

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

¹ See, eg, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 3 ('Geneva Convention I'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) art 3; *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 3; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 3.

² International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949: Analysis for the Use of National Red Cross Societies* (1950) vol 2, 5 ('Geneva Conventions Analysis').

³ Frédéric Siordet, 'The Geneva Conventions and Civil War' (1950) 3(8) *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge: Supplement* 132, 133.

⁴ Frédéric Siordet, 'The Geneva Conventions and Civil War (Continued)' (1950) 3(9) *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge: Supplement* 166, 168.

⁵ Frédéric Siordet, 'The Geneva Conventions and Civil War (Concluded)' (1950) 3(11) *Revue Internationale de la Croix-Rouge et Bulletin International des Sociétés de la Croix-Rouge: Supplement* 201, 212.

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.¹⁰ 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’.¹¹

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.¹² In fact, prior to 1949, there was a significant body of international law relevant to civil war and revolution.¹³ There was, most directly, the doctrine of belligerency, which, among other things, imposed obligations on and gave rights to rebel groups via recognition.¹⁴ The law of alien protection also applied certain standards to civil war and revolution.¹⁵ 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.¹⁶ 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’.¹⁷ 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’),¹⁸ in which the internationalisation of certain conflicts only deepened the marginalisation of others. It was through the subsequent practice of first 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 than predominantly a problem for relations, and particularly commercial relations,

¹⁰ Ibid vol 2, 6.

¹¹ Ibid vol 2, 7.

¹² See, eg, Michael Bothe, ‘Article 3 and Protocol II: Case Studies of Nigeria and El Salvador’ (1982) 31(4) *American University Law Review* 899, 899.

¹³ For a comprehensive and insightful recent study, see Ville Kari, ‘On the Classical Doctrine of Civil War in International Law’ (PhD Thesis, University of Helsinki, 2020).

¹⁴ See, eg, Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012) 9–20.

¹⁵ See, eg, Kathryn Greenman, ‘Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels’ (2018) 31(3) *Leiden Journal of International Law* 617 (‘Aliens in Latin America’).

¹⁶ Ibid 622–3.

¹⁷ Richard A Falk, ‘Introduction’ in Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) 1, 1.

¹⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’).

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,¹⁹ 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,²¹ 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 — what states and rebels could and could not do during civil wars and revolutions,

¹⁹ See Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Martinus Nijhoff Publishers, 2006) 29 (emphasis added).

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).

²³ See Owen Taylor, *International Law and Revolution* (Routledge, 2019); Deborah Whitehall, ‘The International Prospects of the Soixante-Huitard’ (2018) 29(4) *European Journal of International Law* 1377; David Armitage, *Civil Wars: A History in Ideas* (Alfred A Knopf, 2017); Anne Orford, ‘Civil War, Intervention and the Transformation of International Law’ (International Order & Justice Public Lecture Series, Rolin-Jaequemyns International Law Institute, Ghent University, 12 December 2017); Vidya Kumar, ‘International Law, Kelsen and the Aberrant Revolution: Excavating the Politics and Practices of Revolutionary Legality in Rhodesia and Beyond’ in Nikolas M Rajkovic, Tanja E Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge University Press, 2016) 157.

²⁴ For early scholarship here, see Carlos Wiesse, *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).

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.²⁵ 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’.²⁶ 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.²⁷

Dunn noted the ‘special importance’ of the decolonisation of Latin America to the development of alien protection;²⁸ Latin American independence meant the ‘opening up of the new world to international trade’²⁹ (since previously Spain enforced a strict monopoly on trade with the region):³⁰ ‘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.’³¹ Yet there was a problem: ‘in large sections of the new world’, observed Dunn, ‘political disorder and revolutions prevailed for many years’.³² Alien protection thus mediated the extension of capitalist economic order, as embodied in international law, in the face of political instability.³³

²⁵ See Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad, or, The Law of International Claims* (Banks Law Publishing, 1915); Frederick Sherwood Dunn, *The Protection of Nationals: A Study in the Application of International Law* (Johns Hopkins Press, 1932) (‘The Protection of Nationals’).

²⁶ Borchard (n 25) v; Dunn, *The Protection of Nationals* (n 25) 53. Cf Julius Goebel Jr, ‘The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars’ (1914) 8(4) *American Journal of International Law* 802, 819, arguing that it was ‘an outgrowth of the whole movement for individual rights which culminated in the French Revolution’.

²⁷ Dunn, *The Protection of Nationals* (n 25) 1.

²⁸ Ibid 53.

²⁹ Ibid.

³⁰ See Graciela Márquez, ‘Commercial Monopolies and External Trade’ in Victor Bulmer-Thomas, John H Coatsworth and Roberto Cortés Conde (eds), *The Cambridge Economic History of Latin America* (Cambridge University Press, 2005–06) vol 1, 395.

³¹ Dunn, *The Protection of Nationals* (n 25) 53.

