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1 The historical regulation of internal armed conflict

It is perhaps trite to observe that non-international, or internal, armed conflicts have been commonplace throughout history. They have occurred for a variety of reasons, such as the desire to overthrow one government and replace it with another, or the desire of one or more parts of a State to secede from the rest and achieve independence. Particularly relevant for two reasons, however, was the demise of colonial rule in Africa and Asia.[1] First, colonised peoples frequently rose up against the colonial power in an effort to gain independence,[2] and secondly, upon achieving independence, violent internal struggles for power frequently ensued, often along tribal, ethnic and religious lines.

The legal regulation of internal armed conflict has continued to grow in importance in the post-colonial era. Since 1945, the vast majority of armed conflicts have been internal rather than international in character.[3] Kofi Annan, Secretary-General of the United Nations, has stated that 'wars between sovereign States appear to be a phenomenon in distinct decline'.[4] Unfortunately, this is not true of internal armed conflict and, to make matters worse, time has witnessed an apparent diminution in the application of the laws of war to internal armed conflicts, from their general observance in the 1861–1865 American Civil

[1] Many similar characteristics have been seen more recently in the demise of Soviet influence and Communist rule in Eastern Europe.

[2] As Algeria did against France in 1954, for example. Such conflicts would now be classed as international rather than internal under Article 1(4) of Additional Protocol I of 1977. See below at pp. 89–90.

[3] Statistics compiled by the International Peace Institute in Oslo suggest that in the period 1990–1995, seventy-three States were involved in armed conflicts, of which fifty-nine were involved in internal conflict or civil war. See Dan Smith, *The State of War and Peace Atlas*, 3rd edn (London, 1997), 90–95.

[4] Preface to UNHCR, *The State of the World's Refugees* (Oxford, 1997), ix.

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War, to their blatant disregard in more recent conflicts, such as those in Bosnia-Herzegovina and Rwanda, typified by atrocities, ethnic cleansing and genocide. That so many such conflicts continue to arise clearly underlines the need for their effective legal regulation, while the pattern of many of these conflicts further demonstrates that those most in need of legal protection are civilians, i.e. those not directly involved in hostilities.

Given that these conflicts are *internal*, however, why should they be subject to *international* regulation at all? There are several reasons why this should be so. First, despite their non-international character, internal armed conflicts can have a profound effect on international peace and security. Hostilities can spill over into neighbouring States which may also be subject to influxes of refugees fleeing the war zone. There is also the risk that third States will intervene on behalf of one side or another, causing an escalation of hostilities.[5] Secondly, international law is no longer concerned only with States and their mutual relations. Perhaps best exemplified by the development of human rights law following the Second World War, individuals are now also seen as being the holders of rights and obligations under international law. Just as a government's treatment of its own citizens in that sphere is now regulated by international law, so the humanitarian protection of its citizens in situations of armed conflict is equally a matter of concern for the entire international community. Thirdly, international law protects those not involved in hostilities in the context of international armed conflict, and there is no reason why this should not also be the case merely because the conflict is characterised as internal. It is warfare nonetheless, and experience has shown that the civilian need for protection is often even greater where the conflict is internal.

That humanitarian rules were applicable in armed conflicts was accepted long before the nineteenth century, but the fact that internal armed conflicts were regarded as beyond the ambit of international regulation meant that the application of such norms to them was certainly not a matter of course. The traditional laws of war rely on the ability and willingness of the contending parties to distinguish between civilians and combatants, and between military and non-military targets. During internal armed conflict, however, such clear distinctions may

[5] This was particularly common at the height of the Cold War, where the United States and Soviet Union, fearful of nuclear war, chose instead to become involved (either directly or indirectly) in non-international conflicts in smaller but strategic States, using them as a battleground for their rival ideologies.

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be impossible. Insurgents, often bereft of the military hardware and manpower available to government forces, frequently feel compelled to resort to guerrilla warfare and indiscriminate attacks. They are unlikely to have many of the facilities required to take care of prisoners, the sick and wounded. Using their fellow citizens as cover, insurgents frequently escape identification, forcing the government to wage war against virtually an entire civilian population.

Towards the end of the eighteenth century there had been a distinct move towards the application of the laws of warfare to internal as well as international armed conflicts,[6] but this was based almost exclusively on the character of the conflicts and the fact that both were often of a similar magnitude, rather than any overriding humanitarian concern to treat the victims of both equally. Not until the late nineteenth century did the application of the laws of war to internal armed conflict become a widespread and pressing issue in international law. It is here that the examination of their effect must begin.

