TRANSNATIONAL ARMED CONFLICTS: THEIR HISTORY AND DEVELOPMENTS IN A MODERN CONTEXT

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ABSTRACT

How shall a conflict, where a state is fighting against a non-state actor in the territory of another state without the consent of the latter, be qualified? Does the absence of consent imply the existence of international armed conflict between the two states in parallel with non-international armed conflict? The present article will attempt to address those questions and, along with the review of different scenarios of conflict classification, argue that conflict should be classified as international, and the applicable law shall be determined accordingly.

Keywords: International Armed Conflict (IAC); Consent of a Territorial State; Non-State Actor (NSA); Non-International Armed Conflict (NIAC); Transnational Armed Conflict (TAC)

INTRODUCTION

Following the terrorist attacks of September 11, 2001, the recognition of terrorism as a threat to humanity has increased significantly.[1] While states undertake wide-scale measures against the threat of terrorism, the protection of the civilian population is becoming more and more challenging.[2] Basic rights of the civilian population are infringed due to security considerations.[3] Counterterrorist operations[4] often also violate the rules of international law.[5] As the example of Syria has demonstrated recently, the fight against terrorism can turn into a tragedy for the civilian population.[6]

Considering the above, it is key to ensure that actions of a foreign state, carried out in the territory of the country (hereinafter as "territorial state") from which a non-state actor (NSA) operates, are regulated clearly and comprehensively. This need is further illustrated by the fact that two major states involved in anti-terrorist operations, the United States of America and Israel, deny the extraterritorial application of international human rights instruments, including that of the International Covenant on Civil and Political Rights.[7]

Clearly, International Humanitarian Law (IHL) regulates such acts, provided that certain

[1] Karinne Coombes, "Protecting Civilians during the Fight against Transnational Terrorism: Applying International Humanitarian Law to Transnational Armed Conflicts," Canadian Yearbook of International Law 46 (2008): 242.

[2] Ellen Policinski, The power of words: the dangerous rhetoric of the "terrorist", Humanitarian Law and Policy, March 4, 2020, shorturl.at/rBFN4 [accessed 27.05.2020].

[3] Rhonda Powell, "Human Rights, Derogation and Anti-Terrorist Detention," Saskatchewan Law Review 69, no. 1 (2006): 81.

[4] Heeyong Daniel Jang, "The Lawfulness of and Case for Combat Drones in the Fight against Terrorism," National Security Law Journal 2, no. 1 (Fall/Winter 2013): 3.

[5] Jon Moran, "Time to Move out of the Shadows: Special Operations Forces and Accountability in Counter-Terrorism and Counter-Insurgency Operations," University of New South Wales Law Journal 39, no. 3 (2016): 1249.

[6] Human Rights Watch, Syria, Events of 2018, June 29, 2018, https://www.hrw.org/world-report/2019/country-chapters/syria [accessed 28.05.2020].

[7] Beth Van Shaack, "The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change," International Law Studies Series, US Naval War College. 90 (2014): 23.

criteria are met; however, to what extent the relevant rules are applicable is dependent upon conflict classification. According to the "Commentary" to the four Geneva Conventions, relied upon as an authoritative interpretation of the Conventions and updated by the International Committee of the Red Cross in 2016, unconsented armed intrusion designed to target a non-state actor (NSA) will be deemed as an attack against the territorial state and, thus, will amount to international armed conflict (IAC).[8]

The present article looks at the possibility of the existence of "simultaneous" armed conflicts with the territorial state of a non-state actor (NSA) when that state has not consented to the operations taking place in its territory. To this end, the first chapter will touch upon the practical significance of the distinction between international armed conflict (IAC) and non-international armed conflict (NIAC). The second chapter discusses the notion of non-international armed conflict compared to transnational armed conflict. The third chapter of the article analyzes under what conditions the actions directed against non-state actors can be considered as an attack on a territorial state; and the fourth chapter reviews the specific case of fighting NSA in occupied territories.

1. SIGNIFICANCE OF CONFLICT CLASSIFICATION IN DETERMINING THE APPLICABLE LAW

International Humanitarian Law (IHL) strictly distinguishes international armed conflict (IAC) from non-international armed conflict (NIAC)[9] and applies different rules to these situations.[10] Although the set of rules regulating the two types of conflict are indeed coming closer as time passes,[11] a principal difference is still in place.[12]

What is the practical significance of conflict classification in terms of determining the applicable law? It should be noted, that as far as treaty law is concerned, the difference

[8] T. Ferraro and L. Cameron, „Article 2: Application of the Convention", ICRC, Commentary on the First Geneva Convention (2016), (hereinafter - Ferraro, Cameron (2016) para. 261, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518#101_B [accessed 28.05.2020].

