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From International to Non-International Armed Conflicts: IHL and the changing realities in the nature of armed conflicts

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1. Introduction

In the second half of last century as well as in the recent decades the established bipartition between international armed conflict (IAC) and non-international armed conflict (NIAC) and the respective laws has been seriously challenged. While armed confrontations between states have continued to occur, either individually or through coalitions of states and occasionally with the participation of an international organization (IO), the vast majority of the armed conflicts after 1949 were NIACs and they still outnumber IACs in the present time. Contemporary NIACs, however, do not always correspond to the traditional type of internal conflict – insurgents fighting against the government of a state within the boundaries of its territory – which before 1949, and irrespective of its motives – change of government, secession or others – was considered as falling within the purview of individual states only.

As regards the parties to the conflict, internal armed conflicts may occur either between state armed forces and non-state armed groups (NSAGs) or

among different NSAGs. As to their geographical dimension, a number of armed conflicts which are not purely inter-state are not just internal either, because they do not take place in the territory of one single state – and for this reason they are called cross-border, or in some cases transnational, armed conflicts. Sadly, the expansion of armed violence has given way to criminal acts and has caused immense suffering to the civilian population in the affected areas.

From 1949 on International Humanitarian Law (IHL) has developed trying to respond to the changing realities in the nature of armed conflicts on the basis and in the framework of the Geneva Conventions (GCs).

2. NIACs at Geneva

According to Common Article 2 the GCs apply to IAC, i.e. "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." Yet, while negotiating the GCs the delegates at the Diplomatic Conference were well aware of the NIAC issue. After all, the Spanish Civil War had preceded World War Two by a few years and the past decades had witnessed long and bloody civil wars, like for instance the Mexican Revolution (1910-1920) or the Russian Civil War (1917-1922) as well as a multitude of rebellions and uprisings in different parts of the world.

Although NIACs were deemed to be an intra-state matter, international practice had developed some measures, such as recognition of belligerency or recognition of insurgency, which would produce certain effects on the relations between the parties to the conflict and between them and third states.[1] Moreover, Red Cross Societies and the ICRC had a long record of initiatives and studies aimed at extending IHL obligations, or at least the basic ones, to situations of NIAC.[2]

Various proposals, which would make international humanitarian rules regarding the wounded, sick, shipwrecked, and prisoners of war applicable in NIAC were discussed at the 1946 Preliminary Conference, at the 1947

[1] Such belligerent practice is reviewed and analysed by L. Moir *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 4-18.

[2] The Red Cross initiatives addressing humanitarian concerns in NIACs are recalled in the ICRC Commentary on the First Geneva Convention, 2016, Article 3: Conflicts of not an international character, paras. 362-364. Available at https://ihl-databases.icrc.org/.

Conference of Government Experts, at the Stockholm Conference of the Red Cross in 1948 and eventually at the Diplomatic Conference in 1949.[3] A Special Committee, then a Working Party were established by the Conference and they submitted several drafted versions of the provision which after complex negotiations became Article 3 common to the four GCs of 1949 (CA 3) and which changed forever the scope of IHL.[4]

CA 3 has proved to be a true bastion of IHL, on the basis of which customary law of NIAC has developed and is presently universally recognized. The "mini-Convention" condenses the essential rules of the GCs making them binding on each Party to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties" but without affecting the legal status of the parties to that conflict. This is probably the most relevant provision of CA 3, which affirms and enshrines parity in obligations, while acknowledging asymmetry in status.[5]

CA 3, however, could not govern all different type of situations in a NIAC. The expression "in the territory of one of the High Contracting Parties" would seem to exclude from its scope those NIACs which take place in, or spill over to the territory of different states. A definition of what is an "armed conflict" is not provided. But above all, while protecting "persons taking no active part in the hostilities", CA 3 does not regulate the conduct of hostilities in NIAC. On these and other aspects IHL has developed along two main lines, one of which consists of a normative/legal process and the other one of an interpretive/analytic activity. Faced with the complexities of contemporary NIACs, IHL owes much to two other branches of International Law, i.e. International Human Rights Law (IHRL) and International Criminal Law (ICL) which have contributed substantially to both its normative and interpretive progress.

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[3] *Op. cit.* paras. 366-374.

[4] *Op. cit.* paras. 376-383.

[5] See S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 242-246. The "revolutionary import at the time" of this provision was pointed out by the Constitutional Court of Colombia in its 1995 ruling on the constitutional conformity of AP II at para. 14 (see https://casebook.icrc.org/case-study/colombia-constitutional-conformity-protocol-ii).