The customary laws of war and belligerent practice

Prior to the nineteenth century, internal uprisings were commonly believed to be purely a matter of domestic security. The existing authority in the State treated rebels as criminals unworthy of any legal protection, a view still espoused by some legal scholars well into the twentieth century.[7] By the nineteenth century, however, the sharp theoretical

[6] Emmerich de Vattel, for example, in *The Law of Nations* (London, 1760), book III, chapter 18, 109–110, argued that, 'A civil war breaks the bands of society and government, or at least it suspends their force and effect; it produces in the nation two independent parties, considering each other enemies, and acknowledging no common judge: therefore of necessity these two parties must, at least for a time, be considered as forming two separate bodies, two distinct people, though one of them may be in the wrong in breaking the continuity of the state, to rise up against lawful authority, they are not the less divided in fact; besides, who shall judge them? Who shall pronounce on which side the right or the wrong lies? On earth they have no common superior. Thus they are in the case of two nations, who having a dispute which they cannot adjust, are compelled to decide it by force of arms. Things being thus situated, it is very evident that the common laws of war, those maxims of humanity, moderation and probity . . . are in civil wars to be observed by both sides.'

[7] See, for example, Thomas Baty and John H. Morgan, *War: Its Conduct and Legal Results* (London, 1915), 289; Pasquale Fiore, *International Law Codified*, trans. E. M. Borchard (New York, 1918), 533; Wyndham L. Walker, *Pitt Cobbett's Leading Cases on International Law*, 5th edn (London, 1937), vol. II, 6; and Hans Wehberg, 'La Guerre civile et le droit international' (1938–i) 63 *Rec des Cours* 7 at 9.

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distinction traditionally drawn between internal and international armed conflict was not necessarily adhered to in practice, and the legal status of internal armed conflicts could be fundamentally altered by invoking the doctrine of recognition of belligerency.[8]

Traditional international law and the recognition of belligerency

In classical international law, an armed or violent challenge to the established authority within a State was characterised by reference to three different stages, depending upon the scale and intensity of the conflict: rebellion, insurgency and belligerency.[9] Rebellion was a modest, sporadic challenge by a section of the population intent on attaining control. Provided the uprising could be dealt with swiftly and effectively in the normal course of internal security, the conflict remained fully domestic. No international restraints on conduct were applicable, and the rebels had no rights or protection in international law, remaining instead punishable under municipal law.[10]

Insurgency, on the other hand, referred to a more substantial attack against the legitimate order of the State,[11] with the rebelling faction being sufficiently organised to mount a credible threat to the government. Foreign States were thus forced to acknowledge the factual situation pertaining in the country in order to protect their own interests:[12]

> Insurgency, so far as foreign States are concerned, results, on the one hand, from the determination . . . not to recognise the rebellious party as a belligerent on the ground that there are absent one or more of the requirements of belligerency. On the other hand, recognition of insurgency is the outcome both of the unwillingness of foreign States to treat the rebels as mere lawbreakers, and of the desire of those States to put their relations with the insurgents on a regular, although clearly provisional basis . . . It may prove expedient to enter into contact with the insurgent authorities with a view to protecting national interests in the territory occupied by them, to regularizing political and commercial

[8] Those authors mentioned above in n. 7 did, however, accept that such recognition removed the conflict from purely internal regulation.

[9] See Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford, 1988), 22–29.

[10] *Ibid.*, 23–24. See also Richard A. Falk, 'Janus Tormented: The International Law of Internal War' in James N. Rosenau (ed.), *International Aspects of Civil Strife* (Princeton, 1964), 185 at 197, and R. P. Dhokalia, 'Civil Wars and International Law' (1971) 11 *Indian JIL* 219 at 224–225.

[11] Dhokalia, 'Civil Wars', 225–226.

[12] Ordinarily these were of an economic character, the third States accepting that certain areas and resources might be controlled by the insurgents.

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intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities.[13]

A recognition of insurgency conferred no formal status on either party, and was certainly not regarded as according belligerent rights,[14] although certain international rights and duties were then brought into play.[15] The requirements necessary for insurgency to be recognised, however, were not settled:

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

The final stage was reached when the insurgents were extended recognition as a belligerent party. This amounted to a declaration by the recognising party that the conflict had attained such a sustained level that both sides were entitled to be treated in the same way as belligerents in an international armed conflict, and could be granted either by the parent government or by some third State.[17] Recognition, whether of insurgency or belligerency, was however, different from recognition of the insurgent party as the legitimate government of the afflicted State. It was simply recognition of the fact of the existence of war: 'It [did] not involve recognition of any government or political regime, nor . . . any expression of approbation or disapprobation or indicate any sympathy

[13] Hersch Lauterpacht, *Recognition in International Law* (Cambridge, 1947), 270–271.

