

Red Belt, Green Hunt, Gray Law: India's Naxalite-Maoist Insurgency and the Law of Non-International Armed Conflict



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ABSTRACT

The practical application of international humanitarian law to a potential non-international armed conflict is unclear in case law and other literature. This Comment fills this lacuna by clarifying existing legal standards, reconciling the inconsistent application of these standards, and honing the law of non-international armed conflict. Specifically, this Comment focuses on the two essential elements of a non-international armed conflict: (1) a nonstate actor that is sufficiently organized and (2) violence that is sufficiently intense. The meaning and scope of the “organization” and “intensity” criteria are developed on the basis of treaty law, case law, and case studies of Colombia and Mexico. This newly clarified legal standard is then applied to the extreme-left Naxalite-Maoist insurgency in India, a conflict waged with particular fervor since 2004. The insurgency’s organized and violent nature necessitates the conclusion that a non-international armed conflict exists between the Indian State and the Naxalites, triggering the application of international humanitarian law.

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INTRODUCTION

India's scale is often beyond comprehension. It is home to more than a sixth of humanity,¹ and it will become the most populous country in the world within a decade.² The largest cities in India are some of the largest metropolises on the planet.³ Its most populous state contains roughly the same number of people as the entire country of Brazil.⁴ For Indians, this size is both a blessing and a curse: India has been able to draw on its massive workforce to drive the vigorous expansion of its economy,⁵ but the sheer magnitude of its population risks obscuring the absolute size of its many minorities along with the global significance of the issues facing them.

India's tribal peoples are one such minority. Known in Hindi and other Indian languages as *adivasis*,⁶ this community constitutes just 8.5 percent of

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1. India's population was 1.29 billion in August 2015. *India Population (Live)*, WORLDOMETERS, <http://www.worldometers.info/world-population/india-population> [http://perma.cc/PL4G-7FSN] (last visited Dec. 16, 2015). For comparison, the world's population was estimated at 7.36 billion in August 2015. *Current World Population*, WORLDOMETERS, <http://www.worldometers.info/world-population/> [http://perma.cc/GFM6-WDFQ] (last visited Dec. 16, 2015).
 2. According to the United Nations, India's population is expected to surpass that of China by 2022. UNITED NATIONS DEPT OF ECON. & SOC. AFFAIRS, WORLD POPULATION PROSPECTS: THE 2015 REVISION 4 (2015), http://esa.un.org/unpd/wpp/Publications/Files/Key_Findings_WPP_2015.pdf [http://perma.cc/4N4C-4V27].
 3. Delhi, Mumbai, and Kolkata are among the twenty most populous cities in the world. See UNITED NATIONS DEPT OF ECON. & SOC. AFFAIRS, WORLD URBANIZATION PROSPECTS: THE 2014 REVISION 26 (2014), <http://esa.un.org/unpd/wup/Highlights/WUP2014-Highlights.pdf> [http://perma.cc/LK4T-H5YY].
 4. Uttar Pradesh's population was 199.81 million in 2011. *Uttar Pradesh Profile*, CENSUS INDIA (2011), http://censusindia.gov.in/2011census/censusinfodashboard/stock/profiles/en/IND009_Uttar%20Pradesh.pdf [http://perma.cc/KP5H-KG8V]. In contrast, Brazil's entire population was 203.96 million by August 2015. *Brazil Population (Live)*, WORLDOMETERS, <http://www.worldometers.info/world-population/brazil-population> [http://perma.cc/3PS2-TC25] (last visited Dec. 16, 2015).
 5. India's economy averaged seven percent growth between 1997 and 2011, and its workforce is the second largest in the world, estimated at 502.2 million in 2014. *India*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/in.html> [http://perma.cc/5UCS-5SC9] (last visited Dec. 16, 2015).
 6. This literally translates to "first inhabitants" from Sanskrit, with *ādi* (first) and *vāsin* (inhabitant) referring to the perception that India's tribal peoples are the subcontinent's aborigines. *Adivasin*, SPOKEN SANSKRIT DICT., <http://spokensanskrit.de/index.php?input=AdivAsin> [http://perma.cc/F3TR-YRFY].

India's population.⁷ An independent adivasi country, however, would be the twelfth most populous state in the world, containing 104 million inhabitants.⁸ For over forty-five years, adivasis in central India have been caught in the crossfire of one of the country's deadliest conflicts since independence.⁹ Yet to the outside world, the thick central Indian forests have all but engulfed and silenced the conflict, just as India's massive population has obscured the magnitude of the crisis.

The extreme-left Naxalites—as India's Maoists are known¹⁰—claim to represent the grievances of the country's adivasis, who are typically isolated from mainstream India.¹¹ The Naxalites have been waging an insurgency against the Indian government for several decades.¹² Massive swaths of central and eastern India—the country's “red belt” or “red corridor”—are now Naxalite-dominated territory.¹³ The insurgency has led to thousands of deaths in the last three decades,¹⁴ with India's former prime minister characterizing it as the country's

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7. Scheduled tribes comprised 104.54 million members in 2011. *Primary Census Abstract Data for Scheduled Tribes*, CENSUS INDIA (2011), http://www.censusindia.gov.in/2011census/population_enumeration.html [<http://perma.cc/FG4B-2C23>]. India's population, however, was 1.21 billion that year. *Primary Census Data Highlights*, CENSUS INDIA (2011), http://www.censusindia.gov.in/2011census/PCA/PCA_Highlights/pca_highlights_india.html [<http://perma.cc/9CAS-3MP5>].
 8. *Primary Census Data Highlights*, *supra* note 7.
 9. The insurgency began in 1967. *See, e.g.*, Kamal Kumar, *Analysis: India's Maoist Challenge*, AL JAZEERA (Aug. 24, 2013), <http://www.aljazeera.com/indepth/features/2013/08/2013812124328669128.html> [<http://perma.cc/R8QH-B6NY>]. The conflict has counted thousands of deaths in the past decade alone. *UCDP Battle-Related Deaths Dataset v.5-2015*, UPPSALA UNIVERSITY, http://www.pcr.uu.se/research/ucdp/datasets/ucdp_battle-related_deaths_dataset [<http://perma.cc/RTG9-9DV6>] (last updated June 22, 2015); Imran Garda, *India's Silent War*, AL JAZEERA (Oct. 21, 2011, 11:11 PM), <http://www.aljazeera.com/programmes/AljazeeraCorrespondent/2011/10/20111019124251679523.html> [<http://perma.cc/R8QH-B6NY>].
 10. This Comment uses the term “Naxalite” to avoid any possible confusion with related Maoist movements elsewhere in South and Southeast Asia. “Naxalite” and “Maoist,” however, are typically interchangeable in India, and the Naxalites' centralized organization is known as the Communist Party of India (Maoist), or CPI-Maoist. *See, e.g.*, *Confused Between Maoists and Naxalities? Read on to Know the Difference*, DNA INDIA (Jan. 12, 2014), <http://www.dnaindia.com/india/report-confused-between-maoists-and-naxalities-read-on-to-know-the-difference-1949798> [<http://perma.cc/RCP5-3SGD>] (“[The Indian m]edia seems to be confused with the terms and uses Maoists and Naxalites quite inter-changeably. . . . [The term] Naxalite is [used] mostly in the Indian sub-continent and [refers to] a member of an armed revolutionary group advocating Maoist Communism.”).
 11. CENTRAL COMMITTEE (P) CPI (MAOIST), PARTY PROGRAMME 21 (2004), <http://www.bannedthought.net/India/CPI-Maoist-Docs/Founding/Programme-pamphlet.pdf> [<http://perma.cc/AA9W-NKKJ>].
 12. The insurgency began in 1967. *See, e.g.*, Kumar, *supra* note 9.
 13. *See, e.g.*, *Conflict Map: Left-Wing Extremist Affected Areas in India 2012*, SOUTH ASIA TERRORISM PORTAL (2012), <http://www.satp.org/satporgtp/countries/india/database/conflictmap.htm> [<https://perma.cc/SUH8-YDSV>].
 14. *See UCDP Battle-Related Deaths Dataset v.5-2015*, *supra* note 9; *see also* Garda, *supra* note 9.

“biggest internal security challenge.”¹⁵ Some commentators, by contrast, have dismissed this characterization as hysterical hyperbole.¹⁶ The last decade has been particularly violent, with 3000 to 6000 deaths attributed to the insurgency in the period between 2005 and 2015 alone.¹⁷

The Indian government has publicly treated the Naxalite insurgency as a law and order issue. The central Indian government and several state governments have deployed police and paramilitary forces to respond to the violence generated by the movement, with the central government’s most recent offensive dubbed “Operation Green Hunt” by the national media.¹⁸ Although the Indian military denies being directly involved in the counterinsurgency,¹⁹ it has been training these non-military forces²⁰ and may also be involved in certain counterinsurgent missions.²¹

The insurgency’s duration, vigor, and geographic spread, the relative formality of the Naxalites’ organization,²² and the possible direct involvement of

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15. *Naxalism Biggest Threat to Internal Security: Manmohan*, THE HINDU (May 24, 2010, 12:57 PM), <http://www.thehindu.com/news/national/naxalism-biggest-threat-to-internal-security-manmohan/article436781.ece> [<http://perma.cc/3SLK-2PD9>].
 16. See, e.g., NIRMALANGSHU MUKHERJI, THE MAOISTS IN INDIA: TRIBALS UNDER SIEGE 55–56 (2012).
 17. P.V. Ramana, *India’s Maoist Movement: Trends and Security Implications*, in MORE THAN MAOISM: POLITICS, POLICIES AND INSURGENCIES IN SOUTH ASIA 327, 329 (Robin Jeffrey et al. eds. 2012); *Fatalities in Left-Wing Extremism: 2005–2015*, SOUTH ASIA TERRORISM PORTAL, http://www.satp.org/satporgtp/countries/india/maoist/data_sheets/fatalitiesnaxal05-11.htm [<https://perma.cc/ZG6K-QFE9>] (last updated July 27, 2015) (counting 6774 deaths between 2005 and 2015); *UCDP Battle-Related Deaths Dataset v.5-2015*, *supra* note 14 (counting 3393 to 4076 deaths between 2005 and 2014).
 18. Aman Sethi, *Green Hunt: The Anatomy of an Operation*, THE HINDU, <http://www.thehindu.com/opinion/op-ed/green-hunt-the-anatomy-of-an-operation/article101706.ece> [<http://perma.cc/38N3-GKA4>] (last updated Feb. 6, 2010, 1:08 AM).
 19. Deepal Jayasekera, *Indian State to Intensify Counter-Insurgency War After Maoist Ambush*, WORLD SOCIALIST WEB SITE (May 29, 2013), <http://www.wsws.org/en/articles/2013/05/29/indim29.html> [<http://perma.cc/4GJP-ASHN>] (“India’s military provides training and logistical support (including extensive use of helicopter transport) to central and state government paramilitaries. It is also reportedly playing a major role in the formulation of their strategy. However, the military has opposed calls for it to lead the war on the ground. . . . On Monday Indian Defence Minister A.K. Antony again ruled out the possibility of tasking the Army with mounting anti-Maoist operations. ‘There is no proposal like that,’ said Antony. ‘We extend our support without direct involvement. The real answer is to strengthen the local police and paramilitary forces.’”).
 20. *Id.*; see also Sethi, *supra* note 18.
 21. Jayasekera, *supra* note 19.
 22. The Naxalite movement’s organization is described more fully later in this Comment. At the most basic level, the central Naxalite organization, CPI-Maoist, is a hierarchical body with strict internal rules. See, e.g., SHREY VERMA, RAKSHAK FOUND., FAR REACHING CONSEQUENCES OF THE NAXALITE PROBLEM IN INDIA: UNDERSTANDING THE MAOIST PROBLEM 23–32 (2011), <http://www.rakshakfoundation.org/wp-content/uploads/2011/08/White-Paper-on-Naxalite-Movement-in-India.pdf> [<http://perma.cc/8SME-UBCC>].

the Indian military have all raised questions about its proper legal classification. Does the Naxalite insurgency truly constitute an internal disturbance—a mere issue for police and paramilitary forces—or is it something more: a full-fledged civil war? The answer to this question deeply implicates the conduct of both the Naxalites and the Indian government. Although terms such as “war,” “civil war,” and “armed conflict” have colloquial meanings, their use within a legal context is restricted and precise. Thus, regardless of whether some have characterized the Naxalite movement as a “civil war,”²³ the actual legal question is separate.

Classifying the Naxalite insurgency has consequences for the rights and permitted conduct of both parties to the violence. Internal disturbances typically trigger the application of domestic criminal law, under which insurgents could be charged for various crimes such as first-degree murder; domestic criminal law, in turn, is framed by international human rights norms.²⁴ A civil war or armed conflict, on the other hand, demands the application of international humanitarian law, the body of law governing the conduct of war.²⁵

International human rights law and international humanitarian law are complementary—human rights law applies during both war and peacetime, while humanitarian law only applies during war—and the “hard core” of human rights law converges with the protections in humanitarian law.²⁶ In comparison to domestic law, international humanitarian law is more permissive in its rules of engagement. For example, a crime like murder would not typically apply to the wartime killing of active, targetable combatants.²⁷ But while some human

23. See, e.g., Garda, *supra* note 9; Jim Yardley, *Maoist Rebels Widen Deadly Reach Across India*, N.Y. TIMES (Oct. 31, 2009), <http://www.nytimes.com/2009/11/01/world/asia/01maoist.html> [<http://perma.cc/Y3C7-7QTD>].

