THE VIII INTERNATIONAL CONFERENCE FOR YOUNG RESEARCHERS "IHL DEVELOPMENT: NEW AGENDA AND REALITY CHECK"
THE VIII INTERNATIONAL CONFERENCE FOR YOUNG RESEARCHERS "IHL DEVELOPMENT: NEW AGENDA AND REALITY CHECK"

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FOREWORD

The Russian-Armenian University in partnership with the Delegation of the International Committee of the Red Cross (ICRC) in Armenia annually organizes Yerevan International Conference for Young Researchers on International Humanitarian Law. The 8-th edition of the Conference marked with the slogan “IHL Development: New Agenda and Reality Check”, was held in Yerevan, Armenia from November 19 to November 21, 2015.

The Conference is aimed at creating a sustainable platform for young researchers to discuss the challenges of modern armed conflicts from the perspectives of the International Humanitarian Law, International Human Rights Law and International Criminal Law.

The First Conference took place in April 2007 and since then became one of the most significant events held in Armenia in the sphere of International Law and particularly International Humanitarian Law.

The first eight editions of the Conference hosted young researchers from almost all the CIS countries, as well as from Brazil, Czech Republic, Estonia, Georgia, Hungary, India, Iran, Israel, Italy, Netherlands, Poland, Peru, Switzerland, United Kingdom and United States of America. During the events broad range of topics such as Status of Private Military Companies and Private Security Companies under International Humanitarian Law, The Status of Non-Privileged Categories of Persons Participating in Armed Conflicts (Unlawful Combatants, Mercenaries, Terrorists, Pirates), Status of Participants of Modern Armed Conflicts, War Crimes and their Contemporary Interpretation, Implementation of IHL Norms and War Crimes and Crimes against Humanity Repression, Interaction between International Humanitarian Law and International Human Rights Law, IHL compliance mechanisms were debated. The best research papers presented during the previous editions of the Conference, as well as the current one, were and will be published in a special volume. A survey conducted among former participants, revealed that more than 80% of former participants intend to return to the Conference. The stated confirms once again that the objective of the Conference, which was creation of a solid forum for young researchers involved in the International Humanitarian Law, International Human Rights Law and International Criminal Law, has been achieved. The forum is recognized and continues to enlarge the scope of the topics discussed and countries participating.

Organizing Committee of the Conference
November 07, 2016, Yerevan, the Republic of Armenia
Paola Diana Reyes Parra  
Legal Adviser of the Office of International Law, MFA Peru, Geneva Academy of International  
Humanitarian Law and Human Rights

Abstract

The engagement with NSAGs is important for their compliance with IHL, which has an  
impact on the protection of the civilian population, in particular on the possibility to access humanitarian assistance. However, through counter-terrorism measures, states have been limiting individuals/organizations from “supporting” terrorism. This approach has restricted the possibilities to establish constructive IHL dialogue with NSAGs which qualify as such under IHL. Indeed, under this counterterrorism measures, humanitarian organizations would be seen as supporters to the terrorist organization. There is an overlapping point in both counter-terrorism legislation and IHL – they fight against attacks on civilian population, but they should not counter each other and put humanitarian actors before the choice between them. That is why it is an important reason that the engagement of NSAGs, lawful under IHL, may not be criminalized by counterterrorism measures.

Introduction

The 9/11 resulted in an unprecedented response to the threats posed by international terrorism, subsequently it shaped in the doctrine of the “war on terror” and declaration of a novel type of armed conflict. Moreover, the counter-terrorism context blurred the border lines between law enforcement operations against terrorist organisations and the situations constituting de facto armed conflicts involving non-state armed groups (“NSAGs”).

The NSAGs have an impact on humanitarian matters in armed conflicts. However, the cornerstone of the international legal order is the principle of the sovereign equality of states. States may pursue various aims by refusing to qualify the situations of hostilities against NSAGs as armed conflicts and labelling them as anti-terrorist operations, and, accordingly, by denying the legal status and role of the non-state party to an armed conflict. This has detrimental effect on the International Humanitarian Law (“IHL”) protection of the civilian population affected by the situation of a de facto armed conflict, since one cannot expect that an NSAG applies IHL if one does not recognise it as a party to the conflict.

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1 See BERNARD, V., ‘Editorial’ (2011) 93 International Review of the Red Cross 883, at p. 624. In fact, during 2011, there were at least 48 NIAC around the world.
The paper focuses on the challenges linked to the engagement of NSAGs to comply with the IHL in the context of the phenomenon of terrorism. The main emphasis of the paper is on the challenges accompanying the attempts to engage NSAGs to comply with IHL in light of the counter-terrorism measures, in particular because of the criminalization of the interaction with NSAGs, labelled as terrorist organisations.

The conclusion highlights that the engagement with NSAGs is important for their compliance with IHL, which has an impact on the protection of the civilian population, in particular on the possibility to access humanitarian assistance. However, through counter-terrorism measures, states have been limiting individuals/organizations from “supporting” terrorism. This approach has restricted the possibilities to establish constructive IHL dialogue with NSAGs which qualify as such under IHL. Indeed, under this counterterrorism measures, humanitarian organizations would be seen as supporters to the terrorist organization. There is an overlapping point in both counter-terrorism legislation and IHL – they fight against attacks on civilian population, but they should not counter each other and put humanitarian actors before the choice between them. That is why it is important reason that the engagement of NSAGs, lawful under IHL, may not be criminalized by counterterrorism measures.

I. Engagement of NSAGs to comply with international humanitarian law in non-international armed conflict

The possibility to undertake actions involving NSAGs is regulated by two sets of norms. The first category which relies on IHL promotes humanitarian engagement with NSAGs in NIACs for the purpose of promoting compliance with the international rules and assisting civilian populations. The second category concerns counter-terrorism measures that through domestic laws/multilateral norms prohibit some acts which may in fact constitute such engagement.

The simultaneous application of these sets of norms might give rise to contradictions. Difficulties arise due to the collision between the mentioned categories of provisions, for those engaged in the providing of humanitarian assistance in armed conflicts involving certain NSAGs designated as terrorist organizations. Particularly, “the autonomous negotiation between independent humanitarian organizations and all parties to conflict” may be problematic because it may be viewed as a sort of support to the terrorist objectives.

This Part provides an overview of the concept of the humanitarian engagement with NSAGs. In particular, it outlines the notions and the applicable framework of engagement.

1. Engaging NSAGs to comply with IHL

The majority of the armed conflicts are of non-international character, i.e., these armed conflicts involve NSAGs as parties thereto. The experience does indicate that the lack of compliance

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2 Idem, at p. 624.

3 A NIAC is a “conflict not of an international character occurring in the territory of one of the High Contracting Parties”. See, common article 3 to the Geneva Conventions of 1949 and article 1 (1) of the Protocol Additional II to the Geneva Conventions.
by such groups with legal requirements constitutes a challenge for the protection of the civilian population.\(^1\)

The efforts directed at enhancing compliance with international legal requirements by NSAGs are referred to as “engagement” of such groups. These measures are exercised through “a variety of means, especially awareness-raising, dissemination, persuasion, technical support/capacity-building, negotiation, dialogue, and advocacy.”\(^2\)

Compliance with IHL by armed groups presupposes that they are bound by these rules. There are different ways to explain the legal nature of IHL obligations imposed on NSAGs.

Some commentators focus on the principle of effectiveness whereby a NSAG exercising effective control over a part of the territory of a state is bound by the obligations of that state. Others argue that there exists a customary international law rule according to which NSAGs bear the obligations accepted by the state against the government of which they are fighting.\(^3\)

These approaches have the disadvantage of linking NSAG obligations to those accepted by the governments against which they are fighting. However, it is considered preferable to receive a commitment by the group itself.\(^4\) Indeed, it is more effective to obtain respect of a rule by its acceptance by the group itself.\(^5\)

IHL applicable in NIAC binds non-state party: common article 3 to the Geneva Conventions of 1949 (“GCs”) refers to “each party to the conflict.”\(^6\) Further, this article encourages the parties to a NIAC “to bring into force, by means of special agreements, all or part of the other provisions” of the GCs. Thus, the parties to the conflict may conclude the “special agreements”. By doing so, they would be bound by IHL rules providing protection to the civilian population.\(^7\) Some of such agreements have been concluded under the auspices of the ICRC/UN.\(^8\)

**2. IHL and humanitarian assistance**

The primary concern of seeking to engage with NSAGs is the protection of the civilian population. However, the framework for engagement with NSAGs appears to be vague. States indeed have not given the power to them to restrict/grant humanitarian access in armed conflict. On the other hand, it can be argued that under IHL NSAGs should engage with humanitarian organizations in the delivery

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\(^5\) Idem, at p. 29-30.


\(^8\) For instance, in the armed conflicts in Sudan, Congo and Sierra Leone.
of assistance as well as humanitarian organizations may engage with NSAGs as a means to prevent violations of IHL\(^1\).

The legal framework regulating the delivery of humanitarian assistance in armed conflicts is IHL which adopts a narrow definition of humanitarian assistance restricted to life-saving materials.\(^2\) In this context, common article 1 to the CGs has established that states are bound to “respect and ensure respect” for the rules of these treaties, including common article 3, “in all circumstances”.

In addition, under the GCs, states have primary responsibility for the well-being of the civilian population.\(^3\) Thus, there is a state’s obligation to provide this humanitarian assistance.

Moreover, there is a right to initiative on the part of humanitarian/impartial organizations. Indeed, IHL has recognized that these organizations are essential in providing lifesaving goods to civilian population. To do this, however, they “must (...) seek the consent of the relevant party”\(^4\) and “must negotiate their access with NSAG”\(^5\). Although IHL does not mention a right of humanitarian organizations to engage/negotiate with NSAGs as such, it provides a basis for protection of the work of those organizations in armed conflict.\(^6\)

Common article 3 has an important wording because it uses the term “parties” which includes NSAG. By virtue of its paragraph 2, IHL provides legal grounds for impartial/humanitarian organizations to offer their services to the parties to the conflict, including NSAGs.\(^7\) In this context, “if an NSAG is strong enough to exert control over a territory, their consent for (...) agencies to operate on the territory is a prerequisite to safe and predictable access.”\(^8\)

\section*{II. Counter-terrorism laws limiting engagement with NSAG: criminalization of the material support for terrorism}

Since 9/11, there has been atendency to use the “terrorist” label to define NSAGs through the use of blacklists. This listing of NSAGs as terrorists groups has produced the proscription of any contact with the terrorist organization or the provision of “material support” to them, even if its purpose is to engage NSAGs on humanitarian grounds.

This Part analyzes these issues through the prism of the counter-terrorism regulations, particularly, UN SC counter-terrorism regimes and domestic counter-terrorism laws (from the US) criminalizing certain forms of engagement with listed NSAGs.

\begin{flushright}
\footnotesize
\textsuperscript{1}MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism…’ at p. 627-628.
\textsuperscript{2}See, GC IV, article 55 (referring to “necessary foodstuffs, medical stores”); AP I, at article 69 (listing “clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population”).
\textsuperscript{3}See, SANDOZ, Y., and others (eds), \textit{Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949} (International Committee of the Red Cross, Geneva, 1987), 1479.
\textsuperscript{4}MODIRZADEH, N., LEWIS D., and BRUDERLEIN, C., ‘Humanitarian engagement under counter-terrorism…’ at p. 626.
\textsuperscript{5}Idem, at p. 626.
\textsuperscript{6}Ibidem, at p. 625.
\textsuperscript{8}HOLLAND, E., ‘\textit{Holder v. Humanitarian Law Project} and the potential to cripple humanitarian assistance…’, at p. 16.
\end{flushright}
1. UN Policies and Resolutions

Since 1999, the UN Member States have been required to take actions against individuals considered as terrorists by the UN SC. Moreover, after the 9/11, the UN SC addressed international terrorism as a “threat to international peace and security”\(^3\). Through its Resolutions, the UN SC has established two regimes with sets of rules which are significant for humanitarian engagement\(^2\).

The counter-terrorism sanctions regime was first established by Resolution 1267 (1999)\(^3\). By virtue of this instrument\(^4\), the SC imposes the application of sanctions against designated individuals/entities associated with Al-Qaeda. These individuals/entities are placed on the Al-Qaida Sanctions List\(^5\). Among the measures that UN Members States are required to impose one can find ban on travel, arms embargo and freezing of funds\(^6\).

The SC issued Resolution 1373 (2001)\(^7\) sets out general counter-terrorism obligations for the UN Member States, for instance, to “[p]revent and suppress the financing of terrorist acts”\(^8\); to prohibit their nationals/entities from making “any funds, financial assets or economic resources or financial or other related services” for the benefit of persons suspected to commit/facilitate or participate in the commission of terrorist acts\(^9\). It also requires Member States to “[r]efrain from providing any form of support (…) to entities or persons involved in terrorists acts (…)”\(^10\).

2. US Criminal

At the domestic level, states have enacted legal tools against terrorism with effects for the engagement with NSAGs and the delivery of humanitarian assistance.

Regarding the US Material Support Statute, it must be considered that the Code of Laws of the US\(^11\) has included three US Federal statutes intended to target the provision of material support: the 18 USC §2339A\(^12\) makes it a criminal offence to provide material support/resources to individuals

\(^2\) The SC Resolutions represent binding obligations on UN Member States and must been implemented at the domestic level. See, articles 25 and 103 and Chapter VII of Charter of the UN.
\(^3\) See, UN SC Resolution 1267 (1999).
\(^6\) Idem, para. 4(a) and (b).
\(^7\) See, UN SC Resolution 1373 (2001).
\(^8\) Idem, para. 1 (a).
\(^9\) Ibidem para. 1 (d).
\(^10\) Ibidem para. 2 (a).
\(^11\) The Code of Laws of US codifies the federal laws of the US. The Title 18 of the USC is the criminal and penal code and contains the federal crimes and criminal procedure. The latter has in its Chapter 113B the reference to the terrorism (paras. 2331–2339D).
\(^12\) It was enacted by the Violent Crime Control and Law Enforcement Act of 1994 (9 P.L. 103-322, §120005, 108 Stat. 2022 (1994). It has been amended by the USA PATRIOT Act of 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004.
committing terrorist offences. The 18 USC §2339B makes it a criminal offence to provide material support/resources to a designated foreign terrorist organization ("DFTO"). The 18 USC §2339C criminalizes the provision of funds used in the commission of a terrorist offence.

In that context, the “material support or resources” has been described as “any property (…) or service, (…) lodging, training, expert advice or assistance, (…) communications equipment, facilities, (…) and transportation, except medicine or religious materials (…)”\(^3\). Under the Statute, the term “training” means “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”\(^4\). Also, the term “expert advice or assistance” is defined as “advice or assistance derived from scientific, technical or other specialized knowledge”\(^5\).

By these measures individuals may be held accountable in U.S. courts for material support provided to listed [NSAGs] for acts conducted anywhere in the world\(^6\).

3. *Holder v Humanitarian Law Project*

There have been criminal processes under the material support legislation\(^7\). One of the most important is the *Holder v. HLP* case\(^8\) where the US Supreme Court has upheld the constitutionality of the Statute that makes it a crime to knowingly provide “material support” to DFTOs.

The case was decided by the US Supreme Court in 2010 regarding the US Patriot Act\(^9\). In particular, the question was “whether 18 USC § 2339B(a)(1)’s criminal prohibitions on the provision of “training,” “expert advice or assistance,” “service,” and “personnel” to government-designated “terrorist organizations” are unconstitutional as applied to pure speech that promotes only lawful, nonviolent activities”\(^10\).

The plaintiffs wanted to know if the activities they wanted to engage in would violate the prohibition of material support to groups which are on the US terrorist list, and, if so, whether the Statute would contravene the US Constitution. Indeed, they argued that certain constitutional

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\(^1\) It was enacted by the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-32, §§303, 110 Stat. 1250. It was amended by the USA PATRIOT Act of 2001 and the Intelligence Reform and Terrorism Prevention Act of 2004.


\(^3\) 18 USC 2339A (b) (1). See also 2339B (g) (4) and 2339C (e) (13).

\(^4\) *Idem* 2339A (b) (2).

\(^5\) *Ibidem*2339A (b) (3).

\(^6\) PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny: Criminalizing humanitarian engagement’ (2011) HPCR Working Paper, at p. 3. The sanction for transgression of these prohibitions is imprisonment for term of up to 15 years and/or a fine of not more than $250,000 US dollars ("USD"). This quantity may increase until $500,000 USD in the case of an organization. See 18 USC 2339B(a).

\(^7\) For instance, for running a website providing links to jihadist websites (resulting in acquittal); for rebroadcasting a television network run by a designated terrorist organization (resulting in a guilty plea); or in the case of a criminal defense lawyer, for communicating to a reporter a statement made by a leader of a designated group (resulting in a guilty verdict). See, FRATERMAN, JUSTIN A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws…?’ at p. 8.


\(^9\) The USA Patriot Act was signed by the then President George Bush on 26 October 2001 as a response to the events of 9/11.

\(^10\) *Holder v. Humanitarian Law Project, Opening Brief for Humanitarian Law Project, 16 November 2009,* at p. i.
protections, including freedom of speech and association, and due process of law, precluded the US from enforcing the Statute against the Humanitarian Law Project’s activities. The US Supreme Court upheld the constitutionality of the Statute. According to Chief Justice Roberts, the Statute neither violates the Constitution nor is vague. Indeed, “fighting terrorism was an important enough matter to warrant criminal sanction even for forms of speech that would otherwise appear to fall under First Amendment protection”. Consequently, it is not unconstitutional to block speech and other forms of advocacy in support of DFTOs, even if such speech is intended to support such a group’s peaceful or humanitarian actions. For the Court, “any contribution to an organization facilitates that conduct”.

III. Contradictions between counter-terrorism measures and IHL rules: why the engagement of NSAG should not be criminalized

Part 1 has demonstrated that engagement with NSAGs is important for their compliance with IHL, which has an impact on the protection of the civilian population. Part 2 has showed that some states, however, have opposed NSAGs’ engagement and have adopted measures that criminalize the dialogue with NSAGs designated as “terrorist organizations”; considering a broad range of conducts that may affect the engagement with NSAGs and the provision of humanitarian assistance.

This Part highlights the importance of the engagement of NSAGs for their compliance with IHL and for the delivery of humanitarian assistance and fundamental basis of the reasons as to why such engagement should not be criminalized by counterterrorism measures.

1. Relevance of the engagement of NSAGs

The international community acknowledges the role of the engagement with NSAGs in enhancing their compliance with international legal rules and in promoting/ensuring the delivery of humanitarian assistance; and it recognizes the role that humanitarian/impartial organizations play in the engagement with NSAGs. Humanitarian actors cannot avoid contacts with NSAGs even in such issue as basic logistics of aid delivery. This constructive dialogue and engagement with NSAGs can

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3 PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny…’, at p 19.
5 PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny…’, at p. 19..
7 Idem.
8 PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, ‘Humanitarian action under scrutiny…’, at p. 3.
be effective and it can influence their behavior and enhance their compliance with international rules.

IHL sets out the legal framework regulating the delivery of humanitarian assistance in armed conflicts\(^1\). The IHL considers that because of common article 1 to the CGs, High Contracting Parties are bound to “respect and ensure respect” for IHL; and under the GCs, they have the primary responsibility for the well-being of the civil population.\(^2\) On the other hand, common article 3 to the GCs provides for the right of initiative on part of humanitarian organizations, by which they can offer their services to all the parties to the conflict, including NSAGs. There is, however, a saving clause: IHL provides that for such an offer and for humanitarian operations, such principles of humanitarian action as humanity, neutrality and impartiality must be observed. However, counterterrorism measures do not take these elements into consideration.

2. **The problematic of the meaning of material support**

The Statute prevents all possible forms of engagement with NSAGs. The criminal risk to which the humanitarian organizations are exposed will depend therefore of the understanding of the meaning of the term “material support” under the Statute’s purview\(^3\).

For instance, the “material support” refers to the prohibition of any “property” or “service”\(^4\). However, the definitions of these terms and others remain broad. For instance, according to the US Statute, the term “training” means “instruction or teaching designed to impart a specific skill, as opposed to general knowledge”\(^5\). But how to distinguish the teaching of “specific skills”, which are prohibited, from the allowed “general knowledge”? \(^6\)

It seems that the content of the Statute in terms of definitions has raised a broad understanding that has a dangerous consequence. In particular, humanitarian activities could be understood as provision of material support or resources. In this context, the training programs on IHL would be considered as “expert advice” or “training”; and humanitarian assistance activities could be viewed as “services” related to “expert assistance”\(^6\).

3. **Obligation not to interfere with the provision of humanitarian assistance**

Because of common article 1 to the CGs, states are bound to “respect and ensure respect” for these treaties “in all circumstances”. This obligation includes the requirement that High Contracting Party do all in their power to ensure that IHL is respected\(^7\). The US, as a High Contracting Party, has an obligation, therefore, to refrain from interfering with “the ability of other High Contracting

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\(^1\) See Section 4 of Chapter 1.


\(^3\) Modirzadeh, N., Lewis D., and Bruderlein, C., ‘Humanitarian engagement under counter-terrorism…’ at p. 632.

\(^4\) 18 USC 2339A (b)(1). See 2339B (g)(4) and 2339C (e)(13).

\(^5\) 18 USC para. 2339A (b)(2).

\(^6\) Fraterman, J.A., ‘Criminalizing humanitarian relief: are US material support for terrorism laws…’ at p. 21.

\(^7\) See Section 4.2 in Chapter 1.
Parties to fulfill their Convention and to refrain from interfering with the discretionary exercise of non-obligatory provisions\textsuperscript{1}.