³² Ibid 54.

³³ Ibid. For contemporary accounts here, see Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (Cambridge University Press, 2019); Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (Cambridge University Press, 2020).

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 and navigation,³⁹ these arbitral tribunals developed principles of customary

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.

³⁵ See Kathryn Greenman, 'Aliens in Latin America' (n 15); Frédéric Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens' in Ignacio de la Rasilla and Jorge E Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (Cambridge University Press, 2019) 127; Tzvika Alan Nissel, 'A History of State Responsibility: The Struggle for International Standards (1870–1960)' (PhD Thesis, University of Helsinki, 2016) 78–9.

³⁶ Nissel (n 35) 78–9; M Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference' in Yves Daudet (ed), *Topicality of the 1907 Hague Conference, the Second Peace Conference* (Martinus Nijhoff, 2008) 127, 149.

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.

³⁸ On the Venezuelan commissions, see Kathryn Greenman, 'The History and Legacy of State Responsibility for Rebels 1839–1930: Protecting Trade and Investment against Revolution in the Decolonised World' (PhD Thesis, University of Amsterdam, 2019) ch 2 ('The History and Legacy of State Responsibility for Rebels'). On the Mexican commissions, see AH Feller, *The Mexican Claims Commissions, 1923–1934: A Study in the Law and Procedure of International Tribunals* (Macmillan, 1935) 7, 15; Frederick Sherwood Dunn, *The Diplomatic Protection of Americans in Mexico* (Columbia University Press, 1933).

³⁹ See, eg, Borchard (n 25) 222; Richard B Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press, 1984) 18–21.

international law. From the late 19th century onwards, scholars and institutions sought to codify or develop the rules in this area.⁴⁰

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’.⁴¹ 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,⁴² other than ‘those [injuries] inflicted during actual hostilities’ and justified by military necessity.⁴³ 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.⁴⁴ 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.⁴⁵

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

⁴⁰ See, eg, E Brusa, ‘Responsabilité des états à raison des dommages soufferts par des étrangers en cas d’émérite 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’émérite 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’émérite, 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’émérites, ou de guerres civiles’ [International Responsibility of the 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.

⁴⁵ Ibid 235–6.

protection. It did capture cases of murder, torture and deprivation of liberty.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’,⁴⁷ a jurisdiction that came to be understood as including claims based in contract.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’.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.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.⁵¹ Furthermore, companies and corporations were as important a category of claimants as individuals.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 over its own nationals.⁵³ The state’s right to suppress rebellion as it saw fit gave

⁴⁶ 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).

⁴⁷ 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.

⁴⁸ 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.

⁴⁹ Borchard (n 25) 281.

⁵⁰ 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.

⁵¹ *Protocol between Great Britain and Venezuela for the Settlement of British Claims*, 192 ConTS 414 (signed and entered into force 13 February 1903) art III (‘Britain–Venezuela Protocol’); *Protocol between Germany and Washington for the Arbitration of German Claims*, 192 ConTS 411 (signed and entered into force 13 February 1903) art III; *Protocol between Italy and Venezuela for the Settlement of Italian Claims*, 192 ConTS 418 (signed and entered into force 13 February 2018) art IV. These protocols are reproduced in Jackson H Ralston, *Venezuelan Arbitrations of 1903* (Government Printing Office, 1904) 292, 512, 644.

⁵² 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.

⁵³ See, eg, Norman J Padelford, ‘International Law and the Spanish Civil War’ (1937) 31(2) *American Journal of International Law* 226, 228.

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.⁵⁴

Thus, although the laws of war generally only applied to interstate wars,⁵⁵ 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.⁵⁶

There was a humanitarian aspect to a recognition of belligerency, at least by the parent state,⁵⁷ 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;

⁵⁴ Henry Wheaton, *Elements of International Law*, ed AC Boyd (Stevens & Sons, English ed, 1878) 354 ('Elements, 1st English ed').

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.

⁵⁷ Robert R Wilson, 'Recognition of Insurgency and Belligerency' (1937) 31 *American Society of International Law Proceedings* 136, 138–9.

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

⁵⁸ William Edward Hall, *A Treatise on International Law* (Clarendon Press, 4th ed, 1895) 33–4. See also Wheaton, *Elements*, 1st English ed (n 54) 36; Marqués de Olivart, *Del reconocimiento de beligerancia y sus efectos inmediatos* [On Recognition of Belligerency and its Immediate Effects] (Péant é Hijos, 1895) 85–6; Vernon A O'Rourke, ‘Recognition of Belligerency and the Spanish War’ (1937) 31(3) *American Journal of International Law* 398, 406–7.

⁵⁹ Hall (n 58) 34–5.

