COMMON ARTICLE 3 AT 70:
REAPPRAISING REVOLUTION AND CIVIL WAR IN
INTERNATIONAL LAW

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Shortly after its adoption, Article 3 common to the Geneva Conventions of 1949 ("Common Article
3") was described as 'striking' and 'revolutionary', as well as a 'legal heresy' and 'unconceivable,
from a legal point of view'. 70 years after its adoption and coming into force, I seek to explore
what type of a 'revolution' or 'heresy' Common Article 3 represented. I argue that Common Article
3 was not revolutionary or heretical merely because it applied international law to civil war and
revolution or imposed international obligations on rebels. The law of alien protection and the
doctrine of belligerency already did this. It was certainly the first multilateral treaty to do so, but
such a change in form is not, I argue, revolutionary or heretical in itself. What was groundbreaking
about Common Article 3 was that it applied international law to civil war and revolution and
imposed international obligations on rebels within a new framing of internal conflict as a
humanitarian — rather than a primarily commercial — problem. It took many decades, however,
and the rise of international human rights law, for this framing to come to predominate and for
international lawyers to take a serious interest in the obligations of rebels.

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I  INTRODUCTION

Shortly after its adoption, Article 3 common to the Geneva Conventions of 1949 (‘Common Article 3’)¹ was described as ‘striking’² and ‘revolutionary’,³ as well as a ‘legal heresy’⁴ and ‘unconceivable, from a legal point of view’.⁵ Common Article 3 provides that in an ‘armed conflict not of an international character’, ‘each Party to the conflict’ is bound by a set of minimum standards for the humane treatment of ‘[p]ersons taking no active part in the hostilities’.⁶ It also provides for the collection and care of the wounded and sick, and the provision of services ‘to the Parties to the conflict’ by ‘[a]n impartial humanitarian body, such as the International Committee of the Red Cross’.⁷ Finally, Common Article 3 stipulates that the ‘Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention’ and that ‘[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict’.⁸ What was so striking about this? In 1950, the International Committee of the Red Cross (‘ICRC’), in its preliminary analysis of the Geneva Conventions, explained:

[Common Article 3] does no less than extend the Conventions to civil war, and, in general, to all conflicts which cannot be classed as international war … Till very recently, the idea of extending the Conventions to cover a domestic conflict was thought to be impossible from a legal point of view … Much blood had to be shed in another World War and great changes made in the conceptions of International Law, before this idea could even begin to be accepted by Governments. Once the idea was more or less agreed to, powerful obstacles had still to be overcome before it could be reduced to an acceptable formula.⁹

Among the ‘principal difficulties’ identified by the ICRC was the ‘impossibility, from a legal point of view’, of binding ‘illegal rebel group[s]’ to

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⁶ Geneva Convention I (n 1) art 3.

⁷ Ibid.

⁸ Ibid.

⁹ Geneva Conventions Analysis (n 2) vol 2, 5–6.
the Conventions as non-states and non-signatories. Noting that such ‘misgivings … were not without foundation’, the ICRC concluded that it was ‘remarkable that the Geneva Conference was able to agree upon a text’.

Following the 70th anniversary of its adoption and coming into force, I seek to explore what type of a ‘revolution’ or ‘heresy’ Common Article 3 represented in terms of the international regulation of revolution and civil war and, in particular, the imposition of obligations on rebel and insurgent groups. Some have argued that Common Article 3 was the first time that international law addressed civil war at all. In fact, prior to 1949, there was a significant body of international law relevant to civil war and revolution. There was, most directly, the doctrine of belligerency, which, among other things, imposed obligations on and gave rights to rebel groups via recognition. The law of alien protection also applied certain standards to civil war and revolution. Although it did apply in other circumstances and is not commonly thought of as being of any particular relevance to domestic conflict, in fact, revolution and civil war were the paradigm of alien protection. Thus, as Richard Falk has argued, ‘[t]he phenomenon of civil war, despite the terminology, is not, and has never been, an entirely domestic affair’. In fact, it was Common Article 3 that established — rather than overcame — the distinction between international and non-international conflict, a distinction that was consolidated by the 1977 Additional Protocols to the Geneva Conventions (‘Additional Protocols’), in which the internationalisation of certain conflicts only deepened the marginalisation of others. It was through the subsequent practice of first non-government organisations (‘NGOs’) and then international organisations, particularly in the area of human rights, that this marginalisation was later overcome.

So, what was new — other than its form as a multilateral treaty — about Common Article 3? I will argue that Common Article 3, with its protections for persons taking no active part in the hostilities without discrimination and its provision for humanitarian relief, marked the beginning of a shift towards a new framing of civil war and revolution as primarily a humanitarian problem rather

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10 Ibid vol 2, 6.
11 Ibid vol 2, 7.
16 Ibid 622–3.
than predominantly a problem for relations, and particularly commercial relations, between states. What was groundbreaking about Common Article 3 was that it applied international law to civil war and revolution and imposed international obligations on rebels within a new framing of internal conflict as a humanitarian — rather than a primarily commercial — problem. While the century preceding Common Article 3 has been characterised as representing ‘the rise of international law concern’ for non-international armed conflict, I will argue that international law has long been concerned about revolution and civil war, but it is the nature of this concern that has changed.

In what follows, I will first look at how international law regulated civil war and revolution prior to 1949. I will then proceed to analyse the ways in which Common Article 3 did, and did not, change international law’s treatment of civil war and revolution: first in terms of the shift to humanitarianism, and then more specifically in terms of the obligations of rebel and insurgent groups. Before getting underway, it is worth saying something about terminology. Common Article 3 coined the term ‘armed conflict not of an international character’,20 This marked a shift from the language of rebellion, insurgency and civil war that had been used previously, although such terminology remained dominant until the 1970s. The term ‘non-international armed conflict’ only slowly began to take over from the late 1970s onwards.22 Common Article 3 thus straddles this change in vocabulary. In this piece, I generally stick with the older language, even if Common Article 3 does not use it, for continuity and to reflect the recent resurgence of interest in revolution and civil war in international law.23

II CIVIL WAR AND REVOLUTION IN INTERNATIONAL LAW PRE-1949

Prior to 1949, there was a significant body of international law relevant to civil war and revolution, made up of the doctrine of belligerency and — perhaps less obviously — the law of alien protection.24 These were bodies of customary international law that developed and were applied in an ad hoc fashion. They framed civil war and revolution primarily as a problem for relations between states, particularly commercial relations. Humanitarian concerns were peripheral or even incidental to these regimes. These regimes regulated — to a certain extent

20 Geneva Convention I (n 1) art 3.
21 See Sivakumaran, The Law of Non-International Armed Conflict (n 14) 9.
22 Following the adoption of this terminology by Additional Protocol II (n 18).
24 For early scholarship here, see Carlos Wiese, Reglas de derecho internacional aplicables a las guerras civiles [International Law Rules Applicable to Civil Wars] (Viuda Galland, 1893); Antoine Rougier, Les guerres civiles et le droit des gens [Civil Wars and the Law of Nations] (Larose, 1903).
— what states and rebels could and could not do during civil wars and revolutions, but not, for the most part, in the interests of humanitarianism. In this section, I seek to understand how they worked to mediate the impact of revolution and civil war on international economic order.

