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## Introduction

According to the typology of armed conflicts in International Humanitarian Law (IHL), two types of conflicts exist: international armed conflicts and non-international armed conflicts. Applicable conventional IHL, and to a lesser extent customary IHL, varies depending on each situation. If non-international armed conflicts are today by far more numerous than international armed conflicts, the law of international armed conflict is still quantitatively as well as qualitatively more substantial.

From a humanitarian point of view, the victims of non-international armed conflicts should be protected by the same rules as the victims of international armed conflicts. They face similar problems and need similar protection. Indeed, in both situations, fighters and civilians are arrested and detained by “the enemy”; civilians are forcibly displaced; they have to flee, or the places where they live fall under enemy control. Attacks are launched against towns and villages, food supplies need to transit through front lines, and the same weapons are used. Furthermore, the application of different rules for protection in international and in non-international armed conflicts obliges humanitarian players and victims to classify the conflict before those rules can be invoked. This can be theoretically difficult and is always politically delicate. To classify a conflict may imply assessing questions of jus ad bellum. For instance, in a war of secession, for a humanitarian actor to invoke the law of non-international armed conflicts implies that the secession is not (yet) successful, which

is not acceptable for the secessionist authorities fighting for independence. On the other hand, to invoke the law of international armed conflicts implies that the secessionists are a separate State, which is not acceptable for the central authorities.

However, States, in the international law they have made, have never agreed to treat international and non-international armed conflicts equally. Indeed, wars between States have until recently been considered a legitimate form of international relations and the use of force between States is still not totally prohibited today. Conversely, the monopoly on the legitimate use of force within its boundaries is inherent in the concept of the modern State, which precludes groups within that State from waging war against other factions or the government.

On the one hand, the protection of victims of international armed conflicts must necessarily be guaranteed through rules of international law. Such rules have long been accepted by States, even by those which have the most absolutist concept of their sovereignty. States have traditionally accepted that soldiers killing enemy soldiers on the battlefield may not be punished for their mere participation: in other words, they have a “right to participate” in the hostilities.[1]

On the other hand, the law of non-international armed conflicts is more recent. States have for a long time considered such conflicts as internal affairs governed by domestic law, and no State is ready to accept that its citizens would wage war against their own government. In other words, no government would renounce in advance the right to punish its own citizens for their participation in a rebellion. Such renunciation, however, is the essence of combatant status as defined in the law of international armed conflicts. To apply all the rules of the contemporary IHL of international armed conflicts to non-international armed conflicts would be incompatible with the very concept of the contemporary international society being made up of sovereign States. Conversely, if ever the international community is organized as a world State, all armed conflicts would be “non-international” in nature and it would thus be inconceivable for combatants to have the right to participate in hostilities independently of the cause for which they fight, as foreseen in the law of international armed conflicts.

In recent years, however, IHL of non-international armed conflicts has drawn closer to IHL of international armed conflicts: through the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda based on their assessment of customary international law;[2] in the crimes defined in the ICC Statute;[3] because States have accepted that recent treaties on weapons and on the protection of cultural objects are applicable to both categories of conflicts;[4]

- Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines

and on their Destruction

- Conventions on the Protection of Cultural Property

under the growing influence of International Human Rights Law; and according to the outcome of the ICRC Study on Customary International Humanitarian Law.[5] This study, which assesses official State practice and opinion juris (rather than actual conduct in the field, comes to the conclusion that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which run parallel to rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts.

Theoretically, IHL of international armed conflicts and IHL of non-international armed conflicts should be studied, interpreted and applied as two separate branches of law – the latter being codified mainly in Art. 3 common to the Conventions and in Protocol II. Furthermore, non-international armed conflicts occur much more frequently today and entail more suffering than international armed conflicts. Thus, it would be normal to study first the law of non-international armed conflicts, as being the most important.

