Legalization of civil wars: the legal institutionalization of non- international armed conflicts

Ohlenschlaeger Buhl, Kenneth

Veröffentlichungsversion / Published Version
Zeitschriftenartikel / journal article

Legalization of Civil Wars: The Legal Institutionalization of Non-international Armed Conflicts

Kenneth Øhlenschlæger Buhl[*]

I. INTRODUCTION AND PRESENTATION

This article is concerned with the legal challenges of regulating civil wars in international humanitarian law.[1] Civil war is not a term used in international law; it falls, however, within the context of the legal term 'armed conflicts not of an international character', although the shorter 'non-international armed conflict' is used here. Civil wars are usually limited to the territory of a state. Considering that international law is generally concerned with the legal relations between states – being a legal system based on the system of states with states as its subjects – the main question is how civil wars as internal conflicts have become subject to international humanitarian law.

International humanitarian law, which is a term that came into the legal vocabulary after World War Two, is the part of international law that regulates behaviour *during* armed conflicts; other legal terms used are the 'laws of war', *'jus in bello'* or 'the laws of armed conflict'. International humanitarian law applies to all participants regardless of who caused the conflict. In this sense,

[*] After being commissioned as a naval officer from the Naval Academy in 1986 the author served in submarines, patrol frigates, a naval headquarters operations centre and Defence Command Denmark. Following legal studies, the author served in international missions as military legal adviser in Macedonia (NATO), Iraq (Danish Battlegroup) and Sudan (United Nations Mission in Sudan). He is currently on active duty, serving with Danish Institute of Military Studies as a military analyst, while undertaking PhD studies under the auspices of University of Southern Denmark.

[1] This article is based in part on findings emanating from the author's PhD dissertation entitled, 'Armed Conflict as a Legal Entity and the Application of International Humanitarian Law'.

international humanitarian law as *jus in bello* is distinct from the *jus ad bellum*, the right to start a war or use armed force, and the two are watertight compartments.[2]

Traditionally in international law, belligerent status, as the right to wage war during wartime, has been considered the prerogative of states. Only states and their armed forces could lawfully participate in armed conflicts, and as such they were considered equal. Consequently, until 1949, international humanitarian law dealt with international armed conflicts, i.e. wars between states. Indeed the laws of war were the subject of some of the first conventions in international law, such as the first Geneva Convention from 1864, which also marked the birth of the International Committee of the Red Cross (ICRC).[3] The legacy of Henri Dunant is often mentioned as the driving force behind the convention; what must also be taken into account, however, are the political and religious movements in Europe at the time, which created a window of opportunity during which states agreed to limited themselves legally in their right to wage war.[4]

More narrowly, international humanitarian law is aimed at regulating conduct during armed conflict, and at protecting civilians and the victims of war. In more practical terms international humanitarian law has sought to balance the requirements of military necessity and the principles of humanity. Regulation of non-international armed conflict has been less extensive than that of international armed conflict, and was first made part of international humanitarian law with the introduction of a common Article 3 into each of the four Geneva Conventions from 1949, which are mainly concerned with the regulation of international armed conflicts. These conventions, together with their two Additional Protocols from 1977, are considered the core of international humanitarian law. They build on the experience of World War Two, and must be analysed in this

[2] Although the doctrine of belligerent equality, at least among states, must be considered to stand in international law, it is tested from time to time. See G. Best, *War and Law since 1945* (Oxford University Press, Oxford, 1994 (reprint 2002), at 235-247.

[3] The 1864 Geneva Convention was concerned with the sick and wounded on the battle field. It was rather short, having only ten articles.

[4] On the limitations on war before 1864, see C. von Clausewitz, *On War* (original title: *Vom Kriege*) (Penguin Classics, New York, 1982), foreword by Anatol Rapoport, translated by J.J. Graham; 102f: "...to introduce into the philosophy of War itself a principle of restraint would be an absurdity". Clausewitz, however, recognized that civilized nations were waging war in a more restraint manner than "uncivilized" nations, because they were civilized, not because they felt a legal obligation.

context. The fact that Article 3 set minimum standards for non-international armed conflicts broke new ground in international law. Until then civil wars had been considered to fall within the internal affairs of states and were not subject to international regulation; for this reason, the inclusion of Article 3 met with a lot of resistance.[5] The 1949 Geneva Conventions include 394 articles that relate to international armed conflict. Together with the 1977 Additional Protocol 1, which also concerns international armed conflict, there are altogether 496 articles regulating armed conflict between states. By comparison, Article 3 of the 1949 Conventions, which sets minimum standards in non-international armed conflicts, along with the 1977 Additional Protocol 2, which formulates rules for non-international armed conflicts, has 28 articles.

Generally states are only bound by the convention obligations they have ratified. However, they are also considered to be bound by customary international law[6], which is quite extensive in international humanitarian law both in relation to international and non-international armed conflict.[7] Despite developments in customary international law and other regulations in conventional law within this field, this quantitative comparison with the very core of the legal instruments regulating armed conflicts evidences a discrepancy at the level of regulation.

Although sources differ at the time of writing it is clear that, numerically, most existing armed conflicts are of a non-international character. From a quantitative perspective, civil wars in developing countries are regarded as the dominant form of warfare.[8] Furthermore civil wars, which are often of an ethnic nature, tend to be fiercer than international armed conflicts, with the civilian population being the primary target. This has invoked a requirement for increased legal regulation

[5] G. Best, *War and Law Since 1945*, above note 2, at 168-179.

[6] Customary international law is considered the oldest and original source of international law. It is defined in Article 38(1)(c) of the Statute of the International Court of Justice as an "international custom, as evidence of a general practice accepted as law". Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law, Ninth Edition, Vol. I,* (Longman, London,1992), (1996 edition), p. 27, defines a *custom* as " a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are according to international law, obligatory or right."

[7] For a comprehensive work on customary international humanitarian law, see J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law, Volume I: Rules* (Cambridge University Press, Cambridge, 2005).

[8] D. Sandole: *Capturing the Complexity of Conflict, Dealing with Violent Ethnic Conflicts of the Post-Cold War Era* (Pinter, London, 1999), at 2ff.

of non-international armed conflicts. New international judicial institutions such as the International Criminal Court (ICC), which have legal competence in both international and non-international armed conflicts, have necessitated improved regulation of the latter. In other words, there has been a 'rule gap' that has required bridging.

This problem is narrowly related to the issue of convergence between the two legal regimes of international humanitarian law and international human rights law. It is disputed whether the gap should be filled with one regime or the other, or both. The issue of delineation between international humanitarian law and international human rights law also applies to international armed conflicts, and the question is whether the criteria for delineation should be the same or different for both international and non-international armed conflicts.

Secondly, developments in warfare have created a 'grey zone' between situations of peace and situations of armed conflicts in the legal sense of the terms 'peace' and 'armed conflict'. The conventional legal doctrine, *inter bellum et pacem nihil est medium*[9], dictates that there can be either a state of war or a state of peace, implying that either the laws of war or the laws of peace prevail. A state between war and peace, a *status mixtus*, cannot, according to this doctrine, exist, and has thus far been rejected in international law.[10] Consequently, regulation of the use of force has been adapted to a legal structure in which there is a clear delineation of war and peace, but this does not always reflect reality.

Article 2(4) of the UN Charter, a *jus ad bellum* rule prohibiting the use of armed force in interstate relations, is in effect a prohibition against international armed conflict.[11] However, this rule, the nature of contemporary conflicts and the general interests of states have together created an environment in which states can be unwilling to admit the existence of an international armed conflict, which is detrimental to the application of international humanitarian law.[12]

[9] Formulated by Hugo Grotius in his work *De Jure Belli ac Pacis* (The Laws of War and Peace), 1625.