A Alien Protection

The law of alien protection concerned the rights of states to protect their nationals overseas and the duties of states when it came to the treatment of foreign citizens in their territory. This field of law emerged in the context of the expansion of capitalism during the 19th century, particularly in newly decolonised Latin America. This was acknowledged by the earliest scholars of alien protection at the beginning of the 20th century. United States international lawyer Edwin M Borchard described alien protection as a response to the frictions caused by the ‘vast commercial and other interests abroad’ resulting from ‘increased facilities for travel and communication’ and ‘the growth of international commerce and intercourse’. For Frederick Sherwood Dunn, another US scholar of international law, the problem that alien protection was concerned with was maintaining a unified economic and social order for the conduct of international trade and intercourse among independent political units of diverse cultures and stages of civilization, different legal and economic systems, and varying degrees of physical power and prestige.

Dunn noted the ‘special importance’ of the decolonisation of Latin America to the development of alien protection; Latin American independence meant the ‘opening up of the new world to international trade’ (since previously Spain enforced a strict monopoly on trade with the region): ‘Here was a vast new territory, rich in the minerals and other resources needed in the economic life of Europe, and offering huge potential markets for European goods.’ Yet there was a problem: ‘in large sections of the new world’, observed Dunn, ‘political disorder and revolutions prevailed for many years’. Alien protection thus mediated the

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28 Ibid 53.
29 Ibid.
32 Ibid 54.
extension of capitalist economic order, as embodied in international law, in the face of political instability.33

Although it applied more widely and did not, on its face, seem of special relevance to domestic conflict, revolution and civil war were in fact the central case of alien protection.34 While initially alien protection was exercised through diplomatic or military means, it emerged as an international legal field largely as a result of a series of arbitrations in the 19th and early 20th centuries.35 The most influential mixed claims commissions of this period were set up following revolutions or civil wars,36 such as in the US, Spain’s then colonies, Mexico, Venezuela and Chile,37 and particularly where such revolutions or civil wars disrupted periods of capitalist expansion, such as those in Venezuela under Antonio Guzmán Blanco and in Mexico under Porfirio Díaz.38 In addition to the protections for nationals provided for in bilateral treaties of friendship, commerce


34 Some of the earliest scholarship on alien protection focused specifically on injuries caused during revolution and civil war: see, eg, Carlos Calvo, ‘De la non-responsabilité des États à raison des pertes et dommages éprouvés par des étrangers en temps de troubles intérieurs ou de guerres civiles’ [On the Non-Responsibility of States for Losses and Damages Experienced by Foreigners in Times of Internal Troubles or Civil Wars] (1869) (1st ser) 1 Revue de Droit International et de Législation Comparée 417; Luis A Podestá Costa, El extranjero en la guerra civil [The Foreigner in Civil War] (Coni Hermanos, 1913). The topic was chosen by the Institut de Droit International as a topic for codification in 1900 and was also later discussed by the International Law Association and the American Society of International Law at their meetings: see below n 40.


37 A Britain–US mixed claims commission was set up by the Treaty between Great Britain and the United States for the Amicable Settlement of All Causes of Difference between the Two Countries, 143 ConTS 145 (signed and entered into force 8 May 1871) (‘Treaty of Washington’) to deal with claims arising out of acts committed against persons or property during the US Civil War; Spain established mixed commissions with the US in 1871 to deal with injuries to US citizens during the insurrection in Cuba and with Britain in 1923 after uprisings in Morocco; commissions were set up between Chile and a number of states during the 1890s following the Chilean Civil War of 1891; 11 states established commissions with Venezuela following the revolutions and civil wars of 1892–1902; and a series of commissions were set up between Mexico and foreign states to resolve alien protection claims coming out of the Mexican Revolution of 1910–20: AM Stuyt, Survey of International Arbitrations: 1794–1938 (Springer, 1939) 95–6, 98, 182, 185, 190, 199, 245, 253, 266, 268–76, 369–70, 372–5, 385, 389, 399, 402–3.

and navigation, these arbitral tribunals developed principles of customary international law. From the late 19th century onwards, scholars and institutions sought to codify or develop the rules in this area. The law of alien protection secured for foreign nationals ‘a certain minimum of rights necessary to the enjoyment of life, liberty and property’, enforceable internationally should their domestic vindication fail, protecting aliens from ‘the arbitrary action of the state’. In the context of revolution and civil war, this meant that the state was obliged to compensate foreigners for injuries resulting from acts of its authorities and troops in the course of the conflict, such as plunder or seizure of property, other than ‘those [injuries] inflicted during actual hostilities’ and justified by military necessity. Acts of state authorities also included acts of successful rebels and national de facto governments, as well as certain acts of local de facto authorities. Most significantly, however, unless there was a recognition of belligerency, the state was obliged to exercise due diligence to protect foreigners against harm caused by rebels.

40 See, eg, E Brusa, ‘Responsabilité des États à raison des dommages soufferts par des étrangers en cas d’émeute ou de guerre civile’ [Responsibility of States for Damage Suffered by Foreigners in the Event of Riot or Civil War] (1898) 17 Annuaire de l’Institut de Droit International 96; L de Bar, ‘De la responsabilité des États à raison des dommages soufferts par des étrangers en cas de troubles, d’émeute ou de guerre civile’ [On the Responsibility of States for Damage Suffered by Foreigners in the Event of Unrest, Riot or Civil War] (1899) (2nd ser) 1 Revue de Droit International et de Législation Comparée 464; Institut de Droit International, Règlement sur la responsabilité des États à raison des dommages soufferts par des étrangers en cas d’émeute, d’insurrection ou de guerre civile [Regulation on the Responsibility of States for Damage Suffered by Foreigners in the Event of Riot, Insurgency or Civil War] (Resolution, Session de Neuchâtel, 10 September 1900); Convention concerning the Rights of Aliens. 190 ConTS 445 (signed and entered into force 29 January 1902); LA Podestá Costa, ‘International Responsibility of the State for Damages Suffered by Aliens During Civil War’ (1922) 31(1) International Law Association Reports of Conferences 119; Charles Strupp, ‘Responsabilité internationale de l’État en cas de dommages, causes aux ressortissants d’un État étranger en cas de troubles, d’émeutes, ou de guerres civiles’ [International Responsibility of the State in the Case of Damages Caused to Nationals of a Foreign State in the Event of Troubles, Riots or Civil Wars] (1922) 31(1) International Law Association Reports of Conferences 127; Committee of Experts for the Progressive Codification of International Law, League of Nations, ‘Questionnaire No 4 Adopted by the Committee at its Second Session, held in January 1926: Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners’ (1926) 20(Special) Supplement to the American Journal of International Law 176; James W Garner, ‘Responsibility of States for Injuries Suffered by Foreigners within Their Territories on Account of Mob Violence, Riots and Insurrection’ (1927) 21 American Society of International Law Proceedings 49; Institute of International Law, ‘International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners’ (1928) 22(Special) Supplement to the American Journal of International Law 330; Supplement, ‘Draft Conventions and Comments on Nationality, Responsibility of States for Injuries to Aliens, and Territorial Waters, Prepared by the Research in International Law of the Harvard Law School’ (1929) 23(Special) Supplement to the American Journal of International Law 1.
41 Borchard (n 25) 39.
42 Ibid 233–5.
43 Ibid 233.
44 Ibid 206–9, 239–42: the legitimate government could not collect for a second time taxes or customs paid to local de facto authorities.
That its central concern was insulating economic order against revolution and civil war is not to say that there was not also a humanitarian aspect to alien protection. It did capture cases of murder, torture and deprivation of liberty.\textsuperscript{46} However, this was secondary to the commercial interests that were at the core of alien protection. The first mixed claims commissions enforced claims for ‘injuries to persons or property by the authorities of the state’,\textsuperscript{47} a jurisdiction that came to be understood as including claims based in contract.\textsuperscript{48} Contract claims, as Borchard noted, ‘[c]oincident with the constant growth of international intercourse and the exploitation of backward countries by foreign capital … assumed large proportions’.\textsuperscript{49} Property claims were, however, often the most significant category. They were the most numerous before, for example, the 1839 Mexico–US commission and the 1923 Mexico–US general commission.\textsuperscript{50}

Following the 1902–03 blockade, Venezuela was forced to admit liability for property claims before the mixed claims commissions that were set up with the blockading powers.\textsuperscript{51} Furthermore, companies and corporations were as important a category of claimants as individuals.\textsuperscript{52} Ultimately, foreigners were protected primarily as commercial actors rather than individuals.

