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Problems in Implementing  
International Humanitarian Law  
in Non-International Armed  
Conflicts

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# Contents

<b>SUMMARY</b>	<b>1</b>
<b>PREFACE</b>	<b>2</b>
<b>ABBREVIATIONS</b>	<b>3</b>
<b>1 INTRODUCTION</b>	<b>4</b>
1.1 Subject and Purpose	4
1.2 Method and Material	5
1.3 Definitions and Delimitations	5
1.4 Outline	6
<b>2 GENERAL BACKGROUND</b>	<b>8</b>
<b>3 INTERNATIONAL HUMANITARIAN LAW</b>	<b>10</b>
3.1 The Fundamental Principles	11
3.1.1 The Principle of Distinction and Recognition of Belligerency	11
3.2 The Characterisation of Armed Conflicts	12
3.2.1 International Armed Conflicts	14
3.2.2 Non-International Armed Conflicts	14
3.2.3 Internationalised Armed Conflicts	15
3.3 Provisions Applicable to Non-International Armed Conflicts	16
3.3.1 The Status and Protection of Individuals	19
3.3.2 Penal Prosecutions	23
3.3.2.1 Prosecution for Violations of International Humanitarian Law	23
3.4 Implementation and Enforcement	25
3.5 The International Humanitarian Fact Finding Commission	28
3.6 The United Nations and IHL	28
<b>4 DETERMINATION OF ARMED CONFLICTS</b>	<b>31</b>
<b>5 ANALYSIS AND CONCLUSIONS</b>	<b>37</b>
<b>BIBLIOGRAPHY</b>	<b>41</b>



# Summary

This thesis concerns the problems that surround the implementation and enforcement of international humanitarian law in non-international armed conflicts. The provisions applicable to such conflicts are common Article 3 of the Geneva Conventions together with Additional Protocol II to the Geneva Conventions. The main obstacles surrounding the implementation of these provisions are of various natures. States tend to be reluctant to admit that a situation meets the requirements for non-international armed conflicts. States are equally reluctant to recognise armed insurgent factions as parties to such conflicts. Armed insurgent factions, on the other hand, lack motivation to apply the rules since this measure will probably not change their status and treatment under the domestic laws of the State. In addition, the concept of internationalised armed conflict, where a *prima facie* non-international armed conflict turns international by the involvement of a third State or States, is creating confusion on which legal framework should be applicable.

The conclusion is that since the problems surrounding the implementation and enforcement in non-international armed conflicts are various and not easily dealt with under the current provisions, a solution to this problem would be to create one single legal framework for all armed conflicts, abandoning the current division between international and non-international armed conflicts. This would help in the application of the rules and in addition make it easier for the parties involved to abide by them. Unfortunately, it seems that such a solution is yet far away.

# Preface

The finishing of this thesis has not come easily and I am therefore very thankful to all of those who have supported me, in one way or another, in writing it.

I would like to express my gratitude towards Ms Lena Olsson and Mr Habteab Tesfay for making the RWI Library such a warm and welcoming place to conduct ones studies and for always trying to help students in need.

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Anna Christer-Nilsson  
Lund, June 2005

# Abbreviations

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
FRY	Federal Republic of Yugoslavia (Serbia and Montenegro)
GC	The Four Geneva Conventions of August 12, 1949
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the Field of August 12, 1949
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949
GC III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
NLF	National Liberation Front (Vietcong)
POW	Prisoner of War

# 1 Introduction

## 1.1 Subject and Purpose

The aim of the Geneva Conventions, to protect the victims of war, is as important today as it was when the Conventions came into force in the 1950s. At that time however, the world had just witnessed the Second World War and the Conventions were negotiated thereafter. The single article referring to non-international armed conflicts was common Article 3.

With the ratification of the Additional Protocol II in 1977, the legal framework concerning non-international armed conflicts was expanded. Since then the number of non-international armed conflicts has increased and today they represent the majority of all armed conflicts taking place around the world. The question remains, however, if the *de facto* protection of victims of internal conflicts has increased. This thesis will investigate the regulation offered to non-international armed conflicts, i.e. common Article 3 of the Geneva Conventions and Additional Protocol II, and the problems surrounding its implementation in actual situations of hostilities. Problems in non-international armed conflicts arise on all sides of the conflict. The main obstacles for implementing the provisions of international humanitarian law are *inter alia* States' reluctance to acknowledge the applicability of the regulation offered to internal armed conflicts and the involvement by third States in such conflicts. Yet another obstacle is that insurgent groups do not feel that adherence to the provisions would provide them better treatment under domestic law and such groups would need additional motivation to apply the rules.

A State has a responsibility to act in accordance with its treaty obligations. Insurgents are not parties to any treaty, but are obligated to abide by the provisions under, at least customary international law. Notwithstanding being non-State actors they have a responsibility to act in accordance with international humanitarian law. This brings about the question of what status should be afforded to insurgents. Should they be regarded as civilians who have temporarily lost the protection of not being the target of attack or should they be regarded as combatants?

The questions surrounding non-international armed conflicts are various and numerous. This study will try to investigate the problems concerning the implementation and enforcement of applicable international humanitarian law provisions in such armed conflicts.

## 1.2 Method and Material

The writer has chosen to analyse the implementation and enforcement of international humanitarian law in non-international armed conflicts by looking at what different humanitarian and human rights bodies as well as what the international tribunals have concluded. This has been done mainly with reference to the ICRC and the ICTY.

The International Committee of the Red Cross has in 2005 concluded its investigation on customary international humanitarian law and hopefully this tribute to the development of international humanitarian law will make the obligations for States and individuals more clear and increase the protection of the victims of war.

In this study the writer's particular sources have been books or articles in journals, which the writer considers reliable, such as *inter alia* the American Journal of International Law and the International Review of the Red Cross. Case law from the International Court of Justice and the International Criminal Tribunal of the Former Yugoslavia has also been examined.

## 1.3 Definitions and Delimitations

The scope of this study is to investigate what problems arise concerning the implementation and enforcement of international humanitarian law in non-international armed conflicts. In doing so the writer has chosen not to investigate any particular internal armed conflict but rather look at the regulation offered to such conflicts as a whole, except, of course, where examples are given.

The question of internationalised armed conflicts is of importance to this study. An internal armed conflict could be rendered international by the involvement of a third State to that conflict. The writer would like to stress that the examination of third State involvement in internal conflicts will not concern the legality of such involvement, since international humanitarian law is applicable regardless of who initiated the conflict and why.

Problems connected with the so-called "war on terror" will not be investigated in this study. The reference to members of terrorist organisations as "unlawful combatants" or as otherwise not following the laws of war should, in the writer's point of view, be done with caution and consideration. The writer has chosen to focus on the entities addressed by common Article 3 and Additional Protocol II, namely State parties and armed groups, which have some sort of organisation as required by Article 1, Protocol II. For the purpose of this thesis, armed terrorist groups or networks are not included in the meaning of the term "armed groups". Not to say that they are not interesting or should not be investigated but



questions surrounding the “war on terror” are immense and perplex and the writer has therefore decided not to include problems relating to this area.

When, in this study armed groups are addressed, the writer refers to them with the terms armed groups, insurgents, rebels, separatists units or opposing factions. The writer would like to emphasise that this does not mean that her intention is to put any legal justification on such groups. Nor is it her intention that there should be any distinction regarding the meaning, notwithstanding the different terminology. All the terms are used with identical understanding. Likewise will the terms non-international armed conflict and internal armed conflict be used throughout this thesis with an equal meaning.

An internal armed conflict is a situation that in most cases would amount to a state of public emergency in the context of human rights law. This could in turn allow for derogations of the provisions of the International Covenant on Civil and Political Rights (ICCPR), as prescribed by Article 4 of the same treaty. The Human Rights Committee, the treaty body established under Article 28 of the Covenant, has stipulated that the ICCPR supplements international humanitarian law in armed conflicts.<sup>1</sup> In addition the General Assembly has declared that fundamental human rights continue to apply in cases of non-international armed conflicts.<sup>2</sup> The writer has however decided to put human rights issues outside the scope of this study. Not because it is not important but because she would like to focus on the implementation of international humanitarian law alone, without looking at the possible protection that human rights law may offer.

The writer would also like to point out that she will not go into any deeper investigation concerning the Hague law, but concentrate on the relevant Geneva law.

## 1.4 Outline

This study will begin with a general background emphasising the problems related to the implementation and enforcement of international humanitarian law in non-international armed conflicts. This is followed by a more profound analysis of the provisions in force, namely common Article 3 and Additional Protocol II, and what protection they offer. As the application of international humanitarian law depends on the existence of an armed conflict, the different types of conflicts to which international humanitarian law is relevant and offers diverse protection in will be described. A separate chapter will examine the question of if and when an internal armed conflict could turn international. The different suggestions on how the

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<sup>1</sup> General Comment No. 29: *States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001 and General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004.

<sup>2</sup> General Assembly Resolution 2675 (XXV), *Basic principles for the protection of civilian populations in armed conflicts*, 9 December 1970.

implementation and enforcement of the provisions of international humanitarian law in internal armed conflicts should be performed will also be investigated.

## 2 General Background

The implementation of international humanitarian law (IHL) depends primarily on the question of how an armed conflict is characterised. International humanitarian law distinguishes between two sets of armed conflicts; those of an international character and those of a non-international or internal nature. To be applicable, the Geneva Conventions of 1949 (GC) and the Additional Protocols of 1977 (AP) presuppose a characterisation of an armed conflict as either international or non-international. In recent years a “new” type of armed conflict has evolved, the so-called “internationalised” armed conflicts, where a *prima facie* internal armed conflict has been “internationalised” due to the involvement of another State or States on the different sides of the conflict. The importance of classification of a conflict cannot be underestimated. The protection offered to those affected by an armed conflict is different depending on how a situation is classified and international humanitarian law is still depending on only two categories. The attempts to address this situation have met with difficulties and critique and a final solution seems yet to be far away.

