

INTERNATIONAL HUMANITARIAN LAW RESEARCH INITIATIVE

**THE TEMPORAL SCOPE OF APPLICATION OF
INTERNATIONAL HUMANITARIAN LAW IN CONTEMPORARY
CONFLICTS**

By

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Background paper

**THE TEMPORAL SCOPE OF APPLICATION OF INTERNATIONAL
HUMANITARIAN LAW IN CONTEMPORARY CONFLICTS**

By Derek Jinks¹

When does the application of international humanitarian law properly begin and end in modern conflicts? Classical international law distinguished three types of armed conflict: (1) war; (2) civil war; and (3) armed hostilities short of war. The laws of war were applicable in time of war--from the declaration of war until the formal reestablishment of peace (for example, by the signing of a peace treaty). The laws of war were not applicable in civil wars--which were considered internal matters--unless a state formally recognized the insurgency as a belligerent. And, of course, the laws of war were not applicable as a formal matter in hostilities short of war. Prior to the drafting of the Geneva Conventions in 1949, the applicability of the "law of war" was, therefore, delimited by formal acts of state such as a formal declaration of war or a formal recognition of belligerency. The Geneva Conventions substantially revised this formalistic, *de jure* approach--making contemporary international humanitarian law applicable during armed hostilities that *de facto* constitute "armed conflicts." In both international and non-international armed conflicts, the Geneva Conventions, in general, govern the conduct of hostilities for the duration of the "armed conflict." This background note briefly outlines the regime established in the Geneva Conventions and summarizes several ambiguities in these rules. Because the scope of application regimes differ sharply between international and non-international armed conflict, these two types of conflict are analyzed separately.

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I. THE TRADITIONAL APPROACH: THE “ARMED CONFLICT” THRESHOLD OF THE GENEVA CONVENTIONS

In general, the Geneva Conventions apply from the initiation to the termination of “armed conflict.” The “armed conflict” threshold requires some elaboration because: (1) the conditions triggering application of international humanitarian law differ for international and non-international armed conflicts; and (2) some “post-conflict” obligations are triggered prior to the close of military obligations.

A. Beginning of Application: The Initiation of “Armed Conflict”

1. International Armed Conflict

The Geneva Conventions apply in full 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,” or in “any cases of partial or total occupation of the territory of a High Contracting Party.”² The applicability of international humanitarian law presents is clear in the case of declared wars between two or more states. Such conflicts clearly qualify as an international armed conflict to which the Geneva Conventions would apply in their entirety. Of course, such conflicts have also become rare. By its terms, Geneva law also applies to situations amounting to international “armed conflict.” Hostilities between states are, for the most part, governed by the laws of war irrespective of the intensity, duration, or scale of the conflict. According to the official commentary of the International Committee of the Red Cross (ICRC), the conditions for an international war are satisfied whenever any difference arises leading to the use of armed force between the militaries of two states.

2. Non-International Armed Conflict

Common Article 3 provides that in “armed conflicts not of an international character” each party to the conflict shall observe certain minimum standards. The laws of war, however, do not provide an authoritative definition of “armed conflict.” Substantial evidence suggests, in fact, that the drafters of the Geneva Conventions purposely avoided any rigid formulation that might limit the law’s field of application. There is, as yet, no settled definition of “armed conflict” in international law; and unguided case-by-case analysis has often produced unsatisfying results. These problems are most acute in the context of putative internal armed conflicts (or conflicts “not of an international character”) because internal unrest is commonplace and states resist the application of international humanitarian law in domestic matters. Indeed, the coherence of the “armed conflict” concept turns on the viability of the distinction between internal disturbances or insurrections and internal armed conflicts—the former being governed by domestic law (as conditioned by international human rights law) and the latter governed by international humanitarian law.

² GC, Common Article 2. I will not address the conditions under which the “occupation” rules are applicable--this topic is beyond the scope of this paper.

