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978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

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The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen advances an argument for a particular approach to the interpretation of non-international armed conflict in international humanitarian law. Part I examines the origins of the 'armed conflict' concept and its development as the lower threshold for the application of international humanitarian law. Here, the meaning of the term is traced from its use in the Hague Regulations to the present day. Part II focuses on a number of contemporary developments which have affected the scope of non-international armed conflict. The case law of the International Criminal Tribunal for the former Yugoslavia has been especially influential, and the definition of non-international armed conflict provided by this institution is examined in detail. It is argued that this concept represents the most authoritative definition of threshold and that, despite differences in interpretation, there exist reasons to interpret an identical threshold of application in the Rome Statute.

ANTHONY CULLEN is a researcher on the joint British Red Cross and International Committee of the Red Cross (ICRC) project to update the collection of practice underlying the ICRC's Study on Customary International Humanitarian Law. He is also a Research Fellow at the Lauterpacht Centre for International Law and a Visiting Fellow at Wolfson College, University of Cambridge.

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Anthony Cullen

Frontmatter

[More information](#)

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Anthony Cullen

Frontmatter

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978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

Contents

<i>Acknowledgements</i>	<i>page ix</i>
<i>Abbreviations</i>	x
Introduction	1
PART I Origins of the non-international armed conflict concept and its development in international humanitarian law	5
1 The application of international humanitarian norms to internal conflict prior to the Geneva Conventions of 1949	7
1.1 The practice of recognition and the application of humanitarian norms in traditional international law	7
1.2 The non-application of the laws of war to situations of rebellion	8
1.3 The concept of insurgency	10
1.4 The recognition of belligerency and the application of international humanitarian norms in civil war	14
1.4.1 The practice of belligerent recognition	14
1.4.2 The legal personality of belligerents in civil war	18
1.4.3 Conditions determining belligerent recognition	19
1.4.4 Problems in the interpretation of belligerency	20
1.4.5 The substitution of 'armed conflict' for 'war'	21
1.4.6 The decline of belligerency as a doctrine of international law	22
1.5 Concluding observations	23

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

vi	CONTENTS	
2	Article 3 common to the four Geneva Conventions of 1949 and the threshold of non-international armed conflict in international humanitarian law	25
2.1	The drafting history of common Article 3	27
2.1.1	Interpretation of 'armed conflict not of an international character' at the Geneva Conference of 1949	29
2.1.2	Report of the Joint Committee to the Plenary Assembly of the Diplomatic Conference	42
2.1.3	Plenary debate on the application of the Conventions to armed conflicts not of an international character	44
2.1.4	Comments on the intended scope of common Article 3	49
2.2	The ICRC Commentary on common Article 3	51
2.3	State practice relating to the applicability of common Article 3	55
2.4	Concluding observations	59
3	Changes in the scope of non-international armed conflict resulting from the Additional Protocols of 1977	62
3.1	Additional Protocol I	63
3.1.1	The drafting history of Article 1(4)	66
3.1.2	The customary status of wars of national liberation	81
3.1.3	The applicability of Article 1(4)	83
3.2	Additional Protocol II	86
3.2.1	The drafting history of Additional Protocol II	88
3.2.2	The threshold for the application of Additional Protocol II	102
3.2.3	Applicability of Additional Protocol II	109
3.3	Concluding observations	113
	PART II The anatomy of non-international armed conflict in international humanitarian law	115
4	The threshold of non-international armed conflict	117
4.1	<i>Tadić</i> : a formula for the characterisation of armed conflict	117

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

CONTENTS vii

4.1.1	Two aspects of non-international armed conflict determining the applicability of international humanitarian law: the organisation of insurgents and the intensity of hostilities	122
4.1.2	Application of the <i>Tadić</i> formula for the characterisation of armed conflict	133
4.2	The geographical scope of non-international armed conflict	140
4.3	The temporal scope of non-international armed conflict	142
4.4	The existence of armed conflict between non-state actors	146
4.5	The question of responsible command	148
4.5.1	Does the concept of non-international armed conflict presuppose the existence of responsible command?	148
4.5.2	The existence of responsible command as a condition for the characterisation of armed conflict: <i>Prosecutor v. Hadžihasanović</i>	150
4.5.3	Responsible command as a condition for the characterisation of non-international armed conflict in international humanitarian law	155
4.6	Concluding observations	157
5	The concept of non-international armed conflict in the Rome Statute of the International Criminal Court	159
5.1	The question of subject-matter jurisdiction over war crimes in non-international armed conflicts prior to the Rome Conference	160
5.2	The question of subject-matter jurisdiction over war crimes in non-international armed conflicts at the Rome Conference	163
5.2.1	Report of the Preparatory Committee on the Establishment of an International Criminal Court	163
5.2.2	Views of delegations on inclusion of clauses relating to non-international armed conflict	165
5.2.3	Bridging the gap: proposals for a threshold for non-international armed conflict	167

