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PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

Principles of International Humanitarian Law

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Preface

This book has two main aims. The first is to provide a clear and concise explanation of some of the central principles of international humanitarian law (also known as the law of armed conflict). The second is to bring additional clarity to the understanding of those principles by situating them in a broader philosophical, ethical and legal context. We consider a range of wider issues relevant to international humanitarian law, such as its relationship to theories of humanitarianism, the extent to which it reflects the ethical duties of participants in armed conflict and its connection to other bodies of law, such as international human rights law. We also take up positions on some contested questions concerning the interpretation of specific norms. The book should therefore prove useful for students encountering international humanitarian law for the first time, but we hope it will also hold interest for practitioners and scholars with existing knowledge of the field.

The book has had a long gestation. The idea for the work was first conceived some ten years ago as a collaboration with two other authors, Kate Parlett and Andrew Stumer. Those authors later withdrew to pursue other projects and the work has gone through many phases of development since then. However, we would like to express our sincere thanks for their contributions. Their enthusiasm in the earlier stages of the process played a large role in bringing the book to where it is today.

There are several other people whose contributions to the book we would like to acknowledge. Both authors have benefited greatly over the years from the teaching, mentoring and collegiality of Anthony Cassimatis. We would also like to mention the role of Peter Alcorn, who sadly passed away in 2009, in fuelling our enthusiasm for the study of international humanitarian law. Jonathan Crowe would like to thank the students in his courses on international humanitarian law at the University of Queensland over the last several years for their enthusiasm and probing questions. He also thanks Eve Massingham for her helpful comments on earlier drafts of some of the chapters. Both authors are grateful to Youngwon Lee for her excellent research assistance and proof editing. Finally, we would like to thank our respective partners, Cicely Bonnin and Kerry O'Brien, for their support and encouragement throughout all stages of the project.

There is no more pressing and important area of international jurisprudence than international humanitarian law. It protects people's lives and well-being on a daily basis. War is destructive by its very nature, but the law of armed conflict plays a crucial role in moderating its harmful impact on the lives of people around the globe. In many ways, it is the last-ditch hold-out position of humanity against arbitrary violence. We hope this book can make a modest contribution to the dissemination, understanding and universal acceptance of humanitarian norms. We can think of no better objective.

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1. The concept of armed conflict

International humanitarian law can be generally defined as *the body of international law governing the conduct of armed conflicts*. The notion of armed conflict is therefore central to understanding this area of law. This is true both in terms of the philosophical underpinnings of international humanitarian law and in terms of the legal rules that set out the limits of its operation. The guiding principles of international humanitarian law arise from the need to place limits on the conduct of armed conflicts. These restraints are needed due to what we will call the *morally exceptional* nature of warfare. The philosophical concept of warfare will therefore be our first focus in this chapter.

We will then turn to the legal limits on the operation of international humanitarian law. The fundamental principle here is that international humanitarian law has no operation unless an armed conflict exists. This raises the important question of what constitutes an 'armed conflict'. We will therefore examine the legal definition of armed conflict, before turning to related questions concerning the duration and scope of hostilities. Finally, we will consider the legal distinction between international and non-international armed conflicts. This distinction has historically played an important role in international law. However, as we will see, its importance is diminishing over time.

THE LOGIC OF WARFARE

It is worthwhile to begin by reflecting on the morally exceptional character of armed conflict. It is widely seen as permissible and perhaps even praiseworthy for people engaged in warfare to deliberately set out to injure and kill others. This is, to put it mildly, quite different from the moral framework that governs human interaction in everyday life. In the normal moral codes of almost every human community, setting out deliberately to injure and kill other people is one of the very worst things you can do. This common view of warfare therefore posits a radical exception to the normal moral paradigm.

Let us assume the morally exceptional status of armed conflict for

present purposes and ask where that idea leads. We might call this the question of the *logic of warfare*. It is sometimes said that 'all is fair in war', meaning that all moral rules are suspended. This is the notion of *absolute warfare*. The concept of absolute warfare is often associated with the Prussian military theorist Carl von Clausewitz (1780–1861). Clausewitz famously argued that armed conflicts tend naturally to escalate towards a state of absolute warfare.[1] The idea that the sole aim of warfare is to defeat your opponent and normal moral rules do not apply leads logically to the conclusion that any and all means are justified.