Despite the textual similarity between Common Articles 2 and 3, divergent patterns of state practice and important policy concerns necessitate reading the “armed conflict” requirement of Common Article 3 somewhat more stringently. Common Article 2 purports to regulate only conflicts between two or more entities with international legal personality—namely, states and, perhaps, “recognized belligerents.” Common Article 3, on the other hand, purports to regulate conflicts between states and sub-state armed groups even if the conflict is confined to the territory of one state. Because Common Article 3 regulates internal matters, the conditions of its applicability should be carefully construed to extend only to matters of international concern.

B. End of Application: The “General Close of Military Operations” or the “Cessation of Active Hostilities”

In both international and non-international armed conflicts, the Geneva Conventions, in general, govern the conduct of hostilities for the duration of the “armed conflict.” Under the Geneva Conventions, the general rule is that international humanitarian law applies until the “general close of military operations.” There are, nevertheless, exceptions to this general rule. First, the obligation to repatriate persons protected under the Third (POWs) and Fourth (Civilians) Geneva Conventions is triggered by the “cessation of active hostilities.” Second, the obligations imposed upon occupying powers by the Civilians Convention extend beyond the “general close of military operations.”

The clearest method of ending an “armed conflict” is by means of a peace treaty. This method of terminating conflicts, however, is increasingly rare--particularly given the sharp decline in formal declarations of war. Even in the absence of a peace treaty, there may be a complete cessation of hostilities; and the de facto resumption of normal peaceful relations between the parties. Nevertheless, active hostilities may cease in a variety of ways--some temporary, some permanent--including an armistice, a cease-fire, or a truce. Given the de facto “armed conflict” regime of the Geneva Conventions, the general applicability of international humanitarian law terminates if active hostilities cease and there is no probability of a resumption of hostilities in the near future. Recall that the “armed conflict” persists until the “general close of hostilities”--even though some obligations (such as the duty to repatriate POWs) are activated by the “cessation of active hostilities.” It is important to note that many commentators have suggested that the “general close of military operations” standard is distinct from the “cessation of active hostilities” standard. The latter refers to the termination of hostilities--the silencing of the guns--whereas the former refers to the complete cessation of all aggressive military maneuvers. On this reading, an “armed conflict” might persist beyond the “cessation of active hostilities.” And, because the obligation to repatriate is triggered by the “cessation of active hostilities,” it necessarily follows that, in some circumstances, there might be a duty to repatriate before the “armed conflict” as such is terminated.

II. CURRENT CHALLENGES: IDENTIFYING POTENTIAL AMBIGUITIES IN THE GENEVA CONVENTIONS

Contemporary conflicts have substantially clarified ambiguities in the traditional approach. Several recent developments raise important questions regarding the temporal scope of application of international humanitarian law including: the prevalence of non-international armed conflicts (as well as hostilities that skirt along the boundary between international and non-international conflicts); changes in military tactics, operations and participants; the existence of non-traditional conflicts with evolving and open-ended objectives; and the emergence of conflicts which foreclose the possibility of diplomatic solutions. In this section of the paper, I identify several arguable ambiguities in the Geneva Conventions that merit sustained reflection.

A. Non-Traditional Conflicts and the Threshold of Application for “Non-International Armed Conflict”

Perhaps the most pressing (and most obvious) ambiguity is the threshold of application in non-international armed conflicts. As previously discussed, the “armed conflict” threshold of Common Article 3 is, without question, ambiguous. Because of the prevalence of non-international conflicts, the purposeful ambiguity of Common Article 3 should be reevaluated. In addition, non-international armed conflicts interact with international conflicts in increasingly complex ways. For instance, the September 11 terrorist attacks on the United States set in motion the events leading to the international armed conflict between the U.S., U.K., and Afghanistan--which is unquestionably covered by the Geneva Conventions. Although that much is clear, the question remains whether international humanitarian law applies to the September 11 attacks themselves. And even if the September 11 attacks confirmed the existence of a non-international armed conflict between the U.S. and al Qaeda, it is unclear whether and when the substantial number of pre-September 11 attacks on the U.S. triggered the application of international humanitarian law. Moreover, opponents in these conflicts often will not be traditional combatants, which will in turn delay the recognition of a state of armed conflict even if force is projected from abroad.