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

viii CONTENTS

5.3	Interpreting the threshold contained in Article 8(2)(f)	174
5.3.1	The meaning of the threshold intended by the Rome Conference	175
5.3.2	Textual interpretation of Article 8(2)(f)	177
5.3.3	The customary status of provisions relating to non-international armed conflict and the interpretation of the threshold contained in Article 8(2)(f)	183
5.4	Concluding observations	185
6	Conclusion	186
6.1	On the interpretation of non-international armed conflict	189
6.2	On the significance of the <i>Tadić</i> definition	190
6.3	The characterisation of non-international armed conflict and its effect on the legal status of parties	192
	<i>Bibliography</i>	194
	<i>Index</i>	212

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

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Abbreviations

ABiH	Army of Bosnia and Herzegovina
AJIL	American Journal of International Law
ARK	Autonomous Region of Krajina
ASU	Active Service Unit
BH	Republic of Bosnia-Herzegovina
BRITBAT	UNPROFOR British Battalion
BYBIL	British Yearbook of International Law
CBOZ	Central Bosnia Operative Zone
ECHR	European Convention on Human Rights
ECMM	European Commission Monitoring Mission
EJIL	European Journal of International Law
EU	European Union
FRY	Federal Republic of Yugoslavia [Serbia and Montenegro]
HDZ	Croatian Democratic Community; Croat Democratic Union
HOS	Croatian Defence Forces
HV	Army of the Republic of Croatia
HVO	Croatian Defence Council
HZHB	Croatian Community of Herceg-Bosna
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
ILM	International Law Materials
IRRC	International Review of the Red Cross

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

LIST OF ABBREVIATIONS xi

IYBHR	Israel Yearbook on Human Rights
JACL	Journal of Armed Conflict Law
JCSL	Journal of Conflict & Security Law
JNA	Yugoslav People's Army
KLA	Kosovo Liberation Army
NYUL Rev	New York University Law Review
SC	Security Council [United Nations]
SCOR	Security Council Official Records
SDA	Muslim Party of Democratic Action
SDS	Serb Democratic Party
SIS	HVO Security and Information Service
SUP	Serbian Secretariat of Internal Affairs
TO	Bosnian Territorial Defence
UN	United Nations
UNCHR	UN Commission on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNPROFOR	United Nations Protection Force
UNTS	United Nations Treaty Series
VJ	Army of the FRY
VRS	Army of Republika Srpska

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

Introduction

The objective of this study is twofold. First, it seeks to highlight misconceptions surrounding the concept of non-international armed conflict in international humanitarian law. Second, it advances an argument refining interpretation of the lower threshold of non-international armed conflict. Although the majority of armed conflicts that have occurred since the Second World War may be characterised as non-international, research on the application of international humanitarian law to such situations has been sparse. Substantive scholarship in this area has been discouraged by a number of factors. The extremely complex and highly politicised nature of non-international armed conflict tends to provide an especially difficult subject area for research. Also, many scholars have argued that the distinction between internal and international armed conflict is an unhelpful, artificial one which should ultimately be dispensed with.¹ Contending that the same body of law should apply to all situations of armed conflict, irrespective of their characterisation as either internal or international, publicists have argued against continuing use of the distinction in international humanitarian law.² This has, understandably, lessened interest in research on the characterisation of armed conflict. Irrespective of one's position on the merit of the distinction, its recent codification in the Rome Statute of the International Criminal Court provides for the continued classification of armed conflict as either international or non-international. Given the frequency of non-international armed conflict, and problems surrounding the application of international

¹ See, for example, Crawford, 'Unequal before the Law'.

