

The beginning of application of international humanitarian law: A discussion of a few challenges

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Abstract

This article discusses some of the challenges related to the beginning of application of international humanitarian law (IHL). It concludes that IHL pertaining to international armed conflicts begins to apply as soon as one State employs force in the territory of another State without the latter's consent, provided that the violence is of a collective nature. In the case of non-international armed conflicts, this article acknowledges that it is now well settled that the two key criteria are the organization of the parties to the conflict and the level of intensity of the violence. This article shows however that some of the challenges inherent to the beginning of application of IHL make it almost impossible to identify a very single point in time at which it begins to become applicable, be it for international armed conflicts, including occupation, or non-international armed conflicts.

Keywords: IHL, temporal scope of application, beginning of application, beginning of armed conflict, international armed conflict, non-international armed conflict, occupation.

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The point in time at which international humanitarian law (IHL) begins to apply to a situation varies. Notwithstanding the series of limitations on the human person that IHL may involve, once it is deemed to apply, this branch of law also triggers a range of protective rules to the benefit of persons affected by armed conflicts. It is therefore crucial to be able to determine the point at which IHL begins to apply. Over and above the rules covering occupied territories, which are discussed below and which are among the most protective, IHL provides some substantial safeguards, for instance to persons who are deprived of their liberty in times of armed conflicts, in accordance with a specific conceptual framework adapted to the extraordinary circumstances of armed conflict. The simultaneous application of human rights law in armed conflict might obscure the usefulness of implementing the rules of IHL in matters of detention. However, in international armed conflicts (IACs), the status conferred by IHL imposes a number of obligations which are not found in any other body of law. It is sufficient to think of the prohibition on prosecuting prisoners of war on the sole grounds of their participation in the hostilities, or of the prohibition on the detention of civilians in any place other than in the territory where they have been captured.

Conversely, the appraisal that IHL applies to a situation radically alters the outlook as far as the rules on the use of force are concerned. While in one context (law enforcement), lethal force may be used only as a measure of last resort, in the other (armed conflict), it is standard practice. For this reason, a determination that IHL applies may prove extremely disadvantageous to persons engaged in violence. In these circumstances, such persons may indeed become legitimate targets if they are participating in hostilities within the meaning of IHL, while in a law enforcement paradigm governed by international human rights law and domestic law, other means than the use of lethal force would be needed. This fundamental distinction may possibly explain the strange position adopted by the International Committee of the Red Cross (ICRC) on 8 May 2012, after one year of clashes in Syria. Its opinion was reported to be that the conflict could be classed as “a situation of internal armed conflict in certain areas”.¹ In terms of another aspect of the application of IHL, its applicability *ratione loci*, this statement is, to say the least, curious, since it is well settled that if IHL applies in a given situation, it covers the whole of the territory concerned and not just the immediate theatre of hostilities. However, if it were held to apply throughout the territory, the existence of a localized conflict might be put forward as a pretext to consider any protests or demonstrations as direct participation in hostilities and thus as being governed by the rules on the conduct of hostilities (rather than law enforcement).

1 Stephanie Nebehay, “Some Syria Violence Amounts to Civil War: Red Cross”, *Reuters*, 8 May 2012, available at: www.reuters.com/assets/print?aid=USBRE8470D920120508 (all internet references were accessed on 14 January 2015). On 17 July of the same year, however, the ICRC clarified in a press release: “Thus, hostilities between these parties *wherever* they may occur in Syria are subject to the rules of international humanitarian law.” ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increased Fighting”, available at: www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm.

Conversely, maintaining that the conflict is confined to just one part of the territory can help to avoid an escalation of violence.

In a different context, determining when IHL becomes operative has major implications in terms of its enforcement, above all with regard to the prosecution of persons who are suspected of having committed violations of IHL. The essential prerequisite for being able to charge someone with a war crime, or to claim universal jurisdiction, as provided for in the four Geneva Conventions of 1949, is to characterize the situation in which these breaches took place as an armed conflict and therefore to determine that IHL is applicable.

These are just three of the many scenarios where establishing the point at which IHL becomes operative is of key importance—and since IHL (with the exception of provisions applicable “at all times” or “in time of peace”, or those that begin to apply at the “end of active hostilities”) is deemed to begin to apply with the outbreak of an armed conflict, this point in time should be easy to identify. Yet, as this article will aim to show by way of discussing a few key challenges, this is not as straightforward as it seems.

A few preliminary inquiries

While there is no mathematical formula for pinpointing the exact time at which IHL becomes operative, there are a number of factors which must be borne in mind for the purposes of this exercise. Traditionally, these factors turn on the distinction between IHL applicable in IACs and in non-international armed conflicts (NIACs). The pertinent provisions are to be found in the 1949 Geneva Conventions. Apart from the Hague Convention of 1907 relative to the Opening of Hostilities, which has fallen into desuetude,² the only IHL treaties which expressly stipulate when this *corpus juris* begins to apply are the 1949 Geneva Conventions supplemented by their Additional Protocols of 1977. Article 2 common to all four Geneva Conventions, relevant to IACs, states that the Conventions 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 applicability of common Article 3, regulating NIACs, is set forth in the following terms: “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 ...” These provisions are further supplemented by those of Additional Protocol I (AP I), which extends the applicability of IHL of IAC to “wars of national liberation”, and then by Additional Protocol II (AP II), which establishes a list of conditions triggering the application of IHL in NIAC, thereby making a distinction between those NIACs

2 For further details regarding the status of this Convention, see Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess Éditions Romandes, Genève, 2014, p. 30, note 88.

governed only by common Article 3 and those governed also by AP II (provided that the State in whose territory the NIAC takes place is party to that instrument). To this list must be added the relevant provisions of the Rome Statute, some of which are discussed below.

Generally speaking, in order to ascertain when IHL begins to apply, the following questions must be asked: when may it be said that a war has been declared? When does an IAC exist, including a situation of occupation? What events mark the beginning of a war of national liberation? What indicators point to the existence of a NIAC and hence to the moment when IHL of NIAC begins to apply? A number of challenges then arise from this set of questions. The first one is to answer not only each of these queries, but also various underlying questions such as: does IHL begin to apply when a single enemy soldier is captured or a single civilian interned, even in the absence of any previous hostilities? When does a NIAC turn into an IAC owing to foreign intervention, thus triggering the application of IHL of IAC, and which are the parties to this IAC? Then there are challenges related to the fact that some of the relevant texts do not explicitly stipulate when IHL begins to apply, while others attempt to tie the beginning of IHL's applicability to a list of criteria that are arguably objective but whose fulfilment is extremely difficult to establish in practice, particularly as a situation unfolds. A further complication stems from interpretations in the case law, especially that of international criminal tribunals, which are somewhat unclear, if not contradictory. Lastly, an undeniable challenge is the disconnect between the theory and its practice on the ground by those who are supposed to apply and respect IHL – in other words, the States and/or armed groups involved. This sometimes risks rendering the question of the beginning of IHL's application a purely theoretical one.

