Why a War Without a Name May Need One: Policy-Based Application of International Humanitarian Law in the Algerian War

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SUMMARY

INTRODUCTION ............................................................................................................... 575

I. THE EVOLUTION AND ESCALATION OF THE ALGERIAN WAR ...................... 578

II. THE DEBATE OVER THE APPLICATION OF THE GENEVA CONVENTIONS OF 1949 ................................................................. 583
   A. Common Article 3: Armed Conflict Not of an International Character ................................................................. 583
   B. International Armed Conflict: The Full Geneva Conventions? ............ 591

CONCLUSION ................................................................................................................... 601

INTRODUCTION

Forty-five years after the beginning of Franco-Algerian hostilities in Algeria, the French government officially recognized that the conflict was, in fact, a war.¹

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¹ France Admits Algerian Campaign Was ‘War,’ BBC NEWS (June 10, 1999), http://news.bbc.co.uk/2/hi/africa/365868.stm; see also Blandine Grosjean, La “guerre d’Algérie” reconnue à l’Assemblée. Les
Throughout the Algerian War’s nearly eight-year duration and for nearly four decades after its end, the French government characterized the conflict merely as opérations de maintien de l’ordre or “order maintenance operations.” From the beginning of the conflict, France insisted that the Algerian events were purely internal order maintenance operations governed by domestic law and as such were “not a conflict relevant to international law.”

The actual nature of the conflict in Algeria, however, never quite reflected the legal appraisal offered by the French government. At the height of the order maintenance operations, 400,000 French troops—including 80% of conscripts—were fighting in Algeria. In total, 2,000,000 French men served in Algeria between 1955 and 1962. French military casualties totaled 23,196 deaths, 7,541 wounded, and 875 missing. The Algerian Ministry of War Veterans calculates 152,863 Front de Libération Nationale (FLN) deaths, and although the death toll among Algerian civilians may never be accurately known, Algerian authorities estimate “1,000,000 martyrs.” The conflict created other victims too—refugees seeking exile in neighboring countries, forcibly resettled citizens, and detainees held in internment camps. By the end of the war, these victims numbered about 2,500,000, or about one-fourth of the population of Algeria.

Given these disparities between the actual nature of the conflict and France’s legal characterization, it is perhaps unsurprising that the question of whether or not députés adoptent la proposition de loi officialisant cette expression. [The “Algerian War” Recognized in the Assembly. Members Adopt the Bill Formalizing This Expression.], LIBÉRATION (June 11, 1999), http://www.liberation.fr/politiques/0101286383-la-guerre-d-algerie-reconnue-a-l-assemblee-les-deputes-adoptent-la-proposition-de-loi-officialisant-cette-expression (reporting the French National Assembly’s unanimous acceptance of a law recognizing the expression “Algerian War”). This translation and all others given hereinafter, unless otherwise noted, are the Author’s.


6. Id.


8. BEIGBEDER, supra note 5, at 96.

9. Alexander et al., supra note 7, at 5.


11. Id.
any of the provisions of the Geneva Conventions of 1949 were applicable to the order maintenance operations became a contemporary source of recurring debate.\footnote{12}

As this Note will explain, the Algerian War provides a historical example of a policy-based application of the Geneva Conventions—a serious and recurring application problem of international humanitarian law (IHL). To prevent the application of IHL for various political and strategic reasons, signatory states have either tendentiously classified or denied altogether the existence of armed conflicts in which they are involved.\footnote{13} In theory, the very existence of an armed conflict—either international or “not of an international character”—automatically triggers the application of relevant provisions and protections of the Geneva Conventions and thus prevents avoidance of the law by states.\footnote{14} However, in practice, signatory states avoid applying the Geneva Conventions for various political and strategic reasons because it remains open to those states to determine whether the subjective criteria of an armed conflict have been met.\footnote{15}

Importantly, the fact that the case of the Algerian War is not unique in this regard highlights how widespread this classification problem continues to be in contemporary IHL. France’s policy-based application of the Geneva Conventions in Algeria is a pattern that has repeated itself similarly in El Salvador, South Africa, Sri Lanka, Colombia, and the U.S. global war on terror against Al Qaeda.\footnote{16}

This Note will present an analysis of the debate about applicable international law during the Algerian War and will also shed light on some of the concrete

\footnote{13}{See \textit{Lindsay Moir, The Law of Internal Armed Conflict} 34 (2002) (explaining that states can “hide behind the lack of a definition to prevent the application of international humanitarian law by denying the very existence of an armed conflict”).
\footnote{15}{Moir, supra note 13, at 45.
\footnote{16}{See, e.g., Robert Goldman, \textit{International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua}, 2 \textit{Am. U. Int’l L. \\& Pol’y} 539, 544 (“Despite the fact that both the Salvadoran and Nicaraguan governments have permitted the ICRC to establish permanent delegations in their territory, neither government has publicly recognized the existence of an internal armed conflict as defined in Article 3 of the Geneva Conventions.”); U.N. Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka 7–13 (Mar. 31, 2011), \textit{available at} http://www.un.org/News/dh/infocus/Sri_Lanka/POE_Report_Full.pdf (describing the Sri Lankan government’s refusal to allow for humanitarian assistance during the country’s civil war and the classification of some armed conflict as counterterrorism and humanitarian rescue operations); Arturo Carrillo-Suarez, \textit{Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict}, 15 \textit{Am. U. Int’l L. Rev.} 1, 34–38 (1999) (arguing that, while parts of the Colombian Constitutional Court recognized that international humanitarian law is integrated into Colombian law, the military, Congress, and the Executive Branch all refused to adopt applicable IHL standards); Derek Jinks, \textit{September 11 and the Laws of War}, 28 \textit{Yale J. Int’l L.} 1, 20–25 (2003) (explaining that the September 11 attacks on the United States may not be classified as armed conflict in international law because they “were carried out by a transnational criminal organization that does not appear to act on behalf of any state” and the “armed group responsible for the attacks does not seek to administer or control any part of U.S. territory; nor have they articulated any specific political objectives”); The Azanian Peoples Organization (Azapo) v. The President of the Republic of South Africa 1996 (4) South African Law Reports 671 at 698, para. 29 (S. Afr.) (holding that “it is doubtful whether the Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which [South Africa] found itself during the years of the conflict”).}
consequences that resulted from France’s reluctance to recognize the applicability of the various provisions of the Geneva Conventions. I will begin in Part I by laying out relevant historical background to the conflict. In Part II, I will then analyze the debate concerning applicable IHL—both the lower threshold of Common Article 3 between internal disturbance and armed conflict not of an international character, as well as the debate about whether the conflict eventually constituted an international armed conflict.

This Note will illustrate that as one of the first major test cases for the applicability of either Common Article 3 or the full corpus of the Geneva Conventions, the Algerian War began a legacy of policy-based application of IHL that continues in the post-9/11 world.

I. THE EVOLUTION AND ESCALATION OF THE ALGERIAN WAR

From November 1, 1954 to March 18, 1962, the French military forces fought the FLN in Algeria.17 Before the war began, however, France and Algeria shared a long, interwoven history. Unlike other French colonial possessions, Algeria had long been considered a part of France itself rather than a colony or a protectorate.18 Annexed since 1830—longer than the comté of Nice, which was annexed in 1860—Algeria had been considered a French territory for nearly 130 years.19 Algeria was divided into départements—or administrative districts—including with the départements of the mainland French métropole.20 By the start of the conflict in 1954, over one-million French and other European settlers were living in the Algerian départements.21

However, while both the indigenes, or indigenous people, of Algeria and the European settlers were considered French citizens, they were not equals under French law. For example, only European settlers in Algeria were represented in parliament.22 There were stirrings of Algerian nationalism prior to the first attacks in 1954, with the first movement calling for an independent, Muslim-controlled Algeria arising in 1926.23 On the day of the German surrender in 1945, another nationalist demonstration escalated into riots, and thousands of Algerians were killed when the French military “brutally” put down the rioters.24 Growing from these same roots of nationalist movements and driven by similar aspirations for an independent Algeria, the FLN and its military arm, the Armée de Libération Nationale (ALN), planned and carried out the first surprise attacks of the Algerian War against French settlers and military targets in November 1954.25

17. Fraleigh, Algeria Case Study, supra note 10, at 179.
18. BEIGBEDER, supra note 5, at 93.
20. Id.
21. See id. (stating that in 1954 more than 80% of the Algerian population was Muslim). See generally BEIGBEDER, supra note 5, at 93–95 (discussing the size of the French and other European population in Algeria leading up to the Algerian War).
22. BEIGBEDER, supra note 5, at 94.
23. Id.
24. Id.
25. ALISTAIR HORNE, A SAVAGE WAR OF PEACE: ALGERIA 1954–1962 90–95 (1977). There were
The scope and intensity of the eight-year conflict increased steadily. The organization of the ALN was initially limited, and popular support for the FLN’s aspirations for an independent Algeria did not come immediately. Only about 700 FLN members carried out the first FLN attacks on All Saints’ Day in November 1954, and it is estimated that only about half were armed—mainly with hunting rifles, shotguns, and homemade bombs. The first year of fighting consisted mainly of hit-and-run terrorism, and furthermore, the district chiefs in charge of three of the six military-political districts set up by the FLN had few followers and weapons at their command. One French intelligence expert estimated that the ALN numbered about 6,000 FLN regulars at the end of 1955, but by the end of 1956 it numbered about 20,000 men carrying 13,000 weapons—mainly automatic rifles and pistols.