This issue has implications with reference to the Statute. For instance, the US is bound to respect and ensure respect for common article 3 which permits the right of initiative\textsuperscript{2}. Consequently, if as a result of the Statute, the US prosecutes members of humanitarian organizations, then it may not only be violating its direct obligations under the GCs, but may also be preventing or hindering other Parties from fulfilling their obligations. So, the US would be in violation of its international obligations\textsuperscript{3}.

4. The engagement with NSAGs should not be criminalized

Humanitarian engagement as a wide range of measures undertaken by humanitarian actors is based on constructive dialogue with them. Without such dialogue one cannot facilitate access to affected civilians under the control of NSAGs. It is likewise impossible to promote/raise respect for IHL to obtain guarantees for humanitarian operations as sometimes only NSAGs can guarantee this in the territories under their control.

The counterterrorism legislation is so broad in its prohibition of providing material support that may stop a humanitarian organization from engaging some activities that include involvement with DFTOs. Under this legislation humanitarian organizations would be seen as supporters of DFTOs\textsuperscript{4} arising a number of detrimental consequences. For instance, humanitarian actors risk facing travel bans, asset freezing, criminal liability and reputational damage.\textsuperscript{5}

Such measures, which are based on political choice to list groups/persons as terrorists and, therefore, transforming one party to a conflict in a criminal, would deny any hope to people in need where assistance is vital.

Conclusions

The negotiation and engagement with NSAGs are important for their compliance with IHL, which has an impact on the protection of the civilian population, in particular on the possibility to provide them with humanitarian assistance\textsuperscript{6}. This becomes more evident when the civilian population is under control of such groups.IHL provides the legal basis for humanitarian engagement with NSAGs in NIACs. Indeed, common article 3 to the GCs encapsulates the right of initiative allowing humanitarian organizations to offer their humanitarian services to all parties to the conflict, including NSAGs.

\textsuperscript{1} FRATERMAN, J., ‘Criminalizing humanitarian relief: are US material support for terrorism laws…’ at p. 4.


\textsuperscript{3} FRATERMAN, J., ‘Criminalizing humanitarian relief: are US material support for terrorism laws…’ at p. 1 and 25.


\textsuperscript{5} Idem.

Despite the recognition of the importance of engaging with NSAGs, through counter-terrorism measures, states have been limiting individuals/organizations from “supporting” terrorism. This approach has restricted the possibilities to establish constructive IHL dialogue with NSAGs. However, by virtue of common article 1 to the GCs, States must refrain from an act impeding the needed of humanitarian assistance; and they must ensure that its domestic laws do not compromise its ability to act according with its duties.

Under IHL, the engagement of NSAGs may not be criminalized. The enactment of counterterrorism legislation prohibiting either the engagement with NSAGs or the offer of services by a humanitarian organization to NSAGs, regardless of whether such support is materialized, even respecting the standards under IHL, would be sufficient to constitute a violation of GCs, and could bring states into breach of its obligations under IHL.
Abstract
Since war has been an integral part during human life, man have always cherished the ideal of peace and have done efforts in both international and domestic area, to achieve this important matter. peace is the base of life and peacebuilding is the first rate goal of every nation. any part of the state can have a role in domestic peacebuilding, one of the important parts is private sector. Thus, the domestic private sector can have a key role, either in prevention of conflicts or in post-conflict situations. since the private sector benefits from establishment of peace, it seems that the more governments support this sector, the more they can get close to the ideal of peace. By using data analysis in this paper, we aim to specially study the role of private domestic sector of Iran, after oil nationalization, in peacebuilding. given that a huge part of economic growth of Iran, has depended on oil industry, the private sector of this industry have affected the tendency of the government for keeping the region safe, not only for this special sector, but also for advancement of all the other important private sectors, like private banks and holdings and etcetera...
Without any doubt as the private sector becomes stronger, it can be involved in government’s decisions and help peacebuilding and if the government support and foster private domestic sector, specially the strong and effective ones, the basis for establishment of peace in the region and inside the state, would be provided and thus, this support and protection by the time can take the form of bilateral between the state and the domestic private sector.

Introduction
Peace is commonly understood as the absence of hostility and retribution, peace also suggests sincere attempts at reconciliation, the existence of healthy or newly healed interpersonal or international relationships, prosperity in matters of social or economic welfare, the establishment of equality, and a working political order that serves the true interests of all.

In this article we want to get familiar with the domestic private sector and study its role in peacebuilding and what the role of domestic private sector can be in stability of peace. We dare to say, peace is the most important human concern and we have to find the ways for peacebuilding by paying attention to the factors that provide the context of its creation and domestic private sector can be one of these factors.

We will also study the domestic private sector of Iran and its role in stability of peace

This article consists of:
- **Section one:** on definitions and understanding peace and the ways to achieve it

Chapter one: Peace, the vision to reality
Chapter two: the domestic private sector
Chapter three: Relation between peace and domestic private sector

- **Section two:** domestic private sector of Iran and oil nationalization

Chapter one: The formation of domestic private sector in Iran

Chapter two: oil nationalization

Chapter three: the role of domestic private sector of oil industry in changing the approach of the government towards peace.

- **Conclusion**

**I. Section one**

*About definitions and understanding peace and the ways to achieve it*

To study the relation between peace and domestic private sector, first of all we have to define and understand their meanings and have a context about their formation, history and benefits. Here we represent these items and get familiar with them to achieve the goal which we have mentioned above.

**a. Chapter one: Peace, the vision to reality**

The ideal of peace has been humans concern since a very long time, it seems that the first king who gave importance to peace was Cyrus, the great king of Persia. He mentions in his charter that he has worked to make peace and he would never force anyone to accept his reign and people are free to choose their religion and so many nice ideas for making people lives peaceful. After the two world wars, achieving peace became the first rate concern of the nations and they were looking for a way to create and maintain peace. after the failure of the League of Nations, the first step taken by the international community was establishment of united nations, and after its establishment, peacebuilding became more prominent than ever. international community found that when peace has not established, relationships are not going well. peace is not a state to be achieved but rather a process to be maintained. Maintaining the peace is far more important than achieving it, because by time you achieve it, the maintenance of peace make it come true and without the element of maintenance, it means nothing. Nowadays world have found the importance of maintenance and that this element is the secret to the reality of peace.

There are so many ways that scholars have found for attain peace, for instance: Various political ideologies, Democratic peace theory, Capitalism peace theory, Mutual assured destruction, Isolationism and non-interventionism. we will define last one.

Proponents of isolationism and non-interventionism claim that a world made up of many nations can peacefully coexist as long as they each establish a stronger focus on domestic affairs and do not try to impose their will on other nations. Isolationism is a category of foreign policies institutionalized by leaders who asserted that their nations’ best interests were best served by keeping the affairs of other countries at a distance. non-intervention is a foreign policy that holds that political rulers should avoid alliances with other nations but still retain diplomacy and avoid all

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1. Peace: A World History by *Antony Adolf*  
wars unless related to direct self-defense. An original more formal definition is that non-interventionism is a policy characterized by the absence of interference by a state or states in the external affairs of another state without its consent, or in its internal affairs with or without its consent.  

The more we move forward, world’s tendency to attain and maintain peace become more important and every single day that passes, more people become aware of its importance. This is a great success that the world has become aware of the importance of peace.

**b. Chapter two: the domestic private sector**

The part of the economy that is not state controlled, and is run by individuals and companies for profit. sometimes referred to as the **citizen sector**. The private sector encompasses all for-profit businesses that are not owned or operated by the government. Companies and corporations that are government run are part of what is known as the public sector, while charities and other nonprofit organizations are part of the voluntary sector.

In most free-market economies, the private sector is the sector where most jobs are held. This differs from countries where the government exerts considerable power over the economy, like in the People's Republic of China.

The private sector is legally regulated by the state. Businesses within one country are required to comply with the laws in that country.

In some cases, industries and individual businesses have chosen to self-regulate by applying higher standards for dealing with their workers, customers, or the environment than the minimum that is legally required of them. In Iran, the rules for private domestic sector and their relation with their workers, regulates by government, such as in labor law and commercial law.

**Effective factors in importance of private sector**

The role of the private sector in different aspects of conflict resolution has received increasing attention in recent years. This is due to several factors. First, the private sector, domestic or multinational, is often present in contexts of armed conflict and exposed to its risks and impacts, which frequently compel it to act. Second, it has the capacities (human, resources, managerial and technical, among others) to intervene in different ways. Third, what has been called the ‘privatization of peace’ is underpinned by the wider global trend of privatizing services and functions traditionally provided by the state or the international community. In conflict contexts, states have frequently been described as ‘fragile’, that is unwilling or unable to provide essential services and functions to at least part of their populations – leaving the private sector, in many instances, to perform such roles.

**c. Chapter three: Relation between peace and domestic private sector**

there is an undeniable relation between peace and domestic private sector, they are somehow linked to each other and business needs peace to thrive, but at the same time, peace needs business to progress and consolidate.

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1. The doctrine of intervention (1915) by Henry G. Hodges.
The relationship between the private sector, conflict, and peacebuilding has received increased scholarly attention. Conflict in many societies has historically revolved around the allocation of privileges accrued to members of the economic elites. In this sense, business as a defender of the status quo is a prime factor in explaining internal conflicts.

Business has been recognized to be a key partner in overcoming conflict. In the domestic realm, private sector support, both material and nominal, has been found to be crucial for peacebuilding activity to prosper.¹

In the past ten years, international norms, standards, and agreements have complemented this concern by increasingly referring to the need for direct engagement of the private sector as an economic force in peacebuilding.

Peacebuilding Architecture of UN (PBA to refer collectively to the Peacebuilding Commission, the Peace Building Fund and the Peacebuilding Support Office) Founded in 2004, the UN Peacebuilding Commission has produced a wide variety of documents, many of which refer to the importance of including the private sector in peacebuilding tasks as well as designing strategies to favor and attract private investment as a condition for growth resumption after conflict.²

What I want to state is that the domestic private sector can have a more important role than the private sector as general in peacebuilding within the states, domestic private sector of any state can have a key role in preventing any conflict situation within the state, cause regardless of the services it can offer to protect peace, the private sector itself can make states willingly maintain the situation of peace, because states benefit from domestic private sector and their stability can be a good motive for states to work for maintenance of peace, as a result if any problem arise for the state and threaten the peace, domestic private sector would offer any help it could afford.

II. Section two

*domestic private sector of Iran and oil nationalization*

Despite the shift toward economic liberalization, domestic privatization in Iran is not new; it had already begun in the late 1980s, when the phenomenon was becoming common in both developed and developing countries. The policy was created by the first administration of Hashemi Rafsanjani in 1989. It has since been continued with its ups and downs throughout the Rafsanjani, Muhammad Khatami, and Mahmoud Ahmadinejad presidencies. For over two decades of privatization and economic liberalization policies in Iran, however, the state (including revolutionary and religious foundations) has remained the dominant force in the country’s economy.

After the oil nationalization in Iran, the immediate consequence was that the Iranian oil business was brought to a standstill, as the Britons who operated the Abadan refinery left the country and the international oil companies, supported by the British and American governments, refused to buy or transport Iranian oil. This led to an economic crisis and a move against the Mussadeq government by the Shah in the summer of 1952, which was met by huge and violent demonstrations in July. Iran broke off diplomatic relations with Britain in October. Mussadeq was driven to ever wilder extremes

². The Private Sector, Peacebuilding, and Economic Recovery. Angelika Rettberg. Page 6, para 3
and by August 1953 was proposing to abolish the parliament and depose the Shah. The Shah fled the country, but a military coup backed by the American Central Intelligence Agency and British MI6 (Operation Boot) swiftly restored him to power and arrested Mussadeq. The oil situation was not resolved until late in 1954, when agreement was reached with the oil companies and the British, and the National Iranian Oil Company took over the industry.  

**a. Chapter one: The formation of domestic private sector in Iran**

The history of privatization in Iran, dates back to four decades ago, early months of 1971. Under article 48 of the law of budget and plans in 1972, the state allowed to sell its profit facilities, to natural or legal persons. Also in 1975 it was decided to give 99% of state-owned in mother industries and 49% of private sector’s share, to workers and other groups. But privatization as a necessity and economic concern born after Islamic revolution and Iran’s war with Iraq. After the war and with the formulation of implementation of the first five-year economic development plan, the privatization was introduced earnestly in 1989. But this plan begin seriously in 2001 with a focus on centralization and privatization as intentionally executive agency of the third chapter of third development plan. The fourth development plan and notification of the general policies of article 44 of constitutional law has led to new and vast forms of privatization in the Islamic Republic of Iran.

Domestic Privatization is an economic policy to balance between state and market and it is more useful for market. Privatization refers to a series of actions in which different levels of control, ownership and management entrusts to private sector, from public sector.

This move is intended to increase the efficiency of economic activities carried out since privatization theoretically based on the idea that the market environment is established when the competition is in full operation and the private sector acts in a way to achieve economic efficiency. According to the Article 44 of the Iranian Constitution, the economy of Iran is to consist of three sectors: state, cooperative, and private; and is to be based on systematic and sound planning.

The state sector is to include all large-scale industries, foreign trade, major minerals, banking, insurance, power generation, dams and large-scale irrigation networks, radio and television, post, telegraph and telephone services, aviation, shipping, roads, railroads and the like; all these will be publicly owned and administered by the State.

The cooperative sector is to include cooperative companies (Bonyad) and enterprises concerned with production and distribution, in urban and rural areas, in accordance with Islamic criteria.

The private sector consists of those activities concerned with construction, agriculture, animal husbandry, industry, trade, and services that supplement the economic activities of the state and cooperative sectors.

A strict interpretation of the above has never been enforced in the Islamic Republic and the private sector has been able to play a much larger role than is outlined in the Constitution. In recent years, the role of the private sector has been further on the increase. Furthermore, an amendment of the article in 2004 has allowed 80 percent of state assets to be privatized.

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1. Richard Cavendish Published in History Today Volume 51 Issue 5 May 2001
In 2007, Supreme Leader Ayatollah Khamenei requested that government officials speed up implementation of the policies outlined in the amendment of Article 44, and move towards economic privatization. Khamenei also suggested that ownership rights should be protected in courts set up by the Justice Ministry; the hope was that this new protection would give an additional measure of security and encourage private investment.[2][3] Despite these statements, true official backing for privatization remains very slow due to political reasons. Some 80 percent of the companies subject to Article 44 of the Constitution would be transferred to public ownership, 40 percent of which will be conducted through the "Justice Shares" Scheme and the rest through the Bourse Organization. The government will keep the title of the remaining 20 percent. It is widely believed that if current governmental organizations are privatized they will need to become more efficient. At present many are not profitable due to large numbers of unnecessary employees hired by the government to reduce unemployment. Furthermore, many of these companies are subsidized by oil revenues. True privatization will inevitably lead to many unpopular job cuts and large scale layoffs.¹

b. Chapter two: oil nationalization

William Knox D'ArCY signed a contract with Muzaffar al-Din Shah Qajar in 1901, to explore and extract oil in Iran. The contract was known as Darcy contract, this contract caused domination of England over politic, economy, military and cultural of Iran for half of a century. Darcy contract was extended in another form with Reza Pahlavi in 1933.

But after World War II, Great Britain’s control over Iran's oil industry, criticized by Iranians in a gradual process. Nationalization of the oil industry project was approved in the parliament, by leadership of doctor Mossadeq. The law of nationalization of the oil industry was a proposal, signed by all members of the National Assembly's Commission on oil in 1951.

The proposed text to be adopted:

To the prosperity of Iranian nation and to help safeguard global peace, The following signatories, suggest that Iran's oil industry in all regions of the country without exception, declare national. It means all exploration, extraction and exploitation shall assign to the hands of government.²

As you can see in the above-mentioned text, to help safeguard peace is mentioned and it means legislators were aware of the fact that the nationalization of the oil industry is a step forward in helping to bring peace in the world and consequently bring peace within the country.

Nationalization of the oil industry and taking it from aliens was just the first step and the next was privatization, which needed more time and required development of this industry which was almost new at that times.

c. Chapter three: the role of domestic private sector of oil industry in changing the approach of the government towards peace.

¹. Wikipedia.com privatization in Iran
². Doctor Seyed Salman Safavi , International Centre for Peace Studies
Despite Iran’s long history of capital accumulation, industrial development, and the existence of non-energy resources, since early 1960s, natural resource revenues—oil in particular—have gradually come to dominate its economic structure, and dependency on oil revenues has in fact increased under the Islamic Republic. While the Iranian state has long played a central role in the economy, the growing importance of state-controlled oil revenues led to expanded state intervention. Therefore, control of the capital accumulation process inevitably moved from private capitalists to rulers and public sector bureaucrats.¹

The way of privatization has paved, since article 44 of the constitution law of Iran has interpreted in 2004. Thus investment, ownership and management declared permissible as bellow:

a. Large industry, mother industry (including large oil and gas downstream industry) and large mines(excluding oil and gas);
b. International trade activities within the framework of the country’s trade and foreign currency policies as long as it does not create a monopoly;
c. Banking and Insurance;
d. Power generation including production for domestic and export consumption;
e. Dams and large irrigation networks;
f. All post and telecommunications with the exception of mother telecommunications networks, transfer off frequencies and exchange and distribution of basic mail services

g. Roads and railways;
h. Aviation and shipping;

Three of large oil industry organizations in Iran:

- **Association of petroleum industry engineering and construction companies**, which consists of private sector companies operating in the engineering and implementation of plans and projects for the oil industry.

- **Society of Iranian petroleum industry equipment manufacturers**, which consists of more than 500 active members, which supplies a large percentage of equipment in this field.

- **Association of engineering and construction companies (oil and energy)**, which was formed by the top 6 companies in the field of engineering and construction in the oil, gas, petrochemical and energy. This association works in various fields of engineering and construction of oil and power industries.

This industry is one of the largest industries in Iran. 84% of the annual foreign exchange earnings of the country, belongs to the oil industry. The oil industry is one of the main advantages of Iran’s economy, as the huge supply of the national budget comes from oil sector. Many of the issues in oil industry have lodged to domestic private sector, such as drilling and investment for new projects and general contracting work.

**Different roles of domestic private oil industry on peacebuilding**

As the role of the private sector in the oil industry highlighting and holding the majority of the country’s capital, the government tries to bed stability and development of this sector of the oil industry, because government needs this sector to develop the oil industry. Development and

¹. **THE POLITICS OF PRIVATIZATION IN IRAN**. December 5, 2010 By Shirzad Azad
stability in this sector, requires establishment of peace within the country and in the region and with other states in the world, because the situation of peace, in the first step affects the oil price and cause Fluctuation. The domestic private sector requires achieving modern day technology for its growing needs and this is not possible except with peacebuilding.

In the preceding paragraph, we considered the role of the domestic private sector before the existence of conflict, but about the role of the domestic private sector, specially the oil industry after the start of conflict, we can say that the oil industry is very vulnerable when it comes to conflict. When the conflict begins, this sectors interest is in helping to end the conflict and establish peace as soon as possible to incur less damage. This sector is holding the majority of countries capital and can have financially and politically important role in peacebuilding. Even it can cause change in governments decisions and to achieve this important matter, this sector won’t hesitate financial aids.

**Conclusion**

Privatization at the local level, leads to distribution of national wealth among the people and they become more motivated to invest and do economic activities. When a large part of the national capital in any way is in the hands of the people, they do not know themselves apart from their government, their interests is tied to states interests and the Problems and issues that arises on a global scale for the government will also affect the private sector, this makes the domestic private sector pay more attention to the situation of the state in the world and protect the state against crisis and situations that endanger the peace and peacebuilding.

The conflict situation affects the efficiency of the domestic private sector and the private sector wants war to end and build peace as soon as possible, so it can help with a variety of financial or other aids to achieve peace and help peacebuilding within the state. This way the state will not be alone in the conflicts and the way to achieve peace will be smoother.
What is a non-international armed conflict (NIAC)? The Protocol Additional II to the Geneva Conventions of 12 August 1949 states that NIACs “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”\(^1\). The ICC Statute states that NIACs “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”\(^2\). Neither document applies to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”\(^3\). International judicial bodies follow those definitions (e.g. Prosecutor v. Tadić\(^4\), Prosecutor v. Mucić et al.\(^5\), Prosecutor v. Boškovski and Tarčulovski\(^6\), Prosecutor v. Milutinović et al.\(^7\) in ICTY; Prosecutor v. Brima et al.\(^8\), Prosecutor v. Sesay et al\(^9\) in the SCSL).

Common Article 3 to the Geneva Conventions of 1949 mentions “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”\(^10\). We can see that this definition is made “by contradiction” and refers us to the Common Article 2\(^11\).

Certainly, qualification of the situation is necessary primarily not for the legal science but for real people who need effective protections of their lives and rights in conditions of tensions and disturbances.

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\(^3\)Ibid. Art.8(d); Protocol II. Art.1(2).
conflict. The absence or the existence of an armed conflict determines the applicable law in the situation.

First of all, we need to note that even the Common Article 3 and the Additional Protocol II are not identical in their definition of NIAC. Two main problems rise here. The first one is the terms “in the territory of one of the High Contracting Parties” and “the territory of a High Contracting Party”. Without going deep into the theory of internationalized NIACs, we will just note that most often the provision of Common Article 3 is interpreted in this case as binding only the states-parties to the Conventions. In turn, the Additional Protocol speaks about conflict inside one state between its armed forces and opposition movements.¹

A narrow reading of this provision could reduce unreasonably the application of the Protocol. Fortunately, the interpretation is broader and includes any armed forces intervening on behalf of the government.

