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Extending the applicability of the
Geneva Conventions-
Moving towards a uniform law of all
armed conflicts?

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Summary

The aim of this study is to examine a possible fusion of the different legal regimes applicable to international and non-international armed conflicts. The thesis points at different means of rendering the provisions of the Geneva Conventions applicable to conflicts which appear to be non-international. The Conventions are interpreted according to the provisions on interpretation of treaties in the Vienna Convention on the Law of Treaties. Subsequent State practice and the object and purpose of the Conventions play a vital role in this process, as well as international court decisions. The field of application of the Geneva Conventions is found to be broader than the traditional Inter-State war. Firstly, parties to a non-international armed conflict could conclude an agreement or make a unilateral declaration with the effect that the provisions of the Geneva Conventions should be applicable, notwithstanding the character of the conflict. Secondly, some *prima facie* internal conflicts should be classified as international armed conflicts. This is the case if the conflict can be classified as being; (i) a war of national liberation, (ii) although more dubious, a war between other State-like entities and a State. Finally (iii) foreign interventions amounting to a certain level of control over national forces can also render the provisions of the Conventions applicable. Such an intervention either directed at the governmental forces or at the insurgents will render the initial conflict between the government and the insurgents international.

If the conflict could not be classified as international a third possibility of extending the field of application exists. The thesis elaborates on the question whether common art. 3, the single provision explicitly applicable to non-international armed conflicts, in fact has the same content as the other provisions of the Geneva Conventions. Not all the provisions of the Conventions seem to be applicable, but some of them, especially those referring to human treatment of detainees, could be referred to when interpreting common art. 3. Therefore I conclude that we are actually moving towards a uniform law applicable to all armed conflicts. This development is beneficial to the victims of armed conflicts, since the law of international armed conflicts provides for a better protection.

Preface

I would like to thank all of those who have encouraged and inspired me during the process of writing this thesis. Special thanks should be awarded to Krister Hellström, Swedish Red Cross, for his interest in the project.

Abbreviations

API	Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the protection of Victims of International Armed Conflicts of 8 June, 1977
AP II	Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the protection of Victims of Non-International Armed Conflicts of 8 June, 1977
ECHR	European Convention for the protection of Human Rights and fundamental freedoms
FRD	Friendly Relations Declarations
GA	United Nations General Assembly
GC I	Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field of August 12, 1949
GC II	Geneva Convention for the amelioration of the condition of the wounded and sick and shipwrecked members of armed forces at sea of August 12, 1949
GC III	Geneva Convention relative to the treatment of Prisoners of War of August 12, 1949
GC IV	Geneva Convention relative to the Protection of Civilian Persons in time of War of August 12, 1949
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights and
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
POW	Prisoners of War

SC	United Nations Security Council
UN	United Nations
US	United States of America
VCLT	Vienna Convention on the law of Treaties

1 Introduction

1.1 Subject and purpose

Since the Geneva Conventions (GC) entered into force in October 1950 armed conflicts have shifted in their character. The classical Inter-State war has become a rather rare phenomenon. While the globalisation and international dimensions of politics rapidly increases, the armed conflicts are nowadays to a great extent waged within the borders of a single State. This paradox risks putting aside international concerns when they are as most important. The brutality of these internal armed conflicts is usually striking and civilians are constantly exposed to the horrors of war. International Humanitarian Law (IHL) addresses constraints on the parties to the conflict in its provisions. These provisions do not apply equally to international and non-international armed conflict, it would appear. IHL has, to simplify it, divided its framework into two legal boxes, one applicable in international armed conflicts and the other applicable in non-international armed conflicts. The aim of this study is to challenge this traditional dichotomy. Non-international armed conflicts have only been provided with one single article in the GC, common art. 3. The protection for victims of non-international armed conflicts thus appears to be less comprehensive than the protection in international ones. Yet, in non-international armed conflicts it is perhaps even more necessary to make provisions for the protection of those who fall into the hands of the opponents. The causes to the conflict might be closer linked to historical conflicts, and ideologies and emotions may play a stronger role than in international armed conflicts.¹ In this study I will elaborate on the possibilities for victims of *prima facie* non-international conflicts to profit from all the provisions of the GC. Three main legal tools are presented. The first concerns the institute of recognition of belligerency and special agreements, whereby the GC become binding on the conflicting parties. The second part of the study will look into the definition of an international armed conflict. One way of extending the legal framework of a *prima facie* internal conflict would be to classify it as an international armed conflict. The last possibility, that I will examine, is whether the law of non-international armed conflict could be interpreted as containing the same substantive law as the provisions of the GC. I wish to present conclusions concerning the possible fusion of the two legal boxes, ultimately the study will investigate whether the rapprochement between the two legal frameworks have melted together into one regime applicable to all types of armed conflicts.

¹ Green: 327

1.2 Method and Material

Both common art. 2 and 3 will be interpreted according to the Vienna Convention on the Law of Treaties (VCLT) art. 31 and 32. Although not in force when the GC was drafted in 1949, these articles can be used when interpreting the treaty today.²

In the study I am using both primary and secondary sources. International and national court cases are analysed, and national legislations are also scrutinised. State practice is further searched for in various treaty-making processes and in resolutions adopted by international forum, such as the Security Council (SC), the General Assembly (GA) and the UN Human Rights Commission. To complement these resources I have consulted literature on the subject, mainly in the form of articles published in legal journals.

The jurisprudence of the two ad hoc Tribunals has on several occasions addressed the issues that are analysed in this thesis. An important question that evolves is then what impact on public international law and IHL the decisions of these ad hoc Tribunals shall have. The Aleksovski Appeal Judgement held that in the interest of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice. On the other hand the Trials Chamber should be bound by the ratio decendi of previous Appeals Chamber decisions, although not bound by the decisions of a different Trial Chamber. The judgements of the ICTY will naturally not bind the International Criminal Court (ICC), other ad hoc Tribunals or any national court.³ However the interpretations of IHL made by the Tribunal will probably be of great impact beyond the ICTY. Though only a subsidiary source of international law according to ICJ Statute⁴, the jurisprudence still has a greater impact than for example national court decisions and other subsidiary sources. Established by Security Council resolutions, the ad hoc Chambers are more deeply rooted in the international community than most courts. The legal doctrine has certainly welcomed the newly arrived extensive jurisprudence in this field of international law, an area that earlier has suffered from lack of jurisprudence, although not lack of applicability. When authors approve of the rulings of the ICTY, the status of its decisions is strengthened, since legal doctrine is also a source of international law.

As so often is said, truth is the first victim of war, information concerning the practice of IHL is therefore obviously not easy to obtain. Official

² International judgments have reaffirmed that legal rights and obligations according to treaty should be interpreted according to the international law in force at the time of adjudication. In practice, VCLT art. 31 and 32 are treated as exceptions of the rule of non-retroactivity.

³ The Prosecutor v. Aleksovski, Appeals Chamber Judgment, 24 March 2000, case no. IT-95-14/1-A, para. 134, para. 107, 113-114, see also Byron: 79-80

⁴ Statute of the International Court of Justice, art. 38

documents such as legislation, court decisions or government statements might therefore get a greater attention than they deserve.

1.3 Definitions and Delimitations

1.3.1 Definitions

The terminology is always a crucial matter. By labelling a construction as a fence or as a wall or referring to the anti-governmental forces as freedom fighters, insurgents or rebels one can also be accused of taking an indirect stand in the conflict. Throughout the thesis I will use the word insurgents, by this I do not intend to give a judgement on the legality of the war; this question appertains to the law *ius ad bellum* and falls outside the scope of this study. The terms internal armed conflicts and non-international armed conflicts are attributed an equal meaning in the study.

1.3.2 Delimitations

One cannot emphasize enough, the importance of not neglecting international human rights standards in times of armed conflicts. The existence of an armed conflict does not exclude the application of the core human rights standards. The non-derogable rights of ICCPR and ECHR are still applicable in these situations. Art. 15(2) ECHR holds that there can be no derogation from the right to life except lawful acts of war or other measures contrary to other obligations under international law. The jurisprudence of ICTY has also confirmed the close interrelation by using the case law relating to international human rights treaties when interpreting IHL. International refugee law also offers interesting aspects of the issue in focus. Insurgents might qualify as refugees, and their appraisal may be considered as political crimes according to the Refugee Convention from 1951⁵ My thesis will not deal with the substantive international human rights law; instead I will focus on the IHL provisions. The interrelation in focus is between the law applicable in international armed conflict and the law applicable in non-international armed conflict.

While Geneva law concerns the treatment of those in the hands of the adversary, the Hague law regulates the conduct of hostilities. This study will not elaborate on the rapprochement of substantive law in the field of Hague law. It has been held by several decisions and authors that principles guiding the latter category exist in both international and non-international armed conflicts as general principles of international law or as international customary law. Prohibition on certain types of weapons and against taking reprisals against civilians and civilian objects, the principles of distinction

⁵ Convention relating to the Status of Refugees Art. 1 (f) (c) and Art. 33

and avoiding unnecessary harm applies in all types of armed conflicts. The question is restricted to the applicability of the GC, and not the status of AP I or other provisions regulating Hague law. However, the rapprochement in this field is mentioned as a general indication of applying the same rules to all types of armed conflicts.

The thesis will interpret the relevant provisions of the GC in its capacity of treaty law. The conclusions are restricted to this source of law. It is however inevitable to occasionally cross the domain of customary law. State practice is of relevance to both sources of law, customary international law could further be a mean when interpreting a treaty.

1.4 Outline

The second chapter concerns the possibilities of rendering non-international armed conflicts subject to all provisions of the GC by ad hoc declarations and agreements.

The third chapter will be devoted to the question of the definition of an international armed conflict. I have identified two main types of situations which would appear non-international in their character. By interpreting art. 2 in the GC I will try and find out whether the legal framework of international armed conflicts should be applicable in these situations. (1) Firstly I will test whether the GC could be applicable in armed conflicts, in which not two or more States are involved. (2) Secondly, I will look into the situation of a *prima facie* non-international armed conflict when a foreign Power supports a party to the conflict. In this situation, the issue would be what degree of support that is necessary to render the conflict international. In this category different subgroups can be identified; (a) A foreign State that supports an insurgent group fighting an established government, (b) a foreign State that is invited by an established government to assist them in their fight against the insurgents, (c) a foreign State that is directing attacks against non-governmental forces without any consent from the government. The impact of the presence of UN troops and the current declared war on terrorism are also approached. Extensive references to cases are made, in order to illustrate the different theoretical subgroups and to shed light on state practice.

Chapter four deals with the situation where a conflict has been characterised as a non-international one. The aim is here to find out whether common art. 3 should actually be interpreted as containing the same provisions as the GC in whole.

Both Chapters three and four commence with a survey of relevant judgements from the ad hoc Chambers. This methodology gives the reader an introduction to the problem and its relevance.

In the final chapter, concluding remarks from the analysis is presented and the conclusions are put in a broader context. The presumption underlying the study; that the law of international armed conflict offers a better protection than the law of internal armed conflict, is also challenged.

2 Agreements and Recognition

In this chapter I will look into the possibilities of applying the GC due to special statements of the parties.

2.1 Special agreements

Common art. 3 urges the parties to a non-international armed conflict to bring into force, by means of special agreements, all or part of the GC. This appeal has not, as one could have suspected, been unheard. On several occasions States and other parties to a conflict have made use of this possibility.

On May 22 1992 the parties to the conflict in Bosnia-Herzegovina concluded an agreement. In Yemen both parties to the conflict agreed to abide by the essential rules of the GC.⁶ An agreement between the insurgents and the Batista government in Cuba was concluded in Havana in 1958.⁷

Agreements to apply the law of non-international armed conflicts, where the parties have not been bound by it have also occurred. In Guatemala the government and the insurgents concluded an agreement to apply AP II applicable in non-international armed conflicts, although Guatemala has not ratified this Protocol.

Some parties have also unilaterally committed to apply IHL. In El Salvador both the governments and the insurgents undertook to abide common art. 3 and AP II. In 1964, the Prime Minister made a statement where he declared that the government desired to respect the GC.⁸ An operational code of conduct for Nigerian armed forces was issued in July 1967 and held that the Federal troops were duty-bound to respect the rules of the GC.⁹

Several declarations to the ICRC have been made by liberation movements declaring that they will apply the GC. For example the PLO¹⁰, ANC¹¹, SWAPO¹² and the EPFL¹³ have made such declarations. Since liberation

⁶ The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber 2 October 1995, IT-94-1-AR72, para. 103

⁷ *Abi-Saab*, R: 71

⁸ The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber 2 October 1995, IT-94-1-AR72, para. 105

⁹ Directive to all officers and men of the armed forces of the federal republic of Nigeria on conduct of military operations, operational code of conduct for Nigerian armed forces.

¹⁰ Palestinian Liberation Organisation

¹¹ African National Congress

¹² South West African People's Organization

¹³ Eritrean Peoples' Liberation Front

movements are not adhering formally, they do not become parties to the GC. Instead, their declaration should be looked upon as a valid unilateral undertaking. Liberation movement can on the other hand accede to the AP I by formal declaration under art. 96.¹⁴

In the following chapters these agreements will be discussed as a mean when interpreting common art. 2 and 3 of the GC.

2.2 Recognition of belligerency

The concept of recognition of belligerency elevates an insurgents movement to the status of a State and demands that other States remain neutral between the warring parties. Dettner points out that recognition of belligerency in non-international armed conflicts does not amount to recognition of statehood.¹⁵

Green explains that a State, in which a non-international armed conflict is taking place, may declare its intention to apply the GC. The parties must then apply IHL. This recognition is usually issued when each party to the conflict possesses a responsible authority exercising governmental functions within the territory under its control and shows willingness to respect IHL.¹⁶ However, such statement only affects the parties involved, the principles concerning the law of neutrality do not come into play. On the other hand, the activities of the parties involved in the conflict can affect the rights and interest of non-parties. For example, seeking to inhibit supplies from reaching the opponent entitles a non-party to recognise the parties as possessing belligerent rights. It could be argued that the Nigerian government recognised Biafra as a belligerent by declaring total blockade of the Eastern region.¹⁷ Thus, a State not involved may also make a declaration recognising the belligerency of anti-governmental forces.¹⁸ The ICRC commentaries is of the view that if a party to a conflict is recognised by third parties as a belligerent, that Party would then have to respect the Hague rules.¹⁹ Green, on the other hand, considers that such a declaration does not affect the relationship between the parties to the conflict; it only evokes the law of neutrality.²⁰

On the basis of its general conduct, a government can also be deemed to have granted recognition of belligerency implicitly argues Rosas²¹. However; such a claim would probably invoke a vivid debate among the parties. Further, some scholars believe that the recognition of belligerency is

¹⁴ Dettner:186-190

¹⁵ *ibid*:192

¹⁶ Green: 317

¹⁷ Rosas: 196-202

¹⁸ Green:59

¹⁹ Pictet: 38

²⁰ Green: 317

²¹ Rosas: 244-245

a fact when the rebel movement fulfils certain criteria such as control over a territory and the structure of an army.²²

This doctrine was practised in the American Civil War, but since then there has only been an explicit recognition in the Boer war in 1904 and it could be argued that this notion has fallen into desuetude. Several authors consider this to be the case.²³ The GC is based on the idea that it should not be left to the parties to characterise the conflict. This new principle seems to have rendered the concept of recognition obsolete. It has been replaced by common art. 3 and AP I and II. Still, one can note that the idea of applying the law of international armed conflict to non-international ones is not a new one.

In conclusion, parties to the conflict may render the provisions of the GC applicable by concluding agreements or undertake unilateral statements. The formal recognition of the adversary is not a precondition. If a State nevertheless should choose to make use of the instrument recognition of belligerency, this could be interpreted as a unilateral act which renders the GC binding on that State.

²² David:123

²³ Provost: 259, David:124, Stewart: 348

3 Extending the concept of an international armed conflict

The international legal framework constituting the body of international humanitarian law (IHL) can be divided into several sub disciplines; such as the law of Geneva and the law of Hague. But the most fundamental division that needs to be made is to determine which provisions that is applicable to a certain conflict. The classification of an armed conflict has turned out to be as legally complex as it is politically sensitive. When it comes to the Geneva Conventions and their additional protocols one can detect four different categories of violent situations that evoke four different types of legal treatment. For a State that has ratified the GC and their additional protocols the following legal regimes are possible; (1) International conflicts including wars of liberation, (2) armed conflicts falling under AP II and common art. 3, (3) armed conflicts falling under common art. 3, but not under AP II because of the lack of magnitude of the conflict or due to the fact that the parties to the conflict do not fulfil the prerequisites enumerated in art. 1, (4) conflicts and events which are not armed conflicts, where IHL is not applicable

These four categories do not necessarily reflect international customary law. Rather, some court decisions have held that wars of national liberation should not be classified as an international armed conflict according to customary international law.²⁴ Further, AP II is not yet considered to fully reflect customary international law.