[9] International Committee of the Red Cross Opinion Paper, How is the Term 'Armed Conflict' Defined in International Humanitarian Law?, 2008, https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm [accessed 29.05.2020].

[10] Rogier Bartels, "Timelines, borderlines and conflicts: The historical evolution of the legal divide between international and non-international armed conflicts," International Review of the Red Cross 91, no. 873 (March 2009): 35.

[11] Emily Crawford, "Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts," Leiden Journal of International Law 20, no. 2 (June 2007): 54.

[12] James G. Stewart, "Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict," (hereinafter – Stewart (2003) International Review of Red Cross 85, no. 850 (June 2003): 319.

remains considerable. The four Geneva Conventions[13] and the First Additional Protocol[14] apply to IAC. The said treaties consist of detailed rules which, on the one hand, regulate the conduct of hostilities and, on the other, lay down proper guarantees to protect those who do not or no longer participate in hostilities.[15] However, the scope of treaty rules applicable to NIAC is quite limited.[16] Common article 3 to the Geneva Conventions for the first time addresses situations of non-international armed conflicts.

The gradual approximation of the legal regimes regulating the two types of conflict can be explained by considering two main factors. Firstly, some treaties adopted relatively recently regulate the conduct of war without distinguishing between types of conflicts.[17] Secondly, a considerable portion[18] of customary international law regulates NIAC as well[19].

However, the picture might be drastically different when it comes to the enforcement of the rules.[20] It should be noted in this regard that the Statute of the International Criminal Court[21] contains a longer list[22] of war crimes prohibited in IAC.[23]

2. DOES THE LAW OF NON-INTERNATIONAL ARMED CONFLICT ADEQUATELY REGULATE TRANSNATIONAL ARMED CONFLICTS?

It is important to understand what is meant by the notion of NIAC when addressing the issue of "conflict classification". Does the definition of non-international armed conflict (NIAC) include transnational, extraterritorial conflicts,[24] or should the latter be regulated

[13] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[14] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

[15] Stewart (2003), supra, note 12, 319.

[16] Louis Moir, "Towards the Unification of International Humanitarian Law?" in R. Burchill, N. White and J. Morris (eds), International Conflict and Security Law (2005): 108.

[17] Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts", (hereinafter -Akande (2012) in International Law and the Classification of Conflicts, ed. Elizabeth Wilmshurst (Oxford: Oxford University Press, 2012), 5.

[18] ICTY, Tadić Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 1995, para.127 (hereinafter – Tadić).

[19] Jean-Marie Henckaerts and Louise Oswald-Beck, Customary International Humanitarian Law, Vol. 1(Cambridge: ICRC/Cambridge University Press, 2005).

[20] Akande (2012), supra, note 17, 7.

[21] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, (hereinafter - Rome Statute) 2187 UNTS 3.

[22] William Schabas, "War Crimes," in The International Criminal Court: A Commentary to the Statute, ed. William Schabas (Oxford: Oxford University Press, 2015), 229.

[23] The Prosecutor v Bahar Idriss Abu Garda, ICC-02/05-02/09, Confirmation of Charges Decision (Pre-Trial Chamber), 8 February 2010, para. 85.

[24] Dietrich Schindler, "International humanitarian law and internationalized internal armed conflicts", International Review of the Red Cross, No. 230 (1982): 255.

by the legal regime of IAC?[25] Since these questions are directly relevant to the present article, we will examine the normative content and the confines of Common Article 3 to the four Geneva Conventions which for the first time addresses non-international armed conflicts.

As the preparatory works of the Geneva Conventions illustrate,[26] non-international armed conflict (NIAC) was always regarded as a conflict occurring in a single state and not as a conflict against non-state actors (NSA) as such.[27] This interpretation is supported by the wording of Common Article 3 itself that states that NIAC occurs *"in the territory of one of the High Contracting Parties."* Taking into account the time of adoption of the Geneva Conventions, one may conclude that NIAC at that moment was considered to be a conflict encompassing actions of a state in its territory and not of a modern "war on terror".