However, with an influx of new recruits, the number of attacks carried out by the ALN increased, and the conflict grew to a mainly guerilla-style war with no fixed military fronts or set battles throughout the duration of the war. According to French estimates, the number of incidents rose steadily during the first two years of the conflict, peaking at about 2,500 per month and fluctuating between 1,000 and 2,000 per month for the rest of the war. The ALN’s strategy focused on quick, limited attacks—for example, small guerilla units ambushing convoys, attacking military outposts, or derailing trains and immediately retreating into the night. Barracks and police stations were popular targets; however, brutal murders and mutilations of other Muslim “friends of France” also increased. Urban terror campaigns against civilians in Algiers also escalated; bombs were detonated in public areas where Europeans congregated, like cafes, stadiums, and bus stops. Due to the nature of the ALN’s guerilla tactics, it was difficult to be sure which areas were held by FLN forces and which were secured by French forces for the French military command.

The success of an FLN-led general strike across Algeria corresponded with a growth of tacit support for the rebels amongst the 8,000,000 Muslim Algerians. After this growth in popular support, the FLN eventually created the Gouvernement Provisoire de la République Algérienne (GPRA)—meaning the Provisory Government of the Republic of Algeria—in 1958, headquartered in Tunisia. The highest figure mentioned by the FLN during the conflict counted 130,000 fighters.

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27. Id. at 47.
28. Id. at 48–49.
29. HORNE, supra note 25, at 111.
30. Fraleigh, Algeria Case Study, supra note 10, at 192.
31. Id. at 193.
33. HORNE, supra note 25, at 112.
34. Fraleigh, Algeria Case Study, supra note 10, at 202.
35. Id. at 192.
36. Greenberg, supra note 12, at 43.
37. Id. at 40; Fraleigh, Algeria Case Study, supra note 10, at 211.
but after Algerian independence, 250,000 Algerians claimed to have been fighting for the FLN.\textsuperscript{38}

As for the French military forces, at the beginning of the conflict there were only seven gendarmes in charge of maintaining order in the region where the attacks took place and about 54,000 troops on the ground under the commander-in-chief in Algeria.\textsuperscript{39} However, after the first attacks, the French government immediately dispatched “[20,000] additional troops” and one-third of “the mainland’s riot police.”\textsuperscript{40}

However, the French military presence continued thereafter to increase dramatically. By December 1956, there were 400,000 French troops in Algeria—about twenty French soldiers for each single FLN fighter—divided between search-and-destroy missions and divisions charged with the protection of Algerians and French settlers and their property.\textsuperscript{41} It was the largest army that the French government had ever sent overseas.\textsuperscript{42} Included among these troops were paratrooper divisions, fresh from the war in Indochina, which quickly gained a reputation as a “nasty police force” in their repression of the FLN rebels.\textsuperscript{43} By sea, the French navy controlled the entire Algerian coastline, attempting to prevent arms importation to the ALN.\textsuperscript{44} In turn, the financial cost of maintaining the military operations ballooned, and by mid-1956, the French military budget for fighting in Algeria reached 280 billion \textit{anciens francs}, or $560 million.\textsuperscript{45}

The FLN relied on support from Tunisia and Morocco as training grounds for ALN forces, supply depots, bases for launching attacks into Algeria, and as sanctuaries when they fled from French forces.\textsuperscript{46} In response, the French turned to various military measures to attempt to put an end to the FLN’s use of the two neighboring Arab countries. The French military, for example, constructed barriers along the Tunisian and Moroccan borders, which consisted of barbed wire, electrified fences, and about 3,200,000 mines buried between them.\textsuperscript{47} The French air force even bombed several Tunisian villages that had contributed to border skirmishes.\textsuperscript{48}

Relying more and more heavily on counter-insurgency tactics, the French army also recruited pro-French Algerian Muslims, known as \textit{harkis}, as auxiliary forces.\textsuperscript{49} Paid less than conscripts and professional French soldiers but with an intimate knowledge of the terrain and local population, \textit{harkis} were often used in secretive

\begin{itemize}
  \item \textsuperscript{38} Fraleigh, \textit{Algeria Case Study}, supra note 10, at 192 (citing White Paper on the Application of the Geneva Conventions of 1949 to the French Algerian Conflict, Algerian Office of FLN, New York (1960)).
  \item \textsuperscript{39} Talbott, supra note 26, at 38; Horne, supra note 25, at 89.
  \item \textsuperscript{40} Talbott, supra note 26, at 38–39.
  \item \textsuperscript{41} Id. at 63.
  \item \textsuperscript{42} Id. at 73.
  \item \textsuperscript{43} Id. at 69.
  \item \textsuperscript{45} Greenberg, supra note 12, at 39.
  \item \textsuperscript{46} Fraleigh, \textit{Algeria Case Study}, supra note 10, at 193.
  \item \textsuperscript{48} Talbott, supra note 26, at 118; Fraleigh, \textit{Algeria Case Study}, supra note 10, at 206–07.
  \item \textsuperscript{49} Evans, supra note 32, at 121–22.
\end{itemize}
counter-insurgency operations, carrying out “commando raids and ambushes” mirroring the ALN’s strategies.50 Once the harkis located and cornered an ALN unit, French paratroopers would be flown in by helicopter to “finish off the job.”51

Faced with a mounting domestic political crisis and the continuing insurrection in Algeria, the French peacetime legal framework strained to provide justification for the French army’s use of repressive force.52 Thus, in April 1955, the government declared a state of emergency status for Algeria that extended France’s civil and military authority, effectively allowing “exceptional police measures.”53 Specifically, the “state of emergency” granted civil authorities the right to order house arrests and greatly expanded the legal powers of the French army to “accelerate[] the course of justice.”54 Military tribunals therefore gained jurisdiction to try crimes committed by FLN nationalists,55 including offenses from simple traffic violations to theft, criminal association, rape, and murder.56 House arrests could be ordered without judicial authorization “on any person . . . whose activity proves to be dangerous for public security and order.”57 Furthermore, French authorities could thereafter order curfews, forbid meetings, close cafés, search private homes at night, and censor the press.58 Because the authority to order house arrest raised the specter of concentration camps and the crimes of the Vichy police,59 the National Assembly included another provision in the state of emergency law stating, “In no case, will confinement to residence result in the creation of camps.”60 Despite this provision, four camps were opened one month later in May 1955.61

As the situation in Algeria continued to deteriorate, and with victory in Algeria given greater priority, the National Assembly passed in March 1956 another, more expansive special powers law.62 The special powers given to the government were not enumerated, as they had been under the state of emergency, and instead granted breathtakingly broad power to the government to re-establish order in Algeria with refocused and intensified vigor.63 These special powers were presented as merely a

50. Id. at 122–23.
51. Id. at 123.
53. Id.
54. Id.
56. BEIGREDER, supra note 5, at 97.
57. Id. at 96.
58. Id.
59. THENAULT, supra note 55, at 34–35. As one member of the National Assembly said, “We are numerous, in this Assembly, to have known personally, before 1939 and from 1940 to 1944, the crimes of police affiliations.” Id. at 35. Denying that house arrests opened the possibility of concentration camps, another member responded that, “Under the Vichy regime, arrests made for imprisoning people in concentration camps is not the same as talking about confinement to residence.” Id.
60. Id.
61. Id.
62. Branche, Torture and Other Violations, supra note 52, at 135–36.
63. See id. (stating that these powers were granted for the purpose of “buttressing the principle of the executive’s absolute power with regard to all matters concerning Algeria”).
temporary measure, but they were continually renewed by subsequent French political chiefs and remained in effect throughout the war.64