In this study the challenging question concerning the definition of the lower threshold, that is, the magnitude of the conflict necessary for the AP II to be applicable, will not be addressed. The object in this section is to study the distinction that has been made between international conflicts (1) and non-international conflicts (2, 3) and find out whether there is a tendency to classify *prima facie* internal conflicts as international conflicts. If that is the case, one can conclude that by broadening the concept of international conflict, rules relating to international armed conflict will also be applicable to what traditionally was seen as internal conflicts.

²⁴ see for instance *The State v. Petane*, Cape Provincial Division, South Africa, 3 November 1987

3.1 Practice of the Ad hoc Chambers

3.1.1 The Tadic case and the overall control test

The Tadic case concerned a list of crimes allegedly committed at a camp in Omarska, Bosnia-Herzegovina between 25 May and August 1992, where a large number of Bosnian Muslims and Croats were detained by Serb forces.²⁵ In the Tadic Trial Chamber Judgement²⁶ the Majority held that the test laid down in the Nicaragua case²⁷ was applicable. Even though this case primarily appertains to the law of State responsibility it was held to be necessary to consult general international law in order to define the armed conflict, since there were not sufficient guidance in the jurisprudence concerning IHL. In their view this test declared that there must be a relationship of dependence on the one side and control on the other between the foreign State and the paramilitaries in order for those forces to be considered as de facto organs of that State. The degree of control should be subject to a high threshold.²⁸ The establishing, equipping, supplying, maintenance and staffing of the paramilitaries would be insufficient for finding that they were de facto agents of a third State. Effective control over the insurgents military operations must also be shown.²⁹ The Majority held that there was insufficient evidence that the Federal Republic of Yugoslavia made use of its potential control and the conflict was therefore to be considered as a non-international one.³⁰

McDonald's dissenting opinion presented another interpretation of the Nicaragua case. The requirement of effective control was to be considered as a separate and distinct base for State responsibility when there was no agency relationship she argued.³¹ The acts of paramilitaries could be attributed to a State in order to render a conflict international either when the paramilitaries act as agents of that State, which could be established by a finding of dependency on the one side and control on the other or where the paramilitaries are specially charged to carry out a particular act by that State, this being established by effective control.³²

Initially the Appeal Chamber³³ concluded that in a case of internal conflict breaking out on the territory of a State it may become international if another State intervenes in that conflict through its troops. Secondly it may become international if paramilitary units belong to a State other than the

²⁵ Greenwood: 265

²⁶ The Prosecutor v. Tadic, Trial Chamber Judgment, 7 May 1997, case no. IT-94-1-T

²⁷ Military and paramilitary activities in and against Nicaragua, (Nicaragua v. United States of America), ICJ Reports 1986

²⁸ *ibid.* para. 585

²⁹ *ibid.* para. 595

³⁰ *ibid.* para. 605 See also Byron: 69-70

³¹ Separate and Dissenting Opinion of Judge McDonald, para. 22

³² *ibid.* para. 25, see also Byron: 70

³³ The Prosecutor v. Tadic, Appeal Chamber Judgment, 15 July 1999, case no. IT-94-1-A

one against which they are fighting.³⁴ This conclusion can be drawn from art. 4 (A) GC III, which lays down the requirement that these forces must belong to a Party to the conflict. According to the Chamber, the content of this phrase is that States should be legally responsible for the conduct of irregular forces they sponsor. Further, this phrase requires control of irregulars by a party to an international armed conflict and a relationship of dependence and allegiance of these irregulars vis-à-vis that party to the conflict.³⁵

The judgement concludes that the test to decide whether a group of individuals are acting as de facto State officials or organs is the same, whether the purpose behind the enquiry is in order to attribute State responsibility or to decide whether a conflict is international or not. Therefore, the Nicaragua case was held to be of interest also in determining the character of an armed conflict. In the view of the Majority of the Appeals Chamber, the Nicaragua case did not present a persuasive solution to the question of the degree of control necessary to attribute State responsibility.³⁶ Instead the Majority launched three tests of control, the first applicable for acts of individuals and the second concerning organised and hierarchically structured groups such as a military unit. In the first case it would be necessary to show that the State had issued specific instructions concerning the commission of the breach or that the State has publicly given retroactively approval to the action of that individual. The situation with an organised group is different since there is structure, a chain of command and a set of rules as well as the outward symbols of authority. The members of the group are normally conforming to standards prevailing in the group and subject to the authority of the head of the group. The judgement therefore held that in order to establish State responsibility, it is sufficient that the group as a whole be under the overall control of the State. The third case involves assimilation of individuals to State organs on account of their actual behaviour within the structure of a State.³⁷ The test of effective control used in the Nicaragua case was thus considered to be inappropriate concerning military or paramilitary groups.³⁸ As to the overall control required, the Majority held that the test should be whether a State has a role in “organising, co-ordinating or planning the military actions of the group, in addition to financing, training and equipping or providing operational support to that group.”³⁹ In this case the Chamber concluded that the Bosnian Serb armed forces constituted a military organisation and that the Yugoslav Army, by general direction, co-ordination and supervision of the activities and operations had exercised overall control.⁴⁰ The conflict was therefore to be classified as international.

³⁴ *ibid.* para 84

³⁵ *ibid.* Para. 94

³⁶ *ibid.* Para. 115

³⁷ *ibid.* Para. 118-121

³⁸ see also *Byron*: 73-75

³⁹ *The Prosecutor v. Tadic*, Appeal Chamber Judgment, 15 July 1999, case no. IT-94-1-A Para. 137

⁴⁰ *ibid.* para. 156

The Majority in both the Blaskic Trial Chamber⁴¹ and the Aleksovski Appeal Chamber⁴² applied the overall control test that was laid down in the Tadic Appeal Chamber. The test has also been applied in the Delalic Appeal Chamber⁴³ and the Kordic and Cerkez Trial Chamber.⁴⁴ This would indicate that the overall control test will be used in future decisions of the ICTY.⁴⁵

3.1.2 Different tests of classification

In a separate opinion, Judge Li classifies the whole conflict in former Yugoslavia as international as from 8 October 1991 when Slovenia and Croatia became independent States.⁴⁶ This view is based on the characterisation made by the SC and the Commission of Experts established by the SC res.780.

In the Aleksovski Trial Chamber⁴⁷ the Majority held that there must be some evidence of the control, direction or command of the State that is sufficiently strong to impute the rebel force's acts to it and the degree of control necessary to establish depends on the circumstances of each case.⁴⁸ In this case the Chamber found that the Prosecutor had not proven that the Bosnian Croatian Army was under the overall control of the Croatian Army and the conflict was therefore to be considered as an internal one.⁴⁹

Shahabuddeen presented a separate opinion⁵⁰ where he argued that the question to be asked when deciding upon the nature of the conflict is simply whether one State has used force against another.⁵¹ He then found that the Nicaragua case held that the supplying of funds by the United States to the contras did not amount to a use of force, whilst the arming and training of the contras in the circumstances amounted to a use of force.⁵² He then found that the Federal Republic of Yugoslavia trained, equipped, supplied and maintained the Bosnian Serb forces. They had thereby exercised an effective

⁴¹ The Prosecutor v. Blaskic, Trial Chamber Judgment, 3 March 2000, case no. IT-95-14, para. 75

⁴² The Prosecutor v. Aleksovski, Appeals Chamber Judgment, 24 March, case no. IT-95-14/1-A, para. 134

⁴³ The Prosecutor v. Delalic and others, Appeals Chamber Judgment, 20 February 2001, case no. IT-96-21-A. Para. 26

⁴⁴ The Prosecutor v. Kordic and Cerkez, Trial Chamber Judgment, 26 February 2001, case no. IT-95-14/2-T, para. 111

⁴⁵ See section 1.2. see also Byron:78

⁴⁶ Separate Opinion of Judge Li, The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber, 2 October 1995, case no. IT-1-AR72, para. 17

⁴⁷ The Prosecutor v. Aleksovski, Trial Chamber Judgment, 25 June 1999, case no. IT-95-14/1

⁴⁸ *ibid.* Para. 14

⁴⁹ *ibid.* Para. 27, see also Byron: 71-72

⁵⁰ Separate Opinion of Judge, The Prosecutor v. Tadic, Appeal Chamber Judgment, 15 July 1999, case no. IT-94-1-A

⁵¹ *ibid.* Para. 7

⁵² *ibid.* Para. 8-10

control over the Bosnian Serb forces, which led to the classification of the conflict as an international one. According to his view the question is not whether a third State is responsible for any breaches of IHL committed by a military group but whether a third State is using force through a military group against the State. Further he stated that what needs to be provided in order to establish a violation of IHL goes beyond what needs to be proved in order to establish a use of force.⁵³ Shahabuddeen upheld, in the Blaskic case, his approach that the control must be effective in any set of circumstances to enable the impugned State to use force against the other State through the intermediary of the foreign military entity concerned⁵⁴.

The Delalic Trial Chamber Judgement concluded that if the conflict in Bosnia-Herzegovina was found to be international the relevant norms of IHL apply throughout its territory until the general cessation of hostilities, unless it can be shown that the conflicts in some areas were separate internal conflicts unrelated to the larger international armed conflict.⁵⁵ The withdrawal of the Yugoslav troops and the creation of the Bosnian Serbs Army was said to be a deliberate attempt to mask the continued involvement of the Federal Republic of Yugoslavia in the conflict. The Chamber here presumed that the link between them remained unless proved otherwise since the Bosnian Serb Army had a prior identity as an organ of the former Yugoslavia. Thus, in this case the norms of IHL applicable in international armed conflict would apply until the end of hostilities.⁵⁶ The dissenting opinion of judge Rodrigues in the Aleksovski Judgment laid down that according to art. 5 GC III and art. 6 GC I-V, IHL applies throughout the territory in which an international conflict takes place for the entire duration of the hostilities, insofar as the conflict must be viewed as a whole.⁵⁷ In other words he agreed with the Delalic Trial Chamber.

3.1.3 Comments

I will here analyse the above-cited decisions, in particular the Tadic case. My critic mainly concerns the use of the law of State responsibility when defining the character of the conflict. An alternative test for classification is presented and compared with the test applied in the Tadic case.

The interpretation launched by judge Shahabuddeen⁵⁸, emphasising the distinction between the mere participation in an armed conflict and the

⁵³ *ibid.* Para. 13-15, see also Byron: 76-77

⁵⁴ Separate Declaration, Judge Shahabuddeen, *The Prosecutor v. Blaskic*, Trial Chamber Judgment, 3 March 2000, case no. IT-95-14,

⁵⁵ *The Prosecutor v. Delalic and others*, Trial Chamber Judgment, 25 June, case no. IT-96-21-T, para. 209, 214-215

⁵⁶ *ibid.* para. 232-234, see also Byron: 71

⁵⁷ Separate and Dissenting Opinion of Judge Rodrigues, *The Prosecutor v. Aleksovski*, Trial Chamber Judgment, 25 June 1999, case no. IT-95-14/1, para. 18

⁵⁸ Separate Opinion of Judge, *The Prosecutor v. Tadic*, Appeal Chamber Judgment, 15 July 1999, case no. IT-94-1-A

breaches of the laws of war indeed makes some good points. In the Nicaragua case the mere participation in the conflict constituted a breach of international law, the prohibition of use of force in the UN Charter art. 2 (4) and the principle of non-intervention was violated.

The determination of the degree of control that the US exercised over the contras in general was directly linked to two different questions of State responsibility; firstly concerning the use of force, and secondly concerning the delictual acts committed by the contras. In the Nicaragua case the court held that the US was using force against Nicaragua due to the fact that it was arming and training the contras. On the other hand the court stated that the US lacked sufficient control to be responsible for the acts of the contras. Thus, the court applied different tests for the different types of State responsibility.

Of course, the issue in the Tadic case was to establish criminal responsibility for an individual, not attributing State responsibility. If we agree that general international law could be consulted when finding solutions to a problem that a special branch of international law cannot solve, it seems more appropriate to look into the question of non-intervention. It makes more sense to argue that the determination concerning the use of force and non-intervention in the Nicaragua case should be relevant when deciding upon the existence of intervention in the Tadic case. The rejection of the Nicaragua case with reference to the effective control test, made by the Tadic Appeal Chamber, is therefore confusing, since this test refers to a different situation. Rather the Tadic Appeal Chamber should have considered the test constructed for the principle of non-intervention.

Instead, the Chamber added the prerequisites of organising, co-ordinating or planning the military actions of the group to the preconditions of arming and training spelt out in the Nicaragua case. The Tadic Appeal Chamber has thereby constructed a more restrictive approach in classifying *prima facie* internal armed conflict compared to the test to classify an act as use of force established in the Nicaragua case.

The threshold for internationalisation of a conflict is less strict according to judge Shahabuddeens interpretation. Establishing the use of force requires a lesser form of control than what is necessary when attributing State responsibility.⁵⁹ Careful reading of the Nicaragua case also reveals that ICJ considered the conflict between the contras and the government as non-international, while the actions taking place between the United States and the Nicaraguan government were classified as an international armed conflict.⁶⁰ In the view of the ICJ the use of force was not considered to determine the character of the conflict between the government and the insurgents.

⁵⁹ Byron: 78-79

⁶⁰ para. 219

To me it does not seem inappropriate to require a higher threshold of control when it comes to establish State responsibility for the acts of the military group, such as breaches against IHL. The ILC Draft on State Responsibility⁶¹ art. 8 requires that the group is in fact acting on the instructions of, or under the direct control of that State in carrying out the conduct. On the other hand when we are establishing whether the State is using illegal force, the breach is actually committed by the State as an actor. It is the link to the military group itself that constitutes the breach, not the acts of that group. The ILC Draft does therefore not explicitly require a certain degree of control in this case.

If an international armed conflict exists due to the support from a foreign State to the insurgents, would it not seem inappropriate to release that State from responsibility for the acts of the paramilitary group? The degree of intervention might be sufficient to render the armed conflict international, but not to attribute the acts of the group to the State. The interest of the foreign State to implement respect for among the insurgents might decrease. On the other hand individual criminal responsibility for breaches against IHL still applies which is an incitement for the insurgents to respect the provisions. Moreover, the ILC Draft on State Responsibility art. 10 also addresses the issue. It holds that if the insurgents should be successful in either becoming the new government of that State or establishing a new State in part of a pre-existing State or in a territory under its administration, the conduct of this movement shall be considered an act of that State. State responsibility for wrongful acts would thus be possible in these situations.

Sassòli and Olson conclude that before State responsibility or individual responsibility can be established, the rules according to which the State or the individual should have acted must be clarified. They then argue that only if the acts committed by the contras or by Tadic could be legally considered as acts of another State, the law of international armed conflict would apply.⁶²

Byron argues that if a conflict is classified as international, the subjects of the State that is exercising effective or overall control will be bound by IHL. A leader of that State ordering the rebels to commit crimes would be subject to individual criminal jurisdiction.⁶³

In the Akayesu case the issue of potential perpetrators were discussed. The Tribunal said that IHL would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for violations of common art. 3 under the pretext that they were not belonging to a specific category. The nexus between violations and armed conflict implies that, in most cases, the perpetrator will probably have a special relationship with one of the parties to the conflict. However, such a

⁶¹ The ILC Draft on State Responsibility for internationally wrongful acts, as adopted on second reading, 26 June 2001

⁶² Sassòli: 739

⁶³ Byron: 89

special relationship is not a condition precedent to the application of common art. 3.⁶⁴ This judgement seems to distinguish between the question of the scope of applicability and the question of responsibility, although referring to non-international armed conflicts.

Other organs of the intervening State could still commit state responsibility for violations of IHL. For instance, in the Nicaragua case the US was found to have encouraged breaches of the GC, itself a violation of art. 1 of the GC.⁶⁵

The second type of control presented in the Tadic Appeal Chamber referred to acts of individuals. In this case the prerequisite for rendering the conflict international would be that the State had issued specific instructions concerning the commission of the breach or that the State has publicly given retroactively approval of the act. This conclusion was drawn with reference to case law concerning State responsibility and it also seems to be in accordance with ILC Draft on State Responsibility art. 8 and art. 11. The GC does not explicitly require a certain level of intensity of the armed conflict, yet the situation must qualify as an armed conflict. With regard to the means of warfare that exists today it seems possible that an act of a single individual could evoke an armed conflict.⁶⁶ The impact on the characterisation of the conflict of foreign mercenaries will probably not be significant since the involvement of their National State in most cases will be absent. In the new conflict types, corporate companies are also to a greater extent becoming actors in the conflict; this might lead to an internationalisation of the conflict.

