LEGAL RESEARCH PAPER SERIES
Paper No 50/2012 **July 2012**

Classification of Armed Conflicts: Relevant Legal Concepts

In E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) chapter 3

DAPO AKANDE

This is a prepublication version of this chapter. Please cite the chapter as published

Wilmshurst (ed), *International Law and the Classification of Conflicts*, (2012, OUP), Chapter 3

http://ukcatalogue.oup.com/product/9780199657759.do

CLASSIFICATION OF ARMED CONFLICTS: RELEVANT LEGAL CONCEPTS

Dapo Akande*

1. Introduction

International humanitarian law governs the conduct of participants in an armed conflict. In order to determine whether it applies to situations of violence it is necessary to assess first of all whether the situation amounts to an 'armed conflict'. However, international humanitarian law does not recognize a unitary concept of armed conflict but, rather, recognizes two types of armed conflicts: international and non-international.

This chapter examines the history of the distinction between these two categories of armed conflict, the consequences of the distinction and whether it still has validity. The chapter then discusses legal concepts relevant to the two categories, including the differences between a non-international conflict and other violence, extraterritorial hostilities by one State against a non-state armed group and conflicts in which multinational forces are engaged. All these concepts are relevant to the understanding of the case studies which follow.

2. History of the distinction between international and non-international armed conflicts

This distinction between international and non-international armed conflicts arises out of the history of the regulation of wars and armed conflicts by international law. In the period following the peace of Westphalia and until the end of the Second World War, the

* Co-Director, Oxford Institute for Ethics, Law and Armed Conflict & University Lecturer in Public International Law, University of Oxford; Yamani Fellow, St Peter's College, Oxford. I am grateful to Nicole Urban for assistance with this chapter.

international laws of war applied only to wars between States.[1] This was a consequence of the fact that international law as a whole was concerned only with relations between States[2] and eschewed regulation of matters considered to be within the domestic jurisdiction of States. Internal armed conflicts, or civil wars, were not considered to be 'real war[s] in the strict sense of the term in International Law', since that term was reserved for conflicts between States.[3] It was possible for the laws of war to apply to civil wars but only in cases where there was recognition, either by the State involved in the civil war or by a third State, of the belligerency of the insurgent party.[4] Even in such a case, the application of the rules of international law to what was prima facie an internal situation did not occur automatically but rather because the insurgent party was recognized by the State concerned as having acquired State-like qualities. During the period under consideration, the international laws of war did not distinguish between international and other wars. There was only one body of law which either applied *in toto* to international conflicts between States (or conflicts treated as such) or it did not apply at all.[5]

The extension of international regulation to internal armed conflicts changed decisively after the Second World War. This was, of course, a period in which international law as a discipline began to recognize the possibility of extending rights and, indeed, obligations to individuals and other non-state actors. This recognition was exemplified in that period by the immediate post World War II prosecutions for international crimes and the development of international human rights law, beginning with the Universal Declaration of Human Rights 1948. It is therefore not surprising that around the same time consideration was given to the

---

[1] See R. Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts' (2009) 91(873) *International Review of the Red Cross* 35, 44–8 (Bartels, *The Historical Evolution*). Cassese defines this period as ending at the time of the Spanish Civil War (1936–39), see A. Cassese, 'Civil War and International Law' in A. Cassese (ed.), *The Human Dimension of International Law: Selected Papers* (2008) 111, 113–14.

[2] See L. Oppenheim, *International Law*, *Vol. I: The Law of Peace* (2nd edn, 1912) 12, para 13: 'States solely and exclusively are the subjects of International Law.'

[3] L. Oppenheim, *International Law, Vol. II: War and Neutrality* (1st edn, 1906) 67.

[4] Ibid, 65; L. Moir, *The Law of Internal Armed Conflict* (2002) 5 et seq. (Moir, *Internal Armed Conflict*).

[5] See Bartels, *The Historical Evolution*, 51; Moir, *Internal Armed Conflict*, 10.

extension of the laws of war to the regulation of internal armed conflicts. Indeed, the developments in international humanitarian law after World War II were foreshadowed by the practice of some States and of the League of Nations during the Spanish Civil War (1936–1939). Although there was no recognition of belligerency during that conflict, there was an emerging view that international law applied to the conduct of hostilities during a civil war and Antonio Cassese has argued that there was a development, during that conflict, of customary rules applicable to certain internal armed conflicts.[6] In any event, the bifurcation of international humanitarian law into the law of international armed conflicts and that of non-international armed conflicts was established by the Geneva Conventions of 1949. As those Conventions apply 'to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties', they apply to international or inter-state armed conflicts. It was proposed by the ICRC to extend the Conventions in their entirety to internal conflicts.[7] However, this proposal was rejected by most States and it was agreed instead to have a single provision—article 3 common to the four Geneva Conventions ('Common Article 3')—which would be applicable '[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Through Common Article 3 international treaty law, for the first time, sought to regulate certain aspects of internal conflicts, even in the absence of a recognition of belligerency. However, it also established a differentiation between the law applicable to inter-state conflicts and those applicable to internal or, more accurately, non-international armed conflicts.

The division of international humanitarian law between rules applicable in international and non-international armed conflicts was further confirmed in 1977 at the time of the

---

[6] A. Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts' in A. Cassese (ed.), *Current Problems of International Law* (1975) 287, reprinted in A. Cassese, *The Human Dimension of International Law: Selected Papers* (2008) 128. See also A. Cassese, 'Civil War and International Law' in A. Cassese, *The Human Dimension of International Law: Selected Papers* (2008) 114–16 (Cassese, *Civil War*). See also Bartels, *The Historical Evolution*, 56; *Prosecutor v Tadić*, IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para 63 *(Tadić Jurisdiction).*

[7] See Cassese, *Civil War*, 116–17; Bartels, *The Historical Evolution,* 57.

adoption of the Protocols Additional to the Geneva Conventions.[8] Additional Protocol I is stated as 'Relating to the Protection of Victims of International Armed Conflicts,' while Additional Protocol II 'relat[es] to the Protection of Victims of Non-International Armed Conflicts'. This division was also recognized in the Statute of the International Criminal Court of 1998, which makes a distinction between war crimes (i.e. serious violations of the laws and customs of war) committed in an international armed conflict[9] and war crimes committed in a non-international armed conflict.[10]

3. Consequences of the distinction between international and non-international armed conflicts

It is essential to distinguish between international and non-international armed conflicts for the purposes of the application of international humanitarian law because differences exist between the content of the law applicable to the different types of armed conflicts. As a matter of treaty law, the differences are vast. The entirety of the Geneva Conventions of 1949, the Hague Conventions which preceded them and Additional Protocol I of 1977 apply to international armed conflicts. These treaties contain many hundreds of articles which establish a fairly detailed body of rules relating to the conduct of hostilities (so called 'Hague Law'), as well as elaborate rules relating to the protection of those who do not take part, or who no longer take part, in hostilities (so called 'Geneva Law'). By contrast, the treaty rules applicable specifically to non-international armed conflicts are rather limited. In essence, they are restricted to Common Article 3 of the 1949 Geneva Conventions, the provisions of Additional Protocol II of 1977 and article 8(2)(c) and (e) of the ICC Statute. Common Article 3 is limited to basic protection of those who do not, or who no longer, take part in hostilities

[8] The division can also be seen in the relevant provisions of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. Under art. 18 of that treaty, the entirety of the treaty applies to international armed conflicts while under art. 19 only limited aspects apply to non-international armed conflicts. See R. O'Keefe, *The Protection of Cultural Property in Armed Conflict* (2006) 96–8.

[9] ICC Statute, art. 8(2)(a) and (b).

[10] ICC Statute, art. 8(2)(c) and (e).

and has no rules regulating the conduct of hostilities. Additional Protocol II, which has fewer than 20 substantive provisions, and those parts of the ICC Statute dealing with non-international armed conflicts extend, somewhat, the rules relating to the protection of victims of armed conflict and introduce some modest rules relating to the conduct of hostilities[11] but fall far short of establishing a regime of international humanitarian law close to that established for international armed conflicts.[12]

Notwithstanding this difference in the regulation of international and non-international armed conflicts by the bedrock treaties of international humanitarian law, the distinction between international and non-international armed conflict is being eroded such that there is now greater, though by no means complete, unity in the law applicable to these two forms of conflict.[13]

First of all, there are recent treaties that govern the conduct of participants in an armed conflict which apply to all situations of armed conflict, without distinction. The list of such treaties includes the Biological Weapons Convention 1972, the Chemical Weapons Convention 1993, the Convention Prohibiting Anti-Personnel Land Mines 1997, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999 and the 2001 amendment which extends the Convention on Conventional Weapons and its protocols to non-international armed conflicts.

Secondly, and more importantly, it has been argued that customary international law now provides for a broader set of rules governing non-international armed conflicts and fills the gaps left by treaty law such that the dichotomy between international and non-international armed conflicts is much less significant today. This was the position taken by the Appeals Chamber of the ICTY in the *Tadić (Appeal on Jurisdiction)* case when it stated that:

---

[11] See further discussion in ch. 4 section 4 below.

[12] See section 6 below for a discussion of the relationship between Common Article 3 and Additional Protocol II.

[13] See L. Moir, 'Towards the Unification of International Humanitarian Law?' in R. Burchill, N. White and J. Morris (eds), *International Conflict and Security Law* (2005) 108.

> Notwithstanding ... limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[14]

The ICTY also held that:

> elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.[15]

The ICRC, in its comprehensive study of customary international humanitarian law (the Study) published in 2005,[16] has taken a similar approach. It found that nearly all the rules identified in the Study applied to both international and non-international armed conflicts. It went on to state that:

> This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and show the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, the gaps in the regulations of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in

[14] *Tadić Jurisdiction,* para 127.

[15] Ibid, para 119.

[16] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Study* (2004).

Additional Protocol I**,** but applicable as customary law to non-international armed conflicts.[17]

The suggestion that there are rules of customary international law applicable to non-international armed conflicts which go beyond the rules in Common Article 3 and Additional Protocol II appears to be contrary to the earlier report of the Commission of Experts appointed by the Security Council to investigate violations of humanitarian law in the former Yugoslavia.[18] However, though questions have been raised as to the methodology used by the ICRC study for determining rules of customary international law,[19] there also seems to be acknowledgement, even by States, that customary international law now provides more elaborate rules for non-international armed conflicts than the rules to be found in Common Article 3 and Additional Protocol II. Thus, the provisions of the ICC Statute, which was adopted in 1998, relating to war crimes in non-international armed conflicts, contain rules which go beyond the text of those treaties. However, it also ought to be noted that the provisions of the ICC Statute reflect a reluctance on the part of States to go as far as the ICTY and the ICRC. The Statute was adopted after the *Tadić* decision and incorporated some elements of that decision (e.g. the definition of non-international armed conflicts). However some of the rules identified by the ICTY and ICRC as customary rules applicable in non-international armed conflicts (e.g. the prohibition of attacks on civilian objects) are not included in the war crimes provisions of the ICC Statute. Although it is possible that the drafters of the Statute were simply more reluctant to criminalize violations of international humanitarian law in non-international armed conflicts than in international armed conflicts, it is nonetheless noteworthy that the Statute includes a significantly longer list of war crimes

[17] Ibid, xxix.

[18] See Final Report of the Commission of Experts Established Pursuant To Security Council Resolution 780(1992), S/1994/674 (27 May 1994) 13, para 42.

[19] See D. Bethlehem, 'The Methodological Framework of the Study' and I. Scobbie, 'The Approach to Customary International Law in the Study' in E. Wilmshurst and S. Breau, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 3, 15; and also J. Bellinger and W. Haynes, 'A US Government Response to the International Committee of the Red Cross Study on *Customary International Humanitarian Law*' (2007) 89 (866) *International Review of the Red Cross* 443.

in international than in non-international armed conflicts.[20] In conclusion, the distinction between the law applicable in international and non-international armed conflicts is blurring; however, whenever States have been presented with opportunities to abolish the distinction they seem reluctant to do so. Also, it is undeniable that two key parts of international humanitarian law—the law relating to the status of fighters and the rules relating to detention of combatants and civilians—differ depending on the status of the armed conflict.[21] For these reasons, classification of armed conflicts for the purpose of applying international humanitarian law remains important.

4. Why does the distinction exist and should it be abolished?

As explained above, the distinction between international and non-international armed conflicts can be explained by reference to the history of the development of international law in general and international humanitarian law in particular. However, asserting that international law was, historically, only concerned with inter-state conflicts does not explain why, once it was accepted that international law ought to regulate non-international conflicts as well, it was not extended in its entirety to such conflicts. Nor does it explain why the distinction persists, even if in an attenuated fashion. The main reason for the persistence of the distinction is the view by States, or some of them, that equating non-international and international armed conflicts would undermine State sovereignty and, in particular, national unity and security.[22] States have been concerned that treating non-international armed

[20] Compare art. 8(2)(a) and (b) with art. 8(2)(c) and (e) of the ICC Statute. The Pre-Trial Chamber of the ICC has regarded the difference in criminalization of attacks on civilian objects as reflecting a difference in international humanitarian law. *The Prosecutor v Bahar Idriss Abu Garda*, ICC-02/05-02/09, Confirmation of Charges Decision (Pre-Trial Chamber), 8 February 2010: 'The Majority notes that, while international humanitarian law offers protection to all civilians in both international armed conflict and armed conflict not of an international character, the same cannot be said of all civilian objects, in respect of which protection differs according to the nature of the conflict.'

[21] For further discussion, see ch. 4 below.

[22] See Cassese, *Civil War*, 116. See also Bartels, *The Historical Evolution,* 61–4. See H.S. Levie (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* (1987) (Levie, *Additional Protocol II*) for statements made, during the drafting of Additional Protocol II, by the representatives of

conflicts in the same way as international armed conflicts would not only encourage secessionist movements, by giving them a status under international law, but it would restrain the hand of the State in seeking to put down rebellions.[23] For example, if the principle of combatants' immunity—which applies to international conflicts and prevents prosecutions of combatants merely for taking part in an armed conflict—were to be applied in non-international armed conflicts, States would be unable to criminalize acts which are traditionally regarded as treasonous.[24]

It was these concerns that led to the inclusion of article 3 in Additional Protocol II stating that nothing in the Protocol restricts the responsibility of the State 'by all legitimate means, to maintain or re-establish law and order'.[25] There has also been concern on the part of States that abolishing the distinction and treating non-international armed conflicts in the same way as international armed conflicts would give international status to non-state groups and might even encourage international intervention in internal conflicts.[26] This concern led to the inclusion of paragraph 4 in Common Article 3 which states that '[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict'.

Given that the relevant treaties include provisions which make clear that the issues of concern to States should not be read into the treaties, it is difficult to see why those concerns should persist. Furthermore, these concerns relate primarily to the status of fighters and should not prevent the extension of other norms of international humanitarian

---

Argentina (30, para 17); the German Democratic Republic (32, para 29); Indonesia (35, para 53); Romania (42, para 33) and Yugoslavia (47, para 6).

