ISSN:0041-9060

# THE SCOPE OF APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO NON-INTERNATIONAL ARMED CONFLICTS*

# EL ALCANCE DE LA APLICACIÓN DEL DERECHO INTERNACIONAL HUMANITARIO A LOS CONFLICTOS INTERNACIONALES NO ARMADOS

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*Reception date: August 12th, 2014*
*Acceptance date: October 27th, 2014*
*Available online: June 30, 2015*

**To cite this article/Para citar este artículo**

Londoño-Camargo, Tatiana, *The scope of application of International Humanitarian Law to non-international armed conflicts*, 130 *Vniversitas*, 207-234 (2015). http://dx.doi.org/10.11144/Javeriana.vj130.saih

doi:10.11144/Javeriana.vj130.saih

* Article product of final research paper presented for the seminar *Law of War*, Prof. Gary Solis, LLM in International Legal Studies, Georgetown University, 2009.

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## ABSTRACT

Since the issuance of the Geneva Conventions in 1949 there has been a latent confusion in States undergoing internal violence situations related to whether or not non-international armed conflicts exist in their national territories, given that neither Article 3, common to the Conventions, nor the Additional Protocol II of 1977, define what a conflict is. Thus, this research document aims to clarify this matter by means of an analysis of the law, case law, and current legal principles, defining what the application margin is for the International Humanitarian Law to non-international armed conflicts. Afterwards, we aim to clarify another common question: Does International Humanitarian Law apply exclusively to Party States, or does it also apply directly to non-state agents? Finally, this document aims to briefly propose a plausible solution to the problem regarding the confusion created by the lack of a clear definition of armed conflict. Said issue clearly harms the protection that during conflicts must be given at all times to *hors de combat* or protected population.

**Keywords:** law of war; international humanitarian law; international law of armed conflicts; non-international armed conflict; definition of armed conflict; non-international conflict existence guidelines; application margin of the international humanitarian law; common article 3; additional protocol II to the Geneva Conventions; personal application of the IHL; IHL; application of the IHL to non-state actors; compliance of the IHL in non-international armed conflicts; security council

## RESUMEN

Desde el momento de la expedición de los Convenios de Ginebra de 1949, ha existido una confusión latente entre los Estados que atraviesan situaciones de violencia interna acerca de si existen o no conflictos armados no-internacionales en sus territorios nacionales, dado que ni el Artículo 3 Común a los Convenios ni el Protocolo Adicional II de 1977 definen qué es un conflicto. Por tanto, este documento investigativo busca aclarar mediante el análisis de la legislación, jurisprudencia y doctrina vigentes este asunto, delimitando cuál es el margen de aplicación del Derecho Internacional Humanitario a los conflictos armados no-internacionales. Posteriormente, se busca aclarar otro interrogante común: ¿el Derecho Internacional Humanitario aplica exclusivamente a los Estados Parte, o aplica también de manera directa a los agentes no estatales? Finalmente, este documento busca proponer muy brevemente, una solución plausible a la problemática de la confusión que una ausencia de definición clara sobre conflicto armado plantea, en detrimento claro de la protección que en los conflictos debe brindárseles en todo momento a los hors de combat o población protegida.

**Palabras clave***:* Derecho de la Guerra; Derecho Internacional Humanitario; Derecho Internacional de los Conflictos Armados; conflicto armado no-internacional; definición conflicto armado; lineamientos existencia conflicto armado no-internacional; margen aplicación Derecho Internacional Humanitario; Artículo 3 Común; Protocolo Adicional II a los Convenios de Ginebra; aplicación personal DIH; DIH; aplicación DIH a actores no-estatales; cumplimiento del DIH en los conflictos armados no-internacionales; Consejo de Seguridad

## SUMMARY

## INTRODUCTION

In the aftermath of World War II, the members of the international community got together in Geneva to draft a set of rules that would seek to prevent the atrocities committed during the war from recurring in the future. This idea arose from the eternal phrase enunciated by the Supreme Commander of the Allied Forces in Europe and the future United States President General Dwight D. Eisenhower [1953-1961] during the liberation of the Nazi death camps: "The world must know what happened, and never forget."[1]

The result was the drafting of the Geneva Conventions, which codified the existing law of war[2] into four different treaties that further included major advances such as offering civilians a similar protection to other victims of war, and introduced a minimum of humanitarian laws to be applied during internal conflicts for the first time in history,[3] achieving thus a great victory for mankind.

As explained by the authoritative commentator on the Geneva Conventions, Jean S. Pictet,[4] common Article 3, included in all Four Geneva Conventions, "at least ensures the application of the rules of humanity [to conflicts of a non-international nature] which are recognized as essential by civilized nations."

