The Rule of Law in Armed Conflicts Project

Lecturer Bogdan BUNECI, PhD.
Ecological University Bucharest, Lawyer at Bucharest Bar.
bogdanbuneci@yahoo.com

Abstract
The Rule of Law in Armed Conflicts Project aims to report on every concerned State and disputed territory in the world, considering both the legal norms that apply as well as the extent to which they are respected by the relevant actors. The Project is an initiative of the Geneva Academy of International Humanitarian Law and Human Rights to support the application and implementation of international law in armed conflict.
Keywords: *„Rules of law", „Armed Conflicts Project", „Geneva Academy", „International Humanitarian Law", „Human Rights"*

International humanitarian law refers to two different types of armed conflict: international armed conflicts and conflicts of a non-international character. [1] For example, the four Geneva Conventions of 1949 (with the exception of common Article 3) and 1977 Additional Protocol I concern international armed conflicts. Common Article 3 to the 1949 Geneva Conventions and the 1977 Additional Protocol II concern armed conflicts of a non-international character.

An international armed conflict usually refers to an inter-state conflict. Common Article 2 of the 1949 Geneva Conventions states that:

"In addition to the provisions which shall be implemented in peace-time, 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. The ICRC commentary on the provision explains that:

"Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims." [2]

Thus, it is generally agreed that a single incident involving the armed forces of two states may be sufficient to be considered an international armed conflict. In cases of insignificant border incidents involving members of the armed forces of two states it may be unclear whether the threshold has been reached for the incident to be considered an international armed conflict. 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 armed resistance."If a state intervenes with its armed forces on the side of another state in a non-international armed conflict, it is generally agreed that this does not change the qualification of the conflict. An armed conflict confined geographically to the territory of a single state can, however, be qualified as international if a foreign state intervenes with its armed forces on the side of the rebels fighting against government forces.

It is unclear, though, whether foreign military intervention in an armed conflict which would otherwise be a non-international conflict triggers the internationalization of the entire conflict or only the conflict between the two states. The better view is that there are two different types of conflict taking place at the same time. [3] Thus, for example, according to the International Court of Justice in the 1986 Nicaragua case:

"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 conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts."

Where a state intervenes indirectly without the use of its armed forces in a non-international armed conflict on the side of the rebels, the Tadić case, decided by the International Criminal Tribunal for the former Yugoslavia (ICTY), concluded that "overall control" of a rebel group would be sufficient to internationalize the conflict. The standard set by the Tribunal does not require the "issuing of specific orders by the State, or its direction of each individual operation"; it is sufficient that a state "has a role in organizing, coordinating or planning the military actions" of a given non-state armed group. [4]

Article 1, paragraph 4 of 1977 Additional Protocol I provides that conflicts shall also be qualified as international when they occur 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 peoples to self-determination". This provision has never been triggered. There is a procedural requirement that the authority representing the people formally undertakes to apply the Geneva Conventions and the Protocol in relation to the conflict with the government in question. This must be done by means of a unilateral declaration addressed to the depositary (the Swiss Federal Council).

Article 2 of 1949 Geneva Convention IV reads in part:

“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 armed resistance.”

Occupation is not defined in the 1949 Geneva Conventions, but 1907 Hague Convention IV offers 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.” [5]

In the Tadić case, referred to briefly above, the ICTY affirmed that a non-international armed conflict exists when there is: “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” [6] Thus, in the view of the ICTY, for there to be a non-international armed conflict:

- non-state armed groups must carry out protracted hostilities; and
- these groups must be organized.

Two key treaty provisions set thresholds for identifying the law applicable to armed conflicts of a non-international character:

- Common Article 3 to the 1949 Geneva Conventions; and
- Article 1 of 1977 Additional Protocol II to the 1949 Geneva Conventions.

Common Article 3 (which appears with identical language in each of the four 1949 Geneva Conventions) provides, inter alia, that:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions…"

In its commentary on the article, the ICRC states that:

"Speaking generally, it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities of conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front." [7]

Control of a portion of the territory by a non-state armed group is not required for the application of common Article 3, but would certainly be strong evidence of its application.

The scope of application of 1977 Additional Protocol II is stated by its Article 1 to be as follows:

"1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application, 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.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

In its commentary on the article, the ICRC states that:

"the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict." [8]

Certain criteria are required for the application of 1977 Additional Protocol II, namely:

- A confrontation between the armed forces of the government and opposing "dissident" armed forces; [9]
- That the dissident armed forces are under a responsible command; [10] According to the ICRC, the existence of a responsible command "implies some degree of organization of the insurgent armed group or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority."
- That they control a part of the territory as to enable them to "carry out sustained and concerted military operations" and to implement the Protocol. As the ICRC notes, "In many conflicts there is considerable movement in the theatre of hostilities; it often happens that territorial control changes hands rapidly. Sometimes domination of a territory will be relative, for example, when urban centres remain in government hands while rural areas escape their authority. In practical terms, if the insurgent armed groups are organized in accordance with the requirements of the Protocol, the extent of territory they can claim to control will be that which escapes the control of the government armed forces. However, there must be some degree of stability in the control of even a modest area of land for them to be capable of effectively applying the rules of the Protocol." [11]

As a consequence of these criteria, the Commentary opined that common Article 3 and 1977 Additional Protocol II have different, but overlapping, application:

"In circumstances where the conditions of application of the Protocol are met, the Protocol and common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of common Article 3. On the other hand, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply. In fact, common Article 3 retains an autonomous existence, i.e., its applicability is neither limited nor affected by the material field of application of the Protocol. This formula, though legally

rather complicated, has the advantage of furnishing a guarantee against any reduction of the level of protection long since provided by common Article 3." [12]

The element of territorial control will often be the distinguishing factor between a situation where only common Article 3 applies and one where both common Article 3 and 1977 Additional Protocol II apply. [13]

Where a non-state armed group is engaged in protracted armed violence with a state and is operating from across an international border, the prevailing view (14) is that this is a non-international armed conflict with the associated rights and obligations.