Another great issue relating to the implementation of international humanitarian law in internal armed conflicts is the question of recognition. Whereas States have an obligation under international law to “adopt and carry out measures implementing humanitarian law”<sup>3</sup> they might be reluctant to admit that the hostilities meet the requirements for a non-international armed conflict. Armed opposition groups on the other hand, do not feel that observance of the provisions of international humanitarian law would grant them any favourable treatment under domestic law. The motivation for such groups to abide by their obligations is therefore insufficient. The dilemma arises when neither the State nor the insurgents apply the provisions. States are also unwilling to apply the provisions because they fear that this might imply recognition of the rebels as subjects under international law. Both common Article 3 and Additional Protocol II explicitly state, however, that invoking their provisions does not change the status of the parties to the conflict.<sup>4</sup> The unwillingness of recognising a conflict as non-international is also closely connected with the reluctance of

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<sup>3</sup> International Committee of the Red Cross, *Implementing International Humanitarian Law: from Law to Action*, Advisory Service on International Humanitarian Law, available at: [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JNXN/\\$FILE/Implementing\\_IHL.pdf?OpenElement](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/57JNXN/$FILE/Implementing_IHL.pdf?OpenElement), 15 February, 2005.

<sup>4</sup> Common Article 3, para. 4, GC: “The application of the preceding provisions shall not affect the legal status of the Parties to the conflict” and Article 3, AP II: “(1) Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State. (2) Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs”.

getting other States involved in what most States see as their domestic affairs.

The implementation also concerns the problem of how to obtain adherence to the rules in actual combat. This problem is associated with the question of recognition as States may claim that the situation does not trigger the rules of IHL. On the other hand insurgents may claim that they are not bound by inter-State agreements or they simply refuse to abide by the rules since they deem that their incentive hereof is insufficient. Violations of humanitarian law are common on all sides of internal conflicts.

To summarise, the application of international humanitarian law to non-international armed conflicts contains various problems. The first involves the characterisation of the conflict as internal. Moreover, it concerns the difficulty to acquire adherence to already existing rules in a conflict of an internal character. On the other hand, some experts argue that attempts should be made to adopt even more rules of international humanitarian law to non-international armed conflicts and thus create a sole solution for all armed conflicts.<sup>5</sup> This path can be envisaged in Article 1(2) of Protocol II to the 1980 Conventional Weapons Convention<sup>6</sup>, which states that the Protocol is applicable in cases covered by common Article 3 of the Geneva Conventions as well as in international armed conflicts.<sup>7</sup> Likewise, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict applies equally to international and non-international armed conflicts.<sup>8</sup>

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<sup>5</sup> Stewart James G, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, International Review of the Red Cross, Vol. 85, No. 850, 2003.

<sup>6</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980.

<sup>7</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980. Amended Article 1, 21 December 2001.

<sup>8</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, Article 22.

# 3 International Humanitarian Law

International humanitarian law is the law applicable in armed conflicts, sometimes also referred to as the law of war (*jus in bellum*). IHL distinguishes between two types of armed conflicts, international and non-international armed conflicts. The main documents applicable in armed conflicts are the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. The provisions governing non-international armed conflict are found in Article 3, common to the four Geneva Conventions, and Additional Protocol II. The existence of an armed conflict is crucial for the application of international humanitarian law. Without an armed conflict, the provisions of the Geneva Conventions and the Additional Protocols are not applicable and consequently alleged violations of these provisions cannot be adjudicated. IHL does not concern the question of who started a conflict and why. It applies when the requirements attributed to an armed conflict are met and aims to protect those affected by that conflict.

The regulation offered under international humanitarian law is of two separate natures. One set of law, the so-called Hague law, relates to rules of conduct, the means and methods of warfare. The Hague rules prohibiting certain types of weapons have, however, a disputed applicability in non-international armed conflicts. Some argues that the rules are not applicable,<sup>9</sup> while the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) discussed the subject in the *Tadić case* and concluded that, at least, the prohibition of chemical weapons is applicable in internal armed conflicts.<sup>10</sup>

The other set of law, also referred to as Geneva law, concerns the protection of victims of war. Recalling that wars do exist, international humanitarian law tries to minimize the consequences that the armed conflict causes, by regulating how States and State-actors operate during hostilities. The so-called Geneva law identifies certain provisions applicable to specific categories of protected persons. The whole of the international humanitarian law is built up by basic principles to help scrutinise States' conduct in times of armed conflict.

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<sup>9</sup> See Stewart James G., *supra* note 5.

<sup>10</sup> *Prosecutor v. Duško Tadić a/k/a "Dule"*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 124 (hereinafter "*Tadić case I*").

## 3.1 The Fundamental Principles

### 3.1.1 The Principle of Distinction and Recognition of Belligerency

The primary requisite whether in international or non-international armed conflicts is to differentiate those who fight from those who do not. This is done by the fundamental principle of distinction between combatants and non-combatants. All members of the armed forces of a party to the conflict are combatants.<sup>11</sup> Military medical personnel and religious personnel are however excluded from this category. Instead, they are included in the group of non-combatants, together with civilians. Combatants may take up arms and legally engage in the hostilities. They do not enjoy protection from attacks, as do civilians or other non-combatants. If combatants fall into the hands of the adversary they are entitled to the protected status of prisoner of war. Depending on how they are related to the armed forces or how they act, persons belonging to the non-combatant category may enjoy the protected status of prisoners of war.<sup>12</sup> It has to be pointed out however that prisoner of war status only exists in international armed conflicts. The distinction between combatants and non-combatants is crucial for the treatment of such individuals affected by an armed conflict. It also has a bearing on other measures taken in an armed conflict, primarily on the means and methods used. The Geneva Conventions offer protection to both combatants and non-combatants. The first and second Convention aim to protect combatants who have been wounded, sick or shipwrecked. The third Convention relates to the treatment of prisoners of war and the fourth Convention concerns the civilian population. Additional Protocol I offers protection to all these categories whereas Additional Protocol II offers protection to the wounded, sick and shipwrecked and civilians in situations of non-international armed conflicts.

The International Court of Justice (ICJ) has stated that the principle of distinction

“is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”<sup>13</sup>

The principle of distinction is thus intended to protect the civilian population and the ICRC points to the practice of the international Courts and states that “the obligation to make a distinction between civilians and

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<sup>11</sup> Article 4(A)(1) GC III and Article 43(2) AP I.

<sup>12</sup> See Article 4(A)(4), (5) and (6) GC III. For example, the spontaneous resort to weapons by unorganised civilians, to resist invading forces may grant them prisoner of war status provided they carry their weapons openly and respect humanitarian law.

<sup>13</sup> *Legality of the Treat or Use of Nuclear Weapons (1994-1996)*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 78.

combatants is customary in both international and non-international armed conflicts”.<sup>14</sup> The Rome Statute of the International Criminal Court (ICC) affirms this view in that it criminalises the intentional directing of attacks against the civilian population as such or against individual civilians not taking part in the hostilities in case of a non-international armed conflict.<sup>15</sup>

Common Article 3 does not state anything concerning the principle of distinction, neither between combatants and civilians, nor between civilian and military targets. The Article only refers to persons not taking an active part in the hostilities. Additional Protocol II, on the other hand, explicitly states that the civilian population as such, as well as individual civilians shall not be the object of attack, “unless and for such times as they take a direct part in hostilities”.<sup>16</sup> Protocol II also protects objects that are indispensable to the survival of the civilian population.<sup>17</sup> There is however no definition of the terms “civilian” or “civilians” offered by Additional Protocol II. Members of the armed forces of a State do not fall under this category but, for the purpose of non-international armed conflicts, it is uncertain how to define members of insurgent groups.<sup>18</sup> The rather few provisions of Protocol II and common Article 3 fall short compared to the regulation offered to international armed conflicts in Additional Protocol I and the rest of the Geneva Conventions. It is worth mentioning that the principle of distinction also relates to the prohibition of the use of indiscriminate weapons, even if the Hague law is outside the scope of this study.

To prevent excessive harm or injury, the principle of proportionality requires that all attacks must be carried out proportionally and with precaution to the civilian population as such and civilian objects. The principle of humanity helps prevent unnecessary suffering and invokes an obligation to care for the wounded and sick.

Even though all the principles have been considered, military demands may have priority over humanitarian law. The principle of military necessity must therefore always be evaluated.

### **3.2 The Characterisation of Armed Conflicts**

The enforcement of international humanitarian law depends significantly on the classification of a conflict. The perplexity that the internationalisation of armed conflicts creates with regard to the characterisation is devastating not only for the protection of victims of such conflicts but also for the possibility to prosecute individuals for violations of the laws of war. Even

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<sup>14</sup> Henckaerts Jean-Marie and Doswald-Beck Louise, *Customary International Humanitarian Law*, Volume I, Rules, Cambridge University Press, Cambridge, 2005.

<sup>15</sup> Article 8(e)(i), Rome Statute of the International Criminal Court.

<sup>16</sup> Article 13, AP II.

<sup>17</sup> Article 14, AP II.

<sup>18</sup> See Henckaerts Jean-Marie and Doswald-Beck Louise, *supra note* 14.

though international humanitarian law distinguishes between two types of conflicts, the reality is that in most cases the difference is hard to tell because “[t]here is almost invariably some form of foreign [S]tate involvement in internal armed conflicts”.<sup>19</sup> References to so-called internationalised armed conflicts are alarming since this new terminology creates confusion concerning what rules should be applicable. The involvement of third States in internal armed conflicts is not new. The Spanish Civil War (1936-39) was of a mixed character, containing elements of both internal and international armed conflict. The rules apply differently to the two recognised categories of conflicts. In these “new” conflicts the question of what set of law is applicable is affecting the victims.

Internal disturbances and tensions are not regarded as armed conflicts in the eyes of international humanitarian law and Additional Protocol II explicitly leaves out these types of conflicts from its scope of application. Such conflicts fall within the scope of international human rights law.

The temporal and geographical scope of armed conflicts depends on how the conflict is characterised. However for both types of conflicts the rules applicable “[extend] beyond the exact time and place of hostilities”.<sup>20</sup> The Appeals Chamber in the *Tadić* case argued that since common Article 3 aims to protect those not taking an active part in the hostilities, the geographical scope concerning non-international armed conflicts is broader than the actual battlefield.<sup>21</sup> The same could be said with regard to the Additional Protocol II. The temporal scope of application also extends further than actual combat situations. To use the words of the Court:

“[A]n armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>22</sup>

The distinction between international and non-international armed conflicts have become more and more vague and the development seems to move towards extending the regulation offered to non-international armed conflicts, either by the creation of new laws or by agreements on the matter.<sup>23</sup> The rationale behind this progress is *inter alia* that internal armed conflicts have become more numerous and cruel. The increased involvement of third States in internal conflicts has also helped generate this development.