After the spectacular collapse of the Fourth Republic, spurred by French army pressure and riots in Algiers against the French government,65 the turning point of the war came in September 1959 when—against the wishes of part of the French army and the French settlers in Algeria—newly re-installed President Charles de Gaulle endorsed the right of self-determination of the Algerian people.66

I deem it necessary that recourse to self-determination be here and now proclaimed. In the name of France . . . I pledge myself to ask the Algerians, on the one hand, in their twelve Departments, what, when all is said and done, they wish to be; and, on the other hand, all Frenchmen to endorse that choice.67

Specifically, de Gaulle offered the Algerian people three alternatives: “secession,” integration with France, or a “government of Algerians by Algerians” that would remain politically and economically associated with the French métropole.68 However, De Gaulle’s endorsement of self-determination came with qualifications,69 and it took another two and a half years of war before the last qualification was dropped.70

In January 1961, the French as well as Algerian people approved the referendum on self-determination by a large majority.71 In a dramatic reversal of France’s previous policy of non-recognition, de Gaulle recognized the GPRA as the representative of all of Algeria at the negotiation table.72 After months of tense and often bitter negotiations, on March 18, 1962 the Algerian War finally came to an end with de Gaulle and GPRA representatives signing the Evian Accords and the birth of Algérie algérienne.73

Four days later, the French government issued two decrees: one granting amnesty for all offenses committed relating to the Algerian insurrection and the other granting amnesty for all offenses committed during “operations of order maintenance” against the Algerian insurgents.74 The events in Algeria remained, however, une guerre sans nom—or a war without a name—until 1999.75

64. Id. at 136.
65. BEIGBEDER, supra note 5, at 95.
66. Id.
68. TALBOTT, supra note 26, at 151.
69. For example, de Gaulle made clear that the FLN were not allowed to participate in organizing the referendum for self-determination, but the FLN refused to accept a vote supervised by the French army. Fraleigh, Algeria Case Study, supra note 10, at 183.
70. Id.
71. BEIGBEDER, supra note 5, at 95.
72. Flory, Algérie algérienne, supra note 3, at 995. Two of the main issues negotiated included the terms of a cease-fire and the future status of Europeans in Algeria. TALBOTT, supra note 26, at 222.
73. BEIGBEDER, supra note 5, at 95. The Evian Accords were approved of by 90.7% of voters in a referendum in France one month later. Id.
74. Id.
75. Id. at 96.
II. THE DEBATE OVER THE APPLICATION OF THE GENEVA CONVENTIONS OF 1949

France ratified, without reservations, the Geneva Conventions of 1949 on June 28, 1951 and was therefore bound to observe the Conventions in all applicable circumstances. The question of whether various provisions of the Conventions were applicable to the Algerian conflict became a recurring source of debate throughout the nearly eight-year conflict.

The legal appraisals of the French government and of the FLN concerning the conflict were in complete opposition. The French steadfastly insisted that the conflict was a purely internal problem in which political malcontents showed their opposition to the government by illegal means and where a police force was necessary to restore order. At the same time, the FLN loudly asserted that the conflict had quickly become an international armed conflict. The progressive escalation of the Algerian events, therefore, not only blurred the crucial lower threshold distinction between internal disturbance and an “armed conflict not of an international character,” but also eventually posed the question of whether the events rose to the scale of international armed conflict.

First, in Section A, I will discuss the relevant debate concerning the nature of the conflict and the applicability of Common Article 3 that circulated in the government, military, judiciary, and psyche of France during the Algerian War. In Section B, I will then discuss the debate surrounding the question of whether the conflict, which reached its apex in the later stages of the war, rose to merit the classification of an international armed conflict.

A. Common Article 3: Armed Conflict Not of an International Character

For the Algerian conflict, the threshold question was whether Common Article 3 was applicable (i.e., whether the violence amounted to an “armed conflict”).

76. Greenberg, supra note 12, at 47.
78. Touscoz, Etude, supra note 4, at 954.
79. Id.
80. Id.
81. Common Article 3 of the four Geneva Conventions provides:

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

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any
Before the ratification of the four Geneva Conventions, there had never existed an international legal instrument to regulate internal armed conflict.\(^82\) Often called the “conventions in miniature,”\(^83\) Common Article 3 was drafted to come into effect for any “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”\(^84\) and to trigger the application of certain minimal, underlying humanitarian principles of all four Conventions upon the parties to such a non-international armed conflict.\(^85\)

However, the question of which conflicts come within the scope of application of Common Article 3 has remained a consistently controversial one. The lower threshold between a purely internal disturbance—where no international humanitarian frameworks apply—and the upper threshold, an armed conflict—where IHL is called into force—is critical but difficult, and perhaps impossible, to objectively identify.\(^86\) There are no authoritative or clearly defined criteria for identifying when an internal armed conflict has reached this legal category of armed conflict not of an international character.\(^87\) Because the definition contains relatively open criteria necessary to define an abstract concept like armed conflict, it remains open to states to determine whether such a conflict exists and thus, whether to apply IHL.\(^88\) Oftentimes—and as France did during the Algerian War—states deny that insurgents have met necessary criteria and thus claim that the situation does not amount to armed conflict.\(^89\)

Other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

GPW, supra note 77, art. 3; First Geneva Convention, supra note 77, art. 3; Second Geneva Convention, supra note 77, art. 3; Fourth Geneva Convention, supra note 77, art. 3 [hereinafter Common Article 3].

82. MOIR, supra note 13, at 30.
83. Id.
84. Common Article 3, supra note 81.
85. See id. (creating both prohibitions and affirmative obligations concerning non-combatants).
86. See, e.g., MOIR, supra note 13, at 45 (discussing obstacles to objective assessment).
87. Greenberg, supra note 12, at 48; see also, e.g., MOIR, supra note 13, at 31–32 (stating that there is no universally accepted definition of the term “armed conflict” and the condition, “not international in character,” provides little guidance).
88. MOIR, supra note 13, at 45.
89. Id.
France was reluctant to admit the applicability of Common Article 3, and never explicitly accepted its obligations. From the beginning of the conflict, France insisted that the Algerian events were purely internal “operations to restore order” governed by domestic law and as such did not constitute “a conflict relevant to international law.” Throughout the eight-year duration of the Algerian War and for nearly four decades after its end, the French government employed an impressive variety of creative legal semantics to avoid officially recognizing the conflict as a “war.” Examples of such tendentious official terminology include opérations de maintien de l’ordre en Afrique du Nord (order maintenance operations in North Africa), évènements d’Algérie (Algerian events), rebellion, l’affaire algérienne (the Algerian affair), le conflit algérien (the Algerian conflict), and les troubles d’Algérie (the Algerian troubles). Similarly, the official discourse of the French government and military systematically denied members of the National Liberation Army (ALN) the status of fighters or combatants, and were instead referred to as hors-la-loi (outlaws), fellaghas (bandits/highwaymen), rebelles, responsables de la rebellion (responsible for the rebellion), and terroristes. The French military’s “pacification” campaign was not officially considered waging war, but rather order maintenance operations and police operations.

The rhetorical veneer of the French government’s official discourse aside, the debate about applicable law showed similar reluctance to recognize that the lower threshold between internal disturbance and armed conflict had ever been crossed. Considered a collection of départements, Algeria was politically, economically, and socially linked closely to France. France never considered Algeria to have been a separate state, and this attitude heavily informed France’s early legal assessment of the conflict. For example, during the Tenth General Assembly of the United Nations in 1955, Antoine Pinay—the French Foreign Minister at the time—attempted to put an end to the first official international discussion concerning the character of the events when he declared, “Algeria is an integral part of the French territory” and “[i]t would . . . be inconceivable that the United Nations could be so unmindful of its

90. Flory, Algérie algérienne, supra note 3, at 983.
91. Touscoz, Etude, supra note 4, at 959.
92. Grosjean, supra note 2.
94. Touscoz, Etude, supra note 4, at 954.
95. Id.
96. Id.
97. Id.
99. Id.
100. Thénault, Justice et politique, supra note 93, at 583.
101. Touscoz, Etude, supra note 4, at 954.
102. See Flory, Algérie algérienne, supra note 3, at 983 (describing the actions of Algerian fighters as terrorism); Alexander et al., supra note 7, at 3 (stating that the French government labeled the ALN as “terrorists”).
103. Flory, Algérie algérienne, supra note 3, at 983.
105. Id.
functions and so untrue to its mission as to interfere in the domestic affairs of member states."\(^{106}\) When the “Algerian question” was voted onto the docket of the General Assembly by a one-vote margin, the French delegation walked out in protest and the issue was shortly thereafter removed from discussion.\(^{107}\)

The debate was largely a psychological and political one, closely tethered to the French government’s need to maintain the viability of any degree of its authority in Algeria.\(^{108}\) The creation of the GPRA, which was comprised only of FLN members,\(^{109}\) unsurprisingly did not change France’s legal assessment of the purely internal nature of the conflict.\(^{110}\) The French legal community generally considered the GPRA to be an “exterior organization of the rebellion”\(^{111}\)—or at best a propaganda organization.\(^{112}\) For the French government, the idea of the FLN establishing a government of an independent state was absurd\(^{113}\) since Algeria was considered to be as much a part of France as Alsace or Strasbourg.