[23] F. Bugnion, '*Jus Ad Bellum*, *Jus in Bello* and Non-International Armed Conflicts' (2003) 6 *Yearbook of International Humanitarian Law* 167, 168.

[24] See D. Fleck, 'The Law of Non-International Armed Conflicts' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008) 611–12 (Fleck, *Non-International Armed Conflicts*); W. Solf, 'Non- International Armed Conflicts: Commentator' (1982) 31 *American University Law Review* 927.

[25] See also ICC Statute, art. 8(3).

[26] See Levie, *Additional Protocol II,* for statement made, during the drafting of Additional Protocol II, by the representatives of Yugoslavia (47, para 6) and Mexico (49, para 14).

law to non-international armed conflicts.[27] Also, the idea that intervention by the international community follows from a classification of a conflict is to some extent erroneous. Firstly, the UN Security Council has in recent years demonstrated its capacity and willingness to intervene in non-international conflicts.[28] Secondly, international law does not permit unilateral 'humanitarian intervention'[29] and therefore does not permit forceful unilateral intervention by States within another State based on the nature of a conflict going on in that other State. However, it is probably fair to recognize that adding to the rules that apply to non-international armed conflicts increases the opportunity for other States to assert that violations of international law are occurring and may also increase opportunity for lawful non-forcible countermeasures (sanctions or other forms of political pressure) taken by other States and directed at addressing violations by the States engaged in the conflict.[30]

Although it has been argued that the humanitarian aims of international humanitarian law are best fulfilled by the abolition of the distinction between international and non-international armed conflicts,[31] the concerns of States regarding sovereignty remain (even if

---

[27] See Fleck, *Non-International Armed Conflicts,* 611–12.

[28] For example, see Security Council resolution 1973 (2011) with respect to Libya which authorizes a no-fly zone and protection of civilians in the context of a non-international armed conflict. See also the World Summit Outcome Document, GA res. 60/1 (2005) para 139, in which the UN General Assembly recognizes the authority of the Security Council to take action in cases of genocide, war crimes and crimes against humanity.

[29] See generally, S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law* (2001).

[30] See art. 54 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles on State Responsibility) and accompanying commentary, in *Yearbook of the International Law Commission,* Vol. II, Part Two (2001). That commentary refers to sanctions imposed on the former Yugoslavia by a number of States and the European Communities for actions that occurred when armed conflict broke out in that country in 1991. Likewise in 2011, the United States (and others) imposed sanctions on Libya (which went beyond that authorized by SC res. 1970) in response to measures taken by Libya during the violence and conflict that broke out there in 2011. See White House, 'Executive Order: Blocking Property and Prohibiting Certain Transactions Related to Libya' (25 February 2011), available at: www.whitehouse.gov/sites/default/files/2011libya.eo_.rel_.pdf.

[31] J.G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85(850*) International Review of the Red Cross* 313; A. Duxbury, 'Drawing Lines in the Sand—Characterising Conflicts for the Purposes of Teaching International Humanitarian Law' (2007) 8 *Melbourne Journal of International Law* 259; J. Crawford, 'Unequal Before the

they are misplaced) and are a reason why the law, particularly the law relating to the status of fighters, continues to be different in non-international armed conflicts.

5. The scope of application of international humanitarian law: international armed conflicts

5.1 Inter-state conflict

Article 2 common to the Geneva Conventions of 1949 states that the Conventions 'shall apply to all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them'. It follows from this that an international armed conflict is essentially an inter-state conflict.[32] However, the key question for the application of international humanitarian law is 'when does an armed conflict exist between two States such that this body of law applies?'

5.1.1 War

Before considering what amounts to an armed conflict, it is worth noting that prior to the Geneva Conventions the laws of war applied to 'war'. 'War' was something that came to have a technical meaning in international law. It was a state of relations between States that was opposed to a state of peace.[33] Traditional international law and the 1907 Hague Convention (III) relative to the Opening of Hostilities required a formal declaration of war for the laws of war to apply to the relations between the parties. This meant that where the parties failed to consider themselves at war they were able to escape the application of the laws of war.[34] Today, international humanitarian law will apply once an armed conflict exists

---

Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts' (2007) *Leiden Journal of International Law* 441.

[32] Except in situations covered by art. 1(4) of Additional Protocol I on which see section 5.2 below.

[33] C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2008) 45 (Greenwood, *Scope of Application*).

[34] See R. Provost, *International Human Rights and Humanitarian Law* (2002) 249.

between States even if the parties do not consider themselves at war. Despite the wording of Common Article 2, which speaks of the application of the Conventions to armed conflicts even if the state of war is not recognized by *one* of the parties, the position generally taken is that international humanitarian law applies to an armed conflict even if *neither* party recognizes a state of war.[35] What is important today is the fact of an armed conflict rather the formal status of war. However, the Geneva Conventions will apply to cases of declared war, even if no fighting or hostilities take place between States and will, for example, govern the status of interned enemy nationals and the exercise of belligerent rights at sea. Greenwood notes that there are no modern cases of a formal declaration of war being delivered through diplomatic channels as was the practice during World War I and World War II.[36] However, there are examples of statements by States to the effect that they are at war with another State.[37] Whether statements referring to a state of war are to be regarded as a declaration of war bringing into effect the application of the Geneva Conventions and other rules of international humanitarian law is essentially a question of intention. For there to be a war in the technical sense, there needs to be an *animus belligerendi*. However, '[t]here is probably a presumption that nations do not intend to create a state of war'[38] and '[s]o serious a matter as the existence of a state of war is not lightly to be implied'.[39]

5.1.2 Armed conflict

In both the *ius ad bellum* and the *ius in bello*, post World War II international law has moved away from conditioning the applicability of the law on the formal or technical concept of war and towards much more factual criteria. Under the *ius ad bellum,* what is prohibited by the UN Charter is the 'use of force' and, under international humanitarian law, the application of

[35] See Greenwood, *Scope of Application,* 47; See also J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. IV* (1952) 21 (Pictet, *Commentary on Geneva Convention IV*).

[36] See Greenwood, *Scope of Application*, 49.

[37] See examples cited in C. Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 283.

[38] Greenwood, *Scope of Application*, 49.

[39] Lord McNair and A.D. Watts, *The Legal Effects of War* (1966) 8.

the law depends on the existence of an 'armed conflict'. The Geneva Conventions do not define 'armed conflict'. However, it has been defined by the Appeals Chamber of the ICTY in *Tadić (Appeal on Jurisdiction)* case as follows:

> 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. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply to the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[40]

By asserting that an international armed conflict exists *whenever* there is resort to armed force by States, this decision suggests that the threshold for an international armed conflict is very low.[41] As Vité notes, 'it is . . . not necessary for the conflict to extend over time or for it to create a certain number of victims'.[42] Almost any use of armed force by one State against another will bring into effect an international armed conflict,[43] except perhaps in cases where the use of force is unintended (for example arising out of error).[44] The low threshold for international armed conflicts is reflected in the ICRC commentary to the Geneva Conventions which states that:

---

[40] *Tadić Jurisdiction,* para 70.

[41] S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91(873) *International Review of the Red Cross* 69, 72 (Vité, *Typology*); W. Fenrick, 'Article 8, War Crimes' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999).

[42] Vité, *Typology,* 72.

[43] See Greenwood, *Scope of Application*, 46, para 202: 'An international armed conflict exists if one state uses force against another state.'

[44] UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 29: 'an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country.'

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Conventions are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.[45]

The alternative view, which asserts that an international armed conflict only comes into effect when the use of force between States reaches a certain intensity[46] seeks consistency with the definition of non-international armed conflicts, which does have an intensity requirement.[47] However, this analogy is mistaken. To import an intensity requirement into the definition of international armed conflicts is effectively to assert that no law governs the conduct of military operations below that level of intensity, including the opening phase of hostilities. This is different from the position in non-international armed conflicts where domestic law and international human rights law will govern tensions and internal disturbances that fall below the intensity of an armed conflict.

It is a question of fact whether or not an armed conflict exists between two States. Where it does, military operations may only be carried out by the parties in the territories of the parties, as well as on the high seas (including the airspace above and the sea floor below)

---

[45] J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, *Vol. III* (1960) 23 (Pictet, *Commentary on Geneva Convention III*). In support of this view, see R. Baxter, 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)' in *International Dimensions of Humanitarian Law* (Henry Dunant Institute/UNESCO, 1988) 98; M. Cottier, W. Fenrick, P. Sellers and A. Zimmerman, 'Article 8, War Crimes' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes, Article by Article* (2008) 182.

[46] See International Law Association, 'Final Report of the Meaning of Armed Conflict in International Law' (2010).

[47] See discussion of non-international armed conflicts in section 6 below.

and including the exclusive economic zones of neutral States.[48] In international armed conflicts, international humanitarian law will apply to the activities of the parties across this broad geographical area, and in any other area where military operations are actually carried out.

As the *Tadić* decision indicates,[49] in international armed conflicts international humanitarian law applies until a general conclusion of peace is reached. The clearest example of a general conclusion of peace is the conclusion of a peace treaty between the belligerent parties. However, since the Second World War, such peace treaties have not been common (the 1979 peace treaty between Israel and Egypt being a notable exception[50]). This is probably due, in part, to the fact that peace treaties have in the past been used for the termination of 'wars' and there has been a noticeable decline in declared wars. Therefore questions have arisen as to whether other events might constitute a conclusion of peace, and are therefore to be regarded as bringing to an end an armed conflict between two or more States. In particular, the issue has arisen as to whether a ceasefire or an armistice agreement is to be regarded as bringing an armed conflict to an end or whether, alternatively, the parties are to be regarded as in a state of war and therefore subject to international humanitarian law until a peace treaty is signed. This latter view would mean, for example, that the belligerents remain entitled to continue to use force against one another or that they may continue to exercise belligerent rights at sea, where there is a breach of the armistice or ceasefire agreement.[51] Under the Hague Regulations of 1907, an armistice only suspended military operations and the belligerent parties could

[48] See Greenwood, *Scope of Application,* 59, para 216. Note that military operations will be prohibited in certain areas, such as hospital and safety zones, demilitarized zones, neutralized zones, all of which are established by agreement of the parties. Ibid, paras 219–20.

[49] *Tadić Jurisdiction*, para 70.

[50] Peace Treaty between Egypt and Israel of 1979 (1979) 18 *International Law Materials* 362.

[51] See G. Chang, 'How to Stop North Korea's Weapons Proliferation' *Wall Street Journal* (1 July 2009).

resume operations at any time.[52] This was because an armistice was not regarded as bringing the war to an end.

The issue of what is required to bring an armed conflict to an end is of great significance in contemporary international affairs given that there has, as yet, been no peace treaty terminating the Korean conflict of the early 1950s, nor a peace treaty between Israel and some of her Arab neighbours since the 1949 conflict. The better view seems to be that taken by Greenwood that 'since armed conflict is not a technical, legal concept but a recognition of the fact of hostilities, the cessation of active hostilities should be enough to terminate the armed conflict'.[53] A fortiori, a ceasefire or armistice agreement will bring an armed conflict to an end where it is intended to bring the hostilities to an end.[54] In any event, the cessation of hostilities will trigger the application of certain duties, such as the duty to release prisoners of war[55] and of persons interned in occupied territory or in the territory of the parties to the conflict.[56] However, certain parts of international humanitarian law will apply beyond the cessation of hostilities, for example the law of occupation,[57] as well as the law applicable to those protected persons who are not released and repatriated.[58]

When the proposition that an armistice or ceasefire which brings hostilities to a close should now be regarded as terminating an armed conflict is combined with the prohibition of the use of force contained in the UN Charter, the effect is that the parties to an armed conflict may no longer exercise belligerent rights at sea and may no longer resort to force after the conflict is terminated, even if there are breaches of the agreement. Resort to force would only be permissible where it constitutes a lawful use of force in self-defence.[59] This

---

[52] Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (1907), art. 36.

[53] See Greenwood, *Scope of Application,* 72, para 250.

[54] Y. Dinstein, *War, Aggression and Self-Defence* (2005) 44.

[55] Geneva Convention III, art. 118.

[56] Geneva Convention IV, art. 133 and 134.

[57] Ibid, art. 6.

[58] Geneva Convention III, art. 5; Geneva Convention IV, art. 6; Additional Protocol I, art. 3.

[59] See Greenwood, *Scope of Application,* 68.

was confirmed by the Security Council in resolution 95 (1951) where it rejected Egypt's continued exercise of belligerent rights against shipping, after the armistice which ended hostilities in the 1949 conflict with Israel.[60]

The question whether or not a conflict is an inter-state one may be difficult to answer where one of the parties claims to be a State and the other party rejects that claim—as occurred, for example, during the dissolution of the former Socialist Federal Republic of Yugoslavia. It is possible that what begins as a non-international armed conflict becomes international when an internal rebel group is successful in becoming a State. However, as Crawford has pointed out, except in the case of entities possessing the right of external self-determination (i.e. colonial or other non-self governing peoples with a right to determine their political status including a right to independence),[61] secession without the consent of the parent State is rarely recognized as successful as a matter of international law.[62] Therefore, where an armed conflict involves an attempt at secession it would be difficult to argue that a rebel group had gained statehood such that the conflict had now become international. Nonetheless, this may be possible in cases of dissolution of the parent State or where the parent State consents to secession but continues to fight (perhaps indirectly by providing support for groups within the new State). However, the fact that the armed conflict is ongoing may itself make it more difficult to argue that the criteria for statehood had been met. In *Prosecutor v Milošević*,[63] the ICTY's Trial Chamber had to determine the question of when Croatia became a State (at the time of the dissolution of the former Socialist Federal Republic of Yugoslavia) such that the conflict became an international armed conflict. Applying the criteria for statehood contained in the Montevideo Convention,

---

[60] For a general discussion, see D. Akande, 'The Korean War Has Resumed!! (Or so we are told)' *EJIL: Talk!* (22 July 2009).

[61] See GA res. 1514 (1960); GA res. 2625 (1970).

[62] J. Crawford, *The Creation of States in International Law* (2006), ch. 9 (Crawford, *Creation of States*). The main exception to this has been Bangladesh—which was admitted to the UN before consent by Pakistan. Kosovo represents an example of a seceding entity which at the time of writing, in early 2012, had not yet achieved recognition by the majority of States in the face of opposition by Serbia of such recognition.

[63] *Prosecutor v Milošević*, IT-02-54-T, Decision on Motion for Judgment of Acquittal Under Rule 98 bis (Trial Chamber), 16 June 2004 (*Prosecutor v Milošević*).

it determined that Croatia was a State by October 1991; this was before Croatia was recognized by the European Community in January 1992 and admitted to the UN in May 1992.

