40th Round Table on Current Issues of International Humanitarian Law

"The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives"

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Additional Protocol II and threshold of application

My presentation will be divided into two parts: in the first part, I will try to define the threshold of application of Additional Protocol II (AP II); in the second part, I will try to tentatively answer the question on whether and to what extent the precise identification of this threshold really matters.

1. The threshold of application of Additional Protocol II

To correctly understand the threshold under Article 1, AP II, it is necessary to briefly recall its history, which is strictly connected with the history of Common Article 3 to the Geneva Conventions (GCs). In fact, since the moment in which Common Article 3 was adopted in 1949, the inadequacy of this norm was perceived, and the need was felt to supplement it with further regulation.

As is well known, the history of the elaboration of the two additional protocols was long and complicated. But when the decision was taken to elaborate two instruments, instead of one protocol covering both international and non-international armed conflicts, the idea was initially to integrate, or rather to supplement Common Article 3, without modifying its scope of application.

The problem with Common Article 3 was, however, the lack of a definition of the armed conflicts to which it applied. For States it was essential, when broadening the scope of the provisions applicable in non-international armed conflicts, to clearly define and delimit the concept. The definition thus became the main bone of contention. In 1972 the ICRC issued a proposal for a draft additional protocol whose intent would be to supplement Common Article 3 with regard to all armed conflicts to which this provision applies: therefore, in defining non-international armed conflicts, the ICRC draft intended to offer a definition that would also be valid in assessing the scope of Common Article 3. The draft provided:

"The present Protocol, which elaborates and supplements article 3 common to the four Geneva Conventions of August 12, 1949 (hereinafter referred to as common article 3), shall apply to all armed conflicts not of an international character referred to in common article 3 and, in particular, in all situations where, in the territory of one of the High Contracting Parties, hostilities of a collective nature are in action between organized armed forces under the command of a responsible authority."

The majority of States, however, opted for a different approach, which would separate the protocol from Common Article 3, so that each of the two instruments would be governed by its autonomous scope of application. This idea was accepted by the ICRC, who modified its draft accordingly in 1973. With a series of important changes, and in particular after a severe curtailment of the text, this draft would become the basis for the elaboration of the text currently in force.

Now, as is well known, Article 1 of the Protocol contains, in para. 1, a reference to Common Article 3; the definition of an upper threshold, in addition to a set of objective criteria; and, in para. 2, the definition of a lower threshold. The reference specifies that, although the purpose of the instrument is to "develop and supplement" Common Article 3, it does not "modify its existing conditions of application". Which in fact means that the definition of non-international armed conflicts (NIACs) under AP II concerns a restricted category of NIACs and it does not limit the applicability of Common Article 3 to a broader category of NIACs. Therefore, while Common Article 3 applies to all NIACs, AP II only applies to those NIACs fulfilling the requirements set in this instrument.

Coming to the threshold, and in connection with the above statement, it makes sense to start with considering the lower threshold: para. 2 states that the Protocol:

> "shall 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, as not being armed conflicts".

Interestingly, while this definition was contained, in practically the same words, in the 1973 ICRC draft, the last specification, "as not being armed conflicts", was not present in that text and had been added later on. This addition is a clear indication of the conviction of States, which is shared by the ICRC, that the aforementioned situations are to be considered not only below the threshold of NIACs considered by AP II, but rather below the threshold of the concept of armed conflict itself, i.e. below the threshold of **any NIAC**.

It is true that, from a formal point of view, due to the clause contained at the beginning of para. 1, this specification remains not applicable *per se* to Common Article 3. At the same time, it cannot be overlooked that it points to a broadly shared view in the international community according to which the situations envisaged by para. 2 are not armed conflicts and therefore are not subject to IHL, not even to Common Article 3. This view seems to be confirmed by recent practice, in particular by the case law of international criminal tribunals and by the ICC Statute and other instruments, and is nowadays shared by the majority of

commentators. To conclude on this point, Art. 1, para. 2, from a substantial point of view, has had a bearing on the interpretation of Common Article 3.

Let us come to the upper threshold, which consists of international armed conflicts to which AP I, and the GCs, are applicable. This upper threshold does not even introduce any change with regard to the conditions for the applicability of Common Article 3, as both instruments merely apply to NIACs, i.e. to conflicts taking place not between States, but between a State on one side and non-State actors on the other side, or between non-State actors. What really matters for the definition of the scope of AP II is what is in the middle, i.e. the objective conditions required for the application of the Protocol, setting a high standard which is well above the lower threshold under para. 2.
Those conditions are as follows:

1. Exclusion of conflicts only involving non-State actors. Armed conflicts between two or more organized armed groups are certainly NIACs, subject to CA 3, if the other conditions are met, but they are clearly excluded from the scope of AP II;
2. Inclusion of only those armed conflicts involving on one side the **armed forces** of a State (not necessarily its "regular" armed forces), and on the other side dissident armed forces or other **organized armed groups**;
3. These organized armed groups shall operate "under **responsible command**", which once again adds to the element of organization (what is clear is that a high level of organization is required, but it is clearer from what follows: anyway, a loose organization would not be sufficient); and they shall respect a further essential criterion:
    - They shall exercise **control over** a part of the **territory** of the State against which they are fighting: not "any" control, but a control which is such
        i. "as to enable them to carry out **sustained** and **concerted** military operations
        ii. and to implement th[e] Protocol".
4. The above requirements demonstrate what can be considered a further element that would limit the applicability of AP II: if we consider that there can be transnational NIACs, AP II can only apply to basically internal NIACs, as they shall be conflicts between a State and a non-State actor controlling part of **that** State's territory. This does not prevent the conflict in question from possibly spilling over into the territory of adjacent States, but a purely transnational conflict, e.g., between a State and an organized armed group controlling part of the territory of another State would be excluded from the scope of application of the Protocol.