24. See INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS, http://www.redcross.org/images/MEDIA_CustomProductCatalog/m22303661_IHL-FAQ.pdf [<http://perma.cc/P64G-RDKK>] (“International humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict. Cases of this type are governed by the provisions of human rights law ... and such measures of domestic legislation as may be invoked.”) (internal citations omitted).

25. *What Is International Humanitarian Law?*, INT'L COMM. OF THE RED CROSS (July 2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf [<http://perma.cc/YE2S-7TPJ>].

26. The “hard core” of human rights comprises rights that cannot be suspended during times of public emergency, such as the right to life or the right to freedom from torture. *What Is the Difference Between Humanitarian Law and Human Rights Law?*, INT'L COMM. OF THE RED CROSS (Jan. 1, 2004), <https://www.icrc.org/eng/resources/documents/misc/5kzmuy.htm> [<https://perma.cc/QG9L-JEMD>].

27. See, e.g., IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 39–40 (2009) (“[I]t is possible to think of [international humanitarian law] . . . as implicitly permitting the use of force (including lethal force) against persons who meet certain criteria (eg, [sic] the criteria for being a

rights protections can be suspended during public emergencies, humanitarian law applies to all parties at all times during a conflict.²⁸

The determination of the insurgency's legal status does not necessarily carry any normative weight or legitimizing effect. Instead, the legal classification is intended to shed light on each party's obligations and privileges and to circumscribe their behavior in order to ultimately shield civilians and other protected individuals and institutions caught in the crossfire of an armed conflict.²⁹

If the Naxalite insurgency is treated as a law and order issue—as opposed to an armed conflict—then the behavior of the Indian State is restricted by international human rights standards. But if it is treated as a non-international armed conflict between governmental authorities and a nonstate group, then all parties—the Indian State as well as the Naxalites—must meet the standards of international humanitarian law.³⁰ Classifying the insurgency as an armed conflict would thus be an important step in restricting both parties' actions. The Naxalites would be subject to international norms and possible prosecution on the basis of international criminal law for their violent movement against the Indian State.

A non-international armed conflict exists when two essential elements are present: (1) a nonstate actor that is sufficiently organized and (2) violence that is sufficiently intense. The conflict is subject to international humanitarian law once these conditions are met. Unfortunately, the law is still rather gray. In fact, the Naxalite question exposes the underdevelopment of international humanitarian law as it relates to the classification of non-international armed conflicts: There is a surprising dearth of scholarship or case law on the practical use of the organization and intensity elements.

This Comment fills this lacuna by clarifying existing legal standards, reconciling their inconsistent application, and honing the law of non-international armed conflict to focus only on the practical satisfaction of the two elements distilled from case law: organization and intensity. In order to do so, the meaning and scope of the organization and intensity elements are developed on the basis of treaty law, case law, and case studies of Colombia and Mexico. Ultimately, this Comment argues that certain indicia underlying these two elements are dispositive while other indicia—including bilateral peace negotiations between

combatant) . . . [This] facilitates an analysis as to why certain acts that would otherwise be unlawful under domestic law are not unlawful when conducted during an armed conflict.”).

28. *What Is the Difference Between Humanitarian Law and Human Rights Law?*, *supra* note 26.

29. See James W. Garner, *Recognition of Belligerency*, 32 AM. J. INT'L L. 106 (1938) (“Recognition of belligerency does not necessarily confer legitimacy to the insurgent party, nor does it carry an expression of approval or disapproval for or against the causes fought by either party.”).

30. *What Is the Difference Between Humanitarian Law and Human Rights Law?*, *supra* note 26.

parties, international recognition of the conflict, and criminal proceedings on the basis of international humanitarian law—are merely persuasive.

This Comment then argues that the Naxalite insurgency has assumed the traits of a non-international armed conflict by virtue of its level of organization and the intensity of the violence between the Naxalites and the Indian government. First, the Communist Party of India (Maoist) (or “CPI-Maoist”) and its associated committees are highly centralized and hierarchical. Second, the casualty rates associated with the insurgency have remained reliably high, particularly following the 2004 centralization of Naxalite power in CPI-Maoist. The Indian government has mounted a forceful and large-scale response to the insurgency even as the number of Naxalite troops appears to be high. While there has not yet been public and consistent recourse to Indian military forces, the military has been training and providing equipment to the police and paramilitary; in addition, paramilitary can be considered combatants when they take part in hostilities.³¹ Thus, the violent conflict between the Naxalites and the Indian government fits the mold of a non-international armed conflict and international humanitarian law must be applied to both parties.

I. CLARIFYING THE LAW OF NON-INTERNATIONAL ARMED CONFLICT

This Part distills the law governing non-international armed conflicts by drawing from treaty and case law as well as the examples of the Revolutionary Armed Forces of Colombia (FARC) insurgency and Mexico’s drug cartel-related conflict. By reconciling the conflicting approaches to the law, a more explicit and narrow standard emerges for the application of international humanitarian law to unrest between a government and a nonstate actor.

A. Sources of Law

International humanitarian law pertains to armed conflicts and flows primarily from the Geneva Conventions.³² At the moment, three Additional

31. *Rule 4: Definition of Armed Forces*, INT’L COMM. OF THE RED CROSS, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule4 [https://perma.cc/476J-2R74] (last visited Dec. 16, 2015).

32. *Treaties and Customary Law: Overview*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/eng/war-and-law/treaties-customary-law/overview-treaties-and-customary-law.htm> [http://perma.cc/H8K4-TAMX]. *See generally*, INT’L COMM. OF THE RED CROSS, GENEVA CONVENTIONS OF 12 AUGUST 1949, <https://www.icrc.org/eng/assets/files/>

Protocols supplement the Geneva Conventions, although not all states are party to them.³³ In particular, Additional Protocols I and II expand on substantive elements of international humanitarian law.³⁴ India is a High Contracting Party to the Geneva Conventions, but it is not a party to either of the first two Additional Protocols.³⁵ Yet the International Committee of the Red Cross (ICRC), which sponsors the Conventions,³⁶ considers the majority of Additional Protocols I and II to have risen to the level of customary international law.³⁷ Thus, India would be bound by many of the Additional Protocols' provisions regardless of whether it had ratified the texts themselves.³⁸

Within international humanitarian law, a primary distinction is drawn between armed conflicts that are either international in character or not.³⁹ Other forms of violence that fall outside of this dichotomous framework include riots, violent protests, banditry, and similar internal disturbances or tensions necessitating action by a country's law enforcement rather than its military.⁴⁰ The distinction between armed conflicts

publications/icrc-002-0173.pdf [https://perma.cc/H8K4-TAMX] [hereinafter GENEVA CONVENTIONS OF 12 AUGUST 1949].

33. *See States Party to the Following International Humanitarian Law and Other Related Treaties as of 20-Aug-2015*, INT'L COMM. OF THE RED CROSS, [https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US&nv=4&\\$\\$ajaxid=%40none](https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US&nv=4&$$ajaxid=%40none) [https://web.archive.org/web/20150420022557/https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US&nv=4] (last visited Dec. 16, 2015).
34. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, <http://www.refworld.org/docid/3ae6b36b4.html> [http://perma.cc/AP2D-5VAF] [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, <http://www.refworld.org/docid/3ae6b37f40.html> [http://perma.cc/794J-FMEY] [hereinafter Protocol II].
35. Protocol I, *supra* note 34; Protocol II, *supra* note 34.
36. GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 32, at 19–22.
37. Cornelio Sommaruga, *Appeal by the International Committee of the Red Cross on the 20th Anniversary of the Adoption of the Additional Protocols of 1977*, INT'L COMM. OF THE RED CROSS (Oct. 31, 1997), <http://www.icrc.org/eng/resources/documents/article/other/57jnu.htm> [http://perma.cc/4D2Z-X3S].
38. Customary international law binds states even in the absence of formal treaty law. *Customary International Law*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/customary_international_law [https://web.archive.org/web/20150921144252/https://www.law.cornell.edu/wex/customary_international_law] (last visited Dec. 16, 2015).
39. *See generally* INT'L COMM. OF THE RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [https://perma.cc/SA7V-6PZH].
40. The International Committee of the Red Cross (ICRC) defined "internal disturbances" in a document submitted to a 1971 conference. 5 INT'L COMM. OF THE RED CROSS,

and internal disturbances is critical because each triggers a distinct set of laws: armed conflicts are governed by international humanitarian law, which generally provides for more liberal rules of engagement on both sides of the violence, while internal disturbances are governed by a state's domestic law,⁴¹ which strictly limits the use of violence in most cases.⁴² In addition, while human rights norms circumscribe the permitted behavior and responsibilities of a state, humanitarian law places restrictions on the actions of all parties to a conflict.⁴³

The vast majority of the Geneva Conventions' original text applies to international armed conflicts (IACs) between two opposing High Contracting Parties.⁴⁴ Common Article 3, however, offers a skeletal outline of parties' obligations during non-international armed conflicts (NIACs), which do not involve two opposing High Contracting Parties.⁴⁵ Additional Protocol II expands on the parties' legal obligations in NIACs.⁴⁶

As the Naxalite insurgency in India does not clearly involve the participation of two High Contracting Parties, this Part does not discuss the legal status of IACs and the disputed boundary between IACs and NIACs. Instead, it focuses on the distinctions between NIACs and internal disturbances.

PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS 79 (1971) (“[T]here exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence . . . all the way from spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. . . . [T]he authorities in power call upon extensive police forces, or even armed forces, to restore internal order.”) (presented at the conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts).

41. A state's domestic law is, in turn, limited by international human rights law, although each state's observance of these norms varies. See INT'L COMM. OF THE RED CROSS, INT'L HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS 17 (2002), http://www.redcross.org/images/MEDIA_CustomProductCatalog/m22303661_IHL-FAQ.pdf [<http://perma.cc/QX2H-2U4Z>] (“International humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict. Cases of this type are governed by the provisions of human rights law . . . and such measures of domestic legislation as may be invoked.”).
42. One of the most basic rules of international humanitarian law is that combatants—those taking part in hostilities—can be targeted for killing. *Rule 1. The Principle of Distinction Between Civilians and Combatants*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 [<http://perma.cc/ABR2-Q4GV>]. In contrast, killing individuals outside of a wartime context is illegal under most circumstances.
43. *What Is the Difference Between Humanitarian Law and Human Rights Law?*, *supra* note 26.
44. See generally GENEVA CONVENTIONS OF 12 AUGUST 1949, *supra* note 32.
45. *Id.* at 35–36.
46. See generally Protocol II, *supra* note 34.

B. Primary Sources and Commentary

Common Article 3⁴⁷ of the Geneva Conventions and Article 1 of Additional Protocol II provide the basis for determining whether a conflict is a NIAC. The text of Common Article 3 simply draws a distinction between IACs and NIACs (“armed conflicts not of an international character”) and provides no more in terms of a definition for NIACs, but Jean Pictet’s 1949 commentary on the Conventions offers guidance on determining whether an armed conflict is underway.⁴⁸ The commentary outlines four model indicia “as a means for distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection,” but also cautions that these criteria are “not obligatory and are only mentioned as an indication,” instead encouraging the widest possible application of Common Article 3.⁴⁹

The first criterion examines whether the nonstate actor has “an organized military force, an authority responsible for its acts, acting within a determinate territory, [with] the means of respecting and ensuring respect for the Convention.”⁵⁰ Next, the analysis asks whether the *de jure* government must resort to its regular military forces in response.⁵¹ The third criterion focuses on official classification. Specifically, does the *de jure* government classify the nonstate actors as belligerent, or do the actors classify themselves as belligerent?⁵² Has the dispute been submitted to the United Nations (UN) Security Council under Chapter VII of the UN Charter?⁵³ The final criterion looks to several more factors. This includes whether the nonstate actor appears to have a civil authority organized similar to a state; whether the actor exercises control over a portion of territory; whether the actor issues orders to and is responsible for the nonstate armed forces; or whether the actor agrees to be bound by the Conventions.⁵⁴ These criteria are not binding on any state, but are simply meant as guidance.

47. All four Geneva Conventions use the same text for each Convention’s third article. This “common” text is typically called “Common Article 3.” See, e.g., *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, AM. RED CROSS 4 (Apr. 2011), http://www.redcross.org/images/MEDIA_CustomProductCatalog/m3640104_IHL_SummaryGenevaConv.pdf [https://web.archive.org/web/20150414071641/http://www.redcross.org/images/MEDIA_CustomProductCatalog/m3640104_IHL_SummaryGenevaConv.pdf].

48. INT’L COMM. OF THE RED CROSS, *THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY* 35–36 (Jean S. Pictet ed. 1958), http://www.loc.gov/frd/Military_Law/pdf/GC_1949-IV.pdf [http://perma.cc/4CGB-UPFJ].

49. *Id.*

50. *Id.* at 35.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 36.