⁶⁰ See, eg, Institut de Droit International, ‘Le lois de la guerre sur terre’ (1881–82) 5 *Annuaire de L’Institut de Droit International* 157, 160–1 (arts 7–9), 164–5 (arts 32–4) [James Brown Scott (ed), *Resolutions of the Institute of International Law Dealing with the Law of Nations: With an Historical Introduction and Explanatory Notes* (Oxford University Press, 1916) 29–30 (arts 7–9), 33 (arts 32–4)].

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.

⁶³ See Sivakumaran, *The Law of Non-International Armed Conflict* (n 14) 15.

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.

⁶⁸ For a common approach, see Thomas Alfred Walker, *The Science of International Law* (Cambridge University Press, 1893) 116.

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,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.⁷¹ For the Marquis of Olivart, who authored the first monograph on recognition of belligerency in 1895,⁷² 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’.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.⁷⁴ This was because of the inevitable impact that maritime war had on commerce.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.⁷⁶ The second situation was where Britain needed to establish relations with an insurgent government in order to protect its nationals.⁷⁷ As Richard Dana’s well-known note to Wheaton put it, ‘[t]he tests to determine the question [of belligerency] are ... far more decisive where there is maritime war and commercial relations with foreigners’.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’.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’.⁸⁰ The development of rights and duties for neutrals during war was

⁷⁰ See eg Henry Wheaton, *Elements of International Law*, ed Richard Henry Dana (Little, Brown and Company, 8th ed, 1866) 35 n 15 (‘Elements’, 8th ed’).

⁷¹ See, eg, Walker (n 68) 116; Joseph H Beale Jr, ‘The Recognition of Cuban Belligerency’ (1896) 9(6) *Harvard Law Review* 406, 407; Hall (n 58) 35. For Hall, necessity was the only condition.

⁷² Olivart (n 58). For other early works specifically on recognition of belligerency, see L Stéfanesco, *La guerre civile et les rapports des belligérants* [Civil War and the Belligerent Relations] (Arthur Rousseau, 1903); Paul Sadoul, *De la guerre civile en droit des gens: Reconnaissance de belligérance* [On Civil War in International Law: Recognition of Belligerence] (Scheffer, 1905).

⁷³ Olivart (n 58) 93 [tr author].

⁷⁴ See Wheaton, *Elements*, 1st English ed (n 54) 36; Hall (n 58) 36–7; Olivart (n 58) 95; Beale (n 71) 417.

⁷⁵ See Wheaton, *Elements*, 1st English ed (n 54) 36; Hall (n 58) 36–7.

⁷⁶ Herbert Arthur Smith (ed), *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.

⁷⁷ Ibid. See also Olivart (n 58) 95.

⁷⁸ Wheaton, *Elements*, 8th ed (n 70) 35 n 15.

⁷⁹ Hall (n 58) 35.

⁸⁰ Wheaton, *Elements*, 1st 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.⁸¹

At the core of the rules whose application was triggered by a recognition of belligerency was prize law.⁸² While prize law gave belligerents the right to visit and search enemy and neutral vessels and to capture enemy vessels or cargo,⁸³ neutral vessels and goods were generally exempt from capture,⁸⁴ the right of visit and search was strictly regulated,⁸⁵ and there was a right to compensation for unnecessary interference or wrongful capture.⁸⁶ Neutrals were allowed to trade with belligerents to the extent that such trade did not directly assist the war effort,⁸⁷ while belligerents had the right to prevent neutrals from supplying war materials to the enemy or trading at all within blockaded areas.⁸⁸

The classic example of the operation of this doctrine is the US Civil War.⁸⁹ 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.⁹⁰ 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.⁹¹ While the British declaration was made by the Queen,⁹² a Prussian proclamation, taking the side of the Union, was made by the Minister of Commerce.⁹³ When it came to parent state recognition, this was inferred. The US government treated the rebels

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.

⁸³ Viscount Tiverton, *The Principles and Practice of Prize Law* (Butterworth & Co, 1914) 7–8.

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.

⁸⁶ For an overview of 19th century prize law, see Wolff Heintschel von Heinegg, 'Visit, Search, Diversion, and Capture in Naval Warfare: Part I, The Traditional Law' (1991) 29 *Canadian Yearbook of International Law* 283.

⁸⁷ Tiverton (n 83) 7.

⁸⁸ *Ibid.*

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

⁹⁰ See Sam Foster Halabi, 'Traditions of Belligerent Recognition: The Libyan Intervention in Historical and Theoretical Context' (2012) 27(2) *American University International Law Review* 321, 342–4.

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.

as belligerents,⁹⁴ according them belligerent rights, such as prisoner of war status,⁹⁵ and exercising belligerent rights against them, for example, by calling the blockade.⁹⁶ 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.⁹⁷

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.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

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 civil war or that set up mixed claims commissions to adjudicate alien protection

⁹⁴ Wheaton, *Elements*, 1st English ed (n 54) 354.

⁹⁵ Azarova and Blum, 'Belligerency' (n 82) [11].