Secondly, the Additional Protocol II applies to situations of conflict between government armed forces and dissident armed forces but not between such groups. Anyway, the Additional Protocol develops and supplements Common Article 3 and cannot restrict its application. “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”.² Anyway, the restrictive application could contribute to “a gap in protection, which could not be explained by states concerns about their sovereignty. […]” Additionally, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda extend the jurisdiction of that tribunal called to enforce, inter alia, the law of non-international armed conflicts, to the neighboring countries.³

Looking at the ICC Statute definition of the NIAC, we can see that this instrument distinguishes serious violations of the Common Article 3 and other serious violations of the laws and customs of war. So, in case of such “other serious violations”, NIAC “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”. Some researchers speak about the two types of NIAC in this case, because we have new criteria of time. Others say that there is no any separation and the ICC definition is just trying to overcome the restrictions of Additional Protocol II. Anyway, practice goes the first way.

So where is the line between these internal tensions in the state and non-international armed conflict? If we look at the international courts' practice, we find some formulas which can be now named “classical” in this issue. Thus, ICTY defined NIAC in Tadić case as "whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". Subsequently, this definition was acknowledged in all relevant cases. Now there is no doubt that the situation of a non-international armed conflict includes cases

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² Ibid. P. 4.
where “several factions [confront] each other without involvement of the government's armed forces”\textsuperscript{1}.

We can state that two main criteria have formed in international practice: organization of the parties to a conflict and intensity of the conflict (e.g. \textit{Prosecutor v. Lubanga}\textsuperscript{2}, \textit{Prosecutor v. Tadić}\textsuperscript{3}. Report of the International Commission of Inquiry on Darfur\textsuperscript{4}). These criteria can be used to decide whether or not there is a non-international armed conflict in a certain situation.

Firstly, an armed group must satisfy a high enough level of organization to be a party to a non-international armed conflict (e.g. \textit{Prosecutor v. Jean-Paul Akayesu}\textsuperscript{5} in the ICTR). Looking at the practice of international judicial bodies, we can highlight major factors, which are taken into account to determine the organization level of the parties of NIAC: the internal hierarchy of an armed group; the command structure and rules; the existence of headquarters; the ability to get, transport and distribute weapons, including firearms (e.g. \textit{Prosecutor v. Lubanga}\textsuperscript{6}, \textit{Prosecutor v. Limaj et al.}\textsuperscript{7} and \textit{Prosecutor v. Haradinaj et al.}\textsuperscript{8}); the ability to coordinate with each other (e.g. \textit{Prosecutor v. Limaj et al.}\textsuperscript{9}). Moreover, an armed group must possess such a level of organization to have an objective opportunity to plan and conduct continuous military operations.

Secondly, clashes between government authorities and the armed group or between different armed groups must be of a higher level of intensity than “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. This requirement is necessary \textit{inter alia} for the distinction of armed conflicts and terrorist activities that are not regulated by international humanitarian law (e.g. \textit{Prosecutor v. Đorđević}\textsuperscript{10} in the ICTY). International practice takes into account the following factors: the seriousness of the attacks; the increase of armed clashes over time; the geographic distribution of armed clashes; the increase in the mobilization and distribution of weapons by both sides of the conflict (e.g. \textit{Prosecutor v. Lubanga}\textsuperscript{11} in the ICC; \textit{Prosecutor v. Tadić}\textsuperscript{12}, \textit{Prosecutor v. Mrkšić et al.}\textsuperscript{13} and \textit{Prosecutor v. Boškovski and Tarčulovski}\textsuperscript{14} in the ICTY). Furthermore, one of the main factors is the existence of tensions between the parties over an extended period of time before the confrontation can be qualified as a NIAC (e.g. \textit{Prosecutor v. Lubanga}\textsuperscript{15} and \textit{Prosecutor v. Al Bashir}\textsuperscript{16}). The ICTY in \textit{Haradinaj et al.}

\textsuperscript{3}Lubanga Judgment. Para.537.
\textsuperscript{6}Lubanga Judgment. Para.108.
\textsuperscript{8}Lubanga Judgment. Para.538.
\textsuperscript{9}Tadič Defense Appeal. Para.566.
\textsuperscript{11}Boškovski Judgment. Para.177-178, 193.
\textsuperscript{12}Lubanga Judgment. Para.234.
case also has resorted to the ingenious “position, stating that the notion of ‘protracted armed violence’ must therefore be understood broadly. It does not cover the duration of the violence only, but also covers all aspects that would enable the degree of intensity to be evaluated”\(^2\).

Actually, the length of confrontation should not be perceived exclusively as a condition of a temporary nature. Length of tensions is also an indicator of its intensity. In this vein, ICTY appealed to the criteria of length in *Prosecutor v. Tadić*. Practice also states that none of the above factors is not determinative, and the circumstances should be studied collectively and individually in each case (e.g. *Prosecutor v. Lubanga\(^3\)*). For example, the type of government forces involved, the number of fighters and troops involved, the types of weapons used, the number of casualties and the extent of the damage caused by the fighting can be taken into account.

D. Schindler comments on the requirement of intensity and the level of organization as follows: “as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. […] The hostilities are meant to be of a collective character, [i.e] they have to be carried out not only by single groups. […] Their [insurgents’] armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements”\(^4\).

Some researchers also raise a question of the significance of motive in non-international armed conflict. They say that there is NIAC only in the case when the political motive is the basis for a conflict. However, international practice does not support that concept. In particular, the ICTY in *Limaj* case abandoned this approach: “the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant”\(^5\). “The motives of armed groups are never uniform and cannot always be clearly identified. Many of them often carry out criminal activities such as extortion or drug-trafficking, while at the same time pursuing a political objective”\(^6\).

However, these qualifications actually raise more questions than answers. For example, how long a period of time is enough to be sure that the tensions can be qualified as a NIAC? We can find the reference of the 5-month period in the ICC practice (*Prosecutor v. Bemba Gombo\(^7\)*) but is it unconditionally determinative? Also, there are some cases in international practice, when certain conditions were deemed not necessary, though they may seem important from the first glance. So, active control over some territory or purposes of establishment of armed groups were directly deemed not necessary (by ICC in *Prosecutor v. Bemba Gombo* and ICTY in *Prosecutor v. Limaj*).

The International Committee of the Red Cross defines NIACs in its documents as “protracted armed confrontations occurring between governmental armed 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].

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\(^3\)Lubanga Judgment. Para.537.


\(^7\)ICC. *Prosecutor v. Bemba Gombo*, No.ICC-01/05-01/08. Pre-Trial Chamber II. Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo. 15 June 2009. Para.235.
The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization”¹. In my opinion, it is some kind of perfect definition, because it sets certain restrictions, so the standard is not too low, which is important in the current state of development of international human rights law and in the same time it is not too restrictive and it is able to provide the necessary protection for the participants of the conflict.

The problem of qualification of situations as armed conflicts is very relevant nowadays when new hotbeds of tensions appear in the world every year.

The importance of this paper lies in the fact that although at present we have a number of relevant conventions regarding different types of armed conflicts, these instruments do not contain precise standards that would stand to determine unambiguously the content of those types. Nowadays, we face practical intricacies where legal regimes may differ and it becomes difficult to understand whether this or the next situation is an international or a non-international armed conflict. A stress shall alongside be made on "internationalized" armed conflicts as well as the concept of occupation. I would examine their importance, what norms would be applicable to these situations, along with a brief case-law study. Not less attention may also be required to special types of armed conflicts (at some point controversial ones). And therefore the purpose of this paper would also be to examine such situations, what IHL rules might be applicable there, such as, in terms of the so-called "transnational" armed conflicts, along with their diverse manifestations.

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The Concept of Armed Conflict

Prior to qualifying any armed conflict there are two underlying questions that need to be satisfied. First, what were the reasons that the concept of 'armed conflict' was preferred above the concept of 'war'? And, second, what amounts to armed conflict?

Basically, there are two main reasons as to why the notion of 'armed conflict' was preferred above the concept of 'war'. First, the term 'war' carries the implication of violence between States or between armed groups within the boundaries of a State and which have a high intensive form of hostilities. To put this differently, as defined by legal scholar Detter, war is "a sustainable struggle by armed force of a certain intensity between groups of a certain size consisting of individuals who are armed, who wear distinctive insignia and who are subjected to military discipline under responsible command". Such a definition of war has been employed by national tribunals a number of times; however, as one can see, it is apparent that the concept of 'war' is very restrictive and thus excludes other types of hostilities that have less intensive forms (such as armed raids, border incidents and the like). At this, in order to provide appropriate protection to victims of armed violence the term 'armed conflict' was preferred not only to exclude the restrictive nature of the term 'war' but also because the concept of 'armed conflict', inter alia, includes hostilities that carry low-intensity forms. The second reason in this respect is a more legal one. In the past war had to be declared for humanitarian rules to be applied. However, the practice shows that 'declaration' clause

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was widely abused by States, and which thus led a number of times to improper protection of victims of hostilities. Given this, the term 'armed conflict' was set up in light of Common Article 2 of the Geneva Conventions 1949 and which indicates that "... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them". Consequently, the term 'armed conflict' provides for a better protection of victims of hostilities irrespective of its formalism.¹

As soon as the concept of 'armed conflict' was adopted, which happened pretty quickly by way of IHL documents and the UN General Assembly resolutions,² there followed the need to describe it. Interestingly, both the Geneva Conventions and their Additional Protocols are silent about the definition of armed conflict. But on the other hand, its definition is pivotal since the application of IHL rules vastly depends upon it. At this, the ICTY through its Tadic case lends a hand and provides a good description in regard to this question, and which held that:

"On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there."³

This statement of the Tribunal clearly indicates that international armed conflicts and non-international armed conflicts have different thresholds that must be met for IHL rules to be employed. Here the holding of ICTY points out that for IACs it would be sufficient that states resort to armed force, whereas speaking in terms of NIACs, it is needed that conflicts reach a certain level of intensity and the parties reach a certain level of organization.⁴ Moreover, even in the framework of NIACs there are different thresholds for Common Article 3 and AP II. I would examine all these situations, along with the thresholds and their differences in depth thereafter.

Furthermore, not less important is to understand the reasons as to why such a differentiation between armed conflicts emerged. In this respect, I provide two underlying reasons in response to this question. One reason and explanation goes back to the Second World War, where civilians and prisoners of war were most frequently maltreated beyond any reason. This impelled ICRC and the States to articulate a general framework designed to protect the wounded, sick, shipwrecked, civilians and prisoners of war in light of an inter-State armed conflict. As one can see, IHL was

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²Already in United Nations General Assembly Resolution 378 (V) (duties of States in the event of the outbreak of hostilities); more recently, for example; United Nations General Assembly Resolution 59/261 (children in armed conflict); Resolution 59/178 (mercenaries); Resolution 59/171 (new humanitarian order).
⁴Author: Frida Lindström, Supervisor: Prof. emer. Göran Lysén, Asymmetric warfare and challenges for international humanitarian law, Civilian direct participation in hostilities and state response, Master's Thesis in Public international Law 30 ECTS, Department of Law, Fall 2012, pp. 23-24.
initially drafted to cover IACs. However, it should not be forgotten that the question of non-international armed conflicts was not despised as well. It was envisioned in Common Article 3 to the Geneva Conventions, setting up the minimum standards to be respected, along with AP II relating to the Protection of the Victims of Non-International Armed Conflicts (although, with the caveat of a high threshold for its application). Another reason in terms of differentiation of conflicts lies in the reluctance of States to provide prisoner of war status in the framework of non-international armed conflicts. The reason for that is because States would rather consider these conflicts as matters falling entirely within their domestic jurisdiction and hence would regard the rebel factions as nothing more than criminals (thus, IHL protection is ebbled away). \(^1\) Despite the fact that international law is striving to mitigate the divergence between IACs and NIACs, their difference is hitherto relevant, particularly, in terms of protection of victims of hostilities. Such a mitigation is displayed by way of the adoption of human rights law and the ICC Rome Statute, along with the developments in the international prosecution by ICTY and ICTR. \(^2\)

**Law of International Armed Conflict**

*The Legal Underpinning of the International Armed Conflict*

Historically speaking, the regime of international armed conflict commenced to progressively extend as treaty law developed. Generally, there is an international armed conflict whenever two or more States parties to the Geneva Conventions are waging hostilities between one another. Consequently, the Geneva Conventions and AP I would apply.

Here, the main focus will be on the problematic aspects of IACs, the so-called 'internationalized' armed conflicts, along with the concept of occupation.

One problem rests on the concept of 'recognition'. The question to be asked here is: will the GCs and AP I be affected if a State or its regime is not recognized by a majority or even all of the States? History is evidence that when, for example, the US seized the Taliban forces the prisoner of war status was not granted based on the fact that the Taliban was not recognized as the legitimate regime of Afghanistan. Currently, such an argument is, however, discarded and the GCs along with AP I would be applied regardless of whether the State or its regime in question is recognized or not. A State entity which has acceded to the GCs or AP I and is engaged in an IAC, shall be regarded as a party to the conflict, even if not recognized by a majority or even all of the states. \(^3\) One example of this might be the Israeli-Arab War, wherein many Arab States did not recognize the State of Israel, but which nonetheless had no effect on the application of the Geneva Conventions. \(^4\)

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\(^2\) *Ibid*; The Statutes of these tribunals contain provisions criminalizing violations of humanitarian law in a non-international armed conflict, whereas the Geneva Conventions and the Additional Protocols do not contain provisions obliging States to penalize certain behavior in non-international armed conflicts. See art. 8 (2) ICC Statute; art 4 ICTY Statute; art. 3 ICTR Statute, which criminalizes violations of the laws and customs of war, includes violations of international humanitarian law in non-international armed conflicts: see *Prosecutor v. Dusko Tadic, Decision on the Defense Motion on Jurisdiction*, Trial Chamber II, 10 August 1995, §§ 58-60 at: [http://www.un.org/icty/tadic/trialc2决策e/100895.htm](http://www.un.org/icty/tadic/trialc2/decision-e/100895.htm).


Another problem rests on the intensity of the international armed conflict. Here, in contrary
to the situation of NIAC, the severity and the duration of IAC is not relevant. Generally, it would be
sufficient to have a single border incident or even to shoot down a military airplane for the Geneva
Conventions and for AP I to be brought into action.\(^1\) The ICTY on a number of its occasions has
stated that there is an international armed conflict whenever there is a resort to armed force between
States.\(^2\) The crucial point, however, is the intention to cause harm to the enemy. It is crucial since
there might be situations where the use of force may be the outcome of an error (such as, inadvertent
incursion into a foreign territory or wrongful identification of the target). At this, in such cases the
situation would not be qualified as an IAC. Similarly, the same refers to situations where in a State
consents for a third State to take action in its territory and fight against a non-state armed group (so-
called 'transnational' armed conflict). Here also, the situation would not be qualified as an IAC,
although I believe there is a probability that the opposite view of this might also be true, and I would
explain how this may be unraveled thereafter. Moreover, there is even no need for an international
conflict to be armed, as in the case of an occupation when the other party displays no resistance, or
in another case when there is a declared war without any armed action.\(^3\)

\textit{'Internationalized' Armed Conflicts}

The reason why we call this concept 'internationalized' is because it changes the qualification
of an armed conflict or it may lead to 'double classification'. Here, I would observe different
situations related to this concept.

First is direct intervention. If a third State intervenes with its armed forces on the side of
another State fighting against non-state armed groups in a non-international armed conflict, this will
not change the qualification of the conflict and it will still be considered as NIAC. If, however, the
third State intervenes with its armed forces on the side of the rebel factions (non-state armed groups)
fighting against governmental forces of the State, this may change the qualification from NIAC to
IAC. Here, however, it is also possible to deal with 'double classification'. A classic example is the
\textit{Nicaragua} case observed by the ICJ, where the Court held:

\begin{quote}
"The conflict between the contras' forces and those of the Government of Nicaragua is an
armed conflict which is 'not of an international character'. The acts of the contras towards the
Nicaraguan Government are therefore governed by the law applicable to the conflicts of that
\end{quote}

application of the Fourth Geneva Convention without taking into account the condition of recognition of Israel by
Jordan.
\(^{1}\)However, some authors argue that a distinction should be set up between international armed conflict (thus, establishing
a certain level of intensity) and other forms of hostile acts amounting to 'incidents', 'border clashes' or skirmishes' only.
\(^{2}\)ICTY, Prosecutor v. Tadic, Case No. IT-94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction,
2 October 1995, para. 70; See also ICTY, Prosecutor v. Mucic’ et al. (C’ elebic’i Camp), Case No. IT 96-21, Judgment
(Trial Chamber), 16 November 1998, para 184: ‘le recours à la force armée entre l’tatsuffit en soi à de’
clenchel’application du droit international humanitaire’. This definition has since been taken up by other international
bodies. See for example: Commission of Inquiry on Lebanon, Report pursuant to Human Rights Council resolution S-
2/1, A/HRC/3/2, 23 November 2006, para 51.
\(^{3}\)J.S. PICTET, \textit{La Convention de Genève relative à la protection des personncives en temps de guerre}, Geneva,
International Committee of the Red Cross, 1956, 26; E. DAVID, \textit{o.c.}, 109; C. GREENWOOD, “The Concept of War in
Modern International Law”, \textit{I.C.L.Q.} 1987, 295; an example of the first situation is the occupation by Germany of
Czechoslovakia and Denmark, of the second the declaration of war by some Latin American States on Germany.
character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.  

Second is indirect intervention. Here we observe the same scenario, but this time in the case of indirect intervention may also lead to the internationalization of the conflict. As the ICTY has held in its Tadic case, it would be sufficient that a State "has a role in organizing, coordinating or planning the military actions" of the very non-state armed group. To put another way, the ICTY held that the 'overall control' of the rebel group would suffice to internationalize the conflict.

Third is exercising the right to self-determination. Article 1, paragraph 4 of the 1977 AP I invokes that conflicts shall also be qualified as international when they take place between a State party to the Protocol and an authority representing a people engaged in a struggle "against colonial domination and foreign occupation and against the racist regimes in the exercise of the right of the peoples to self-determination", provided that the requisite conditions are fulfilled.

The Concept of Occupation

Occupation is not defined in the 1949 Geneva Conventions, however, the 1907 Hague Convention IV provides the following definition:

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".

For occupation to take place, two conditions must be fulfilled: (a) effective territorial control by the occupier, (b) lack of consent for intervention from the legitimate sovereign. The element of effective territorial control implies that enemy troops shall be deployed in the territory concerned and exercise their responsibilities deriving from the law of occupation.

Here, I would like to concentrate more on one highly controversial question. The question is: would it be possible to qualify the situation as occupation without the presence of enemy troops? In other words, can we speak about occupation if the element of effective territorial control, which is the core of the concept of occupation, is absent?

The withdrawal of the Israeli troops in 2005 from the Gaza Strip demonstrates the practical complexities of the concept of occupation. In 2004 the Israeli authorities adopted a 'Disengagement Plan' according to which Israel continues to exercise its control over the borders of the Gaza Strip, along with its air space and coastal region, and that they could enter the territory at any time. The question is whether without the physical presence of the Israeli forces it is realistic to still qualify the situation as occupation.

Here, we have a divergence of opinions in regard to this question.

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3 Additional Protocol I, articles 1(4) and 96(3).
4 Article 42, Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
5 Sylvain Vite, Typology of armed conflicts in international humanitarian law: legal concepts and actual situations, IRRC Volume 91, Number 873, March 2009, pp. 73-74.
One group of observers consider it possible. They emphasize the wording of Article 42 (2) of the 1907 Hague Convention, which makes it clear that occupation exists when the authority of the hostile army "has been established and can be exercised". This can be construed as meaning that potential authority would be sufficient for occupation to exist. Moreover, the UN Secretary General has stated that 'the actions of IDF in respect of Gaza have clearly demonstrated that modern technology allows an occupying Power to effectively control a territory even without a military presence'.

However, another group of observers consider it to be unrealistic. In support of their stance, they put forward two points. First, they indicate that there is an indivisible link between the establishment of authority by way of deploying troops in the territory and the ability to exercise that authority over the entire territory. As the ICJ has held in its Congo v Uganda case, for effective control to take place there should be a substitution of powers. Apparently, this cannot happen if the hostile army is located outside of the territory in question. And second, it would be practically impossible for the hostile army to fulfill its international obligations arising from the law of occupation if it is out of the territory concerned.

Thus, as the example of Gaza Strip makes it clear, despite the contributions of the Geneva Conventions along with the Hague Regulations, we still do have uncertainties about the concept of occupation, particularly, when the matter comes to practice. And we have to strive to observe and clarify all possible flaws that may lead to legal ambiguities.

The Law of Non-International Armed Conflict
The Legal Underpinning of the Non-International Armed Conflict

In contrast with IACs, the law of NIACs requires a higher threshold for its application. The normative basis for NIACs includes Common Article 3 and AP II. Common Article 3 is regarded as a "mini convention" that sets up minimum protection standards for victims of internal armed violence. It is different from AP II in that it has a lower threshold for its application.

The Tadic case (ICTY) contributed to the emergence of two main criteria in order for the application of IHL rules in NIACs to come into force. These criteria are (a) the minimum level of intensity of hostile acts and (b) the minimum level of organization of rebel forces.

(a) The ICTY in its Tadic case uses the term "protracted armed violence", which was further concluded as referring more to the intensity of the armed violence than to its duration. There are no intensity criteria in Common Article 3, however, since it provides for a fundamental guarantee for humane treatment, its threshold should not be that high. Apropos of AP II, it also does not contain the term protracted, however, it has a higher threshold for its application in light of a number of its criteria that I would introduce thereafter.