However, because IHL of non-international armed conflicts must provide solutions to problems similar to those arising in international armed conflicts, because it was developed after the law applicable to international armed conflicts, and because it involves the same principles, although elaborated in the applicable rules in less detail, it is best to start by studying the full regime of the law applicable to international armed conflicts in order to understand the similarities and differences between it and the law of non-international armed conflicts. The two branches of law share the same basic principles, and analogies have to be drawn between them to flesh out certain provisions or to fill logical gaps. Similarly, only by taking the law of international armed conflicts as a starting point can one identify which changes must result, for the protective regime in non-international armed conflicts, from the fundamental legal differences between international and non-international armed conflicts. Finally, from the perspective of the law of international armed conflicts, there is a grey area not affected by those fundamental differences but in which States have refused to provide the same answer in the treaties of IHL. The practitioner in a non-international armed conflict confronted with a question to which the treaty rules applicable to such situations fail to provide an answer will either look for a rule of customary IHL applicable to non-international armed conflicts or search for the answer applicable in international armed conflicts and then analyse whether the nature of non-international armed conflicts allows for the application of the same answers in such conflicts. In any event, soldiers are instructed and trained to comply with one set of rules and not with two different sets.

The ICRC Study on customary IHL[6] has confirmed the customary nature of most of the treaty rules applicable in non-international armed conflicts (Art. 3 common to the Conventions and Protocol II in particular). Additionally, the study demonstrates that many rules initially designed to apply only in international conflicts also apply – as customary rules – in non-international armed conflicts. They include the rules relating to the use of certain means of warfare, relief assistance, the principle of distinction between civilian objects and military objectives and the prohibition of certain methods of warfare.

The fact that IHL of non-international armed conflicts comes closer to that of international armed conflicts is certainly a good thing for the victims of such conflicts, which are the most frequent in today's world, but it should never be forgotten that these rules are equally binding on government forces and non-State armed groups.[7] Therefore, for all existing, claimed and newly suggested rules of IHL of non-international armed conflicts, or whenever we interpret any of these rules, we should check whether an armed group willing to comply with the rule in question is able to do so without necessarily losing the conflict. Unrealistic rules do not protect anyone and undermine the credibility of other, realistic rules of IHL.

In addition, it should be borne in mind that if a given situation or issue is not regulated by IHL of non-international armed conflicts applying as the *lex specialis*, international human rights law applies, although possibly limited by derogations.

To conclude, it should be stressed that even in cases in which IHL of international armed conflicts contains no detailed provisions or to which no analogies with that law apply, and even without falling back on customary law, the plight of the victims of contemporary non-international armed conflicts would be incomparably improved if only the basic black-letter provisions of Art. 3 common to the Conventions and of Protocol II were respected.

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- ECJ, Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides
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## Footnotes

- [1] As recalled in P I, Art. 43(2)
- [2] See in particular ICTY, The Prosecutor v. Tadic [Part A., paras 96-136]
- [3] Compare Art. 8 (2) (a) and (b) with Art. 8. (2) (c) and (e), The International Criminal Court [Part A.]
- [4] See
- [5] See ICRC, Customary International Humanitarian Law
- [6] See ICRC, Customary International Humanitarian Law
- [7] See *infra*, Internal Armed Conflicts, VIII. Who is bound by the IHL of non-international armed conflicts?

# I. International and non-international armed conflicts

## ^ CASES AND DOCUMENTS

- ICTY, The Prosecutor v. Tadic [Part A., paras 71-76 and 96-98]
- United States, Hamdan v. Rumsfeld
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 2-27]
- Syria, Syrian rebels treat captured Filipino soldiers as 'guests'
- Central African Republic/Democratic Republic of Congo/Uganda, LRA attacks
- Central African Republic, Coup d'Etat

## Quotation

The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions.

[**Source:** Commission of Experts appointed to investigate violations of International Humanitarian Law in the Former Yugoslavia. UNDoc. S/1994/674, para. 52]

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## II. Comparison of the legal regimes for international and for non-international armed conflicts

### ^ CASES AND DOCUMENTS

- The International Criminal Court [Part A., Art. 8]
- UN, Minimum Humanitarian Standards [Part B., paras 74-77]
- Germany, International Criminal Code [Paras 8-12]
- Belgium, Law on Universal Jurisdiction [Part A., Art. 136(c)]
- UN, UN Forces in Somalia
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [para. 18]

