

Legal Analysis of *Armed Conflict* under the International Humanitarian Law [IHL]

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Abstract: *The law of armed conflicts applies to those who are participating in hostilities. To decide whether the IHL would govern over the situation of hostilities depends upon the situation amounts to an armed conflict under the IHL. There is no acceptance of the unitary theory of armed conflict. Still, it is recognized for classifying two kinds of armed conflicts: international or inter-state [IAC] and non-international (NIAC) or within the state. This research paper examines the peculiarity of these two categories of armed conflict and its validity. This paper also analyses the legal concept and distinction between NIAC and IAC, extra-territorial hostilities by one State against non-state actors, and conflicts in which transnational forces are engaged, called internationalized armed conflict.*

Keywords: International humanitarian law, International armed Conflict, Non-international armed conflict, Internationalized armed conflict.

1. Introduction

All throughout 2024, there have been around 45 armed conflicts raging throughout the various state boundaries of the Middle East and North Africa overall. Most of them are non-international (NIACs), involving numerous armed non-state entities and Western countries' external operations.¹ There are two military occupations, three international armed conflicts, and some overlapping NIACs that involve multiple armed organisations fighting against the government and against one another.²

With around 35 non-international armed conflicts (NIACs) occurring, Africa ranks second in terms of the number of armed conflicts per region.³ These conflicts feature a number of armed groups battling against the government and/or one another.⁴

Asia is in third place with nineteen non-international armed conflicts (NIACs), including nineteen armed groups.^{5,6}

There are seven armed conflicts in Europe. In addition to two non-international armed conflicts (NIACs) in Ukraine between state forces and the self-proclaimed "People's Republics" of Donetsk and Luhansk in eastern Ukraine, Europe is at the forefront of an international armed conflict (IAC) between Ukraine and Russia.⁷ The intensity of the violence has changed since February 2022.⁸

Mexico and Colombia share an equal number of the six NIACs that are now taking place in Latin America.⁹ Additionally, this is the first time that armed violence

involving criminal organisations has been designated as an NIAC.¹⁰

A 2008 ICRC opinion paper provided information on how, for almost 60 years since the Geneva Conventions were drafted, the concept of armed conflict has been construed in theory and jurisprudence. There are now new issues. The ICRC has observed a number of changes in the ways that armed groups take part in conflicts as either parties or supporters. These changes include, for instance, the support given by state coalitions to governments engaged in NIACs, the use of force by states outside of their borders without consent, the formation of coalitions of armed groups with varying degrees of organisation, and the growth of agglomerations of such groups.¹¹

2. Nature of "armed conflict."

Following World War II¹², international law as a discipline started to acknowledge the possibility of extending rights and obligations to individuals and other non-state actors, which significantly altered the application of international law to internal armed conflicts.¹³ International human rights law development started with the Universal Declaration of Human Rights in 1948.¹⁴ The International Committee of the Red Cross (ICRC) is entrusted by the Statutes of the International Red Cross and Red Crescent Movement "to endeavour to comprehend and spread knowledge of international humanitarian law applicable in armed conflicts and to prepare for any development thereof".¹⁵ To fulfil that duty, the ICRC has a commonly held legal view that

¹ <https://geneva-academy.ch/galleries/today-s-armed-conflicts>, explains Dr Chiara Redealli, Research Fellow at the Geneva Academy., Mahmoud Sulaiman, Unplash, visited on 22/10/2024.

² <https://geneva-academy.ch/galleries/today-s-armed-conflicts>, visited on 28/10/2024

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW? INTERNATIONAL COMMITTEE OF THE RED CROSS OPINION PAPER 2024,

¹² Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", Wilmshurst (ed.) International Law and the Classification of Conflicts (OUP, 2012)

¹³ Ibid.

¹⁴ <https://www.un.org/en/our-work/uphold-international-law>, visited on 23/10/2024.