The FLN first argued that Common Article 3 applied to the conflict as early as February 1956, and prominent contemporary legal commentators argued that France eventually conceded that Common Article 3 applied to the conflict.\(^{114}\) While never published in the official record, in 1955 the Prime Minister expressly acknowledged Common Article 3’s applicability to the conflict when asked an official question by a member of the National Assembly.\(^{115}\) Moreover, the International Committee of the Red Cross (ICRC) initially offered its humanitarian services to the French government first in 1955 and again in 1956.\(^{116}\) The French government urged the ICRC for “pressing reasons of public order” to defer sending missions.\(^{117}\) Eventually, the Prime Minister accepted the second ICRC offer to visit prisoners “in conformity with Article 3 of the Geneva Conventions regarding armed conflicts not of an international character.”\(^{118}\) ICRC representatives ultimately made 289 visits to French detention centers in Algeria by 1959.\(^{119}\)

Despite French cooperation with the ICRC, the record of compliance with Common Article 3 for both France and the FLN was far from satisfactory and included the practice of questionable due process, summary execution, collective responsibility, and widespread, if not systematic, use of torture.\(^{120}\) Efforts by the

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107. Flory, droit international, supra note 19, at 822.
109. Flory, droit international, supra note 19, at 835.
110. Greenberg, supra note 12, at 40.
111. Id. at 44.
112. Id. at 41.
113. Id. at 40.
114. Moir, supra note 13, at 71. See, e.g., Flory, droit international, supra note 19, at 832 (stating that the French government’s position that the events in Algeria were not an international armed conflict implicated a de facto recognition of the applicability of Article 3).
115. See Moir, supra note 13, at 71 (stating that “the question was from M. Bouthien, No. 17,520 of 20 June 1955, and the answer was communicated only to him and the ICRC”).
116. Greenberg, supra note 12, at 50.
117. Id. at 67.
118. Id. at 50; Flory, droit international, supra note 19, at 831.
119. Flory, droit international, supra note 19, at 831.
120. An in-depth discussion of such practices exceeds the scope of this Note, but has been tackled in impressive detail elsewhere. See, e.g., Beigbeder, supra note 5 (discussing previous war crimes committed by France); Branche, Torture and Other Violations, supra note 52, at 134 (discussing France’s
ICRC to coax the two sides into special accords, which would have agreed to slightly more than the minimum humanitarian principles laid out in Common Article 3, were never realized.\(^{121}\) Neither party responded to a Draft Agreement, presented by the ICRC in May 1958 whereby “both parties would pledge themselves to observe Article 3, avoid reprisals, and treat prisoners humanely.”\(^ {122}\) In fact, neither side replied to the repeated requests of the ICRC made in October 1958, and the premier of the GPRA, Ferhat Abbas, ignored a written demand on the subject again in December 1959.\(^ {123}\)

Despite the tacit nod to Common Article 3, throughout the war the French government never wavered in its insistence that only French domestic law—and not the international laws of war—governed its order maintenance operations in Algeria. Only days after the first attacks in November 1954, Minister of the Interior François Mitterand wrote, “The terrorist attacks are common law crimes. The men who commit these attacks against people and property are in no case to be considered as having a military nature since the antinational propaganda strives to attribute precisely this [military] characteristic to the bandits.”\(^ {124}\) In line with this sentiment, domestic penal code provisions, criminal offenses, and the heaviest criminal sanctions—which were reserved only for times of war—were never employed to prosecute FLN rebels.\(^ {125}\) After years of military escalation, this same legal appraisal endured. As late as 1958, the French legal system treated FLN fighters as part of a sedition movement that fell not under the laws of war but under French domestic law protecting against national security.\(^ {126}\)

Importantly, moreover, the French military strategies and operations in Algeria did not very closely mirror the French government’s official legal appraisal of a purely internal conflict. Specifically, there was a noticeable disconnect between the actual nature of the French military’s pacification operations and what might generally be expected of order maintenance operations of law enforcement in an
internal disturbance. French military strategy in Algeria did not much resemble law enforcement but instead more closely paralleled status-based rules of engagement. The principal official military objectives were to “pacify Algeria,” reestablish confidence in a continued French presence, and to “crush the uprising.” In other words, the scope, intensity, and duration of the French government’s response to the threat indicated that the government was engaged in combat operations or even war, and not merely maintaining order in the face of widespread criminal disobedience.

Troops were divided generally into one of two different sectors: (1) quadrillage and pacification, as well as reestablishing order by ratissage, or (2) seeking out and fighting the rebels. Quadrillage consisted of dividing the countryside into grids with each box raked over by military patrols. This method, however, proved largely ineffective in light of ALN troops’ intimate knowledge of the terrain and ability to attack and retreat into hiding quickly. Beginning around 1959, the search-and-destroy missions took more of an offensive approach with “integrated radio communications, tactical air support, and interdiction of fleeing ALN bands by French air force light bombers, along with helicopter scouts, armored cars, and motorized columns.” For the French, the key to victory became relentless pursuit. Tracker units of Muslim harkis and a large general reserve of French troops worked in tandem to seek out ALN bands, and naval helicopters also assisted in locating and weeding out ALN forces. Such status-based tactics became acutely evident during the famous Battle of Algiers where, in mass round-ups, military regiments made summary arrests from lists of suspects made by military authorities who had forcibly taken over police dossiers. As the Minister of Defense stated: “You do not fight rebels with legal means; you fight rebels with means identical with theirs. It is the lex talionis—eye for an eye, tooth for a tooth; it is the law of self-defence on a country-wide scale.”

One particular tactic not generally considered characteristic of order maintenance or law enforcement operations was the forced mass relocation of Algerian civilians. Despite assertions by the French government and military that the ALN never secured territorial control over any section of Algeria, there were large expanses of the country that were “won by the rebellion” or where “the FLN

127. Geoffrey S. Corn, for example, has argued that when the rules of engagement “authorize engagement based solely on status determinations, it represents an inherent invocation of the laws of war as a source of operational authority . . . and indicates when the forces of the state will inherently invoke authorities derived from the laws of war.” Corn further recommends that the use of status-based rules of engagement should be adopted as a new law-triggering paradigm for Common Article 3. Corn & Jensen, supra note 14, at 823–24.


131. Id.

132. Id. at 17. These operations were known as the Challe Plan. Id. at 16.

133. Horne, supra note 25, at 332.

134. See id. at 334 (discussing French air support).

135. Id. at 190.


were the masters,” called zones interdites, or “No Go Zones” by French military command.\textsuperscript{138} French troops strictly controlled access to these zones and required the civilian population living within any zones interdites to evacuate the area.\textsuperscript{139} After civilian evacuations, homes and villages were often destroyed or burned to make it easier to detect ALN troop movements.\textsuperscript{140} This regroupment policy—figuratively designed to drain the water in order to asphyxiate the rebel fish—led to the transfer of over one million Muslim villagers to housing camps.\textsuperscript{141} Camps ranged from installations that resembled “fortified villages of the Middle Ages to the concentration camps of a more recent past.”\textsuperscript{142} Sometimes surrounded by barbed wire, trenches, and armed sentries, the camps often had serious problems with disease, malnutrition, and cramped living conditions—for example, housing fifteen civilians in a single tent.\textsuperscript{143} At least one, perhaps overstated, calculation remarks that 2,157,000 Muslims were either currently or at one point living in one of over 2,000 regroupment centers by 1960.\textsuperscript{144}

Besides forced displacement and internment, French military operations at times purposefully did not discriminate against the civilian population. “In the course of combat, mechtas (small villages) that serve as active defensive cover to rebels are military objectives, to be treated as such by [French military] firepower” but “after combat, no retaliation against surrounding buildings by soldiers or commanders is tolerated.”\textsuperscript{146} To incentivize civilians suspected of harboring rebels to talk or to convince the rebels to surrender, parachutists sometimes soaked family farms in gasoline.\textsuperscript{147} After civilians were evacuated, troops often burned the village since cattle and grain were essential provisions for the rebels.\textsuperscript{148} Moreover, after the passage of the state of emergency laws, centres de triage et de transit (CTT), or “triage and transit centers” operating under total military authority could hold any suspect—civilian or combatant—for interrogation for a maximum of one month.\textsuperscript{149} Torture and other coercive interrogation techniques were not uncommon practices in these camps.\textsuperscript{150}