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## **1. Traditional difference: protection not based on status (e.g. prisoner-of-war or protected civilian status) but on actual conduct (direct participation in hostilities)**

### **^ CASES AND DOCUMENTS**

- ICTY, The Prosecutor v. Tadic [Part C., paras 68, 171]
- Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3., Para. E.1]
- Afghanistan, Drug Dealers as Legitimate Targets
- ECHR, Khatsiyeva v. Russia [Paras 132-138]
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 7-15, 42, 84 and 92]
- Syria, Code of Conduct of the Free Syrian Army
- Syria, Press conference with French President Francois Hollande and Russian President Vladimir Putin
- USA, Guantánamo, End of "Active Hostilities" in Afghanistan
- USA, Jawad v. Gates
- Italy, Use of force against ambulances in Iraq
- United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: United States of America v. Khalid Shaikh Mohammad et al.
- Mexico, Recapture of Ovidio Guzmán, One of the Leaders of the Sinaloa Cartel
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**2. However, the regime is closer to that of international armed conflicts if fighters (members of an armed group with a continuous fighting function) are not considered to be civilians:**

#### ^ SPECIFIC BIBLIOGRAPHY

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- SASSÒLI Marco, "The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?", in *IYHR*, Vol. 39, 2009, pp. 177-212.

- a. and may therefore be targeted not only while directly participating in hostilities through specific acts but also – like combatants in international armed conflicts – as long as they do not fall into the power of the enemy or are otherwise hors de combat;

#### ^ CASES AND DOCUMENTS

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- a. and may, in the view of some States and specialists, also be detained for the mere fact that they belong to the enemy (like prisoners of war in international armed conflicts).

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- United States, President's Military Order
- United States, Hamdan v. Rumsfeld
- United States, The Obama Administration's Internment Standards

- United States, Closure of Guantanamo Detention Facilities
- United Kingdom, The Case of Serdar Mohammed (High Court Judgment)
- United States, Mukhtar Yahia Maji Al Warafi v. Obama
- Syria, Code of Conduct of the Free Syrian Army
- Malaysia/Philippines, Conflict over the Sultanate of Sulu
- US/Afghanistan, Transfer of Control over Bagram Prison
- United States, Jurisprudence Related to the Bombing of the U.S.S Cole
- Central African Republic, Report of the UN Independent Expert, July 2016
- Somalia/US, Airstrikes in Somalia

### 3. Uncontroversial similarities and differences

- a. protection of all those who do not or no longer directly participate in hostilities

#### ^ CASES AND DOCUMENTS

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- Nigeria, Operational Code of Conduct
- Chile, Prosecution of Osvaldo Romo Mena
- ICJ, Nicaragua v. United States [Para. 255]
- UN, Security Council Resolution 688 on Northern Iraq
- ICTY, The Prosecutor v. Tadic [Part B., paras 573-575 and 615]
- Switzerland, Military Tribunal of Division 1, Acquittal of G.
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- Colombia, Special Jurisdiction for Peace, Extrajudicial Executions in Casanare
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- Switzerland, Swiss Federal Criminal Court Finds Liberian Commander Guilty of War Crimes

- aa) who is protected?

## ^ CASES AND DOCUMENTS

- Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 292]
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 629]
- Switzerland, The Niyonteze Case [Part B., III., ch. 3.D.1]
- Colombia, Special Jurisdiction for Peace, Extrajudicial Executions in Casanare

bb) the wounded and sick

## ^ CASES AND DOCUMENTS

- Colombia, Response of armed groups to COVID-19
- ICRC Report on Yemen, 1967
- Afghanistan, Separate Hospital Treatment for Men and Women
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- South Sudan: Medical Care Under Fire
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cc) prohibition of rape and other forms of sexual violence

## ^ CASES AND DOCUMENTS

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dd) treatment of detainees

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- Central African Republic, Coup d'Etat
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## VII. Necessity and limits of analogies with the law of international armed conflicts

### Introductory text

First, in some cases the precise rule resulting from a common principle or from combining principles with a provision of the law of non-international armed conflicts or with simple legal logic can be found by analogy in rules which have been laid down in the much more detailed texts of the Conventions and Protocol I for international armed conflicts.[8]

Second, certain rules and regimes of the law of international armed conflicts have to be applied in non-international armed conflicts to fill gaps in the applicable provisions, to make the application of explicit provisions possible, or to give the latter a real chance of being applied.