The commentary itself cautions that situations that do not fit any of the above indicia may still be treated as an armed conflict depending on the circumstances.⁵⁵

Article 1(1) of Additional Protocol II offers more in the way of a definition for NIACs. It frames NIACs as those armed conflicts that occur between a High Contracting Party's armed forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."⁵⁶ Article 1(2) specifically excludes "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" from being classified as NIACs.⁵⁷ The definition for NIACs in Additional Protocol II is narrower than the conception of NIAC in Common Article 3 in two respects: (1) it limits NIACs to situations in which the dissident armed group exercises sufficient territorial control to conduct operations, and (2) it eliminates from NIAC classification any conflicts between two nongovernmental armed groups.⁵⁸

The scope of the "territorial" element under Additional Protocol II is debated. One commentator, Jamshid Momtaz, has suggested that the necessary scope of territorial control ought to be evaluated in light of parties' different obligations toward combatants and noncombatants under international humanitarian law. For example, some fundamental rights, such as restrictions against wanton killing, might be enforceable regardless of whether the nonstate actor has achieved a satisfactory level of territorial control under Additional Protocol II.⁵⁹ Yves Sandoz's commentary on the Additional Protocols suggests that there is some flexibility in evaluating territorial control: a situation in which "urban centers remain in government hands while rural areas escape their authority"⁶⁰—that is, incomplete control—may suffice, but

55. *Id.*

56. Protocol II, *supra* note 34.

57. *Id.*

58. INT'L COMM. OF THE RED CROSS, *supra* note 31.

59. Djamchid Momtaz, *Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux* [International Humanitarian Law Applicable to Non-International Armed Conflicts], in 292 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 21, 50 (2002).

60. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1352–53 (Sandoz et al. eds. 1987), http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf [<http://perma.cc/9PYS-DPCC>].

there must be “some degree of stability in the control of even a modest area of land.”⁶¹

The ICRC has stated that the distinction between “internal disturbances and tensions” and NIACs drawn by Article 1 of Additional Protocol II is generally accepted to apply to Common Article 3 as well.⁶² Because Common Article 3 casts a wider net in classifying NIACs as described above, it follows that not all situations under the ambit of Common Article 3 would fall under Additional Protocol II, but all situations within the scope of Additional Protocol II should fall under Common Article 3.⁶³ At least two commentators, Claude Bruderlein and David Petrasek, have narrowed the definition further, requiring that violence be directed toward some sort of political or ideological end in order to be classified as a NIAC.⁶⁴ This has no textual legal basis, however, and was explicitly rejected by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Limaj*.⁶⁵

Although Pictet’s commentary on the Conventions is illuminating, the actual text of Common Article 3 is bare. But Additional Protocol II explicitly “develops and supplements [Common Article 3] ... without modifying its existing conditions of applications.”⁶⁶ This Comment thus views the text of Article 1 in Additional Protocol II as the standard for defining NIACs.

C. Operationalizing the *Tadić* Criteria: ICTY Jurisprudence

The legal interpretations of international courts such as the ICTY or the International Criminal Tribunal for Rwanda (ICTR) provide important guidance on operationalizing the application of international humanitarian law. The jurisprudence of each international tribunal is not binding on any court

61. *Id.*

62. INT’L COMM. OF THE RED CROSS, *supra* note 31, at 3.

63. Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law*, 91 INT’L REV. RED CROSS 69, 79 (2009), <https://www.icrc.org/eng/assets/files/other/irc-873-vite.pdf> [<https://perma.cc/TE7A-WQSS>].

64. CLAUDE BRUDERLEIN, CTR. HUMANITARIAN DIALOGUE, THE ROLE OF NON-STATE ACTORS IN BUILDING HUMAN SECURITY: THE CASE OF ARMED GROUPS IN INTRASTATE WARS 9 (2000), http://www.hdcentre.org/uploads/tx_news/223-The-role-of-non-state-actors-in-building-human-security.pdf [<http://perma.cc/2PSW-KM7J>]; DAVID PETRASEK, INT’L COUNCIL ON HUMAN RIGHTS POLICY, ENDS AND MEANS: HUMAN RIGHTS APPROACHES TO ARMED GROUPS 6 (2000).

65. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 170 (INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA Nov. 30, 2005) [hereinafter *Limaj* judgment] (“[T]he purpose of the armed forces to engage in acts of violence or also to achieve some further objective is, therefore, irrelevant . . .”).

66. INT’L COMM. OF THE RED CROSS, *supra* note 48.

but itself,⁶⁷ however, governments, inter-governmental organizations, non-governmental organizations, and academic commentators generally see these courts' judgments as providing nonbinding guidance—informative but not precedential.⁶⁸

The ICTY outlined the distinction between internal disturbances and NIACs in the 1997 judgment for the case of *Prosecutor v. Dusko Tadić*.⁶⁹ The *Tadić* judgment offers landmark legal analysis in many respects, providing, for example, what has become the standard definition of an armed conflict: Those situations in which “there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁷⁰ These criteria have been distilled into two elements: intensity and organization⁷¹—that is, in order for a situation to be classified as a NIAC, the violence must reach a certain level of intensity and the nonstate parties must display a certain level of organization.⁷²

The *Tadić* judgment emphasized that these determinative elements should only be used “as a minimum” to distinguish armed conflicts,⁷³ which trigger the application of international humanitarian law, from internal disturbances, which do not. The *Tadić* elements have become so integral to the analysis of armed conflict that they have been formalized near-verbatim in Article 8 of the Rome Statute of the International Criminal Court.⁷⁴

Eight years later, the ICTY revisited these elements at length in *Prosecutor v. Limaj*, offering, in part, a closer look at the *Tadić* criteria by determining

67. Even this precedent appears to be rather weak compared to common law domestic courts. See Xavier Tracol, *The Precedent of Appeals Chambers Decisions in the International Criminal Tribunals*, 17 LEIDEN J. INT'L L. 67, 99 (2004).

68. See generally Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 INT'L DISP. SETTLEMENT 5, 5–23 (2011).

69. *Prosecutor v. Tadić*, Case No. IT-94-1-T, 2 Opinion and Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) [hereinafter *Tadić* judgment].

70. *Id.* at para. 561.

71. *Id.* at para. 562. Although the terms “intensity” and “organization” are now widely used as shorthand for the *Tadić* judgment criteria, it is unclear whence these terms arise given that “protracted” is a temporal adjective and not a qualitative one. The authoritative French text of the *Tadić* judgment uses the word *prolongé* (“prolonged”), which also refers only to length of time. This temporal interpretation seems to disappear, replaced by the qualitative term “intensity,” as early as paragraph 562 of the *Tadić* judgment. *Id.* For curious readers, this question would be ripe for a short historical paper.

72. *Id.*

73. *Id.*

74. Article 8, paragraph 2(f) of the Rome Statute of the International Criminal Court (ICC) notes that the ICC's jurisdiction extends to crimes committed in the context of NIACs, which are defined as “armed 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.” Rome Statute of the Int'l Criminal Court, July 1, 2002, 2178 U.N.T.S. 90.

whether an armed conflict had existed between Serbian government forces and the Kosovo Liberation Army (KLA) before the end of May 1998.⁷⁵ The court found that the KLA was sufficiently organized in order to engage in an armed conflict⁷⁶ and that the conflict was sufficiently intense.⁷⁷

In seeking to avoid the application of international humanitarian law to the alleged crimes, the defense in *Limaj* attempted to argue for a set of preconditions necessary for its application. Specifically, “a party to the conflict must be able to implement international humanitarian law and, at the bare minimum, must possess: (i) a basic understanding of the principles laid down in Common Article 3, (ii) a capacity to disseminate rules, and (iii) a method of sanctioning breaches.”⁷⁸ This reasoning appears to flow from Article 1(1) of Additional Protocol II, which states that NIACs involve governmental armed forces and organized armed groups that “exercise such control as to enable them to . . . implement this Protocol.”⁷⁹ The ICTY, however, rejected the use of this heightened and specific standard, noting that the *Tadić* elements should be the sole minimum criteria applied to the analysis.⁸⁰ Thus, the ICTY decided against a narrowing of the *Tadić* criteria in its *Limaj* holding, instead favoring an expansion of the two determinative elements in *Tadić* to include situations that involve forces “organized to a greater or lesser extent” and conflict of “a certain intensity.”⁸¹

With this expansive view of the *Tadić* criteria established, the ICTY in *Limaj* then went on to unfold its approach to both “intensity” and “organization” in considerable detail.

1. Organization

A year before *Limaj*, in a decision related to the trial of former Serbian President Slobodan Milošević (*Milošević*), the ICTY had cursorily listed some factors relevant to whether the KLA was sufficiently organized—namely, its “official joint command structure, headquarters, designated zones of operation,

75. *Limaj* judgment, *supra* note 65, at para. 83–179.

76. *Id.* at para. 134.

77. *Id.* at para. 171–72.

78. *Id.* at para. 88.

79. Protocol II, *supra* note 34.

80. *Limaj* judgment, *supra* note 65, at para. 89.

81. The International Criminal Tribunal for the Former Yugoslavia (ICTY) lifted this expansive language from an ICRC working paper that was also used by a commission tasked with developing ICC crimes. INT’L COMM. OF THE RED CROSS, WORKING PAPER 9 (June 29, 1999), <http://www.iccnw.org/documents/ICRCWorkPaperArticle8Para2e.pdf> [http://perma.cc/AHB2-W29P].

and the ability to procure, transport, and distribute arms.”⁸² In *Limaj*, the ICTY expanded on that discussion, holding that particular facts, activities, and traits weighed in favor of considering the KLA “organized” for the purposes of applying international humanitarian law. These included the KLA’s hierarchical structure,⁸³ such as the ability of a general staff to issue communiqués,⁸⁴ organize the supply of weapons,⁸⁵ and command subordinate administrators;⁸⁶ a “KLA Regulations” text, containing information on intra-organizational hierarchies and particular duties;⁸⁷ the informal development of a KLA military police⁸⁸ (even though its level of internal discipline had been in dispute⁸⁹) and its later formalization by the general staff;⁹⁰ the KLA’s ability to recruit;⁹¹ the KLA’s role in international negotiations⁹² and its acceptance internationally as a key negotiating party;⁹³ and a Human Rights Watch report arguing that the KLA was “organized” for the purposes of international humanitarian law.⁹⁴

In contrast, the ICTY did *not* consider the following factors to weigh decisively against a requisite level of organization: the nonexistence of a unified KLA uniform;⁹⁵ the KLA’s confusing and secretive internal structure;⁹⁶ or an expert report from Robert Churcher, a private-sector military consultant, arguing that the KLA was not “organized” for the purposes of international humanitarian law because it was unable to maintain a command system or requisite discipline or training to engage in warlike operations.⁹⁷

Three years following *Limaj*, the ICTY in *Prosecutor v. Haradinaj* offered some more criteria, none of which are individually determinative but may be useful in evaluating a nonstate actor’s organization: “the existence of a command

82. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, para. 23 (Int’l Crim. Trib. for the Former Yugoslavia June 16, 2004) [hereinafter *Milošević* Rule 98bis decision].

83. See generally *Limaj* judgment, *supra* note 65, at para. 94–109.

84. *Id.* at para. 101.

85. *Id.* at para. 100.

86. *Id.* at para. 98.

87. *Id.* at para. 110–12.

88. *Id.* at para. 113.

89. *Id.* at para. 116.

90. *Id.* at para. 17. The ICTY thought this step was particularly important.

91. *Id.* at para. 118.

92. *Id.* at para. 125–29.

93. *Id.* at para. 129.

94. *Id.* at para. 133.

95. *Id.* at para. 123. This factor may be decisive, however, if a lack of uniform has great bearing on the organization’s function. In addition, the presence of a uniform may weigh in favor of organization. *Id.*

96. *Id.* at para. 132.

97. *Id.* at para. 133.

structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.”⁹⁸

The *Haradinaj* Trial Chamber thus supplements a running list of criteria from *Milošević* and *Limaj*. In determining whether the KLA was sufficiently organized for the purposes of international humanitarian law, the *Limaj* Trial Chamber offers a detailed and useful expansion of the factors originally listed in the *Milošević* court document: “official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.”⁹⁹ To this basic list the *Limaj* adds the KLA’s military police (which the Chambers singles out as particularly telling), the KLA’s ability to recruit, and the KLA’s participation in international negotiations. The *Limaj* Trial Chamber also seems to accept the determination of Human Rights Watch, a prominent and respected human rights organization, with respect to the KLA’s organization, but rejects the findings in the private military consultant’s report. The *Haradinaj* chambers adds territorial control and participation in bilateral negotiations to the list of factors, while essentially retaining the remainder of the *Milošević* and *Limaj* factors.

Based on the *Milošević*, *Limaj*, and *Haradinaj* cases, we come to a non-exhaustive list of factors that indicate a group is sufficiently organized under international humanitarian law: official joint command structure; headquarters; designated zones of operation and/or territorial control; the ability to procure, transport, and distribute arms; the ability to recruit; the presence of a centrally-run police force; and participation in international or bilateral negotiations regarding the conflict. A determination by a respected international observer, such as Human Rights Watch and similar organizations, may also be considered.

98. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) [hereinafter *Haradinaj* trial judgment].