The "Commentary" to Common Article 3 also supports the interpretation that NIAC occurs within the boundaries of a country.[28] The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, in the *Tadić* case, equally indicates that NIAC takes place *"within a state"*.[29] The Rome Statute, in general terms, refers to conflicts taking place in the territory of a state.[30] The logical interpretation of the said provisions, therefore, appears to be that the meaning of non-international armed conflict (NIAC) is limited to conflicts that arise in the territory of one state.

At the same time, some authors assert that, notwithstanding the historic context of the adoption of the Geneva Conventions, the notion of NIAC has acquired a wider meaning in the modern world and that this should be recognized.[31] In other words, although historically the term of non-international armed conflict (NIAC) had been synonymous with internal conflict, it cannot be denied that conflicts nowadays are more diverse and that the relevant clauses of the Geneva Conventions should be interpreted accordingly.[32]

Indeed, in the modern context, non-international armed conflicts (NIAC) may not anymore be realistically considered to be synonymous with internal conflict. In view of the foregoing, the historic characteristics[33] of NIAC may no longer be deemed adequate to meet the challenges of modern times.

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[25] Christine Byron, "Armed conflicts: international or non-international?" Journal of Conflict and Security Law, Vol. 6, No. 1 (2001): 63.

[26] David A. Elder, ''The Historical Background of Common Article 3 of the Geneva Conventions of 1949", Case Western Reserve Journal of International Law 11 (1979): 37.

[27] Marko Milanovic, "Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case," International Review of the Red Cross 89, no. 866 (June 2007): 379.

[28] Jean Pictet, ed., Commentary on the Geneva Conventions of 12 August 1949 (hereinafter - Pictet (1952), (Geneva: ICRC, 1952-9), 36.

[29] Tadić, supra, note 18, para. 71.

[30] Article 8(2)(f) of Rome Statute.

[31] Marko Milanovic and Hadzi-Vidanovic, "A Taxonomy of Armed Conflict" (hereinafter - Milanovic, Vidanovic (2012) in N. White, C. Henderson (eds), Research Handbook on International Conflict and Security Law, Edward Elgar (2012): 31.

[32] Sylvain Vité, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations", (2009) International Review of Red Cross: 69, 72.

[33] It cannot be denied that the essence of this particular legal regime lies within the regulation of the relationships between the state and its citizens/residents.

3. OPERATIONS DIRECTED AGAINST NON-STATE ACTORS AS AN ATTACK AGAINST A TERRITORIAL STATE

Under the basic rules of IHL, the classification of conflict[34] is determined rather by the parties to the conflict and not the territory to which the conflict might spread. For that reason, most conflicts where states are fighting against non-state actors (NSAs) were considered as NIAC,[35] regardless of whether they took place in the territory of a state party to a conflict or in another country.

Common Article 2 to the four Geneva Conventions states that the conventions "*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*". There is no requirement of a threshold, such as intensity,[36] and the resort to an armed force between two or more states automatically amounts to IAC.[37] IAC can also arise in a situation where a state employs unilateral force against another state and the latter does not respond with military means.[38]

Does this mean that the use of armed force against the *territory* of another state and not its military forces will qualify as IAC? In cases where the consent of a territorial state is present, most scholars agree that the conflict should be qualified as non-international.[39] The answer is also straightforward where the intervention takes place to assist the NSA in fighting against the territorial state. In such a case the conflict is international.

However, situations, where the unconsented intervention occurs to combat a NSA that acts independently from the territorial state, are more challenging in practice.[40] If in such a case force is used against the civilian population and civilian objects[41] the conflict should be qualified as international.[42] IHL does not require that targets of attacks be part of official authorities, just as the attack does not need to be directed against the government.[43] The government is merely one of the elements of the state; the territory and the population constitute the other elements.[44] Thus, an attack directed against the territory, population, or infrastructure of a state, amounts to the use of armed force against this particular state.[45]

[34] Pictet (1952), supra, note 28, 32.
[35] Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, (Cambridge: Cambridge University Press, 2010), 122.
[36] Pictet (1952), supra, note 28, 23.
[37] Tadić, supra, note 18, para. 70.
[38] Ferraro, Cameron (2016), supra, note 8, para. 223.
[39] Milanovic, Vidanovic (2012), supra, note 32, 36.
[40] Noam Lubell, "Fragmented Wars: Multi-Territorial Military Operations against Armed Groups," International Law Studies Series. US Naval War College. 93 (2017): 228.
[41] Ferraro, Cameron (2016), supra, note 8, para. 262.
[42] Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) ICJ Rep 2005, paras. 108-146.
[43] Akande (2012), supra, note 17, 79.
[44] Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents," Columbia Journal of Transnational Law 37, no. 2 (1999): 403.
[45] James G. Stewart, "The UN Commission of Inquiry on Lebanon," Journal of International Criminal Justice 5, no. 5 (November 2007): 1043.

