

# **Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict**

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International humanitarian law applies different rules depending on whether an armed conflict is international or internal in nature. Commentators agree that the distinction is “arbitrary,”<sup>1</sup> “undesirable,”<sup>2</sup> “difficult to justify,”<sup>3</sup> and that it “frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs”.<sup>4</sup> The views are not new. In 1948 the International Committee of the Red Cross (ICRC) presented a report recommending that the Geneva Conventions apply the full extent of international humanitarian law “[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties”.<sup>5</sup> In 1971, it submitted a draft to a Conference of Government Experts recommending a further proposition that was intended to make the whole body of international humanitarian law applicable to a civil war if foreign troops intervened.<sup>6</sup> The ICRC put forward a more subtle proposal along the same lines the following year.<sup>7</sup> Finally, in 1978 the Norwegian delegation of experts to the same Conference proposed that the two categories of armed conflict be dropped in favour of a single law for all kinds of armed conflict, again without success.<sup>8</sup> Somewhat surprisingly, calls for a unified body of international humanitarian law have since died out, even though “the manifold expressions of dissatisfaction with the dichotomy between international and internal armed conflicts”<sup>9</sup> persist.

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This article revives the calls for a single law of armed conflict by illustrating the failure of the current regime to deal with conflicts that contain both international and non-international elements, namely internationalized armed conflicts. While the article does not attempt to comprehensively plot the content of a single law applicable to all armed conflict, it does sketch the outlines of a unified regime that might better account for the intricacies of internationalized warfare.

1 R. J. Dupuy and A. Leonetti “La notion de conflit armé à caractère non international” in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale scientifica, Naples, 1971, p. 258. “Elle produit une dichotomie arbitraire entre les conflits, puisque la distinction, purement formelle, ne se fonde pas sur une observation objective de la réalité ...”. See also G. Aldrich, “The laws of war on land”, *American Journal of International Law*, Vol. 94, 2000, p. 62. “Reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories – international and non-international – into which international humanitarian law is divided.”

2 “It is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflict.” I. Detter, *The Law of War*, Cambridge University Press, London, 2002, p. 49.

3 C. Warbrick and P. Rowe, “The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal on jurisdiction in the Tadić case”, *International & Comparative Law Quarterly*, Vol. 45, 1996, p. 698.

4 “The ‘distinction’ between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.” W. Michael Reisman and J. Silk, “Which law applies to the Afghan conflict?”, *American Journal of International Law*, Vol. 82, 1988 p. 465.

5 J. Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949*, Vol. III: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 31 (hereinafter *Commentaries*).

6 The paragraph reads: “When, in case of non-international armed conflict, one or the other party, or both, benefits from the assistance of operational armed forces afforded by a third State, the parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts.” International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts*, Geneva, 1971, para. 284.

7 The proposal sought to apply the full body of international humanitarian law to internal conflicts when third States intervened in support of both sides. See International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts*, Geneva, 1972, Vol. I, para. 2.332.

8 See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, *Official Records*, Summary Record, Vol. 5, p. 91 (CDDH/SR.10) (1978).

9 S. Boelaert-Suominen, “Grave breaches, universal jurisdiction and internal armed conflict: Is customary law moving towards a uniform enforcement mechanism for all armed conflicts?” *Journal of Conflict and Security Law*, Vol. 5, No. 63, 2000, at section 5.

## The reality of internationalized armed conflict

The term “internationalized armed conflict” describes internal hostilities that are rendered international. The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.<sup>10</sup> The most transparent internationalized internal armed conflicts in recent history include NATO’s intervention in the armed conflict between the Federal Republic of Yugoslavia (FRY) and the Kosovo Liberation Army (KLA) in 1999<sup>11</sup> and the intervention undertaken by Rwanda, Angola, Zimbabwe, Uganda and others, in support of opposing sides of the internal armed conflict in the Democratic Republic of Congo (DRC) since August 1998.<sup>12</sup>

The proliferation of nuclear weaponry and its inhibiting impact on direct forms of aggression during the Cold War led to many less transparent internationalized armed conflicts, which although superficially internal were in fact “wars by proxy”, taking place in the territory of a single State with the covert intervention of foreign governments.<sup>13</sup> The United States government’s support of the *contras* in Nicaragua in the early 1980s is perhaps the best documented example.<sup>14</sup>

Motivations for intervention in civil wars may have changed since the end of the Cold War, but the increased economic interdependence of States born of *globalization*, the development of nuclear capabilities among previously incapable states, the greater incidence of terrorism in Western

<sup>10</sup> D. Schindler, “International humanitarian law and internationalized internal armed conflicts”, *International Review of the Red Cross*, No. 230, 1982, p. 255.

<sup>11</sup> S. Alexeyevich Egorov, “The Kosovo crisis and the law of armed conflicts”, *International Review of the Red Cross*, No. 837, 2000, p.183.

<sup>12</sup> “By 1999, a new war was raging in the renamed Democratic Republic of the Congo. The Rwandan and Ugandan governments now supported the anti-Kabila opposition. Zimbabwe, Angola and other States backed Kabila.” M. Shaw, “From the Rwandan genocide of 1994 to the Congo civil war”, <<http://www.sussex.ac.uk/Users/hafaz3/rwanda.htm>>. See also Human Rights Watch, “Eastern Congo ravaged: Killing civilians and silencing protest”, Vol. 12, No. 3(A), <[http://www.hrw.org/reports/2000/drc/Drco05-01.htm#P68\\_1748](http://www.hrw.org/reports/2000/drc/Drco05-01.htm#P68_1748)>.

<sup>13</sup> G. Abi-Saab, “Non-international armed conflicts”, in *International Dimensions of Humanitarian Law*, Henry Dunant Institute / Unesco, Geneva, 1988, p. 222.

<sup>14</sup> See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14.

countries and the increasing scarcity of natural resources all provide continuing incentives for foreign intervention in domestic conflicts. As a reflection of that reality, internal conflicts are presently more numerous, brutal and damaging than their international counterparts,<sup>15</sup> despite the fact that the State remains the main war-waging machine.<sup>16</sup> Consequently, international humanitarian law still very much exists against a backdrop “d’une fusion des éléments politiques internes et internationaux dont l’effet cumulatif est le phénomène de conflit interne internationalisé: l’intervention d’Etats tiers dans les guerres civiles est un fait constant.”<sup>17</sup> There is almost invariably some form of foreign state involvement in internal armed conflicts.<sup>18</sup>

The difficulty from a humanitarian perspective is that although internationalized armed conflicts have special features distinguishing them from both international and internal armed conflicts,<sup>19</sup> there is absolutely no basis whatsoever for a halfway house between the law applicable in internal armed conflicts and that relevant to international warfare.<sup>20</sup> Therefore, the application of international humanitarian law to internationalized armed conflicts involves characterizing events as either wholly international or wholly non-international according to the various tests espoused in the Geneva Conventions, their Protocols and customary international law.

## The legal dichotomy

### Thresholds for the application of international humanitarian law

Traditionally, international humanitarian law has sought to regulate the conduct of and damage caused by conflict between rather than within States. The distinction was based on the premise that internal armed violence

<sup>15</sup> B. De Schutter and C. Van De Wyngaert, “Non-international armed conflicts: The borderline between national and international law”, *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, p. 279.

<sup>16</sup> Detter, *op. cit.* (note 2), p. 38.

<sup>17</sup> R. Bierzaneck, “Quelques remarques sur l’applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés” in C. Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984.

<sup>18</sup> According to Detter “... most apparently ‘internal’ wars do, in fact, receive some kind of outside support.” Detter, *op. cit.* (note 2), p. 40. See also L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, London, 2000, p. 46: “Even in the post-Cold War international order, outside involvement in internal armed conflicts is still far from uncommon.”

<sup>19</sup> H-P. Gasser, “Internationalized non-international armed conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon”, *American University Law Review*, Vol. 33, 1983, p. 157.

<sup>20</sup> C. Byron, “Armed conflicts: International or non-international?”, *Journal of Conflict and Security Law*, Vol. 6, No. 1, June 2001, p. 87.

raises questions of sovereign governance and not international regulation. On that basis, the 1899 and 1907 Hague Conventions respecting the Laws and Customs of War on Land applied solely to international warfare.<sup>21</sup>

The Geneva Conventions of 1949 continued to very heavily favour regulation of inter-State rather than domestic warfare, the vast majority of the substantive provisions contained in the Geneva Conventions of 1949 applying solely to:

“...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>22</sup>

Although the scope of the article was more restrictive than some would have hoped, the wording marked an important departure from earlier conventions that had required more formalistic declarations of war.<sup>23</sup> From the perspective of internationalized armed conflicts, which are often characterized by covert rather than direct military action, the change was critical.

In addition, the international community's experience of the Spanish Civil War, which was in fact heavily internationalized,<sup>24</sup> and the massive atrocities committed against minority groups within individual nations during the Second World War, contributed to a political willingness to at least superficially regulate some aspects of civil war. After considerable disagreement in giving that willingness form, Article 3 common to the four Geneva Conventions of 1949 extended the most rudimentary principles of humanitarian protection to those persons taking no active part in hostilities and placed *hors de combat*.<sup>25</sup> The problematic issue of defining internal armed

<sup>21</sup> Aldrich, “The law of war on land”, *op. cit.* (note 1), p. 54.

<sup>22</sup> Article 2 common to the four Geneva Conventions of 1949.

<sup>23</sup> Reisman and Silk, *op. cit.* (note 4), p. 461.

<sup>24</sup> K. D. Heath, “Could we have armed the Kosovo Liberation Army? The new norms governing intervention in civil war”, *UCLA Journal of International Law & Foreign Affairs*, Vol. 4, 2000, pp. 272 – 274.

<sup>25</sup> The principles include prohibition of: “(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. Common Article 3(2) also stipulates that “[t]he wounded and sick shall be collected and cared for”.

conflict was circumvented by a negative definition that rendered common Article 3 applicable in “armed conflicts not of an international character,” even if “one of the most assured things that might be said about the words ‘not of an international character’ is that no one can say with assurance precisely what they were intended to convey.”<sup>26</sup> Although the substance of common Article 3 defines principles of the Conventions and stipulates certain imperative rules, the article does not contain specific provisions.<sup>27</sup> In addition, the scant principles enumerated in it apply only where the intensity of hostilities reaches the level of “protracted armed violence between governmental authorities and organised armed groups or between such armed groups.”<sup>28</sup>

The Additional Protocols to the Geneva Conventions continued the distinction between international and non-international armed conflicts “leaving unresolved the troublesome question of the law to be applied to armed conflicts in which there are both international and non-international elements.”<sup>29</sup> Additional Protocol I sought to reaffirm and develop the rules affecting victims of international armed conflicts, specifically indicating in Article 1 that “[t]his Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.”<sup>30</sup> Tellingly in relation to internationalized armed conflicts, Article 1(4) of Additional Protocol I also explicitly provides that “...armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination” automatically qualify as international armed conflicts for the purposes of the Protocol. Although the subject of some considerable criticism, the inclusion of such conflicts within the scope of Article 1(4) confirms that the dichotomy

<sup>26</sup> T. Farer, “The humanitarian laws of war in civil strife: Towards a definition of ‘international armed conflict’” *Revue Belge du Droit International*, 1971, p. 26 quoted in Moir, *op. cit.* (note 18), p. 46.

