



ICRC

## How is the Term "Armed Conflict" Defined in International Humanitarian Law?

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The States parties to the 1949 Geneva Conventions have entrusted the ICRC, through the Statutes of the International Red Cross and Red Crescent Movement, *"to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof"*<sup>1</sup>. It is on this basis that the ICRC takes this opportunity to present the prevailing legal opinion on the definition of "international armed conflict" and "non-international armed conflict" under International Humanitarian Law, the branch of international law which governs armed conflict.

International humanitarian law distinguishes two types of armed conflicts, namely:

- international armed conflicts, opposing two or more States, and
- non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only. IHL treaty law also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.

Legally speaking, no other type of armed conflict exists. It is nevertheless important to underline that a situation can evolve from one type of armed conflict to another, depending on the facts prevailing at a certain moment.

### I. International Armed Conflict (IAC)

#### 1) IHL Treaties

Common Article 2 to the Geneva Conventions of 1949 states that:

*"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 cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance"*.

According to this provision, IACs are those which oppose "High Contracting Parties", meaning States. An IAC occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation. Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required. The existence of an IAC, and as a consequence, the possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground. It is based on factual conditions. For example, there may be an IAC, even though one of the belligerents does not recognize the government of the adverse party<sup>2</sup>. The Commentary of the Geneva Conventions of 1949

<sup>1</sup> Statutes of the International Red Cross and Red Crescent Movement, art. 5, para. 2(g).

<sup>2</sup> "It is irrelevant to the validity of international humanitarian law whether the States and Governments involved in the conflict recognize each other as States": *Joint Services Regulations (ZDv) 15/2*, in: D.

confirms that *"any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place"*<sup>8</sup>.

Apart from regular, inter-state armed conflicts, Additional Protocol I extends the definition of IAC to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (wars of national liberation).<sup>4</sup>

## 2) Jurisprudence

The International Criminal Tribunal for the former Yugoslavia (ICTY) proposed a general definition of international armed conflict. In the Tadic case, the Tribunal stated that *"an armed conflict exists whenever there is a resort to armed force between States"*.<sup>5</sup> This definition has been adopted by other international bodies since then.

## 3) Doctrine

The doctrine gives useful comments concerning the definition of an international armed conflict.

According to D. Schindler, *"the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other. [...] Any kind of use of arms between two States brings the Conventions into effect"*<sup>6</sup>.

H.-P. Gasser explains that *"any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States. [...] It is also of no concern whether or not the party attacked resists. [...] As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant convention"*<sup>7</sup>.

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Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 45.

<sup>3</sup> J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 32.

<sup>4</sup> Additional Protocol I, art. 1, para. 4: "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 enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".

<sup>5</sup> ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70.

<sup>6</sup> D. Schindler, *The different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 131.

<sup>7</sup> H.P. Gasser, *International Humanitarian Law: an Introduction*, in: *Humanity for All: the International Red Cross and Red Crescent Movement*, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993, p. 510-511.

The German Joint Services Regulations (ZDv) 15/2 says that "*an international armed conflict exists if one party uses force of arms against another party. [...] The use of military force by individual persons or groups of persons will not suffice*"<sup>8</sup>.

Finally, according to E. David, "*tout affrontement armé entre forces des Etats parties aux CG de 1949 (et éventuellement au 1<sup>er</sup> PA de 1977) relève de ces instruments, quelle que soit l'ampleur de cet affrontement: une escarmouche, un incident de frontière entre les forces armées des Parties suffisent à provoquer l'application des Conventions (et du 1<sup>er</sup> Protocole, s'il lie les Etats) à cette situation*"<sup>9</sup>.

## II. Non-International Armed Conflict (NIAC)

### 1) IHL Treaties

Two main legal sources must be examined in order to determine what a NIAC under international humanitarian law is: a) common Article 3 to the Geneva Conventions of 1949; b) Article 1 of Additional Protocol II:

#### a) Non-International Armed Conflicts within the Meaning of Common Article 3

Common Article 3 applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties*". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "*in the territory of one of the High Contracting Parties*" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.

In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. It has been generally accepted that the lower threshold found in Article 1(2) of APII, which excludes internal disturbances and tensions from the definition of NIAC, also applies to common Article 3. Two criteria are usually used in this regard:<sup>10</sup>

- First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.<sup>11</sup>
- Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.<sup>12</sup>

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<sup>8</sup> D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 40.

<sup>9</sup> E. David, *Principes de droit des conflits armés*, ULB, Bruxelles, 2002, p. 109.