[10] Y. Dinstein, *War, Aggression and Self-defence* (Cambridge University Press, Cambridge, 4th edition, 2005) at 15ff.

[11] There are notable exceptions to this rule, the most prominent being self defence, as described in Article 51 of the UN Charter, the use of force in accordance with a UN Security Council resolution based on Chapter VII of the Charter, and the use of force by consent of the territorial state.

[12] C. Greenwood, "The Concept of War in Modern International Law*"*, 36 *The International and Comparative Law Quarterly* (1987), 283-306, at 287ff.

This aspect is also valid in non-international armed conflicts. There is no prohibition against a state waging a non-international armed conflict. A state may, however, be reluctant to admit the existence of a non-international armed conflict within its territory for political reasons. Even if states were willing to admit the existence of a non-international armed conflict there are still likely to be a number of situations where legal uncertainty will exist.

Furthermore, the demarcation between international and non-international armed conflict has become blurred. Several non-international armed conflicts have transnational elements, for example a state supporting a non-state actor within another state, or a non-state actor fighting a state from the territory of another state, or an international intervention force that uses armed force against a non-state actor within the territory of a state.

II. CHARACTERIZATION OF ARMED CONFLICTS

The aim of this section is characterize the different types of armed conflict in accordance with the interdependency of the applicable rule set. As a general rule, the legal requirement for the application of international humanitarian law, such as the 1949 Geneva Conventions, depends on the existence of an armed conflict.[13] Conversely, if it is recognized that international humanitarian law applies in a given situation, this would indicate the existence of an armed conflict. Thus it may be claimed that the two legal entities of 'armed conflict' and 'international humanitarian law' are intertwined to a degree that they can be considered mutually dependent.

A. Defining the Regime of International Humanitarian Law

Although the question of what falls within international humanitarian law may be evident to the trained scholar, proposing a precise definition or delineation is far less obvious. Traditionally

[13]This follows from the common Article 2 of the 1949 Geneva Conventions, which states *inter alia* that:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

international humanitarian law, *jus in bello*, originates from the laws and customs of war[14], or laws of war[15]. The term 'laws of armed conflict' would establish a clear link. Common to all these terms is the general concern in international humanitarian law with restraining warfare or alleviating the sufferings of war[16], two sides of the same coin, whether the focus is on the belligerent or the victims of war. Traditionally, there has been a distinction between 'Geneva Law', which focuses on the protection and alleviating the sufferings of the victims of war, and 'Hague Law', which focuses on the conduct of military operations. However, after the emergence of 1977 Protocol 1, the distinction has become artificial obsolete and of little, if any, relevance[17]; even at the time of Nuremberg Trials, "the distinction between the two was artificial"[18].

As mentioned above, the 1949 Geneva Conventions and their 1977 Additional Protocols are very much at the core of current international humanitarian law. Without attempting to provide an exhaustive list of all the relevant regulations, it is nevertheless important to mention the 1907 Hague Conventions and the 1954 Hague Convention on Protection of Cultural Property. Conventions regulating certain categories of weapons are also regarded as an integral part of international humanitarian law; and other legislation, such the statutes of and decisions by the International

[14] See e.g. the foreword by Jakob Kellenberger, President of ICRC, in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7, at ix.

[15] G. Best, *War and Law since 1945*, above note 2, at 12.

[16] A.P.V. Rogers: *Law on the Battlefield* (Manchester University Press, Manchester, 2nd edition, 2004), at 1; Hilaire McCoubrey: *International Humanitarian Law* (Ashgate, Dartmouth, 2nd edition, 1998), at 1: "International Humanitarian Law is, broadly, that branch of public international law which seeks to moderate the conduct of armed conflict and to mitigate the suffering which is causes."

[17] The division of *jus in bello* into Geneva and Hague rules has probably always been somewhat exaggerated given the fact that the 1907 Hague Conventions also contained regulations relating to prisoners of war, and the sick and wounded. See further R. Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge, 2002 (2005 edition)), at 194: "Even if "Hague Law" can be differentiated from "Geneva Law", the two are not watertight compartments." F. Kalhoven, *Constraints on the Waging of War* (International Committee of the Red Cross: Geneva, 1987, 2nd edition 1991): at 7-23; Hilaire McCoubrey, *International Humanitarian* Law, above note 16, at. 2; Danish Red Cross International Law Committee (DRCILC): *Den humanitære folkeret og Danmark*, (The International Humanitarian Law and Denmark) (DRCILC: Copenhagen, 2006), at 17. See also Best, *War and Law since 1945*, above note 2, at 184.

[18] G. Best: *War and Law since 1945*, above note 2, at 183f.

Criminal Court (ICC) and the International Criminal Tribunals for Former Yugoslavia (ICTY) and Rwanda (ICTR) respectively, may contribute to what is considered international humanitarian law.

International regulation on armament control and disarmament, including international agreements limiting the number of nuclear and of conventional weapons, such as the Treaty on Conventional Armed Force in Europe (CFE Treaty), are not considered to be humanitarian law, because the primary rationale is different, that is, to promote measures of mutual trust among states in order to *prevent* war. Certainly, the subjects and issues of armament control and disarmament are interrelated with international humanitarian law, and indeed there are some scholars who include them within that framework.[19]

Furthermore, some aspects of international law may be applicable both in armed conflict and in peacetime; for example, the 1948 Genocide Convention concerns acts committed both during war and in times of peace, and in some instances is mentioned in conjunction with legislation on *jus in bello*.[20]

It could be suggested that the delineation of international humanitarian law should be based on criteria concerning acts related to the conduct of hostilities. This would cover the core of the regulations, but seems somewhat narrow as international humanitarian law is also applicable in the event of hostile occupation after the termination of hostilities, and some regulations apply even in times of peace.[21] Such regulations may concern rights and obligations that are not directly related the actual conduct of hostilities such as those relating to ranks[22], disciplinary measures[23], and the

[19] I. Detter, *The Law of War* (Cambridge University Press: Cambridge, 2nd edition, 2000 (reprint 2003), at 109-123.

[20] See e.g. the collection of significant conventions concerning international humanitarian law during armed conflict issued by the Danish Governmental Red Cross Committee: *Regeringens Røde Kors Udvalg: Humanitær Folkeret*, (Copenhagen, 2004), ISBN no. 87-7667-062-7, which contains the 1948 Genocide Convention.

[21] Best, *War and Law since 1945*, above note 2, at 146. Common Article 1 to the 1949 Geneva Conventions concerning respect for the Conventions implies a duty ensure dissemination, knowledge and training already in peacetime.

[22] 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Arts. 43-45, regulating *inter alia* the duty of the detaining power to recognize promotions of POW.

[23]1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Arts. 39-42, regulating *inter alia* the wearing of badges and decorations.

right to smoke of prisoners of war[24] (POW). Another interesting rule is the obligation of an occupying power to provide for a school system for children in occupied territories.[25]

Another criterion may be the rights and obligations of belligerents. After all, restraints and the duty to protect and alleviate the suffering of the victims of war have traditionally been addressed to belligerents. Although this seems more encompassing, there are two major aspects here. First of all, belligerent rights are to a large extent uncodified, although they exist in customary law. That such belligerent rights exist can be deduced *inter alia* from the codified obligations of the Geneva Conventions, for example, the right of belligerents to detain and intern prisoners of war is not codified anywhere in international humanitarian law; however, such a right must be assumed to exist, otherwise the regulations concerning treatment etc. of prisoners of war would be meaningless. Similarly, a right of belligerents to use force against military targets during hostilities must be assumed to exist.

