

Concept of Armed Conflict in International Humanitarian Law: Legal analysis of Contemporary Issues

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1. Introduction

International Humanitarian Law (IHL) is a special branch of law covering situations of armed conflict. Its aim is to protect people who are not or are no longer taking part in the conflict. It also restricts the means and methods of warfare employed. However, initially, the concept of war was considered in a very narrow and formalistic manner. With the development of treaty laws, the legal regime of international armed conflict has been progressively extended. Especially the revision of the Geneva Conventions in 1949 came up with a broader approach of armed conflict. That extension continued with the adoption of Additional Protocol I in 1977. This instrument added another type of conflict to the field of the law of international armed conflict, which is a war of national liberation. At the present era, there are many other forms of armed conflicts taking place all over the world. This article tries to accumulate these different types of armed conflicts and justifies their legal aspects within the framework of present International Humanitarian Law.

2. Armed Conflict and its classification in IHL

The term ‘armed conflict’ is hardly defined anywhere in the Geneva Conventions or in other instruments of International Humanitarian Law. We can better quote from the decision of the International Criminal Tribunal for the former Yugoslavia (ICTY):¹

[A]n armed conflict exists whenever there is a resort to armed conflict between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.

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¹ ICTY, *The Prosecutor v. Dusko Tadić*, (1995) Case no. IT-94-1-A (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), para.70.

Though International Humanitarian Law does not define the term “armed conflict”, it recognises two different categories of armed conflict,² (i) international armed conflict and (ii) non-international armed conflict. The reference point for distinguishing between these two is the State border. Wars between two or more States are considered to be international armed conflicts, and warlike clashes occurring on the territory of a single State are non-international (or internal) armed conflicts (usually known as civil wars). However, situation in which people rises up against colonial domination in the exercise of its right of self-determination is taken as an exception in International Humanitarian Law. Since the adoption of Additional Protocol I, wars of national liberation have been considered to be international armed conflicts. A brief discussion about different categories of armed conflicts is encompassed below.

3. International Armed Conflict

By virtue of common Article 2(1), the Geneva Conventions, 1949 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’.

So, if there is an armed conflict between two or more States, International Humanitarian Law is automatically applicable. It is immaterial whether or not a declaration of war has been made and whether the parties to the conflict have recognised or not that there is a state-of-war. The only thing required for Humanitarian Law to become applicable is the circumstances of an armed conflict. Depending on the case in question, the situations may take two forms. Such as:

- a) A direct conflict between States or
- b) An intervention in a previously existing internal conflict.

In the present geo-political reality, a direct conflict is becoming rare practice. Armed conflicts, like the second one, are more common now a days and demands more attention.

3.1 Foreign Intervention in Internal Conflicts

In this form, the conflict is in true sense ‘internationalized’. This may happen, for example, if a foreign Power sends troops into a territory of some other country to

² Schindler, Dietrich. 1979, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ 163 II *RCDAL*, pp. 117-163.

support a movement opposing the local government. Intervention may also take place by proxy when a foreign Power merely supports and guides the uprising within the territory of other country from a distance.³ In that case, the obvious question raises, what is the yardstick to justify that a conflict has been internationalized? Here the 'level of control' of the foreign Power can help to sort out the answer. Because not every form of international influence necessarily make a conflict international. On this particular issue, the International Criminal Tribunal for the former Yugoslavia (ICTY) pointed out that:⁴

Control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.

In reality, the criterion of 'overall control' is achieved when the foreign State 'has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group'.⁵ Involvement must, therefore, go beyond mere logistical support.

3.2 Conflicts to Determine the Right of Self-determination

Since the adoption of Additional Protocol I in 1977, the field of application of the law of international armed conflict is no longer confined only to the inter-State conflicts. Now it also covers conflicts between government forces and some non-governmental groups, i.e. peoples fighting in the exercise of their right of self-determination. The Protocol stipulates that the situations targeted by Article 2 common to the 1949 Geneva Conventions include armed conflicts in which peoples fight either

- against colonial domination or
- against alien occupation or
- against racist regimes.

In any of these conflicts, proviso is that people are fighting in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the

³ ICTY, above note 1, para 84.

⁴ Ibid., para 137.