In sum, the law of alien protection regulated states’ conduct in respect of civil war and revolution, at least to the extent that such conduct impacted on certain internationally protected rights of foreign nationals. There were no obligations on rebels — their conduct was only regulated indirectly through the state. Of course, this is more limited than the scope of Common Article 3, which does not make any distinction on the basis of nationality. Nevertheless, the law of alien protection meant that a state did not have unlimited right of action when it came to foreigners in its territory; the exclusive jurisdiction of the state, on this account, was only

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  \item See, eg, John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Government Printing Office, 1898) vol 3, 2972, citing *Memorial of Mary Hughes, Administratrix of George Hughes* (Opinion of Commissioners Evans, Smith, and Paine, 18 February 1850).
  \item This wording was used, for example, in the jurisdictional clause of the 1868 treaty establishing a Mexico–US mixed claims commission following the War of the Reform and French occupation: *Claims Convention between Mexico and the United States*, 137 ConTS 331 (signed and entered into force 4 July 1868) art 1 (‘Mexico–US Convention’). See also Stuyt (n 37) 85.
  \item For some of the earliest cases involving military supplies made to the Mexican revolutionaries during the war of independence against Spain, see John Bassett Moore (n 46) vol 4, 3426–8.
  \item Borchard (n 25) 281.
  \item Regarding the former, see John Bassett Moore (n 46) vol 2, 1244. Regarding the latter, see Dunn, *The Protection of Nationals* (n 25) 404–5.
  \item See, eg, *Treaty of Washington* (n 37) art XII, which dealt with civil war claims between Britain and the US ‘on the part of corporations, companies, or private individuals’. The 1868 Mexico–US commission also heard claims ‘on the part of corporations, companies, or private individuals, citizens’: John Bassett Moore (n 46) vol 2, 1292, quoting *Mexico–US Convention* (n 47) art I. The *Britain–Venezuela Protocol* refers to claims by British subjects, including the railway companies: *Britain–Venezuela Protocol* (n 51) art III. Regarding corporate claims before the Mexican commissions of the 1920s, see Feller (n 38) 112–22.
\end{itemize}
over its own nationals. The state’s right to suppress rebellion as it saw fit gave way to its obligations in respect of aliens. These obligations were not, however, primarily humanitarian in aim; rather, they sought to insulate commercial interests against revolution and civil war in the decolonised world.

B  The Doctrine of Belligerency

Before Common Article 3, the doctrine of belligerency applied the laws of war to revolution and civil war. As the 1878 English edition of Henry Wheaton’s *Elements of International Law* noted:

It seems to be now settled that it is unnecessary in order to constitute a war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other. Whether the struggle is a war, or is not, is to be determined, not from the relation of the combatants to each other, but from the mode in which it is carried on.

Thus, although the laws of war generally only applied to interstate wars, a recognition of belligerency could put a civil war on the same legal footing as a war between states and admit an insurgent group to a certain international legal status for the purposes of the hostilities. The exact configuration of the legal results of a recognition of belligerency varied depending on whether it was the parent state or a third state who did the recognising. However, the basic consequences were, for the parent state, that the laws of war applied between the parties, giving them belligerent rights and duties, and that the parent was released from responsibility for the acts of the insurgents for the purposes of alien protection. Third party states, upon recognition, were afforded the rights and duties of neutrality.

There was a humanitarian aspect to a recognition of belligerency, at least by the parent state, in terms of rebels being afforded belligerent rights and thus entitlement to prisoner of war status. As William Edward Hall put it in his influential 1895 treatise,

it would be inhuman for the enemy to execute his prisoners; it would be still more inhuman for foreign states to capture and hang the crews of war-ships as pirates;

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55 Some have argued that the Martens Clause should be considered to apply to internal conflict: see, eg, Antonio Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11(1) *European Journal of International Law* 187, 209–10. However, the Martens Clause was a response to the failure of the First Hague Peace Conference to agree on explicit protections for civilians who took up arms against an occupying force, and it is not clear that anyone at the time, or in the decades afterwards, thought that it applied more widely to civil wars. For more on the Martens Clause, see Rupert Ticehurst, ‘The Martens Clause and the Laws of Armed Conflict’ (1997) 37(317) *International Review of the Red Cross* 125; Theodor Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience’ (2000) 94(1) *American Journal of International Law* 78.

56 For a detailed explanation, see Daoud L Khairallah, *Insurrection under International Law, with Emphasis on the Rights and Duties of Insurgents* (Lebanese University, 1973) 27–39.

humanity requires that the members of [an insurgent community that resembles a state] shall be treated as belligerents.58

However, for Hall, this was a matter of morality rather than international law.59 The application of the laws of war between the parties also brought into effect those humanitarian limitations on the waging of war that existed at that time, such as the prohibition on the bombardment of undefended towns.60 This was not, however, a factor legally relevant to the decision to recognise belligerency.61 It was relations — generally commercial — with third party states that were at the core of the doctrine of recognition of belligerency,62 rather than concerns about the impact of how the war was being conducted on combatants or populations.63 Parent state recognition was, anyway, relatively uncontroversial64 and could be inferred.65 It was third state recognition that was the issue.66

When the conditions for belligerency were met, this conferred a right, but not a duty, on third states to recognise.67 The doctrine of recognition of belligerency was about enabling states to protect their interests when they were affected by a civil war. There were different accounts of what the conditions for the existence of a state of belligerency were.68 However, fundamentally, they were all concerned with the intensity of the conflict (understood in different ways) reaching a certain threshold so as to impact third party states or the parent state’s relations with them.69 Although the existence of a state of belligerency was commonly


59 Hall (n 58) 34–5.


61 See Institut de Droit International, *Droits et devoirs des puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l’insurrection* [Rights and Duties of Foreign Powers in Cases of Insurrectional Movement against Established and Recognised Governments that are Grappling with the Insurgency] (Resolution, Session de Neuchâtel, 8 September 1900) art 4(2) (‘*Droits et devoirs des puissances étrangères*’).

62 The Marquis of Olivart describes third state recognition as the ‘true’ recognition: Olivart (n 58) 92. See also Wilson (n 57) 139.


64 See, eg, Hall (n 58) 33.

65 See, eg, *Droits et devoirs des puissances étrangères* (n 61) art 4(1).

66 Arnold D McNair even refers to parent state recognition as a ‘domestic affair’: Arnold D McNair, ‘The Law Relating to the Civil War in Spain’ (1937) 53(4) Law Quarterly Review 471, 477. See also O’Rourke (n 58) 399.

67 Hall (n 58) 34–5. At least this was the opinion in the 19th century. For the contrary view expressed by later scholars during and after the Spanish Civil War, see O’Rourke (n 58); H Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947) 175.