The second aspect is that belligerency entails *inter alia* the right to use force in accordance with international humanitarian law.[26] The significance is that a combatant cannot be punished providing there is compliance with the laws of war.[27] Traditionally, belligerent rights have been considered

[24] 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Art. 26 stating *inter alia* "the use of tobacco shall be permitted".

[25] 1949 Geneva Convention IV Relative to the Protections of Civilian Persons in Time of War, Art. 50 stating *inter alia* that "[t]he Occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children".

[26] See J.S. Pictet (ed.), *Commentary III Geneva Convention* (International Committee of the Red Cross: Geneva, 1952), at 46f:

> At the 1899 and 1907 Peace Conferences, the lengthiest and most important discussions were centred around the provisions relating to *belligerent status.* The question is of the outmost significance. Once one is accorded the status of belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right, following capture, to be recognized as a prisoner of war, and to be treated accordingly.

[27] See also H. Campbell Black *et al*, *Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern*, at 155: 'Belligerency' is defined as follows: "In international law, the status of de facto statehood attributed to a body of insurgents, by which their hostilities are legalized. The international status assumed by a state, quality of being belligerent; status of belligerent; act or state of waging war; warfare." 'Belligerent' is defined as follows: "In international law, as an adjective, it means engaged in lawful war. As a noun it designates either of two nations which are actually in a state of war with each other as well as their allies actively co-

the prerogative of states. This rule has been modified in situations where non-state actors, that is, entities not being considered *de jure* as states such as "regular armed forces who profess allegiance to a Government or an authority not recognized" by the other belligerent powers to conflict (for example, the Free French under De Gaulle during World War II), have been attributed with *de facto* statehood or similar with respect to the laws of war.[28] While belligerent status would be a relevant criterion in international armed conflicts, it is of little or no significance in non-international armed conflicts, where one or both opponents are non-state actors.

Non-state actors may *de facto* create a situation that constitutes a non-international armed conflict, and when involved in such internal armed conflicts they may have rights and obligations according to international humanitarian law regulating the hostilities[29], but this does not imply a right to wage war as a belligerent. The exclusivity of states in relation to belligerency is admittedly under pressure.[30]

In summary, it may be concluded that international humanitarian law is the part of international law that is recognized as applying to behaviour during armed conflict, including related rights and

---

operating as distinguished from a nation which takes no part in the war maintains a strict indifference as between the contending parties, called a "neutral"."

[28] The limited status of belligerency, such as "regular armed forces who profess allegiance to a Government or an authority not recognized by" the belligerent Power may be seen as implicit in the 1949 Conventions, as members of such regular armed forces were given a similar status as wounded, sick, shipwrecked and prisoners of war belonging to the other Parties of an international armed conflict. It was a new creation in international humanitarian law reflecting the experience in of such forces during World War Two, most notably the members of the Free French forces under De Gaulle, who were given prisoner of war status by Germany in spite of the armistice conditions signed with the Vichy Government, according to which Germany was not obliged to recognize other French authorities. See J.S. Pictet, *Commentary III Geneva Convention*, above note 26, at 63: "During the Second World War, the German Authorities accepted this solution and stated that they would consider the Free French Forces to be "fighting for England". "It is not expressly stated that this Government or authority must, as a minimum requirement, be recognised by third States, but condition is consistent with the spirit of the provision, which was founded on the specific case of the forces of General de Gaulle." Other entities such as national liberation movements may be accorded belligerent rights similar to that of states, provided that 1977 Additional Protocol 1 applies to an armed conflict.

[29] Concerning the application of international humanitarian law on non-state organized armed groups, see L. Zegveld, *The Accountability of Armed Opposition Groups* (Cambridge University Press, Cambridge, 2002) at 14-18.

[30] I. Detter, *The Law of War* (Cambridge University Press, Cambridge, 2000 (2003 reprint)), at 40ff.

obligations in the event of occupation and in peacetime, and that may derogate from international law as applicable in times of peace.

B. Types of Armed Conflicts

Generally speaking there are two major types of armed conflicts in relation to the application of international humanitarian law: international armed conflicts and non-international armed conflicts.

1. International Armed Conflicts

Two categories of international armed conflicts are usually recognized in relation to the application of international humanitarian law, or *jus in bello*:

- International armed conflicts according to common Article 2, and
- Wars of national liberation according to 1977 Additional Protocol 1, Article 1, Paragraph 4.

a. International Armed Conflict according to Common Article 2

International armed conflicts according to common Article 2 are by far the most relevant category of international armed conflict. There are two main views in relation to what constitutes the decisive criterion for determining what constitutes an international armed conflict. One view, which is endorsed by this author, is that it is determined by the *legal status of the opponents*. This view is supported by the wording of common Article 2 in the 1949 Geneva Conventions that refers to an armed conflict between parties to the conventions, which can only be states. Article 2 declares *inter alia* that the conventions:

> …shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

From this perspective, an international armed conflict is a state of affairs between states, an interstate conflict, not something contingent on territorial boundaries. In actual fact, an armed conflict may be fought in international waters outside the territory of any state. Likewise, a state

may fight non-state actors within the territory of another state with the consent of that state. For example Sudan concluded a formal agreement in 2005 allowing Sudanese armed forces to fight the Lord Resistance Army (LRA) under the infamous Joseph Kony in the territory of southern Sudan, as this non-state organized armed group originating from Uganda tried to seek refuge in the neighbouring state.

If a state does not consent to allow another state to operate within its territory against a non-state actor, there may be two concurrent armed conflicts, an international between the intruding state and the territorial state, and a non-international armed conflict between the intruding state and the non-state actor. That was the situation in 2006 when Israel reacted against Hizbollah, a non-state organized armed group, in southern Lebanon. Even though the Lebanese armed forces did not react against the intruding Israeli forces, according to the *jus ad bellum* rules a state of war can be said to have formally existed between Israel and Lebanon.

The other view would emphasise criteria based on the transnational effect of an armed conflict. Although the transnational effect of an armed conflict is relevant, it is not considered decisive. In current conflicts such as Afghanistan, states are fighting non-state opponents in the territory of other states on the invitation or acceptance of the latter, or in accordance with a mandate issued by the UN Security Council imposing an obligation upon the territorial state to accept the intervention. These armed conflicts are not considered international from a legal perspective.

b. Wars of National Liberation

Wars of national liberation are considered international armed conflicts that constitute a modification to the traditional interstate, 'state-versus-state', conflict. They are defined in the 1977 Additional Protocol 1, Article 1, Paragraph 4, as situations where:

> …peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declarations on Principles of International Law concerning Friendly Relations and Co-operation among States in the United Nations.

It is emphasized that only states which have ratified 1977 Additional Protocol 1 without any reservations in this respect are obliged to consider such armed conflicts as being international, as this part of the regulation cannot be considered to be part of customary international law.[31]

The scope of application – peoples fighting against colonial domination, alien occupation and against racist regimes – must be considered exhaustive. For the same reasons, several armed conflicts where certain groups such as political minorities are fighting for segregation, self-rule or self determination, are not included.[32] According to 1977 Additional Protocol 1, Article 96, Paragraph 3, it is a condition for the recognition of a war of national liberation, that the authority representing the "people" applies the four 1949 Geneva Convention and the protocol "by means of a unilateral declaration addressed to the depositary". This formality is not without its problems as only one authority can be recognized in this respect and often several entities are competing for this status, supported by various states according to political preferences.[33] The regulation of wars of national liberation must be viewed in the context of opposition to the colonial powers that dominated the period after World War Two, and the creation of many new states, but is generally not of relevance today.

It is noted that an authority that ratifies the conventions is not expected to have legal personality as a state, but may be recognized as a *de facto* government in accordance with the principles of international law, at least within part of the territory of the state.[34] From this perspective, the authority may be regarded as the upcoming *de jure* government in a state under creation.

