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Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition

Laurie R. Blank*
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ABSTRACT

The situation in Syria has the potential to become a pivotal moment in the development of the law of armed conflict (LOAC). The ongoing brutality serves as a reminder of the importance of extending international humanitarian regulation into the realm of non-international armed hostilities; however, the very chaos those hostilities produce reveals critical fault lines in the current approach to determining the existence of an armed conflict. The international community's year-long reluctance to characterize the situation in Syria as an armed conflict highlights a clear disparity between the object and purpose of the LOAC and the increasingly formalistic interpretation of the law's triggering provisions. Focusing on Syria, this Article critiques the overly technical approach to the definition of non-international conflict currently in vogue—based on Prosecutor v. Tadić's framework of intensity and organization—and how this approach undermines the original objectives of Common Article 3 of the Geneva

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Conventions. This overly legalistic focus on an elements test, rather than the totality of the circumstances, means that the world has witnessed a retrograde of international humanitarian efficacy: Syria appears to be a lawless conflict like those that inspired Common Article 3—the regime employs its full combat capability to shell entire cities, block humanitarian assistance, and target journalists and medical personnel directly. The LOAC is specifically designed to address exactly this type of conduct, and yet the discourse on Syria highlights the dangers of allowing over-legalization to override—and undermine—logic, resulting in a deleterious impact on human life.

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In a war zone, some buildings are obvious targets—command centers, weapons depots, enemy hideouts—and some are not, like schools, hospitals, media centers. But in the battle for Syria, where rules of war do not apply and where civilians are facing a savage massacre, the house that served as a makeshift press center in the rebel district of Bab Amr is ground zero. Destroying that target would go a long way toward allowing the regime of Bashar Assad to flatten the entire enclave without the whole world watching.

Vivienne Walt, *Escape from Syria*, TIME INT'L, Mar. 19, 2012.

The world has watched for over a year as President Bashar al-Assad's armed forces have employed unrestrained and overwhelming

combat power against the most recent uprising of the Arab Spring.¹ What began as tens of thousands of unarmed protesters marching in the face of bullets and artillery shells has turned into a seemingly unending struggle between the regime's opponents—protesters, dissident army units, and other fighters—and the military forces loyal to the regime.² The unavoidable conclusion to be drawn from reports emanating from Syria is that the government's tactic of choice has been to indiscriminately and relentlessly attack entire towns, villages, and cities in an attempt to terrorize opponents and thereby repress the uprising once and for all.

Massive human suffering associated with heavy-handed government response to internal dissident threats is nothing new; indeed, the images coming from Syria are unfortunately reminiscent of many previous "internal" armed conflicts. From the Spanish Civil War to Sierra Leone to Rwanda to Sudan, internal wars have showcased the most heinous acts humans can commit. The brutality and human suffering associated with these conflicts spurred one of the most important evolutions in international law during the twentieth century: the extension of international humanitarian regulation into this realm of sovereign authority. Since the advent of the 1949 Geneva Conventions, the international community has steadily expanded and reinforced the application of the law of armed conflict (LOAC) to situations of internal armed violence to regulate state and opposition conduct for the clear and imperative purpose of mitigating the suffering inevitably associated with these situations, especially suffering inflicted on innocent civilians and opposition forces who have been rendered *hors de combat*.³ Today, it is simply axiomatic that the LOAC regulates the conduct of hostilities and the protection of persons during all armed conflicts, whether inter- or intra-state.

As important as this development has been for limiting the suffering associated with war, it is equally axiomatic that the LOAC does not apply unless a situation rises to the level of armed conflict.⁴ Accordingly, the increasingly robust package of international humanitarian protections the law mandates is not triggered if the facts on the ground do not support an objective, fact-based

1. See generally JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: U.S. AND INTERNATIONAL RESPONSE (2012) (discussing the background of the conflict up to July 2012).

2. See *id.* at 1 ("Despite international efforts to broker a cease-fire, by the summer of 2012 government and opposition forces have been engaged in all-out armed conflict.").

3. See *infra* notes 51–55 and accompanying text (discussing the motivations behind the inclusion of Common Article 3 of the Geneva Conventions).

4. See *infra* notes 81–90 and accompanying text (discussing a range of considerations in identifying the threshold of armed conflict for the application of the LOAC).

determination of armed conflict. Furthermore, because of its treaty foundation and the relatively recent role of international criminal jurisprudence assessing when this law applies, the meaning of armed conflict has become increasingly legalistic. Indeed, this shift in emphasis from a practical and pragmatic factual assessment to a legalistic “test” is reflected in what many today apply as an “elements” test: unless certain proposed elements are *independently* satisfied, a situation cannot be designated an armed conflict, even when the totality of the facts and circumstances cry out for international humanitarian legal regulation. The unfortunate effect of this evolution from practical to legal is that the international community seems incapable of seeing the humanitarian forest for the trees.

The current situation in Syria has the potential to become a pivotal moment in the development of the law of conflict recognition. The ongoing brutality reminds the world of the importance of extending international humanitarian regulation into the realm of non-international armed hostilities; however, the very chaos produced by those hostilities reveals critical fault lines in the current elements approach to determining the existence of an armed conflict. From almost the very inception of the government response to the Syrian opposition, most people, if asked to describe what was happening in Syria, would have used terms such as war, conflict, hostilities, or something comparable. Indeed, it is almost incomprehensible that those caught up in the chaos and violence—government soldiers, dissident fighters, innocent civilians, journalists, foreign observers—would seriously question the assertion that they were involved in a “war.” And yet the international legal discourse evinced a clear reluctance to acknowledge the existence of armed conflict until the legalistic elements test was apparently objectively satisfied, in the summer of 2012, at least fifteen months after the violence erupted.⁵ Prior to this point in time, the international community spoke of massive human rights violations, repression, even massacres—but not of war or armed conflict.⁶ This reluctance highlights a clear

5. In a 2012 operational update, the International Committee of the Red Cross (ICRC) reported:

The ICRC concludes that there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country Thus, hostilities between these parties . . . are subject to the rules of international humanitarian law.

Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increased Fighting, INT’L COMM. RED CROSS (July 17, 2012), <http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>.

6. See, e.g., G.A. Res. 66/253, ¶¶ 2–4, U.N. Doc. A/66/L.36 (Feb. 14, 2012) (“Expressing grave concern at the deterioration of the situation in the Syrian Arab

disparity between the object and purpose of the LOAC and the increasingly legalized and formalistic interpretation of the law's triggering provisions in relation to non-international hostilities. This is especially discouraging in light of the motivation for adopting the armed conflict trigger: to mitigate the impact of technical legal formulas when determining the applicability of humanitarian protections.⁷

Before 1949 and the drafting of the Geneva Conventions (the Conventions), international law contained no positive law applicable to internal conflicts, and as these conflicts were perceived as occurring within the zone of state sovereignty, minimal authority existed for the applicability of customary regulatory norms.⁸ The inclusion of Common Article 3 in those Conventions, which imposed limited but critically important standards of conduct on participants in internal conflicts, was revolutionary. This unprecedented intrusion into state sovereignty was motivated by the recognition that the brutality associated with internal conflict necessitated the imposition of an international obligation to respect, at a bare minimum, fundamental humanitarian principles at the core of the laws and customs of war.⁹ The need for respect for these principles—focused principally on protecting individuals who never took or are no longer taking an active role in hostilities¹⁰—was equally logical regardless of whether the conflict was internal or interstate in nature.¹¹ Accordingly, Common Article 3 reflected a simple premise: armed conflict, whether internal or international, triggers international

Republic, in particular the ongoing human rights violations and use of violence by the Syrian authorities against its population . . .”).

7. See 3 INT'L COMM. OF THE RED CROSS [ICRC], GENEVA CONVENTION: RELATIVE TO THE TREATMENT OF PRISONERS OF WAR: COMMENTARY 19–23 (Jean S. Pictet ed., 1960) (discussing the use of the term “armed conflict” rather than “war” as a means to minimize law avoidance).

8. See EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 32 (2008) (“Civil conflicts were generally thought to fall within the reserved domain of each state. The state was free to decide on the means to restore peace and order.”); see also MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 384, ¶ 15.1.2 (2004) (“In the past, the application of the law of armed conflict was largely dependent on ‘recognition of belligerence.’”).

9. See 4 ICRC, GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 26, 44 (Oscar M. Uhler & Henri Coursier eds., 1958) (discussing the historical motivations behind the inclusion of Common Article 3).

10. See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (mandating protections for “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”).

11. See *id.* (binding parties “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”).

legal regulation.¹² As the states that adopted the 1949 Conventions understood so well, any other approach would leave the protection of individuals detrimentally impacted by the brutality of internal armed violence to the whims of the state, a situation already considered untenable by 1949.¹³

In 1949, the drafters of the Conventions sought to have the law apply as broadly as possible to conflicts occurring between states and nonstate entities in order to maximize its effectiveness and reach.¹⁴ In 1994, the first case before the International Criminal Tribunal for the former Yugoslavia (ICTY) set forth a comprehensive definition of armed conflict, specifically defining non-international armed conflict as “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹⁵ At the time, the ICTY emphasized again the need for a broad and comprehensive application of the LOAC in order to fulfill the object and purpose of the law.¹⁶ Over time, the two key factors that the ICTY identified—the intensity of the fighting and the organization of the parties—have morphed into a highly technical test for the definition of non-international armed conflict, a test ostensibly requiring *independent* satisfaction of both elements before a situation of armed conflict may properly be recognized.¹⁷ This “elements test,” which has gained substantial momentum in international legal discourse, requires satisfaction of each element as an independent requirement, instead of understanding them as factors in a totality assessment.¹⁸ This development undermines the original objective of Common Article 3. Focusing on the events in Syria, this Article critiques how what was originally conceived as an analytical

12. See 4 ICRC, *supra* note 9, at 26 (“The same logical process [of extending legal protections to different categories of persons during international armed conflict] could not fail to lead to the idea of applying the principle to *all* cases of armed conflict, including internal ones.”).

13. LA HAYE, *supra* note 8, at 38 (“The Spanish Civil War and its catalogue of violations made states aware of the necessity to adopt some treaty norms dealing with means and methods of warfare in civil wars, but real developments were not possible until after the second World War.”); see also Matthew White, *Wars of the Twentieth Century*, HIST. ATLAS TWENTIETH CENTURY, <http://users.erols.com/mwhite28/warlist.htm> (last updated Jan. 1999) (noting that the estimated numbers of people killed in civil wars during the interwar years are 8,800,000 in the Russian Civil War (1918–1921), 2,500,000 in the Chinese Civil War (1945–1949), and 365,000 in the Spanish Civil War (1936–1939)).

14. See 4 ICRC, *supra* note 9, at 36 (emphasizing the need for “the scope of application of [Common Article 3 to be] as wide as possible”).

15. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

16. See *id.* ¶¶ 67–70 (holding that the LOAC applies throughout the entire territory of state where the conflict is taking place and until a general conclusion of fighting is reached).

17. See *infra* Part II.B.

18. See *infra* notes 126–134 and accompanying text.

framework morphed into an overly legalistic elements test for the recognition of the existence of non-international conflict and how this evolution undermines the original concept and purpose for recognizing the existence of non-international armed conflicts.

The impact of this strict elements test was apparent in an early report by the UN Commission of Inquiry for Syria. In stating that the situation in Syria did not constitute an armed conflict, the Commission of Inquiry explained that the opposition parties in Syria were not sufficiently organized to satisfy this test.¹⁹ The effect was that the world witnessed a retrograde of international humanitarian efficacy: Syria appeared objectively to be a lawless conflict like those that inspired the adoption of Common Article 3—one in which the regime employed its full arsenal of combat capability to shell entire cities and neighborhoods at will, block the provision of humanitarian assistance, and target journalists and medical personnel directly. The LOAC is specifically designed to address exactly this type of situation. Core LOAC principles related to both the conduct of hostilities and humanitarian protections developed over time to mitigate the suffering inherent in situations involving widespread and intense hostilities.²⁰ Human rights law—the exclusive source of international legal regulation applicable in the absence of an armed conflict—simply does not contemplate massive uses of military power and therefore does not provide an effective regulatory framework for such use. For example, human rights law does not seek to balance the need to utilize deadly combat power with humanitarian concerns inherent in the principle of military necessity, nor does it include obligations for “parties to a conflict” to facilitate humanitarian relief organization access to areas engulfed in hostilities or respect those exclusively engaged in the collection and care of the wounded and sick.²¹ Equally significant are the increasingly robust mechanisms for

19. See U.N. Gen. Assembly, Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, ¶ 13, U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) (“While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity, it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or other anti-Government armed groups had reached the necessary level of organization.”).

20. See generally Geoffrey S. Corn & Laurie R. Blank, *The Laws of War: Regulating the Use of Force*, in NATIONAL SECURITY LAW IN THE NEWS: A GUIDE FOR JOURNALISTS, SCHOLARS AND POLICYMAKERS 97 (Paul Rosenzweig et al. eds., 2012) (“War, or armed conflict, has been subject to regulation since it became an organized societal endeavor.”); Gregory P. Noone, *The History and Evolution of the Law of Armed Conflict Prior to World War II*, 47 NAVAL L. REV. 176 (2000) (discussing the historical development of the LOAC from ancient times up to World War II).

21. These obligations appear in core LOAC treaties and documents, including the Lieber Code and the four Geneva Conventions of 1949. See, e.g., FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, arts. 14, 16 (1898) (providing the first codified statements of the principle of military necessity and its application during conflict); Geneva Convention for the Amelioration

imposing international criminal responsibility for violations of international humanitarian law during non-international armed conflicts that have resulted in, at least in practical terms, a more effective accountability regime for war crimes than for human rights violations.²²

Syria is therefore a symbolic and painful reminder of why the drafters of the Conventions recognized a need to distinguish internal disturbances resulting in an exclusively government law enforcement response from situations that necessitate a government response with military force utilizing tactics and weaponry inconsistent with a law enforcement characterization—namely armed conflict.²³ This dividing line is inherent in Common Article 3. Although this provision imposes only humanitarian protections and does not address regulation of the means and methods of warfare (military tactics and weaponry), the dividing line it establishes demonstrated a recognition that these protections are essential to offset the humanitarian consequences attendant to the employment of a state's combat capabilities to repress an internal threat. Quite simply, Common Article 3 evinced the recognition that states need no "test" to decide to employ a heavy-handed military response to internal challenges. Instead, what was needed was an international standard to ensure that *when* such force is unleashed, the participants in the hostilities become bound to respect the most fundamental norms of international humanitarian law.²⁴

Indeed, the most obvious distinction between peacetime and wartime (armed conflict) is the legal authority to employ deadly force. During war, armed forces employ lethal force against enemy

of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; GC III, *supra* note 10; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. For an overview of human rights law and the differences from the LOAC, see generally THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW (1989).

22. See, e.g., U.N. HIGH COMM'R FOR HUMAN RIGHTS, INTERNATIONAL LEGAL PROTECTION OF HUMAN RIGHTS IN ARMED CONFLICT 76–77 (2011) (noting, for example, that few human rights treaties contain provisions regarding the criminalization and prosecution of human rights violations); see also LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 591 (2013) (referencing the number of prosecutions, convictions, and acquittals at the ad hoc tribunals).

23. ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1354–55 (Yves Sandoz et al. eds., 1977) (discussing the exclusion of situations of internal disturbances from the application of the LOAC).