99. Milošević Rule 98bis decision, *supra* note 82, at para. 23.

2. Intensity

The ICTY's prior jurisprudence considered the following factors in assessing a conflict's intensity:¹⁰⁰ "the seriousness of attacks and whether there has been an increase in armed clashes;"¹⁰¹ "the spread of clashes over territory and over a period of time;"¹⁰² "any increase in the number of government forces and mobilization and the distribution of weapons among both parties to the conflict;"¹⁰³ and "whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed."¹⁰⁴ To this list, the ICTY in *Prosecutor v. Haradinaj* adds "the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones."¹⁰⁵ Taken together, these cases suggest that many different factors are applicable to intensity, though none individually is decisive or determinative.

In *Limaj*, the ICTY described at great length and in considerable detail an escalating set of clashes between the KLA and Serbian government forces that resulted in several hundred deaths and the displacement of thousands.¹⁰⁶ In addition to the known facts about the armed clashes and their resultant casualties, the ICTY noted that a report from a Serbian military commander warned of the complexity of the security situation and indicated its "growing intensity."¹⁰⁷ Because of the pattern of violence, the ICTY's Trial Chamber found that the clashes satisfied the "intensity" criterion before the end of May 1998, even

100. This list is taken from the *Limaj* judgment, *supra* note 65, at para. 90, but the specific cases are provided later in this Comment.

101. See, e.g., *Tadić* judgment, *supra* note 69, at para. 565; *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, para. 189 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) [hereinafter *Celebići* trial judgment]; *Milošević* Rule 98bis decision, *supra* note 82, para. 28.

102. See, e.g., *Milošević* Rule 98bis decision, *supra* note 82, at para. 29; *Tadić* judgment, *supra* note 69, para. 566.

103. See, e.g., *Milošević* Rule 98bis decision, *supra* note 82, at para. 30–31; *Celebići* trial judgment, *supra* note 101, at para. 188.

104. See, e.g., *Celebići* trial judgment, *supra* note 101, at para. 29; *Tadić* judgment, *supra* note 69, at para. 567.

105. *Haradinaj* trial judgment, *supra* note 98, at para. 49.

106. *Limaj* judgment, *supra* note 65, at para. 135–67.

107. *Id.* at para. 146.

though the Serbian military (VJ) did not officially confirm its participation until June 1998.¹⁰⁸

In downplaying the situation's intensity, the defense in *Limaj* attempted to characterize the clashes as "regionally disparate and temporally sporadic"¹⁰⁹ and one-sided in favor of the Serbian forces.¹¹⁰ The ICTY's Trial Chamber, however, held that "periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area,"¹¹¹ and that the KLA often enjoyed a "significant level of overall military success."¹¹² The ICTY specifically contrasted its characterization of the conflict—which satisfied the "intensity" criterion¹¹³—from the defense's suggestions of "regionally disparate and temporally sporadic"¹¹⁴ and one-sided¹¹⁵ clashes, which would not be sufficiently "intense" for the purposes of international humanitarian law.

The ICTY's cases thus distill a standard for sufficient intensity under international humanitarian law: a periodic and escalating set of continuous armed clashes that are neither regionally disparate and temporally sporadic nor one-sided after considering civilian displacement, weapon type, physical destruction, quantity of troops, deployment of government forces, and the brokering of ceasefire agreements or other bilateral negotiations.

It is difficult to arrive at a standard threshold number of casualties or forces engaged in the conflict that triggers classification one way or another. States' populations vary, and a grave conflict in a small state may simply be seen as a minor skirmish in a populous one. While the conflict in Kosovo resulted in thousands of deaths and hundreds of thousands displaced—sufficiently significant numbers for the ICTY's Trial Chambers¹¹⁶—a standard referencing specific numbers of casualties or displacements would not provide a useful benchmark for states with very different population sizes.

108. *Id.* at para. 159. Of course, the ICTY found that the Serbian military (VJ) had participated long before June 1998. *Id.* at para. 152.

109. *Id.* at para. 168.

110. *Id.* at para. 169.

111. *Id.* at para. 168.

112. *Id.* at para. 169.

113. *Id.* at para. 171.

114. *Id.* at para. 168.

115. *Id.* at para. 169.

116. Human Rights Watch estimated 500 civilian deaths by 2000, but the Yugoslav government's numbers varied from 1200 to 5700 civilian deaths. Human Rights Watch further estimated that 250,000 Kosovar Albanians had been displaced by fall 1998 during the early stages of the conflict. *The Crisis in Kosovo*, HUMAN RIGHTS WATCH (2000), <http://www.hrw.org/reports/2000/nato/Natbm200-01.htm> [<http://perma.cc/QT2J-Y3N5>].

D. Operationalizing the *Tadić* Criteria: Other Jurisprudence

In *Prosecutor v. Akayesu*, the ICTR's Trial Chamber considered whether the 1994 genocide in Rwanda could be classified as a NIAC that fell under the scope of Additional Protocol II.¹¹⁷ This was the first judgment of the new court. The Trial Chamber first suggests that the situation is *prima facie* under the scope of Additional Protocol II because the UN Security Council explicitly added Additional Protocol II to the subject-matter jurisdiction of the Tribunal in its founding statute, just as the Yugoslav conflict was considered to be a NIAC because that Tribunal's statute comprised the four Geneva Conventions.¹¹⁸ The UN Security Council did not itself offer an explanation for the inclusion of Additional Protocol II in the ICTR's founding statute.¹¹⁹ The ICTR thus considered moot the question of the applicability of Additional Protocol II, and added that Common Article 3 would apply regardless of whether Additional Protocol II applied.¹²⁰ This discussion implies that a UN Security Council situational classification is legally dispositive.

In 2007, the International Criminal Court (ICC) considered the *Tadić* criteria—implemented directly in Article 8(2)(f) of its founding statute¹²¹—in a decision related to the confirmation of charges in *Prosecutor v. Lubanga*.¹²² The ICC's Pre-Trial Chamber referenced the *Tadić* decision in determining that territorial control was not a necessary element for NIAC classification.¹²³ The ICC also offered a clear interpretation of Article 8(2)(f) of its Rome Statute, stating that its reference to “protracted armed conflict between . . . organized armed groups”¹²⁴ “focuses on the need for the armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time.”¹²⁵

It is curious that the ICC's Pre-Trial Chamber did not invoke territorial control as a necessary factor in determining the “organization” of an armed group, given that the prior *Haradinaj* judgment at the ICTY referenced territorial

117. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, para. 606 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998) [hereinafter *Akayesu* judgment].

118. *Id.*

119. *Id.*

120. *Id.*

121. Rome Statute of the International Criminal Court, *supra* note 74, at art. 8, para. 2(f).

122. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Pre-Trial Chamber I, para. 229–37 (Int'l Crim. Court Jan. 29, 2007) [hereinafter *Lubanga* PTC-I decision].

123. *Id.* at para. 233.

124. Rome Statute of the International Criminal Court, *supra* note 74, at art. 8, para. 2(f).

125. *Lubanga* PTC-I decision, *supra* note 122, at para. 234.

control¹²⁶ and the *Milošević* decision discussed “zones of operation.”¹²⁷ Indeed, Article 1 of Additional Protocol II itself makes reference to territorial control as an element of a NIAC.¹²⁸ The territorial control element might be subsumed in the ICC’s reasoning that armed groups are required to have “the ability to plan and carry out military operations for a prolonged period of time.”¹²⁹ Yet it is certainly possible to have a headquarters and a place from which to carry out operations without controlling a significant territorial area. Given that territorial control is explicitly referenced in treaty law, this Comment treats it as a central factor.

Beyond treaty text and case law, case studies of insurgencies in Colombia and Mexico illuminate the outer boundaries of NIAC classification.

E. Case Study: Colombia’s Leftist Insurgency

The Revolutionary Armed Forces of Colombia—People’s Army (FARC) are a far-leftist, revolutionary armed group active in Colombia.¹³⁰ Their ideological underpinnings are similar to the Naxalites in that FARC claims to follow Marxism-Leninism,¹³¹ a leftist revolutionary theory that predates and also underpins much of Maoism.¹³² FARC is organized hierarchically, headed by a Central High Command and a Secretariat with several levels of leadership below these governing bodies.¹³³ In 2007, FARC claimed its forces numbered 18,000 members,¹³⁴ although the Colombian government submitted that FARC had just 6000 to 8000 members in 2008.¹³⁵ Formed in 1964, its first armed attack was carried out in 1987.¹³⁶ Much like India’s Maoists, FARC

126. *Haradinaj* trial judgment, *supra* note 98, at para. 60.

127. *Milošević* Rule 98bis decision, *supra* note 82, at para. 23.

128. Protocol II, *supra* note 34.

129. *Lubanga* PTC-I decision, *supra* note 122, at para. 234.

130. *Revolutionary Armed Forces of Colombia—People’s Army*, STAN. U., <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/89> [<https://perma.cc/Z34N-ANEV>] (last updated Aug. 15, 2015).

131. *Id.*

132. *Marxism-Leninism*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Marxism-Leninism> [<http://perma.cc/PSG9-T6UE>] (last updated Sept. 22, 2014).

133. *Colombia: An Overview of the Farc’s Military Structure*, EUR. STRATEGIC INTELLIGENCE & SEC. CTR. (Dec. 1, 2010), <http://www.esisc.org/publications/briefings/colombia-an-overview-of-the-farcs-military-structure> [<http://perma.cc/6NMB-AY5W>].

134. Garry Leech, *Interview With FARC Commander Raul Reyes*, COLUMBIA J. (July 12, 2007), <http://colombiajournal.org/interview-with-farc-commander-raul-reyes.htm> [<http://perma.cc/T8CA-FGQM>].

135. *Colombia Forces Kill ‘Key Rebel’*, BBC NEWS, <http://news.bbc.co.uk/2/hi/americas/7630663.stm> [<http://perma.cc/9CUK-ZCVZ>] (last updated Sept. 23, 2008).

136. *Revolutionary Armed Forces of Colombia—People’s Army*, *supra* note 130.

seeks leftist revolution in Colombia to restructure wealth and power in the country in favor of the poor, and it has garnered considerable criticism for its use of violence against civilians.¹³⁷

The current position of the Colombian government, under President Juan Manuel Santos, is that the State is engaged in a NIAC with FARC.¹³⁸ His predecessor, Alvaro Uribe, was highly opposed to calling the FARC insurgency an armed conflict, however, for he feared that naming the insurgency a NIAC would give FARC “belligerency status”—in Uribe’s eyes, political and moral legitimacy—and elevate its position to be on par with the State’s armed forces.¹³⁹ Uribe also reportedly feared that international humanitarian law would grant some special protection to the rebels.¹⁴⁰ He thus refused to label the conflict a NIAC.

Since Uribe left office, FARC has engaged in bilateral peace negotiations with the Colombian government; the most recent round began in late November 2014.¹⁴¹ The government also officially labeled the FARC insurgency as an armed conflict in a law regulating victims’ reparations.¹⁴² Further, the Colombian Constitutional Court as well as the Inter-American Court of Human Rights have created long chains of case law on the application of international humanitarian law to the FARC insurgency.¹⁴³

The FARC insurgency was thus labeled a NIAC by governmental action, a declaration that appears persuasive on its face, but is largely irrelevant in a legal assessment—the question of whether a conflict is a NIAC is determined by objective factors irrespective of any declarations by the parties.¹⁴⁴ Indeed, a public declaration of the applicability of international humanitarian law, regardless of the legal soundness of such a determination, may work in favor of the declaring State by providing some measure of legitimacy for its use of lethal force. The FARC insurgency, nevertheless, appears to be a NIAC: the Rule of Law in

137. *Id.*

138. *Tormenta Política Ante Posible Declaratoria de Conflicto Armado*, ELPAIS (May 4, 2011), <http://www.elpais.com.co/elpais/colombia/presidente-santos-reconoce-en-colombia-hay-conflicto-armado> [<http://perma.cc/4UMZ-G67R>].

139. Guillermo Otálora Lozano & Sebastian Machado, *The Objective Qualification of Non International Armed Conflicts: A Colombian Case Study*, 4 AMSTERDAM L. F. 58 (2012), <http://amsterdamlawforum.org/article/view/252> [<http://perma.cc/EP32-S6P7>].

140. *Id.*

141. *What Is at Stake in the Colombian Peace Process?*, BBC NEWS (Jan. 15, 2015), <http://www.bbc.com/news/world-latin-america-19875363> [<http://perma.cc/5QHP-6KGK>].

142. *Ley 1448 de 2011*, BOGOTÁ JURÍDICA DIGITAL (June 10, 2011), <http://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=43043> [<http://perma.cc/MR9J-DKZZ>].

143. Lozano & Machado, *supra* note 139.

144. *See, e.g., id.*

Armed Conflicts (RULAC) Project, which is dedicated to the legal analysis of armed conflict, concluded that the NIAC threshold had been reached in the case of FARC, noting that “the extent and sustained nature of armed violence, and the level of organization of the non-state armed groups fighting mean that the situation in Colombia has reached the threshold of an armed conflict.”¹⁴⁵ RULAC also concluded that the threshold set forth in Additional Protocol II had been reached because of the “effective control of certain territory by non-state armed groups and their level of organization.”¹⁴⁶ The Inter-American Court of Human Rights, a permanent legal institution, offers further persuasive evidence in the forms of its judgments related to FARC on the basis of NIAC classification.¹⁴⁷

The FARC insurgency involves many aspects of engagement with the Colombian State that are absent in the Naxalite context. These include an official governmental determination of the existence of a NIAC as well as national and international litigation that applied international humanitarian law. FARC also engaged in bilateral peace negotiations with the government. Using the standards distilled in the previous Part, however, none of these facts are determinative on their own. While they may provide persuasive support in favor of NIAC classification, RULAC and two other commentators argued that the FARC insurgency rose to the level of a NIAC by virtue of FARC’s organization and the intensity of the violence.¹⁴⁸ This suggests that a NIAC can exist in the absence of governmental declarations and domestic and international litigation.