3. The normative/legal process

About three decades after conclusion of the CGs, states undertook an exercise of modernization and strengthening of IHL resulting in the adoption of the two Additional Protocols (APs) of 8 June 1977. With regard to NIACs the outcome of this process was twofold. On one hand, in the wake of the decolonization period, the "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" were made subject to the law of IAC.[6] On the other hand, a rather high threshold was established for NIACs other than wars of national liberation, which under AP II were made subject to the basic rules on the conduct of hostilities, including protection of civilian population and of selected civilian objects. Indeed AP II applies only to high intensity NIACs, i.e. armed conflicts not covered by Article 1 AP I and 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."[7] AP II, however, does not replace CA 3, which continues to apply to the broader range of NIACs going beyond internal disturbances and tensions.[8]

Both APs have incorporated principles belonging to the realm of IHRL. For example, Article 75 of AP I lists a number of provisions which are contained in HRL instruments; while, however, human rights treaties include clauses permitting derogation in times of war, no derogation or suspension of guarantees established in Article 75 is allowed.[9] The influence of IHRL is especially relevant in respect of AP II, the preamble

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[6] AP I Article 1.4. See Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977*, ICRC, Geneva, 1987, paras. 66–118. It should be noted that at the time of adoption of the APs most wars of national liberation had come to an end. Presently the two main examples are Western Sahara and Palestine. Palestine has acceded to the GCs and AP I in April 2014 and in June 2015 the Polisario Front has made a unilateral declaration undertaking to apply the GCs and AP I to the conflict between it and Morocco. While Morocco has acceded to AP I in 2011, Israel is not yet a party to the Protocol.

[7] AP II Article 1.1.

[8] See Y. Dinstein *Non-International Armed Conflicts and International Law*, Cambridge University Press, Cambridge, 2014 p. 8.

[9] See Sandoz et al. *Commentary on the Additional Protocols* supra n. 6 at para. 3092.

of which expressly recalls that "the international instruments relating to human rights offer a basic protection to the human person." For example, Article 6 AP II applying to penal prosecutions was clearly inspired by Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) of 1966.[10] Thus IHRL fertilizes IHL through normative lending.

It should also be added that AP II does not exhaust the normative/legal process of development of IHL in the face of the increase of contemporary NIACs. Indeed, after the entry into force of the GCs several treaties on the protection of cultural property as well as conventions regarding weapons or prohibiting child soldiers have extended their scope of application to NIAC.[11] This is how a gradual harmonization of the law on the conduct of hostilities in IAC and in NIAC has begun.

4. The interpretive / analytic activity

The development of IHL in the decades subsequent to the Geneva Conventions, and particularly after the adoption of the two APs, benefited greatly from the judicial activity of international and (to a lesser extent) domestic tribunals.

The legal qualification of an armed conflict is almost always controversial, especially with regard to internal conflicts which, in relation to the applicable IHL instruments, may be classified into three different categories: CA 3 NIACs, AP II NIACs and AP I wars of national liberation. A significant example is offered by the first conflict in the Chechen Republic of the Russian Federation (1994-1996). While a rare domestic judicial decision of the Russian Constitutional Court stated on 31 July 1995 that Protocol II was one of the sources of law relevant to the conflict, the Chechen side has for a long time claimed that the war was an

[10] See Dinstein *Non-International Armed Conflicts* supra n. 8 p. 143.

[11] See the 1954 Convention on the protection of cultural property in the event of armed conflict (CPCP) at Article 19.1 and its 1999 Second Protocol at Article 22.1; the Convention on certain conventional weapons (CCCW) as amended in 2001 at Article 1.2 and its Protocol II on prohibition or restrictions on landmines, booby-traps and other devices as amended in 1996 at Article 1.3; the 1993 Chemical Weapons Convention (CWC) at Article I.1; the 1997 Ottawa Convention on landmines at Article 1; and the 2000 Optional protocol to the Convention on the rights of the child at Article 4.

conflict governed by article 1.4 AP I.[12] As a matter of fact, the majority of contemporary internal conflicts are deemed to fall under the scope of CA 3.

While neither the GCs nor the APs include grave breaches of CA 3 or violations of other rules applicable to NIAC, in 1993 the Statute of the International Tribunal for the former Yugoslavia (ICTY) first extended individual criminal responsibility to violations of CA 3 and other customary rules in NIAC. From then on a common thread has run through Article 3 of the ICTY Statute, Article 4 of the Statute of the International Tribunal for Rwanda (ICTR), corresponding articles in the statutes of mixed tribunals and eventually Article 8.2(c) and 8.2(e) of the Statute of the International Criminal Court (ICC). It resulted in the flourishing of interpretive activities, which have complemented the IHL applicable to both IAC and NIAC while promoting its knowledge and dissemination among legal scholars as well as the general public.

