HC 13, 08-01-2018, International Law

Applicability international humanitarian law

- (Non-) International armed conflict

International armed conflicts (IAC) are regulated in the Geneva Convention 1949, and in the first optional protocol. A distinction is made between those and non-international armed conflicts (NIAC). They are regulated in the Geneva Conventions as well, but only in common article 3 and in the second optional protocol. If states are not part to the Geneva Conventions you will have to refer back to customary law. When it comes to NIAC, things are less clear within customary law. The Red Cross has a study in which it tries to trace state practice and opinio juris on this topic to see which rules are part of customary international law.

When you look at these two categories there are some differences. For example when it comes to the basis/authority to detain people. In an IAC, you can detain people. This works for both sides. In a NIAC, where you have the government and armed forces (who have no status under international law) fighting, this is tricky. The government can detain people, but is this under international or national law? A second difference is on combatants privilege and immunity. In an IAC both sides recognize that the other may fight them. This is combatants privilege from which follows combatants immunity. There is no such privilege for the armed opposition groups in a NIAC. The government will just say they are violating the law.

Looking at the Geneva Conventions, they indicate that the Conventions 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 (common article 2). Just the factual situation of two states fighting is enough for the Conventions to apply. Usually if both states do not recognize the state of war, the Conventions will apply as well.

- Armed conflict

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) (*Tadic case).* This does seem to suggest war, not just the use of force by one state. Protocol one adds (in article 1(4)): 'International armed conflict includes 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.'

To say that something is an armed conflict is to recognize the other party as an independent state. That is why this article was quite debated. It wants to give rights to 'states' fighting for independence. An example of this is the Western Sahara, which is largely occupied by Morocco. Morocco is supported a lot by its European allies. The ICJ accepted that there had been some ties between Western Sahara and Morocco, but said those were not ties of sovereignty. They concluded that the people of Western Sahara still have the right of self-determination.

The Geneva Conventions also apply in situations of occupation. If there is no longer any armed conflict because the territory is occupied, the Conventions still apply. This happened for example in Palestine. It is laid down in article 2 as well, which says: 'even if it meets no armed resistance'. Denmark did not fire one shot when the Germans invaded in the World War for example. This is what is meant by 'no armed resistance'. Territory is considered occupied when is is placed under the authority of the hostile army. It extends only to the territory where such authority has been established and can be exercised (article 42 of the Hague Regulations).

In case of armed conflict not of international character occurring in the territory of one of the High Contracting Parties, they have to apply the provisions in the Conventions (common article 3). This refers to situations of civil war. Article 1 of the second protocol mentions this as well, but gives some criteria. It adds a number of conditions for the protocol to even be applicable. The *Tadic* case paragraph 2 makes clear that not every situation can be considered armed conflict, like internal disturbances and tensions for example (riots / sporadic violence). When it comes to NIAC, an armed conflict exists if the government fights against rebels/opposition groups, or when those groups fight amongst each other.

The second protocol requires sustained military operations. If you have to have sustained military operations, this suggests a certain degree of organization. Secondly, it suggests that there has to be a certain intent. Sporadic actions are not sufficient. Armed activities have to take place over a certain period of time. This is interpreted differently sometimes, where a short period of military operations might qualify as well. And lastly you need to have control over the territory. This protocol takes a restrictive view to when there is an armed conflict or not.

- Sustained military operations
- Intent
- A period of time
- Control over the territory

The Global War On Terror is not an IAC (there are not two states fighting against each other) but it is also not a NIAC (within the territory there is no government fighting an opposition group). In Syria the question was raised: which law applies? In respect to fighting ISIS it is often said that the law on NIAC applies. With respect to western countries this is more difficult to determine, because they do not have consent of the Syrian government to intervene. There is a tendency to say that western countries are engaging in an IAC, mostly because they are not acting with consent of the Syrian government.

