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International and Non-International Armed Conflicts

International Armed Conflicts

Rule 19

An international armed conflict exists when hostilities, which may consist of or include nuclear hostilities, take place between two or more States.

1 Article 2 common to the four 1949 Geneva Conventions applies those Conventions 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'. There must therefore be a State-versus-State situation for an international armed conflict to exist.

2 While there is no specific definition of armed conflict, it is clear that hostilities, comprising the collective application of means and methods of warfare, are required. The API Commentary expresses the view that '[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict . . . '. The Commentary goes on to opine that 'it makes no difference how long the conflict lasts or how much slaughter takes place'.[1] This suggests that the threshold of violence that suffices for an international armed conflict to exist is fairly low, which is rather supported by the oft-quoted and authoritative statement by the ICTY Appeals Chamber in the *Tadić* case when ruling on the interlocutory appeal on jurisdiction: 'an armed conflict exists whenever there is a resort to armed force between States . . . '.[2]

3 According to the ICRC, however, '[i]t is important . . . to rule out the possibility of including in the scope of application of humanitarian law situations that are the result of a mistake or of individual *ultra vires* acts,

[1] API Commentary, para. 236.

[2] *Prosecutor* v. *Tadić*, International Criminal Tribunal for the Former Yugoslavia Case IT-94–1-A, Decision of 2 October 1995 on the Defence Motion for Interlocutory Appeal on Jurisdiction (Tadić Decision on Interlocutory Appeal on Jurisdiction), para. 70.

which – even if they might entail the international responsibility of the State to which the individual who committed the acts belongs – are not endorsed by the State concerned. Such acts would not amount to armed conflict.'[3] The present authors do not share that view. Firstly, wars or international armed conflicts of the past were possibly initiated by either a mistake or by ultra vires acts. Secondly, absence of State endorsement cannot be a criterion offering an operable basis on which to make such a distinction if the act in question was clearly committed by a State organ, such as the regular armed forces. Whose endorsement would be relevant? Thirdly, there would be an inherent contradiction in establishing a State's international responsibility for ultra vires acts by its organs while rejecting such acts for the purposes of conflict classification. In this context it must be remembered that a nuclear attack by a strategic submarine might be launched even though the political leadership has officially stated that it will refrain from the use of (nuclear) force.

4 A state of international armed conflict can exist irrespective of the view taken by an involved State. It is the factual circumstances that will determine whether the situation amounts to an international armed conflict and, thus, whether the rights and obligations set forth in the law of armed conflict will apply. That body of law will apply as soon as there has been a resort to armed force on a State-on-State basis. It therefore applies to the first use of force, whether this takes the form of an armed attack or a first use of force that has been authorised by the UN Security Council acting under Chapter VII. In this regard it must be borne in mind that *jus ad bellum* and *jus in bello* are distinct bodies of law. However, circumstances might arise in which a single act breaches both bodies of law. Consider, for example, a situation in which a State mounts an armed attack against its neighbour; the armed attack targets a civilian apartment block in the neighbouring State's territory and the apartment block is used exclusively for civilian purposes. That act will constitute both a breach of Article 2(4) of the UN Charter and an unlawful targeting of a civilian object.

5 A State-on-State situation will include circumstances in which an organised armed group that is subject to the 'overall control' of a State is involved in hostilities against another State.[4] While the control being exercised must go beyond 'the mere provision of financial assistance or military equipment or

[3] ICRC Commentary on GCI (2016), para. 241.

[4] Tadić Appeals Chamber Judgment, paras. 131, 145, 162. Consider also ICJ Genocide Judgment, para. 404; *Prosecutor* v. *Lubanga*, International Criminal Court, Case ICC-01/04-01/06, Trial Chamber I Judgment of 14 March 2012, para. 541.

training', the controlling authorities do not have to plan all the operations of the dependent units, choose their targets or give specific instructions as to the conduct of military operations. The required control exists when the relevant State '*has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group'.[5] Mere support by the State of a group that is engaged in a non-international armed conflict is insufficient to internationalise the armed conflict,[6] but it may constitute unlawful intervention in the internal affairs of the State where the non-international armed conflict is taking place.

5 Accordingly, if an organised armed group that is under the overall control of State A undertakes a series of cross-border attacks against commercial premises that are used for manufacturing key components of State B's intercontinental ballistic missile system, the resulting armed conflict will be international in nature because of the overall control being exercised by State A. It is not necessary for these purposes for State A to have specifically instructed the group to attack the particular target. The required degree of control will be present if State A gives general direction as to the kind of military campaign to be undertaken.[7]

6 Where the relevant actor is not an organised armed group but instead consists of individuals or loosely associated groups, the actions of the individuals or of the loosely associated group can be attributed to a State only if they are undertaken pursuant to specific instructions from, or under the effective control of, the State or the State subsequently acknowledges and adopts the action taken as its own.[8] So if, in the example given in the previous paragraph, the operation were to be undertaken by a group of individuals that is insufficiently organised to constitute an organised armed group, their actions could not be attributed to State A and would not render the conflict international in character.