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<sup>19</sup> See Stewart James G., *supra* note 5.

<sup>20</sup> See *Tadić* case I, *supra* note 10, para. 67.

<sup>21</sup> *Ibid*, para. 69.

<sup>22</sup> *Ibid*, para. 70.

<sup>23</sup> *Ibid*, para. 97.



### 3.2.1 International Armed Conflicts

The traditional international armed conflicts are recognised as “all cases of declared war or of any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them” and “all cases of partial or total occupation of the territory of a High Contracting Party”.<sup>24</sup> The whole of the Geneva Conventions along with Additional Protocol I is applicable to these conflicts, provided, of course, that the State has ratified it. In negotiating the Conventions the term “armed conflict” was intentionally added since States could claim that they were not actually engaged in war. An armed conflict is a wider concept and does not depend on a formal declaration of war.<sup>25</sup> The general notion of an international armed conflict is where two or more States are fighting against each other. With the adaptation of Additional Protocol I a new category of conflicts was integrated with the international armed conflicts, namely armed conflict where people are fighting for their right to self-determination.<sup>26</sup> This does not mean that every claim from separatist movements with reference to national liberation should automatically invoke the provisions governing international armed conflicts. The wording of Article 1(4), AP I, helps to regulate the possible situations where it can be invoked, by explicit reference to self-determination, alien occupation, colonial domination and racist regimes.

### 3.2.2 Non-International Armed Conflicts

The provisions governing non-international armed conflicts are found in common Article 3 and Additional Protocol II. The Geneva Conventions offer no definition of what constitutes a non-international armed conflict. Common Article 3 refers only to minimum rules that apply in cases of “armed conflict not of an international character”. So much can however be said that a non-international armed conflict takes place within the territory of a State, between “existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms” and “reaches the magnitude of an armed riot or a civil war”.<sup>27</sup>

The ICRC Commentary on common Article 3 sets up a list of conditions relevant to differentiate a non-international armed conflict from mere tensions and disturbances. These conditions include that the insurgents should be organised in some way, have a responsible command and act in a defined territory. The government should also have to involve its armed

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<sup>24</sup> Common Article 2, GC.

<sup>25</sup> Fleck Dieter, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, New York, 1995.

<sup>26</sup> Article 1(4), AP I.

<sup>27</sup> See Fleck Dieter, *supra note 25*.

forces and/or recognise the insurgents as an opposing faction.<sup>28</sup> The examples given in the Commentary are not exhaustive but illustrate different scenarios. The criteria all refer to some level of seriousness of the conflict, *inter alia* the involvement of governmental armed forces or the level of organisation of the opposing faction. The aim and purpose of the insurgents is another criterion to evaluate in order to distinguish a non-international armed conflict from tensions or disturbances.<sup>29</sup> Additional Protocol II on the other hand, defines non-international armed conflicts in negative terms, referring to all conflicts not covered by Article 1 of Protocol I.<sup>30</sup> Additional Protocol II also excludes from its scope of application certain types of circumstances as not covered by the term “armed conflict”, with the specific reference to internal disturbances and tensions.<sup>31</sup>

A non-international armed conflict differs from an international in the sense that in the latter there are two or more sovereign States fighting against each other. In a non-international armed conflict the existing government is fighting against a faction within its own territory or different factions are fighting against each other without the involvement of governmental power.<sup>32</sup> It is worth mentioning that common Article 3 is applicable to hostilities where insurgents are engaged in fighting amongst themselves, whereas Additional Protocol II is not. The Protocol requires the involvement of governmental armed forces. While in an international armed conflict the parties to the conflict are alike; they are sovereign States, subjects under international law and members of the international community, the parties to a non-international armed conflict are not on the same level. The government’s authority is challenged by the country’s own citizens. Persons opposing the government in taking an active part in the hostilities have no right to do so and they can be punished for these acts under the domestic laws of the State.

### 3.2.3 Internationalised Armed Conflicts

Most conflicts taking place today are non-international in character. This does not mean that all of them stay internal in nature as “[t]here is almost

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<sup>28</sup> Pictet Jean (ed.), *Commentaries on the Geneva Conventions of 12 August 1949*, Vol. IV: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958 (hereinafter “*Commentary GC IV*”).

<sup>29</sup> Spieker Heike, *The International Criminal Court and Non-International Armed Conflicts*, Leiden Journal of International Law, Vol. 13, issue 2, 2000.

<sup>30</sup> Article 1, AP I, refers to situations covered by Article 2, GC, and conflicts where people are fighting for their right to self-determination.

<sup>31</sup> Article 1(2), AP II: “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

<sup>32</sup> Sandoz Yves, Swinarski Christophe and Zimmermann Bruno, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, Martinus Nijhoff Publishers, Geneva, 1987 (hereinafter “*Commentary AP II*”).

invariably some form of foreign [S]tate involvement in internal armed conflicts”.<sup>33</sup> There are at least three situations where a non-international armed conflict could become internationalised. The first situation is one where insurgent groups are engaged in combat against each other and different States back them up. The other situation is that where two States involved in an international armed conflict with each other, intervene in an internal armed conflict in favour of the different combating factions. The third situation, which may be referred to as an internationalised armed conflict, is where one State supports the insurgent side in an internal armed conflict.<sup>34</sup> The 1999 involvement by NATO in the armed conflict in the Former Yugoslavia is one example of internationalisation of an internal conflict. The same thing could be said about the intervention by some African countries in the internal armed conflict in the Democratic Republic of Congo. The most internationally known intervention in an internal armed conflict by a State is the United States’ support of the *contras* in Nicaragua. The main issue in this case was however not the problem of internationalisation of a conflict of *prima facie* internal character but rather that of State responsibility for acts committed by insurgents.

By the involvement of third countries, a non-international armed conflict could hence develop into an international one. There is also the situation where a conflict is both international and internal at the same time, also referred to as “mixed” armed conflicts.<sup>35</sup> In the *Tadić case*, the Appeals Chamber declared that a non-international armed conflict could succeed into an international armed conflict “if (i) another State intervenes in that conflict through its troops, or alternatively (ii) some of the participants in the internal armed conflict act on behalf of that other State”.<sup>36</sup>

### 3.3 Provisions Applicable to Non-International Armed Conflicts

Before the adaptation of Additional Protocol II, common Article 3 of the Geneva Conventions was the only provision in force relating to non-international armed conflicts. The text of Article 3 realises the fundamental principle of humanity and gives the ICRC a chance to offer its services. The scope of application is wide and protection is given to those not taking an active part in the hostilities. Article 3 sets out minimum rules and principles to be applied automatically when a non-international armed conflict is at hand and reads as follows:

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<sup>33</sup> See Stewart James G., *supra note 5*.

<sup>34</sup> *Ibid.*

<sup>35</sup> Kalshoven Frits and Sandoz Yves (eds.), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, Dordrecht, 1989, pp. 1-30.

<sup>36</sup> *Prosecutor v. Duško Tadić*, Judgement, Case No. T-94-1-A, 15 July 1999, para. 84 (hereinafter “*Tadić case IP*”).

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

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

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

The provisions laid down in Article 3 are, as mentioned above, minimum requirements. There are, however, no obstacles for the government and/or the rebel forces to expand these minimum provisions at any time. The wording of Article 3, paragraph 1, implies that measures taken that would be inconsistent with the prohibited acts listed in the Article are strictly prohibited at *all* times. Even if a certain measure is not listed in Article 3, it is still prohibited if it comprises any of the listed acts.<sup>37</sup> It should be mentioned, however, that even if the Article prohibits murder, capital punishment is not prohibited if prescribed by law.

History shows that the application of Article 3 has met with difficulties. For example, Article 3 contains no provision for medical personnel and transportation or the emblem of the ICRC. Likewise, there are no provisions governing the civilian population as such, only references to persons not taking an active part in the hostilities. The ICJ has stated that the provisions set out in common Article 3 reflect “elementary considerations of humanity” and as such, the applicability of these provisions is not dependent on the type of conflict at hand.<sup>38</sup>

Whereas common Article 3 is applicable in all armed conflicts of a non-international character, Additional Protocol II applies only in internal armed conflicts of a certain level. The Protocol develops and supplements common

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<sup>37</sup> See Commentary GC IV, *supra* note 28, p. 39.

<sup>38</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, para. 218.

Article 3 without changing its “existing conditions of application”.<sup>39</sup> Additional Protocol II stands on its own, as does common Article 3. Common Article 3 stands for itself in the sense that it is not affected whether or not Protocol II is applicable. In cases that meet the requirements for invoking Protocol II, common Article 3 will also be applicable at the same time. Protocol II is, however, not automatically applicable in situations covered by common Article 3. The Protocol has still not attained the same level of ratification as the four Geneva Conventions, the main dissidents being the United States, Israel and Sudan.

The reluctance of States to apply Article 3 in internal armed conflicts made it necessary to further develop its rules. There were two options, either forming a definition of a non-international armed conflict or creating conditions determining objectively the existence of an armed conflict not of an international character. The former alternative was preferred, as history had shown that the application of common Article 3 halted because of the lack of a clear definition. The absence of a clear definition of a non-international armed conflict in common Article 3 made the provision subject to interpretations and, in the end reluctance in applying its regulations.<sup>40</sup> To avoid this, Additional Protocol II was equipped with, not one but two thresholds. The application of the Protocol requires that the armed conflict shall not be so severe that it amounts to armed conflicts covered by Article 1 of Protocol I, i.e. covered by Article 2 common to the four Geneva Conventions. Further, the armed conflict shall

“[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 [Protocol II]”.<sup>41</sup>

The armed conflict should moreover not be so trifling that it is defined as an internal disturbance or tension. Protocol II consequently excludes “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”.<sup>42</sup> In addition, Additional Protocol II is applicable where government armed forces are fighting against “dissident armed forces or other organized armed groups”, a *vertical* application. It does not, as is the case for common Article 3, apply in a *horizontal* way, i.e. when insurgents are fighting amongst themselves. The scope of application of Protocol II is thus slightly different from that of common Article 3, as the latter applies in all cases of armed conflict not of an international character. Because of the customary character of common Article 3, it is also applicable in international armed conflicts.