International criminal tribunals have not been reluctant to address issues of qualification of armed conflicts and interpretation of the applicable IHL. In the judgments and decisions of the ICTY, the ICTR, the mixed tribunals and eventually the ICC we find a comprehensive definition of what constitutes an armed conflict,[13] as well as the application to hostilities in both IAC and NIAC of the principles of distinction,[14] proportionality, precautions in attacks[15] and a number of other IHL principles and rules. Thus responding to the increase of war crimes committed in armed conflicts, the development of ICL has contributed and is contributing to filling gaps existing in IHL instruments, whilst at the same time supporting the process of osmosis from IAC to NIAC law which is one of the most important defining elements of contemporary IHL.

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[12] See P. Gaeta 'The Armed Conflict in Chechnya before the Russian Constitutional Court' EJIL Vol. 7, 1996, pp. 563-570 at pp. 568-569. An amendment to the Russian federal act on damages for soldiers deployed in missions to extremely dangerous areas, passed on 19 December 1997, also made reference to the non-international conflict in the Chechen Republic. See M. Mísová 'The legal character of the conflict in Chechnya' 8 May 2001, available at: https://reliefweb.int/report/russian-federation/legal-character-conflict-chechnya.

[13] According to the famous ICTY decision in the Tadić case "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" (IT-94-1, 2 October 1995, para. 70).

[14] IT-95-16-T, Kupreškić, 14 January 2000, para. 521; IT-01-47-AR73.3, Hadžihasanović, 11 March 2005, para. 30.

[15] IT-98-29-T, Galić, 5 December 2003, para. 58

International tribunals have also played a crucial role in asserting the continuing application of IHRL in armed conflict. Since the two famous advisory opinions of the International Court of Justice (ICJ) on the legality of nuclear weapons (1996) and on the construction of the wall by Israel in the Palestinian territory (2004) it is recognized that the protection of human rights norms does not cease in time of armed conflict and the relationship between IHRL and IHL is defined as one of *lex generalis* / *lex specialis*.[16] Thus the European Court of Human Rights (ECtHR) delivered judgments finding violations of the European Convention of Human Rights (ECHR) in connection with the conflict in Chechnya, including killing and injuries to civilians, destruction of homes and property, use of landmines, torture and inhuman conditions of detention.[17] The Inter-American Human Rights control and judicial mechanisms also offer important examples of application and interpretation of IHL norms.[18]

5. The role of the legal thought

Elaborating legal analyses of the changing nature of armed conflicts was not the prerogative of the sole judicial practice. Legal scholarship has produced substantial research related to the contemporary forms of armed conflicts and the applicable substantive law. Leading academics, military experts and institutions have expressed theoretical orientations relating to IHL both individually and through collective works serving as references for the specialist, the diplomat and the judge. Important manuals and

[16] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para. 25; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, para. 106. See Sivakumaran, *The Law of Non-International Armed Conflict*, supra n. 5 at pp. 88-93.

[17] The ECtHR applied Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 8 (right to respect for private and family life), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the ECHR and Article 1 (protection of property) of Protocol No. 1 to the ECHR. See https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf, 19 September 2019 at 10-12.

[18] See E.J. Buis, **'**The implementation The Implementation of International Humanitarian Law by Human Rights Courts: the Example of the Inter-American Human Rights System**'** in R. Arnold e N. Quénivet, *International Humanitarian Law and Human Rights Law*, Brill-Nijhoff, Leiden, 2008, pp. 269-293 at pp. 277-292.

studies have covered the law naval warfare as well as the law of air and missile warfare, [19] the law applicable to international operations,[20] the legal regulation of cyber warfare [21] and a number of other areas. A special mention deserve the contributions of the ICRC, notably through its fundamental Study on Customary International Humanitarian Law finding that most of the customary IHL rules are applicable in international as well as non-international armed conflicts and are binding on both sides to a conflict. [22] The analysis of international practice has enriched our knowledge of IHL and the ability of those who operate in the field to implement its rules in IACs as well as in NIACs.

International legal scholars have delved into the concept of armed conflict paying special attention to the different types of NIAC and to IHL applicable thereto. There has been academic debate about whether IHL is still based on a binomial IAC / NIAC system or – as some scholars argue – the progressive convergence of IAC *jus in bello* and the law of NIAC is leading to a blending of the law regulating the two types of armed conflict. [23] In the case of so called spillover conflicts it is generally recognized that the expansion of an internal fighting into the territory of a foreign state would not change the nature of the conflict, which would remain fully subject to the law of NIAC. [24] More problems arise with military intervention due to the variety of cases that may occur. The most recent history has shown states fighting NSAGs which operate from the territory of a foreign state, intervening militarily in the territory of that

[19] See the *Sanremo Manual on International law Applicable to Armed Conflicts at Sea*, 1994 and the *HPCR Manual on International law Applicable to Air and Missile Warfare*, 2013.