One could also criticise the fact that the Chamber held that there are two different criteria for rendering an internal conflict international. Besides the fulfilment of the requisite “acting on behalf of another State”, a military intervention by a foreign State could also have this impact. The judgement did not elaborate on the degree of intervention that would be necessary to classify the conflict as international. Taking into account the subsequent practice of the ICTY the separate criteria of intervention could be viewed as a very generous approach, were the whole conflict is viewed as international abandoning the mixed conflict approach.

In the Blaskic Trial Chamber the Judgement argued that the Croatian Army hostilities in the areas outside the conflict zone also had an impact on the conduct of hostilities in that zone.⁶⁷ This line of argument suggests that foreign military intervention that only indirectly affects an independent internal conflict is sufficient to render that conflict international. The Kordic and Cerkez Judgement is supporting this view by saying that the Croatian governments intervention in the conflict against Serb forces in Bosnia

⁶⁴ Akayesu, Appeals Chamber, ICTR-69-4-A, para. 432, 443-445, see also Dörman: 392

⁶⁵ Para. 255-256

⁶⁶ Byron: 81

⁶⁷ Prosecutor v. Blaskic "Lasva Valley", Trial Chamber 3 March 2000 IT-95-14 para. 94

rendered a different conflict, namely between Bosnian Croats and Bosnian Muslims international.⁶⁸ The degree of intervention that would render the conflict international has not been clarified in any of the cases. The GC applies to international armed conflict regardless of their level of intensity it would seem. Allowing foreign military intervention of any intensity to internationalise all armed conflicts within a territory seems to contradict the Tadic Appeal Chambers overall control test and its initial statement that an armed conflict may be international in character alongside an internal conflict. An intervening State's unintentional support of a military group does not make that group an agent of the State and if it does not belong to a State their actions cannot constitute an international armed conflict. Rather, one could argue that there are now two separate conflicts taking place, one between the insurgent and the government forces, an internal one, and a second conflict between the government forces and the intervening State. If the State actually supports the insurgent intentionally, one could wonder why the overall control test should not be applied. These judgements seem to have applied different, less stringent criteria for situations of military interventions when in fact the difference between the two situations is hard to detect. Both situations are characterised by a foreign State's involvement in a conflict between a government Party and a non-government Party within that State. The reason for setting up different criteria therefore seems unconvincing.⁶⁹ The question of whether a foreign State has intervened relates more to the issue of the existence of an armed conflict, while the character of the intervention should determine the character of the conflict. The conclusion here is that the overall control, if at all, should also be applicable to situations referred to as military interventions.

It is possible that the Appeal Chamber did not give sufficient weight to the particularities of the situation of a State breaking apart into several States, where the armed force of the former central State necessarily have many links with the former central authorities which are now foreign authorities. As such links are inherent in the situation; they are not necessarily an indication of control.⁷⁰

The view that is advocated for in the dissenting opinion of judge Rodrigues in the Aleksovski Judgement and the Delalic Trial Chamber seems to present another possible situation for considering a *prima facie* non-international conflict as international. This refers to the situation of withdrawal of foreign troops, where the hostilities continues or recommences. Art. 6 in GC IV defines the timeframe of the law applicable to international armed conflict and the provision holds that it ceases to apply at the general close of military operations. This could be interpreted as meaning that international military operations should be closed, while allowing ongoing non-international hostilities to continue or recommence, being subject to the law applicable in non-international armed conflicts. The

⁶⁸ Prosecutor v. Kordic and Cerkez, IT-95-14/2-T, Judgment, 26 February 2001, para. 108-109

⁶⁹ Stewart: 328-333

⁷⁰ Sassòli: 741

conflict becomes non-international when the overall control can no longer be established. Byron argues that in such a case the burden of proof would be on the party who claims that the conflict has changed character, given that the GC were intended to grant the widest protection possible to civilians and POW.⁷¹ However, the GC commentaries speak of the final end of all fights between all those concerned. This would indicate that IHL continues to apply until the end of all hostilities whether international or domestic. Greenwood notes that many provisions of the IHL expressly are intended to apply away from the scene of the fighting or after the end of active hostilities.⁷² According to the latter interpretation, it would not be necessary to apply the overall control test to render the conflict international. The conflict would still be considered as an international one, when the foreign State has withdrawn its troops and ceased its assistance to the insurgents.

Stewart is reluctant to the possibility of extending the IHL applicable to international armed conflicts in these situations. The level of the conflict might not even fulfil the prerequisite for applying common art. 3. It would also be almost impossible to distinguish between the continuations of international hostilities from distinct internal conflicts. If applying the overall control test, it would rather be in terms of determining whether forces *were ever* under the control of a foreign State and such a construction undermines the object of the test. Therefore, he argues, the full body of IHL should cease to apply at the close of international hostilities.⁷³ The argument to have a test of classification, as univocal and as stringent as possible is convincing, while the definition of the close of international hostilities is far from clear.

In Rwanda, several senior Ugandan military personnel allegedly participated in the conflict during 1990-1994. This might have sufficed to internationalise the conflict according to the criteria in the Tadic case; as another State intervening in a conflict through its troops. The ICTR however found that it is a matter of common knowledge that the conflict in Rwanda was of a non-international character.⁷⁴ Even though the question appears to have been set by the SC, since the ICTR explicitly refers to art. 3 and AP II, it would have been preferable if the Tribunal instead had elaborated on this issue in order to shed light on the question.

In conclusion, based on international law there are alternative tests for classification that would result in a broader definition of an international armed conflict than the overall control test.

⁷¹ Byron: 84-85

⁷² Greenwood: 269

⁷³ Stewart: 338

⁷⁴ Prosecutor v. Ntagerura et al. ICTR-99-46-T, 4 July 2002, "Oral decision", p. 9, see also Stewart:315

3.2 Interpretation of the Geneva Conventions

When interpreting the expression “international armed conflict” in the GC, I will apply the VCLT and its art. 31 and 32. According to art. 31, the starting point would be to establish the ordinary meaning of terms of the treaty. If the term international armed conflict is ambiguous one should proceed by looking at the context and the object and purpose of the treaty. The point of departure is here common art. 2, which regulate the scope of applicability.

This section aim at establishing whether the GC is applicable in conflicts, in which two or more States are not involved. The ICTY has not elaborated on this question, but some authors are leaning towards the conclusion that the GC is applicable to at least some intra-State conflicts.⁷⁵ The question of whether two States actually are involved in an armed conflict will be looked upon in section 3.2.3. and 3.2.4. In this section the applicability test does not depend on the impact of foreign assistance. The two Additional Protocols (AP I and II) from 1977, will only be dealt with here as means of interpretation. The question in focus in this section is whether Inter-State conflict is a precondition in order to characterise an armed conflict as international. Subsections 3.2.3 and 3.2.4 are more devoted to the situation of a foreign intervention and whether this intervention renders the conflict international.

“Common art. 2

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 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. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

Art. 2 refers to “armed conflicts which may arise between two or more of the high contracting parties” and to the “Powers” who are parties to the conflict. Thus, the expression “State” is here avoided. The ordinary meaning of the expression “high contracting parties” and the expression “Powers” are ambiguous. Their meaning could be interpreted in several ways and I will therefore turn to examine the context.

The *travaux préparatoires* suggests that the term “Power” in art. 2 of the GC is meant to refer only to States. Several States took this position at the Conference in 1949.⁷⁶ Concerning the interpretation of art. 4 (A) (3) GC

⁷⁵ see Farer, Rosas, David

⁷⁶ Kwakwa: 48

III⁷⁷, the drafters of the article seem primarily to have situations fulfilling three conditions in mind. Those conditions were; (1) an armed conflict arises between two existing States, (2) One State is partly or totally occupied by the other. Finally, (3) an authority claiming to represent the State desist from further resistance, while another authority continues the resistance, hostilities taking place mainly between it and the foreign State and not between it and the other national authority. This was the situation in the occupied France during the Second World War.⁷⁸ I would like to point out the *travaux préparatoires* is only a subsidiary mean of interpretation according to Art. 32 VCLT and that subsequent state practice should be given a greater weight.

3.2.1 The context and the object and purpose

Once we have concluded that the ordinary meaning is ambiguous, the next step would naturally be to look at other provisions in the treaty to seek for a solution. The term “armed conflict not of an international character” is used in common art. 3. This formulation leaves us little guidance. The term “international” seems to refer to a situation that affects interests not limited to one country. It could very well be argued that the character of an armed conflict is international even if it does not include the presence of two States. Other external factors could be considered to render the conflict international. The conflict itself might also have great impact outside the geographical area, where it takes place. The opposite view would be that the term international is solely referring to situations of conflict between two States. Farer notes that the meaning of the term “international” was not evident in 1949. It was established that the domestic political affairs in a State could legitimately engage international concern. The UN had several times placed a civil conflict on its agenda; there was no obvious dichotomy between internal and international concerns, even at that time.⁷⁹

Art. 4 (A) (3) GC III includes in its definition of POW “Members of regular armed forces who profess allegiance to a government or an authority not recognised by the Detaining power”. The same definition exists for protected persons in GC I and II.⁸⁰ The meaning of the expression “authority” is highly debatable. The reference to an unrecognised government seems sufficient to cover all case of conflict between two parties who refuse to recognise each other but are generally comprehended as two separate political units by the rest of the international community. It is therefore not implausible to find an intention to cover certain cases of conflict between political forces within a geographical area classified by the international community as a single State. Possibly the term “authority” was

⁷⁷ see discussion below

⁷⁸ Rosas: 256

⁷⁹ Farer: 26-27

⁸⁰ GC I and GC II Art. 13 (3)

used to govern forces deployed by the UN or any other regional organisation. However such a clarification would have been easy for drafters to do, for instance by adding the words “international” or “regional” to the term “authority”.⁸¹ On the other hand not all internal conflict could profit from this line of argument. Authority seems to apply at least some form of effective civilian administration. Rosas also discusses the meaning of this expression. In his view, the existence of a regular armed force professing allegiance to an unrecognised government or authority is not a sufficient condition for the application of GC. In addition the conflict must be considered international according to art. 2 and 3.⁸² This interpretation does not take into account that the treaty as a whole should be considered when interpreting art. 2. The other provisions in the GC, such as art. 4 (A) 3 is part of the context.⁸³

Even if agreement is obtained concerning the possibility of using art. 4 (A) (3) as vehicle to apply the provision in internal conflicts, a question can be raised whether it should only be applicable in the first three Conventions or also including GC IV, which lacks such a provision.

The GC I-IV also uses the wording “Detaining Power” and “Protecting Power” throughout the Conventions. The notion of high contracting party and detaining power seems to be more open to interpretation than the word State.⁸⁴ However, the expression “Protecting Power” is reserved for States according to the ICRC commentaries⁸⁵, although this mechanism never has been practised since the Second World War.⁸⁶ Even though the Protecting Power is not a party to the conflict, this understanding might indicate a similar interpretation of the term “Power” in art. 2 as well.

There are several indications in the GC that they are only applicable in armed conflicts between States. The expressions “State” and “country” are actually used in a few of the provisions, for instance in the signatory clause in each of the GC⁸⁷ But even if only States could be parties to the Convention, the provisions could apply to other Powers according to paragraph 3. Art. 35 and 38 of GC IV also use the word State indicating that; at least, these provisions are not applicable to conflicts between other entities.

Further, many of the provisions in GC are based on the assumption that both parties to an international conflict are State-like entities. In order to be able to implement the GC there should exist a legal system, including military or civilian courts, organised armed forces, and possibility to establish POW camps with the needed facilities. The GC III also seems to presuppose that

⁸¹ Farer:29-30

⁸² Rosas: 251-252

⁸³ VCLT Art.31

⁸⁴ Rosas: 249

⁸⁵ Pictet: 81

⁸⁶ with one exception, the Gulf War in 1956, Hingorani:160

⁸⁷ *ibid*: 245-246

POW are not nationals of the Detaining Power.⁸⁸ Hingorani concludes that it may be suggested that on the basis of past practices as well as prevailing prescriptions, IHL relating to POW may be applied in domestic conflicts also, if the insurgents can display all the ingredients necessary for it to declare itself as a State.⁸⁹ The object and purpose of the GC is to ensure adequate protection for non-combatants. It would then seem reasonable to interpret the categories of persons entitled to POW status in a generous way concludes Rosas.⁹⁰

State and Statehood remains one of the most disputed issues in international law. It is not far-fetched to believe that the drafters, by the exclusion of the word “State”, meant to avoid situations where parties to an armed conflict would argue that the opposite party is not a State and thereby rendering the GC inapplicable.⁹¹ It would also seem at variance with the object and purpose to let recognition of Statehood, either by the opposing party or by the international community, to be a prerequisite for the applicability.

The inclusion of Intra-State conflicts in GC is not an implausible interpretation due to the reading of the GC and looking at the object and purpose. I would suggest that certain conflicts, between a State, which is a party to the GC, and a not recognised State-like entity, which applies the provisions of the GC according to common art. 2 § 3, should be subject to the GC. However, only a limited number of entities could be of relevance here. Entities that display the characteristics of a State but, for some reason, will not be considered to be a State according to the legal concept of Statehood will also be included when interpreting the object and purpose of the GC. These situations would be very rare, for instance when an entity is not recognised as a State or if the entity does not itself claim to be a State, as is the case concerning Taiwan.⁹²

3.2.2 Subsequent State Practice

In this section, State practice will be examined to find out if there are any grounds for characterising certain *prima facie* internal conflicts as international ones, due to subsequent state practice as a mean of interpretation in VCLT art. 31 (3).

An agreement to apply all or some of the provisions of the GC concluded between the parties to the conflict suggests that they did not consider the GC to be directly applicable. Such agreements would be invalid if they were concluded in an international armed conflict.⁹³ Thus, the agreements

⁸⁸ *ibid*: 247

⁸⁹ Hingorani:17

⁹⁰ Kwakwa:49

⁹¹ Rosas:249

⁹² Shaw: 166

⁹³ See Art .6 GC I-III and Art. 7 GC IV

mentioned in chapter 2.1 do not strengthen the theory that is scrutinised in this thesis.

It would not be accurate to assume that when a party to a conflict is acting in compliance with the GC, it necessarily considers the conflict to be of an international character. Neither could a unilateral undertaking to respect the provisions in the GC reflect a view that the conflict is international. There needs to be some more explicit indicators to prove this. A clear statement that GC is applicable to the conflict, when there has been no special agreement concluded, could be such an indicator. Some authors have also proposed that one should accord greater weight to the characterisation made by third States when it comes to IHL since all States are reluctant to admit the applicability of IHL to conflicts to which they are parties.⁹⁴

3.2.2.1 The Diplomatic Conference 1974-1977

In this section the Diplomatic Conference leading to the adoption of the two additional protocols is examined to find out whether it could be invoked in favour of a definition of international armed conflicts encompassing Intra-state conflicts. The Diplomatic Conference in 1974-77 treated internal and international armed conflict within different legal frameworks. A proposal was made by the ICRC to apply the principles of the GC in case of civil conflicts and colonial conflicts. Many delegations were opposed of this type of application. That a rebel party would be entitled to ask for assistance from a protecting power and the granting of POW-status to rebels were seen as major obstacles.

At the Diplomatic conference on the Reaffirmation and Development of IHL in 1974, the Norwegian experts proposed to drop the two different categories and to formulate a single law for the two kinds of armed conflict. This solution did not, as is well known, succeed.⁹⁵

ICRC made a draft proposal in 1972, intended to make the whole body of the GC applicable to non-international armed conflicts involving foreign intervention and members of organised liberation movements. This also included a suggestion to provide for POW treatment for combatants. The governments' experts objected that such a provision would encourage insurgents to seek foreign assistance to improve their legal status.⁹⁶

AP I extends the scope of the GC with the inclusion of national wars of liberation. The scope of this notion will not be addressed here. Several authors have elaborated on this issue. Most writers seem to agree that only a limited number of situations would qualify as wars of national liberation. There is no absolute identity between the right to self-determination

⁹⁴ Provost: 295

⁹⁵ Gasser: 146

⁹⁶ Rosas: 288-291, Gasser: 146, Bierzanek: 284

contained in FRD and the status as a national liberation movement according to Provost.⁹⁷ Kwakwa is more generous in his understanding of the concept. It would appear that *prima facie* internal conflicts that are not to be characterised as wars of national liberation should not be classified as international armed conflicts, according to the signatory States to AP I. Of course, some States preferred an even broader extension but an agreement with that content could not be reached. The AP I would then speak against a definition of international armed conflicts including State-like entities, unless they are characterised as wars of national liberation.