F. Case Study: Drug Cartel-Related Violence in Mexico

Mexico’s government has engaged with several rival drug cartels jockeying for economic and territorial control since the 1990s, though Felipe Calderon’s ascension to the presidency in 2006 escalated both the government’s response and the casualty rate.¹⁴⁹ In 2009, the U.S. Department of Defense estimated that the drug cartels boasted a combined force of 100,000 foot soldiers that was

145. *Colombia: Applicable International Law*, GENEVA ACAD. INT’L HUMANITARIAN L. & HUM. RTS. (July 18, 2012), http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=47 [<http://perma.cc/PR3N-L9J7>].

146. *Id.*

147. *See, e.g.*, Lozano & Machado, *supra* note 139.

148. *Id.*

149. ROBERT S. LEIKEN, CTR. FOR THE NAT’L INT., MEXICO’S DRUG WAR 1 (July 2012), [<http://perma.cc/97AD-ZYJ2>].

comparable to the Mexican military forces of 130,000.¹⁵⁰ By 2012, around 50,000 deaths were directly attributable to the violence.¹⁵¹ To the surprise of some observers, the Mexican government has not yet engaged in peace negotiations with the drug cartels despite the scale of the violence.¹⁵² At least one commentator has argued that Mexico's drug cartel-related violence has become a *de jure* armed conflict on the basis of the continuing and escalating conflict between the Mexican military and the drug cartels' armed forces.¹⁵³

The Mexican case is distinguishable from the Naxalite insurgency on a number of fronts. While the Naxalites are quite centralized in CPI-Maoist, the Mexican drug cartels are legion and rival, with the result being that the government is engaged with several different armed groups at once.¹⁵⁴ In addition, the drug violence-related death toll in Mexico—at 50,000 in 2012¹⁵⁵—is significantly higher than that of Naxalite-related violence in India.¹⁵⁶ The armed forces of the drug cartels are also similar in size to that of the Mexican military. Finally, the Mexican government, beginning in 2006, has resorted to use of its military forces in response to the drug cartels;¹⁵⁷ this has not yet happened in India. Similar to the Naxalite context, however, the government has not yet engaged in bilateral peace negotiations with the drug cartels as of 2015.

Although the drug cartel-related violence in Mexico is regularly dubbed a “drug war,” not much is written on the subject of whether the conflict can be classified as a NIAC. One commentator has argued rather persuasively that the conflict is a NIAC on the basis of the hierarchical order of each cartel, the intensity of the violence, the duration of the conflict, and the behavior of Mexico's military forces.¹⁵⁸ Assuming that the “drug war” is indeed a war, this militates toward the conclusion that recourse to bilateral peace negotiations, absent in the Mexican context, is not a necessary and determinative characteristic of NIAC classification.

150. *100,000 Foot Soldiers in Mexican Cartels*, WASH. TIMES (Mar. 3, 2009), <http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels> [<http://perma.cc/2LNZ-WKKE>].

151. LEIKEN, *supra* note 149.

152. See, e.g., Ricardo Ainslie, *Mexico's 'New' Drug War*, L.A. TIMES (July 26, 2013), <http://articles.latimes.com/2013/jul/26/opinion/la-oe-ainslie-trevino-mexico-pena-nieto-20130726> [<http://perma.cc/U2XL-99ZP>].

153. Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1048 (2011).

154. LEIKEN, *supra* note 149.

155. *Id.*

156. See sources cited *supra* note 16.

157. LEIKEN, *supra* note 149.

158. *Id.*

G. Toward a Legal Standard

As the foregoing discussion demonstrates, the *Tadić* criteria of organization and intensity are characterized by considerable broadness and malleability depending on the particular circumstances of a situation. While many cases and commentators discuss the legal criteria in broad conceptual strokes—useful information, but not entirely practical when applied to novel situations—*Limaj* provides a uniquely detailed look into how these criteria are operationalized and applied to every descriptive level of a conflict. The case studies of Colombia and Mexico offer more clarity on the outer boundaries of NIAC classification.

The relevant legal standards distilled above are restated here. With regard to organization, the following factors weigh in favor of NIAC classification: official joint command structure; headquarters; designated zones of operation and/or territorial control; the ability to procure, transport, and distribute arms; the ability to recruit; the presence of a centrally-run police force; and participation in international or bilateral negotiations regarding the conflict. A determination by a respected international observer may also be considered. With regard to intensity, the following factors suggest the existence of a NIAC: a periodic and escalating set of continuous armed clashes that are not regionally disparate and temporally sporadic nor one-sided, considering civilian displacement, weapon type, physical destruction, quantity of troops, deployment of government forces, and the brokering of ceasefire agreements or other bilateral negotiations.

In addition to these legal standards, commentary surrounding the Colombian case suggests that a NIAC can exist in the absence of governmental declarations, domestic or international litigation applying international humanitarian law, or bilateral peace negotiations. The Mexico case seems to emphasize that bilateral peace negotiations are not a necessary or determinative component of NIAC classification.

II. THE NAXALITE INSURGENCY: ORIGINS AND GROWTH

Central India's forests are lovely—lush and resource-rich—but they do not normally garner international or even domestic attention as economic centers or tourist attractions. These forests' diverse inhabitants are lumped together under India's sweeping demographic classification system as "tribal peoples"

or “scheduled tribes.”¹⁵⁹ In the popular creation story of India, adivasis are said to be the first people: the aboriginal population of the subcontinent before new groups, who became southern and northern Indians, arrived.¹⁶⁰

According to the Indian Labor Bureau, scheduled tribes are deemed as such by four main criteria: “geographical isolation,” “backwardness” or reliance on “primitive” agricultural methods and low human development indicators, “distinctive culture, language, and religion,” and “shyness of contact.”¹⁶¹ Adivasis constitute roughly 8.5 percent of India’s population, or around 104 million people,¹⁶² although their share of the urbanized population is much lower at 2.4 percent.¹⁶³ They live a world apart from mainstream Indian society, speaking different languages, observing different customs, and functioning with economic networks that are typically isolated and closed.¹⁶⁴ Further, their health and education statistics lag considerably behind the rest of India.¹⁶⁵ In independent India’s march toward economic success, adivasi groups are often left behind or pushed out of the way and tensions have naturally erupted. The verdant forests in the heart of India are a dissonant backdrop to the violence.

Thus, the adivasis of central India—concentrated in the states of Andhra Pradesh, Chhattisgarh, Jharkhand, and Orissa—have been vulnerable to displacement and economic marginalization.¹⁶⁶ This is not only because of their

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159. See, e.g., *Home*, MINISTRY TRIBAL AFFAIRS, <http://tribal.nic.in/index.aspx> [<http://web.archive.org/web/20151031025639/http://tribal.nic.in/index.aspx>] (last updated Dec. 17, 2015).
160. The characterization of adivasis as the aborigines in India is common, regardless of actual historical fact, and their title itself connotes aboriginal status. See, e.g., 42 LOK SABHA DEB. 41–42, Series 10 (June 1995) (Debates from the Lower House of Indian Parliament) (“The Adivasis are the aborigines of India . . .”).
161. LABOUR BUREAU, GOV’T OF INDIA, REPORT ON SOCIO-ECONOMIC CONDITIONS OF SCHEDULED TRIBES 6–11 (2007), http://labourbureau.nic.in/SE_Gujarat%2006-07_Contents.htm [<http://perma.cc/5Q45-VQTB>].
162. *Population Enumeration Data*, CENSUS INDIA (2011), http://www.censusindia.gov.in/2011census/population_enumeration.html [<http://perma.cc/N45L-FYAU>] (last visited Dec. 16, 2015).
163. *Scheduled Castes and Scheduled Tribes*, CENSUS INDIA (2001), http://censusindia.gov.in/%28S%28wuuk0bnvnw1rmz1w0j0f345%29%29/Census_And_You/scheduled_castes_and_scheduled_tribes.aspx [<http://perma.cc/RTA5-S88S>].
164. See, e.g., Yardley, *supra* note 23 (“The adivasis are the group least incorporated into India’s political economy . . . [their plight is one of the] unfinished quests of Indian democracy.”) (quoting Ashutosh Varshney, an India specialist at Brown University). See generally BARBARA HARRISS-WHITE ET AL., DALITS AND ADIVASIS IN INDIA’S BUSINESS ECONOMY (2014).
165. Soudarssanane M. Bala & D. Thiruselvakumar, *Overcoming Problems in the Practice of Public Health Among Tribals of India*, 34 INDIAN J. OF COMMUNITY MED. 283, 283–87 (2009).
166. For example, according to the World Bank, adivasis are 20 years behind the average growth in poverty reduction in India. MAITREYI BORDIA DAS & SOUMYA KAPOOR MEHTA, WORLD BANK, POVERTY AND SOCIAL EXCLUSION IN INDIA: ADIVASIS 1–2 (Apr. 2011), http://siteresources.worldbank.org/EXTSOCIALDEVELOPMENT/Resources/244362-1265299949041/6766328-1307475897842/India-PSE-Adivasis_Brief.pdf [<http://perma.cc/RF6D-GS8Z>].

physical and social isolation from mainstream India, but also because the central Indian forests are rich in resources like wood, uranium, limestone, and graphite.¹⁶⁷ Jharkhand and Orissa alone are home to some of the largest iron ore mines in the world.¹⁶⁸ Because of the obvious economic value of the land, the government and large corporations have been forcing adivasis off of the land in order to exploit its resources.¹⁶⁹ Adivasis and their advocates note that the Fifth Schedule of the Indian Constitution grants scheduled tribes a large measure of local and group autonomy in regulating the use of their lands (known as “scheduled areas”) and their natural resources,¹⁷⁰ but these rights have seen little realization.¹⁷¹ Adivasi land rights litigation has so far yielded few results.¹⁷²

As a result of the country’s deep and persistent class, caste, and religious divisions, India has long been home to many robust (and sometimes revolutionary) leftist movements. The states of Kerala and West Bengal were previously ruled by democratically elected Communist governments,¹⁷³ and the state of Tripura is currently ruled by the Communist Party of India (Marxist) (or

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167. See *2010 Minerals Yearbook: India*, U.S. DEPT OF THE INTERIOR, GEOLOGICAL SURVEY (2010), <http://minerals.usgs.gov/minerals/pubs/country/2010/myb3-2010-in.pdf> [<http://perma.cc/P2KV-74PJ>].
168. *Jharkhand Orders Closure of Some Iron Ore Mines*, REUTERS (Sept. 11, 2014, 3:53 PM), <http://in.reuters.com/article/2014/09/11/india-jharkhand-mines-ironore-closures-idINKBN0H60Y120140911> [<http://perma.cc/SX43-D7X4>]; Manolo Serapio Jr., *India to Import Iron Ore, Offer Market to Oversupplied Global Industry*, BUS. TODAY INDIA (Sept. 16, 2014, 10:51 AM), <http://businessday.intoday.in/story/india-iron-ore-mining-curb-import-effect-on-global-market/1/210374.html> [<http://perma.cc/B8CT-M7XG>].
169. See generally Jérémie Gilbert, *The Blur of a Distinction: Adivasis Experience With Land Rights, Self-Rule and Autonomy*, in 20 INTERNATIONAL LAW AND INDIGENOUS PEOPLES 269 (N. Walsh & J. Castellino eds. 2005).
170. See CONSTITUTION OF INDIA, art. 244.
171. E.N. Rammohan, *Unleash the Good Force*, OUTLOOK INDIA (July 16, 2012), <http://www.outlookindia.com/article.aspx?281554> [<http://perma.cc/J2S9-3V6D>] (“Regrettably, no governor of any state in India has ever constituted tribal advisory councils of scheduled tribes living in the reserve forests or scheduled areas of the states they [govern]. In this deliberately created vacuum, the chief ministers of the states have merrily administered their reserve forests by leasing them for mining to private companies, evicting the tribals living in these forests for millennia.”).
172. See, e.g., *Lesson 2: The Relationship Between the Right to Land and the Right to Food*, HUMAN RTS. CORRESPONDENCE SCH., <http://www.hrschool.org/doc/mainfile.php/lesson39/156> [<https://web.archive.org/web/20110725092210/http://www.hrschool.org/doc/mainfile.php/lesson39/156/>] (last visited Dec. 16, 2015); Gladson Dungdung, *India: Is the Judiciary Biased Against Adivasis?*, IC MAGAZINE (July 30, 2012), <https://intercontinentalcry.org/india-is-the-judiciary-biased-against-adivasis> [<https://perma.cc/GNA5-QN3H>].
173. *Communist Party in Kerala*, COMMUNIST PARTY OF INDIA (MARXIST) STATE COMMITTEE, KERALA, <http://www.cpimkerala.org/eng/history-2.php?n=1> [<http://perma.cc/6FA3-4DML>] (last visited Dec. 16, 2015); *History*, COMMUNIST PARTY OF INDIA (MARXIST) WEST BENGAL STATE COMMITTEE, http://www.cpimwb.org.in/history_details.php?history_id=7 [<http://perma.cc/S5L3-B2GE>] (last visited Dec. 16, 2015).