5.1.3 Occupation

Common Article 2 to the 1949 Geneva Conventions states that the Conventions shall also apply to all cases of partial or total occupation of the territory of a Party, even if the occupation meets with no armed resistance. The last part of that provision (dealing with occupation without armed resistance) is intended to cater for situations like the German annexation of Czechoslovakia prior to World War II. The Geneva Conventions do not themselves define occupation, but occupation is defined under customary international law by article 42 of the 1907 Hague Regulations which states that 'territory is considered occupied when it is actually placed under the authority of the hostile army'.[64] This means that the occupier must exercise effective territorial control, substituting its own authority for the authority of the territorial State,[65] and do so without the consent of the government.[66] Usually this will require the occupying power to deploy troops on the ground in order to impose a degree of stability and to carry out the obligations imposed by international humanitarian law. A brief incursion will probably not amount to occupation under the Hague Regulations.

Alternatively, it may be possible for a State to be in occupation of the territory of another State, or parts of it, not directly but rather through a subordinate (or puppet) administration that it controls. Where the former State exercises such control over the administration, or over a group exercising control over the territory of a State such that the acts of the administration or group are attributable to the State, the State may constitute an

---

[64] See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Rep 2005, 168, paras 172ff (*Armed Activities* case).

[65] *Armed Activities* case, para 173. For the unusual situation in Gaza, and the debate as to whether there can be occupation without 'boots on the ground', see discussion in ch. 9 below.

[66] See generally, A. Roberts, 'What is Military Occupation?' (1984) 55 *British Yearbook of International Law* 249.

occupying power. In the *Armed Activities* case, the International Court of Justice considered the possibility that Uganda was in occupation of parts of the Democratic Republic of the Congo that were controlled by rebel groups outside the Ituri region (where it found a belligerent occupation) but dismissed the possibility on the facts because those groups were not 'under the control of Uganda'.[67] However it has been asserted that the situation in Nagorno-Karabakh constitutes an example of indirect occupation on the basis that Armenia is in control of the administration that exercises control of the so-called 'Nagorno-Karabakh Republic', which is recognized as a part of Azerbaijan.[68]

The Fourth Geneva Convention imposes particular obligations with regard to occupation and occupied territory. Part III, Section III of that Convention imposes obligations relating to the status and treatment of protected persons in occupied territories. Also, Part III, Section IV details regulations for the treatment of internees in occupied territory (as well as in the territory of the belligerent). However, questions have been raised as to whether 'occupation' and 'occupied territory' under this Convention mean the same thing as 'belligerent occupation' under customary international law and under article 42 of the Hague Regulations. Article 6 of the Fourth Convention states that '[t]he present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2'. The important point here is that the Convention applies from the beginning of the conflict as well as from the beginning of occupation. This has been interpreted to mean that a belligerent occupation, as defined above, does not need to have been established in order for

[67] *Armed Activities* case, para 177. The possibility of indirect occupation has also been accepted by the ICTY. See *Prosecutor v Tadić*, IT-94-1-T, Judgment (Trial Chamber), 7 May 1997, para 584 (*Tadić* Trial Judgment). The level of control that will be required for such indirect occupation is the level provided for by the law of State responsibility. However, contrary to the ICTY decisions, the correct test of control under the law of State responsibility will be complete control and dependence under art. 4 of the International Law Commission's Articles on State Responsibility or failing that 'effective control' under art. 8 of those Articles. See further discussion in section 7 below.

[68] See Vité, *Typology,* 74–5. The effective overall control (which Turkey exercises over Northern Cyprus (See *Loizidou v Turkey* (Judgment) App No. 15318/89 (18 December 1996)) may also lead to the conclusion that it is in indirect occupation of that territory.

obligations under the Fourth Convention to apply.[69] The ICRC Commentary to article 6 states that:

> the word 'occupation', as used in the Article, has a wider meaning than it has in Article 42 of the Regulations annexed to the Fourth Hague Convention of 1907. So far as individuals are concerned, the application of the Fourth Geneva Convention does not depend upon the existence of a state of occupation within the meaning of the Article 42 referred to above. The relations between the civilian population of a territory and troops advancing into that territory, whether fighting or not, are governed by the present Convention. There is no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation. Even a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions in its dealings with the civilians it meets. When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 which prohibits the deportation or forcible transfer of persons from occupied territory. The same thing is true of raids made into enemy territory or on his coasts. The Convention is quite definite on this point: all persons who find themselves in the hands of a Party to the conflict or an Occupying Power of which they are not nationals are protected persons. No loophole is left.[70]

Clearly, this interpretation of article 6 provides maximum protection for civilians as it means that even if they are in territory that is not yet under the full administration of the opposing belligerent, they are entitled to the protections of the Fourth Geneva Convention. However, it results in the bifurcation of the law of occupation, with the law deriving from the Hague Regulations applying where occupation is actually established (stable situations of administration) and the law deriving from the Fourth Geneva Convention applying even in areas where stable control is not yet established. The alternative interpretation, which

[69] See discussion by K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85(849) *International Review of the Red Cross* 45, 61–3 (Dörmann, *Unlawful Combatants*).

[70] See Pictet, *Commentary on Geneva Convention IV,* art. 6. Quoted with approval by the ICTY Trial Chamber in *Prosecutor v Rajić*, IT-95-12, Review of the Indictment (Trial Chamber), 13 September 1996.

would require that the conditions for the application of article 42 be met, even for the application of the Fourth Geneva Convention,[71] would not only leave significant gaps in the protection of the civilian population but would render redundant that part of article 6 which provides that the Fourth Geneva Convention applies from the outset of an occupation. For these reasons the ICRC interpretation is to be preferred.

In a situation of occupation, the occupying power may be engaged in hostilities with, or otherwise take military action against, a local non-state group, as happened in Iraq after the 2003 invasion by the US and UK and the fall of the regime of Saddam Hussein. In order to determine the law applicable to such action, it must first of all be determined that the situation is not merely an internal disturbance or riot (in which case domestic law will apply) but rather hostilities or combat governed by the law of armed conflict. Questions will arise in such a scenario as to whether or not those actions are governed by the law applicable to international armed conflicts (since the context is one of occupation) or rather by the law applicable to non-international armed conflicts (since the particular contention is between a State and a non-state group).[72] There are two possibilities in this sort of situation. First of all, the non-state group may be fighting on behalf of the occupied State or may be under a command responsible to the occupied State within the meaning of articles 4(A)2 of the Third Geneva Convention or article 43 of Additional Protocol I.[73] Secondly, the non-state group may be independent of the occupied State. In the first case, it is clear that the conflict will be governed by the law applicable to international armed conflicts since the group, though an irregular force, would form part of the armed forces of the State under the provisions mentioned above. The case of other non-state groups is more difficult. The Israeli Supreme

[71] That interpretation is shared by R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) *28 British Yearbook of International Law* 325; H.P. Gasser, 'Protection of the Civilian Population' in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2007) (Gasser, *Civilian Population*), appears to take this view at 276, para 528; Y. Dinstein, *The International Law of Belligerent Occupation* (2009) 41 (Dinstein, *Occupation*).

[72] See A. Paulus and M. Vashakmadze, 'Assymetrical War and the Notion of Armed Conflict—A Tentative Conceptualization' (2009) 91(873) *International Review of the Red Cross* 95, 113–15 (Paulus and Vashakmadze, *Assymetrical War*).

[73] See later discussion in section 7.1 below on how these provisions should be interpreted.

Court has taken the view that confrontations between the occupying party and non-state groups in occupied territory are governed by the law applicable to international armed conflicts, even in cases where the non-state group is not fighting on behalf of a State.[74] In the view of this author, this conclusion is correct.[75] The conclusion follows from the fact that the Geneva Conventions, and other rules concerning international armed conflicts (including Additional Protocol I, where applicable), apply to the acts of the occupying power and regulate the relationship between the occupying power and the people in the occupied territory.

The argument that armed conflicts between an occupying power and a non-state group within occupied territory amount to a non-international armed conflict proceeds from the view that every international armed conflict is between two opposing States.[76] However, the relevant question is not what type of conflict exists between the State and the non-state group but what law applies to the acts of an occupying power within occupied territory. It is important to note that the law of occupation is not just about the relationship between two contending States and not just a means of indicating the temporary nature of the authority of the occupier vis-à-vis that of the territorial State. The law of occupation is also a means of regulating what may well be the tense relationship between the occupying power and persons within the occupied territory and a means of providing restraint with regard to how the occupier treats the local population. The tension between the occupier and the local population may well result in acts of hostilities but the fact that the local population has chosen to rise up in arms does not free the occupier from the restraints it otherwise has. Indeed it ought to strengthen those restraints. The law of occupation is no less necessary in

---

[74] *The Public Committee against Torture in Israel. The Government of Israe*l, High Court of Justice, HCJ 769/02 (11 December 2005) paras 16–23 (*Targeted Killings* case).

[75] See in support, A. Cassese, *International Law* (2005) 420–3; A. Cassese, 'On Some Merits of the Israeli Judgment on Targeted Killings' (2007) *5 Journal of International Criminal Justice* 339; Dinstein, *Occupation,* 100. For a contrary view, see M. Milanovic, 'Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case' (2007) 89(866) *International Review of the Red Cross* 373, 383–6 (Milanovic, *Lessons for Human Rights*); Y. Arai-Takahashi, *The Law of Occupation: Continuation and Change of International Humanitarian Law, and its Interaction with International Human Rights Law* (2009) 300–03; see also ch. 6 section 4.2 below.

[76] See Milanovic, *Lessons for Human Rights.*

those situations. Moreover, the law of occupation is cognizant of the fact that persons who are not combatants (in the sense in which that term is used in international armed conflicts) may well engage in hostilities against the occupier, acts of sabotage, or other acts which imperil the security of the occupier. For example, article 5 of the Fourth Geneva Convention contemplates persons who engage in sabotage and the provisions of that Convention relating to internment deal with persons who may imperil the security of the State. Likewise, article 45(3) of Additional Protocol I contemplates that persons who engage in hostilities in a situation of occupation, and are not entitled to prisoner of war status, are nevertheless entitled to the protections of the Fourth Geneva Convention or of the fundamental guarantees in article 75 of Additional Protocol I (which represents customary law).[77]

Thus, it is the law of occupation and other rules of international armed conflict (including the law of targeting) that conditions how the occupier may respond to an uprising in the foreign territory of which it has temporary occupation. This conclusion is also supported by the International Court of Justice's decision in the *Armed Activities* case where the Court applied the law of occupation (derived from the Geneva Conventions and from customary law emerging from the Hague Regulations) and the law of international armed conflicts (as derived from the Geneva Conventions and Additional Protocol I) to Uganda's acts in the Ituri region. This was despite the fact that Uganda was acting primarily against non-state groups in that region.[78] To determine otherwise would be to ignore much of the protections to which occupied people are entitled. However, this is not to suggest that there may never be a non-international armed conflict in occupied territory. There may well be

[77] See generally Dörmann, *Unlawful Combatants.*

[78] *Armed Activities* case. For a similar view, see the decision of the ICC Pre-Trial Chamber in *Prosecutor v Lubanga*, ICC-01/04-01/06, Decision on Confirmation of Charges (Pre-Trial Chamber) 29 January 2007, para 220 *(Prosecutor v Lubanga* Pre-Trial Chamber, Confirmation of Charges Decision*)*; also *Prosecutor v Katanga and Chui*, ICC-01/04-02/07, Decision on Confirmation of Charges (Pre-Trial Chamber) 26 September 2008, para 240 *(Prosecutor v Katanga and Chui)*.

such a conflict between two non-state groups (e.g. Hamas and Fatah in Gaza) with the result that those parties are bound by the rules relating to non-international armed conflict.[79]

Occupation will cease 'with the end of actual control of the territory by the occupying power'.[80] Usually the end of actual control will coincide with the removal of the occupying power's troops from the occupied territory. However, control may extend beyond this removal, for example, in cases where the direct control of the occupier is simply replaced by indirect occupation carried out through a group or administration that is established by the occupier and is under its complete control. More difficult is the situation, such as that in Gaza, where the armed forces of the occupier leave the territory and no longer exercise control over the governance of the territory but continue to exercise control over other aspects of the territory (in the case of Gaza, control over the airspace, over certain borders and over adjacent sea areas). Opinion is divided over whether such a situation constitutes a continuation of occupation.[81] However, it may be argued that, like the criteria for statehood (where the criteria for the creation of statehood are not the same as the criteria for the maintenance or continuation of statehood[82]), the criteria for the establishment of occupation may not be the same as the criteria for the maintenance of occupation. This argument would suggest that even in cases where a former occupying power no longer exercises the level of control that would justify the establishment of occupation, if it exercises such control as to prevent another power from exercising full control, the occupying power remains in occupation.

5.2. Self-determination conflicts of national liberation under article 1(4) of Additional Protocol I

[79] See *Prosecutor v. Thomas Lubanga Dyilo* (Trial Chamber Judgment Pursuant to Article 74, ICC Statute) ICC-01/04-01/06, March 2012, paras: 563-565 (*Prosecutor v. Lubanga, Trial Judgment);* Paulus and Vashakmadze, *Asymetrical War,* 115.

[80] Gasser, *Civilian Population,* 282, para 537.

[81] See the discussion by Vité, *Typology,* 83–5 with extensive references to the opposing views, and the discussion in ch. 10 below.

[82] Crawford, *Creation of States,* 667 et seq.

Although it is usually the case that an international armed conflict involves two (or more) States in conflict against each other, Additional Protocol I of 1977 also provides for the application of the laws of international armed conflict to a category of internal armed conflict. Under article 1(4), Additional Protocol I (which applies to international armed conflicts) also applies to 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.

The provision is a reflection of popular concerns of the era in which Additional Protocol I was negotiated as well as a response to the desire, mainly of developing countries, for legitimation of those engaged in liberation struggles. The provision was primarily aimed at the situation regarding Israel's occupation of Palestine, the struggle in South Africa and Rhodesia (as it was then called) and the colonial struggles of the time.[83] However, Additional Protocol I has never been applied in any of those situations. One of the reasons why the provision has not been applied is that the three situations are difficult to define. However, it must be remembered that the key question identified by the provision is whether a movement is fighting in the exercise of the right of self-determination. That is a matter to be determined by reference to general international law.

Most authors consider that article 1(4) has not been accepted as a norm of customary international law.[84]

---

[83] See G. Aldrich, 'Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions' (1991) 85 *AJIL* 1, 6.

[84] See eg Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (2010) 28. However, Cassese has argued that when one takes into account the views of States expressed during the drafting of the provision, together with the General Assembly resolutions on the same topic, the provision ought to be regarded as embodying a customary rule. See A. Cassese, 'Wars of National Liberation and Humanitarian Law' reprinted in A. Cassese (ed.), *The Human Dimension of International Law: Selected Papers* (2008) 99, 106.