This article will examine the challenges mentioned above in relation to the beginning of the application of IHL, while at the same time supplying further evidence in support of the standard proposition that IHL begins to apply as soon as an armed conflict exists. The article will first focus on the beginning of IACs, including situations of occupation, and will then move on to a discussion of the beginning of NIACs.

The beginning of the application of IHL in international armed conflicts

As the Geneva Conventions do not provide any real definition and as there is no universal authority responsible for classifying conflicts, the existence of an IAC must be determined on the basis of facts.³ A number of factors, discussed in the

3 See Anthony Aust, *Handbook of International Law*, Cambridge University Press, Cambridge, 2005, p. 252; Dino Kritsiotis, "The Tremors of Tadić", *Israel Law Review*, Vol. 43, 2010, p. 275; Marko Milanovic, "The End of Application of International Humanitarian Law", in this issue of the *Review*; Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Sijthoff/Henry Dunant Institute, Leyden/

sections below, help to identify the point(s) in time at which IHL pertaining to IAC begins to apply.

Although “clear declarations by the parties are the most distinct indication of the commencement of a war”,⁴ the notion of a “declared war” refers to a practice which has now fallen into desuetude.⁵ For this reason, this section will focus on the prerequisites for ascertaining that an armed conflict exists as a matter of fact, and hence that IHL begins to apply. Two positions serve as a point of departure for determining the beginning of the applicability of IHL: the one proposed in the Commentaries to the Geneva Conventions (commonly referred to as “the first shot theory”), and the one adopted by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case.⁶

The Commentaries to the 1949 Geneva Conventions state:

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.⁷

The ICTY, in its first case, stated more laconically that “an [international] armed conflict exists whenever there is a resort to armed force between States International humanitarian law applies from the initiation of such armed conflicts.”⁸ With the benefit of hindsight, it is plain that two separate questions

Geneva, 1975, p. 52; Jean-François Quégunier, “Ten Years after the Creation of the International Criminal Tribunal for Former Yugoslavia: Evaluation of the Impact of Its Jurisprudence on International Humanitarian Law”, *International Review of the Red Cross*, Vol. 85, No. 850, 2003, p. 273; International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-I-A, Judgement (Appeals Chamber), 15 July 1999, Separate Opinion of Judge Shahabuddeen (Presiding Judge), p. 150, paras 25–26.

4 Werner Meng, “War”, in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, Amsterdam, North-Holland, 2000, p. 1338. See also Alfons Klafkowski, “Les formes de cessation de l’état de guerre en droit international (Les formes classiques et non classiques)”, *Collected Courses of the Hague Academy of International Law*, Vol. 149, 1976, p. 224.

5 This provision, which was codified in Convention III relative to the Opening of Hostilities (The Hague), 1907, may be regarded as a dead letter. Probably the last time that it was applied was in 1946, in the aftermath of the Second World War, in the judgment of the Nuremberg Tribunal, which found that that war had been conducted in breach of the 1907 Hague Convention III: International Military Tribunal for Germany, 14 November 1945–1 October 1946, *Trial of the Major War Criminals*, Vol. 1, Official Documents, Proceedings, Nuremberg, 1947, pp. 85 (Indictment), 220 (Judgment). For a fuller discussion of this question and for references in the literature, see J. Grignon, above note 2.

6 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-I-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

7 Jean Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary*, ICRC, Geneva, 1952, p. 32. See also UK Ministry of Defence, *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2004, p. 27, para. 3.1; Ministère de la Défense, *Manuel de droit des conflits armés*, Impressions SMS, Château-Chinon, 2000, pp. 12, 41.

8 ICTY, above note 6, para. 70. This definition has never been contradicted in later judgments; see in this connection Luisa Vierucci, “Armed Conflict”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 247–248. In the *Delalić* case, the Trial Chamber merely stated that “in its adjudication of the nature of the armed conflict with which it is concerned, the Trial Chamber is guided by the Commentary to the Fourth Geneva

regarding these factors require examination: against whom must the armed force be directed, and under what conditions, in order for IHL pertaining to IAC to apply?

The target of the armed violence

While Article 2 common to the four Geneva Conventions makes it clear that an IAC exists whenever there is an armed conflict between two “High Contracting Parties”, the Commentary to this provision and the ICTY’s findings in the *Tadić* case refer to the use of armed force between “States”.⁹ The question is therefore whether the two terms are synonymous.¹⁰ Although a High Contracting Party must necessarily be a State, a State can be involved in an armed conflict without having had the opportunity to become a party to the Geneva Conventions. Since all the States in the world are party to the Geneva Conventions today,¹¹ and some of the rules they contain are customary in nature,¹² this question might seem to be moot. It is, however, pertinent in respect of wars of secession and the dissolution of a State in the course of an armed conflict. As the pre-existing State is usually opposed to secession or dissolution, these processes are generally accompanied by force—in other words, they occur during an armed conflict which will be classified as a NIAC as long as it is entities of the former State that are fighting against government armed forces. However, if this conflict continues between the new “State(s)” and the pre-existing State after secession or dissolution, the question then arises of when it turns into an IAC. Given the effects produced by these situations and bearing in mind the underlying question of when IHL pertaining to IAC becomes effective, it is necessary to be guided by the facts

Convention”. ICTY, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, also known as “Pavo”, Hazim Delić, Esad Landžo, also known as “Zenga”*, Case No. IT-96-21-T, Judgement (Trial Chamber), 16 November 1998, para. 208. See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2002, p. 19; William A. Schabas, *The International Criminal Court: A Commentary of the Rome Statute*, Oxford University Press, Oxford, 2010, p. 202.

- 9 The ICTY had no choice but to use the term “State”. Its Statute made it impossible to use the term “High Contracting Party”, which is specific to the Geneva Conventions. On this point see also D. Kritsiotis, above note 3, p. 275.
- 10 For the ICRC, the answer is definitely in the affirmative: “According to this provision [common Article 2], international armed conflicts are those which oppose ‘High Contracting Parties’, meaning ‘States’.” ICRC, *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?*, opinion paper, March 2008, available at: www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm.
- 11 See ICRC, “Treaties and States Parties to Such Treaties”, online database available at: [www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).
- 12 See International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, p. 226, para. 75 (reiterated with regard to the conduct of military operations in ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *ICJ Reports 2004*, p. 136, para. 89). See also A. Aust, above note 3, p. 253; as well as Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), p. 628.