⁵ Ibid, para 137; see also paras 120 and 131. See also ICTY, *Prosecutor v. Naletilic* (2003) Case No. IT 98-34-T, Judgment (Trial Chamber), para 198.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.⁶

However, the scope of Common Article 2 has been found not so simple so far. The non-governmental groups are given protection under the realm of International Humanitarian Law beside the State parties. So the concerned State party often tries to cover the issue under non-international armed conflict which is not dealt under Common Article 2. Moreover, it is often not wise or even possible to cover all sorts of non-governmental groups under the protection of International Humanitarian Law. This is because, law not only gives protection but also comes up with some responsibilities. It is often a practical problem to determine whether the non-governmental groups are abided by the International Humanitarian Law as they can never become signatory parties of the Act. Common Article 2 is also silent about the status of the State parties who did not ratify Additional Protocol I. Last but not the least, Common Article 2 does not come up with any criteria which can make it possibly different from non-international armed conflict which is covered by Article 3 common to the 1949 Geneva Conventions and their Additional Protocol II.

4. Non-international Armed Conflict

International and non-international armed conflicts are dealt differently as the legal status of the belligerents in the two types of conflicts is different. The Geneva Conventions were originally developed with the view that they would apply only to international armed conflicts.⁷ But at present there are three basic treaty texts under International Humanitarian Law that cover non-international armed conflicts as well. These are:

- i) Article 3 common to the 1949 Geneva Conventions
- ii) Article 1 of Additional Protocol II of 1977 and
- iii) Article 8 of the Rome Statute of the International Criminal Court

4.1 Article 3 Common to the 1949 Geneva Conventions

Article 3 common to the 1949 Geneva Conventions does not come up with any direct definition of non-international armed conflict. Rather it confines its applicability in the case of 'armed conflict not of an international character

⁶ *Additional Protocol I 1977* Art. 1(4).

⁷ Meron, T. 1995, 'International Criminalisation of Internal Atrocities', *American Journal of International Law*, Vol. 89, No. 3, pp. 554-577.

occurring in the territory of one of the High Contracting Parties'.⁸ Here comes the question which armed conflicts are not of international character? This issue was dealt by the International Criminal Tribunal for the former Yugoslavia (ICTY) and it finds out that depending on the case in question, 'armed conflicts that are not of an international character' take place either

- (a) between one (or more) armed group(s) and government forces or
- (b) solely between armed groups.⁹

So non-international armed conflicts are those in which at least one of the parties involved is not governmental. It is sometimes confused with internal disturbance within a State territory to avoid the application of International Humanitarian Law. States are often unwilling to categorise their internal disturbances as 'armed conflicts'. For example, the Russian Federation and Turkey do not consider their internal conflicts with separatists as armed conflicts. In dealing with the Chechen or Kurdish separatists, these states see themselves as conducting internal operations against terrorists rather than anything comparable to an 'armed conflict' and therefore denied the application of International Humanitarian Law to their situations. So the distinction between non-international armed conflict and internal disturbance demand an inclusive discussion.

4.1.1 Non-international Armed Conflict vs. Situations of Internal Disturbances and Tensions

In common practice, riots, isolated and sporadic acts of violence, civil disturbance and other acts of similar nature are considered as 'situations of internal disturbances and tensions'.¹⁰ They cover less violent circumstances involving, for example, mass arrests, a large number of political detainees, torture or other kinds of ill treatment, forced disappearance and/or the suspension of fundamental judicial guarantees.¹¹ In these sorts of cases International Humanitarian Law does not apply.¹² As Stewart points out, 'much of the Geneva Conventions simply cannot be applied in civil conflicts because their operation turns on notions of belligerent occupation of

⁸ *Geneva Conventions 1949*, Art. 3(1).

⁹ ICTY, above n 1, para 70.

¹⁰ *Additional Protocol II 1977*, Art. 1(2).

¹¹ Sandoz Y. et al. (eds), 1987, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague paras 66–118.

¹² *Additional Protocol II 1977* Art. 1(2). Although this quote is taken from Additional Protocol II, it is accepted that the threshold established is also valid for conflicts covered by common Art. 3.

territory and enemy nationality, concepts that are alien to civil conflicts.¹³ The methods used to tackle internal disturbances are also differing. In such situations, the authorities in power usually call upon extensive police forces, or even armed forces, to restore internal order.¹⁴ So the means are often closer to counter-terrorism, riot control or general law enforcement. These are quite different than what is considered the means and methods envisaged by International Humanitarian Law.