In warfare, then, it seems that all bets are off. The goal of all parties in the conflict must be to secure victory and bring about the return of normal moral relations. Any measures that promote this end are permissible. Clausewitz is often interpreted as having fully endorsed this conclusion, but in fact he was ambivalent about it. He thought that the logic of warfare, if followed to its natural conclusion, means that the end justifies the means. However, he also noted that in actual wars, which are for limited purposes, absolute warfare is unsustainable, as it allows no conclusion short of total annihilation.[2] A state of absolute warfare will not truly end until one side is completely destroyed.

HUMANITARIANISM

The morally exceptional nature of warfare means that the most important goal is to bring about peace. Absolute warfare might end the conflict, but it is not the best way to secure a peaceful conclusion. Rather, it would end the war at the cost of totally destroying one of the parties. It seems, then, that we need an alternative to absolute warfare. Rather than seeking an end to war at all costs, we need to conduct armed conflicts in such a way as to leave open the possibility of a lasting peace. This is perhaps the fundamental idea behind the doctrine of *humanitarianism*. Humanitarianism brings moral limits back into war by seeking to moderate the effects of warfare in the name of human ideals.

Humanitarianism responds to the unusual situation that arises in armed conflicts by adopting an approach of moderation. Although war necessarily involves suffering, there are basic values that unite humans even in wartime. This means that even war has limits. Humans are not inclined to

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[1] Carl von Clausewitz, *On War* (JJ Graham tr, Wordsworth 1997) 6–7 [bk I, ch I, §3].

[2] Ibid 22–3 [bk I, ch I, §25].

live in a permanent state of warfare and the wounds left by war will eventually have to be tended. It is therefore necessary to maintain a commitment to human ideals on which community may be founded following the cessation of hostilities. In this way, international humanitarian law aims to ensure respect for the most basic human values, such as dignity, community and freedom from suffering. It represents the last-ditch hold-out position of the human community against absolute warfare.

Classical Origins

The historical development of the idea that humanitarianism moderates warfare laid the foundations for the contemporary body of rules that constitutes international humanitarian law. Despite the moral strangeness of armed conflicts, human communities have long accepted the importance of mitigating the effects of warfare. For example, there is evidence that warfare between Ancient Greek city states around 700 to 450 BCE was governed by customary rules, concerned among other things with the treatment of prisoners of war and the extent to which defeated forces should be pursued.[3] The influence of these rules is apparent in Plato's *Republic*, written around 375 BCE, where it is noted that citizens of occupied territories should not be enslaved or attacked, corpses should not be robbed and conquering forces should refrain from burning houses or destroying occupied lands.[4]

Plato's central reason for approving these principles concerned the common values that united the Greek nations. He noted the importance of maintaining goodwill between states even in times of armed conflict, in order to facilitate the progress of their common culture. Although Plato was not prepared to extend this approach to wars between Greeks and other races, whom he considered 'barbarians', his emphasis on the need to maintain a sense of common value during armed hostilities, in order to pave the way for future reconciliation between the parties, foreshadowed modern humanitarianism. We will discuss the limits on the Ancient Greek idea of humanitarianism further below.

Another important antecedent to modern humanitarian theories is found in the writings of Plato's pupil, Aristotle (384–322 BCE). Aristotle's theories on law and politics have been highly influential in shaping

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[3] Josiah Ober, 'Classical Greek Times' in Michael Howard, George J Andreopoulos and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press 1994).

[4] Plato, *Republic* (Desmond Lee tr, Penguin 1987) 197–9 [bk V, §§469–71].

modern Western legal systems. His conception of the political community has been particularly important. Aristotle viewed humans as naturally social animals, who possess a common understanding of a good and fulfilling life. According to this shared conception of the good life, called *eudaimonia*, the highest form of human existence is characterised by full participation in the political community.[5] This emphasis on shared values and the importance of community in human existence finds modern expression in the rules of international humanitarian law.