<sup>10</sup> ICTY, *The Prosecutor v. Dusko Tadic*, Judgment, IT-94-1-T, 7 May 1997, para. 561-568; see also ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 84.

<sup>11</sup> For a detailed analysis of this criteria, see ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 135-170.

<sup>12</sup> See D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 147. For a detailed analysis of this criteria, see ICTY, *The Prosecutor v. Fatmir Limaj*, Judgment, IT-03-66-T, 30 November 2005, para. 94-134.

## b) Non-International Armed Conflicts in the Meaning of Art. 1 of Additional Protocol II

A more restrictive definition of NIAC was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts *"which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"*.<sup>13</sup>

This definition is narrower than the notion of NIAC under common Article 3 in two aspects. Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control *"as to enable them to carry out sustained and concerted military operations and to implement this Protocol"*. Secondly, Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organised armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups.

In this context, it must be reminded that Additional Protocol II *"develops and supplements"* common Article 3 *"without modifying its existing conditions of application"*.<sup>14</sup> This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC in general. The Statute of the International Criminal Court, in its article 8, para. 2 (f), confirms the existence of a definition of a non-international armed conflict not fulfilling the criteria of Protocol II<sup>15</sup>.

### 2) Jurisprudence

Case law has brought important elements for a definition of an armed conflict, in particular regarding the non-international armed conflicts in the meaning of common Article 3 which are not expressly defined in the Conventions concerned.

Judgments and decisions of the ICTY throw also some light on the definition of NIAC. As mentioned above, the ICTY went on to determine the existence of a NIAC *"whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State"*.<sup>16</sup> The ICTY thus confirmed that the definition of NIAC in the sense of common Article 3 encompasses situations where *"several factions [confront] each other without involvement of the government's armed forces"*<sup>17</sup>. Since that first ruling, each judgment of the ICTY has taken this definition as a starting point.

### 3) Doctrine

Several recognized authors also commented very clearly on what should be considered as a non-international armed conflict. Their comments are relevant in first place to the conflicts which do not fulfil the strict criteria foreseen in Additional Protocol II and provide useful elements to ensure the application of the guarantees provided in common article 3 to the Geneva Conventions of 1949.

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<sup>13</sup> Additional Protocol II, art. 1, para. 1.

<sup>14</sup> Additional Protocol II, art. 1, para. 1.

<sup>15</sup> Statute of the ICC, art. 8 para. 2 (f): *"It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups"*

<sup>16</sup> ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.

<sup>17</sup> Y. Sandoz/C.Swinarski/B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4461.

According to H.-P. Gasser, it is generally admitted that "non-international armed conflicts are armed confrontations that take place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand. [...] Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power"<sup>18</sup>.

D. Schindler also proposes a detailed definition: "The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, [i.e.] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements".<sup>19</sup>

M. Sassoli,<sup>20</sup> writes "common Article 3 refers to conflicts 'occurring in the territory of one of the High Contracting Parties,' whereas Article 1 of Protocol II refers to those 'which take place in the territory of a High Contracting Party.' According to the aim and purpose of IHL, this must be understood as simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not 'non-international armed conflicts', there would be a gap in protection, which could not be explained by states' concerns about their sovereignty. Those concerns made the law of non-international armed conflicts more rudimentary. Yet concerns about state sovereignty could not explain why victims of conflicts spilling over the territory of several states should benefit from less protection than those affected by conflicts limited to the territory of only one state.

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 neighbouring countries. This confirms that even a conflict spreading across borders remains a non-international armed conflict. In conclusion, 'internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.'<sup>21</sup>"

### III. Conclusion

On the basis of the analysis set out above, the ICRC proposes the following definitions, which reflect the strong prevailing legal opinion:

1. **International armed conflicts** exist whenever there is *resort to armed force between two or more States*.
2. **Non-international armed conflicts** are *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]. The armed confrontation must reach a *minimum level of intensity* and the parties involved in the conflict must show a *minimum of organisation*.

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<sup>18</sup> H.P. Gasser, *International Humanitarian Law: an Introduction*, in: *Humanity for All: the International Red Cross and Red Crescent Movement*, H. Haug (ed.), Paul Haupt Publishers, Berne, 1993, p. 555.

<sup>19</sup> D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, RCADI, Vol. 163, 1979-II, p. 147.

<sup>20</sup> Sassoli M., "Transnational Armed Groups and International Humanitarian Law", Program on Humanitarian Policy and Conflict Research, Harvard University, *Occasional Paper Series*, Winter 2006, Number 6, p. 8,9.

<sup>21</sup> Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002, p. 136.