7 While armed forces involvement is not essential to the characterisation of a situation as an international armed conflict, in the nuclear context relevant activities will often involve armed forces personnel and equipment. It should also be borne in mind that an armed conflict will exist if one State declares war against another State, irrespective of whether hostilities have yet taken place. Moreover, the law of international armed

[5] Tadić, Appeals Chamber Judgment, para. 137 (emphasis in original).
[6] Tadić, Appeals Chamber Judgment, para. 137.
[7] Tallinn Manual 2.0, Commentary accompanying Rule 82, para. 4.
[8] Consider Tadić Appeals Chamber Judgment, paras. 132, 137, 141, 145; ICJ Tehran Hostages Judgment, para. 74.

conflict will apply if a State or States are in belligerent occupation of another State's territory.[9]

Non-International Armed Conflicts

Rule 20

A non-international armed conflict occurs when protracted violence takes place in the territory of a State between its armed forces and organised armed groups or between such groups.

1 Article 3 common to the four Geneva Conventions of 1949 refers to 'the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties' and provides for some basic protection that reflects customary law.[10] So the law of non-international armed conflict applies where governmental armed forces are fighting against non-governmental organised armed groups or where such organised armed groups are fighting among themselves, in both cases in the territory of a State. The hostilities must attain a minimum level of intensity and the parties to the conflict must be sufficiently organised.

2 In the opinion of the present authors, Article 3's wording 'in the territory of one of the High Contracting Parties' is effectively referring to *any* State. The mere fact that, for example, nuclear operations are conducted by an organised armed group from outside the borders of the State in question does not cause the armed conflict to be international in nature.[11] It is the non-international nature of the conflict that is the important factor, and the law of non-international armed conflict will apply to all action between the parties to the conflict that relates thereto, irrespective of whether that action occurs inside or outside the territory of the State in question.[12]

3 Certain circumstances do not meet the intensity requirement that has to be satisfied for a non-international armed conflict to exist. Thus, 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature' do not meet the intensity

[9] If a naval or aerial blockade is established, this is likely to bring about an international armed conflict; see ICRC Commentary on Geneva Convention I (2016), para. 223.

[10] The same threshold is referred to in the Rome Statute, Article 8(2)(c). Note also UK Manual, para. 3.3; US DoD Law of War Manual, para. 17.1.1; AMW Manual, Commentary accompanying Rule 1(f); NIAC Manual, para. 1.1.1.

[11] AMW Manual, Commentary accompanying Rule 2(a).

[12] Tallinn Manual 2.0, Commentary accompanying Rule 83, para. 4.

requirement and are not non-international armed conflicts (NIACs).[13] It was the *Tadić* judgment that drew attention to the requirement of protracted armed violence between organised armed groups within a State.[14] There are therefore two essential elements that must pertain for a state of non-international armed conflict to exist: hostilities of sufficient intensity and the participation of an organised armed group.

4 In determining whether the intensity requirement is satisfied, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia suggests that the relevant factors will include the gravity and frequency of attacks, the time span and territorial extent of the hostilities, the degree to which the respective parties control territory, the mobilisation of volunteers, the distribution of weapons among the parties to the conflict and the extent to which the hostilities give rise to displacement of members of the population.

5 An armed group is organised if there is an established command structure and if it is able to conduct sustained military operations.[15] While the degree of organisation usually seen in a conventional unit of the armed forces is not required and while the organisation requirement is not precisely defined in international law, the general view seems to be that loosely associated groups of individuals that lack any form of leadership or command structure will generally not satisfy the 'organisation' criterion.

6 Ultimately, it will be a question of fact whether the intensity of the hostilities is sufficient and whether the armed group is sufficiently organised. Those issues will be determined by an objective assessment of the relevant information, irrespective of the interpretations of the parties involved.[16]

7 APII applies to armed conflicts not covered by Article 1 of API 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to

[13] APII, Article 1(2). See also Rome Statute, Article 8(2)(f); UK Manual, para. 15.2.1; US DoD Law of War Manual, para. 17.1.1; Canadian Manual, para. 1709; AMW Manual, Commentary accompanying Rule 2(a).

[14] Tadić Decision on Interlocutory Appeal on Jurisdiction, para. 70.

[15] *Prosecutor* v. *Limaj et al.*, International Criminal Tribunal for the Former Yugoslavia, Case IT-03-66, Judgment of 30 November 2005, para. 129.

[16] *Prosecutor* v. *Akayesu*, International Criminal Tribunal for Rwanda, Case ICTR-96-4-T, Judgment of 2 September 1988, para. 603; ICRC Commentary on Geneva Convention I (2016), paras. 861–9.

enable them to carry out sustained and concerted military operations and to implement this Protocol'.[17] So, while Article 3 and the customary law of non-international armed conflict apply to all NIACs, APII applies only to the particular kind of NIAC defined in Article 1(1) of the treaty, and the treaty will apply only if the State in question is a party thereto.

[17] APII, Article 1(1).