

APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW IN A CONTEXT OF NON-INTERNATIONAL ARMED CONFLICTS: AN OVERVIEW

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INTRODUCTION

“The law of armed conflict regulates aspects of a struggle for life and death between contestants who operate on the basis of formal equality.” (T. Meron, 2000). Accordingly, it is apparent that the law has to play a significant role in the sphere of an armed conflict to harmonize the conflicting interests of all parties. Historically, after many disastrous and painful experiences, the International Humanitarian Law (IHL) has been developed to protect persons who are not or no longer participating in the hostilities and restrict the means and methods of warfare. In the sense, it is noteworthy that, the ultimate aim of the IHL is to strike a balance between humanitarian needs and military necessity.

Nonetheless, IHL recognizes a distinction between international and non-international armed conflicts. International Armed Conflicts (IACs) are those in which at least two States are involved. As well, Non International Armed Conflicts (NIACs) are those restricted to the territory of a single state, involving either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. (C.Harland, 2012). However, it is notable that the IHL principles governing IACs and NIACs, afford different kind of protection in its application. Even though, IACs are subjected to plethora of IHL rules, the protections given for NIACs are only embodied in the Common Article 3 of the 1949 four Geneva Conventions and Additional Protocol II of 1977.

However, as an emerging trend, the differences between IACs and NIACs are gradually blurring and in reality, it way forward for a nature of „mixed“ conflicts. Therefore, as Sivakumaran (2011) correctly opined, even if NIACs represent the vast majority of armed conflicts in the world today, they are suffering the lack of regulation to challenge the complex nature of warfare. Moreover, this study intends to examine the applicability of IHL rules in this mixed nature of conflicts and further, it discusses the root causes that still preserve the difference between IACs and NIACs. Finally, this paper attempts to analyze the changing nature of armed conflicts and its impact on demarcation between IACs and NIACs.

METHODOLOGY

This study is a normative research. Fundamentally, it is based on an extensive review of literature. Thus both primary and secondary sources are used to carry out the research. International conventions, statutes and decisions on international tribunals are thoroughly used as primary data. Particularly, 1949 four Geneva Conventions and its Additional Protocols (APs) in 1977 are used to emphasize the IHL rules governing in IACs and NIACs. As well, text books, journal articles and case studies conducted by International Red Cross Society are used to enrich the research as secondary data.

RESULTS AND DISCUSSION

IHL distinguishes two types of armed conflicts; namely, IACs and NIACs. Though this dichotomy has been widely criticized by some scholars on the basis of humanity and moral concerns, the distinction is still firmly placed in the sphere of IHL. (J.Stewart, 2003). As Ditter (2002) pointed out, „it is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the Law of War for the two types of conflict.“

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In contrast to that argument it may be worthwhile to recall that the primary difference between an international and an internal armed conflict is the actors taking part in them and the involvement of differing actors in the two types of armed conflict suggest that, at the very least, certain legal norms cannot be transposed directly from IACs to NIACs without some modifications. (S. Sivakumaran, 2011). Thus, before it reaches the discussion of emerging trends, it is worthwhile to unpack the legal definition of IAC and NIAC embedded in the Geneva Conventions and Additional Protocols.

According to the Common Article 2 of the Geneva Conventions „even if the state of war is not recognized by one of them, all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties“ an IACs occurs. Even if one of the parties denies the existence of a state of war and without considering the intensity or the duration, such an armed conflict can be categorized as an IAC. Also, AP I expand the scope of the IACs into the armed conflicts against colonial domination, alien occupation, racist regimes, as well as wars of national liberation by virtue of Article 1(4). Thus, it is amply clear that the IACs are clearly defined in the IHL paradigm.

On contrast, the importance of rules pertaining to NIACs are overwhelmingly discussing in modern context due to the uprising conflicts of non-international character in all over the world. As professor Cassese (1981) vigilantly pointed out; “ [First], internal wars are increasingly common all over the world, in particular in Third World countries....large and medium sized powers either restrain from settling disputes by armed forces of fights their wars by proxy, in the territories of other States.”

The modern definition of NIACs is lying beneath two main legal sources of IHL; namely, Common Article 3 to the Geneva Conventions and Article 1 of the AP II. The Common Article 3, applies to the armed conflicts/hostilities that may occur between governmental armed forces and non-governmental armed groups or between such groups in the territory of the „High Contracting Parties“. Since Common Article 3 does not define „conflicts not of an international character“ governments can easily contest its applicability. Furthermore, the definition embedded in Article 1 of the Additional Protocol II introduces a very high threshold on NIACs than Common Article 3. Thereby, the protocol applies only in the „situations at or near the level of a full-scale civil war“ or belligerency. Thus, it is evident that the internal conflicts that occurred in developing countries; for example the CPN-M initiatives in Nepal, the RUF activities in Sierra Leone, the LTTE insurgents in Sri Lanka and the Revolutionary Armed Forces of Colombia (FARC) considered as act of intervention of the internal affairs and the matters ended up internally.

