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Definition and Classification of Armed Conflicts

INTRODUCTION

International humanitarian law (IHL) is the body of rules that applies to armed conflicts.¹ An armed conflict is triggered when there is recourse to armed force. When the opposing parties are States, the armed conflict is international (IAC) whereas when the opposing parties are States and organised armed groups or only armed groups, the armed conflict is non-international (NIAC).² The classification of armed conflicts as either IACs or NIACs is critical for legal, political and operational purposes because of the different rules that apply to them. The existence of an IAC or a NIAC is a question of fact; it is not determined by the views of the parties nor is it determined by the legality or morality of the initial use of force.³ That said, the required degree of violence, the degree of organisation of the parties, and the geographic and temporal scope of an armed conflict are not easily determined, which complicates the process of classification of armed conflicts and of determining the applicable law. Furthermore, the multiplicity of actors (States, international organisations, individuals and groups) participating in armed conflicts, the diverse aims they pursue and the use of new technologies pose serious challenges to the definition and categorisation of armed conflicts as, for example, in cases of external intervention by States, the use of proxies, terrorism or the use of cyber weapons. International and national jurisprudence has grappled with these issues but, as the materials show, their conclusions have not always been consistent.

Resources: Common Articles 2 and 3, Geneva Conventions (GCs); Article 1, Additional Protocol I (API); Article 1, Additional Protocol II (APII)

¹ The term 'armed conflict' is used in this context as a generic term to describe a situation of armed violence.

² Common Articles 2 and 3, GCs and Art. 1, API and APII. For NIACs, see Chapter 10.

³ The distinction between *jus ad bellum* and *jus in bello* is well established and underpins the IHL principle of equality between belligerents.

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1.1 DEFINITION OF ARMED CONFLICT

1.1.1 ICTY, *Prosecutor v. Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1-A, Appeals Chamber (2 October 1995)

Note: *The ICTY considered an indictment of Dusko Tadić for crimes against humanity and violations of the laws or customs of war following his involvement in the conflict in Bosnia-Herzegovina between 23 May 1992 and 3 December 1992. On the issue of the definition of 'armed conflict', the Tribunal said:*

70. . . . an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

1.1.2 ICTR, *The Prosecutor v. Akayesu*, (Judgment), Case No. ICTR-96-4-T, Trial Chamber I (2 September 1998)

Note: *Following the deaths of Presidents Juvénal Habyarimana of Rwanda and Cyprien Ntaryamira of Burundi, widespread violence erupted in Kigali and other parts of Rwanda. Jean Paul*

Akayesu was indicted for genocide, crimes against humanity and war crimes. On the issue of whether an armed conflict existed at the time, the Tribunal said as follows:

603. It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. . . . If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto.

1.1.3 ICTR, *The Prosecutor v. Rutaganda*, (Judgment and Sentence), Case No. ICTR-96-3-T, Trial Chamber I (6 December 1999)

Note: *Georges Rutaganda was indicted for genocide, crimes against humanity and violations of Common Article 3 GCs for his involvement in the widespread killings of Tutsis in the prefectures of Kigali and Gitarama territory of Rwanda between 1 January 1994 and 31 December 1994. On the issue of the definition of armed conflict, the Tribunal confirmed:*

93. . . . the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an ‘armed conflict’, meeting the criteria of common Article 3, is to be decided upon on a case-by-case basis.

1.1.4 ICTR, *The Prosecutor v. Alfred Musema*, (Judgment and Sentence), Case No. ICTR-96-13-A, Trial Chamber I (27 January 2000)

Note: *Alfred Musema in concert with others brought armed individuals to the area of Bisesero and directed them to attack the Tutsis seeking refuge there. In addition, Alfred Musema personally attacked and killed Tutsis seeking refuge in Bisesero. In determining the existence of an armed conflict, the Trial Chamber reinforced the approach of the Tribunal in the earlier cases of Akayesu and Rutaganda in the following terms:*

248. The expression “armed conflicts” introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order.

1.1.5 UK, British Ministry of Defence, *The Joint Service Manual of the Law of Armed Conflict* (Joint Service Publication 383, 2004 Edition)

3.3. Neither the Geneva Conventions nor Additional Protocol I contain any definition of the expression ‘armed conflict’ but the following guidance has been given:

- a. ‘any difference arising between States and leading to the intervention of members of the armed forces is an armed conflict’;

b. ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups within a State’.