However significant this achievement was, conquering obstacles such as State reluctance to permit the regulation of their internal affairs by international treaties limiting their sovereignty as set forth at the 1648 Peace of Westphalia,[5] common Article 3 consists

1 International Committee of the Red Cross, ICRC, *The Geneva Conventions of 1949: Origins and Current Significance*, Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions, Address by Philip Spoerri, Director of International Law, ICRC. Official Statement (December 8, 2009). Available at: https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm

2 Frits Kalshoven, *Constraints on the Waging of War*, in *International Law*, 1079 (Barry E. Carter, Phillip R. Trimble & Allen S. Weiner, Aspen Publishers, New York, 2007).

3 International Committee of the Red Cross, ICRC, *The Geneva Conventions of 1949: Origins and Current Significance*, Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions, Address by Philip Spoerri, Director of International Law, ICRC. Official Statement (December 8, 2009). Available at: https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm

4 Jean S. Pictet, *Commentary, I Geneva Convention 48 (1952)*, in *International Law*, 1083 (Barry E. Carter, Phillip R. Trimble, Allen S. Weiner, Aspen Publishers, New York, 2007).

5 Gary Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, New York, 2010). Peace of Westphalia, Peace Treaty between the Holy Roman Emperor and the King of France and their respective Allies, October 24, 1648. Available at: http://avalon.law.yale.edu/17th_century/westphal.asp

of general and brief wording, making some questions of its applicability unclear. This haziness has been used by governments to try to evade the application of International Humanitarian Law to armed conflicts taking place within their territories for a number of diverse reasons.

Since the Geneva Conventions were drafted in 1949, a major change has taken place in war fighting around the planet. Mankind's reaction to the amount of carnage suffered by the international community during the Second World War did not stop at the drafting of the Geneva Conventions to regulate the acts of States during on-going conflicts, but the States also devised the creation of instruments that would prevent wars from surfacing at all. This is how the United Nations was engendered with the main rationale of preventing the development of armed conflicts among its members. Other regional organizations were created in the subsequent decades with a similar objective, such as the Organization of American States, OAS, and the North-Atlantic Treaty Organization, NATO. A myriad of international treaties and resolutions have been additionally drafted and ratified by most of the States in the world renouncing the use of force against other States, especially the United Nations Charter in its Article 2(4). Furthermore, countries and powers such as the United States, Russia, and China have also dramatically increased their arsenal of weapons, making full implementation of the military deterrence strategy seeking to prevent the perpetration of further attacks on their territories by other States.

Even though these actions, treaties, and organizations have not been entirely effective in preventing conflicts on the Planet, they did generate a side effect, which has drastically altered the very nature of the world security panorama. This has been the proliferation of what have been denominated as Fourth Generation[6] or Low-Intensity Conflicts,[7] in which non-State irregular actors attack State forces or fight each other with the implementation of tactics,

6 William Lind, *Archives*. http://www.military.com/Opinions/0,,Lind_Index,00.html, http://www.theamericanconservative.com/author/william-s-lind/page/2/

7 Robin Geiss, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91 *International Review of the Red Cross*, 873, 127-142 (2009). Available at: https://www.icrc.org/eng/assets/files/other/irrc-873-geiss.pdf

which usually directly involve civilians, encompassing massive and flagrant violations of International Humanitarian Law.

For these reasons, it becomes of vital consequence to analyze the Law of the Armed Conflicts' scope of application, mainly of common Article 3 to the Geneva Conventions of 1949 and Additional Protocol II to the Geneva Conventions, in relation to non-international armed conflicts, which are generally those resulting from the action of non-State actors against governmental forces. More often than not, internal hostilities encounter the implementation of tactics such as terrorism or as those described as part of "guerrilla warfare" by the Chinese military strategist and communist leader Mao Tse-tung[8] that focus on the direct involvement of the civilian population in the hostilities, expressly forbidden by the International Humanitarian Law Principle of Distinction, widely considered as customary international law.[9]

The state of the art in the world's security environment indicates that the scales are tilting in the frequency and intensity of armed conflicts towards non-international state confrontations, and away from regular conflicts involving State actors,[10] and a full analysis must be made as to whether or not the current norms of Law of War are sufficiently clear in their applicability to these type of hostilities, thus assuring that mankind is protected in the future by the yard-stick minimum of humanity provided by common Article 3 to internal armed conflicts. In this paper, the issues of to which internal "conflicts" is Law of War applicable to, and who is bound by International Humanitarian Law norms will be assayed.

8 Mao Tse-Tung, *On Guerrilla Warfare* (Samuel B. Griffith II, trans., University of Illinois Press, Chicago, 2000).

9 George J. Andreopoulos, *The Impact of the War on Terror on the Accountability of Armed Groups*, in *The Law of Armed Conflict, Constraints on the Contemporary Use of Military Force*, 171-192, 180 (Howard M. Hensel, ed., Global Interdisciplinary Studies Series, Ashgate, Aldershot, Hampshire, 2005).