<sup>27</sup> *Commentaries*, *op. cit.* (note 5), p. 48.

<sup>28</sup> *Prosecutor v. Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70 (hereinafter *Tadić Jurisdiction Appeal*).

<sup>29</sup> 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, p. 100.

<sup>30</sup> The aspect of Common Article 2 that the section cross-references reads: “...all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

between international and non-international conflict is far from strict or principled: international armed conflict is not a synonym for inter-State warfare, nor does the full extent of international humanitarian law presuppose that the collective belligerents must be States.<sup>31</sup>

The more limited development of the law applicable in non-international armed conflicts was continued by Additional Protocol II, which sought to develop and supplement Article 3 common to the Geneva Conventions of 12 August 1949.<sup>32</sup> While providing greater clarity to the broad principles identified in common Article 3, Additional Protocol II set a significantly higher threshold for its own application, limiting its scope:

“to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (...) (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”<sup>33</sup>

Therefore, unlike common Article 3 of the Geneva Conventions, Additional Protocol II will not apply to conflicts between two warring dissident groups. It will also only apply in conflicts that in fact approximate to traditional conceptions of inter-State warfare, namely where an organized dissident armed force exercises military control over a part of the territory of a State Party.

In the context of internationalized armed conflicts, which by definition contain both international and internal elements, determining which set of rules applies and to what aspect of the conflict is critically important.

### The substantive legal differences

Superficially, the difference between the substantive regulation of international armed conflicts and the laws applicable in non-international armed conflicts is striking. As a reflection of the historical bias in international humanitarian law towards the regulation of inter-State warfare, the

<sup>31</sup> Bierzanek, *op. cit.* (note 17), p. 284: “[L]e conflit international n’est pas synonyme de conflit interétatique; de plus, le droit de la guerre ne présuppose pas, pour toutes ses règles, que les collectivités belligérantes doivent être des Etats.”

<sup>32</sup> Additional Protocol II, Art. 1.

<sup>33</sup> *Ibid.*

1949 Geneva Conventions and the 1977 Protocols contain close to 600 articles, of which only Article 3 common to the 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts.<sup>34</sup> In addition and as previously mentioned, the law of The Hague addressing methods and means of combat and conduct of armies in the field is not applicable in internal armed conflicts.<sup>35</sup>

Consequently, a strict reading of the Conventions and their Protocols would suggest that a range of very significant disparities between the two regimes exist. For example, common Article 3 covers only non-participants and persons who have laid down their arms, and does little to regulate combat or protect civilians against the effects of hostilities.<sup>36</sup> Common Article 3 also fails to define elaborate rules of distinction between military and civilian targets<sup>37</sup> and makes no mention of the principle of proportionality in target selection.<sup>38</sup> Although Additional Protocol II does address the protection of civilian populations more explicitly,<sup>39</sup> its coverage does not compare to the prohibitions on indiscriminate attack,<sup>40</sup> on methods and means of warfare causing unnecessary suffering<sup>41</sup> and on damage to the natural environment,<sup>42</sup> that are applicable under Additional Protocol I.

Most significant from a political perspective is the fact that there is no requirement in either common Article 3 or Additional Protocol II that affords combatants *prisoner-of-war* status in non-international armed conflicts, nor is there anything preventing parties from prosecuting enemy combatants in those circumstances for having taken up arms.<sup>43</sup>

<sup>34</sup> Boelaert-Suominen, *op. cit.* (note 9), footnote 31.

<sup>35</sup> *Ibid.*

<sup>36</sup> A. Cassese, "A tentative appraisal of the old and new humanitarian law of armed conflict", in A Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale scientifica, Naples, 1971, pp. 492-493.

<sup>37</sup> Article 48 of Additional Protocol I states that "[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."

<sup>38</sup> Additional Protocol I, Articles 51(5)(b), 57(2)(iii) and 85(3).

<sup>39</sup> Additional Protocol II, Articles 13-15, relating to the protection of the civilian population, of objects indispensable to the survival of the civilian population and of works and installations containing dangerous forces.

<sup>40</sup> Additional Protocol I, Art. 51.

<sup>41</sup> *Ibid.*, Art. 35(2)

<sup>42</sup> *Ibid.*, Art. 35(3).

<sup>43</sup> In international armed conflicts, combatants have a "right to participate directly in hostilities." Additional Protocol I, Art. 43(2).



More intricate anomalies are myriad even in instances of overlap between the two systems. For example, while common Article 3 prevents a combatant from being tortured, it does not prevent him or her from being executed for treason.<sup>44</sup> The uncomfortable overlap was also reinforced by the Rome Statute of the International Criminal Court (ICC Statute), which perpetuates the cumbersome international/non-international legal dichotomy. The Statute limits the grave breaches regime to international conflicts<sup>45</sup> and, despite similarities,<sup>46</sup> the serious violations provisions of common Article 3 that are applicable in “armed conflicts not of an international character” are both different and less comprehensive than their international counterparts.<sup>47</sup>

Yet somewhat ironically given the staunch opposition to explicitly assimilating the laws of war applicable in internal and international armed conflict, there is now extensive literature that suggests that customary international law has developed to a point where the gap between the two regimes is less marked.<sup>48</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić Jurisdiction Appeal* held that customary rules governing internal conflicts include:

“protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property,

<sup>44</sup> According to Farer, if an internal combatant's punishment is limited to detention, the conditions and form of detention may approach barbarity without manifestly violating common Article 3 and in spite of the more complete protection that the Third Geneva Convention would offer prisoners-of-war in circumstances of international equivalence. T. Farer, “Humanitarian law and armed conflicts: Towards the definition of ‘international armed conflict’”, *Columbia Law Review*, Vol. 71, 1971, pp. 39-40.

<sup>45</sup> ICC Statute, Art. 8(2)(b).

<sup>46</sup> The ICTY has held that there is no material difference between the term “wilful killing” within the grave breaches regime and common Article 3's prohibition of “murder” and that “torture” is the same legal phenomenon in both types of conflict. Boelaert-Suominen, *op. cit.* (note 9), citing *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 Nov. 1998 (hereinafter “*Čelebići Judgement*”), paras 421-23. Other provisions in the ICC Statute, such as those dealing with inhuman treatment including biological experiments (Art. 8(2)(a)(ii)) and wilfully causing great suffering or serious injury to body or health (Art. 8(2)(a)(iii)), correspond to provisions in it relating to violence to life and person (Art. 8(2)(c)(i)) and outrages upon personal dignity (Art. 8(2)(c)(i)).

<sup>47</sup> For a detailed comparison see H. Spieker, “The International Criminal Court and non-international armed conflicts”, *Leiden Journal of International Law*, Vol. 13, 2000, p. 417.

<sup>48</sup> Boelaert-Suominen, *op. cit.* (note 9); Byron, *op. cit.* (note 20); J-M. Henckaerts, “The conduct of hostilities: Target selection, proportionality and precautionary measures under international humanitarian law”, in The Netherlands Red Cross, *Protecting Civilians in 21st-Century Warfare: Target Selection, Proportionality and Precautionary Measures in Law and Practice*, 8 December 2000, p. 11.

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.”<sup>49</sup>

The then President of the ICTY, Antonio Cassese, opined that “there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts...”<sup>50</sup> Similarly minded and in contrast to the terms of the ICC Statute, at least one ICTY Appeals Chamber Judge considered that “a growing practice and *opinio juris*, both of States and international organizations, has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles (...) even when they are committed in the course of an internal armed conflict.”<sup>51</sup> In fact, the ICRC has chosen to address what it calls “the insufficiency with respect to content and coverage” of treaty law applicable in non-international armed conflicts by analysis of custom and not promulgation of further treaty-based law.<sup>52</sup> The position reflects the reality that national legislation,<sup>53</sup> international legal instruments<sup>54</sup> and judicial reasoning<sup>55</sup> all show that “states are chipping away at the two-legged edifice of the laws of armed conflict.”<sup>56</sup>

On the other hand, the Appeals Chamber of the ICTY warns that even though the chipping away process may have come some distance in

<sup>49</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), para. 127.

<sup>50</sup> Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court, in Moir, *op. cit.* (note 18), p. 51.

<sup>51</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), Separate Opinion of Judge Abi-Saab.

<sup>52</sup> Henckaerts, *op. cit.* (note 48), p. 11.

<sup>53</sup> See (Belgium): Law of 16 June 1993 concerning repression of grave breaches (“*infractions*”) of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 8 June 1977; (Spain) *Código Penal*, Law 10/1995, of 23 November; (Finland): Chapter 11 of the Revised Penal Code Dealing with War Crimes and Crimes Against Humanity, 21 April 1995, *Finnish Law Gazette* 1995/587; (United States): Article 6 of the United States War Crimes Act 1996; (Netherlands): The Dutch Law of War Crimes 1952; (Sweden): Chapter 22, Section 11, of the Swedish Penal Code, National Council for Crime Prevention, Stockholm (1986); (Switzerland): *Code Pénal Militaire*, Federal Law of 13 June 1927; (Nicaragua): *Ley de Código penal de la Republica de Nicaragua*, *Bibliografía Técnicas*, (1997), all cited in Boelaert-Suominen, *op. cit.* (note 9), p. 4.3.1.

<sup>54</sup> The Amended Protocol II of 1996 to the 1980 UN Weapons Convention, the 1997 Ottawa Convention on the Prohibition of Anti-personnel Mines and the 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict all apply equally to international and non-international armed conflicts.

<sup>55</sup> See Boelaert-Suominen, *op. cit.* (note 9), section 4.3.2.

<sup>56</sup> *Ibid.*, section 5.

eroding the disparity between the laws applicable in international and non-international armed conflict, “this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”<sup>57</sup> Consequently, the process has created what Meron describes as “a crazy quilt of norms that would be applicable in the same conflict, depending on whether it is characterized as international or non international.”<sup>58</sup> Thus, the struggle to determine the law applicable in armed conflicts that as a matter of fact involve both international and internal elements, becomes a complex but important task.