In case of non-international armed conflict, however, an 'armed conflict' already exists. This means that the situation already reached at a level that distinguishes it from situations of internal disturbances and tensions. So the distinguishing point between non-international armed conflict and internal disturbances is the threshold of intensity. It was revealed in the International Criminal Tribunal for the former Yugoslavia (ICTY) that this threshold reaches at such a level that the situation can be defined as 'protracted armed violence'.¹⁵ The Tribunal also suggested two fundamental criteria to assess the threshold of intensity. These are:

- (i) The intensity of the violence and
- (ii) The organization of the parties.¹⁶

These two assessing criteria cannot be explained and confined in theoretical texts. They need evaluation on a case-by-case basis by weighing up a host of indicative data.¹⁷ For example, the duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead,

¹³ Stewart, J. 2003, 'Towards a single definition of armed conflict in international humanitarian: a critique of internationalized armed conflict' *International Review of the Red Cross*, Vol. 85(850), p. 345.

¹⁴ ICRC, 1971, 'Protection of Victims of Non-International Armed Conflicts' (Document presented at the Conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts) Vol. V, p. 79.

¹⁵ ICTY, above note I, para 70.

¹⁶ ICTY, above note 1, para 561–568, especially para 562. See also ICTY, *Prosecutor v. Limaj* (2005) Case No. IT-03-66-T, Judgment (Trial Chamber) para 84; ICTY, *Prosecutor v. Boskoski* (2008) Case No. IT-04-82, Judgment (Trial Chamber) para 175.

¹⁷ ICTY, *Prosecutor v. Haradinaj* (2008) Case No. IT-04-84-T, Judgment (Trial Chamber) para 49; ICTR, *Prosecutor v. Rutaganda* (1999) Case No. ICTR-96-3, Judgment (Trial Chamber I) para 93.

wounded, displaced persons, etc.)¹⁸ These pieces of information can be taken into account to evaluate the intensity of the violence.

Regarding the second criterion, a minimum level of organization is the pre-requisite for parties in the armed conflict. As for the government forces, without any evaluation, it is presumed that they meet that requirement.¹⁹ But in case of non-governmental armed groups, there has to be few indicative elements of organisation. These include, for example, the existence of an organizational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules.²⁰

When one or other of these two conditions is not met, a situation of violence may well be defined as internal disturbances or internal tensions instead of non-international armed conflict. However, some observers consider ‘motive of the non-governmental groups’ as a further condition to the notion of non-international armed conflict. Their suggestion is that, groups with a political objective only should be covered under the realm.²¹ Thus ‘purely criminal’ organizations, such as mafia groups or territorial gangs would be eliminated. But there is no legal basis for this additional condition in the current International Humanitarian Law. The International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the notion and summed up that:²²

¹⁸ For a review of the indicative factors taken into account by the ICTY in its case law, see ICTY, *Prosecutor v. Boskoski* (2008), above note 16, para 177, ICTY, *Prosecutor v. Limaj* (2005) above note 16, para 168; ICTY, *Prosecutor v. Haradinaj* (2008) *ibid* para 49.

¹⁹ ICTY, *Prosecutor v. Haradinaj* (2008) above n 17, para 60.

²⁰ For a review of the indicative factors taken into account by the ICTY in its case law, see ICTY, *Prosecutor v. Boskoski* (2008) above note 16, paras 199–203; ICTY, *Prosecutor v. Limaj* (2005) above note 16, paras 94–134; ICTY, *Prosecutor v. Haradinaj* (2008) above note 17, para 60.

²¹ Bruderlein retains, for example, three main characteristics for the definition of an armed group, i.e. (a) a basic command structure; (b) recourse to violence for political ends; (c) independence from State control (Bruderlein, C. 2000, *The Role of Non-state Actors in Building Human Security: The case of Armed Groups in Intra-state Wars*, Geneva :Centre for Humanitarian Dialogue. See also Petrasek, D. 2000, *Ends and Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, Geneva.

²² ICTY, *Prosecutor v. Limaj* (2005) above note 16, para 170.

[T]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.

4.2 Article 1 of Additional protocol II

To strengthen the regulation of non-international armed conflict, Additional Protocol II was adopted in 1977. It applies to non-international armed conflicts ‘which take place in the territory of a High Contracting Party between its 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’.²³ So the application of Additional Protocol II is conditional on following issues:

- a) The armed conflict has to take place in the territory of one High Contracting Party and
- b) The parties of the conflict have to be the armed forces of the High Contracting Party and dissident armed forces or other organized armed groups;

However, Additional Protocol II does not apply to the organised groups fighting for national liberation. These sorts of conflicts are equated with international armed conflicts by virtue of Article 1(4) of Additional Protocol I. But the *ratione loci* criterion (i.e. it only covers non-international armed conflicts occurring in the territory of one of the High Contracting Parties) can have controversial impact. Because at present world, non-international armed conflicts often no longer remains confined within a state territory. But the *ratione loci* criterion excludes non-international armed conflicts taking place in two or even more State territories from the realm of International Humanitarian Law.