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2ICJ, Case concerning Armed Activities on the Territory of the Congo, para 173.
3See Art. 43 of the 1907 Hague Regulations and Arts. 55, 56 and 59 of the Fourth Geneva Convention.
4Author: Frida Lindström, Supervisor: Prof. Emer. Göran Lysén, Asymmetric warfare and challenges for international humanitarian law, Civilian direct participation in hostilities and state response, Master's Thesis in Public international Law 30 ECTS, Department of Law, Fall 2012, p. 25.
5Ibid.
(b) As to the criterion of the minimum level of organization, here, we have some other cases of the ICTY that provide a good guidance and a comprehensive understanding of the notion of "organized armed groups". The Milosevic case provides a number of elements relating to the organization of a group: an official joint command structure, headquarters, designed zones of operation, and the ability to procure, transport, and distribute arms.\(^1\) The Limaj case went even further in this respect and provided the following elements: the ability to recruit, arm, train members of the group, the ability to carry out effective and large military operations as well as the types and quantity of weapons.\(^2\)

As to the threshold required for AP II to come into force, its Article 1 sets up the following criteria:

(a) presence of organized armed groups,
(b) these groups should be under a responsible command,
(c) they should exercise control over a part of the territory,
(d) they are able to carry out sustained and concerted military operations, and
(e) to implement the Protocol.

**Typology of NIACs**

In this part I observe a number of situations which may be qualified as NIACs, although I would also consider the possibility of their internationalization.

First, there are classical types of NIACs taking place between governmental forces of the State and non-state armed groups occurring within a territory of a single State.

Second, there are NIACs that take place between two or more organized armed groups happening within the borders of a single State.

Third, there may also be so-called 'exported' non-international armed conflicts (a manifestation of transnational armed conflicts). This happens when there is an armed conflict between governmental forces and non-state armed groups that originate in the territory of a single State, but then the armed conflict "spills over" into the territory of a third State. Here, we may face the question of violations of sovereignty, along with the internationalization of the conflict. However, the general view to this question is that if the third State gives its consent for the governmental forces to intervene and fight against non-state armed groups, this would not affect the qualification of the conflict, and it would continue to be considered as a NIAC. Still, some observers consider that even with the consent, there is a probability of internationalization of the conflict. It may be the situation when the attacks spill over and take a much broader range and as a result affect the infrastructure of the third State.

Fourth, there exist so-called 'cross-border' armed conflicts (another manifestation of transnational armed conflicts). This happens when there is an armed conflict between governmental forces and non-state armed groups which are originally located in the territory of a third State (i.e. there is no 'spill over', as in the case of 'exported' NIAC). Here, the legal consequences are almost similar to the situation of 'exported' NIAC, in terms of consent and the possibility of internationalization of the conflict.

\(^1\) *Ibid*; *Prosecutor v. Milošević*, Trial Chamber Decision, Case No. IT-02-54-T, 16 June 2004, para. 23.

Fifth, currently States may witness an armed conflict what may be called 'multinational NIACs'. These are armed conflicts wherein multinational armed forces in the territory of the host State fight against non-state armed groups. An example of this is the United Nations Organization Mission in the Democratic Republic of Congo, which provided military support for the Government of Congo fighting against the armed opposition.¹

**Final Remarks**

Understanding the difference between international and non-international armed conflicts stands to be a cardinal principle of international humanitarian law, since it is the decisive part for its application. As we can see, there are a number of legal ambiguities that may lead to improper application of IHL. There are difficulties in terms of legal categories, especially when the matter comes to practical application. Nonetheless, one cannot evade the fact that international practice is developing and strives to concretize all possible controversies in light of real situations.

**PANEL 4. SCOPE OF APPLICATION OF IHL: PERSONAL SCOPE**

‘PARTIES TO THE CONFLICT’: SELF-EXPLANATORY OR AN UNSOLVED MYSTERY OF IHL?

Nele Verlinden  
*Leuven Centre for Global Governance Studies, University of Leuven, Belgium*

**Introduction**

International Humanitarian Law (IHL) binds all parties to an armed conflict. The existence of an armed conflict depends on facts, but a legal definition of armed conflict is still subject to some debate. In general, a distinction is made between international and non-international armed conflicts. While this paper briefly summarizes the discussion on the definition of armed conflict, its main focus is the concept of ‘parties to the conflict’. After discussing some of the important legal consequences of being ‘party to the conflict’, the paper aims at identifying what ‘parties to the conflict’ means, as this concept is not as self-explanatory as it might seem. In doing so, this paper will not only look at the ordinary meaning of ‘parties to the conflict’ or the *travaux préparatoires* of IHL treaties, but it will also examine whether the support-based approach as developed by the ICRC could be used as a general tool to identify ‘parties to the conflict’. Exploring the meaning and scope of ‘parties to the conflict’ is especially of interest to those entities that have not been involved in an armed conflict *ab initio*, but that become party to an armed conflict that already exists. As noted by Engdahl, “it must be acknowledged that there is a dearth of literature on this specific topic.”

**Defining ‘armed conflict’**

International humanitarian law is a body of international law that applies during situations of armed conflict. While its application primarily depends upon the existence of an armed conflict, remarkably this general concept is nowhere defined in IHL treaties. In contrast with the notion of ‘war’, which historically often required a declaration of war, the existence of an armed conflict can only be derived from the facts on the ground. But without a clear definition enshrined in the law, it has been disputed which factors need to be taken into account to determine the existence of an armed conflict. Both the judiciary and scholars have over years tried to identify the relevant factors. As noted by the International Law Association, the accurate identification of a situation of armed conflict has significant and wide-ranging implications for the discipline of international law. Armed

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1 See, for example, ICTY, *The Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Judgment, Trial Chamber, 30 November 2005, § 90.
3 Some IHL provisions also apply during peacetime, such as the obligation to disseminate the Geneva Conventions (see Arts. 47/48/127/144 GCs, Art.83 AP I and Art. 87(2) AP II). Other provisions continue to apply even when an armed conflict no longer exists, such as the protection of prisoners of war (Art. 5 GC III).
4 Defined by Oppenheim as “a contention between two or more States, through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.” See Hersch Lauterpacht, *Oppenheim’s International Law: A Treatise. Vol. 2. Disputes, War and Neutrality* (Longmans 1955) 202.
5 See *supra* note 1.
conflict may have an impact on treaty obligations; on U.N. operations; on asylum rights and duties, on arms control obligations, and on the law of neutrality, amongst others. Perhaps most importantly states may only claim belligerent rights during and armed conflict. To claim such rights outside situations of armed conflict risks violating fundamental human rights that prevail in non-armed conflict situations, i.e., in situations of peace.¹

IHL treaties distinguish between two types of armed conflict, without necessarily defining them in detail. Each type of armed conflict has its own threshold. Common Article 2 GCs and Article 1 AP I provide guidance for international armed conflicts, while common Article 3 GCs and Article 1 AP II offer (a starting point for) a definition of non-international armed conflict.

International armed conflicts (IACs) are situations of armed force between two States, including occupation and, since 1977 also liberation wars. An IAC exists as soon as there is recourse to armed force, “regardless of the reasons or intensity of this confrontation”². Non-international armed conflicts (NIACs) were initially solely defined by Article 3 GCs as those conflicts not of an international character. Article 1 AP II imposes additional criteria for the NIACs that fall under its scope³, and the Rome Statute has potentially created even a third subdivision of NIACs.⁴ If AP II does not apply, the definition of a NIAC remains underdeveloped in IHL. The case-law of the International Criminal Tribunal for the former Yugoslavia (ICTY) offered a substantial contribution on this point. In 1995 the Tribunal had to determine whether there had been a conflict in ex-Yugoslavia at the time of the crimes of Tadić. In its judgment, it tentatively provided a general definition of armed conflict by ruling that an armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”⁵. The ICTY thus indicated that the existence of a NIAC depends on two criteria: organization of the non-State actor(s) and protracted armed violence.⁶ In subsequent case-law, the ICTY reformulated the two criteria to organization and intensity, rather than protracted violence.⁷

The International Law Association (ILA) did not entirely follow the ICTY definition and concluded in its 2010 report that all armed conflicts (IACs and NIACs) have two constitutive elements, namely (1) the existence of organized armed groups (2) engagement in fighting of some

³Art. 1 AP II says the Protocol “shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and 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.”
⁴Art. 8(2)(f) ICC Statute provides that sub-paragraph e “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.”
⁵ICTY, Appeals Chamber, The Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, § 70.
⁶ICTY, Tadić, supra note 5, § 70.
intensity.\textsuperscript{1} This ILA definition does not take into account the fact that IHL treaties do not impose an intensity requirement for the existence of an IAC. The International Committee of the Red Cross therefore stressed in its Opinion Paper of March 2008 the distinction between the definitions of international and non-international armed conflicts (IAC and NIAC respectively).\textsuperscript{2}

While these examples illustrate that to date there is no fully accepted definition of armed conflict, it cannot be denied that extensive attention has been given to this notion.

\textbf{Importance of the concept ‘parties to the conflict’}

The concept of ‘party/parties to the conflict’ appears 188 times in the Geneva Conventions\textsuperscript{3}, 133 times in the First Additional Protocol and once in the Third Additional Protocol, resulting in 322 references in total.\textsuperscript{4} Despite not being defined anywhere in the law, it has important legal consequences attached to it, of which some will be briefly mentioned here.

A first, general consequence of being a party to an armed conflict is that international humanitarian law becomes applicable to the party. This is the most crucial consequence of becoming a party to an armed conflict, as the paradigm of a State’s operations shifts from human rights law to humanitarian law (and human rights law).\textsuperscript{5} In order to trigger this consequence, it is not sufficient to merely operate within the context of an armed conflict. In this regard, the EU has for example declared that “respect for International Humanitarian Law is relevant in EU-led operations when the situation they are operating in constitutes an armed conflict \textit{to which the forces are party}”\textsuperscript{6} [emphasis added]. Many peacekeeping operations are operating in the context of an armed conflict without being involved therein, hence they cannot be considered parties to the conflict.\textsuperscript{7}

While it is quite obvious that IHL applies to parties to the conflict while they are conducting military operations, it should be stressed that IHL also foresees rights for and imposes obligations on parties to the conflict in provisions that are not necessarily linked to such operations. Besides the wide variety of obligations applicable to detention or situations of occupation\textsuperscript{8}, there is also a range of rights or obligations which are triggered for all parties to the conflict. Precisely these rules could

\begin{itemize}
  \item \textsuperscript{1}International Law Association (\textit{supra} note 7) 713.
  \item \textsuperscript{2}International Committee of the Red Cross (\textit{supra} note 8).
  \item \textsuperscript{3}More specifically, ‘party to the conflict’ or ‘parties to the conflict’ appears 43 times in GC I, 50 times in GC II, 41 times in GC III, 54 times in GC IV, 133 times in AP I and one time in AP III.
  \item \textsuperscript{4}The concept of ‘parties to the conflict’ was initially also used in the ICRC draft for AP II (see Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977), Vol. I, p. 33 ff.). However, in the last phase of the Diplomatic Conference leading to the Protocols, the concept ‘parties to the conflict’ was completely deleted from Protocol II, as it made “appear that the two sides were on the same level or had equal rights”. See Michael Bothe, Karl Josef Partsch and Waldemar A Solf, \textit{New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949} (MartinusNijhoff Publishers 1982) 606.
  \item \textsuperscript{5}While IHL also becomes applicable to armed groups who become a party to the conflict, only a minority of scholars considers that armed groups are bound by human rights law. In this regard, see Andrew Clapham, \textit{Human Rights Obligations of Non-State Actors} (Oxford University Press 2006).
  \item \textsuperscript{6}EU, Salamanca Presidency Declaration, International Humanitarian Law European Seminar, Salamanca, 22-24 April 2002, DIH/Rev.01.Corr1, 3 (on file with the author).
  \item \textsuperscript{7}This of course raises the important question whether any use of force by peacekeepers makes the peacekeeping mission or the contributing States party to the conflict. While sporadic force in self-defence arguably does not change the status of a peacekeeping mission, recurrent force (even in self-defence) and certainly offensive force would make such a mission party to the conflict. It falls however beyond the scope of this paper to deal with this issue in detail. For further information, see for example Engdahl (\textit{supra} note 2) 98–103.
  \item \textsuperscript{8}See GC III (prisoners of war) and GC IV (civilians).
\end{itemize}
be relevant for those parties to the conflict that do not carry out kinetic operations themselves or that do not come in direct contact with civilians through detention or occupation. Some of those provisions are common to the four Geneva Conventions, such as the consent of parties to the conflict that is required for humanitarian activities by the ICRC or other impartial humanitarian organizations (Articles 9/9/9/10 GCs) or the possibility of each party to request an enquiry concerning an alleged violation of the conventions (Article 52 GC I, Article 53 GC II, Article 132 GC III and Article 149 GC IV). Other rules are more specific, such as the rule according to which parties to an IAC have to ensure correspondence between family members (Article 25 GC IV) and to facility the re-establishment of family links (Article 26 GC IV). Also applicable to all parties to the conflict is the obligation to establish, upon the outbreak of a conflict, an Information Bureau that receives and transmits information on possible protected persons in the power of the party (Article 136 GC IV). A last example that deserves to be mentioned is the obligation for all parties to take precautions against the effects of attacks (Article 58 AP I). This obligation applies regardless of whether the party carries out attacks itself.

A second important consequence of being a ‘party to the conflict’ relates to the personal protection of the individuals operating on behalf of that party. IHL allows the targeting of combatants. Combatant status is well-defined in Article 4 GC III and Article 43 AP I and one of the conditions is that the individual “belongs to a party to the conflict”. While in most instances the individual will be perfectly aware of the fact that he or she would be a lawful target under IHL, this might not always be the case. Consider, for instance, the planned EU military mission to neighboring countries of Libya during the Libyan conflict of 2011. Some EU Member States were at that time also involved in the NATO operation against Gaddafi, an armed conflict to which they were party. If those EU Member States would have sent armed forces to the neighboring States of Libya, albeit in the framework of a separate military operation, they could potentially have been targeted by Gaddafi troops. Hence, being a party to an armed conflict may change the willingness of States to participate in other operations, since their armed forces can be at risk of attacks.

A third consequence is the geographical scope of applicability of IHL. IHL is applicable in the whole territory under the control of a party to the conflict (in NIAC) or on the whole territory of the parties of an IAC. In practical terms, this means, for example, that any military objective located on the territory of a party to the IAC may be lawfully attacked. Therefore, if a State supporting a party to an armed conflict becomes party to that conflict itself, it potentially opens its entire territory to the risks of hostilities.

A fourth consequence of being a ‘party to the conflict’ concerns the position under international law of third States vis-à-vis those parties to the conflict. In situations of international armed conflict, the position of third States is regulated by the law of neutrality, which imposes obligations and restrictions on both the parties to the conflict and on third States in their behavior.

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1 Under AP I, however, this obligation no longer only concerns parties to the conflict, but all “High Contracting Parties and parties to the conflict” (Art. 74 AP I).
2 Council Decision 2011/210/CFSP of 1 April 2011 on a European Union military operation in support of humanitarian assistance operations in response to the crisis situation in Libya (EUFOR Libya), Preamble, § 6: “Close coordination and consultation is taking place with the Governments of Egypt and Tunisia in order to ensure their authorisation for a possible Union military presence in their respective countries.”
3 ICTY, Tadić, supra note 5, § 70.
with parties to the conflict. For instance, Article 1 of Hague Convention V on Neutral powers in case of war on Land imposes that the territory of neutral States shall not be violated, while Article 6 of Hague Convention XIII on Neutral Powers in Naval War prohibits neutral States from supplying the parties with war material. In situations of non-international armed conflict the law of neutrality does not apply, but the principle of non-intervention refrains somewhat the possibilities of third States to assist parties to the NIAC. Indeed, according to this customary rule of international law, third States are prohibited from intervening in the internal affairs (including in the case of a non-international armed conflict) of a State. This principle is not explicitly mentioned by the UN Charter (even though it can be implied from the duty to respect State sovereignty in Article 2(1) UN Charter), but it is reflected in numerous regional treaties and Resolutions by the UNGA.1

In sum, as shown by the consequences mentioned above, the question on who is a party to the conflict is not merely semantics. The legal consequences of being a party to the conflict are varied and far-reaching. Therefore, the identification of parties to the conflict deserves as much attention as the definition of armed conflict.

Identifying ‘parties to the conflict’

As the IHL treaties do not provide for a definition of the concept ‘parties to the conflict’, a definition can be sought by using the interpretative techniques enshrined in the Vienna Convention on the Law of Treaties (VCLT).2 According to Article 31 VCLT, an interpretation starts with the ordinary meaning of words, “in their context and in light of [the] object and purpose [of the treaty]”. Since extensive attention has already been given by others to the notion ‘armed conflict’ (see supra), this paper will primarily look at the notion ‘parties’. As a preliminary note, it should be mentioned that it is unclear why IHL treaties use the concept of ‘parties to the conflict’ rather than ‘parties to the armed conflict’. The most logic reason for this is that the former is shorter than the latter, and that the negotiators assumed it would be clear that ‘the conflict’ meant ‘the armed conflict’.

According to the Oxford English Dictionary, a ‘party’ is ‘as side in a battle’, or ‘an enemy or opposing force’. This does not help us much further, as merely ‘choosing a side’ in an armed conflict may imply a political preference as to the outcome of the conflict, without any assistance to the parties involved. Indeed, even neutral States are allowed to have preference for one side of a conflict, as long as they remain neutral in their behavior vis-à-vis the parties.3 In addition, choosing a side ‘in a battle’ seems to be too restrictive, as the existence of armed conflicts does not necessarily require that ‘a battle’ is ongoing. The ‘ordinary meaning’ of the word ‘party’ therefore leaves open too many possible interpretations. If one looks at the object of IHL-treaties, which is to ensure

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4 The Vienna Convention technically only applies to treaties concluded after the entry into force of the Vienna Convention, on 27 January 1980. This means that the Geneva Conventions of 1949 and the First Additional Protocol of 1977 does not fall within its material scope. Nevertheless, the rules on interpretation are accepted as customary international law, and can therefore be used here.
protection to the victims of armed conflict\(^1\), one could argue that the sooner an entity becomes party to a conflict, the better, since the protective IHL-rules become applicable. However, this reasoning can be easily counter-argued, first, because even non-parties have the obligation to ensure respect for IHL rules (Article 1 GCs) and, second, because IHL does not only protect victims but also allows for the use of force in more circumstances that human rights law would do.

Subsequent State practice is also one of the sources for the interpretation of treaties (Article 31 §3, b) VCLT). It is however difficult to obtain a clear overview of State practice regarding the concept ‘party to the conflict’, as the opinion of States as to their own position vis-à-vis an armed conflict often remains a secret if there is no clear, kinetic involvement of the State. While States are already reluctant to admit that \emph{prima facie} an armed conflict exists, there is even more hesitancy to admit that assistance to a party to an armed conflict results in becoming party to the conflict themselves. The fact that there is no overarching international body that decides on who is a party to an armed conflict and who is not, makes an analysis of practice even more difficult. The International Committee of the Red Cross identifies internally the existence of armed conflicts and the parties thereto, and communicates a ‘rappel du droit’ – a brief statement of the applicable law – to all the parties of an armed conflict, but this classification and subsequent communication between the ICRC and the State falls under the confidentiality of the ICRC. Hence, whether a State considers itself party to a conflict will only be known by the public if the State concerned decides to reveal its classification.

According to Article 32 VLCT, \emph{travauxpréparatoires} of treaties can serve as supplementary means of treaty interpretation. The \emph{travauxpréparatoires} of the GCs show that at the XVII International Red Cross Conference in 1948, the notion of ‘belligerents’ was still used, instead of ‘parties to the conflict’.\(^2\) The 1948 ICRC Draft Geneva Conventions I, II and III contained only in their general provisions the concept ‘parties to the conflict’ (for example in the articles relating to special agreements and the procedure of conciliation, and in Article 3 Draft GC III on the definition of a prisoner of war), but in the rest of the text the drafts still referred to ‘belligerents’.\(^3\) In contrast, Draft Geneva Convention IV already systematically used the notion ‘parties to the conflict’ instead of ‘belligerents’. This discrepancy in wording between the Draft GC I, II and III and Draft GC IV was \emph{inter alia} noted by the Belgian delegate during the negotiations, who pointed at Articles 15/19 GC I and II and Article 15 GC IV specifically. The UK delegate’s preference was to change all the references back to ‘belligerents’.\(^4\) Despite the UK suggestion, the Drafting Committee changed the word ‘belligerent’ almost everywhere in the Conventions\(^5\) into ‘party to the conflict’. However, the discussion on the precise wording was not yet entirely settled. For example, during the discussions

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\(^1\) See, \emph{inter alia}, the preamble of AP I.


\(^3\) Final Record of the Diplomatic Conference of Geneva, 1949, Vol. I, pp. 47-48 (Art. 4 (Special agreements), 6 (Protecting Powers), 7 (Activities of the ICRC), 8 (substitutes for protecting powers) and 9 (conciliation procedures) of Draft GC I), pp. 61-61 (Art. 5 (special agreements), 7 (Protecting Powers), 8 (Activities of the ICRC), 9 (substitutes for protecting powers) and 10 (conciliation procedures) of Draft GC II), pp. 73-74 (Art. 3 (prisoners of war), 5 (special agreements), 7 (Protecting Powers), 8 (Activities of the ICRC), 9 (substitutes for protecting powers) and 10 (conciliation procedures) of Draft GC III). Compare with \emph{ibid.}, pp. 113-139 (Draft GC IV).