### The test for internationalization

In the *Tadić Appeal Judgement*, the Appeals Chamber of the ICTY stipulated that:

“It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”<sup>59</sup>

### Agents of a State

The most frequently applied limb of the *Tadić Appeal Judgement*’s test for determining whether an internal armed conflict has become international is whether “some of the participants in the internal armed conflict act on behalf of [an]other State.”<sup>60</sup> The International Court of Justice (ICJ) was asked to answer a similar question in the *Military and Paramilitary Activities in and against Nicaragua* case in order to determine the responsibility of the United States for armed conflict between the *contras* it had

<sup>57</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), para. 126.

<sup>58</sup> T. Meron, “Classification of armed conflict in the former Yugoslavia: Nicaragua’s fallout”, *American Journal of International Law*, Vol. 92, 1998 (hereinafter “Nicaragua’s fallout”), p. 238.

<sup>59</sup> *Prosecutor v. Tadić*, T-94-1-A, Judgement, 15 July 1999, para. 84 (hereafter *Tadić Appeal Judgement*).

<sup>60</sup> *Ibid.*

sponsored and the Nicaraguan government.<sup>61</sup> In defining the circumstances in which an insurgent's acts can be attributed to a State, the Court applied what it described as an "effective control" test,<sup>62</sup> which involved assessing:

"whether or not the relationship of the contras to the United States Government was so much one of *dependence on the one side and control on the other* that it would be right to equate the contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."<sup>63</sup>

In applying that test to the facts, the ICJ found that despite a high degree of participation and a general degree of control over the contras, who were highly dependent on that foreign assistance, the United States was not responsible for violations of humanitarian law perpetrated by the contras since those violations "...could be committed by members of the contras without the control of the United States."<sup>64</sup>

The substance of the decision and its relevance to international humanitarian law have been the subject of considerable judicial inconsistency and academic dispute, the intricacies of which are thoroughly set out elsewhere.<sup>65</sup> For the present purposes, it is sufficient to note that the *Tadić Appeal Judgement* overruled the Trial Chamber's support for the strict "effective control" test espoused in the *Nicaragua case*, declaring the ICJ's reasoning "unconvincing [...] based on the very logic of the entire system of international law on State responsibility."<sup>66</sup> As a result of the overruling, an

<sup>61</sup> *Nicaragua case, op. cit.* (note 14). The ICJ somewhat confusingly distinguished the question of whether the acts of the contras were imputable to the United States from the question of whether the United States had breached its international obligations to Nicaragua through its relationship with the contras. The Court concluded that it "...does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras" *Nicaragua case, op. cit.* (note 14), para. 116.

<sup>62</sup> The Court stated that "for this conduct to give rise to a legal responsibility of the United States, it would in principle have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed." *Ibid.*, para. 115 (emphasis added).

<sup>63</sup> *Ibid.*, para. 109 (emphasis added).

<sup>64</sup> *Ibid.*, para. 115.

<sup>65</sup> See Meron, "Nicaragua's fallout", *op. cit.* (note 58), Byron, *op. cit.* (note 20) and Moir, *op. cit.* (note 18), pp. 46-52.

<sup>66</sup> *Tadić Appeal Judgement, op. cit.* (note 59), para. 116.

apparently less stringent<sup>67</sup> and some suggest “dubious”<sup>68</sup> test for determining when parties can be considered to be acting on behalf of States has gained ascendancy in international criminal law.<sup>69</sup> The test espouses three different standards of control under which an entity could be considered a de facto organ of a State, each differing according to the nature of the entity.<sup>70</sup>

Firstly, where the question involves the acts of a single private individual or a not militarily organized group that is alleged to have acted as a de facto State organ,

“it is necessary to ascertain whether specific instructions concerning the commission of that particular act has been issued by that State to the individual or group in question, or alternatively, it must be established whether the unlawful act has been publicly endorsed or approved ex post facto by the State at issue.”

In the second instance, involving control by a State over subordinate armed forces, militias or paramilitary units, “control must be of an overall character.” The Appeals Chamber declared that:

“... control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training).”<sup>71</sup>

The Appeals Chamber made clear that the overall control test under the second category requires that a State “*has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group*” but

<sup>67</sup> The Appeals Chamber in *Aleksovski* declared that “[b]earing in mind that the Appeals Chamber in the *Tadić* Judgement arrived at this test against the background of the “effective control” test set out by the decision of the ICJ in *Nicaragua*, and the “specific instructions” test used by the Trial Chamber in *Tadić*, the Appeals Chamber considers it appropriate to say that the standard established by the “overall control” test is not as rigorous as those tests.” *Prosecutor v. Aleksovski* IT-95-14/1-A, Judgement, 24 March 2000 (hereinafter “*Aleksovski Appeal Judgement*”), para. 145.

<sup>68</sup> Moir describes the overruling as “...an unnecessary (and indeed dubious) piece of reasoning.” Moir, *op. cit.* (note 18), p. 49.

<sup>69</sup> See *Tadić Appeal Judgement*, *op. cit.* (note 59); *Aleksovski Appeal Judgement*, *op. cit.* (note 67), paras 120-154; *Prosecutor v. Delalić et al.* IT-96-21-A, Judgement, 20 February 2001, paras 5-50 (hereinafter “*Čelebići Appeal Judgement*”); *Prosecutor v. Naletilić et al.* IT-98-34-T, Judgement, 31 March 2003, paras 183-188.

<sup>70</sup> *Čelebići Appeal Judgement*, *op. cit.* (note 69), para. 13.

<sup>71</sup> *Tadić Appeal Judgement*, *op. cit.* (note 59), para.137.

that it “does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.”<sup>72</sup>

The third and final test involves “assimilation of individuals to State organs on account of their actual behaviour within the structure of a State.”<sup>73</sup> The Appeals Chamber’s only explanation of the somewhat undeveloped category consisted of three illustrations: an Austrian Jew elevated by German camp administrators to positions of authority over the other internees;<sup>74</sup> a Dutch national who in fact behaved as a member of the German forces;<sup>75</sup> and the attribution of international responsibility to Iran for acts of five Iranian “Revolutionary Guards” in “army type uniforms”.<sup>76</sup>

Despite the now extensive literature addressing the issue,<sup>77</sup> application of the three-pronged test remains complex, convoluted and the subject of considerable confusion, even among Appeals Chamber Judges themselves.<sup>78</sup> That complexity is plainly undesirable when, as Judge Shahabuddeen persuasively reiterates in the *Blaskić Judgement*, the degree of control required to internationalize an armed conflict is simply that which “is effective in any set of circumstances to enable the impugned state to use force against the other state through the intermediary of the foreign military entity concerned.”<sup>79</sup> The question is, after all, whether the insurgent’s actions amount to “a resort to armed force between States.”<sup>80</sup>

Moreover, if the complexity of the various tests has proved difficult to apply in the context of criminal prosecutions where the full extent of

<sup>72</sup> *Ibid.*, para.,137 (emphasis added).

<sup>73</sup> *Ibid.*, para.,141.

<sup>74</sup> *Ibid.*, para.,142.

<sup>75</sup> *Ibid.*, para.,143.

<sup>76</sup> *Ibid.*, footnote 174.

<sup>77</sup> See Meron, “Nicaragua’s fallout”, *op. cit.* (note 58), Byron, *op. cit.* (note 20); Moir, *op. cit.* (note 18), pp. 46 – 52; R. Hayden “Bosnia’s Internal War and the International Criminal Tribunal”, *Fletcher Forum of World Affairs*, Vol. 22, No. 1, 1998, p. 45; R. Hayden, “Biased ‘Justice’: Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia”, *Cleveland State Law Review*, Vol. 47, 1999, p. 566.

<sup>78</sup> Judge Shahabuddeen claims “I am unclear about the need to challenge *Nicaragua*. I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate.” *Tadić Appeal Judgement*, *op. cit.* (note 59), Separate Opinion of Judge Shahabuddeen, para. 17.

<sup>79</sup> *Prosecutor v Blaskić*, IT-95-14, Judgement, 3 March 2000 (hereinafter “*The Blaskić Judgement*”) Declaration of Judge Shahabuddeen.

<sup>80</sup> An “armed conflict” is said to exist “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.” *Prosecutor v Kunarac et al.*, IT-96-23/1-A, Judgement, 12 June 2002, para. 56 (hereinafter “*Kunarac Appeal Judgement*”).

hostilities can be viewed in hindsight,<sup>81</sup> it must be debilitating for forces involved in hostilities on the ground when the very purpose of internationalized armed conflicts is often to employ covert methods of warfare. In those circumstances, relevant information is “the subject of fierce controversy of a political nature”,<sup>82</sup> giving rise to “opinions about the facts that often differ widely.”<sup>83</sup> The possibility that commanders of the Northern Alliance in present-day Afghanistan could be expected to assess a test the Appeals Chamber itself can hardly agree on, in the heat of battle, based on highly protected intelligence and on an ongoing basis seems slim. Certainly, “there is no reason to think that, during a conflict, one could convince a military commander to respect certain rules by arguing that he is an agent of a foreign country.”<sup>84</sup>

The complexity also has serious effects on outside parties seeking to enforce international humanitarian norms. Not only will parties to a conflict involving various international and domestic actors struggle to determine whether detainees qualify for prisoner-of-war status, so too will the ICRC, which is attempting to encourage respect for that status.<sup>85</sup> Moreover, from the perspective of legality the test is a shaky foundation for the application of the very different penal sanctions provided for under the two regimes. It is hardly surprising, then, that the test has unduly delayed proceedings of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR).

In sum, the three-pronged test may well reflect the current state of public international law on state responsibility, but its application to international humanitarian law undermines the possibility of a consistent or principled application of humanitarian norms in internationalized warfare. As this paper will show, that failing is unfortunately inevitable in a regime that requires armed forces to artificially categorize internationalized armed conflict

<sup>81</sup> Much of the evidence used by ICTY decisions to characterize the internal conflicts as internationalized is “[a]n ex post facto confirmation of the fact...”. *Tadić Appeal Judgement*, *op. cit.* (note 59), para. 157.

<sup>82</sup> Gasser, *op. cit.* (note 19), p. 157.

<sup>83</sup> *Ibid.* For example, as Reisman and Silk point out, “the war in Afghanistan has never been either purely internal or purely international. Any determination is further complicated by the lack of neutral accounts of the conflict. Afghanistan is caught up in the politics of East-West rivalry, and most reports of the conflict there rely, to a large degree, on sources with a clear preference for or tie to one side or the other in the larger rivalry.” Reisman and Silk, *op. cit.* (note 4), p. 467.

<sup>84</sup> M. Sassòli and L. M. Olson, “International decision: *Prosecutor v. Tadić* (Judgement)”, *American Journal of International Law*, Vol. 94, July 2000, p. 576.

<sup>85</sup> Byron, *op. cit.* (note 20), p. 88.

as wholly international or non international. The solution is thus to abandon the distinction rather than redefine the three-pronged test.