¹⁵ Statutes of the International Red Cross and Red Crescent Movement, art. 5, para. 2(g)., also see International Committee of

differentiates between two categories of armed conflicts: non-international armed conflicts (NIAC), which are fought between governmental forces and nongovernmental armed groups, or just between such groups, and international armed conflicts (IAC), which are fought against two or more States.¹⁶ There are no other forms of armed warfare recognized by law. However, as stated above, it is crucial to emphasize that a scenario might change from one type of armed conflict to another based on the facts at hand.¹⁷

Before the Second World War, the international laws of war exclusively applied to conflicts between states. This changed after the *Peace of Westphalia*.¹⁸ This resulted from international law's focus on state-to-state relations and disdain for regulating issues seen to fall under a state's domestic court.¹⁹

Under international law, participants to a conflict must decide which legal framework applies to the conduct of their military operations; there is no central body that may declare a situation to be an armed conflict.²⁰ Civil wars might be subject to the rules of war, but only if the belligerence of the insurgent group was acknowledged by the host state or by a third state.²¹ Even in this instance, applying international law to what was essentially an internal matter did not happen automatically; rather, it happened because the insurgent party was acknowledged by the relevant State as having taken on characteristics of a State.²²

A *de facto* state of hostilities depends on neither a declaration nor recognition of the existence of "war" by its parties.²³ With no clear definition of "armed conflict," Articles 2 and 3 of the 1949 Geneva Conventions distinguish between the regulations that apply to IACs and NIACs. Furthermore, the

omission is crucial to depoliticising the Conventions' application to the violent circumstances for which they were designed.²⁴ Since then, the application of IHL has been based on a fact-based analysis rather than just a belligerent's formal acknowledgement that a state of war has been declared.²⁵ The International Committee of the Red Cross (ICRC) makes an independent determination of the facts and systematically classifies situations of armed conflict. One could argue that the ICRC addresses the humanitarian fallout from the wars that characterised the second half of the 20th century, beginning in 1948 with Israel and Palestine. But since 1863, its only goal has been to protect and assist those who have been impaired by armed conflict and turmoil.²⁶ The ICRC leads global action by fostering the advancement of international humanitarian law and advocating for governments and all bearers of weapons to uphold it. The motives for the ICRC classify the armed conflict are: *first*, the High Contracting Parties to the 1949 Geneva Conventions have entrusted the ICRC, through the Statutes of the International Red Cross and Red Crescent Movement, "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof";²⁷ *Second*, a fundamental part of the ICRC's mandate is to support parties in complying with their legal obligations in situations of armed conflict.²⁸ *Third*, an armed conflict, whether international or non-international, is an essential basis for the ICRC's mandate.²⁹ In fact, in a 2008 opinion paper, the ICRC publicly presented the prevailing legal opinion on the definition of IAC and NIAC under IHL.

the Red Cross (ICRC) Opinion Paper, March 2008, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', p.1

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ See R. Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts' (2009) 91(873) International Review of the Red Cross 35, 44–8 (Bartels, the Historical Evolution). Cassese defines this period as ending at the time of the Spanish Civil War (1936–39), see A. Cassese, 'Civil War and International Law' in A. Cassese (ed.), *The Human Dimension of International Law: Selected Papers* (2008) 111, 113–14., see also: Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", Wilmshurst (ed.) *International Law and the Classification of Conflicts* (OUP, 2012)

¹⁹ See L. Oppenheim, *International Law, Vol. I: The Law of Peace* (2nd edn, 1912) 12, para 13: 'States solely and exclusively are the subjects of International Law.', See also: Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", Wilmshurst (ed.) *International Law and the Classification of Conflicts* (OUP, 2012)

²⁰ Article 2 of the Geneva Conventions, <https://ihl-databases.icrc.org/en/ihl-treaties/gci-1949/article-2?activeTab=>, also see: How Is the Term "Armed Conflict" Defined in International Humanitarian Law? International Committee of the Red Cross Opinion Paper 2024, www.icrc.org. visited on 22/10/2024.

²¹ L. Oppenheim, *International Law, Vol. II: War and Neutrality* (1st edn, 1906) 67., L. Moir, *The Law of Internal Armed Conflict* (2002) 5 et seq. (Moir, *Internal Armed Conflict*).

²² Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", Wilmshurst (ed.) *International Law and the Classification of Conflicts* (OUP, 2012)

²³ Ibid.

²⁴ Ibid.

²⁵ As the ICRC noted in its 2016 Commentary, "Article 2(1) encompasses the concepts of 'declared war' and 'armed conflict'. Both trigger the application of the Geneva Conventions but cover different legal realities, the latter being more flexible and objective than the former" and it would be "premature to conclude the demise of the concept of declared war, even if its progressive decline cannot be ignored". See: ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 2*, ICRC, Geneva / Cambridge University Press, Cambridge, 2016, para. 201–209 (Art. 2): <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>.

²⁶ Ibid.

²⁷ Statutes and Rules of Procedure of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986 (amended in 1995 and 2006), Art. 5(2) (g): <https://shop.icrc.org/statutes-and-rules-of-procedure-of-the-international-red-cross-and-red-crescent-movement-pdf-en.html>.