Humanitarian attitudes towards warfare can be discerned in other classical traditions. Although the Roman armies developed a reputation for fierceness in pursuit of military objectives,[6] Cicero argued in *De Officiis* in 44 BCE that certain standards must be observed in the conduct of warfare. In particular, he contended that forces should refrain from inflicting unnecessary devastation upon occupied territories, and captured opponents not guilty of excessive brutality during combat should be protected.[7] Cicero's position was motivated by the idea that there are important principles of justice common to all human communities. He emphasised that hostilities should always be conducted with the aim of securing a lasting and equitable peace. Unlike Plato, Cicero did not distinguish in this respect between his fellow Romans and members of other cultures.

Early Modern Developments

Customary rules regulating warfare persisted through to the Middle Ages, when the first attempts were made to formalise the rules. These initially took the form of official proclamations. The Ordinance for the Government of the Army, published in 1386 at the order of Richard II of England, prohibited acts of violence against women and priests, as well as the burning of houses and the desecration of churches. Proclamations to a similar effect were issued by Henry V of England in 1415 and 1419,[8] Ferdinand of Hungary in 1526, Emperor Maximilian II in 1570 and King

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[5] For an overview of Aristotle's legal and political theory, see Jonathan Crowe, *Legal Theory* (Thomson Reuters 2009) 18–22.

[6] Robert C Stacy, 'The Age of Chivalry' in Michael Howard, George J Andreopoulos and Mark R Shulman (eds), *The Laws of War: Constraints on Warfare in the Western World* (Yale University Press 1994).

[7] Cicero, *De Officiis* (Walter Miller tr, Harvard University Press 1913) 37 [bk I, §XI], 83 [bk I, §XXIV].

[8] Theodor Meron, 'Shakespeare's Henry the Fifth and the Law of War' (1992) 86 *American Journal of International Law* 1, 23–4.

Gustavus II Adolphus of Sweden in 1621.[9] These instruments show that common international standards governing warfare were in place long before any formal agreements on the topic were concluded.

One of the most important modern works on international humanitarian law, Hugo Grotius' *On the Law of War and Peace* (1625), also dates from this period. The first two books of that work are mainly concerned with how a war may justly be commenced – in other words, the *jus ad bellum*. The third and final book, however, discusses what behaviour is permissible once war has started – that is, the *jus in bello* or international humanitarian law. Grotius' examination of the law of war is notable for his purposive view of human nature, which echoes Aristotle's emphasis on humanity's shared sense of value. In particular, Grotius emphasises that armed conflicts should always be conducted with a view to creating a lasting peace, again laying the foundations for modern humanitarianism.[10]

Grotius' writings contain many of the fundamental principles of contemporary international humanitarian law that we will encounter throughout this book. For example, he argues that combatants should take steps to avoid causing injury to civilians caught up in fighting, that prisoners of war should be treated humanely and that armed forces should avoid causing unnecessary damage to the regions through which they pass during the conflict. However, it was to be more than 200 years before these principles began to find formal expression in international legal agreements.

The preceding paragraphs by no means provide a complete account of the development of humanitarian ideas. However, they illustrate that the formal documents at the heart of modern international humanitarian law reflect a long customary tradition. This point is central to understanding the standards governing contemporary armed conflicts. Considered apart from this customary background, modern treaties concerning humanitarian law might well seem vague, incomplete and unenforceable. It is only when these documents are understood as attempts to formalise a robust tradition of unwritten principles that one appreciates why their provisions are so widely respected and obeyed.

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[9] See generally Edoardo Greppi, 'The Evolution of International Criminal Responsibility under International Law' (1999) 835 *International Review of the Red Cross* 531; Kenneth Ögren, 'Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden' (1996) 313 *International Review of the Red Cross* 438; MH Keen, *The Laws of War in the Late Middle Ages* (Routledge and Kegan Paul 1965).

[10] Hugo Grotius, *On the Law of War and Peace* (Francis W Kelsey tr, Clarendon Press 1925) vol II, 860–62 [bk III, ch XXV].