because, in these cases, “at most the international community accepts the *fait accompli*”.¹³ In keeping with the pragmatism characterizing IHL, determining the moment at which its applicability is triggered must not be made subject to any international recognition process, or to any reaction on the part of the United Nations.¹⁴ It can, however, prove difficult to rest the applicability of IHL on no more than the factual findings that the new “State” no longer recognizes the central government, is in sole command of its territory, and has its own armed forces. How can a distinction be drawn between these attributes and those of an armed group which could not be termed a “party” to an IAC within the meaning of IHL? It will therefore be necessary to abide by the conditions which public international law lays down for the recognition of a State by the international community. In other words, “as soon as States emerge as independent and fulfil the criteria of statehood ..., whether admitted into the United Nations (UN) or not, [they] are bound by the rules of the international legal community”,¹⁵ including those of IHL. Nor is it necessary for the parties to the armed conflict to recognize each other as States, mutually or even unilaterally.¹⁶

It is then necessary to determine what State bodies must be covered. As already highlighted above, according to the Commentary to common Article 2, “[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict”.¹⁷ This notion was later reaffirmed in the following terms: “any opposition between two States involving the intervention of their armed forces and the existence of victims, as defined by the Geneva Conventions, is therefore an armed conflict”.¹⁸ In both cases, the requirement that there has to be intervention “of armed forces” or “of their armed forces” prompts a number of questions. First, the latter proposition, more than the former, suggests that in order for an international armed conflict to exist, and hence for IHL to begin to apply, the armed forces of one or more States must be involved. Acceptance of this view would be tantamount to considering, for

13 Patrick Dallier, Mathias Forteau and Allain Pellet, *Droit international public*, 8th ed., Librairie Générale de Droit et de Jurisprudence, Paris, 2009, p. 587, para. 344. See also the opinion of the Badinter Arbitration Commission (named after its chairman) in connection with the issue of whether the constituent republics of the Socialist Federal Republic of Yugoslavia were seceding and what the consequences were: “the existence or disappearance of a State is a question of fact and the effects of recognition by other States are purely declaratory”. Peace Conference on Yugoslavia, Arbitration Commission, available at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e13?>].

14 See in this connection Marco Sassòli, “The Legal Qualification of the Conflicts in the Former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in Wang Tieya and Sienho Yee (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, p. 320.

15 Ram P. Anand, “New States and International Law”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, para. 1, electronic ed. available at: www.mpepil.com (password required).

16 ICRC, above note 10; Christopher Greenwood, “Scope of Application of Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2nd ed., 2008, p. 51; Dietrich Schindler, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, *Collected Courses of the Hague Academy of International Law*, Vol. 163, 1979, pp. 128, 129.

17 J. Pictet (ed.), above note 7, p. 32.

18 J. Pictet, above note 3.

example, that aerial bombing raids carried out by one State against another, without the latter reacting, either because it lacks the physical capacity or for any other reason, would not constitute an armed conflict. There is, however, no doubt that in these circumstances the distinguishing features of a conflict are present and that IHL is applicable, especially the part of this *corpus juris* specifically dealing with the conduct of hostilities. Consequently, it is not necessary for the armed forces of one or more of the States in question to have exchanged fire. An IAC will already exist – and therefore IHL will begin to apply – if one State employs armed force against another, even if the latter does not retaliate. Thus, the intervention of members of the armed forces of either High Contracting Party is sufficient. This conclusion is unavoidable in light of the rules on the conduct of hostilities. There would be no justification for exempting the initial attack by one country against another from these rules; the military target must be identified and proportionality and precautionary measures will have to be analyzed beforehand and respected. Furthermore, no other conclusion is possible bearing in mind the fact that some States do not have their own armed forces. If at least two armies have to participate in order for the situation to qualify as an armed conflict and for IHL to apply, it would be theoretically impossible for an IAC to arise with Costa Rica or the Solomon Islands.¹⁹ Yet any use of force by a third State in the territory of these countries, and directed against them, would certainly be subject to the pertinent rules of IHL. Similarly, any national of these countries who is in the hands of the enemy would be protected by the relevant rules of IHL.

The purpose of the armed violence and its collective nature

A State that used force against the civilian population of another State or against any other civilian object of another State, to the exclusion of military objects, would likewise be engaged in an IAC to which IHL applies. The mere fact that one State employs force against another is sufficient to render operative IHL pertaining to IAC, provided that the act in question is not an isolated one committed by a lone individual.²⁰ In order to fulfil the criteria for an IAC, the member of the armed forces who carries out the attack must have been under orders to do so. If he/she is acting on his/her own initiative, without consulting his/her superiors, it will not be possible to speak of an IAC between the State of which he/she is a national and the State which he/she is attacking. Whatever the nature of the object(s) or person(s) targeted, IHL pertaining to IAC applies as soon as a desire to harm the State against which the armed force is exercised can be inferred from this targeting; this is what is implied by the phrase “against another State”. In other

19 Despite some slight differences, since some of them have paramilitary forces or have a foreign army stationed in their territory, some twenty States in the world have no government armed forces. For a list of these States, see the CIA data available at: www.cia.gov/library/publications/the-world-factbook/fields/2055.html#bp: they are Andorra, Costa Rica, Dominica, Grenada, Iceland, Kiribati, Liechtenstein, Marshall Islands, Mauritius, Micronesia, Monaco, Nauru, Palau, Panama, Saint Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Solomon Islands, Tuvalu, Vanuatu.

20 See in this connection C. Greenwood, above note 16, p. 46.

words, the use of force on the territory of another State must be hostile in nature. There is therefore absolutely no need for the armed forces of the State at the receiving end of the violence to be targeted directly. The International Criminal Court (ICC) has adopted the definition proposed in the Commentaries to the Geneva Conventions and the findings in the case law of the ICTY²¹ in deeming “an armed conflict to be international in character if it takes place between two or more States”,²² which seems satisfactory. A further assertion, however, must remain under scrutiny: the Court has further stated that “an international armed conflict exists in case of armed hostilities between States through their respective armed forces or other actors acting on behalf of the State”.²³ First, the word “between” need not imply a reaction from the State on the territory in which the force is used. Second, if the force must be used collectively by the armed forces of the State carrying out the attack at least, the words “through their respective armed forces” might give the false impression that a response is necessarily needed in order to trigger the applicability of IHL.

Capture as an act triggering the applicability of international humanitarian law in international armed conflicts

In IHL, the use of armed force does not signify solely the use of lethal force. Capture of enemy soldiers is another form of violence and can constitute an act triggering the applicability of IHL. The Commentary to Article 2 of the third Geneva Convention explicitly states:

It suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application. The number of persons captured in such circumstances is, of course, immaterial.²⁴

If the aim of the armed conflict is to undermine the potential of the enemy army, one means of achieving this is to capture its soldiers. Consequently, the general applicability of IHL pertaining to IAC commences as soon as the conditions of common Article 2 are met. Once someone falls into the hands of the enemy, IHL *ipso facto* begins to regulate his/her situation. A hostile event consisting solely of the capture of members of enemy armed forces by those of another State triggers the applicability of the Third Geneva Convention, even if there are no other hostile acts. Hence the rules of IHL on capture and internment can begin to

21 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 29 January 2007, paras 207, 208.

