> See Pictet, *Principles*, chapter 3. See also Meron, 'Humanization'.

legal rules can constitute an illuminating interpretive tool, leading to both the understanding and change of the legal regime.

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