
Week 2: International v Non-International Armed Conflict

Acronyms

- GC 1, GC 2, GC 3 and GC 4 - Geneva Conventions
 - IAC - International Armed Conflict
 - NIAC - Non-International Armed Conflict
 - AP 1 and AP 2 - Additional Protocols
- full panoply of IHL treaty law, other than AP2, applies in IAC, while NIAC subject only to Common Article 3 of GC's, AP2 and some of more recent treaties.

IACS and Treaty Law (non-exhaustive)

- The Hague Conventions
- GC 1, 2, 3, 4, Additional Protocol 1
- apply directly to international armed conflicts

NIAC and Treaty Law

- Article 3 common to 1949 GCs
 - Article 19 of 1954 Hague Convention for Protection of Cultural Property
 - 1977 AP 2 - only protocol dedicated solely to NIAC
 - Article 8, 2(c) and (e) of Statute of International Criminal Court adopted in Rome on 17 July 1998
 - Article 22 of Hague Protocol of 26 March 1999
 - 1980 UN Conv *****
 - Biological weapon convention - don't specify if they apply to certain armed conflicts.
- major of customary IHL rules defined and published by ICRC Study

International Armed Conflicts

Common Article 2 Armed Conflicts

Article 2 common to GC's apply in 3 potentially distinct situations:

- declared war (with or without actual hostilities)
- inter-State armed conflict, and
- where territory is occupied

Common Article 2 - GC's

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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

- 'whenever there is a resort to armed force between States'
- ICRC Commentaries for Common Article 2
 - > any difference arising between two States and leading to intervention of armed force = armed conflict -> even if one of Parties denies existence of a state of war.
- Makes no difference how long conflict lasts, or how much slaughter takes place.
- Respect due to human personality not reliant on number of deaths.

* nature of actors

IACs - Threshold Approach

- Sir Christopher Greenwood example

- > US Air Force pilot shot down over Lebanon's Bekka Valley in early 1980s by Syria missile - landed safely - US announced GC3 applied and entitled to POW status.
- > no armed conflict before or after date of attack - GC3 applied
- > discussion of whether its accurate.

- Nils Melzer

- > demonstrates belligerent intent.
- > States must have intent to cause harm - if testing boundaries or set off missile - not an armed conflict
- > do something deliberately with military plan behind it = armed conflict.

- Test of consequences?

- > argument of Sir Christopher Greenwood - wanted POW status upheld because they wanted prisoner protected from consequences.

International Armed Conflict - Recognition

- parties need not recognise other party as a 'state' = Arab-Israeli conflict; Israeli-Palestine conflict.

'War' vs 'Armed Conflict'

- early treaties on LOAC applied only between States, and only in situations of 'war'.
- absence of any definition of 'war' - states could easily portray their conflicts as involving forcible measures short of war - avoid legal consequences.
- creation of UN in 1945, international community agreed to outlaw the use of armed force, except if authorised by UN SC or in self-defence
 - > no State could declare war without violating the UN Charter.
- States meeting in 1949 - Conventions would apply to 'any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'.
- Armed conflict - socially constructed concept
- no longer predicated on formal declaration of war
- Shift from subjective criteria (e.g. declaration of war) to objective criteria
 - > don't need states to acknowledge their in a war
- Once an armed conflict exists - any action taken for reasons relate to conflict is governed by IHL
- Absence of armed conflict - any difference between States and any question of individual protection must be resolved in accordance with the law applicable in peacetime.
- IHL overrides other areas of law.
- never needed a definition as dependent on formal declaration of war - now need a definition.
- Cyber law - have to adapt.

What is an 'armed conflict'?

- no definition
- **ICRC position** - armed conflict exists as soon as there is 'resort to armed force between 2 or more States',
-> ICRC, 'How is the Term 'Armed Conflict' Defined in International Humanitarian Law?', ICRC Opinion Paper, March 2008, p. 5

Tadic Jurisdiction, ICTY [70].

- *An armed conflict exists whenever there is a resort to armed force between States or protracted violence between governmental authorities and organised armed groups or between such groups within a State. IHL applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, internal conflict - a peaceful settlement is achieved.*

Until that moment, IHL continues to apply in the whole territory of the warring States, or, in the case of internal armed conflict, the whole territory under the control of a party, whether or not actual combat takes place there.