### Military intervention

The second criterion the *Tadić Appeals Judgement* considered capable of rendering an internal armed conflict international occurs where “another State intervenes in that conflict through its troops.”<sup>86</sup> In the *Blaškić Judgement*, the ICTY Trial Chamber seized on a range of factors in finding “ample proof to characterize the conflict as international” based on “Croatia’s direct intervention in Bosnia-Herzegovina”.<sup>87</sup> Although, like *Tadić*, the Chamber declined to articulate any particular standard for what degree of intervention would be sufficient to internationalize a pre-existing internal armed conflict, it was satisfied that that process had taken place by the presence of an estimated 3,000 to 5,000 regular Croatian Army personnel who were mostly stationed outside the area of conflict between the the Croatian Defence Council and the Bosnia Herzegovina Army.<sup>88</sup> Although the Chamber accepted evidence that the Croatian Army had had some presence in the area of conflict, the principal rationale for its decision was that the Croatian Army’s hostilities:

“in the areas outside the [conflict zone] inevitably also had an impact on the conduct of the conflict in that zone. By engaging the [Bosnia Herzegovina Army] in fighting outside the [conflict zone], the Croatian Army weakened the ability of the [Bosnia Herzegovina Army] to fight the [Croatian Defence Council] in central Bosnia.”<sup>89</sup>

Consequently, the reasoning would seem to suggest that foreign military intervention that only indirectly affects an independent internal conflict is sufficient to render that conflict international. That supposition was subsequently confirmed by the *Kordić & Čerkez Judgement*, which found that the Croatian government’s intervention in the conflict against Serb forces in Bosnia internationalized a separate conflict in which the Croatian government had no direct military involvement, namely the conflict between Bosnian Croats and Bosnian Muslims.<sup>90</sup> According to the Trial Chamber, it did this “by enabling the

<sup>86</sup> *Tadić Appeal Judgement*, *op. cit.* (note 59), para. 84.

<sup>87</sup> *The Blaškić Judgement*, *op. cit.* (note 79), paras. 75, 76 and 94.

<sup>88</sup> The Trial Chamber went on to find that the Croatian Defence Council also acted as an agent of the Croatian government, but the analysis of military intervention was independent of that finding.

<sup>89</sup> *The Blaškić Judgement*, *op. cit.* (note 79), para. 94.

<sup>90</sup> *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Judgement, 26 February 2001.



Bosnian Croats to deploy additional forces in their struggle against the Bosnian Muslims.”<sup>91</sup> The decision also uses a range of evidence to reach its conclusion, but similarly fails to quantify the requisite extent of direct military force. The *Naletilić Judgement* followed suit, stating unhelpfully that:

“There is no requirement to prove that [Army of the Republic of Croatia] troops were present in every single area where crimes were allegedly committed. On the contrary, the conflict between the [Armed Forces of the Government of Bosnia and Herzegovina] and the [Croatian Defence Council] must be looked upon as a whole and, if it is found to be international in character through the participation of the [Army of the Republic of Croatia] troops, then Article 2 of the Statute will apply to the entire territory of the conflict.”<sup>92</sup>

In fact, a Trial Chamber’s review of an indictment in *Prosecutor v. Rajić* is the only instance where the question is specifically addressed.<sup>93</sup> In that decision, the Chamber found that an internal armed conflict could be rendered international if troops intervene “significantly and continuously”.<sup>94</sup> Unfortunately, significant and continuous intervention is hardly a term of precision. Moreover, the fact that the term is not mentioned in the *Kordić & Čerkez*, *Blaškić* or *Naletilić Judgements* raises the question of whether more minor military intervention could suffice. Certainly the Geneva Conventions apply in traditional inter-State armed conflicts “regardless of their level of intensity”.<sup>95</sup>

<sup>91</sup> *Ibid.*, para. 108(2).

<sup>92</sup> *Prosecutor v. Naletilić et al*, *op. cit.* (note 69), para. 194.

<sup>93</sup> *Prosecutor v. Rajić*, IT-95-12-R61, Review of the Indictment Pursuant to Rule 61, 13 September 1996, para. 12 “The Appeals Chamber’s decision on jurisdiction in the Tadić case did not, however, set out the quantum of involvement by a third State that is needed to convert a domestic conflict into an international one.”

<sup>94</sup> *Ibid.*, para. 21 “There is therefore enough evidence to establish for the purpose of the present proceedings that, as a result of the significant and continuous military intervention of the Croatian Army in support of the Bosnian Croats, the domestic conflict between the Bosnian Croats and their Government in central Bosnia became an international armed conflict, and that this conflict was ongoing at the time of the attack on Stupni Do in October 1993.”

<sup>95</sup> See Baxter, *op. cit.* (note 29), p. 98: “The proper view would seem to be that ‘any other armed conflict which may arise between two or more of the High Contracting Parties’ should be taken as referring to any outbreak of violence between the armed forces of two states, regardless of the geographical extent and intensity of the force employed...”. Fenrick argues that “the firing of weapons by soldiers of opposing sides across a contested border on the uninvited intervention of the armed forces of one State, even in small numbers, in the territory of another State may trigger the application of the Geneva Conventions in totality.” M. Cottier, W. Fenrick, P. Viseur Sellers and A. Zimmermann, “Article 8, War Crimes”, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes, Article by Article*, Nomos, Baden-Baden, 1999, p. 182, quoted in Byron, *op. cit.* (note 20), footnote 137. See also *Commentaries*, *op. cit.* (note 5): “It makes no difference how long the conflict lasts, or how much slaughter takes place.”

There is no legal basis for treating internationalized armed conflicts any differently.

Yet allowing foreign military intervention of any intensity to internationalize all armed conflicts within a territory sits uncomfortably with the *Tadić Appeal Judgement's* initial statement on internationalized armed conflicts that presupposed that an armed conflict may "...depending upon the circumstances, be international in character alongside an internal armed conflict". Regrettably, the possibility of direct military intervention that only indirectly involves an internal armed conflict as in the *Blaškić* and *Kordić & Čerkez Judgements*, and the absence of any meaningful threshold test for what extent of direct military intervention will internationalize a conflict, suggests the absence of a principled basis for distinguishing internationalized armed conflicts from those "international in character alongside an internal armed conflict".

One explanation may be that only "direct military intervention which has the effect of supporting a campaign is enough to internationalize the conflict".<sup>96</sup> But as a matter of logic it is questionable whether a military intervention that does not involve insurgents acting on the intervening State's behalf could make that insurgent group qualify as "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory...",<sup>97</sup> with the result that it becomes meaningful to speak of "resort to armed force between States".<sup>98</sup> An intervening State's unintentional support of third parties does not make those parties its agents and if insurgents do not belong to a State for the purposes of the Geneva Conventions, their actions cannot constitute an international armed conflict.<sup>99</sup>

<sup>96</sup> R. Cryer, "The fine art of friendship: *Jus in bello* in Afghanistan", *Journal of Conflict and Security Law*, Vol. 7, 2002, p. 42.

<sup>97</sup> Third Geneva Convention, Art. 4(2) (emphasis added).

<sup>98</sup> Common Art. 2 of the Geneva Conventions; See also *Kunarac Appeal Judgement*, *op. cit.* (note 80), para.56.

<sup>99</sup> See for example Judge Shahabuddeen's declaration in the *Blaškić Judgement* where he states that "There is an armed conflict between a secessionist group and the government of the state. A foreign state intervenes militarily in support of the secessionist group and is resisted by the local state. The external military intervention clearly constitutes an armed conflict between states for the purpose of making the Fourth Geneva Convention applicable. But does the internal conflict itself become an armed conflict between states? The answer is in the affirmative if the foreign state assumes control over the secessionist group such that the use of force by the secessionist group becomes a use of force by the foreign state against the local state, thereby giving rise to an armed conflict between states within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention." *The Blaškić Judgement*, *op. cit.* (note 79), Declaration of Judge Shahabuddeen.

Even where support is an intentional consequence of intervention, the notion that mere support could internationalize an otherwise internal armed conflict would seem to contradict the “overall control” test for agency, which explicitly states that “it is not sufficient for the group to be financially or even militarily *assisted* by a State.”<sup>100</sup> The argument that direct military intervention should be treated differently because it completely changes the course of the conflict<sup>101</sup> is also unconvincing, since provision of arms, financial aid and intelligence have similar effects despite being explicitly excluded by the same “overall control” test.

The more pertinent rationale for incorporating military intervention as a criterion for the internationalization of armed conflicts might be that for the purposes of the second paragraph of Article 2 common to the Geneva Conventions, such intervention qualifies as a partial occupation. That paragraph was “intended to fill the gap left by paragraph 1”<sup>102</sup> by stipulating that the entire Conventions “shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”<sup>103</sup> Even so, the application of the paragraph to foreign military intervention in civil conflicts poses several problems.

It is clear that the passage was adopted in order to extend the application of obligations of Occupying Powers under the Fourth Geneva Convention to *protected persons* in instances of occupation such as that which occurred when the German Reich invaded Czechoslovakia in 1939, where the latter simply capitulated without putting up armed resistance.<sup>104</sup> The paragraph’s ability to internationalize a pre-existing and independent internal conflict is less clear, perhaps reflected by the absence of any reference to the provision in the *Blaškić, Kordić & Čerkez* or *Naletilić* Judgements. Moreover, while it is laudable to bring as much as possible of the humanitarian law applicable to international armed conflicts into operation, military presence need not amount to occupation and has no bearing on whether the

<sup>100</sup> *Tadić Appeal Judgement*, *op. cit.* (note 59), para. 130 (emphasis added).

<sup>101</sup> Aldrich, “The laws of war on land”, *op. cit.* (note 1), p. 63. See also F. Kalshoven, *The Law of Warfare: A Summary of its Recent History and Trends in Development*, A.W. Sijthoff, Leiden, 1973, p. 15: “it seems justified for the purposes of the present subject to attribute the aforesaid internationalizing effect to intervention taking the form of direct and significant participation of foreign armed forces, as that will incontestably deprive the armed conflict of its original character as a purely intestine affair.”

<sup>102</sup> *Commentaries*, *op. cit.* (note 5), p. 22.

<sup>103</sup> 1949 Geneva Conventions, common Art. 2 .

<sup>104</sup> Baxter, *op. cit.* (note 29), p. 95. See also *Commentaries*, *op. cit.* (note 5), p. 8.

conduct of insurgents qualifies as the use of armed force by one State against another. Allowing foreign military presence to internationalize all conflict within a territory is also inconsistent with the notion that an international armed conflict can exist “alongside an internal armed conflict,” and directly contradicts the State Parties’ rejection of the clause that would have allowed for the automatic application of the full body of international humanitarian law when a third State militarily intervenes.<sup>105</sup> In fact, the major concern behind the rejection of the suggested amendment based on direct military intervention was that it would create a massive incentive for insurgents to seek assistance from sympathetic foreign States, thereby rapidly escalating internal hostilities.<sup>106</sup> That concern persists in the jurisprudence identified.