Parties to the GC that have not ratified the AP I are not bound by this amendment it would seem. However, the AP I could serve as a mean of interpretation when determining the scope of application. In order for the AP I to be considered as a subsequent agreement referred to in Art. 31 (3) (a) or as subsequent practice establishing an agreement in Art. 31 (3) (b) VCTL, all the parties to the GC must have accepted the agreement or practice.⁹⁸ Even if not all the parties to the GC have ratified the AP I, it could be a part of the context since not all parties must take an active part in the agreement. A difference between the paragraphs lies in the fact that art 31(3) (a) requires a will to be legally bound by the agreement, a condition that is lacking in art. 31(3) (b).

Israel, having consistently and vigorously opposed the inclusion of art. 1 (4) was the only State that voted against it.⁹⁹ Thus, at the adoption of the AP I all the State parties to the GC did not agree that wars of national liberation fall under the scope of the GC. On the other hand Israel maintains that it observes the GC de facto in the occupied territories, although not directly applicable.¹⁰⁰ It appears as if Israel does not have the will to be legally bound by the application of GC in wars of national liberation. State practice according to 31 (3) (b) does not require *opinio juris* nor a will to be legally bound of the State. It is sufficient that the practice is in conformity with the alleged agreement. On several occasions Israel has been condemned for breaches against IHL¹⁰¹ which would indicate that a state practice of de facto applying the provisions in the GC does not exist. But one could also argue that as long as Israel argues that their acts are not violating the provisions of the GC their state practice is in fact establishing a subsequent agreement with all the other parties to the GC, which did not express any opposition against the inclusion of wars of national liberation in art. 1 (4) of AP I. Israel's Supreme Court has on several occasions assumed that GC is applicable in its judgements, although not having granted POW status to Palestinians.¹⁰² Israel and Palestine would then be bound by the GC as a

⁹⁷ Provost: 254-255

⁹⁸ Linderfalk: 188-9

⁹⁹ Kwakwa: 60

¹⁰⁰ *ibid*: 81

¹⁰¹ for instance SC 681 – alarmed by the decision of the Government of Israel to deport four Palestinians from occupied territories in contravention of its obligation under GC IV

¹⁰² Physicians for Human Rights et al v. Commander of the IDF Forces in the Gaza Strip May 30th 2004, Kassem and others, see also David: 119

matter of treaty law, although not as customary international law, since the persistent objector rule would then prevail.

One way to conclude that the GC and its provisions concerning occupation bind Israel by art. 2 § 2 would be to argue that the original conflict was between three parties to the GC; Israel, Jordan and Egypt. The provisions concerning the law of occupation would then apply to the territories. However, it is not likely that Palestine is a party to that original conflict, since the link between the Palestinian authority and Jordan is not of such character, the other provisions would then not be applicable according to this reasoning.

The threshold in AP II seems to be very close to the threshold in the GC. The application of this protocol in fact requires that the belligerent parties possess all the characteristics of a State, namely an organised armed group who exercises military control over a part of the territory of a State.¹⁰⁵ This indicates that the parties to AP II did not consider that armed conflicts between State-like entities should be governed by the GC; rather they would fall under a separate regime. It should be noted that a relatively small number of States have actually ratified this Protocol and it can not be said to establish an agreement between the parties.

The inclusion of wars of national liberation confirms that the dichotomy between internal and international armed conflicts is not clear cut and that international armed conflict is not a synonym for inter-State warfare.¹⁰⁴ To summarise, the wars of national liberation, as defined in AP I art. 1 (4) would constitute an international armed conflict for all parties to the GC. Otherwise, the Diplomatic Conferences can not be invoked in favour of a broad interpretation of what constitutes an international armed conflict.

3.2.2.2 UN Resolutions

This section attempts to find out whether UN resolutions have considered *prima facie* internal conflicts as being international ones. These documents are representing state practice concerning the interpretation of the GC. General Assembly (GA) resolutions, requiring two-thirds majority of the Member States¹⁰⁵ express the views of the majority of the parties to the GC. They do not however suffice themselves to establish an agreement between all the parties.¹⁰⁶ The resolutions emanating from the UN Human Rights Commission (HR Commission) reveals the views of a substantial number of States. Finally the practice of the Security Council (SC) is also of relevance. Although only expressing the view of the majority of the 15 member States, tacit agreement by other States could render these resolutions relevant as

¹⁰³ Provost: 264

¹⁰⁴ Stewart: 319

¹⁰⁵ Charter of the United Nations art. 18(2)

¹⁰⁶ VCLT Art. 31 (3) (b)

subsequent state practice. I will therefore examine whether *prima facie* internal armed conflicts have been characterised as international in these resolutions.

The most debated case would probably be the situation in the former Yugoslavia. Authors disagree on whether the SC treated the conflict in former Yugoslavia as an international armed conflict or not. Gray finds that the SC characterised the conflict in former Yugoslavia as an internal conflict and constituting a threat to international peace and security in 1991.¹⁰⁷ When the fighting spread to Bosnia and Herzegovina in 1992 the SC still referred to the conflict as a threat to international peace and security.¹⁰⁸ Although Bosnia and Herzegovina repeatedly wrote to the SC claiming that it was the victim of aggression, the SC did not use this term, which would have indicated that they considered the conflict to be international in character.¹⁰⁹ Gray considers that the GA comes a bit closer to determining an inter-State conflict, since it went further in accusing Yugoslavia of aggressive acts and in saying that the Bosnian Serbs were surrogates of Yugoslavia.¹¹⁰

SC Resolution 819 condemned the Bosnian Serbs for violation of IHL and demanded that Yugoslavia immediately should cease the supply of military arms, equipment and services to the Bosnian Serb paramilitary groups in Bosnia and Herzegovina. However, it did not expressly hold Yugoslavia responsible for all the actions of the Bosnian Serbs or assert direct intervention by it. Subsequent resolutions followed this shift of focus from Yugoslavia to the Bosnian Serbs. After the announced end of co-operation with the Bosnian Serbs made by Yugoslavia in 1994 the SC imposed sanctions directly on the Bosnian Serbs.¹¹¹ In the view of Gray, the language of the SC resolutions reflects an internal conflict, since they avoided any direct accusation of aggression or of armed attack. Its allegations are instead of intervention.¹¹² This conclusion does not seem totally convincing. The notions of armed attack or aggression are not intrinsically linked to the concept of international armed conflict. On the other hand intervention would constitute an international armed conflict according to the Tadic Appeal Chamber. (See chapter 3.1.1)

Greenwood, on the other hand, concludes that the SC considered that there was an international armed conflict taking place in former Yugoslavia. It referred to provisions in the GC applicable to international conflicts. One could also argue that it treated the region as containing several conflicts, both international and non-international. If interpreting resolution 827, adopting the ICTY Statute, as establishing jurisdiction over both types of

¹⁰⁷ Gray: 156, Res. 713

¹⁰⁸ Res. 757,770,807,827,1021

¹⁰⁹ Gray: 158

¹¹⁰ GA res. 47/121.Gray:179

¹¹¹ *ibid*: 168

¹¹² *ibid*. 178-179

armed conflicts, this would form a strong argument.¹¹³ Greenwood argues persuasively for this interpretation. The United States had put on the record its interpretation of art. 3 of the ICTY Statute in its statement to the SC. In this statement it was said that “the laws of war” referred to in article 3 includes common art. 3 of the GC and the AP I and II. This interpretation was not challenged by any other State. Therefore one can conclude that the Statute confers jurisdiction for breaches of the law in internal conflicts as well, which would have been meaningless if the Security Council had determined that all of the conflicts in the former Yugoslavia were of an international character.¹¹⁴

In conclusion, there is no clear evidence in the resolutions regarding the situation in former Yugoslavia indicating that the SC considered the conflict to be international when there were not two or more recognised States taking part in the hostilities. In fact, the SC makes no reference to IHL in the resolutions adopted before May 1992, when it recommended that Bosnia and Herzegovina should be a member of the UN. On the other hand, subsequent SC resolutions concerning former Yugoslavia repeatedly referred to the grave breaches provisions of the GC although it did not state that the conflict was international.

In the armed conflict between France and Algeria the GA did on several occasions call on all the parties to give status as political prisoners to the insurgents.¹¹⁵ The GA also called upon the Governments of Portugal¹¹⁶ and the UK¹¹⁷ to ensure the application of GC III in the conflict in Southern Rhodesia. In the case of national wars of liberation, the practice is clear, explicit reference has been made to the provisions in the GC, although AP I had not been drafted at the time.

In relation to El Salvador¹¹⁸, the GA referred to the applicable rules of international law, such as common art. 3. Concerning Sudan¹¹⁹, the GA called upon the parties to fully respect the applicable provisions of IHL, including common art. 3 and the additional protocols. Similarly, the Government of Myanmar was called upon to fully respect the obligations under GC, in particular common art. 3.¹²⁰ Concerning the situation in Sudan the HR Commission called upon the parties to respect fully the applicable provisions of IHL, including common art. 3.¹²¹ Concerning the situation in the DR Congo the violations of IHL in the territory of was also addressed. The HR Commission urged the parties to respect, as applicable to them,

¹¹³ Greenwood: 271, SC Res. 764, 771, 780, 787

¹¹⁴ Greenwood: 267-271, the HR Commission has also addressed the situation in Yugoslavia, it reaffirmed the individual responsibility of IHL and denounced inter alia unlawful attacks and the use of military force against civilians in E/CN.4/RES/1994/72.

¹¹⁵ GA res. 1650, (1961)

¹¹⁶ GA res. 2395 para. 12, 2795

¹¹⁷ GA res. 2508 para. 11

¹¹⁸ GA res. 36/155 Dec. 1981

¹¹⁹ GA res. 47/142 Dec. 1992

¹²⁰ GA res. 47/144 Dec. 1992

¹²¹ res. E/CN.4/RES/1998/67

IHL.¹²² SC resolution 955 establishing the ICTR Statute only provides for jurisdiction of common art. 3 of the GC. It does not mention grave breaches or other violations of the laws or customs of war. SC resolution 1216 calls upon the parties to the conflict in Guinea-Bissau to respect the relevant provisions of IHL.

These resolutions mentioned above do not provide any argument for a generous interpretation of the definition of an international armed conflict. The references to violations of “the relevant provisions of” or “the applicable provisions of IHL” indicate that not all provisions of the GC are applicable. Since all provisions are applicable in international armed conflict (as customary law or treaty law) the drafters did not deem the conflict to be international, but rather non-international. A call for the compliance with the applicable rules of IHL, without specifying the nature of these rules or the character of the conflict could not be interpreted as classifying the conflict as international. Some resolutions explicitly refer to common art. 3 in particular. In these cases it seems clear that the conflict was considered as a non-international one.

In resolution 794, on the situation in Somalia, the SC spoke of violations of IHL, including attacks on non-combatants and relief and medical personnel. It also held that perpetrators will be held individually responsible.¹²³ In resolution 1193 concerning the situation in Afghanistan the SC reaffirmed that all parties are bound to comply with IHL, in particular the GC and the commission of grave breaches will invoke individual responsibility.¹²⁴ In a GA resolution¹²⁵ concerning the human rights situation in the Democratic Republic of Congo, reference was made to the violation of IHL. The GA here also welcomed the release of POW and spoke of grave breaches of IHL.

As is shown above, not all references to IHL is made in general terms. Interestingly some resolutions, condemning violations of IHL, are using the terminology linked with the law of international armed conflicts of the GC when referring to situations of *prima facie* internal conflicts. GA resolution 57/233 referred to grave breaches and to POW, concepts that do not, according to most authors, exist in the vocabulary of internal armed conflicts. The mentioning of non-combatants in SC resolution 794 would also indicate that the conflict was considered to be international, since the notion of combatants is not featured in common art. 3.

Other resolutions are giving a plain reference to violations of IHL, without speaking about the relevant or applicable provisions. SC resolution 1479 is devoted to the situation in Côte d’Ivoire, and it emphasizes the need to bring into justice those responsible for violations of IHL. Concerning the situation in Angola, the SC condemned attacks on UN personnel by UNITA as a

¹²² res. E/CN.4/RES/2002/14

¹²³ see also SC res. 814

¹²⁴ SC res. 1193 para.12

¹²⁵ GA res. 57/233

violation of IHL.¹²⁶ The condemnation of attacks on UN personnel was once again stated in resolution 912, where the SC called on all concerned to fully respect IHL. Concerning the situation in Liberia, the SC called on all parties to the conflict to respect the provisions of IHL.¹²⁷ The hostilities taken place in Georgia was also addressed¹²⁸ and the SC reaffirmed the need for the parties to comply with IHL. Concerning the human rights situation in Sudan,¹²⁹ the GA urged all the parties to fully respect IHL, in particular to protect the civilians. In relation to the conflict in Uganda¹³⁰ the HR Commission referred to the obligation to respect IHL in accordance with the GC and its additional protocols.

In these resolutions it seems difficult to conclude what character the States considered the conflict to possess. Why did they not specify that only part of the IHL would be applicable to the conflict if they considered it to be non-international? This has, as has been shown earlier, been the case in other situations. The most probable answer might be that States did not want to classify the conflict. Sufficient information about the type of conflict may not have been available and political considerations could have caused States to refrain from characterising the situation.

Even if there are cases of *prima facie* internal armed conflicts where the law of international armed conflict has been referred to, it is difficult to find a coherent set of prerequisites that has been relied on. There does not seem to be any criteria, used in the resolutions, for classifying *prima facie* internal armed conflicts as international ones. It is also difficult to tell whether the international forum considered that the conflict was international in its character or if they considered that the GC reflected the law of non-international armed conflicts. This question will be dealt with in section 4.

3.2.3 Foreign Intervention directed against governmental forces

This section more specifically looks into the situation considered in the ICTY, namely when there is a foreign intervention. Thus, the question is under what circumstances state practice tend to treat these situations as international armed conflicts. The object and purpose of GC do not give much guidance concerning the possibility of a foreign intervention rendering a conflict international, other than the fact that they are intended to provide for a protection for civilians as wide as possible. UN resolutions have not made any explicit statement concerning the possibility of foreign intervention rendering a conflict international. The most interesting and comprehensive material concerning this question is the decisions of the ad

¹²⁶ SC res. 864

¹²⁷ SC res. 788, 972, 1001

¹²⁸ SC res. 993

¹²⁹ GA res. 57/230

¹³⁰ E/CN.4/RES/1998/75, 22 April 1998

hoc Chambers. There is however some subsequent state practice that can shed light on the issue.

In the Genocide case, Bosnia and Herzegovina argued that Yugoslavia had used force against them in violation of the UN Charter art. 2 and art. 33 (1) and that it had armed, equipped, financed, supplied and otherwise encouraged, supported, aided and directed military and paramilitary actions by means of its agents and surrogates. Yugoslavia argued that there was not an inter-State conflict but a civil war and that it did not support any side military. The court did not pronounce on the issue of the nature of the conflict. However, judge Kreca in his dissenting opinion argued for a mixed character of the conflict. He concluded that after the proclamation of sovereignty and independence of Bosnia and Herzegovina the civil war became an international armed conflict.¹³¹

The Commission of Experts, established by the Security Council in Resolution 780, concluded that the character and complexity of the armed conflicts in the Balkans as well as the number of agreements that the parties have concluded concerning humanitarian issues, justify an approach whereby it applies the law applicable in international armed conflicts to the entirety of the armed conflicts in the territory of the former Yugoslavia.¹³² Meron also considered the conflict in former Yugoslavia as being a single international armed conflict.¹³³

Inter-American Commission in *Coard v. US* regarded the US intervention of Grenade as an international armed conflict since the parties themselves had deemed it to be of such a character.¹³⁴ It seems inappropriate to leave it up to the parties to characterise the conflict, even if the Commission probably would have come to the same conclusion.

In the case of *Nicola Jorgic*¹³⁵, a German Court found that the conflict in former Yugoslavia was international because the Federal Republic of Yugoslavia financed, organised and equipped the Bosnian Serb Army. According to the Court, there existed a close personal, organisational and logistical interconnection which led to this classification.