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<sup>39</sup> Article 1, AP II.

<sup>40</sup> See Commentary AP II, *supra* note 32, p. 1348.

<sup>41</sup> Article 1, AP II.

<sup>42</sup> Article 1, AP II.

The criteria set up in Article 1 of Protocol II are all objective. That means that one State cannot unilaterally decide when a non-international armed conflict is at hand. Once the criteria are fulfilled the State is obliged to implement the provisions of Protocol II to the conflict.<sup>43</sup> Protocol II is intended to protect the victims of internal conflicts, to invoke humanitarian regulations, just like common Article 3. The ICRC Commentary on Article 3 points out that the Article should be applied as widely as possible. It should not be impossible to apply it to mere tensions or disturbances because common Article 3

“does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries [...]”<sup>44</sup>

Common Article 3 applies, because of its character as a “minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts”<sup>45</sup>, both to armed conflicts not of an international character as well as to international armed conflicts. Each side of an internal conflict is bound to apply the provisions of the Article and no reciprocity is required in this case.

### **3.3.1 The Status and Protection of Individuals**

The requirement of humane treatment without adverse distinction of persons not taking, or no longer taking an active part in hostilities is stated in both common Article 3 and Additional Protocol II.<sup>46</sup> The Protocol offers further provisions on the subject and states that these persons also shall enjoy respect for their person, honour and convictions and religious practice and offers a list of prohibited acts. In addition, a new element of the protection of children in internal conflicts has been laid down in Protocol II as well as provisions on persons whose liberty has been restricted and regulations concerning penal prosecutions. The protection offered to the wounded, sick and shipwrecked also embraces protection to medical and religious personnel and transports as well as the obligation to respect the distinctive emblem of the Red Cross in all circumstances.<sup>47</sup>

Protocol II applies to all persons affected by an armed conflict not of an international character, whether they are civilians, rebels or belonging to the armed forces of the government. All persons within the territory of a State affected by an internal armed conflict are protected by the provisions of the Protocol, irrespective of where they are in that territory. The geographical scope of the Protocol consists of “the whole territory under the control of a party, whether or not actual combat takes place there”.<sup>48</sup> Further,

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<sup>43</sup> See Commentary AP II, *supra* note 32, p. 1351.

<sup>44</sup> See Commentary GC IV, *supra* note 28, p. 36.

<sup>45</sup> See Nicaragua Case, *supra* note 38, para. 218.

<sup>46</sup> Article 4, AP II.

<sup>47</sup> Articles 9-12, AP II.

<sup>48</sup> See Tadić case I, *supra* note 10, para. 70.

individuals enjoy protection regardless of their nationality or other criteria.<sup>49</sup> The lack of combatant status in non-international armed conflicts does not change the view that even in such conflicts, the civilian population shall be protected. Accordingly, civilians benefit from a general protection from the consequences of war and enjoy special protection from the prohibition of making such persons the object of attack.<sup>50</sup> It is likewise prohibited to attack, destroy, remove or render useless objects that are indispensable to the survival of the civilian population.<sup>51</sup>

The fourth Geneva Convention relates to the protection of civilians and such persons are defined, for the purpose of the Convention, as “those who, at a given moment and in any manner whatsoever, find themselves [...] in the hands of a Party to the conflict [...] of which they are not nationals”.<sup>52</sup> The wording “in the hands of” should be regarded in a broad way, meaning any time a person is in the hands of that party as a prisoner but also when that person finds himself on the territory of a party to the conflict.<sup>53</sup> Civilians enjoy protection from “all acts of violence or threats thereof”, meaning they shall not be the objects of attack.<sup>54</sup>

Article 2 of the Protocol identifies the fundamental principle of non-discrimination and offers a list on grounds considered discriminatory. Nothing in the Protocol does however prohibit positive discrimination. Article 2 declares merely that no “adverse distinction” must be made between individuals when applying the provisions of the Protocol, as it applies to all persons affected by an internal armed conflict.

Regarding the legal status of the parties to the conflict, invoking common Article 3 does not in any way change the status of such parties. It does not change the ability of the government to act against the rebels. Further, it does not invoke any belligerent or other status on the rebels that is not prescribed by the provisions of common Article 3 or, in such cases, Protocol II. As the Commentary points out, the purpose of common Article 3 is strictly humanitarian,

“it is in no way concerned with the internal affairs of States, and [...] it merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself”.<sup>55</sup>

The sovereignty of the State as well as the State’s responsibility to uphold national security is not affected by the application of Protocol II either.<sup>56</sup> In this sense Protocol II extends the comparable provision contained in common Article 3. Moreover, in recalling the provisions of Article 2(7) of

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<sup>49</sup> See Commentary AP II, *supra* note 32, p.1359.

<sup>50</sup> Article 13, AP II.

<sup>51</sup> Article 14, AP II.

<sup>52</sup> Article 4, GC IV.

<sup>53</sup> See Commentary GC IV, *supra* note 28, p. 47.

<sup>54</sup> Article 27, GC IV.

<sup>55</sup> See Commentary GC IV, *Supra* note 28 p. 44.

<sup>56</sup> Article 3, AP II.

the UN Charter, Article 3(2) AP II, points out that there is no right for other countries to interfere with the internal or external affairs of the State if it should apply Protocol II.

As for individuals of insurgent groups opposing the government, their status is more disputed. They fall somewhere between the recognised statuses offered by international law. They are not regarded as mere criminals but they do not benefit from the protection offered to lawful combatants. In non-international armed conflicts reference to “combatants” is somewhat misleading since this concept traditionally refers to the members of the armed forces of a State. Members of such armed forces are considered lawful combatants in international armed conflicts.<sup>57</sup> They may legally engage in the armed conflict and if they fall into the hands of the enemy, they are to be treated as prisoners of war. To this group are also referred members of militias and volunteer corps forming part of such armed forces. Members of other militias and volunteer corps may also be regarded as combatants if they fulfil the four conditions of i) being under a responsible command, ii) having a distinctive sign, iii) carrying their weapons openly, and iv) following the laws and customs of war.<sup>58</sup> The spontaneous resort to weapons by inhabitants in a non-occupied territory is sufficient to afford such persons the status of combatants under the condition that the weapons are carried openly and that the provisions of IHL are respected. There is no requirement that such persons should be organised.<sup>59</sup>

The right to challenge the authority of the government is regulated by domestic law and independent of how members of armed opposition groups are categorised. Such groups may still face prosecutions under the national laws for, for instance treason or mutiny. In a democracy, there exists obviously no right to challenge the authority of the government by force of arms. The problem then arises as to how one should define and what status should be given to armed insurgent groups who fight against the government or amongst themselves. One could argue that armed opposition groups do indeed belong to the category of civilians but that they have lost their protected status against attacks for the reason of having participated in the conflict. But is it equally arguable to acknowledge these groups an actual right to attack themselves? Since they have no right to contest the authority of the government they cannot enjoy the protected status of combatants and accordingly they will not be regarded as prisoners of war if they fall into the hands of the government. If a civilian takes up arms and engages in the hostilities he will lose his protected status and may be attacked.<sup>60</sup> In reality the argumentation of rebels having a right to attack would mean that government armed forces could lawfully attack members of insurgent groups only for such time as they engage in the conflict.

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<sup>57</sup> Article 4A(1), GC III and Article 43(2), AP I.

<sup>58</sup> Article 4A(2), GC III.

<sup>59</sup> Article 4A(6), GC III.

<sup>60</sup> Article 13(3), AP II: “Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”



Members of such groups could however attack the governmental armed forces at any time. The ICRC argues that to overcome this discrepancy, individuals associated with such groups should either be “considered to be continuously taking a direct part in hostilities or not considered to be civilians”.<sup>61</sup>

Rebels have been referred to as “combatants” meaning that these persons, contrary to civilians, may be the objects of attack. The reference to these persons as combatants does not mean that they have the additional rights afforded to such status, such as the right of engaging in the hostilities or the right to be treated as POWs upon capture.<sup>62</sup> The closely related term “belligerent” has however previously been acknowledged to insurgents with the result of bringing into force the whole of international humanitarian law.<sup>63</sup> The requirements to obtain this status were that the insurgents had to be organised, control a part of the territory, and announce their independence and that the government identified them as belligerents. It was also important that the rebel group had started the conflict. The development has however taken the path of States refusing to identify insurgents as anything more than mere criminals since States are reluctant to put any legal status on the insurgents and in that way acknowledge that they no longer have control over the situation. International humanitarian law has therefore invoked certain objective criteria establishing when an internal armed conflict is at hand. In this way, the need for recognition of belligerents or a state of belligerency is no longer of importance. Third States that recognise a situation as a non-international armed conflict must certify that the objective criteria are met. If not that State may violate the prohibition of interfering in the internal affairs of a State laid down in the UN Charter.<sup>64</sup>

Insurgents opposing the government must be under a responsible command and exercise control over a part of the territory, as prescribed by Article 1, AP II. Article 1 does not state how much of the territory that must be controlled by the rebels, it must however be such that they can carry out military operations and apply Protocol II. The criterion of controlling a part of the territory also implies that some sort of organisation must have been established. The requirement of armed groups to “carry out sustained and concerted military operations” contained in Article 1, AP II, indicates that the operations must have some sort of strategy and be continued in time. The armed group must also have the ability to respect the laws of war. This cannot be done without an organisation within the group.<sup>65</sup>

One of the problems with common Article 3 and Additional Protocol II is that, as inter-State treaties they bind non-State actors that have not been able

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<sup>61</sup> See Henckaerts Jean-Marie and Doswald-Beck Louise, *supra note* 14.

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

<sup>63</sup> Gutman Roy and Rieff David (eds.), *Crimes of War*, W.W. Norton & Company, New York, 1999, p. 42.

<sup>64</sup> See Commentary AP II, *supra note* 32, para. 4346.