In the second criterion, the Protocol stipulates that the conflicts concerned are those taking place on the territory of a High Contracting Party between ‘its’ armed forces and opposition movements. This confines the scope of applicability of the Protocol. A narrow interpretation of this passage makes this instrument inapplicable to the troops of a government intervening abroad in support of the local authorities. Because the forces involved in that case are not those of the State in which the conflict is taking place.

²³ *Additional Protocol II 1977* Art. 1(1).

4.2.1 Comparison between Article 1 of Additional protocol II and Common Article 3 of the 1949 Geneva Conventions

Article 1 of Additional Protocol II is more restrictive in its application than that of Common Article 3 of the 1949 Geneva Conventions. It requires non-governmental forces to have a particularly high level of organization. This includes:

- a) The non-governmental forces must have a responsible command;
- b) They need to have a control over a part of the territory;
- c) This control has to be sufficient enough to carry out sustained and concerted military operations and
- d) They must comply with the Additional Protocol II.²⁴

Although common Article 3 also presumes a degree of organization among the armed groups, it does not mention about the territorial control. So an armed conflict may fall within the material field of application of common Article 3 without fulfilling the conditions determined by Additional Protocol II.²⁵ Conversely, all the armed conflicts covered by Additional Protocol II are also covered by common Article 3 but not vice versa.

The second distinction is regarding the parties of conflict. Additional Protocol II restricts its field of application to armed conflict between governmental forces and dissident armed forces or other **organized** armed groups. So it does not cover conflicts solely between non-governmental groups.²⁶ But common Article 3 of the 1949 Geneva Conventions does not provide for that restriction.

In case of practical implication, it is often hard to identify situations that meet the criteria mentioned in Article 1 of Additional Protocol II. If the Article is interpreted in strict sense, it is only applicable in circumstances where the non-governmental party has reached a stage to look and act like a state. In modern warfare, where

²⁴ *Additional Protocol II 1977* Art. 1(1). On this point, see Bothe, M., Partsch K.J. and Solf, W.A. 1982, *New Rules for Victims of Armed Conflicts*, London: Martinus Nijhoff Publishers, p. 626.

²⁵ Vite, Sylvain. 2009, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' *International Review of the Red Cross*, Vol. 91(873) p. 79.

²⁶ Sandoz et al. (eds), above note 11, para 4461.

control of territory is now far less important and belligerents are less likely to have an organized command structure, the Additional Protocol is unlikely to apply.²⁷

4.3 The Rome Statute of the International Criminal Court (ICC)

During the drafting of the Rome Statute of the International Criminal Court, a long list has been incorporated to categorize the war crimes that generally occur during 'armed conflicts not of an international character'. It distinguishes these crimes into two broad categories:

- (a) War crimes which are serious violations of common Article 3, and
- (b) Other serious violations of the laws and customs applicable in armed conflicts not of an international character.²⁸

In both cases, the Statute indicates the lowest level of applicability of the relevant provisions by stipulating that they do not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.²⁹

4.3.1 War crimes which are serious violations of common Article 3

Article 8(2)(c) of the Rome Statute deals with the material field of application of the rules pertaining to 'serious violations of common Article 3' of the 1949 Geneva Conventions. It talks about the rights of those persons who are no longer taking active part in armed conflicts not of an international in character. It also includes protection for members of armed forces in such conflicts who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. The following acts committed against any of these persons are categorized as 'war crimes which are serious violations of common Article 3':

- (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (iii) Taking of hostages;

²⁷ Odermatt, Jed. 'New Wars' and the International/Non-international Armed Conflict Dichotomy, available at <http://www.isisc.org/dms/images/stories/PDF/Paper%20Odermatt.pdf> p. 10.

²⁸ *Rome Statute of the ICC 1998*, Art. 8(2) (c) and (e), respectively.

