# PART I• ORIGINS OF THE NON-INTERNATIONAL ARMED CONFLICT CONCEPT AND ITS DEVELOPMENT IN INTERNATIONAL HUMANITARIAN LAW

# 1 The application of international humanitarian norms to internal conflict prior to the Geneva Conventions of 1949

In appreciating the significance of recent developments affecting the scope of non-international armed conflict in international humanitarian law, it is important to view the current concept in the context of its historical evolution. Notable influences on the development of the contemporary legal regime for situations of non-international armed conflict are the concepts of belligerency, insurgency and rebellion in traditional international law (the body of law that preceded the regime established by the Geneva Conventions of 1949).[1] These will be explored in this chapter as a means of illustrating the origins of legal concern for adherence to international humanitarian norms in situations of non-international armed conflict. In doing so, changes in the scope of international regulation to the conduct of hostilities will be highlighted.

## 1.1 The practice of recognition and the application of humanitarian norms in traditional international law

The relevance of traditional international law to the concept of non-international armed conflict is an area that is frequently overlooked.[2] However, as the succeeding analysis will show, it merits scrutiny not

This chapter was developed from an earlier publication: Cullen, 'Key Developments', 65.

[1] The term 'traditional international law' is that which is generally used by commentators when referring to the laws of war prior to 1949. It was also employed in this way by the Appeals Chamber of the ICTY. See *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-1-AR72, para. 96.

[2] This occurs mainly for two reasons. First, international instruments such as the Geneva Conventions of 1949 (Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 August 1949,

only as the predecessor of the current legal regime governing situations of non-international armed conflict, but also as the starting point for international concern over adherence to humanitarian standards in such situations. The issue of recognition in traditional international law is studied in this chapter as a means of investigating the application of international humanitarian norms to the conduct of hostilities prior to the formulation of the Geneva Conventions of 1949. The purpose of doing so is to indicate the origins of the contemporary concept of non-international armed conflict in traditional international law. Three discernible stages in the development of internal conflict are examined: rebellion, insurgency and belligerency. Particular attention is paid to the grounds for recognising the application of international humanitarian norms in the second and third stages. In doing so, the scope of protection provided in traditional international law is shown to be limited to situations where the belligerency of insurgents is recognised.

## 1.2 The non-application of the laws of war to situations of rebellion

The concept of rebellion in traditional international law refers to situations of short-lived insurrection against the authority of a state.[3] In

6 UST 3114, 75 UNTS 31; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 6 UST 3217, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 UST 3316, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 6 UST 3516, 75 UNTS 287), the Additional Protocols of 1977 (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1125 UNTS 3, 1977; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 1125 UNTS 609, 1977) and the Rome Statute of the International Criminal Court of 1998 (37 ILM 999, 1998), have overtaken this body of law in their provisions relating to non-international armed conflict. Second, the doctrine of belligerency, utilised in traditional international law for the recognition of internal armed conflict, has fallen into disuse and is now considered obsolete. For further reading on the concept of belligerency in traditional international law, see Garner, 'Recognition of Belligerency', 106; Lootsteen, 'Concept of Belligerency', 109; Menon, 'Recognition of Belligerency', Menon, *Law of Recognition*, pp. 109–37; O'Rourke, 'Recognition of Belligerency', 398; Schindler, 'State of War', in Cassese (ed.), *New Humanitarian Law* at p. 3.

[3] See Falk, 'Janus Tormented', in Rosenau (ed.), *International Aspects*, pp. 197–9. Heather A. Wilson defines rebellion as 'a sporadic challenge to the legitimate government'. *International Law*, p. 23.

part because of their brevity, situations of rebellion were considered to be completely beyond the remit of international humanitarian concern.[4] Rebels challenging the *de jure* government during a rebellion were afforded no protection under traditional international law. According to Richard A. Falk, a situation of rebellion was to be understood as 'a sporadic challenge to the legitimate government, whereas insurgency and belligerency are intended to apply to situations of sustained conflict'.[5] He has stated that situations qualify as rebellion 'if the faction seeking to seize the power of the state seems susceptible to rapid suppression by normal procedures of internal security'.[6] Lothar Kotzsch has supported a similar position, stating that 'domestic violence is called rebellion or upheaval so long as there is sufficient evidence that the police force of the parent state will reduce the seditious party to respect the municipal legal order'.[7]