In *Hamdan v. Rumsfeld*,[46] the US Supreme Court implicitly classified the conflict between the US and Al-Qaeda as non-international in stating that Common Article 3 was applicable to the hostilities.[47] The proponents of this classification argued that it best reflects factual reality.[48] Firstly, a classification of the conflict as a conflict between two states is avoided where, in factual terms, that situation does not exist.[49] Secondly, such a qualification supports the fact that a state acting against a terrorist group does what the territorial state should have done. Thirdly, the model allows states to apply appropriate rules of targeting under the doctrine of continuous combat.[50]

In the absence of the consent of a territorial state, the existence of a parallel[51] international armed conflict was determined by the United Nations Commission of Inquiry tasked by the Human Rights Council to examine the 2006 conflict in Lebanon.[52] The Commission held that "*hostilities were in actual fact and in the main only between the Israeli Defense Forces (IDF) and Hezbollah. The fact that the Lebanese Armed Forces did not take an active part in them neither denies the character of the conflict as a legally cognizable international armed conflict, nor does it negate that Israel, Lebanon and Hezbollah were parties to it....*"[53] The Commission, *inter alia,* referred to "*a widespread and systematic campaign of direct and other attacks throughout its (Lebanon's) territory against its civilian population and civilian objects, as well as massive destruction of its public infrastructure, utilities, and other economic assets.*"[54] It is worth noting that both Israel and Lebanon viewed the conflict as international even though the actions of Israel were directed against Hezbollah and the Lebanese army did not use force against Israel.[55]

The above example also illustrates that it is often impossible to distinguish actions of a foreign state against NSA from those against the civilian population and civilian objects of the territorial state,[56] considering the features of modern warfare.[57] For these reasons, some scholars favor a "blanket classification" of territories as containing international and internal armed conflicts.[58]

[46] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[47] Ibid., para. 67.

[48] N. D. Ungureanu, "The International Humanitarian Law Applicable in the New Types of Armed Conflicts," AGORA International Journal of Juridical Sciences 2014, no. 4 (2014): 184.

[49] Claus Kreß, "Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts," Journal of Conflict and Security Law 15, no. 2 (2010): 256.

[50] Jason Fisher, "Targeted Killing, Norms, and International Law," Columbia Journal of Transnational Law 45, no. 3 (2007): 711.

[51] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, para. 219.

[52] Human Rights Council, Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1 A/HRC/3/2 (2006), paras. 50-62.

[53] Ibid., para.55.

[54] Ibid., para.58.

[55] Ibid., paras. 59, 62.

[56] Constantin von der Groeben, "The Conflict in Colombia and the Relationship between Humanitarian Law and Human Rights Law in Practice: Analysis of the New Operational Law of the Colombian Armed Forces," Journal of Conflict and Security Law 16, no. 1 (2011): 141.

[57] Nathalie Durhin, "Protecting civilians in urban areas: A military perspective on the application of international humanitarian law," International Review of the Red Cross 98, no. 1 (April 2016): 180.

[58] Stewart (2003), supra, note 12, 334.

4. FIGHT AGAINST A NON-STATE ACTOR IN AN OCCUPIED TERRITORY

For the purposes of this article, the issue of occupation is relevant because in certain cases belligerent occupation can be an outcome of a fight against NSA, or such a fight might take place in a situation where the occupation has already been established. Regarding conflict classification in such cases, the judgment of the Supreme Court of Israel on "Targeted Killings" case[59] deserves attention. The case mainly concerned the policy of "targeted killings" which was applied as a security measure[60] against terrorist groups[61] in the territories occupied by Israel. In its review of the nature of the conflict, the Court cites a relevant article of Professor Cassese[62] and concludes that military activities between the occupying power and the NSA, even when the latter does not act under the control of the territorial state, is regulated by the rules of IAC.[63] This position of the Court is shared by some scholars.[64]