⁹⁶ Wyndham Legh Walker, 'Recognition of Belligerency and Grant of Belligerent Rights' (1937) 23 *Transactions of the Grotius Society* 177, 187.

⁹⁷ Wheaton, *Elements*, 1st English ed (n 54) 354, citing *United States v Huckabee*, 83 US (16 Wall) 414 (1872); *The Confederate Note Case*, 86 US (19 Wall) 548 (1874).

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]'.

¹⁰¹ See Richard A Falk, 'Janus Tormented: The International Law of Internal War' in James N Rosenau (ed), *International Aspects of Civil Strife* (Princeton University Press, 1964) 185, 218 ('Janus Tormented'). Several decades before the Spanish Civil War, the Mexican Revolution had become an arena for First World War rivalries. See Friedrich Katz, *The Secret War in Mexico: Europe, the United States, and the Mexican Revolution* (University of Chicago Press, 1981).

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 The

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

¹⁰³ See David P Forsythe, ‘Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts’ (1978) 72(2) *American Journal of International Law* 272, 275–6 (‘Legal Management of Internal War’). Here I am drawing on Anne Orford’s argument regarding the responsibility to protect: see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

¹⁰⁴ David A Elder, ‘The Historical Background of Common Article 3 of the Geneva Convention of 1949’ (1979) 11(1) *Case Western Reserve Journal of International Law* 37, 41–2; Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary* (International Committee of the Red Cross, 1952–59) vol 1, 41 (‘The Geneva Conventions’).

¹⁰⁵ David P Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge University Press, 2005) 52.

¹⁰⁶ Ibid 54–62.

¹⁰⁷ See International Committee of the Red Cross, ‘Humanitarian Aid to the Victims of Internal Conflicts: Meeting of a Commission of Experts in Geneva’ (1963) 3(23) *International Review of the Red Cross* 79, 79.

¹⁰⁸ Dietrich Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’ (1982) 31(4) *American University Law Review* 935, 935.

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

¹¹⁰ Amanda Alexander, ‘A Short History of International Humanitarian Law’ (2015) 26(1) *European Journal of International Law* 109, 117 (‘A Short History’). Alexander particularly notes the work of Jean Pictet in the 1960s: at 116–18, citing Jean S Pictet, ‘The Development of International Humanitarian Law’ in C Wilfred Jenks et al (eds), *International Law in a Changing World* (Oceana Publications, 1963) 114; J Pictet, ‘The Principles of International Humanitarian Law’ (1966) 6(66) *International Review of the Red Cross* 455.

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.

¹¹² See Richard A Falk, 'Preface' in Richard A Falk (ed), *The International Law of Civil War* (John Hopkins Press, 1971) xv. Exceptions include Siordet, 'The Geneva Conventions and Civil War' (n 3); Siordet, 'The Geneva Conventions and Civil War (Continued)' (n 4); Siordet, 'The Geneva Conventions and Civil War (Concluded)' (n 5); Jean Siotis, *Le droit de la guerre et les conflits armés d'un caractère non-international* [The Law of War and Armed Conflicts of a Non-International Character] (Librairie Générale de Droit et de Jurisprudence, 1958); Quincy Wright, 'International Law and Civil Strife' (1959) 53 *American Society of International Law Proceedings* 145; Mohammed Bedjaoui, *Law and the Algerian Revolution* (International Association of Democratic Lawyers, 1961); Boško Jakovljević and Jovica Patrnogić, 'The Urgent Need to Apply the Rules of Humanitarian Law to So-Called Internal Armed Conflicts' (1961) 1(5) *International Review of the Red Cross* 250; Falk, 'Janus Tormented' (n 101); Castrén (n 109).

¹¹³ See, eg, Rosalyn Higgins, 'Internal War and International Law' in Cyril E Black and Richard A Falk (eds), *The Future of the International Legal Order* (Princeton University Press, 1969–72) vol 3, 81, 115–16.

¹¹⁴ Morris Greenspan, *The Modern Law of Land Warfare* (University of California Press, 1959) 621.

¹¹⁵ See, eg, *Asian Agricultural Products Ltd v Sri Lanka (Award)* (1991) (ICSID Arbitral Tribunal, Case No ARB/87/3, 27 June 1990); *Ampal-American Israel Corporation v Egypt (Decision on Liability and Heads of Loss)* (ICSID Arbitral Tribunal, Case No ARB/12/11, 21 February 2017).

¹¹⁶ Falk, 'Introduction' (n 17) 1. See also Tarak Barkawi, 'From Law to History: The Politics of War and Empire' (2018) 7(3) *Global Constitutionalism* 315.

for international lawyers,¹¹⁷ who sought to develop the rules of international law to meet the challenges of modern ‘revolutionary and interventionist violence’.¹¹⁸ This reached a peak during the height of US involvement in Vietnam during the late 1960s and early 1970s.¹¹⁹ Alongside intervention, anticolonial wars raised other international legal questions. The Algerian War (1954–62), for example, was fought primarily around questions of *status*.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.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).¹²² It was also a means of legitimising the Algerian cause and discrediting the French,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.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.¹²⁵ However, this was just one aspect of the problem that civil war and revolution posed for international law

¹¹⁷ See, eg, Richard Falk, ‘International Law and the United States Role in the Viet Nam War’ in Stefan Andersson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (Cambridge University Press, 2018) 30.