22 *Ibid.*, para. 209; ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, para. 238.

23 ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), 15 June 2009, para. 223.

24 Jean Pictet (ed.), *Geneva Convention relative to the Treatment of Prisoners of War: Commentary*, ICRC, Geneva, 1960, p. 23.

apply even in the absence of hostilities prior to the event. For example, the fifteen British soldiers captured by Iran on 23 March 2007, while they were on patrol in the Persian Gulf,²⁵ should have been regarded as prisoners of war merely by virtue of their capture. For this reason, by showing them on television a few days later, the Iranian authorities infringed Article 13(2) of the Third Geneva Convention, which protects prisoners of war against public curiosity.

This means of triggering the applicability of IHL as set forth in the Third Geneva Convention is straightforward. If the person concerned is a combatant, his/her capture will simply make him/her a prisoner of war, and this will entail the applicability of the Third Geneva Convention regardless of the territory in which that person is present, of his/her nationality and of whether the existence of an IAC had been established beforehand. The capture of a combatant is therefore *per se* a hostile act triggering the applicability of the third Geneva Convention.

The position with regard to the effects of Article 4 of the Fourth Geneva Convention is more delicate, as there are two possibilities. The first is that the person is present in the territory of a State of which he/she is a national at the time of his/her capture and, for this reason, if he/she has fallen into the hands of the enemy, this means that a foreign army has invaded the territory and has thereby triggered an IAC, bringing about the applicability of IHL. Even if no armed hostilities take place, the military operations leading to the enemy army's advance into the territory trigger the applicability of IHL before the capture of the person in question. This condition is met even if the sole purpose of the armed incursion was to capture one or more persons. The Fourth Geneva Convention therefore begins to apply not as from the actual capture itself but as from the previous act initiating the IAC. The second possibility is that a person is present in the territory of a country of which he/she is not a national when he/she falls into the hands of the enemy. When there have been no previous hostilities, how can a distinction be drawn in this case between ordinary detention and detention governed by IHL? If war has been formally declared, the question does not arise, since the applicability of IHL is simply triggered by this declaration and the internment of foreign civilians is covered by IHL. As this situation no longer occurs, however, it is problematic if, without other prior hostile acts, a State decides that the nationals of another State who are present in its territory are to be deprived of liberty. Since, in these circumstances, internment or assigned residence are ordered in the interests of the security of the State carrying out that measure, IHL must apply to these situations, which in themselves are signs of inimical relations between the two States in question. If, on the contrary, these persons form the subject of judicial proceedings, they must be regarded as ordinary detainees. It is therefore the purpose of detention,

25 For a detailed account of these events, see Jean-Pierre Langellier, "Téhéran capture quinze soldats britanniques", *Le Monde*, 25 March 2007, p. 4; and Jean-Pierre Langellier, "Les quinze marins britanniques capturés dans le Golfe sont apparus à la télévision iranienne: Londres gèle ses relations diplomatiques avec Téhéran", *Le Monde*, 30 March 2007, p. 4.

namely security, and the status of the persons concerned, as nationals of a given third State,²⁶ that are decisive in this second case.

The role of consent in determining the point in time at which IHL applies

In addition to these physical factors, a mental element is required in order to establish whether IHL should begin to apply: the violence employed must be hostile in nature. The very term “hostilities” implies that the acts in question are motivated not by benevolence but by enmity. Hence, not all military operations observed in the territory of a State will automatically lead to their classification as an IAC. The presence of foreign armed forces in the territory of a High Contracting Party to which the latter has consented must therefore be excluded from the definition because, in this case, the foreign presence does not stem from a “dispute”.²⁷ In order to assess whether a dispute exists and therefore determine whether IHL pertaining to IAC begins to apply, it will be necessary to ascertain whether or not there is consent. While the absence of consent by virtue of armed hostilities is fairly easy to discern, the same is not true of its existence. When there are violent clashes between enemy troops, it is easy to conclude that an IAC exists, since the lack of consent is obvious. On the other hand, when only a foreign military presence in the territory of a State is observable, it may be difficult to infer that this presence is hostile, a case in point being the scenario in which a State conducts military operations against an armed group in the territory of another State but not against the government armed forces of that State. In this situation, it is IHL of NIAC that applies to the relations between the State conducting the military operations and the armed group, but IHL pertaining to IAC may likewise apply in the relations between that State and the State “hosting” the armed group.

Uganda’s conduct in the Democratic Republic of the Congo (DRC) highlights a difficulty in determining the point in time marking the beginning of applicability of IHL when a State requests the assistance of another State in order to combat an armed group in its territory, but subsequently withdraws its consent. In this instance, the DRC had initially requested support from Uganda in its armed struggle against rebel armed groups. Uganda had therefore used force in the territory of the DRC with the latter’s consent. After a while, however,

26 These circumstances call to mind the notion of allegiance employed by the ICTY in its reasoning regarding the application of Article 4 of the Fourth Geneva Convention in the event of ethnic armed conflicts, where people can be interned on account not of their nationality, but of their allegiance to a third State. This question alone would merit lengthy analysis, irrespective of any considerations related to the applicability *ratione temporis* of IHL. See in this connection ICTY, above note 3, paras 164 ff; Christopher Greenwood, “International Humanitarian Law and the *Tadic* Case”, *European Journal of International Law*, Vol. 7, No. 2, 1996, pp. 272–273; and Theodor Meron, “Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout”, *American Journal of International Law*, Vol. 92, 1998, p. 242.

27 See in this connection Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 73.

the DRC authorities claimed “the end of the presence of all foreign military forces in the Congo”,²⁸ then denounced the invasion of their territory by Uganda.²⁹ The DRC therefore considered Uganda’s presence in its territory to be unlawful. Uganda’s argument in defence against some of the accusations that the DRC was levelling against it was that consent had been given to its presence.³⁰ In a case like this, the foreign army will engage in acts against armed groups. So long as the State in whose territory the clashes take place (the “territorial State”) consents to these acts, the situation will “only” be classified as a NIAC between the territorial and intervening States, on one side, and the armed groups, on the other. But as soon as the State which initially requested assistance withdraws its consent, military activities that would nevertheless still be conducted by the intervening State in the territorial State would trigger an IAC between the two States. IHL of IAC would therefore apply to the relationship between those States at least. The question is then one of knowing when consent may be deemed to have ended. In the opinion of the International Court of Justice (ICJ), the fact that the DRC had denounced Uganda’s invasion of its territory signified that it no longer consented to the latter’s presence; however, the judges rejected the official statement of the DRC that all foreign armed forces had left its territory, on the grounds that it was ambiguous.³¹ In this instance, the point at which consent is withdrawn is therefore the moment when the State publicly denounces a foreign presence in its territory. Here part of the question is not completely resolved, namely which is the organ(s) entitled to give and to withdraw consent within a State. What is important to note, however, is that the ICJ took care to specify that “no particular formalities would have been required for the DRC to withdraw its consent to the presence of Ugandan troops on its soil”.³² Noting the withdrawal of consent is therefore purely a question of fact and must not necessarily be accompanied by a formal act in order to be valid.