24. See 4 ICRC, *supra* note 9, at 26 (noting the importance of legal regulation in internal, or non-international, armed conflicts).

personnel and objects as a first resort.²⁵ In contrast, the peacetime authority to use force—regulated by international human rights principles—restricts lethal force to a measure of last resort permitted only based on individualized threat determinations.²⁶ In theory, therefore, the absence of armed conflict obligates governments to limit security response to internal threats to the more restrictive parameters of constabulary use of force authority consistent with international human rights law, which would therefore provide greater protection to civilians from government violence. It is an unfortunate reality, however, that an overly restrictive interpretation of when armed conflict arises results in a different demarcation line: one not between the application of human rights law and the LOAC, but between the LOAC and no law at all. As highlighted by the opening quote, the primary concern generated by the early phases of the current Syrian civil war was not “peacetime vs. wartime,” but “wartime vs. totally unrestrained brutality.”

Acknowledging this reality necessitates a reconsideration of how armed conflict recognition has evolved in recent years, and whether this evolution is inconsistent with the type of pragmatic trigger for application of the LOAC’s regulatory framework that is essential for balancing military reality and humanitarian protections. If this evolution provides the legal space for the type of paralysis that marked the initial international legal reaction to the violent government response to Syrian opposition, it is ultimately inconsistent with the primary objective of Common Article 3 and the broader corpus of today’s law applicable to non-international armed conflicts: aligning the reality of armed hostilities with humanitarian protections developed to apply in such situations. As we explain, Syria therefore reinforces exactly why this is so and why the strict elements test increasingly relied on for recognition of armed conflict detracts from the law’s applicability precisely when it is most needed.

In Part I, this Article analyzes the LOAC’s object and purpose with respect to non-international armed conflicts and highlights the goals of the drafters of the Geneva Conventions in establishing a pragmatic triggering mechanism for the application of the law. In particular, this Part demonstrates why a broad conception of non-international conflict is essential to contain the brutality historically endemic during these conflicts and why the nature of the government response to an internal challenge has always been and must remain a

25. Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUM. LEGAL STUD. 52, 74–75 (2010) (highlighting that “the legitimate application of deadly force as a measure of first resort against operational opponents during armed conflict [is] a distinction reflected in the regulatory norms of the LOAC”).

26. See *id.* at 76 (“Thus, the state actor is only permitted to employ deadly force when no lesser means will effectively reduce a direct and specific threat, producing a use of deadly force as a last resort requirement.”).

key indicator of the existence of armed conflict. This analysis highlights and helps recall what the framers of Common Article 3 contemplated when they created this extraordinarily important treaty provision.

Part II traces the evolution of non-international armed conflict “recognition,” specifically focusing on the ICTY Appeals Chamber opinion in *Prosecutor v. Tadić* and how that opinion evolved into an elements test as the result of subsequent ICTY and other jurisprudence and scholarly interpretation. The rigidity of what is today known as the elements test fails to effectuate the underlying objective of conflict identification, especially in the internal hostilities context. The story of conflict recognition—or lack thereof—in Syria provides a compelling example of the consequences of this rigidity.

Finally, Part III demonstrates how a totality of the circumstances approach better serves core LOAC objectives of humanitarian protection. Rather than inflexible independent requirements, the *Tadić* factors should serve as a conceptual guidepost for a totality approach to assessing the existence of non-international armed conflict and how to distinguish such conflicts from lower level types of internal violence insufficient to trigger the LOAC, such as civil disobedience, riots, and other types of internal disturbances. In support of this argument, an analogy to U.S. constitutional criminal jurisprudence offers an intriguing insight into the very different outcomes of these two approaches to conflict identification.

This Article proceeds on the belief that the LOAC’s object and purpose provide the essential foundation for properly understanding the intensity and organization factors, how they relate to each other and combine to indicate existence of armed conflict, and for recognizing how other factors, such as the government’s response, affect the analytical impact of these factors. Together, these layers of analysis demonstrate the need for a conceptual—rather than technical—framework guided by the object and purpose of the law. The current discourse on Syria highlights the dangers of allowing an overly technical test to override—and undermine—logic, with an obviously deleterious impact on human life. A more flexible totality of the circumstances approach to conflict identification—one that relies heavily on the *Tadić* factors but utilizes them to guide a much more pragmatic factual assessment—will contribute to fulfilling the humanitarian goals so central to the original inclusion of Common Article 3 in the 1949 Conventions.

I. WHY THE LAW OF ARMED CONFLICT (LOAC) REGULATES NON-INTERNATIONAL ARMED CONFLICTS

In the aftermath of World War II, the international community aimed to enhance humanitarian protections for war victims by revising the Geneva Conventions.²⁷ Three Geneva Conventions that had been in force during the war were updated, and one entirely new Convention was created.²⁸ The states that came together for this important revision process shared a collective motivation: to close the numerous gaps and loopholes exposed during the cataclysmic events of World War II in order to better achieve the humanitarian objectives of international law.²⁹ These efforts culminated in the four 1949 Geneva Conventions, each of which addressed the plight of a distinct category of war victims (the wounded and sick in the field; the wounded, sick, and shipwrecked at sea; prisoners of war; and civilians).³⁰ These four treaties have since earned the distinct status of universal ratification and unquestionably form the very foundation of international humanitarian law.³¹

Of the many lessons learned in the “battle laboratory” of twentieth century conflicts culminating with World War II—lessons that inspired the revisions to the Conventions—two were especially significant. First, human suffering associated with armed hostilities, or *de facto* war, is not limited to conflicts between states, but is often even more pervasive during civil war and other intrastate hostilities.³² Second, without a clear and pragmatic trigger for application of treaty provisions developed to provide humanitarian protection to war victims, even the most comprehensive treaty regime is functionally meaningless.³³

Each of these lessons reflected the delta between *de facto* war and *de jure* war. While it may seem axiomatic that international legal

27. See, e.g., Convention Relative to the Treatment of Prisoners of War, 47 Stat. 2021 (July 27, 1929); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (July 6, 1906), available at <http://www.icrc.org/ihl.nsf/FULL/180?OpenDocument>; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Aug. 22, 1864), available at <http://www.icrc.org/ihl.nsf/full/120?opendocument>.

28. See GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 33–65 (2012); 4 ICRC, *supra* note 9, at 1 (noting that the Fourth Geneva Convention “is a new one, . . . provid[ing] civilians at long last with the safeguards so cruelly lacking in the past”).

29. See generally 4 ICRC, *supra* note 9, at 3–6 (highlighting the challenges the ICRC faced in protecting civilians during World War II).

30. See GC I, *supra* note 21; GC II, *supra* note 21; GC III, *supra* note 10; GC IV, *supra* note 21.

31. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES*, at xv (2005).

32. 4 ICRC, *supra* note 9, at 27.

33. See 3 ICRC, *supra* note 7, at 19–20 (explaining how the drafters of the Geneva Conventions sought to minimize law avoidance).

regulation of war is applicable to any situation that manifests the obvious indicia of war—armed hostilities between belligerent groups seeking to impose their will on each other—in reality, no such pragmatic synchronization existed prior to 1949.³⁴ Civil wars were not considered wars in the international legal sense because of the absence of an interstate contest.³⁵ Accordingly, the law developed to regulate war was inapplicable to these intrastate, or internal, hostilities. This was in large measure a consequence of the dormancy of the historically effective concept of belligerency, a concept that extended international legal regulation to belligerent parties in civil war.³⁶ In those situations, belligerent recognition of a dissident group resulted in the imposition of international rights and obligations as if the entity were a state.³⁷ However, the recognition of belligerent status fell victim to an increasingly bipolar world, resulting in the politicization of what had previously been a predominantly *de facto* doctrine.³⁸ Failing to acknowledge belligerent status resulted in a troubling lacuna in international legal regulation of large-scale internal conflicts, such as the one in Spain that claimed upwards of 500,000 lives.³⁹ Conflicts such as the Spanish Civil War unquestionably satisfied any pragmatic definition of war—widespread and intense hostilities between belligerent groups. However, the political hobbling of the doctrine of belligerency coupled with the absence of an internationally defined and binding standard for determining compulsory applicability of the law of war (a term that is today synonymous with humanitarian law or the LOAC) left this category of hostilities immune from international legal regulation.⁴⁰

34. See 4 ICRC, *supra* note 9, at 27 (noting the resistance of states to recognizing internal violence as armed conflict subject to international regulation).

35. OPPENHEIM'S INTERNATIONAL LAW §§ 74–75 (Hersch Lauterpacht ed., 7th ed. 1952) (arguing that the “Law of Nations” mandates that only “full sovereign States alone possess the legal qualifications to become belligerents” and that “half and part sovereign States are not legally qualified to become belligerents”).

36. See, e.g., Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 109–41 (2000).

37. *Id.* at 109.

38. *Id.* at 115–16.

39. See HUGH THOMAS, *THE SPANISH CIVIL WAR* (1961).

40. See Lootsteen, *supra* note 36, at 115–17, 123 (analyzing the impact of the Spanish Civil War on the development of Common Article 3). See generally ANTONY BEEVOR, *THE SPANISH CIVIL WAR* (1982). During this period, brutal internal conflicts in other states, such as Russia and China, challenged this customary expectation that professional armed forces engaged in armed conflict would conduct themselves in accordance with principles of disciplined warfare. The estimated numbers of people killed in civil wars during the interwar years are 8,800,000 in the Russian Civil War (1918–1921), 2,500,000 in the Chinese Civil War (1945–1949), and 365,000 in the Spanish Civil War (1936–1939). Matthew White, *30 Worst Atrocities of the 20th Century*, HIST. ATLAS TWENTIETH CENTURY, <http://users.erols.com/mwhite28/atrox.htm> (last updated Dec. 2004).

In response, the drafters of the Geneva Conventions included in each of the four treaties articles dictating situations of treaty applicability.⁴¹ The undisputed purpose was to create a *de facto* standard for determining the applicability of Geneva law, a standard that would more effectively protect victims of war by preventing definitional law avoidance and hopefully nullify the corrosive effect of political agendas in assessing law applicability. As a result, the focal point for determining applicability would no longer be war—a term susceptible to interpretive avoidance—but instead armed conflict.⁴² Accordingly, Article 2 common to the four treaties (Common Article 2) required application of the full corpus of the treaties to any international (interstate) armed conflict.⁴³ And, in response to the humanitarian risk associated with armed hostilities in the purely intrastate context, all four treaties also included an article imposing limited international humanitarian obligations on parties engaged in non-international armed conflicts: Common Article 3.⁴⁴ While the

41. See, e.g., GC I, *supra* note 21, art. 2; GC III, *supra* note 10, art. 2.

42. 4 ICRC, *supra* note 9, at 20; see also Laurie R. Blank & Benjamin R. Farley, *Characterizing U.S. Operations in Pakistan: Is the United States Engaged in an Armed Conflict?*, 34 FORD. INT'L L.J. 151, 160 (2011) ("Notably, the Geneva Conventions adopted the term 'armed conflict' specifically to avoid the technical legal and political pitfalls of the term 'war.'"); Sylvain Vité, *Typology of Armed Conflicts in International Law: Legal Concepts and Actual Situations*, 91 INT'L REV. RED CROSS 69, 70 (2009) ("Whereas a narrow formalistic concept of war was predominant initially, the reform of the system with the revision of the Geneva Conventions in 1949 gave precedence to a broader approach, based on the more objective concept of armed conflict.").

43. See GC II, *supra* note 21, art. 2 ("[T]he present Convention shall apply to all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties . . ."); see also Vité, *supra* note 42, at 70–71.

44. Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

textual effect of each of these treaty provisions only related to the Conventions themselves, they evolved over time to represent the definitive standard for assessing LOAC applicability to these two categories of armed conflict (and indeed ushered in the concept of non-international armed conflict as a distinct type of conflict).⁴⁵

This did not, however, eliminate all uncertainty from law applicability analysis. Instead, the focal point of that uncertainty shifted from the meaning of the term war to the meaning of the term armed conflict.⁴⁶ Determining that meaning was never particularly complicated in the context of interstate hostilities, or international armed conflicts. Relying principally on the International Committee of the Red Cross (ICRC) Commentary to Common Article 2, any hostilities between the regular armed forces of two or more states resulting from an interstate dispute qualified as an international armed conflict, triggering the full corpus of the Conventions and, by implication, the LOAC writ large.⁴⁷ The non-international context, however, proved far more complex.

Extending international humanitarian regulation to situations of internal hostilities certainly seemed justified by the brutality that defined those struggles. However, it also represented an intrusion into an area until then considered to be the exclusive domestic sovereignty of the state. Precisely when this intrusion becomes justified may be obvious at the extreme—e.g., the types of civil war like the one in Spain, involving widespread and large-scale “force on force” battles between two traditional armies. But as the nature of the internal violence moves down the scale of intensity and involves opposition forces lacking the type of traditional military organization typical of the classic civil war, the line between armed conflict and civil disturbance becomes uncertain. Because internal civil disturbances below the threshold of armed conflict were viewed as

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

GC III, *supra* note 10, art. 3

45. See INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S SCH., LAW OF WAR WORKSHOP DESKBOOK 25–34 (Brian J. Bill ed., 2000); see also Vité, *supra* note 42, at 70–94 (analyzing the range of types of armed conflicts).

46. 4 ICRC, *supra* note 9, at 20; Geoffrey S. Corn, Hamdan, *Lebanon and the Regulation of Armed Hostilities: The Need To Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 304 (2007) (noting that “uncertainty has developed regarding the application of [the non-international armed conflict] prong of the legal trigger” for armed conflict).

47. 4 ICRC, *supra* note 9, at 20 (“Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war.”). Uncertainty can persist even in the context of international armed conflict, however. See Geoffrey S. Corn & Sharon G. Finnegan, *America's Longest Held Prisoner of War: Lessons Learned from the Capture, Prosecution, and Extradition of General Manuel Noriega*, 71 LA. L. REV. 1111, 1114–20 (2011).

matters of domestic sovereignty,⁴⁸ identifying this demarcation point was in 1949, and remains today, a key source of uncertainty—a reality painfully illustrated by the recent brutal events in Syria.⁴⁹

A. Containing Brutality

It is, of course, self-evident that one way to contain or limit the brutality of warfare is to prevent warfare itself. Efforts to achieve this important humanitarian goal have and must continue to be a central focus of much of international law and diplomacy, irrespective of the “character” of the potential conflict.⁵⁰ However, over time the branch of the law intended to mitigate the risks associated with the inevitable failure of these efforts—the *jus in bello* or the LOAC—has also become an important source of law that contributes to this purpose. At its most basic conception, applying a strict and oftentimes difficult legal equation to determine the existence of armed conflict enables international disavowal of the denial of humanitarian protections in those situations even when the pragmatic metrics “on the ground” indicate otherwise.⁵¹ The motivation for this approach is almost certainly a desire to limit the consequences of armed hostilities by preventing states or nonstate groups from legitimately

48. See 4 ICRC, *supra* note 9, at 27 (“In a civil war the lawful Government, or that which so styles itself, tends to regard its adversaries as common criminals.”).

49. *Id.* at 30–37.

50. League of Nations Covenant art. 12 (“[T]hey agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision . . .”); U.N. Charter pmb., art. 2, para 4; Treaty Providing for the Renunciation of War as an Instrument of National Policy art. 1, Aug. 27, 1928, 46 Stat. 2343, 94 L.T.N.S. 57.

51. Interestingly, this theory runs directly counter to the drafters’ fundamental goal of eliminating “law avoidance” with regard to interstate hostilities. The ICRC’s Commentary to the Convention explains:

By its general character, [the first] paragraph deprives belligerents, in advance, of the pretexts they might in theory put forward for evading their obligations. There is no need for a formal declaration of war, or for recognition of the existence of a state of war, as preliminaries to the application of the Convention. The occurrence of *de facto* hostilities is sufficient.

