

Whether a Situation of Armed Violence is an Armed Conflict Pursuant to International Humanitarian Law Criteria

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Abstract

International humanitarian law (IHL) or the jus in bello (law in war) is one of the oldest bodies of international law which seeks to govern the actions of States and persons taking part in an armed conflict, and to protect people and their property. The law aims at balancing two objectives: the demands of the armed forces of a State (or non-State armed group) to prosecute the armed conflict, and the humanitarian law requirement to safeguard those who do not, or no longer, take direct part in the conflict. The legal framework that governs the actions of parties to armed conflict consists of wide range of rules and regulations drawn from treaties, conventions, statutes and judicial precedents. It is in this regard that this paper examined the existence of armed conflict and the various laws regulating such conflict; showing its impact on human dignity, and the polity in itself. The pertinent literature to this study is divided into international humanitarian law and the debate on the legal framework to armed conflict and analyzed whether a situation of armed violence is an armed conflict pursuant to international humanitarian law criteria and the nature of such conflict. The article concluded by identifying the concept and nature of armed conflict, including the distinction between War and Armed Conflict, Occupation and National Liberation and determined the specific rule(s) that is applied. The value of the analysis in this article will contribute in understanding not only the existence of armed conflict but the specific law(s) that apply for atrocities committed in armed conflicts in order to restrain such actions in courtrooms and provide novel measures in the field of international law. By way of methodology, this paper adopted the qualitative research method that utilized both primary and secondary sources.

Keywords: *Armed Conflict, Additional Protocol I, International Humanitarian Law, Occupation, and National Liberation*

Introduction

When the International Law Commission was constituted in 1947, it was saddled with ‘the promotion of the progressive development of international law and its codification (Sompong, 1990). At its conference in 1949, the Commission commences reviewing the fields of international law that required such codification or progressive development, and the issue of whether the laws of armed conflict should be chosen as a field of study received attention (Bogdan, 2025). The ILC reviewed a number of views, including whether war has been prohibited, the management of its conduct had ceased to be relevant (Hill, 2017). Eventually, the ILC resolved not to continue with an evaluation of the law of armed conflict, based on the reason that if the Commission, at the very beginning of its mandate, were to carry out this study, public

opinion might interpret its action as exhibiting lack of confidence in the effectiveness of the means as the disposal of the United Nations for maintaining peace.

The ILC position on the law of armed conflict in 1949 touches on an attitude regarding a law that is often proclaimed by newcomers to the area: how can one introduce moderation and limitation into an activity extraordinarily contrary to those qualities (Gary, 2010: 8)? How can there be laws to govern and restraint conduct in situations that are largely lawless, where the injury and death of persons, and destruction of property are a given, even a hoped-for outcome? Indisputably, there is ample data in times past to show that when wars break out, barbaric actions have happened, and the masterminds and perpetrators of such cruelty repeatedly escape punishment of their evil acts (Gary, 2010: 8). It is on this note that the article examined the existence of armed conflict against armed conflict, the nature of such conflict, the legal framework of the laws of armed conflict etc.

Common Article 2 to the Four Geneva Conventions of 1949

Article 2 Common to the four Geneva Conventions stipulates that the Conventions would apply in perhaps three different situations: declared war (with or without actual confrontations), inter-State armed conflict, and where territory is occupied:

Article 2 – In addition to the provisions which shall be implemented in peacetime, 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 Convention shall also apply to all instances of fractional or entire occupation of the territory of a High Contracting Party, even when such occupation is not met with armed confrontation.

Whether Armed Violence is an Armed Conflict?

According to the ICRC, an armed conflict exists as soon as there is “resort to armed force between two or more States” (Marzena, 2020). This wording follows the International Criminal Tribunal for the former Yugoslavia (ICTY) *Tadic* Judgment and is highlighted by the ICRC as meaning “recourse to armed force [by one state] against another State, irrespective of the reasons or the intensity of this hostility” (Prosecutor v Tadic: Para 70). Likewise, the Commentary to the Geneva Conventions, also expounds that an armed conflict is “any difference arising between two States and leading to the intervention of armed forces [irrespective] of how long the conflict lasts, or how much slaughter takes place” (Anita, 2023). In line with this, the ICRC explains that an armed conflict exists whenever one State uses armed force against another, and that the duration and intensity of the conflict are immaterial. Some legal scholars refer to this as the “first shot” theory, whereby an armed conflict exists, and as a result IHL applies, once force is employed (John, 2013: 44). The International Law Commission (ILC) also adopted the *Tadic* wording in its 2011 Draft Articles on the effects of armed conflicts on treaties, characterizing international armed conflict under Article 2(b) as a situation in which there is resort to armed force between States (Lauren, 2016). No threshold necessity is suggested by the ILC, but in any case, the commentary to the Draft Articles clearly states that the use of this definition is for the purposes of treaty law, which is the subject of the Draft Articles, and not aimed to affect the rules of IHL (Lauren, 2016). While other scholars believe that isolated cases or minor skirmishes, even involving armed forces, do not constitute armed conflict, and that minimum requirements of duration, intensity and the intention of the parties, must be fulfilled. The UK Ministry of