The temptation to revive the animus belligerendi in order to determine the moment at which international humanitarian law begins to apply

It is plain from the foregoing that the premise that violence must be exercised for hostile purposes before IHL can begin to apply may entail a difficult assessment.

28 Official statement of 28 July 1998, reproduced in the judgment of the ICJ in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 December 2005, para. 49.

29 This denunciation took place at the Victoria Falls Summit, which ended on 8 August 1998. See in this connection *ibid.*, para. 33.

30 See *ibid.*, paras 42 ff.

31 *Ibid.*, paras 51, 53. See more generally the Commentaries to Draft Articles 20 and 45 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which refer to the point in time at which consent (or acquiescence) may be found to exist. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, available at: legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, para. (3) of the Commentary to Draft Article 30 and para. (6) of the Commentary to Draft Article 45, pp. 73 and 122.

32 ICJ, above note 28, para. 51.

The exercise of classifying the armed conflict and determining the applicability of IHL can be rendered even more complex if account is also taken of the multiplicity of military operations conducted by coalition forces, not all of whom have the same role in the armed conflict. In order to overcome this obstacle, there might be a temptation to revive the old notion of *animus belligerendi*, related to the old-fashioned notion of “war”. *Animus* is an intention. In the context of a “war”, the *animus belligerendi* was a means of ascertaining whether the States in question had intended to replace a state of peace with a state of war between them. In other words, it meant employing a legal concept.³³ The introduction of the notion of “armed conflict” in 1949 was, on the contrary, an attempt to ground the applicability of IHL in a factual finding. Consequently, using the notion of *animus belligerendi* in this new context would be a step backwards and would not only be prejudicial to the implementation of IHL but would also be out of step with a general trend, which began in 1907, gathered momentum in 1949 and has grown stronger ever since, towards making a factual analysis in order to determine whether IHL applies to a given situation.³⁴ Furthermore, in order to establish the aforementioned hostile intention through the *animus belligerendi*, it would be necessary to rely largely on the parties’ expressions of their intention. Traditionally *animus belligerendi* was manifested by a “declaration of war or any other formal pronouncement”,³⁵ whereas IHL seeks to disregard any expression of a position when it comes to pinpointing the start of its application. The obligations that this branch of the law imposes on States involved in armed conflicts almost inevitably lead them to deny the existence of any such conflict in order to evade the application of IHL. For this reason, any attempt to detect an *animus belligerendi* would inevitably be stymied by declarations or stances at odds with the situation on the ground. Consequently, although the use of this notion is ostensibly appealing because it seems to facilitate the identification of enmity between the States in question, its untoward effects make its restoration undesirable.

It has been argued that this notion would be especially useful in “cases of doubt” such as erroneous troop movements to the territory of another State, or use of force at the behest of the State in whose territory it takes place.³⁶ It is hard to see how the *animus belligerendi* would be of assistance in the case of erroneous troop movements—if they were a mistake, by definition the army that had committed the error would have no reason to engage in any hostile act against the population of the territory concerned.

33 See in this connection Christopher Greenwood, “The Concept of War in Modern International Law”, *International and Comparative Law Quarterly*, Vol. 36, 1987, p. 286.

34 *Ibid.*, p. 295.

35 *Ibid.*, p. 286.

36 These are possibilities suggested by D. Kritsiotis, above note 3, p. 280.

The intensity of violence is irrelevant when determining the beginning of the application of IHL in international armed conflicts

Notwithstanding some doubts and uncertainties stemming from statements made by various judicial bodies³⁷ or found in the literature,³⁸ IHL is indisputably applicable in IAC regardless of the level of violence which might occur in the use of force between the parties to the conflict. At the 31st International Conference of the Red Cross and Red Crescent, the ICRC solemnly affirmed this in the following terms:

In the decades since the adoption of the Conventions, duration or intensity have generally not been considered to be constitutive elements for the existence of an international armed conflict. This approach has recently been called into question by suggestions that hostilities must reach a certain level of intensity It is submitted that, in addition to prevailing legal opinion which takes the contrary view, the absence of a requirement of threshold of intensity for the triggering of an international armed conflict should be maintained because it helps avoid potential legal and political controversies about whether the threshold has been reached based on the specific facts of given situation.³⁹

In the same vein, while the positions expressed by international criminal courts and tribunals have sometimes been less than clear, in the final analysis there appears to be a tendency towards retaining the traditional approach, namely that an IAC is characterized without reference to the level of intensity of the violence.

The ICTY judges' reasoning in their judgement in the *Tadić* case contains the curious statement that "it suffices for the moment to say that the level of intensity of the conflict ... was sufficient to meet the requirements for the

37 See, for example, ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the ICRC, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2–6 December 2003, p. 8, or ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared by the ICRC, 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, p. 7; and ICTY, *Tadić*, Case No. IT-94-1-A, Judgment (Trial Chamber), 7 May 1997, para. 569, or Special Court for Sierra Leone (SCSL), *The Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber II), 18 May 2012, paras 563 ff.; Lucius Caflisch, "La pratique suisse en matière de droit international public 2008", *Revue Suisse de Droit International et Européen*, No. 4, 2009, p. 605, reproduced in the reply given on 19 November 2008 by the Federal Council to a question put by Mr Josef Lang, Member of the National Council, on 1 October 2008.

38 See, for example, UK Ministry of Defence, above note 7, p. 29, para. 3.3.1; George H. Aldrich, "Jurisdiction of the International Criminal Tribunal for the Former Yugoslavia", *American Journal of International Law*, Vol. 90, 1996, p. 67, or International Law Association, *Initial Report on the Meaning of Armed Conflict in International Law*, prepared by the International Law Association Committee on the Use of Force, submitted at the Rio de Janeiro Conference, 2008, p. 10; and International Law Association, *Final Report on the Meaning of Armed Conflict in International Law*, The Hague Conference, 2010, p. 3, note 7, available at: www.ila-hq.org/en/committees/index.cfm/cid/1022.