It remains to ascertain what is meant by “armed conflict”. The substitution of this much more general expression for the word “war” was deliberate. It is possible to argue almost endlessly about the legal definition of “war”. A State which uses arms to commit a hostile act against another State can always maintain that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression “armed conflict” makes such arguments less easy.

4 ICRC, *supra* note 9, at 20. See also Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 85 (2005) (“[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”).

claiming the broad powers associated with armed conflict.⁵² As laudable as this may be, it is both inconsistent with the underlying rationale of the Geneva Convention conflict recognition framework and produces a negative operational and humanitarian impact.⁵³

Nothing in the Commentary to Common Article 3 suggested that a primary or even secondary function of this landmark development was to limit resort to armed hostilities.⁵⁴ Instead, the Commentary confirms that the drafters intended the article to be a highly pragmatic humanitarian remedy to the reality that armed conflicts, especially in the intrastate context, would manifest themselves in diverse and often unpredictable permutations, more amenable to a totality of the circumstances assessment than a technical legal assessment.⁵⁵ The goal was clear: maximize applicability of international humanitarian protection for victims of these historically brutal conflicts.⁵⁶

The current discourse, which considers the applicability of the LOAC solely as a distinguishing line from the peacetime regime of

52. See INT'L LAW ASS'N [ILA], THE HAGUE CONFERENCE: FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2–4, 25–26 (2010) (arguing that while the United States has engaged in armed conflicts within Iraq and Afghanistan, it has not engaged in a larger, global armed conflict with terrorist forces); see also Mary Ellen O'Connell, *Defining Armed Conflict*, 13 J. CONFLICT & SECURITY L. 393, 394–95 (2009).

53. See *infra* notes 212–213 and accompanying text.

54. Indeed, by 1949, the strict separation between the *jus ad bellum*—the law governing the resort to force and the central paradigm for efforts to outlaw war—and the *jus in bello* was firmly entrenched and an important aspect of the equal application of the LOAC during armed conflict. As the U.S. Military Tribunal V stated in the *Hostage Case*:

Whatever may be the cause of a war that has broken out, and whether or no[t] the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other . . .

The Hostage Case, in 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: “THE HIGH COMMAND CASE”/“THE HOSTAGE CASE” 759, 1247 (1950) (quoting 2 LASSA OPPENHEIM & ARTHUR WATTS, INTERNATIONAL LAW 174 (1920)) (internal quotation marks omitted).

55. See 4 ICRC, *supra* note 9, at 35–36 (noting that the drafters of the Conventions abandoned the idea of listing specific conditions for recognizing the existence of non-international armed conflict and that “the scope of application of the article must be as wide as possible”).

56. See *id.* at 34 (explaining that Common Article 3 was designed to be simple and clear, making application automatic without the need to consider the complexities of different types of conflicts); LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 32 (2002) (explaining how a restrictive definition of armed conflict can lead to a restrictive reading of Common Article 3); see also Rogier Bartels, *Timelines, Borders and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts*, 91 INT'L REV. RED CROSS 35, 38 n.9 (2009) (describing how Professor Erik Castren, an attendee at the Diplomatic Conference of 1949, characterized the lack of a definition of armed conflict not of an international character as a deliberate choice to prevent a limited reading of Common Article 3).

human rights law and domestic law enforcement mechanisms, simply fails to account for the LOAC's historic purpose of mitigating the humanitarian suffering inherent in warfare, especially internal warfare. As far back as the Old Testament, leaders and societies imposed some limitation on the conduct of hostilities; these early regulations were directed at reducing the violence visited on certain groups, such as women and children, or prisoners.⁵⁷ The founding of the ICRC itself was a response to the horrors of war and an effort to introduce a measure of humanity into the brutality of combat and to mitigate wartime suffering.⁵⁸ Throughout this long stretch of history, international human rights law did not exist, of course. The LOAC thus functioned as the primary—in fact, the exclusive—restraint on the imposition of violence as a tool of policy.

Today, sixty-plus years after the modern human rights movement began with the Universal Declaration of Human Rights, this historic and central purpose of the LOAC has faded from the discourse, overtaken by concerns about identifying the demarcation line between the peacetime regime of law enforcement regulation pursuant to human rights norms and the regulation of hostilities pursuant to the LOAC.⁵⁹ Unfortunately, however, Syria demonstrates all too tragically that the potential for unmitigated cruelty and brutality has not faded commensurately. The result is a failure to use the tool of LOAC for one of its key purposes. Thus, the international community must not forget that just as LOAC's applicability threshold identifies the dividing line between peacetime law and wartime law, so the application of LOAC equally represents the even more fundamental demarcation between law and no law at all, between a measure of humanity and wholly unmitigated brutality. Ignoring this reality has too high a price in human suffering.

Furthermore, this reluctance to identify armed conflict in the context of a situation in which peacetime paradigms are insufficient produces a gap in legal protection and obligation: in essence, an invitation to unrestricted warfare. The LOAC is historically adamant in its rejection of gaps in the law, for the basic reason that gaps inherently undermine LOAC's central goals of protecting civilians during hostilities and minimizing the suffering inherent in war.⁶⁰

57. See, e.g., HOWARD LEVIE, *TERRORISM AND WAR: THE LAW OF WAR CRIMES* 9 (1993) (citing *Numbers* 31:7–12; *Deuteronomy* 3:6–7, 20:14–17; 1 *Samuel* 15:3) (noting that the *Old Testament* contains “numerous admonitions for, and records of, the slaughter of the captured men, the transplanting of the women and children, the plunder of beasts and other property, the looting and wanton destruction of cities, etc.”); Noone, *supra* note 20.

58. See Hans Haug, *Afterword* to HENRY DUNANT, *A MEMORY OF SOLFERINO* 30, 131–33 (Int'l Comm. of the Red Cross 1986) (1862).

59. Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004).

60. LOAC's concern with comprehensive application can be found in numerous areas, such as the foundational principle of equal application of the law, see Adam

Allowing a situation that produces a consequential gap in legal protection and regulation simply runs counter to LOAC's very object and purpose. Equally problematic is the loss of a fairly well-established regime of international criminal accountability for violations of these core norms of armed conflict.⁶¹ While it is not inconceivable that widespread human rights violations may result in international criminal responsibility,⁶² it remains a reality that the accountability structure associated with violations of international humanitarian law is much more predictable—a factor that must inevitably impact deterrence in those situations.

It may be true that the international community should be reluctant to acknowledge situations of armed conflict if and when that reluctance serves as a deterrent to a heavy-handed government response to internal oppositions threats. Unfortunately, there seems to be little evidence indicating such an impact. Instead, state forces exploit the legal uncertainty of these situations in their attempts to deal decisive blows to emerging threats.⁶³ Common Article 3's

Roberts, *The Equal Application of the Laws of War: A Principle Under Pressure*, 90 INT'L REV. RED CROSS 931 (2008), or in the insistence that all persons merit some protection under the law, regardless of the nature of their status or position. The ICRC Commentary thus notes:

In short, all the particular cases we have just been considering confirm a general principle which is embodied in all four Geneva Conventions of 1949. Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that that is a satisfactory solution—not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.

4 ICRC, *supra* note 9, at 51.

61. Rome Statute of the International Criminal Court, art. 25, U.N. Doc A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute] (imposing individual criminal liability for war crimes in internal armed conflicts); Lindsay Moir, *Grave Breaches and Internal Armed Conflicts*, 7 J. INT'L CRIM. JUST. 763, 765–66 (2009) (discussing International Criminal Tribunal for Rwanda and ICTY cases that impose individual criminal liability for actions taken during internal armed conflicts).

62. Prosecutor v. Muthaura, Case No. ICC-01/09-02/11, Decision on the Prosecutor's Application for Summonses To Appear, ¶¶ 56–57 (Mar. 8, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1037052.pdf> (issuing summonses to the accused due to their reasonable likelihood of committing crimes against humanity); Rep. of Int'l Comm. of Inquiry Mandated To Establish the Facts and Circumstances of the Events of 28 September 2009 in Guinea, transmitted by letter dated Dec. 18, 2009 from the U.N. Secretary-General to the President of the Security Council, ¶ 266, U.N. Doc. S/2009/693 (Dec. 18, 2009) (recommending that due to the deficiencies of the Guinean justice system, situations involving crimes against humanity should be referred to the International Criminal Court).

63. See JIM NICHOL, CONG. RESEARCH SERV., RL34613, STABILITY IN RUSSIA'S CHECHNYA AND OTHER REGIONS OF THE NORTH CAUCASUS: RECENT DEVELOPMENTS 1 (2010) (describing Russia's use of military sweep operations in targeting Chechen resistance).

drafters seemed to recognize this risk, leaving the definition of armed conflict to the pragmatic metrics of each situation.⁶⁴ Unless and until it is established that linking conflict regulation to the strict elements approach currently in vogue actually inhibits resort to combat power by governments responding to internal threats, the underlying totality approach reflected in the Commentary should prevail. The goal must be constant: synchronize the applicability of conflict regulation with the reality of armed conflict and actively avoid any law-based disavowal of those realities.

B. *What Role for the Government's Response?*

This reminder of the LOAC's core purpose highlights the need to allocate substantial weight to the nature of the state response to emerging internal opposition threats when assessing LOAC applicability. As Syria demonstrates, failing to account for a state's wholly unrestrained use of force as the method of repressing internal opposition creates a genuine risk of legal uncertainty and humanitarian catastrophe, precisely when such certainty is most needed. The Geneva Conventions' trigger for LOAC application rests on an objective and pragmatic framework, seeking to divorce applicability from the rhetoric of states.⁶⁵ Just as Common Article 2's paradigm for international armed conflict eliminates the opportunity for states to engage in law avoidance by creating an objective trigger untethered to declarations of war or other public pronouncements, so Common Article 3 also introduced the same objective approach to internal armed conflict.⁶⁶ Internal violence is fundamentally a threat to the government's authority; therefore, analyzing how the government responds to that violence must be a major component of any objective determination.⁶⁷ At the same time, the nature of the government's actions cannot be the determinative or exclusive component, for the very reason that the Conventions substituted the term armed conflict for war: any trigger for the law that rests solely on governmental rhetoric or action will lose that essential objectivity.⁶⁸ To better understand how and when to incorporate the nature of the government's response into the conflict recognition

64. See 4 ICRC, *supra* note 9, at 35–36 (“The idea [of listing certain conditions for the application of Common Article 3] was finally abandoned—wisely, we think.”).

65. See *id.* at 20 (noting that “[i]t is possible to argue almost endlessly about the legal definition of ‘war,’” but “the expression ‘armed conflict’ makes such arguments less easy”).

66. See, e.g., Anthony Cullen, *supra* note 51 (“[I]t is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion.”).

67. See 4 ICRC, *supra* note 9, at 35 (listing one relevant criterion as “[t]hat the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory”).

68. See *id.* at 20 (noting that the Convention would apply even in the absence of a formal declaration of war in the presence of “de facto hostilities”).

analysis, it is important to examine how this consideration was viewed at the time Common Article 3 was drafted.

The ICRC Commentaries to the Conventions offered what has always been understood as a series of important factors to guide non-international armed conflict identification—the critical distinction between civil disturbance below the threshold of armed conflict and the type of internal violence that crosses that threshold and triggers humanitarian regulation.⁶⁹ The Commentary to Common Article 3 emphasized that no factor or combination of factors should be considered dispositive. Instead, it seems apparent that a totality of the circumstances analytical approach was proposed, requiring a true case-by-case analysis of each individual situation.⁷⁰ Perhaps more importantly, this assessment was to be guided by the very motivational purpose of establishing international humanitarian regulation for non-international armed conflicts: maximizing application of Common Article 3.⁷¹ Why, the Commentary queried, would anyone object to its application? “What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?”⁷² Even in the “close call” situation, the result of recognizing the existence of an armed conflict merely required the humane treatment of individuals who no longer posed a threat to the state—an obligation equally applicable in peacetime.⁷³

What the Commentary failed to recognize when it posed this question, however, was that crossing the threshold from peacetime civil disturbance to internal armed conflict triggers not only the humanitarian protections of Common Article 3, but also a range of robust state powers justified only in the context of an armed conflict, most significantly the power to kill as a first resort based on status presumptions.⁷⁴ Perhaps this was implicitly recognized by the

69. See, e.g., *id.* at 35–36.

70. See *id.* (noting that the conference “wisely” abandoned developing a list of conditions to define the term conflict).

71. See *id.* (emphasizing that scope of application “must be as wide as possible”).

72. *Id.* at 36. Tragically, reports from Syria demonstrate precisely this conduct. See, e.g., *Pro-Assad Forces Reportedly Kill over 220 in Assault on Syrian Village*, HAARETZ (July 13, 2012), <http://www.haaretz.com/news/middle-east/pro-assad-forces-reportedly-kill-over-220-in-assault-on-syrian-village-1.450789> (Isr.) (describing wounded and bodies in fields, houses, and rivers after a government attack on the town of Taramseh).

73. 4 ICRC, *supra* note 9, at 36 (“[N]o Government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.”).

74. Corn, *supra* note 25, at 93 (noting that unlike human rights law, the LOAC authorizes the use of deadly force as a first resort based on the presumption that belligerent operatives are offensive based on their membership in the enemy forces);

Commentary's emphasis on the significance of state resort to regular armed forces as a factor indicating the existence of armed conflict. If it is assumed that the use of the armed forces will involve the employment of combat power normally associated with war, then it does indeed suggest the existence of armed conflict, for the simple reason that the armed forces called upon to respond to the internal opposition threat would implicitly invoke LOAC authority in the execution of their operations.⁷⁵

This is not, however, a universally valid assumption. States routinely utilize regular armed forces to augment law enforcement efforts, and many states maintain permanent national military police, or gendarmerie.⁷⁶ Thus, the answer to the Commentary question is clear: objection to an expansive application of Common Article 3 does not necessarily reflect opposition to imposing an international legal obligation on the state to ensure the humane treatment of inoffensive individuals; it reflects opposition to the premature and unjustified use of LOAC powers by a state to address an internal crisis.⁷⁷ This is certainly a legitimate concern. However, what does not seem to have been adequately considered in contemporary conflict recognition discourse is whether a strict legal test for the existence of armed conflict—a test substantially more demanding than the totality approach proposed by the Commentary to Common Article 3—achieves this objective.

Perhaps if it could be established that states are increasingly hesitant to unleash the full force and effect of their military capabilities to respond to nascent internal opposition threats because they do not believe the elements of armed conflict are satisfied, this shift from a totality to a more juridical approach would have merit. This, however, is a highly dubious proposition. Instead, limiting recognition of armed conflict through a strict elements test may produce the exact opposite effect of exposing victims of hostilities to increased brutality as the result of the legal regulatory uncertainty—

ILA, *supra* note 52, at 4 (noting that certain rights, including the right to kill enemy combatants as a measure of first resort, are only available in armed conflict).

75. See Geoffrey S. Corn & Eric T. Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 *TEMPLE L. REV.* 787, 819 (2008) (concluding that because the Commentary noted that the deployment of armed forces is a factor in determining whether Article 3 applies, the nature of government response is a significant indicator of the existence of armed conflict).

76. Gendarmeries are paramilitary law enforcement units that retain a mix of military and police functions. Notable examples include the Italian *Carabinieri*, the Turkish *Jandarma*, and the French *Gendarmerie Nationale*. While these states organize these forces differently, the melding of traditional police work with the attributes and duties of military forces is the common thread.