Regulation of national liberation wars can also be viewed in the context of UN General Assembly Resolution 3103(XXVIII) from December 1973, which attempted to give combatant status to

[31] J.M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7, at 387ff; The resistance from states such as the United States and Israel would imply that the rule cannot be considered to have status as either universal or general international law.

[32] R. Provost, *International Human Rights and Humanitarian Law*, above note 17, at 256.

[33] Ibid, at 257. Here, the colonial war of liberation in Angola is mentioned, where three movements, FNLA, MPLA and UNITA all sought to be recognized as the legitimate authority.

[34] R. Jennings and A. Watts (eds.), *Oppenheim's International Law, Vol. I* (Longman, London, 9th edition, 1992, 1996), at 16-22 and 162-169.

members of national liberation movements.[35] This status implied that members of the national liberation movements fulfilled the traditional criteria of combatant status, and later those of 1977 Additional Protocol 1, Article 43, especially in relation to being under the command of a responsible officer, an internal disciplinary system and observing international humanitarian law.[36]

The regulation of national wars of liberations has been without practical relevance to date, partly because the number of conflicts that might qualify for this status have diminished, and partly because states falling within the relevant scope of being colonial, occupying or racist, have not ratified the 1977 Additional Protocol 1, or have made reservations accordingly. For example, the armed conflict in early 2009 between Hamas and Israel in the Gaza strip could not be classified as a war of national liberation, because Israel has not ratified the Protocol; even if it had, Hamas might not have been recognized as the legitimate authority. This lack of ratification means that a conflict involving a state and a national liberation movement that does not have legal personality as a state but would otherwise fulfil the criteria is considered a non-international armed conflict.

2. Non-international Armed Conflicts

Non-international armed conflicts may also be termed 'armed conflicts not of an international character', which is the language used in the conventions, or 'internal armed conflicts', which implies that a conflict is restricted to the territory of one state. Three categories of non-international armed conflicts are identified here:

- Non-international armed conflicts falling under common Article 3 to the 1949 Geneva Conventions,
- Non-international armed conflicts falling under 1977 Additional Protocol 2, and
- Internationalized internal armed conflicts.

Although only a state can ratify the conventions applicable to both international and internal armed conflicts, all actors participating in an internal armed conflict, both state and non-state, are bound by applicable international humanitarian law. This may seem obvious for state actors, but less so for

[35] R. Provost, *International Human Rights and Humanitarian Law*, above note 17, at 255.

[36] Ibid, at 257.

non-state actors. The aspect of state sovereignty becomes relevant here; the rationale for this position is that the state is competent to ratify conventions under international law, which then become relevant for all aspects of law within their jurisdiction. This must also be considered to apply in relation to customary international law, which likewise imposes obligations on states. Although disputed, the view is here that non-state actors are implicitly bound by rules of international law that are applicable on the territory from which they operate.[37] A non-state actor is thus bound by rules of international humanitarian law whether or not they made any declaration in this respect.[38] This responsibility of non-state actors also seems to be established in customary international humanitarian law.[39] Nevertheless the recognition of non-international armed conflicts[40] in international law has fundamentally challenged the prerogative of states to declare and wage war.[41] Non-state actors still cannot formally declare war, but they can *de facto* create a situation which *de jure* may be considered to constitute an armed conflict.

An armed conflict between a state and a non-state actor is for the same reason to be considered a non-international armed conflict, even if there is a trans-national dimension as mentioned above. In that situation the armed conflict would be termed as an "internationalised internal armed conflict". An exception may be when a state can be made accountable for the actions of a non-state actor to an extent that would establish identification between the two. This was established in the Nicaragua case, but it would likely require a high degree of control by the state over the actions of the non-state actor.[42] This would make the armed conflict international. This aspect is different from the

[37] L. Zegveld, *The Accountability of Armed Opposition Groups*, above note 29, at 14-26. They are also protected to some extent by the same regulation, including common Article 3 to the 1949 Geneva Conventions, which is considered to be customary international law, as well as 1977 Additional Protocol 2 insofar it has been ratified by the territorial state.

[38] Ibid, at 14-18.

[39] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7, at 497f.

[40] Concerning the historical background, see F. Siordet in J.S. Pictet (ed.), *Commentary I Geneva Convention* (International Committee of the Red Cross: Geneva, 1952), at 37-48.

[41] Y. Dinstein, *War, Aggression and Self-defence*, above note 10, at 75ff.

[42] International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua, Nicaragua vs. United States of America*, Judgment 26 June 1986, paragraph 109ff:

> Yet despite the heavy subsidies and other support provided to them by the United States, there is no clear evidence of the United States having actually exercised such a degree of control in all fields justifying treating the *contras* as acting on its behalf.

issue whether any support by a state to a non-state actor involved in an internal armed conflict on the territory of another state is legal[43], and may thus result in any liabilities in accordance with international law.[44]

a. Non-International Armed Conflicts falling under Common Article 3

In general any non-international armed conflict falls under the scope of common Article 3; it may also be subject to 1977 Additional Protocol 2. An internal armed conflict can exist between a state and one or more "non-state organized armed groups".[45] Alternatively two or more "non-state organized armed groups" can be engaged against each other without involving the state. This situation prevailed in the civil war in Lebanon during the 1980s. For the conflict to qualify as "armed conflict" in relation to the application of international humanitarian law, the non-state entity must be considered an "organized" armed group. Even though this is not an explicit condition of common Article 3, a minimum level of organization, command and control, and political purpose such as "overthrowing the government" is required.[46] The rationale for this requirement is that observance of common Article 3 and 1977 Additional Protocol 2 seems to require the existence of such an entity or organization fulfilling these requirements.[47] If these conditions are not met, the character of the situation falls out the scope of armed conflict such as riots, law enforcement operations etc., which are also common tasks in peace support operations.

[43] The prohibition against supporting non-state actors operating within the territory of other states can be deduced not only from Article 2(4) of the UN Charter Article, and as established by the ICJ in the Nicaragua case in customary international law, but also from UN Security Council Resolution 1373(2001) following the attacks on USA on 11 September 2001, in which it is stated that states should not only abstain from supporting terrorist organizations, but should actively prevent them from operating within their territory.

[44] Y. Dinstein, *War, Aggression and Self-defence*, above note 10, at 104-112; and O. Spiermann, *Moderne Folkeret*, *3*. (Jurist- og Økonomforbundets Forlag: udgave, revised edition, 2006), at 240.

[45]Concerning the obligations of non-state organized armed groups, see L. Zegveld, *The Accountability of Armed Opposition Groups*, above note 29, at 9-93.

[46] Ibid, at 1.

[47]Ibid, at 9-93.

b. Non-International Armed Conflicts falling under 1977 Additional Protocol 2

A condition for the application of 1977 Additional Protocol 2 is the existence of armed conflict on the territory of a party to the protocol "between its armed forces and dissident armed forces or other armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol".

Within its scope of application, the 1977 Additional Protocol 2 supplements common Article 3. Generally the scope of the protocol has been considered rather narrow, setting what are considered rather strict conditions for its application. For example, the civil war in Lebanon, fought entirely between non-state organized armed groups, would clearly fall outside the scope of the 1977 Additional Protocol 2, but within common Article 3. This does not, however, preclude that compliance with international law in a non-international armed conflict is of the same unilateral structure as in international armed conflict, meaning that the obligation to observe the law does not depend on reciprocity.[48]

c. Internationalized Internal Armed Conflict.

Although internationalized internal armed conflicts are becoming increasingly common, they are not defined, described or directly regulated in international humanitarian law. As mentioned above the term encompasses situations where a state is engaged in an internal armed conflict on the territory of another state.