- interpreted by ICRC as 'recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.
- Commentary to Geneva Conventions 'any difference arising between 2 States and leading to the intervention of armed forces regardless of how long the conflict lasts, or how much slaughter takes place; GC Commentary, p.32
- some writers - IHL applies from first moment force used.
- ILC in 2011 Draft Articles - IAC = 'situation in which there is a resort to armed force between States;
-> ILC, *Draft Articles on the effects of armed conflicts on treaties with commentaries*, 2011, art. 2(b).
- No threshold requirement recommended by ILC.
- UK Ministry of Defence - accidental bombing or unintentional border incursion would not constitute an armed conflict.
- International Law Association concluded in 2010 - hostilities must reach a certain level of intensity to qualify as an armed conflict.

Occupation

- Common Article 2 extends the Geneva Conventions to all situations of **belligerent occupation** - where territory is occupied by a foreign army, **whether or not the occupation is resisted**.

Hague Regulations Art 42

- Territory considered occupied when actually placed under authority of hostile army. Occupation extends only to territory where such authority has been established and can be exercised.

- Dependent on facts on the ground - essentially an 'effective control' test
 - e.g. ability to substitute own authority on territory occupied
 - withdrawal or defeat of enemy forces
 - temporary administration of territory establish
 - issuance and enforcement of directions to civilian population
 - presence of sufficient force to hold territory
- IAC - has to be a **state** party.

End of Occupation

- concept of occupation by nature = temporary
- Palestine = occupied territories of Palestine - no end in sight

3 ways to end an occupation

1. Withdrawal or loss of effective control
2. Genuine consent to a foreign military presence
3. Political settlement - ceding that borders should change

- straight forward but rarely clear cut.

Israel still an occupier of Gaza Strip?

- 2007 withdrew troops from Gaza Strip - whether it could still be occupied as are still on borders and could still assert their control.

Wars of National Liberation

AP1 Art 1(4)

- ... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

- related to colonial self-determination
- East-Timor - NIACs until proved statehood
- AP1 adopted in 1977
- wars of national liberation prevalent since late 1940s but considered internal matters
- developing states would succeed as conflicts being classified as international with result IHL would apply to their struggles for independence, and POWs and occupation.
 - > many states objected to this development - introduced subjective and political concepts into IHL.
- Protocol does not apply automatically in a war of national liberation - requires satisfaction not only of the criteria in Art 1(4) but also Art 96(3) of the Protocol.

AP1 Art 96(3)

- authority representing the relevant people may submit a declaration to the Swiss government as depository of the Protocol, undertaking to apply the GC's and AP1 to their conflict.
- State against which armed conflict is being waged must be a party to the Protocol.
 - > State not a party - effect of a unilateral commitment by the national liberation movement but no effect on State.
- have the right to choose whether or not to submit to IHL, insofar as it goes beyond customary law.
- no declaration = GC + AP1 do not apply.

- rare example - National Democratic Front of the Philippines (NDFP) in 1996 - Philippines was not a party to the Protocol and declaration was not accepted by the depository; Swiss Federal Department of Foreign Affairs, email f 15 January 2015, on file with the authors.
- list of types of conflict in Art 1(4) is exhaustive and confined to colonial domination, alien occupation and racist regimes.

Effect of AP 1 Articles 1(4) and 96(3)

Armed group is a NLM	Yes	Yes	Yes	Yes	No
State is a party to AP 1	Yes	Yes	No	No	Yes or No
Art. 96(3) declaration made	Yes	No	Yes	No	N/A (only an NLM can make a Art 96(3) declaration)
Effect	GCs and AP 1 apply to both parties	GCs* and AP 1 do not apply to the conflict	GCs and AP 1 apply only to the NLM	GCs* and AP 1 do not apply to the conflict	GCs* and AP 1 do not apply to the conflict.
* Other than Common Article 3, which will apply in any non-international armed conflict.					

- Conventions and Protocol do not apply to the conflict, effect = conflict will not be subject to the customary and treaty laws governing IAC, could be NIAC.