However, while the French government consistently maintained that this military pacification of the FLN rebels did not constitute a war, French civil courts in metropolitan France asserted—though rather timidly—that the conflict was in fact a

\textsuperscript{138} FRENCH ARMY STRATEGY, supra note 130, at 15.
\textsuperscript{139} See Fraleigh, Algeria Case Study, supra note 10, at 202 (discussing mandatory evacuations of areas of Algeria for the purpose of targeting combatants); FRENCH ARMY STRATEGY, supra note 130, at 15 (noting that the French called the areas controlled by the FLN zones interdites).
\textsuperscript{140} BRANCHE, TORTURE ET L’ARMEE, supra note 129, at 41.
\textsuperscript{141} See Fraleigh, Algeria Case Study, supra note 10, at 202 (stating that after civilian areas were destroyed, the French presumed that those remaining were FLN sympathizers).
\textsuperscript{142} HORNE, supra note 25, at 338.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 338–39.
\textsuperscript{146} BRANCHE, TORTURE ET L’ARMEE, supra note 129, at 40.
\textsuperscript{147} Id. at 46–47.
\textsuperscript{148} Id. at 47.
\textsuperscript{149} Id. at 122.
\textsuperscript{150} Id.
In light of the prolonged and increasingly intense nature of the rebellion in Algeria, a metropolitan court of appeals—ruling on an insurance company indemnification claim for private property destroyed by attacks in Algeria—first qualified the conflict as a civil war in November 1959. The court declined to give significance to the French government’s official statement and instead held:

Whereas this well-known situation, whether it is qualified as “terrorism,” “rebellion,” or “events” is, by its political goals, by the importance of the military resources put in place, by the magnitude of the conflict and by the number of its victims, constitutive of an insurrectional state armed by a part of the French population against the government and must be qualified as a civil war.

According to this decision, therefore, the political goals and the violent military confrontation warranted the legal characterization of civil war. Other courts of appeals followed this reasoning, and the highest French court, the Court of Cassation, affirmed the decision, although it did so without setting forth its own definition of the notion of civil war. Prior to this affirmation, the Court of Cassation had annulled the decision of the Court of Algeria, which had held that the events in Algeria could no longer be qualified as only a rebellion, and had affirmed another decision holding that a fire set by FLN rebels was not an act of civil war.

This position, however, fell well outside the range of the French government’s legal appraisal of the nature and gravity of the Algerian conflict. Moreover, the legal ambiguity of the situation persisted, for example, when the President of the Military Tribunal refused to admit witnesses’ use of the expression “Algerian War” into the record. In fact, Common Article 3 was invoked only once before the Court of Cassation, but was never expressly pronounced to be applicable.

The reach of Common Article 3 in this case, therefore, was extremely limited in its legal capacity to offer “any real guarantee” to prosecuted FLN rebels. It is also important to note that the French civil courts characterized the conflict as a civil war for insurance purposes—reasons irrelevant to humanitarian concerns. Nonetheless, by qualifying it as a civil war, the French judicial system, at least in part, helped to add some precision to a poorly defined conflict and suggested that there was an emergent international dimension to the Algerian events.

151. Touscoz, _Etude_, supra note 4, at 966–68.
152. _Id._ at 965.
154. Touscoz, _Etude_, supra note 4, at 967.
155. _Id._ at 968.
156. _Id._ at 963–64.
157. Flory, _Algérie algérienne_, supra note 3, at 983.
158. _Id._
159. Touscoz, _Etude_, supra note 4, at 958.
160. _Id._
161. _Id._ at 965.
B. International Armed Conflict: The Full Geneva Conventions?

Throughout the conflict, there was never a clear resolution to the question of whether the war was an internal one or one of international character. In fact, French government officials and FLN representatives in the GPRA disputed this point all the way up to the cease-fire negotiations in 1962, and the question remains in dispute today.

While the French government at least implicitly acknowledged the applicability of Common Article 3, it steadfastly denied that the conflict reached an international scope, and thus that the full force of the Geneva Conventions applied. The FLN, on the other hand, pushed early on for the recognition of the hostilities as an international armed conflict.

This distinction is a particularly meaningful one since parties to an international armed conflict benefit from the robust humanitarian protections of the full corpus of the Geneva Conventions as triggered by Common Article 2, while internal or armed conflicts not of an international character trigger only the comparatively modest protections of Common Article 3. Of particular importance for the case of Algeria, if a conflict rises to one of an international scope, the detailed protections of the Third and Fourth Conventions, which cover the treatment of prisoners of war and protection of civilians, then apply. After providing for the application of the full Conventions to “armed conflicts which may arise between two or more of the High Contracting Parties,” Common Article 2 further provides, in relevant part:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

162. Fraleigh, Algeria Case Study, supra note 10, at 182.
163. Id. at 195.
164. See Flory, Algérie algérienne, supra note 3, at 980 (stating that the GPRA announced in 1960 its intention to define the conflict in Algeria as one that is international in nature).
165. Common Article 2 establishes the criteria for the application of the Conventions to armed conflict. It provides:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

GPW, supra note 77, art. 2; First Geneva Convention, supra note 77, art. 2; Second Geneva Convention, supra note 77, art. 2; Fourth Geneva Convention, supra note 77, art. 2 [collectively hereinafter Common Article 2].
166. Common Article 3, supra note 81.
167. Common Article 2, supra note 165.
Generally, an international conflict is understood to mean an inter-state conflict, and therefore, whether a conflict is legally characterized as international depends on the involvement of more than one state power.\textsuperscript{168} Attempting to fulfill this international characterization—and thus to potentially receive the humanitarian protections of the full Conventions and not just Common Article 3—the FLN sought international recognition of its belligerent status and of the legitimacy of the GPRA.\textsuperscript{169} Accordingly, in an effort to raise the conflict to international status, the GPRA publicly announced its own adherence to the Conventions.\textsuperscript{170}

Despite changing its official policy after General de Gaulle’s 1959 speech—shifting from keeping Algeria “French” to allowing for the possibility of an “Algerian Algeria”—France never changed its position that the Algerian question was a purely internal issue.\textsuperscript{171} Therefore, it is perhaps unsurprising that the French government did not seriously consider characterizing the GPRA as anything other than “the exterior organization of the rebellion.”\textsuperscript{172} While the GPRA was no longer considered the “leader of bands of rebels,”\textsuperscript{173} the French government remained unconvinced that the GPRA was representative of the Algerian people merely by virtue of “installing itself at the head of Algerian Algeria.”\textsuperscript{174} This is because for France to have recognized the belligerency of the FLN or the legitimacy of the GPRA would have “called into question the whole validity of its efforts” to pacify the FLN and restore internal order.\textsuperscript{175}

In December 1959, the GPRA issued a memorandum outlining French actions that it claimed amounted to a recognition of Algerian belligerency:

(1) recourse by France to exceptional legislation inspired by that used in times of war;

(2) the legal significance of French inspections of ships on the open ocean and the seizure of their cargo;

(3) the legal impact of diverting the plane transporting [an FLN leader] and his companions;

(4) the recognition of Algerian belligerence by General de Gaulle in his speech on 23 October 1958;

(5) the negotiation attempts between the FLN and the French government.\textsuperscript{176}

Even so, according to the French legal analysis, the FLN barely fulfilled any of the three requirements of belligerency under the traditional laws of war. These requirements include: (1) hostilities conducted by organized troops under military

\textsuperscript{168} MOIR, supra note 13, at 47.
\textsuperscript{169} Flory, droit international, supra note 19, at 825.
\textsuperscript{170} Flory, Algérie algérienne, supra note 3, at 981.
\textsuperscript{171} Id. at 973–74.
\textsuperscript{172} Id. at 973 (“L’Organisation extérieure de la rebellion . . . .”).
\textsuperscript{173} Id. at 991 (“Il n’est plus question de chefs de bande . . . de l’insurrection . . . .”).
\textsuperscript{174} Id. at 990 (“[p]uisqu’il se place déjà à la tête de l’Algérie algérienne”).
\textsuperscript{175} Greenberg, supra note 12, at 47.
\textsuperscript{176} Flory, Algérie algérienne, supra note 3, at 982.
discipline in compliance with the laws of war; (2) the establishment of a government that exercises the rights inherent in sovereignty on that territory; and (3) occupation of a certain part of the State territory by insurgents. At least by 1959, it was generally recognized that, despite continuing weaponry shortages, the ALN forces showed sufficient military organization to constitute at least the semblance of an army. The ALN was trained both abroad and in Algeria, had a hierarchically organized command structure, was composed of relatively standardized units, and wore a distinctive sign—a red crescent and a star on the cap. One prominent contemporary legal scholar contends, though perhaps overstates, that “the bulk of the ALN consisted of soldiers in uniform.”