69 Cf Wilson (n 57) 139, arguing that there was an extreme view that recognition can be purely for political expediency ‘without much regard for the adequacy of rebel organization or their possession of the resources that would make the outcome doubtful’.
considered to be a matter of fact,\textsuperscript{70} a number of scholars stressed that the right to recognise only arose where this was necessary for the recognising state to protect its interests.\textsuperscript{71} For the Marquis of Olivart, who authored the first monograph on recognition of belligerency in 1895,\textsuperscript{72} even where the conditions for the existence of a state of belligerency were met, ‘not only is [recognition] not compulsory, but it is not even legal, unless [the right of] self-defence and [that of] life itself require it’.\textsuperscript{73}

Primarily, there were two situations that could give rise to the necessity of recognition for third states: where the civil war took place in a neighbouring state and where the civil war took on a maritime aspect. The second was the most important. It was where civil wars were conducted at sea, as well as on land, that a recognition of belligerency was likely to be necessary.\textsuperscript{74} This was because of the inevitable impact that maritime war had on commerce.\textsuperscript{75} Herbert Arthur Smith, in his review of British international law practice, argued that Britain recognised belligerency, first of all, where the legitimate government claimed the right to interfere with neutral commerce.\textsuperscript{76} The second situation was where Britain needed to establish relations with an insurgent government in order to protect its nationals.\textsuperscript{77} As Richard Dana’s well-known note to Wheaton put it, ‘[i]n the tests to determine the question [of belligerency] are … far more decisive where there is maritime war and commercial relations with foreigners’.\textsuperscript{78}

A recognition of belligerency offered neutral states protection against the exercise of certain war powers that belligerents inevitably used against each other at sea, particularly those of blockade, visit and search, and capture. As Hall explained, ‘these means … are only acquiesced in … under limitations and safeguards which, being prescribed by international law with reference only to war, could not be insisted upon during the continuance of nominal peace’.\textsuperscript{79} Without a recognition of belligerency, the exercise of these powers would lead to ‘[i]nevitable collisions … which would not improbably drag neutral nations into the conflict’.\textsuperscript{80} The development of rights and duties for neutrals during war was

\textsuperscript{70} See, eg, Henry Wheaton, \textit{Elements of International Law}, ed Richard Henry Dana (Little, Brown and Company, 8\textsuperscript{th} ed, 1866) 35 n 15 (‘\textit{Elements}, 8\textsuperscript{th} ed’).\
\textsuperscript{71} See, eg, Walker (n 68) 116; Joseph H Beale Jr, ‘The Recognition of Cuban Belligerency’ (1896) 9(6) \textit{Harvard Law Review} 406, 407; Hall (n 58) 35. For Hall, necessity was the only condition.\
\textsuperscript{72} Olivart (n 58). For other early works specifically on recognition of belligerency, see L Stéfanesco, \textit{La guerre civile et les rapports des belligérants} [Civil War and Belligerent Relations] (Arthur Rousseau, 1903); Paul Sadoul, \textit{De la guerre civile en droit des gens: Reconnaissance de belligérance} [On Civil War in International Law: Recognition of Belligerence] (Scheffer, 1905).\
\textsuperscript{73} Olivart (n 58) 93 [tr author].\
\textsuperscript{74} See Wheaton, \textit{Elements}, 1\textsuperscript{st} English ed (n 54) 36; Hall (n 58) 36–7; Olivart (n 58) 95; Beale (n 71) 417.\
\textsuperscript{75} See Wheaton, \textit{Elements}, 1\textsuperscript{st} English ed (n 54) 36; Hall (n 58) 36–7.\
\textsuperscript{76} Herbert Arthur Smith (ed), \textit{Great Britain and the Law of Nations: A Selection of Documents Illustrating the Views of the Government in the United Kingdom upon Matters of International Law} (PS King & Son, 1932–35) vol 1, 261.\
\textsuperscript{77} Ibid. See also Olivart (n 58) 95.\
\textsuperscript{78} Wheaton, \textit{Elements}, 8\textsuperscript{th} ed (n 70) 35 n 15.\
\textsuperscript{79} Hall (n 58) 35.\
\textsuperscript{80} Wheaton, \textit{Elements}, 1\textsuperscript{st} English ed (n 54) 36.
necessary to balance the desire of belligerents to interfere with their adversaries’ commerce and the desire of neutral states to maintain freedom of trade. At the core of the rules whose application was triggered by a recognition of belligerency was prize law. While prize law gave belligerents the right to visit and search enemy and neutral vessels and to capture enemy vessels or cargo, neutral vessels and goods were generally exempt from capture, the right of visit and search was strictly regulated and there was a right to compensation for unnecessary interference or wrongful capture. Neutrals were allowed to trade with belligerents to the extent that such trade did not directly assist the war effort, while belligerents had the right to prevent neutrals from supplying war materials to the enemy or trading at all within blockaded areas.

The classic example of the operation of this doctrine is the US Civil War. Britain and France recognised the Confederate states as belligerents by declaring a policy of neutrality, after Abraham Lincoln declared a blockade of Confederate ports and Jefferson Davis issued letters of marque to Confederate privateers. The declaration of neutrality sought to protect shipping from these hostilities at sea. The British declaration forbade its citizens from enlisting; fitting out, equipping or arming any ship of war; breaking the blockade; or carrying contraband. While the British declaration was made by the Queen, a Prussian proclamation, taking the side of the Union, was made by the Minister of Commerce. When it came to parent state recognition, this was inferred. The US

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81 See Francis Deák and Philip C Jessup, ‘Prize Law Procedure at Sea: Its Early Development’ (1932) 7(4) Tulane Law Review 488, 488; Hall (n 58) 75.

82 The origins of the doctrine of belligerency have been traced to The Brig Amy Warwick, 67 US (2 Black) 635 (1863) (‘Prize Cases’) decided by the US Supreme Court during the US Civil War: Valentina Azarova and Ido Blum, ‘Belligerency’ in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (Oxford University Press, online at September 2015) [1]. Prize law was described by Wheaton in 1815 as ‘the most important practical branch of the law of nations’: Henry Wheaton, A Digest of the Law of Maritime Captures and Prizes (R M’Dermut and DD Arden, 1815) iii.


84 This is unless the goods were contraband or the vessel did not have the proper papers, resisted search, or was in unneutral service or breaking a blockade: ibid 8–9, 12–20.

85 For an overview of the controls on the right to visit and search, see Deák and Jessup (n 81) 495.


87 Tiverton (n 83) 7.

88 Ibid.

89 See, eg, Azarova and Blum, ‘Belligerency’ (n 82) [11].


91 ‘British Proclamation, for the Observance of Neutrality in the Contest between The United States and the Confederate States of America. — London, May 13, 1861’ (1861) 51 British and Foreign State Papers 165, 169.

92 Ibid 165.

93 Letter from Mr Wright to Mr Seward, 25 June 1861, reproduced in ‘Correspondence between the United States and Austria, Belgium, Chile, Denmark, France, Hawaiian Islands, Italy, Netherlands, Portugal, Prussia, Russia and Spain, Respecting the Civil War in America; The Non-Recognition of the So-Called Confederate States; Maritime Rights in Time of War, Privateering; and Neutral Trade. — 1861’ (1861) 51 British and Foreign State Papers 67, 67.
government treated the rebels as belligerents, according them belligerent rights, such as prisoner of war status, and exercising belligerent rights against them, for example, by calling the blockade. The Confederate government was given de facto recognition for commercial reasons; purchases of property and contracts done by the Confederate authorities were subsequently enforced by the US Supreme Court.