<sup>65</sup> *Ibid.*, para. 4469.

to negotiate the conditions of their obligations. The government represents the State and is bound to abide by the rules in the role of being a party to the Conventions and Protocol II. The ICRC Commentary on common Article 3 argues that if insurgents claim that they represent the country or part of it, they are bound to apply Article 3. If armed opposition groups are under some sort of command and this command claims a right to a certain part of the territory or the whole of it that command should also consider himself bound by the provisions as an agent of the State he claims to represent.<sup>66</sup>

This also has a bearing on common Article 3 and Protocol II. If the insurgents do not have this sort of hierarchy or otherwise organised and do not claim any right to a define territory, it is easier to argue that there is no non-international armed conflict taking place at all.

### **3.3.2 Penal Prosecutions**

Only combatants may legally engage in an international armed conflict. They cannot be punished for their participation in the hostilities and if they fall into enemy hands, they are entitled to prisoner of war status. Combatant status applies to all members of the armed forces of a party to the conflict with the exception of medical and religious personnel.<sup>67</sup> As combatant status does not exist in non-international armed conflicts, persons taking an active part in the hostilities can consequently be punished for this act and, of course, for any other violation of domestic law or international humanitarian law. In such cases common Article 3 puts down the requirements of fair trial in that a regularly constituted court shall pass sentences on judgements based on “all the judicial guarantees which are recognized as indispensable by civilized peoples” including prohibition of “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court”. Additional Protocol II provides a separate article for penal prosecutions. Article 6 points out the fundamental principles of a fair trial, namely the independence and impartiality of the court. In addition, it specifies other important provisions, such as the right to be informed without delay of the charges alleged, the principle of individual criminal responsibility; the prohibition of *ex post fact* laws; the presumption of innocence and that capital punishment shall not be pronounced on persons under eighteen years of age or pregnant women.

#### **3.3.2.1 Prosecution for Violations of International Humanitarian Law**

Nothing in common Article 3 or Additional Protocol II can be read on the accountability for breaches of their regulations. Common Article 3 is not included in the grave breaches provisions contained in the Geneva

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<sup>66</sup> See Commentary GC IV, *supra* note 28, p.37.

<sup>67</sup> Article 4(A)(1), GC III and Article 43(2), AP I.

Conventions<sup>68</sup> and Protocol II does not address the issue of grave breaches at all. Violations of IHL have traditionally been addressed to international armed conflicts. Individual criminal responsibility in non-international armed conflict was doubtful and nothing in the said treaties offered anything on universal jurisdiction in internal armed conflicts.<sup>69</sup> The jurisprudence of the *ad hoc* chambers shows, however, that this has changed. The Appeals Chamber concluded in the *Tadić case* that individual criminal responsibility for violations of common Article 3 is customary in character.<sup>70</sup>

The Statute of the International Criminal Tribunal for Rwanda (ICTR), established by the Security Council in 1994<sup>71</sup> explicitly concerns violations committed in non-international armed conflicts, as the Tribunal have jurisdiction over atrocities carried out in the territory of Rwanda.<sup>72</sup> There are three crimes of concern for the Tribunal; genocide, crimes against humanity and violations of common Article 3 and Additional Protocol II. The crime of genocide is understood as involving acts that has been committed with the intent to “destroy, in whole or in part, a national, ethnical, racial or religious group”.<sup>73</sup> Crimes against humanity are crimes that are “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds”.<sup>74</sup> Both these crimes are considered crimes under customary international law and contain provisions regarded as *jus cogens*.<sup>75</sup> The tribunal is empowered to prosecute violations of common Article 3 and Additional Protocol II.<sup>76</sup> The list of violations is not exclusive. The Tribunal may prosecute persons for violations of other provisions, in particular other provisions of Additional Protocol II.<sup>77</sup>

Article 3 of the Statute of the ICTY concerns violations of IHL. The Appeals Chamber declared in the *Tadić case* that Article 3 covers all serious violations of IHL regardless where committed. In other words, Article 3 is applicable to violations committed both in international and non-international armed conflicts.<sup>78</sup>

According to the Rome Statute, the International Criminal Court (ICC) is a permanent institution that has jurisdiction over persons accused of the most serious crimes of international concern, and shall be complementary to

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<sup>68</sup> Article 50, GC I; Article 51, GC II; Article 130, GC III, and; Article 147, GC IV.

<sup>69</sup> Meron Theodor, *International Criminalization of Internal Atrocities*, American Journal of International Law, Vol.89, 1995.

<sup>70</sup> See *Tadić case I*, *supra note 10*, para. 134.

<sup>71</sup> S/RES/955 (1994), 8 November 1994.

<sup>72</sup> Article 1, Statute of the International Criminal Tribunal for Rwanda (hereinafter referred to as “*Statute ICTR*”).

<sup>73</sup> Article 2(2), Statute ICTR.

<sup>74</sup> Article 3, Statute ICTR.

<sup>75</sup> See Meron Theodor, *supra note 70*.

<sup>76</sup> Article 4, Statute of the ICTR.

<sup>77</sup> Article 4 states that violations of common Article 3 and Additional Protocol II shall include, but not be limited to certain provisions stated in the said Article.

<sup>78</sup> See *Tadić case I*, *supra note 10*, paras. 89-92.

national criminal jurisdictions.<sup>79</sup> The Court has jurisdiction over serious crimes of concern to the international community as a whole, and these are the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>80</sup> War crimes embraces, for the purpose of non-international armed conflicts, serious violations of international and customary law applicable in non-international armed conflicts.<sup>81</sup> The ICC maintains the distinction between international and non-international armed conflicts, in that Article 8(a) and (b) address violations carried out during international armed conflicts and Article 8(c) and (e) refers to internal armed conflicts.

The ICJ has declared that the crime of genocide does not depend on what type of conflict is at hand, but the legal regime governing both international as well as internal armed conflicts recognises the crime of genocide.<sup>82</sup>

### 3.4 Implementation and Enforcement

The International Court of Justice has in its practise distinguished three fundamental principles relating to the implementation of international humanitarian law.<sup>83</sup> Article 1 common to the four Geneva Conventions, governs the first of these principles outlined by the ICJ as relative to the implementation of international humanitarian law. According to this article “[t]he High Contracting Parties undertake to respect and to ensure respect for the [Geneva Conventions] in all circumstances”. The ICJ has determined that this provision forms part of the customary international humanitarian law. This means that the rule is equally applicable in both international and non-international armed conflicts. The rule does not depend on reciprocity. As spelled out in common Article 1 and 3, a State party is obliged to respect and ensure respect for the Conventions “in all circumstances” and “at any time and in any place whatsoever”. In the *Nicaragua case* the Court stated that common Article 1 puts an obligation on States (in that particular case, the United States)

“to ‘respect’ the Conventions and even ‘to ensure respect’ for them ‘in all circumstances’, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression”.<sup>84</sup>

The obligation Article 1 puts on State parties is thus on the one hand to respect, themselves, the provisions of the Conventions. Throughout its domestic system a State must make sure that the provisions of the Conventions are complied with. On the other hand, a State party must also *ensure* respect for the Conventions by others, a conclusion that can be

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<sup>79</sup> Article 1, Rome Statute.

<sup>80</sup> Article 5, Rome Statute.

<sup>81</sup> Article 8(c) and (e), Rome Statute.

<sup>82</sup> Chetail Vincent, *The contribution of the International Court of Justice to international humanitarian law*, International Review of the Red Cross, Vol. 85, No. 850, 2003.

<sup>83</sup> See Chetail Vincent, *supra* note 83.

<sup>84</sup> See *Nicaragua case*, *supra* note 38, para. 220.

drawn from the *Nicaragua case*. The Court stated that a State has responsibility not to encourage violations of common Article 3 of the Conventions, by other States parties or by individuals or groups in other countries. A State is thus under an obligation to respect and ensure respect not just by its own armed forces, but by any armed faction acting under its “instructions, or under its direction or control”.<sup>85</sup> Insurgent movements are bound to apply, as a minimum the rules of common Article 3. Additional Protocol II does not talk about “parties to the conflict” but as it supplements and develops common Article 3, both insurgents and government armed forces are bound to apply its rules. While it is an obligation for State parties to have legal advisers available to inform military commanders of the application of the Conventions<sup>86</sup> it seems that this requirement is not valid for insurgent movements. These groups must however still abide by the rules of international humanitarian law and if they fail to do so, the lack of an adviser will not offer any justification.<sup>87</sup>

In non-international armed conflicts there is a possibility for the parties to the conflict to invoke additional provisions further than those embraced by common Article 3. Paragraph 3 of the said Article 3 encourages the parties to apply “all or part of other provisions” of the Conventions, by special agreements. It is stated that the parties should “further endeavour”, putting an obligation upon them to try to implement other provisions of the Conventions. This possibility has not been unheard and some examples may be drawn. On 22 May 1992 the parties to the conflict in Bosnia-Herzegovina concluded such special agreement as provided for in common Article 3. The parties agreed that common Article 3 was applicable, considering that they were involved in a non-international armed conflict at that time and decided further to invoke parts of the Geneva Conventions applicable in international armed conflicts.<sup>88</sup> In 1967 the parties to the conflict in Yemen brought about an agreement to respect the provisions of the Geneva Conventions and in 1988 the FMLN movement in El Salvador agreed to adhere to the provisions of common Article 3 and Additional Protocol II.<sup>89</sup> This was done after it had become clear that the government of El Salvador refused to apply Additional Protocol II.<sup>90</sup> In the Vietnam War (1957-1975), South Vietnam and the United States made a unilateral declaration to bring into force more provisions of IHL than common Article 3, with regard to the National Liberation Front (NLF) movement.<sup>91</sup> The “Operational Code of Conduct for Nigerian Armed Forces” constituted a declaration to abide by the rules of the Geneva Conventions in the internal armed conflict against Biafra (1967-70) and embraced provisions applicable

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<sup>85</sup> See Henckaerts Jean-Marie and Doswald-Beck Louise, *supra note* 14, p. 496.

<sup>86</sup> Article 82, AP I.

<sup>87</sup> See Henckaerts Jean-Marie and Doswald-Beck Louise, *supra note* 14, p.501.

<sup>88</sup> See Tadić case I, *supra note* 10.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, para. 107.

