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PROBLEMS OF INTERNATIONAL AND INTERNATIONALIZED ARMED CONFLICT

BRIEF OVERVIEW

This module provides an overview of the distinctions between the types of armed conflict that exist under the International Humanitarian Law. Further, it discusses the emergence of internationalised armed conflict and various provisions that exist under the law to determine the internationalisation of an armed conflict.

The module contains examples of recent internationalised armed conflicts. Further, it establishes the difference between the 'effective control test' and the 'overall control test' of determining the internationalisation of an armed conflict.

OBJECTIVE

The objective of this module is to make the readers understand the difference between the three types of armed conflicts. Also, the module aims to establish a fine distinction between international and internationalised armed conflicts by way of various judgments and law. The module also aims to make a clear distinction between the 'Overall control' test and the 'Effective control' tests and their utility in the current scenario.

INTRODUCTION

With the rise of globalisation and international treaties, the interaction between different states of the world is increasing. The world is more aware of what is happening around them. Motivations for intervention in civil wars may have changed since the end of the Cold War, but with the increased economic interdependence of states born of *globalization*, the development of nuclear capabilities among previously incapable states, the greater incidence of terrorism in Western countries and the increasing scarcity of natural resources all provide continuing incentives for foreign intervention in domestic conflicts.¹ As a result, a third perspective of armed conflict i.e. internationalised armed conflict has been added to the existing international and non-international armed conflict.

DEFINITION

Before moving further, it is important to understand the definition of each type of armed conflict under the International Humanitarian Law.

¹James G. Stewart "Towards a single definition of Armed Conflict in International Humanitarian Law", International Review of Red Cross, No. 850,2003, pg 315

The International Committee of Red Cross has defined the internal and international armed conflicts in the following ways²-

International Armed Conflict exists whenever there is resort to armed force between two or more States.

Non-International Armed Conflict is protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.

Although the International Humanitarian Law has made a distinction between the types of conflict, one question remains to be answered. The question of addressing those armed conflict, which had elements of both- international armed conflict and internal armed conflict.³

Internationalized armed conflict: An internationalised non-international armed conflict is a civil war characterised by the intervention of the armed forces of a foreign power.⁴ There is no specific

²<https://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>

³ James G. Stewart "Towards a single definition of Armed Conflict in International Humanitarian Law", International Review of Red Cross, No. 850,2003, pg 318

⁴ Hans P. Gasser, "Internationalized non international armed conflicts: case studies of Afghanistan, Kampuchea and Lebanon", The American University law review,1983, pg 1

provision in the International Humanitarian Law to deal with the Internationalized Armed conflicts.

ARMED CONFLICT TYPE TRENDS

Figure 1: Armed Conflicts per Type, 1946–2006.