Defence, for instance, states that an accidental bombing or unintentional border invasion would not amount to an armed conflict (Geoffrey & Andrew, 2017). Similarly, (Dinstein, 2011) also considered that a border incident would not constitute an armed conflict as long as it is over soon and neither of the parties intends to involve in armed conflict. In 2010, the International Law Association (ILA) noted that “State practice, judicial opinion, and majority of writers uphold the position that hostilities must attain a certain degree of intensity to qualify as an armed conflict” (Noam & Michael, 2019). The ILA attempted to resolve the issue that this approach would leave a legal vacuum where inter-State violence was not regulated by IHL, indicating that in practice, IHL can be and is on occasion applied by States even without armed conflict. This is not a comprehensive response, however, since it appears to leave the application of the law to the discretion of the States concerned. Yet other scholars seek to reconcile these positions. They favor the opinion that an armed conflict exists when there is resort to armed force between States, in order that there can be no legal gap in the period between that moment and the confrontations attaining the threshold requirements explained above (Mary, 2008). They view that there is no reason why IHL should not be applicable in all situations. However, they noted that in practice only the rules of IHL are important to the particular situations will apply. Therefore, in a nutshell, minor border incident very few rules of IHL will be relevant; however, if during the incident a member of the opposing armed forces were held prisoner, the rules of war will regulate that person’s treatment; and etc.

War vs. Armed Conflict

The early agreements on the Laws of Armed Conflict applied between States, and only in conflict situations. For instance, in this regard, Article 2 of the Hague Regulations, 1899 stated that “the provisions contained in the Regulations stated in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them.” This latter condition provided no complexity when States officially declared war on each other, but there were a number of situations of military actions that were similar to war, yet had not been followed by any declaration – such as Japan’s actions in China in the 1930s, as well as Italy’s invasion of Ethiopia in 1935 (Fenwick, 1937). In the absence of any definition of war, states could easily, if they want, describe their conflicts as involving forcible measures short of war, and thereby avoid the legal consequences of being at war such as the application of the LOAC.

Thus, with the establishment of the United Nations in 1945 (Andreas, 2014) the global community come to an arrangement in Article 2(4) of the UN Charter to proscribe the use of armed force in inter- State relations, unless as noted in Articles 42 and 51 respectively that such action is authorized by the UN Security Council or in Self-defense. Since then, no State could declare war (unless in the limited situations of lawful self-defense) without contravening the UN Charter – another reason for States to avoid formal declarations of war (Sindhu, 2011).

The States conference in 1949 to conclude the texts of the Geneva Conventions took account of these events and decided in Article 2 of the 1949 Geneva Conventions that the conventions would apply not just to “all situations of declared war” but also to “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” (Raymund & Robert, 1952). This formulation ensures that the Conventions apply following any declaration of war, even if there is no actual fighting, as well as to any armed conflict between States, irrespective of whether a war is declared or recognized (Wenjun, 2023). The other instances in which the Conventions apply are reviewed below.

Occupation

Besides instances of declared war and concrete armed conflict, Common Article 2 extends the Geneva Conventions to all instances of aggressive occupation – situations where territory is occupied by a foreign armed force, whether or not the occupation is confronted. If territory is occupied during armed conflicts, the situation is covered by the first paragraph of Common Article 2 – declared war or other armed conflict (Eric & Stone, 2025). Sometimes, however, territory is occupied without any accompanying confrontations. The States discussing the Geneva Conventions were mindful that during the 2nd World War territories such as Denmark had chosen not to resist German occupation, considering resistance to be pointless. In drafting the Geneva Conventions, thus, the second paragraph was added to Common Article 2 to rule out the possibility of an occupying power rejecting to follow the laws and customs of war on the ground that the occupation was not part of a war or other armed conflict.