If the US Civil War was the classic example of recognition of belligerency in operation, the Spanish Civil War has come to be seen as the epitome of its failings. The withholding of recognition, particularly by Britain and France, during the Spanish conflict is often presented as marking the fall of the doctrine after its rise during the 19th century. As a result of what happened regarding Spain, the doctrine of belligerency was perceived as giving states too much discretion, as policy rather than law. This, of course, had been the purpose of the doctrine originally: to give states — in the context of the expansion of capitalism during the 19th century — the power to protect their commercial interests when they were affected by civil war or revolution. However, it could not necessarily address what was to be a central aspect of the changing context for international law’s engagement with civil war post-Second World War: civil wars became arenas for larger geopolitical and ideological struggles, a shift that became evident with the Spanish Civil War.

### III COMMON ARTICLE 3: A SHIFT TO HUMANITARIANISM?

By seeking to apply rules of international law to revolution and civil war, Common Article 3 was not, then, treading on new ground, since alien protection and the doctrine of belligerency had already done this. The most obvious thing that was new about Common Article 3 was that it was a multilateral treaty provision that explicitly regulated revolution and civil war. This was a first. Before, there had only been bilateral treaties — such as treaties of friendship, commerce and navigation that applied to the treatment of foreigners in the event of revolution or

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95 Azarova and Blum, ‘Belligerency’ (n 82) [11].
98 On the question of the recognition of belligerency in the context of the Spanish Civil War, see O’Rourke (n 58); Padelford (n 53); McNair (n 66); Wilson (n 57); Walker (n 96); James W Garner, ‘Recognition of Belligerency’ (1938) 32(1) *American Journal of International Law* 106; Charles Rousseau, ‘La non-intervention en Espagne’ [Non-Intervention in Spain] (1938) (3rd ser) 19 *Revue de Droit International et de Législation Comparée* 473.
99 See, eg, Sivakumaran, *The Law of Non-International Armed Conflict* (n 14) 17.
100 See, eg, ibid 29, noting the ‘decentralized’ and ‘self-serving’ nature of the exercise of recognising belligerency; Azarova and Blum, ‘Belligerency’ (n 82) [19], noting the Spanish Civil War as the ‘exemplary reference point for the political nature of such decisions [to recognise or not]’.
civil war or that set up mixed claims commissions to adjudicate alien protection claims — and customary international law that was applied on an ad hoc basis. This move from ‘ad hoc’ regulation by custom or bilateral treaty to ‘systematic’ regulation by multilateral treaty, as Sandesh Sivakumaran has termed it, is not in itself a revolutionary or heretical development.\(^{102}\) What was significant about Common Article 3, I suggest, was that it reframed revolution and civil war as a humanitarian problem rather than a commercial one, even if this did not immediately have a significant impact on international law.

Initially, the biggest impact of Common Article 3 was in giving existing ICRC practice a legal basis, rather than in creating new normative obligations for states (or rebels).\(^{103}\) This had indeed been the original motivation of the ICRC in proposing in 1946 that parties to internal conflict be invited to expressly declare their willingness to apply the principles of the *Geneva Conventions*, beginning the process that led to the adoption of Common Article 3.\(^{104}\) After the Second World War, the ICRC’s future was uncertain, not least because it had been heavily criticised for its response to the Holocaust.\(^{105}\) The role it took in the drafting and negotiation of the *Geneva Conventions* and its work in civil wars were part of its response to this challenge, as it sought to restore its reputation and legitimacy as an institution.\(^{106}\) Thus, in the first years of Common Article 3’s life, the ICRC was busy.\(^{107}\) According to Dietrich Schindler, the ICRC had coined the term ‘humanitarian law’ in the early 1950s, following the adoption of the *Geneva Conventions*.\(^{108}\) The ICRC’s new humanitarian law did not, however, replace the traditional approach to revolution and civil war centred on the doctrine of belligerency and the rules of neutrality.\(^{109}\) As Amanda Alexander has shown, instead, humanitarian law became a ‘peripheral’ strand of the laws of war.\(^{110}\)

\(^{102}\)*Sivakumaran, The Law of Non-International Armed Conflict* (n 14) chs 1–2.


\(^{106}\)*Ibid 54–62.


\(^{109}\) This is exemplified, for example, by Erik Castrén, *Civil War* (Suomalainen Tiedeakatemia, 1966).

The ICRC’s initial push during the 1950s for greater regulation of internal conflict in the interests of humanitarianism failed.111

In the decade that followed the adoption of Common Article 3, there was relatively little international law scholarship about it, or about civil war and revolution more generally.112 Initially, the main concern about civil war was intervention in the context of the Cold War and decolonisation.113 Morris Greenspan wrote in 1959 that international law was increasingly interested in the problem of civil and colonial war because ‘experience has demonstrated, especially in recent years, that such wars may gravely threaten international peace and security, and may contain the seeds of international conflict of calamitous dimensions’.114 Greenspan was forgetting that, in the past, international law had been interested in civil war for other, not so different, reasons. Civil war was no longer being framed as a commercial problem — although the emerging body of international investment law would continue to deal with this aspect of civil war.115 There was nevertheless a certain continuity of concern with the doctrine of belligerency approach in two ways. First, in the sense that focus remained on the rights and duties of third states: the question was how to regulate foreign intervention in the new nuclear Cold War age. Second, in terms of the continued centrality of the status of rebels and the conflicts in which they fought: it was a matter of whether national liberation movements were belligerents and anticolonial struggles were international wars.

With the US and the Soviet Union generally avoiding direct confrontation during the Cold War, in the decades following the Second World War, civil wars were ‘converted … into the major testing ground of rival ideologies, capabilities, and commitments … [and] assumed a symbolic role in the geopolitics of the nuclear age’.116 The issue of when and to what extent foreign states could intervene in civil wars and revolutions was a central question of international order

111 Alexander, ‘A Short History’ (n 110) 117; Sivakumaran, The Law of Non-International Armed Conflict (n 14) 42.
for international lawyers,\textsuperscript{117} who sought to develop the rules of international law to meet the challenges of modern ‘revolutionary and interventionary violence’.\textsuperscript{118} This reached a peak during the height of US involvement in Vietnam during the late 1960s and early 1970s.\textsuperscript{119} Alongside intervention, anticolonial wars raised other international legal questions. The Algerian War (1954–62), for example, was fought primarily around questions of status.\textsuperscript{120} For the National Liberation Front (‘FLN’) in Algeria, the goal was to establish themselves as a legitimate belligerent and the conflict as a true state of belligerency.\textsuperscript{121} This not only meant that their fighters would get the full protections of the laws of war, particularly prisoner of war status (Common Article 3, of course, only protected persons taking no active part in the hostilities).\textsuperscript{122} It was also a means of legitimising the Algerian cause and discrediting the French,\textsuperscript{123} who had denied that there was a conflict in Algeria, be it international or non-international, and argued that they were simply carrying out an ‘operation of pacification’ and could exercise emergency ‘police’ powers unrestrained by international standards.\textsuperscript{124} There was, of course, humanitarian concern about the conduct of the hostilities and the inhumane treatment of prisoners and civilians during proxy and anticolonial wars such as those in Vietnam and Algeria.\textsuperscript{125} However, this was just one aspect of the problem that civil war and revolution posed for international law.


\textsuperscript{120}See, eg, Algerian Office, White Paper on the Application of the Geneva Conventions of 1949 to the French–Algerian Conflict (1960) 2 (‘White Paper’). The question of intervention was not entirely unrelated to the question of the status of conflicts, since it raised the issue of whether civil wars in which foreign states had intervened were ‘civil’ or ‘international’ (or something else): Falk, ‘International Law and the United States Role in the Viet Nam War’ (n 117) 30.