3.3.1. These definitions do not deal with the threshold for an armed conflict. Whether any particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances. For example, the replacing of border police with soldiers or an accidental border incursion by members of the armed forces would not, in itself, amount to an armed conflict, nor would the accidental bombing of another country. At the extreme, a full-scale invasion would amount to an armed conflict. . . .

3.12. One of the most important characteristics of the law of armed conflict is its universal application. It applies with equal force to all parties engaged in an armed conflict, whether or not any party is considered to be ‘an aggressor’ or ‘a victim of aggression’.

**1.1.6 Australia, Australian Defence Force, *Law of Armed Conflict*,
 (Executive Series, Australian Defence Doctrine Publication
 06.4, 11 May 2006)**

3.5. Whether any particular factual situation meets the threshold so as to become an armed conflict will depend on all circumstances surrounding a particular event.

**1.1.7 ICTY, *Prosecutor v. Boškoski and Tarčulovski*, (Judgment),
 Case No. IT-04-82-T, Trial Chamber II (10 July 2008)**

Note: *The case of Boškoski and Tarčulovski concerns crimes committed between 12 and 15 August 2001 against the ethnic Albanians from Ljuboten village near Skopje in the former Yugoslav Republic of Macedonia. Both Defendants challenged the jurisdiction of the Tribunal on the basis there was no armed conflict at the relevant time. The Tribunal held:*

174. . . . the question of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial.

**1.1.8 ILA, Use of Force Committee, *Final Report on the Meaning
 of Armed Conflict in International Law*, (The Hague, 2010), p. 28**

The discussion above supports the position that armed conflict is to be distinguished from “incidents”; “border clashes”; “internal disturbances and tensions such as riots, isolated and sporadic acts of violence”; “banditry, unorganised and short lived insurrections or terrorist activities” and “civil unrest, [and] single acts of terrorism”. The distinction between these situations and armed conflict is achieved by reliance on the criteria of organisation and intensity.

1.1.9 US, Department of Defense, *Law of War Manual*, Office of General Counsel (June 2015, Updated 2016)

3.3.1 International Armed Conflict and Non-International Armed Conflict. The law of war treats situations of “war,” “hostilities,” or “armed conflict” differently based on the legal status of parties to the conflict. If two or more States oppose one another, then this type of armed conflict is known as an “international armed conflict” because it takes place between States. However, a state of war can exist when States are not on opposite sides of the conflict.

These other types of conflict are described as “not of an international character” or “non-international armed conflict.” For example, two non-State armed groups warring against one another or States warring against non-State armed groups may be described as “non-international armed conflict,” even if international borders are crossed in the fighting. . . .

3.4.1 Intent-Based Test for Applying *Jus in Bello* Rules. *Jus in bello* rules apply when a party intends to conduct hostilities. . . .

3.4.1.2 Non-State Armed Groups With the Intention of Conducting Hostilities. A non-State armed group, such as a rebel group, might also intend to conduct hostilities. . . .

3.5.1 General Distinction Between *Jus in Bello* and *Jus ad Bellum*. As a general matter, *jus in bello* and *jus ad bellum* address different legal issues and should not be conflated . . .

3.5.2.1 Compliance With *Jus in Bello* Is Required Regardless of Compliance With *Jus ad Bellum*.

1.2 DEFINITION OF INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICT

1.2.1 Definition of International Armed Conflict

1.2.1.1 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, (Decision on the Confirmation of Charges), Case No. ICC-01/04-01/06 (29 January 2007)

Note: *Thomas Lubanga was charged with war crimes arising out of his involvement in the conflict in the Congo between September 2002 and 2 June 2003, when he enlisted and conscripted children under the age of fifteen into the Forces Patriotiques pour la Libération du Congo (FPLC) to actively participate in hostilities in the Congo. Defining IAC, the ICC said:*

209. The Chamber considers an armed conflict to be international in character if it takes place between two or more States; this extends to the partial or total occupation of the territory of another State, whether or not the said occupation meets with armed resistance. In addition, an internal armed conflict that breaks out on the territory of a State may become international – or, depending upon the circumstances, be international in character alongside an internal armed conflict – if (i) another State intervenes in that conflict through its troops (direct intervention), or if (ii) some of the participants in the internal armed conflict act on behalf of that other State (indirect intervention).