10 International Committee of the Red Cross, ICRC, *Commentary to the 1949 Geneva Conventions' Common Article 3* (International Humanitarian Law, Treaties and Documents, 2005). Available at: http://www.icrc.org/IHL.nsf/COM/365-570006?OpenDocument

## I. WHAT NON-INTERNATIONAL "CONFLICTS" DOES INTERNATIONAL HUMANITARIAN LAW APPLY TO?

The first issue at hand in analyzing International Humanitarian Law's scope of application to conflicts of a non-international nature is to establish what situations are considered as "armed conflicts" and come into the range of applicability of the norms regulating the matter.

### A. Armed Conflict in Common Article 3

Common Article 3 to the Geneva Conventions states: "In the case of *armed conflict* not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions (…)" (italics out of text).

It is apparent that the specific characteristics, which hostilities occurring within a State Party must include in order to be considered as an "armed conflict" for the application of the norm are not incorporated within the text of the common Article 3 itself, and neither is a definition of the term "armed conflict."

In the 1949 Diplomatic Conference for the drafting of the Geneva Conventions, one of the most controversial subjects was precisely the scope of application of common Article 3 relating to armed conflicts of non-international nature.[11]

Most of the States worried that these regulations could extend to any disturbance within their territories, therefore intervening in their own ability to control internal security issues. Therefore, several criteria were set forth to determine exactly when an armed conflict was occurring. One of these proposals included, for example, that the warring party would possess "an organized civil authority exercising de facto governmental functions over the population of a determinate portion of the national territory, an organized military force under the direction of the above civil au-

11 International Committee of the Red Cross, ICRC, *Commentary to the 1949 Geneva Conventions' Common Article 3* (International Humanitarian Law, Treaties and Documents, 2005). Available at: http://www.icrc.org/IHL.nsf/COM/365-570006?OpenDocument

thority, and the means of enforcing the Convention and the other laws and customs of war."[12]

In the end, the Conference couldn't agree on an acceptable definition of internal conflict[13] and consequently decided to leave the term open, but to restrict the application of the norms included in the Geneva Conventions for International Armed Conflicts to internal conflicts only to their core principles. Thus, a broader notion for its material scope of application could be maintained, and since only the basic humanitarian laws were binding, no great controversy arose.[14]

However, from the discussions that took place in the Diplomatic Conference, it can be established that, to come under the scope of action of common Article 3, an armed conflict "presupposes the existence of hostilities of a certain scale or duration, as they cannot be either isolated or sporadic acts."[15] However, the scale or duration is not clearly defined or described.

The International Criminal Tribunal for Yugoslavia has followed this notion by stating that an armed conflict exists "whenever there is a resort to armed force between states or protracted armed violence between authorities and organized armed groups or between such groups within a state."[16]

In turn, the International Committee of the Red Cross has established in its *Commentaries* to common Article 3, considered as one of the main sources of interpretation of International Humanitarian Law, some basic guidelines for distinguishing when hostilities boast such magnitude as to be considered as an "armed conflict." These

12 International Committee of the Red Cross, ICRC, *Commentary to the 1949 Geneva Conventions' Common Article 3* (International Humanitarian Law, Treaties and Documents, 2005). Available at: http://www.icrc.org/IHL.nsf/COM/365-570006?OpenDocument

13 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 8 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

14 International Committee of the Red Cross, ICRC, *Commentary to the 1949 Geneva Conventions' Common Article 3* (International Humanitarian Law, Treaties and Documents, 2005). Available at: http://www.icrc.org/IHL.nsf/COM/365-570006?OpenDocument

15 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 8 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

16 International Criminal Tribunal for Yugoslavia, ICTY, Prosecutor v. Tadić, case IT-94-1-AR72, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 67. Appeals Chamber, in *War Crimes in Internal Armed Conflicts*, 11 (Eve La Haye, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008). International Criminal Tribunal for Yugoslavia, ICTY, *Prosecutor v. Tadić*, case IT-94-1-AR72, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995. Appeals Chamber. Available at: http://www.icty.org/case/tadic/4

guidelines are the following: "that the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention. (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory. (3) (a) That the *de jure* Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression. (4) (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) That the insurgent civil authority exercises *de facto* authority over persons within a determinate territory. (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war. (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.[17]

The ICRC, however, is emphatic at clarifying that these are mere useful guidelines for determining whether a situation within a State constitutes an armed conflict or not, but that the absence of some of these conditions in a particular situation does not signify automatically that common Article 3 is not applicable. The ICRC affirms in its *Commentary*: "Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfill any of the above conditions (which are not obligatory and are only mentioned as an indication)? We do not subscribe to this view. We think, on the contrary, that the Article should be applied as widely as possible. There can be no reason against this.