²⁸ A model *rappel du droit*, a document used as part of the ICRC's bilateral dialogue with parties to conflict, can be consulted in the annex to this paper.

²⁹ Statutes of the International Red Cross and Red Crescent Movement, art. 5, para. 2(g), also see International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?'

3. Application of law during “armed conflict.”

3.1 International armed conflict (IAC)

ICRC expresses that in ‘International Armed Conflict (IAC), Common Article 2 to the Geneva Conventions of 1949 shall apply. According to this provision, IACs are those that oppose ‘High Contracting Parties’, which means states.³⁰ An IAC occurs when one or more States have recourse to armed force against another State, regardless of the confrontation's reasons or intensity.³¹ Relevant rules of IHL may be applicable even in the absence of open hostilities. The existence of an IAC, and as a consequence, the possibility of applying International Humanitarian Law to this situation, depends on what happens on the ground.³² It is based on factual conditions. ICRC further clarifies that there may be an IAC, even though one of the belligerents does not recognize the government of the adverse party.³³ The Commentary of the Geneva Conventions of 1949 confirms that ‘any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts or how much slaughter takes place.³⁴ The International Criminal Tribunal for the Former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the *Tadic* case, the Tribunal stated, “an armed conflict exists whenever there is a resort to armed force between States”.³⁵ Other international bodies have adopted this definition since then.³⁶ In short, any use of arms between two States brings the Conventions into effect.³⁷ ‘An

international armed conflict exists if one party uses force of arms against another party. [...] The use of military force by individuals or groups of persons will not suffice’.³⁸ An IAC does not exist in cases where the use of force results from an error (e.g. involuntary incursion into foreign territory, wrongly identifying the target) and when the territorial State has consented to an intervention.³⁹

3.2 Classification of an IAC by Proxy:

Sufficiently intense violence taking place between non-state armed groups (NSAGs) and states is classified as a NIAC. However, when one state exercises overall control over an NSAG fighting against another state, the conflict is classified as an IAC between the two states.⁴⁰ An NSAG under the overall control of a state is subordinated to that state as its de facto organ, and members of the group become the equivalent of agents of the state. As a result, fighting between the group and an opposing state does not give rise to a NIAC. Instead, the situation is classified as an IAC between the state exercising overall control over the NSAG and the state fighting that NSAG.⁴¹

Similarly, a state is an occupying power when it exercises overall control over de facto local authorities or other local organized groups that effectively control all or part of a territory of another state. Such an occupation by proxy would be examined using an adaptation of the effective control test for occupation by considering whether the test’s conditions are met by agents controlled by that state or acting on its behalf.⁴²

³⁰ International Committee of the Red Cross (ICRC), Opinion Paper, March 2008, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’

³¹ Ibid.

³² Ibid.

³³ “It is irrelevant to the validity of international humanitarian law whether the States and Governments involved in the conflict recognize each other as States”: Joint Services Regulations (ZDv) 15/2, in: D.Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 45.

³⁴ J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 32., see also: International Committee of the Red Cross (ICRC), Opinion Paper, March 2008, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’

³⁵ ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-I-A, 2 October 1995, para. 70., see also: International Committee of the Red Cross (ICRC), Opinion Paper, March 2008, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’

³⁶ : International Committee of the Red Cross (ICRC), Opinion Paper, March 2008, ‘How is the Term “Armed Conflict” Defined in International Humanitarian Law?’

³⁷ D. Schindler, *The different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 131.

³⁸ D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 40, it is mentioned by the German Joint Services Regulations (ZDv) 15/2.

³⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), <http://www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx>, visited on 23/10/2024. See also: INTERNATIONAL COMMITTEE OF THE RED CROSS (2009). *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*. Volume 91 Numbers 873. Available from <https://www.icrc.org/en/doc/assets/files/other/irrc-873-vite.pdf>, visited on 23/10/2024.

⁴⁰ This position is widely supported; the International Court of Justice (ICJ), which held that the overall control test was not dispositive for state responsibility, found the test dispositive for conflict-classification purposes – that is, the classification of IACs by proxy. See: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment, merits, ICJ GL No. 91, ICGJ 70 (ICJ 2007), 26 Feb. 2007, para. 404–406. For the ICRC’s detailed position on IACs by proxy, see: ICRC, *Commentary on the First Geneva Convention*, 2016, para. 271–273 (Art. 2). See also: HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? INTERNATIONAL COMMITTEE OF THE RED CROSS OPINION PAPER 2024

⁴¹ Ibid.