[14] Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (New York, 1939), 196–200.

[15] The foreign State's shipping was secure through the belligerents' duty not to blockade ports, to visit and search foreign ships on the high seas or to capture those vessels; both sides gained the rights to prevent supplies from abroad destined for their opponents from entering the country where the conflict was taking place and to requisition lawfully the property of foreigners and nationals; and, although the government ultimately represented the State, insurgents were permitted to enter into agreements on 'routine matters' and make arrangements with the ICRC, etc. See Erik Castren, *Civil War* (Helsinki, 1966), 216–223; Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, 1959), 620; Herbert W. Briggs, *The Law of Nations*, 2nd edn (New York, 1952), 1000–1003; Georg Schwarzenberger, *International Law* (London, 1968), vol. II, 693; and Wilson, *National Liberation Movements*, 24–25.

[16] Lauterpacht, *Recognition*, 276–277. See also Greenspan, *Modern Land Warfare*, 619; Evan D. T. Luard, 'Civil Conflicts in Modern International Relations' in Evan D. T. Luard (ed.), *The International Regulation of Civil Wars* (London, 1972), 7 at 21; and Castren, *Civil War*, 214.

[17] Although there was a significant distinction between the two, on account of its implications.

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for or prejudice against the cause for which either side [was] fighting nor [did] the refusal to recognise carry any such implications.'[18] Nevertheless, some commentators claimed that recognition of the insurgent government *must* follow belligerent recognition. While accepting that belligerent recognition related to the existence of war (a question of fact) rather than to the recognition of a government, Smith, for example, maintained that, 'if we recognise the fact that a war is being carried on, then the recognition of the insurgent government follows as a necessary consequence. Wars can only be carried on by governments, and there must be at least two parties to every war.'[19] This may be true as regards the practice of equating internal armed conflicts with international armed conflicts following a recognition of belligerency, but the fundamental assertion that recognition of belligerency is separate from the recognition of an insurgent government remains unaffected. One may have been a logical consequence of the other, but they were not the same – to claim otherwise would accept that a State could have two governments. States may have taken notice of the *de facto* position of the insurgents and dealt with them accordingly, but this stopped short of actual *de jure* recognition.[20]

The doctrine of belligerent recognition took shape, at least for Great Britain and the United States, in the early nineteenth century through practice arising from the conflict in the Spanish-American colonies.[21] The United States had granted belligerent rights to the South American States in 1815, proclaiming a strict neutrality.[22] Britain also had a policy of 'neutrality' throughout the conflict, or, rather, a policy of

[18] James W. Garner, 'Recognition of Belligerency, (1938) 32 *AJIL* 106 at 111–112.

[19] Herbert A. Smith, 'Some Problems of the Spanish Civil War' (1937) 18 *BYIL* 17 at 18.

[20] In the context of the Spanish-American colonies' revolt in the early nineteenth century, the American position was that, 'So long as a contest of arms, with a rational or even remote prospect of eventual success, was maintained by Spain, the United States could not recognize the independence of the colonies as existing *de facto* without trespassing on their duties to Spain by assuming as decided that which was precisely the question of the war.' See John B. Moore, *A Digest of International Law* (Washington, 1906), vol. I, 89. Britain did not reject intercourse with the Spanish provinces, but was careful to avoid any formal recognition of the governments thereof. See F.O. 72/108 in Herbert A. Smith (ed.), *Great Britain and the Law of Nations* (London, 1932; reprinted New York, 1975), vol. I, 118. At one point in the early twentieth century, the USA even had a policy of not recognising governments which came to power via revolution. See Green H. Hackworth, *Digest of International Law* (Washington, 1940), vol. I, 185.

[21] For an outline of the development of the concept see Smith, *Law of Nations*, 261–333, and Moore, *Digest*, 164–205.

[22] *Dip. Corr.* 1865, I, 536 at 540. Reproduced in Moore, *Digest*, 172.

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non-interference whilst still affording certain benefits to the Spanish.[23] In 1819, however, the Foreign Office took the necessary steps to place Spain and her colonies on the same footing, at least in so far as the export of munitions was concerned.[24] This was effectively Britain's first recognition of belligerency, although the consequences of the decision were not fully accepted until 1822.[25]

Recognition of belligerency by third States rendered the customary international law of neutrality applicable between those States and the parties to the conflict.[26] Of course, there was no requirement upon third States to be neutral. Neutrality only becomes possible in the event of an armed conflict, however, and internal conflict could only be considered as such if the insurgents were recognised as belligerents. Consequently, if third States wished to have the rights attached to neutrality, in particular for their shipping, then a recognition of belligerency was required.

