Chapter Seven

The Law of Non-International Armed Conflict

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- The scope and number of IHL treaty rules governing non-international armed conflicts are far less extensive than those applicable to international armed conflicts.
- Internal armed conflicts are covered by Art.3 common to the GCs, AP II to the Conventions, and by a certain number of other treaties.
- *What is non-international armed conflict?*

Cont’d

- In determining which regime of law is applicable to a certain conflict, it becomes crucial first to ascertain its type.
- There is also an evolving third type of conflict called internationalized armed conflicts.
- International armed conflicts are conflicts between states.
- They are inter-state armed conflicts.

Cont'd

- Non-international armed conflicts are generally armed conflicts taking place within the boundaries of one country between the government forces and non-government armed groups (rebels) or among rebels themselves.
- There is no other States participation in the conflict.
- Thus, they are sometimes referred to as internal armed conflicts. *War of secession?*

Cont’d

- The notion of internationalized armed conflicts is not clear.
- But it is understood as armed conflicts sharing the feature of both international and non-international armed conflicts.
- It is also understood as conflicts originally internal in nature but that have taken a different form because of the involvement of other States in support of any of the groups fighting.

Cont’d

- James G. Stewart states 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 armed conflict in support of opposing sides;
- War involving a foreign intervention in support of an insurgent group fighting an established government.

Cont’d

- As far as, international armed conflict is concerned, states have for a long time accepted that soldiers killing enemy soldiers on the battlefield may not be punished for their mere participation. I.e.
- They have a “right to participate” in hostilities.
- But the law of non-international armed conflicts is more recent.

Cont’d

- States have for a long time considered such conflicts as their internal affairs governed by their domestic laws.
- No State is ready to accept that its citizens would wage a war against their own government.
- No government would in advance renounce to punish its own citizens for their participation in the rebellion.

Cont’d

- Such renunciation, however, is the essence of the combatant status as prescribed by the law of international armed conflicts.
- To apply all rules of contemporary IHL of international armed conflicts to internal one would be incompatible with the very concept of the contemporary international community composed of sovereign States.
- Thus, currently we have two separate branches of IHL to be studied, interpreted and applied based on the nature of the conflict.

The Rules Applicable to Non-International Armed Conflicts

1. Rules of Common Article 3 and Additional Protocol II

- When the 1949 Geneva Conventions were drafted and adopted, only one article has been agreed upon regarding ‘non-international armed conflicts’.
- This article contains identical provisions and incorporated in all four Geneva Conventions as Article 3, and hence called common Article 3.

Cont’d

- The minimum protection provided by the article is stated broadly as humane and non-discriminatory treatment, in all circumstances, of persons taking no active part in the hostilities.
- However, common Article 3 has two shortcomings.
- First, it provides only a minimum of protection. E.g. means and methods

Cont’d

- Second, common Article 3 does not define ‘armed conflicts not of international character’.
- Thus in practice this wording has left room for governments to contest its applicability to situations of internal violence inside their countries.

Cont’d

- Additional Protocol II sets out numerous important guarantees for the protection of those affected by non-international armed conflicts.
- It expands the protection offered by common Article 3 to include:

✓ prohibitions on collective punishments,

✓ violence to health and physical and mental well-being,

✓ acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage.

Cont’d

- It also includes provisions for the protection of children, for the protection and rights of those detained for reasons related to the conflict,
- It provides fair trial guarantees for those prosecuted for criminal offences related to the conflict.
- There are also articles dealing with the protection and care of the wounded, sick and shipwrecked and the protection of medical and religious personnel.

Cont’d

- Protocol II also prohibits attacks on the civilian population, the use of starvation as a method of war, and the arbitrary displacement of the civilian population.
- The most serious omissions concern the many specific protections for civilians against the effects of hostilities found in Protocol I.
- It provides only a few general rules on those matters dealt with by protocol I in detail.

Cont’d

- However, the bigger difficulty with Protocol II is that the protection it offers only apply in internal conflicts meeting a certain threshold of intensity and nature (Art.1 (1) (2)).
- It is argued that this two-fold test would appear to limit the application of Protocol II to situations at or near the level of a full-scale civil war.

Cont’d

- Neither the Protocol nor any other agreement allows for an impartial outside body to decide on whether or not the criteria are met to apply the Protocol.
- Thus it is largely left to the goodwill of the government concerned.

Cont’d

2. Customary IHL

- The clause, known as Martens clause, is found in the preamble to Protocol II:

“Recalling that, in cases not covered by the laws in force, the human person remains under the protection of ***the principles of humanity and the dictates of the public conscience***.”

Cont’d

- Like common Article 3, Martens clause provides important protections.
- But the problem has been in determining, both in general and as regards any specific case, what is prohibited by the “principles of humanity and the dictates of the public conscience”.
- What does it include?

Cont’d

3. General Principles of IHL

- These principles include:
  - The principle of distinction,
  - The principle of military necessity,
  - The principle of proportionality, and
  - The right to relief (humanitarian assistance).

Cont’d

4. Analogical Application

- The law of international armed conflict may also analogically apply to regulate internal armed conflicts.
- There is a necessity of analogical application.
- Mainly to fill gaps (e.g. definition of military objectives, it does not use ‘combatant’ let a lone its duty, means and methods, use of emblem)

Parties Bound by the Law of Non-international Armed Conflicts

- From the point of view of the law of treaties, common Art.3 and AP II bind the States party to those treaties.
- This obligation of States includes a responsibility for all those who can be considered as agents of those states.
- IHL must, however, also bind non-state parties in a non-international armed conflict.

Cont’d

- This includes not only those who fight against the government but also armed groups fighting each other. Do you agree?
- “… each Party to the conflict …” Common Art.3 (1).
- There are difficulties on the legal mechanisms for its implementation, particularly on the part of non-state armed groups.