5.3. Recognition of belligerency[85]

As noted above, even prior to the Second World War, international law provided for one circumstance in which the laws of war would apply to a civil war between a State and a rebel group. This was where an insurgent group was recognized as a belligerent for the purpose of and with the consequence of bringing the laws of war into operation in relation to the conflict. The recognition of belligerency could be granted either by the government against whom the insurgent group was fighting or alternatively by third States, usually through a declaration of neutrality by that foreign State. According to Oppenheim, 'any State may recognize insurgents as a belligerent Power, provided (1) they are in possession of a certain part of the territory of the legitimate Government; (2) they have set up a Government of their own; and (3) they conduct their armed contention with the legitimate Government according to the laws and usages of war'.[86]

The effect of a recognition of belligerency by the belligerent government was that the entire laws of war were brought into effect between the contending parties. The effects of recognition of belligerency are primarily relative, i.e. they operate between the recognizing State and the belligerent group and do not, in principle, change the relations between other States and the belligerent group.[87]

The practice of recognizing belligerencies appears to have declined since the creation of the concept of non-international armed conflicts and it has been claimed that the doctrine is now either obsolete or has fallen into desuetude. However, though there seem to have been no instances since the Boer War (1899–1902) in which a belligerent government has expressly recognized the belligerency of an insurgent group, there seem to have been instances of third States recognizing belligerency of insurgents operating in other

[85] See E. Riedel, 'Recognition of Belligerency' in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, *Vol. 4* (2000) 47 (Riedel, *Recognition of Belligerency*).

[86] L. Oppenheim, *International Law*, *Vol. II: Disputes, War and Neutrality* (2nd edn, 1912) 92.

[87] L. Oppenheim, *International Law*, *Vol. II: Disputes, War and Neutrality* (7th edn, 1952) 251.

countries.[88] Also it should be remembered that even in the nineteenth century 'most instances of recognition of belligerency . . . concerned implied recognition, usually by declarations of neutrality or acquiescence in confiscation of contraband or in blockade maintained by one of the belligerents'[89] and there have been blockades instituted in non-international armed conflicts since 1949. These blockades may be regarded as implicit recognitions of belligerency and thus internationalizing the conflict.[90] Finally as Professor Scobbie argues, persuasively, with regard to Gaza,[91] non-application of a doctrine of customary international law does not suffice to extinguish it. There is no concept of desuetude with regard to custom.

6. The scope of application of international humanitarian law: non-international armed conflicts

It is not always easy to determine when a situation of violence within a State is to be classified as a non-international armed conflict. Where a situation of violence is regarded merely as one of internal strife or civil disturbance, international law considers that it does not reach the threshold of 'armed conflict' and international humanitarian law does not apply. However, where the internal violence does reach this threshold, international humanitarian law will apply to that internal, or more accurately, non-international armed conflict. The relevant question, therefore, is what is considered to be the threshold above which a non-international armed conflict may be said to be taking place.

6.1 Common Article 3

[88] For example recognition of the belligerency of the Nicaraguan Sandinistas by the Andean Group in 1979, cited in N. Navia, 'Hay o no hay conflict armado en Colombia' (2008) 1 *Anuario Colombiano de Derecho International* 139, 147; recognition, in 1981, by France and Mexico of El Salvadoran rebels and recognition by Venezuela of the FARC group in Colombia in January 2008.

[89] Riedel, *Recognition of Belligerency,* 48.

[90] See the discussion on this issue with respect to Gaza in ch. 9 below.

[91] See ch. 9, section 4.4 below.

Unfortunately, article 3 Common to all four 1949 Geneva Conventions does not specify precisely when it will apply, referring only to an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Whether or not such a conflict is taking place is determined by criteria which have been fleshed out by customary international law. In the *Tadić* case, the Appeals Chamber of the ICTY referred to a non-international armed conflict as a situation of 'protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[92] This test is also adopted in article 8(2)(f) of the Statute of the ICC. As the ICC Statute indicates, a non-international armed conflict excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature'.[93]

For a non-international armed conflict to exist there must be, firstly, parties to that conflict. What is evident from customary international law is that a non-international armed conflict governed by Common Article 3 may be a conflict between a State and a non-state group or alternatively, may be a conflict arising between non-state groups. It is clear that in all non-international armed conflicts, at least one side must be considered a non-state group and international humanitarian law provides the rules for determining when such a group may be regarded as party to an armed conflict. In order to be a party to an armed conflict a non-state group must have a certain level of organization with a command structure.[94] In short, in the words of the Appeals Chamber in *Tadić*, it must be an 'organized armed group'.[95] The factors relevant to determining whether an armed group is sufficiently organized are as follows: the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military

[92] *Tadić Jurisdiction*, para 70.

[93] ICC Statute, art. 8(2)(d) and 8(2)(f), following art. 1 of Additional Protocol II.

[94] J. Pejić, 'Status of Armed Conflicts' in E. Wilmshurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) 85–6 (Pejić, *Status of Armed Conflicts*).

[95] *Tadić Jurisdiction*, para 70.

equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords.[96] It is worth noting that these are not minimum factors that must be present but rather indicators of organization.

The question may arise whether violence involving criminal groups which act for private non-political motives may be classified as a non-international armed conflict and therefore subject to the application of international humanitarian law. Although it is usually the case that groups involved in non-international armed conflicts have a political purpose or aim, this is not a requirement under international humanitarian law. The cases in the international criminal tribunals, which set out the criteria for classifying conflicts, do not include reference to the motivation or purpose of the groups in questions. What is important is that the group has a sufficient degree of organization, taking into account the factors indicated above, and that the group is able to and does conduct, or is otherwise involved, in an armed campaign which reaches the required degree of intensity. Factually, it is unlikely that these conditions will be met with criminal gangs but the possibility cannot be ruled out. Indeed, the possibility of the application of international humanitarian law to the fight against piracy has been acknowledged by the United Nations Security Council. In resolution 1851 (2008), the Security Council authorized States and regional organization 'to undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, . . provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law'. The reference to international humanitarian law appears to be an indication that the use of force against

[96] *Prosecutor v Ramush Haradinaj*, IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para 60 *(Prosecutor v Haradinaj)*.

the pirates *may* rise to a level where it amounts to, or is in any event a part of an armed conflict.[97]

The second criterion required for a non-international armed conflict is that the level of violence or fighting must reach a certain degree of intensity.[98] In *Tadić* the ICTY spoke of 'protracted armed violence'.[99] While the word 'protracted' suggests that the criterion relates exclusively to the time over which armed conflict takes place, it has come to be accepted that the key requirement here is the intensity of the force. There are factors, beyond timing, that go to determining whether the violence reaches the 'intensity' that would cause it to be classified as an armed conflict. The requirement for a degree of intensity indicates that the threshold of violence that is required for the application of international humanitarian law in non-international armed conflicts is higher than the case of international armed conflicts. Unlike the law regulating international armed conflicts, which applies from the initiation of inter-state violence (and perhaps even before), the situation with respect to non-international armed conflicts is more fluid as often the violence pre-dates the establishment of a non-international armed conflict and the application of international humanitarian law. Thus, the question when the violence crosses the threshold of applicability of international humanitarian law will often need to be answered.

In *Prosecutor v Ramush Haradinaj et al*, which arose out of the conflict in Kosovo between the authorities of the Federal Republic of Yugoslavia and the Kosovo Liberation Army, the ICTY relied on a number of indicative factors for assessing the two criteria of

---

[97] See R. Geiss, 'Armed Violence in Fragile States: Low Intensity Conflicts, Spill Over Conflicts, and Sporadic Law Enforcement Operations by External Actors' (2009) 91(873) *International Review of the Red Cross* 127, 139 et seq; M. Passman, 'Protections Afforded to Captured Pirates Under the Law of War and International Law' (2008) 33 *Tulane Maritime Law Journal* 1. See however D. Guilfoyle, 'The Law of War and the Fight against Somali Piracy: Combatants or Criminals?' (2010) 11 *Melbourne Journal of International Law* 141, pointing out that it is difficult to regard the Somali pirates as participants in an armed conflict, and stating that there is no need to have recourse to international humanitarian law in relation to the fight against piracy.

[98] For a summary of the two criteria, see D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979) 163 *Recueil des cours* 147.

[99] *Tadić Jurisdiction*, para 70.

'intensity' and 'the organization of armed groups'.[100] The factors relevant to intensity include: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.[101] Clearly, these criteria may point in different directions and a complete assessment has to be made of the overall situation without there being any particular formula that can be applied to determining what weight should be given to the different factors. It may well be that violence of relatively short duration amounts to a non-international conflict where the scale of violence and destruction is particularly high. In the *Abella* case the Inter-American Commission of Human Rights held that a confrontation lasting 30 hours between the Argentinian military and a dissident group of soldiers was covered by Common Article 3.[102] Alternatively prolonged violence may suffice even though the individual confrontations do not result in extensive casualties or destruction and are mere 'pin-pricks'. However, in the case of violence implicating State authorities it is to be expected that the violence is of the kind that would be used by the armed forces of a State though what is decisive is the activity rather than the arm of the State that is carrying it out.[103] Thus even operations conducted by law-enforcement agents are not excluded from classification as non-international armed conflicts.

---

[100] *Prosecutor v Haradinaj*. See also in *Prosecutor v Milošević*, para 14 et seq. See generally, A. Cullen, *The Concept of Non-International Armed Conflicts in International Humanitarian Law* (2010).

[101] *Prosecutor v Haradinaj*, para 49.

[102] *Abella v Argentina*, Inter-American Commission on Human Rights, Case No. 11.137, Report No. 55/97 (18 November 1997). This case is however criticized in ch. 11 (M. Schmitt) and ch. 13 (N. Lubell) below.

[103] A question that is sometimes posed is whether the threshold of derogation from human rights treaties in case of a 'public emergency threatening the life of the nation' may serve as an indication that the threshold of a Common Article 3 conflict under international humanitarian law has been reached. There is nothing in the treaty texts to suggest such an interpretation and it would appear that such a linkage cannot always be established in practice. The existence of a non-international armed conflict is a question of fact that does not (and should not) require a State declaration, including one derogating from a human rights treaty. Moreover, there are cases in which States declared public emergencies and presumably fulfilled the derogation criteria even though no non-international armed conflict was threatened or ongoing. There are

6.2 Additional Protocol II

The threshold for the application of Additional Protocol II to non-international armed conflicts is higher than that for Common Article 3. As is the case with the Common Article 3, Additional Protocol II does not apply to situations of internal disturbance and tensions such as riots, isolated and sporadic acts of violence (the threshold for 'armed conflict'). However, under article 1(1) of Additional Protocol II, the rules contained therein only apply to armed conflicts which take place on the territory of a 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'.

This test is similar to that which was historically applied by States in recognizing belligerency in civil wars for the purpose of bringing into effect the law of armed conflict.[104] However, this provision applies only to Additional Protocol II and is a more stringent test of non-international armed conflicts than that which exists in customary international law.[105]

The test is more rigorous than the threshold for the application of Common Article 3 in a number of ways. First of all, it excludes conflicts which arise solely between organized armed groups and applies only if government forces are involved in the armed conflict. Secondly,

---

also cases in which non-international armed conflicts have occurred without the State declaring a public emergency and derogating from its human rights obligations, mainly for political reasons. It could also be asked how any linkage between the derogation threshold could trigger the application of international humanitarian law if a State is not a party to the relevant treaty, for instance the ICCPR. Similarly it is not clear how a derogation threshold could be relied on with respect to treaties that make no provision for derogation, such as the African Charter on Human and Peoples' Rights. What is the utility of this proposal for non-international armed conflicts waged only between non-state armed groups? These and other queries suggest that the existing international humanitarian law triggers remain sufficient to enable a determination of when a situation may be classified as a non-international armed conflict, without the need to resort to additional criteria. See Human Rights Committee, 'General Comment 29: States of Emergency (article 4)' CCPR/C/21/Rev.1/Add.11 (2001).

[104] See eg the criteria set out by L. Oppenheim, *International Law*, *Vol. II: Disputes, War and Neutrality* (2nd edn, 1912) 92.

[105] It has been suggested that under customary international law there might be two separate thresholds for classifying non-international armed conflict, with these thresholds corresponding to the tests under Common Article 3 and Additional Protocol II. See further discussion in ch. 4, section 4 (n 96) below. However, there seems to be very little, if any evidence that the test contained in Additional Protocol II is regarded as anything other than the test for the application of the rules in that treaty.

there is the requirement that the organized armed group exercises control over territory. The test seems designed for a situation in which a rebel group is a contending power, with the government, for authority over the State or a part of it. The requirement of control over territory is linked to an ability to carry out sustained and concerted military operations as well as an ability to implement the protocol. Textually, the words do not seem to require the actual carrying out of such operations but merely the ability to do so. However, in practice it is difficult to conceive of control of territory being achieved and maintained without sustained and concerted military operations being carried out at some stage.

A third differentiation between the application of Additional Protocol II and Common Article 3 is that Additional Protocol II applies to non-international armed conflicts taking place in the territory of a party between '*its* armed forces' and organized armed groups described above. The combination of the requirements that the conflict be (i) in the territory of a party and (ii) between the forces of that party and armed groups is to limit the application of the Protocol in internationalized non-international armed conflicts. As will be discussed below, in situations when a foreign State intervenes in an internal armed conflict with the consent of the State where the conflict is taking place, the armed conflict remains non-international. However, even where both the intervening State and the territorial State are parties to Additional Protocol II, that treaty will not apply to the acts of the intervening State in the conflict. This is because the conflict does not take place in its territory and though it takes place in the territory of another party to the Protocol, the conflict is not between the armed forces of that party and armed groups. Applying this interpretation to the armed conflict in Afghanistan, (since it became a non-international conflict in 2002) would mean that though Afghanistan became party to Additional Protocol II in 2009 and though some of the countries fighting in Afghanistan with its consent are also parties to Additional Protocol II, the Protocol does not apply to the conflict between those intervening countries and armed groups they fight.[106] It is not clear whether this was intended in the

[106] D. Akande, 'Afghanistan accedes to Additional Protocols to Geneva Conventions: Will AP II govern the conflict in Afghanistan?' *EJIL Talk* (30 June 2009) (Akande, *AP II and the Afghan conflict*).

drafting of article 1(1) of the Protocol. An alternative interpretation would be to consider the forces of the intervening State to be part of the armed forces of the territorial State.[107] Although this would be desirable in order to extend the humanitarian protections of Additional Protocol II, this test for armed forces does not find support in the rest of international humanitarian law. The forces of a co-belligerent are not usually regarded as part of the armed forces of a party. A State is responsible for all the acts of its own armed forces[108] and it would be a stretch to say that a State is responsible for all acts of the co-belligerent's forces.