¹¹⁸ See, eg, John Norton Moore, ‘Introduction’ in John Norton Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins Press, 1974) xxv.

¹¹⁹ See, eg, Wolfgang Friedmann, ‘Intervention, Civil War and the Rôle of International Law’ (1965) 59 *American Society of International Law Proceedings* 67; Richard A Falk, *Legal Order in a Violent World* (Princeton University Press, 1968) pt 2; Tom Farer, ‘Intervention in Civil Wars: A Modest Proposal’ (1967) 67(2) *Columbia Law Review* 266; John Norton Moore, ‘The Control of Foreign Intervention in Internal Conflict’ (1969) 9(2) *Virginia Journal of International Law* 205; Tom J Farer, ‘Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife’ (1969) 82(3) *Harvard Law Review* 511 (‘Harnessing Rogue Elephants’); Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971); John Norton Moore, ‘Introduction’ (n 118).

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.

¹²¹ See Bedjaoui (n 112) 53–5, 139–80. For commentary, see Amanda Alexander, ‘International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I’ (2016) 17(1) *Melbourne Journal of International Law* 15, 40–4 (‘International Humanitarian Law’).

¹²² Alexander, ‘International Humanitarian Law’ (n 121) 43.

¹²³ Ibid. See also Jessica Whyte, ‘The “Dangerous Concept of the Just War”: Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions’ (2018) 9(3) *Humanity* 313, 319; Helen M Kinsella, *The Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian* (Cornell University Press, 2011) 131–2.

¹²⁴ *White Paper* (n 120) 12–13.

¹²⁵ Regarding Algeria, see *ibid* 26–55; Bedjaoui (n 112) 207–11; Eldon van Cleef Greenberg, ‘Law and the Conduct of the Algerian Revolution’ (1970) 11(1) *Harvard International Law Journal* 37. Regarding Vietnam, see, eg, Stefan Andersson (ed), *Revisiting the Vietnam War and International Law: Views and Interpretations of Richard Falk* (Cambridge University Press, 2018) pt II.

alongside, or quite often behind, issues of intervention and recognition.¹²⁶ In 1971, Falk wrote of the traditional approach's 'partial decay'.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.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.¹²⁹ The turning point was the 1968 International Conference on Human Rights in Tehran ('Tehran Conference'),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 ...¹³¹

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

¹²⁶ Examples of international legal scholarship with a significant focus on intervention and/or recognition include Castrén (n 109); Bayless Manning, 'Foreign Intervention in Civil Strife: From Diplomacy to Politics' (1968) 3 *Stanford Journal of International Studies* 1; John Norton Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins Press, 1974). For other references, see above n 119. A significant body of scholarship tended to address both questions of intervention/recognition and of the conduct of the hostilities and the treatment of prisoners and civilians: Falk, *The International Law of Civil War* (n 119); Roger Pinto, 'Les règles du droit international concernant la guerre civile' [The Rules of International Law concerning Civil War] (1965) 114 *Recueil des Cours de l'Académie de Droit International* 451; Richard A Falk (ed), *The Vietnam War and International Law* (Princeton University Press, 1968–76) vols 1–4; Higgins (n 113); Khairallah (n 56). Rarer examples of an approach focusing purely on the conduct of the hostilities and the treatment of prisoners and civilians include Richard R Baxter, 'Ius in Bello Interno: The Present and Future Law' in John Norton Moore (ed), *Law and Civil War in the Modern World* (Johns Hopkins Press, 1974) 518; James E Bond, *The Rules of Riot: Internal Conflict and the Law of War* (Princeton University Press, 1974).

¹²⁷ Falk, 'Introduction' (n 17) 11–16.

¹²⁸ See, eg, ibid 16–17; Farer, 'Harnessing Rogue Elephants' (n 119); Khairallah (n 56) 85–96.

¹²⁹ Alexander, 'A Short History' (n 110) 118, 121. See also Whyte (n 123) 316. For Richard Baxter,

[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.

¹³⁰ RR Baxter, 'Modernizing the Law of War' (1977) 78 *Military Law Review* 165, 167.

¹³¹ Sylvie-Stoyanka Junod, 'General Introduction to the Commentary on Protocol II' in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff Publishers, 1987) 1319, 1326–7 [4371]. See also Alexander, 'A Short History' (n 110) 119.

¹³² 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.

