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

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1 See, for example, Crawford, ‘Unequal before the Law’.
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
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
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.