[23] Both neutrality and non-interference reflect the desire to remain detached from a conflict, but whereas neutrality as an international legal concept provides that a State may not, by virtue of any governmental measure, intervene in a conflict to the benefit of one of the belligerent parties, a policy of non-interference, by contrast, is merely an expression of political attitude and the aim not to become directly involved in the conflict, while retaining the possibility of treating one side more advantageously. Several official opinions between 1814 and 1819 illustrate the fact that Spain was still seen by Britain as entitled to a measure of favour, contrary to the strict impartiality required by neutrality in international law. A paper of 22 September 1817 stated that 'the declarations alluded to, must be understood . . . in the most limited sense, and as conveying only an intimation that Great Britain would not afford direct assistance to either Party. In any other sense the term neutrality would scarcely preserve its proper signification towards both Parties – Because the Antecedent relations with Spain, or rather with the Spanish Government, must continue, and to elevate the Insurgent Provinces to the same conditions of Amity could not but affect the pretensions and the interests of Spain; and however competent it might be to a State to form such relations, by separate and specific engagements, it would be a result that could not be implied in the profession of neutrality between both Parties.' (F.O. 83/2365, reproduced in Smith, *Law of Nations*, 273–274.)

[24] For some time the export of arms and munitions to South America and Africa had been prohibited, except under royal licence. This prohibition was now extended to include Spain.

[25] Following the recognition of belligerency, the F.O. Legal Officer was still undecided as to the competency of the insurgent Government of Peru to declare a blockade. In 1822, however, he stated that, 'Considering the principles of neutrality that have been professed on the part of this Country, the asserted independent Governments would have a right to exercise the ordinary privileges of War in maritime capture.' (F.O. 83/2366, reproduced in Smith, *Law of Nations*, 279.)

[26] Axel Möller, *International Law in Peace and War* (Copenhagen, 1935), part II, 157; James L. Brierly, *The Law of Nations*, 6th edn, edited by Humphrey Waldock (Oxford, 1963), 141; Castren, *Civil War*, 168.

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This imposed no duty or requirement on the established authority in the State concerned to recognise the belligerents, but widespread recognition of belligerency by foreign States would undoubtedly have influenced the parent government to follow suit. Equally, if recognition by the parent government had already taken place, it could hardly then complain of interference should other States do the same.

Recognition appeared to work against the third State, however, in that it then became legitimate prey for both sides should they engage in commercial warfare.[27] Its freedom of action was also severely curtailed, as neutrality demands. In contrast, recognition of belligerency was most beneficial to the insurgents:

> They gain[ed] the great advantage of a recognized status, and the opportunity to employ commissioned cruisers at sea, and to exert all the powers known to maritime warfare, with the sanction of foreign nationals. They [could] obtain abroad loans, military and naval materials, and enlist men, as against everything but neutrality laws; their flag and commissions [were] acknowledged, their revenue laws . . . respected, and they acquire[d] a quasi-political recognition.[28]

Third States were prohibited from providing assistance to the legitimate government, eliminating to some degree the latent inequality between the parties to the conflict, and furthermore, the act of recognition was open to interpretation as an expression of moral support for the insurgents.

With so little advantage apparently accruing to third States recognising the belligerency of insurgents abroad, why should they take such action? The most obvious reason could be that the recognising State *did* in fact support the aims for which the rebels were fighting. Political motives and self-interest are, after all, the foundation upon which much of State practice has historically been built. In this respect, it may also have made good sense since victorious insurgents may well be influenced by any recognition afforded when deciding on future foreign relations. Such an act of recognition would clearly be damaging to the recognising State's relations with the legitimate government, but relations to protect its nationals or property in any territory under insurgent control would

[27] For details of how belligerency could affect the interests of third States upon the sea, see *US* v *The Three Friends* (1896) 166 US 1, 41 L 897, where the Supreme Court held at 918 that, 'the recognition of belligerency involves the right of blockade, visitation, search and seizure of contraband articles on the High Seas, and abandonment of claims for reparation on account of damages suffered by our citizens from the prevalence of warfare'.

[28] Henry Wheaton, *Elements of International Law*, 8th edn, edited by R. H. Dana (London, 1866), n. 15 at 37.