77. See ILA, *supra* note 52, at 33 (discussing the chances of human rights violations when states assert belligerent powers outside the context of an armed conflict).

if not paralysis—generated by this approach. In these situations, it should come as no surprise that a government determined to extinguish a nascent opposition would seek to exploit this regulatory uncertainty to maximum advantage. Nothing could be more inconsistent with the original motivation for Common Article 3.

II. THE EVOLUTION OF NON-INTERNATIONAL ARMED CONFLICT RECOGNITION

As noted above, there is no dispute that Common Article 3 was included in the 1949 Geneva Conventions for the specific purpose of mitigating the humanitarian suffering associated with brutal internal armed struggles. Indeed, the original proposal by the ICRC went much further, suggesting that no distinction should be made between types of armed conflicts, for the simple reason that human suffering was simply not contingent on whether an armed conflict was international or internal.⁷⁸ Although ultimately rejected by the states party to the treaties, this original proposal remains a powerful reminder of the underlying goal of the compromise that evolved into Common Article 3: to prevent the type of humanitarian suffering international law had been incapable of addressing prior to 1949.

Naturally, a key question associated with the new article was determining exactly when internal disturbances crossed the triggering threshold from a domestic criminal law problem to an international humanitarian law problem, precisely because states remain reluctant to countenance international intrusions into what they view as domestic matters.⁷⁹ Although Common Article 3's black letter text does not provide further clarification as to when a given situation constitutes an armed conflict so as to trigger LOAC, its objective was abundantly clear: to implement the post-World War II focus on the need to extend LOAC applicability to internal conflicts.⁸⁰

78. The ICRC Commentary explains that the ICRC originally submitted a draft of Article 2 including the following paragraph:

In all cases of armed conflict which are not of an international character, especially in cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no wise [sic] depend on the legal status of the Parties to the conflict and shall have no effect on that status.

3 ICRC, *supra* note 7, at 31.

79. See 4 ICRC, *supra* note 9, at 35–36 (“What is meant by ‘armed conflict not of an international character’? That was the burning question . . .”).

80. Michael W. Lewis, *International Myopia: Hamdan's Shortcut to "Victory,"* 42 U. RICH. L. REV. 687, 698–99 (2008).

Common Article 3's text emphasizes the provision's goal of ensuring minimum humanitarian protections in all situations of armed conflict, but offers little guidance with regard to what constitutes an armed conflict.⁸¹ The applicability threshold was, however, a major focus of the associated Commentary. According to the Commentary, it was both impossible and ill-advised to attempt to identify a specific test for determining the applicability of Common Article 3; rather, the Commentary proposed what is best understood as a totality of the circumstances analysis intended to effectuate the underlying humanitarian objectives of the new article: to interpret Common Article 3 as broadly as possible.⁸²

The Commentary offers critical insight into the intent of the drafters in the form of indicative—but not dispositive—factors or characteristics of a Common Article 3 conflict, based on the nature and behavior of both state and nonstate parties. For example, the response of the state is a critical component,⁸³ in particular whether it employs its regular armed forces in combating the nonstate actor and whether it has recognized the nonstate actor as a belligerent.⁸⁴ As noted above, ignoring the nature of the government's response in pursuit of conflict recognition is a serious shortcoming and fails to take into account the practicalities of the situation. In addition, several considerations can provide useful guidance for understanding whether violence or hostilities have progressed beyond internal disturbances, such as whether the nonstate actor (1) has an organized military force; (2) has an authority responsible for its acts; (3) acts within a determinate territory, having the means of ensuring respect for the Geneva Conventions; and (4) acts as a *de facto* governing entity, and its armed forces are prepared to obey the laws of war.⁸⁵

81. The first sentence of Common Article 3 simply states: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . ." GC III, *supra* note 10.

82. 4 ICRC, *supra* note 9, at 36 ("Does this mean Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of [the suggested criteria]? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible.").

83. Geoffrey S. Corn, *What Law Applies to the War on Terror?*, in *THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE* 1, 17 (Michael Lewis et al. eds., 2009); see also *Abella v. Argentina*, Judgment, Inter-Am. Ct. H.R., No. 55/97, ¶ 155 (Nov. 18, 1997), available at <http://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm> (noting that one consideration in finding the existence of an armed conflict was that the President "ordered that military action be taken to recapture the base and subdue the attackers").

84. 4 ICRC, *supra* note 9, at 35–36.

85. *Id.* None of these factors is dispositive; rather, these and other factors may be used to distinguish acts of banditry, short-lived insurrection, or terrorist acts from armed conflict. See, e.g., *Prosecutor v. Lukić*, Case No. IT-98-32/1-T, Judgment, ¶¶ 879–888 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009) (applying different and overlapping factors to determine whether an armed conflict existed); *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49 (Int'l Crim. Trib. for the

These factors or considerations are just that: factors and considerations. The Commentary explains that the idea of defining the term conflict was abandoned after some debate, as was the inclusion of a list of “a certain number of conditions on which the application of the Convention would depend.”⁸⁶ Rather, as explained above, the drafters intended Common Article 3 to have as broad a scope as possible.⁸⁷ Nor can it be ignored that the drafters of both Common Article 3 and the Commentary were, by necessity, basing their catalogue of factors on their collective experiences, indicating that as the nature of conflict evolves, so must the relevance of other potential conflict identification indicators.

In 1992, the importance of Common Article 3’s objective—to mitigate the brutality of internal wars and mandate a minimum level of humane treatment—was elevated to unprecedented international attention when the break-up of the former Yugoslavia rapidly devolved into widespread armed violence. A new front in the regulation of intrastate hostilities emerged: the extension of international criminal responsibility for violations of the laws and customs of war to situations of internal armed conflict.⁸⁸ This important development necessitated, however, identification of the armed conflict demarcation point not as a matter of policy or theory, but as a jurisdictional predicate to the imposition of this criminal responsibility.⁸⁹ The conflict in the former Yugoslavia, and the international decision to impose criminal responsibility on the participants of that conflict, generated the first, and by any measure, seminal, international judicial opinion analyzing the existence of an internal armed conflict: *Prosecutor v. Tadić*.⁹⁰ The methodology utilized by the ICTY to assess the situation in Bosnia evolved into what is often characterized as the elements test, an approach to conflict analysis that is potentially undermining the objectives that originally motivated the adoption of Common Article 3.

A. *Tadić and Its Framework*

In *Tadić*, the first case heard by the ICTY, the Tribunal immediately faced the question of whether the situation in the former

Former Yugoslavia Apr. 3, 2008); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Vité, *supra* note 42, at 76–77.

86. 4 ICRC, *supra* note 9, at 35.

87. *Id.* at 36.

88. *Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 94–128.

89. *Id.* ¶ 66.

90. *Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction.

Yugoslavia was an armed conflict.⁹¹ In particular, charges brought under Article 2 (grave breaches of the Geneva Conventions) and Article 3 (violations of the laws and customs of war) of the Statute of the ICTY applied only to situations of armed conflict,⁹² rendering this determination a jurisdictional predicate to any criminal responsibility for the alleged violation of these provisions. In a decision on interlocutory appeal, the Appeals Chamber of the ICTY set forth the modern definition of armed conflict: “[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁹³ In the context of examining the broader purposes and goals of Common Article 3 and understanding its application, it is important to note that the Appeals Chamber emphasized that the notion of armed conflict has a broad geographical and temporal scope.⁹⁴ This broad scope is directly related to the protective purposes of the Geneva Conventions; the ICTY specified that “the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations” and that “the temporal scope of the applicable rules clearly reaches beyond the actual hostilities.”⁹⁵ As such, the ICTY looked to the object and purpose of the LOAC as a guide in understanding the reach and parameters of the law’s application.⁹⁶ This definition has not only been the driving factor in the ICTY’s jurisprudence, but was also adopted by the drafters of the Rome Statute establishing the International Criminal Court (ICC)⁹⁷

91. *Id.* See generally MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* (1997).

92. Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 2 (Sept. 2009), available at <http://www.icty.org/sid/135> (“The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention”); *id.* art. 3 (“The International Tribunal shall have the power to prosecute persons violating the laws or customs of war.”).

93. *Tadić*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70.

94. *Id.* ¶¶ 68–69.

95. *Id.* ¶ 69.

96. *Id.* ¶¶ 67–69; see also Laurie R. Blank & Amos N. Guiora, *Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare*, 1 HARV. NAT’L SECURITY J. 45, 52–53 (2010) (“When unforeseen situations have demanded new answers, LOAC’s basic principles have guided interpretations and helped find solutions to preserve and protect the law’s core values.”).

97. Rome Statute, *supra* note 61, art. 8(2)(f) (defining non-international armed conflicts as conflicts “that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups”).

and by the International Criminal Tribunal for Rwanda (ICTR).⁹⁸ It continues to be the most common and oft-cited contemporary definition of armed conflict.⁹⁹

In its decision on the merits, the *Tadić* Trial Chamber took this definition and the Commentary's broad-stroke guidelines and expounded on the meaning and parameters of non-international armed conflict under Common Article 3. Fleshing out the definition, the ICTY thus laid the foundation for what was to become the two-prong elements test—the ultimate legacy of *Tadić*.¹⁰⁰ According to the Tribunal:

The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.¹⁰¹

Importantly, the Trial Chamber further noted that factors relevant to identifying the threshold between armed conflict and lower level types of violence—e.g., riots, terrorist activities, etc.—are discussed in the Commentary.¹⁰² In a brief analysis, the Trial Chamber then concluded that given the ongoing hostilities and the nature of the parties to the conflict in Bosnia

at all relevant times, an armed conflict was taking place between the parties to the conflict in the Republic of Bosnia and Herzegovina of sufficient scope and intensity for the purposes of the application of the law or customs of war embodied in Article 3 common to the four Geneva Conventions.¹⁰³

The *Tadić* definition quickly became the determinative statement on what constitutes armed conflict. Subsequent cases at the ICTY and the ICTR relied on the definition of armed conflict as protracted violence between the government and organized armed groups or between two or more armed groups as the paradigm for identifying the existence of an armed conflict.¹⁰⁴ In most of these

98. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 619–620 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1998) (citing the *Tadić* criteria for determining the existence of an armed conflict).

99. See ILA, *supra* note 52, at 3 (noting that the *Tadić* decision is “widely cited for its description of the characteristics of armed conflict”).

100. *Id.*

101. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

102. *Id.*

103. *Id.* ¶ 568.

104. See, e.g., *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgment, ¶ 41 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007) (quoting the *Tadić* definition of

cases, the Tribunal examined the nature of the fighting and the relevant parties in some fashion in order to determine if the facts of the situation objectively fit within the definition as set forth in *Tadić*. However, the *Tadić* definition and the reference to intensity and organization as useful considerations were not applied as a test of factors. Rather, the tribunals noted the relevance of intensity and organization and used the two considerations as guides to understanding the evidence presented regarding the situation at hand. Thus, even in many of the cases routinely cited for the proposition that *Tadić* established a two-part test of factors, the terms intensity and organization do not appear as identifiable factors, or—in some cases—even at all.

In *Prosecutor v. Delalić* and *Prosecutor v. Kordić*, for example, decided in the first few years after *Tadić*, neither the Trial Chamber nor the Appeals Chamber set forth intensity and organization as distinct factors that were required to be independently satisfied in assessing the existence of a conflict.¹⁰⁵ Even later, nearly ten years after *Tadić*, the ICTY continued to explore the existence of armed conflict as a predicate for the imposition of criminal responsibility using the foundational *Tadić* definition without the further step of a test of elements or factors. *Prosecutor v. Halilović*, decided in 2005, does not mention the words intensity or organization; the Tribunal assessed the nature of the hostilities and military operations and concluded that an armed conflict existed at the relevant time.¹⁰⁶ One year later, the ICTY took a similar approach in *Prosecutor v. Hadžihasanović*, looking at the escalation and continuation of the hostilities and the efforts to broker a deal between the two different sides to the conflict, again without reference to specific factors of intensity and organization.¹⁰⁷ Finally, in *Prosecutor v. Martić*, decided in 2007, the Trial Chamber again provided the definition of armed conflict without any further breakdown into specific factors or elements to be satisfied.¹⁰⁸ The ICTR generally followed the same approach, helping to establish the *Tadić* definition of armed conflict

armed conflict); *Prosecutor v. Halilović*, Case No. IT-01-48-T, Judgment, ¶¶ 160–173 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005) (considering the facts and determining that an armed conflict existed in the territories of Bosnia and Herzegovina); *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 24 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (applying the *Tadić* definition of armed conflict); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 327 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (applying the “control test” from *Tadić*); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 603 (Sept. 2, 1998) (noting that existence of an armed conflict is determined by objective criteria).

105. *Kordić*, Case No. IT-95-14/2-A, Judgment, ¶¶ 24, 333–341; *Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 182–191.

106. *Halilović*, Case No. IT-01-48-T, Judgment, ¶¶ 160–173.

107. *Prosecutor v. Hadžihasanović*, Case No. IT-01-47-T, Judgment, ¶¶ 20–25 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006).

108. *Martić*, Case No. IT-95-11-T, Judgment, ¶ 41.

as the definitive modern definition for use not only by the ICTY, but also by a variety of national and international courts and tribunals around the world.¹⁰⁹ It is, however, important to note that the conflicts in both the former Yugoslavia and Rwanda overwhelmingly satisfied both elements of intensity and organization, rendering assessment of the relationship between these two factors unnecessary for either tribunal as each analyzed the existence of non-international armed conflict.

B. *The Strict Elements Test Takes Hold*

Over time, however, *Tadić* morphed into a formal test of elements. Challenges to the ICTY's jurisdiction over events in Kosovo appear to have been the primary catalyst for this evolution in how *Tadić* is understood. Starting with *Prosecutor v. Milošević*,¹¹⁰ the ICTY began to alter its presentation of the *Tadić* definition of armed conflict and how it should be applied. Rather than setting forth the definition, looking at the evidence proffered regarding the situation at issue, and reaching a determination as to the existence of a conflict based on an overall understanding of who was fighting, how they were fighting, where they were fighting, for how long, and so on, the Tribunal began to state the definition and then immediately list two factors: intensity and organization.¹¹¹ Analysis then proceeded solely within the construct of this two-part test, with little or no regard for any of the other considerations discussed in the Commentary or elsewhere, such as the nature of the government response or the involvement of the international community.¹¹²

A trio of cases cemented the two factors as a strict elements test for determining the existence of an armed conflict—*Prosecutor v. Limaj*, *Prosecutor v. Haradinaj*, and *Prosecutor v. Boškoski*—the first two addressing events in Kosovo and the latter events in Macedonia.¹¹³ *Limaj*, decided in 2005, provided a new and extensive

109. See, e.g., *Prosecutor v. Rutaganda*, Case No. ICTR-95-1C, Judgment, ¶ 92 (March 14, 2005); *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 620.

110. See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 14–32 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004).

111. For the purposes of this Motion, the relevant portion of the *Tadić* test, which has been consistently applied within the Tribunal, is “protracted armed violence between governmental authorities and organized armed groups”. This calls for an examination of (1) the organisation of the parties to the conflict and (2) the intensity of the conflict.

Id. ¶ 17.

112. *Id.* ¶¶ 17–22.