[20] See T. Gill and D. Fleck D, Eds. *The Handbook of the International Law of Military Operations*, 2nd ed., Oxford University Press, Oxford, 2015 and the *Leuven Manual on the International Law Applicable to Peace Operations*, Cambridge University Press, Cambridge, 2017.

[21] See the *Tallinn Manual on International Law Applicable to Cyber Warfare*, 2013.

[22] See J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 Volumes, Cambridge University Press, 2005. The Study is updated through the Customary IHL Database available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.

[23] R. Bartels 'Timelines, borderlines and conflicts. The historical evolution of the legal divide between international and non-international armed conflicts,' IRRC Vol. 91 (2009) No. 873, reviews the different opinions of scholars (pp. 40-41) concluding that at present the distinction between the two types of conflict still forms part of positive law (p. 67).

[24] See Dinstein, *Non-International Armed Conflicts* supra n. 8, p. 25.

state, with or without its consent; states or multinational coalitions intervening in support of the official government of another state against local insurgents, but also to support insurgents against the incumbent government, and even NSAGs supporting the government of a state fighting against other NSAGs. As a consequence, several and distinct armed conflicts may occur in the same territory, either simultaneously or consecutively; in some situations an internal conflict may become international, but an inter-state conflict may also transition to an internal conflict due to changing circumstances.[25] In the majority view, the existing binary IHL framework is still adequate for the purpose of regulating contemporary armed conflicts, with the consequence that each situation should be classified according to the thresholds of armed conflict and the applicable law should be determined on a case by case basis – with all the difficulties this entails for those operating on the field.[26]

6. Concluding remarks

In the decades following the adoption of the Geneva Conventions and Protocols the emergence of new types of armed conflicts has given rise to sensitive questions about which IHL rules apply in each different situation and whether the traditional binary paradigm IAC / NIAC is still an adequate model to effectively reflect the changing nature of contemporary armed conflict.

From the normative point of view, the two parts of IHL remain clearly separate: on one hand, the GCs and AP I governing IAC; on the other hand, CA 3 and AP II being applicable to NIAC. However, as said above (4.3), several other treaties have expressly extended their scope to NIAC thus establishing a legal bridge between the two sets of rules, particularly those

[25] See S. Vité, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations,' IRRC Vol. 91 (2009) No. 873 pp. 69-94 at pp. 83-93; M. Milanovic and V. Hadzi-Vidanovic, 'A taxonomy of Armed Conflict' in N. White and C. Henderson, *Research Handbook on International Conflict and Security Law*, Edward Elgar Publishing, Cheltenham, 2013 pp. 256-314 at pp. 291-298; T. Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict,' IRRC Vol. 97 (2015) No. 900 pp. 1227-1252 at pp. 1240-1250.

[26] See Bartels, 'Timelines, borderlines and conflicts' supra n. 24. See also Vité, 'Typology of armed conflicts' supra n. 26 at p. 86 and Ferraro 'The ICRC's Legal Position' supra n. 26 at p. 1229.

related to the protection of cultural property and the use of weapons. The interpretive-analytic activity as developed by the case law of international criminal tribunals also argues in favour of a progressive harmonization between the two parts of IHL.

Clearly, sensible divergences between the law of IAC and the law of NIAC still persist, the most relevant being the treatment of persons deprived of their liberty, the regulation of occupied territory and the obligations of states not involved in the conflict. While in IACs combatants are entitled to the POW status and the laws of neutrality and belligerent occupation are applicable, these areas are not covered by the law of NIACs. Another critical issue deserving discussion on both formal and substantive grounds relates to equality between the parties of a NIAC. While the legal basis of the obligation of NSAGs to respect IHL can be found in treaties and in customary law, their capability and willingness to abide by the existing rules are another matter altogether. For this reason, engaging NSAGs in implementing IHL is one of the most demanding challenges facing IHL today.

Although the legal qualification of an armed confrontation is complicate especially for those operating on the field in a territory where several and distinct conflicts may occur, this certainly must not prevent the quest for the best protection of victims by all actors involved. It should be taken into account that HRL, general public international law and even soft law (e.g. for situations of detention) can provide suitable rules to be applied in the diverse landscape of contemporary armed conflicts.