In the case of *Grabez*¹³⁶ the defendant was accused of war crimes committed in former Yugoslavia. The Tribunal qualified the conflict in October 1991 as an international one since the Slovenia and Croatia had become

¹³¹ ICJ Application of the Convention on the Prevention and Punishment of the Crime of Genocide. Request for the Indication of Provisional Measures. Separate and Dissenting Opinion of Judge Kreca Para. 100

¹³² Final Report of the Commission, May 1994, UN Doc. S/1994/674, para.44, see also Greenwood: 266

¹³³ Meron: 556

¹³⁴ Para. 38-42

¹³⁵ Bundesgerichtshof, 30 April 1999; 45BGHSt No. 9, 64 (2000)

Oberlandsgericht Düsseldorf, 26 September 1997, 2 StE 8/96

¹³⁶ Tribunal Militaire de Division 1 Lausanne, Switzerland 1997 18 April

independent States. The Court held that the conflict must be approached in a comprehensive manner and classified it as international.

In Cambodia, the Khmer Rouge regime committed atrocities against its population. Fighting between Vietnam and Cambodia occurred on the border and in 1979 Vietnamese forces and the Front Uni de salut de Kampuchea took the city of Phnom Phen. The exiled government of Cambodia nevertheless considered itself to be the country's legal government. Most States of the world also considered the Khmer Rouge regime to be the valid representative of Cambodia. Gasser considers that in relation between the Vietnamese forces and the troops of Khmer Rouge, the law of international armed conflict should apply, as it did during the first phase of the conflict when the Khmer Rouge regime was not in exile.¹³⁷ The conclusion would here be that it does not matter whether the government is actually a *de facto* government as long as it is the legally recognised government.

In the case of Cambodia, the new installed government was finally recognised and this would according to Gasser render the conflict between Vietnamese forces and the Khmer Rouge internal in its character.¹³⁸ On the other hand one could argue that a test of control should be applied and thereby still classifying the conflict as international. In my view, this seems to be the better alternative, since the concept of recognition is avoided in other parts of the IHL.

There are good reasons for arguing that troops acting under a SC mandate are subjects to and must apply the provisions in the GC. In 1999 Secretary General issued a bulletin for UN forces and the need to apply IHL.¹³⁹ Discussions are waging whether all provisions in the GC are applicable or not. According to Green the law of armed conflict will apply to parties to the GC and the AP in operations undertaken by the UN.¹⁴⁰ On the other hand, in a criticised judgement a Canadian court martial appeal court held that the UN forces were not engaged in any armed conflict in Somalia. As shown earlier the SC in resolution 794 did condemn violations of IHL implying an armed conflict.¹⁴¹

The GC should, at least, be applicable in conflicts between States. The UN forces contain armed forces from several States acting under the command of UN. An interpretation of the scope of the GC does not exclude the possibility of an authority, not classified as a State to be part to an international armed conflict. It would therefore seem appropriate to apply the GC in these situations. For the purpose of this study the question is rather whether the presence of UN or troops of regional organisation could render the primary conflict between the government and the insurgents

¹³⁷ Gasser: 154-156

¹³⁸ *ibid*: 155

¹³⁹ UN's Secretary-General Bulletin on Application of IHL to UN forces, 6 August 1999

¹⁴⁰ Green: 56

¹⁴¹ Brocklebank case, see Boustany 1998: 371-374

international in its character. I find it reasonable that this question should be determined according the same tests that I have discussed earlier. The answer will then depend on the relationship and degree of assistance between the UN troops and the insurgents.

The announced war on terrorism has also brought attention to the concept of an international armed conflict. Some States have argued that the announced war on terrorism has such different characteristics that the traditional law of armed conflicts should not be applicable. The argument is that transnational violence does not fit the definition of international armed conflict, since it is not waged among States. Nor does it apply to the law of non-international armed conflict since it is taking place in a wide geographical area. Instead this type of armed conflict is regulated by an emerging customary international law.¹⁴² The better view seems to be that acts of terrorism may occur in the context of an international armed conflict, non-international armed conflict or in other disturbances. Terrorism perpetrated by military or civilian agents of a party to the conflict is a breach of IHL.¹⁴³ The ICRC also believes that IHL is applicable when the fight against terrorism amounts to or involves an armed conflict. It is evident that most of the activities taken to stop terrorism do not amount to an armed conflict. Measures such as the freezing of assets, criminal sanctions and extradition do not involve the use of armed force. It is not clear whether the fight between States and transnational terror networks as a whole could be considered as an armed conflict. Acts of terrorism and responses to them ought to be classified on a case by case basis. Concerning the detainees at Guantanamo, it seems that States which have expressed their disapproval have not really characterised the conflict between US and al-Quada. The urge either to initiate judicial proceedings or to release the detainees applies to all conflict types. The most accurate approach would be to characterise a conflict according to the tests discussed above, whether or not the opposing side is labelled as terrorists or not. In any event it should not be possible to put IHL in detention along with the detainees with reference to an instant unilateral custom.

State practice is rather ambiguous in its effort to characterise armed conflicts. A tendency to adopt a more global approach in determining a complex conflict could perhaps be invoked. In this approach the conflict is not separated into different conflicts but treated in its entirety. Nevertheless the ICTY jurisprudence will probably be a valuable precedence in future decisions.

¹⁴² International Humanitarian Law and the challenges of contemporary armed conflicts: 231-234

¹⁴³ Solf: 53

3.2.4 Foreign interventions not directed against governmental forces

The ad hoc Chambers did not elaborate on the situation discussed in this section. However, there have been some incidents where foreign interventions have been directed against other targets than those representing the government. It would therefore be useful to conclude how these situations could be characterised. The object and purpose of the GC does not provide much guidance. It is also difficult to draw any conclusions from UN resolutions in this matter.

The first subgroup under this heading concerns the case where the intervention is backed by an invitation of the government. A Foreign State supporting the government in their armed conflict with an opposing military group would not render the conflict international it would appear.¹⁴⁴ Traditionally the relationship between the insurgents and a foreign State that has been invited by the established government to help it in its fighting against the insurgents has been deemed to be regulated only by the rules of non-international armed conflict.¹⁴⁵ However, history shows that sometimes a foreign State deposes an established government and installs a puppet leader to invite military intervention to suppress a pre-existing civil war, for example as was the case with the Soviet intervention in Afghanistan in 1979.¹⁴⁶ The Afghan Government never made an affirmative public statement on the legal character of the conflict between itself and the insurgents and the GA resolutions spoke only about a foreign armed intervention in Afghanistan without clarifying the character of the conflict.¹⁴⁷

Concerning the conflict between the insurgents and the intervening State, Gasser argues that the armed forces of Soviet should at least respect common art. 3 if and when it is engaged in military operations against insurgents.¹⁴⁸ According to Kwakwa the war in Afghanistan was international since there was a foreign occupation. It makes no difference that the foreign forces were invited by the Afghan government, additionally; the mujaheddin would also have qualified as a national liberation movement. This view is also presented by Roberts who argues that every time the armed forces of a country intervenes and find themselves face to face with the inhabitants, some or all of the provisions of occupation are applicable.¹⁴⁹ Rosas also agrees that Art. 4 A (3) seems to confirm that the GC are applicable when the occupying power does not recognise the exiled government but has instituted a puppet regime.¹⁵⁰ In the view of

¹⁴⁴ Schindler: 260

¹⁴⁵ Gasser: 147, Bierzanek: 285

¹⁴⁶ Stewart: 342, Reisman: 466-479

¹⁴⁷ GA res. 35/37

¹⁴⁸ Gasser: 152

¹⁴⁹ Kwakwa: 46

¹⁵⁰ Rosas: 255

Reisman and Silk, The Afghan conflict was subject to the law of international conflicts. Where the forces of one State enter the territory of another State and engage in hostilities with the government of that State and install a new government the conflict must be considered international even if there is no armed resistance or if an independent government freely invites the State the conflict should be considered as international according to art. 2 § 2.¹⁵¹

As far as the relation between the government and the insurgents concerns, the ICRC sent a message to the insurgents and the government of Afghanistan, where it referred to common art. 3 and thus considered the conflict between them to be non-international. Gasser also argues that the relations between Afghan Government and the insurgents were subject to common art. 3.¹⁵² Neither Kwakwa nor Rosas discusses this situation.

Another similar situation would be when a foreign State is attacking non-governmental targets without the consent of the government, as was the case in 1982 when Israel attacked refugee camps Sabra and Chatila in Lebanon.¹⁵³ My suggestion is that if the government retroactively approved the attack, this should not be treated differently from the situation discussed in the above section. If such an attack is condemned by the government, on whose territory the attack occurred, it would seem even more adequate to apply the IHL regulating international armed conflict.

Of course, it is not easy to establish whether a regime has actually been installed, or if the invitation is genuine. Therefore, it would be preferable to regard the relation between the foreign troops and the insurgents as an international armed conflict in all circumstances. The relation between the governmental troops and the insurgent, I suggest, will depend on a control test, establishing the link between the intervening State and the government. This type of argument is also advocated for by Reisman, he argues that where outside forces are in effective control of the conflict and have incorporated local forces into their own operations, the conflict between the insurgents and its government has been internationalised.¹⁵⁴ It is also important to separate the two legal regimes *ius in bello* and *ius ad bellum*, it would be unfortunate if the legality of the attack or intervention itself would affect the law applicable in the armed conflict.

The situation of two States intervening in an internal armed conflict in support of opposing sides, either taking part in the direct hostilities or providing any other form of support, should preferably be dealt with

¹⁵¹ Reisman:483-485

¹⁵² Gasser: 149-152

¹⁵³ Sassòli, Bouvier: 887-888

¹⁵⁴ Reisman: 485

according to the same reasoning.¹⁵⁵ A test of control would reveal whether the conflict is international or not.

3.3 Concluding remarks

In this section a humble attempt to summarise the conclusion reached in chapter 3 is made. Initially, it could be said that the concept of international armed conflicts is not exclusively applicable to inter-State wars, although only a few other entities could be a party to an international armed conflict.

In this chapter I have also discussed and criticised the classification of an armed conflict in the ICTY decisions. The approach that looks to be the most frequent, elaborated on in the Tadic Appeal Chamber is neither crystal clear nor necessarily the most accurate one. More importantly, for the purpose of this study, compared to other models, the overall test is not particularly generous when it comes to classifying *prima facie* internal conflicts as international. The Tadic case cannot be said to contribute to the vividly advocated *rapprochement* of the legal regimes in its classification of an armed conflict to any great extent. *Prima facie* internal conflicts stands a lesser chance in being classified as international when applying the overall test than other tests, such as proposed by judge Shahabudden and Rodrigues. State practice is rather ambiguous in its approach to internationalisation of the conflict by foreign intervention, this possibility seems to have been neglected in many cases. The global approach, in which a complex set of conflicts is treated as a single international conflict is indeed simple and at a first glance rather appealing. But the legal division of different conflict types calls for a more comprehensive and adequate treatment. A test of control appears to be the solution.

The test of control applied in the Tadic Appeal Chamber is indeed more likely to find a conflict international than the approach of the ICJ in the Nicaragua case, where the Court did not consider the possibility of foreign intervention, military or not, to render the conflict between the insurgents and the government international. It should be interesting to see whether the Court will apply the judgements of the ICTY or not. Sassòli and Olson find it most probable that the ICJ will continue to apply its own reasoning.¹⁵⁶

In order to achieve a uniform application of the GC, the test used for rendering *prima facie* internal armed conflicts international must be applied regardless of the characterisation by the parties to the conflict. The legality of the intervention should not be decisive as to the character of the conflict.

¹⁵⁵ This was the case in the civil war in Yemen from 1962 to 1970, when the republican forces were supported by Egypt and the royalist forces supported by Saudi Arabia. Rosas: 156–157

¹⁵⁶ Sassòli, Olson: 740

4 Extending the law of non-international armed conflicts

The aim of this section is not to provide a detailed list of the content of common art. 3. Rather it is to find out whether there exists a fusion of the substantive law applicable to the two legal frameworks.

In this chapter the concept of grave breaches will play a crucial role. I deem it necessary to give a few remarks on the subject here. Grave breaches¹⁵⁷ is a technical term used in the GC and the AP I. It only refers to certain serious war crimes. Thus, not all violations of the GC qualify as grave breaches. These violations are committed wilfully against the different groups of protected people or against certain property. The AP I has extended the concept to certain acts forming part of the conduct of hostilities and make a reference to wilful omissions. The grave breaches system gives States the right to try persons which are non-nationals and to exert jurisdiction over crimes committed outside their territory. If the State does not bring the person before their own court, there is a duty to extradite the suspect for trial elsewhere.¹⁵⁸ The GC also refers to all acts contrary to the provisions other than grave breaches. States have an obligation to take measures necessary for the suppression of these acts, but the Conventions do not attach a similar jurisdictional provision to these other breaches of the Conventions. The AP

¹⁵⁷ *Article 129 G.C. III*

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

Article 130 GC. III

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

¹⁵⁸ Boelaert 2: 69-71

1 introduced a new concept, serious violations of the GC and the AP 1, but the status of this class remains uncertain.¹⁵⁹

4.1 Practice of the ad hoc Chambers

4.1.1 The Tadic case

Tadic was accused of rape, unlawful killing, and cruel treatment. The indictment charged the defendant in respect of each of these crimes under Art. 2, 3 and 5 of the ICTY Statute. Art. 2 is titled “grave breaches of the Geneva Conventions of 1949”¹⁶⁰ while Art. 3 is titled “violations of the laws or customs of war”.¹⁶¹ Art. 5 deals with crimes against humanity. The Trial chamber¹⁶² held that the existence of an international armed conflict was not a requirement for the exercise of jurisdiction under Art. 2, 3 and 5. The

¹⁵⁹ Boelaert 2: 72-73

¹⁶⁰ **Article 2**

Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

¹⁶¹ **Article 3**

Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

¹⁶² The Prosecutor v. Tadic, Trial Chamber, Decision of the Defense Motion on Jurisdiction, case no. IT-94-1-T, 10 August 1995.

Chamber argued that despite its reference to grave breaches of the Geneva Conventions, the Statute did not restrict the Tribunal to applying these provisions of the Conventions. Instead it enabled the Tribunal to treat those provisions as declaratory of customary law and thereby to try persons committing the acts listed in the grave breaches provisions in an internal conflict as well, even though those provisions would not apply as treaty law.¹⁶³

The Appeal Chamber¹⁶⁴ rejected this approach concerning art. 2. The Chamber considered that the concept of grave breaches under the Conventions was inseparable from the concept of protected persons and property and that neither concept featured in common art. 3 in the GC, applicable to non-international armed conflicts.¹⁶⁵ On the other hand the Appeal Chamber agreed with the Trial Chamber in its view that violations of war and customs of war under art. 3 of the Statute also included violations of IHL applicable in internal armed conflicts. The headings of these articles seem to refer to the distinction between Geneva law (art.2) and Hague law (art.3) but this interpretation was rejected by the Chamber. The Chamber held that the terms violations of the laws and customs of war covered both Geneva and Hague rules. In particular art. 3 was held to cover; (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the GC other than those classified as grave breaches; (iii) violations of common art.3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict.¹⁶⁶

The Chamber went on to discuss the customary international law governing internal armed conflicts relating to the conduct of hostilities, which falls outside the scope of this thesis. However it is of importance that the Chamber noted that the law applicable in internal armed conflicts is more limited than the law applicable in international armed conflict in two ways. Firstly, only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts. Secondly, this extension has not taken place in form of a full and mechanical transplant of those rules to internal conflicts; rather the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.¹⁶⁷

The Chamber also considered the personal scope of common art. 3. The protected persons was said to include at least all of those protected by the grave breaches regime; POW, civilians, sick, wounded and shipwrecked.¹⁶⁸

¹⁶³ *ibid.* Para. 46-52, see also Greenwood: 265-268

¹⁶⁴ *The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber 2 October 1995, IT-94-1-AR72*

¹⁶⁵ *ibid.* Para. 79-85

¹⁶⁶ *ibid.* Para. 89, see also Boalaert 1:627-630

¹⁶⁷ *ibid.* Para. 126

¹⁶⁸ *ibid.* Para. 203, see also Dörman: 390

Due to the Appeal Chambers interpretation of the phrase “violations of the laws or customs of war” the charges of war crimes has shifted greatly from art. 2 to art. 3 of the Statute. Many of these cases have contributed to the expansion of the body of Geneva law applicable to all armed conflicts, using common art. 3 as the main vehicle. If the prosecution wishes to bring charges under art. 2 it has the burden of proving (i) that there was an international armed conflict and (ii) that the crimes were directed against persons or property protected under the provisions of the GC On the other hand art. 3 only requires the prosecution to prove that there is an armed conflict, no matter whether it is international or internal. Neither does art. 3 requires that the prosecution should prove that the violation was committed against a protected person. The prosecution has then decided to drop the grave breaches charges in certain cases and has laid war crimes charges under art. 3 instead of under art. 2. The Tadic decision has thereby encouraged the prosecution to bring charges under art. 3, which incorporates common art. 3, as an alternative for charges under art. 2. for similar conduct. Therefore, there is now a body of jurisprudence of the ICTY on the common core of Geneva-type substantive law applicable to all armed conflicts.¹⁶⁹

Judge Abi-Saab presented a dissenting opinion¹⁷⁰ where he spoke in favour of applying the grave breaches to non-international armed conflicts. Art. 85 (5) of AP I classifies grave breaches as war crimes, a term traditionally reserved to the violations of the Hague law. The drafters of the ICTY Statute chose to treat Geneva law and Hague law separately. According to Abi-Saab the recent developments calls for two conclusions. (i) A growing practice and opinio juris of States and international organisation has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles as well as for other serious violations of IHL, even when they are committed in the course of an internal armed conflict. (ii) In much of this practice and opinio juris, the former acts are expressly designated as grave breaches. It can be said that this new normative substance has led to a new interpretation of the GC as a result of the subsequent practice and opinio juris of States. He then concludes that this interpretation also coincides with the understanding of the parties to the conflict since they concluded an agreement under common art. 3 where they recognised the applicability of the regime of grave breaches in their ongoing conflict, which they had already classified as internal.