A different way of reaching a similar result (i.e. making Additional Protocol II apply to acts of invited foreign forces) is to consider whether the territorial State is legally responsible under the law of State responsibility for violations of Additional Protocol II committed by foreign forces invited by the territorial State. However, for that to occur, the foreign forces would need to be 'placed at the disposal of' the territorial State.[109] This means that those forces must act under the exclusive direction and control of the territorial State and not under the authority of the sending State.[110] This test would rarely be satisfied and, therefore, the acts of foreign forces will rarely be attributable to the territorial State.

The effect of the different thresholds for the application of Common Article 3 and Additional Protocol II is that there are at least two types of non-international armed conflicts. On the one hand there are those covered by Additional Protocol II (and also by Common Article 3) and on the other hand there are those covered only by Common Article 3.

6.3 A third threshold?

It has been suggested that the provisions of the ICC Statute dealing with war crimes in non-international armed conflicts introduce a third type of non-international armed conflict, or

[107] See Vité, *Typology,* 80.

[108] For international armed conflicts, see Additional Protocol I, art. 91.

[109] ILC Articles on State Responsibility, art. 6. See also discussion in Akande, *AP II and the Afghan conflict*.

[110] See ILC Articles on State Responsibility, commentary to art. 6.

rather, introduce a third threshold at which a different regime of law will apply to certain non-international armed conflicts.[111] This suggestion is based on the fact that article 8(2)(f) of the Statute states that article 8(2)(e), which deals with war crimes in a non-international armed conflict (other than violations of Common Article 3, which are dealt with in article 8(2)(c)), applies where there is 'protracted armed conflict between governmental authorities and organized armed groups or between such groups'.' It is said that this threshold falls between those identified by Common Article 3 and Additional Protocol II because it requires a 'protracted conflict'. It is noteworthy that article 8(2)(d), which deals with the applicability of Common Article 3, does not contain wording regarding protracted armed conflict. Despite the different wording of paragraphs (2)(d) and (2)(f) of article 8, it is not at all clear that it was intended to create different thresholds of application. Nor does the wording actually do so. As is obvious, the wording in article 8(2)(f) is taken from the *Tadić* case and in *Tadić* the ICTY was trying to define the sorts of conflicts that would fall within Common Article 3. While it is true that some emphasis is placed on the duration of the conflict and the fact that it must be protracted, ICTY jurisprudence has already indicated that this is one of the factors to be taken into account in applying Common Article 3 and in judging intensity. Article 8(2)(f) is better interpreted as simply stating the intensity test with the protracted nature of the conflict being a factor to be assessed in determining intensity.

7. Foreign intervention in non-international armed conflicts

Despite the significance of the distinction between international and non-international armed conflicts, making the distinction is often difficult. This is particularly so in cases where there is foreign intervention in a non-international armed conflict. It is often noted that since the end of the World War II there have been many more internal rather than inter-state armed conflicts. However, during the Cold War this trend was coupled with the phenomenon of 'proxy wars' where many internal conflicts were fought through the

[111] See Vité, *Typology,* 80–3 and also discussion in Pejić, *Status of Armed Conflicts,* 89.

intervention of foreign States. Similarly, as is demonstrated by some of the case studies in this work (e.g. Iraq, Afghanistan, DRC, South Ossetia), the period after the end of the Cold War has continued to see increased foreign intervention in what would otherwise be internal conflicts between a State and non-state groups.

Since international armed conflicts are essentially inter-state conflicts, whether or not intervention in a non-international armed conflict transforms that conflict into an international armed conflict (or at least grafts an international armed conflict onto an existing, and perhaps continuing, non-international armed conflict) will depend on which side of the conflict the foreign State intervenes. A proposal by the ICRC, at the initiation of the process which led to the conclusion of the Additional Protocols, for all such conflicts to be deemed international armed conflicts was rejected.[112]

7.1 Foreign intervention on the side of a non-state armed group against a State

Where the forces of a foreign State intervene on the side of the rebel or non-state group fighting against a State, there will be two opposing States involved in a conflict and, therefore, an international armed conflict will ensue. In cases where a foreign State intervenes through the introduction of its armed forces on the side of rebels then the situation is hardly any different from that which would exist in the quintessential international armed conflict. However, the fact that there is an international armed conflict between two States does not necessarily affect the classification of the conflict between the territorial State and non-state group. That conflict will remain as a non-international armed conflict in so far as the non-state group does not act on behalf of the foreign intervening State. There will therefore be a mixed conflict with an international armed conflict going on alongside the pre-existing and continuing non-international armed conflict. In the *Nicaragua* case, the International Court of Justice held that the actions of the US in and against Nicaragua were governed by the rules applicable to international armed conflicts but that

[112] ICRC, 'Protection of Victims of Non-International Armed Conflicts' (1971) cited by Vité, *Typology,* fn 31.

the conflict between the Nicaraguan forces and the Contra rebels remained a non-international armed conflict.[113]

More difficult is the situation where a foreign State intervenes on the side of a rebel movement not by way of introduction of its forces but rather through support given to rebels or non-state groups in cases where it is the non-state group who actually does the fighting against the territorial State. It is accepted that where a non-state group fighting against a State acts on behalf of a different State, there will be an international armed conflict. However, there has been much controversy as to the relevant test for determining when a conflict is internationalized in such a situation. The question that arises here is what level of involvement by the State supporting the non-state group is sufficient to internationalize the conflict.[114]

The leading case here is the *Tadić* decision of the ICTY.[115] First of all, the Appeals Chamber of the ICTY held that whether or not State support for a non-state group suffices to turn the conflict into an international armed conflict depends on whether the non-state group belongs to a party to the conflict (within the meaning of article 4 of the Third Geneva Convention). The question whether the non-state group 'belongs' to the State was then interpreted as one of whether the non-state group was to be regarded as a de facto State organ. In other words, the question was whether the acts of the non-state group are attributable to the State under the law of State responsibility. In the view of the ICTY Appeals Chamber, only where the non-state group is to be considered as a de facto organ of the foreign State is there an international armed conflict between the foreign State and the territorial State. Secondly, the Appeals Chamber held that the relevant test of attribution with regard to the responsibility of a State for the acts of non-state organized armed groups is a test of 'overall control'. On this second point, the Appeals Chamber took issue with the

---

[113] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Rep 1986, 14, para 219 *(Nicaragua)*. See section 7.3 below for discussion of 'Mixed Conflicts'.

[114] See generally, C. Byron, 'Armed Conflicts: International or Non-International' (2001) 6 *Journal of Conflict and Security Law* 63.

[115] *Tadić* Trial Judgment.

test the International Court of Justice had constructed for attribution in the *Nicaragua* case. The ICTY Appeals Chamber was of the view that the International Court of Justice had put forward a test of 'effective control' in order for a non-state group to be regarded as a de facto State organ. In the Appeals Chamber's view this test was too strict and, in cases of organized groups it proposed a test of 'overall control'. The 'overall control' test would be satisfied

> when the State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organizing, coordinating or planning the military actions* of a military group, in addition to financing, training and equipping or providing operational support to the group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[116]

On the basis of these holdings, the Appeals Chamber held that because the Bosnian Serbs were under the overall control of the Federal Republic of Yugoslavia, the conflict between that group and the Muslim-led Bosnian government was an international armed conflict. The overall control test put forward by the ICTY has also been approved by the ICC in the *Lubanga* case.[117]

However, though the actual decision on the facts in *Tadić* was probably right, the reasoning by which it reached its conclusion has been the subject of criticism, and rightly so, in the view of this author.[118] Both of the points made by the Appeals Chamber regarding the internationalization of armed conflicts on the basis of support to non-state groups are open to dispute. To take the second point first: the ICTY misinterpreted the decision in the *Nicaragua* case regarding the test of attribution of acts of non-state groups to a State. As the

---

[116] *Tadić Jurisdiction,* para 139 (emphasis in original).

[117] *Prosecutor v Lubanga* (*Pre-Trial Chamber, Confirmation of Charges Decision*), para 210, 211. and *Prosecutor v. Lubanga, Trial Judgment,* para 541.

[118] See S. Talmon, 'The Responsibility of Outside Powers for Acts of Secessionist Entities' (2009) 58 *International and Comparative Law Quarterly* 493 (Talmon, *Secessionist Entities*); M. Milanovic, 'State Responsibility for Genocide' (2006) 17 *EJIL* 553 and M. Milanovic, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *EJIL* 669.

International Court of Justice has since confirmed in the *Bosnia Genocide Convention* case,[119] the *Nicaragua* case, customary international law and the International Law Commission's (ILC) Articles on State Responsibility do not contain a single test for attribution of acts of non-state groups. Rather there are at least two tests. First of all, there is the test to determine whether a non-state group is to be considered de facto as a State organ under article 4 of the ILC's Articles. If that test is satisfied, then all the acts of a non-state group would be attributable to a State. In some ways this (attributing all acts of a non-state group to a State) is precisely what the Appeals Chamber was seeking to achieve in *Tadić*. But the test for whether a non-state group is to be regarded as de facto organ of a State is not, in the eyes of the ICJ, a question of 'overall control' but rather a much stricter test of 'complete dependence and control'. As stated in the *Bosnia Genocide Convention* case, 'according to the Court's jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in "complete dependence" on the State, of which they are ultimately merely the instrument'.[120]

Secondly, where a group is not completely dependent on a State and is therefore not to be regarded as a de facto State organ under article 4, specific acts of a non-state group can be attributed to a State, under article 8 of the ILC's Articles, where the non-state group's specific acts are carried out on that State's instructions or under its direction or 'effective control'.[121] So, in fact, the tests for State responsibility are stricter than that put forward by

---

[119] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* ICJ Rep 2007, 43, paras 385–95 (*Genocide Convention* case).

[120] *Genocide Convention* case, para 392. See also para 393: 'However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence".'

[121] *Genocide Convention* case, paras 396–402. See in particular, para 400, where the Court stated that: 'The test thus formulated differs in two respects from the test—described above—to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of "complete dependence" on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its "effective control".

the ICTY and there are good reasons for this.[122] A State should only be held to be legally responsible for acts which are really its own, while (if the relevant primary rules permit), it may be held responsible for its own failure to control others or for creating a situation which permitted particular acts to occur.[123]

Since the test of State responsibility is rather strict, it raises the question whether the internationalization of an armed conflict is actually dependent on rules of attribution in the law of State responsibility. The starting point for answering this is that the ICTY is right, that where a non-state group is indeed a de facto organ of a State (or where it acts on specific instructions from a State), and that non-state group fights against another State, the conflict will be international. This is because, in such a scenario, the acts of the non-state group are to be regarded as that of the State on whose behalf it acts. That State is therefore taken as fighting against the other State. However, this does not exhaust the issue of whether the primary rules of international humanitarian law have a different test for whether a conflict is to be regarded as international or not. As the ICJ stated in the *Bosnian Genocide Convention* case:

> Insofar as the 'overall control' test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; the Court does not however think it appropriate to take a position on the point in the present case, as there is no need to resolve it for purposes of the present Judgment. On the other hand, the ICTY presented the 'overall control' test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case - when a State is responsible for acts

---

It must however be shown that this "effective control" was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations.'

[122] See Talmon, *Secessionist Entities,* 517.

[123] For example, in the *Genocide Convention* case while the ICJ held that Serbia was not responsible for the genocide that occurred in Bosnia it was held responsible for breaching its duty to prevent and to punish the genocide.

> committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.
>
> It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.[124]

There are three different views that may be put forward with regard to the test for internationalization of internal armed conflicts as a result of State support for non-state groups. One view would agree with *Tadić* that the key question is whether the non-state group belongs to a foreign State but hold that the answer to this question does not depend on the general law of State responsibility but on specific rules in international humanitarian law. On this view, the specific rules of IHL regarding the test for the internationalization of internal armed conflicts would be different from the test of control in State responsibility. Under these rules, an armed group would be regarded as belonging to (and thus fighting on behalf of) a State (in particular under article 4 of the Third Geneva Convention) even if the State does not exercise control over the group but there is a de facto agreement between the State and the group.[125] This test draws from the ICRC commentary to article 4 which states that

> International law has advanced considerably concerning the manner in which th[e] relationship [between a party to a conflict and irregular forces deemed to fight on that party's behalf] shall be established. The drafters of earlier instruments were unanimous in including the requirement of express authorization by the sovereign,

[124] Ibid, paras 404–5. See M. Spinedi, 'On the Non-Attribution of the Bosnian Serbs' conduct to Serbia' (2007) 5(4) *Journal of International Criminal Justice* 829.

[125] See K. del Mar, 'The Requirement of Belonging Under International Humanitarian Law' (2010) 21 *EJIL* 105.

> usually in writing, and this was still the case at the time of the Franco-German war of 1870–1871. Since the Hague Conferences, however, this condition is no longer considered essential. It is essential that there should be a 'de facto' relationship between the resistance organization and the party to international law which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organization is fighting. But affiliation with a Party to the conflict may also follow an official declaration, for instance by a Government in exile, confirmed by official recognition by the High Command of the forces which are at war with the Occupying Power.[126]

This test of a de facto relationship is probably a looser test even than the 'overall control' test. What this approach does is to accept that there is a *lex specialis* in the regime of State responsibility[127] for breaches of international humanitarian law. A State would, therefore, be responsible for the acts of non-state groups that belong to it[128] but would be identified as responsible using a test that is looser than the general test under the law of State responsibility.

A second approach for achieving internationalization of internal conflicts would be to argue along similar lines to the first but to say that the 'overall control' test is a special test of responsibility, introduced by international humanitarian law. This approach would be different from the approach in *Tadić* in that it would not seek to show (as *Tadić* does) that the 'overall control' test is derived from general international law.

A third approach with respect to the question of internationalization of internal conflicts, and the approach to be preferred, is to adopt the test that was used by Judge Shahabuddeen in his Separate Opinion in the *Tadić* case. In his view, the question to be addressed, in considering whether support by a foreign State for a non-state group

---

[126] Pictet, *Commentary on Geneva Convention III*, 23.

[127] A possibility contemplated by art. 55 of ILC Articles on State Responsibility.

[128] Additional Protocol I, art. 91.

transforms the conflict into an international armed conflict, is whether a foreign State can be said to have used force against another State. He set out the relevant question with regard to the Bosnian conflict in this succinct way: '*Ex hypothesi*, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY [Federal Republic of Yugoslavia] and BH [Bosnia Herzegovina] depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika Srpska ("VRS")."[129]

If a foreign State has used force against another State, albeit indirectly by supporting a non-state group, there is an international armed conflict between the two States. In order to determine whether there is a use of force by one State against another we must turn to those aspects of the *ius ad bellum* that determine this question. Ironically, the leading case here is the *Nicaragua* case[130] but not the parts referred to by the majority in *Tadić*. The case law of the International Court of Justice and customary international law shows that a State is taken to have used force against another State even where it has not intervened with its own troops or, even where it has not used forces that are de facto its own (e.g. by organizing and sending forces) but also where it arms and trains non-state forces.