\textsuperscript{122}Alexander, ‘International Humanitarian Law’ (n 121) 43.


\textsuperscript{124}White Paper (n 120) 12–13.

alongside, or quite often behind, issues of intervention and recognition.\textsuperscript{126} In 1971, Falk wrote of the traditional approach’s ‘partial decay’.\textsuperscript{127} By the 1970s, it was being widely criticised for its inability to regulate civil wars as proxy wars in a global ideological and geopolitical struggle.\textsuperscript{128} The solution offered by the 19th century doctrine of belligerency was rejected. Nevertheless, the framing of the problem — as one mainly concerning the rights and duties of third states and the status of rebels and internal conflicts — was still relevant.

However, in the late 1960s, the ICRC’s efforts to promote further humanitarian regulation of armed conflict — including revolution and civil war — began to have more purchase. It was the rise of the human rights movement that gave the ICRC its opening.\textsuperscript{129} The turning point was the 1968 International Conference on Human Rights in Tehran,\textsuperscript{130} which adopted a resolution requesting the consideration of additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare …\textsuperscript{131}

In 1971, the ICRC convened its Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable


\textsuperscript{127} Falk, ‘Introduction’ (n 17) 11–16.

\textsuperscript{128} See, eg, ibid 16–17; Farer, ‘Harnessing Rogue Elephants’ (n 119); Khairallah (n 56) 85–96.

\textsuperscript{129} Alexander, ‘A Short History’ (n 110) 118, 121. See also Whyte (n 123) 316. For Richard Baxter,

\[\text{[i]nterest on the part of the human rights constituency within the United Nations, pressure exerted by the United Nations in the form of a threat to move into what had heretofore been the preserve of the International Committee of the Red Cross, and the accumulated concerns of the ICRC itself all played a part.}\]


\textsuperscript{131} International Conference on Human Rights, Human Rights in Armed Conflicts, Res XXIII, 25th plen mtg, UN Doc A/CONF.32/41 (12 May 1968) para 1(b) (emphasis added). This was followed by a series of UN General Assembly resolutions and two UN Secretary-General reports on human rights in armed conflict. For details and full references, see Alexander, ‘A Short History’ (n 110) 119–21.
in Armed Conflicts (‘Conference of Government Experts’).\(^\text{132}\) For Alexander, this marked the emergence of international humanitarian law as a field of international law, which would replace the laws of war\(^\text{133}\) and the traditional approach to civil war and revolution. This new international humanitarian law was to go far beyond Common Article 3 when it came to revolution and civil war, covering protections for combatants and the regulation of the conduct of hostilities.

However, at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts held in Geneva between 1974 and 1977 (‘1974–77 Diplomatic Conference’), states had their own agendas, independent of that of the ICRC.\(^\text{134}\) Following Algeria, the struggle for the states of the decolonised world was to give certain conflicts, particularly wars of national liberation, international status: that is, to have them recognised as situations of belligerency on a par with interstate wars.\(^\text{135}\) This was successful with the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (‘Additional Protocol I’), even if many states initially refused to sign or ratify it.\(^\text{136}\) However, the states of the decolonised world objected to greater humanitarian protections in other sorts of internal conflict, fearing that they would undermine postcolonial statehood by encouraging intervention from without and rebellion within (as per Biafra, Katanga or Vietnam).\(^\text{137}\) For Jessica Whyte, the 1974–77 Diplomatic Conference pitted Third World mobilisation of the language of just war in the interests of self-determination and anti-imperialism against the supposedly apolitical humanitarianism espoused by Western delegates.\(^\text{138}\) As a result of objections from decolonised states, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (‘Additional Protocol II’) eventually ended up very limited, stripped of a lot of content in order to reach a consensus.\(^\text{139}\) Nevertheless, Additional Protocol II introduced ‘innovative’ protection for civilians during internal conflict.\(^\text{140}\) Despite their limitations, the adoption of Additional Protocols I and II marked the predomination of the new humanitarian conception of revolution and civil war.

The internationalisation of civil wars and revolutions ‘in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’ in Additional


\(^{133}\) Alexander, ‘A Short History’ (n 110) 122–4.

\(^{134}\) Ibid 124.


\(^{136}\) Additional Protocol I (n 18) art 1(4); Alexander, ‘International Humanitarian Law’ (n 121) 49.

\(^{137}\) Forsythe, ‘Legal Management of Internal War’ (n 103) 278–82.

\(^{138}\) Whyte (n 123) 315.

\(^{139}\) Junod (n 130) 1335–6 [4412]–[4418].

\(^{140}\) Alexander, ‘A Short History’ (n 110) 125.
Protocol I\textsuperscript{141} only reinforced the distinction between international conflict and conflict not of an international character that had been established by Common Article 3. Those conflicts that had been left out of Additional Protocol I had never been less international, especially those that did not even meet Additional Protocol II’s high threshold for application.\textsuperscript{142} They were much more peripheral to the new field of international humanitarian law than they ever had been under the pre-Second World War regulation of revolution and civil war through alien protection and the doctrine of belligerency. After Additional Protocol II, the task for the emerging body of international humanitarian lawyers was to bring them back in. The way to do it, as I shall discuss in the next section, was through the practice of international organisations and NGOs, particularly in the area of human rights.

By the turn of the 1980s, the doctrine of belligerency was entirely discredited; the traditional laws of war had been replaced by the new international humanitarian law.\textsuperscript{143} Alien protection had split into international human rights law and international investment law. To the extent that alien protection was about protecting foreign commercial interests, it was separated off into the latter as a new specialist regime. To the extent that alien protection addressed issues such as deprivation of liberty and inhumane treatment, it has been absorbed into and exceeded by international human rights law, which also covers nationals.\textsuperscript{144} Now that the US had pulled out of Vietnam and most colonies had achieved independence, it was less clear which causes, if any, would emerge that had the same widespread moral purchase. As the limits of postcolonial sovereignty were becoming evident and faith in revolutionary nationalism was on the wane, humanitarianism and human rights — with their apparently apolitical and neutral focus on victims — began to take over as frameworks for understanding revolution and civil war.\textsuperscript{145}

IV COMMON ARTICLE 3 AND THE OBLIGATIONS OF REBELS AND INSURGENTS

At the Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims, held in Geneva between 21 April and 12 August 1949 (‘1949 Diplomatic Conference’), doubt was expressed about how a non-state party that did not yet exist could be bound by a treaty to which it was not a signatory. The ICRC’s initial drafts of what became Common Article 3 were based on reciprocity.\textsuperscript{146} For some, reciprocity was the only mechanism by which to circumvent the fact that rebels, as non-signatories lacking international

\begin{footnotes}
\item[141] Additional Protocol I (n 18) art 1(4).
\item[142] Additional Protocol II (n 18) art 1(1).
\item[143] Alexander, ‘A Short History’ (n 110) 123–4.
\item[144] Greenman, ‘The History and Legacy of State Responsibility for Rebels’ (n 38) 228.
\end{footnotes}
legal personality, could not be bound by the *Geneva Conventions*.

In the end, the draft conventions approved at the 17th International Red Cross Conference convened in Stockholm in 1948 (‘*Stockholm Drafts*’) — which became the basis for discussion at the 1949 Diplomatic Conference — included a reciprocity clause in the draft third and fourth Conventions but not in the first and second. The Greek delegate explained that this was because it was not considered appropriate in matters of a purely humanitarian nature, such as the treatment of the wounded and sick, for one party’s obligations to depend on the observance of the same by the other party, whereas prisoners of war were a different matter.