113. *Prosecutor v. Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 175 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008); *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 37–38 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3,

analysis of intensity and organization as the apparently exclusive determinative factors in applying the *Tadić* definition of armed conflict to the facts at hand. The *Limaj* judgment devotes forty-two paragraphs to the analysis of the requisite organization of the parties and thirty-four paragraphs to the analysis of the intensity of the fighting.¹¹⁴ In so doing, the judgment laid the foundation for a comprehensive elements test—one that would itself ultimately include lists of subfactors and components.¹¹⁵ Three years later, the ICTY left no doubt as to its reliance on this strict elements test. In *Haradinaj*, the Trial Chamber first devoted extensive attention to formulating the test based on past precedent and then, like *Limaj*, engaged in extensive analysis of the facts regarding the fighting solely within the framework of intensity and organization.¹¹⁶

Boškoski involved alleged crimes committed in the northern part of the former Yugoslav republic of Macedonia in 2001.¹¹⁷ Events in Macedonia had not yet come before the ICTY and the charges therefore mandated a fresh examination of whether an armed conflict existed at the time, so as to attach international criminal responsibility for violations of the laws and customs of war. As in the previous two cases, the Trial Chamber began with the *Tadić* definition and expressly stated that the definition had to be applied by examining intensity and organization, to the exclusion of other considerations discussed in the Commentary.¹¹⁸ The judgment explains:

The Trial Chamber in *Tadić* noted that factors relevant to this determination are addressed in the Commentary to Common Article 3 of the Geneva Conventions. These “convenient criteria” were identified by the drafters of Common Article 3 during negotiations of the Geneva Conventions in order to distinguish an armed conflict from lesser forms of violence, although these were rejected from the final text. While these criteria give some useful indications of armed conflict, they remain examples only. The drafters of the Commentary were of the view that Common Article 3 should be applied as widely as possible and could still be applicable in cases where “armed strife breaks out in a country, but does not fulfil any of the above conditions”. The Trial Chamber in *Limaj*, after having reviewed the drafting history of Common Article 3, concluded that “no such explicit requirements for the application of Common Article 3 were intended by the drafters of the Geneva Conventions”. Consistent with this approach, Trial

2008); Prosecutor v. *Limaj*, Case No. IT-03-66-T, Judgment, ¶ 84 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

114. *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 92–169. Regarding the definition or understanding of the term organized armed group, see Peter Margulies, *Networks in Noninternational Armed Conflicts: Crossing Borders and Defining “Organized Armed Group,”* 89 INT'L L. STUD. 54 (2012).

115. *Limaj*, Case No. IT-03-66-T, Judgment (detailing numerous factors and considerations in the assessment of intensity and organization).

116. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶¶ 39–99.

117. *Boškoski*, Case No. IT-04-82-T, Judgment, ¶ 1.

118. *Id.* ¶ 175.

Chambers have assessed the existence of armed conflict by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group or groups involved depending on the facts of each case.¹¹⁹

In effect, the interpretation of the *Tadić* definition of armed conflict had thus fully morphed into a test of two exclusive and *independent* factors: intensity and organization.

Throughout the same process, the understanding of intensity and organization themselves as useful indicators of the existence of armed conflict also changed and transformed into an elements test. In a variety of cases, the ICTY has highlighted key factual information that helps to demonstrate the intensity of fighting, such as the number, duration, and intensity of individual confrontations; the types of weapons and other military equipment used; the number of persons and types of forces engaged in the fighting; the geographic and temporal distribution of clashes; the territory that has been captured and held; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.¹²⁰ Frequency of confrontations and the involvement of the UN Security Council also prove to be indicative of intensity for the purposes of identifying an armed conflict.¹²¹ Similarly, with regard to organization, cases have focused on a range of information about the groups involved in the conflict, such as a hierarchical structure; territorial control and administration; the ability to recruit and train combatants; the ability to launch operations using military tactics; the ability to enter peace or cease-fire agreements; the ability to issue internal regulations; and the ability to coordinate multiple units.¹²²

There is little doubt that all of these various considerations are useful means for assessing the intensity of fighting and the organizational framework of parties to a conflict. However, the regular application of the *Tadić* definition through an elements test has further influenced the presentation and analysis of intensity and organization into factor tests of their own, only serving to solidify the formalized nature of the inquiry. A look at how the examination of organization as a key element of the armed conflict test has changed offers a useful example of the overall dynamic. Early cases focused on

119. *Id.* ¶ 176 (footnotes omitted).

120. *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49; *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 135–143; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 564–565 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

121. *See Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49; Vité, *supra* note 42, at 76–77 (discussing a range of indicators of armed conflict beyond those referenced in the text above, including the government's response and the collective nature of the fighting); *see also* *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment, ¶¶ 34–40 (Mar. 14, 2012).

122. *See, e.g.,* *Prosecutor v. Lukić*, Case No. IT-98-32/1-T, Judgment, ¶ 884 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009); *Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 60; *Limaj*, Case No. IT-03-66-T, Judgment, ¶¶ 95–109.

whether the hostilities involved at least two sides fighting against each other, without too much further detail.¹²³ The ICTY has regularly referred to “some degree of organization”¹²⁴ when broadly characterizing this pillar of its armed conflict analysis. Indeed, this phrasing coincides with the ICRC’s characterization of “a minimum amount of organisation”¹²⁵ as a feature of non-international armed conflicts. Seeking evidence of some organization is obviously logical, as the law itself is framed in terms of “parties” to an armed conflict.

Over time, however, organization began to be understood as a strictly independent requirement, analyzed as a series of factors, such as the five categories of factors set forth in *Boškoski*: factors signaling the presence of a command structure, factors indicating the ability to carry out military operations in an organized manner, factors indicating a level of logistics, factors relevant to whether the group has sufficient discipline to implement the LOAC, and factors demonstrating that the group can speak with “one voice.”¹²⁶ As a result, the focus of the organization inquiry shifted from identifying some modicum of organization to satisfy the “party” element of armed conflict, enabling consideration of how this element interrelates with the intensity of operations, to an independent requirement.¹²⁷ Several cases have also detailed components of an intensity analysis as well, listing many of the considerations identified in the previous paragraph.¹²⁸ Notwithstanding the relevance of any one or more of the various subfactors the cases have identified, the effect of a factor-

123. See *supra* notes 134–144 and accompanying text.

124. *Limaj*, Case No. IT-03-66-T, Judgment, ¶ 89 (referring to a 1999 ICRC Working Paper submitted to the Preparatory Commission for the establishment of the elements of crimes for the International Criminal Court, which stated that armed conflict involves hostilities between armed forces that are organized to a greater or lesser extent).

125. ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?* 5 (ICRC Opinion Paper, 2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

126. Prosecutor v. *Boškoski*, Case No. IT-04-82-T, Judgment, ¶¶ 199–203 (July 10, 2008).

127. *Id.* ¶ 206 (referring specifically to an independent “criterion of organization”).

128. Prosecutor v. *Mrkšić*, Case No. IT-95-13/1-T, Judgment, ¶ 407 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007); see also Prosecutor v. *Haradinaj*, Case No. IT-04-84-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); *Limaj*, Case No. IT-03-66-T, Judgment. The Tribunal in *Mrkšić* indicated:

Relevant for establishing the intensity of a conflict are, *inter alia*, the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and if so whether any resolutions on the matter have been passed.

Mrkšić, Case No. IT-95-13/1-T, Judgment, ¶ 407 (footnotes omitted)

based analysis for intensity and organization has only served to solidify the idea of a strict elements test for the definition of armed conflict.

The application of this strict elements test has taken hold beyond the ICTY's jurisprudence and has seemingly become the authoritative standard for assessing conflict recognition in situations of internal violence.¹²⁹ In May 2005, motivated by the United States' assertion of a "global war on terror" in response to the attacks of September 11, 2001, the Executive Committee of the International Law Association (ILA) approved a mandate for the Use of Force Committee to produce a report on the meaning of war or armed conflict in international law.¹³⁰ In effect, the United States consistently claimed the right to exercise belligerent privileges applicable only during armed conflict anywhere in the world where members of terrorist groups are found.¹³¹ This position ran directly contrary to a trend of states generally attempting to avoid acknowledging involvement in wars or armed conflicts.¹³² The ILA report relied substantially on the *Tadić* definition of armed conflict and "confirmed that at least two characteristics are found with respect to all armed conflict: 1.) The existence of organized armed groups; 2.) Engaged in fighting of some intensity."¹³³ The report continued:

The Committee, however, found little evidence to support the view that the Conventions apply in the absence of fighting of some intensity. For non-state actors to move from chaotic violence to being able to challenge the armed forces of a state requires organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity. Such organized forces are only recognized as engaged in

129. See, e.g., Vité, *supra* note 42, at 76–77 ("When one or other of these two conditions [intensity or organization] is not met, a situation of violence may well be defined as internal disturbances or internal tensions.").

130. ILA, *supra* note 52, at 1.

131. See, e.g., George W. Bush, President, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html> ("Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated."); Kenneth Roth, *The Law of War in the War on Terror: Washington's Abuse of "Enemy Combatants,"* 83 FOREIGN AFF. 2, 2 (2004), (quoting President George W. Bush stating that "[o]ur war on terror will be much broader than the battlefields and beachheads of the past[—it] will be fought wherever terrorists hide, or run, or plan").

132. See Edith Lederer, *Newsday, U.N. Seeks To Stop Use of Child Soldiers, NONVIOLENT RADICAL PARTY TRANSNAT'L & TRANSPARTY*, Apr. 23, 2004, <http://www.radicalparty.org/en/content/un-seeks-stop-use-child-soldiers> (It.) (describing how Russia and Britain held up a Security Council Resolution condemning the use of child soldiers in armed conflicts until both Chechnya and Northern Ireland were removed from the list of armed conflicts).

133. ILA, *supra* note 52, at 1–2.

armed conflict when fighting between them is more than a minimal engagement or incident.¹³⁴

In reaching this conclusion, the report effectively wraps the past few decades of conflict recognition and analysis in the cloak of intensity and organization, placing a solid veneer on the strict elements test formulated by the ICTY over the past several years.

C. Conflict Recognition in Syria

On March 15, 2011, Syrian activists called for a national day of rage in the aftermath of popular uprisings in Egypt, Libya, and Tunisia.¹³⁵ Syrian troops opened fire on the demonstrations in Dera'a, killing five people and accelerating the pace of the discontent in Syria that had simmered since December 2010.¹³⁶ Between March and June 2011, demonstrations continued to spread throughout Syria.¹³⁷ The Assad regime used military force in a manner that can in no way be reconciled with a constabulary mission.¹³⁸ Instead, the nature of the force employed was a patent example of a state unleashing combat power to quell an internal insurrection—most notably the deployment of Syrian infantry and mechanized units.¹³⁹ On July 29, 2011, a group of deserted Syrian officers released a video announcing the formation of the Free Syrian Army (FSA).¹⁴⁰ At the same time, disparate groups of Syrians began resisting the regime with armed violence on a local level.¹⁴¹ After the formation of the FSA, some of

134. *Id.* at 2.

135. Associated Press, *A Timeline of Some Key Events in Syrian Uprising*, CNSNEWS.COM, Mar. 15, 2012, <http://cnsnews.com/news/article/timeline-some-key-events-syrian-uprising>; *Protesters Stage Rare Demo in Syria*, AL JAZEERA, Mar. 15, 2011, <http://www.aljazeera.com/news/middleeast/2011/03/20113151834383782.html> (Qatar).

136. See Katherine Marsh, *Syria: Four Killed in Deraa as Protests Spread Across South*, GUARDIAN, Mar. 22, 2011, <http://www.guardian.co.uk/world/2011/mar/22/syrian-protests-troops-kill-deraa> (U.K.).

137. Liam Stack, *Syrian Tanks Move in on City as Thousands Mourn Protesters' Deaths*, N.Y. TIMES, June 4, 2011, http://www.nytimes.com/2011/06/05/world/middleeast/05syria.html?_r=1&; *Syria Unrest: Deadly Fresh Protests Erupt*, BBC, June 17, 2011, <http://www.bbc.co.uk/news/world-middle-east-13812882> (U.K.).

138. See Borzu Daragahi, *Syrian Troops Fire on Protesters, 34 Killed*, L.A. TIMES, May 20, 2011, <http://articles.latimes.com/2011/may/20/world/la-fg-syria-protests-kurds-20110521>; Roula Hajjar, *SYRIA: Assad's Security Forces Increasingly Violent [Video]*, L.A. TIMES (Aug. 8, 2011, 8:17 AM), <http://latimesblogs.latimes.com/babylonbeyond/2011/08/syria-protesters.html>.

139. See Anthony Shadid, *Syrian Military Mounts Assault on Another City*, N.Y. TIMES, Aug. 7, 2011, <http://www.nytimes.com/2011/08/08/world/middleeast/08syria.html?pagewanted=all>.

140. Asharq Al-Awsat, *Syrian Army Colonel Defects Forms Free Syrian Army*, ASHARQ AL-AWSAT (Aug. 1, 2011), <http://www.asharq-e.com/news.asp?section=1&id=26095>.

141. Saad Abedine, *Military Defectors Unite Under Free Syrian Army*, CNN, Mar. 25, 2012, <http://www.cnn.com/2012/03/24/world/meast/syria-unrest>; Justin Vela,

the local groups professed allegiance to the FSA, while others did not.¹⁴² Those resisting the regime armed themselves with automatic weapons and rocket propelled grenades, as well as improvised explosive devices.¹⁴³

Over the course of the fall and winter, the struggle between the regime and the opposition became increasingly militarized, with extensive combat in cities throughout the country and steady reports of large-scale military attacks on towns and residential areas, atrocities, and escalating violence.¹⁴⁴ By spring, heavy fighting continued and the Syrian rebels continued to gain in numbers, helped by defections from the Syrian Army and the regime.¹⁴⁵ Throughout this time, the wholly unrestrained nature of the fighting continued, with government forces reportedly attacking towns and cities indiscriminately with tanks, mortars, helicopter gunships, and other heavy weaponry.¹⁴⁶

In September 2011, the UN Human Rights Council established an Independent International Commission of Inquiry to investigate alleged violations of human rights from March 2011 onward in Syria.¹⁴⁷ Within the next eight months, the Commission issued two

On the Front Line with Syria's Free Army, FOREIGN POL'Y, Dec. 8, 2011, http://www.foreignpolicy.com/articles/2011/12/08/syria_free_army_rebels.

142. See Abedine, *supra* note 141 (describing challenges to unification of resistance groups).

143. See, e.g., *Inside Syria: The Rebel Call for Arms and Ammunition*, GUARDIAN (Dec. 11, 2011, 10:11 AM), <http://www.guardian.co.uk/world/2011/dec/11/inside-syria-rebels-call-arms> (U.K.).

144. See, e.g., Khaled Yacoub Oweis, *Syrian Demonstrators Call for International Protection*, REUTERS (Sept. 9, 2011, 6:39 PM), <http://www.reuters.com/article/2011/09/09/us-syria-idUSTRE7883AP20110909> (reporting that Syrian forces killed six pro-democracy activists); *'Many Dead' in Latest Syria Clashes*, AL JAZEERA (Oct. 14, 2011, 12:18 AM), <http://www.aljazeera.com/news/middleeast/2011/10/20111013232820923909.html> (Qatar) (reporting that Assad's troops stormed the town of Banash and launched an attack on the village of Taum, killing twenty people, including ten civilians); *Syrian Troops 'Wipe Out Village'*, IRISH EXAMINER (Dec. 21, 2011, 6:02 PM), <http://www.irishexaminer.com/breakingnews/world/syrian-troops-wipe-out-village-533148.html> (Ir.) (reporting that Syrian troops attacked the village of Kfar Owaid with rockets, machine guns, and tanks, killing approximately one hundred people).

145. Kelly McEvers, *Defectors Offer Insider's View of Syrian Army*, NPR (Apr. 9, 2012, 3:35 AM), <http://www.npr.org/2012/04/09/150257045/defected-soldiers-offer-insiders-view-of-syrian-army>.