7.2 Foreign intervention at the invitation (or with consent) of a State against a non-state group

Where there is intervention by a foreign State in an internal armed conflict on the side of the government (or at its invitation) and against a non-state group, such intervention is not sufficient to transform an armed conflict into an international armed conflict and the conflict remains non-international.[131] As noted above, the ICRC's proposal in the 1970s, that all conflicts where there was the intervention of a foreign State are to be regarded as international, was rejected by States. Despite this rejection some distinguished voices,

[129] See *Tadić* Trial Judgment, Separate Opinion of Judge Shahabuddeen, para 7.

[130] Now also the *Armed Activities* case.

[131] See Fleck, *Non-International Armed Conflicts,* 605; also *The Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08, Confirmation of Charges Decision (Pre-Trial Chamber), 15 June 2009, para 246 where it was held that the conflict in the Central African Republic (CAR) was non-international despite the presence of foreign troops in the country, as those troops were there to support the government of the CAR.

notably George Aldrich,[132] have argued that whenever there is foreign intervention this transforms the conflict fundamentally and it should be regarded as international. Aldrich relies on the experience of the Vietnam War and argues that it would be practically impossible to apply both the rules on international armed conflict and those of non-international armed conflict to what is, in fact, a single armed conflict with two warring sides. These proposals have not met with general approval.

Where a foreign State intervenes initially on the side of rebels, but where those forces then take control of the capital (and perhaps the majority of territory) and a government is established (supported by the foreign State) but where fighting continues with the former government or other forces, questions will arise as to the classification of that continued fighting. In accordance with the analysis above, at the time when the foreign State was supporting what was a non-state group, the conflict would have been an international armed conflict. However, once a new government takes over and the intervention of foreign forces is at the invitation of that new government, traditional analysis is that the conflict is transformed to a non-international conflict.[133] However, if this position is always taken, and without safeguard, there could be an undermining of the law of occupation by setting up a puppet regime and claiming consent from that regime. What is required is some assurance that the so-called government is indeed the government of the State and has a degree of independence from the foreign forces such that the consent which transforms the conflict is

[132] G. Aldrich, 'The Laws of War on Land' (2000) 94 *AJIL* 42, 62–3.

[133] See the letter to the UK House of Commons by Philip Spoerri, Legal Adviser, International Committee of the Red Cross: 'Following the convening of the Loya Jirga in Kabul in June 2002 and the subsequent establishment of an Afghan transitional government on 19 June 2002 which not only received unanimous recognition by the entire community of States but could also claim broad-based recognition within Afghanistan through the Loya Jirga process the ICRC has changed its initial qualification as follows: The ICRC no longer views the ongoing military operations in Afghanistan directed against suspected Taliban or other armed groups as an international armed conflict.' Available at: www.publications.parliament.uk/pa/cm200203/cmselect/cmintdev/84/84ap09.htm. Others have suggested that the nature of the conflict changed from international to non-international at an even earlier date: see Y. Arai-Takahashi, 'Disentangling Legal Quagmires: The Legal Characterisation of the Armed Conflicts in Afghanistan Since 6/7 October 2001 and the Question of Prisoner of War Status' (2002) 5 *Yearbook of International Humanitarian Law* 61, 97 (citing the signature of the Bonn Agreement of 5 December 2001 as the date when the conflict became non-international in nature).

one that genuinely comes from the proper authorities of the State in question. Otherwise, those rules designed for the protection of the population from arbitrary power by the foreign occupier could be swept aside by a supposed transfer of power to an authority that is not in fact independent of the foreign power. In order to assure that the new government that gives consent is indeed the government, one should look at the degree of effectiveness of its control over the territory of the State and also at whether it has achieved a general international recognition.[134]

7.3 Mixed conflicts

International and internal armed conflicts may be going on simultaneously in the same area at the same time. For example in the *Nicaragua* case, the ICJ held that the conflict between the United States and Nicaragua was to be analysed under the law relating to international armed conflicts and the conflict between the Contras and the government of Nicaragua was to be analyzed under the law relating to non-international armed conflicts. Likewise, the ICTY Appeals Chamber held, in the *Tadić Jurisdiction Appeal*,[135] that the conflict in the former Yugoslavia had both internal and international characteristics, thus requiring a determination in each particular case as to what conflict was at issue and what law applied. This approach, which allows for mixed (international and non-international) conflicts in the same factual situation, has been criticized on the ground that it creates 'a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non-international'.[136] However, as Greenwood has noted, there is nothing 'intrinsically illogical or novel in characterizing some aspects of a particular

[134] For a similar situation in Libya, see M. Milanovic, 'How to Qualify the Armed Conflict in Libya' *EJIL Talk* (1 September 2011).

[135] *Tadić Jurisdiction.*

[136] See T. Meron, 'Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua's* Fallout' (1998) 92 *AJIL* 236, 238; see also US Amicus Brief in the *Tadić* case.

set of hostilities as an international armed conflict while others possess an internal character'.[137]

The fact that it is possible for two different types of conflicts to be ongoing simultaneously has made the application of international humanitarian law much more complicated in many recent conflicts. Questions relating to the standards for detention will sometimes depend solely on who happened to capture or to detain a particular person since the Third Geneva Convention dealing with POWs and the Fourth Geneva Convention, which includes provisions on internment, are only applicable if the person is interned by State forces in an international armed conflict, but are not applicable if the conflict in question is non-international.

In cases where there is intervention by foreign State forces on the side of or alongside a non-state group which is fighting the territorial State, whether the conflict is a mixed conflict or is internationalized entirely will depend on whether the non-state group is seen as 'belonging to' the intervening State. Where the foreign intervening State exercises the requisite degree of control over the non-state group or where it is in fact using force through the non-state group,[138] the entire conflict will become an international armed conflict. Therefore even fighting between the non-state group and the territorial State will be governed by the law relating to international armed conflicts.

8. Intervention by multinational forces under UN command or authorized by the UN

Particular problems regarding the classification of conflicts arise when forces authorized by the United Nations (or indeed another international organization, such as the African Union) are involved in, or intervene in, an armed conflict. It is worth bearing in mind that the United Nations does not have any forces of its own and forces authorized by the UN are always composed of national armed forces or contingents from national armed forces. Therefore

[137] C. Greenwood, 'Development of International Humanitarian Law by the ICTY' (1998) 2 *Max Planck Yearbook of UN Law* 98, 117.

[138] See discussion in section 7.1 above regarding the test for internationalization of such conflicts.

the key question with regard to classification of conflicts involving UN authorized forces is whether the authorization of force by the UN somehow affects the classification of a conflict such that the result would be different from cases where national armed forces act without that authorization. In order to answer that question, the first issue that needs to be determined is whether any particular UN authorized force is to be regarded simply as a national armed force or whether it is to be regarded instead as a UN force with the UN having responsibility under international law for the acts of those forces.

Under article 7 of the International Law Commission's (ILC) Draft Articles on Responsibilities of International Organization, an international organization will only be responsible for acts of a State organ, such as a part of its armed forces, which is placed at the disposal of the international organization, for example in a peace-keeping or peace-enforcement operation, where the organization is in effective control of the organ or forces that are placed at its disposal.[139] Although the European Court of Human Rights has held to the contrary,[140] the UN or other international organization will only be in effective control of a contingent from a State's armed forces where the UN has operational control of the force.[141] UN responsibility for the force is not established simply because the UN has ultimate control over the force in that it authorized it and can terminate its mandate. Where there is no UN responsibility for the force because the UN does not have effective control over it, the force is simply a national one, albeit operating by virtue of a UN mandate. In such

[139] See International Law Commission, Draft Articles on Responsibility of International Organizations (adopted on 2nd reading in June 2011) A/CN.4/L.778, art. 7.

[140] In *Behrami and Saramati v France and others* (Decision) App No. 71412/01 and 78166/01 (2 May 2007), the European Court of Human Rights held that despite the fact that the UN had no operational control over forces authorized to act in Kosovo, it was the UN and not the States whose force was at issue, that was responsible for the acts of the force. But see *Al Jedda v The United Kingdom* (Judgment) App No. 27021/08 (7 July 2011) para 84 where the ECHR mentioned effective control together with ultimate control.

[141] In its commentary to art. 6 (now art. 7) of the Draft Articles on the Responsibility of International Organizations, the ILC has pointed out that the ECHR's decision in *Behrami and Saramati*, though reliant on art. 6, misunderstood the scope of art. 6. See International Law Commission, 'Report on the work of its 61st session' A/64/10 (2009), ch. IV: Responsibility of International Organizations, 67. The ECHR decision has been criticized by many scholars. See eg M. Milanovic and T. Papic, 'As Bad as it Gets: The European Court of Human Rights Behrami and Saramati Decision and General International Law' (2009) 58 *International and Comparative Law Quarterly* 267, and other works cited by the ILC in its commentary to art. 6 of the Draft Articles.

a case, if the force is involved in an armed conflict, whether the conflict is international or non-international is determined by the principles established above.

In broad terms, when the UN Security Council authorizes the use of force, the armed forces acting under the authorization will be one of three types. Firstly, the Security Council may authorize States, acting individually, in coalition, or through regional arrangements to take enforcement action under Chapter VII of the UN Charter. Examples of this type of authorization include the authorization to remove Iraq from Kuwait in 1990 and to protect civilians in Libya in 2011.[142] In these cases, the forces are not placed under UN command but remain under national command or some other unified command. Since these forces are not under the UN's effective control they are national forces and the principles for classification already discussed apply to those conflicts that these forces are involved in.

Secondly the UN may create and authorize a peace-keeping mission of the classic or traditional mode where the force is under UN command, operates with consent, in a neutral manner and uses force only in self-defence. Often these peace-keeping forces are established as buffer forces overseeing ceasefires that have suspended or terminated hostilities in an international armed conflict.[143] Thirdly, the UN may create and authorize what has come to be known as a robust peace-keeping force where the national contingents operate under UN command but where the force is authorized to use all necessary means (i.e. to use military force) to achieve certain objectives such as protecting civilians or facilitating humanitarian deliveries. Very often, these forces are deployed in internal conflicts and sometimes in situations where the armed conflict is ongoing or where peace is not secure.[144] In the second and third categories, the fact that the forces are under UN command will mean that they act, in principle, as organs of the United Nations. Indeed the

[142] See SC res. 678 (1990) and SC res. 1973 (2011) respectively.

[143] Examples include the United Nations Emergency Force I and II deployed in the Middle East after the conflicts in 1956 and 1973. More recent is the United Nations Mission in Ethiopia and Eritrea. For details on these operations, see www.un.org/en/peacekeeping/operations/past.shtml.

[144] See e.g. ch. 6 below on the DRC.

UN accepts that peace-keeping forces constitute a subsidiary organ of the UN.[145] However, where a force is not in fact under the effective control of the UN but is acting primarily under national control, the UN will not be responsible for its acts. It is in the case of these peace-keeping missions including 'robust peacekeeping forces' where one needs to address particular issues regarding the classification of the conflict.

In the early years of the UN there was much debate and discussion about the application of international humanitarian law to UN forces.[146] The matter has since been resolved by universal acceptance of the position that UN forces are bound by international humanitarian law where they are engaged in an armed conflict.[147] Although the UN is not bound by the relevant treaties, it is bound by customary international humanitarian law. In order to promote observance of international humanitarian law by UN Forces, the UN, by the 1990s, began to include in Status of Forces Agreements with host States, as well as agreements with troop-contributing countries, provisions which required respect for the 'principles and spirit of the general conventions applicable to the conduct of military personnel'. The provision went on to state that these conventions include the Geneva Conventions and their Additional Protocols.[148] Moreover, in 1999, the UN Secretary-General issued a Bulletin on Observance by United Nations Forces of International Humanitarian Law which asserts that the fundamental principles and rules of international humanitarian law as

---

[145] See Letter of 3 February 2004 by the United Nations Legal Counsel to the Director of the Codification Division, A/CN.4/545 (2004), section II.G: 'As a subsidiary organ of the United Nations, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation.'

[146] For an overview of this debate, see H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996) and P. Szasz, 'UN Forces and International Humanitarian Law' in M. Schmitt, *International Law Across the Spectrum of Conflict: Essays in Honour of Professor L.C. Cohen on the Occasion of His Eightieth Birthday* (2000) 507.

[147] See C. Greenwood, 'International Humanitarian Law and United Nations Military Operations' (1998) 1 *Yearbook of International Humanitarian Law* 3 (Greenwood, *UN Operations*); Resolution on the Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces may be Engaged, adopted at Zagreb in 1971 ('the Zagreb Resolution') (1971) 54 (II) *Annuaire de I 'institut de droit international* 465. See also the 1994 Convention on the Safety of United Nations and Associated Personnel, art. 2(2).

[148] See agreements cited in Greenwood, *UN Operations,* 21.

set out in the bulletin are applicable to UN forces when in situations of armed conflict they are actively engaged as combatants.[149]

It is not easy to determine when peacekeepers become direct participants in hostilities such that they are engaged in armed conflict with another party. The fact that peacekeepers are present in a situation where an armed conflict is ongoing does not mean that they are a party to it. Also the fact that peacekeepers use force in exercise of their right of personal and individual self-defence will not mean that they are combatants involved in the armed conflict. As the Trial Chamber of the Special Court for Sierra Leone put it in *Prosecutor v Sesay, Kallon and Gbao (RUF Judgment)*:[150] 'Where peacekeepers become combatants, they can be legitimate targets for the extent of their participation in accordance with international humanitarian law. As with all civilians their protection would not cease if the personnel use armed force only in exercising their right to individual self-defence.'

The holding that peacekeepers will not be involved in an armed conflict simply because they act in individual self-defence was echoed by a Pre-Trial Chamber of the ICC in *The Prosecutor v Bahar Idriss Abu Garda*.[151] More complicated is the scenario where a peace-keeping force is authorized to use force beyond self-defence but also to execute a particular mandate. In such scenarios, the peace-keeping force may initiate the use of force in the context of an ongoing armed conflict or even where there is no longer an armed conflict, if the force deems this to be necessary to carry out its mandate. The Special Court for Sierra Leone (SCSL) held, immediately following the text just quoted, that: 'Likewise, the Chamber opines that the use of force by peacekeepers in self-defence in the discharge of their

[149] 'Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law' ST/SGB/1999/13 (6 August 1999). For a discussion of the issues raised by the Bulletin, see D. Shraga, 'The Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law- A Decade Later' (2009) *39 Israel Yearbook on Human Rights* 357.

[150] *Prosecutor v Sesay, Kallon and Gbao (RUF case),* SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para 233 (*RUF Judgment*).