The ICRC had already abandoned reciprocity by this point. It argued that the ‘minimum satisfaction of humanitarian demands, apart from any question of reciprocity’, remained the same in civil war as in international conflict and that a reciprocity clause may ‘completely stultify’ Common Article 3’s application since ‘[o]ne of the parties to the conflict could always assert, as would be all too easy in a war of this nature, that the adversary was not observing such and such a provision of the Convention’.

The relevant provisions of the *Stockholm Drafts* provided, primarily, that ‘each of the Parties to the conflict’ or ‘each of the adversaries’ were bound to apply the provisions of the *Geneva Conventions* in situations of armed conflict not of an international character in the territory of the one of the contracting parties.

During the debates at the 1949 Diplomatic Conference, some states objected to the ‘each Party to the conflict’ wording, on the basis that the non-state party could not be bound by a convention to which it was not a signatory. In contrast, the French delegation argued that Common Article 3 would bind rebels on the basis of the obligation on each state party to ensure respect for the Conventions in all circumstances under Common Article 1. The delegate from Monaco explained:

> [T]he rebels might be regarded as already bound by the Convention … because the Contracting Parties undertake not only to respect them, but to ensure respect for them, an article providing for their dissemination among the population through

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147 See, for example, the comments of the US, Swiss and Swedish delegations in International Committee of the Red Cross, *XVIIe Conférence Internationale de la Croix-Rouge (Stockholm, Août 1948): Commission juridique* [17th International Conference of the Red Cross (Stockholm, August 1948): Legal Committee] (Meeting Minutes, 1949) 55, 56 (‘Minutes of the 1948 Red Cross Conference’).

148 International Committee of the Red Cross, *Revised and New Draft Conventions for the Protection of War Victims: Texts Approved and Amended by the XVIIth International Red Cross Conference* (1948) (‘*Stockholm Drafts*’).


150 He did not mention civilians: *Minutes of the 1948 Red Cross Conference* (n 147) 38–9.


152 *Stockholm Drafts* (n 148) 9–10, 32, 51–2, 114.

153 At the 1949 Diplomatic Conference, after the *Stockholm Drafts*’ wording was rejected early on, the First Working Party, set up to redraft the provisions, dropped the ‘each of the adversaries’ wording. See *Final Record of the Diplomatic Conference of Geneva of 1949* (Federal Political Department, 1949) vol 2 section B, 77 (‘*Final Record of the 1949 Diplomatic Conference*’).


155 Ibid vol 2 section B, 84.
instruction. Therefore, the rebels are a part of the population in revolt of the Contracting State.\footnote{Ibid vol 2 section B, 79.}

The Greek delegate added two further reasons. First, that the \textit{Geneva Conventions} were ‘law making Conventions … which should be applicable not only on behalf of or against the Contracting Parties, but also in circumstances which were analogous to those governed by the said Conventions’.\footnote{Ibid vol 2 section B, 94.} Second, that rebels would be bound by the obligations of the state of which they were nationals and, presuming that their home state was a signatory, they would thus be bound by the Conventions.\footnote{Ibid.} In the end, the final text refers to ‘each Party to the conflict’ being bound,\footnote{Geneva Convention I (n 1) art 3.} although now not by the entire Conventions but by some core humanitarian principles. According to Frédéric Siordet of the ICRC, there was ‘a clear majority who considered that both parties should be bound in case of domestic conflict’.\footnote{Siordet, ‘The Geneva Conventions and Civil War (Concluded)’ (n 5) 212.}

Nevertheless, some delegations remained unconvinced. The Swiss delegate described Common Article 3 as a ‘code of the obligations assumed by the Contracting States in the event of non-international conflicts’.\footnote{Final Record of the 1949 Diplomatic Conference (n 153) vol 2 section B, 336 (emphasis added).} The delegate from Burma objected forcefully:

[R]eciprocity … [is an] insoluble difficulty … The adverse party should, in all reason and sense of justice, be made to comply with the unqualified provisions laid down for the observance of the High Contracting Party … [T]he text … proposed an impossible condition: to bind down a non-contracting party … [T]he Article says that ‘each Party to the conflict shall be bound to apply’ etc. May I ask how it is proposed to bind the rebels? … In Article 2, the application of the Conventions in conflicts of an international character, the High Contracting Party has to apply the provisions only when a non-signatory party accepts and complies with its provisions. In this Article in a conflict not of an international character — in the dealings with insurgents — the High Contracting Party is bound to apply the provisions whether the insurgents accept and observe them or not.\footnote{Ibid vol 2 section B, 328–9. According to Giovanni Mantilla, this was because of an insurrection at home: Giovanni Mantilla, ‘Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict’ (2018) 72(2) International Organization 317, 338–9.}

Its drafting history would suggest that Common Article 3, rather than representing the foundations of a consensus regarding the imposition of obligations on rebels, confirms Philip Allott’s famous assertion that ‘[a] treaty is a disagreement reduced to writing’.\footnote{Philip Allott, ‘The Concept of International Law’ (1999) 10(1) European Journal of International Law 31, 43. On Common Article 3 as a compromise text, see Mantilla (n 162).} As Siordet noted in 1950, ‘[d]oubt has been repeatedly expressed … that Article 3 could be binding on a rebel party that is not yet in existence’.\footnote{Siordet, ‘The Geneva Conventions and Civil War (Concluded)’ (n 5) 216.}
Despite dissent, that Common Article 3 nevertheless bound rebels did not cause too much controversy in the decades that followed, even if the problem of how was never satisfactorily resolved. For some, the proposition that Common Article 3 imposed obligations on rebels with its reference to the ‘parties to the conflict’ was ‘too obvious to require any other explanation’. A number of theories circulated as to how Common Article 3 bound rebels, on top of those discussed at the 1949 Diplomatic Conference. The ICRC commentaries to the Geneva Conventions posited that ‘if the responsible authority at their head exercises effective sovereignty, [the insurgent party] is bound by the very fact that it claims to represent the country, or part of the country’. Others argued that rebels were bound as a result of the principle of effectiveness; that ‘[w]hen individuals group themselves in a particular way so that they become a party to an internal conflict, then they are given collectively a sufficient legal personality to enable them to be subject to obligations’; or that Common Article 3 restated existing international law. None of these theories managed to resolve the issue definitively, however, and indeed, they continue to be argued about.

So why were the obligations of rebels under Common Article 3 nevertheless relatively uncontroversial? I argue that this was because imposing obligations on rebels was not an important goal of Common Article 3 at that time. Rather, Common Article 3 was aimed at protecting civilians under occupation; its promoters had the acts of the Nazis in mind. Thus, it was state conduct that was the concern. In any event, it was envisioned that rebel groups would not deny their obligations under Common Article 3 on the basis of legal technicalities.

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166 Siotis (n 112) 217 [tr author]. Erik Castrén noted that ‘some writers are content to state only that humanitarian principles should be observed although the parties may be completely without legal status’: Castrén (n 109) 86–7.

167 Pictet, The Geneva Conventions (n 104) vol 1, 51.

168 Pinto (n 126) 528.

169 GIAD Draper, The Red Cross Conventions (Stevens & Sons, 1958) 17.

170 Greenspan (n 114) 623.


172 Cf Final Record of the 1949 Diplomatic Conference (n 153) vol 2 section B, 94 (Greece).

173 See, eg, Pictet, The Geneva Conventions (n 104) vol 1, 54. See also Geneva Conventions Analysis (n 2) vol 2, 6, in which the ICRC refers to ‘blood … shed in another war’.