In traditional international law a situation of rebellion may thus be characterised as a short-lived, sporadic threat to the authority of a state. Such situations may manifest themselves as a 'violent protest involving a single issue … or an uprising that is so rapidly suppressed as to warrant no acknowledgement of its existence on an external level'.[8] According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the lack of provision in traditional international law relating to situations of rebellion was partially because of the fact that states preferred to regard it as 'coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction'.[9] Falk commented that in situations of rebellion:

> external help to the rebels constitutes illegal intervention. Furthermore, the incumbent government can demand that foreign states accept the inconvenience of domestic regulations designed to suppress rebellion, such as the closing of ports or interference with normal commerce … There is also the duty to prevent domestic territory from being used as an organising base for hostile activities overseas … Thus if an internal war is a 'rebellion', foreign states are forbidden to help the rebels and are permitted to help the incumbent, whereas the incumbent is entitled to impose domestic restrictions upon commerce and normal alien activity in order to suppress the rebellion.[10]

[4] Dhokalia, 'Civil Wars', at 224. [5] Falk, 'Janus Tormented', p. 99.
[6] *Ibid*. [7] Kotzsch, *Concept of War*, p. 230.
[8] Falk, 'Janus Tormented', p. 197. [9] *Tadić*, Case No. IT-94-1-AR72, para. 96.
[10] Falk, 'Janus Tormented', p. 198.

The conduct of participants in situations of rebellion did not fall within the remit of traditional international law. Such situations were considered purely a matter for the domestic authorities of the state concerned. Hence, Heather A. Wilson states that where a rebellion takes place

> the rebels have no rights or duties in international law. A third State might recognize that a rebellion exists, but under traditional international law a rebellion within the borders of a sovereign State is the exclusive concern of that State. Rebels may be punished under municipal law and there is no obligation to treat them as prisoners of war … Because rebels have no legal rights, and may not legitimately be assisted by outside powers, traditional international law clearly favours the established government in the case of rebellion, regardless of the cause for which the rebels are fighting.[11]

The absence of legal rights for insurgents in situations of rebellion helped to ensure non-interference in the internal affairs of sovereign states. While arguably not to the advantage of securing justice for those involved in rebellion, this lack of international regulation effectively strengthened the position of governments wishing to deal swiftly with dissent. When a government would fail in its efforts to suppress rebellion, the status of the conflict would shift to one of insurgency. As the section that follows shows, this shift in status allowed for the possibility of insurgent recognition, providing a window for the application of international humanitarian norms.

## 1.3 The concept of insurgency

When a rebellion survives suppression, it duly changes in status to a situation of insurgency.[12] The concept of insurgency in traditional international law is, however, ambiguous in the sense that its broad parameters are ill-defined. Falk has described it as a 'catch-all designation', holding that '[o]n a factual level, almost all that can be said about insurgency is that it is supposed to constitute more sustained and substantial

[11] Wilson, *International Law,* pp. 23–4.

[12] According to Erik Castrén, '[r]ecognition of insurgency means acknowledgement of the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful government to maintain public order and exercise authority over all parts of the national territory'. *Civil War*, p. 212. For further reading on the concept of insurgency in traditional international law, see Wilson, 'Insurgency', 46; O'Brien, '*Jus in bello*', 193; Menon, 'Recognition of Belligerency', in Menon, *Law of Recognition*, pp. 109–37.

intrastate violence than is encountered if the internal war is treated as a "rebellion"'.[13] Heather A. Wilson has noted that