INSIDERS AND OUTSIDERS

We have already seen that the classical doctrine of humanitarianism espoused by Ancient Greek authors like Plato and Aristotle was limited in scope. The Ancient Greeks did not extend humanitarian principles to 'barbarians', but only to other Greeks. Barbarians, like women and slaves, were not considered members of the *polis* (city state or political community), which for the Greeks was equivalent to the moral community. It was assumed that non-citizens did not share common aspirations and values with citizens, so there was no need to extend them humanitarian consideration.

This feature of the Ancient Greek worldview marks a fundamental difference from modern humanitarianism. The version of the doctrine that lies behind international humanitarian law posits a *global moral community*. On this view, all humans are entitled to respect by virtue of their shared nature and values. Another way of putting this is that modern humanitarianism is committed to *cosmopolitanism*: the view that the whole world is a single moral community. The term comes from a statement attributed to the radical Ancient Greek thinker Diogenes the Cynic (c 412–323 BCE), founder of the Stoic school of philosophy: 'I am a citizen of the world [*kosmopolitês*].'

Diogenes was a great philosopher whose ideas are still influential today. However, he was a very strange man. He is reputed to have lived in a large tub and dined mainly on onions. Other stories involve him masturbating, spitting and defecating in public to mock prudish customs. He is also reputed to have wandered around in daytime with a lamp, saying, 'I am only looking for a true human being'. This story reflects the extent to which he rejected the worldview of his fellow Athenian citizens. The division between insiders and outsiders, marked by the conferral of citizenship, was firmly ingrained in Ancient Greek culture. Diogenes, however, questioned the distinction.

It may seem obvious to us today that cosmopolitanism is correct. (*Of course* we should extend the same moral standards to everyone!) However, it arguably still goes against some widespread practices and beliefs. For example, we commonly think it is legitimate to extend greater consideration to family members and fellow nationals than to those more distant from us. Is this type of partiality legitimate? There is a lively philosophical debate on these issues.[11] There is no scope to pursue the topic fully here,

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[11] See, for example, Harry Brighouse and Adam Swift, 'Legitimate Parental Partiality' (2009) 37 *Philosophy and Public Affairs* 43; Harry Brighouse, 'Justifying

but it illustrates the potentially radical implications of cosmopolitanism as a doctrine. We should not be too quick to simply declare that 'we are all cosmopolitans now!' International humanitarian law, however, has clear affinities with the cosmopolitan outlook.

JUS AD BELLUM AND *JUS IN BELLO*

We defined international humanitarian law at the start of this chapter as *the body of international law governing the conduct of armed conflicts*. The existence of an armed conflict is therefore a necessary prerequisite for international humanitarian law to operate. It is important to note in this context that international humanitarian law is concerned with regulating the *conduct* of armed conflicts, rather than their *commencement*. It is not concerned with how a conflict started or who was to blame for it, but rather stipulates what forms of conduct are permissible once the war is ongoing.

The body of international law relating to the conduct of armed conflicts is sometimes referred to using the Latin term *jus in bello* ('law in war'). This is generally viewed as synonymous with what we now call international humanitarian law. The law relating to the commencement of armed conflicts, by contrast, is known as the *jus ad bellum* ('law to war'). It is also sometimes called the *jus contra bellum* ('law against war'), since its primary concern is to stem the proliferation of armed disputes.

The distinction between the *jus in bello* and the *jus ad bellum* is fundamental to international humanitarian law. The objective of this field of law is to set up a body of rules that applies consistently to all parties to an armed conflict. It thereby avoids the need to draw difficult and controversial distinctions between just and unjust conflicts. It also avoids passing judgment on which of the parties to a conflict may be at fault. It simply applies the same fundamental guarantees and responsibilities to everyone.

THE PRINCIPLE OF NEUTRALITY

We might call this feature of international humanitarian law the *principle of neutrality*. There is a good reason why international humanitarian law

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Patriotism' (2006) 32 *Social Theory and Practice* 547; Igor Primoratz, 'Patriotism: A Deflationary View' (2002) 33 *Philosophical Forum* 443; Peter Singer, *Practical Ethics* (2nd edn, CUP 1993) 232–4; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (CUP 2006) 168–76; Jonathan Crowe, 'Natural Law in Jurisprudence and Politics' (2007) 27 *Oxford Journal of Legal Studies* 775, 791–3.

adopts this principle. It is common for parties on both sides of a conflict to depict themselves as fighting for justice and to accuse their opponents of being at fault. If international humanitarian law imposed different rules on unjust aggressors and innocent parties, both sides of a conflict would try to exploit this for their own advantage. This would undermine the underlying goal of establishing dependable limits on warfare. The principle of neutrality therefore plays an important role in promoting universal respect for humanitarian principles.