1.2.1.2 **Cambodia, *Kaing Guek Eav alias Duch*, (Judgment), Case File/Dossier No. 001/18-07-2007/ECCC/TC, Extraordinary Chambers in the Courts of Cambodia (26 July 2010)**

Note: *Case 001 was the first case before the Extraordinary Chambers in the Courts of Cambodia. The Defendant, Kaing Guek Eav alias Duch, was the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh. He was indicted for crimes against humanity and war crimes. In relation to the clashes between Cambodia and Vietnam in 1975, it was held:*

423. The Chamber finds that armed hostilities existed between Cambodia and Vietnam from 17 April 1975 through 6 January 1979. Continuous clashes, whether border skirmishes or more serious incursions into both Cambodian and Vietnamese territory, continued throughout this period, despite DK and Vietnam's desire to keep them covert at the outset. The Chamber concludes that an international armed conflict accordingly existed at all times.

1.2.1.3 **Germany, Federal Ministry of Defence, *Law of Armed Conflict – Manual – Joint Service Regulation (ZDv) 15/2* (May 2013)**

203. An international armed conflict triggering the applicability of LOAC exists if one State Party to a conflict uses armed force against another State. It is irrelevant, however, whether the Parties to the conflict consider themselves to be at war with each other, and how they denote this conflict.

1.2.2 Direct State Intervention

1.2.2.1 **ICTY, *Prosecutor v. Blaškić*, (Judgment), Case No. IT-95-14-T, Trial Chamber (3 March 2000)**

Note: *Tihomir Blaškić was indicted for grave breaches of the GCs, violations of the laws and customs of war and crimes against humanity committed by the Croatian Defence Council (HVO) between May 1992 and January 1994 against Bosnian Muslims. Blaškić was commander of the HVO. The Tribunal concluded as follows as to Croatia's involvement in Bosnia-Herzegovina (BH):*

94. . . . Based on Croatia's direct intervention in BH, the Trial Chamber finds ample proof to characterise the conflict as international.

1.2.2.2 **ICTY, *Prosecutor v. Kordić and Čerkez*, (Judgment), Case No. IT-95-14/2-T, Trial Chamber (26 February 2001)**

Note: *This case concerned attacks on Vitez and the Muslim villages of Lašva Valley in April 1993. The Tribunal found the attacks were the product of a well-organised and planned attack by the HVO. The Tribunal concluded:*

109. . . . the Chamber finds that the conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina was internationalised by the intervention of Croatia in that conflict through its troops.

1.2.2.3 ICC, *The Prosecutor v. Mbarushimana*, (Decision on the Confirmation of Charges), Case No. ICC-01/04-01/10-465-Red, Pre-Trial Chamber I (16 December 2011)

Note: *Callixte Mbarushimana was a member of the Comité Directeur of the Forces Démocratiques pour la Libération du Rwanda (FDLR). The ICC concluded as follows in relation to the intervention of Rwandan forces in DRC (Democratic Republic of the Congo) territory:*

101. The Chamber finds substantial grounds to believe that the presence and involvement of Rwandan troops in DRC territory during Umoja Wetu was aimed at assisting and supporting the FARDC in its efforts aimed at neutralising the FDLR. It was a joint military operation, whereby the presence of the Rwandan forces was, at all times, with the consent of the authorities of the DRC. The participation of Rwanda in operation Umoja Wetu cannot therefore be characterised as arising from a “difference arising between two states” since the two governmental forces (FARDC and Rwanda Defence Force (RDF)) fought side by side against a common enemy, the FDLR.

102. Accordingly, the Chamber finds that the armed conflict waged in the Kivus during operation Umoja Wetu does not satisfy the conditions that would establish the existence of an international armed conflict within the meaning of international humanitarian law.

1.2.3 State Control Over an Armed Group

1.2.3.1 ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits, Judgment) [1986] I.C.J. Rep. 14

Note: *The case was brought by Nicaragua, which accused the United States of planning and undertaking armed activities against Nicaragua by using paramilitaries, the contras, with the intention of overthrowing the new Sandinista government. Nicaragua alleged the United States was ‘in control’ of the contras and that consequently it was responsible for violations of international law. In assessing whether the acts of the contras could be attributed to the United States and thus whether it could be held responsible for violations of IHL, the ICJ said:*

115 The Court has taken the view . . . that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the contras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the contras without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

1.2.3.2 ICTY, *Prosecutor v. Tadić*, (Judgment), Case No. IT-94-1-A, Appeals Chamber (15 July 1999)

Note: *The facts of this case are set out in Section 1.1.1. The ICTY also addressed the question of what level of control by a State over an organised armed group or individuals can internationalise an armed conflict.*

115. The “effective control” test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the Judgment. The Appeals Chamber, with respect, does not hold the Nicaragua test to be persuasive. . . .