² See Stewart, 'Towards a Single Definition', McDonald, 'Eleventh Annual Waldemar A. Solf Lecture'.

Cambridge University Press

978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

humanitarian law in such situations, the lack of scholarship on the subject is regrettable.

As a starting point for the analysis of the concept of non-international armed conflict, Chapter 1 focuses on how the application of international humanitarian norms to such situations had evolved prior to the formulation of the Geneva Conventions of 1949. This chapter examines the characterisation of situations using the concepts of rebellion, insurgency and belligerency in traditional international law. As precursor to the regime established by the Geneva Conventions, recognition of belligerency required the application of the 'laws of war' to situations of internal conflict. The threshold for the recognition of belligerency was that of civil war.

Chapter 2 examines Article 3 common to the four Geneva Conventions of 1949 and its impact as a development of international humanitarian law. The drafting history of this provision is explored in depth to highlight the intended scope of the term 'armed conflict not of an international character'. As the first substantive provision of international humanitarian law specific to situations of non-international armed conflict, attention is drawn to the import of common Article 3 as a development of this body of law. The Commentary on this provision provided by the International Committee of the Red Cross (ICRC) is also probed to investigate its consistency with the intentions of those who drafted common Article 3.

Chapter 3 looks at changes in the concept of non-international armed conflict resulting from the 1977 Protocols Additional to the Geneva Conventions of 1949. Additional Protocol I expands the scope of international armed conflict to include wars of national liberation, while Additional Protocol II creates a new category of non-international armed conflict. The *travaux préparatoires* of both instruments is examined to highlight the basis for these developments of international humanitarian law. While the distinctions introduced by the Additional Protocols are significant, it is argued that they do not affect the lower threshold for the application of international humanitarian law to situations of non-international armed conflict.

Chapter 4 examines the threshold distinguishing situations of non-international armed conflict from situations of internal disturbances and tensions in light of recent developments. The objective is to clarify the terms of its application under international humanitarian law. An argument will be advanced in support of a particular approach to the application of this threshold in the characterisation of

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978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

non-international armed conflict. The definition of non-international armed conflict provided in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) will form a central tenet of this argument. The interpretation of this definition will focus on two aspects of non-international armed conflict: the intensity of hostilities and the organisation of armed groups. The temporal and geographical scope of non-international armed conflict will also be examined. The application of international humanitarian law to hostilities between non-state armed groups is furthermore discussed as a recent development affecting the scope of non-international armed conflict.

Chapter 5 examines possible lines of interpretation applicable to non-international armed conflict in the Rome Statute of the International Criminal Court and in doing so sets out an argument for an understanding of the threshold contained in Article 8(2)(f) as one equivalent to that of Article 3 common to the four Geneva Conventions of 1949. The drafting history of the Rome Statute is explored in this chapter and provisions relating to war crimes committed in non-international armed conflict are analysed in light of guidance on interpretation provided by the Vienna Convention on the Law of Treaties.

Chapter 6 concludes the study with a summary of recommendations on the interpretation of non-international armed conflict. Attention is drawn to state practice on the complementarity of international humanitarian law and international human rights law. It is argued that as the interpretation of non-international armed conflict evolves, it is important that an approach is employed which is guided by the object and purpose of international humanitarian law. This approach must proceed with a view to providing the best possible legal framework for the implementation of this body of law. If the role of international humanitarian law in situations of armed conflict is misconstrued, its utility is undermined. It is essential therefore that the concept of non-international armed conflict be interpreted in terms consistent with the object and purpose of this body of law, which concerns the protection of victims of armed conflict.

Overall, this study seeks to remedy some of the confusion that exists surrounding distinctions that are used to differentiate non-international armed conflict. It presents an approach to the interpretation of important distinctions which define the concept of the non-international armed conflict in international humanitarian

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978-0-521-76048-5 - The Concept of Non-International Armed Conflict in International Humanitarian Law

Anthony Cullen

Frontmatter

[More information](#)

16 INTRODUCTION

law. In doing so, an attempt is made to develop a framework for the characterisation of armed conflict. It is hoped, in adopting this approach, that the analysis may prove useful in determining the applicability of international humanitarian law to situations of non-international armed conflict.