It is worth noting, however, that the ethical underpinnings of the rules governing armed conflict are more complicated than the principle of neutrality makes it seem. International humanitarian law takes the view that it does not matter how a conflict started. The same rules apply to everyone. However, imagine that Kate is asleep in her bed when she hears a noise downstairs. She comes down to find that Andrew has broken into her house and is brandishing a gun. Kate also happens to have a gun nearby, which she keeps for self-defence. The two confront each other in Kate's living room.

Let us suppose that Kate and Andrew both see that the other is armed. They are in genuine fear for their lives. Most people would agree that Kate is entitled to defend herself from Andrew. She should probably disarm him or flee if she can, but she may use force to defend herself if necessary. Andrew, however, seems to be in a different position. He is the one who caused the altercation by wrongfully breaking into Kate's house. If Kate defends herself against Andrew and injures him, she is not culpable. However, if Andrew ends up injuring Kate, he is to blame, even if he feared for his life.

This example shows that it does make a difference who started a conflict. An innocent victim who acts in self-defence is in a different ethical position to an unjust aggressor.[12] Nonetheless, international humanitarian law sets this aside and aims at the universal acceptance of a common set of rules.[13] If the parties to a war were treated differently depending on their

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[12] For further discussion, see Michael Walzer, *Just and Unjust Wars* (Basic Books 1977) ch 3; Jeff McMahan, 'Innocence, Self-Defence and Killing in War' (1994) 2 *Journal of Political Philosophy* 193; Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693; Gerhard Øverland, 'Killing Civilians' (2005) 13 *European Journal of Philosophy* 345; Gerhard Øverland, 'Killing Soldiers' (2006) 20 *Ethics and International Affairs* 455.

[13] Compare Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693, 730–33; David Luban, 'War Crimes: The Law of Hell' in Larry May (ed), *War: Essays in Political Philosophy* (CUP 2008) 270–73; Patrick Emerton and Toby Handfield, 'Order and Affray: Defensive Privileges in Warfare' (2009) 37 *Philosophy and Public Affairs* 382.

ethical status, everyone would claim to be in the right. One party might claim to be above the rules and the other would retaliate. The situation would escalate. We would be on the slippery slope to absolute warfare.

COHERENCE AND ACCEPTANCE

It is instructive in this context to distinguish two aspirations that often guide the development of legal principles. The first aspiration is to create a body of norms that exhibits coherence with underlying ethical principles. The second aspiration is to achieve general acceptance of the norms that comprise the legal system; in other words, to ensure the norms are followed. Frequently, these two objectives go hand in hand. A legal system is often more likely to be respected if it contains a coherent body of rules.[14]

Legal systems may differ, however, in the relative levels of emphasis they place on these two aspirations. A case can be made that international humanitarian law places greater emphasis on acceptance and less on consistency with underlying ethical norms than many other fields of law. Humanitarian norms often prioritise simplicity and clarity over coherence with underlying ethical principles, since the primary aim of this body of law is to secure recognition and respect from all participants in armed conflict. The principle of neutrality, as discussed in the previous section, provides an example.

We saw above that the ethical principles governing self-defence seem to suggest that different standards apply to aggressors and innocent parties. This is what Jeff McMahan calls the 'deep morality' of warfare.[15] However, as McMahan points out, the deep morality of warfare differs significantly from the law of war.[16] The international law of armed conflict, then, does not derive its legitimacy from its strict coherence with the deep morality of warfare, but rather from the need for clear and generally accepted conventions to 'mitigate the savagery of war'.[17] These conventions are typically founded in broad underlying values, but their most important feature may be that they are generally respected. It is only by maintaining clear, stable and predictable conventions concerning acceptable conduct on the battlefield that the international community can place reliable limits on warfare.