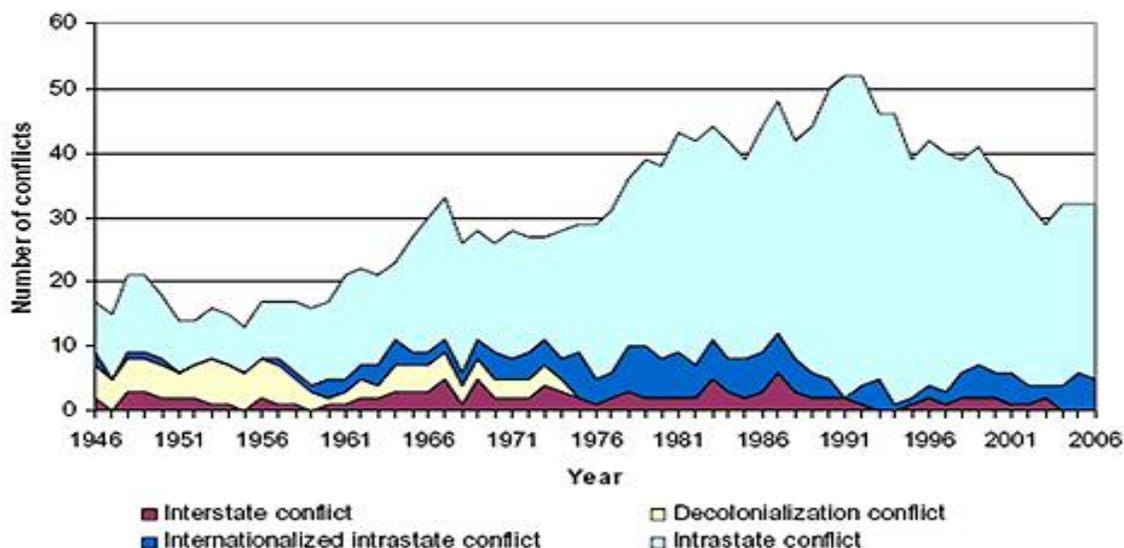


Figure 1: The above graph shows the trend in types of armed conflict over years.

DIFFERENCE BETWEEN THE TWO

While International armed conflict is between the states. On the other hand, the internationalised armed conflict is achieved by the intervention of the second state in the ongoing internal crisis of any state. The involvement of the second state in the internal conflict, however, cannot always lead to the internationalization of a Non-international armed conflict. For example, the conflict between the state of Afghanistan and the terror group Taliban does not become internationalised by the US, UK or NATO forces. This is because the US, UK and NATO forces were allies with the government in fighting against Taliban and did not play a role of second state.

The Geneva Convention of 1949 and the additional protocols, 1977 consists of 600 articles out of which only the common article 3 and the 28 articles of the Additional Protocol II are applicable to the internal armed conflicts. Rest all other guidelines and rules are for the international armed conflict. On the other hand there is no provision for the internationalised armed conflicts.

HOW DOES NIAC GETS INTERNATIONALIZED

The factual circumstances that can achieve that internationalization are numerous and often complex: the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.⁵

In the *Tadić Appeal Judgement*⁶, the Appeals Chamber of the ICTY (International Criminal Tribunal for former Yugoslavia) stipulated that: “It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”⁷ The above conditions set by the ICTY provides conditions for the internal armed conflict to become international. In the same case the ICTY provided the ‘overall control’ test to determine the internationalisation of an armed conflict.

The *Tadić Appeal Judgement’s* test to determine the internationalisation of an internal armed conflict is “some of the participants in the internal armed conflict act on behalf of [an] other State.”⁸ It says that the ‘overall control’ of any rebel group going against the state would be sufficient to internationalize the armed conflict. This standard is satisfied if any state outside the territory ‘has a role in organizing, coordinating and planning the military action’.⁹

⁵D. Schindler, “International humanitarian law and internationalized internal armed conflicts”, *International Review of the Red Cross*, No. 230, 1982, p. 255

⁶*Prosecutor v. Tadić*, T-94-1-A, Judgement, 15 July 1999

⁷*I.d.* at para. 84

⁸*I.d.*

⁹*I.d.* at para. 131



Figure 2: The International Criminal Tribunal for the former Yugoslavia was an ad-hoc Court for trying the crimes that took place during the conflict in the Balkans in the 1990's.

Another way in which a conflict can become international is provided in Article 1, paragraph 4 of Additional Protocol I, 1977. It says when the conflict occurs between the state party and an authority representing its people "against colonial domination and foreign occupation and against the racist regimes in the exercise of the right of peoples to self-determination"¹⁰, such conflict becomes international.

According to Marco Milanovic, Secretary General of European society of international law, there are only two situations where with the intervention of a second state in the NIAC between a state and non state actor, the conflict is internationalized-

1. State A intervenes into the internal conflict of state B in support of the non-state actor and against the state B.
2. State A acts against the non state actor present in state B, without the permission of state B.

Situations where a state A would act against the non state actor present in state B in alliance with state B will not be termed as an international armed conflict.

See more at <http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/>

¹⁰ Article I, para. 4, Additional Protocol I, 1977

IHL- TIMELINE

April 24, 1863: The Lieber Code was introduced. It was a field manual instructing the US Army on how to behave in the war.

October 26-29, 1863: International conference is held in Geneva to discuss the laws of war, proposed by Henry Dunant.