“CPI-M”).¹⁷⁴ The CPI-M reliably captures around ten seats in India’s Parliament each election cycle—usually from Kerala, West Bengal, and Tripura—and the Communist Party of India (CPI) wins one or two more.¹⁷⁵

The Naxalites are unique compared to these other leftist groups because of their scope and goals. While CPI-M and other mainstream Communist political parties work within the established system to further their ideological goals, the Naxalites, who have consolidated themselves into one umbrella organization—CPI-Maoist—seek independence from the system altogether through the waging of a “people’s war” and the establishment of an independent communist state: an egalitarian haven for adivasis.¹⁷⁶ The Communist Parties of India are linked in name, but CPI and CPI-M have explicitly disavowed the behavior of CPI-Maoist.¹⁷⁷

This Part presents an overview of the origins and present-day characteristics of the Naxalite-Maoist insurgency in India. A detailed analysis of the insurgency’s causes is beyond the scope of this Comment, but several commentators in the Indian subcontinent and beyond have written extensively on the movement.¹⁷⁸ Naxalites are legion and diverse in India, but this Part focuses primarily on the development and status of CPI-Maoist, in which Naxalite authority was centralized in September 2004.¹⁷⁹

As described in detail below, the Naxalite movement has grown in many ways—not only in geographic and membership size, but also organizational maturity—in the last half century. Today’s Naxalite movement, concentrated organizationally in CPI-Maoist, is highly centralized and very hierarchical. By many measures it exerts considerable influence over a large swath of east-central India, either directly (through its Central Committee and subordinate committees) or indirectly (through its Revolutionary People’s Committees). The Indian State has been forced to expend extraordinary resources in responding to the insurgency, especially in the last few years.

174. *Tripura Legislative Assembly*, LEGIS. BODIES INDIA, <http://legislativebodiesinindia.nic.in/TRIPURA.htm> [<http://perma.cc/B8X8-UMTR>] (last visited Dec. 16, 2015).

175. India’s Parliament has 545 members. *Members Biographical Sketch (Alphabetical)*, LOK SABHA, <http://www.loksabha.nic.in/members/AlphabeticalList.aspx> [<http://perma.cc/ZAV9-L65J>] (last visited Dec. 15, 2016).

176. PARTY PROGRAMME, *supra* note 11.

177. See Jayasekera, *supra* note 19.

178. For an introduction to the subject, see fiction author Arundhati Roy’s excellent essay series on the Naxalites. Arundhati Roy, *Walking With the Comrades*, OUTLOOK INDIA (Mar. 29, 2010), <http://www.outlookindia.com/article.aspx?264738-1> [<http://perma.cc/SSU2-H89T>].

179. *Left-Wing Extremist Groups: Communist Party of India-Maoist (CPI-Maoist)*, S. ASIA TERRORISM PORTAL, http://www.satp.org/satporgtp/countries/india/terroristoutfits/CPI_M.htm [<http://perma.cc/S3LP-ZNSB>] (last visited Dec. 16, 2015).

A. First Phase (1960s–1980s): The Seeds of Agrarian Revolution

Amidst persistent marginalization and displacement, some of India's landless, poor, and low-caste found inspiration in the writings of Mao Zedong, the Communist revolutionary and founding father of the People's Republic of China.¹⁸⁰ Mao's ideology was spread among poor and elite leftist Indians by Charu Majumdar, who condensed Mao's ideas of agrarian revolution and peasant uprising into a series of eight monographs known as the "Historic Eight Documents."¹⁸¹ His writings were widely distributed across India in 1965 and 1966.¹⁸²

Majumdar's writings came on the heels of a critical split in the CPI, which led in 1964 to the formation of the CPI-M, a group of leftists who preferred to work within India's formal political institutions rather than engage in open revolution.¹⁸³ The CPI-M later rose to power in West Bengal in 1967.¹⁸⁴ Meanwhile, tensions over the actions of "feudal landlords, usurious money-lenders, unscrupulous government officials and a rapacious police force" had come to a head after two decades of India's independence.¹⁸⁵ In May 1967, Majumdar led a peasant uprising in the West Bengal village of Naxalbari, fueled by adivasis who sought the return of their lands.¹⁸⁶ The government, which was dominated by the CPI-M, cracked down violently on the rebels.¹⁸⁷ The incident captured the country's imagination and Naxalbari-style uprisings soon appeared all over central India, where adivasis and other landless and poor Indians

180. See, e.g., Shashank Chouhan & Sankalp Phartiyal, *Who Are India's Maoists and Why They Are in the News*, REUTERS (May 29, 2013), <http://blogs.reuters.com/india/2013/05/29/who-are-indias-maoists-and-why-they-are-in-the-news> [<https://web.archive.org/web/20150317031720/http://blogs.reuters.com/india/2013/05/29/who-are-indias-maoists-and-why-they-are-in-the-news/>].

181. Charu Majumdar, *The Historic "Eight Documents"*, SCRIBD (Jan. 22, 2011), <http://www.scribd.com/doc/47358714/Historic-Eight-Documents#scribd> [<http://perma.cc/6G6Y-HGH4>].

182. *History of Naxalism*, HINDUSTAN TIMES (Dec. 15, 2005), <http://www.hindustantimes.com/news-feed/nm2/history-of-naxalism/article1-6545.aspx> [<http://perma.cc/N4SG-ZYES>].

183. *Id.* For a more partisan view, see also COMMUNIST PARTY OF INDIA (MARXIST) WEST BENGAL STATE COMMITTEE, *supra* note 173. The Communist Party of India (Marxist) (or "CPI-M") has since gone on to enjoy considerable electoral success, winning polls and forming governments in the states of Kerala, West Bengal, and Tripura. See *supra* notes 171–70 and accompanying text.

184. Sumanta Banerjee, *Reflections of a One-Time Maoist Activist*, in MORE THAN MAOISM: POLITICS, POLICIES AND INSURGENCIES IN SOUTH ASIA 47, 49 (Robin Jeffrey et al. eds. 2012).

185. *Id.*

186. *History of Naxalism*, *supra* note 178.

187. *Id.*

began violently protesting their maltreatment.¹⁸⁸ The terms “Naxal,” “Naxalite,” and “Naxalism” are drawn from the Naxalbari incident.

Periodic uprisings led by Naxalites continued from 1967 to 1975 in West Bengal, Bihar, and Andhra Pradesh until—at the urging of Prime Minister Indira Gandhi—the president imposed a state of emergency on the country for two years. In doing so, the Government cited concerns over the “internal disturbance” stemming not only from the Naxalite uprisings but also the activities of other opposition groups.¹⁸⁹ Gandhi stamped out opposition to the government during this controversial period and was given the power to rule by decree.¹⁹⁰ The Naxalite movement was quieted during the state of emergency.¹⁹¹

B. Second Phase (1980s–1990s): Rapid Expansion

After the state of emergency ended in 1977, the Naxalite movement splintered again along the same lines as in 1964: many renounced the ideology of violent uprising in favor of working through formal political institutions and trade unions.¹⁹² The remaining group was committed to the original ideology of peasant rebellion. In the words of one commentator, “the Naxalites argue that parliamentary democracy has disillusioned the masses and the only option left with the people is to violently confront the oppressors—the state, the bureaucrats, moneylenders, landlords, and the mafia.”¹⁹³ Over the two decades following the end of the emergency, the Naxalites expanded their political and military reach over 160 districts in ten states in east-central India, an area now known as the Red Corridor.¹⁹⁴

C. Third Phase (2000s–Today): Unity and Force

The Naxalite movement was infused with new vigor and strength upon the formation in 2004 of a single consolidated, revolutionary party: CPI-Maoist.¹⁹⁵

188. Banerjee, *supra* note 184, at 49.

189. *Id.* Article 352(1) of the Indian Constitution allows the president to declare a “state of emergency” in cases of internal disturbance.

190. The state of emergency remains intensely controversial in India. *See, e.g.*, Avneesh Arputham, *Emergency: The Darkest Period in Indian Democracy*, VIEWSPAPER (June 27, 2009), <http://theviewpaper.net/emergency-the-darkest-period-in-indian-democracy> [<http://perma.cc/AHX2-646Q>].

191. Banerjee, *supra* note 184.

192. *Id.*

193. D. Raja, *The Naxal Movement: A Realistic Approach*, in *THE NAXAL CHALLENGE: CAUSES, LINKAGES, AND POLICY OPTIONS* 2, 3 (P.V. Ramana ed. 2008).

194. *Id.*

195. PARTY PROGRAMME, *supra* note 11.

The Party Programme of CPI-Maoist restates many of the ideological tenets that had undergirded the movement since its beginnings.¹⁹⁶ Among these is the commitment to “armed agrarian revolution” and “protracted people’s war” in order to resolve the tension between so-called “feudal forces” in India with the aspirations of the country’s masses.¹⁹⁷ CPI-Maoist vows to achieve these ends by arming a “people’s liberation army” and “establish[ing] guerilla zones and base areas in strategically favorable areas” in order to foment an “armed agrarian revolutionary guerilla war.”¹⁹⁸ According to the Party Programme, the three instruments needed to achieve these goals are: (1) a revolutionary party based on Marxist-Leninist-Maoist ideology; (2) a people’s army built through armed agrarian revolution; and (3) a united front to advance the armed struggle and seize political power.¹⁹⁹

The Naxalites today, in contrast to the Naxalites of the 1970s, appear to be more woven into the fabric of central Indian society and are far less easily quieted by forces led by the Indian State.²⁰⁰ They have shifted emphasis directly to military activity, in contrast to the prior two phases.²⁰¹ The language in the Party Programme is strong and violent, but one commentator has suggested that the concept of overthrowing the Indian State and establishing a socialist haven for adivasis and other marginalized communities is a bookish pipe-dream held by the wealthy elite of CPI-Maoist; the true immediate goals of the movement’s base are to motivate radical land reforms and exterminate unscrupulous semi-feudal landlords and their allies.²⁰² Another commentator disagrees, arguing that the Naxalites no longer recognize “landlordism” as a significant force and are indeed focused on military activity as a means to establish an independent state.²⁰³

1. Increased Violence and Organization

The militarization of the Naxalite movement has peaked in the last two decades and the number of casualties on both sides has risen, due in no small part to the shift in weaponry from simple farm implements to sophisticated

196. *Id.*

197. *Id.* at para. 19.

198. *Id.* at para. 28.

199. *Id.* at para. 32.

200. John Harriss, *What Is Going on in India’s ‘Red Corridor’? Questions About India’s Maoist Insurgency: A Literature Review*, in MORE THAN MAOISM: POLITICS, POLICIES AND INSURGENCIES IN SOUTH ASIA 25, 33 (2012).

201. *Id.*

202. Banerjee, *supra* note 184, at 51.

203. Harriss, *supra* note 200.

military equipment.²⁰⁴ The total number of deaths in recent years is a matter of dispute. According to P.V. Ramana, an Indian national security specialist, nearly 3000 deaths were attributable to the insurgency between 2005 and 2009.²⁰⁵ (The year 2005 is significant, as it is the first full year after the Naxalites consolidated themselves into CPI-Maoist.²⁰⁶) The Indian Ministry of Home Affairs reports over 7600 incidents and nearly 3000 deaths between 2009 and 2012.²⁰⁷ The Uppsala Conflict Data Program records between 3393 and 4076 deaths from 2005 to 2014.²⁰⁸ A second commentator, K.P. Singh, claims that since 1991, the Naxalites have killed more than 500 “class enemies” (officials whose views are held to be antithetical to the Naxalite movement) each year and that approximately 1500 incidents of Naxalite-led violence of varying severity are reported every year.²⁰⁹ In Jharkhand, a forested and impoverished state carved out of central India in 2000, Naxalites carried out 570 attacks on government installations, killed 300 people, and built at least 35 known underground bunkers between 2000 and 2008.²¹⁰ In total, according to K.P. Singh, their armed cadre reportedly numbers around 8000 trained individuals and 15,000 more armed villagers, with an arsenal of around 6500 regular weapons and 10,000 informal weapons.²¹¹ Their annual budget is around 1.5 billion rupees, or \$25.2 million.²¹²

The Naxalites also display considerable centralized authority over their operation. A Central Committee (CC) is elected once every five years and controls all operations.²¹³ Under the CC, there are six levels of governance corresponding to administrative divisions in India, from state committees all the way down to local-level committees.²¹⁴ The Naxalites have also devoted considerable resources to developing *grām rājya* (village government) programs, known as Revolutionary People’s Committees (RPCs) or people’s government, in adi-

204. P.V. Ramana, *supra* note 17, at 329.

205. *Id.* at 329–30.

206. PARTY PROGRAMME, *supra* note 11.

207. V. Balasubramaniyan, *The Origins of the Maoist Movement in India*, GEOPOLITICAL MONITOR (Oct. 14, 2013), <http://www.geopoliticalmonitor.com/the-origins-of-the-maoist-movement-in-india-4871> [<http://perma.cc/PP94-X492>].