39 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report presented at the 31st International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, pp. 8–9, available at: www.icrc.org/fre/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-fr.pdf.

existence of an international armed conflict for the purposes of the Statute”.⁴⁰ It seems, however, that this is an isolated instance of such thinking. The opposite may be found, for example, in the *Delalić* case, which states that in the case of international armed conflicts, “the existence of armed force between States is sufficient of itself to trigger the application of international humanitarian law”.⁴¹ The ICC has adopted a similar position.⁴² Lastly, the Special Court for Sierra Leone, in its judgment of 18 May 2012, adopted the definition provided by the ICTY in paragraph 70 of its judgement in the *Tadić* case.⁴³ The wording is, however, ambiguous, since the judges in the *Taylor* case take the view that organization and intensity are criteria for establishing the existence of an armed conflict, without specifying its nature, either IAC or NIAC, whereas these two criteria are only relevant for the classification of a NIAC. It is therefore a moot point whether the judges wished to apply a criterion of intensity for the purposes of classifying a situation as an IAC. This did not seem to be their intention because, although they considered that the distinction between IACs and NIACs was of little relevance in the case before them as the acts in question were crimes in both kinds of conflict, they employed exactly the same wording as the ICTY, which certainly does draw a distinction between the two kinds of armed conflict.

The special case of the beginning of the application of IHL in occupied territories

The issue of when the rules contained in Part III of the Fourth Geneva Convention on occupied territories apply is one of the crucial questions related to the beginning of the applicability of the IHL of IAC. In recent years, debates regarding IHL have centred on the notion of occupation as such, and on the implications of the point at which a foreign army may be deemed to be occupying a territory within the meaning of Article 42 of the Hague Regulations.⁴⁴ The invasion of Iraq by the United States in 2003 and the Israeli army’s unilateral withdrawal from the Gaza Strip in 2005 have reawakened interest in this topic. Without revisiting these aspects which have been widely debated by eminent experts in this journal,⁴⁵ it will simply be noted that a further difficulty emerges once it is accepted that, pursuant to the theory of functional occupation, the rules on occupied territories may apply before the situation may be qualified as an occupation within the meaning of the Hague Regulations. This becomes plain on reading the provisions of the section

40 ICTY, above note 38, para. 569.

41 ICTY, above note 8, paras 184 and 208.

42 See ICC, above note 21, para. 207.

43 SCSL, above note 37, paras 563 ff.

44 Article 42 of the Hague Regulations, which is the reference provision regarding the beginning of a situation of occupation, states: “Territory is considered occupied when it is actually placed under the authority of the hostile army.” Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

45 See *International Review of the Red Cross*, Vol. 94, No. 885, 2012, in particular the debate between Michael Bothe, Martin Zwanenburg and Marco Sassöli, as well as Tristan Ferraro’s contribution, all of which discuss the point at which an occupation can be said to have begun.

dedicated to occupied territories one after the other. There is no question of requiring the “Occupying Power” to respect all of these provisions if this “Power” amounts to just a few soldiers who have entered the territory, or more generally during the invasion phase before the Power’s authority has been decisively established.⁴⁶ In an effort to decide when the provisions related to occupied territories begin to apply, a guided reading of each of the provisions of Part III of the Fourth Geneva Convention was proposed by the present author in 2014, in order to make it possible to identify when the obligations that they contain start to apply to the “Occupying Power”.⁴⁷ To this end, consideration was given to the question of whether they established the enjoyment of a right, or if they had a bearing on the treatment of the protected persons, and at the same time, whether it could be found that they could be implemented before the “Occupying Power” had established effective control.⁴⁸ Indeed, the pragmatic nature of IHL demands that it must always make sure that its implementation is possible.⁴⁹ Most of the time, the present author’s 2014 study consisted in the observation that the provision studied requires only abstention from acts, and not the introduction of specific implementing measures. The conclusions were that Articles 47–49, 51, 53, 58, 59, 61 first sentence, 63, 64–75, 76 and 78 of the Fourth Geneva Convention applied immediately, unlike Articles 50, 52, 54 to 57, 60, 61 second and following sentences, 62 and 77.⁵⁰ Since some of the provisions of the Fourth Geneva Convention regarding occupied territories are found to be applicable even when there is no occupation within the meaning of the Hague Regulations, the legal situation remains hazy in some respects. The proposed reading of the articles contained in Part III of the Fourth Geneva Convention rests on a broad understanding of their authors’ intentions. This may prompt a feeling that IHL can be applied at will, thus throwing it open to challenge by an Occupying Power which could take refuge in the normal meaning of the terms “occupied territories”. It is therefore fortunate that AP I transcends the dichotomy that can stem from a combined reading of the Hague Regulations and the provisions of the Fourth Geneva Convention on occupation. Indeed, AP I no longer draws a distinction between the territory of the parties to a conflict and occupied territories, save in a few of its provisions. Only eight provisions (out of 102) specifically mention occupied territories, and only three of them⁵¹ are entirely

46 See in this connection Robert Kolb and Sylvain Vité, *Le droit de l’occupation militaire: Perspectives historiques et enjeux juridiques actuels*, Bruylant, Brussels, 2009, pp. 145–146. See also Eritrea–Ethiopia Claims Commission, *Partial Award, Western Front, Aerial Bombardment and Related Claims*, *Eritrea’s Claims 1, 3, 5, 9–13, 14, 21, 25 & 26*, between the State of Eritrea and the Federal Democratic Republic of Ethiopia, The Hague, 19 December 2005, para. 27.

47 For the details of this study, see J. Grignon, above note 2.

48 ICRC, *Occupation and Other Forms of Administration of Foreign Territory*, Expert Meeting, ICRC, Geneva, 2012, p. 25, available at: www.icrc.org/eng/resources/documents/publication/p4094.htm.

49 See in this connection Daniel Thürer and Malcolm McLaren, “Ius Post Bellum in Iraq: A Challenge to the Applicability and Relevance of International Humanitarian Law?”, in Klaus Dicke *et al.* (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück*, Duncker & Humblot, Berlin, 2005, p. 758.

50 See J. Grignon, above note 2, p. 133 ff.

51 Geneva Convention IV, Arts 14, 63, 69.

devoted to this particular situation. The six others contain paragraphs addressed to the parties to the conflict and paragraphs addressed to the Occupying Power.

The beginning of the application of IHL in non-international armed conflicts

Non-international armed conflict is the more prevalent form of armed conflict in today's world,⁵² yet treaty law does not define when a NIAC begins. For this reason, the material aspects of this kind of conflict have been widely analyzed and dissected, mostly in the case law of the international criminal tribunals for the former Yugoslavia and Rwanda, as well as in doctrine. Although less attention has been devoted to its temporal aspects, in order to determine the moment when IHL begins to apply to NIACs, it is sufficient to sum up the numerous positions already expressed on this subject by judicial bodies and learned writers.⁵³

In short, today it is accepted that IHL will begin to apply to a NIAC as soon as it is clear that the parties to the conflict are sufficiently organized and that violent clashes have reached a certain level of intensity. Although the indicators for both organization and intensity are elucidated in the ICTY's *Haradinaj* and *Boškoski* cases,⁵⁴ their practical determination almost inevitably proves extremely complex. Furthermore, a classification (or not) of NIAC carries significant consequences since, *inter alia*, rules on the use of force in international human rights law differ from those in IHL; the issue thus remains an extremely sensitive one.