146. Julian Borger & Mona Mahmood, *Syrian Troops Bombard Sealed off Suburb of Homs*, GUARDIAN, Feb. 9, 2012, <http://www.guardian.co.uk/world/2012/feb/09/syrian-troops-suburb-homs> (U.K.) (reporting that one hundred civilians were killed after Syrian tanks, gunships, and artillery bombarded Homs); *Syrian Army Moves To Wrest Damascus Suburbs from Rebels*, BBC, Jan. 29, 2012, <http://www.bbc.co.uk/news/world-middle-east-16779203> (U.K.) (reporting that the Syrian army used tanks and mortar shells against suburban Damascus).

147. Human Rights Council Res. S-17/2, ¶ 12, 17th Spec. Sess., U.N. Doc. A/HRC/S-17/2 (Nov. 23, 2011). There have been extensive critiques of the Human Rights Council's application of international humanitarian law, challenging the mandate of the Council to apply this body of law. See, e.g., Daphné Richemond-Barak,

reports and at least one periodic update, in November 2011, February 2012, and May 2012, respectively.¹⁴⁸ As fighting raged between government forces and the opposition—leaving civilians trapped in an increasingly dangerous and deadly zone of combat throughout the country—the Commission’s reports offer a telling, and troubling, example of reliance on the formalized elements test for identifying an armed conflict in accordance with the definition the ICTY originally set forth in *Tadić*.

The first report, issued in November 2011, described widespread combat operations by regular state armed forces and an increasingly violent response to the protests.¹⁴⁹ More than 3,500 civilians had been killed and some defectors and regime opponents had organized themselves into the FSA.¹⁵⁰ By November, the report stated, “military and security forces carried out operations in Homs, Dar’a, Hama, Dayr Az Zawr and Rif Damascus,” including in residential areas; in Homs, “[a]ccording to eyewitnesses, tanks deployed in and around the city frequently fired at residential buildings.”¹⁵¹ Estimates were that 260 civilians were killed in the last week of October and the first two weeks of November.¹⁵² “According to information received, a small number of defectors claiming to be part of the Free Syrian Army engaged in operations against State forces, killing and injuring members of military and security forces.”¹⁵³ In assessing the applicable law that would guide its analysis of alleged crimes in Syria, the Commission expressed its concern that the events in Syria risked rising to the level of an internal armed conflict, which would, of course, trigger application of the LOAC.¹⁵⁴ The Commission stated that the test for an internal armed conflict

The Human Rights Council and the Convergence of Humanitarian Law and Human Rights Law, in SHAPING A GLOBAL LEGAL FRAMEWORK FOR COUNTERINSURGENCY: NEW DIRECTIONS IN ASYMMETRIC WARFARE (William Banks ed., 2012) (arguing that the Human Rights Council has neither the mandate nor the expertise to address international humanitarian law issues). In particular, the Council’s examination and application of international humanitarian law—or LOAC, as used in this Article—highlights the dissonance often encountered between the operational implementation of the law at the time of the conflict and the post hoc examination and application of the law for accountability purposes.

148. Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, 19th Sess., U.N. Doc. A/HRC/19/69 (Feb. 22, 2012) [hereinafter 2012 Syria Report]; Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic, 17th Spec. Sess., U.N. Doc. A/HRC/S-17/2/Add.1 (Nov. 23, 2011) [hereinafter 2011 Syria Report]; Periodic Update from the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic (May 24, 2012) [hereinafter Syria Periodic Update].

149. 2011 Syria Report, *supra* note 148, ¶¶ 27–83.

150. *Id.* ¶¶ 28–29.

151. *Id.* ¶ 39.

152. *Id.*

153. *Id.*

154. *Id.* ¶ 97.

consisted of the two criteria of intensity and organization and then concluded:

The commission was unable to verify the level of the intensity of combat between Syrian armed forces and other armed groups. Similarly, it has been unable to confirm the level of organization of such armed groups as the Free Syrian Army. For the purposes of the present report, therefore, the commission will not apply international humanitarian law to the events in the Syrian Arab Republic since March 2011.¹⁵⁵

Although the situation in the fall of 2011 in Syria was certainly not clear-cut one way or the other, a comparison of some of the factual descriptions in the report with similar brief descriptions in early cases before the ICTY shows the extent to which intensity and organization have become a strict test of elements.¹⁵⁶

Three months later, the Commission issued a second report, focused on the period between November 2011 and February 2012.¹⁵⁷ The report noted that “the crisis ha[d] become increasingly violent and militarized” and that the “rise of an armed opposition led the Government to intensify its violent repression.”¹⁵⁸ Describing the violence, the Commission stated that FSA groups had launched offensive operations against police stations, government forces, and checkpoints.¹⁵⁹ Government forces continued to shell residential areas with heavy weapons.¹⁶⁰ The Commission also referenced numbers of casualties among civilians, armed forces, and police officers.¹⁶¹ Finally, with regard to the opposition forces, the report explained that many “anti-Government armed groups identify themselves as FSA and consist of defectors (mainly from the army) and an increasing number of armed civilians,” and the leadership’s control (from abroad) over the different FSA groups inside the country remained unclear.¹⁶² At this time, one year after the start of the violence and at a time when armed opposition groups and the government fought throughout the country for control of areas from Homs to Idlib to Damascus, the Commission continued to adhere rigidly to a formalistic and strict application of a two-factor test for the existence of an armed conflict: “While the commission is gravely concerned that the violence in certain areas may have reached the requisite level of intensity, it was unable to verify that the Free Syrian Army (FSA), local groups identifying themselves as such or

155. *Id.* ¶ 99.

156. See the discussion of earlier references to the *Tadić* definition in *supra* notes 110–128 and accompanying text.

157. 2012 Syria Report, *supra* note 148.

158. *Id.* ¶ 17.

159. *Id.* ¶ 19.

160. *Id.* ¶ 20.

161. *Id.* ¶¶ 22–25.

162. *Id.* ¶ 18.

other anti-Government armed groups had reached the necessary level of organization.”¹⁶³ The juxtaposition of the events in Syria at the time and the Commission’s methodology dramatically demonstrates the effect of the strict elements test. Thousands of civilians and hundreds of soldiers had been killed.¹⁶⁴ The FSA and other groups were engaging in military operations in towns across the country and were able to force government groups out of and even consolidate control in selected areas. Most of all, the government was using nearly the full extent of its military capabilities—including attacks from the air—against the opposition forces and the civilian population, creating a situation of unrestrained brutality and combat with no regulation and no respite.

Finally, in May 2012, the Commission issued a Periodic Update on events since March 2012.¹⁶⁵ The Commission stated that it “has taken note of the intensity of the violence in the Syrian Arab Republic as well as the increasingly organized nature of armed groups in some areas.”¹⁶⁶ It nonetheless described the situation as one in which “gross violations continue unabated in an increasingly militarized context.”¹⁶⁷ At the same time, the international community remained reluctant to use the term armed conflict to describe events in Syria. As late as May 2012, the ICRC refrained from characterizing events across the country as an internal armed conflict, noting instead only that the fighting in Homs and Idlib likely rose to the level of an internal armed conflict.¹⁶⁸ In mid-July, the ICRC announced that it

163. *Id.* ¶ 13. The Commission explained further that it “uses the term ‘FSA group’ to refer to any local armed group whose members identify themselves as belonging to the FSA, without this necessarily implying that the group has been recognized by the FSA leadership or obeys the command of the FSA leadership abroad.” See also *Syria Not in Civil War but Situation Grave: ICRC*, REUTERS (Dec. 8, 2011, 5:20 PM), <http://www.reuters.com/article/2011/12/08/us-syria-aid-idUSTRE7B727C20111208> (reporting that the ICRC believed that the conflict in Syria did not qualify as a civil war under international law at that time).

164. Press Release, Security Council, Top UN Political Official Tells Security Council Talks Started by Israelis, Palestinians in Amman Stalled, Time Not on Side of “Either Party,” U.N. Press Release SC/10560 (Feb. 28, 2012) (reporting that the Under-Secretary-General for Political Affairs informed the Security Council that the Syrian death toll had reached 7,500 civilian casualties); *Syria Unrest: Death Toll Passes 7500*, U.N. Says, BBC, Feb. 28, 2012, <http://www.bbc.co.uk/news/world-middle-east-17194593> (U.K.) (reporting that Assad claimed 1,345 members of the Syrian security forces had also perished).

165. Syria Periodic Update, *supra* note 148.

166. *Id.* ¶ 5.

167. *Id.* ¶ 2.

168. See Update 2—Some Syria Violence Amounts to Civil War—Red Cross, REUTERS (May 8, 2012, 12:10 PM), <http://www.reuters.com/article/2012/05/08/syria-redcross-idUSL5E8G87KJ20120508> (noting also that “[o]nly lately did they determine that Syrian rebels represent an ‘organized’ opposition force”).

viewed the situation in Syria as a non-international armed conflict, thus triggering the application of the LOAC.¹⁶⁹

For over sixty years, the international community has recognized and upheld the essential need to regulate internal armed conflicts. Through treaty, customary law, and international and national jurisprudence, the international community has steadily expanded the law applicable to these conflicts, so that today there is increasingly less distinction between the law of international armed conflict and the law of internal armed conflict.¹⁷⁰ More importantly, the fundamental goals of the LOAC remain the same regardless of the characterization of the conflict. As the ICTY stated in the very same *Tadić* decision that set forth the modern definition of armed conflict:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?¹⁷¹

These questions resonate as strongly as ever in Syria. In response to an internal challenge, the Assad regime—like so many other despotic regimes facing similar challenges in the past—unleashed the full fury of its combat power to cower the nascent antiregime movement. For fifteen months, Syrian armed forces deliberately attacked civilians and civilian property, targeted ambulances and journalists, and prevented or restricted the delivery of humanitarian assistance, all with absolutely no respect for the most fundamental tenets of conflict regulation. By any measure, this was an unjustified, immoral, and intolerable use of force. And yet sixty years of international law designed to ensure that when a state resorts to military force to protect internal interests, that force is subject to the same core regulation as force applied in interstate hostilities, was rendered prostrate by an overly technical conception of the conditions triggering the law’s application—as profound a distortion of the origins of the law as could be imagined.

169. Stephanie Nebehay, *Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes*, REUTERS (July 15, 2012, 3:42 PM) <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714>.

170. See, e.g., Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan*, 85 INT’L L. STUD. SERIES U.S. NAVAL WAR C. 307, 308 (2009) (“[T]he [LOAC] norms governing attacks during international armed conflicts, on one hand, and non-international armed conflicts, on the other, have become nearly indistinguishable.”).

171. Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

The ultimate outcome of this distortion has been an unacceptable dilution of the core purpose of the LOAC: to limit the brutality of armed violence and protect civilians and belligerents from unnecessary suffering and gratuitous violence.¹⁷² While the jurisprudential evolution of the broad and somewhat amorphous definition of armed conflict must be acknowledged as a positive development in the law, this is only the case if that development is interpreted and understood to effectuate the object and purpose of the law. The events in Syria demonstrate that what is needed is a more pragmatic understanding of what has evolved into a strict elements test, one that preserves the wisdom of focusing on these important elements, but does so within a pragmatic framework sufficiently responsive to the countless permutations of situations necessitating applicability of the law. The process of conflict recognition must therefore align more closely with the LOAC's goals in order to ensure the most extensive fulfillment of those goals. How this reconciliation may be achieved is illustrated by a source of law from a radically different context, but one that reflects an almost identical process of distortion of a core pragmatic purpose of the law and restoration of that purpose through a more refined methodology of relying on guiding elements to assess a critical legal question: U.S. probable cause jurisprudence.

III. TOTALITY OF THE CIRCUMSTANCES: TO BETTER SERVE THE LOAC'S OBJECT AND PURPOSE

Tadić is without question an invaluable contribution to the conflict recognition and characterization landscape. However, as the preceding discussion emphasizes, how the opinion has evolved into a strict elements test actually undermines the original purpose of Common Article 3 and the Commentary's proposed conflict-assessment methodology. This concern arises not because these elements are inappropriate to that recognition process; rather, it is because they have become transformed into inflexible requirements, distorting the totality approach manifested in the Commentary.¹⁷³ In order to reconnect this recognition process to its origin, this strict elements test must be reconceived, and the *Tadić* elements must instead be understood as two guiding pillars in the totality of the circumstances analysis. This approach will preserve the analytical value of these elements, eliminate the unnecessary and unjustified inflexibility that has evolved around them, and provide a much more effective template for making a pragmatic assessment of the existence

172. See *supra* Part I.

173. See *supra* Part II.B.

of an armed conflict, one that is not hobbled by a requirement to completely satisfy both elements.

A. Analogy to U.S. Constitutional Criminal Jurisprudence

Conflict assessment, especially in the non-international context, must be pragmatically driven. And a totality approach to this assessment process better serves this goal than a strict elements test. In support of this assertion, U.S. constitutional criminal law, and specifically jurisprudence on the assessment of probable cause, offers a remarkably useful analogy. Although probable cause analysis is legally inapposite to armed conflict recognition analysis, similarities in the objectives of both tests justifies consideration of the approach adopted by the U.S. Supreme Court as a model for assessing the existence of non-international armed conflicts.

Pursuant to the Fourth Amendment of the U.S. Constitution, probable cause is the constitutional requirement to justify issuance of a search warrant.¹⁷⁴ Normally, assessing probable cause is relatively uncomplicated, such as when it is based on a police officer's own observation of criminal activity, or on scientific or eyewitness reports. Loosely analogous to the traditional civil war in conflict recognition analysis, these situations are so self-evident that resort to an analytical methodology is basically unnecessary. However, the challenge of assessing probable cause becomes far more complex and difficult when the source of information is an informant's tip of criminal activity.¹⁷⁵ In this situation, the only first-hand observation of criminal activity comes from the informant, and while police investigation in response to the tip may confirm noncriminal details of the tip, the probable cause determination will ultimately reflect a ratification of the tip, or "opinion" of ongoing criminal activity.¹⁷⁶ How the Supreme Court addressed the assessment of such tips, and more importantly the value of utilizing a totality of the circumstances approach to such assessments, provides a useful example of how a similar approach would more effectively synchronize the *Tadić* elements with the pragmatic purpose at the core of conflict recognition.

174. U.S. CONST. amend. IV; see also WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 3.3(a) (5th ed. 2009).

175. See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (establishing that a magistrate should know some of the underlying circumstances relied on by an informant and some of the underlying circumstances that allowed an officer to conclude that the informant was reliable); *Spinelli v. United States*, 393 U.S. 410, 416 (1969) (establishing that the magistrate should also know the underlying circumstances and context from which an informant had concluded a crime had been committed); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (reversing the *Aguilar-Spinelli* two-pronged test in favor of a "totality of the circumstances" test).

176. *Spinelli*, 393 U.S. at 423 (White, J., concurring).