August 22, 1864: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field adopted, Geneva. This is the First Geneva Convention.

July 29, 1899: An International Peace Conference is held at The Hague which leads to the birth of various Hague Conventions.

August 8, 1945: The Allied powers of World War II create an International Military Tribunal to prosecute Nazi war criminals in Nuremberg, London.

November 21, 1945: Some 21 Nazi leaders are prosecuted for crimes of aggression, war crimes and crimes against humanity in Nuremberg. Eleven are sentenced to death, three are acquitted and the rest are imprisoned.

October 1946: In the wake of the precedent set by Nuremberg, an international congress is convened in Paris calling for the adoption of an international criminal code prohibiting crimes against humanity and the prompt establishment of an International Criminal Court (ICC).

December 10, 1948: The UN General Assembly adopts the Universal Declaration of Human Rights detailing human rights and fundamental freedoms.

August 12, 1949: Another diplomatic conference is held in Geneva, establishing: - Convention I for the Amelioration of the Condition of the Wounded and Sick in armed forces in the field. - Convention II for the Amelioration and the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. - Convention III is relative to the Treatment of Prisoners of War. - Convention IV relative to the Protection of Civilian Persons in time of War.

June 8, 1977: Additional Protocols of the Geneva Conventions are adopted: - I relation to the Protection of Victims of International Armed Conflicts. - II, relating to the Protection of Victims of Non-International Armed Conflicts.

October 10, 1980: A UN Conference in Geneva establishes: - Prohibitions on the Use of Certain Conventional Weapons Which May be deemed to be Excessively Injurious or to have Indiscriminate Effects. - Protocol on Non-Detectable Fragments. - Protocol on Prohibitions or restrictions on the Use

of Mines, Booby-Traps and Other Devices - Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons.

December 10, 1984: UN General Assembly adopts the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

May 25, 1993: the UN Security Council establishes an International Criminal Tribunal to prosecute war crimes in the former Yugoslavia.

November 8, 1994: The UN General Assembly establishes a second International Criminal Tribunal to prosecute war crimes in Rwanda.

June 17, 1998: Rome Statute establishing the International Criminal Court is finalised and adopted.

International Criminal Tribunals and the ICC

1. Ad-Hoc courts of limited jurisdiction

- Nuremberg and Tokyo tribunals
- International Criminal tribunal on Rwanda
- International Criminal Tribunal on former Yugoslavia
- Sierra Leone, Timor Leste, Cambodia....

2. ICC

- Expansion in time: A permanent court
- Expansion in space: Not limited to regions

US WAR ON TERROR

On September 11, 2001, four domestic commercial aircraft were hijacked by 19 men from three airports on the East Coast of USA¹¹. The hijackers were identified as men from the organization Al Qaeda. Two of the airplanes were deliberately flown into the World Trade Center in Manhattan, New York. As a result, both of the towers collapsed. Around three quarters of an hour following this attack the Pentagon building in Washington DC was struck by another of the airplanes. About 15 minutes later the fourth hijacked airplane crashed in the field in Pennsylvania.



Figure 3: The attack on 9/11 gathered a he public support for the USA's decision of declaring war against terrorism.

Following this attack, the then US President George W Bush stated that America was in a war on terrorism. A resolution dated 18th Sept 2001 was passed by the US Congress authorising the President to use all necessary and appropriate force against those nations, organisation or persons he determines planed, authorized, committed or aided the terrorist attack that occurred on Sep, 11, 2001.¹²

¹¹ Crawford, Emiley, The treatment of combatants and insurgents under the Law of Armed Conflict, 2010, pg 57

¹²*l.d.*

On October 2001, the United States in conjunction with NATO began airstrikes against the Taliban regime, the authorities in power in Afghanistan. By 2003, the war on terror had spread to include Iraq and the regime of Saddam Hussein whom they suspected was hiding the suspected terrorists and Al Qaeda operatives.

The US had also instituted a policy of detention of the persons arrested in relation to the 'war on terror'. Bulks of foreign detainees were taken to the US military base in Guantanamo Bay in Cuba. The then US government also tried to limit the protection and remedies offered to detained persons. Both US law and International law was challenged by the detainees a number of times.