> there seems to be general agreement that recognition of insurgency is recognition of a 'factual relation' or acknowledgement of the fact that an internal war exists. Beyond that, there is little explanation of the characteristics of the 'fact'. There are no requirements for the degree of intensity of violence, the extent of control over territory, the establishment of a quasi-governmental authority, or the conduct of operations in accordance with any humanitarian principles which would indicate recognition of insurgency is appropriate. Indeed, the only criterion for recognition, if one could call it that, is necessity.[14]

Recognition of insurgency occurs out of necessity when the interests either of the *de jure* government or a third state are affected by the conflict, requiring the establishment of relations with the insurgent party. This vague criterion of necessity referred to by Wilson alleviates much of the ambiguity surrounding the concept of insurgency in traditional international law. As the conditions are not clearly defined, the legal situation arising from such acts of recognition differs in each case.[15] In regard to objective grounds for the recognition of insurgency, Hersch Lauterpacht has stated that

> any attempt to lay down the conditions of recognition of insurgency leads itself to misunderstanding. Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside States exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest.[16]

Although the legal effects of recognition differ according to each situation of insurgency, generally it may be taken as 'an indication that the recognizing state regards the insurgents as legal contestants, and not as mere lawbreakers'.[17] As noted by Lauterpacht, recognition of insurgency is linked to the desire of foreign states 'to put their relations with the insurgents on a regular, although clearly provisional, basis'.[18]

[13] Falk, 'Janus Tormented', p. 199. [14] Wilson, *International Law,* p. 24.
[15] According to Erik Castrén, 'recognition of insurgency includes as one of its principle elements the grant [sic] of certain rights [which vary] according to whether recognition has been received from the lawful Government or from a third State. It is thus impossible to define in advance the legal situation consequent on recognition of insurgency.' *Civil War,* p. 212.
[16] Lauterpacht, *Recognition,* pp. 276–7.
[17] Higgins, 'Internal War', in Black and Falk, *International Legal Order,* p. 88. See also Lauterpacht, *Recognition*, p. 270.
[18] Lauterpacht, *Recognition*, p. 270.

The indeterminate scope of insurgency allows for the concept's manipulation by states wishing to define their relationship with insurgents. Third states may recognise the existence of insurgency without explicitly declaring an allegiance or adopting a position of neutrality towards the conflict.[19] An act recognising the existence of belligerency would infer an obligation to refrain from offering assistance to either party.[20] In contrast, the recognition of insurgency may be utilised to tailor the position of the state according to its interests, avoiding the risks involved in explicitly joining the conflict and also the restrictions on behaviour resulting from neutrality. On this point, Falk has written that the recognition of insurgency

> serves as a partial internationalisation of the conflict, without bringing the state of belligerency into being. This permits third states to participate in an internal war without finding themselves 'at war', which would be the consequence of intervention on either side once the internal war had been identified as a state of belligerency. Interventionary participation in an insurgency may arouse protest and hostile response, but it does not involve the hazards and inconveniences that arise if a state of war is established with one or the other factions.[21]

The concept's indeterminate range of efficacy allows states the greatest measure of flexibility in defining their relationships with insurgents.[22] As an international acknowledgement of the existence of conflict by a third state, the recognition of insurgency leaves it 'substantially free to control the consequences of this acknowledgment'.[23] Possible motives for the recognition of insurgency are illustrated by Lauterpacht. He has stated that '[i]t may prove expedient to enter into contact with insurgent authorities with a view to protecting national interest in the territory occupied by them, to regularizing political and commercial intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities'.[24] It is important to recognise here that the concept of

[19] Recognition of insurgency was first employed by the US government in relation to the Cuban Civil War of 1868–78. See Castrén, *Civil War*, pp. 46–7.
[20] See section 2.4. [21] Falk, 'Janus Tormented', p. 200.
[22] Falk states that

> [i]n general, the status of insurgency is a flexible instrument for the formulation of claims and tolerances by third states. If it is used to protect economic and private interests of nationals and to acknowledge political facts arising from partial successes by insurgents in an internal war, then it can adjust relative rights and duties without amounting to a mode of illegal intervention in internal affairs. (*Ibid*., p. 202.)