17 International Criminal Tribunal for Yugoslavia, ICTY, Prosecutor v. Tadić, case IT-94-1-AR72, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, para. 67. Appeals Chamber, in *War Crimes in Internal Armed Conflicts*, 11 (Eve La Haye, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008). International Criminal Tribunal for Yugoslavia, ICTY, *Prosecutor v. Tadić*, case IT-94-1-AR72, decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995. Appeals Chamber. Available at: http://www.icty.org/case/tadic/4

For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion."

Similar guidelines have been used by international jurisprudence in determining the existence of an armed conflict of a non-international nature: the hostilities must have a sustained nature of certain magnitude, but no requisites of belligerency, territory control, or the existence of civil war must be necessarily met.

The International Criminal Tribunal for Yugoslavia, ICTY, has, in assessing the intensity of the conflict, taken into consideration factors such as "the seriousness of attacks and their recurrence, the spread of these armed clashes over territory and time, whether various parties were able to operate from a territory under their control, an increase in the number of governmental forces, the mobilization of volunteers, and the distribution of weapons among both parties to the conflicts, as well as whether the conflict had attracted the attention of the UN Security council and whether any resolutions on that matter had been passed. In order to assess the organization of the parties to the conflict, Trial Chambers took into account such factors as the existence of headquarters, designated zones of operation and the ability to procure, transport and distribute arms (ICTY Tadić, Kordić, and Čelebići Trials)."[18]

Furthermore, the Inter-American Commission of Human Rights has ascertained that an armed conflict requires "the existence of organized armed groups that are capable of and actually do engage in combat and other military actions against each other… Article 3 armed conflicts do not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory."[19]

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18 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 10 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

19 Inter-American Commission on Human Rights. *Tablada Case. Abella v. Argentina*. Report No. 55/97 Case No. 11.137: Argentina, OEA.Ser/L/V.II.97, Doc 38, 18 November 1997, in *War Crimes in Internal Armed Conflicts* 11 (Eve La Haye, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008). Inter-American Commission on Human Rights, *Tablada Case. Abella v. Argentina*. Report 55/97 Case 11.137, Argentina, OEA.Ser/L/V.II.97, Doc 38, November 18, 1997. Available at: https://www.cidh.oas.org/annualrep/97eng/Argentina11137.htm

Lastly, the Trial Chamber of the International Criminal Tribunal for Yugoslavia, in the Limaj Case,[20] rejects the defense submission that the "insurgents" must have a belligerent statute, have a state-like organization, and authority to observe the rules of war, stating that these criteria, drawn from the *Commentary to common Article 3*. These criteria are used "solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law."

This analysis dispels any misleading doubts that governments may have that the application of common Article 3 to their internal public order situations, and that the sole existence of an armed conflict, will grant the illegal armed group a special belligerent or international status, thus affecting the sovereignty over their territories.

However, adverse situations such as the above have arisen from the lack of clarity of the text of common Article 3, and from the absence of an established international authority for construing both the law and the nature and status of a particular conflict situation, breeding various interpretations which can, in the end, undermine the effectiveness the framers wished to bestow on the regulations. It can be argued that there is an actual necessity to amend the International Humanitarian Law norms relating to internal armed conflicts, clarifying their scope of application in order to prevent misinterpretations and loopholes from giving civilians, wounded, and other non-combatants the minimal protections they are entitled to.

## B. Armed Conflicts in Additional Protocol II

The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, known as Additional Protocol II, was drafted

20 Trial Chamber Judgement, *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, 30 November 2005, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991. http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf. International Criminal Tribunal for Yugoslavia, ICTY, *Limaj et al. Case, Prosecutor v. Fatmir Limaj, Isak Musliu & Haradin Bala*, case IT 03-66. Available at: http://www.icty.org/case/limaj/4.

in June 1977,[21] and includes a much more definite notion of armed conflicts of a non-international nature.

In its Article 1(1), Additional Protocol II delineates its Material Field of Application to acts "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."

Immediately, differences with common Article 3 can be established, especially the fact that the conflict must include the participation of groups 1) under responsible command 2) that exercise control over its territory and 3) the control enables them to carry out military operations and to implement this Protocol.

Another important difference is that the Article makes it imperative that the armed forces of the State in whose territory the conflict occurs have to participate in the hostilities, as opposed to common Article 3, in which two illegal groups may be engaging each other in combat.[22]

In its *Commentary to the Additional Protocol*,[23] the ICRC has recognized that this instrument has a much higher threshold for applicability than common Article 3 does, and that, contrary to many misinterpretations of international law, Additional Protocol II does not regulate common Article 3, but situations of a greater magnitude of violence than those encompassed in the latter. Additional Protocol II and common Article 3 are, therefore, two separate normative bodies for internal armed conflicts. Whereas common Article 3 applies to all more or less sustained hostilities

21 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Available at: https://www.icrc.org/ihl/INTRO/475?OpenDocument

22 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 7 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

23 International Committee of the Red Cross, *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977* (International Humanitarian Law, Treaties and Documents, 2005, http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=475&t=com) (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987). Available at: http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf

of a certain scope of violence, Additional Protocol II only applies to those in which the conditions it sets forth specifically are met.