Predictably, the lack of clarity in determining the circumstances in which military intervention will suffice to render an internal conflict international raises serious practical difficulties. For instance, the alleged participation of several senior Ugandan military personnel in the Rwandan Patriotic Front’s war with the Forces Armées Rwandaises (FAR) between 1990 and 1994,<sup>107</sup> may have constituted “another State interven[ing] in that conflict through its troops.”<sup>108</sup> That participation might have been sufficient to internationalize the conflict, contrary to the ICTR’s findings that “it is a matter of common knowledge that the conflict in Rwanda was of an internal non-international character.”<sup>109</sup> Yet even if the FAR could somehow determine the overall degree and significance of Ugandan military participation, it seems highly unlikely that it would re-question “common knowledge” in

<sup>105</sup> See note 7.

<sup>106</sup> D. Schindler, “The different types of armed conflicts according to the Geneva Conventions and Protocols”, *Recueil des Cours*, Vol. II, 1979, p. 150.

<sup>107</sup> “On 1 October 1990, the Ugandan army invaded Rwanda under the disguise of an internal rebellion by the Rwandese Patriotic Front (RPF) led by the Rwandan-born Ugandan General Fred Rwigema. At that time, General Paul Kagame was pursuing military studies in USA as an Ugandan military officer; in fact, he was the Deputy Chief of Military Intelligence in the Ugandan government’s army (...). When Gen. Fred Rwigema died in the end of October 1990, Major Paul Kagame returned to Uganda and took charge of the RPF.” Rally for the Return of Refugees and Democracy in Rwanda, “No Arms Nor Impunity For Suspected Rwandan War Criminals On Power,” Press Release No. 4/2001 < <http://www2.minorisa.es/inshuti/rdr26.htm>> See also S. R. Shalom, “The Rwandan Genocide” <<http://www.zmag.org/ZMag/articles/april96shalom.htm>> “In October 1990, the Rwandan Patriotic Front, an organization of primarily Tutsi refugees from Uganda, invaded the country to obtain the right to return to Rwanda and to overthrow the dictatorial Habyarimana regime. Many of the RPF soldiers were veterans of civil war in Uganda, where they had fought for a non-ethnically based regime, some rising to high positions in the Ugandan military.”

<sup>108</sup> *Tadić Appeal Judgement*, *op. cit.* (note 59), para.84.

<sup>109</sup> *Prosecutor v. Ntagurura et al*, ICTR-99-46-T, 4 July 2002, “Oral Decision”, p. 9.

light of that information, to bind itself to a more rigorous body of humanitarian law on the basis of legal standards that lack any real clarity.

In sum, the inclusion of direct foreign military intervention *qua* foreign military intervention in the test for an internationalized armed conflict is at best confusing and at worst fundamentally incoherent. In either case, the implications for the principled observance of humanitarian norms are bleak.

### The effect of internationalization

Even after an aspect of the test for internationalization is satisfied, the effect of that internationalization on other conflicts within the same territory and the extent to which international humanitarian law continues to apply after the end of international participation remain unclear.

#### “Global” versus “mixed” characterization

The position adopted by the ICTY relative to violence in the former Yugoslavia is that it can be characterized “at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.”<sup>110</sup> The predominance of that “mixed” approach is reflected in the inclusion of the phrase “depending upon the circumstances, [the conflict may] be international in character alongside an internal armed conflict” in the *Tadić Appeal Judgement’s* original test for internationalization of internal conflict.<sup>111</sup> The rationale for the “mixed” approach is apparently that an act of internationalization only renders international the conflict between the parties *belonging* to States rather than all conflicts in the territory.<sup>112</sup> While the position is clearly justified on a strict reading of the Conventions, it is equally clear that it often involves artificially differentiating internal

<sup>110</sup> “Taken together, the agreements reached between the various parties to the conflict(s) in the former Yugoslavia bear out the proposition that, when the Security Council adopted the Statute of the International Tribunal in 1993, it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.” *Tadić Appeal Judgement*, *op. cit.* (note 59), para. 73.

<sup>111</sup> See above note 59.

<sup>112</sup> Greenwood also defends the “mixed” approach based on the danger of prejudging the status of the conflict given the marked difference between the criminal law applicable in the two circumstances; the apparent intention of the Security Council that both types of conflict occurred in the former Yugoslavia and the complexity of the conflicts in the area. C. Greenwood “International Humanitarian Law and the *Tadić* Case”, *European Journal of International Law*, Vol. 7, No. 2, 1996, available at: <<http://www.ejil.org/journal/Vol7/No2/art8-01.html#TopOfPage>>.

aspects of armed conflicts from international, a process that has proved impractical, convoluted and imprecise. As McDonald observes:

“[w]ith the increase in the number of internal and internationalized armed conflicts is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was...”<sup>113</sup>

In response, a number of authorities have preferred to apply the full body of international humanitarian law to an entire territory that contains multiple conflicts of international and internal origin. For instance, in the case of the former Yugoslavia, proponents of this “global view” of characterisation considered “... the situation to be an international armed conflict, arguing that to divide it into isolated segments to exclude the application of the rules of international armed conflict would be artificial.”<sup>114</sup> The global view has considerable support: Judges Li<sup>115</sup> and Rodrigues,<sup>116</sup> the *Nikolić* and *Mrđić* Decisions,<sup>117</sup> the United Nations Commission of Experts,<sup>118</sup> the United States government<sup>119</sup> and several academic scholars<sup>120</sup> have advocated or adopted a blanket classification of State territories containing international and internal armed conflicts. Even the normally reticent ICRC urged parties

<sup>113</sup> A. McDonald, “The year in review”, *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 121.

<sup>114</sup> Meron, “Nicaragua’s fallout”, *op. cit.* (note 58), p. 238.

<sup>115</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), Separate Opinion of Judge Li on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras. 17-18: “I am of the opinion that the submission of the Prosecution to view the conflict in the former Yugoslavia in its entirety and to consider it international in character is correct.”

<sup>116</sup> *Prosecutor v. Aleksovski*, Case No IT-95-14/1, Judgement, 25 June 1999, Dissenting Opinion of Judge Rodrigues, Presiding Judge of the Trial Chamber, paras. 19 and 22: “[I]nternational humanitarian law applies throughout the territory in which an international conflict takes place (...) and for the entire duration of the hostilities, insofar as the conflict must be viewed as a whole” and “I support a global approach to the conflict in the former Yugoslavia.”

<sup>117</sup> Byron, *op. cit.* (note 20), p. 68.

<sup>118</sup> “[T]he Commission is of the opinion that the character and complexity of the armed conflicts concerned, combined with the web of agreements on humanitarian law that the parties have concluded among themselves, justifies the Commission’s approach in applying the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.” *Final Report of the Commission of Experts S/1994/67*, 4-27 May 1994, section II.A.

<sup>119</sup> *Prosecutor v. Tadić*, IT-94-1-T, “Amicus Curiae Brief presented by the Government of the United States”, 25 July 1995, cited in Meron, “Nicaragua’s fallout”, *op. cit.* (note 58), pp. 26-34, footnote 15.

<sup>120</sup> Meron, “Nicaragua’s fallout”, *op. cit.* (note 58), p. 238. See also G. H. Aldrich, “Comment: Jurisdiction of the International Criminal Tribunal for the former Yugoslavia”, *American Journal of International Law*, Vol. 90, 1996, p. 68: “In my view, this first decision by the appeals chamber is unfortunate in that it complicates unnecessarily the further work of the Tribunal by suggesting that each prosecution will have to involve arguments and decisions as to the characterization of the armed conflict in which the alleged offenses occurred...”

to the Vietnam War in 1965 to observe the full body of international humanitarian law throughout the territory, on the basis of the same reasoning.<sup>121</sup>

Although the global view is positive from a practical and humanitarian perspective, it is contradicted by the international community's rejection of the ICRC's attempt to adopt an explicit provision in Additional Protocol I making the whole body of international humanitarian law applicable to a civil war if foreign troops intervened<sup>122</sup> and by what is now the orthodox reference to "mixed" international and non-international armed conflicts in the jurisprudence of the ICTY.<sup>123</sup> The global approach would also seem to lead to the conclusion that a single international use of force in a foreign territory, direct or otherwise, would somehow suffice to render all internal armed conflict in that territory international irrespective of whether internal conflicts constitute a "resort to force between States" within the terms of the Geneva Conventions.

The tension between the two approaches to characterization is not likely to be easily resolved. As Meron laments:

"the contradictory decisions rendered by the different ICTY chambers on the nature of the conflicts in the former Yugoslavia illustrate the difficulty of characterizing 'mixed' or 'internationalized' conflicts. There is no agreed-upon mechanism for definitively characterizing situations of violence."<sup>124</sup>

Worse, the relative strengths and weaknesses of the "mixed" and "global" views indicate that reaching any sort of agreement within the present framework will inevitably involve choosing between a theory that cannot work and a practice that is not justified. The challenge, therefore, is not so much to the merit of the two competing views as to the structure of international humanitarian law more generally.

### Close of internationalized hostilities

Article 6 of the Fourth Geneva Convention defines the point at which the law applicable in international armed conflicts ceases to apply. The article stipulates that "[i]n the territory of Parties to the conflict, the application

<sup>121</sup> "Respect for the rules of humanity in Vietnam", *International Review of the Red Cross*, No. 53, August 1965, p. 417.

<sup>122</sup> See notes 7 and 90.

<sup>123</sup> See *Tadić Appeal Judgement*, *op. cit.* (note 59), paras. 73 and 84; *The Blaškić Judgement*, *op. cit.* (note 79), Declaration of Judge Shahabuddeen.

<sup>124</sup> T. Meron "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, 2000, (hereinafter "Humanization of Humanitarian Law"), p. 261.

of the present Convention shall cease on the general close of military operations.”<sup>125</sup> The *Commentaries* on the Geneva Conventions afford the term “general close of military operations” a broad interpretation, indicating that it is equivalent to the point at which “the last shot has been fired,”<sup>126</sup> and “in most cases (...) the final end of all fighting between all those concerned.”<sup>127</sup> Thus, in States that contain several warring factions of both international and internal origin, the *Commentaries* at least superficially suggest that international humanitarian law continues to apply until the end of all hostilities, domestic or otherwise. The competing view is that the term “close of military operations” implies only international military operations, allowing ongoing hostilities “not of an international character” to continue or recommence under the auspices of the law applicable to non-international armed conflict.