This last remark is not, as Abi-Saab claims, supporting his view. On the other hand, the parties to the conflict could not have considered that the grave breaches regime belonged to the law of internal armed conflict. If they did, why should they have deemed it necessary to conclude a special agreement rendering it applicable?

¹⁶⁹ Boelaert 1: 637

¹⁷⁰ Separate and Dissenting Opinion by judge Abi-Saab, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber 2 October 1995, IT-94-1-AR72

4.1.2 Subsequent practice of the Chambers

Subsequent decisions of the ICTY have confirmed the decision of the Tadic Appeal Chamber, that art. 2 of the ICTY Statute is not applicable to internal armed conflicts. An exception to this practice is the Delalic Trial Chamber¹⁷¹, which agreed with Judge Abi-Saab. The Chamber was of the view that the possibility of customary international law has developed the provisions of the GC to constitute an extension of the grave breaches system to internal armed conflicts should be recognised.¹⁷² On the other hand a clear practice of the decisions shows that the substantive content of the crimes under art. 2 and art. 3 of the Statute are fairly similar.

In the Delalic case¹⁷³, detainees were Bosnian Serbs who were in the hands of Bosnian Croats and Muslims and confined in a prison facility, all parties were nationals of Bosnia and Herzegovina.¹⁷⁴ In the GC the term wilful killing is used in the provisions on grave breaches, while the concept of murder is used in common art. 3. The Trial Chamber held that the essence of the offences wilful killing and murder in the ICTY Statute derives from their ordinary meaning in the context of the GC. There can be no line drawn between these two crimes which affect their content.¹⁷⁵ The Chamber noted that the primary purpose of common art. 3 is to extend the elementary considerations of humanity to internal conflicts. In the spirit of equality there can be no reason for attaching meaning to difference of terminology utilised in common art. 3 and the articles referring to grave breaches of the GC.¹⁷⁶ Further, the offences torture and cruel treatment were discussed. The Chamber held that the characteristics of the offence of torture under common article 3 and under the grave breaches provisions of the Geneva Conventions do not differ. The Chamber also held that the offence of cruel treatment under common article 3 carries the same meaning as inhuman treatment in the context of the grave breaches provisions.¹⁷⁷ The Chamber confirmed that rape and other forms of sexual assault are expressly prohibited under IHL.¹⁷⁸

The Trial Chamber in the Blaskic case¹⁷⁹ discussed the notion of violence to life and person, which appears in common art. 3(1) (a) and encompasses in particular murder, mutilation, cruel treatment and torture. The Chamber held

¹⁷¹ Delalic and others. "Celebici", Trial Chamber II, 16 November 1998, IT-96-21

¹⁷² *ibid.* Para. 202

¹⁷³ Delalic and others. "Celebici", Trial Chamber II, 16 November 1998, IT-96-21

¹⁷⁴ Ackerman: 12

¹⁷⁵ Delalic and others. "Celebici", Trial Chamber II, 16 November 1998, IT-96-21, para. 422

¹⁷⁶ *ibid.* para. 423

¹⁷⁷ *ibid.* para. 443

¹⁷⁸ *ibid.* para. 476, AP II prohibits rape, enforced prostitution and any form of indecent assault in Art 4 (2) and an implicit prohibition is found in art. 4(1) which states that all persons are entitled to respect for their person and honour.

¹⁷⁹ Prosecutor v. Blaskic "Lasva Valley", Trial Chamber 3 March 2000 IT-95-14

that the offence should be linked with the crimes wilful killing, inhuman treatment and causing serious injury to body appearing in Art. 2 of the ICTY Statute and regulating international armed conflicts.¹⁸⁰ The taking of hostages is prohibited in common art. 3(b) The Chamber referred to the GC Commentaries which states that the term "hostage" must be understood in the broadest sense. It then concludes that the definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute.¹⁸¹

The Trial Chamber in the Kordic and Cerkez judgement¹⁸² repeated that the crime of murder as provided for in common art. 3 and in art. 5 of the Statute require the same actus reus and mens rea, and referred to the Delalic case by stating that there can be no line drawn between wilful killing and murder which affects their content. The only difference between them is that murder need not have been directed against a protected person but against a person taking no active part in the hostilities.¹⁸³ When discussing the content of the prohibition on taking of hostages the Chamber referred to the Blaskic case and considered that in the context of an international armed conflict, the elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostage as described by Article 2 (h).¹⁸⁴

The Furundzija Trial Chamber also discussed the offence of rape and pointed out that international criminal rules not only punish rape but also other forms of sexual assault. The Chamber also held that these norms are applicable in any armed conflict.¹⁸⁵

The Trial Chamber in the Akayesu case also confirmed that there is no difference between the terms murder and wilful killing.¹⁸⁶

4.1.3 Comments

The jurisprudence of the ICTY shows that war crimes charges based on grave breaches of the GC have a counterpart in war crimes charges based on common art. 3.¹⁸⁷ Green is also of the view that ICTY appears to have treated both international and non-international armed conflicts as subject to the same law but do not elaborate further in this particular issue.¹⁸⁸

¹⁸⁰ *ibid.* Para. 182

¹⁸¹ *ibid.* Para. 187

¹⁸² Kordic and Cerkez , "Lasva Valley", Trial Chamber III, 26 February 2001, IT-95-14/2

¹⁸³ *ibid.* Para. 233

¹⁸⁴ *ibid.* Para. 316

¹⁸⁵ Prosecutor v. Furundzija, Trial Chamber, case no. IT- 95-17/1, 10 December 1998, para. 186

¹⁸⁶ Prosecutor v. Akayesu, ICTR- 96-4-T, 2 September. 1998, 238, para.589-90

¹⁸⁷ Boelaert 1:620-621,631,637

¹⁸⁸ Green: 66

The Tadic Trial Chamber never expressed a view that the grave breaches regime applies to internal conflict as treaty law, only that it does as customary international law. However, to me it seems likely that if there is sufficient state practice to form customary international law with this content, this state practice would also be sufficient as a mean of interpreting GC in this way.

Some authors have argued that the Tadic Appeal Chamber is actually saying that the Hague law and all the provisions in the GC, except those whose violation is considered as grave breaches, are applicable in non-international armed conflicts.¹⁸⁹ Meron concludes that in suggesting that art. 3 of the ICTY Statute includes all serious violations of IHL except grave breaches, the Tribunal considers that the Hague law and all the principles, other than the grave breaches, are applicable to both international and non-international armed conflicts. He also finds it surprising that the Tribunal did not consider whether grave breaches of the GC as customary international law could fit into art. 3 of the ICTY Statute.¹⁹⁰ A separate opinion of Judge Li also agrees with this interpretation. This is clear in paragraph 10 where she disagrees with the decision of the Appeal Chamber to assert that there has been a development of customary international law to such an extent that all the various violations of the laws or customs of war as enumerated in art. 3 of the ICTY Statute are liable to be prosecuted and punished even if they are committed in an internal armed conflict.¹⁹¹

I would say that this interpretation is at variance with other findings of the decision. The Appeal Chamber¹⁹² is holding that only a number of rules and principles governing international armed conflict have gradually been extended to apply to internal armed conflicts.

The Delalic judgement indicates that the umbrella charge of inhuman treatment of the grave breaches provisions of the GC carries the same meaning as the charge of cruel treatment under common art. 3. Further, the Blaskic Trial Chamber held that inhuman or cruel treatment constitutes umbrella charges that cover other offences such as torture and wilfully causing great suffering. The Trial Chambers of Aleksovski and Blaskic have confirmed this construction of inhuman and cruel treatment.¹⁹³

When it comes to the offence of torture, the Delalic and Furundzija cases confirm that the characteristics of the offence under common art. 3 and under the grave breaches provisions do not differ.¹⁹⁴ The taking of hostages

¹⁸⁹ Momtaz:180

¹⁹⁰ Meron 1996: 243-244

¹⁹¹ Separate Opinion of Judge Li, *The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Appeal Chamber 2 October 1995, IT-94-1-AR72, para. 10

¹⁹² *ibid.* para. 126, see also chapter 4.1.1.p.41

¹⁹³ Boelaert 1.: 637-638

¹⁹⁴ *ibid.*: 638

has been held to have the same characteristics in both international and non-international armed conflicts.

The jurisprudence of the ICTY also indicates that it makes no difference for sentencing purposes whether a particular crime was committed in internal or international armed conflict. This can be illustrated by the Appeal Chambers decision in the *Aleksovski* case. The prosecution had charged the defendant both under art. 2 and art. 3 for the same set of allegations and the Trial Chamber found that the prosecutor could not prove the existence of an international armed conflict. Even though the Appeals Chamber found that the Trial Chamber had not applied the right test for the evaluation of the art. 2 charges, they declined to re-examine these allegation on the ground that the defendant was not going to receive any higher sentence if he were to be found guilty on grave breaches charges as well as the charges under art. 3 of the ICTY Statute.¹⁹⁵

4.2 Interpretation of the Geneva Conventions

In this section I intend to interpret art. 3 in accordance with the Vienna Convention on the law of treaties. As in chapter 3.2, the object and purpose of the GC as well as subsequent State practice is in focus. A point of departure in this exercise is the assumption that certain rules of the law of international armed conflict have to be applied in non-international armed conflict to fill gaps in the provisions applicable to it. For instance, rules relating to the conduct of hostilities are lacking to a great extent in the provisions in common art. 3. To clarify the content of the provisions in common art. 3, analogies with the provisions applicable to international armed conflict can be made. The question is then whether there is a tendency to disregard the traditional dichotomy between international and non-international armed conflict. To what extent can one apply the same law in international and non-international armed conflict?

Greenwood notes that in considering whether an individual may be penalised for acts committed in an armed conflict, it is necessary to examine three distinct questions (1) were those acts in violation of the rules of applicable to that category of substance? (2) Does international law impose individual criminal responsibility for those acts; is such a violation a crime under international law? (3) Who has jurisdiction to try the individual concerned for such an offence?¹⁹⁶

I will only look into the first of these questions, even though an emerging similar regime concerning jurisdiction for war crimes in international and non-international armed conflicts also could serve as evidence of the fusion

¹⁹⁵ *ibid.*: 640

¹⁹⁶ Greenwood: 276-277

of the two legal boxes. There exists a vast academic literature concerning the question of universal jurisdiction¹⁹⁷ and this topic must be left outside the scope of this thesis due to space constraints. Instead I will focus on the provisions relating to the substantive law.

“Common Article 3

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:

1. 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.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

4.2.1 The context and the object and purpose

What it is inhumane in international armed conflict must also be inhumane in non-international armed conflict is the underlying assumption in this section. As the GC commentaries notes, common art. 3 is expressing the common principles that are governing the whole GC.¹⁹⁸ These underlying principles must be equalled with the object and purpose of the GC. Since the GC has refined these principles it would seem natural to refer to these provisions when interpreting the content of the more vague common art. 3. *Abi-Saab* holds that the GC is an elaboration of the principles mentioned in common art. 3 and that an interpretation in good faith of that article would be to apply the provisions in the GC.¹⁹⁹ Analogies with the law of international armed conflicts must also be used to fill gaps in common art. 3. For example, there exists no combatant status in non-international armed conflicts. Nevertheless, if civilians are to be respected in these conflicts, as

¹⁹⁷ see for example van Elst

¹⁹⁸ Pictet: 35

¹⁹⁹ *Abi-Saab*, R: 71–72

prescribed in the applicable provision, it must be possible to distinguish themselves from those who do not fight.²⁰⁰

4.2.2 Subsequent State practice

It is usually not clear whether the conflict is international or internal. Not even the parties to the conflict have always expressed their view concerning this classification. It is not clear how should one draw conclusions from a conflict that was classified as internal when it was running, but today would be considered as international.

Declarations and practice to respect the provisions in the GC could of course be labelled as discretionary tolerance, a beneficial act not expressing an *opinio juris*. However the subsequent state practice in itself constitutes a relevant part of the context to the GC.

4.2.2.1 The Diplomatic Conference 1974-1977

It is quite clear that at the 1977-74 Conferences, the State parties did not want to regulate the different types of conflict with a single law, rather they preferred to rely on two separate legal frameworks.

AP II, applicable in non-international armed conflict, could be an important mean to interpret common art. 3. Even if this protocol has not yet received an impressive number of ratification it might be said to refine the content of art. 3. According to the ICRC Commentary²⁰¹ AP II both supplements and develops common art. 3. Abi-Saab concludes that AP II can have a substantial impact in interpreting the material protection provided for in common art. 3. Especially part II “Humane treatment” and Part III “Sick, Wounded and Shipwrecked” that elaborate on the general principles enunciated in art. 3, can be considered as an authoritative interpretation of the article.²⁰²

Even though AP II could be said to develop art. 3, bringing it more in conformity with the law of international armed conflicts, the diplomatic conferences did not contribute to a fusion of the two regimes.

²⁰⁰ Sassoli, Bouvier: 207-208

²⁰¹ Sandoz: 1343

²⁰² Abi- Saab, G. :237

4.2.2.2 Subsequent IHL Treaties

A move towards extending treaties on IHL to cover both international and non-international armed conflicts could be shown in subsequent treaties concerning IHL. Statements made by single States in the treaty process can serve as State practice, and the treaty itself can be looked upon as a multilateral statement.

The 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines applies to both types of conflict according to Byron.²⁰³ The same goes for the 1999 Second Hague Protocol for the Protection of Cultural Property.²⁰⁴

1980 Inhuman Weapons Convention²⁰⁵ has four protocols and the second of them was revised in 1996. The final expert meeting suggested that the Protocol should apply in all circumstances during war and peace; alternatively it would apply to all parties to the conflict including dissident armed groups as long as the threshold of internal disturbances was attained. During the Conference a proposal was made declaring that provisions of the GC relating to the repression of grave breaches shall apply to breaches and grave breaches of this Convention during armed conflict. Such a provision would indicate that the term grave breaches, as used in the GC, is not exclusively applicable to international armed conflicts. However, the final text does not feature any express reference to the grave breaches provisions in the GC.²⁰⁶ The Protocol is definitely a proof of the aim among certain States to diminish the differences between the two frameworks and finally in 2001 the Convention and all its protocols was extended to apply to non-international armed conflicts²⁰⁷

Although these treaties appertain to the Hague law, the drafting process and its outcome reveals a willingness among States to bring the legal boxes for international and non-international armed conflict in conformity with each other.

4.2.2.3 The ICC Statute

The recent treaty making process of the ICC Statute deserves some attention, a vast number of States have been involved in the adoption of the treaty that concerns the Geneva law.

²⁰³ Byron:65

²⁰⁴ Art. 22

²⁰⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980

²⁰⁶ The language in the Protocol is nevertheless broad enough to be read as an obligation for States to introduce universal criminal jurisdiction for certain violations of the Protocol in common art. 3 situations, Boelaert 2:80-84

²⁰⁷ Amendment of art. 1, the text refers to situations referred to in common art. 3 of GC.