<sup>91</sup> Schindler Dietrich, *International Humanitarian Law and Internationalized Armed Conflicts*, International Review of the Red Cross, No.230, 1982.

in international armed conflicts.<sup>92</sup> In a public statement of the Prime Minister of the Democratic Republic of Congo the Prime Minister assured the Congolese Government's wish to respect the Geneva Conventions and its expectation that the rebel forces would "act in the same manner".<sup>93</sup>

One of the great problems is, however, the reluctance of applying the rules when an armed conflict is a fact. This is a two-folded dilemma, which contains issues of politics and domestic affairs of the State. States tend to show an unwillingness to acknowledge a situation as an internal armed conflict within the meaning of common Article 3 and/or Additional Protocol II. Admitting that a situation amounts to a non-international armed conflict implicitly discloses an adversary. States fear that this implicit acknowledgement of a party to the conflict might create an actual recognition of that party as a subject under international law, especially with regard to the special agreement recommendation in common Article 3.

Insurgent movements on the other hand might feel that adherence to IHL provisions will not lead to better treatment of the individuals of such groups, as challengers of the authorities. They will probably be confronted with prosecutions for treason or other violations of domestic and/or international law. The ICRC suggests that more incentives must be given to rebel forces in order for them to apply the rules.<sup>94</sup> Even if they apply the rules they fear prosecutions for the mere fact of having participated in the conflict and therefore more encouragement is needed. The special agreement opportunity envisaged in common Article 3 is one example. In this way the rebel forces may have "an opportunity to express their consent to be bound by the rules".<sup>95</sup> States are reluctant to acknowledge the situation as a non-international armed conflict and equally reluctant to regard the insurgents as a party to the conflict. The ICRC suggests that if it is impossible to bring into force a special agreement, it might be possible to agree on a more narrow understanding, including rules on specific protections, such as hospital zones. It might also be possible for the insurgents to unilaterally announce their willingness to apply IHL or to implement internal rules of conduct, amongst themselves, with regard to IHL. Another way to make rebel forces more willingly to apply the rules of IHL might be to grant them amnesty for participation in the conflict. If the conflict were international in character, prosecutions for engaging in the conflict would never take place. The ICRC explicitly declares, however, that immunity for violations of international humanitarian law can never be given. Yet another encouragement could be that if rebels are prosecuted under the domestic laws of the State, their penalties could be minimized if they have adhered to the provisions of IHL.

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<sup>92</sup> See Tadić case I, *supra note* 10, para. 106.

<sup>93</sup> See Tadić case I, *supra note* 10, para. 105.

<sup>94</sup> *Improving Compliance with International Humanitarian Law*, ICRC Expert Seminars, Report prepared by the International Committee of the Red Cross, Geneva, October 2003.

<sup>95</sup> *Ibid.*

### **3.5 The International Humanitarian Fact Finding Commission**

The only institution specifically authorised to deal with situations of non-international conflicts is the ICRC. Recent developments show, however, that the International Humanitarian Fact Finding Commission has taken steps to address this issue.

The International Humanitarian Fact Finding Commission was established under Article 90 of the Additional Protocol I, as a new mechanism to promote the implementation of international humanitarian law. It came into office in 1991. The Commission is a permanent body and is tasked with enquiries “into any facts alleged to be a grave breach [...] or other serious violation of the Geneva Conventions or of [...] Protocol [I].<sup>96</sup> Further it shall “facilitate [...] the restoration of an attitude of respect for the Conventions and [Protocol I]”.<sup>97</sup>

The Commission is not a court and does not render judgements. Complaints are submitted to the Commission, which starts an enquiry. A report together with recommendations is then presented to the parties on the findings of the Commission. All findings are confidential unless the parties agree to make them public. Although mandated to investigate alleged violations in international armed conflicts, the Commission has agreed to undertake enquiries in non-international armed conflicts if the parties to such conflicts agree.

The latest report from the Commission shows, however, that it has not investigated any armed conflict so far.<sup>98</sup> The Commission has been approached by armed groups involved in non-international armed conflicts. When they understood the requirements of agreement of both parties to the conflict for enquiry and the possibility that they could also face an enquiry they dropped the issue. The closest the Commission came to actual involvement was in the armed conflict in Colombia. The government and one armed group had started to negotiate an agreement to accept the competence of the Commission. Unfortunately, it was never used. It remains thus yet to be revealed what competence and impact the Commission will have on non-international armed conflicts.

### **3.6 The United Nations and IHL**

The principal purpose of the UN is to maintain international peace and security. Even though Article 2(7) of the Charter states that the UN may not interfere with the domestic jurisdiction of any State, the organisation may,

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<sup>96</sup> Article 90(2)(C)(i), AP I.

<sup>97</sup> Article 90(2)(C)(ii), AP I.

<sup>98</sup> Report from the International Humanitarian Fact Finding Commission 1997-2001, available at: [www.ihffc.org/en/publicreports.html#](http://www.ihffc.org/en/publicreports.html#), on 13 May 2005.

nevertheless, invoke actions under Chapter VII, if a conflict could be said to threaten international peace and security. Non-international armed conflicts could constitute a threat to international peace and security, which in turn could invoke actions by the Security Council operating under Chapter VII of the Charter. The issue was discussed by the Appeals Chamber in the *Tadić case*:

“Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a ‘threat to the peace’ and dealt with under Chapter VII, with the encouragement or even the behest of the General Assembly, such as the Congo crisis [...] and, more recently, Liberia and Somalia. It can thus be said that there is a common understanding, manifested by the ‘subsequent practice’ of the membership of the United Nations at large, that the ‘threat to the peace’ of Article 39 may include, as one of its species, internal armed conflicts”.<sup>99</sup>

The UN Charter contains the important obligation to promote and encourage respect for human rights and fundamental freedoms for all without discrimination.<sup>100</sup>

In 1968, the General Assembly affirmed the need in all armed conflicts to apply “basic humanitarian principles”, in its resolution on respect for human rights in armed conflicts.<sup>101</sup> The Assembly pointed out these principles as including the limited means of injuring the enemy; the protection of the civilian population as such, and the principle of distinction. A new resolution was adopted in 1970 on the basic principles for the protection of civilian populations in armed conflicts. The Assembly once again pointed out the principle of distinction and the prohibition of attacks on the civilian population as such, but new principles were added, *inter alia* the continued full application of fundamental human rights in armed conflicts and the principle of precaution.<sup>102</sup> These two resolutions reflect provisions of customary international law.<sup>103</sup>

The Security Council has also taken steps to address issues of international humanitarian law. In 1992 the Council condemned the violations of IHL taking place in the territory of Somalia and demanded the parties to that conflict to “immediately cease and desist from all breaches of international humanitarian law”.<sup>104</sup> In 1995 the Council recognised the importance of the parties to the conflict in Georgia to abide by the rules of IHL.<sup>105</sup> With regards to the conflict in Sudan the Security Council, acting under Chapter VII of the Charter, in 2004 established an international commission of inquiry for the purpose of investigating violations of international humanitarian and human rights law in Darfur. The Commission is mandated

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<sup>99</sup> See *Tadić case I*, *supra note 10*, para. 30.

<sup>100</sup> Article 1(3), UN Charter.

<sup>101</sup> General Assembly Resolution 2444 (XXIII), *Respect for human rights in armed conflicts*, 19 December 1968.

<sup>102</sup> See General Assembly Resolution 2675(XXV), *supra note 2*.

<sup>103</sup> See *Tadić case I*, *supra note 10*.

<sup>104</sup> S/RES/794 (1992), 3 December 1992.

<sup>105</sup> S/RES/993 (1995), 12 May 1995.



to investigate such violations committed by all the parties to the conflict.<sup>106</sup> In a subsequent resolution the Security Council condemned all violations of international humanitarian law and stated that all the parties to that conflict must show respect for IHL. In this context the Council demanded both the government and the armed groups to “ensure that their members comply with international humanitarian law”.<sup>107</sup> The Council has now decided to refer the situation in Sudan and Darfur to the International Criminal Court.<sup>108</sup>

The UN Commission on Human Rights and the UN High Commissioner on Human Rights has also considered questions involving international humanitarian law. With reference to the conflict in Darfur the Commission stated that the Government of Sudan must take immediate steps to scrutinize the violations of international humanitarian law and bring those responsible for such acts to justice.<sup>109</sup> The Commission also stated that the rebel forces supposedly had committed violations of IHL as well, but it was difficult to investigate the degree of such violations.<sup>110</sup>

The Human Rights Committee, the treaty body established under Article 28 of the International Covenant on Civil and Political Rights (ICCPR), has stated that the ICCPR supplements international humanitarian law in armed conflicts.<sup>111</sup> Even if not directly mandated with issues of international humanitarian law, human rights bodies have begun to address this subject.

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<sup>106</sup> S/RES/1564 (2004), 18 September 2004.

<sup>107</sup> S/RES/1574 (2004), 19 November 2004.

<sup>108</sup> S/RES/1593 (2005), 31 March 2005.

<sup>109</sup> Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up the World Conference on Human Rights, Situation of Human Rights in the Darfur Region of the Sudan*, E/CN.4/2005/3, 7 May 2004.

<sup>110</sup> *Ibid.*

<sup>111</sup> See General Comment No. 31, *supra note 1*.

## 4 Determination of Armed Conflicts

As been stated above, the reference to the so-called internationalised armed conflicts has put new considerations on the question of how to characterise an armed conflict. The problem of internationalised armed conflicts was illuminated as early as in the Spanish Civil War (1936-39). It was however not until the 1960s and the Vietnam War (1957-1975) that the problem was dealt with for the first time. The nature of the relationship between the United States and North Vietnam was then considered as international as well as the relationship between North and South Vietnam, which was also regarded as international in character.<sup>112</sup> The relationship between South Vietnam and the NLF represented the non-international feature of the Vietnam War.<sup>113</sup>

At that time two suggestions to deal with this situation were laid down. The first, which was supported by the ICRC, suggested that the whole of the international humanitarian law be applicable to *prima facie* non-international armed conflicts that supersedes into international ones by the involvement of the armed forces of another State. Accordingly, the ICRC demanded adherence by all the parties involved in the Vietnam War to the Geneva Conventions. The other suggestion was to analyse a conflict from international and non-international angles and in that way split that conflict into two, with different legal frameworks applicable to each of them.<sup>114</sup>

Even if internationalised armed conflicts distinguish themselves from both international and non-international armed conflicts and it could be argued that there exists a “third” category of armed conflicts, the application of international humanitarian law is still depending on the characterisation of a conflict as purely one of the two.<sup>115</sup> The Appeals Chamber has, however proposed in the *Tadić case* that an armed conflict could be both international and internal at the same time: “depending upon the circumstances, be international in character alongside an internal armed conflict”.<sup>116</sup>

The ICRC suggested a solution to the problem at the Conference of Government Experts in 1971, offering a provision dealing with this matter:

“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.”<sup>117</sup>

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<sup>112</sup> See Schindler Dietrich, *supra note 92*, p. 258.