²⁹ *Id.*

- (iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.³⁰

4.3.2 Other Serious Violations of the Laws and Customs

The Rome Statute clarifies the notion of non-international armed conflict in the case of 'other serious violations' in Article 8(2) (e). Any of the following twelve acts can be considered as serious violation within the established framework of international law:

- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
- (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- (v) Pillaging a town or place, even when taken by assault;
- (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
- (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;

³⁰ *Rome Statute of the ICC 1998 Art. 8(2) (c).*

- (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (ix) Killing or wounding treacherously a combatant adversary;
- (x) Declaring that no quarter will be given;
- (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- (xii) Destroying or seizing the property of an adversary unless such destruction or seizure

After enlisting the acts which can be considered as serious violation within the established framework of international law, the Statute stipulates a condition in Article 8(2) (f) for the application of the provision. It says that the rule can apply 'to 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'.³¹ The explicit reference of the condition of duration (protracted armed conflict) in Article 8 (2) (f) raises the question whether it is proposing a different type of non-international armed conflict and thus defining a new field of application. That question is the subject of controversy and has not yet been finally resolved.

4.3.3 Comparison among Art. 8 of Rome Statute, Common Article 3 and Art.1 of Additional Protocol II

Common Article 3 of the 1949 Geneva Conventions was primarily developed in order to regulate any kind of non-international armed conflicts. That is why Common Article 3 contains a relatively modest degree of regulation. But Additional Protocol II, although it adds to substantive legal rules covering non-international armed conflict, is even more restrictive in its application than Common Article 3. So while drafting the Rome Statute, concern was to prevent the restrictive notion in Additional Protocol II from being incorporated into the Statute. With that mind, the

³¹ This definition is based on the case law of the ICTY, which deemed that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State' (ICTY, above note 1, para 70).

concept of non-international armed conflict in Article 8 (2) (d) refers directly to that of common Article 3. But the notion in paragraph (2) (f) of Article 8 of the Rome Statute adds a time criterion. A non-international armed conflict within the meaning of paragraph (2) (f) exists when that conflict is ‘protracted’. This special criterion was discussed in the *Lubanga Dyilo* case,³² with an apparent intension to confer a distinct meaning on this provision and defining a specific threshold of applicability of the Rome Statute. The International Criminal Court Pre-Trial Chamber made it clear that this threshold is characterized by two conditions:

- (a) The violence must achieve a certain intensity and be protracted;
- (b) An armed group with a degree of organization, particularly the ‘ability to plan and carry out military operations for a prolonged period of time’ must be involved.³³

This definition, therefore, comes up with a definite field of application that is stricter than that of common Article 3. This is because, it requires the fighting to take place over a certain period of time. But it is wider than that of Additional Protocol II as it does not require the armed group(s) concerned to exercise territorial control. The category of conflict targeted here is therefore half way between the categories referred to in common Article 3 and in Additional Protocol II.³⁴ Precisely, the Rome Statute of the International Criminal Court identifies two types of non-international armed conflict:

Firstly, conflicts within the meaning of common Article 3³⁵ and

Secondly, ‘protracted’ non-international armed conflicts.³⁶

This division has been done only to determine the jurisdiction of the International Criminal Court. So the Statute does not create a new concept of non-international armed conflict in International Humanitarian Law, but simplifies its area jurisdiction.

³² *Prosecutor v. Lubanga Dyilo* (2007) Case No. ICC-01/04-01/06-803.

³³ ICC, *Prosecutor v. Lubanga Dyilo* (2007) Case No. ICC-01/04-01/06-803, Decision on the confirmation of charges (Pre-Trial Chamber I), paras 229–237, especially 234.

³⁴ Vite, above note 25, p. 82.

³⁵ *Rome Statute of the ICC 1998*, paras (2) (c)–(d) of Art.8.

³⁶ *Rome Statute of the ICC 1998*, paras (2) (e)–(f) of Art.8.

5. Rational of Classification of Armed Conflicts

There are several reasons why humanitarian law instruments differently deal with international or non-international armed conflicts. The State parties continue to cling to the distinction as the nature of the parties to these conflicts is different. Not only the nature of the parties but also their relationship with each other is fundamentally different. Let us have a brief discussion on this point.

5.1 Parties to the Armed Conflicts

In an international armed conflict, both the parties of the conflict are sovereign States (an exception is the liberation war). But in case of non-international armed conflict, either one or both the parties are non-governmental groups. The Geneva Conventions were originally developed to be applied to the State parties only.³⁷ This is because States have international legal personality. Almost every State has a developed military command structure, military manuals that set out legal obligations of their fighters, and courts or military tribunals to prosecute those who breach these rules. So States are presumed fully capable to fulfil their obligations under international law.