In 1964, in the case of *Aguilar v. Texas*,¹⁷⁷ the Supreme Court addressed the issue of when an informant's tip establishes probable cause to support a warrant. The Court held that

the magistrate [the neutral officer making the probable cause assessment] must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer [the officer requesting the warrant and presenting the tip as the basis for the warrant] concluded that the informant, whose identity need not be disclosed, was "credible" or his information "reliable."¹⁷⁸

Much like the *Tadić* decision, this holding evolved into a two-prong test for assessing probable cause: first, the magistrate must assess the underlying circumstances informing the tip (the foundation of knowledge upon which the tip is based), and second, the magistrate must be provided information to establish the informant's veracity.¹⁷⁹ Although the *Aguilar* decision never addressed how each of these prongs interrelates with the other, like the *Tadić* elements, these two prongs evolved into strict individual requirements, with each prong treated independently in the probable cause assessment.¹⁸⁰

In 1969, the Supreme Court revisited this issue, and this time endorsed this two-prong test when it decided *United States v. Spinelli*.¹⁸¹ In *Spinelli*, the Court reviewed the propriety of a warrant issued based on a confidential informant's tip.¹⁸² The Court concluded the tip was insufficient to establish probable cause because both prongs of the *Aguilar* test were lacking.¹⁸³ According to the Court, the tip failed to satisfy both prongs because it offered no reason to conclude that the informant was reliable (the veracity prong), nor did it provide the type of predictive details indicating that the informant obtained his information from Spinelli or from inside access to Spinelli's alleged criminal activities (the basis of knowledge prong).¹⁸⁴ As a result, there was nothing on which a neutral reviewing official could rely to conclude the tip was sufficiently reliable to establish probable cause.¹⁸⁵ Ostensibly because the evidence was insufficient to meet the requirements of either prong of the standard, the

177. *Aguilar*, 378 U.S. at 114.

178. *Id.*

179. *Gates*, 462 U.S. at 278–84.

180. *See infra* note 223 and accompanying text.

181. *Spinelli*, 393 U.S. at 413.

182. *Id.*

183. *Id.* at 419.

184. *Id.* at 417–18.

185. *See id.* at 415–17 (explaining that reliance on an informant's tip, even when police corroborate aspects of the tip's predictions that are readily observable by any other person (and therefore not based on inside access to the alleged criminal activities of the subject of the search), provides nothing upon which a neutral magistrate may properly carry out his duty of determining the existence of probable cause).

relationship of each of the prongs was once again omitted from the decision.

Lower courts, however, began to fill this void. Based on these two cases, lower courts developed what came to be known as the *Aguilar-Spinelli* two-prong test for establishing probable cause.¹⁸⁶ Pursuant to this test, courts assumed that a finding of probable cause required independent satisfaction of *each* of these prongs.¹⁸⁷ Although the Court never mandated the necessity of a strict compartmented analysis, that method nonetheless evolved as the accepted meaning of these decisions. Thus, while the deficiency of the informant's tip in *Spinelli* implicated a total failure to provide adequate information on *either* the informant's foundation of knowledge or credibility, these were subsequently understood as *independent* requirements.¹⁸⁸ Much like the *Tadić* decision, the subsequent evolution of the *Aguilar-Spinelli* test potentially transformed it into a standard more demanding than the Court ever intended to impose.¹⁸⁹

Unlike *Tadić*, however, this evolution itself became the object of critique by the court that created the conditions leading to its adoption: the Supreme Court. The strict two-prong test, requiring independent satisfaction of each prong, itself came before the Court in 1984 in the case of *Illinois v. Gates*.¹⁹⁰ In *Gates*, a magistrate issued a search warrant based on an anonymous tip, but a tip that included significant indicia that the informant had intimate knowledge of the suspect's criminal activities (growing and selling large amounts of marijuana).¹⁹¹ Police investigated the tip and corroborated much of the information provided by the informant, including future travel activity of the suspect.¹⁹² Based on this information, a magistrate issued a warrant to search the suspect's home. Police subsequently discovered large amounts of marijuana in the suspect's home and car.¹⁹³

The suspect was convicted at trial, and when his appeal reached the Illinois Supreme Court, the strict two-prong *Aguilar-Spinelli* test doomed the government's case.¹⁹⁴ Even though the police had corroborated sufficient information to establish that the informant

186. See *Illinois v. Gates*, 462 U.S. 213, 230 n.5, 234 n.9 (1983) (describing the "entirely independent character" of both prongs and their rigid application by lower courts).

187. *Id.* at 228.

188. See *id.* (describing the Illinois Supreme Court's belief that the *Aguilar-Spinelli* test implemented a rigid test); *id.* at 229 (describing how the Illinois Supreme Court used an "elaborate set of legal rules" in an effort to evaluate "veracity, reliability and basis of knowledge" under *Aguilar-Spinelli*).

189. *Id.* at 232 n.7.

190. *Id.* at 228.

191. *Id.* at 225.

192. *Id.* at 226.

193. *Id.* at 227.

194. *Id.* at 229.

had provided the tip of criminal activity with a solid foundation of knowledge, the anonymity of the informant left the credibility/veracity prong of the two-prong test almost totally vacant.¹⁹⁵ As a result, the Illinois Supreme Court “reluctantly” concluded that the magistrate erred in issuing the warrant.¹⁹⁶ This crystallized the issue that had been brewing for two decades: was it necessary to treat each of the two *Aguilar–Spinelli* prongs as independent requirements? Or were they better understood as a framework to guide a totality of the circumstances analysis of probable cause?

The U.S. Supreme Court’s answer was emphatic—because probable cause is a practical, common sense assessment of all facts and circumstances, the inflexibility of the strict two-prong approach that had evolved from its earlier opinions actually undermined the very purpose of probable cause assessment.¹⁹⁷ Instead, these two prongs are properly understood as a framework to guide a totality of the circumstances assessment of probable cause, an assessment that furthers the practical and pragmatic objective of determining a “fair probability” of an alleged fact.¹⁹⁸ According to the opinion:

We agree with the Illinois Supreme Court that an informant’s “veracity,” “reliability,” and “basis of knowledge” are all highly relevant in determining the value of his report. We do not agree, however, that these elements should be understood as entirely separate and independent requirements to be rigidly exacted in every case, which the opinion of the Supreme Court of Illinois would imply. Rather, as detailed below, they should be understood simply as closely intertwined issues that may usefully illuminate the common-sense, practical question whether there is “probable cause” to believe that contraband or evidence is located in a particular place.¹⁹⁹

Central to the Court’s opinion was the pragmatic nature of probable cause, a standard that was never intended to connote a strict legal test:

Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a “practical, nontechnical conception.” “In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”²⁰⁰

As these comments illustrate, probable cause is a fluid concept—turning on the assessment of probabilities in particular factual

195. *Id.* at 227.

196. *Id.* at 230.

197. *See id.* at 234 (contrasting the more balanced totality of the circumstances analysis with the stricter two-pronged *Aguilar–Spinelli* test).

198. *Id.* at 238.

199. *Id.* at 230 (footnote omitted).

200. *Id.* at 231 (alteration in original) (citations omitted).

contexts—not readily, or even usefully, reduced to a neat set of legal rules.

The Court then explained why a totality of the circumstances approach to assessing probable cause better served the underlying objectives of this common sense assessment.²⁰¹ The Court's articulation of this relationship is remarkably suited to the issue presented in this Article: whether the objectives of armed conflict assessment are furthered or undermined by viewing the *Tadić* elements as two distinct requirements.

The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.²⁰²

It is of course obvious that these cases had nothing to do with international law or the identification of the armed conflict demarcation point. However, the value in considering this evolution of probable cause analysis is that, like the conflict recognition debate, it turned on the validity of imposing a strict two-prong elements test for this assessment. Furthermore, the pragmatic nature of the probable cause determination laid the entire analytical foundation for the *Gates* opinion. Both of these considerations are easily and properly extended to the conflict recognition debate. As the Supreme Court did with regard to probable cause, the Commentary indicates almost without question that conflict recognition was intended to be a pragmatic, practical, and common sense assessment.²⁰³ Indeed, the primary rationale for adopting the term armed conflict was the inherent flaw in the overly legalistic assessment of "war." And like probable cause analysis, a seminal international judicial decision providing a logical and rational framework for determining the existence of non-international armed conflict has evolved into a strict, overly legal two-prong elements test. Modifying only a few words in the preceding opinion extract highlights the logic of this analogy:

The task of *conflict recognition* is simply to make a practical, common-sense decision whether, given all the circumstances *related to the ongoing confrontation between the state and opposition groups*, including the "*intensity of hostilities*" and "*organization of opposition forces*", there is a fair probability that *the situation has crossed the threshold from civil disturbance to armed hostilities*. And the duty of a

201. *Id.* at 232–35.

202. *Id.* at 238–39 (alteration in original) (citations omitted).

203. *See generally* 3 ICRC, *supra* note 7, at 19–22, 34–37.

assessing state or international organization is simply to ensure that *there is a "substantial basis for . . . conclud[ing]" that an armed conflict has commenced.* We are convinced that this flexible, easily applied standard will better achieve the accommodation of *state and humanitarian interests* that *international law* requires than does the approach that has developed from *Tadić*.²⁰⁴

Adopting this totality of the circumstances methodology for conflict recognition does not, as illustrated by the modified extract, in any way diminish the importance of the *Tadić* factors. Instead, it lodges those factors within a framework that is better suited for making practical and common sense assessments than for technical legal assessments. That pragmatic value enhances the significance of these factors, which will continue to guide the analytical process.

Indeed, like the *Gates* approach, a totality of the circumstances methodology in conjunction with the *Tadić* elements would result in those elements serving as two essential guideposts for making the pragmatic conflict recognition assessment. Why will this better serve the objectives of the law? In *Gates*, the Court recognized that no matter how solid the basis of knowledge was for an anonymous tip, a strict two-prong approach would prohibit a finding of probable cause because the anonymity of the informant would preclude any assessment of veracity or reliability.²⁰⁵ However, the Court also recognized that, in practical terms, this did not make sense. If the objective is to inform a common sense and practical determination of probable cause, an overwhelming indication that the informant's tip is based on inside and intimate access to the alleged criminal activity, validated by independent police corroboration, effectively self-validates the veracity requirement.²⁰⁶ In other words, when it is established that the tip is based on a clear and compelling basis of knowledge, that basis itself provides sufficient indicia of veracity. Thus, as the *Gates* Court concluded, the totality approach better served the objectives of assessing probable cause: it permits the overwhelming satisfaction of one element to offset a reduced quanta of indicia on the other element,²⁰⁷ an outcome that is impossible if each element is treated as a strictly independent requirement.

204. See *Gates*, 462 U.S. at 238. The authors' changes are indicated in italics.

205. See *id.* at 229 (noting that an anonymous letter alone would not satisfy the two-pronged test regardless of how detailed and predictive the information might be, because of an inability to assess the informant's veracity).

206. See *id.* at 241–42 (“[A]n officer ‘may rely upon information received through an informant, rather than upon his direct observations, so long as the informant’s statement is reasonably corroborated by other matters within the officer’s knowledge.’” (quoting *Jones v. United States*, 362 U.S. 257, 269 (1960))).

207. See *id.* at 237–38 (noting the benefits of the totality approach over the two-pronged approach).

B. Understanding Intensity and Organization as a Framework

Whether and when a state is justified in resorting to combat power to respond to an internal dissident threat is undoubtedly a complex question. The Commentary is clear that recognition of an internal armed conflict is in no way intended to legitimize the opposition or its use of force.²⁰⁸ However, what history seems to demonstrate repeatedly is that states almost always tend to err on the side of aggressiveness when they feel threatened by dissident movements.²⁰⁹ This is unsurprising. A state seeking to preserve its warrant will almost always perceive even a nascent and poorly organized armed opposition movement as a critical national security challenge. From an operational and tactical perspective, it is often precisely at this point in the threat evolution that a massive and heavy-handed combat response will be perceived as decisive. Expecting the state to calmly wait for the opposition to coalesce into an organized force capable of sustained combat operations *before* it makes maximum use of its almost always (at least initially) superior capability is simply counterintuitive.

Proponents of a strict elements test for conflict recognition emphasize that until these requirements are satisfied, government

208. This clause is essential. Without it Article 3 would probably never have been adopted. It meets the fear that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with the *de jure* Government's suppression of the revolt by conferring belligerent status, and consequently increased authority and power, upon the adverse Party. . . . Consequently, the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion by all the means—including arms—provided by its own laws; nor does it in any way affect that Government's right to prosecute, try and sentence its adversaries, according to its own laws.

In the same way, the fact of the adverse Party applying the Article does not give it any right to any new international status, whatever it may be and whatever title it may give itself or claim.

3 ICRC, *supra* note 7, at 43–44 (alteration in original).

209. See, e.g., HUMAN RIGHTS WATCH, THE PRICE OF INDEPENDENCE: SILENCING LABOR AND STUDENT UNIONS IN TUNISIA (2010), available at <http://www.hrw.org/sites/default/files/reports/tunisia1010w.pdf>; INT'L FED'N FOR HUMAN RIGHTS, BAHRAIN: GOVERNMENT CRACKDOWN ON OPPOSITION CONSTITUTES A BLATANT HUMAN RIGHTS VIOLATION (2012), available at <http://www.unhcr.org/refworld/docid/50b382785.html>; Manuel Noriega Must Face Justice in Panama Following Extradition, AMNESTY INT'L (Aug. 4, 2011), <http://www.amnesty.org/en/news-and-updates/manuel-noriega-must-face-justice-panama-following-extradition-2011-08-04>; Ray Mosely & Howard Witt, *Russian Crisis Plays Out in a Fiery Storm*, CHI. TRIB. (Oct. 5, 1993), http://articles.chicagotribune.com/1993-10-05/news/9310050105_1_ruslan-khasbulatov-parliament-building-president-boris-yeltsin; Joe Stork, *Mubarak Convicted, but Abuses Continue in Egypt*, HUMAN RIGHTS WATCH (June 10, 2012), <http://www.hrw.org/news/2012/06/10/mubarak-convicted-abuses-continue-egypt>.

forces are legally obligated to respond within a law enforcement legal framework.²¹⁰ Perhaps if there was a viable method to strictly enforce this consequence of the elements test, it would have greater merit, but there is not. Instead, it borders on axiomatic that when the state calls its combat-trained forces from the barracks to deal with an internal opposition threat, those forces are going to operate in a manner that maximizes their operational and tactical advantage. Have there been exceptions to this norm? Of course.²¹¹ But building a humanitarian protection paradigm on the exception while ignoring the rule is debilitating, and Syria is a quintessential manifestation of this reality. First, the forces themselves enter the fray uncertain as to the law that regulates their actions. As noted in the introduction, the sad reality is that this will often be perceived not as limited authority, but as authority with no limits. They will rarely see themselves as robustly armed police—why would they be called out of the barracks if that was what was needed? And yet, the constant emphasis that the opposition is insufficiently organized to qualify as a “real” enemy and that therefore they are not “really” in an armed conflict will suggest that the only rule is rapid repression.²¹²

This obviously creates uncertainty for the forces called upon to respond to the opposition threat. But far more problematic is the degradation of humanitarian protections applicable to the response. Government forces will seek to exploit the nascent organization of opposition or dissident movements with the application of overwhelming force, creating a situation wholly unsuited for normal peacetime legal regulation. In this context, issues such as lawful objects of attack, precautions in the attack, minimization of collateral damage, clear standards of protection for those rendered *hors de combat*, protection for the wounded and sick, establishment of neutral zones, and access to humanitarian relief become essential. These are

210. Philip Alston, Hum. Rts. Council, Rep. of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions: Study on Targeted Killings, ¶ 31, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

211. See, e.g., Colm Campbell & Ita Connolly, *A Model for the War Against Terrorism? Military Intervention in Northern Ireland and the 1970 Falls Curfew*, 30 J.L. & SOC'Y 341 (2003) (discussing the UK response to the unrest in Northern Ireland); Christopher M. Schnaubelt, *Lessons in Command and Control from the Los Angeles Riots*, PARAMETERS, Summer 1997, at 88–109 (discussing the response by the Los Angeles police and other authorities to the Rodney King riots in Los Angeles in 1992).