The issue of consent by the territorial state is of relevance here. Sometimes, however, the position of the territorial state is somewhat unclear, as when the Turkish Army invaded Northern Iraq in

[48] The issue of reciprocity in international humanitarian law is dealt with in detail by R. Provost, *International Human Rights and Humanitarian Law*, above note 17, at 153-163, see especially p. 156: Common Article 3 and its customary equivalent thereby impose an absolute obligation, completely disconnected from reciprocity, on all parties to an armed conflict."

February 2008 to fight Kurdish partisans from the Kurdistan Workers' Party (PKK).[49] Although the Iraqi government made formal protests, it did not react to the invasion by using force in self-defence. The point is that, for political reasons, the Turkish action was probably in the interests of both states, and thus was neither labelled "armed aggression" nor "armed conflict", although there was clearly a requirement to apply international humanitarian law.

III. INSTITUTIONALIZATION OF NON-INTERNATIONAL ARMED CONFLICT

Considering that, until the 1949 Geneva Conventions, non-international armed conflicts were not subject to international regulation, the relevant questions here are why did international law on non-international armed conflicts develop the way it did, what factors have affected this development, and how does this influence our understanding and interpretation of the law? To answer these questions, the school of institutionalism within the discipline of international relations of political science is used as a 'prism' through which international law can be examined and analysed.

A. International Law and the Legalization of International Relations

Institutionalism focused on international institutions that may be defined as "sets of rules that stipulate the ways in which states should cooperate and compete with each other".[50]

For these purposes, international law can be considered an 'institution'. From a legal perspective, international law and institutionalism are in some ways mutually interdependent; institutions may be subject to legalization, and various regimes of international law may be institutionalized. Institutions other than international law, such as international trade, war and diplomacy, may also be subject to some degree of legalization. This emphasizes how international institutions are all legalized to some extent, and the general trend is towards the increasing legalization of international

[49] International Herald Tribune: *Turkey announces troop withdrawal from northern Iraq*, published 29 Februar 2008, (accessed 1 March 2008); http://www.iht.com/articles/2008/02/29/europe/turkey.php

[50] J.J. Mearshheimer, "The False Promise of International Institutions", 19 *International Security* (1994-1995),5-49, at 17.

relations: "the world is witnessing a move to law"[51]. The ever increasing quantity of conventions, also within the regime of international humanitarian law, is an indicator of more legalization.

In this section, the concept of legalization as developed by Abbott, Keohane, Moravcsik, Slaughter and Snidal will be presented and examined in relation to the legalization of non-international armed conflict.[52] This model of the legalization of international institutions contains three dimensions, or variables: obligation, precision and delegation. The idea is that international legislation may vary along these parameters depending on its purpose and the interests involved. Generally, the higher the level of obligation, precision and delegation, the more the legislation is considered 'hard law', while a low level is an expression of 'soft law'.

1. The Obligation Variable

The 'obligation variable' refers to the extent to which states are willing to commit themselves to legally binding rules. A high level of obligation indicates a clear intent by the parties to commit themselves to rules of legally binding nature, for example, a treaty or a UN Security Council resolution. Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol 2 are clear examples in this context. At the other end of the scale, different instruments are used, such as international agreements, exchange of letters, UN World Summit declarations and UN General Assembly resolutions. The content of such agreements may be presented in the form of guidelines, best practices and recommendations, and statements whereby the parties declare that they do not consider themselves legally bound.

Most regulations within the regime of international humanitarian law have a high level of obligation, either in the shape of conventions or customary law. Some soft law regulations take the form of UN General Assembly resolutions. An explanation for this high level of obligation is that reciprocity is that reciprocity is no longer considered an essential determinant of compliance with

[51] J. Goldstein, M. Kahler, R.O. Keohane, and A.-M. Slaughter (eds.), *Legalization and World Politics* (MIT Press, Cambridge, MA, 2001), "Introduction", at 1ff.

[52] K.W. Abbott, RO. Keohane, A. Moravcsik , A.-M. Slaughter and D. Snidal, "The Concept of Legalization", in ibid, at 17-35.

the rules. This follows from the common Article 1 of the 1949 Geneva Conventions that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances". This has generally been interpreted to mean that states parties were under an obligation to comply with the rules even if their opponents did not.[53] This would be in accordance with the overall aim of international humanitarian law, which is to protect the victims of war and ensure respect for human dignity under the most extreme circumstances.[54] From this perspective compliance seems not to depend on whether the opponent also complies with the regulations, and customary international humanitarian law confirms that "the obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity".[55] It would also imply that access to reprisals is limited, and only applicable in international armed conflicts.[56]

For the very same purposes compliance by non-state actors such as organised armed groups not belonging to a state should no depend on their lack of legal personality in inter-state relations. If states were not in the position to implement legislation derived from international law within its territory it would indeed challenge its sovereignty.

i. The 1949 Geneva Conventions and the 1977 Additional Protocol 2.

From a historical perspective, non-international armed conflict became part of international humanitarian law with the adoption of the 1949 Geneva Conventions, although only common Article 3 applied to "armed conflict not of an international character". That article was the result of a hard-fought compromise hammered out during the diplomatic conference leading up to the conventions, where it was the intention of the International Committee of the Red Cross (ICRC) to make the conventions generally applicable to both international and non-international armed

[53] R. Provost, *International Human Rights and Humanitarian Law*, above note 17, at 137.

[54] Ibid, at 121: "Human rights and humanitarian law have been said to largely to escape from reciprocity because both essentially aim to protect the interests of individuals rather than states."

[55] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7, at 498f; Rule 140. This rule applies both in international and non-international armed conflicts.

[56] Ibid, at 513ff; Rule 145: "Where not prohibited by international law, belligerent reprisals are subject to stringent conditions." This rule does only apply in international armed conflicts.

conflicts. This was probably too progressive for the participating states at that point in history, and common Article 3 may be said to be an expression of minimum standards.[57]

Nevertheless this article must be considered as nothing less than revolutionary in international law in general, and in the laws of war in particular. In international law during the time leading up to World War Two, belligerent status and the waging of war were considered state the prerogatives. Wars, or armed conflicts, were international *per se*. As the principal legislators of international law, it was in the mutual interest of states to retain this exclusivity. Non-international armed conflict, or internal wars, were, as phenomena, something that was considered to be exclusively within the domain of the sovereign state and thus not subject to international law. Events in the years between World War One and World War Two, notably the Spanish Civil War, changed that perception, especially as a result of the international dimension of this conflict.[58] Another aspect was action taken by the International Red Cross in relation to the civil war in the plebiscite area of Upper Silesia in 1921 and the Spanish Civil Wars 1936-1939.[59] The point is that the Spanish Civil War was in many ways an 'internationalized internal war', as both sides were widely supported by states outside Spain.[60] Indeed it may be said that most international wars have an internal element, and most non-international wars have an international element.

Common Article 3 became known as 'the convention within the convention', but it may also be regarded as having the same function as a 'Martens Clause', that is, a clause setting out minimum standards in an international armed conflict. The 1977 Additional Protocol 2 may be seen as an attempt to widen the scope of protection, but the main problem there was that it was applicable only to a limited scope of internal armed conflicts.

---

[57] Concerning the history behind the negotiations behind common Article 3, see Siordet in J.S. Pictet (ed.), *Commentary I Geneva Convention* , above note 40, at 39-48; and G. Best, *War and Law since 1945*, above note 2, 168-179.

[58] A. Beevor, *The Battle for Spain: The Spanish Civil War 1936-1939* (Weidenfeld and Nicolson, London, 2006), at 145ff.