For example, the law of non-international armed conflicts contains no definition of military objectives or of the civilian population. Such definitions are required, however, to apply the principle of distinction applicable in both types of conflict and the explicit prohibitions to attack the civilian population, individual civilians and certain civilian objects.[9] No fundamental difference between the regimes applicable to the two types of conflict precludes the application of one and the same definition.

Prohibitions or limitations on the use of certain weapons are a more difficult case. None of the relevant differences between the two categories of conflict could justify not applying in non-international armed conflicts prohibitions or restrictions on the use of certain weapons set out in the law of international armed conflicts. Yet States have traditionally refused to accept proposals explicitly extending such prohibitions to non-international armed conflicts. Fortunately, this trend has been reversed in recent codification efforts.[10]

A striking feature of the law of non-international armed conflicts is that it foresees no combatant status, does not define combatants and does not prescribe specific rights and obligations for them; its provisions do not even use the term "combatant". This is a consequence of the fact that no one has the "right to participate in hostilities" in a non-international armed conflict (a right which is an essential feature of combatant status). Some authors conclude that the law of non-international armed conflicts does not protect people according to their status but according to their actual activities. If this is correct, on the crucial question of when a fighter (i.e. a member of an armed group with a fighting function[11] may be attacked and according to what procedures a captured fighter may be detained, no analogy could be made with the rules applicable in international armed conflicts to combatants and prisoners of war. Fighters could only be attacked if and for

such time as they directly participate in hostilities and the admissibility of their detention would be governed, in the absence of specific rules of the IHL of non-international armed conflicts, by domestic law and International Human Rights Law.

Other authors and States consider that fighters may be attacked in non-international armed conflicts like combatants may be attacked in international armed conflicts, i.e. at any time until they surrender or are otherwise hors de combat. Some of those who promote this analogy also consider that captured fighters may be detained, like prisoners of war in international armed conflicts, without any individual judicial determination until the end of the conflict.

This controversy, which has important humanitarian consequences in non-international armed conflicts and armed conflicts which have both international and non-international components, shows that an analogy between international and non-international armed conflicts does not always lead to better protection for those affected by the conflict. It also raises the question of whether International Human Rights Law should not have a greater impact in non-international armed conflicts than in international armed conflicts, inter alia because the applicable IHL treaty rules are incomplete.

In any case, if civilians are to be respected in non-international armed conflicts as prescribed by the applicable provisions of IHL, those conducting military operations must be able to distinguish those who fight from those who do not fight, and this is only possible if those who fight distinguish themselves from those who do not fight. Detailed solutions on how this can and must be done are found, mutatis mutandis, in the law of international armed conflicts. In addition, it might be reasonable not to consider fighters as civilians (who may be attacked only if and for such time as they directly participate in hostilities), but this presupposes clear criteria and a real possibility to determine who is a fighter. On the other hand, in our view, captured fighters should not be detained by analogy to prisoners of war. On arrest, it is more difficult to identify fighters than soldiers of armed forces of another State. The correct classification can be made by a tribunal, which will only have its say if the arrested person is not classified as a POW.

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## 1. “Combatants” must distinguish themselves from the civilian population

### ▴ CASES AND DOCUMENTS

- Malaysia, Osman v. Prosecutor
- Nigeria, Pius Nwaoga v. The State
- Case Study, Armed Conflicts in the former Yugoslavia [Para. 35]
- Case Study, Armed Conflicts in the Great Lakes Region [Part II. B.]
- Russian Federation, Chechnya, Operation Samashki
- Sri Lanka, Naval War against Tamil Tigers

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- ELMORE Christina D., “An Enemy within Our Midst: Distinguishing Combatants from Civilians in the War against Terrorism”, in *University of Kansas Law Review*, Vol. 57, No. 1, 2008, pp.213-250.