\(^4\) Final Record, \emph{supra} note 3, Vol. 2 B., p. 138.

\(^5\) There are still some exceptions. For example, Arts. 14, 16, 17 GC II use the concept ‘belligerent’: it seems that for these articles there is no equivalent in the other GCs, hence the drafter probably forgot to adjust the language when making everything in accordance with the new terminology.
regarding Draft Article 3 GC III, a proposal was made to change ‘parties to the conflict’ back to ‘adverse belligerent’, as that was the language used in the Hague Rules of 1907. This proposal was rejected since “the conditions of war had changed since 1907 and [since] there was no need to retain an obsolete terminology.”

The Guidance for the Red Cross Societies, which was drafted after the adoption of the Geneva Conventions, justifies the changes in wording with the following explanation:

The term "belligerent" means "legally at war", in speaking of a nation. But the four Conventions henceforth apply also when a state of war is not recognized (Article 2), and, at least for certain provisions, where the conflict is not international (Article 3). Therefore the term "belligerent" does not, because of its limitative sense, cover all possible cases, and it had to be replaced by a more general expression.

While the travaux préparatoires show us the negotiators found that ‘parties to the conflict’ was more apt language than ‘belligerents’ to describe the ‘changed conditions of war’, this rationale for updating the GCs’ language does not help us in identifying the specific threshold for determining when an entity becomes party to a conflict. In absence of guidance from IHL treaties – even after having relied on the treaty interpretation rules – various approaches can be taken.

One approach is to take the traditional point of view and assimilate the conditions for the existence of an armed conflict with the question whether an entity is ‘party to the conflict’. Another approach is to consider that, from a broader point of view, some actions in support of parties to an armed conflict can render an entity party to a conflict as well. For the purpose of this paper, the latter approach will be referred to as ‘the progressive’ one. With these two approaches in mind, various scenarios can be thought of, depending on the type of conflict (IAC or NIAC) and, in case of a NIAC, the type of entity involved (a State or an armed group).

In case a NIAC exists, the question whether a third State has become party to the pre-existing NIAC will, under a traditional approach, require the fulfillment of both the conditions of intensity and organization. Therefore, if a NIAC between State A and armed group X exists, and State B supports State A but without causing armed confrontation between B and X, under the traditional point of view, the criterion of ‘intensity’ will not be fulfilled, and thus B will not be considered party to the conflict. This outcome seems unsatisfactory. Yet, the facts underlying this scenario are not uncommon: many multinational operations involve a host State that is in a situation of NIAC with an armed group on its territory. Since the support offered by multinational forces is often non-kinetic but nevertheless far-reaching (to the extent that no single military operation by the host State could occur without the help of the multinational operation), the ICRC has proposed the support-based approach in order to deal with these kinds of situations. According to the support-based approach in order to deal with these kinds of situations.

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2 Ibid., p. 478.
3 Analysis for the Use of Red Cross Societies, ICRC, 1950, p. 7.
4 “This situation [of multinational forces involved in a NIAC through logistical support, intelligence activities, planning, coordination,…] has led to an examination of whether the classic criteria for defining the existence of a NIAC involving multinational forces should be completed by an approach taking account of this support in order to ascertain whether IHL should apply to multinational forces intervening in a pre-existing NIAC (hereinafter the ‘support-based approach’). Tristan Ferraro, ‘The Applicability and Application of International Humanitarian Law to Multinational Forces’ (2013) 95 International Review of the Red Cross 561, 583. See also ICRC, International humanitarian law and the challenges
based approach, the intensity requirement does not need to be fulfilled for a third assisting State to become party to a pre-existing NIAC, if the following conditions are met: on the one hand there is of course the requirement of (i) the existence of a NIAC, and on the other hand the actions by the third State have to be (ii) related to the conduct of hostilities in the context of the NIAC, (iii) in support of a party to the NIAC and (iv) pursuant to an official decision by the State or organization.1 Especially the second condition is crucial here. Supportive acts ‘related to the conduct of hostilities’ cannot merely be a general contribution to the war effort. The action should be ‘an integral part of specific, coordinated military operations carried out by the supported party which directly inflict harm on the enemy’.2 The support-based approach is an example of a progressive approach. In the words of Ferraro, such an approach ‘makes it possible to avoid the illogical situation where multinational forces making an effective and significant contribution to military operations and participating in the collective conduct of hostilities in a pre-existing NIAC would not be considered belligerents and could still claim protection against direct attacks’.3

Still if we look at the scenario of a pre-existing NIAC, from a traditional point of view, again the criteria of organization and intensity would determine whether a third armed group has become party to the NIAC or not. If State A is in a NIAC with armed group X, and armed group Y supports X without however entering in armed confrontation with A, the traditional approach would not consider that Y is a party to the NIAC. There are however, in this author’s opinion, no legal impediments to apply the support-based approach to these types of scenarios. If the criterion of intensity is not to be interpreted too strictly when deciding whether a State becomes party to a pre-existing NIAC, then, logically, the same progressive approach can be used for third armed groups which become party to the NIAC. Hence, if the fulfillment of the necessity criterion is not necessary for supporting third States, it should not be necessary for supporting armed groups either.4 In the present author’s view, however, no similar leeway is possible with regard to the criterion of organization, as organization is a condition for the existence of an armed group as such.

The same reasoning can be applied to cases where an IAC already exists. Under the traditional approach, a State can become a party to it if there is resort to armed force between its armed forces and armed forces of a party to the conflict, in support of the other party. While ‘resort to armed force’ has, already under the traditional approach, been interpreted in a broad way – meaning that no hostilities per se are required, the capture of a soldier would suffice as well5 – an analogic argument with the support-based approach has not yet been made. A progressive approach would here again use the support-based approach to evaluate third-State support to parties to an

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1 Ferraro (supranote 37) 584.
2 Ibid., 585.
3 Ibid., 584.
4 Of course, the fourth condition of the support-based approach (requiring the supportive action to be subsequent to an official decision) should be assessed taking into account the organization of the armed group in question.
5 Jean de Preux and others, The Geneva Conventions of 12 August 1949. III: Geneva Convention III Relative to the Treatment of Prisoners of War: Commentary (ICRC 1960) 23. See also Sylvain Vité, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ [2009] International Review of the Red Cross 69, 72 who notes that “it is […] not necessary for the conflict to extend over time or for it to create a certain number of victims”.
IAC. The main reason to expand the support-based approach also to IAC situations is an *a fortiori* argument: if one is willing to circumvent the intensity criterion in a NIAC by using a support-based approach in order to decide whether third-State becomes party to that NIAC, one should *a fortiori* be willing to apply the same reasoning during an IAC, since in such a situation there is no intensity criterion in the first place.

Moreover, a few hypothetical examples show the logic of broadening the support-based approach. Consider, for example, a NIAC between State A and armed group X. State B provides a kind of support to State A which, according to the support-based approach, would render B party to the NIAC as well. Imagine that the armed group takes control over part of the territory and declares itself independent from State A, and that this ‘new State’ is widely accepted by the international community. In such case we would consider the armed conflict an IAC. But if we only apply the support-based approach to NIAC-situations, State B would change from being a party to the NIAC to being no party at all. This is why it seems, to the author, logical to broaden up the support-based approach. Consider, in a similar scenario, that armed group X takes over the power of State A, and that the former leader of State A continues to fight the newly established government (the ‘2011 Libya-scenario’). Would State B, which is since the change of power technically supporting an ‘armed group’, no longer be considered party to the NIAC? Here again, in the author’s view, it seems logical to apply the support-based approach to the scenario of a State supporting an armed group. Lastly, if armed group Y decides to support armed group X in the NIAC with State A, its support could take the same form as that provided by State B to State A. If the support provided by armed group Y fulfills the support-based approach criteria, there seems to be no impediment for considering armed group Y a party to the conflict as well.

The schedule below illustrates the various scenarios and approaches.¹

<table>
<thead>
<tr>
<th>The conditions under which third entities can become ‘parties to the conflict’ in case of a pre-existing armed conflict</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pre-existing IAC</strong></td>
</tr>
<tr>
<td>Third State</td>
</tr>
<tr>
<td>‘resort to armed force’</td>
</tr>
<tr>
<td><strong>Progressive approach</strong></td>
</tr>
</tbody>
</table>

Of course, the use of the support-based approach in order to identify parties to a pre-existing armed conflict could also raise interesting questions under *jus ad bellum*. It falls however beyond the scope of this paper to discuss the relationship between the support-based approach and the threshold for a violation of the prohibition on the use of force (Article 2(4) UN Charter) or for an ‘armed attack’ leading to a reaction in self-defence (Article 51 UN Charter).

¹ Please note that it does not show the scenario whereby a State would become party to an armed conflict by exercising control over an armed group. This effective or overall control-scenario falls beyond the scope of this paper. See, *inter alia*, Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts* (Oxford University Press 2012) 56–62.
On a final note, the legal reasoning used to assess whether an entity becomes party to a pre-existing conflict should of course not be limited to situations whereby the pre-existing armed conflict is already ongoing for a long time. The support of the third entity can occur already from the beginning of an armed conflict. What is important is that the criteria for an armed conflict, whether it is an IAC or a NIAC, are already fulfilled. Once an armed conflict exists, third-entity support to parties to the conflict can be assessed in the framework as discussed in this paper. The temporal aspect of a ‘pre-existing armed conflict’ should not impose limitations on the use of the support-based approach.

**Conclusion**

IHL does not define the concept ‘parties to the conflict’, nor does it define the concept ‘armed conflict’. While the latter notion has received much attention in judicial and scholarly writings, much less attention has been given to the former concept. This paper aims at showing that the concept ‘parties to the conflict’ nevertheless has important legal consequences and therefore deserves more attention. ‘Parties to the conflict’ is not self-explanatory. One can take a traditional approach and rely on the criteria for the determination of the existence of an armed conflict to identify parties to the conflict. Alternatively, if an armed conflict already exists, one can adopt a more progressive approach. The ICRC has already proposed this in the context of a multinational operation involved in a NIAC, by using the support-based approach. This paper suggests that the support-based approach can also be used to identify ‘parties to the conflict’ in other situations.
The objective of this paper is to analyze the cases before the Inter-American Court on Human Rights (IACHR) on violations of human rights of indigenous peoples and their members in situations of armed conflict in the Americas, focusing on particular impacts caused by armed violence. To do this, we framed the relationship between International Humanitarian Law (IHL) and International Human Rights Law (IHRL). We consider that indigenous peoples and their members a group of special protection in situations of armed conflict. It should be noted that in this paper, we will consider some cases of afro-descendant peoples who qualify as “tribal peoples” but enjoy the same rights as indigenous peoples according to the International Law.

In the Americas, armed conflicts have arisen in various states of the region affecting a vast population, which includes special protection groups such as women, children, the elderly and others. These conflicts have created contexts and cases of massive violations of human rights, seeking international protection; they have come under various mechanisms, the Inter-American Human Rights System (IAHRS) being one of them. In this System, both the Inter-American Commission on Human Rights (IAComHR) and the Inter-American Court of Human Rights (IACHR) analyzed the relationship between IHL and IHRL and have focused on the specific protection of certain groups of special protection.

One of the most affected groups we visualize are the indigenous peoples and their members. The violations suffered by such peoples have distinct and specific impacts of both collective nature, belonging to a particular ethnic group with their own cultural institutions, and as also of an individual in nature, affecting a woman, a child, a senior citizen belonging to a particular indigenous people. Hence the importance and necessity of identifying such impacts to be repaired properly for the victims of hostilities.

**IHL and IHRL in the IACHR**

Both IHRL and IHL share the protection and promotion of human dignity since they have a convergence around the principle of humanity. That process of humanization is shown in the coincidences between those provisions of IHRL that cannot be suspended under any state of

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exception and those provisions established in the common art. 3 to the four Geneva Conventions (1949) which is applicable in any context of armed conflict. Indeed, IHL complements the scope of protection of the human being by giving special attention to certain rights with a more detailed and precise regulation.

According to Professor Elizabeth Salmón, if we analyze the relationship between IACHR and IHL in IACHR’s jurisprudence, we can find three phases. These phases are:

Phase of Indifference. In this phase, we can find The Cayara Case and the Caballero Delgado and Santana Case. In both cases, the armed conflict was considered indirectly and not relevant to determine whether or not the states had international responsibility.

Phase of Recognition of IHL as an interpretative tool. In this phase, we can find the following cases: Las Palmeras, Bámaca Velásquez, Serrano Cruz Sisters and Mapiripán Massacre. Analyzing these cases, professor Salmón considers that the IACHR “rejects any direct competence to use IHL.”

Phase of the “Gray Area”. In this phase, we have the cases Santo Domingo Massacre and Operation Genesis. Elizabeth Salmón considers that the IACHR “turns to the humanitarian customary rules to interpret IHRL but, at the same time, makes statements that appear to leave IHL out of its range of subject matter jurisdiction.” She adds that “[i]n this process, the IACHR mainly aims to the usage of customary and not conventional norms for reasons that are not explicit but that probably aim to prevent the State from claiming that the Court is applying treaties that it has no competency for.”

Indigenous Peoples in the International Law

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5 IACHR. Judgment, Cayara v. Peru, 3 February 1993, para. 15.

6 IACHR. Judgment, Caballero Delgado and Santana v. Colombia, 21 January 1994, para. 11.


8 IACHR. Preliminary Objections, Las Palmeras v. Colombia, 4 February 2010, para. 33


13 IACHR. Judgment, The Santo Domingo Massacre v. Colombia, IACHR, 30 November 2012, paras. 211–229

14 IACHR. Judgment, The Afro-descendant Communities displaced from the Cacarica River (Operation Genesis) v. Colombia, 20 November 2013, para. 221.


International Law uses the categories of "indigenous" and "tribal" peoples to which same rights are enshrined\(^1\). Therefore, we will refer to the legal category of "indigenous peoples", meaning they have the same rights as "tribal peoples" and also that we are talking about them. There is no universal definition for such categories, and the main position is that it is not necessary to have one for purposes of protection of the rights of such people\(^2\).

As the IAComHR notes, given “the immense diversity of indigenous peoples in the Americas and the rest of the world, a strict definition and closed one always run the risk of being too broad or too restrictive”\(^3\). International Law does recognize the existence of "identification criteria" to find out those human groups covered under such categories. Thus the art. 1 No. 169 ILO Convention sets out the identification criteria for "indigenous" and "tribal" peoples to whom it will apply the provisions of the-treaty.

In both the "indigenous" and "tribal" peoples, the self-identification of such human communities will be vital to recognize them as such. This is indicated by the art. 2.2 No. 169 ILO Convention, which states "indigenous or tribal identity should be considered a fundamental criterion for determining the groups to which the provisions apply (...)". Also the art. 33.1 of the UNDRIP states that "indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions."

Both IAComHR and IACHR have highlighted self-identification of people as a fundamental criterion\(^4\). The IAComHR has indicated that the "criterion of self-identification is the main determining Indian status, both individually and collectively as peoples"\(^5\). Similarly, IACHR in the Indigenous Community Xákmok Kásev Cases aid the following: "The identification of the Community, from its name to its composition, is a social historical fact that is part of their autonomy (...). Therefore, the Court and the State should be limited to respect the determinations in this regard present the Community, that is, the way it self-identifies."

According to art. 1.1.b of No. 169 ILO Convention, qualify as "indigenous peoples" the human groups that self-identify as descendants "of populations which inhabited the country, or a geographical region to which the country belongs, at the time of the conquest or colonization or the establishment of present state boundaries" and "retain all their own social, economic, cultural and political institutions, or part of them", resulting irrelevant legal status of such groups. According to art. 1.1.a. the No. 169 ILO Convention, as “tribal people’ are qualified those groups "whose social,

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\(^1\) IACHR. Community Garífuna Triunfo de la Cruz & its members v. Honduras, 8 October 2015, par. 19-23 and 46-52; and Garífuna Punta Piedra Community & its members v. Honduras, 8 October 2015, par. 51-57 and 82-89


\(^3\) IAComHRDerechos de los pueblos indígenas y tribales sobre los asuntos de los pueblos indígenas, 2010, par. 25.


\(^5\) IAComHR. Acceso a la Justicia e Inclusión Social: El caminohacia el fortalecimiento de la Democraciaen Bolivia, 2007, párr. 216; and Derechos de los pueblos indígenas y tribales sobre los asuntos de los pueblos indígenas, 2010,párr. 24-31

economic and cultural conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special legislation”.

**Cases and impacts of armed violence on indigenous peoples**

Indigenous peoples have suffered armed violence in different states of the Region, for example, the Maya Indigenous People in Guatemala or the Quechua Indigenous People in Peru. Nowadays, considering the *Auto 004 of the Judgment T-025* ruled by the Colombian Constitutional Court, the armed conflict in Colombia is threatening the life of more than 30 indigenous peoples.

The livelihoods of indigenous peoples depends on the ancestral territory in which they live and where they can find natural resources for living. Because armed violence has been carried out in their territories, it undoubtedly affects their ability to continue to exist and live with dignity.

Not all cases have been brought to IAHRS. Nevertheless, the ones IACHR has had the opportunity to analyze can help us to see the specific impacts indigenous peoples have to suffer due to armed violence. These cases show the impacts on their rights as people but also on their members as individuals that are part of a specific culture.

We have several cases that address the impacts of armed violence on indigenous peoples in the American Region. So far, we can highlight the following cases: *Case of Aloeboetoe et al.*¹, *Case of Bámaca Vélásquez*², *Case of Moiwana Community*³, *Case of the Plan de Sánchez Massacre*⁴ and *Río Negro Massacres*⁵, and *Operation Genesis*⁶ among others.

Considering all these cases, we can see that armed violence can have specifics impact on indigenous peoples. For instance, indigenous communities suffered profound irreparable effects on their way of life and survival, their culture and ancestral identity. Those effects are produced due to the forced displacement and the impossibility to return to their homes; the militarization of the indigenous communities with the loss of the traditional organization which is replaced by military organization; and destruction of their ancestral property, the natural resources and deterioration of their lands and environment. Other impacts are the impossibility to perform the rites of their indigenous culture and to hold their religious ceremonies. We can also find specific impact caused by the deaths of indigenous leaders (elders and women) which make it almost impossible to transmit their millenarian culture, ensuring the loss of oral knowledge. This impact on indigenous peoples has caused irreparable damage in some cases.

**OAS Declaration on Indigenous Rights and IHL**

The State Parties Assembly to the Organization of American States Chart approved the American Declaration about indigenous peoples’ rights in June 2016⁷. Although the Declaration has

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⁷ OAS. Press Note. *Fin a 17 años de espera para los pueblos indígenas*. Available at: http://www.oas.org/es/centro_noticias/comunicado_prensa.asp?Codigo=C-075/16 (Visited: July 2016)
been questioned for not being protective enough on the issue of land rights of indigenous peoples, it is important to note that it includes specific provisions on indigenous peoples and IHL in the art. XXX. Considering the impact of armed violence on indigenous peoples, one should understand that is relevant that States have taken special attention to the situation of indigenous peoples and their members in such contexts. This Declaration considers explicitly the indigenous peoples as a group that deserves special protection during armed violence.

The art. XXX of the Declaration states that the indigenous peoples have the right to peace and security. Every state should recognize and respect their institutions for the maintaining of their organization and control of their communities and people. The Declaration adds that indigenous peoples have the right to protection and security in situations or periods of internal or international armed conflict under IHL. In the event of armed conflict, the Declaration obliges the states, in compliance with international agreements about IHL and IHRL to which they are parties, including the Fourth Geneva Convention of 1949 relating to the Protection of Civilian Persons in Time of War, and Protocol II of 1977 on the protection of victims of armed conflict not of an international character, to take appropriate steps to protect human rights, institutions, lands, territories and resources of indigenous peoples measures and their communities. In case of breaches to the norm, the states will have to take effective measures of reparation and provide the necessary resources for them, in conjunction with indigenous peoples affected by the loss or damage caused by armed conflict.

Regarding specific groups within the indigenous peoples, the Declaration prohibits the recruitment of indigenous children and adolescents in the armed forces under any circumstances. Also, the States will have to take special and effective measures in cooperation with indigenous peoples to ensure that women, indigenous children live free from all forms of violence, especially sexual, and guarantee the right of access to justice, protection and effective compensation for damage caused to victims.

One guarantee in relation to the protection of indigenous territories relates to the military activities undertaken without the consent of the indigenous peoples. Concerning it, the Declaration states that military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise agreed freely with the indigenous peoples concerned, or that they have requested. This matter is very relevant for Colombia, since many of the indigenous territories have been militarized due to the conflict.

Conclusions

According to the IAHRS, indigenous peoples are considered a group that deserves special protection under situations of armed conflict. In IHL, although there is no express provision of protection for indigenous peoples, the provisions for the protection of civilians are applicable to the situation of indigenous peoples. We consider that a look at the impact of indigenous peoples due to armed violence allows to visualize the violations of the rights of its members (children, women and the elderly) as individuals and also the collective impact as indigenous people, as it has happened in the cases taken before IACHR.
TARGETED KILLINGS AGAINST “TERRORISTS” IN A FRAMEWORK OF INTERNATIONAL HUMANITARIAN LAW

Hanna Hryshchanka
International University “MITSO”

Abstract

There are a number of debates whether targeted killing (both certain operations and the targeting tactic in general) constitutes a violation of international humanitarian law. Indeed, the policy of targeted killing was used several times by States in a so-called “war on terror”. However, despite the fact that targeted killing is tried to be justified by reasons of its effectiveness for diminishing of casualties among civilians, we may observe that it is not always an option.