Status of persons

- Combatants

For the definition of combatants in an IAC we usually point to article 4 of the Geneva Conventions III: 'members of the armed forces of a state'. Typical for combatants is that they are in uniform and carry their weapons openly. Sometimes people have volunteered to form part of the armed forces in situations of conflict. Another option are militia or volunteer corps belonging to a party to the conflict. A number of conditions have to be met in this case:

- Commander responsible for subordinates
- Fixed distinctive sign recognizable at distance
- Carrying arms openly
- Operations conform to laws and customs of war

You have to show that you are not a civilian but a combatant with the intent to engage in the conflict.

How do we treat resistance fighters / guerrillas? There are circumstances where owing to the nature of the conflict you cannot distinguish yourself. For example resistance fighters in occupied territory. Guerrillas would also try to hide their activities. If you cannot distinguish yourself but you do carry your weapons openly, according to article 44, you would be considered a combatant. Article 46 and 47 talk about spies and mercenaries. If there is a question about the status of a person you should have a determination status.

For combatants there are two things to understand. The first is combatant's privilege. As a combatants you are allowed to kill the enemy. You can destroy property while doing so, and you can also destroy military equipment. You have the right to engage in armed activities. This leads to combatants immunity. Combatants cannot be taken to trial for acts of war. Members of armed forces who kill their enemies cannot be prosecuted for murder etc. But this is subject to the condition that what they were doing was lawful under international humanitarian law. This applies to lawful acts of war, not to crimes committed before the armed conflict, or during, when they are unrelated to the conflict.

- Civilians

Everybody who is not a combatant is a civilian. What about civilians who use armed force against the enemy? They are civilians who participate directly in hostilities. If they do so they lose their protection under humanitarian law. Civilians have no right to participate in hostilities, but there is also no obligation not to. They seem to be able to participate as long as they realize they will lose their protection.

In case of a NIAC things are different. Of course there are always civilians. But how do we define opposition groups? We do not call them combatants as they do not have the right to participate in hostilities. We sometimes call them fighters. They do not have combatants immunity. They can be prosecuted for murder, theft etc. If many people are involved, all the trials that would follow are of course impossible to deal with. When there is a peace agreement you have to consider the broadest amnesty possible. This solves part of the problem, but you can never give amnesty for war crimes.

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Basic principles

Principle of military necessity

The first principle is that of military necessity. It permits a belligerent to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. It also means that actions of armed forces have to have purpose, they have to provide you with a military advantage. The action has to be useful from a military perspective. If there is no military advantage, there is no military necessity either.

Principle of humanity

Combatants cannot be subjected to unnecessary suffering, and civilians have to be treated with humanity, in a humane fashion. There should be a balance between the authority to take hostile measures, with the obligation to limit the suffering associated with the armed conflict, to that which is genuinely necessary.

Principle of distinction

When you engage in targeting you have to make a distinction between military and civilian objects. You also have to distinguish between targeting combatants and civilians. This is why combatants have to distinguish themselves. The idea is that by that distinguishment only combatants will be targeted (article 52 Protocol I). You can try to kill soldiers if you are in an armed conflict, whenever you want, wherever they are (also if they are sleeping). Objects (buildings / vehicles) can be targeted if the object by virtue of:

- nature,

- location,
- purpose,
- use,

makes an effective contribution to military action. The destruction / capture / neutralization should give you a military advantage. You can target a school if there are soldiers in that school, using the building for military purposes. The same goes for hospitals. Collateral damage is accepted, but always needs to be proportional.

Basic rules

Legitimate military objectives

The only objective a state should have in war is to defeat and weaken the military forces of the enemy. You want to neutralize their army. There needs to be a legitimate objective for war. Not all is fair in war. There are limits to what you are allowed to do.

Prohibition of indiscriminate attacks

If you have a military operation without any distinct object, that is not allowed. You have to assess the lawfulness of any action in the moment of time the action took place. This includes weapons which cannot be directed at a specific military objective. If you attack with biological weapons you know that not only soldiers will suffer. You can attack with chemical weapons, but it all depends on the case. For mass destruction weapons you would need quite an isolated area to attack, without too many civilians surrounding it.