However, for French authorities, the FLN’s fulfillment of belligerency requirements stopped there. The French maintained not only that the GPRA was not a legitimate government, but also that the ALN never held exclusive control over a portion of Algerian territory. More than this, the French saw the GPRA’s vigorous arguments for application of the full Geneva Conventions as disingenuous and merely a “means of propaganda.” The GPRA issued the “White Paper,” in which it demanded Common Article 3 treatment “as a minimum,” and asserted that ALN forces qualified for the full protection of prisoner of war status under Article 4 of the Third Geneva Convention. The GPRA had previously asserted this position in its first official Policy Declaration after its formation. More specifically, relying on belligerent status and asserting that “the conflict in Algeria constitutes a war,” the GPRA argued that under paragraph (A)(2) of Article 4 of the Third Geneva Convention (GPW), its forces met all defining qualifications set forth to qualify its members as part of an “organized resistance movement.”


178. See Greenberg, supra note 12, at 42, 57 (describing the recognition of the ALN as a belligerent army, and the typical captured ALN soldier as not having a weapon).

179. Flory, droit international, supra note 19, at 826.

180. Greenberg, supra note 12, at 42.


182. Flory, droit international, supra note 19, at 826–27.

183. Id.

184. Greenberg, supra note 12, at 56.

185. Id. at 47 n.48 (citing LE MONDE, Sept. 27, 1958, at 2, col. 5).

186. Id. at 56.

The conditions set forth are:

(a) That of being commanded by a person responsible for subordinates;
(b) That of having a fixed distinctive sign recognizable at a distance;
(c) That of carrying arms openly;
(d) That of conducting their operations in accordance with the laws and customs of war.

GPW, supra note 77, art. 4(A)(2).
Moreover, the GPRA Council of Ministers passed a decree in approval of the Conventions and deposited the instrument with the Swiss Federal Council. In response, however, the Swiss Federal Council issued a public statement “that for states which had not recognized Algeria, adhesion was ‘without juridical relevance,’” and while the ICRC announced its pleasure at the GPRA’s willingness to ratify the Conventions, it made clear that no recognition of belligerency by other signatories could be implied by the gesture. The French government had no official response, but a *Le Monde* article written by a respected contemporary legal commentator might be representative of reactions within the government:

>[It] does not appear judicially receivable. In effect, whatever may be its international status, the “GPRA” does not represent an established state. As a result, it does not fall within the scope of the articles of the Geneva Conventions, which envision the adhesion of powers, that is, of states.

To be sure, the FLN very likely invoked the full Conventions in large part to lend international recognition to their cause. However, there is evidence that at least a small effort was made to give prisoner of war status to detained French soldiers. A fair number of captured French soldiers—either after their release or in letters home to their families carried by the ICRC—stated that they had been treated as prisoners of war. Another GPRA decree releasing French prisoners mentioned its compliance with Common Article 2. The FLN’s overall record of compliance was certainly not as rosy as these examples suggest. However, despite engaging in a public relations campaign for international legitimacy by showing its willingness to ratify, the FLN voluntarily took on the likelihood of international pressure from other states and perhaps took a small step toward humanizing the conflict. For example, in 1959, the GPRA proposed a general humanitarian agreement that extended modestly beyond the reach of Common Article 3, but the French did not accept.

Despite the reluctance of the French government to recognize the legitimacy of the GPRA, the FLN was, in fact, rather successful in gaining international recognition. Even before the founding of the GPRA, the FLN attended the Bandung Conference as unofficial delegates and five months later was added by a vote on to the agenda of the U.N. General Assembly. The FLN had foreign offices in Bonn, Rome, London, and New York. When French naval ships seized cargo of ships in international waters in attempts to stop arms shipments to the FLN, several

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187. Greenberg, supra note 12, at 64.
188. Id. at 65.
190. Id. at 65–66.
191. Flory, *droit international*, supra note 19, at 826.
192. Id.
193. Greenberg, supra note 12, at 66 (“[T]he decision to ratify can also be seen as a gesture directed toward humanizing the conflict. . . . Ratification imposed an obligation on the FLN to conform to the rules it had accepted; regardless of the motivation of its accession, the FLN was voluntarily opening itself to increased external (and perhaps internal) pressure from other parties to comply.”).
194. Id. at 51.
196. Greenberg, supra note 12, at 43.
countries protested that France had violated international law. By the end of 1959, seventeen countries recognized the GPRA, and by the cease-fire, that number had grown to thirty. The French government, however, attached no legal implications to such recognitions and instead viewed them as purely politically motivated acts by “Soviet-bloc states,” the “group compact of Muslim countries,” and “two African countries.”

However, it is perhaps important to note that both Tunisia and Morocco behaved as if the war had risen to one of international character. Both neighboring countries officially considered the conflict to be an international war, declared themselves allies of the FLN, and provided considerable financial and material support to the FLN during the conflict. For its part, the Tunisian government refused to consider FLN members as French citizens and claimed that the French consul did not have the right to visit FLN fighters in prison. Similarly, the Moroccan leader warned that pursuing FLN rebels who were seeking refuge in Moroccan territory would not be tolerated. Aware of the delicate situation and wanting to avoid any internationalization, France explicitly avoided confrontation with either country but maintained that Morocco and Tunisia’s recognition of belligerence did not alter its own legal appraisal of the conflict as purely internal. However, when twice brought before the U.N. Security Council for the bombing of Tunisian villages believed to be harboring ALN fighters, France in turn requested condemnation of Tunisia for its military aid to rebels and argued that the support to the rebels provided by Tunisia constituted acts of aggression.

In light of French actions such as recourse to emergency laws, attempts at negotiation with GPRA representatives, frontier incursions into Tunisia, and the seizure of ships under foreign national command in international waters, some jurists wondered whether France had ventured outside the boundaries of a purely internal conflict and had instead recognized the de facto belligerency of the FLN. One jurist wrote that in light of these French actions, the FLN might deserve “a

197. Flory, Algérie algérienne, supra note 3, at 982.
198. Id. at 984.
199. Greenberg, supra note 12, at 43.
200. See Flory, droit international, supra note 19, at 840 (noting that other factors beyond political considerations were important for the Muslim countries as well). States recognizing the GPRA in 1959 include: Iraq, the United Arab Republic, Libya, Yemen, Morocco, Tunisia, Saudi Arabia, Jordan, Sudan, Indonesia, China, North Vietnam, North Korea, Outer Mongolia, Ghana, and Guinea. Id. at 839–40.
201. Id. at 829.
202. Id.
203. Id. at 828.
204. Id. at 829.
205. Flory, droit international, supra note 19, at 828–29. The Moroccan leader Abbas el Fassi defined his country’s official position, stating in 1957, “Our Algerian brothers fight inside their borders and if they take refuge inside Morocco, no one has the right to pursue them there because the sanctuary that they seek inside Moroccan territory is one of the rights without which Moroccan sovereignty could not be complete. It is the least of our duties toward a brother country who defends liberty. . . . We equally strive to increase the support that we bring to our brother country in his fight against colonialism for his liberation.” Id.
206. Id. at 834–35.
208. Greenberg, supra note 12, at 41–44.
belligerent status in the non-technical sense of the term.”209 This non-technical belligerent status was perhaps achieved by the close of the war, as indicated at the opening peace negotiations at Evian, where the chief French negotiator discussed the French government’s perception of the GPRA representatives by saying, “[W]e recognize in them the quality of combatants. We see in them the delegates of a political organization who present themselves as candidates for power . . . .”210

Translated into military practice in Algeria, the French government’s refusal to consider application of the full Conventions, and thus to offer prisoner of war status to ALN fighters led to ambiguous detention practices. Even after General de Gaulle began the transition toward an official French political policy of allowing for Algerian self-determination and an Algerian Algeria in 1959, the French government did not reconsider its policy of refusing to apply formal prisoner of war status to ALN troops and FLN fighters.211 In the year before de Gaulle’s return to the presidency, French military leadership stipulated that certain FLN rebels, referred to as “PAM” (pris les armes à la main or “fighters captured openly carrying arms”), should not be prosecuted.212 Instead, military leadership suggested the creation of centres militaires d’internés (CMI), where combatants would be held under arrest.213 On this new practice, General Salan commented that, “It is well settled that the detained must not be considered as prisoners of war. The Geneva Conventions are not applicable to them.”214