Where, however, a state is party to such a non-international armed conflict and conducts military operations in a second state on whose territory the non-state armed group is present, views differ as to the legal consequences. One view is that if attacks by the outside state are limited to the non-state armed group and its associated military infrastructure, this does not change the status of the conflict. If, though, attacks are made more broadly on the infrastructure of the state on whose territory the non-state armed group is present, this transforms the entire conflict into an international one.

The better view is that the determinant factor is whether the second state has given its consent to the military intervention, or at least acquiesced in it. Where such consent or acquiescence occurs, the conflict remains one of a non-international character. Where, however, the state opposes this intervention, or at least condemns it, this results in an armed conflict of an international character between the two states simultaneous and in addition to the non-international armed conflict between the first state and the non-state armed group. International humanitarian law – also called the law of armed conflict or the laws of war – regulates the conduct of warfare. Most of the applicable rules are to be found in the four 1949 Geneva Conventions and their two 1977 Additional Protocols. In addition, the 1907 Hague Conventions and the annexed Regulations lay down important rules on the conduct of hostilities, notably on military occupation. There are also several treaties that prohibit or restrict the use of specific weapons, including anti-personnel mines, exploding or expanding bullets, blinding laser weapons, and, most recently in 2008,cluster munitions.

An important distinction exists between international armed conflicts and those of a "non-international character". (For a detailed discussion of this issue, see our paper

on the legal qualification of armed conflict.) The legal regulation of international armed conflicts is more detailed and the protection afforded by the law greater than is the case with non-international armed conflicts. A notable example is the obligation on parties to an international armed conflict to accord captured combatants the status of prisoner of war (POW) with the associated rights and obligations. This prevents the prosecution of a POW for the mere fact of participation in hostilities. There is no such right to POW status in the law governing non-international armed conflicts (although captured fighters are still entitled to legal protection). For example, according to common Article 3 to the four 1949 Geneva Conventions, which governs conflicts of a non-international character: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The basis of international humanitarian law is the principle of distinction, which applies in all armed conflicts. This principle obliges “Parties to a conflict” (i.e. the warring parties, whether states or non-state armed groups) to target only military objectives and not the civilian population or individual civilians or civilian objects (e.g. homes, schools, and hospitals). Failing to make this distinction in military operations represents an indiscriminate attack and is a war crime.

Similarly, although it is understood that it is not possible for parties to a conflict always to avoid civilian casualties when engaged in military operations, international humanitarian law also requires that parties to a conflict take precautions in any attack to minimize civilian deaths and injuries. Attacks likely to cause deaths or injuries among the civilian population or damage to civilian objects which would be "excessive" compared to the expected military advantage must be cancelled or suspended.

These rules are generally considered to be customary international law, which binds every party to a conflict – government or non-state armed group – whether or not the state on whose territory a conflict occurs has ratified the relevant treaty.

References:

[1] Vité S., "Typology of armed conflicts in international humanitarian law: legal concepts and actual situations", International Review of the Red Cross, Vol. 91 No. 873, March 2009, pp. 69-84.

[2] ICRC Commentary on the Four Geneva Conventions of 1949, pp. 20–21.
[3] 1986 Nicaragua case, ICJ Reports, p. 114, available at: www.icj-cij.org/docket/files/70/6503.pdf.
[4] Judgment of 15 July 1995, §§ 131, 137. For criticism of the Tribunal's decision, see for example L. Moir, The Law of Internal Armed Conflict, Cambridge Studies in International and Comparative Law, Cambridge University Press, UK, 2002, pp. 49–50.
[5] 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.
[6] Tadić case, No. IT-94-1-AR72, § 70.
[7] ICRC Commentary on the Four Geneva Conventions of 1949, p. 36.
[8] ICRC Commentary on the 1977 Additional Protocols to the Geneva Conventions of 1949, p. 1348.
[9] i.e. where there is a rebellion by part of the government army or where the government's armed forces fight against insurgents who are organized in armed groups. As the ICRC further notes, this criterion illustrates the collective character of the confrontation; it can hardly consist of isolated individuals without coordination. ibid., p. 1351.
[10] Ibid., p. 1352.
[11] Ibid., p. 1352-1353.
[12] ICRC Commentary on the 1977 Additional Protocols to the Geneva Conventions of 1949, p. 1350.
[13] L. Zegveld, The Accountability of Armed Opposition Groups in International Law, Cambridge Studies in International and Comparative Law, UK, 2002, pp. 145–146.www.cicr.org/web/eng/siteeng0.nsf/html/armed-conflict-article-170308?opendocument; and the judgment of the ICTY in April 2008 in the Ramush Haradinaj case, paras. 49, 60 (see below).
[14] Though see Sassòli M., "Transnational Armed Groups and International Humanitarian Law", HCPR Occasional Paper Series, No. 6, Winter 2006, Program on Humanitarian Policy and Conflict Research, Harvard University, USA, p. 5.