Somewhat ambiguously, the ICTY Appeals Chamber in the *Tadić Jurisdiction Appeal* addressed the issue by declaring that:

“International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>128</sup>

While the statement is often cited to give international humanitarian law its widest possible application, it is far from clear that it represents an authority for the notion that the law applicable in international armed conflicts continues to apply to surviving internal conflict. The more plausible interpretation is that the Chamber’s comments only contemplate ongoing obligations between warring parties *inter se*, in accordance with the more restrictive view of “close of military operations.” That interpretation is supported by the same decision’s creation of the “mixed” approach to characterization on the very basis that international and non-international armed conflicts can mutate and co-exist. The interpretation is also supported by the fact that both the *Čelebići* and *Tadić Trial Judgements* found that prior to the Yugoslav People’s Army’s formal withdrawal on 19 May 1992, the relevant

<sup>125</sup> Fourth Geneva Convention, Art. 6.

<sup>126</sup> *Commentaries*, *op. cit.* (note 5), Vol. IV, p. 62.

<sup>127</sup> *Ibid.*

<sup>128</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), para. 70.



conflict was international in character, but that subsequently the Bosnian Serbs were not agents of the Federal Republic of Yugoslavia, and that the conflict was therefore internal.<sup>129</sup> The former judgement emphatically declared that:

“It is evident that there was no general cessation of hostilities in Bosnia and Herzegovina until the signing of the Dayton Peace Agreement in November 1995. The Trial Chamber must, however, address the possibility that the nature of the armed conflict was changed by the withdrawal of the external forces involved, and hence the cessation of those hostilities, and the commencement of a distinct, self-contained, internal conflict between the Government of Bosnia and Herzegovina and organised armed groups within that State.”<sup>130</sup>

Although the conclusions that the status of the conflict were both overturned on appeal because of factual findings concerning agency, in both cases the Appeals Chamber tacitly endorsed the notion that an international armed conflict can become internal<sup>131</sup> Moreover, the possibility of transition from international to internal armed conflict is not a mere function of international criminal prosecution: formal foreign recognition of the People's Republic of Kampuchea in 1980 sufficed to render an internationalized conflict internal despite ongoing hostilities in the territory.<sup>132</sup>

<sup>129</sup> *Prosecutor v. Tadić*, IT-94-1-T, Judgement, 7 May 1997, para. 607.

<sup>130</sup> *Čelebići Judgement*, *op. cit.* (note 46), para. 215.

<sup>131</sup> The *Tadić Appeal Judgement* found that “[i]n the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character. The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces — in whose hands the Bosnian victims in this case found themselves — could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY.” *Tadić Appeal Judgement*, *op. cit.* (note 59), para. 87 (footnote omitted). In *Čelebići*, the Appeals Chamber accepted that “[t]he issue before the Trial Chamber was whether the armed forces of the Bosnian Serbs could be regarded as acting on behalf of the FRY, in order to determine whether after its withdrawal in May 1992 the conflict continued to be international or instead became internal.” *Čelebići Appeal Judgement*, *op. cit.* (note 69), para. 29.

<sup>132</sup> Gasser, *op. cit.* (note 19), p. 155. In early 1978, the international armed conflict between Vietnamese armed forces and the Democratic Republic of Kampuchea, or the Khmer Rouge, culminated in the Vietnamese and Front Uni de Salut National du Kampuchéa armies taking the city of Phnom Penh on 7 January 1978, sending the established Khmer Rouge government into exile and installing another regime. For several years thereafter, the United Nations viewed the government in exile as the legitimate representative of Kampuchea, rendering ongoing conflicts between the Khmer Rouge and Vietnamese forces international in nature. According to Gasser, it was only when the majority of countries in the international community abandoned the exiled Khmer Rouge government and recognized the legitimacy of the new People's Republic of Kampuchea that the Vietnamese forces still in the area were no longer subject to the laws governing international armed warfare, since they were present in the country by the authority of the legitimate government.

The precedents' apparently more restrictive interpretation of "close of military operations" has clear appeal. Extending the application of international humanitarian law beyond the close of international hostilities to the end of even internal conflict could foreseeably involve applying the full body of international humanitarian law in circumstances falling below the threshold required for the application of even common Article 3, and could continue to do so several years after the end of international participation.<sup>133</sup> In addition, the wider interpretation would make it near impossible to distinguish the initiation of distinct internal conflicts from those that represent a continuation of international hostilities, since there are no means of determining how closely linked in time, territory, membership or motivation a preceding international armed conflict and subsequent civil war must be to justify the continued application of the more comprehensive body of law. In fact, the application of the law applicable in international armed conflicts in instances where the tests for internationalization are no longer met would undermine the tests themselves. In such instances, the "overall control" test would not involve "assessing all the elements of control taken as a whole,"<sup>134</sup> but rather determining whether forces *were ever* under the overall control of a foreign State. If Sassòli and Olson are correct in suggesting that "there is no reason to think that, during a conflict, one could convince a military commander to respect certain rules by arguing that he is an agent of a foreign country",<sup>135</sup> the chances of doing so several years later, on the basis that his group used to be an agent of a foreign State, are almost none. The more intellectually satisfying solution, apparently adopted by the ICTY in *Tadić* and *Čelebići*, is thus that the full body of international humanitarian law ceases to apply at the close of international hostilities. The only difficulty is that identifying the point at which international hostilities cease is impractical in many internationalized armed conflicts.

<sup>133</sup> This would occur, for example, where "terrorist" activities that did not constitute protracted armed violence were continued by dissatisfied members of a formerly foreign-sponsored insurgent group against a State after the end of an internationalized armed conflict.

<sup>134</sup> "The 'overall control' test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control." *Aleksovski Appeal Judgement*, *op. cit.* (note 67), para. 145. See also *Prosecutor v. Naletilić et al.*, *op. cit.* (note 69), para. 188: "With respect to the latter, it held that a group might be found to be acting on behalf of a State if it is, 'as a whole', under the overall control of that State."

<sup>135</sup> Sassòli and Olson, *op. cit.* (note 84), p. 576.

Traditionally, the close of inter-State conflict requires the cessation of hostilities evidenced by armistice agreement and the subsequent establishment of peace, generally by the signing of a formal peace treaty.<sup>136</sup> Because internationalized conflict is rarely initiated by declaration and frequently involves covert rather than direct hostilities, formal events such as armistice, conclusion of treaties and public withdrawal of forces are rare. As Detter observes, “there is no need to acknowledge the end of something which allegedly never existed.”<sup>137</sup> Therefore, the refrain that international humanitarian law “extends beyond the cessation of hostilities until a general conclusion of peace”<sup>138</sup> is often unhelpful in the context of internationalized armed conflicts since the latter is seldom formally achieved. Consequently, in many instances the close of internationalized military operations can only be determined by simple reference to the point at which actual hostilities cease on the ground.<sup>139</sup>

In practice, a clear decision about that point “may be difficult to make and subject to much controversy, especially when an armed conflict involves several or a multitude of States and when military operations close at different times within different regions involved in the conflict.”<sup>140</sup> It is even more problematic when international conflict is carried out through domestic intermediaries on the basis of a relationship that “fluctuates greatly in its intensity, with periods of armed hostilities interspersed with perhaps lengthy periods in which no hostilities occur...”.<sup>141</sup> The near Herculean challenge in internationalized conflict is thus to distinguish the actual close of hostilities from their mere suspension.<sup>142</sup>

For example, in applying the tests for internationalization to present-day hostilities in Afghanistan, Cryer cites a range of factors which in his estimation render a finding that the Northern Alliance is under the overall control of the Coalition forces “not totally perverse,”<sup>143</sup> but goes on to

<sup>136</sup> See C. Rousseau, *Le Droit des Conflits Armés*, Édition A. Pedone, Paris, 1983, p. 188.

<sup>137</sup> Detter, *op. cit.* (note 2), p. 344.

<sup>138</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), para. 70.

<sup>139</sup> Detter, *op. cit.* (note 2), p. 344.

<sup>140</sup> Major T. J. Murphy, “Sanctions and enforcement of the humanitarian law of the four Geneva Conventions of 1949 and Geneva Protocol I of 1977”, *Military Law Review*, Winter, 1984, p. 53.

<sup>141</sup> *Ibid.*

<sup>142</sup> International humanitarian law continues to apply during the suspension of active hostilities. See Major S. R. Morris, “America’s most recent prisoner of war: The Warrant Officer Bobby Hall incident”, *Army Law*, Vol. 3, 1996, p. 17.

<sup>143</sup> Cryer, *op. cit.* (note 96), p. 44.

conclude on balance that such control does not exist, predominantly because “the Northern Alliance was acting directly contrary to the clearly expressed wishes of the Coalition when it actually took the Afghan capital Kabul, and entered the city itself.”<sup>144</sup> The assumption is, therefore, that the group was under the overall control of the Coalition prior to its taking of Kabul but not afterwards.

Accepting that hypothesis and on the basis that “close of military operations” relates only to international operations, the Northern Alliance’s entry into Kabul terminated the relationship of overall control with Coalition Forces, potentially ending actual international hostilities and thus, at least on the orthodox “mixed” conflict approach, giving birth to an independent non-international armed conflict between the Northern Alliance and the Taliban. Subsequently, the Northern Alliance was bound by the law applicable in international armed conflict prior to its entry into Kabul but only by common Article 3 thereafter.<sup>145</sup>

That an insurgent force could avoid obligations contained in the full body of international humanitarian law simply by disagreeing with a foreign State is highly undesirable, to say nothing of the unrealistic obligations required of that force if its entry into Kabul is deemed a close of international hostilities.<sup>146</sup> The anomaly is particularly apparent in the context of a continuing internal armed conflict with the Taliban and the possibility that Northern Alliance and Coalition forces might collude on subsequent military operations. The overriding concern, aside from the possibility that the Northern Alliance could quite reasonably consider itself alternating between

<sup>144</sup> *Ibid.*

<sup>145</sup> Only by common Art. 3, since Afghanistan has not signed Additional Protocol II to the Geneva Conventions.

<sup>146</sup> Under Art. 118 of the Third Geneva Convention, captured enemy combatants must be repatriated at the close of hostilities. Art. 17 of the First Geneva Convention requires States Parties to exchange lists showing the exact location and markings of graves “as soon as circumstances permit, and at latest at the end of hostilities”; Articles 67 and 68 of the Third Geneva Convention relate to compensation payable to detainees at the close of hostilities; Art. 46 of the Fourth Geneva Convention states that “in so far as they have not been previously withdrawn, restrictive measures taken regarding protected persons shall be cancelled as soon as possible after the close of hostilities”; Art. 130 of the Fourth Geneva Convention states that “[a]s soon as circumstances permit, and not later than the close of hostilities, the Detaining Power shall forward lists of graves of deceased internees...”; Arts. 133 and 134 of the Fourth Geneva Convention require States “upon the close of hostilities (...) to ensure the return of all internees to their last place of residence, or to facilitate their repatriation”; and Art 33(1) of Additional Protocol I requires each party to the conflict to search “as soon as circumstances permit, and at the latest from the end of active hostilities” for persons reported missing by an adverse party.

internal and internationalized armed conflicts depending on its “overall” relationship with Coalition forces, is that it could justify any characterization it preferred.