It seems worthwhile to confine our study here to two aspects that have received relatively little attention in the literature and which have a direct bearing on the point at which IHL begins to apply in NIACs. These two aspects are as follows: first, the potential repercussions of introducing an element of protraction, which for a time was a predominant consideration in the case law, and the difficulties of applying the indicia for ascertaining whether the parties to the conflict are sufficiently organized; and second, the consequences of the additional differentiation or, on the contrary, standardization – depending on the viewpoint – of the threshold of NIAC after the adoption of the ICC Rome Statute.

52 See Michele Mack, *Increasing Respect for International Humanitarian Law in Non-international Conflicts*, ICRC, Geneva, 2008, available at: www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf.

53 See in particular ICTY, *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-T, Judgement (Trial Chamber I), 3 April 2008, para. 49; ICTY, *The Prosecutor v. Ljube Boškoski, Johan Tarčulovski*, Case No. IT-04-82-T, Judgement (Trial Chamber II), 10 July 2008; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgement Pursuant to Article 74 of the Statute (Trial Chamber I), 14 March 2012, para. 537; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2010; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge Studies in International and Comparative Law, Cambridge University Press, Cambridge, 2002.

54 ICTY, *Haradinaj* and *Boškoski*, above note 53.

The uncertainty of determining the exact beginning of application of IHL in NIACs

The elements of intensity and organization are useful for the purposes of classification, but they still leave some doubts as to when IHL actually starts to apply in NIACs. The level of organization of the parties to the conflict is hard to assess and introduces an element of uncertainty into the point in time at which IHL begins to apply to NIACs. Similarly, the introduction of the notion of a “protracted armed conflict” into the analysis of the intensity of the violence is a temporal element muddling the analysis.

The criterion of organization

The level of organization of the parties to the conflict is hard to assess and introduces an element of uncertainty into the point at which IHL begins to apply to NIACs. The case of Syria has well illustrated the difficulty of matching events on the ground with the indicators described in the case law. While it might be straightforward today to say that the situation in Syria displays the characteristics of a NIAC regulated by common Article 3,⁵⁵ it is still debatable at which point in time exactly the organization and intensity criteria were fulfilled.

It can be seen today that the weapons used by both the armed opposition groups and the government armed forces, the army’s inability to regain control of certain areas, the tens of thousands of victims, the mass flight of civilians into neighbouring countries, the mounting violence, and the involvement of the UN in a fruitless effort to restore peace, as well as the constant, intensive use of force on the government side, combined with the fact that the situation has lasted for almost three years, are all factors indicating that the level of intensity has been attained.⁵⁶ Similarly, as far as the degree of organization is concerned, it may be said that the Free Syrian Army, the main armed group present at the time (2011–2012), of which the vast majority of insurgents involved in the armed clashes claimed to be members, carried out coordinated actions, had a general staff, controlled certain parts of the territory or was at least capable of preventing the Syrian army from entering certain areas, and had spokespersons and representatives. Thus, the Free Syrian Army’s degree of organization appears to have met the relevant requirements. It can therefore be concluded that there was an ongoing NIAC, to which common Article 3 applied.⁵⁷ The

55 See ICRC, “Syria: ICRC and Syrian Arab Red Crescent Maintain Aid Effort Amid Increasing Fighting”, Operational Update, 17 July 2012, third paragraph, available at: www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm. No further attempt will be made to consider whether the conflict also meets the requirements of the AP II, since Syria is not a party to that instrument; hence it is inapplicable to this situation. See the table of ratifications compiled by the ICRC, available at: [www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf).

56 See the indicative factors defined by the ICTY in *The Prosecutor v. Ljube Bošković, Johan Tarčulovski*, above note 53, paras 177 ff.

57 *Ibid.*, paras 199 ff.

descriptions offered by the ICRC, the UN and Human Rights Watch confirm this assessment.⁵⁸

But although this seems to be an uncontroversial statement today, how long has it been true? It can be argued that the requisite level of intensity was attained fairly rapidly, insofar as the aforementioned indicative factors could be verified as from the end of April 2011.⁵⁹ On the other hand, it is much more difficult to assess the point in time at which the Free Syrian Army met the criterion of a sufficient organization. August 2011 is certainly a pivotal moment, since that was when it was formed. It seems, however, that it did not acquire a sufficient degree of organization until the following months. The available information on the intensification of the violence in autumn 2011 and the means deployed by the Syrian Army to counter the insurgents suggests a mature organization, as evidenced by the Free Syrian Army's capacity to conduct concerted military actions that held government forces in check. Another decisive element over this period has been the armed group's capacity to conduct genuine military offensives, which is an indication of the existence of a chain of command capable of giving orders to subordinates who will carry them out. For all these reasons, although it is impossible to give the exact date on which the two chief criteria of a NIAC coming under common Article 3 were met, it may be argued that this situation has existed since autumn 2011.

The criterion of intensity of the violence and the notion of "protracted armed violence"

The mention of "protracted armed violence" early on in the ICTY's jurisprudence in the *Tadić* case, and the notion of "protracted armed conflict" figuring in Article 8 of the ICC Statute, may create some confusion to the extent that they may give the impression of an additional requirement being necessary for the purposes of

58 The UN set up an Independent International Commission of Inquiry to look into the situation in Syria. The Commission has produced several reports covering various periods, namely: UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 23 November 2011, UN Doc. A/HRS/S-17/2/Add.1; UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, 22 February 2012, UN Doc. A/HRC/19/69; UN Human Rights Council, Oral Update of the Independent International Commission of Inquiry on the Syrian Arab Republic, 26 June 2012, UN Doc. A/HRC/20/CRP.1. The Parliamentary Assembly of the Council of Europe has also produced an extremely detailed report on events prior to 24 April 2012: Parliamentary Assembly of the Council of Europe, *The Situation in Syria*, report, 24 April 2012, Doc. 12906. See also UN Human Rights Council, Preliminary Report of the High Commissioner on the Situation of Human Rights in the Syrian Arab Republic, 14 June 2011, UN Doc. A/HRC/17/CRP.1. Reference may also be made to reports produced by the non-governmental organization Human Rights Watch, in particular: "We Live as in War": Crackdown on Protesters in the Governorate of Homs, Human Rights Watch, November 2011; "By All Means Necessary": Individual and Command Responsibility for Crimes against Humanity in Syria, Human Rights Watch, December 2011; and *In Cold Blood: Summary Executions by Syrian Security Forces and Pro-Government Militias*, Human Rights Watch, April 2012. See also S. Nebhay, above note 1; and "Exclusive: Red Cross Ruling Raises Questions of Syrian War Crimes", *Reuters*, 14 July 2012, available at: www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714. See also ICRC, above note 1.