[59] Siordet in J.S. Pictet (ed.), *Commentary I Geneva Convention* , above note 40, at 40ff., stating *inter alia* that involvement by national Red Cross societies, the International Red Cross and other relief societies in civil wars were not based on a convention, but a resolution from the Xth International Red Cross Conference in 1921. This resolution was strengthened by the 1938 Resolution from the XVI Conference that may be regarded as the progenitor of the common article 3 of the Geneva Conventions.

[60] A. Beevor, *The Battle for Spain*, at 145ff.

Although the 1949 Geneva Conventions ended up bringing non-international wars within the scope of international law, as far as the rules applicable for the use of force, *jus in bello*, were concerned, they did not explicitly change the legal status of non-state actors. Paragraph 4 of common Article 3 reads: "The application of the preceding provisions shall not affect the legal status of the Parties to the conflict." The 1977 Additional Protocol 2, supplementing common Article 3 in relation to certain categories of internal armed conflicts, does not seem to change this, stating in Article 3(1) concerning non-intervention that:

> Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State of the responsibility of the government, by all legitimate means, to maintain and re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

This clearly emphasizes the significance that states attach to sovereignty and how they seek to avoid attaching legal personality, and thus legitimacy, to non-state actors. In fact, Protocol 2 does not apply the term 'Parties', as used in common Article 3 to refer to opponents in an internal war, which indicates an even greater distancing from recognition of a non-state actor. Conversely, the initial part of common Article 3 reads that:

> In 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…

This merely implies that non-state actors may *de facto* create a situation that *de jure* may be regarded as a non-international armed conflict, thereby rendering applicable a set of rules that is different from that of international armed conflicts. Paragraph 3 goes on to urge the "Parties" to "bring into force, by means of special agreements, all or parts of the other provisions of the present Convention", but that does not in itself entail any recognition other than what the government of the "High Contracting Party" chooses to extend to any insurgency or rebel movement. This provision may admittedly be seen as an option for a rebel party to achieve at least some recognition, because is it possible to enter into an agreement with someone that you do not recognise? As emphasized in the commentaries, this provision must be read in the context of Paragraph 4, which implies that no legal consequences with regard to the recognition of any status of a rebel party can be made from any conclusion of any agreement.[61] Considering that all known states have now ratified the 1949

[61]Siordet in J.S. Pictet (ed.), *Commentary I Geneva Convention* , above note 40, at 41-48.

Geneva Conventions, common Article 3 must be considered to be both universal and applicable as customary law.[62] Furthermore, at the time of writing, 168 states had ratified 1977 Additional Protocol 1, and 164 had ratified 1977 Additional Protocol 2.

There is every indication that it was not the intention of the ratifying states to admit any legal personality or legitimacy to non-state actors whatsoever, other than ensuring that they incur responsible for war crimes.

ii. Other Developments

Regulation of non-international armed conflicts continued in areas other than the 1949 Geneva Conventions. From being the exception, it has become the rule that new international conventional humanitarian law is applicable to non-international armed conflicts as well as international armed conflicts, although the scope of application may differ according to the varying characteristics of the two situations. One of the significant landmarks in this process was the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict and its two protocols. Another trend was the extension in 2001, with the amended Article 1, of the 1980 Convention on Certain Conventional Weapons (CCW) from international armed conflicts to non-international armed conflicts.[63]

---

[62] International Committee of the Red Cross, "States Party to the Main Treaties", available at: http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/party_main_treaties (accessed 6 July 2009). Ratification status as of 30 June 2009.

[63]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 as amended on 21 December 2001 (CCW). From 1980, the Convention originally had 5 protocols regulating different types of conventional weapons, but was only applicable in international armed conflict. Protocol 1 prohibited the use of "Non-Detectable Fragments". Protocol 2 regulated the use of "Mines, Booby-Traps and Other Devices"; Amended Protocol 2 extended *inter alia* the application of this protocol to non-international armed conflicts. Protocol 3 limited the use of incendiary weapons, and Protocol 4 prohibited the use of laser blinding weapons. Protocol 5 is somewhat atypical, dealing with "Explosive Remnants of War", which is nevertheless a huge problem in many conflict zones across the world that have been subject to armed conflict.

The biggest lapse in recent new regulation occurred in relation to the 1997 Ottawa Convention, which put a ban on anti-personnel mines, and was not made applicable to internal armed conflicts.

The Statute of the International Criminal Court is considered to be competent in war crimes related to both international and non-international armed conflicts. This can be deduced from the 'Elements of Crime of the Court', which are not conventional law but exist only as an official UN document of the Preparatory Commission.[64] *Inter alia*, it enumerates a long list of war crimes for international and non-international armed conflicts respectively. In total, there are 46 war crimes related to international armed conflicts, and 25 for non-international armed conflicts. What is probably more important is that descriptions of the crimes are very similar for both types of armed conflict. Thus, while the number of crimes for non-international armed conflict is significantly lower than for international armed conflict, it underscores a trend whereby the extent of international humanitarian legislation applicable to non-international armed conflicts is closing in on, and converging with, that applicable to international armed conflicts.

Within international customary humanitarian law, the trend in non-international armed conflict seems to be towards the application of customary law developed from the rules applicable in international armed conflicts. An examination of the very comprehensive and impressive study of customary international humanitarian law carried out by the International Committee of Red Cross (ICRC)[65] seems to confirm this trend, as it identifies several rules of customary international humanitarian law that are applicable to both international and internal armed conflicts. A closer examination of the 161 customary rules identified in the study shows that 132 rules are considered applicable in both types of conflict, while a further 14, which are considered applicable in international armed conflicts, are perceived as "arguably" applicable in non-international armed conflicts (12), or applicable in modified form (2). Several of these rules have developed from rules already codified in the 1977 Additional Protocols 1 and 2. Another 3 customary rules are applicable only in non-international armed conflicts. Only 12 of the rules apply only to international armed conflict, and in most cases these relate to occupation or combatant status that is only relevant in such conflicts. The ICRC study has been criticized for politicizing the issues, and perhaps for being

[64] : United Nations, *Report of Preparatory Commission for the International Criminal Court, Addendum Part II*: *Finalized draft text of the Elements of Crimes* (PCNICC/2000/1/Add.2) 2 November 2000.

[65] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7.

too liberal in its application of the test of what is considered customary law. Either way, it nevertheless confirms this trend.

2. The Precision Variable

The 'precision variable' is primarily concerned with the level of detail contained in a regulation; the more detailed it is, the less scope there is for interpretation. As mentioned above, an authoritative definition of armed conflict, considered a fundamental condition for applying international humanitarian law, does not exist. The mere absence of such a definition indicates the difficulty of the issue of precision in international law. States do not wish to be bound by narrow definitions that may not be sufficient in unforeseen circumstances.

Still, some parts of international humanitarian law are extensively regulated, while others contain little or no detail. A good example of extensive regulation is the 1949 Geneva Convention III that covers almost every relevant aspect of prisoners of war. Conversely, the regulation on detained persons in non-international armed conflict is far less detailed, and is generally restricted to fundamental guarantees.[66]

At the other end of the scale, the principle of proportionality may be considered a fundamental principle in international humanitarian law, but is never mentioned by this term where it is found in the conventions.[67] Although it is considered part of the international customary law of international armed conflict[68], it is not firmly established as customary law in non-international armed conflicts. However, it could be argued that it is so fundamental to the balancing of military necessity against

[66] Common Article 3 to the 1949 Geneva Conventions, Paragraph 1 contain some fundamental guarantees to all individuals not taking an active role in the hostilities, stating *inter alia* that such persons shall in all circumstances be treated humanely, without any distinction to race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. This implies prohibition against e.g. torture, cruel treatment, executions without trials, and humiliating and degrading treatment. 1977 Additional Protocol II includes more detailed regulation in Articles 4, 5 and 6.