Because non-state actors have acquired the capacity to project coordinated force globally, the threshold of application in non-international conflicts should be examined. Discussion of these issues requires taking stock of developments in the regulation of non-international armed conflict that post-date Common Article 3. These subsequent legal developments have arguably clarified the definition of non-international “armed conflicts.” Three important developments merit scrutiny: Protocol II to the Geneva Conventions, the judgment of the ICTY Appeals Chamber in the *Tadic* case, and the statute establishing an International Criminal Court (ICC). Each of these developments arguably offers a more rigid conception of “armed conflict;” and, as a consequence, narrows Common Article 3’s material field of application. The multiple interpretive controversies identified in this section suggest several additional ambiguities.

1. Protocol II to the Geneva Conventions

Protocol II to the Geneva Conventions, pertaining to internal armed conflict, arguably resolved much of the controversy surrounding the definition of armed conflict in

Common Article 3. Because of clear deficiencies in the international legal machinery regulating internal armed conflict, the ICRC and many states party to the Geneva Conventions undertook efforts to “reaffirm and develop” the scope and substance of humanitarian law. These efforts culminated in two additional protocols to the Geneva Conventions. Protocol I expanded the definition of international armed conflict to include internal “wars of national liberation;” and clarified many important substantive provisions of the Geneva Conventions. In an effort to “develop and supplement” Common Article 3, Protocol II expanded the rules applicable in internal armed conflicts.

On its terms, Protocol II is applicable to armed conflicts between forces of a High Contracting Party and other armed forces that are “under responsible command, [and] 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.” The scope of Protocol II is further clarified in Article 1(2), which provides: “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.” Because Protocol II purports, on its face, to supplement Common Article 3 “without modifying its existing conditions of application,” the rigidly defined field of application in the Protocol arguably clarifies as a formal matter the situations in which Common Article 3 applies. In short, Protocol II arguably provides a positive, concrete definition of “armed conflict not of an international character.”

Although this view enjoys a surface plausibility, the best reading of Protocol II is that it has a much more narrow field of application than Common Article 3. This conclusion finds support in the text of the two provisions, the drafting history of Protocol II, subsequent state practice, and the consensus of commentators. As a result of the two Protocols, the Geneva Conventions now recognize and regulate four distinct categories of armed conflict: inter-state armed conflict under Common Article 2; internal “wars of national liberation” as defined in Protocol I; “civil wars” proper as defined in Protocol II; and “armed conflicts not of an international character” under Common Article 3. Common Article 3, therefore, establishes the lowest threshold of application for the laws of war.

2. ICTY Judgment in Prosecutor v. Tadic (Appeal on Jurisdiction)

Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has arguably clarified the definition of “armed conflict” in international humanitarian law. Established to prosecute individuals for serious violations of humanitarian law, the ICTY has subject matter jurisdiction over war crimes, crimes against humanity, and genocide. In *Prosecutor v. Tadic*, the tribunal’s first case, the Appeals Chamber defined the contours of the “armed conflict” requirement within the meaning of the Geneva Conventions. Specifically, the Appeals Chamber held that:

[A]rmed conflict exists whenever there is a resort to armed force between States or protracted armed violence between such groups within a State. International humanitarian law applies from the initiation of such conflicts

and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal armed conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.³

Two aspects of this definition arguably represent important contributions to the definition of “armed conflict.” First, the definition arguably implies that an “armed conflict” exists only if the armed group exercises control over a portion of the state’s territory. Second, the definition arguably classifies internal hostilities as an “armed conflict” only if the armed violence is “protracted.” Both requirements would represent important restrictions on the conditions under which Common Article 3 applies. Although this definition has proven quite influential, a careful reading of the tribunal’s reasoning makes clear that it does not narrow the scope of Common Article 3’s application.

First, the tribunal’s definition does not require that armed groups exercise control over territory within the state. The tribunal defines the circumstances in which international humanitarian law applies by carefully parsing its general material field of application (all “armed conflicts”); territorial field of application (all territory affected); and temporal field of application (from the initiation to the cessation of hostilities). In defining the territorial field of application for internal armed conflicts, the tribunal only makes clear that humanitarian law applies (1) even in territory no longer under the control of the state; and (2) throughout such territory.