One of the examples that illustrates this statement is a bombing of Doctors Without Borders hospital in Afghanistan by American air forces which led to deaths of civilians and medical personnel. Such “signature strikes” are very likely to constitute a violation of the requirements of international humanitarian law where individuals become a military target by mere local intelligence information and/or suspicious behavior as well as their movement, and where their specific identities are unknown by armed forces.

Therefore, the policy of targeted killing once again raises such fundamental rules as distinction, proportionality, humanity and necessity in a situation when a government uses this tactic for a fight against “terrorists”. This is especially valued in situations when armed forces use unmanned aerial vehicles (drones) as means and methods of warfare since their “signature strikes” may not always comply with fundamental principles of distinction and precaution which are required by international humanitarian law. For instance, when such a “signature” aim is a male who is not participating directly in hostilities, but being armed in areas of armed conflict where this behavior is used by combatants and members of armed groups.

Hence, the most important issues of targeted killings against “terrorists” in the time of armed conflict will be addressed and examined with regard to compliance with norms of international humanitarian law in this paper.

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The attack against the United States of America on September 11th, 2001 marked the beginning of the “war on terror” and targeted killings era against “suspected terrorists” of al-Qaeda and other terrorist groups by States all around the world. It has involved a flood of criticism from academicians, media and international organizations, because of vague norms of international humanitarian law (hereinafter IHL) applicable to such situations. However, the tactic of targeted killings is commonly used by the States which justify it as a legitimate and necessary response to
“terrorism”. Moreover, reference to “terrorists” makes this tactic more unclear because of the absence of a definition of “terrorists” and uncertainty of their role during an armed conflict.

**Different approaches to the notion of targeted killings**

When analyzing the definition of targeted killings in an armed conflict, one should mention that a targeted killing entails an entire military operation that is planned and executed against a particular, known person.¹

At the experts meeting held at the University Centre for International Humanitarian Law in Geneva in 2006, a targeted killing was defined as a military tactic that involves lethal attack against an individual not on the ground of his “combatant” status, but rather on a mere believing of the State that this person poses a serious threat as a result of his activities, even at a time when the person is not really engaging in hostile activities.² On the other hand, P. Alston, the Special Rapporteur of the United Nations on extrajudicial, summary or arbitrary executions, mentioned that in a situation of armed conflict targeted killing would be lawful only when the target for attack is a combatant or fighter.³ Moreover, targeted killing may be used against a civilian who is directly participating in hostilities.⁴

There are a number of examples when a targeted killing was used in military operations, but different sources define targeted killings by different terms.

For instance, targeted killings are sometimes considered as targeted assassination. As mentioned by N. Canestaro⁵ and D. Kretzmer⁶, the term of targeted assassination is narrower than targeted killings and should not be considered as equal to it because this term is usually considered as a killing of a particular individual on political grounds.

On the other hand, L. Doswald-Beck mentioned that the term “assassination” may be applicable not only in a situation of deprivation of life on the political matter; it may also refer to the unlawful killing of a person who should enjoy protection under IHL.⁷ The same position was expressed by M. Schmitt who argues that assassination may be considered as killing of any targeted person (combatant or not) by treacherous means in a situation of an armed conflict.⁸

Moreover, the Israeli Supreme Court addressed the issue of assassination in the Targeted Killings case in 2006. In this case, two human rights NGOs (petitioners) challenged the use of the

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²University Centre for International Humanitarian Law, Report of the expert meeting on the right to life in armed conflicts and situations of occupation (2005), Section E.
³P. Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on targeted killings, A/HRC/14/24/Add.6 (2010), para. 30.
⁴I-IV Geneva Conventions of 12 August 1949, common art. 3; I Protocol Additional to the Geneva Conventions of 12 August 1949, art. 52(1) and (2); International Humanitarian Law Research Initiative, HPCR Manual and Commentary on International Law Applicable to Air and Missile Warfare, Harvard University Program on Humanitarian Policy and Conflict Research, 15 May 2009, section C.12.(a).
⁵N. Canestaro, American law and policy on assassinations of foreign leaders: The practicality of maintaining the status quo, 26 Boston College International and Comparative Law Review 1(2005), p. 11.
⁷L. Doswald-Beck, The right to life in armed conflict: does international humanitarian law provide all the answers?, Volume 88 Number 864 December 2006 International Review of the Red Cross, p.900-901.
policy of targeted killings or assassinations as equal terms by the Israeli Armed Forces, for example against assassinations of Hamas leaders Ahmed Yassin and Abdul Aziz Rantisi in 2004. The petitioners referred to assassinations as to a limited military operation with the purpose of killing a specific person, usually considered as a suspected terrorist.

However, D. Kretzmer points out that “the Israeli authorities rarely, if ever, release evidence regarding the activities of the persons targeted, and it is quite possible that some of the cases indeed involved assassinations” in the sense of political killings while analyzing different approaches of Targeted Killings case interpretation. ¹

The author of this work considers that understanding of the nature of targeted assassination that was provided by N. Canestero and D. Kretzmer is more appropriate. For the purposes of elimination of misunderstanding, the term “assassinations” should be used for a premeditated killing of political figures and for political reasons even in time of armed conflict, rather than killing of “suspected terrorists”. However, for the purposes of this work the term “targeted assassination” is considered as a type of targeted killing that may be used for defining attack against a person on apolitical basis.

Another term that is used with respect to targeted killings tactic is signature strike. This definition was created mostly for drone strikes against target individuals on the ground of their behavior.² Signature strike has been deployed with the Federally Administered Tribal Areas of the United States of America, Pakistan, Yemen, and Afghanistan.³

Therefore, signature strike is considered by the author as a specific type of targeted killing tactic with the use of drones for the attack.

These two different approaches highlight two main areas for discussion, such as: who is a legitimate aim for targeted killings in a time of an armed conflict? Should the main principles of IHL, namely, proportionality and necessity be satisfied? The issues will be addressed in turn.

**Target: a legitimate aim of targeted killing**

The main debates over the targeted killing tactic are concentrated over the determination of a legitimate aim in a context of IHL. There are several options when a person may be considered as a legitimate aim based on the principle of distinction, namely: combatants in international armed conflicts and civilians “directly participating in hostilities”. Moreover, ICRC issued its Interpretive Guidance on Direct Participation in Hostilities which stipulates that civilians who participate directly in hostilities and members of an armed group who have a “continuous combat function” may be as well targeted at all times and in all places.⁴

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The concept of targeted killing is created mostly for strikes against individuals on the ground of their behavior. An individual’s pattern of behavior is considered as a proxy for the determination of “signature” if the individual has a continuous combat function as a lawful combatant or this individual directly participates in the conflict. Thus, determination of the person as a legitimate aim for a signature strike or targeted killing depends on mere believing and suspicion of this individual involvement in an armed activity.

A contemporary development of international law shows that after the 9/11 States prefer to use the term of the so-called “suspected terrorist” while addressing the use of legitimate aim for targeted killing in a vein of “war on terror”. Many commentators highlight that States usually consider combatants (in international armed conflicts) or members of organized armed group (in non-international armed conflicts), as well as persons directly participating in hostilities under the term of “suspected terrorists”. However, as it was mentioned by D. Kretzmer, a conflict between States and “a transnational terrorist group” “is not a conflict between two collectives, some of whom are combatants, but most of whom are civilians, but between one such collective and an ‘organized armed group’.”

The problem of targeted killing is that the decision to strike is usually based on intelligence data. There is little doubt in the lush standard of accuracy for the data provided by the intelligence services to States. However, when there is an issue of life and death, the State has no right for a mistake. Recent examples when States fail to protect civilians and other persons who do not take part in hostilities one more time raise the issue of legitimacy of the attack against a targeted person based exclusively on the results of the intelligence. For instance, US forces used signature strike on the hospital operated by the Doctors Without Borders in Afghanistan on 3 October, 2015 relying on its local intelligence. It resulted in a number of deaths of civilians and medical personnel who must be protected under IHL.

Therefore, the use of targeted killing when individuals and/or objects become a military target on the basis of mere local intelligence and/or suspicious behavior as well as movement, and where their specific identities are unknown by armed forces, very likely, may violate the requirements of IHL.

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4 D. Kretzmer, Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence? 16:2 Europen journal of international law 171 (2005), p. 197
6 For civilians, I Protocol Additional to the Geneva Conventions of 12 August 1949, art. 48; I-IV Geneva Conventions of 12 August 1949, common art. 3; for medical personnel II Geneva Conventions of 12 August 1949, art. 36; I Protocol Additional to the Geneva Conventions of 12 August 1949, art. 8(c).
Condition, when the enemy could be neutralized

Compliance of targeted killing with the main principles of IHL, such as necessity and proportionality, is also an important test, as it was stressed by P. Alston. The Rapporteur highlights that the killing of “signature” person must be militarily necessary and the use of force must be proportionate. This military advantage that is anticipated by the killing should be considered in light of the expected harm to civilians in the vicinity. Moreover, P. Alston also takes the position that military forces have to take all necessary measures to prevent mistakes and reduce harm to civilians that may be caused by such a strike.

It is necessary to admit the standards formulated by P. Alston have to be applicable to all situations of armed conflict, namely, an international armed conflict or non-international armed conflict, including conflicts between a State and a non-state armed group that may be called “terrorists”.

Military necessity of targeted killing or choice of evils

On the matter of such necessity for the use of lethal force the ICRC in its Guidance come to conclusion that “it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force.” During the fourth expert meeting on the meaning of “direct participation in hostilities” held by the ICRC and the Asser Institute (the Hague), the ICRC also proposed a rule that would mirror the human rights rule in a context of armed conflict that the fact that killing persons when they could be arrested does not fall within military necessity.

It supports the idea that IHL accounts for cases when an attack on the enemy instead of capturing would be a violation of IHL if he “clearly expressed an intention to surrender” as it was formulated in Article 41(b) of the I Additional Protocol. In accordance with M. Schmitt’s research, this norm provides the principle of humanity through the creation of balance between military necessity and humanitarian consideration.

In the American legal doctrine the principle of necessity is called “choice of evils”, because it justifies conduct “which the actor believes to be necessary to avoid a harm or evil to himself or to another if the harm to be avoided is greater than that sought to be prevented by the law defining the crime, and so long as there is no reason to believe the legislature intended to exclude this justification.” In accordance with the view of the author, this comparison seems to be very appropriate in case of intentional attack on a targeted individual in a context of armed conflicts.

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3 Protocol Additional to the Geneva Conventions of 12 August 1949, art. 51 (2); P. Alston, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Study on targeted killings, A/HRC/14/24/Add.6 (2010), para. 30.
4 Protocol Additional to the Geneva Conventions of 12 August 1949, art. 51(5)(b).
7 American Model Penal Code § 3.02.
Turning to the situation of targeted killings, one may hardly agree that a targeted person has the possibility to be captured rather than killed. This problem is more outlined in a situation when a targeted person is a civilian who directly participates in hostilities because IHL does not create an unrestrained right to kill. Therefore, the approach to less-than-lethal measures raises the issue of compliance of targeted killing with necessity principle, since States should use graduated force and, wherever and whenever possible, capture an individual rather than kill him.

**Proportionality in targeted killing**

Considering the concept of targeting killings under the framework of proportionality, one should notice that it has some advantages, but it has disadvantages as well.

General understanding of this principle is reflected in Article 51(5)(b) of the 1977 Additional Protocol I which stipulates that “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

While Additional Protocol II does not contain an explicit reference to the principle of proportionality in attack, Rule 14 of the Customary IHL reflects proportionality either in international and non-international armed conflict that requires an assessment whether an attack that is expected to cause incidental casualties of civilians or injury to civilians would be excessive against a “concrete and direct military advantage anticipated”.

It is incontestable that the use of targeted killing may violate IHL norms regarding proportionality as any other military tactic. However, there are still many arguments in favor of targeted killing use. For example, while addressing a legal challenge of civilian casualties in IHL, Andrew C. Orr states that targeted killing of Al-Qaeda fighters by the United States’ Army is permissible under common Article 3 of Geneva Conventions I-IV, which applies protections to “persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat”. He bases his position on the ground that such attacks do not kill such protected persons, instead of targeting only Al-Qaeda fighters with the help of drones.

While IHL has a comprehensible and universal regulation, today we witness a lot of States’ fatal mistakes by targeted neutralization of “enemies” that led to such ramifications as deaths of innocent people who are suspected to be protected. The author considers that relying only on local intelligence data in a decision to attack an object that is full of protected persons may hardly be proportional and necessary to military advantage such as the killing of several “terrorists”. Using of targeted killing tactic, as any other military tactic, has not existed in a legal gap; however, its practical application brings a thought about accuracy in the understanding of States’ military aim.

The author is conscious of the need to take into account the probability of a military mistake that always exists in an armed conflict as well as benefits of the concept of targeted killings. IHL

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1. I Protocol Additional to the Geneva Conventions of 12 August 1949, art. 51 (5)(b).
fully covers the concept of targeted killing attacks; therefore, we should not create new norms and specific regulation for it.

Nevertheless, in a situation of targeted killings use, especially when it causes losses among civilians or damage to civilian objects, parties to a conflict have to be transparent over their actions and an investigation even if it involves intelligence data. It will help to ensure that the casualties are counted and appropriately acted on if a mistake take place, as well as States will be more responsible relying on their intelligence and striving for military superiority.
Abstract

One of the challenges of International Humanitarian Law (IHL) is the increase in the number of non-international armed conflicts (NIACs) all over the world and their new challenges; besides this fact, the problem of refugees is one of the most complicated matters the world has to solve today; and one of the direct causes of such important matter is the occurrence of armed conflicts. This article will observe legal basis for the principle of non-refoulement of refugees who have migrated because of a NIAC and the protections granted to them.

The fact is that no one likes or chooses to be a refugee. Being a refugee means more than being an alien; it means living in exile and depending on others for such basic needs as food, clothing and shelter. Protection of individuals in such situation rests primarily on three bodies of Law: Refugee law, International Human Rights Law and IHL.

It is vital to bear in mind that one of the fundamental principles governing international refugee law is the principle of non-refoulement that prohibits the forced return of a refugee to his originating country. Article 31 of the Refugee Convention also states that no penalty may be imposed on a refugee on account of his illegal entry in the host country if he comes directly from a territory where his life was threatened and if he presents himself without delay to the authorities of the host country. Non-refoulement of refugees may be considered as being embedded in International Customary Law on the basis of the general practice of States.

Since 1977, the adoption of Additional Protocol I to the Geneva Conventions (AP I), it is still unclear whether the refugees are as such ‘protected persons’. Article 73 of AP I explicitly acknowledges that refugees are protected persons ‘within the meaning of Parts I and III of the Fourth Convention, in all circumstances and without any adverse distinction’. As protected persons, they benefit from a substantial range of fundamental guarantees, including the right to leave the grounds and procedures governing their internment or assigned residence, as well as protection against deportation and forcible transfer.

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2 Regarding this principle of non-refoulement, see Article 33 of the 1951 Convention relating to the status of refugees; Article II(3) of the OAU Convention; Article 3 of the United Nations declaration on territorial asylum adopted by the General Assembly in 1967 (Resolution 2312).
3 Part II of the Fourth Convention already applies to refugees as member of the civilian population.
The relevant international instruments in this regard obviously include the Geneva Convention relating to the Status of Refugees as amended by its Protocol, the Organization of African Unity Convention governing the Specific Aspects of Refugee Problems in Africa, and the European Union Qualification Directive. According to the ICRC Commentary, they also cover non-binding resolutions.

International legal protection of refugees concentrates on a person meeting the criteria for refugee status as laid down in the 1951 Refugee Convention. The second condition required by Article 73 to be recognized as a protected person is much more significant and restrictive: they must have been considered as refugees ‘before the beginning of hostilities’. Those who have become refugees after the outbreak of hostilities, and most probably because of them, are thus excluded.

Considering the NIAC and its relevant provisions, Common Article 3 to the Geneva Conventions and under some circumstances, AP II are reminding that other Provisions of Geneva Conventions and AP I do not apply to the refugees in situation of NIAC, this idea may appears if IHL has nothing to do about the protection of refugees in NIACs; but most of the abovementioned regulations which grant protection to the refugees in international armed conflicts are now a part of Customary IHL so they can also be applied in situation of NIAC. By the way based on the principle of Universality of the IHL rules and applicability of this branch of Law, application of IHL protection granted to the refugees even in NIACs is inevitable; therefore, we can conclude that refugees are even protected from refoulement in NIAC not only because they enjoy protected status but also because the principle of non-refoulement is a part of the prohibition of torture which is prohibited in both types of Armed Conflicts.

I. Forced Migration

The definition of ‘forced migration’ promoted by the International Association for the Study of Forced Migration (IASFM) describes it as ‘a general term that refers to the movements of refugees and internally displaced people (those displaced by conflicts) as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects.’ Forced migration is a complex, wide-ranging and pervasive set of phenomena.

Forced Migration may happen because of different reasons; but what is true is that whatever the reason of migration, people who migrate are always looking for a better life and on top of that are seeking safety. UNHCR mentions that ‘factors that have contributed to the increase in the scale of international migration include globalization and growing disparities in living conditions, both within and between countries.’ Keeping these factors in mind, one should outline the three most important causes of Forced Migration:

1. Under Article 1(A)2, the term “refugee” shall apply to any person who:
   ‘...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

2. No one must be transferred to a place where s/he risks torture or other forms of ill-treatment. While the precise contours of the principle may differ slightly in the different bodies of law, the essence of the principle is uncontroversial.


1- Conflict Induced Displacement: This type of displacement occurs when people are forced to flee their homes as a result of armed conflict including civil war, generalized violence, and persecution on the grounds of nationality, race, religion, political opinion or social group.

2- Development-Induced Displacement: This type occurs when people are compelled to move as a result of policies and projects implemented to advance ‘development’ efforts. Examples of this include large-scale infrastructure projects; urban clearance initiatives; mining and deforestation; and the introduction of conservation parks/reserves and biosphere projects.

3- Disaster-Induced Displacement: This one occurs when people are displaced as a result of natural disasters, environmental change and human-made disasters (industrial accidents, radioactivity).

Only the first category, ‘Conflict Induced Displacement’ or forced migrations because of the occurrence of an armed Conflict, is directly connected to the goal of this article; so the next part will observe Armed Conflict.

II. Armed Conflict

Human History has always witnessed different scenes of Armed Conflicts and the concept of peace has never been duly applied to the international community. In 1945 when we the peoples of the United Nations gathered in San Francisco to unite our strength to maintain International Peace and Security, we were determined to save succeeding generations from the scourge of war which had brought untold sorrow to us. Those days International Armed Conflicts were the only devil we wanted to get rid of. But today, in 2015, the world is confronting a more serious problem which is the growth in the number of Non-International Armed Conflicts. Over the time, this phenomenon resulted in the creation of new challenges to the world population, challenges which are not restricted to the results of these sorts of Armed Conflicts. Indeed armed conflicts are one of the direct causes of the most complicated issues before the world community today. I mean the problem of the world's refugees and internally displaced people; NIACs are not a separate issue.

It is vital to recall that no legal instrument including the four Geneva Conventions and their Additional Protocols have defined the term NIAC but the judicial precedents may be quite helpful. In this regard, based on these precedents a NIAC exists whenever there is a resort to protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. In a non-international armed conflict, common Article 3 and, perhaps, Additional Protocol II to the Geneva Conventions (AP II) apply. No other portion of the Geneva Conventions applies.

Common Article 3

Common Article 3 is the sole Article in all the Geneva Conventions that deals with internal armed conflicts – armed uprisings, sustained insurrections, civil wars. Because common Article 3 contains, in abbreviated form, a range of basic humanitarian norms it is often referred to as a Geneva Convention in miniature. It has the merit of being simple and clear and the additional advantage of being applicable automatically, without any condition of reciprocity. Its observance does not depend

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1 http://www.forcedmigration.org/about/whatisfm; last visited on 02/12/2015.
2 The prosecutor v. Thomas Lubanga Dyilo, case No.: ICC-01/04-01/06, date: 29 January 2007, Para. 233; The prosecutor v. Dusko Tadic, case No.: IT-94-1-AR75, date: 02 October 1995, Para. 70.
on preliminary discussions as to the nature of the conflict. It is true that it merely provides for the application of the principles of the Convention and not for the application of specific provisions, but it defines those principles. In another view this Article provides the minimum protections to the victims of NIACs.

1977 AP II

Just like AP I, AP II cannot yet be said to be customary law, but many of its provisions are considered to be part of customary rules. ‘Because there are doubts as to which of its provisions are now part of customary international law, and because its fundamental guarantees largely overlap with common Article 3 (which undoubtedly is part of customary law). AP II is an effort to ‘broaden the scope of application of basic humanitarian rules [as] experience demonstrated the inadequacy of the common Article 3.’ AP II develops and supplements common Article 3 and applies in NIACs, its mere eighteen substantive provisions largely repeating humanitarian norms that are mandated in other treaties. It is not helpful that the drafters had in mind two varieties of NIAC: one involving major civil war, like that in Spain in the 1930s, and another more like the ‘contained’ civil wars of Nigeria and the Congo, in the 1970s. ‘Through this definition two levels of NIACs were created, even as to parties to both the Conventions of 1949 and Protocol II – the lower level, governed by Article 3, and the higher level, governed by Protocol II. Such nice legal distinctions do not make the correct application of the law any easier.’ Indeed, today the distinction is forgotten and common Article 3, rather than Additional Protocol II, has become the protection invoked in non-international armed conflicts of every variety.  

