Chapter II
From the Lieber Code to the Drafting of Common Article 3 of the Geneva Conventions: The Rise of International Law Concern

In the next few sections the key elements, which have played an important role in the development of the rules of law in non-international armed conflicts, and, in particular, before and during the drafting of Common Article 3 to the Geneva Conventions are analysed.

In particular, attention is paid to the impact on the development of the rules of law in internal armed conflicts of: 1) the theory of recognition of belligerency; 2) the Lieber code; 3) the creation of the International Committee of the Red Cross (ICRC); 4) the events of the Spanish civil war; 5) the evolution of the principle of state sovereignty; 6) the human rights movement and 7) developments in the Christian tradition.

Finally, Common Article 3 to the Geneva Convention of 1949 is examined against this background.

1. The theory of recognition of belligerency

As mentioned in the previous chapter, the theory of state sovereignty and the theories of war, as developed by the early jurists of international law, gave rise to the theory of recognition of belligerency.

This theory was clearly shaped by the conception that states were the only subjects of international law and that they were the only proper enemies in a war. In particular, since a war was supposed to take place only between two independent states, internal armed conflicts did not fall within the definition of war. For insurgents to be recognized as a “belligerent party”, certain requirements had to be fulfilled, which would require the rebels to have a sort of state organization.

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1 See, in particular, the work of Vattel.
2 See Lauterpacht, H., Recognition in international law, Cambridge University Press, Cambridge 1947, p. 176. These requirements resemble, at least to some extent, the conditions for the recognition of a militia as combatants in international armed conflicts. See art. 1 of the Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, which, for the application of the laws, rights and duties of war to militia and volunteer corps, requires that such belligerents fulfil the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war.
According to the theory of belligerency, a war that took place within the boundaries of the state could be regarded as a war, "in the technical meaning of the term", only by recognizing the insurgents as a belligerent Power. Thus, the recognition of belligerency was necessary in order to treat organized armed groups as subjects of international law and for the conflict in question to be subject to the laws of war.\textsuperscript{4}

Whilst the lawful government could "exercise belligerent rights at its option",\textsuperscript{5} outside states, in order to get the benefits of neutrality law, might be required to recognize belligerency in another state. As explained by Lauterpacht:

"In the case of civil war the duty of non-interference follows from the obligation to respect the independence of the State affected by the civil war. That independence would be denied if the ordinary obligations of neutrality were to be disregarded. However, it is only in consequence of the recognition of belligerency that these obligations come, in law, into being. For this reason the refusal [...] to recognize the insurgents as belligerent may [...] amount in fact to a denial of the independence of the state concerned".\textsuperscript{6}

However, even if outside states could find themselves in a position of needing to recognize belligerency, such recognition has occurred rarely in international law. On the one hand, the incumbent government was usually reluctant to concede it as it claimed that recognition advantaged the insurgents. On the other hand, as noted by Lauterpacht, it was very difficult for civil wars to satisfy all the requirements for recognition of belligerency.\textsuperscript{7} Furthermore, third states were not willing to recognize belligerency as such recognition might have been considered a hostile act by the incumbent government.

In this respect, the case of the Spanish civil war is illustrative. Here, in fact, recognition of belligerency should have been granted, but, for political reasons, it was not. By contrast, the American civil war represents one of the exceptional cases in which recognition of belligerency was conceded.

\textsuperscript{3} "War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victory pleases .... A contention may, of course, arise between the armed forces of a State and a body of armed individuals, but this is not war". Lauterpacht, H., Oppenheim's International law, vol. II, Disputes, war and neutrality, seventh edition, Longmans, Green and Co., London 1953, p. 202. (Emphasis added).

\textsuperscript{4} See generally, Lauterpacht, H., Recognition in international law, p. 175.

\textsuperscript{5} Ibid., p. 176.

\textsuperscript{6} Ibid., pp. 228-229.

\textsuperscript{7} Ibid., p. 183.