<sup>113</sup> *Ibid*, p. 259.

<sup>114</sup> *Ibid*,

<sup>115</sup> See Stewart James G., *supra note 5*.

<sup>116</sup> See *Tadić case II*, *supra note 36*, para. 84.

<sup>117</sup> See Schindler Dietrich, *supra note 92*.

This proposition was however rejected with the motive that rebels could understand it as an encouragement to invoke third States.

As been stated above, there are at least three situations that could generate the notion of internationalised armed conflict. The first situation refers to the involvement of different States on each side of conflicting armed rebel groups, fighting against each other without the involvement of governmental forces. Another situation is that of an existing international armed conflict between two States and both of them involve themselves in an internal armed conflict in favour of the combating factions. Yet another situation is that of State's support of the rebel side against the government in a non-international armed conflict.<sup>118</sup> The Appeals Chamber in the *Tadić case* stated that, whereas international armed conflicts are easily distinguished as those waged between two or more States, non-international armed conflicts may be rendered international "if (i) another State intervenes in that conflict through its troops, or alternatively (ii) some of the participants in the internal armed conflict act on behalf of that other State".<sup>119</sup> In cases referred to in (i) the relationship between such State and the government would be considered non-international in character if that State supports the government but considered international if that State would support the insurgents. Consequently, the relationship between that State in support of the government and the insurgents would also be of a non-international character. Situations where States, involved in an international armed conflict with each other, intervenes on the opposite sides of an internal armed conflict would be considered as an international armed conflict.<sup>120</sup> The perplexity these different relationships create with regard to what legal framework is applicable is obvious. With regard to cases referred to in (ii) the *Nicaragua case* raised the question if the United States could be said to be responsible for alleged violations of international law committed by the *contra* forces. The Court concluded that it had to be established

"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>121</sup>

The question of State responsibility for acts committed by armed opposition groups is relevant to the concept of internationalised armed conflicts. The Appeals Chamber stated in the *Tadić case* that if insurgents could be said to act on behalf of a State that would generate the two situations of (i) making that State internationally responsible for those acts, and (ii) making the armed conflict international.<sup>122</sup> The ICJ elaborated on the question of what degree of control would be necessary for a State to be responsible for the

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<sup>118</sup> See Stewart James G., *supra note 5*.

<sup>119</sup> See *Tadić case II*, *supra note 36*, para. 84.

<sup>120</sup> See Schindler Dietrich, *supra note 92*, p. 257.

<sup>121</sup> See *Nicaragua case*, *supra note 38*, para. 109.

<sup>122</sup> See *Tadić case II*, *supra note 36*.

actions of insurgents and concluded that “it would in principle have to be proved that [the United States] had effective control of the military or paramilitary operations [...]”.<sup>123</sup> The conclusion was that the United States could not be considered to have had effective control over the *contras* since that faction could have acted in violation of international humanitarian law without the United States’ knowledge. Consequently the “training, arming, equipping, financing and supplying [...] or otherwise encouraging, supporting and aiding”<sup>124</sup> the *contras* was not sufficient to hold the United States responsible for their acts. Instead this conduct was considered a breach of the obligation not to intervene in the domestic affairs of another State. The Court found that the United States had encouraged the *contras* to commit violations of international humanitarian law but it could not held responsible for these acts.

The question of what status should be afforded to individual insurgents is closely connected with the notion of internationalised armed conflict. The Appeals Chamber argued in the *Tadić* case that the reference in Article 4A of the third Geneva Convention to members of militias and volunteer corps and the condition that such groups “[form] part”<sup>125</sup> or “[belong] to”<sup>126</sup> the armed forces of a State “implicitly refers to a test of control”.<sup>127</sup> In other words, the Appeals Chamber is arguing that insurgents could meet the requirements for combatants if they are supported by a State and if so, this fact could render a conflict international. A control test is necessary from various perspectives. One is connected with the question of State responsibility and another concern the problem of characterising an armed conflict as either international or non-international. A third perspective is that of invoking the grave breaches regime of the Geneva Conventions. The Appeals Chamber correctly ascertained the absence in international humanitarian law of criteria to characterise a conflict and found that “[r]eliance must therefore be had upon the criteria established by general rules on State responsibility”.<sup>128</sup> The Appeals Chamber declared that the ICJ established the “effective control test” with regards to the *contras*, to be able to determine under what conditions individuals could be said to act on behalf of a State and thereby invoke the rules of State responsibility.<sup>129</sup> The reference in *Nicaragua* case to an “agency” test should not be seen as a separate examination. According to the Appeals Chamber the ICJ is hence referring to one single test, namely that of “effective control”.<sup>130</sup>

The Appeals Chamber in the *Tadić* case developed the “effective control test”, elaborated by the ICJ, into a new test. This test distinguishes three different situations in which insurgents could be said to act on behalf of a

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<sup>123</sup> See *Nicaragua* case, *supra* note 38, para. 115.

<sup>124</sup> See *Nicaragua* case, *supra* note 38, para. 292 (3).

<sup>125</sup> Article 4A(1), GC III.

<sup>126</sup> Article 4A(2), GC III.

<sup>127</sup> See *Tadić* case II, *supra* note 36, para. 95.

<sup>128</sup> *Ibid*, para 105.

<sup>129</sup> *Ibid*, 109 in fine.

<sup>130</sup> *Ibid*, para. 112.

State and thus make that State responsible for their acts. The degree of control over the individuals or groups of individuals must however be examined with regard to each and every case. The Appeals Chamber declared however that

“[t]he control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *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”.<sup>131</sup>

The first situation regarded as possibly invoking State responsibility refers to unlawful acts carried out by an individual on behalf of a State in the territory of another. The second situation concerns violations of international law by loosely connected groups of individuals and the third situation is that where an individual is acting on behalf of a State in a lawful action but, in the performance of that mission is breaching an obligation under international law of that State.<sup>132</sup> The Appeals Chamber points out that for a State to be held responsible for the acts of groups it has to be proven that the whole of the group is “under the overall control of the State”.<sup>133</sup> The “overall control test” acknowledges that groups often undertake various actions and for this reason it is not relevant, for the purpose of State responsibility “whether or not each of [these actions] was specifically imposed, requested or directed by the State” as long as that State exercise the overall control over such groups.<sup>134</sup> The level of control attributed to a State for individuals acting on its behalf varies. With regard to individuals and loosely organised groups the degree of control must be such as it can be proven that the State issued instructions regarding the action performed by that individual or group or if the State, after the acts have been committed, supports it.<sup>135</sup> Armed organised militias and paramilitary factions could be considered to be under the overall control of a State. In this case financial support, equipment and training of such groups are not sufficient to invoke overall control. The State must have had something to do with the organisation or planning of the acts besides supporting the group with finances or weapons, but it is not necessary that the State actually issued the orders.<sup>136</sup> The Appeals Chamber goes even a step further in stating that there exists a third test for establishing the overall control by a State. This, the last “overall control test”, addresses individuals who can be said to act on behalf of a State “on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)”.<sup>137</sup> An example of this situation is the accusation of murder and other offences attributed to an Austrian Jew detained in a concentration camp in Germany who had been “elevated by

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<sup>131</sup> *Ibid*, para. 137.

<sup>132</sup> *Ibid*, para. 118-119.

<sup>133</sup> *Ibid*, para 120.

<sup>134</sup> *Ibid*, para. 122, emphasis removed.

<sup>135</sup> *Ibid*, para. 137.

<sup>136</sup> *Ibid*, para. 137.

<sup>137</sup> *Ibid*, para 141, emphasis removed.

the camp administrators to positions of authority over the other internees”.<sup>138</sup>

In the situation where a third State intervenes in a non-international armed conflict with its armed forces the level of involvement seems however to be arguable. In one case it seems that “foreign military intervention that only indirectly affects an independent internal conflict is sufficient to render that conflict international”.<sup>139</sup> In another case it was established that the intervention should be “significant and continuous”.<sup>140</sup> If a State assists a party to the conflict without the actual purpose thereof it seems too far reaching to say that the rebels would belong to that State and consequently too far to say that that conflict should be considered international. It seems hence not clear what level of intervention or support is sufficient to bring an internal armed conflict international. At least since the Appeals Chamber has stated that “the degree of control may [...] vary according to the factual circumstances of each case”.<sup>141</sup>

The Appeals Chamber also found it necessary to develop the *Nicaragua* “effective control test” on the ground that subsequent State practice has invoked a different test concerning the military and paramilitary groups. The Court points at judicial practice from international courts, such as the Iran-United States Claims Tribunal and the European Court of Human Rights and declares that the practice of these courts show that the effective control test, elaborated by the ICJ, has been abandoned. Instead, the Appeals Chamber concludes that for a State to be held responsible for the actions of military and paramilitary groups it has to be proven that that State exercised the “overall control” of that group, “not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity”.<sup>142</sup> Furthermore, the Court points out that it is not additionally required that the State delivered instructions on acts violating international law. For the purpose of individuals or groups not organised, a State is responsible for acts committed by such groups if “specific instructions or directives aimed at the commission of specific acts” have been issued or if subsequent “public approval of those acts” have been made.<sup>143</sup>

In the *Tadić case* the conclusion of the Appeals Chamber was that the Federal Republic of Yugoslavia (FRY) had exercised the overall control over the armed forces of *Republika Srpska*. This conclusion was reached on the finding that

“[s]uch control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction,

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<sup>138</sup> *Ibid*, para. 142.