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become correspondingly easier. Recognition might also have been influential in tempering the hostilities on humanitarian grounds.[29]

The geographical location of the conflict was also vital. Should the contest be conducted entirely on land, with the third State far away and in no immediate danger of involvement, then it is difficult to imagine any real need to recognise insurgents as a belligerent party. In the absence of any effects on national interests, recognition by third States was simply an expression of open support for the insurgents which could rightly be regarded by the parent State as an unfriendly act.[30] The position was different where the conflict extended to the seas:

> Where the insurgents and the parent state are maritime, and the foreign nation has extensive commercial relations and trade at the ports of both, and the foreign nation and either or both of the contending parties have considerable naval force, and the domestic contest must extend itself over the sea . . . the liability to political complications, and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers, seem to require an authoritative and general decision as to the status of the three parties involved.[31]

Recognition of belligerency by third States therefore occurred most commonly in maritime situations, often following the institution of a blockade upon insurgent ports by the legitimate authority. An excellent example is that of the recognition afforded to the Confederate States in the American Civil War, most importantly by Great Britain.[32]

[29] By leading the insurgents to suspect that a recognition of belligerency and all that entailed might follow if the laws of war were applied to the conflict. Wheaton, for example, stated in *Elements of International Law*, 35, that a prerequisite for such recognition was the 'actual employment of military forces on each side, acting in accordance with the rules and customs of war'.

[30] As stated in Wheaton, *Elements of International Law*, 34: 'The reason which requires and can alone justify this step [i.e. the recognition of belligerency] by the government of another country is that its own rights and interests are so far affected as to require a definition of its own relations to the parties.'

[31] *Ibid.*, 35.

[32] On 13 May 1861. This was done implicitly, however, through a declaration of neutrality, rather than by any express statement of recognition in favour of the South. France, Spain, the Netherlands and Brazil also declared their neutrality in 1861. See John B. Moore, *History and Digest of the International Arbitrations to which the US has been a Party* (Washington, 1898), vol. I, 595. Other examples of such recognition include that granted to the Spanish colonies in America during their war of independence by the United States and Great Britain (see above); that afforded to the Greeks in their insurrection of 1821–1829 by Russia, France, Great Britain, etc.; and possibly that afforded by some Latin American States to the Cuban insurgents during the Civil War of 1868–1878 (although this is a matter of some debate, see below p. 18 n. 68).

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Recognition of belligerency by the parent State brought into effect the *jus in bello* in its entirety between it and the rebels.[33] The overriding problem was that such recognition was commonly believed to be entirely at the discretion of the government, which was unlikely to take that step until it was clear that the insurrection could not be put down quickly or effectively.[34] Recognition tended then to come late if at all, and only once reciprocity had become an issue.

Again, such recognition was clearly more beneficial to the insurgents than to the government, which was no longer in a position to put down the insurrection in any manner which it saw fit, treating the rebels as mere criminals at the mercy of domestic law. Rather, it found that the rebels had rights and duties analogous to its own which served to eliminate the inequalities between the sides to some extent, imposing obligations on both. Only those means permitted by international law could be employed in suppressing the conflict from then on. That was (and is) always the position in theory, but where a government used all of the power at its disposal to crush an insurrection, at least the conflict would be over quickly and before it received widespread international attention. Recognition could, then, serve to prolong the conflict.[35] It might also have been regarded as a concession to the insurgents and a sign of weakness.

It is not wholly true, however, that the government itself would not benefit from the act of recognition. Certainly the members of its armed forces would benefit (at least theoretically), in that they were then entitled to expect improved treatment both during the course of hostilities and in the event of capture.[36] It was therefore desirable from a humanitarian standpoint that the government recognise the insurgents as belligerents as soon as possible, although this was seldom considered important. Rather, there may have been other factors inducing a government to recognise the belligerency of insurgents – upon recognition

[33] See Thomas J. Lawrence, *The Principles of International Law*, 7th edn (London, 1923), 64; Castren, *Civil War*, 135–137; Julius Stone, *Legal Controls of International Conflict* (London, 1959), 305; and Lassa F. L. Oppenheim, *International Law* (London, 1906), vol. II, 66.

[34] Recognition by the established government in a State was, in fact, very rare.

[35] The use of severe violence by the legitimate authority could itself tend to prolong the hostilities, however, provoking the insurgents into an even more desperate struggle, a point well made in Castren, *Civil War*, 145.

[36] Although breaches of the laws of war are inevitable in reality. Even where belligerency was recognised, the treatment of enemy soldiers often fell well short of what could be considered acceptable, e.g. the treatment of prisoners by both sides in the American Civil War, which included placing them in strategic military targets as human shields.

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