But non-governmental groups like rebel groups, secessionists or armed militias are less likely to be capable of implementing these obligations. They are relatively unorganised or irregular. So International Humanitarian Law treats the conflicts differently where non-governmental groups are involved. They come under this legal regime only when they have reached a level of organisation and control that is comparable to that of a State.

5.2 Relationship between the Parties of the Armed Conflicts

At the international level, States are regarded as legally equal entities.³⁸ In an international armed conflict, generally one State goes to war against another. There the conflict is between two sovereign entities. However, in a non-international armed conflict, the conflict takes place between legal unequals, one being the sovereign State and the other being an organized group. But as long as a non-governmental group comes under the protection of International Humanitarian Law, the fighters get at least some level of legal status, and acquire rights and duties as belligerents. So the rationality of the distinction of armed conflicts is rooted in the

³⁷ Meron, above note 7, pp. 554-577.

³⁸ Odermatt, above note 27, p. 5.

view that the rules of international armed conflict would, if applied to situations of internal disturbances, affect the status of insurgents and the territory they hold.³⁹

6. Controversial Classification of Certain Armed Conflicts

One aspect of modern wars seems to distinguish them from conflicts of earlier eras, that is, their complex combination of international and non-international elements.⁴⁰ They hardly match with any of the defined categories provided in the legal instruments of International Humanitarian Law. This creates legal vacuum and hardship for the application of humanitarian law in armed conflicts of complex nature. Here comes the question whether the conventional classification of armed conflicts needs a thorough review. For better understanding, the following discussion comes up with four types of situation whose classification is controversial yet. These are:

- I. Control of a territory without military presence on the ground;
- II. Foreign intervention in non-international armed conflict;
- III. Non-international armed conflicts on the territory of several States;
- IV. Cross-border non-international armed conflicts.⁴¹

6.1 Control of a Territory without Military Presence on the Ground

When one of the belligerents succeeds in gaining the upper hand over his adversary, an international armed conflict takes the form of occupation.⁴² As per Article 42 of the 1907 Hague Regulations, 'a territory is considered occupied when it is actually placed under the authority of the hostile army'. For occupation in the meaning of this provision to exist, two conditions must be fulfilled:

- (a) The occupier is able to exercise effective control over a territory that does not belong to it;
- (b) Its intervention has not been approved by the legitimate sovereign.⁴³

³⁹ Solomon, S. 2006, 'Internal Conflicts: Dilemmas and Developments', *The George Washington International Law Review*, Vol. 38, No. 3, p. 582.

⁴⁰ Odermatt, above note 27, p. 1.

⁴¹ Vite, above note 25, p. 84.

⁴² For a more detailed study of the notion and the law of occupation, see Dinstein, Y. 2009, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press.

⁴³ Benvenisti, E. 1993, *The International Law of Occupation*, New Jersey: Princeton University Press, p. 4. The author defines occupation as 'the effective control of power

Effective territorial control, which is at the heart of the concept of occupation, implies that a substitution of powers must take effect. But present world witnessed several international armed conflicts without a direct territorial control. The example of the Gaza Strip following the Israeli withdrawal illustrates those difficulties with particular acuity.

The Israeli troops had their continuous presence on the Gaza Strip since the Six-Day War in 1967. Their last troops were withdrawn from that region on 12 September 2005. In doing so, they were helping to implement a 'Disengagement Plan' adopted by the Israeli government on 6 June 2004 and endorsed by parliament on 25 October of that same year.⁴⁴ By virtue of that plan, the authorities' intention was to put an end to their responsibilities *Vis-a-Vis* the people living in that territory.⁴⁵ But the physical withdrawal of the Israeli forces does not end up the occupation of the region in question. Israel retained substantial control over the Gaza Strip, although its troops were no longer physically deployed in that area.⁴⁶ The Disengagement Plan clearly stated that Israel was to continue to exercise control over the borders of that territory, as well as over its air space and coastal region.⁴⁷ Moreover, Israel has the advantage of being able to enter Palestinian territory at any time in order to maintain public order.⁴⁸ Here comes the question, what is the category of this sort of armed conflicts where one State controls a territory without military presence on the ground?

(be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory'.

⁴⁴ Israeli Prime Minister's Office, Cabinet Resolution Regarding the Disengagement Plan: Addendum A – Revised Disengagement Plan – Main Principles, 6 June 2004, <http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm#A> at 9 July 2009.