Armed Conflicts ('Conference of Government Experts').¹³² For Alexander, this marked the emergence of international humanitarian law as a field of international law, which would replace the laws of war¹³³ 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.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.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* ('Additional Protocol I'), even if many states initially refused to sign or ratify it.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 Vietnam, Katanga or Biafra).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.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* ('Additional Protocol II') eventually ended up very limited, stripped of a lot of content in order to reach a consensus.¹³⁹ Nevertheless, *Additional Protocol II* introduced 'innovative' protection for civilians during internal conflict.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*

¹³² See International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971): Report on the Work of the Conference* (Report, August 1971) ('Report on the Work of the Conference').

¹³³ Alexander, 'A Short History' (n 110) 122–4.

¹³⁴ Ibid 124.

¹³⁵ See, eg, David P Forsythe, 'The 1974 Diplomatic Conference on Humanitarian Law: Some Observations' (1975) 69(1) *American Journal of International Law* 77. For a recent critical history of this struggle, see Whyte (n 123).

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*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.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.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 too.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.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.¹⁴⁶ For some, reciprocity was the only mechanism by which to circumvent the fact that rebels, as non-signatories lacking international

¹⁴¹ *Additional Protocol I* (n 18) art 1(4).

¹⁴² *Additional Protocol II* (n 18) art 1(1).

¹⁴³ Alexander, 'A Short History' (n 110) 123–4.

¹⁴⁴ Greenman, 'The History and Legacy of State Responsibility for Rebels' (n 38) 228.

¹⁴⁵ See Samuel Moyn, *The Last Utopia: Human Rights in History* (Belknap Press, 2010) 3–4, 7–8; Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press, 2019) 100–6, who traces this shift back to Biafra.

¹⁴⁶ See International Committee of the Red Cross, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross: Geneva, July 26 – August 3, 1946* (Report, 1947) 14–15 ('Report on the Work of the Preliminary Conference'); International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims (Geneva, April 14–26, 1947)* (Report, 1947) 8–9.

legal personality, could not be bound by the *Geneva Conventions*.¹⁴⁷ In the end, the draft conventions approved at the 17th International Red Cross Conference convened in Stockholm in 1948 ('Stockholm Drafts')¹⁴⁸ — 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.¹⁴⁹ 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.¹⁵⁰ 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'.¹⁵¹

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.¹⁵² During the debates at the 1949 Diplomatic Conference, some states objected to the 'each Party to the conflict' wording,¹⁵³ on the basis that the non-state party could not be bound by a convention to which it was not a signatory.¹⁵⁴ 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 1.¹⁵⁵ 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

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').

¹⁴⁹ Ibid 51–2, 114. Cf at 9–10, 32.

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

¹⁵¹ International Committee of the Red Cross, *Revised and New Draft Conventions for the Protection of War Victims: Remarks and Proposals Submitted by the International Committee of the Red Cross* (1949) 36–8.

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

¹⁵³ At the 1949 Diplomatic Conference, after the *Stockholm Draft* 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').

¹⁵⁴ Ibid vol 2 section B, 83, 90, 93–4, 99.

¹⁵⁵ Ibid vol 2 section B, 84.

instruction. Therefore, the rebels are a part of the population in revolt of the Contracting State.¹⁵⁶

The Greek delegate added two further reasons. First, that the *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’.¹⁵⁷ 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.¹⁵⁸ In the end, the final text refers to ‘each Party to the conflict’ being bound,¹⁵⁹ 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’.¹⁶⁰

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’.¹⁶¹ 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.¹⁶²

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’.¹⁶³ 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’.¹⁶⁴

¹⁵⁶ Ibid vol 2 section B, 79.

¹⁵⁷ Ibid vol 2 section B, 94.

¹⁵⁸ Ibid.

¹⁵⁹ *Geneva Convention I* (n 1) art 3.

¹⁶⁰ Siordet, ‘The Geneva Conventions and Civil War (Concluded)’ (n 5) 212.

¹⁶¹ *Final Record of the 1949 Diplomatic Conference* (n 153) vol 2 section B, 336 (emphasis added).

¹⁶² 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.

¹⁶³ 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).

¹⁶⁴ Siordet, ‘The Geneva Conventions and Civil War (Concluded)’ (n 5) 216.

Despite dissent,¹⁶⁵ 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’.¹⁶⁶ 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’.¹⁶⁷ Others argued that rebels were bound as a result of the principle of effectiveness,¹⁶⁸ 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’;¹⁶⁹ or that Common Article 3 restated existing international law.¹⁷⁰ None of these theories managed to resolve the issue definitively, however, and indeed, they continue to be argued about.¹⁷¹

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.¹⁷² Rather, Common Article 3 was aimed at protecting civilians under occupation; its promoters had the acts of the Nazis in mind.¹⁷³ Thus, it was *state* conduct that was the concern.¹⁷⁴ In any event, it was envisioned that rebel groups would not deny their obligations under Common Article 3 on the basis of legal technicalities. Even