National Liberation Movements and the Laws of Armed Conflict

According to (Amechi, 1977), national liberation refers to the armed struggle waged by a people through its liberation movement against the established government to reach self-determination. There are many legal instruments that have enshrined and therefore guaranteed the right to self-determination. These include Articles 1 and 55 of the United Nations Charter which though not explicitly provided for self-determination, respected the principle of independence and thus self-determination. Also, certain provisions of the International Covenant on Civil and Political Rights guaranteed the principle of self-determination, especially its Article 1 which mentioned the right of a people to freely determine their political status (Abdulhamid, 2005). Again, the International Covenant on Social, Economic and Cultural Rights which came into force in 1976 had provided for the principle of self-determination. The most fundamental aspect of this right is that it forms a central aspect of *jus cogens* principles which means that all states are required to respect as encoded in the judgment of the International Court of Justice in (Portugal v Australia: Para 90). Be that as it may, states have been reluctant in implementing the right to self-determination of national liberation movements for the pride of protecting sovereignty. The denial of the right to self-determination by state parties has discouraged the establishment of national liberation front who are perceived as “challenging governmental authority” (Higgins, 2009). Legal scholars and practitioners have contended that the application of the principles of International Law in conflict involving national movements can aid in the protection of combatants on both sides and also for the protection of civilians within the battle front (Dior, 2025). In order to attract international sympathy and support, national liberation movements have always sought to apply the principles of IHL as this have proven to also aid in legitimizing their struggles. Whenever national liberation movement act in line with the principles of IHL, states do not hesitate to accord them legitimacy and are accorded all forms regard including being taken seriously. However, when these movements do not regard the principles of IHL, they are categorized as rebel forces or even terrorists (Amanda, 2015).

Furthermore, Additional Protocol I to the Geneva Conventions builds upon Common Article 2 and applies the Convention as well as the Protocol not only to armed conflicts as provided in that Article, but also to:

“1(4) Additional Protocol I ... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as encoded in the Charter of the United Nations

and the Declaration of Principles of International Law regarding Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

However, the Protocol does not just apply in a war of national liberation: its application requires fulfillment not just of the conditions in Article 1(4) mentioned above but also those in Article 96 (3) of the Protocol (Dieter, 2013). This stipulates that the leadership or power that is acting on behalf of the relevant people (those fighting the war of national liberation) may forward a declaration to the Swiss authority as depository of the Protocol, committing to employ the Geneva Conventions and Additional Protocol I in their conflict. Where such a declaration is made, the leadership or authority making it instantly becomes a party to the conflict and liable to all the rights and obligations of those agreements. Although not explicitly provided in AP I, most view is that an Article 96 (3) declaration is sine qua non for the application of AP I to an Article 1(4) conflict (Sandesh, 2012). Under Article 96 (3), national liberation movements have the right to select whether or not to abide with IHL, as far as it goes beyond customary law. Therefore, where a declaration is not made, the Geneva Conventions and AP I would not apply to the conflict.

Conclusion and Recommendation

As discussed above, the article examined whether armed violence is an armed conflict with a view to ascertaining the current state of the law on the subject matter. The article also provided a contrast between armed conflict and armed violence. It further determined the nature of an armed conflict and the specific rules that apply to the conflict. The determination of the existence of armed conflict as against armed violence is indeed very complex. There are some amounts of ambiguity as well as strong legal opinion on almost all facets from the meaning of armed conflict. As such, a situation which seems, in the beginning to be armed violence, may turn to be armed conflict in the following ways. First, when a sovereign state under Common Article 2 considers the situation as an attack. Second, conflict against colonial domination, alien occupation, and racist regimes are generally regarded as armed conflict. Third, the most complex of them is a situation of armed violence will be considered as armed conflict under Article 1(4) of Additional Protocol I and Article 96 (3) for the purposes of national liberation movement.

This article therefore, recommends that it is essential to evaluate strength and intensity of armed violence in order to establish if the violence is "protracted" and exceeds internal disturbances or tensions, requiring a higher degree of effective measure. Furthermore, even if a situation is rising, ensure humanitarian principles such as protecting civilians, their property and medical aid are applied as soon as the threshold of armed conflict is met.

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