Second, the “protracted” armed violence requirement, properly understood, does not restrict the application of humanitarian law in any appreciable way. The nature of the finding contemplated by the ICTY Appeals Chamber suggests that most instances of internal strife would satisfy this requirement. Whether internal armed violence is “protracted” or not is assessed by reference to the entire period from the initiation to the cessation of hostilities. Few, if any, putative internal armed conflicts would fail to satisfy this requirement so conceived. In addition, the laws of war apply to all acts committed in an armed conflict even if committed prior to the point at which the “protracted” threshold was crossed. That is, the “protracted” requirement does not immunize acts committed in the early stages of an internal armed conflict. In short, the “protracted” armed violence requirement is best understood as little more than a restatement of the general rule excluding “isolated and sporadic acts of violence” (disorganized and short-lived) from the scope of humanitarian law. Moreover, jurisprudence of the International Criminal Tribunal for Rwanda (ICTR) established that armed violence extending over only a few months satisfies the “protracted” requirement; and given the intensity of the violence, it constituted an “armed conflict” within the meaning of Common Article 3.

3. International Criminal Court Statute

³ Prosecutor v. Tadic, Appeal on Jurisdiction, Case IT-94-1-AR72 (Oct. 2, 1995), 35 I.L.M. 32, 54, para. 70 (1996).

The International Criminal Court (ICC) Statute also provides a more elaborate definition of internal “armed conflict” than Common Article 3. The ICC Statute identifies several acts as war crimes when committed in internal armed conflict. Specifically, the Statute criminalizes “serious violations of Common Article 3” committed in “armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”⁴ The Statute also criminalizes a much broader range of conduct characterized as “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”⁵ The criminal prohibitions identified in this ambitious provision apply in “armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted* armed violence between governmental authorities and organized armed groups or between such groups.”⁶

Several aspects of the ICC Statute’s approach should be emphasized. First, the Statute adopts the general framework of the Geneva Conventions in that it offers no affirmative definition of “armed conflict.” Second, the Statute codifies the ICRC Commentary’s view that internal “armed conflicts” within the meaning of Common Article 3 do not include “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.” Third, the Statute adopts the ICTY’s “protracted armed violence” formulation *but does not apply this requirement to Common Article 3 conflicts*. Moreover, the wording of Article 8(2)(f) itself suggests that it applies to one type of internal armed conflict—armed conflicts where there is protracted armed violence.

Because these legal developments have not clarified the material field of application for Common Article 3, defining internal “armed conflict” requires grappling with the ambiguous regime established in the 1949 Geneva Conventions. Several ambiguities in the temporal scope of application are suggested by this analysis. First, if the “protracted” requirement is read into international humanitarian law—that is, only “protracted” internal hostilities constitute “armed conflicts” within the meaning of the Geneva Conventions—then the question arises whether international humanitarian law covers acts committed prior to the point at which the hostilities became “protracted.” Does international humanitarian law apply from the initiation of hostilities or only from the point at which the conflict can fairly be characterized as “protracted”? Second, if international humanitarian law applies only to internal conflicts that cross some threshold of intensity, then this raises difficult questions about the point at which the applicability of this law terminates. More specifically, does the applicability of international

⁴ ICC Statute, art. 8 (2)(d).

⁵ *Id.* art. 8 (2)(e). The chapeau of this section provides: “Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts . . .” *Id.*

⁶ *Id.* art. 8(2)(f).

humanitarian law terminate once the intensity of the fighting passes back below the critical threshold? Or, does it apply until the “general close of hostilities” or the “cessation of active hostilities”?

B. Transnational, Non-International Armed Conflicts

Contemporary non-international armed conflicts are often transnational in character. That is, the armed conflict spans the territories of several states even though the armed hostilities are not international (there is only one state involved or all states involved are fighting on the same side). Again, the U.S.-led “war on terror” provides an instructive example. Al Qaeda is a transnational organization with operational cells in many countries. Any armed conflict between a state and such a group will likely take on a transnational character. The question is when the application of international humanitarian law begins and ends in such conflicts.