⁴² Ibid., The adapted effective control test would thereby have the following formulation:

- the armed forces of a state or agents controlled by the state are physically present in a foreign territory without the consent of the local government effectively in place at the time of the invasion
- the local government effectively in place at the time of the invasion has been or can be rendered substantially or completely incapable of exerting its powers by virtue of the foreign forces’ unconsented-to presence or by virtue of agents controlled by them

3.3 Conflicts Involving Multinational Forces:

As stated above, international organisations may become parties to an IAC or a NIAC. The question then arises of who the parties to the conflict are: the individual member states that contribute their troops to that force (troop-contributing countries, or “TCCs”), the organization itself, or both the organization and some or all of the TCCs.⁴³ Answering this question requires determining to whom the sum of the multinational force’s actions are attributable. IHL is silent on the issue of attribution.⁴⁴ To ascertain under what circumstances the actions of multinational forces can be ascribed to international organisations and the TCCs, one must rely on the general principles of public international law without specific criteria in IHL. When a state or an international organisation has authority over the actions of the forces, it can be held accountable for those acts. This usually corresponds to the command-and-control structure of the forces. Therefore, which entity or entities have command and control over the military operations is the decisive question in the presence of a multinational force. Sometimes, the TCC transfers most, but never all, of the command and control to the organisation; in these situations, only the organisation should be regarded as a party to the conflict.⁴⁵ In other situations, the TCCs maintain adequate authority and control to be considered separate conflict parties.⁴⁶

3.4 Non-international armed conflict (NIAC):

A larger category of armed conflicts within States often involves a group of people who are armed and ready to fight for the goal of seizing governmental power. Sometimes, conflicts are matters of organized crime as opposed to politics. For these groups, money is the driving force. In contrast to those involved in secessionist movements, these groups are typically willing to stay in the same area as other groups, regardless of how the conflict turns out.⁴⁷ Most armed conflicts are fought by regular armies and militias and armed civilians with little discipline and ill-defined chains of command. Such clashes are, in fact, often *guerrilla wars* without clear front lines.

Two main legal sources must be examined to determine a NIAC under international humanitarian law: a) common Article 3 to the Geneva Conventions of 1949; b) Article 1 of Additional Protocol II. Common Article 3 applies to ‘armed

conflicts not of an international character occurring in the territory of one of the High Contracting Parties’. These include armed conflicts involving one or more non-governmental armed groups.⁴⁸ Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have been universally ratified, the requirement that the armed conflict must occur ‘in the territory of one of the High Contracting Parties’ has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.⁴⁹ Further, Common Article 3 and subsequent rules of IHL applicable in NIAC require a non-state party to a conflict ‘to possess organized armed forces. This means, for example, that these forces have to be under a certain command structure and have the capacity to sustain military operations.’⁵⁰ To distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots, or acts of banditry, the situation must reach a certain threshold of confrontation.⁵¹ It has been generally accepted that the lower threshold found in Article 1(2) of APII, which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3.⁵² A more restrictive definition of NIAC was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts “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”.⁵³ ‘The non-state party is under responsible command’ and ‘The non-state party exercises such control over a part of its territory’ as to enable [it] to carry out sustained and concerted military operations and to implement [AP II], can be further clarified.⁵⁴ “Responsible command” indicates a certain organized structure within the NSAG, even if it does not have a hierarchical military organization similar to those of regular armed forces. Such a responsible command structure needs to impose discipline among the group members and plan and carry out military operations.⁵⁵ A responsible command permits, in turn, the criteria of “non-state party exercises “such control over a part of its territory

• the foreign forces or agents acting on their behalf are in a position to exercise authority over the territory concerned (or parts thereof) in lieu of the local government.

⁴³ HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? INTERNATIONAL COMMITTEE OF THE RED CROSS, OPINION PAPER 2024

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ R. Williams Ayers, A World Flying Apart? Violent Nationalist Conflict and the end of the Cold War, *Journal of Peace Research*, Vol. 37, no. 1, 2000, pp.105-117; see also Armed Conflict Report 1993, 1995 and 1998, Project Ploughshares, Institute of Peace and Conflict Studies, Waterloo, Ontario (Canada).

⁴⁸ International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, How is the Term “Armed Conflict” Defined in International Humanitarian Law?

⁴⁹ Ibid.