## 2. Respect for IHL must be rewarded

### ^ CASES AND DOCUMENTS

- United States, The Prize Cases
- South Africa, *Sagarius and Others*
- Case Study, Armed Conflicts in the former Yugoslavia [Para. 16]

### ^ SPECIFIC BIBLIOGRAPHY

#### Suggested reading:

- SASSÒLI Marco, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, in *Journal of International Humanitarian Studies*, Vol. 1, No. 1, 2010, pp. 5-51.

#### a. internment, not imprisonment for those captured bearing arms

### ^ CASES AND DOCUMENTS

- Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala*,

#### a. encouragement of amnesty at the end of the conflict P II, Art. 6(5)

### ^ SPECIFIC BIBLIOGRAPHY

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- MUYOT Alberto T., "Amnesty in the Philippines: The Legal Concept as a Political Tool", in *Philippine Law Journal*, Vol. 69, No. 1, 1994, pp. 51-95.

aa) for the mere fact of having taken part in hostilities

#### CASES AND DOCUMENTS

- El Salvador, Supreme Court Judgment on the Unconstitutionality of the Amnesty Law
- Colombia Peace Agreement

bb) but not for war crimes or other violations

#### ^ CASES AND DOCUMENTS

- South Africa, AZAPO v. Republic of South Africa
- Sri Lanka, Jaffna Hospital Zone
- Columbia, Constitutional Conformity of Protocol II[Paras 41-43]
- Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 3. D.]
- El Salvador, Supreme Court Judgment on the Unconstitutionality of the Amnesty Law
- Colombia Peace Agreement

#### ^ SPECIFIC BIBLIOGRAPHY

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- NAQVI Yasmin, "Amnesty for war crimes: Defining the limits of international recognition", in *IRRC*, Vol. 85, No. 851, 2003, pp.583-626.

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### 3. Rules on the use of the emblem

## ^ CASES AND DOCUMENTS

- Sri Lanka, Jaffna Hospital Zone
- Colombia, Misuse of the Emblem
- Afghanistan, Attack on Kunduz Trauma Centre

## ^ SPECIFIC BIBLIOGRAPHY

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## 4. Prohibition of the use of certain weapons

## ^ CASES AND DOCUMENTS

- Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts
- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)
- ICRC, Customary International Humanitarian Law
- Minimum Humanitarian Standards [Art. 5(3)]
- ICRC Report on Yemen, 1967
- UN/ICRC, The Use of Chemical Weapons
- Inter-American Commission on Human Rights, *Tablada* [Para. 187]
- Geneva Call, *Puntland State of Somalia Adhering to a Total Ban on Anti-Personnel Mines*
- ICTY, *The Prosecutor v. Tadic* [Part A., paras 119-124]
- ICTY, *The Prosecutor v. Martić* [Part A., para. 18; Part B., 303-313, 461-463, 470 and 472]

## ^ SPECIFIC BIBLIOGRAPHY

### Suggested reading:

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## 5. Protection of the environment

### ^ CASES AND DOCUMENTS

- Colombia, Special Jurisdiction for Peace, Crimes against the Environment in Cauca

## 6. Limits to analogies

### ^ SPECIFIC BIBLIOGRAPHY

#### Suggested reading:

- KREß Claus and MÉGRET Frédéric, "The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?", in *IRRC*, Vol. 96, No. 893, 2014, pp. 29-66.
- KRETZMER David, BEN-YEHUDA Aviad and FURTH Meirav, "Thou Shall Not Kill": The Use of Lethal Force in Non-International Armed Conflicts", in *Israel Law Review*, Vol. 47 2014, pp. 191-224.
- SOLF Waldemar A., "Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict", in *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, pp. 323-326.