After suggesting calling these facilities military internment camps, however, General Salan soon changed his mind in favor of the term military interment centers in order to avoid any comparison with prisoner of war camps.215 Despite this careful lexical adjustment, however, the ersatz prisoner of war camps were recognized as such: “The CMIs are in fact prisoner of war camps to which one did not want to give this name in order not to recognize the de facto belligerent status of the FLN.”216

The stated policy of not prosecuting PAM, however, did not amount to a general recognition of either combatant or prisoner of war status. The official instructions from the Ministry of Justice directed procurer generals not to prosecute combatants “against whom there is no crime charged and those who acted under the coercion of the FLN.”217 In actuality, PAM, who were deemed to have committed crimes or atrocities as well as “those who have proved a likely fanaticism to harm the

209. Id. at 44 (citing THOMAS OPPERMAN, LE PROBLÈME ALGÉRIEN [THE ALGERIAN PROBLEM] (1961)).
210. Id. at 45 (citing Jean Charpentier, La France et la GPRA [France and the GPRA], 7 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 855, 867 (1961)).
211. Thenault, Justice et politique, supra note 93, at 585.
212. Id. at 583 (citing Memorandum from General Salam to l’Armée de terres (Mar. 13, 1958) (on file with le Service historique de l’Armée de terre)).
213. Id.
214. Id.
215. Id. at 583–84.
216. Id. at 587 (citing Memorandum from General de Gaulle (Nov. 11, 1961) (on file with le Service historique de l’Armée de terre)).
217. Thenault, Justice et politique, supra note 93, at 584 (citing Memorandum from le sous-directeur de la direction des Affaires criminelles et graces [Memorandum from the Deputy Director of the Direction of Criminal Affairs] (Dec. 31, 1958) (on file with le Centre des archives contemporaines de Fontainbleau)).
favorable evolution of the State spirit overall,” were not exempt from prosecution under French domestic law.218

Later, in 1960—the same year that de Gaulle and the French government began their first meetings with GPRA representatives to negotiate the terms of Algerian self-determination—the PAM policy was further clarified:219

The government considers, as much for reasons of military order (encouragement of surrender) as for consideration of international order (foreign opinion, Red Cross . . .), that the current system must be maintained. As a result, rebels captured openly carrying weapons (PAM) will continue as a general rule not to be prosecuted and to be detained directly in special camps (CMI).220

The policy was clearer—PAM were not to be detained and not to be prosecuted—but its application remained problematic and unpredictable.221 In fact, there was no precise definition of PAM, though one conception included those “combatants of rebel bands (djounoud) who, in uniform, armed, trained, lived as a djebel without compromising himself in other subversive forms of the rebellion.”222 Therefore, any member who played an active role in political activities or administrative functions of the FLN could still be prosecuted. As before, PAM who had engaged in military actions could still be tried if they committed any prosecutable crime or exaction.223 The concept of exaction was not clearly defined, but its interpretation was extremely broad. Included in the term exaction were “all acts contrary to laws of war,” “all attacks against life and property of civilians,” “attacks on liberty,” “attacks on the public welfare that have no connection to war,” as well as “all acts which target public order,” like train derailments.224 Moreover, it was the general commander of each particular military zone who had the sole discretion to grant or refuse PAM status, and therefore the sole discretion to determine whether such prisoner would face prosecution.225

While PAM status appeared to be a grant of unofficial prisoner of war status in principle, in practice the availability of the status was completely unpredictable and depended upon individual commanders.226 The population statistics of the CMI provide intriguing evidence. The initial total number of prisoners in the CMI was relatively modest—holding about 1,000 men by the end of 1958.227 The number of PAM detained at any one time did not fluctuate significantly. From the end of 1958 to the cease-fire, the number of PAM never far exceeded 5,000 men.228

218. Id.
219. Id. at 585.
220. Id. at 585–86 (citing Directive particulière concernant les rebelles pris les armes à la main [Directive concerning the rebels captured carrying arms] (Nov. 24, 1960) (on file at le Service historique de l’Armée de terre)).
221. Id. at 586.
222. Id.
223. Thenault, Justice et politique, supra note 93, at 586.
224. Id.
225. Id. at 586.
226. Id.
227. Id. at 584.
228. Id. at 586.
of terrorists, accused criminals, or those already convicted who were housed in other detention facilities, however, fluctuated between 9,000 and 16,000. Even up to ten days before the signing of the Evian Accords, French military tribunals continued to issue death sentences.

The French civil judicial system also treaded lightly around the issue of addressing prisoner of war status raised as a defense by FLN fighters on trial for domestic crimes prosecuted under the French penal code. Specifically, prisoners most often appealed to Article 4(A)(3) of the Convention relative to the Treatment of Prisoners of War. Article 4(A) sets forth various categories of persons “who have fallen into the power of the enemy” that qualify for prisoner of war status, including “members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”

While at first glance this provision seems applicable to the circumstances of the FLN and the GPRA, the legal analyses of French courts highlighted the French government’s position that the war was not an international one. Returning to a familiar argument, France insisted that the GPRA was not a legitimate government and had no territorial foundation in Algeria—since its headquarters sat in Tunisia. Moreover, French jurists asserted that in the absence of any further agreement between French authorities and the Algerian rebels, France’s implicit adhesion to Common Article 3 did not activate any other provisions of the Conventions. Since this inquiry of whether the war was an international one did not present serious difficulty, French military courts never called the interpretation of the Conventions to the attention of the government.

Several decisions by the Court of Cassation, however, indicate a more nuanced analysis of the applicability of the Conventions. The highest French court never

230. Id. at 586–87.
231. The Third Geneva Convention, Article 4(A) provides, in relevant part:

   A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
   1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
   2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
      (a) That of being commanded by a person responsible for his subordinates;
      (b) That of having a fixed distinctive sign recognizable at a distance;
      (c) That of carrying arms openly;
      (d) That of conducting their operations in accordance with the laws and customs of war.
   3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

GPW, *supra* note 77, art. 4.

232. Id.
234. Id.
235. Id.
236. Id.
237. Id. at 960.
expressly declared that the full Conventions applied to the Algerian conflict, but it is significant that it also never explicitly affirmed that the Conventions did not apply. In fact, many Court decisions seemed to establish a distinction between rebel members of regular forces and terrorists. For example, on appeal from a military tribunal conviction where the tribunal had refused to accord prisoner of war status under the full Conventions, the Court of Cassation affirmed the military tribunal’s conviction, but the content of its reasoning indicated that the Court recognized a distinction between types of fighters. The FLN member on trial had been convicted of criminal association and aiding attacks on civilians not participating in combat, and the Court reasoned that because of the nature of his acts of terrorism, the rebel did not benefit from the full Conventions. Similarly, in another case where an FLN fighter condemned to death for murder and complicity in attempted murder invoked the Conventions to determine his combatant status and thereby avoid conviction, the Court of Cassation affirmed his conviction because he “did not belong to a regularly formed troop.”

At the same time, the Court also seemed to admit the possibility of applying the Conventions to Algeria in different cases. In one case, the Court set aside the conviction of a rebel who had invoked Article 4(A)(3) as a defense, but who had been sentenced to death without consideration of his claim. The Court of Cassation held that since the military tribunal did not decide whether the prisoner could benefit from prisoner of war status, the tribunal had therefore not properly determined whether he could be prosecuted for his crimes.

Another case illustrates in an even more significant way the idea that defenses based on the Geneva Conventions were not entirely ignored by the Court. Abdellah Berrais, a corporal of a regularly formed ALN troop who was captured after exchanging fire with French troops, was convicted by a military tribunal for attempted murder and participation in an armed band formed to trouble the State, despite raising the Conventions as a defense. Declaring the tribunal not to be competent to carry out an interpretation of an international convention—which was of concern to public order—the Court quashed the judgment below, stating:

[T]he response of the military tribunal to these contentions does not permit the Court of Cassation to verify whether the said Convention was irrelevant to the facts of the case or whether an official interpretation should have been sought from the government.
While it is possible that these decisions were perhaps not of much practical significance because the Court was aware that the government had not officially recognized the applicability of the full Conventions, these decisions seem to indicate that the Court at least recognized “the possibility of their technical relevance.” Likely in light of the tense political context surrounding this question, the Court avoided expressly declaring the Conventions to be either applicable or inapplicable. Though the Berrais case appears to be an exception to the Court’s general preference to avoid addressing the Convention’s applicability, one prominent contemporary French jurist characterized this partial and unofficial respect for the full Conventions as useful, at least for encouraging a psychological détente between French authorities and FLN fighters and in hopes that French soldiers would also benefit from unofficial prisoner of war status.