[67] The principle of proportionality is codified in 1977 Additional Protocol 2, Articles 51(15)(b) and 57, and relates to incidences where the loss of civilian lives and property, or injury to civilians, is excessive in relation to the military advantage of such an attack.

[68] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7, at 46-48.

the interests of humanity that it must form a part of the regulation for non-international armed conflicts.[69]

Generally speaking, there is a clear trend that suggests that regulations on non-international armed conflict are far less regulated in precision and extensiveness than those governing international armed conflict.

3. The Delegation Variable

Considering the decentralized nature of international law, which reflects the anarchical structure of the international society of states, the delegation of legal authority to entities such as international courts and tribunals is a clear indication of a high level of legalization within a specific area. Delegation creates centralized institutions in international relations; that said, this does not necessarily challenge the sovereignty of states, since authority is derived directly from those states. Examples of delegation within the regime of international humanitarian law are the International Court of Justice (ICJ), the International Criminal Tribunal for former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC).

Furthermore, delegation of authority has occurred in a number of respects with regard to the ICRC or a so-called 'protective power'[70], a neutral states representing the interests of one or more states taking part in the conflict and accepted by the involved parties to the conflict; these include access to prisoners-of-war[71], interned civilians[72] and civilians in occupied territories[73]. The logic behind these actions is to ensure that access is granted to an impartial entity to the conflict, with the aim of ensuring compliance with the law. The role of the ICRC in this respect is very much subsidiary to that of the protective powers: the ICRC will act instead of a protective power if the latter cannot be appointed.[74] This caused much consternation during the diplomatic conferences leading up to the

[69] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Law*, above note 7, at 48f.

[70] 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Article 8.

[71] 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Article 79.

[72] 1949 Geneva Convention IV Relative to the Protection of Civil Persons in Time of War, Article 76.

[73] 1949 Geneva Convention IV Relative to the Protection of Civil Persons in Time of War, Article 11.

[74] 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Article 10.

1949 Conventions, because some states felt that "opening their gates to the ICRC" was encroaching upon their sovereignty.[75] But, today, the role of the ICRC is generally accepted, at least in international armed conflict. In relation to non-international armed conflicts, the ICRC, according to common Article 3, "may offer its services to the Parties to the conflict". A similar provision is provided for in Article 18 of the 1977 Additional Protocol 2, whereby national relief societies such as a national Red Cross or Red Crescent organization may offer their services.

The 1977 Additional Protocol 1 provided in Article 90 for the possibility of establishing an International Fact-finding Commission that had the mandate, for example, to "enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol". This entity has, however, to the best of my knowledge, never been implemented in practice[76], and was probably overtaken by the establishment of the ICC.

IV. THE ISSUE OF DELINEATION

The issue of delineation between international humanitarian law and international human rights law represents a critical aspect of the use of force in all types of armed conflict. In relation to non-international armed conflict the issue has become crucial due to lack of detailed regulation and the convergence between the two regimes. It is generally recognized that the international human rights regime as *lex generalis* continues to exist during times of armed conflict, while international humanitarian law applies as *lex specialis*.[77] This legal construction is the presumption for further examination and analysis here. It has often been stated that there may be situations where the two legal regimes apply to the same situation. Although this statement is consistently repeated, it

[75] Best, *War and Law since 1945*, above note 2, at 350.

[76] Ibid, at 386f.

[77] L. Doswald-Beck, "The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?", 88 *International Review of the Red Cross* (2006) at 881: "It is generally recognized, even by the most sceptical, that international human rights law continues to apply during all armed conflicts alongside international humanitarian law (IHL)." See furthermore the International Court of Justice Advisory Opinion of 8 July 1996, *Legality of the Threat or Use of Nuclear Weap*ons, Para 25; and its Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Para 106, which are dealt with in further detail below in Para 8.2.

continues to remain unclear exactly what dual application entails, and what the legal implications are.

Therefore, one legal challenge is to identify criteria determining when international humanitarian law applies during a situation of armed conflict as *lex specialis*, that is, when international human rights law does not apply as *lex generalis*, when only international human rights law applies, and when both legal regimes apply.

The lack of explicit regulation of international humanitarian law in non-international armed conflict has fostered another legal challenge or debate with two main opposing positions. One is that areas not covered explicitly by the regulations of international humanitarian law should be regulated by international human rights law. The other is that such areas not regulated explicitly by international humanitarian law would be subject to customary law within international humanitarian law and, insofar as they are relevant, the rules applicable in international armed conflict would apply, in a modified form. In fact, a third position might be that such areas are *non licet.* This would imply that such areas are not regulated by international law at all, and thus subject to national jurisdiction. However, this position must be rejected as the subject area clearly falls within the scope of international law.[78]

The author endorses the second view for the following reasons. The application of international humanitarian law is intrinsically linked to the existence of armed conflict. If the scope of application between the two regimes varies depending on the characterization of the armed conflict, the definition and/or scope of armed conflict would vary accordingly. Such a position is neither desirable nor convincing. The development of international humanitarian law, as described above, clearly leads in the direction of convergence between the main two sets of regulations applicable to the two types of armed conflicts. The internationalization of non-international armed conflict should

[78] R. Jennings and A. Watts, *Oppenheim's International Law*, above note 34, at 13, §3: Here, international law is regarded as a complete system implying that "every international situation is capable of being determined as a *matter of law*, either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles. It is thus not permissible for an international tribunal to pronounce a *non liquet*, ie. to invoke the absence of clear legal rules applicable to the dispute as a reason for declining to give judgment (unless the compromise submitting the dispute to the tribunal in some way limits the power of the tribunal to apply international law as a whole)."

also encourage harmonization of the two systems. However, the two sets of regulations will never be identical as some of the fundamental constructions, such as combatant status, can only be expected to apply in international armed conflicts. It is not in the interests of states to go further than that and it should be remembered that, in spite of all evolution in customary international law, states are generally still only bound by the rules in international law to which they accede. Furthermore, an uncritical adoption of human rights norms within the legal regime relevant to internal armed conflicts might result in some of the individuals or groups of individuals in such conflicts obtaining a significantly more elevated legal position than in international armed conflict. Such a result would simply not be sustainable and would not be in sync with the general interrelationship between the two regimes in international law.

A. Legal Implications of Application

Although the two legal regimes share a common core in the principle of humanity and have influenced each other in their development, they possess individual characteristics that make it significant which of them is applied in a specific situation. A few aspects will be highlighted for the purpose of illustration here. For a more extensive comparative study and analysis the work of Rene Provost is recommended.[79]

B. Holders and Addressees of Rights and Obligations

International law regulates the affairs between states. In their *inter partes* relations, states are only bound by mutual consent. Consequently, a state is only bound by the 1949 Geneva Conventions in an international armed conflict if its opponent state has ratified them or has otherwise accepted and applies the provisions as stated in the last paragraph of common Article 2. The same applies in relation to the 1977 Additional Protocol 1. For example, Denmark was not bound by its ratification of this protocol when participating in the campaign against Iraq in 2003, as the latter had not ratified it. Considering that the 1949 Geneva Conventions are generally accepted as international customary

[79] R. Provost, *International Human Rights and Humanitarian Law*, above note 17.

law, as are large parts of the 1977 Protocol 1, the relevance of mutual ratification is limited nonetheless.

With regard to the regulation of non-international armed conflict, states are likewise bound by their obligations in the conventions they ratify, as well as by applicable customary international law. The same applies to any non-state actor participating in an internal armed conflict on the territory of that state.