It can be noted, however, that nothing in the wording of Article 1(1) of Additional Protocol II concerns the amount of territory that must be controlled or for how long,[24] or what "control over territory" entails, or over who must decide on these issues, thus generating a confusing condition which can be distorted into an excuse for ultimately avoiding its application.

## C. Armed Conflict in the Rome Statute

The drafters of the Rome Statute[25], basic treaty regulating the International Criminal Court, decided to follow the jurisprudence rendered by the International Criminal Tribunal for Yugoslavia and engendered a distinct notion of armed conflict, analogous to that of common Article 3 with an inferior threshold for application than Additional Protocol II.[26]

As ordained in the Statute, its Article 8(2)(f), "applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies 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."

The notion of armed conflict proscribed in the Rome Statute has significant relevance, taking into consideration that neither common Article 3 nor Additional Protocol II contain specific enforcement procedures, and perhaps the only enforcement of the infraction of International Humanitarian Law may stem from the International Criminal Court's individual criminal prosecution.

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24 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 9 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

25 Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Available at: http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

26 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 9 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

## II. WHO DOES LAW OF WAR IN AN INTERNAL CONFLICT APPLY TO?

The query as to whom does common Article 3 and Additional Protocol II to the Geneva Conventions in an internal armed conflict apply to has lead to immense controversies and diverse interpretations.

In its Article 2(1)(a), the Vienna Convention[27] defines a 'treaty' as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." According to this definition, it is clear that the Geneva Conventions and its Additional Protocols constitute international treaties, for they are agreements concluded between States that create international obligations for the signatories.

According to this traditional concept, only those who ratify the international treaties, by disposition of the Vienna Conventions, are bound by them. In this case, 195 States are parties to the Geneva Conventions and 167 to the Additional Protocol II.[28] Hence, in principle, only States would be bound to obey the core humanitarian laws established for internal armed conflicts, so the military forces of every State and government officials acting in their capacities as representatives of the State[29] are undoubtedly bound by them.

But this strict interpretation, however, would leave the civilian population and other non-combatants, such as injured or captured military force members, outside of the scope of protection of the norms and absolutely vulnerable to unrestrained attack. Considering that in internal armed conflicts the application of guerrilla warfare and commonly used tactics such as terrorism progressively target civilians in a direct fashion, this reading would lead to the forced conclusion that the International Humanitarian Law currently in force is outmoded for non-international armed

27 Vienna Convention on the Law of Treaties, 1969. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

28 International Committee of the Red Cross (2005). http://www.icrc.org/ihl.nsf/CONVPRES?OpenView

29 Organization of the United Nations, International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, Article 4, Conduct of Organs of a State, 2001. Available at: http://www.refworld.org/pdfid/3ddb8f804.pdf

conflicts, failing to accomplish its specific objective of providing a minimum safeguard for those most vulnerable during hostilities of a protracted and sustained nature. Following the previously argued statement that increasingly the armed conflicts in the world will hold this quality, the cited interpretation would make a complete re-vamping of the Law of War imperative, seeking to maintain the peril of its complete obsolescence at bay.

In his first report to the Security Council on the Protection of Civilians in Armed Conflict, the United Nations Secretary General noted that the "deliberate targeting of non-combatants" is a key characteristic of these [internal] conflicts, which results in "civilian casualties and the destruction of civilian infrastructure". The Report stressed that it was "non-state actors, including irregular forces and privately financed militias" who were responsible for the bulk of this type of violence.[30]

However, a diverse interpretation has been construed by international law experts, making the applicability of International Humanitarian Law norms plausible for illegal groups playing the preponderant role in internal conflicts. These interpretations can be divided as to their respect to belligerent and to non-belligerent organizations.

The Annex to the Convention (II) with Respect to the Laws and Customs of War on Land,[31] in its Article 1, specifically defines the characteristics that belligerent groups must entail, including, in its numeral 4, their respect to the laws of war. Only when a group complies with these requisites, and is recognized as belligerent by either the State in which it operates or by a third State, does it acquire the rights of an international public law subject, including legal personality.

The former would signify that belligerent groups could endeavor as States in the international public law ambiance and would be bound by treaties to which they are signatories, becoming obliged

30 George J. Andreopoulos, *The Impact of the War on Terror on the Accountability of Armed Groups*, in *The Law of Armed Conflict, Constraints on the Contemporary Use of Military Force*, 171-192, 172 (Howard M. Hensel, ed., Global Interdisciplinary Studies Series, Ashgate, Aldershot, Hampshire, 2005).