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[14] For further discussion of the value of coherence in law, see Jonathan Crowe, 'Dworkin on the Value of Integrity' (2007) 12 *Deakin Law Review* 167.

[15] Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693, 730.

[16] Ibid 730–33.

[17] Ibid 730.

DEFINING ARMED CONFLICT

We have seen that international humanitarian law only operates during an armed conflict. The legal definition of armed conflict therefore plays a critical role in this body of law. A number of important questions arise here. How do we distinguish an armed conflict from a mere civil disturbance, such as a riot? How do we determine exactly when an armed conflict commences and when it ends? These lines may often be difficult to draw, but international courts and tribunals have offered some guidance.

Common Article 2 of the Geneva Conventions of 1949 states that the Conventions will apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'. A declaration of war is therefore not necessary for the existence of an armed conflict. International humanitarian law comes into play whenever hostilities reach a certain threshold. The concept of armed conflict is also relevant to international criminal law, as violations of the laws and customs of war can only be prosecuted when they occur in the context of a conflict. We will return to that issue below.

Common Article 2 goes on to clarify that the provisions of the Geneva Conventions also apply in cases of total or partial occupation of a state party's territory, even when the occupation is met with no resistance. This extends the reach of the Conventions to situations where an occupation occurs without a declaration of war or armed hostilities. People who are affected by such an occupation will therefore still potentially receive the guarantees afforded to protected persons under Geneva Convention IV. The obligations of occupying powers will be discussed in greater detail in Chapter 4.

An important definition of an armed conflict comes from the International Criminal Tribunal for the Former Yugoslavia (ICTY) judgment in *Prosecutor v Tadić*, the first case to be heard before that body.[18] The Appeals Chamber in *Tadić* confirmed that 'for there to be a violation of [international humanitarian law], there must be an armed conflict'.[19] The Appeals Chamber then went on to say that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed

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[18] *Prosecutor v Tadić*, International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Decision on Jurisdiction, 2 October 1995.

[19] Ibid [67].

groups or between such groups within a State'.[20] This was reaffirmed in the later case of *Prosecutor v Kunarac*.[21]

The definition proposed by the Appeals Chamber in *Tadić* recognises two distinct tests for the existence of an armed conflict. The first test refers to 'a resort to armed force between States'. This is the classic definition of an *international* armed conflict. It traditionally involves a formal declaration of warfare by one or both states, although this is not strictly necessary. The second test refers to 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'. This formulation recognises that international humanitarian law may also apply to conflicts involving non-state groups. The test covers both conflicts involving a combination of states and non-state groups and conflicts in which no states are directly involved.

Historically, the application of international humanitarian law to insurgent groups depended on the members of the group being recognised as belligerents by either the state they were opposing or a third state. If the state to which the insurgents were opposed recognised them as belligerents, the laws of war would apply in their entirety. However, this was rare and usually occurred only when it suited the recognising state.[22] The applicability of the rules of international humanitarian law to a non-state group no longer depends upon recognition of the group by a state. Rather, it depends primarily on whether or not an armed conflict exists under international law. We will examine the extent to which international humanitarian law binds non-state groups in more detail in Chapter 7.

Protracted Armed Violence

According to the ICTY Appeals Chamber in *Tadić*, an armed conflict involving non-state groups arises only if the violence is *protracted* and the non-state groups are *organised*. What amounts to 'protracted armed violence' within the meaning of the *Tadić* definition? The ICTY Trial Chamber has clarified that 'protracted armed violence' contrasts with 'banditry, unorganised and short-lived insurrections'.[23] Rioting, for example, is not normally treated as an armed conflict, but merely a civil disturbance. This was reiterated by the Inter-American Commission on

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[20] Ibid [70].

[21] *Prosecutor v Kunarac*, ICTY Appeals Chamber Judgment, 12 June 2002 [55]–[56].

[22] Lindsay Moir, *The Law of Internal Armed Conflict* (CUP 2002) 4–18.

[23] *Prosecutor v Tadić*, ICTY Trial Chamber Judgment, 7 May 1997 [562].