III. Principle of Non-Refoulement

In situations of Forced Migrations because of the existence of a NIAC, regardless of which of the above mentioned bodies of Law - Common Article 3 to the GCs or AP II- shall apply, people who have fled their homes or, in better words, have migrated are divided in three separate groups: 1- Refugees 2- Asylum Seekers 3-Internally Displaced Persons (IDPs)

Refugees

International legal protection of refugees centers on a person meeting the criteria for refugee status as laid down in the 1951 Refugee Convention. Under Article 1(A)2, the term ‘refugee’ shall apply to any person who:
‘...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

Thus, according to this provision, refugees are defined by three basic characteristics:

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2 Ibid, page 129 & 130.
• They are outside their country of origin or outside the country of their former habitual residence;
• They are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted; and
• The persecution feared is based on at least one of five grounds: race, religion, nationality, membership of a particular social group, or political opinion.\(^1\)

**Asylum Seekers**

Asylum seekers are people who have moved across an international border in search of protection under the 1951 Refugee Convention, but whose claim for refugee status has not yet been determined.\(^2\)

Asylum migration is clearly a result of mixed motivations. Most asylum seekers do not come from the world's poorest states; however, many do come from failed or failing states enduring civil war and with high degrees of human rights abuses and, not surprisingly, significant levels of poverty. However, the number of people who are seeking asylum in Western states comprises a small fraction of the total number displaced around the world.\(^3\)

**IDPs**

The United Nations Guiding Principles on Internal Displacement (1998) define IDPs as ‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.’\(^4\)

Internally displaced persons, who now constitute some 22 million persons, are persons whose situation is similar to that of refugees. However, there are several differences between IDPs and refugees:

First, IDPs are not the subject of a treaty adopted at the universal level, although the Guiding Principles are based on binding international human rights and humanitarian law.

Second, as opposed to refugees, IDPs have not crossed an international border from their country of origin.

Third, the definition of IDPs in the Guiding Principles is significantly broader than the refugee definition, including those displaced by armed conflict, human rights violations and natural disasters, while the refugee definition is restricted to those with a well-founded fear of being persecuted on at least one of the five grounds.\(^5\)

The Refugee Convention as one of the prior sources of the Law of Refugees outlines the rights of refugees and protections granted to them. One of the Cardinal principles which is also accepted in this convention is the principle of Non-Refoulement; this principle constitutes the

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\(^{1}\) The Definition of a refugee, available at [http://www.geneva-academy.ch/RULAC/international_refugee_law.php](http://www.geneva-academy.ch/RULAC/international_refugee_law.php); Last visited on 04.12.2015.


\(^{3}\) [http://www.forcedmigration.org/about/whatisfm](http://www.forcedmigration.org/about/whatisfm); Last visited on 04.12.2015.


cornerstone of international refugee protection. So the rest of the article will observe this category of migrants. It is enshrined in Article 33 of the 1951 Convention. Article 33(1) of the 1951 Convention:

‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

Under the abovementioned Article, the protection against refoulement applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention and does not come within the scope of one of its exclusion provisions. It follows that the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared. The principle of non-refoulement is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. This public perception of asylum seekers may explain some of the discomfort with any government efforts to detain them or otherwise to treat them more like unauthorized migrants. The reasons to grant lawful status to asylum seekers seem compelling. Granting asylum reflects not only an impulse to protect vulnerable people, but also a historical sense of responsibility and obligation that infuses international law protections for refugees.

The prohibition of refoulement to a danger of persecution under international refugee law is applicable to any form of forcible removal, including deportation, expulsion, extradition, informal transfer or ‘renditions’, and non-admission at the border in the circumstances described below. This is evident from the wording of Article 33(1) of the 1951 Convention, which refers to expulsion or return (refoulement) ‘in any manner whatsoever’. It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear threats to his or her life or freedom related to one or more of the grounds set out in the 1951 Convention, or from where he or she risks being sent to such a risk. Indeed, whereas Article I (A) (2) of the Refugee Convention defines as a refugee a person who is outside his country of origin ‘owing to well-founded fear of being persecuted’, Article 33 refers to ‘territories where his life or freedom would be threatened’ on account of the same grounds as set out in Article I (A) (2).

Article 33 applies to any Convention refugee who is physically present in the territory of a Contracting State, irrespective of whether his presence in that territory is lawful or unlawful, and regardless of whether he is entitled to benefit from the provision of Article 31 or not. Just like

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5 Article 31:
Article 31 (2), Article 33 must also be considered to apply to persons who are prima facie refugees, pending a decision whether they come within the definition in Article 1.

The term ‘expulsion’ refers to a formal measure, which in some countries may only be carried out in pursuance of a decision by a judicial authority, although in other countries expulsion may be ordered by administrative authorities. In many countries an expulsion order does not only provide for the removal of the person concerned from the territory of the issuing State, but it also contains a prohibition of returning to the country for ever or for a certain period. As a rule, expulsion is only resorted to in case where a person has committed some offence or has become a charge on public funds. What, however, really and basically distinguishes expulsion from other measures amounting to removal of persons from the territory is that it is the only measure which may be used against aliens who so far have been lawfully staying in the country.

Exceptions to the principle of non-refoulement under the 1951 Convention are permitted only in the circumstances expressly provided for in Article 33(2), which stipulates that: ‘The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.’

The application of this provision requires an individualized determination by the country in which the refugee is that he or she comes within one of the two categories provided for under Article 33(2) of the 1951 Convention.

**Principle of Non-refoulement in Customary International Law**

Article 38(1)(b) of the Statute of the International Court of Justice lists ‘international custom, as evidence of a general practice accepted as law’. For a rule to become part of customary international law, two elements are required: consistent State practice and opinio juris. The principle of non-refoulement enjoys the abovementioned conditions and is therefore considered as a part of customary international law and as a result binding on all states including those who are not parties to the 1951 Refugee Convention or its 1967 Protocol.

Within the framework of the 1951 Convention/1967 Protocol, the principle of non-refoulement constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. The fundamental and non-derogable character of the principle of non-refoulement has also been reaffirmed by the Executive Committee of UNHCR in numerous Conclusions since 1977. Similarly,

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1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.
the General Assembly has called upon States ‘to respect the fundamental principle of non-refoulement, which is not subject to derogation’.¹

UNHCR notes the practice of non-signatory States hosting large numbers of refugees, often in mass influx situations. Moreover, exercising its supervisory function, UNHCR has closely followed the practice of Governments in relation to the application of the principle of non-refoulement, both by States Party to the 1951 Convention and/or 1967 Protocol and by States which have not adhered to either instrument. In UNHCR’s experience, States have overwhelmingly indicated that they accept the principle of non-refoulement as binding, as demonstrated, inter alia, in numerous instances where States have responded to UNHCR’s representations by providing explanations or justifications of cases of actual or intended refoulement, thus implicitly confirming their acceptance of the principle.²

**Human Rights-Based Non-Refoulement Obligations under Customary International Law**

After describing the legal instruments of the principle of Non-refoulement and its customary nature, one should note that this principle is also established under international human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. Indeed, this principle is also incorporated in several international human rights treaties, for example the 1984 Convention against Torture, which explicitly prohibits the forcible removal of persons to a country where there is a real risk of torture (refoulement).³ The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or jus cogens. It includes, as a fundamental and inherent component, the prohibition of refoulement to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments.⁴ The prohibition of refoulement to a risk of cruel, inhuman or degrading treatment or punishment, as codified in universal as well as regional human rights treaties, is in the process of becoming customary international law, at the very least at regional level.

Obligations under the 1966 Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 [right to life] and 7 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The prohibition of arbitrary deprivation of life, which also includes an inherent obligation not to send any person to a country where there is a real risk that he or she may be exposed to such treatment, also forms part of customary international law.

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² Ibid, Para 15.
³ Article 3, Convention Against Torture and Other Cruel, inhuman or degrading Treatment or Punishment, 26 June 1897.
The prohibition of refoulement to a country where the person concerned would face a real risk of irreparable harm such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment extends to all persons who may be within a State’s territory or subject to its jurisdiction, including asylum seekers and refugees, and applies with regard to the country to which removal is to be effected or any other country to which the person may subsequently be removed. It is non-derogable and applies in all circumstances, including in the context of measures to combat terrorism and during times of armed conflict.¹

¹Ibid, Para 20
LEGAL REGULATION OF THE EUROPEAN UNION ASYLUM POLICY AND REFUGEE CRISIS

Mariya Mlashevskaya
International University “MITSO”, Belarus

Abstract

Nowadays, due to the armed conflicts in Middle East (Syria, Iraq), Africa (Eritrea, Nigeria, Somalia, Sudan, Gambia), and other conflict zone, the European Union (hereinafter, the EU) is facing unprecedented refugee crisis. Desiring to save their lives, migrants use all ways to enter the EU. However, the EU is not ready for such a high number of asylum-seekers which is increasing from day to day. The Member-States undertake all the necessary measures to find equilibrium and solve the refugee crisis. The necessary step for resolving the problem is the understanding of the background and consequences which lead to the current situation.

I Introduction

The United Nations High Commissioner on Refugees (hereinafter UNHCR) noticed that more than 59.5 million people were forcibly displaced all over the world in 2015. Therefore, our world is experiencing its biggest refugee crisis since the World War II and the actuality of the topic under consideration is obvious.

The following reasons for strengthening attention to this issue can be cited: Countries of first destination of migrants in the EU are Greece, Italy and Croatia. With this regard, the latter have encountered two main problems.

Firstly, in compliance with Dublin Regulations, countries of first destination are responsible for reviewing of asylum applications in case if other criteria are not applicable. However, such a rule raised disproportionality within the Member-States.

Secondly, countries in which migrants enter first do not have enough resources to provide refugees with all necessities for the period of asylum application review because of the critically high number of entering refugees.

Refugees are dying when trying to reach the EU. According to the UNHCR, more than 2,600 people died in the Mediterranean Sea trying to reach Greece or Italy in 2015.

Therefore, we can resume that the main problem for the EU is the disproportionality of asylum applications within Member-States. On the other hand, the main problem for refugees is the horrible conditions in time when they are trying to get to the EU.

2 UNHCR, Worldwide displacement hits all-time high as war and persecution increase, June 18, 2015. Accessed November 17, 2015
4 UNHCR, Crossings of Mediterranean Sea exceed 300,000, including 200,000 to Greece, August 18, 2015. Accessed November 17, 2015
II Distinction between notions ‘Refugee’ and ‘Asylum’

Firstly, it is necessary to clarify the difference between ‘Asylum’ and ‘Refugee’. “Asylum” is ‘the protection that a State grants on its territory to a person who comes to seek it’.1 The term ‘Refugee’ shall apply to any person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country.2

Therefore, the individual whose request for protection is still processed is an asylum-seeker and one whose request is recognized becomes de jure a refugee.

III Compatibility of International Law with Law of European Union in frames of refugees’ protection

Turning to the EU legislation on the issue of asylum, one should pay attention to the provisions of the EU Charter of Fundamental Rights (hereinafter the Charter). According to the latter, the Member-States are obliged to guarantee the right of asylum to any individual who requests it in compliance with obligations enshrined in the UN Convention Relating to the Status of Refugees of 28 July 1951 (hereinafter the UN Refugee Convention) and in accordance with the Treaty on the Functioning of the European Union (hereinafter TFEU).3

In its turn, TFEU establishes the EU obligation for developing a unilateral policy on asylum, subsidiary protection and temporary protection with an aim to provide appropriate status to any third-country national who requests international protection and guarantee compliance with the principle of non-refoulement in accordance with the UN Refugee Convention.4

Moreover, such obligations of the EU Member-States were proved by Courts within the EU. The right to asylum guaranteed under Article 18 of the Charter and the TFEU includes the right of every third-country national that the Member-State where he has applied for asylum fulfills its obligation of achieving the purpose prescribed by Article 78(1) TFEU ‘to offer appropriate status to any third-country national in need to international protection’.5

However, there is a category of migrants who are excluded from international protection. Particularly, provisions of the UN Refugee Convention clearly established that individuals who committed war crimes or crimes similar to the latter cannot be the subject of the protection granted by the Convention.6 With this regard, there has been raised the question of compatibility of the EU legislation and the UN Refugee Convention. For instance, the German Federal Administrative Court

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1 Institute of International Law (5th Commission), ‘Asylum in Public International Law’, Resolutions adopted at its Bath Session, Sept 1950, art 1
5 ZuheryFreyehHalaf v Darzhavaagentsiazabehantsitepriministerskisavet, Sofia City Administrative Court, judgment no 297, January 15, 2014
6 Refugee Convention, art 1F
asked the Court of Justice of the EU (hereinafter CJEU) to explain whether the granting of asylum by application of German Constitution to individuals who lost their right to get refugee status, by article 1F of the UN Refugee Convention, was compatible with the obligations imposed by EU law. CJEU responded that Member States might grant a right of asylum under their national law to a person who is excluded from refugee status. Therefore, the EU Member States are entitled to grant asylum under its legislation.

**IV Dublin Regulations. How do they work?**

Turning to the responsibility of the EU Member States for reviewing asylum applications, we have to look at the Dublin Regulations (EU) No 604/2013 (hereinafter the Dublin Regulations). The criteria for bearing responsibility are clearly prescribed in hierarchical order by Chapter 3 of the abovementioned document.

The Dublin Regulations established unilateral responsibility of each State for migrants. As a result, the EU Member States use a set of established criteria for determining whether they are responsible for reviewing of particular application. In case if the applicants do not have any family members who already applied, asylum seekers must remain in the first European country they entered and that country is solely responsible for examining migrants' asylum applications. In practice, in case if migrants will further travel to another EU country that differs from the country of first entrance they will be deported back to the country they entered first.

For a long time the EU has been trying to harmonize asylum policy. Moreover, the EU has established the Common European Asylum System (hereinafter CEAS). By doing so, the EU is trying to establish an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union. However, that is not so easy, because European Union has 28 member states, the employment opportunities, policy and economic conditions of which differ from State to State.

On the one hand, when the EU reviewed the Dublin Regulations it made a step to a common European asylum policy. On the other hand, the burden of responsibility falls disproportionately on entry-point states with exposed borders. This is the reason why nowadays countries of first entrance, such as Greece, Italy and Croatia, have already stopped enforcing the Dublin Regulations and allow migrants to go to other EU countries in order to render asylum application there. However, a new issue of disproportionality was created. Nowadays, the majority of asylum applications are received by such countries as Sweden and Germany. The German Chancellor Angela Merkel, in spite of Dublin Regulations, allowed Syrian migrants to render their asylum application in Germany.

Moreover, the European Commission (hereinafter the EC) attempted several steps for resolving refugee crisis. Particularly, the EC adopted quotas for relocation of 120 000 refugees who

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1 Id.
2 Joined Cases C 57/09 and C 101/09 Bundesrepublik Deutschland v B&D [2010] ECRI-10979, para 121
3 Dublin Regulations, Chapter 3
4 Id.
5 Ibid., art 9-13
6 Ibid., preamble (2)
were in Italy and Greece per each EU country on 22 of September 2015.\textsuperscript{1} For instance, according to these quotas, Poland was obliged to accept 5082 refugee from Italy and Greece.\textsuperscript{2} However, after Paris terrorist attacks, Poland denied accepting refugees as prescribed by quota system plan.\textsuperscript{3}

In these circumstances, we can agree with statement of Heather Conley, the Senior Fellow of the Center for Strategic and International Studies: "Both the burden and the sharing are in the eye of the beholder. I don't know if any EU country will ever find the equity that is being sought".

\textbf{V Hazardous conditions which refugees encounter on the way to the European Union}

Concerning Refugee crisis, it is necessary to draw attention to refugees who travel to Italy from Libya by boat in hazardous conditions.\textsuperscript{4} Moreover, people traffickers charge thousands of dollars per person for their services.\textsuperscript{5} The chaos in Libya has given traffickers freedom to exploit migrants and refugees desperate to reach Europe.

Another issue of concern to point out are migrants’ detention centers within the EU. A number of human rights groups insist that some of these detention centers violate Article 3 of the European Convention on Human Rights\textsuperscript{6} (hereinafter ECHR) prohibiting inhuman or degrading treatment. For instance, in the Greek case, the European Court of Human Rights interpreted article 3 of ECHR in the following manner: “The notion of inhuman treatment covers at least such treatment as deliberately causing severe suffering, mental or physical, which, in a particular situation, is unjustifiable. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience”.\textsuperscript{7} Moreover, the European Court of Human Rights usually pays attention whether individuals who might be facing a real risk under Article 3 of the ECHR were granted refugee status. In the case of \textit{Ahmed v. Austria}, for instance, the Court declared that it attaches particular weight to the fact that … the Austrian Minister of the Interior granted the applicant refugee status within the meaning of the Geneva Convention.\textsuperscript{8}

Therefore, we can resume that migrants face two problems trying to seek asylum in the EU: firstly, the risk of death at sea in time when they are trying to reach the EU. Secondly, when migrants get to the EU, they encounter problems connected with a long stay in detention centers, the conditions of which are often inconsistent with the provisions of article 3 of ECHR.

\textbf{Conclusion}

\textsuperscript{2}Id.  
\textsuperscript{6}Council of Europe, \textit{European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14}, 4 November 1950, ETS 5, art 3  
\textsuperscript{7}Greek Case, Judgment of 18 November 1969, Yearbook of the European Convention on Human Rights, No. 12  
\textsuperscript{8}Ahmed v. Austria, Judgment of 17 December 1996, Appl. No. 25964/94, para. 42
Thus, one of the main problems of migration issues within the EU is the disproportionality of allocation of migrants. The EU has attempted several steps to find a solution. The Review of the Dublin Regulations and relocation quotas is considered as such a step. However, the rule of receiving asylum application by First-Entry-State, did not help the EU to reach the desired objective, to find a balance within Member-States on the refugee issue. Thereby, European Union is on the right way; however, still much has to be done in the process of harmonizing its legislation on the allocation of migrants.

The second problem is migrants’ lives. People who are leaving their countries on the ground of the existing armed conflict in their motherland can die trying to save their lives. Furthermore, their troubles do not cease even in case they reach the EU since there is a risk of prolonged detention and degrading treatment in the detention centers within the EU.

In this case, the EU can take the next steps to solve the problem of refugee crisis:
To save lives at sea by supervising the main routes
To exercise anti-smuggling operations
To increase the number of safe and legal channels into the EU to reduce demand for smuggling and dangerous journeys
To develop the quota system for relocation of migrants within the EU Member States
To increase the level of material conditions in the detention centers.
Panel 6. The Applicability and Application of International Humanitarian Law to Multinational Forces

Applicability of Occupation Law to United Nations Peace Support Missions

Giga Gigashvili, Davit Jaiani
PhD Student, Iv. Javakhishvili Tbilisi State University

Abstract

In 1945 in San Francisco the United Nations (hereinafter UN) was founded with its first and arguably main goal, which is described in the Charter, being to "save succeeding generations from the scourge of war."1 Unfortunately, soon after the UN was born the Cold War started, with the opposition of the East-communist and the West-democratic member States. In this process, from 1956 to 1990, the UN used peacekeeping missions as one of the major tools in restoring and maintaining peace and security worldwide.

In parallel International Humanitarian Law (hereinafter IHL) was developed to regulate the conduct of parties engaged in an armed conflict or military occupation. Its purpose is to enable the parties to wage war, whilst at the same time providing protection to people that are not involved in the conflict (primarily civilians) and limiting suffering by prohibiting the use of excessively cruel weapons or methods of combat.

In the last decades, during the course of peace support operations (hereinafter - PSO) tragic incidents have occurred urging the international community to a harsh debate on the applicable law in such peace missions. In that respect, one basic conclusion which is commonly shared and accepted is that, in order to achieve justice and, ultimately, peace in any field, it is of crucial importance that all civil and military personnel respect, observe and enforce the rule of law. Discussions and disagreements then have been raised as to which law should be applied; the UN was reluctant to recognize that IHL applied to its peacekeeping forces.

This article will examine the extent to which occupation law applies to UN peacekeeping, and other peace support operations that differ from belligerent occupation as traditionally conceived. However, where a state is in occupation of territory outside its own borders as a result of armed conflict, there is an extensive body of law governing the relationship between the occupant and the people of the occupied territory, focused on Hague conventions and GC IV Relative to the Protection of Civilians in Time of War, 1949 (GC IV).2

The present paper will consist of following chapters: 1) firstly and briefly, the different nature of the peacekeeping, peace-enforcement and robust peacekeeping operations will be

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1 Charter of United Nations and Statute of International Court of Justice, preamble, 1945 San Francisco.
underlined; 2) in the second chapter the applicable law to each type of PSO will be explored; 3) in the following chapter there will be described the notion of occupation and how PSO will be bound by occupation law; 4) in the last chapter there will be presented the status of members of PSO and how law protects them.

Peace support missions

During the Cold War from 1945 to 1990, the Security Council (hereinafter SC) permanent members vetoed 279 resolutions, effectively preventing the UN from taking constructive and determined action, among them peacekeeping and mostly peace enforcement actions in over one hundred major conflicts. Conventional wisdom assumes that the intervention of peacekeepers is always a positive step toward the achievement of a comprehensive, lasting peace between warring sides. As former UN Secretary-General Boutros-Ghali argues, peacekeeping "expands the possibilities for... the making of peace."