208. UCDDP *Battle-Related Deaths Dataset v.5-2015*, *supra* note 9.

209. K.P. Singh, *The Trajectory of the Movement*, in THE NAXAL CHALLENGE 14 (P.V. Ramana ed. 2008).

210. Harivansh, *The Case of Jharkhand*, in THE NAXAL CHALLENGE 18, 20 (P.V. Ramana ed. 2008).

211. Singh, *supra* note 209, at 15.

212. *Id.*

213. Balasubramaniyan, *supra* note 207.

214. *Id.*

vasi areas.²¹⁵ By 2003, 500 RPCs were formed in the forests of east-central India, exercising influence over some 2000 villages.²¹⁶

The CC oversees a Central Military Commission (CMC) that coordinates the People's Liberation Guerilla Army (PLGA), itself highly hierarchical.²¹⁷ According to the Naxalite document "Strategy and Tactics of the Indian Revolution," the Naxalite militias are divided into three levels, headed by a centralized command (primary force) and bulked up by the people's militia (base force).²¹⁸ The document also states that regions in India are distinguished by the level of control exercised by the Naxalites therein: Resistance Zones are zones of least control, the bases of initial rebellion; Guerilla Zones are areas where Naxalites begin to demonstrate a certain level of administrative and military control, including the establishment of quasi-judicial mechanisms; and Liberated Zones are areas in which there is virtually no influence from the Indian State.²¹⁹

Despite these signs that the Naxalites are embedded in much of east-central Indian society, their level of support is still a matter of contention. Notwithstanding the numerical strength of armed Naxalites, some observers have argued that adivasi support for the Naxalites' violence is quite low and that what support they have garnered is driven by fear rather than sympathy.²²⁰ Indeed, on the surface, the numbers are misleading: roughly 23,000 armed insurgents is a large absolute amount, but this amounts to just two-hundredths of 1 percent of the total adivasi population.²²¹ By comparison, FARC counted between 8,000 to 10,000 fighters in 2013,²²² amounting to two-hundredths of 1 percent

215. Ruchir Garg, *The Case of Dandakaranya*, in *THE NAXAL CHALLENGE* 25, 35 (P.V. Ramana ed. 2008).

216. *Id.*

217. *Id.*

218. CENT. COMM. (P) COMMUNIST PARTY OF INDIA-MAOIST, STRATEGY AND TACTICS OF THE INDIAN REVOLUTION (2004), <http://www.satp.org/satporgtp/countries/india/maoist/documents/papers/strategy.htm> [<http://perma.cc/LC3C-6WRV>].

219. *Id.*; see also Balasubramanian, *supra* note 207.

220. See *Tribals Don't Have Sympathy but Chilling Fear for the Naxals*, REDIFF NEWS (Apr. 12, 2010, 12:39 PM), <http://news.rediff.com/report/2010/apr/12/tribals-dont-have-sympathy-but-fear-for-naxals.htm> [<http://perma.cc/MZ8V-FG3S>].

221. Naxalites do not solely consist of adivasis, but the organization still claims to represent their grievances. See, e.g., PARTY PROGRAMME, *supra* note 11, at para. 24.

222. *Columbian Soldiers Die in Clashes*, BBC (July 21, 2013), <http://www.bbc.co.uk/news/world-latin-america-23394408> [<http://perma.cc/B3LN-92Q8>]; *To the Edge and Back Again*, *ECONOMIST* (Aug. 31, 2013), <http://www.economist.com/news/americas/21584384-hiccup-serves-confirm-government-and-farc-are-making-progress-edge-and> [<https://perma.cc/HP9G-9R3T>]; *FARC, Terrorismo, y Dialogos*, *EL UNIVERSAL* (Oct. 23, 2013, 12:02 AM), <http://www.eluniversal.com.co/opinion/editorial/farc-terrorismo-y-dialogos-5462> [<http://perma.cc/J7KE-58Y5>].

of Colombia's population²²³—about the same proportion as the Naxalites. Even India's armed forces, who claim 1.3 million active members,²²⁴ constitute just one-tenth of 1 percent of the country's population.²²⁵ In contrast, Mexico's drug cartels appear to have forces of a comparable size to Mexico's military forces.²²⁶

2. State and Nonstate Armed Responses

The Indian State has been deploying its police and paramilitary in response to the Naxalites since the beginning of the movement, but in 2009 the Central Reserve Police Force (CRPF) began a large-scale operation against the Naxalites.²²⁷ This offensive was dubbed "Operation Green Hunt" by the national media.²²⁸ Although the Indian military denies being directly involved in the counterinsurgency against the Naxalites,²²⁹ the military has been training nonmilitary police and paramilitary forces²³⁰ and may also be involved in certain counterinsurgent missions.²³¹ By 2012, around 100,000 paramilitary personnel had been deployed to deal with the Naxalite insurgency.²³² A further 84,000 CRPF personnel have reportedly been stationed in the Red Corridor since 2013,²³³ along with 200,000 members of the State Armed Police Forces (SAPF),

223. Colombia's population was 46.74 million in July 2015. *Colombia*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html> [https://perma.cc/W9F6-DDYU] (last updated Sept. 4, 2015).

224. INT'L INST. FOR STRATEGIC STUDIES; THE MILITARY BALANCE 2012 243–48 (James T. Hackett ed. 2012).

225. India's population was 1.29 billion in August 2015. *India Population (Live)*, *supra* note 1.

226. *See* Bergal, *supra* note 153, at 1066.

227. *See, e.g.*, Sethi, *supra* note 18.

228. *Id.*

229. Jayasekera, *supra* note 19 ("India's military provides training and logistical support (including extensive use of helicopter transport) to central and state government paramilitaries. It is also reportedly playing a major role in the formulation of their strategy. However, the military has opposed calls for it to lead the war on the ground. . . . On Monday Indian Defence Minister A.K. Antony again ruled out the possibility of tasking the Army with mounting anti-Maoist operations. 'There is no proposal like that,' said Antony. 'We extend our support without direct involvement. The real answer is to strengthen the local police and para-military forces.'").

230. *Id.*; *see also* Sethi, *supra* note 18.

231. Sethi, *supra* note 18.

232. Aman Sharma, *New Crack Greyhound Commando Forces to be Deployed in Five More Maoist-Affected States*, DAILY MAIL INDIA (July 15, 2012, 6:09 PM), <http://www.dailymail.co.uk/indiahome/indianews/article-2174049/Crack-Greyhound-commando-forces-deployed-Maoist-affected-states.html> [https://perma.cc/53RH-B8QU].

233. *CRPF Will Launch Fresh Operations Against Naxals in Chhattisgarh, Jharkhand*, NEW INDIAN EXPRESS, <http://www.newindianexpress.com/nation/CRPF-will-launch-fresh-operations-against-Naxals-in-Chhattisgarh-Jharkhand/2013/05/30/article1612837.ece> [http://perma.cc/YNW8-MLY6] (last updated May 30, 2013, 9:00 PM).

policemen belonging to state governments.²³⁴ According to the Ministry of Home Affairs, from 2007 to 2012, 905 Naxalites were killed, 12,008 were arrested, and 2040 surrendered.²³⁵

Salwa Judum (“purification hunt” in Gondi, an adivasi language) was a group of rightist, anti-Naxalite militias drawn from young male adivasis in Chhattisgarh, a state with high levels of Naxalite activity.²³⁶ Salwa Judum began as an organic uprising among adivasi communities in Chhattisgarh in 2006, but the Chhattisgarhi state government began supporting the militias soon thereafter.²³⁷ Even the central government had praise for the movement.²³⁸ Salwa Judum came under intense criticism among human rights groups for employing child soldiers—possibly up to 4000 minors in all.²³⁹ Violence between Salwa Judum and the Naxalites led to the displacement of at least 100,000 adivasis.²⁴⁰ In 2011, the Supreme Court of India declared Salwa Judum illegal and unconstitutional—violating Articles 14, which provides for equality before the law, and 21, which prohibits arbitrary deprivation of life, of the Indian Constitution—and ordered the militias disbanded.²⁴¹ In denouncing Salwa Judum, the Supreme Court said that the effectiveness of the movement against the Naxalites might have been helpful to the Indian State, but that it did not change Salwa Judum’s illegality: “[i]ndeed, we recognise that the State faces many serious problems on account of Maoist/Naxalite violence. Notwith-

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234. R. Krishna Das et al., *Reds in Retreat*, BUS. STD. (Sept. 27, 2013, 9:50 PM), http://www.business-standard.com/article/beyond-business/reds-in-retreat-113092700488_1.html [http://perma.cc/9XQH-FFET].
235. *India Maoist Assessment: 2013*, SOUTH ASIA TERRORISM PORTAL, <http://www.satp.org/satporgtp/countries/india/maoist/Assessment/2013/indiamaoistassessment2013.htm> [http://perma.cc/2W4V-GQ2B].
236. See, e.g., *Conflict Map: Left-Wing Extremist Affected Areas in India 2012*, *supra* note 13.
237. See Vivek Deshpande, *Left in the Lurch*, INDIAN EXPRESS (July 10, 2011, 3:30 AM), <http://archive.indianexpress.com/news/left-in-the-lurch/815252/0> [https://perma.cc/VN59-29RA]; Human Rights Watch alleged that state support ran deep. HUMAN RIGHTS WATCH, “BEING NEUTRAL IS OUR BIGGEST CRIME”: GOVERNMENT, VIGILANTE, AND NAXALITE ABUSES IN INDIA’S CHHATTISGARH STATE 30 (2008), <http://www.hrw.org/reports/2008/india0708/india0708web.pdf> [http://perma.cc/BLZ2-JEPH].
238. See *Chidambaram All Praise for SPOs*, ECONOMIC TIMES (Jan. 8, 2009, 05:50 AM), http://articles.economictimes.indiatimes.com/2009-01-08/news/28381017_1_spos_salwa-judum-home-minister [https://perma.cc/38WL-WFKG].
239. See, e.g., *India: End State Support for Vigilantes*, HUMAN RIGHTS WATCH (July 15, 2008), <http://www.hrw.org/news/2008/07/13/india-end-state-support-vigilantes> [https://perma.cc/2SKV-MRY8].
240. See e.g., HUMAN RIGHTS WATCH, *supra* note 237; *India: End State Support for Vigilantes*, *supra* note 239.
241. Cf. J. Venkatesan, *Sakwa Judum Is Illegal*, HINDU (Aug. 3, 2011, 1:59 PM), <http://www.thehindu.com/news/national/sakwa-judum-is-illegal-says-supreme-court/article2161246.ece> [https://perma.cc/28WD-DFPS].

standing the fact that there may be social and economic circumstances, and certain policies followed by the State itself, leading to emergence of extremist violence, we cannot condone it.”²⁴²

In May 2014, the right-wing Bharatiya Janata Party (BJP) swept the Indian national elections.²⁴³ Although the BJP and India’s new prime minister, Narendra Modi, have not yet publicly articulated a clear policy toward the Naxalites, there are hints that they will be taking a very unsympathetic stance toward the insurgency: shortly after coming to power, the BJP-led central government began readying a plan that would reclassify Naxalite-affected areas as the country’s “most dangerous zone,” (see Figure 1 below) increasing hazard pay and other benefits for paramilitary security personnel to rates even higher than those in Kashmir and the turbulent northeastern region of India.²⁴⁴

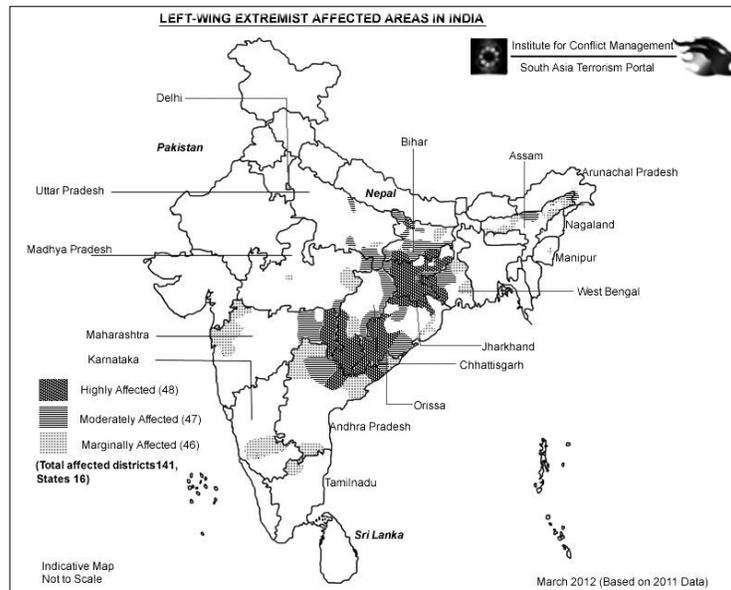
In this relatively early stage of nationwide BJP rule, it is critical for the government, Naxalite leaders, and observers to reevaluate past actions and strategies and develop future policy that is consonant with international human rights and humanitarian norms.

242. *Id.*

243. See, e.g., *Indian Election Result: 2014 Is Modi’s Year as BJP Secures Victory*, GUARDIAN (May 16, 2014, 12:12 PM) <http://www.theguardian.com/world/2014/may/16/india-election-2014-results-live> [<http://perma.cc/W4J5-99TH>].