- no combatant status (but members of armed groups with a continuous fighting function are argued to have the same disadvantages – but not privileges – as combatants in international armed conflicts)

### ^ CASES AND DOCUMENTS

- ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities



- United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
- United States, Hamdan v. Rumsfeld
- United States, The Obama Administration's Internment Standards
- United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments)
- USA, Jawad v. Gates

- no occupied territories

## ^ CASES AND DOCUMENTS

- Case Study, Armed Conflicts in the former Yugoslavia [Para. 8]

### Footnotes

- [8] Thus, one may claim that the prohibition of indiscriminate attacks as codified in Art. 51(5) and the precautionary measure laid down in Art. 57(2)(b) of Protocol I are necessary consequences of the principle of distinction, and the rules of Conventions I and IV as well as Protocol I concerning who may use, and in which circumstances, the distinctive emblem have to be taken into account when applying Art. 12 of Protocol II on the distinctive emblem.
- [9] See P II, Arts 13 and 14
- [10] Thus the Protocol on Mines, Booby-Traps and other Devices also applies to non-international armed conflicts (See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) (Art. 1(2)))
- [11] For a discussion of this concept, see supra, Part I, Chapter 9, II. 7. Loss of protection: The concept of direct participation in hostilities and its consequences

## VIII. Who is bound by the law of non-international armed conflicts?

### Introductory text

From the point of view of the law of treaties, Art. 3 common to the four Geneva Conventions and Protocol II are binding on the States party to those treaties. Even those rules of the IHL of non-international armed conflicts considered customary international law would normally be binding only on States. The obligations of the States parties include responsibility for all those who can be considered as their agents. IHL must, however, also be binding on non-State parties in a non-international armed conflict – which means not only those who fight against the government but also armed groups fighting each other – because victims must also be protected from rebel forces and because if IHL did not respect the principle of the equality of belligerents before it in non-international armed conflicts, it would have an even smaller chance of being respected by either the government forces, because they would not benefit from any protection under it, or by

the opposing forces, because they could claim not to be bound by it.

A first possibility to explain why armed groups are bound by IHL is to consider that when the rules applicable to non-international armed conflicts, which include the provision that those rules be respected by “each Party to the conflict,”<sup>[12]</sup> are created by agreement or custom, States implicitly confer on the non-governmental forces involved in such conflicts the international legal personality necessary to have rights and obligations under those rules. According to this construction, the States have conferred on rebels – through the law of non-international armed conflicts – the status of subjects of IHL; otherwise their legislative effort would not have the desired effect, the *effet utile*. At the same time, the States explicitly stated that the application and applicability of IHL by and to rebels would not confer on the latter a legal status under rules of international law (other than those of IHL).<sup>[13]</sup>

A second theory is to consider that armed groups are bound because a State incurring treaty obligations has legislative jurisdiction over everyone found on its territory, including armed groups. Those obligations then become binding on the armed group via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules. Under this construction, IHL is indirectly binding on the rebels. Only if they became the effective government would they be directly bound.

Other possible explanations for the binding effect of IHL on rebel armed groups are: third, that armed groups may be bound under the general rules on the binding nature of treaties on third parties (this presupposes, however, that those rules are the same for States and non-State actors and, more importantly, that a given armed group has actually expressed its consent to be bound); fourth, that the principle of effectiveness is said to imply that any effective power in the territory of a State is bound by the State’s obligations; fifth, armed groups often want to become the government of the State and such government is bound by the international obligations of that State.

The precise range of persons who are the addressees of the IHL of non-international armed conflicts has been discussed in the jurisprudence of the two ad hoc International Criminal Tribunals.<sup>[14]</sup> Certainly, not only members of armed forces or groups, but also others mandated to support the war effort of a party to the conflict are bound by IHL. Beyond that, all those acting for such a party, including all public officials on the government side, must comply with IHL in the performance of their functions. Otherwise judicial guarantees, which are essentially of concern to judges, rules on medical treatment, which are equally addressed to ordinary hospital staff, and rules on the treatment of detainees, which also apply to ordinary prison guards, could not have their desired effect because those groups could not be considered as “supporting the war effort”. On the other hand, acts and crimes unconnected to the armed conflict are not covered by IHL, even if they are committed during the conflict.

As for individuals who cannot be considered as connected to one party but who nevertheless commit acts of violence contributing to the armed conflict for reasons connected with it, those perpetrating such acts are

bound by the criminalized rules of IHL. If such individuals were not considered addressees of IHL, most acts committed in anarchic conflicts would be neither covered by IHL nor consequently punishable as violations of IHL. What is unclear is whether the many rules of IHL that are not equally criminalized cover all individual acts having a link to the conflict.