Others argue that the situation referred to above should be regulated by the law of non-international armed conflict (NIAC) because the existence of international armed conflict (IAC) requires the involvement of at least two hostile states.[65]According to some scholars,[66] the determining factor should be the applicable law. In this regard, it should be noted that the law of occupation does not only regulate the relations between two states, but also the relationship between occupying power and the local population[67] sets out the standards for the treatment, and protection of the civilian population, and limits the power of the occupying state. Moreover, one of the objectives of the law of occupation is to regulate tensions that may arise between the local population and the occupying power. Such tensions might turn into hostilities. For all of the above, it cannot be concluded that the conflict should be qualified as non-international. Finally, the law of occupation recognizes that the local population might get involved in acts directed against the occupying power;[68] the regulation of such cases would remain within the framework of the law of occupation.[69]

In the case of *Prosecutor v Lubanga*, the Trial Chamber of the International Criminal Court stated that as long as the conflict in the Ituri region (Democratic Republic of the Congo)

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[59] Supreme Court of Israel, Public Committee against Torture in Israel v. Government of Israel, Case No. HCJ 769/02, 13 December 2006 (hereinafter – Targeted Killings case).

60 Ibid., para. 2.

[61] Liesbeth Zegveld, Accountability of Armed Opposition Groups in International Law, (Cambridge: Cambridge University Press, 2002), 136.

[62] Antonio Cassese, International Law, (Oxford: Oxford University Press, 2005), cited in: Targeted Killings case, supra, note 59, para. 18.

[63] Targeted Killings case, supra, note 59, paras. 16–23.

[64] Antonio Cassese, "On Some Merits of the Israeli Judgment on Targeted Killings," Journal of International Criminal Justice 5, no. 2 (May 2007): 340.

[65] Marko Milanovic, "Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case," International Review of the Red Cross 89, no. 866 (June 2007): 374.

[66] Akande (2012), supra, note 17, 22.

[67] W. T. Mallison; R. A. Jabri, "Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity," George Washington Law Review 42, no. 2 (January 1974): 208.

[68] Yoram Dinstein, The International Law of Belligerent Occupation (Cambridge: University Press, 2009), 279.

[69] See, e.g. Article 5 of Geneva Convention 4 and Article 45 (3) of Additional Protocol 1.

between the Lubanga militia and Uganda, *"did not arise between the two states"*, it should be qualified as non-international,[70] regardless of the parallel international armed conflict (IAC) between the DRC and Uganda.[71] Although the assessment of the Court represents a sound classification of the conflict, it still might lead to incoherent interpretations.[72]

CONCLUSION

As the number of transnational armed conflicts is growing, compliance with International Humanitarian Law (IHL) is becoming increasingly difficult and inadequate against non-state actors (NSA). It is therefore timely and important to recognize the construct of the existence of "parallel international armed conflicts" in situations where armed activities are carried out against non-state actors (NSA) without the consent of the territorial state.

However, regulating conflicts with a territorial state, on the one hand, and with a NSA, on the other, creates practical difficulties in terms of the fragmentation of applicable law. Often, due to geographical or other factors, it is not even possible to distinguish between and delineate the two conflicts. Given the nature of these types of conflicts, it is of utmost importance to regulate comprehensively and clearly the actions of the foreign state, which cannot be achieved by simply qualifying a conflict as non-international.

Given the complexity and the number of existing situations of conflict in many parts of the world, only a few preliminary conclusions can be made based on the author's review of legal instruments and scientific research: In case of extraterritorial armed conflict, along with the recognition of the simultaneous existence of international armed conflict (IAC) with non-international armed conflict (NIAC), the integrity of applicable law should be ensured, and that consequently fragmentation be avoided. This should entail the application of the law in respect of international armed conflict (IAC) to the totality of the conflict situation, with the exception of special targeting-, and detention rules that should be applied to members of a non-state actor (NSA). The actions of foreign states must be thereby also strictly regulated.

[70] Prosecutor v Lubanga (ICC-01/04-01/06-2842), Trial Chamber, Decision, 5 April, 2012, para. 563.
[71] Ibid.
[72] Dapo Akande, ICC Delivers Its First Judgment: The Lubanga Case and Classification of Conflicts Situations of Occupation, EJIL: Talk, Blog of European Journal of International Law, March 16, 2012, https://www.ejiltalk.org/icc-delivers-its-first-judgment-the-lubanga-case/ [accessed 29.05.2020].