31 Geneva Convention (II) with Respect to the Laws and Customs of War on Land Regulations concerning the Laws and Customs of War on Land, The Hague, July 29, 1899. Available at: https://www.icrc.org/ihl/INTRO/150?OpenDocument

to enforce them within the territories upon which their sovereignty is claimed and exerted.

This would hence generate a series of different situations depending on the specific circumstances of a conflict. If the belligerent group claims that it is in fact the legal government of a State which has ratified the Conventions, it would be obliged under international legal rules to respect the treaties and obligations acquired by the pre-existing government.[32] If the group renounces respect of the obligations its State has acquiesced to prior to its coming into power, its stance would encompass a violation of international law's *pacta sunt servanda* foundation principle.[33]

However, if the belligerent group wields control and claims sovereignty over only a portion of the state's territory, according to the traditional discernment of treaty law which exclusively binds States signatories, and according to the established international legal rules of state succession,[34] the group wouldn't be obliged under the Conventions, taking they have not accepted their compulsory power by the procedure of signature and ratification established in the Vienna Conventions.[35]

The above brings about the same inquiry that arises when an illegal group takes part in an internal armed conflict and does not control territory, or wields control over it but has not been recognized by other States as a belligerent group: *are they bound by the Geneva Conventions and their Additional Protocols?*

According to the traditional interpretation of treaty law previously cited, illegal groups within a territory would only be bound by the national legislation implemented by the State to enforce International Humanitarian Law within its territory. This results either when the treaties automatically become an integral part of internal law upon ratification, or when the State implements

32 Eve La Haye, *War Crimes in Internal Armed Conflicts*, 119 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

33 Organization of the United Nations, International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, Article 26, Compliance with Peremptory Norms, 2001. Available at: http://www.refworld.org/pdfid/3ddb8f804.pdf

34 Vienna Convention on the Succession of States in Respect of Treaties, 1986. Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en

35 Vienna Convention, Articles 12-17. Vienna Convention on the Law of Treaties, 1969. Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

separate legislation to enforce the treaty, depending on the system adopted by each State.[36]

Consequently, illegal groups would be bound indirectly by the Conventions and their Additional Protocols through national legislation, but would not be obliged directly by International Humanitarian Law. That is to say, they could not be prosecuted or sanctioned for a direct infraction of the treaties. However, the concrete functioning of the International Criminal Court and its prosecution of war crimes committed within a State, points to the fact that the international community does not acquiesce to the described interpretation.

If illegal groups were exclusively bound by national legal systems, they could not be prosecuted internationally for the violations of the Conventions, and this has not been the case. Individuals have been historically prosecuted for their conducts in war in internal conflicts through the United Nations *ad hoc* Tribunals such as the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone, and this practice was consecrated further by the framers of the Rome Statute.

Lately, international legal practice has brought forth the theory that some of the rules contained in the Law of War, such as the principle of distinction, the definition of military objectives, the prohibition of indiscriminate attacks, the principle of proportionality, and the duty to take precautions in attack, constitute customary international law and are therefore binding on all parties to the conflict, including armed groups and civilians.[37] This phenomenon was described in the International Committee of the Red Cross report prepared for the 28th International Conference of the Red Cross and the Red Crescent.

This approach, of the application of customary norms within the international humanitarian law to illegal groups, has been re-

36 Marco Sassòli, Antoine A. Bouvier & Anne Quintin, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, ICRC, Geneva, 2011). Available at: https://www.icrc.org/eng/resources/documents/publication/p0739.htm

37 George J. Andreopoulos, *The Impact of the War on Terror on the Accountability of Armed Groups*, in *The Law of Armed Conflict, Constraints on the Contemporary Use of Military Force*, 171-192, 180 (Howard M. Hensel, ed., Global Interdisciplinary Studies Series, Ashgate, Aldershot, Hampshire, 2005).

cently recognized both by international legal experts in doctrine,[38] including the ICRC, which states that "the law of non-international armed conflict by definition protects persons against their fellow citizens, i.e., it applies equally to all the persons equally affected by such a conflict,"[39] and by the international judicial instances such as the Inter-American Commission of Human Rights[40] with its view that "in internal armed conflicts, paramilitary groups were bound by humanitarian law by effect of their participation in the armed conflicts and that both common Article 3 and Protocol II bind all parties to the conflict." In fact, the Secretary General of the Organization of American States affirmed: "I would like to recall the prohibition against targeting civilians, enshrined in customary international law, which is binding not only on states and their governments but equally and directly so on armed groups that are parties to the conflict. The practice of the two *ad hoc* tribunals and the ICC Statute have underlined the principle of direct responsibility of the armed groups for violations of humanitarian law."[41]

Finally, the Security Council of the Organization of United Nations has adopted this view, stressing that armed groups in internal armed conflicts are "obliged to respect international humanitarian law."[42]

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38 Antonio Cassese, *La guerre civile et le droit international*, 90 *RGDIP, Revue* Générale de *Droit International Public*, 3, 553-578 (1986). Peter Rowe, *Liability for War Crimes During a Non-International Armed Conflict*, 34 *Revue de Droit Militaire et Droit de la Guerre, RDMDG, The Military Law and Laws of War Review*, 149-168, 152 (1996), in *War Crimes in Internal Armed Conflicts* 119 (Eve La Haye, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008).