⁵⁰ ICTY, Trial Chamber, Prosecutor v. Haradinaj et al., judgment, 3 April 2008, case No. IT-04-84-T (hereinafter “Haradinaj”), para. 38; see also: ICTR, Trial Chamber, Prosecutor v. Musema, judgment, 27 Jan. 2000, case No. ICTR-96-13-T, para. 248–251; Boskoski & Tarculovski, para. 196–197.

⁵¹ How Is The Term “Armed Conflict” Defined In International Humanitarian Law? International Committee Of The Red Cross Opinion Paper 2024

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

as to enable [it] to carry out sustained and concerted military operations and to implement condition to be fulfilled.”

The ICTY identified the threshold of an organization as a requirement for the classification of an NIAC and produced a list of indicators of an armed group’s organization. Indicators of the organization include *inter alia*, the existence of a command structure and disciplinary rules, the existence of a headquarters, the fact that the group controls a certain territory, the ability of the group to gain access to weapons or other military equipment, recruits and military training the group’s ability to establish a unified military strategy and use military tactics the group’s ability to plan, coordinate and carry out military operations, including troop movements and logistics the group’s ability to speak with one voice and negotiate and conclude agreements such as ceasefires or peace accords.⁵⁶ In this context, it must be reminded that Additional Protocol II “develops and supplements” common Article 3 “without modifying its existing application conditions”.⁵⁷ This means that this restrictive definition is relevant for the application of Protocol II only but does not extend to the law of NIAC in general. The Statute of the International Criminal Court, in its article 8, para. 2 (f), confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II.⁵⁸ M. Sassoli writes, “Common Article 3 refers to conflicts ‘occurring in the territory of one of the High Contracting Parties,’ whereas Article 1 of Protocol II refers to those ‘which take place in the territory of a High Contracting Party.’ “According to the aim and purpose of IHL, this must be understood as simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not ‘non-international armed conflicts’, there would be a gap in protection, which states’ concerns about their sovereignty could not explain. Those concerns made the law of non-international armed conflicts more rudimentary. Yet concerns about state sovereignty could not explain why victims of conflicts spilling over the territory of several states should benefit from less protection than those affected by conflicts limited to the territory of only one state.”⁵⁹

3.5 NIACs involving coalitions

In a support-based approach, “NIACs involving coalitions of multiple states, NSAGs, or supranational organizations raise a question related to the intensity threshold. Traditionally, for a situation of violence to be classified as a NIAC, the intensity of the violence between each individual state and the opposing NSAG, or between NSAGs, must reach the required intensity threshold. However, when an entity – a state, an NSAG, or an international organization – supports parties to pre-existing NIACs, the supporting entity might not itself necessarily enter into such confrontations with the adversary

to reach the threshold of violence required to constitute a separate NIAC. Rather, the supporting entity’s involvement might take the form of logistical support, intelligence activities for the benefit of one party over another, or participation in the planning and coordination of military operations. These actions may effectively make the supporting entity a de facto co-belligerent while illogically allowing it to avoid responsibility for its IHL obligations and simultaneously claim protection from direct attacks. As a result, in the view of the ICRC, the classical approach expounded in Tadic must be complemented by a support-based approach to third-party operations in pre-existing NIACs.”⁶⁰

3.6 Incorporation of an Armed Group into a Party:

Conflicts can sometimes involve dozens of armed groups fighting each other in varying forms of alliances and pacts, making it difficult to identify discrete parties to these conflicts. “Sometimes, armed groups, including so-called “self-defence forces”, form part of a state’s armed forces. Armed groups that are either incorporated by law as organs of the state or are empowered by law to conduct hostilities on the state’s behalf are incorporated into the state’s armed forces for the purposes of classification. Armed groups that are otherwise under a command responsible to a state form part of the state’s irregular armed forces for the purposes of classification. Armed groups are also considered incorporated into a party for the purposes of classification when those groups are under the command and control of a “parent” NSAG”⁶¹

Inferences of distinction between International armed conflict and Non-international armed conflict

International armed conflicts are governed by the complete provisions of the 1949 Geneva Conventions, the Hague Conventions that preceded them, and Additional Protocol I of 1977.⁶² Numerous articles in these treaties establish a fairly comprehensive body of rules pertaining to the conduct of hostilities (known as “Hague Law”) and complex regulations pertaining to the protection of those who do not participate in or no longer participate in hostilities (known as “Geneva Law”).⁶³ On the other hand, only a small number of treaty rules apply to non-international armed conflicts. They are essentially limited to Article 8(2) (c) and (e) of the ICC Statute, the provisions of Additional Protocol II of 1977, and Common Article 3 of the 1949 Geneva Conventions. Only those who do not or no longer participate in hostilities and who do not have laws governing the conduct of hostilities are covered by Common Article 3. Additional Protocol II, which has fewer than 20 substantive provisions, and those parts of the ICC Statute dealing with non-international armed conflicts extend, somewhat, the rules relating to the protection of victims of armed conflict and introduce some modest rules relating to the conduct of hostilities⁶⁴ but fall far short of