As it is clear, and commonly shared, the Protocol sets high standards; these standards require a rather high level of organization of the armed group or groups and a rather high level of effectiveness of their action, as they shall control a portion of territory and the population living in it. Such elements are connected with a rather high level of intensity of

the fighting ("sustained and concerted military operations") and are clearly required because they have been considered by States as a necessary precondition in order to enable the rebels to "implement the Protocol", i.e. to respect IHL.
What is also clear, and commonly shared, is that these requirements set high standards that, although present in many of the NIAC situations we know today, cannot be deemed to characterize each and every NIAC: and therefore, there are NIACs that are not covered by AP II, while remaining covered by Common Article 3.

2. Customary law and the relevance of AP II's threshold

I come to my second point: to what extent does this threshold really matter today?
A first answer is quite obvious: as a matter of treaty law, this threshold is determinative in deciding whether in a certain circumstance of a NIAC taking place within the territory of a State party to the Protocol, this instrument is or is not applicable.
The answer may, however, be rather different if we consider the situation under the perspective of customary international law (CIL).
It would be difficult to conclude that the entire text of AP II corresponds to CIL. However, a relevant part of its fundamental precepts, and among them the fundamental rules enunciated in Article 13 and relating to the conduct of hostilities, entailing the prohibition to attack the civilian population and individual civilians, are considered to be part of CIL. Furthermore, even related rules that, nonetheless, are not expressly enunciated in the text of the Protocol, such as the prohibition of indiscriminate attacks, are commonly considered to be part of CIL. As for customary rules, their operation, as it would seem to be testified by practice, is not restricted by AP II's threshold of application. These rules are considered to be applicable even outside this framework.

Therefore, what mostly counts in practice, more than identifying the requirements of AP II, is identifying the threshold for those situations to which CIL applies. These requirements have been identified by practice and, in particular, by the case law of international criminal tribunals (ICTs), specifically the ICTY and, later, by the Statute and by the case law of the ICC. This international judicial and treaty practice does not deal with the whole spectrum of CIL, but with a relevant part of it, i.e. with the identification of war crimes, i.e. of serious violations of IHL under CIL. This explains why the identification of NIACs by the tribunals for the purpose of identifying those serious violations of IHL that can be committed in NIACs is highly relevant.
In this case, the threshold is simpler, and wider than that required by AP II. It is expressed by the *Tadic* dictum, according to which, as far as NIACs are concerned, "an armed conflict exists whenever there is (…) protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". The *Tadic* dictum has been reproduced, with only a slight, and probably mistaken, modification of language, in Article 8.2.(f), ICC Statute, and it has been specified by the subsequent case law of the Court.

The requirements are:

1. Organization of the armed groups: however, the level of organization required is not necessarily as high as imposed by Article 1, AP II;
2. No control over part of the territory of the State is specifically required;
3. Also NIACs exclusively involving non-State actors are considered;
4. A certain level of intensity of the violence is necessary, but not necessarily the same level of intensity required by Protocol II.

It is not totally clear, both in the ICTY and in the ICC case law, whether the requirement of **duration**, which would seem to be expressed by the formula "protracted armed violence/conflict", has to be considered as an element among others proving intensity, as would appear from some judgements, or as an autonomous requirement. However, it would seem to me that the tendency in the ICC is to view it as an autonomous requirement (e.g. in the *Bemba* judgment of 21 March 2016: see para.s 139-140), although the reasoning is not always entirely coherent and consistent.

Does this threshold include all NIACs or, in other terms, are there NIACs below this threshold, for which Common Article 3 would continue to apply, but not the rules on the conduct of hostilities, as would seem to be assessed by the presence in the ICC Statute of two apparent definitions, in Art. 8.2.(f), already mentioned, and in Article 8.2.(d) (applicable to the war crimes listed in Article 8.2.(c))? In my view the ICC case law (see, in particular, *Bemba*, para. 132 and ff.), up to this moment, does not testify the existence of two different categories of NIACs. In other words, a NIAC subsists whenever there is armed violence of a certain intensity between a State and organized armed groups or between such groups.
Other elements of State practice, such as domestic criminal laws or military manuals, would seem to confirm this tendency. Therefore, the above definition of a NIAC would seem to be the relevant definition under CIL, for the purpose of applying both Common Article 3 and the customary law provisions on the conduct of hostilities, and on identifying the related war crimes.