Principle of Proportionality

All these principles are in Protocol I. This one is in article 51 (4). The civilian injury cannot be disproportionate to the military advantage anticipated. This has to be assessed at the moment the officer decides to attack. You need to look at it from the officers perspective with the information that was available to him at that time. The statement that 'if civilians are killed war crimes are committed' is wrong. You need to look at the perspective, advantage and proportionality.

Peaceful settlement of disputes

General observations

The law expects you to settle disputes peacefully (article 2 (3) UN Charter). International peace and security and international justice should not be injured. States are not under a legal obligation to settle disputes. They can go on for hundreds of years without being settled (like the Falkland Islands, the dispute has lasted for over 60 years). States make international law and they are the primary subjects. They also enforce the law and have to agree to dispute settlement. Because they are sovereign they cannot be subjected to dispute settlement without their consent. If you have a dispute with an international organization they have to agree to settlement as well. For other actors, most of the time you can go to national courts.

Disputes

There is a difference between breaches of international law and disputes. If a state violates international law that might lead to a dispute, but not all disputes are violations. A boundary dispute is an example of this. It can just be a disagreement, without a violation. The UN Charter talks about situations and disputes. A dispute is a disagreement on a point of law or fact, a conflict of legal views, or of interests between two persons. They can be called:

- Conflicts
- Situations
- Disagreements
- Disputes

Diplomatic methods of settlements

(1) Negotiations

The claim is further discussed in negotiations. If you don't want to negotiate doesn't happen. In negotiations, legal issues and political issues may be discussed. Negotiations have to be in good faith and meaningful. You shouldn't simply stick to your position without considering compromises / weakenings / other options. You have to be willing to compromise. Agreements are often violated.

(2) Fact-finding / inquiry

If you don't know exactly what happened it is useful to set up a commission to investigate facts.

(3) Good offices

They are different in the sense that negotiations are done by the parties to the dispute, but good offices involve a third party, just like fact-finding.

(4) Mediation

The mediator will not only be a channel of communication, but he will try to propose solutions and look for compromises. This can be the pope for example, he would be very objective. Mediation was very important in getting Iran and the US to deal with the hostile crisis.

(5) Conciliation

Conciliation starts from an international perspective and makes suggestions from that point, it is more legally based.

We call these principles diplomatic because diplomats / politicians are often involved. The outcome does not perse have to be legally binding. If states make a treaty, that will obviously be binding. But in the absence of a treaty, a settlement can simply be political. The result is non-binding.

Legal means of settlement

(1) Arbitration

This is one of the more important means. It is open to anyone. You can always propose arbitration, but it is not free. It is attractive as the parties to the dispute determine a lot. They can decide to create an arbitration tribunal, and they select the arbitrators themselves. This gives them a lot of influence. The parties can also decide the procedure. Lastly, they can also decide what the applicable law is. A decision by an arbitration tribunal is called an award, which is legally binding. The award is final, there is no appeal possible. There is a website of the Permanent Court of Arbitration where all the reports of arbitrations are listed.

(2) Judicial settlement

There are no ad hoc tribunals with judicial settlement, but the institutions are permanent ones. This can either be a court or a tribunal. Examples are the ECHR and the International Tribunal for the Law of the Sea.

International Court of Justice

The ICJ is based in The Hague. It has 15 permanent judges. If a state is before the Court and does not have a judge of its own nationality, they can add an extra judge, a judge at hoc. The ICJ can settle disputes between states, and can give legal advice to the UN and special agencies (who must be authorized to ask for an advisory opinion).

Contentious jurisdiction means that the ICJ settles disputes with a binding effect. The binding effect is only on the parties to the dispute. The jurisdiction of the Court depends on consent.

- Given by special agreements of compromis.
- Given by agreements in force.