The International Criminal Court (ICC) has power to exercise jurisdiction over persons for the most serious crimes of international concern. These crimes are listed in art. 5; the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. A definition of the crime of aggression has not yet been drafted on the basis of art. 121 and 123 in the Statute and it is therefore not clear whether this crime can be committed in a non-international armed conflict. Art. 6, defining the crime of genocide, makes no reference to the existence of an armed conflict. The offence could be committed in international as well as non-international conflicts or in case of internal disturbances.²⁰⁸

Art. 7 lists acts that are considered to be crimes against humanity if they are committed (1) as part of a widespread or systematic attack directed against any civilian population and (2) are committed with knowledge of the attack. The term civilian population seems to refer to the principle of distinction and to the definitions of civilian persons and civilian population in IHL²⁰⁹ and therefore presupposing an armed conflict. In art. 7(2) (d) the phrase deportation or forcible transfer of population repeats the wording in GC IV art. 49 (1). In AP II art. 17 the terms displacement of civilian population and forced movement is used instead. This could possibly be interpreted as referring solely to situations of international armed conflict. However, this interpretation would go against the context, since customary international law considers that crimes against humanity could be committed in any violent situation, even in internal disturbances.²¹⁰

Art. 8, in which the definition of war crimes distinguish between international and non-international armed conflicts and omits internal disturbances from this definition, is based on the traditional concept of conflict types.²¹¹ Art. 8(2) (a) refers to the rules on grave breaches of the GC and Art 8(2) (b) to other serious violations of the GC. These war crimes explicitly apply to international armed conflicts. Art. 8(2) (c) and (e) lists war crimes in the form of serious violations of common art. 3 in the GC and other serious violations of the laws and customs of war.²¹² Spieker argues that art. 8(2) (c) and (e) corresponds with the idea that the grave breaches system of the GC is also applicable in non-international armed conflicts according to international customary law. Art 8(2) (a) and (b) make the same distinction between grave breaches and other serious violations of the GC as is set out in the GC This distinction is mirrored in the provisions concerning non-international armed conflict as 8(2) (c) refers to serious violations – grave breaches- of common art.3 and 8(2) (e) covers other serious violations.²¹³ Art. 8(2) (c) does not contain a general clause providing for criminal responsibility for serious violations of common art. 3, it is only those acts which are explicitly listed in the provision that can

²⁰⁸ Spieker:402

²⁰⁹ See for instance AP I art. 48, 50, AP II art 5 and 13-18

²¹⁰ Spieker: 403-405

²¹¹ *ibid.*: 398

²¹² *ibid.*: 405-407

²¹³ *ibid.*: 413-414

evoke criminal responsibility. The wording of the provision also repeats the definition of possible victims as stated in common art. 3.²¹⁴ Compared to the corresponding list of grave breaches in international armed conflicts, the enumeration is less comprehensive. The rules on basic judicial guarantees are not identical, neither is there any prohibition on forcing a protected person to serve in the forces of the opponent in the case of non- international armed conflict 8(2) (c).

Art. 8(2) (e) mainly deals with the conduct of hostilities. The most interesting provisions might be (iv) that adds committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of sexual violence as a serious violation. These crimes are explicitly said to constitute a serious violation of common art. 3.²¹⁵ The list of serious violations committed in non-international armed conflict does not cover all provisions of AP II; any general clause prohibiting inhumane treatment is lacking, slavery and collective punishment are therefore not featured. Even more surprisingly the spreading of terror according to art. 4 (2) (d) and 13 (2) AP II is omitted.²¹⁶

Art. 9 in the ICC Statute declares that the “Elements of crimes” (EC) shall assist the Court in the interpretation and application of art. 6, 7 and 8.” The ICC Assembly of States adopted the text drafted by the preparatory commission. When interpreting the personal scope of 8(2) (c), the EC stressed that the notion hors de combat should not be interpreted in a narrow sense, this was also said to be the correct interpretation of common art. 3. Concerning the notions of murder and cruel treatment in 2(c) (i), the EC establishes that there are no differences between them and their counterpart in international armed conflicts; wilful killing and inhuman treatment.²¹⁷ The notion of mutilation is almost the same as its counterpart in 2(b)(x). The only exception is that this war crime does not require that the conduct caused death or seriously endangered the physical or mental health of the victims. It covers any type of mutilation.²¹⁸ There is no difference between the concept of torture expressed in 2(a) (ii) and 2(c) (i). The same reasoning also applied concerning the taking of hostages and outrages committed upon personal dignity, in particular humiliating and degrading treatment.²¹⁹ Under

²¹⁴ *ibid.*: 414-415

²¹⁵ *ibid.*: 417-419

²¹⁶ Concerning the difference between the AP II and the ICC Statute it could further be noted that Art. 4 (2) (a) in AP II prohibits violence to physical or mental wellbeing at any time and in any place whatsoever. The prohibition on medical procedures is less strict since it is listed in Art. 5(2) (e). The ICC Statute is equating the latter prohibition with other forms of inhumane treatment in art. 8(2) (c) (xi). The prohibition of killing or wounding treacherously a combatant adversary is also an extension of the rules in AP II, since they only prohibits ordering that there shall be no survivors. Spieker finds that some important provisions are missing in the list of acts entailing individual criminal responsibility. On the other hand the Statute criminalizes the destruction and seizing of adversary’s property. This is considered as a grave breach in the GC, but is not mentioned in AP II. Spieker: 420-423, Momtaz: 185

²¹⁷ Dörman: 394-398

²¹⁸ *ibid.*: 396

²¹⁹ *ibid.*:401,404-406

2(e) (vi) it is stated that sexual violence also constitutes a serious violation of common art. 3. This crime is identical to its counterpart in 2(b) (xxii). The judicial guarantees referred to in 2(c) (iv) are influenced by the AP II art. 6 (2). The material elements of art. 6 (2) may be an indication for the notion in the ICC Statute.

A reading of the ICC Statute indicates that it upholds and maybe even reinforces the traditional distinction between international and non-international armed conflicts. In interpreting the Statute the EC adds a more optimistic look at the future decision of the Court. The practice that has been established in the ICTY gain a hearing in this document. The breaches of common art. 3, that have a counterpart in the GC, should be interpreted as having the same content as its counterpart. Different terminology should not preclude that the meaning of the provisions are the same. It is also notable that sexual violence explicitly is said to constitute a serious violation of common art. 3. Although this could most likely be derived from a mere interpretation of common art. 3.

4.2.2.4 UN Resolutions

A survey of relevant resolutions is made in chapter 3. Additionally some other GA resolutions are of relevance here. Thus, a possible interpretation of common art. 3 as containing the same substantive law as the provisions of the GC is here analysed based on UN resolutions.

GA resolution 2444, adopted in 1968, affirmed basic humanitarian principles in all types of armed conflicts such as the principle of distinction and the not unlimited right to adopt means of injuring a party. GA resolution 2675, adopted in 1970, affirmed basic principles for protection of civilian population in armed conflict. The principle of distinction and the need to spare civilians is mentioned here. Civilians should not be the object of military operations. The resolution does not qualify the type of conflict it refers to, but speaks of armed conflicts in general. GA resolution 2676 calls upon all parties to any armed conflict to comply with the terms and provisions of the GC III. The resolution also urges that combatants not covered by GC III art. 4 should receive a treatment similar to that provided for POW. This statement obviously address the question of the rights of combatants in non-international armed conflicts and tries to elevate their status. These GA resolutions are clearly applicable in non-international armed conflicts and their purpose is to decrease the legal gap between the different types of conflict. Especially resolution 2676, which deals with POW, is of interest when interpreting the GC.

The resolutions mentioned in chapter 3.2.2.2 do not explicitly characterise the armed conflict. However, those resolutions that are referring to violation of “the relevant provisions of” or “the applicable provisions of IHL” indicate that there should be a different treatment for different conflicts.

SC resolutions concerning former Yugoslavia repeatedly referred to the grave breaches provisions of the GC although it did not state that the conflict was international. Other resolutions also used the terminology of international armed conflict.²²⁰ This could be interpreted as the provisions referred to, including the grave breaches regime, apply no matter whether the conflict is internal or international. In conclusion, there are some evidence of the alleged fusion, although rather ambiguous, to be found in UN resolutions.

4.2.2.5 National legislation

National legislation could also serve as an important mean when examining the subsequent State practice in the field

The German Code of Crimes against International Law²²¹ contains a list of war crimes in section 8-12. With only a few exceptions the crimes enumerated are considered to be breaches of international law, whether committed in an international or a non-international armed conflict. The unlawful holding of prisoner and delaying of their return home, the transfer of civilians into the occupied territory, and to compel protected persons to serve in the forces of the hostile power are only considered to be crimes in international armed conflicts.²²² This is also true for attacks which severely damage the natural environment.²²³ All other acts featured in the extensive list, for instance sexual coercion and inhumane treatment are crimes regardless of the type of armed conflict in which they were committed. The German Military Manual contains a list of violations of common art. 3 and AP II which are termed as grave breaches.²²⁴

The Belgium Act of June 1993²²⁵ dedicates chapter one to grave breaches, *infractions grave*. Art. 1 *ter* lists violations of the GC and AP I and II. In the chapeau of the article no distinction is made between international and non-international armed conflicts, which would indicate a rejection of this dichotomy. But looking closely at the provisions the act seems to uphold the distinction in some respect. Art. 1 *ter* 3 bis speaks of *infraction grave* of the GC and *violation grave* of common art. 3, the same terminology is thus avoided. Further, the protected persons are defined separately²²⁶ and some provisions refer to treatment contrary to GC and AP I and II respectively.²²⁷ Nevertheless, the acts that are enumerated are considered to be breaches both in the context of an international and non-international armed conflict.

²²⁰ SC res. 794, GA res. 57/233

²²¹ Act to Introduce the Code of Crimes against International Law of 26 June 2002

²²² *ibid.* section 8 (3)

²²³ *ibid.* section 11 (3)

²²⁴ Manual of August 1992, para. 1209, see also Boelaert 2: 98

²²⁵ Belgium Act of June 1993 relative to the repression of serious violations of IHL

²²⁶ *ibid.* Art. 1 *ter*: 4, 5 and 6

²²⁷ *ibid.* Art. 1 *ter*: 5

Especially crimes concerning the conduct of hostilities are listed, but breaches of the Geneva type law, such as sexual violence, are also dealt with. However, this legislation has recently been abrogated, which diminishes the value of this piece of state practice.²²⁸

The legislation in Rwanda²²⁹ prohibits certain acts as long as they are committed against persons protected by the GC and the AP I and II. No division is made between acts committed in international and non-international armed conflicts. For instance the right to fair trial is listed in art. 6 and applies to both POW and other protected persons.

The legislation in Nicaragua²³⁰ declares “actos graves violatorios” committed during an armed conflict criminal, whether international or civil in character. Other breaches of IHL are also made criminal. The notion used in the Spanish text of the GC is “infracciones graves”, which would indicate that the acts enumerated in the Penal Code, should not be interpreted as *per se* constitute grave breaches. However, a certain act is considered as a breach, regardless of the character of the conflict.

Other national legislation are still upholding the dichotomy, for instance Switzerland and the Netherlands clearly separates crimes committed in international and non-international armed conflicts. The US War Crimes Act of 1996, as amended in 1997 also separates between grave breaches and common art. 3 war crimes.

Although some States apparently considers the substantive law of international and non-international armed conflicts to be identical, or at least very similar, a comprehensive practice establishing this fusion cannot be shown in this field of state practice.

4.2.2.6 National court decisions

National court decisions are here presented as subsequent State practice and a possible fusion of the two legal boxes is advocated for.

The Danish High Court delivered its judgement in the Saric case in November 1994. The accused was charged for violations of the grave breaches provisions in GC III and IV. The alleged crimes were committed against persons detained in a POW camp in Bosnia-Herzegovina. This decision has been invoked in support of the view that the grave breaches provisions also apply to internal conflicts. The Court held that the large number of offences was committed in quite uniform circumstances and therefore all the counts related to the Conventions should be considered as a

²²⁸ Art. 27 Abrogation de la Loi du 16 juin 1993

²²⁹ Law No. 33 bis/2003 Repressing the Crime of Genocide, Crimes against Humanity and War Crimes

²³⁰ Penal Code, Art. 551

whole.²³¹ Thus, the requirements for the grave breaches provisions in the GC were fulfilled in the case of all counts of the indictment. The Court did not explicitly examine whether the conflict was internal or international.

Some authors have expressed the view that the conflict constituted an internal conflict and that the Court did not consider this as an obstacle to apply the grave breaches provisions. This interpretation seems to be far too optimistic. Another interpretation would be that the Court did not assume that the conflict was internal; rather the decision to apply the grave breaches provisions should be seen as an assumption that the conflict was international. Finally it could be claimed that the court applied the grave breaches provisions regardless of whether the conflict was internal or international.²³²

In the Knezovic case²³³ the accused was charged with violations of common art. 3, allegedly committed on the territory of Bosnia-Herzegovina. In a decision the Court confirmed that the term “war” in art. 1 of the Dutch War Crimes Act needed to be construed as including internal conflicts as well. Thus, the War Crimes Act provides for universal jurisdiction over violations of common art. 3.²³⁴ Even though the conflict in the Prijedor region was more likely to be an international one, and the acts committed would constitute grave breaches, the prosecutor did choose to prosecute them as violations of common art. 3. This would indicate that he considered violations of common art.3 to be similar to grave breaches.

In the case of Pius Nwaoga²³⁵ the Nigerian Court apparently applied the law of international armed conflict to the case. The defendant was charged for murder committed during the civil war, where he joined the insurgents forces. The Court held the conflict to be internal but referred to a case from the Russia- Japanese War in 1904 and found that the defendant had committed an offence under the Criminal Code when acting under disguise and operating as saboteur. The conclusion would be that the Court either considered the GC as applicable in whole or that the law of non-international conflicts were similar in this regard.

In the case of Sagarius and others²³⁶ the Court held that South Africa was not bound by AP 1 and the inclusion of national wars of liberation. However, the law of international armed conflict was taken into account when imposing the sanction. The Court referred to the provision in the GC III prohibiting POW to be executed for military activities unless they amounted to war crimes.

²³¹ Saric case, Ostre Landsret, Decision of 25 November 1994

²³² Boelaert 2:95-96

²³³ Knezevic case, the Dutch Supreme Court, Decision of 11 November 1997, No. 3717

²³⁴ See also van Elst: 846

²³⁵ Pius Nwaoga v. The State, Nigerian Supreme Court, 1972

²³⁶ Sagarius and others v. The State, South West Africa Division, South Africa 1982

In the Djajic case²³⁷ the German Court sentenced the defendant to five years imprisonment for acts he committed in former Yugoslavia in June 1992. The court considered the conflict to be international at that time and referred to the grave breaches provisions of the GC. In the case of Sokolovic and Kusljic²³⁸ the Federal Court of Justice was concerned with a Bosnian Serb that had been sentenced to nine years²³⁹ in prison for taking part in 1992 genocide and other crimes on the territory of the former Yugoslavia. The Court found the conflict to be international. Although they have had the opportunity, German courts have still not resolved issues relating to the possibility of them to suppress violations committed in internal armed conflicts, and thereby not the questions concerning a rapprochement of the law of substance.

In conclusion, the cases mentioned in this section also indicate a rapprochement of the legal regimes, although this trend is rather subtle.

4.2.2.7 Other official statements

In this section some state practice deriving from declarations or actual practice in a certain conflict will be presented. The question at stake is still whether the state practice points at a similar legal treatment of international and non-international armed conflicts.

An armed conflict commenced in Algeria in 1954. France did not officially acknowledge the applicability of common art. 3 and certainly not the rest of the provisions in the GC. However, an arrangement with ICRC was made allowing for visits to French detention camps and prisons in Algeria. The ICRC referred to common art. 3 in requesting for such permission and the French government permitted those visits. In 1958 France established special camps for the imprisonment of captured members of the FLN armed forces but continued to argue that the conflict was internal and the soldiers were not considered as POW in any legal sense. The following year France announced that the rebel chiefs who had been held in prison for more than two years would now be treated as POW although still denying that there was an international armed conflict going on.²⁴⁰ Ultimately the same treatment as provided for in international armed conflicts was thus recognised for captured combatants in internal armed conflicts.

If one should question this conclusion it could be argued that practice in the wars of liberation, which at the time were considered as internal conflicts, do not contribute to the clarification of state practice in the field, since they nowadays would be classified as international ones. In which legal framework, international or non-international, should that practice have any

²³⁷ Bayerische Oberste Landesgericht, 23 May 1997, 3 St 20/96

²³⁸ *Bundesgerichtshof*, Decision of the Third Criminal Senate of 21 February 2001, 3 StR 372/00

²³⁹ Oberlandsgericht Düsseldorf, 29 November 1999

²⁴⁰ Farer: 35-37

impact? For this study those conflicts that while running, were deemed to be non-international would serve to clarify state practice in the law of non-international armed conflicts.