39 Marco Sassòli, Antoine A. Bouvier & Anne Quintin, *How Does Law Protect in War? Cases, Documents, and Teaching Materials on Contemporary Practice in International Humanitarian Law* (International Committee of the Red Cross, ICRC, Geneva, 2011). Available at: https://www.icrc.org/eng/resources/documents/publication/p0739.htm

40 The Organization of the American States, "*Third Report on the Situation of Human Rights in Colombia*" OAS Doc. OEA/Ser.L/V.II, doc. 102 ( 1999) chapter IV, paras 13 and 85 as cited in Eve La Haye, *War Crimes in Internal Armed Conflicts*, 119 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008). Organization of the American States, OAS, *Third Report on the Situation of Human Rights in Colombia*, OAS Doc. OEA/Ser.L/V. II, doc. 102 (1999). Available at: https://www.cidh.oas.org/countryrep/Colom99en/table%20of%20contents.htm

41 United Nations Commission on Human Rights, E/CN.4/1985/18, 37. *Final report of the Special Representative on El Salvador*, as cited in Eve La Haye, *War Crimes in Internal Armed Conflicts*, 119 (Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2008). United Nations Commission on Human Rights, UNCHR, E/CN.4/1985/18, 37. *Final report of the Special Representative on El Salvador*. Available at: http://www.refworld.org/docid/3b00f19ac.html

42 United Nations Security Council, Resolution 935 of 1 July 1994. S/RES/935 (1994), as cited in Eve La Haye, *War Crimes in Internal Armed Conflicts*, 119 (Cambridge Studies in International

It can therefore be concluded that the core of International Humanitarian Law can be applied during an armed conflict to all State actors, including legally-constituted military groups and government officials acting in their legal capacities as State representatives, as well as on belligerent groups that claim to be the State's righteous government. Some of their rules, regarding foundational humanitarian principles such as distinction and proportionality may also apply to illegal groups acting within the States and to all the inhabitants of a territory, and not just States bound by the Geneva Conventions and their Additional Protocols, given the mostly accepted theory that they constitute customary international law applicable to individuals as well as to States and subjects of Public International Law.

However, this brings about one of the main issues within International Humanitarian Law, which directly addresses its capacity to protect non-combatants in time of conflict, the reason of existence of the Law of War itself: the enforcement of the Law of War in internal armed conflicts.

## III. THE ENFORCEMENT OF LAW OF WAR IN INTERNAL ARMED CONFLICTS

One of the most frequently made questions in the application of International Humanitarian Law to internal armed conflicts is that of *Who decides?* During the drafting of the Geneva Conventions, the Diplomatic Conference studied whether or not it should allow States themselves to declare the existence of an armed conflict, which would be regulated by Additional Protocol II.[43] However, this proposal was rejected, and the immediate application approach was decided upon.

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and Comparative Law, Cambridge University Press, Cambridge, 2008). United Nations Security Council, Resolution 935 of 1 July 1994. S/RES/935 (1994). Available at: http://www.refworld.org/docid/3b00f16034.html

43 International Committee of the Red Cross, *Commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977* (International Humanitarian Law, Treaties and Documents, 2005, http://www.icrc.org/IHL.nsf/WebList?ReadForm&id=475&t=com) (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, eds., International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva 1987). Available at: http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf

Nonetheless, who will decide if the State is respecting these rules, and if there is in fact an armed conflict to which these norms must be applied? To make sure that they will always comply with international law, States should always abide by the minimum yard-stick conditions set by common Article 3 to internal hostilities, that is, not murdering civilians, avoiding illegal detention, refraining from carrying out extrajudicial executions, and abstaining from humiliating and degrading treatment of its prisoners and from not providing or allowing care for the sick and the wounded.[44]

But what if the State is not acting upon these responsibilities? How can the State be punished? Currently, dispositions answering these queries are non-existent International Humanitarian Law. Regional courts have been set up, such as the European and the Inter-American Human Rights Court, to deal with States' violations of Human Rights regional treaties, which equally consecrate many of these conducts as breaches. Additionally, the International Criminal Court has jurisdiction to individually prosecute State representatives and other actors who have themselves committed war crimes, but this specific capacity arises from the Rome Statute and not from the infringement of the Geneva Conventions themselves.