[151] *The Prosecutor v Bahar Idriss Abu Garda*, ICC-02/05-02/09, Confirmation of Charges Decision (Pre-Trial Chamber), 8 February 2010, para 83.

mandate, provided that it is limited to such use, would not alter or diminish the protection afforded to peacekeepers.'[152]

The view that when peacekeepers act in defence of their mandate they will, in most cases, not be participating directly in hostilities and thus are to be regarded as entitled to civilian protection has received some scholarly support.[153] However, it is interesting to observe that though the ICC Pre-Trial Chamber 'noted' this part of the decision of the SCSL (and only in a footnote), it pointedly did not endorse this part of the SCSL decision and confined itself to holding that peacekeepers who act in self-defence do not engage in hostilities. It is difficult to see why the fact that peacekeepers are acting to enforce their mandate will mean that they are not engaged in an armed conflict. Such an approach appears to condition the application of international humanitarian law on the legality of the use of force by the UN force and seems to be a throwback to the idea that UN forces are not subject to its rules because of the high mission they fulfil. Where the force used by UN forces is of a nature and intensity as would otherwise bring into effect an armed conflict, it ought to be recognized that they are involved in one, despite the fact that they act lawfully (in terms of the *ius ad bellum*) in using such force. That legality under the *ius ad bellum* ought not to free the force from the constraints that international humanitarian law would impose.

Another way of getting to the result sought by the SCSL (a high threshold for the application of international humanitarian law to UN forces) is indicated by Christopher Greenwood, who has pointed out that the UN Convention on the Safety of United Nations and Associated Personnel 1994 makes the threshold for the application of international humanitarian law, the ceiling for the application of the Convention (i.e. peacekeepers lose the protection of the Convention once the law of international armed conflict applies). He surmises that troop-contributing countries to UN operations will be reluctant to accept the Convention if there is intense fighting and this leads him to the conclusion that 'a United Nations force and national units operating in association with it but under national

[152] *RUF Judgment*, para 233.

[153] S. Sivakumaran, 'War Crimes before the Special Court for Sierra Leone: Child Soldiers, Hostages, Peacekeepers and Collective Punishments' (2010) *8 Journal of International Criminal Justice* 1009, 1028–9.

command will be regarded as parties to an armed conflict only when they have engaged in hostilities on a scale comparable to those of a force established for the purpose of enforcement action. That scale will be considerably higher than that which is used to define an armed conflict for other purposes'.[154] However, although UN forces have an important function and despite the merits of granting them protection from attack, it is difficult to see why the normal rules for determining whether an armed conflict is taking place should not apply. In the first place, international humanitarian law is based on the equality of the parties and this is so despite the fact that one side will usually be acting lawfully under the *ius ad bellum*. Secondly, the view that UN forces should be subject to the same constraints of international humanitarian law, in the similar ways to national forces, is one which takes into account the protection that the population of the territory ought to be entitled to.

However, holding that UN peacekeepers may be involved in an armed conflict with another entity when acting to carry out their mandate but are not involved in an armed conflict when acting in exercise of the individual right of self-defence leads to an imbalance in the application of IHL to UN forces. The position appears to be that UN forces are engaged in an armed conflict with another entity when the UN force uses force against that entity but are not involved in an armed conflict when it is the other entity that has engaged in hostile acts against the UN force. In that latter scenario, the UN force is not involved in an armed conflict and its members are protected as civilians. Thus, UN forces gain an advantage as they may carry out initial acts of targeting which would be lawful if they comply with international humanitarian law principles, but by contrast other forces may not initiate attacks on UN forces as there would be no armed conflict at that point and those other forces would even be committing a war crime.[155] This result appears. on one level, to be contrary to the principle of equal application of international humanitarian law. However, from a formal perspective it is not, given the fact that once an armed conflict is initiated between the UN forces and others both sides are equal. All that the result being discussed

[154] See Greenwood, *UN Operations,* 25.

[155] ICC Statute, art. 8(2)(b)(iii) and (2)(e)(iii).

here leads to is an imbalance as to who may start an armed conflict when UN forces are involved. In this way, the UN's special role does seem to have an impact on the application of international humanitarian law. An alternative approach is to say that acts of individual self-defence by peacekeepers do not make them direct participants in an armed conflict, but where there is a sustained attack on such peace-keeping forces which would normally pass the intensity threshold for an armed conflict one ought to take the view that there is an armed conflict between the UN forces and the attackers (albeit one initiated by other forces). The difficulty with this approach is that it would mean that those attacks on UN peacekeepers would be made lawful (in terms of international humanitarian law) if they are sustained and draw the UN into a conflict, while lower level attacks would not be lawful since there would be no armed conflict with the UN, and the peacekeepers would remain protected as civilians.

Where multinational forces are involved in an armed conflict, it may need to be determined whether that conflict is international or non-international. Where they are engaged in hostilities against the armed forces of a State (as happened, for example with ONUC in the Congo in the 1960s), it would appear that the conflict is an international armed conflict.[156] However, the basis of this assumption is not so easy to justify since the conflict is not between two States but between an international organization and a State. It may be argued that the conflict is international because the actual fighting is carried out by State forces though acting under the umbrella of the UN. However, it has already been established that when those State forces are under the effective control of the UN, they are an organ of the UN and it is the UN that is responsible for them. In those circumstances, there is no armed conflict between the State from which those troops are drawn and the State whose

[156] See Vité, *Typology,* 88. See also Greenwood, *UN Operations,* 27; H. McCoubrey and N.D. White, *The Blue Helmets: Legal Regulation of United Nations Military Operations* (1996), ch. 8 of which seems to assume that when UN forces act it is the law of international armed conflict that is applicable. See also art. 2 of the 1971 Zagreb Resolution of the Institute of International Law on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which the United Nations Forces May be Engaged.

forces they engage.[157] Either there is a customary rule that broadens international armed conflicts to include conflicts involving international organizations and States or alternatively it could be said that the conflict is international because the States providing contingents remain bound by the treaties to which they are party since they have an obligation not only to respect them but also to 'ensure respect' for the conventions in circumstances where their troops act, even if for someone else.[158]

Where the UN engages in an armed conflict with a non-state group within a State and the UN's presence in the State is with the consent of the host State, the conflict ought to be regarded as a non-international armed conflict in line with the analysis above regarding foreign intervention. Where the UN's presence is without consent and solely on the basis of a Security Council resolution, the matter is more difficult and opinion is divided. There are those who would argue that conflicts of this sort are to be regarded as non-international conflicts.[159] However, the sovereignty concerns which led to the establishment of a diminished law with regard to non-international armed conflicts are clearly absent in this sort of case. Others take the view that whenever the UN is involved in an armed conflict, 'these situations are to be equated with international armed conflicts. To the extent that the operations concerned are decided, defined and carried out by international organizations, they are by nature, included in that category. It is of little relevance in that case whether the opposing party is a State or a non-governmental group'.'[160]

The temporal and geographical scope of armed conflicts involving UN peacekeepers is unclear. Does the fact that one contingent of peacekeepers is involved, in one part of the country, in hostilities that are of such intensity as to qualify as an armed conflict, mean that all UN peace-keeping forces in the country are engaged in an armed conflict with that group? It is difficult to think why the answer should be different from that which one would

[157] Unless the view is taken that attribution of the acts of the forces to the UN does not also preclude attribution to the State.

[158] See UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) 376.

[159] See Vité, *Typology,* 88 who asserts this is also the ICRC position.

[160] See Vité, *Typology,* and the extensive literature referred to in n. 70 of that article.

give with regard to State forces (a positive answer). However, the effect of that answer would be to deprive all UN peacekeepers of the protected status they ordinarily enjoy. The matter is made more complicated by the lack of a definite answer as to when the hostilities phase or armed conflict phase ceases. May peacekeepers move from armed conflict to non-conflict depending on whether they are using force? Or once an armed conflict kicks in does it continue until there is some general conclusion of peace? To require a general conclusion of peace in terms of a ceasefire seems artificial as UN peacekeepers with robust enforcement mandates use force in order to achieve a result that is authorized and ought not to be compelled to negotiate a peace in order to regain their civilian protection.

9. Extraterritorial conflicts with non-state armed groups

There are many situations in which a State (the foreign State) will use force on the territory of another State (the territorial State) but where that force is not primarily directed at the territorial State but rather is directed at a non-state armed group based in that State. Examples drawn from the case studies considered in this work include the use of force by Israel in Lebanon in 2006, acts by Uganda and Rwanda in the Democratic Republic of the Congo, Columbia attacks on the FARC in Ecuador in 2008 and US targeting of persons connected with Al Qaeda in countries such as Yemen, Somalia and Pakistan. Several other examples may be given, such as the Turkish use of force directed at PKK targets in Northern Iraq. In most of these cases, the attack by the State on a non-state group abroad represents an extension of a pre-existing conflict taking place within the foreign State, between the foreign State and the non-state group. It may be that the foreign State is pursuing the non-state group across an international border in order to deny the group cross-border refuge. In other cases, though more rarely, the non-state group is primarily based within the territorial State but has engaged in cross-border attacks on the foreign State or is otherwise deemed to be a threat to the security of the foreign State.

It is possible that despite the use of force by a State against a non-state group, the level of violence does not cross the threshold of an armed conflict.[161] However, where it does, one question that arises in all of these situations is how the distinction between international and non-international armed conflicts applies to these transnational or transborder conflicts. At one level, the distinction appears to be an imperfect fit. The hostilities in question do not engage the armed forces of two States and are thus factually different from the quintessential international armed conflicts (which are, of course, inter-state conflicts). On the other hand, though the hostilities and other acts are between a State and a non-state group they are not internal to the foreign State or to any particular State. There is, as a matter of fact, an international element to the conflict. Furthermore, both Common Article 3 and Additional Protocol II, dealing with non-international armed conflict, appear, on their face, to confine such conflicts to the territory of one Contracting Party. Common Article 3 speaks of an 'armed conflict not of an international character occurring in the territory *of one* of the High Contracting Parties' (emphasis added) and article 1(1) of Additional Protocol II refers to an armed conflict 'which take[s] place in the territory of a High Contracting Party'.

As a result of these apparent incongruities between the facts and the law, some have suggested that international humanitarian law ought to recognize a new and different form of armed conflict which takes account of the transnational aspects of these conflicts but which also recognizes that the conflicts in question are conflicts between States and non-state groups.[162] These new approaches have not found much favour and have been rejected by other scholars who have sought to apply international humanitarian law, as it exists, to the conflict between the State and the non-state group. Ths traditional approach requires, first, examining whether the violence between a State and a non-state group is an 'armed

[161] See further discussion in ch. 13 on Al-Qaeda below.

[162] See G. Corn, 'Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict' (2006) 40 *Vanderbilt Transnational Law Journal* 295; R. Schöndorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?' (2004) 37 *New York University Journal of International Law and Politics* 26.

conflict' and secondly, making a determination as to how to fit it into the international or non-international dichotomy.[163]

Some writers who take this latter approach have come to the conclusion that conflicts involving the use of force by a State against a non-state group on the territory of another State are non-international armed conflicts where the force is directed solely at that non-state group.[164] This is also the view of the majority of contributors to the present book. These writers argue, correctly, that the wording of Common Article 3, referred to above, does not prevent a non-international armed conflict from straddling more than one State. Indeed those who take this view note that the reference to *one* of the High Contracting Parties was simply a reference to the fact that this provision in the Conventions only applies where fighting occurs in the territory of, at least, one party to the Conventions, without an intention to confine the application of Common Article 3 to situations where fighting occurs solely within the territory of only one of the parties.[165] It is further argued that the classification of the conflict as non-international follows from the fact that the opposing parties are not two States but rather a State and a non-state group. It is said that classifying such a conflict as international would not only be contrary to the party structure of international armed conflicts, but also that 'non-state actors would be unable to comply with many of the international armed conflict provisions, and states would be unwilling to grant non-state actors immunities from prosecution granted to prisoners of war in conflicts

---

[163] M. Sassoli, 'Transnational Armed Groups and International Humanitarian Law' Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, No. 6 (Winter 2006) 5 (Sassoli, *Transnational Armed Groups*); Paulus and Vashakmadze, *Asymmetrical War* 111; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors* (2010) (Lubell, *Extraterritorial Use of Force*), part II (particularly ch. 4) and also N. Lubell**,** ch. 13 below; C. Kreβ, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) *15 Journal of Conflict and Security Law* 245.

[164] See the writers cited in the previous note (with the exception of Sassoli). See also T. Hoffman, 'Squaring the Circle?—International Humanitarian Law and Transnational Armed Conflicts' in M.J. Matheson and D. Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Text of Recent Armed Conflicts* (2008).

[165] See Vité, *Typology*; Lubell, *Extraterritorial Use of Force*, ch. 4 and Lubell, ch. 13 below; Sassoli, *Transnational Armed Groups*. See also *Hamdan v Rumsfeld,* 548 U.S. 557, 126 S.Ct. 2749 (29 June 2006) (*Hamdan v Rumsfeld)*.

of this type. The rules of non-international armed conflict are precisely designed for conflicts in which one of the parties is a non-state actor'.[166]

It may well be that a conflict between a State and a non-state group is not to be regarded as an international armed conflict in and of itself. However, that contention does not itself resolve the matter under consideration. It is important to recall that the purpose of classification of conflicts is so that one can determine the law which applies to the actions of participants in the conflict. Therefore, the essential question in such a case is which law applies to the conflicts between a foreign State and a non-state group that occurs in the territorial State. Where the conflict between the foreign State and the non-state group is inextricably bound up with another conflict (notably a conflict between two States) such that acts under the two conflicts (to the extent the conflicts can be distinguished) cannot be separated, the participants will, in reality, be bound to observe the law of international armed conflicts.

In the view of this author, the law that governs transnational conflicts between a State and a non-state group will depend, in the first place, on whether the territorial State in which the non-state group is based has given its consent to the foreign State using force against that group. Where such consent exists, then the conflict will be governed by the law of non-international armed conflicts. The situation here will be no different from a situation in which the territorial State is itself fighting the non-state group and invites the foreign State to intervene. The consent of the territorial State has the effect that there are not two opposing States involved in the conflict.[167]

Irrespective of the consent of the territorial State, there are at least two situations where, applying our earlier analysis, a transnational conflict between a State and a non-state

[166] See discussion in ch. 13 below.