HAMDAN V RUMSFELD¹³

Salim Ahmed Hamdan worked under Osama Bin Laden in Afghanistan. During the US invasion of Afghanistan in 2001, he was captured by the US army and put in Guantanamo Bay detention camp. Hamdan v Rumsfeld¹⁴ was the case filed by Hamdan for his liberty and release from Guantanamo Bay as per the Geneva Conventions. In the court, the Bush administration argued that the Geneva conventions will not apply as the US conflict with the organisation Al-Qaeda did not qualify as either an international armed conflict or a non-international armed conflict.

The common article 3 states that article applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties". The Bush administration justified the detention of Hamdan by stating that the Common Article 3 does not apply in the situation as the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." ¹⁵

The Supreme Court rejected their argument and said that, at minimum, Common Article 3 applies to the conflict with Al Qaeda. Article 3 to all four Geneva Conventions, provides that in a "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," certain provisions protecting "[p]ersons 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 ... detention." One such provision prohibits "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 recognised as indispensable by civilised peoples."

¹³ 548 U.S. 557 (2006)

¹⁴ *Id.*

¹⁵ 415 F. 3d, at 41.

The decision was based on the idea that “the US is a High Contracting party to the Geneva Conventions, its conflict with Al Qaeda is taking place in the territory of a high contracting party, as Afghanistan is also a party to the Geneva convention; the U.S. is fighting against a non-state group-Al Qaeda- rather than another state. The US conflict with Al Qaeda is a non-international armed conflict, and common article 3 applies.”¹⁶

From the ruling of the Supreme Court in the *Hamdan v Rumsfeld*, it can be implied that the Common Article 3 should be applied universally to all the conflicts as a set of basic fundamental rules to be observed in armed conflict, provided that the conflict takes place in the territory of a party to the Geneva Conventions.¹⁷

TESTS TO DETERMINE INTERNATIONALIZED ARMED CONFLICT

The International Court of Justice (ICJ) in *The Republic of Nicaragua v. The United States of America* determined the responsibility of the United States for armed conflict between the Contras it had sponsored and the Nicaraguan government.¹⁸ In defining the circumstances in which an insurgent’s acts can be attributed to a State, the Court applied what it described as an “effective control” test,¹⁹ which involved assessing: “whether or not the relationship of the Contras to the United States Government was so much one of ‘dependence on the one side and control on the other’ that it would be right to equate the Contras, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government.”

However, the *Tadić Appeal Judgment* overruled the Trial Chamber’s support for the strict “effective control” test espoused in the *Nicaragua case*. The “overall control” test²⁰ was developed. According to the “overall control test” the following points had to be proved to show that the conflict was internationalised-

i. Where the question involves the acts of a single private individual or a not militarily organised group that is alleged to have acted as a de facto State organ,

“It is necessary to ascertain whether specific instructions concerning the commission of that particular act has been issued by that State to the individual or group in question, or alternatively, it

¹⁶ Crawford, Emiley, *The treatment of combatants and insurgents under the Law of Armed Conflict*, 2010, pg 57

¹⁷ *I.d.* at 58.

¹⁸ 1986 I.C.J 14

¹⁹ *I.d.* at para 115

²⁰ *I.d.*

must be established whether the unlawful act has been publicly endorsed or approved ex post facto by the State at issue.”²¹

ii. The control by a state over the subordinate armed forces, militias or paramilitary force required that a state “has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group” but that “does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation”²²

iii. The third requirement of the test was “assimilation of individuals to State organs on account of their actual behaviour within the structure of a State.”²³

Thus the test of ‘effective control’ prescribed by the International Court of Justice in *The Republic of Nicaragua v. The United States of America* was overruled. The current status to determine whether an internal armed conflict is internationalised is determined through the ‘overall control test’ given by *The prosecutor v Dusan Tadic*.

²¹ . *Prosecutor v. Tadić*, T-94-1-A, Judgement, 15 July 1999(note 59), para 137.

²²*I.d.*

²³*I.d.* at para.141.