¹⁶⁵ See, eg, Raymund T Yingling and Robert W Ginnane, ‘The Geneva Conventions of 1949’ (1952) 46(3) *American Journal of International Law* 393, 396; Joyce Gutteridge, ‘The Geneva Conventions of 1949’ (1949) 26 *British Year Book of International Law* 294, 300–1, referring to parties to the Conventions rather than to the conflict; Lord McNair, *The Law of Treaties* (Clarendon Press, 1961) 676, suggesting that Common Article 3 might only bind insurgents where there was a recognition of belligerency; Arnold Fraleigh, ‘The Algerian Revolution as a Case Study in International Law’ in Richard A Falk (ed), *The International Law of Civil War* (Johns Hopkins Press, 1971) 179, 194.

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.

¹⁷¹ See, eg, Sandesh Sivakumaran, ‘Binding Armed Opposition Groups’ (2006) 55(2) *International and Comparative Law Quarterly* 369; Daragh Murray, ‘How International Humanitarian Law Treaties Bind Non-State Armed Groups’ (2015) 20(1) *Journal of Conflict and Security Law* 101; Annyssa Bellal and Ezequiel Heffes, ‘“Yes, I Do”: Binding Armed Non-State Actors to IHL and Human Rights Norms through Their Consent’ (2018) 12(1) *Human Rights and International Legal Discourse* 120.

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’.

¹⁷⁴ See, eg, Fabian Klose, ‘The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire’ (2011) 2(1) *Humanity* 107, 107, citing International Committee of the Red Cross, *La Croix-Rouge s’élève contre la torture et l’abus des actes de violence* [The Red Cross Rises against the Torture and the Abuse of Acts of Violence] (Memorandum, Archives du Comité International da la Croix-Rouge, B AG 202 000–003.07, October 1962), expressing concern about the use of torture to fight ‘terrorism’ in the context of decolonisation.

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.'¹⁷⁵

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*.¹⁷⁶ The Provisional Government of the Algerian Republic even acceded to the Conventions in 1960.¹⁷⁷ 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.¹⁷⁸ 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).¹⁷⁹ At the same time, the main concern was the French use of torture, rather than the conduct of the rebels.¹⁸⁰

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'.¹⁸¹ This scenario, which had not been anticipated, had now become a reality.¹⁸² 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'.¹⁸³ Doubts were repeatedly expressed about the possibility of binding

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.

¹⁷⁹ Bedjaoui (n 112) 212–13; *White Paper* (n 120) 10–14, 19–22; Françoise Perret and François Bugnion, 'Between Insurgents and Government: The International Committee of the Red Cross's Action in the Algerian War (1954–1962)' (2011) 93(883) *International Review of the Red Cross* 707, 714. Britain did the same during conflicts in Cyprus in 1955 and Kenya in 1957: Rosalyn Higgins, 'International Law and Civil Conflict' in Evan Luard (ed), *The International Regulation of Civil Wars* (Thames and Hudson, 1972) 169, 183.

¹⁸⁰ For an overview and further references, see Alexander, 'International Humanitarian Law' (n 121) 38–40; Fraleigh (n 165) 199–201. In 1960, an ICRC report detailing French torture was leaked to the press and its findings were published in *Le Monde*. See Luis Lema, 'Torture en Algérie: le rapport qui allait tout changer', *Le Temps* (Geneva, 19 August 2005), reproduced in 'Torture in Algeria: The Report That was to Change Everything', *International Committee of the Red Cross* (Web Page) <<https://www.icrc.org/en/doc/resources/documents/article/other/algeria-history-190805.htm>>, archived at <<https://perma.cc/7B25-NJAH>>.

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.

¹⁸³ Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law* (Oxford University Press, 2017) 181.

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

¹⁸⁴ At least not without an agreement between the parties or a reciprocity condition: see *Report on the Work of the Conference* (n 132) 34 [100], 35 [117], 36 [126], 37 [142]; International Committee of the Red Cross, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Second Session 3 May–3 June 1972: Report on the Work of the Conference* (Report, 1972) vol 1, 67 [2.46], 96 [2.324], 111 [2.448], 124 [2.563]. See further the comments of the delegates from Sudan, Colombia and Zaire in *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Geneva (1974–1977)* (Federal Political Department, 1978) vol 7, 72, 79, 104 (‘Official Records’).

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

¹⁸⁶ International Committee of the Red Cross, *Draft Additional Protocols to the Geneva Conventions of August 12, 1949: Commentary* (1973) 135.