Ultimately, the French government never considered either declaring war or accepting the applicability of the full Geneva Conventions. In fact, French discussions about the applicability of IHL did not include discussions about the significance of terms such as armed conflict, international conflict not of an international character or international armed conflict. These thresholds terms used in the Conventions are noticeably absent from the French legal debate. The legal analysis employed by jurists as well as the government instead tracked the traditional laws of war and leaned heavily on the bright line distinction between belligerency and non-recognition. While it is not entirely clear whether the avoidance of armed conflict discussion was a deliberate choice, it does seem to indicate the French government’s discomfort with the newly implemented framework of the Conventions. This is very likely because of the high value of status for both parties during the Algerian war, and the seeming political impossibility for France to admit that the FLN was a party worthy of French engagement in an armed conflict of any character.

Despite its reluctance to meaningfully examine whether the threshold for international armed conflict had been crossed, the French government spoke—and acted—as if the Conventions and the opinion of international institutions like the United Nations mattered. French jurists were particularly concerned about the treatment of the Algerian conflict before the U.N. General Assembly, were wary of

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247. Greenberg, supra note 12, at 63.
248. Touscoz, Etude, supra note 4, at 962.
249. Id.
250. See, e.g., Greenberg, supra note 12, at 71 (implying that France’s approach during the Algerian War demonstrates a traditional and ineffective approach to international law due to an inappropriate fixation on the “dichotomy between non-recognition and belligerence”).
251. See, e.g., id. at 39–47 (recognizing that as much as the FLN and GPRA valued combatant status, the French position demonstrated a desire to avoid recognizing the legitimacy of the movements).
252. See, e.g., id. (arguing that France’s instinct was to view the conflict as an internal affair even while France’s Foreign Minister Antoine Pinay claimed it would “be inconceivable that the United Nations could” involve itself in domestic affairs); Fraleigh, Algeria Case Study, supra note 10, at 182–224 (claiming that “there was no clear-cut resolution to the question whether the conflict was an international or internal war” and that “the French Government held consistently to the position that neither [the General Assembly nor the Security Council] had the competence” to evaluate the conflict, but went so far as to seek U.N. assistance during the Athos incident).
253. See, e.g., Flory, droit international, supra note 19, at 819 (stating the French State took such a
potential conflicts with the U.N. Charter,\textsuperscript{254} and were quick to downplay the significance of third party recognition of both the GPRA and of a state of belligerency between France and the FLN.\textsuperscript{255} It seems very likely that the French government was aware, just as contemporary French jurists remarked, that the French legal position in the eyes of the international legal community was, at best, delicate.\textsuperscript{256}

In fact, the effects of increasing international pressure to channel the conduct of war modified, at least in part, France’s original position. This is especially visible, for example, in the informal—and inconsistent—prisoner of war status that the French government granted to ALN and FLN prisoners in the later years of the war.\textsuperscript{257} Though political factors seemed to dictate much of France’s conduct in Algeria, the presence of IHL and the international legal community served as a constant, quietly impactful presence that noticeably informed and modified the behavior of the French, as well as the FLN.

CONCLUSION

This historical case study of IHL as applied to the Algerian War sheds light on the recurring state practice of policy-based application that continues to pose a serious problem in the post-9/11 world. States that find themselves in armed conflicts like France will perhaps inevitably employ legal sleight of hand in order to apply IHL in a politically and strategically optimal way—whether to avoid rules that are perceived as “favoring political opponents,”\textsuperscript{258} or that are seen to preclude various policy choices. Under any given set of circumstances, “[s]tates have naturally found it [in] their interest to keep the letter of the law . . . restrictive and limiting.”\textsuperscript{259}

In this respect, the case of the Algerian War is certainly not unique. U.S. global war on terror provides a relevant modern comparison. Before the September 11 attacks, the United States also avoided official use of the word war when engaged in conflict with North Vietnam.\textsuperscript{260} Similarly, nine days after the attacks, President George W. Bush characterized the events as “an act of war,”\textsuperscript{261} but subsequently contended that the nature of transnational terrorism triggered neither

\textsuperscript{254} See, e.g., Flory, \textit{Algérie algérienne}, supra note 3, at 976 (stating the French position that the General Assembly lacked competence to address the conflict because of Algeria’s lack of right as to auto-determination).

\textsuperscript{255} See, e.g., Flory, \textit{droit international}, supra note 19, at 819 (explaining that France strictly interpreted the Algerian conflict as an internal conflict rather than an international one, thus depriving the United Nations of jurisdiction); Flory, \textit{Algérie algérienne}, supra note 3, at 976 (arguing that the French government accepted that Algeria would become truly Algerian, but until the transition was complete, the territory remained French, thereby depriving the United Nations of jurisdiction over the matter).

\textsuperscript{256} Id. at 833.

\textsuperscript{257} See \textit{id.} at 829–32 (highlighting the recurring difficulty in clarifying the French POW policy).

\textsuperscript{258} MOIR, supra note 13, at 34.

\textsuperscript{259} GREGORY BEST, \textit{WAR AND LAW SINCE 1945}, p. 228 (1994).

\textsuperscript{260} Id. at 229.

\textsuperscript{261} \textit{A Nation Challenged, President Bush’s Address on Terrorism Before a Joint Meeting of Congress, N.Y. TIMES}, (Sept. 21, 2001), www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html.
Article 2 nor Common Article 3 to exploit a gap in IHL application. The parallel to the French government’s reliance on the non-recognition and belligerency paradigm should not go unnoticed. However, the global war on terror is far from the only example of policy-based application of IHL, and the current debate over how to properly construe Common Articles 2 and 3 brings to mind the legal reforms in the decades following the Algerian War (as well as other conflicts now deemed wars of national liberation).

While many of the application problems in this case study of the Algerian War stemmed from the fact that it was tantamount to a political impossibility for France to recognize the legitimacy of the FLN or the GPRA, this issue was eventually addressed by the addition of Additional Protocol I (API) to the corpus of IHL in 1977. API later provided that “national wars of liberation” were to be classified as international armed conflicts to which all four Conventions attach. The drafters of API, in other words, did not want another war without a name like the Algerian War.

Reforms to IHL have not traditionally solved the problem of policy-based application. When the IHL community finally arrived at a consensual definition of aggression, for example, states’ actions that were substantively aggressive under the reformed standard “still had to find some way of describing them which would pretend they were not so.”

Some commentators believe that the ambiguities of key concepts that were at play during the Algerian War, such as how to determine the existence and nature of an armed conflict—or how even to define an armed conflict altogether—are at the heart of the state practice of policy-based application of IHL. However, it seems more likely that the problem is not necessarily in the murky conception or definition of these triggers of consideration, but rather in the subjective criteria of determining whether the threshold has been crossed. As Lindsay Moir asserted, “It is unrealistic to expect parties involved in the situation to be either willing or capable of assessing the position objectively. Irrespective of how precise, or how general, the accepted definition . . . might be, so long as the definition contains certain criteria in order to determine the existence or otherwise of a conflict, it will always be open to States to . . . [prevent] the application of humanitarian law.”


264. See Noelle Higgins, The Regulation of Armed Non-state Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements, 17 No. 1 Hum. Rts. Brief 12, 13 (2009) (“[W]ars of national liberation were determined to be international armed conflicts and thus fall under Additional Protocol I.”).

265. BEST, supra note 259, at 229.

266. See Moir, supra note 13, at 34 (suggesting that the absence of a party or method to determine the existence of an armed conflict means “decisions on the issues will inevitably be made by the State itself” and that State can therefore “hide behind the lack of a definition” to prevent adverse consequences).

267. Id. at 45.
Perhaps, therefore, the solution to the state practice of policy-based application of IHL entails the removal of subjective criteria from the crucial de facto law-triggering standards and thresholds of IHL, which, in practice, the very states in conflict assess. Ultimately, one of the main objectives of the drafters of the Geneva Conventions was to prevent law avoidance, and in the end, perhaps an important step in IHL reform is to directly address the state practice of policy-based application to more effectively put an end to state avoidance of IHL.

268. Corn & Jensen, supra note 14, at 826.