Peace support missions do not seem to fit within the scope of the activities specified by chapter VI of the Charter, which concerns the "Pacific Settlement of Disputes," or chapter VII of the Charter, which addresses "Action with Respect to Threats to the Peace, Breaches of the Peace and Acts of Aggression."

Peace support, although not explicitly provided for in the Charter, has evolved into one of the main tools used by the United Nations to achieve this purpose. It is surprising that UN during this period deployed about 60 peace support operations and we cannot find any specific article or provision indicating the right of the UN to use peacekeeping missions (hereinafter PKM) or other PSOs. Despite this, PKMs find the legal basis on art. 33 of the UN Charter, which considers the peaceful means to avoid a conflict. The traditional PKM is then a peaceful mean chosen and consented to by the parties to pursue a peaceful settlement of a conflict. In order to determine the applicable law in any peace support operations, first the types of PSO should be determined: peacekeeping, peace-enforcement and robust peacekeeping.

Missions under Chapter VI

The Review of United Nations Peacekeeping defines peacekeeping as follows: “As the United Nations practice has evolved over the year, a peacekeeping operation has come to be defined as an operation involving military personnel, but without enforcement powers, undertaken by the UN to help maintain or restore international peace and security in areas of conflict. These operations are voluntary and are based on consent and cooperation. While they involve the use of military personnel, they achieve their objectives not by force of arms, thus contrasting them with the "enforcement action" of the UN under Art. 42.”

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2 See note 1, article 33.
Legal Basis for PKM is implicitly reflected in norms contained in Chapter VI, in particular Article 33. So SC may call upon the parties to any dispute to settle this by different peaceful means. PKM under chapter VI is characterized by following compulsory elements:

**Host nation consent:** The UN and the host nation usually formalize the host nation consent with a Status of Force Agreement (hereinafter SOFA). The SOFA is an agreement between the UN and the host nation regulating the consent of the host nation to allow a UN PKM on its soil;

**Impartiality or neutrality:** peacekeepers mediate a conflict and do not side with any of the State in conflict.  

**Self-defensive rules of engagement:** the peacekeepers use of force is restricted to self-defense and has to be necessary and proportional; there must be a potential or real threat that justifies the use of force and the soldier may not use any greater force than is necessary to deal with the threat.

During the Cold War we encounter in most cases PKM under chapter VI with host state consent, which means that the parties are not involved in any conflict and that the members of PKM shall have non-belligerent statute and when a peacekeeper uses a proportionate force in self-defense, the peacekeeper does not then lose non-combatant protection. Examples of PKM under charter VI include missions in South Africa, Haiti, Liberia, Balkans and East Timor.

**Missions under Chapter VII**

After Cold War from 1990, the UN began to use peace enforcement operations (hereinafter PEO) instead of classic peacekeeping. Similar to peace keeping, the term peace-enforcement is also not mentioned in Chapter VII. Despite this, as a main task to restore and maintain international peace and security SC can use any appropriate means under chapter VII to do so. Peace enforcement operations are designed as follows:

**No nation consent:** the UN forces enter the soil of the Aggressor State without its consent. When a State puts in place a threat to the peace or a breach of the peace or an act of aggression the Security Council can react;

**Use of force:** the UN forces use force against a nation State in order to stop the aggression and not just in self-defense.

It should be mentioned that only peace enforcement troops may be deemed to be a party to a conflict. To PEOs the law of armed conflict (*ius in bello*, international humanitarian law) applies, because peace enforcement forces are belligerent forces engaged in ongoing conflict. The UN

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1See note 1, article 33.
3ibid
4ibid
6See note 1, chapter VII
should formally change the mission, withdraw its non-combatant peacekeepers, modify its previous mandate under chapter VII and deploy a more appropriately trained and equipped combat force to accomplish the mission, examples including UNOSOM I and UNOSOM II.¹

Generally, it is not difficult to distinguish peacekeeping from peace enforcement, when in resolution the mandate of missions is determined clearly. Some scholars argue that the core distinctive element is use of force beyond self-defense. Murphy argues that: “Litmus test for determining if an operation was peacekeeping or peace enforcement was the ability and willingness to resort to the use of force.”²

Robust Peacekeeping

These include the UN Operation in Congo (ONUC), the Stabilization Force in post-conflict Bosnia-Herzegovina and Croatia (SFOR), the Kosovo Force (KFOR) and the Intervention Brigade in the Democratic Republic of Congo. The mandate of the Security Council foresaw the members of these operations not as becoming party to an armed conflict, but rather as maintaining or restoring international peace and security in cooperation with the host state, yet there were circumstances of participation in support of the host state in the conduct of hostilities.

The transformation of peacekeeping missions reflects in the UN’s own words more than hybridization: "The goals of Peacekeeping Missions have in fact changed significantly: from assisting in the maintenance of ceasefires during cold war PKOs to increasingly becoming peace building missions.”³

Applicable Law

As it is mentioned, there are different types of operations, such as peacekeeping and enforcement and robust peace keeping. The main object of the paper is to determine whether UN peacekeeping forces are bound by IHL and, specifically, by occupation law.

As it is known, the UN not being a state is not a signatory to the four GCs of 1949 or any other relevant international treaty. It is up to its own member states to sign and ratify these conventions. In this scenario we have to determine whether the 1949 GCs and particularly law of occupation acquired status of customary rules.⁴

The UN itself has recognized that IHL spirit and principles of IHL apply to PSO, including the four GCs of 12 August 1949 and their Additional Protocols of 8 June 1977 and the UNESCO Convention of 14 May 1954 on the Protection of Cultural Property in the event of Armed Conflict.⁵ In addition, the Secretary-General’s Bulletin argues that IHL (not only spirit and

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⁴ Ibid, page 16.
principles) applies to UN “forces when in situations of armed conflict they are actively engaged therein as combatants,” even if the combat is in self-defense.\(^1\) The most complicated issue in Secretary-General’s Bulletin is that it limits the IHL application to UN forces “to the extent and for the duration of their engagement.”\(^2\) However, the UN has not clarified exactly what constitutes “actively engaged” in combat or what applicable “to the extent and for the duration of their engagement” means for the application of IHL. Despite this position, we have examples how UN was reluctant to recognize applicability of IHL to PSOs. The Canadian Courts Martial Appeals Court held in \(R \text{ v} \) Brocklebank that Private Brocklebank (who was arrested for aiding and abetting the torture of a Somali teenager) had no legal obligation to ensure the safety of a prisoner, because neither the GCs nor their Additional Protocols applied to peacekeeping operations. Hence they did not apply to Canadian Forces in Somalia.\(^3\) A Belgian Military Court investigating violations of IHL also concluded that IHL did not apply to the UN peacekeeping forces in Somalia.\(^4\) This resulted in strong criticism of the national courts.

As it was mentioned, the UN is not signatory to the conventions, but it is still bound by the GC rules that have become international customary law, and the Member States that contribute forces to the UN operations are also bound by them. This approach was confirmed by International Court of Justice (hereinafter ICJ) in \Reparation\(^5\) and \Nicaragua\(\) cases. ICJ stated that all GCs regulations that repeat the Hague Regulations, as well as all the GC norms setting out basic humanitarian standards for any armed conflict are customary international law and will bind all States whether they are State parties or not. In addition, ICJ has ruled that the UN is “an international person,” which can be subject to international law, such as IHL.\(^6\) Indeed, a party to a conflict cannot use its status as a member of a collective security force or PSO to justify breaches of IHL.\(^7\)

However, regarding peacekeeping and peace enforcement operations it is more or less clear that IHL is always applicable in peace enforcement operations and in classic peacekeeping operations “blue helmets” must respect the spirit and principles of IHL. But it is very problematic to determine if and when the law of armed conflict applies to the new generation of robust peacekeeping operation. From the reading and interpretation of the main sources of the law of armed conflict it could be argued that IHL applies to robust PKO the when the forces cross the GC common art. 2 thresholds, when we meet the use of force for reasons other than self-defense. In that

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\(^{2}\) Ibid


\(^{6}\) ICJ \textit{interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion}, 1980 I.C.J. 73, Para 89-90 “international organizations such as the UN are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law”

\(^{7}\) Yoram Dinstein, \textit{the conduct of Hostilities under the law of international armed conflict}, Cambridge Univ. Press 2004
case, UN peacekeepers become combatants and lawful targets, instead of internationally protected persons.

**Occupation Law**

International bodies have been hesitant to use the term occupation in relation to PSOs, particularly where there has been a strong humanitarian component to the operation. This is partly because there are genuine differences between these operations and the kind of occupations to which GC IV and Hague regulations were intended to apply to, and partly because of the negative connotations associated with occupation.¹

The law pertaining to military occupation is set out in the Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, and expanded upon in GC IV Relative to the Protection of Civilians in Time of War, 1949 and Protocol Additional to the GCs of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 1977 (Protocol I).²

Article 42 of the Hague Regulations provides that:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

The key determinant is the actual exercise of authority. The question is whether the invading forces have brought the area under their control “to the extent that they can actually assume the responsibilities which attach to an occupying power”.³

A broader definition of occupation is enshrined in Article 2(2) of GC VI:

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

This article relates to occupations taking place outside a state of war. It was intended to bring within the terms of the convention occupations achieved without hostilities when the government of the occupied country considered that armed resistance was useless.⁴ The clear example is the population of the West Bank which has not disarmed but it also seems clear that, despite the violence of the intifada, Israeli forces have effective military control of the territory. UN General Assembly resolutions consistently refer to the Israeli presence in Gaza and the West Bank as an occupation.⁵ The GCs and Hague Regulations do not provide for the establishment of any organ with the power to determine whether or not an occupation exists or has ceased to exist.⁶

Daniel Thürer, in an ICRC Official Statement on ‘Current challenges to the law of occupation’ argues that there are two possible approaches to determining whether there is an occupation:

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¹Siobhán Wills The Applicability of Occupation Law to Peacekeeping and other Multi-national Operations, Oxford University. Press. 2014, Page 2
²See note 1.
⁶See note 25, Page 5
"The more restrictive approach, would be to say that a situation of occupation only exists once a party to a conflict is in a position to exercise the level of authority over enemy territory necessary to enable it to discharge all the obligations imposed by the law of occupation, i.e. that the invading power must be in a position to substitute its own authority for that of the government of the territory. This approach is suggested by a number of military manuals. For example the new British Military Manual".1

**Law of Occupation and UN Operations**

The main legal sources for occupation, the Hague Regulations and GCs make no provision for occupation by multi-national forces or PSOs. However, States contributing troops to UN operations have an obligation to ensure their troops comply with IHL.2

One of the basic principles of IHL is that it applies to all parties engaged in armed conflict irrespective of the lawfulness or moral validity of the conflict. The distinction between *jus in bello* and *jus ad bellum* renders the objectives, motives and legitimacy of the intervention irrelevant to the question of the applicability of IHL. Thus it can be argued that UN authorization does not affect the applicability of occupation law.3

**Special case of Iraq**

Prior to the UN mandated post-conflict occupation of Iraq, under which the Multi-National Force (MNF) are required to comply with the laws of occupation, there was considerable reluctance to hold that the laws of occupation apply to UN operations. SC Resolution 1483 of 22 May 2003 made it clear that occupation law was applicable to the MNF at least up until the transfer of sovereignty, in June 2004. Resolution 1483 was specific to the situation in Iraq and is not determinative as to whether occupation law applies to UN forces generally and if so whether its applicability extends to UN-led operations or only those that are UN-mandated. But if occupation law is applicable to some UN authorized operations but not others, that distinction must be based on legal criteria, and factual differences relevant to the applicability of the legal criteria.

The UN does not support the view that occupation law binds the UN itself. Under the UN Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations, the UN undertakes to “*observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel.*”4 But this approach is concerned with the conduct of personnel, rather than general responsibilities under IHL. The Bulletin5, even if it does encompass occupation law, does not appear to encompass occupations arising in the circumstances set out in Article 2(2) of the GCs, which deals with occupations arising outside of armed conflict. The problem is exacerbated by the

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1 ICRC *Occupation and international humanitarian law: questions and answers*, 4 August 2004.
4 UN GA *Report of Secretary General*, 23 May 1991, Doc A/46/185
5 Secretary-General's Bulletin on *Observance by UN Forces of International Humanitarian Law*, 12 August 1999, UN Doc ST/SGB/1999/13
difficulty of determining the threshold at which IHL applies to UN forces. Troops may be exercising considerable force and exercising considerable authority over territory and yet the contributing States may consider that it is not an armed conflict.

**Occupation law as a customary law**

As mentioned, there is some dispute as to the applicability of customary law to UN forces. Some commentators argue that the fact that the UN denies that it is de jure subject to IHL:

*Raises some doubts as to whether the IHL rules that are customary between States, are also customary in armed conflicts involving international organizations.¹*

However, a significant body of opinion holds that most customary IHL does apply to UN forces.²

Nevertheless, according to statements made by the ICJ, several major international tribunals, and ten years of research by the ICRC culminating in the publication in March 2005 of an extensive and detailed report on customary rules of IHL, it is possible to draw some conclusions as to the extent to which occupation law may be considered customary law. It is generally agreed that the provisions on occupation in the Hague Regulations constitute customary international law as do a great many of the substantive provisions contained in GCIV. The Secretary-General in his Report on the setting up of ICTY referred to the GCs, the Hague Convention and the Charter of the International Military Tribunal of 8 August 1945 as part of conventional international law which has beyond doubt become part of international customary law.³

If we agree that occupation law is part of customary international law and law of occupation is applicable to UN operations, there are still some specific problems, namely UN exercise of control over territory bears some similarities with occupations by States, but there are also important differences.

**Case of Somalia**

The issue is whether the laws of occupation applied to UN forces first came to prominence in the context of UN operations in Somalia in the early 1990s. Resolution adopted under Chapter VII mandated the Unified Task Force (UNITAF) to use “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.”⁴ There was some misunderstanding and dissenting opinion if the mandate constituted appropriate to trigger applicability of law of occupation. In this regard, the legal advisor to the Australian forces in UNITAF considered that the laws of occupation applied de jure to UN operation in Somalia.⁵ Despite this position of Australian advisor, USA and command of mission stated that applicability of IHL (occupation law) was inappropriate.⁶ In our point of view, the legal advisor to the

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¹See note 25, Page 12
³ICTY Prosecutor v Dusko Tadic (Jurisdiction), 10 August 1995, No IT-94-1-AR72 Para 126
⁴UN SC Resolution 794,3 December 1992, S/RES/794,
⁵See note 25, Page 14
⁶Ibid, Page 14
Australians viewed the applicability of occupation law as an integral part of that game plan. It gave the force a legal framework, guidelines governing its relationship with the local population within which it could undertake administrative and policing tasks. This approach enabled Australian contingent to improve humanitarian situation in village Baidoa, when another part of mission failed in doing so in other villages.

UNITAF was replaced by UNOSOM II, which had one of the most extensive mandates ever undertaken by UN. It was the first peace enforcement operation explicitly authorized under Chapter VII of the. UNOSOM II was equipped with wide range of tasks that included ensuring compliance with peace agreements to which the factions had agreed and taking appropriate action against any faction that threatened violence, maintaining control of the heavy weapons of organized factions which were to be brought under international control pending their destruction, seizing small arms of unauthorized armed elements. The Human Rights Committee held that the International Convention on Civil and Political Rights was applicable to UNOSOM II by virtue of the fact that it exercised de facto control over Somalia, but it did not suggest that the laws of occupation might have been applicable. It is somehow strange that if UN enjoyed control over the territory and established effective administration by forces, this type of control does not trigger application of occupation law.

Case of Iraq

The invasion and subsequent occupation of Iraq in 2003 brought about a change in perceptions regarding the relevance of occupation law to multi-national forces that has implications for peace support forces, including those acting under a UN mandate. Coalition forces were present in comparatively large numbers and exercised control over the area to the complete exclusion of the Baghdad administration.

On 22 May 2003 the SC adopted Resolution 1483 in which it resolved that the UN should play:

“A vital role in humanitarian relief, the reconstruction of Iraq, and the restoration and establishment of national and local institutions for representative governance.”

UN SC noted that specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers. The resolution then called upon “all concerned to comply fully with their obligations under international law including in particular the GCs of 1949 and the Hague Regulations of 1907.”

The coalition forces in Iraq enjoyed, among others, the following multi-disciplinary tasks: humanitarian and reconstruction assistance; promoting the return of refugees and displaced persons; advancing efforts to restore and establish national and local institutions for representative governance; facilitating the reconstruction of key infrastructure; promoting economic reconstruction

1See note 13
3See note 25, Page 17
5UN SC Resolution 1483, 22 May 2003, S/RES/1483 (2003),
and sustainable development; and encouraging international efforts to promote legal and judicial reform.

If occupation law applied to the UN authorized occupation in Iraq, the question remains without answer. Why it is not allowed to apply to other UN authorized administrations? Does it apply to administrations directly responsible to the UN?

The laws of occupation strike a balance between the rights of the inhabitants to protection and human treatment and the security needs of the Occupying forces. The UN Administration, on the other hand, has no interest of its own other than to facilitate a transition to another administration or form of governance, and in so doing act solely for and on behalf of the population of the administered territory. David Scheffer in the AJIL, 2004, argued that:

‘In most cases, modern multilateral military interventions, particularly Security Council-authorized missions that are followed by prolonged and widely supported multilateral occupations aimed at transforming societies, will require a far more pragmatic body of rules and procedures than occupation law currently affords.”

Numbers of high-qualified scholars suggest that if the PSO is the “sole authority capable of exercising control over the civilian population,” they will be an occupier under international law.

**Status of Peacekeepers**

Military and civilian personnel of sending states operating on the territory of a host state have a special legal status. They enjoy immunity from legal process in any other state, including the host state and transit states. Hence the immunity of peacekeepers is foremost that of their sending states, and the latter remain accountable for wrongful acts committed under their control. It is important to understand that immunity does not imply impunity for military or civilian members of the forces of a sending state or international organization, neither can immunity limit the accountability of that state or international organization. Rather, it bars the host state from taking direct action against the members of a visiting force.

First and the most authoritative source of immunities is article 105 of the UN Charter, stating that the UN shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes and that officials of the UN shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the UN.
Soon after the 1946 Convention on Privileges and Immunities of the United Nations was taken, providing for immunity of officials and also of experts on missions. Apart from this, there is specific legal basis for the protection of personnel participating in UN peace operations, 1994 Convention on the Safety of United Nations and Associated Personnel and its 2005 Optional Protocol. The Convention covers all UN operations conducted for the purpose of maintaining or restoring international peace and security. The adoption of convention has been pushed by deep concern over the growing number of deaths and injuries resulting from deliberate attacks against UN personnel. Also Model Status of Forces Agreement (SOFA) enshrines privileges and immunities for UN personal. In conclusion, in 1995, the UN Legal Counsel confirmed that, in accordance with customary law, military personnel of sending states enjoy privileges and immunities.

Despite well-established legal norms and practice that UN personnel enjoys, immunities and privileges concerning convention, it stipulates that immunities and privileges do not apply to UN enforcement operation conducted under Chapter VII by SC.

**Peacekeepers as civilians and attack against them**

There is some international criminal jurisprudence on attacks against peacekeepers in armed conflicts. In an assessment of recent cases before the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, ICTY and the International Criminal Court (ICC), in which a number of crimes against peacekeepers, all committed during non-international armed conflicts, had to be adjudicated.

According to Frank's commentary, the combatant status of a person does not depend on whether the PSO was based on a Chapter VI or Chapter VII resolution of the Security Council. The only relevant criterion shall be the notion of "combatant status" under IHL, as well as the actual conduct of the members of the respective mission. Both under statute of ICC and those of number of tribunals, individual criminal responsibility for deliberate attack against peacekeeping mission is entailed.

**Conclusion**

In fact, notwithstanding that the starting legal principles seem to be opposite, international humanitarian law is not applicable to peacekeeping, while it is applicable to peace enforcement, the evolution has brought now to a substantial convergence on the limits of applicable international humanitarian law for all Peace Support Operations. Indeed, talking of ‘principles and spirit of

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1. UN Convention on the Privileges and Immunities of the United Nations, 13 February 1946, UNTS 161
4. UN GA Report of Secretary-General, 9 October 1990, UN Doc. A/45/594
5. See note 51, Page 619
6. See note 55, article 2
international humanitarian law’ and talking of international humanitarian law, which has become
‘international customary law’ is speaking the same language.
The present paper has overviewed some major suggestions that aim to solve legal challenges related
to the application of the law of armed conflict to the PSOs, they have been ranging from the
amendments that should be made to the GCs (to affirm in clear terms that peace operations are
governed by them), to the creation of an entirely new Convention designed specifically for peace
operations. In 1996, the UN adopted the Guidelines for UN forces regarding respect for international
humanitarian law and in the 1999 the Secretary General Kofi Annan issued a Bulletin, the Code of
Conduct for UN peacekeepers. Both documents provide a directive that specifies the very minimum
standards of behavior expected of UN peace operations personnel.
On the one hand, the Security Council made it clear, in the aftermath of the invasion of Iraq, that the
laws of occupation may be applicable to operations that are UN-mandated, however, it is still vague
what position it takes with regard to its other operations. Lastly, as the UN statements on the
applicability of IHL to its forces are directed towards accountability for misconduct by troops and
limited to situations of armed conflict in which troops are engaged as combatants, we are able to
ascertain that contemporary international law, namely IHL, lacks the practical, material proof to
determine that the law of belligerent occupation does cover all forms and types of activity of PKMs,
though it has no theoretical impediments neither in the humanitarian, nor in the UN or international
organization responsibility law, that cannot be overcome.