⁴⁵ *Id.*

⁴⁶ See the Note by the United Nations Secretary-General: Situation of human rights in the Palestinian territories occupied since 1967, UN Doc. A/61/470, 27 September 2006, para 6. See also Report on the situation of human rights in the Palestinian Territories occupied by Israel since 1967, J. Dugard, Special Rapporteur, E/CN.4/2006/29, 17 January 2006, para 6 ff.

⁴⁷ Israeli Prime Minister's Office, Cabinet Resolution Regarding the Disengagement Plan: Addendum A – Revised Disengagement Plan – Main Principles, Chapter 1: Background – Political and Security Implications, 6 June 2004, <<http://www.mfa.gov.il/MFA/Peace+Process/Reference+Documents/Revised+Disengagement+Plan+6-June-2004.htm#A>> at 9 July 2009.

⁴⁸ For a more detailed analysis of the powers still being exercised by Israel following its withdrawal from Gaza, see Gisha – Legal Center for Freedom of Movement, *Disengaged Occupiers: The Legal Status of Gaza*, January 2007, pp. 29 ff, <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf> at 13 July 2009).

6.2 Foreign Intervention in Non-international Armed Conflict

The nature of non-international armed conflicts has become very complex at present world. They take place in a 'globalised' setting. In such a situation, belligerents battle not only for political power but recognition from the international community, access to international markets and trade in natural resources.⁴⁹ So the non-international armed conflicts include large groups of fighters from abroad, at the same time financial and military backing from foreign governments. We can take the example of armed conflicts in Rwanda and in the Great Lakes area of Africa, including the Congo and Uganda. These conflicts are sometimes characterized as internal ethnic and tribal warfare.⁵⁰ But the involvement of combatants from several foreign States ensures their international character as well.

The International Criminal Court has examined this specific issue in the pre-trial stages of the cases *Prosecutor v. Thomas Lubanga Dyilo*⁵¹ and *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*⁵², both relating to the situation in Democratic Republic of Congo (DRC). The finding of the Pre-Trial Chamber is that the *Ituri* conflict in north eastern Democratic Republic of Congo was of international character. This was because of the direct intervention of the Ugandan People's Armed Forces as well as Uganda's substantial contribution of weapons and ammunition to armed groups in DRC.⁵³ The Chamber relied on the determination upheld in the *Lubanga* case,⁵⁴ that an internal armed conflict can exist alongside an international armed conflict when

- (i) another State intervenes in that conflict through its troops (direct intervention), or
- (ii) if some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).⁵⁵

⁴⁹ Odermatt, above note 27, p. 3.

⁵⁰ Bassiouni, C. 2008, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' *The Journal of Criminal Law and Criminology* Vol. 98, No. 3, p. 748.

⁵¹ ICC, *Prosecutor v. Thomas Lubanga Dyilo*(2007) Decision on the confirmation of charges, No. ICC-01/04-01/06, p. 72.

⁵² ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (2008) Decision on the Confirmation of Charges, No. ICC-01/04-01/07, p. 71.

⁵³ *Ibid*, paras. 239-240.

⁵⁴ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, (2008), above n 52.

⁵⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the confirmation of charges, para.

This was also a view supported by the ICJ in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.⁵⁶ We can also consider the conflict in Darfur, Sudan where the *Janjaweed* is made up of fighters from Libya and Chad.⁵⁷ How, then, can this conflict be deemed to be merely internal tribal conflict? There are many other examples where the conflicts are not international in the traditional sense. But the level of direct foreign intervention in these conflicts makes them something more than merely 'tribal' conflicts.

6.3 Non-international Armed Conflicts Taking Place on the Territory of Several States

The Additional Protocol II as well as common Article 3 of the Geneva Conventions is applicable where the conflict in question takes place on the territory of one State. However, many conflicts between a government and an armed group are in practice carried out on the territory of two or even of several States. For instance, the conflicts in the Great Lakes region of Africa, including Ruanda, Congo and Uganda are of such nature. Then what would be the legal status of the combatants who are taken captive in these armed conflicts? Some authors refer to such conflicts as 'transnational armed conflicts' or 'extra-State conflicts'. They also consider that a specific type of international humanitarian law must apply to them.⁵⁸

6.4 Cross-border Non-international Armed Conflicts

This kind of situation arises when a State force enters into conflict with a non-governmental armed group located in the territory of a neighboring State. We can cite the example of Lebanese crisis in the summer of 2006. On 12 July of that year, Hezbollah's military component launched various attacks on Israeli territory. This led to a high-intensity armed conflict in the region. The Israeli authorities retaliated

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⁵⁶ *Democratic Republic of the Congo v. Uganda* (2005) para. 345.