The Vietnam War was considered by the ICRC to be an international conflict and it addressed a letter to the governments of the US, North and South Vietnam and the FLN where it emphasised that any combatant taken prisoner should be treated humanely as POW.²⁴¹ In international law NGO's are not themselves considered to be able to create State practice. On the other hand their practice can stimulate State practice and in the Vietnam War the US policy was to grant POW treatment to both Vietcong Main Forces and North Vietnam troops. Thereby it acted as if the conflict was international in character for all participants.²⁴² According to Provost both the US government and the South Vietnam considered the conflict to be international. North Vietnam, on the other hand, considered the conflict in South Vietnam to be a non-international one.²⁴³

In the Tadic case the US submitted an amicus curiae brief where it argued that the grave breaches jurisdiction under art. 2 of the ICTY Statute was applicable to conduct in an internal armed conflict.²⁴⁴ Another statement from the US not only referred to the grave breaches system; the Chairman of the US Joint Chiefs of Staff made the following declaration " Armed forces of the United States will comply with the laws of war during the conduct of all military operations and related activities in armed conflicts, however such conflicts are characterised".²⁴⁵ Even though these statements are good evidence of the rapprochement, they should be read in conjunction with The US War Crimes Act which on the contrary separates between the two regimes.

In Nigeria the eastern part of the country declared itself independent as the Republic of Biafra in 1967. The Biafra insurgents could not be considered as a national liberation movement. The ICRC reports that both parties assured that they were prepared to observe the provisions in the GC. The Code of Conduct for the Nigerian Armed forces precluded the bombing of non-military targets and held that Biafran prisoners should be treated as POW.²⁴⁶ The UN and the OAU²⁴⁷ both held the conflict to be an internal Nigerian affair,²⁴⁸ but the government never expressly acknowledged the applicability of common art. 3. However, the captured insurgents appear to have been treated as POW.

²⁴¹ Ibid: 40-41

²⁴² United States Military Assistance Command, Vietnam Directives no. 381-46, Military intelligence Combined Screening of detainees. December 1967

²⁴³ Provost: 252

²⁴⁴ US Amicus Brief, Submission by the government of the United States of America concerning Certain Arguments made by Counsel for the case of The Prosecutor of the Tribunal v. Tadic, case no. IT-94-1-T, submitted to the Trial Chamber II, pp 35-36

²⁴⁵ Instruction 5810.01 (1996), quoted in Meron, 2003: 536

²⁴⁶ Farer: 42-43

²⁴⁷ Organisation of African Unity.

²⁴⁸ Rosas:196-202

The Congo War between 1960-1964 involved many different phases and parties. The region of Katanga issued a declaration of independence in July 1960. The government did not at any time recognise POW status for the Katanga forces, although the ICRC was on several occasions able to visit military prisoners. The Katanga authorities never attempted to accede to the GC, but in response to the ICRC it committed itself to the fundamental humanitarian principles.²⁴⁹

A report by the Peruvian Medical Federation²⁵⁰ presented in 1994, qualified the situation in Peru during the last 13 years²⁵¹ as a non-international armed conflict. It held that the principles and rules of IHL contained in the GC and the AP I and II are applicable to all problems and situations in such a context. This last statement must however be given a limited importance, since it is unclear whether the Federation could be defined as a state organ.

The State practice presented in this section is rather ambiguous in its response to the addressed question. The US has maybe presented the most progressive interpretation, but their practice is not coherent, since other sources have laid down a different view. When it comes to the obligation that persons who are taking no active part in the hostilities should be treated humanely, practice is a bit clearer. In the cases mentioned above the basic idea is that the treatment of detainees should be similar, no matter what character the conflict is of. This does not imply that all provisions of the GC concerning POW should be applied; rather it is intended for the regulation concerning the actual treatment during the detention. It would probably be too far-fetched to encompass the provisions concerning the release and repatriation, including the sensitive issue of amnesty for participation in the fighting.

The special agreements that were elaborated on in chapter 2.1 also constitute important state practice. They could on one hand be said to reflect an understanding that fundamental principles should apply regardless of the character of the conflict. But, at the end of the day, these agreements indicate that the legal regimes contain different rules.

²⁴⁹ Rosas: 152-155

²⁵⁰ Entitled "Medical practice in the context of an internal armed conflict".

²⁵¹ A conflict has been carried on between the insurgents *Sendero Luminoso* and the government.

4.3 Concluding remarks - Fusion or confusion?

In this final section of chapter 4 I wish to make some comprehensive comments on the issue dealt with in this chapter, namely the fusion between the legal frameworks of international and non-international armed conflicts. It would be hard to identify exactly the provisions of the GC that are also applicable to internal armed conflict on the basis of the presented material. Two examples shall be given in order to make a probable estimation. By looking closer at the provisions concerning grave breaches and POW, I hope to be able to present a more general conclusion.

The grave breaches regime is referring to the most basic rights in the GC. If not even the grave breaches regime can be applied in internal conflicts, then other provisions are less likely to be applicable in these conflicts.²⁵² When addressing the grave breaches regime and its non-applicability in non-international armed conflict most authors seem to refer to the jurisdictional matters and not the substantive prohibition. For instance, this is the case when Van Elst declares that the grave breaches regime only applies to international armed conflicts.²⁵³ The acts enumerated in art. 130 GC III and 149 GC IV might still be regarded as breaches when committed in non-international armed conflict, even if one believes that the ground for jurisdiction has to be sought elsewhere. State practice, for instance the preparatory work of the ICC Statute, some national legislation and certainly the ad hoc Chambers is not making any difference between the content of common art. 3 and the prohibitions enumerated in the grave breaches provisions. I would say that there are good grounds for presuming that these prohibitions are also applicable to internal armed conflicts.

Authors have pointed out that the greatest differences between the law of international and the law of non-international armed conflicts concerns the situation for combatants in the hands of the enemy.²⁵⁴ Common art. 3 omits any reference to the combatants privilege and entitlement to POW status.²⁵⁵ The main reason for States reluctance to apply the same law to all types of conflict is probably the status of military detainees. Governments are unwilling to establish a provision that would provide rebels with a license to kill and to destroy security installations, also claiming that such a regulation would encourage insurrection by reducing the personal risk. The privileged combatants in international armed conflicts are immune from criminal prosecution for acts that do not violate IHL, but might be crimes under domestic law.²⁵⁶ The provisions concerning POW are therefore here

²⁵² this methodology is sometimes called "the most likely case", implying that this case, the grave breaches provisions, are most likely to apply to all conflicts, since they refer to the most basic rights. If not even the most likely case verify the theory, probably no other provisions will apply either. See Landman: 34-35

²⁵³ Van Elst: 385

²⁵⁴ Martin: 93, Tahzib-Lie: 240

²⁵⁵ Solf: 54

²⁵⁶ Solf: 59, Pictet: 32

considered as the regulation least likely to be applicable to all types of conflict.²⁵⁷ As has been shown, State practice have tended to award detainees in non-international armed conflict a treatment similar to POW-status, without actually recognising such status. Taking into account the aversion to grant immunity for mere participation in hostilities, not all provisions concerning POW could be said to apply to all armed conflicts. On the other hand the provisions concerning humane treatment shall apply.

There are good reasons for arguing that at least some of the provisions of the GC are similar in both types of armed conflicts. The object and purpose of the GC indeed speaks in favour of such a conclusion. State practice does not yet seem to have reached a level where the two legal regimes are identical in all circumstances concerning Geneva law. The provisions on grave breaches seem to be applicable to all types of conflicts. Since this was considered as the obligation most likely to be applicable, this conclusion still holds it open whether the other provisions are applicable. When it comes to the provisions on POW, some of these provisions are found to be valid also in internal armed conflicts. This conclusion can be invoked to present a more general understanding. Since these provisions were considered as the least likely to apply in all types of conflict, other provisions of the GC are also likely to be applicable. To say it in other words, the similar treatment of POW *a fortiori* indicates that also other provisions of the GC should apply to non-international armed conflicts. In conclusion, it is arguable that most of the provisions of the GC could be invoked when interpreting common art. 3. Especially this holds true for regulations concerning inhuman treatment. However, there seems to be some exceptions to this cardinal rule, such as the granting of amnesty.

²⁵⁷ Applying the same terminology, this method is called the least likely case. If the provisions concerning POW are found to be applicable, then all of the provisions probably will apply.

5 Conclusions

5.1 Summarizing remarks

The thesis has pointed at different means of rendering the provisions of the GC applicable in conflicts which appear to be non-international. In order to determine whether a certain provision is applicable in the conflict a set of questions must be used. (1) Have the parties concluded an agreement or has the offending party issued a unilateral declaration with the effect that this provision should be applicable? If this is not the case the question to be addressed is (2) whether the conflict could be deemed to be an international armed conflict. This is the case if the conflict can be classified as being a (2A) war of national liberation or, more uncertainly, (2B) between another State-like entity and a State. Finally (2C) foreign intervention amounting to a certain level of control can also render the provision applicable. Such intervention, either directed at the government or at the insurgents will render the initial conflict between the government and the insurgents international. If there is any directed involvement in the fighting by the intervening State, this conflict will be international in character, whether it is conducted against the government or the insurgents.

If the conflict could not be classified as international the question is (3) whether common art. 3 contains the same content as the provision of the GC. Not all the provisions of the GC seem to be applicable, but some of them, especially those referring to human treatment of detainees could be referred to when interpreting common art. 3. Therefore I conclude that we are actually moving towards a uniform law applicable in all armed conflicts. This development is however not progressing very smoothly; still practice is a bit incoherent in this regard.

5.2 A better legal protection for victims of armed conflicts?

In this section I will challenge the presumption underlying the aim of this study, namely that the law of international armed conflicts offers a better protection for victims than the law of internal armed conflicts do. Does the alleged fusion of the legal regimes constitute a setback or an improvement for the victims of armed conflicts?

According to Sassòli and Olson the law of non-international armed conflicts sometimes offers a better protection for the victims. The protection offered by the law of international armed conflicts to a person who is in the hands of the enemy differs greatly according to the nationality of that person, to whether that person is a civilian or a combatant and to the status of the territory on which he or she is found. It is often difficult to determine who is a combatant or a civilian in internal conflicts.²⁵⁸ It could also be difficult to apply some concepts of the GC. Both Stewart and Bierzanek recognise that many provisions of the GC cannot be applied in civil conflicts since they include notions such as belligerent occupation of territory and enemy nationality, concepts which are not applicable to civil conflicts.²⁵⁹

The law of non-international armed conflict could be deemed easier to apply and having a better chance of being respected in current conflicts. Further, most of its rules benefit, without any adverse distinction, all persons who no longer are taking an active part in the hostilities. The rules applicable in non-international armed conflicts could actually be stricter, as is the case for forced movements of civilians. The law of international armed conflicts only prohibits forcible transfers regardless of their motives out of occupied territories. Expulsions of protected civilians out of a party's own territory are not explicitly prohibited. Since this situation is not unlikely to occur in a prima facie internal armed conflict the law of international armed conflict does not offer sufficient protection in this regard. The best solution according to Sassòli and Olson would thus be to create a new law applicable to all situations of armed conflict.²⁶⁰

The 1995 Tadic Appeal Chamber used a narrow definition of protected persons when interpreting the concept of nationality. It was held that if Bosnian government committed violations against Bosnian Serb civilians this would not amount to a breach of IHL, since these civilians were nationals of Bosnia-Herzegovina.²⁶¹ This reasoning was abandoned in the 1999 decision, where the Chamber held that this interpretation did not correspond well with the contemporary conflicts; the domestic legislation

²⁵⁸ Sassòli, Olson: 745

²⁵⁹ Stewart: 345, Bierzanek: 288

²⁶⁰ Sassòli, Olson: 746

²⁶¹ *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber 2 October 1995, IT-94-1-AR72, para.

should not be able to exclude persons otherwise protected by the GC.²⁶² The nationality criteria should instead be interpreted as a criterion of alliance.²⁶³

Applying the approach taken in the 1995 decision would speak against the classification of *prima facie* non-international armed conflicts as international since these civilians would then no longer be protected by the provisions. However, Greenwood argues that it is not clear that, on the Bosnia and Herzegovina independence, members of the Serb community who opposed that independence should be regarded as having become nationals of Bosnia and Herzegovina, rather than retain Yugoslav or Serbian Citizenship.²⁶⁴ If the acts of Bosnian Serbs could be attributed to a foreign State, why should they not attribute to that State themselves?²⁶⁵ This was also argued for in the Celebici case.²⁶⁶ In the field of refugee law the notion of nationality has been interpreted broadly, to include origins and the membership of particular ethnic, cultural, religious and linguistic communities.²⁶⁷

Green points out that a member of the armed forces may be treated as a traitor in international armed conflicts as well. The belligerent is entitled to treat as traitors, after trial, any member of the adverse party's forces who are nationals of that party or originally belonged to its armed forces.²⁶⁸ This reasoning is based on the traditional interpretation on protected persons. As indicated above, some authors have advocated for a broader scope, not excluding all nationals from this group. Identities such as ethnicity might in some cases be a better division.

I would still argue that the law of international armed conflict contains a better protection. The problem of applying certain provisions including notions designed for international conflicts could be solved by interpretation. The notion of nationality must be given a wider implication.

As to the more beneficial substantive law one must keep in mind the reverse analogy, namely to apply the law of non-international armed conflict to international ones. This has been confirmed in both Nicaragua and Tadic cases.²⁶⁹ According to these judgements the norms enumerated in common art. 3 are also applicable to international armed conflict. There exists a substantive international customary law applicable to all types of armed conflicts. Rather than a mini-convention applicable to non-international armed conflicts only, it reflects minimum standards applicable in any armed conflict, whatever its classification.²⁷⁰ Whether this also means that

²⁶²The Prosecutor v. Tadic, Appeal Chamber Judgment, 15 July 1999, case no. IT-94-1-A, para. 166

²⁶³ see also Quéguiner:300-301

²⁶⁴ Greenwood: 273

²⁶⁵ Sassòli, Olson:741

²⁶⁶ Para. 259

²⁶⁷ Art. 1(A)2 Refugee 1951 Convention, Goodwin-Gill: 45

²⁶⁸ Green:44-45

²⁶⁹ Nicaragua. para 218, Tadic para 151

²⁷⁰ see also Boelaert 2:78, Boelaert 1:620

common art. 3 is also applicable to international armed conflict as a matter of treaty law is not clear from the judgement. The GC commentaries note that common art. 3, as representing the minimum standards applicable in the least determinate of conflicts, must *a fortiori* be respected in the case of international conflicts, since the greater obligation includes the lesser. Martín also concludes that common art. 3 is applicable in all armed conflicts.²⁷¹ The protected persons in international armed conflicts are also within the personal scope of art. 3.²⁷²

Thus, even if applying the law of international armed conflict, the law of non-international armed conflict, as interpreted in common art. 3 would apply. It would then be clear that the law of international armed conflict offers a better protection than the law of non-international armed conflict does.

²⁷¹ Martín: 143

²⁷² The Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeal Chamber 2 October 1995, IT-94-1-AR72, Para. 203

5.3 Contextualizing the conclusions

Enhancing the substantive law protecting the victims of armed conflict is of course a most welcomed development. Still the greatest problem in IHL is the lack of possibilities to monitor the provisions. This crucial matter must be taken seriously in order to render the extended legal framework vital. An even more cynical approach to the fusion of the legal boxes could be made; the greatest problem in internal hostilities is not that only a few provisions are respected²⁷³, but that no provisions at all are respected. The need for an efficient monitoring body appears to be striking.

The fusion of the two legal regimes can also be put in relation to other issues of international law. Traditionally scholars have been eager to emphasise the difference between the law *ius ad bellum* and *ius in bello*. The legality of warfare should not be decisive as to whether the laws of war apply or not. In the last years, especially since the attack on 11th September 2001, art. 51 has been subject to a vivid debate. Armed attack has usually been interpreted as referring to an armed attack by another State, but the justification of the war in Afghanistan and subsequently the war on terrorism is based on a different interpretation. I have refrained from including this development as a proof of the sliding definition of an international armed conflict. This is just because of the risk involved when not separating these legal regimes. The existence of an armed attack should not be a precondition for the existence of an international armed conflict. Neither should the existence of an armed attack necessarily constitute an international armed conflict and thereby invoke the laws applicable to international armed conflicts. In reverse, the finding of an armed conflict as international should not have any impact on the issue of the right to self-defence.

There is also an ongoing discussion to what extent non-State political entities can acquire obligations and rights under international law.²⁷⁴ Such development would be in line with the internationalisation of internal armed conflicts. States are no longer seen as the only actors on the global arena. State sovereignty is loosing its weight as an argument for rejecting external interference in domestic affairs, and the notion of domestic affairs is itself diminishing. Protecting human rights is an international concern and the conclusions drawn in this study are part of this recognition.

²⁷³ art. 3 and AP II

²⁷⁴ see for instance Shaw: 173-176

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