The Geneva Conventions did not envision this type of conflict. Indeed, one interpretation of Common Article 3 suggests that it applies only to armed conflicts within the territory of one state. On this view, the “not of an international character” limitation renders the provision inapplicable to all armed conflicts with international or transnational dimensions. Substantial evidence suggests that the drafters of the provision envisioned its application only in truly internal conflicts. In addition, the full text of the provision offers some support for this reading—the Article covers only cases of “armed conflict not of an international character, *occurring in the territory of one of the High Contracting Parties.*” Despite its textual plausibility, this reading of the provision is arguably problematic. First, this interpretation would create an inexplicable regulatory gap in the Geneva Conventions. On this reading, the Conventions would cover international armed conflicts proper and wholly internal armed conflicts, but would not cover armed conflicts between a state and a foreign-based (or transnational) armed group or an internal armed conflict that spills over an international border into the territory of another state. There is no principled (or pragmatic) rationale for this regulatory gap. Finally, this reading of the provision misconstrues the considerations that limit the application of Common Article 3. Common Article 3 was revolutionary because it purported to regulate as a matter of international humanitarian law wholly internal matters. If the provision governs wholly internal conflicts, as the “one state” interpretation recognizes, then the provision applies *a fortiori* to armed conflicts with international or transnational dimensions. The language of the provision limiting its application to the “territory of one of the High Contracting Parties” can be read another way. Perhaps the wording of the provision simply makes clear that its application is predicated upon a jurisdictional nexus to a state party to the treaty.

C. Internationalized Non-International Armed Conflict (and “Non-Internationalized” International Armed Conflicts)

Contemporary conflicts often pass through stages at which they are international and stages at which they are non-international. This difficulty arises because it is now common for a foreign state to intervene in a non-international armed conflict—often

triggering a range of legal complexities. Where a foreign state intervenes on behalf of a “legitimate” government to assist in the repression of an insurgency, the armed conflict retains its “non-international” character. However, if the foreign state intervenes on behalf of a rebel movement in its fight against the government, this intervention would “internationalize” the armed conflict. This type of conflict raises special problems regarding the temporal scope of application in the Geneva Conventions. And, perhaps more importantly, this type of conflict underscores the importance of defining more clearly the conditions under which specific rules apply. For example, consider the hostilities in Afghanistan. The armed conflict in Afghanistan was probably a “non-international” armed conflict between the Taliban and Northern Alliance troops until U.S. forces intervened, at which point the conflict became international. When the Taliban ceded control of the government, the conflict may well have reverted to a non-international armed conflict, because U.S. forces were aligned with the newly-installed government of Afghanistan. Of course, the involvement of another state (or the resurgence of the Taliban) could re-internationalize the conflict. The obvious difficulty here is that the applicable international humanitarian law is in a state of flux over the course of the hostilities, and several ambiguities might be addressed. Does the internationalization of an internal conflict automatically trigger the application of humanitarian law irrespective of whether the internal hostilities constituted an “armed conflict” ? Does the non-internationalization of an international armed conflict (that is, the reversion of an international armed conflict to an internal armed conflict) constitute the “cessation of active hostilities” for the purposes of POW repatriation?

D. Non-Traditional Tactics in International Hostilities

Finally, contemporary conflicts often involve the use of non-traditional war tactics that may not trigger the application of humanitarian law. The U.S.-led “war on terror” again illustrates many of the challenges that arise in contemporary conflicts. The war is being fought in multiple ways, not only by conventional armed forces but also by tactics typically not associated with “armed conflicts” including: intelligence and law enforcement action, economic and financial sanctions, and special operations which may continue long after the conclusion of any significant troop engagement. In view of these emerging tactics, the “armed conflict” threshold of Common Article 2 may well, over time, present many of the same difficulties associated with Common Article 3. Do these tactics trigger the application of humanitarian law? Or, must these tactics accompany the use of armed forces in the conventional sense to trigger this law? If the threshold of application is lowered to encompass these activities, should the application of humanitarian law terminate only upon the cessation or general close of all such activities?

Conclusion

This briefing paper describes the conditions under which the Geneva Conventions are applicable; and outlines several ways in which contemporary conflicts strain the viability of this regime. The discussion illustrates several important ambiguities that may well be the subject of productive inter-governmental discussions.