⁵⁶ Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, Wilmshurst (ed.) International Law and the Classification of Conflicts (OUP, 2012)

⁵⁷ Statute of the ICC, art. 8

⁵⁸ Statute of the ICC, art. 8 para. 2 (f): “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”

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, Wilmshurst (ed.) International Law and the Classification of Conflicts (OUP, 2012)

⁶³ *ibid.*

⁶⁴ *Ibid.*

establishing a regime of international humanitarian law close to that established for international armed conflicts.⁶⁵

The lines separating international and non-international armed conflict are becoming less distinct, and the laws governing these two types of conflict are becoming more uniform.⁶⁶ Recent treaties govern the conduct of participants in an armed conflict, which apply to all situations of armed conflict without distinction. Such treaties include the Biological Weapons Convention of 1972, the Chemical Weapons Convention of 1993, the Convention Prohibiting Anti-Personnel Land Mines 1997, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999, and the 2001 amendment, which extends the Convention on Conventional Weapons and its protocols to non-international armed conflicts.⁶⁷ The Appeals Chamber of the ICTY in the *Tadić (Appeal on Jurisdiction)* has stated that “notwithstanding ... limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules ... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.”⁶⁸ Today, the distinction between international and non-international armed conflicts is much less important since customary international law fills in the gaps left by treaty law and offers a wider set of regulations governing non-international armed conflicts.⁶⁹ The idea that customary international law rules apply to non-international armed conflicts in addition to those found in Common Article 3 and Additional Protocol II seems to run counter to the previous report of the Commission of Experts, which was established by the Security Council to look into humanitarian law violations in the former Yugoslavia.⁷⁰ The distinction between the law applicable in international and non-international armed conflicts is blurring; however, whenever States have been presented with opportunities to abolish the distinction, they seem reluctant to do so.⁷¹ Furthermore, it cannot be denied that the status of an armed conflict affects two important aspects of international humanitarian law: the regulations governing the status of fighters and the rules governing the detention of both combatants and civilians.⁷²

4. Conclusion

Based on the analysis, it can suggest the following definitions, which are in line with the strongly held legal opinion, as also recommended by the ICRC in its 2008 opinion paper: First, extended armed confrontations between governmental forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions], are considered non-international armed conflicts. International armed conflicts occur whenever armed force is used between two or more States. The parties to the conflict must display a minimum degree of organization, and the armed confrontation must reach a minimum level of intensity. The law that applies to transnational conflicts between a foreign State and a non-state group is the law of international armed conflicts where the foreign State intervenes without the territorial State's consent. In the case of conflicts with non-state groups on the territory of another State, there is little reason to have the more limited regulation of non-international conflicts as the conflict is not an internal matter.

⁶⁵ Ibid.

⁶⁶ See L. Moir, ‘Towards the Unification of International Humanitarian Law?’ in R. Burchill, N. White and J. Morris (eds), *International Conflict and Security Law* (2005) 108.

⁶⁷ Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, Wilmschurst (ed.) *International Law and the Classification of Conflicts* (OUP, 2012)

⁶⁸ *Tadić Jurisdiction*, para 127.

⁶⁹ Ibid.

⁷⁰ See Final Report of the Commission of Experts Established Pursuant To Security Council Resolution 780(1992), S/1994/674 (27 May 1994) 13, para 42.

⁷¹ Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’, Wilmschurst (ed.) *International Law and the Classification of Conflicts* (OUP, 2012)

⁷² Compare art. 8(2)(a) and (b) with art. 8(2)(c) and (e) of the ICC Statute. The Pre-Trial Chamber of the ICC has regarded the difference in criminalization of attacks on civilian objects as reflecting a difference in international humanitarian law. The Prosecutor v Bahar Idriss Abu Garda, ICC-02/05-02/09, Confirmation of Charges Decision (Pre-Trial Chamber), 8 February 2010: ‘The Majority notes that, while international humanitarian law offers protection to all civilians in both international armed conflict and armed conflict not of an international character, the same cannot be said of all civilian objects, in respect of which protection differs according to the nature of the conflict.’