Though, the four Geneva Conventions and two Additional Protocols embedded with hundreds of rules pertaining to armed conflicts, only a few rules are applied on NIACs. Nonetheless, one can argue that the entire corpus of the IHL is heavily tilted on the IACs rather than NIACs. It is amply clear that the distinction would cause to cast two tiers of protection on the subjects of IACs and NIACs accordingly. Furthermore, high thresholds provide by the Geneva Conventions and the Additional Protocols create a restrictive approach of the applicability of IHL into NIACs. As Sivakumaran pointed out, „the idea of combatant immunity and prisoners of war regimes are only bound up with IACs and no treaty provisions envisage in NIACs in this regard.“ It is apparent that several attempts to incorporate those rules in the context of NICAs have failed.

Inevitably, not only by the parameters embedded in conventions but also several other reasons can be identified which supports to the existence of the demarcation between IACs and NIACs. This demarcation may be fertilized by political, economic and social ideologies, as well as international relations of a particular State. Furthermore, the States are unwilling to apply the laws of war into NIACs on the sole ground that this may have the effect of legitimizing rebels, terrorists and other armed groups.(J.Odrnatt,2016) Ultimately, applying of IHL principles onto all NICAs would give cause to recognize the non-governmental party

to an internal conflict, as an entity which is subjected to international law.

However, this distinction is being blurred in the modern context on the following ground reasons. Firstly, applicability of the IHL depending on whether an armed conflict is international or internal in nature is no longer acceptable in the modern context. A resent and welcome trend is blurring the different thresholds of applicability. Thereby, it can be argued that this third category of conflicts, which can be named as „internationalized“ (H. Gasser, 1983) or „mixed conflicts“ render some difficulties to the traditional approach of the applicability of rules of IHL. As Meron argued; „the ICTY appeal chamber has encouraged the blurring of the distinction between international and non-international conflicts“ (T. Meron, 2000) Ultimately, the „internationalized“ armed conflict would be eligible to apply Grave Breaches provisions envisaged in the Geneva Conventions pertaining to IACs. (*Prosecutor v. Dusko Tadić*, [1999]) Thus, it can be pointed out that the „mixed conflicts“ would pave the way for applying the most important rules of IHL in NIACs. Thereby, it is evident that the emerging trends have caused to dilute the traditional demarcation between IACs and NIACs.

Secondly, the distinction between IAC and NIAC is being „blurred“ by the development of customary law principles of IHL. The rules pursuant to IACs are being generalized and made feasible to be adopted in all armed conflict by the intervention of customary law principles of IHL. As noted in the *Tadić* judgment, some rules pertaining to IACs such as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property and protection of all those who do not (or no longer) take active part in hostilities etc. are applicable to all forms of armed conflicts without considering the distinction.

Thirdly, the intersection of International Human rights Law (IHRL) into IHL has unanimously contributed to soften the distinction between IACs and NIACs. As Meron correctly pointed out, „the reason may be the shifting of the traditional focus of State sovereignty towards a human rights approach to international problems.“ In the light of this argument we can reach a conclusion that the applying IHRL would be more fruitful to serve humanity where the States and rebels alike have determined that they are not bound by IHL. Before summing up the passage of the influence of IHRL on IHL and its impact on the distinction between IACs and NIACs, it is worthwhile to note here a dictum pronounced by International criminal tribunal for former Yugoslavia, in *Tadić* (1994) judgment;

“Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted „only“ within the territory of a single state? If international laws, while of course duly safeguarding the legitimate interests of states, must gradually turn the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”

Thus, it is clear that the changing nature of the conflicts, intersection of IHRL into IHL and the codification of customary law principles of IHL and its wide acceptance has caused to dilute the demarcation between IACs and NIACs.

CONCLUSIONS/RECOMMENDATIONS

As per the extensive discussion the writers had on the above passages, the followings facts can be summed up accordingly. Although, the distinction between IACs and NIACs are highly criticized by the scholars and other stakeholders dealing with IHL, the State parties are still willing to accept the demarcation of IACs and NIACs envisaged in basic IHL treaties. Thus, the traditional approach does not give a room to the whole corpus of IHL to be applied to the NIACs. However, this restrictive approach has lost its value by the intervention of

customary law principles of IHL and IHRL in the realm of IHL. Finally it can be concluded that though the distinction still retains, a considerable amount of rules that would be useful to mitigate the echo of any kind of war are applicable to the IACs and NIACs alike.

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