[167] See the discussion on foreign intervention on the side of the territorial State in section 7.2 above. See also Fleck, *Non-International Armed Conflicts,* 608: 'It is suggested that the non-international or international character of an armed conflict depends on the question whether or not a responsible territorial government has given its consent to military operations performed by the intervening State. Under the Westphalian system armed conflicts can be determined as international only in a case in which states . . . are involved as parties to the conflict.'

group will be governed by the law of international armed conflicts. First of all, where the non-state group belongs to, or acts on behalf of a State (other than the intervening foreign State) a conflict between that non-state group and the foreign State will be an international armed conflict because there will be two opposing States. Therefore, it may be considered whether Hezbollah was to be regarded as belonging to Lebanon (or indeed to a third State) in the 2006 conflict with Israel. If it was,[168] then the conflict was international. Secondly, where a State occupies a foreign State, in order to act against a non-state group, or as a result of a conflict with a non-state group, then the actions of the occupying State during the period of occupation will be governed by the law of occupation and other rules relating to international armed conflicts. This follows from our earlier analysis[169] and was the position adopted by the International Court of Justice and the International Criminal Court with respect to Uganda's occupation of Ituri province in the Democratic Republic of Congo.[170]

Most controversy in this area centres around the cases where a foreign State fights against a non-state group in the territorial State but without the consent of the territorial State. In the view of this author, and contrary to the views described above, in such circumstances, there will be an international armed conflict between the foreign State and the territorial State. This will be the case because the use of force by the intervening foreign State on the territory of the territorial State, without the consent of the latter, is a use of force *against* the territorial State. This is so even if the use of force is not directed against the governmental structures of the territorial State, or the purpose of the use of force is not to coerce the territorial State in any particular way. That a use of force on the territory of another State (even if directed against non-state groups) without its consent is a use of force against the territorial State in breach of obligations to it can be seen from State practice and the jurisprudence of international tribunals. The International Court of Justice in the *Armed Activities* case held that:

---

[168] See further discussion in ch. 12 below.

[169] See discussion in section 5 above on occupation.

[170] See *Armed Activities* case. For a similar view, see the decision of the ICC Pre-Trial Chamber in *Prosecutor v Lubanga*, para 220; also *Prosecutor v Katanga and Chui*, para 240.

> The Court considers that the obligations arising under the principles of non-use of force and non-intervention were violated by Uganda even if the objectives of Uganda were not to overthrow President Kabila, and were directed to securing towns and airports for reason of its perceived security needs, and in support of the parallel activity of those engaged in civil war.[171]

The Court further concluded that '[t]he unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter'.[172] It should be recalled that article 2(4) prohibits uses of force *against* the territorial integrity or political independence of other States. Similarly, when Columbia attacked FARC forces in Ecuador in March 2008, the Organization of American States adopted a resolution stating the use of force had violated the territorial sovereignty of Ecuador. More generally, when States use force abroad, even against non-state groups, they routinely invoke article 51 of the UN Charter.[173] Article 51 is an exception to article 2(4) and invocation of that article is an acceptance that article 2(4) is engaged and that absent article 51, the use of force would be against the territorial integrity of another State.

Given that a use of force by one State on the territory of another, without the consent of the latter, is a use of force by the foreign State against the territorial State, a situation of armed conflict between the two automatically arises. An international armed conflict is no more than the use of armed force by one State against another. As Greenwood has stated, '[a]n international armed conflict exists if one State uses force against another State'.[174] To state otherwise is to assert that there can be an armed contention between States, possibly even an act of aggression by one State against another but that this is not covered by the rules which international law has designed to regulate such contentions between States. It

---

[171] *Armed Activities* case, para 163.

[172] Ibid, para 165.

[173] See Israel's letters to the UN Security Council and Secretary-General on 12 July 2006 with respect to action against Hezbollah in Lebanon, S/2006/515, A/60/937 (12 July 2006).

[174] Greenwood, *Scope of Application,* 46, para 202.

matters not (and ought to matter not) whether the territorial State responds by using force against the foreign State. Common Article 2 to the Geneva Conventions makes it clear that the Conventions apply even if one of the parties does not acknowledge a state of war. It is also irrelevant to the existence of a state of international armed conflict whether the targeted entities are part of the governmental structure of the State or whether the purpose of the use of force is to affect the government of the State where force is being used. In the first place there is a distinction between a State and a government. International armed conflicts are conflicts between States. A government is but one part of a State. A State is also made of people and territory in addition to a government in control of the territory.[175] Secondly, it would be difficult to discern what is meant by the governmental infrastructure of a State and no uniform answer can be given to that question. Whether airports, sea ports, electricity-generating plants, roads, bridges etc. are owned by the government of a State, or by private parties (as is the case in some countries) will depend on the economic approach adopted by that particular country. None of these things are intrinsically governmental. Thirdly, and most importantly, to attempt to distinguish between force directed at a non-state group and force which has as its overall purpose the intention to influence the government of the State is to condition the application of international humanitarian law on the mental state or motive of the attacker. It is to suggest that the very same acts of force directed by one State against the territory of another State would yield different legal results depending on the intention of the intervening State regarding whom it seeks to affect. The protections afforded to the civilian population and to the infrastructure of the territorial State ought not to depend on the motives of the foreign State. Additionally, this idea is problematic as the mental state or motive of the foreign State may not be easily discernible. What is important are the objective facts, which are: that force is being used by one State *against* another State (i.e. on its territory and without its consent).

The view that any use of force by a State on the territory of another without the consent of the latter brings into effect an international armed conflict between the two States has

[175] Montevideo Convention on the Rights and Duties of States 1933, art. 1.

some support from scholars,[176] though it is probably not the majority view in the existing literature and, as noted above is not the view of the majority of the authors of this book. However, this view has the support of the international tribunals that have had occasion to consider the matter. First one may recall Judge Shahabuddeen's statement in the *Tadić* case that whether there was an international armed conflict depended on whether the Federal Republic of Yugoslavia was using force against Bosnia.[177] In his view, all that needed to be shown was the use of force by one State against another for an international armed conflict to come into being. Secondly, the International Court of Justice's opinion in the *Armed Activities* case supports the view taken here. The Court applied the law of international armed conflicts (the Geneva Conventions and Additional Protocol I) to the activities of Uganda in the Democratic Republic of the Congo and even to acts of Uganda outside the province of Ituri, which was held to have been under Ugandan occupation. The Court's decision was implicitly based on the view that there was an international armed conflict between Uganda and the Democratic Republic of the Congo, despite the fact that Uganda was in the territory of the Democratic Republic of the Congo primarily to fight non-state groups.[178] In the *Targeted Killings* case, the Israeli Supreme Court also took the view that 'an armed conflict of international character [is] . . . one that crosses the borders of the state—whether or not the place in which the armed conflict occurs is subject to belligerent occupation'.[179]

That an international armed conflict exists where a State uses force against a non-state group on the territory of another State without the consent of the latter State was also confirmed by the UN Commission of Inquiry into the conflict in Lebanon in 2006.[180] The

---

[176] See Fleck, *Non-International Armed Conflicts,* 607; Sassoli, *Transnational Armed Groups*, 5; J. Stewart, 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal' (2007) *5 Journal of International Criminal Justice* 1043.

[177] See *Tadić* Trial Judgment, Separate Opinion of Judge Shahabuddeen.

[178] See *Armed Activities* case.

[179] See *Targeted Killings* case, para 18.

[180] Human Rights Council, 'Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council resolution S-2/1*' A/HRC/3/2 (23 November 2006) paras 50–62.

Commission was of the view 'that hostilities were in actual fact and in the main only between the IDF and Hezbollah. [However] The fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it'.[181]

One of the points emphasized by the Commission in reaching this finding was that:

> the State of Lebanon was the subject of direct hostilities conducted by Israel, consisting of such acts, as an aerial and maritime blockade that commenced on 13 July 2006, until their full lifting on 6 and 8 September 2006, respectively; a widespread and systematic campaign of direct and other attacks throughout its territory against its civilian population and civilian objects, as well as massive destruction of its public infrastructure, utilities, and other economic assets; armed attacks on its Armed Forces; hostile acts of interference with its internal affairs, territorial integrity and unity and acts constituting temporary occupation of Lebanese villages and towns by IDF.[182]

Indeed both Israel and Lebanon were of the view that the conflict was international despite the fact that Israeli action was primarily directed at Hezbollah and despite the fact that Lebanese armed forces did not respond in the conflict.[183]

Themain judicial decision that appears to take a contrary view is the *Hamdan* decision of the US Supreme Court.[184] In that case the Court stated that Common Article 3 applies to persons detained by the US in connection with action taken against Al-Qaeda. The reasoning of the US Supreme Court in this part of the decision is rather confusing and it is not at all

---

[181] Ibid, para 55.

[182] Ibid, para 58.

[183] Ibid, paras 59 and 62.

[184] *Hamdan v Rumsfeld*. See also the decision of ICC Trial Chamber in *Lubanga, Trial Judgment* came to a different view: 'It is widely accepted that when a State enters into conflict with a nongovernmental armed group located in the territory of a neighbouring State and the armed group is acting under the control of its own State, "the fighting falls within the definition of an international armed conflict between the two States". However, if the armed group is not acting on behalf of a government, in the absence of two States opposing each other, there is no international armed conflict.' (para.541, footnote references omitted)

clear that it reaches the conclusion that there is a conflict with Al-Qaeda which is of a non-international character. There are two ways of reading the *Hamdan* decision. One is that the Court applied Common Article 3 because it considered the conflict to be non-international. The other way to read it is that the Court was simply saying that Common Article 3 applied, at a minimum, to the conflict with Al-Qaeda. The US government had argued before the Court in that case that, firstly, it was engaged in a conflict with Al-Qaeda which was separate and distinct from the conflict in Afghanistan, and, secondly, that the conflict with Al-Qaeda was not an armed conflict to which the full Geneva Conventions applied. The Court responded by saying that: '*We need not decide the merits of this argument* because there is *at least* one provision of the Geneva Conventions that applies here even if the relevant conflict is not one between signatories' (emphasis added).[185]

Since the Supreme Court also quoted that part of the International Court of Justice's decision in the *Nicaragua* case*,* which held that Common Article 3 applies as a minimum even in international armed conflicts,[186] its decision is not decisive as to the classification of the conflict with Al-Qaeda, to the extent there was a separate conflict at all.[187]

Even if there is an international armed conflict between an intervening foreign State and a State on whose territory a non-state group is based, it might be argued that this has no bearing on the conflict between foreign State and the non-state group as that conflict would be non-international and there would be two conflicts running in parallel. The relationship between the foreign State and the non-state group would be governed by the law of non-

[185] Ibid, sentence with fn 61 attached.

[186] Ibid, fn 63.

[187] It is worth noting that the position of the Obama administration is that the US is involved in an armed conflict with Al-Qaeda, but it does not state explicitly that this is a non-international conflict. However, reference is made to Common Article 3 which indicates that the US believes the conflict is a non-international conflict, see H. Koh, 'The Obama Administration and International Law' Remarks at the Annual Meeting of the American Society of International Law, Washington, DC (25 March 2010). See also, In Re: Guantanamo Bay Detainee Litigation, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees held at Guantanamo Bay (13 March 2009), available at: www.justice.gov/opa/documents/memo-re-det-auth.pdf, where there is similar ambiguity regarding the classification of the conflict (but where the US administration seeks to draw from the law of international armed conflicts).

international armed conflicts. However, the important point here is that the conflict with the non-state group will be so bound up with the international armed conflict between the two States that it will be impossible to separate the two conflicts. With respect to the conduct of hostilities and targeting in general, every act of targeting by the foreign State will not only be an attempt to target the non-state group (or members thereof) but will also at one and the same time be a use of armed force against the territorial State because it is a use of force on that State's territory without its consent. This means that every act of targeting or opening fire must comply with the law of international armed conflicts.

With regard to detention and the status of combatants, one anxiety that is expressed by some authors is that saying that there is an international armed conflict between a State and non-state group would imply that fighters of the non-state group have combatant immunity or are entitled to prisoner of war status. However, this conclusion does not follow from the assertion that the foreign State is involved in an international armed conflict with the territorial State and that such hostilities are bound up with those against the non-state group. It is one thing to assert that the law of international armed conflict applies; it is another thing to see *how* that law applies. Applying the law of international armed conflict would not grant combatant immunity or indeed prisoner of war status to fighters from the non-state group, as they would not, in practically all cases, fulfil the criteria for these statuses. In the first place, the fighters being considered here would not, by definition, fight on behalf of the State or belong to it as we are only speaking of cases where the territorial State (or another State) is not involved in the hostilities directly or indirectly. If the fighters of the non-state group do belong to another State, the conflict would unquestionably be international. Secondly, they will usually not fulfil the other criteria for prisoner of war status.

However, questions remain as to whether members of that non-state group should be entitled to the benefits that the rest of the population are entitled to. In particular, if they are detained should they be accorded the protections to which civilians are entitled under the Fourth Geneva Convention? The answer to this question depends, first of all, on the

applicability of the Fourth Geneva Convention to persons who take part in hostilities but who are not entitled to prisoner of war status.[188] Views on this are divided but the better view is that such persons, provided they fulfil the nationality criteria in article 4 of that Convention, are, in principle, entitled to such protections as are provided for in the Fourth Geneva Convention, subject to possible limitations imposed in accordance with article 5 of that Convention.[189] The next question would be whether the rules relating to detention apply given that those rules are restricted to protected persons in the territory of the belligerent and in situations of occupation. In the absence of a belligerent occupation, it may be asserted that battlefield unprivileged belligerents are not covered by those parts of the Fourth Geneva Convention relevant to detention.[190] Apart from these questions, in principle, there is no reason why persons in the territory where the conflict takes place should be deprived of protections that they ordinarily enjoy with regard to a foreign force. If a person were to be picked up by the foreign State and detained, it is impossible to see how the person's status as a civilian in the international armed conflict should be superseded by a claim that the person is a fighter in a non-international armed conflict. Such persons are protected persons under the Geneva Conventions and do not lose that status because they may have engaged in acts that are hostile to the foreign State.

So to summarize, the law that applies to transnational conflicts between a foreign State and a non-state group is the law of international armed conflicts where the foreign State intervenes without the consent of the territorial State. This application of the law of international armed conflict is consistent with the underlying reasons for the distinction between international and non-international armed conflicts. In the case of conflicts with non-state groups on the territory of another State, there is little reason to have the more

---

[188] For an extensive discussion, see Dörmann, *Unlawful Combatants*; R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) *28 British Yearbook of International Law* 325; D. Jinks, 'The Declining Significance of POW Status' (2004) 45 *Harvard Journal of International Law* 367; L. Vierucci, 'Prisoners of War or Protected Persons *qua* Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are Entitled' (2003) 1 *Journal of International Criminal Justice* 284; J. Callen, 'Unlawful Combatants and the Geneva Conventions' (2004) 44 *Virginia Journal of International Law* 1025.

[189] For an extensive discussion, see Dörmann, *Unlawful Combatants.*

[190] Ibid.

limited regulation of non-international conflicts as the conflict is not an internal matter. The sovereignty and State autonomy reasons that are used to justify having more limited regulation of non-international armed conflicts do not apply where the State is acting outside its own territory. Deference to the sovereignty of the foreign State ought not to apply where that State acts outside its territory, as the sovereignty and autonomy of the territorial State are now also in issue. Importantly, the territorial State has interests at stake: interests in the protection of its territory and of its civilian population and infrastructure.