

# Chapter 6

## The Meaning of Armed Conflict: Non-International Armed Conflict

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### Introduction

Non-international armed conflicts – and in particular internal armed conflicts, as will be defined below – are the most common type of conflict; in the period 1995-2005 95% of armed conflicts have taken place within states.<sup>1</sup> There was a dramatic increase in the number of civil wars after the Second World War, and an equally dramatic decline in their numbers in the 1990s, but they still constitute the vast majority of conflicts.<sup>2</sup>

It is only comparatively recently that treaty provision has been made for such conflicts, though an early attempt to regulate the American Civil War was made in the 1863 *Lieber Code*.<sup>3</sup> This civil war code subsequently influenced the development of *ius in bello* on international armed conflict. Recently we have seen attempts to achieve the converse, to ensure that the law applicable to international armed conflict applies in full (or almost) to non-international armed conflict.

The crucial factors in establishing the existence of a non-international armed conflict, and the threshold to be reached for the application of IHL, are the identity and degree of organization of the parties, the intensity of the conflict; and the related questions as to start, finish and area of the conflict. Until recently the question of the definition of a non-international armed conflict was a more sensitive question than the definition of international armed conflict. The ICRC did not deal with this issue in its recent Commentary. So there is a clear need for the ILA to study the question.

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1 HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY viii (2005).

2 *Id.* at I-2, 146.

3 See George D. Haimbaugh Jr., *Introduction to Panel II: Humanitarian Law: The Lincoln-Lieber Initiative*, 13 GA. J. INT'L & COMP. L. 245 (1983).

*Mary Ellen O'Connell (ed.), What Is War? An Investigation in the Wake of 9/11.*

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### Threshold: Treaty provisions

Common Article 3 of the four 1949 Geneva Conventions was a revolutionary provision in that it was the first international treaty to attempt to regulate non-international armed conflict.<sup>4</sup> However, it offers no definition. Common Article 3 provides only: “In cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties;” thus it offers only a negative formula. Some commentators were critical of this, saying that the desire for maximum breadth of application had overridden the desire for that element of certainty which legal norms demand if they are to be effective. “The value of the individual rules of restraint in conflict is lost if the scope of the provision lacks certainty.”<sup>5</sup> Others regarded the lack of any more rigorous definition as an advantage in that it provided flexibility.<sup>6</sup>

The ICRC commentary on Common Article 3 suggests criteria for determining the existence of an armed conflict:<sup>7</sup>

1. That the party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the de jure Government has recognized the insurgents as belligerents; or
  - (b) That it has claimed for itself the rights of a belligerent; or
  - (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
  - (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.”
4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
  - (b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.

4 194 parties, more than the 192 members of the UN.

5 G.I.A.D Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983).

6 LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 32-33 (Cambridge University Press 2002).

7 Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, available at <http://www.icrc.org/ihl.nsf/com/380-600006>.