## 1. Both parties

### ^ CASES AND DOCUMENTS

- International Law Commission, Articles on State Responsibility [Part A., para. 16 of the Commentary to Art. 10]
- UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
- Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 172-174]
- Geneva Call, Puntland State of Somalia Adhering to a Total Ban on Anti-Personnel Mines
- ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 430-446]
- Colombia, Constitutional Conformity of Protocol II [Para. 8]
- Engaging Non-state Armed Groups on the Protection of Children
- Syria, Code of Conduct of the Free Syrian Army
- Sweden/Syria, Can Armed Groups Issue Judgments?
- Colombia Peace Agreement
- Geneva Call and the Chin National Front

### ^ SPECIFIC BIBLIOGRAPHY

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## 2. All those belonging to one party

### ^ CASES AND DOCUMENTS

- United States, *Kadic et al. v. Karadzic*
- Case Study, Armed Conflicts in the Great Lakes Region (Parts II. 2 and III.)
- ICTR, *The Prosecutor v. Jean-Paul Akayesu* [Part B., paras 425-446]
- Switzerland, *The Niyonteze Case* [Part A., para. 9 and Part B., III. ch. 3.D]
- Syria, Code of Conduct of the Free Syrian Army
- ICRC, *International humanitarian law and the challenges of contemporary armed conflicts in 2015* [paras 101-107, 110, 113, 114]

### ^ SPECIFIC BIBLIOGRAPHY

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## 3. All those affecting persons protected by IHL by an action linked to the armed conflict

### ^ CASES AND DOCUMENTS

- Colombia, Response of armed groups to COVID-19
- ICTR, *The Prosecutor v. Jean-Paul Akayesu* [Part B., paras 432-445]
- Switzerland, *The Niyonteze Case* [Part B., III. ch. 3.D.2]
- Central African Republic: Sexual Violence by Peacekeeping Forces
- Central African Republic, Report of the UN Independent Expert, July 2016
- International Criminal Court, Trial Judgment in the Case of the Prosecutor V. Jean-Pierre Bemba

Gombo

- Somalia/Kenya, Al-Shabab Attacks
- United States, The US Plan to Mitigate Civilian Harm in Armed Conflicts

## Footnotes

- [12] See GC I-IV, common Art. 3(1)
- [13] See GC I-IV, common Art. 3(4) (See *infra* IX. Consequences of the Existence of a Non-International Armed Conflict for the Legal Status of the Parties)
- [14] See in particular ICTR, *The Prosecutor v. Jean-Paul Akayesu* [Part B., paras 432-445]

# IX. Consequences of the existence of a non-international armed conflict on the legal status of the parties

## Introductory text

Art. 3(4) common to the Conventions clearly states that application of Art. 3 “shall not affect the legal status of the Parties to the conflict”. As any reference to “parties” has been removed from Protocol II, a similar clause could not appear in it. However, Protocol II contains a provision clarifying that nothing it contains shall affect the sovereignty of the State or the responsibility of the government, by all legitimate means – legitimate in particular under the obligations foreseen by IHL – to maintain or re-establish law and order or defend national unity or territorial integrity. The same provision underlines that the Protocol cannot be invoked to justify intervention in an armed conflict.[15]

The application of IHL to a non-international armed conflict therefore never internationalizes the conflict or confers any status – other than the international legal personality necessary to have rights and obligations under IHL – to a party to that conflict. Even when the parties agree, as encouraged by Art. 3(3) common to the Conventions, to apply all of the laws of international armed conflicts, the conflict does not become an international one. In no case does the government recognize, by applying IHL, that rebels have a separate international legal personality which would hinder the government’s ability or authority to overcome them and punish them – in a trial respecting the judicial guarantees provided for in IHL – for their rebellion. Nor do the rebels, by applying the IHL of non-international armed conflicts, affect their possibility to become the effective government of the State or to create a separate subject of international law – if they are successful. Never in history has a government or have rebels lost a non-international armed conflict because they applied IHL. The opposite is not necessarily true.

## ▸ CASES AND DOCUMENTS

- Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)

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### Footnotes

- [15] See P II, Art. 3