Even if Common Article 3 was not strictly legally binding on rebels, this was not perceived as an important problem. As the ICRC’s commentaries to the Conventions put it: ‘If an insurgent party applies Article 3, so much the better for the victims of the conflict. No one will complain. If it does not apply it, it will prove that those who regard its actions as mere acts of anarchy or brigandage are right.’

The events of the Algerian War appeared to bear out this approach. In Algeria, it was the FLN that wanted Common Article 3 to apply to the Algerian conflict and sought a special agreement with France regarding the broader application of the Geneva Conventions. The Provisional Government of the Algerian Republic even acceded to the Conventions in 1960. As I noted above, this was not only about seeking protection for their combatants but also about legitimising their cause in the eyes of the world, just as it was predicted rebels would behave. Meanwhile, the French government initially tried to deny that it was bound by Common Article 3 in Algeria (although France eventually implicitly accepted its application). At the same time, the main concern was the French use of torture, rather than the conduct of the rebels.

However, in 1965, the Viet Cong denied that the Geneva Conventions applied to it, declaring itself ‘not bound by the international treaties to which others beside itself subscribed’. This scenario, which had not been anticipated, had now become a reality. Gradually, the question of Common Article 3’s imposition of obligations on rebels became more controversial. As Katharine Fortin has argued, ‘the idea that armed groups can be bound by treaty law was more controversial in the 1970s, than at the end of the 1940s when the Geneva Conventions were drafted’. Doubts were repeatedly expressed about the possibility of binding

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175 Pictet, The Geneva Conventions (n 104) vol 1, 52. In its report following the Preliminary Conference in 1946, the ICRC also made a similar statement: Report on the Work of the Preliminary Conference (n 146) 15. See also Geneva Conventions Analysis (n 2) vol 2, 7.

176 White Paper (n 120) 15–18; Bedjaoui (n 112) 211–17.

177 Bedjaoui (n 112) 189.

178 See above n 123 and accompanying text.


181 International Committee of the Red Cross, ‘External Activities’ (1965) 5(57) International Review of the Red Cross 634, 636. Although it did say that it would treat prisoners humanely and collect and care for the wounded.

182 See above n 175 and accompanying text.

rebels by treaty at the Conference of Government Experts and at the 1974–77 Diplomatic Conference.184

The original draft version of Additional Protocol II proposed by the ICRC imposed obligations on the ‘parties to the conflict’ as per Common Article 3 and contained an article providing that ‘[t]he rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them’.185 The ICRC explained:

The experts several times voiced their concern that the insurgent party might only be lightly bound by the Protocol, and the view was expressed that it would be desirable to make an attempt to strengthen its obligations. In this regard, the present draft follows a technique similar to the one adopted in common Article 3: an engagement entered into by the State is not only binding upon the government but also upon the constituted authorities and the private individuals who are on the national territory, upon whom certain obligations are thus imposed …186

In the end, however, this provision was deleted, as were all references to the parties to the conflict; the obligations in Additional Protocol II are expressed in the passive voice, silent as to who bears them. This takes us back to the concern of the decolonised states regarding Additional Protocol II.187 Those states objected to the explicit imposition of international legal obligations on rebels on the basis that it would put the rebels on an equal footing with governments and legitimise and encourage rebellion.188 The ‘remarkable’ agreement189 that was reached in 1949 could not be repeated in 1977.

However, at the beginning of the 1980s, human rights groups began monitoring rebel compliance with international humanitarian law, particularly in the context of Central America. Americas Watch, for example — now part of Human Rights Watch — was, according to its official history, ‘founded in 1981 while bloody civil wars engulfed Central America. Relying on extensive on-the-ground fact-finding, Americas Watch … applied international humanitarian law to

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185 Official Records (n 184) vol 1, pt 3, 34 (art 5).


187 See above nn 137–9 and accompanying text.

188 See, eg, the comments of the delegates from India, Iraq, Sudan, Syria and Zaire in Official Records (n 184) vol 7, 104 (Zaire), 201 (Sudan), 203 (India), 219–20 (Zaire); vol 8, 335 (India), 352 (Iraq), 421 (Syria), 426 (Iraq); vol 9, 235 (Iraq), 241 (Iraq). India also expressed concern about imposing obligations on rebels who did not have the capacity to fulfil them: at vol 8, 309.

189 See above n 11 and accompanying text.
investigate and expose war crimes by rebel groups.’ Throughout the 1980s, Americas Watch published numerous reports detailing rebels’ responsibility for civilian casualties and assessing their conduct of hostilities in conflicts in, among others, Colombia, El Salvador, Guatemala, Nicaragua and Peru. In 1990, the Commission on Human Rights requested its monitoring mechanisms ‘to pay particular attention to the activities of irregular armed groups’ in their reports, while around the same time, the Inter-American Commission on Human Rights (‘IACHR’) also started to consider the conduct of rebels in its annual and country-specific reports. The United Nations Security Council too began to engage with rebels, calling on them to comply with international humanitarian and human rights law and even applying sanctions for noncompliance. From these beginnings in the 1980s and early 1990s, a vast body of practice has emerged.
A field of scholarship on rebels and their obligations, compliance and accountability followed, and continues to expand. As Andrew Clapham argued in 2014:

[T]he need to address the international obligations of these groups [armed non-state actors] has become self-evident, especially for those involved in humanitarian protection work. The legal landscape is being reshaped by the recent practices of some parts of the United Nations and certain non-governmental organizations.

So, while Common Article 3 can be seen as the origin of the imposition of humanitarian obligations on rebels, it was not until much later that this was taken up, driven by the practice of international organisations and NGOs, particularly in the area of human rights. It was this practice that brought rebels — and indeed revolution and civil war — back into international law to the extent that they had been marginalised after the Additional Protocols. Now, however, they were framed in a different form than they had been until the early 1970s. They were a humanitarian problem for individuals, rather than a commercial problem or a problem of intervention or recognition for third states. At the same time, and somewhat under the radar, international investment law has continued to protect commercial interests against revolution and civil war, one of the effects of fragmentation.

V CONCLUSION

Common Article 3 was not revolutionary or heretical merely because it applied international law to civil war and revolution or imposed international obligations on rebels. The law of alien protection and the doctrine of belligerency already did this. It was certainly the first multilateral treaty to do so, but such a change in form is not, I argued, revolutionary or heretical in itself. What was groundbreaking about Common Article 3 was that it applied international law to civil war and revolution and imposed international obligations on rebels within a new framing of internal conflict as a humanitarian — rather than as a primarily commercial —

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199 Andrew Clapham, ‘Focusing on Armed Non-State Actors’ in Andrew Clapham and Paola Gaeta (eds), The Oxford Handbook of International Law in Armed Conflict (Oxford University Press, 2014) 766, 766.

problem. It took many decades, however, and the rise of international human rights law for this framing to come to predominate and for international lawyers to take a serious interest in the obligations of rebels. Thus, international law has long been concerned about revolution and civil war, but it is the nature of this concern that has changed. At the same time, it was Common Article 3 that established — rather than overcame — the distinction between international and non-international conflict, a distinction that was consolidated by the Additional Protocols in which the internationalisation of certain civil wars and revolutions only deepened the marginalisation of others. Those conflicts that had been left out of Additional Protocol I had never been less international, a marginalisation that was only later overcome by the subsequent practice of first NGOs and then international organisations, particularly in the area of human rights.