244. *Modi Govt to Name Naxalite Areas ‘Most Dangerous Zone’; Plans Special Benefits for Troops*, ZEE NEWS INDIA (June 7, 2014, 9:58 AM), http://zeenews.india.com/news/nation/modi-govt-to-name-naxalite-areas-most-dangerous-zone-plans-special-benefits-for-troops_937728.html [<http://perma.cc/5AB9-CRME>].

FIGURE 1. A District-Level Map of “Left-Wing Extremist Affected Districts”²⁴⁵



III. CLASSIFYING THE NAXALITE INSURGENCY

This Part applies the legal criteria described earlier to the Naxalite insurgency in east-central India in order to argue that the insurgency has assumed many of the traits of a NIAC, rather than mere internal disturbance. These include: the highly centralized and hierarchical organization of CPI-Maoist and its associated committees; the relatively high and consistent number of casualties; the number of Naxalite troops and their varying levels of control over Indian territory; and the forceful and numerically great response of the Indian State to the insurgency, particularly in the last decade. As argued in the previous Part, the characteristics that the insurgency appears to lack, including public declarations on the status of the conflict or recourse to bilateral or international peace negotiations, are not necessary or determinative for the purposes of NIAC classification.

245. Demonstrating areas of high Naxalite activity, concentrated largely in Andhra Pradesh, Chhattisgarh, Jharkhand, Orissa, Bihar, and West Bengal. This map is from 2012, so it does not display Telangana, a state carved from Andhra Pradesh in 2014. *Conflict Map: Left-Wing Extremist Affected Areas in India 2012*, *supra* note 13.

A. Organization

CPI-Maoist displays many of the organizational characteristics outlined in Subparts I.I.C and I.I.D. The group has a hierarchical structure, with a Central Committee (CC) able to set agendas, control the actions of subordinate committees, and exert control over a Central Military Commission (CMC) that is responsible for coordinating the People's Liberation Guerilla Army (PLGA).²⁴⁶ Further, it has several centralized and widely disseminated documents setting out the organization's mission, hierarchy, and duties.²⁴⁷ Its militarized division is highly hierarchical, controlled by a CMC and split into three levels of forces of varying levels of discipline and centralized control.²⁴⁸ Looking beyond its access to relatively sophisticated weaponry,²⁴⁹ CPI-Maoist reportedly exercises control over certain regions of east-central India²⁵⁰ and is able to recruit members and grow its base.²⁵¹

While the KLA was able to take a role in international negotiations during its conflict with the Serbian government, the Naxalites have engaged in neither international nor bilateral negotiations with the central Indian government. The People's War Group, a predecessor to CPI-Maoist, held "direct talks" with the Andhra Pradesh state government in 2004, with few results to show.²⁵² Likewise, in October 2011, the West Bengal government—controlled by the Trinamool Congress, which ascended to power after defeating the CPI-M in May—appeared willing to enter into negotiations with the Naxalites.²⁵³ While the central Indian government has not yet sat down at the negotiating table, the

246. Balasubramaniyan, *supra* note 207.

247. *See, e.g.*, PARTY PROGRAMME, *supra* note 11; STRATEGY AND TACTICS OF THE INDIAN REVOLUTION, *supra* note 218.

248. *See* STRATEGY AND TACTICS OF THE INDIAN REVOLUTION, *supra* note 218; *see also* Balasubramaniyan, *supra* note 207.

249. Singh, *supra* note 209, at 15.

250. *See, e.g.*, Figure 1 *supra*. While the "red" areas of India have reportedly shrunk, the Naxalites still exercise quite significant control over a handful of districts in central and east-central India. *See India: Chronic Conflict Map 2014*, SOUTH ASIA TERRORISM PORTAL (2014), http://satp.org/satporgtp/countries/india/database/conflictmapindia_2014.html [<https://perma.cc/7T9V-M5BX>].

251. *See, e.g.*, Uddipan Mukherjee, *Catch Them Young: Patterns of Naxal Recruitment*, INST. PEACE & CONFLICT STUDIES (May 2014), http://www.ipcs.org/pdf_file/issue/IB253-Uddipan-Naxal-Edited.pdf [https://web.archive.org/web/20140629070153/http://www.ipcs.org/pdf_file/issue/IB253-Uddipan-Naxal-Edited.pdf].

252. *See* P.V. Ramana, *Negotiating With the Maoists: Lessons From the Andhra Experience*, INST. DEFENCE STUDIES (Oct. 13, 2011), http://www.idsa.in/idsacomments/NegotiatingwiththeMaoistsLessonsfromtheAndhraexperience_pvraman_131011.html [<http://perma.cc/625Z-SJLK>].

253. *Id.*

willingness of two state governments to engage in bilateral talks with the insurgents is telling. Regardless of whether the Indian State has resorted to bilateral negotiations, the commentary surrounding the FARC insurgency in Colombia and the drug cartel-related violence in Mexico suggests that the presence of peace negotiations is not solely determinative for NIAC classification.²⁵⁴

The Naxalites display quite persuasively that they are an organized and highly hierarchical group, with the ability to plan activities and project power over territory. They thus appear to be sufficiently “organized” for the purposes of NIAC classification.

B. Intensity

The Naxalite insurgency also displays many traits of a sufficiently “intense” conflict for the purposes of NIAC classification. The number of violent incidents has remained steadily high and the number of incidents in the last decade is higher than any other period in the insurgency.²⁵⁵ The incidents are geographically spread across the highly populated red corridor, but particularly concentrated in Andhra Pradesh, Chhattisgarh, Jharkhand, and Orissa.²⁵⁶ The government has dramatically increased the number of paramilitary and police forces in response—numbering in the hundreds of thousands—and the military is rumored to be involved in training and fielding supplies.²⁵⁷ Further, the former prime minister stated that the insurgency represented the country’s gravest internal security threat.²⁵⁸ Over 50,000 civilians have been displaced as a result of the conflict²⁵⁹ and the number and type of weapons used, although varied, is relatively sophisticated.²⁶⁰ In addition, the central government’s recent reclassification of Naxalite-controlled areas as “most dangerous zones” for the purposes of paramilitary compensation²⁶¹ underscores the seriousness with which the government views the Naxalite insurgency.

The ICTY’s Trial Chamber in *Limaj* seemed to imply that regionally disparate and temporally sporadic clashes would not satisfy the “intensity”

254. See discussion in Subparts I.I.E & I.I.F.

255. See, e.g., Balasubramaniyan, *supra* note 207.

256. Ramana, *supra* note 17, at 329–30.

257. See, e.g., Sharma, *supra* note 232; CRPF Will Launch Fresh Operations Against Naxals in Chhattisgarh, Jharkhand, *supra* note 233; Krishna Das et al., *supra* note 234; India Maoist Assessment: 2013, *supra* note 235.

258. *Naxalism Biggest Threat to Internal Security: Manmohan*, *supra* note 15.

259. See e.g., HUMAN RIGHTS WATCH, *supra* note 237; India: End State Support for Vigilantes, *supra* note 239.

260. Singh, *supra* note 209, at 15.

261. Modi Govt to Name Naxalite Areas ‘Most Dangerous Zone’, *supra* note 244.

criterion.²⁶² The attacks carried out by Naxalites have occurred in a highly concentrated corridor in east-central India and their frequency and death toll have increased in the last decade, with between 3000 and 6000 deaths directly attributable to the insurgency since 2005.²⁶³ While the ICTY did not offer more in the way of a definition for “regionally disparate” and “temporally sporadic,” the concentration and consistently high death toll of Naxalite-related violence strongly suggest that the insurgency is neither disparate nor sporadic.

With regard to the deployment of government forces, it is perhaps significant that India, unlike Mexico or Columbia, has not deployed its military forces in response to the Naxalites. The Indian military, however, has been actively engaged in supplying and training Indian police and paramilitary forces. Indeed, while the Indian military is not nominally or publicly engaged with the Naxalites, this may be nothing more than a sleight of hand intended to obscure the actual involvement of the government and military. The ICRC has previously noted that paramilitary forces can be considered combatants if they are engaged in hostilities and fulfill the definition of “armed forces,” a category which includes all units under a command responsible to a party such as the Indian State for the conduct of its subordinates.²⁶⁴ The police and paramilitary armed forces, deployed to the order of hundreds of thousands by the central Indian government, have clearly been engaged in hostilities, as they are solely responsible for Naxalite casualties.

Given the frequency and concentration of violent incidents, the displacement of civilians, the use of sophisticated weaponry, and the involvement of the Indian military and paramilitary, the conflict appears to be sufficiently “intense” for the purposes of NIAC classification.

CONCLUSION

This Comment sought to classify the Naxalite insurgency under international humanitarian law and clarify the legal standard that triggers the application of international humanitarian law to a potential NIAC. The Naxalite insurgency in particular suggests appropriate legal standards for determining the existence of a NIAC, filling a lacuna in conflict scholarship. Treaty text, court judgments, and case studies offered guidance that distilled the law and reaffirmed

262. *Limaj* Judgment, *supra* note 65, at para. 168.

263. P.V. Ramana, *supra* note 17, at 329; *Fatalities in Left-Wing Extremism: 2005–2015*, *supra* note 17 (counting 6774 deaths between 2005 and 2015); *UCDP Battle-Related Deaths Dataset v.5-2015*, *supra* note 9 (counting 3393 to 4076 deaths between 2005 and 2014).

264. INT’L COMM. OF THE RED CROSS, *supra* note 31.

the determinative quality of the organization and intensity criteria under *Tadić*. This Comment also developed practical definitions of these criteria, providing a usable and transferable model for the classification of conflicts. The model indicates that the Naxalite insurgency meets the requirements for classification as an armed conflict, triggering the application of international humanitarian law to the behavior of the Indian government and CPI-Maoist. Operating within this legal framework has several implications for the responsibilities and privileges assumed by both parties—particularly in relation to rules of engagement, rules of detention, the principle of distinction between civilians and combatants, combatancy status, possible criminal prosecution, and the negotiation of an end to the violence.

International humanitarian law has as its ultimate goal the protection of civilians and other individuals, as well as institutions that are especially close to a conflict; the Naxalite insurgency has seen many civilians killed or detained and thousands more displaced.²⁶⁵ As a policy matter, while classification as a NIAC is an objective assessment independent of domestic or international recognition, an open acknowledgement that India is engaged in a NIAC with the Naxalites would create positive pressure on both parties to behave in accordance with international humanitarian law. This would, in turn, circumscribe their activities and ensure that protected individuals and institutions are spared from the violence, lest both parties be subject to international opprobrium or even criminal prosecution. In addition, international attention could create positive pressure to find a negotiated and peaceful end to the violence.

In general, international humanitarian law provides for more liberal rules of engagement and allows both parties to exercise greater latitude in the use of lethal force, though they are still limited by the principles of distinction and proportionality. While the Naxalites would not be subject to criminal prosecution for common crimes like the murder of Indian forces, indiscriminate or disproportionate killings committed by either party would potentially render individuals responsible for crimes that fall under the framework of international humanitarian law.

For example, Indian authorities arrested over 12,000 individuals accused of Naxalite activities from 2007 to 2012.²⁶⁶ Under the framework of international humanitarian law, the detainees, if they are combatants,

265. See, e.g., EUROPEAN COMM'N, HUMANITARIAN IMPLEMENTATION PLAN: INDIA 1 (2014).

266. *India Maoist Assessment: 2013*, *supra* note 235.

would be considered prisoners of war who are subject to the limitations and privileges provided by the Third Geneva Convention.²⁶⁷

Quite appropriately given the Naxalites' Maoist ideological underpinnings, a large portion of the Naxalites' armed forces is comprised of armed peasant farmers. This trend implicates a long-standing debate over the principle of distinction as it relates to the archetypal "farmer by day, fighter by night" dual-status, civilian-combatant.²⁶⁸ Under the ICRC's guidance on direct participation in hostilities, such armed farmers would be considered combatants for the duration in which they are directly participating in hostilities, and would regain protected status when they cease direct participation.²⁶⁹ This framework would create new responsibilities for both Naxalite fighters and the Indian State. Naxalite fighters must clearly distinguish themselves as combatants while they are participating in hostilities. In addition, Indian authorities must carefully consider the status of potential detainees before they are arrested, given that such armed farmers would regain their protected status when they are not directly participating in hostilities.

Applying international humanitarian law would also render Indian authorities as well as Naxalite leaders and fighters vulnerable to prosecution for crimes that fall within that framework. These crimes, if prosecuted, would likely be addressed in a domestic court, as India is not a member state of the ICC. Instead, countries with universal jurisdiction statutes could take up the case. Both the Naxalites and the Indian authorities have been accused of grave violations committed against each other and against civilian populations.²⁷⁰ A criminal prosecution would potentially find fertile soil in exploring legal actions related to the insurgency.

267. See generally *Geneva Convention Relative to the Status of Prisoners of War (Geneva Convention III)*, INT'L COMMITTEE OF THE RED CROSS (Aug. 12, 1949), <https://www.icrc.org/ihl/INTRO/375> [<https://perma.cc/AH8M-HF4F>].

268. *Civilian "Direct Participation in Hostilities": Overview*, INT'L COMM. OF THE RED CROSS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/contemporary-challenges-forihl/participation-hostilities/overview-direct-participation.htm> [<https://perma.cc/5VP5-WTFU>].

269. NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 70 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [<http://perma.cc/K36B-WUX3>].

270. See, e.g., HUMAN RIGHTS WATCH, *supra* note 237, at 5.