On the other hand, the wider interpretation of “close of military operations” would allow the Coalition’s relationship with the Northern Alliance to internationalize the armed conflict between the Taliban and the Northern Alliance until the close of all hostilities in Afghanistan, rendering the Northern Alliance’s entry into Kabul irrelevant to the characterization of the conflict, contradicting Cryer’s conclusion and promoting insurgent appeals for foreign intervention, a situation drafters of the Geneva Conventions clearly sought to avoid. Moreover, if previous experience in Afghanistan is any indicator, the more liberal view might continue the application of law applicable in international armed conflict to hostilities in some way linked to the present internationalized conflict decades after the end of Coalition participation.

In an apparent attempt to resolve this type of impasse, the Trial Chamber in the *Čelebići Judgement* creatively reasoned that:

“the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts unrelated to the larger international armed conflict.”<sup>147</sup>

The difficulty is that purporting to exclude “separate internal conflicts” that are “unrelated” begs the question of how to distinguish international and internal hostilities, which is the very essence of the complication. Furthermore, the presumption that all armed conflict in a specific territory is international was described by the Appeals Chamber as “unfortunate,”<sup>148</sup> presumably because the notion was unprecedented and cuts across the tests for internationalization.

The unavoidable conclusion is that the ambiguities in determining the close of internationalized hostilities, coupled with the opposing views about the possibility of mixed armed conflicts, suggest the absence of any coherent basis for determining the temporal or territorial scope of humanitarian law in territories containing conflicts of both international and internal origin. Much of that failing again stems from the uncomfortable relationship between the standards applicable in international and non-international armed conflict.

<sup>147</sup> *Čelebići Judgement*, *op. cit.* (note 46). para. 209.

<sup>148</sup> *Čelebići Appeal Judgement*, *op. cit.* (note 69), p. 46.

### Political influence on characterization

The legal and political ramifications of one State's use of force against another create real incentives for States intervening in foreign civil unrest to deny that involvement. Similarly, States and non-state actors have proved equally willing to favour or fabricate accounts of foreign participation in internal conflicts for their own wider political gain. As a result, the characterization of armed conflicts involving international and internal elements, and the applicable law that flows from that characterization, are frequently "the subject of fierce controversy of a political nature."<sup>149</sup>

A prime example of that controversy occurs where an aggressive foreign State deposes an established government and installs a puppet leader to "invite" military intervention to suppress a pre-existing civil war. The challenge in determining the applicable law involves distinguishing between legitimate inter-governmental military assistance and covert means of obscuring the existence of a hostile invasion of a State by foreign forces.<sup>150</sup> That tension was demonstrated *par excellence* by the Soviet military intervention in Afghanistan in 1979, which, for the Soviets, was initiated on the basis of an invitation issued by the then newly appointed Prime Minister Babrak Karmal pursuant to a Soviet/Afghan treaty of co-operation.<sup>151</sup> The Soviets thus maintained that their presence in Afghanistan constituted bilateral relations between two countries linked by a treaty of friendship to fight an internal uprising<sup>152</sup> and that there was consequently no armed conflict between State Parties to the Conventions, nor a forced military occupation. Conversely, foreign sources considered that the Soviet forces had been implicated in assassinating Karmal's immediate predecessor, installing Karmal, an Afghani who had no official position in the government only days prior to their full military intervention, and issuing his alleged invitation by radio broadcast from within Soviet Central Asia.<sup>153</sup> If those assertions are true, characterizing a foreign State's military invasion of another as either a non-international armed conflict or no conflict at all certainly circumvents the function of the laws of war.<sup>154</sup> The well-founded concern is that in order to avoid internationalizing civil wars, any State could:

<sup>149</sup> Gasser, *op. cit.* (note 19), p. 157.

<sup>150</sup> Baxter, *op. cit.* (note 29), p. 96.

<sup>151</sup> The Treaty of Friendship, Good Neighbourliness and Co-operation was signed on 5 December 1978.

<sup>152</sup> Gasser, *op. cit.* (note 19), p. 149.

<sup>153</sup> Reisman and Silk, *op. cit.* (note 4), pp. 472-474.

<sup>154</sup> *Ibid.*

“maintain a stable of political would-bes and has-beens of varying national pedigrees then at the appropriate time, one with the right nationality would be saddled and bridled and brought to the ring to issue the necessary ‘invitation’.”<sup>155</sup>

Not only does the Afghan experience highlight the difficulty with determining whether invitations are legitimately issued; it demonstrates the frequent disagreement in the characterization of conflicts, particularly between parties to the conflict. As Gasser observes in relation to the same events:

“Given these different positions, it would be unrealistic to expect the three parties to the conflict to reach the same view of the legal aspects of the dispute. Furthermore, it is unlikely that they would agree to observe the complete set of rules of international humanitarian law and, thus, implicitly to recognize the international nature of the conflict.”<sup>156</sup>

The problem is equally pronounced in relation to internal aspects of internationalized armed conflicts, which involve fundamental inequalities between the “legitimate” State acting in self-defence and the “criminal” insurgents.<sup>157</sup> Consequently, States involved will seek to deny the very existence of insurgent forces or the possibility that such forces have entitlements or liabilities,<sup>158</sup> thereby affecting the humanitarian law applicable between State and internationalized insurgent and, perhaps more importantly, the law protecting civilians in such circumstances. On that very basis, the Soviet and Afghan governments involved in hostilities in 1979 argued that the situation was not subject to the laws of armed conflict at all because the internal disturbance that the Soviet forces were invited to address did not constitute protracted armed conflict.<sup>159</sup> Similarly, during the Yemen conflict of 1962-70, political motivations led royalists to characterize the violence in two contradictory ways, claiming that the conflict was international in relation to Egyptian forces but internal in relation to the rebels.<sup>160</sup>

The views of outside observers as to the characterization of internationalized armed conflicts may also differ, giving rise to difficulties in foreign

<sup>155</sup> *Ibid.*

<sup>156</sup> Gasser, *op. cit.* (note 19), p. 149.

<sup>157</sup> Kalshoven, *op. cit.* (note 101), p. 13.

<sup>158</sup> H. McCoubrey and N. D. White, *International Organisations and Civil Wars*, Dartmouth, Brookfield, 1995, p. 61.

<sup>159</sup> Gasser, *op. cit.* (note 19), p. 149.

<sup>160</sup> K. Boals, “The relation of international law to the internal war in Yemen”, in R. A. Falk *et al.* (ed.) *The International Law of Civil War*, John Hopkins, Baltimore, 1971, p. 306.

States observing their obligation “to respect and ensure respect for the Conventions in all circumstances.”<sup>161</sup> During the Korean War, for example, the Soviet Union claimed there was an internal war since only one legitimate government was involved in hostilities, whereas Western powers advocated the application of the full law of international armed conflict.<sup>162</sup>

Under these circumstances, and in the absence of an impartial body charged with authoritatively determining the status of armed conflicts, it is fair to assume that parties will characterize conflicts in terms that best suit their own interests. The sheer complexity of attempting to artificially characterize internationalized armed conflict as either wholly international or non-international promotes that latitude. Therefore, while a single definition of armed conflict within the confines of a uniform body of humanitarian law would not prevent disagreements of fact, hostile covert takeovers or internationalized armed conflicts, it would prevent political agendas from so negatively affecting humanitarian principles applicable in those contexts.

### Recommendation

“...we would appear to be moving tentatively towards the position whereby the legal distinction between international and non-international armed conflict is becoming outmoded. What will matter as regards legal regulation will not be whether an armed conflict is international or internal, but simply whether an armed conflict exists *per se*.”<sup>163</sup>

Commentators are unanimous in their disrespect for the strict dichotomy between international and non-international armed conflict, but few have attempted to tackle the concerns underpinning the political unwillingness to adopt a single law of armed conflict applicable in all situations. Traditionally, those concerns have been based on a fear of premature recognition of belligerence, the potential for promoting internal uprisings, a real reluctance to be prevented from dealing with individuals participating in such groups under domestic law and, in some instances, an uneasiness about applying the full body of international humanitarian law to internal conflicts.

The development of customary international law assimilating many of the rules applicable in internal and international armed conflict has come some way in dispelling uneasiness about applying international principles in

<sup>161</sup> Geneva Conventions, common Art. 1.

<sup>162</sup> Detter, *op. cit.* (note 2), p. 48.

<sup>163</sup> Moir, *op. cit.* (note 18), p. 51.



civil warfare. Yet as has been shown, that process has “not taken place in the form of a full and mechanical transplant,” resulting in “a crazy quilt of norms” applicable in instances of armed conflict. If anything, the promulgation of a single law of war applicable in all armed conflicts would thus present an opportunity to coherently codify and reconcile the rapid development of customary law applicable in internal conflicts. There is no doubt that that process requires a great deal more careful thought since “much of the Geneva Conventions simply cannot be applied in civil conflicts because their operation turns on notions of belligerent occupation of territory and enemy nationality, concepts that are alien to civil conflicts.”<sup>164</sup> Nevertheless, those difficulties already arise in internationalized non-international armed conflicts.

A particular sticking point in developing a single law of armed conflict is defining a generic definition of the term in light of the different levels of intensity that trigger international and non-international armed conflicts at present. Specifically, a single definition of armed conflict will need to ensure that States continue to enjoy an ability to deal with internal disturbances under domestic law but that international conflicts of low intensity remain subject to international humanitarian protection. One possible solution is to adapt the approach proposed by the Brazilian government’s experts in relation to the application of Additional Protocol II, which defined armed conflict as conflict between “organized armed forces or other organized armed groups under a responsible and identifiable authority, and clearly distinguished from the civilian population...”<sup>165</sup> The requirement that armed

<sup>164</sup> R. Baxter, “Comments” in P. Trooboff (ed.), *Law and Responsibility in Warfare: The Vietnam Experience*, 1975, cited in Bierzanek, *op. cit.* (note 17), p. 288.