A key distinction between the two systems is the subjects of the law and the implicit procedural capacity of individuals. The subjects of international humanitarian law are states, and partly non-state organized armed organizations, and their rights and obligations in armed conflict. Although the rules may be construed as rights for individuals, they are generally formulated as rights or obligations of the parties to the conflict, or in such a way that individuals may enjoy protection, have obligations, or be subject to international criminal law, as established by the Nuremberg Trials, which has since become international customary law. There are, however, a few exceptions, notably the rules of the 1949 Geneva Convention IV concerning protected persons, i.e. civilians of enemy nationality on the territory of a party to the conflict. For example, according to Article 42 such an individual may demand voluntarily internment by the party to the conflict through the protective power! If the situation renders such an internment necessary, for instance due to the personal security of the individual, the state is obliged to intern that individual! Such explicit rights are not that common, and they are in general related to rights that reflect similar human rights. Consequently, individuals do not have procedural capacity derived from international humanitarian law. The implication is that a prisoner of war cannot bring any issues related to his detention, such as space, clothing, allowances, the right to smoke and canteen prices, before the court of the detaining power. Such procedural rights are vested in the protective power or the ICRC. Furthermore, states and individuals can be made responsible for infractions of the laws of war in national and international courts and tribunals.

Conversely, in international human rights law the main subject is the rights of the individual against the state.[80] For this purpose, individuals are considered to have, or are meant to have, legal

[80] J. Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, Ithaca, 2nd edition, 2003), at 8-12.

procedural capacity within the regime of international human rights law, which implies that such rights can be enforced through the courts of a state.[81] This is the only way that human rights can function as a mechanism.

C. Concurrent Application of the Two Legal Regimes.

In its Advisory Opinion on *The Wall*[82] the International Court of Justice (ICJ) stated the following:

> 106. More generally, the Court considers that the protection offered by human rights conventions does not cease in cases of armed conflict, save through the effect of provisions for derogations of the kind found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: *some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of humanitarian law*. In order to answer the question put to it, the Court will have to put into consideration both these branches of international law, namely human rights law, and, as *lex specialis*, international humanitarian law. (Emphasis added)

Although legal opinions expressed by the ICJ should in principle always be limited to the actual cases in which they are promulgated, it seems reasonable to assume that they express *de lege lata* on some crucial points here. First of all, international human rights do not cease to apply during a state of armed conflict. During a state of armed conflict international humanitarian law applies as *lex specialis*, but it is not entirely clear according to which criteria. It seems reasonable to assume that the scope of *lex specialis* is determined by the field of application of international humanitarian law, as described above. It is the position of the author that in a specific situation, as a general rule, either international human rights law or international humanitarian law applies. The issue here is to identify situations where both legal regimes may apply to the same situation.

a. Occupational Regime

[81] See, for example, the European Convention on Protection of Human Rights and Fundamental Freedoms, Article 13.

[82] International Court of Justice, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Clearly, occupation constitutes a situation that brings the two legal systems together for rather obvious reasons. International humanitarian law such the 1949 Geneva Convention IV sets up the framework for the general obligations of an occupying power. This includes obligations such as securing the ability for children to go to school, for the local authority to carry on with their work etc. In this respect, the foreign occupying power takes over the *de facto* government of the occupied area, including the responsibility to maintain security in the area. Insofar as the occupying power maintains law and order through law enforcement, the use of force must refer to the human rights regime. From this perspective the *de jure* government is no longer in a position to fulfil its international human rights obligations with respect to individuals living in the area, and it seems reasonable that the occupying power must be considered responsible in its absence.

The implication is that what does not refer specifically to the powers and duties of the occupying powers must be assumed to fall under its jurisdiction as part of the human rights regime. For instance, an occupying power can intern individual civilians for imperative security reasons in accordance with regulations in the 1949 Geneva Convention IV, but any other measure of detention must observe human rights law. This interpretation is supported by the judgment made in the case concerning the legality of the activities of the regular armed forces of Uganda in the territory of the Democratic Republic of Congo (DR Congo).[83] Here the Court *inter alia* concluded in Para 178 that:

> Uganda was the occupying Power at the relevant time. As such it was under the obligation, according to Article of the Hague Regulations of 1907, to take all the measures in its power to restore, and ensure, as far as possible, public order and safety in the occupied area, while respecting, unless absolutely prevented, the laws in force of the DRC. The obligation comprised the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third party.

An interesting point here is that the judgment refers to a rule of general responsibility of an occupying power that predates the regime of international human rights by more than 30 years. The DRC-Uganda case did not make any progress in providing useful criteria for delineation; the ICJ generally concluded that the armed forces of Uganda had committed "massive human rights

[83] International Court of Justice, Decision of 19December 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, General List No. 116.

violations and grave breaches of international humanitarian law".[84] Nevertheless it is worth noting that the Court found that "indiscriminate shelling is in itself a grave breach if humanitarian law."[85] In other words, this act was considered explicitly attributable to international humanitarian law and not human rights law.

b. Legal Prosecution.

Prisoners of war, and persons otherwise detained according to the laws of war, may be prosecuted for war crimes. The legal proceedings for such trials must follow the general principles of due process, which implies that they fall under the regime of human rights law. This can be deduced from Articles 99-108 of the 1949 Geneva Convention III on judicial proceedings for prisoners of war, which refers *inter alia* to the laws of the detaining power. Since such laws will be subject to human rights law relating to the principles of due process, it may be concluded that there is an implicit reference here, although international human rights were not developed to this point in 1949.

Since individuals participating in an internal armed conflict cannot be considered to have combatant status, individuals fighting for non-state actors have no legal right to participate actively in hostilities. They may thus be punished for their actions under the criminal laws of their territorial state, and for war crimes, insofar as their actions constitute infractions of international humanitarian law. For example, if an insurgent belonging to a rebel group kills a government soldier, this may be an infraction of the criminal laws of the territorial state; however, it is not a war crime within the regime of international humanitarian law. If the government soldier is killed due to perfidy, that is, under the cover of having a protected status, or if the government soldier has surrendered first, it would, however, also constitute a war crime. In both cases, the criminal prosecution is subject to the principles of human rights law concerning due process.

[84] International Court of Justice, Decision of 19December 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, General List No. 116, Para 207.

[85] International Court of Justice, Decision of 19December 2005, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, General List No. 116, Para 208.

Individuals fighting for states parties in internal armed conflicts, whether belonging to the territorial state or intervening states, may have a mandate to enforce or maintain peace and security, and thus have the right to fight within those limitations. As in international armed conflict, they may be liable to prosecution for any war crimes committed. For this reason, it may also be claimed that they should fulfil the same criteria as combatants in international armed conflicts, as the same interests concerning command and control, and disciplinary system are relevant here.

D. Concluding Remarks

Situations of concurrent application of the two legal regimes may still be considered the exception rather than the rule; the two situations mentioned above are examples of where it seems natural and obvious. Furthermore, it is not possible to maintain the same level of legal symmetry in internal armed conflicts as in international armed conflicts, but this was never intended. International law is still the legal system of sovereign states, and whether it seems agreeable or not, states permit themselves a privileged legal status in this respect.

V. CONCLUSION

From being a subject of purely internal interests for states, non-international armed conflict has increasingly become an institution in international relations. This institutionalization has mainly been marked by the legalization of such armed conflicts. There are several factors that have driven this development. The general evolution of international humanitarian law provided a framework that promoted legalization during the diplomatic conferences that led to the 1949 Geneva Conventions. The birth of common Article 3 also seems to have been motivated by the realization that internal wars would have an international dimension, whether this was due to the direct involvement of other states in supporting one of the parties to the conflict, or to the more universal dictates of humanity. In this context, is also remarkable that the regulation of non-international armed conflict has been almost concurrent with developments within the international human rights regime. From this perspective, the days when states could declare that internal armed struggle belonged exclusively to the sphere of internal affairs are definitely over.