137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *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. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts. . . .

145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a “military organization”, the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.

1.2.3.3 ICJ, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (Judgment) [2007] I.C.J. Rep. 43

Note: *The ICJ was asked to declare that the Federal Republic of Yugoslavia had directly or through the use of 'surrogates' violated the Convention on the Prevention and Punishment of the Crime of Genocide. Addressing the requisite degree of State control over an armed group, the ICJ stated:*

404. ... Insofar as the “overall control” test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable; ... On the other hand, the ICTY presented the “overall control” test as equally applicable under the law of State responsibility for the purpose of determining – as the Court is required to do in the present case – when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive.

1.2.3.4 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, (Decision on the Confirmation of Charges), Case No. ICC-01/04-01/06 (29 January 2007)

Note: *The facts are set out in Section 1.2.1.1. In addition to defining IAC, the ICC considered the circumstances in which a non-State armed group can be considered to be acting on behalf of a foreign State, rendering the armed conflict international in character. The ICC said as follows:*

211. The Chamber holds the view that when a State does not *intervene directly* on the territory of another State through its own troops, the overall control test will be used to determine whether armed forces are acting on behalf of the first State. The test will be met where the first State has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping the group or providing operational support to it.

1.2.3.5 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, (Judgment Pursuant to Article 74 of the Statute), Case No. ICC-01/05-01/08 66/364, Trial Chamber III (21 March 2016)

Note: *Jean-Pierre Bemba was the President of the Mouvement de Libération du Congo (MLC) and Commander-in-Chief of its military branch, the Armée de Libération du Congo (ALC), charged with crimes against humanity and war crimes within the territory of the neighbouring Central African Republic (CAR). The armed conflict in CAR involved its government supported by the MLC and the organised armed group of General Bozizé's rebels. The ICC opined on the character of the armed conflict in CAR as follows:*

130. The Chamber considers that an armed conflict not of an international character, but involving the governmental authorities of one state, may become internationalised owing to a second state's participation on an opposing side of the conflict. In this regard, the Chamber notes that Trial Chambers I and II found that an armed conflict may be considered

internationalised when it is established that armed groups are acting *on behalf of* a foreign government. . . .

302. For determining whether an armed group is acting on behalf of a state, Trial Chambers I and II endorsed the “overall control” test, as set out by the ICTY Appeals Chamber in the *Tadić* case . . .

654. Recalling that a conflict will only be transformed to an international armed conflict where a second state is involved, directly or indirectly, on an *opposing* side of the conflict, the Chamber focuses its analysis on whether General Bozizé’s rebels, or any aligned forces, were acting on behalf of a foreign government.

655. . . . there is no evidence that the Chadian government had any role in organizing, coordinating, or planning the military actions of General Bozizé’s rebels. Accordingly, the Chamber finds that General Bozizé’s rebels were not acting on behalf, i.e. under the “overall control”, of any foreign government.

656. In light of the above, the armed conflict, which was confined to the territory of the CAR, cannot be viewed as one in which two or more states opposed each other, or one in which territory was occupied by a hostile, foreign state. The Chamber thus finds beyond reasonable doubt that the armed conflict in the context of the 2002–2003 CAR Operation was not of an international character.

1.2.4 Definition of Non-International Armed Conflict⁴

1.2.4.1 IACHR, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95, Doc 7 rev. (18 November 1997)

Note: *The case concerned events that occurred on 23 and 24 January 1989 at the barracks of the General Belgrano Mechanized Infantry Regiment No. 3, located at La Tablada, Buenos Aires province, when a group of forty-two persons launched an armed attack on the barracks. The attack and the ensuing conflict lasted for some thirty hours and resulted in the deaths of twenty-nine of the attackers and several State agents. As to what constitutes a NIAC, the Commission said:*

152. . . . Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces or groups that take place within the territory of a particular State. Thus, Common Article 3 does not apply to riots, mere acts of banditry or an unorganized and short-lived rebellion. Article 3 armed conflicts typically involve armed strife between governmental armed forces and organized armed insurgents. It also governs situations where two or more armed factions confront one another without the intervention of governmental forces where, for example, the established government has dissolved or is too weak to intervene. It is important to understand that application of Common Article 3 does not require the existence of large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory.

⁴ For NIACs, see Chapter 10.