<sup>139</sup> See Stewart James G., *supra note 5*.

<sup>140</sup> *Ibid*.

<sup>141</sup> See *Tadić case II*, *supra note 36*, para. 117, emphasis removed.

<sup>142</sup> *Ibid*, para. 131.

<sup>143</sup> *Ibid*, para. 132.

coordination and supervision of the activities and operations by the [Bosnian Serb Army in Bosnia and Hercegovina]”.<sup>144</sup>

The Court also noted that the Bosnian Serb Army was under the overall control of the Federal Republic of Yugoslavia due to the fact that when the Dayton-Paris Accord was signed the FRY acted as “the international subject wielding authority over the *Republika Srpska*”.<sup>145</sup> The conclusion was thus that the FRY had exercised the overall control over the armed forces of the *Republika Srpska* and consequently that the Bosnian Serb Army was to be seen as acting on behalf of the FRY. This had in turn rendered the conflict between the Bosnian Serb Army and the authorities of Bosnia and Hercegovina in the territory of Bosnia and Hercegovina, international in character.<sup>146</sup>

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<sup>144</sup> *Ibid*, para. 156.

<sup>145</sup> *Ibid*, para. 159.

<sup>146</sup> *Ibid*, para. 162.

## 5 Analysis and Conclusions

The main obstacles surrounding the implementation and enforcement of international humanitarian law in non-international armed conflicts are found on all sides of such conflicts. States tend to show an unwillingness to admit that a situation meets the requirements for non-international armed conflicts. States are equally reluctant in such cases to recognise that the rebels opposing it constitute a party to that conflict. On the other hand, rebel forces tend to show little motivation to abide by the provisions of international humanitarian law. The reason for this could be that even if they were to adhere to those provisions they would still be treated as mere criminals by the authorities if they were captured or if they surrender. Another problem is the so-called internationalised armed conflicts where a *prima facie* non-international armed conflict succeeds into an international one by the involvement of third States to that conflict. Such situations create confusion regarding the provisions applicable.

Common Article 3 offers no definition on what constitutes “an armed conflict not of an international character”. The minimum rules that this Article presents should however be applicable when such a conflict breaks out. According to common Article 2 of the Geneva Conventions an international armed conflict is described as “all cases of declared war or of any other armed conflict“ between two or more States. Non-international armed conflicts thus take place within the boundaries of one State, between the established government and groups opposing this authority or between groups within that State without the involvement of governmental forces. The author would argue that for the purpose of common Article 3 it should not be significant whether or not the government recognises a conflict as internal. Common Article 3 forms part of the customary international humanitarian law and is considered as “elementary considerations of humanity”.<sup>147</sup> Accordingly a State, which is or is not a party to the Additional Protocol II should at least consider common Article 3 applicable. That provision could even apply in situations of internal tensions and disturbances since the underlying theme is that of humanity, “which all civilized nations consider as valid everywhere and under all circumstances and as being above and outside war itself”.<sup>148</sup> For this reason the writer would argue that a State should at least treat insurgents in accordance with common Article 3 regardless of how it decides to characterise the situation.

Regarding States parties to Additional Protocol II they are bound to apply the provisions if the conditions of that treaty are fulfilled. The criteria are objective and once they are met a State cannot unilaterally claim that it is not involved in a non-international armed conflict. The lower threshold of Additional Protocol II excludes internal tensions and disturbances from its

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<sup>147</sup> See Nicaragua case, *supra* note 38.

<sup>148</sup> See Commentary GC IV, *supra* note 28, p. 44.



application. If an armed conflict breaks out in the territory of a contracting State, between its armed forces and opposing organised factions that State is bound to apply Protocol II to that conflict. The reason for the reluctance of States to acknowledge a situation as an internal armed conflict is connected with the unwillingness of admitting that it has lost control over the situation. This could in turn have the effect that other States may interfere in the domestic affairs of that State. But as the ICRC has stated, common Article 3 and Additional Protocol II do not offer anything else but respect for human beings and nothing in Protocol II prevents a State from prosecuting the rebels under domestic laws for treason or other violations connected with the armed conflict.

Both common Article 3 and Additional Protocol II declare that invoking their provisions will not affect the legal status of the parties to the conflict. This raises the question of what status individuals belonging to armed opposition groups actually should be afforded in the first place. The starting point would be to discuss whether or not individual members of insurgent groups could be considered as civilians who have temporarily lost their protection from being the object of attack. The category of civilians is described as persons not taking any active part in hostilities. If they do they lose their protection and may be legitimately targeted. The author would argue that the problem of affording this status to insurgents is that once they engage in hostilities they lose the protection offered and they can no longer be considered belonging to this category. On the other hand it is equally difficult to afford the status of combatants to insurgents, at least if consideration is purely taken to non-international armed conflicts without involvement of foreign States. Combatants have a right to engage in hostilities and to afford insurgents such status would stand in deep contrast with domestic laws. The ICRC has proposed a solution to the problem of relevant status of insurgents.<sup>149</sup> It would be to invent a new category under which insurgents would have a combatant-like position provided they fulfil certain conditions. In the author's point of view this would mean that in the case of an armed conflict not of an international character, organised individuals opposing the government should be recognised as such. The introduction of a new category would not render the opposition of the government legal but it would guarantee that the persons belonging to such groups were recognised as belligerents and enjoy protection from prosecution for the mere fact of having participated in the conflict. The writer must agree that this suggestion is reasonable. As the author sees it, members of rebel groups fall outside any of the recognised categories and States could thus argue that members of such groups do not enjoy any protection at all. The writer would also argue that an amnesty for prosecution for mere participation in hostilities is not the same as giving such persons a right to engage in the conflict. It merely provides more incentives for such groups to abide by the rules, something that even the government would appreciate. The unwillingness of the side of the rebels not to abide by the rules of IHL could also be that their compliance or non-

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<sup>149</sup> See Improving Compliance with International Humanitarian Law, *supra* note 95.

compliance with those laws will in any event most likely not be taken into consideration. They would still be prosecuted for violations of national laws. The solution offered by the ICRC could be to offer such individuals amnesties for participation in the conflict, as mentioned above. Another suggestion is that when deciding upon the penalty, considerations should be taken upon if a person has abided by the rules.<sup>150</sup> The writer would argue that this also seems like a reasonable solution. The problem would be, as the writer sees it, that since governments are already reluctant to admit that a situation constitute an internal armed conflict under IHL together with the unwillingness of recognising rebels as parties to such conflicts, it seems hard to imagine that they would invoke further conditions *beneficial* to the insurgents. In any case, a State's refusal to recognise a situation as an internal conflict should not be an obstacle for insurgents. As there is no reciprocity in these cases insurgents could gain more support from other States if they apply and comply with the provisions. As subjects under international law it is the States who have to change their attitudes and it seems therefore that we will not leave this condition of *status quo* in any near future and that a final solution to the problems is beyond far-away.

In cases of internationalised armed conflicts one could argue that rebel forces would be afforded combatant status if they could be considered to act on behalf of the intervening State and thereby belong to the armed forces of that State. If a State could be considered to exercise the overall control over armed opposition forces, such forces could be argued to form part of the armed forces of that State as stated in the third Geneva Convention. Consequently individuals of such groups could be entitled to prisoner of war status if captured. The author would argue that even if this solution would be favourable for members of rebel forces in terms of giving them a protected status, the question would be if such groups would like themselves to be regarded as parts of the armed forces of another State. The whole mission of challenging the authorities must be to eventually overthrow the government or form a new independent State.

Internationalised armed conflicts are those *prima facie* internal conflicts that turn international by the involvement of a third State. The problem these situations cause is that of what provisions are applicable. Internationalised armed conflicts consist of both internal and international elements. Accordingly, the relationship between the insurgents and the government, as well as that between a State, intervening on the side of the government, and the insurgents would be considered non-international. On the contrary, the relationship between the government and a State supporting the insurgents, as well as that between two States involved in an international armed conflict intervening on opposing sides in an internal conflict would be considered international. The discussion of the Appeals Chamber in the *Tadić case* concerned the question of when a non-international armed conflict could be considered to have succeeded into an international one. The Appeals Chamber stated that internationalisation of an internal armed

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<sup>150</sup> *Ibid.*

conflict depends on the involvement of the armed forces of a third State on the one hand and on if insurgents could be considered to act on behalf of that State, on the other. With regard to the latter condition the findings in the *Tadić case* was that a conflict should be considered international if an intervening State had exercised the overall control over the insurgents opposing the government in a non-international armed conflict. Since the application of contemporary international humanitarian law is depending on the characterisation of a conflict as either international or internal it seems reasonable to invoke the whole of the IHL in cases where there are international elements involved. The idea of dividing an internationalised armed conflict in its internal and international components and deal with issues under each of them seems perplex and difficult. The suggestion offered by the ICRC that the whole of the IHL would be applicable in situations which involved international elements<sup>151</sup> seems to have been adhered to by the Appeals Chamber in the *Tadić case*.

The development of the *ad hoc* Chambers concerning individual criminal responsibility for violations of IHL in non-international armed conflicts is satisfactory. In the authors opinion this progress marks an important step forward in that it shows that even in such conflicts perpetrators will be adjudicated, even if they do not find themselves bound by the provisions. If national courts would deny prosecution of such persons, this possibility will be attributed to the *ad hoc* Chambers, at present the ICC.

The development of international organisations and bodies is likewise satisfactory. The author considers however that there should be established an organisation or body that more loudly could express its findings.

The conclusion must be that the problems surrounding the implementation and enforcement of international humanitarian law in non-international armed conflicts are various and not easily dealt with under the current regulations. One solution that would make it easier to apply the rules and likewise get the parties involved in such conflicts to abide by them would be to elaborate one single legal framework for all armed conflicts, abandoning the current division between international and non-international armed conflicts. If this could be done, the problem of how to deal with internationalised armed conflicts would be manageable and in addition perhaps solve the problems connected with the question of recognition. However, the attempt by the ICRC to invoke a provision stating that foreign State intervention would automatically invoke the whole of the Geneva Conventions could not be adopted and it seems therefore unlikely that a uniform regulation applicable to all armed conflicts could be produced.

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<sup>151</sup> See Schindler Dietrich, *supra note* 92.

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