<sup>165</sup> Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. Geneva (1974-1977) Vol IV, CDDH/I/79, p. 8. Other possibilities are numerous and complex, including adapting a draft of Additional Protocol II submitted by the ICRC that stipulated that the Protocol apply when “in the territory of one of the High Contracting Parties, hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority,” Draft Additional Protocol to Article 3 Common to the four Geneva Conventions of August 12, 1949, in Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May – 3 June 1972, Basic Texts, Documentary material submitted by the International Committee of the Red Cross, p.35; another definition included “opposition of armed forces capable of concerted military actions under responsible command.” *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-1977) Vol VIII, CDDH/I/SR.22, p. 204. Yet another suggested the tests were too restrictive, preferring to define the threshold as simply “situations where both sides resort to collective armed force” Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Vienna, 20 March – 24 March 1972, Report on the Work of the Conference, p. 52.

forces must be distinguished from the civilian population would provide a basic protection of a State's ability to deal with internal tensions under domestic law since those conflicts normally involve asymmetrical guerrilla warfare from within civilian populations as a result of the insurgents' military inferiority, limited weaponry, and lack of significant control over territory.<sup>166</sup> The Conference of Government Experts also felt that the requirement that armed forces be under responsible authority "implies that such armed forces are subject to a system of internal discipline which enables them to respect all or some of the law of armed conflicts."<sup>167</sup> All these factors are likely to exclude internal disturbances, riots and terrorist activities from the scope of a single body of international humanitarian law while still including low level conflict between international forces. The definition could be made more restrictive by adopting further criteria that might include an element of territorial control akin to Art. 1 of Additional Protocol II,<sup>168</sup> an intensity threshold similar to that adopted by the ICC Statute,<sup>169</sup> or a combination of thresholds triggering the same body of law. In addition, by dispensing with references to statehood, a definition could also apply international humanitarian law in conflicts that are trans-national in character<sup>170</sup> and in instances involving the disintegration of states and the establishment of new ones.<sup>171</sup>

This approach could also allow all combatants in armed conflicts to be entitled to prisoner-of-war status, while preserving the State's ability to maintain law and order during internal disturbances and tensions such as riots or isolated and sporadic acts of violence. While it is essential not to be

<sup>166</sup> A. Eide "The New humanitarian law in non-international armed conflict" in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Napoli, 1979, p. 306

<sup>167</sup> Commentary II, part 2, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May – 3 June 1972, Documentary material submitted by the International Committee of the Red Cross, p. 6.

<sup>168</sup> The final version adopted the geo-military threshold in Art. 1(1) of Additional Protocol II which requires parties to "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations..."

<sup>169</sup> Art. 2(f) of the ICC Statute states that "... armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups."

<sup>170</sup> According to Münkler, "[t]he term civil war is the symmetrical opposite of the term international war; the asymmetrical antonym is transnational war, i.e. one in which the boundaries drawn by the States no longer play a role. This type of war crosses national borders without being waged as a war between States, such as the wars in and around Angola, Zaire/Congo, Somalia and Afghanistan." H. Münkler "The wars of the 21st century", *International Review of the Red Cross*, Vol. 85, No. 849, March 2003 p. 16.

<sup>171</sup> Meron, "Humanization of Humanitarian Law", *op. cit.* (note 124), p. 257.

politically naïve with regard to the very real concerns that governments cite against extending prisoner-of-war status to internal conflict or according combatants in such conflicts immunity for taking up arms,<sup>172</sup> there is very little other incentive for insurgent groups to comply with the laws of war if they are not able to claim those privileges.<sup>173</sup> Moreover, granting the privileges to insurgents might promote greater reciprocity on their part, particularly when they hold a significant number of State prisoners.<sup>174</sup> The adoption of Art. 4A(2) of the Third Geneva Convention would also require a certain number of criteria to be met for entitlement to prisoner-of-war status,<sup>175</sup> meaning that granting that status to parties engaged in internal armed conflicts will not necessarily impede the prosecution of all individuals for taking up arms, even within the context of hostilities that constitute armed conflict.<sup>176</sup> Furthermore, even prisoners of war can be prosecuted for aggression, crimes against humanity, war crimes and genocide, further countering the concern that affording such individuals prisoner-of-war status in internal armed conflicts will promote unmitigated internal revolt. Therefore, although the question warrants considerably more debate, amplification of prisoner-of-war status within the context of a single law of armed conflict would ensure a

**172** “In international armed conflicts, prisoner-of-war status flows from the so-called combatants’ privilege, which simply means that the members of the armed forces of a party to the conflict enjoy immunity for their warlike acts. In other words, the combatants’ privilege is a license to kill, maim, or kidnap enemy combatants, destroy military objectives, and even cause unavoidable collateral civilian casualties. My government, as you know, presides over a new and unstable state. It is plagued with ideological and ethnic rivalries, aided and abetted by external states bent on destabilizing our infant democracy. Do you really think that we would concur in any treaty that would grant immunity from our treason laws to our domestic enemies, and by doing so grant them a license to attack the government’s security personnel and property, subject only to honourable internment as prisoners of war for the duration of the conflict?” W. Solf, “Problems with the application of norms governing interstate armed conflict to non-international armed conflict”, *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, pp. 291-292.

**173** *Ibid.*, p. 292.

**174** *Ibid.*, p. 293.

**175** See Art. 4(A) of the Third Geneva Convention, in particular Art. 4(A)(2), which requires that individuals must be members of a militia that answers to a responsible command, has a fixed and distinctive sign, carries arms openly and conducts its operations in accordance with the laws and customs of war.

**176** Article 25 of the ICRC’s draft Additional Protocol II extended prisoner-of-war provisions to combatants in non-international armed conflicts on this very basis. That article reads: “Members of regular armed forces and members of those armed forces which have fulfilled the conditions stipulated in Article 4 A (2) of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall receive, after having fallen into the power of the adversary, a treatment similar to that provided for prisoners of war in the said Convention.” Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 3 May – 3 June 1972, Commentary, Vol II, p. 49.

consistent respect for that status in internationalized conflicts, even when the circumstances of those conflicts are complex and dynamic.

Likewise, a single body of international humanitarian law applicable in all contexts would allay the concern that allowing foreign intervention to internationalize internal conflicts creates an incentive for insurgent groups to invite that intervention, thereby rapidly escalating hostilities. Any such incentive is based solely on the perceived incongruity between the law applicable in international and internal armed conflict, an incongruity that would be eliminated by a single definition of armed conflict incorporating both international and non-international elements. Similarly, the political reluctance to be candid about military interventions in foreign civil wars would not have such a heavy impact on the humanitarian laws applicable in such contexts if a single body of law applied regardless of whether a State acknowledged involvement.

Finally, it is clear that a major reservation in the development of international humanitarian law relating to internal armed conflicts has been the question of the recognition of belligerency. That recognition elevates a rebel movement to the status of a State and demands that other States remain neutral between the warring parties. Even though the doctrine has not been exercised since the American Civil War, giving rise to very reasonable claims that it no longer exists in international law,<sup>177</sup> the fear that application of the Geneva Conventions might lead to belligerent recognition is a matter of extreme political sensitivity.<sup>178</sup> Consequently, a single body of international humanitarian law would, like the ICC Statute and the Geneva Conventions, incorporate articles to reaffirm that the application of laws of war to internal armed conflicts “shall not affect the legal status of the Parties to the conflict.”<sup>179</sup> In addition, because a single law of armed conflict could dispense with references to statehood altogether and potentially involve very

<sup>177</sup> According to Doswald-Beck “[r]ecognition of belligerency has not, however, been given since the American Civil War and there must thus be serious doubts whether the notion has not fallen into desuetude. Textbooks regularly repeat this doctrine as part of the law, but the real test is whether States seriously view it as a legal reality in modern times, and its total non-use, although not conclusive evidence, must nevertheless be carefully assessed.” L. Doswald-Beck, “The legal validity of military intervention by invitation of the government”, *British Yearbook of International Law*, 1985, p. 197.

<sup>178</sup> McCoubrey and White, *op. cit.* (note 158), p. 61.

<sup>179</sup> Common Art. 3(3). Art. 8(3) of the ICC Statute provides that “Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.”

different thresholds than those relevant to determinations of belligerency, the change would hopefully improve the distinction between the doctrine and humanitarian protection, thereby prompting greater observance of international humanitarian law.

## Conclusion

“If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”<sup>180</sup>

The divergent standards applicable within the Geneva Conventions and their Additional Protocols have failed to adequately address the now prolific incidence of internationalized armed conflict. The law developed to bridge the distance between the instruments has created convoluted tests for agency of a State that in practice are near impossible to apply. Jurisprudence betrays an equally ambiguous and impractical test for direct military intervention sufficient to internationalize an otherwise internal conflict. Even once internationalized, it is difficult to determine the law applicable to internal armed conflicts as relationships and military presences change. Moreover, the international/non-international dichotomy in international humanitarian law has proved susceptible to incredible political manipulation, particularly when conflicts involve international and internal elements.

Further consideration of substantive aspects of a single law of armed conflict will therefore be essential in the development of greater humanitarian protection during internationalized armed conflict. This will inevitably require greater attempts at addressing the political concerns that were operative in the creation of the international/non-international dichotomy. Although overcoming those concerns may seem politically ambitious, it is important to maintain an historical perspective on the growth and development of international humanitarian law.<sup>181</sup> That history is ample proof that with critique, consideration and concern, the inconceivable can rapidly become reality.

<sup>180</sup> *Tadić Jurisdiction Appeal*, *op. cit.* (note 28), para. 97.

<sup>181</sup> De Schutter and Van De Wyngaert, *op. cit.* (note 15), p. 290.

## Résumé

### ***Vers une définition unique des conflits armés dans le droit international humanitaire : une critique des conflits armés internationalisés***

*James G. Stewart*

La stricte division du droit international humanitaire en règles applicables dans le cadre de conflits armés internationaux et règles applicables aux conflits qui ne sont pas de caractère international est presque universellement critiquée. Des tentatives ont été faites, lors de la négociation des Conventions de Genève et de leurs Protocoles, d'abandonner cette distinction, mais les appels à la création d'un ensemble unique de règles de droit international humanitaire ont, depuis, sombré dans l'oubli. Cet article ravive ces appels en mettant en évidence les insuffisances du traitement dichotomique actuel des conflits armés internationalisés, c'est-à-dire les conflits armés présentant, tout à la fois, les caractéristiques d'un conflit interne et d'un conflit international.

L'article conclut que le droit élaboré pour définir cette «internationalisation» a institué des tests complexes qui, dans la pratique, sont quasiment irréalisables. Et même lorsqu'un conflit est internationalisé, il est difficile de déterminer quel droit est applicable, car les relations et les présences militaires changent. En outre, la dichotomie «international/non international» du droit humanitaire peut faire l'objet d'incroyables manipulations politiques, souvent au détriment de la protection humanitaire. Il est essentiel d'étudier plus en profondeur les aspects concrets d'un droit des conflits armés unique pour assurer une protection humanitaire accrue en cas de conflit armé internationalisé.