212. See Samia Nakhoul, *Fragmented Syria Opposition Emboldens Assad*, REUTERS (Mar. 28, 2012, 10:53 AM), <http://www.reuters.com/article/2012/03/28/us-syria-opposition-idUSBRE82R0UT20120328> (noting that “even though the Assad regime is under siege it is in a better position than it should be because the opposition is in such disarray”); *Syria's Assad Says Duty To “Annihilate Terrorists,”* REUTERS (June 28, 2012, 5:35 PM), <http://www.reuters.com/article/2012/06/28/us-syria-crisis-assad-idUSBRE85R1D520120628>.

all aspects of conflict regulation derived from the LOAC,²¹³ yet refusing to recognize the existence of armed conflict eviscerates the efficacy of these norms by rendering them inapplicable.

In the conflict recognition context, therefore, the utility of the *Gates* logic and emphasis on the totality of the circumstances is apparent. In a situation with a relatively low intensity of hostilities, indicia of opposition military organization would prove critical to a practical determination of armed conflict. Without satisfaction of both of these prongs, the low level of violence is itself insufficient to meet the objective of the analysis; preventing premature LOAC invocation and application to this situation is therefore best addressed through a peacetime law enforcement framework and regulated exclusively by human rights principles. The same result would be logical when an opposition group was loosely organized, but had yet to engage in action creating a significant intensity of violence. In that situation, the inchoate nature of hostilities would justifiably indicate that neither the state nor the opposition group had fully committed to participation in an armed conflict.

But what if a situation exists in which the intensity of hostilities element is overwhelmingly satisfied while the organizational element is lacking? Under a strict application of the *Tadić* elements test, this situation could never amount to an armed conflict. The discourse about the situation in Syria makes this point all too clearly. But from a pragmatic perspective, this conclusion seems inconsistent with the humanitarian objectives of conflict recognition, precisely because the overwhelming intensity of the hostilities brings one of LOAC's core purposes—mitigating the brutality of and suffering during war—to center stage. Indeed, a situation of intense hostilities without significant opposition force organization indicates the exact type of heavy-handed government military response that necessitates humanitarian regulation. A full-blown use of military combat power is precisely the type of government response that must be effectively regulated, and the LOAC is far better suited to that purpose than human rights law.²¹⁴ It is unfortunately all too common that the very governments that resort to overwhelming combat power to repress opposition are also unlikely to feel bound by any relevant human

213. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 51(b)(5), 52(2), 57, June 8, 1977, 1125 U.N.T.S. 3 (setting forth the principle of proportionality and the definition of military objectives); GC I, *supra* note 21, art. 12 ("Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances."); GC II, *supra* note 21, art. 3(2) ("The wounded, sick and shipwrecked shall be collected and cared for."); GC IV, *supra* note 21, arts. 15, 23 (requiring the establishment of neutral zones and access to humanitarian relief).

214. See *supra* Part I.

rights obligations.²¹⁵ Suggesting that human rights law can provide sufficient protection for those most in need in such circumstances is simply burying one's head in the sand.

Furthermore, relying on a lack of opposition organization to deny the existence of armed conflict and the applicability of this international regulatory framework effectively incentivizes indiscriminate brutality by the government. If, at the inception of an opposition movement, the government responds with overwhelming combat power, it may actually prevent organizational efforts, thereby avoiding the consequences of LOAC applicability.²¹⁶ It may even incentivize deliberate dispersal of opposition capabilities in an effort to minimize indicia of organization and thereby undermine the legitimacy of any state assertion of armed conflict.²¹⁷ Thus, overwhelming satisfaction of the intensity prong should produce an analogous effect to the overwhelming satisfaction of the basis prong in the *Gates* model. Widespread and intense hostilities would offset the requirement to identify significant opposition organization. While some evidence of organization would be necessary, dispersed and

215. See, e.g., Michael Slackman & Nadim Audi, *Clashes Erupt in Bahrain as Tumult Ripples Across Mideast*, N.Y. TIMES, Feb. 15, 2011, at A12; *Thousands of Egyptians Protest What They Call Police Torture*, N.Y. TIMES, June 26, 2010, at A5; *1989: Massacre in Tiananmen Square*, BBC, http://news.bbc.co.uk/onthisday/hi/dates/stories/june/4/newsid_2496000/2496277.stm (last visited Apr. 8, 2013) (U.K.); *Syria—Uprising and Civil War*, N.Y. TIMES, <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html> (last visited Apr. 8, 2013); *Timeline: Egypt's Revolution*, AL JAZEERA, <http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html> (last updated Feb. 14, 2011) (Qatar); Press Release, Victoria Nuland, U.S. Dep't of State Dep't Spokesperson, U.S. Condemns Ongoing Violence in Syria (July 25, 2011), available at <http://www.state.gov/r/pa/prs/ps/2011/07/169069.htm>; Press Release, Mark C. Toner, U.S. Dep't of State Deputy Spokesperson, Message on the Twenty-Third Anniversary of Tiananmen Square (June 3, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/06/191692.htm>.

216. It is not difficult to imagine that a government, concerned that an opposition movement is gaining momentum and capability to challenge the state by force of arms, will perceive an early and heavy-handed response as ideal to prevent the development of this capability and disrupt organizational efforts. An ideal illustration of such a response was the Serbian reaction to the growing opposition movement in Kosovo in 1998. Ostensibly unwilling to allow another former Yugoslav republic to break away from the central government in Belgrade, President Slobodan Milošević ordered a military intervention before the nascent Kosovo Liberation Army could develop an effective capacity to challenge government authority, resulting in a humanitarian disaster. See HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO ch. 4 (2001).

217. This totality of the circumstances analysis is equally valuable when addressing the status of military operations against transnational nonstate organizations, especially when such organizations utilize dispersal and lack of traditional belligerent organization as tactical force multipliers. This certainly seems to be consistent with the continued U.S. assertion that it is engaged in an ongoing armed conflict with al Qaeda. While this assertion remains as controversial today as it was at inception, see ILA, *supra* note 52, it seems clear that it is the intensity of the risk and continued terrorist threat that dominates this assessment, even as al Qaeda's organization has been decimated.

nascent movements would satisfy that requirement in the context of such intensity. This approach also comports with the original conception that while an armed conflict requires two parties fighting against each other, some minimal degree of organization is sufficient to conclude that two sides are engaged in combat.²¹⁸

The claim that the same result would be justified by overwhelming satisfaction of the organization prong of the *Tadić* test with little or no intensity of hostilities is a more difficult argument to sustain. It is perhaps logical to infer the existence of armed conflict as the result of a highly organized dissident force, for example a breakaway military group preparing to initiate hostilities against the government. In general, however, an inference of armed conflict based on high organization and little or no intensity will be less compelling than the inverse relationship between intensity and organization. There are countless examples of highly organized and peaceful opposition movements.²¹⁹ For example, opposition movements to governments frequently are able to quickly organize mass protests and other actions of civil disobedience. Examples such as Tahrir Square in Egypt during that chapter of the Arab Spring,²²⁰ or the civil disobedience efforts in Panama opposing General Manuel Noriega leading up to the U.S. invasion,²²¹ illustrate that these movements may at times attain a high level of organization. However, it would be inconsistent with the Commentary's conception of the civil/armed conflict threshold to suggest that organization, even coupled with widespread activity in opposition to the government, qualifies as an armed conflict. Unless and until that opposition involves some significant level of violence—violence that triggers a military response by the government utilizing the traditional tools and tactics of combat—it does not meet the test for armed conflict, even under a more flexible totality approach.²²² Some hostilities must

218. See 4 ICRC, *supra* note 9, at 35–36 (noting that armed conflict that does not match any of the examples provided in the Commentary would still be considered an armed conflict, and reinforcing that the examples or criteria offered are “not obligatory and are only mentioned as an indication”).

219. See, e.g., Immigration and Refugee Bd. of Can., *Argentina: Information on the Mothers of the Plaza de Mayo*, Doc. No. ARG10694 (May 1, 1992), available at <http://www.unhcr.org/refworld/docid/3ae6abf940.html> (describing the Association of Mothers of the Plaza de Mayo, an organization formed around a silent vigil on April 30, 1977, in front of Argentina's government house by relatives of those who disappeared during the military regime of that time); Kirit Radia, *Thousands To Protest Against Putin in Moscow in Final Demonstration Before Election*, ABC NEWS (Feb. 26, 2012), <http://abcnews.go.com/blogs/headlines/2012/02/thousands-to-protest-against-putin-in-moscow-in-final-demonstration-before-election/>; *Timeline: Egypt's Revolution*, *supra* note 215.

220. See generally *Timeline: Egypt's Revolution*, *supra* note 215.

221. See generally THOMAS DONELLY, MARGARET ROTH & CALEB BAKER, *OPERATION JUST CAUSE: THE STORMING OF PANAMA* (1991).

222. See 4 ICRC, *supra* note 9, at 36 (noting that Common Article 3 conflicts are “armed conflicts, with armed forces on either side engaged in hostilities”).

be necessary for a situation to qualify as an armed conflict—inherent in the term armed—although it does seem logical to reduce the intensity threshold when the evidence of organization is overwhelming.

Interestingly, the *Gates* decision also offers an example of how these inverse relationships might not justify the same conclusion. In a concurring opinion, Justice White critiqued the majority's failure to distinguish between the effect of overwhelming satisfaction of the foundation prong compared to the inverse hypothetical: overwhelming satisfaction of the veracity prong with no indicia of a solid basis for the tip.²²³ Justice White noted that in the latter situation, it would be illogical to find probable cause because the magistrate would have no independent basis for reaching that finding.²²⁴ Instead, it would simply reflect the ratification of an opinion of criminality based on the veracity of the source of the opinion.²²⁵ Justice White also noted that it was inconceivable that a magistrate would properly issue a warrant based solely on the assurance of a police officer that evidence would be located where the officer said it existed.²²⁶ If, Justice White asked, this type of "trust me" affidavit is insufficient to establish probable cause, how could a tip from a private citizen be considered sufficient?²²⁷ Thus, Justice White acknowledged that overwhelming satisfaction of the foundation

223. Justice White noted:

The Court reasons that the "veracity" and "basis of knowledge" tests are not independent, and that a deficiency as to one can be compensated for by a strong showing as to the other. Thus, a finding of probable cause may be based on a tip from an informant "known for the unusual reliability of his predictions or from an unquestionably honest citizen," even if the report fails thoroughly to set forth the basis upon which the information was obtained. If this is so, then it must follow *a fortiori* that "the affidavit of an officer, known by the magistrate to be honest and experienced, stating that [contraband] is located in a certain building" must be acceptable. It would be "quixotic" if a similar statement from an honest informant, but not one from an honest officer, could furnish probable cause. But we have repeatedly held that the unsupported assertion or belief of an officer does not satisfy the probable cause requirement. . . .

...

Thus, as I read the majority opinion, it appears that the question whether the probable cause standard is to be diluted is left to the common-sense judgments of issuing magistrates. I am reluctant to approve any standard that does not expressly require, as a prerequisite to issuance of a warrant, some showing of facts from which an inference may be drawn that the informant is credible and that his information was obtained in a reliable way.

See *Illinois v. Gates*, 462 U.S. 213, 272–73 (1983) (White J., concurring) (alteration in original) (internal citations omitted).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

prong with little or no indicia of veracity as the result of the anonymity of the informant might justify a finding of probable cause because the magistrate could independently assess the foundation.²²⁸ In effect, as long as there is solid foundation, the magistrate has a valid independent basis to assess the reliability of the tip.²²⁹ However, when no indicia of foundation exist, a tip from even the most trustworthy source—such as an experienced and trustworthy police officer—would not alone establish probable cause.²³⁰ Instead, some foundation for the tip had to be provided, although a high level of veracity could reduce the foundation requirement.²³¹

This bifurcated assessment model seems equally well-suited to conflict recognition. As noted above, overwhelming satisfaction of the intensity prong should reduce the requirement for established opposition organization.²³² In contrast, overwhelming satisfaction of the organization prong is analogous to overwhelming satisfaction of veracity in Justice White's conception of the totality of the circumstances test: it alone cannot eliminate the requirement for some level of hostilities.²³³ It would, however, permit a finding of armed conflict at a much earlier point in the hostilities continuum. This is a logical outcome, for it is the total effect of an opposition group poised to engage in hostilities—as manifested through indicia of organization—combined with the initiation of those hostilities that indicates the initiation of armed conflict.

In comparing the two possible examples—high intensity with low organization, or high organization with low intensity—one can see why a more comprehensive totality of the circumstances approach is essential to the pragmatic and operationally effective application of the LOAC. No two situations of violence are the same and no two will pose the same questions regarding the nature of the hostilities and the capacity of the opposition forces. Recognizing this diversity; its consequences for conflict recognition; and the need to analyze intensity, organization, and other relevant factors within a comprehensive framework helps to ensure a more practical application of the LOAC trigger in Common Article 3. Analogy to the *Gates* opinion is merely offered as a means of highlighting the dangers of allowing elements to evolve into strict independent requirements and the benefits of a more flexible understanding of those elements, especially how they interrelate. If doing so better reconciles armed conflict recognition with the underlying

228. See *id.* at 270 n.22 (discussing the possibility that corroborating facts might satisfy both prongs).

229. *Id.* at 271.

230. *Id.* at 273.

231. See *id.* at 272–73 (“[An] unsupported assertion . . . does not satisfy the probable-cause requirement.” (citation omitted)).

232. See *supra* notes 213–218 and accompanying text.

233. *Illinois v. Gates*, 462 U.S. 213, 273–74 (1983).

humanitarian objectives of the LOAC, this methodology will better serve the interests of all those affected by intrastate violence.

IV. CONCLUDING THOUGHTS

Like all legal regimes, the LOAC requires thorough legal analysis and, as a result, can be susceptible to overly legalistic approaches. It is essential, however, to constantly emphasize that the LOAC addresses life and death, and in the starkest manner possible. This is a body of law that recognizes the right of warring parties to destroy enemy personnel and property, accepts incidental civilian casualties (in accordance with the principle of proportionality), and regulates lethal weapons, among a host of other components of the law.²³⁴ Its protections focus equally on the most fundamental of human needs: protection from attack, care for the wounded, respect for the dead, protection for medical personnel and facilities, and more.²³⁵ The LOAC—and especially applicability analysis—is ultimately undermined when technicalities inhibit the realization of its core purposes and protections. Indeed, the consequences of overly narrow or inapt application are simply too great to contemplate.

In addition, the LOAC has a long tradition of relying on the object and purpose of the law in response to changing circumstances and uncertainties. As Jean Pictet wrote in 1985:

The international Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. . . .

. . . They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination.²³⁶

The LOAC's basic principles—military necessity, humanity, distinction, and proportionality—have thus always guided interpretations to preserve and protect the law's core values.²³⁷ In much the same way, the LOAC's essential purposes, including mitigating the brutality and suffering of war, have a similar role to play, especially in the realm of conflict recognition. Just as reliance

234. See generally Corn & Blank, *supra* note 20.

235. See *id.* at 109.

236. JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 59 (1985).

237. See Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96–127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (discussing the growing application in internal armed conflict of LOAC principles and rules originally drafted for and applicable in international armed conflicts).

on the LOAC's basic principles helps protect against interpretations of the law that undermine their goals, so a reminder of the LOAC's historic purpose must drive a recalibration of the conflict recognition process from one of technical legalities to one of a totality of the circumstances aimed at a pragmatic protective framework. If not, Syria serves as an all too tragic reminder of the danger of not seeing the forest for the trees.