⁵⁷ The International Commission of Inquiry on Darfur has stated there was credible evidence that members of the *Janjaweed* included fighters from neighbouring Libya and Chad. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005, p. 32.

⁵⁸ Schoendorf, R.S. 2004, 'Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?' *New York University Journal of International Law and Politics*, Vol. 37, No. 1, pp. 61-75; Corn, G.S. 2007, 'Hamdan, Lebanon, and the Regulation of Armed Conflict: The Need to Recognize a Hybrid Category of Armed Conflict' *Vanderbilt Journal of Transnational Law*, Vol. 40, No. 2.

by launching a ground, air and sea offensive on Lebanon.⁵⁹ But the linkage between the Lebanese government and the Hezbollah combatants raised interesting issue for the implication of International Humanitarian Law. The Lebanese government was not involved in the attacks that originated the conflict, neither had they approved them. They clarified their stand in the official letter to the Secretary General and the Security Council of the United Nations.⁶⁰ With this stand, it becomes difficult to consider it as an international armed conflict between Lebanon and Israel. Here the conflicting parties are one State party and a militia group of another State fighting on other territory. Such a situation is not covered by common Article 3 of the Geneva Conventions or the Additional Protocol II. So what would be the legal status of the combatants who are taken captive in this armed conflict?

6.5 The International Fight Against Terrorism

This kind of situation arises when a State force enters into conflict with a non-governmental armed group located in the territory of a neighboring State. This special kind of conflict came into lime light because of the current clash between some States and Al Qaeda. In October 2001, the United States of America attacked Afghanistan to defeat Al Qaeda. This conflict does not fulfill the criteria of international armed conflict as not both the conflicting parties are sovereign entities. Moreover, Al Qaeda, as a conflicting party does not comply with the conditions of organized non-governmental forces as required in Article 1 of Additional Protocol II.⁶¹

However, the situation was totally changed from 19 June 2002 onwards, when a transition government was established in Afghanistan. The newly established authorities, with the support of the international coalition, carried out a high-

⁵⁹ For more details of the circumstances and the course of this conflict, see Commission of Inquiry on Lebanon, Report pursuant to Human Rights Council resolution S-2/1, A/HRC/3/2, 23 November 2006.

⁶⁰ See, in particular, Identical letters dated 13 July 2006 from the Charge' d' affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the Secretary-General and the President of the Security Council, A/60/938-S/2006/518, 13 July 2006.

⁶¹ Basically, Al Qaeda's way of operating excludes it from being defined as an armed group that could be classified as a party to a non-international armed conflict. In accordance with the current state of intelligence, it appears, rather, to be a loosely connected, clandestine network of cells. These cells do not meet the organization criterion for the existence of a non-international armed conflict within the meaning of humanitarian law. See, in particular, ICRC, International humanitarian law and the challenges of contemporary armed conflicts, Excerpt of the Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent Geneva, December 2003, pp. 232 ff.

intensity fighting against organized non-government troops, i.e. those of the Taliban. But controversy remains about the legal status of the conflict from October 2001 to 18 June 2002. In fact, the fight against terrorism takes the form of a series of terrorist attacks and anti-terrorist operations in several countries. Can the sum total of these events then be considered as a (cross-border global) armed conflict to which international humanitarian law would apply?⁶² Does it constitute a new type of armed conflict giving rise to the application of a legal regime that has yet to be established?⁶³ Or is it a phenomenon that is not related to armed conflict?

7. Conclusion

The classification of situations of armed violence is often linked to political considerations. The parties involved into the conflict endeavor to interpret the facts in accordance with their interests. So there should not be any ambiguity about the typology of armed conflicts in International Humanitarian Law. This will reduce the scope for interpretation, thus reinforcing the predictability of international humanitarian law. It is also true that the conventional classification of armed conflicts need a review as they do not cover the whole range of various conflicts taking place in the present era. In some cases, the criteria described in different legal documents need more explanation. This is the demand of time because depending on how an armed conflict is legally defined, the rules that apply vary from one case to the next. This is also important for the protection of the conflicting parties and captives of these conflicts.

⁶² Yoo, J.C. and Ho, J.C. 2003, "The Status of Terrorists", Public Law and Legal Theory" Research Paper No. 136, UC Berkeley School of Law.

⁶³ Schoendorf, above note 58.