¹⁸⁷ See above nn 137–39 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.¹⁹⁰ 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.¹⁹¹ 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,¹⁹² 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.¹⁹³ The United Nations Security Council too began to engage with rebels, calling on them to comply with international humanitarian and human rights law¹⁹⁴ and even applying sanctions for non-compliance.¹⁹⁵ From these beginnings in the 1980s and early 1990s, a vast body of practice has emerged.¹⁹⁶

¹⁹⁰ 'Our History', *Human Rights Watch* (Web Page) <<https://www.hrw.org/our-history>>, archived at <<https://perma.cc/2R5T-6MKW>>. The ICRC, while important, has always been more secretive about its work. Another important actor, the Geneva Call, was founded in 2000: 'Mission', *Geneva Call* (Web Page) <<https://www.genevacall.org/mission/>>, archived at <<https://perma.cc/53KN-XYAC>>.

¹⁹¹ For full references to Americas Watch's reports and an overview of its work in respect of El Salvador and Nicaragua, see Robert Kogod Goldman, 'International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts' (1993) 9(1) *American University International Law Review* 49, 49–50, 88–93.

¹⁹² Commission on Human Rights, *Consequences of Acts of Violence Committed by Irregular Armed Groups and Drug Traffickers for the Enjoyment of Human Rights*, ESC Res 1990/75, UN ESCOR, 54th mtg, UN Docs E/1990/22 and E/CN.4/1990/94 (7 March 1990) para 2.

¹⁹³ See, eg, Organization of American States, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1990–1991*, Doc No OEA/Ser.L/V/II.79.rev.1 Doc.12, 22 February 1991, ch V s II; Organization of American States, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Peru*, Doc No OEA/Ser.L/V/II.83 Doc.31, 12 March 1993, [108]–[109]. The politics were quite different here than at the 1974–77 Diplomatic Conferences. States were concerned that the reporting system was biased against them, so they asked the IACHR to report on non-state conduct too: Christina M Cerna, 'The History of the Inter-American System's Jurisprudence as Regards Situations of Armed Conflict' (2011) 2(1) *Journal of International Humanitarian Legal Studies* 3, 17.

¹⁹⁴ The first time that the UNSC called on rebels to comply with international humanitarian law was in SC Res 788, UN SCOR, 3138th mtg, UN Doc S/RES/788 (19 November 1992) para 5, regarding the conflict in Liberia. This was followed by SC Res 794, UN SCOR, 3145th mtg, UN Doc S/RES/794 (3 December 1992) para 4, in respect of Somalia, and SC Res 804, UN SCOR, 3168th mtg, UN Doc S/RES/804 (29 January 1993) para 10, regarding Angola. Regarding human rights, see Jessica S Burniske, Naz K Modirzadeh and Dustin A Lewis, *Armed Non-State Actors and International Human Rights Law: An Analysis of the Practice of the UN Security Council and UN General Assembly* (Briefing Report, June 2017) annex II.A, annex II.B.

¹⁹⁵ The UNSC applied sanctions against the National Union for the Total Independence of Angola ('UNITA') in Angola under its Chapter VII powers: SC Res 864, UN SCOR, 3277th mtg, UN Doc S/RES/864 (15 September 1993).

¹⁹⁶ For overviews of aspects of such practice, see, eg, PH Kooijmans, 'The Security Council and Non-State Entities as Parties to Conflicts' in Karel Wellens (ed), *International Law: Theory and Practice* (Martinus Nijhoff Publishers, 1998) 333; Aristotle Constantinides, 'Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council' (2010) 4(1) *Human Rights and International Legal Discourse* 89; Olivier Bangerter, 'The ICRC and Non-State Armed Groups' in Geneva Call, *Exploring Criteria & Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law: Conference Report — Geneva, 4–5 June 2007* (Report, November 2008) 74; Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call *Deed of Commitment*' (2011) 93(883) *International Review of the Red Cross* 673; Burniske, Modirzadeh and Lewis (n 194).

A field of scholarship on rebels and their obligations, compliance and accountability followed,¹⁹⁷ and continues to expand.¹⁹⁸ 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 ...¹⁹⁹

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.²⁰⁰

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 —

¹⁹⁷ See, eg, Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30(2) *International and Comparative Law Quarterly* 416; Nigel Rodley, ‘Can Armed Opposition Groups Violate Human Rights?’ in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers, 1993) 297; David Matas, ‘Armed Opposition Groups’ (1997) 24(3) *Manitoba Law Journal* 621; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002).

¹⁹⁸ For some of the most recent publications in this field, see, eg, Terry D Gill et al (eds), *Yearbook of International Humanitarian Law 2016* (Asser Press, 2016) pt 13; Fortin (n 183); Tilman Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law* (Oxford University Press, 2018). For an overview of the literature pre-November 2016, see Ezequiel Heffes, ‘Armed Opposition Groups’, *Oxford Bibliographies* (Encyclopedia, 28 November 2016) <<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0143.xml?rskey=wWK6S4&result=1&q=armed+opposition+groups#firstMatch>>, archived at <<https://perma.cc/KDN6-32JX>>.

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.

²⁰⁰ See above n 115 and accompanying text. Regarding fragmentation, see Eyal Benvenisti and George W Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60(2) *Stanford Law Review* 595.

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.