[23] *Ibid*., p. 199. [24] Lauterpacht, *Recognition*, p. 270.

insurgency in traditional international law does not necessitate the application of humanitarian norms. Unless explicitly conceded, the *de jure* government would not have been obligated to adhere to such norms.[25] Any legal protection available to insurgents would have had to come only from the provisions of municipal law unless the application of humanitarian standards was specifically provided for in the act of recognition.

International law has now evolved to require the application of the law of armed conflict in all situations of insurgency.[26] In contrast to the position of traditional international law, existence of insurgency is now recognised as triggering the applicability of international humanitarian law. The ICTY Appeals Chamber in the *Tadić* Jurisdiction Decision summarises succinctly four reasons for the historical extension of international humanitarian law to cover situations of insurgency:

> First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled … Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.[27]

[25] Castrén, *Civil War*, pp. 207–23.
[26] For the lower threshold for the application of international humanitarian law to situations of non-international armed conflict, see Chapter 4.
[27] *Tadić*, Case No. IT-94-1-AR72, para. 97.

This development of international humanitarian law strengthens the protection available to the victims of non-international armed conflict. It is noteworthy that prior to the Geneva Conventions of 1949, the only form of internal conflict deemed to necessitate unequivocally the application of laws of war was one involving a state of belligerency or civil war. The section that follows examines the concept of belligerency, enquiring into its range of efficacy and thus also into the conditions necessitating the application of humanitarian norms.

## 1.4 The recognition of belligerency and the application of international humanitarian norms in civil war

The distinction in traditional international law between insurgency and belligerency is referred to in the *Tadić* Jurisdiction Decision made by the ICTY.[28] It states that the 'dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands'.[29] The distinction marked a line necessitating the application of international humanitarian norms in situations of internal conflict. In traditional international law, the recognition of belligerency demands that in all circumstances the laws of war be adhered to. As mentioned in the previous section, the humanitarian norms contained in this body of law could also have been applied to situations of insurgency, but only when specifically provided for in the act of recognition. Thus, Lauterpacht has stated that '[t]he difference between the status of belligerency and that of insurgency in relation to foreign States may best be expressed in the form of the proposition that belligerency is a relation giving rise to definite rights and obligations, while insurgency is not'.[30]

### *1.4.1 The practice of belligerent recognition*

An early example of how the doctrine of belligerency was employed is provided in the case of *The Santissima Trinidad and The St. Sander* (1822) where the Supreme Court of the United States referred to recognition by its government of a state of civil war between Spain and its colonies.

[28] *Ibid.*, paras. 96 and 97. [29] *Ibid.*, para. 96.
[30] Lauterpacht, *Recognition*, p. 270.

The government of the United States has recognized the existence of a civil war between Spain and her colonies, and had avowed a determination to remain neutral between the parties and to allow to each the rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity and all immunities which may be claimed by the public ships in our ports, under the law of nations, such must be considered as equally the right of each; and as such, must be recognized by our courts of justice, until Congress shall prescribe a different rule. This is the doctrine heretofore asserted by this court, and we see no reason to depart from it.[31]

Forty years after the *Santissima Trinidad* case, the Supreme Court of the United States rendered its decision known as the *Prizes Cases* (1862) dealing with the capture of four neutral vessels, which had allegedly violated a blockade during the American Civil War. In its decision, the Court elaborated an interpretation of the threshold required for the recognition of belligerency:

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents – the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war.*[32]

In order for a civil war to be recognised as such, the situation must possess the material characteristics of conventional warfare between two sovereign states. Regarding grounds for the recognition of belligerency in civil war, the Supreme Court of the United States stated that '[t]he true test of its existence, as found in the writings of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so

[31] As cited in Oglesby, *Internal War*, p. 11.

[32] *The Brig Amy Warwick; The Schooner Crenshaw; The Barque Hiawatha; The Schooner Brilliante* (1862) 2 *Black* 635, at 666–7. Reprinted in Brown Scott (ed.), *Prize Cases*, pp. 1413–60, at p. 1436. Emphasis in original.