An additional concern arises, more important yet if considering that most of the crimes perpetrated against civilians within internal conflicts are committed by illegal groups: who decides that a criminal group is in breach of International Humanitarian Law, and how can they be punished if the State does not have the capacity or the will to exercise law enforcement and arraign criminals? Human Rights Courts do not cover this prospect, since they merely have jurisdiction over Human Right violations committed by State actors. Again, the International Criminal Court could be competent to prosecute war crimes, stemming from the globally recognized universal jurisdiction to judge and punish those who commit some of the most atrocious war crimes, but only those that fit the definite description of crimes provided by the Rome Statute, which is much more limited than the normativity created

44 Common Article 3, Geneva Conventions (1949). Available at: https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions

by the Geneva Conventions. However, there is no mechanism to enforce their observation of the Geneva Conventions, and illegal group's motives are precisely founded on a flagrant disrespect for national law, making this a hardly likely deterrent for their criminal ways.

## CONCLUSIONS AND PROPOSAL

Although there exists, in fact, much haziness and speculation as to the previously analyzed aspects of International Humanitarian Law's scope of application to internal armed conflicts, doctrine and jurisprudence have been at work in the nearly six decades since their implementation to fill up these dangerous gaps. Nonetheless, this has not been effective at eliminating the confusion and loopholes through which governments and illegal groups may evade application of norms to their conducts during sustained hostilities.

It is therefore essential that the United States Security Council, which is the world authority with the primary responsibility for the maintenance of international peace and security, and which, under Article 25 of the UN Charter,[45] has the competence to dispense binding Resolutions for all the Members of the United Nations, be given the capacity to decide upon the existence of an internal armed conflict, either falling under common Article 3 or Additional Protocol II's scope of action according to the level of hostilities, thus giving clarity to the State in question that it will be held accountable internationally for its respect and observance of Humanitarian Law. This will surely create a deterrent for breaching the Law of War, for governments will have certainty beyond a doubt that they rest under the scrutinizing eye of the international community and what behavior is accordingly expected of them.

The Security Council would be allowed to create a special commission to investigate the particular circumstances of internal hostilities, in order to aid and support its decisions on armed conflicts. Furthermore, the Security Council would, in binding Resolutions, declare the existence of armed conflicts, abolishing controversies as to when the hostilities purport conflict status and to the temporary applicability of the Conventions, and render governments and illegal groups alike admonitions that the Law of War for internal conflicts is currently effective in their territories.

This would additionally grant the Security Council a concrete indication as to when its peace-keeping or peace-enforcement forces should be deployed, and individual sanctions against both illegal

45 United Nations Charter, UN, San Francisco, June 26, 1945. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf

groups and governments implemented, for they would rely concretely on the objective violation of previous binding Resolutions. The direct applicability of Humanitarian Law to illegal groups has already been determined by the Council as recounted above, so the notion would not encompass a variation within the Organization's current proceedings.

This proposal has potential practical application, since it is not a big deviation from the current role of the Security Council as world warrantor of peace, and its capacity to issue binding resolutions and to impose sanctions will be maintained. No necessity for the creation of additional courts or international organizations is generated, which would presuppose a heavy bureaucratic burden on States in a time of hectic diplomatic activity in the international arena.

But most importantly yet, there will be clarity among the international community, both for the State's sake and to grant instances such as the International Criminal Court and regional Human Rights Courts support, as to when an internal armed conflict is evolving, and to when States or illegal groups are considered to be flagrantly breaching International Humanitarian Law. It can be said that the Security Council would be imbued with a species of judicial competence, but in reality, it would not be very different to its current activities, in which, through independent Resolutions, it has condemned war crimes, acts of terrorism, and genocide committed in several internal armed conflicts in the world, such as in Rwanda[46] and Sudan.[47] The only difference would be that monitoring internal conflicts would now become a permanent and constant function of the Council.

If the Security Council is as effective with this new mechanism to deter the infractions of humanitarian law in internal armed conflicts as it has been in preventing wars among States and international armed conflicts, the side effect stemming from its creation will have been nearly remedied and mankind will be ahead on its way on the road to achieving elusive world peace.

46 United Nations Security Council, Resolution 935 of 1 July 1994. S/RES/935 (1994). Available at: http://www.refworld.org/docid/3b00f16034.html

47 United Nations Security Council Resolution 1590 of 24 March 2005. S/RES/1590 (2005). Available at: http://www.refworld.org/docid/42bc14d44.html

With the endowment of such capacities on the Security Council, the international community would take a gigantic leap towards making the until now absent enforcement of International Humanitarian Law a reality, guaranteeing respect for non-combatants' essential rights in internal conflicts around the globe, and attesting that atrocities similar to those committed with the genocide of scores of innocents during internal conflicts in the former Yugoslavia and Rwanda in the decade of 1990 will not have a place in the future. Only when the aforementioned is a reality will mankind truly follow General Eisenhower's pledge of never forgetting, and of assuring it will never more occur.

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