59 See UN reports of that time, above note 58.

classifying a NIAC. Such an interpretation, beyond the fact that it can only be made *a posteriori*, is also not very helpful because those engaging in armed violence cannot know how long it is going to last.

If the criterion for characterizing a NIAC is the protracted nature of the clashes, at any point in time from the first day onwards, the protagonists may consider that their actions are governed by a different legal regime and may not therefore realize that their acts, being related to an armed conflict, constitute a war crime. How long must they wait in order to be certain that the clashes are characteristic of a NIAC? While it is clear *a posteriori* that a conflict has lasted for three months, for example, during the hostilities it is impossible to predict when it will end. Over a three-month period, it might be possible to consider, again *a posteriori*, that the fifteenth day of the conflict meant that it had become protracted, but while it is taking place, how can the parties work out that this fifteenth day is the crucial juncture at which IHL becomes applicable and they can be charged with failing to respect it by an international criminal court or tribunal? On the contrary, they may imagine that the sixteenth day will be the last day of the conflict and be of the opinion that this duration is too short to meet the requirement of a protracted conflict. This element therefore raises the issue of the perpetrator's intentions when qualifying his/her acts as a war crime. In this situation, the perpetrator of a crime committed when the armed clashes had been going on for a few days could be found guilty even though he/she did not realize that he/she was in the midst of a NIAC when he/she committed it, because he/she could not anticipate that events were going to last long enough to be characterized retrospectively as a NIAC.

To look at it from a different perspective, the requirement that the use of force must be protracted before it may be regarded as a NIAC and hence regulated by IHL mars the protection of persons affected by these conflicts. If it is necessary to wait for some time before finding that the situation displays the distinguishing features of a NIAC, this means that persons arrested at the outset of the violence will not receive the protection afforded by IHL, whereas if they had been arrested a few days, weeks or months later, depending on the length of time considered appropriate for deciding that a NIAC exists, they would have been fully protected. This conflict of interest between the aims of IHL and the introduction of a criterion which postpones the beginning of its applicability was debated during the preparatory work on AP II. The government of the Federal Republic of Germany raised the following question: "Had a Government the right to take action which infringed minimum human rights just because a rebellion was of a recent nature ...?"⁶⁰ Of course today, thanks to the acknowledged applicability of human rights law at all times and to the non-derogable rights that remain applicable in all situations,⁶¹ what the Federal Republic of Germany

60 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–1977)*, Vol. 8, Summary Records of Committee I, 1978, p. 220, para. 31.

61 When the Federal Republic of Germany spoke on 14 February 1975, neither of the international covenants had yet entered into force (the International Covenant on Civil and Political Rights entered into force on 23 March 1976, and the International Covenant on Economic, Social and Cultural Rights on 3 January 1976).

termed “minimum human rights” must be respected, even if IHL does not apply. Nevertheless, IHL, which was specifically designed to regulate armed conflict, contains provisions which are tailored to such situations.

The repercussions of the notion of “protracted armed conflict” in the Rome Statute on the applicability of customary IHL in NIACs

A combined reading of Articles 8(2)(c) and (e) of the ICC Statute gives rise to some uncertainty. While Article 8(2)(c) refers to violations of common Article 3 “[i]n the case of an armed conflict not of an international character”, Article 8(2)(e) deals with “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character”. It is not until Article 8(2)(f) that the Statute stipulates that it applies to “protracted armed conflict between governmental authorities and organized armed groups or between such groups”. The purpose of this distinction is therefore unclear. Did States, through the Rome Statute, intend to reaffirm the traditional conception of common Article 3, with its extremely low threshold, by drawing a dividing line with the violations of Article 3 and *other* violations, or is the purpose of this specific clause in Article 8(2)(f) to standardize the classification threshold formulated by international criminal courts and tribunals and to extend it to all NIACs? The question remains unanswered, and positions are polarized.⁶² We must wait for the ICC to give its interpretation in a case concerning a violation of Article 3. Either the Court will give the same interpretation as the ICTY, or it will return to a traditionally low threshold of applicability. It would then suggest either a standardization of the point at which IHL begins to apply in NIACs, or on the contrary a differentiation. Pending such a decision, it is interesting to examine a not inconsiderable consequence that standardization might entail.

If the standardization of the threshold of applicability for NIACs were to be confirmed – in other words, if the notion of a NIAC taking the form of protracted armed violence becomes the general definition of this kind of conflict – it could potentially have a substantial impact on the applicability of customary IHL to NIACs.

A customary rule should apply as of the same time as the corresponding rule under treaty law. While all NIACs covered by AP II are also necessarily covered by common Article 3, which has a lower threshold of applicability, the converse is not true. This is the very point of the distinction drawn in treaty law between the two kinds of conflict. There are situations that are covered by common Article 3, but to which AP II does not apply owing to the absence of the

62 For a position in favour of standardization, see A. Cullen, above note 53, p. 219. See in particular the detailed list which he proposes in footnotes 18 to 25 on pages 120 and 121. He welcomes this trend because he considers that common Article 3 has no objective criteria and that the criteria contained in AP II are problematic. See also Anthony Cullen, “The Parameters of Internal Armed Conflict in International Humanitarian Law”, *University of Miami International and Comparative Law Review*, Vol. 12, 2004, p. 202; Anthony Cullen, “Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law”, *Military Law Review*, No. 183, Spring 2005, pp. 108–109.

material criteria set forth in Article 1 thereof. In terms of the applicability threshold of customary IHL, this reasoning implies that it should be possible to distinguish between rules which are held to be of a customary nature in NIACs and which apply in situations covered by common Article 3, and those which apply in situations coming under AP II. Strangely, the ICRC Customary Law Study draws no distinction between the two spheres of applicability. When a rule is said to be applicable in a NIAC, the study provides no further indication of whether it is applicable in armed conflicts solely meeting the criteria of common Article 3, or also those of AP II. However, just as a customary rule in IACs is not automatically customary in NIACs as well, a customary rule in armed conflicts coming under AP II is not necessarily of a customary nature in armed conflicts coming under common Article 3. It may be concluded that a rule is of a customary nature in armed conflicts governed solely by common Article 3 and in those falling under AP II only if equivalent practice and *opinio juris* are found in both situations. As the ICRC Customary Law Study does not draw this distinction, for each of the rules which it regards as customary in NIACs, it will be necessary to decide whether the NIAC may be qualified as one which falls solely under common Article 3 or whether it also comes under AP II, by making a case-by-case examination of whether or not the rule in question inherently presupposes control over territory. This task would be impossible without repeating all the work done by the contributors to the study.

For this reason, the standardized definition introduced in Article 8(2)(f), taken with Article 8(2)(e), offers a considerable advantage in that the serious violations listed under Article 8(2)(e)(i) to (xv) include most of the acts covered by AP II. From the point of view of the applicability of IHL pertaining to NIACs, these provisions call for two sets of comments, the second of which is of particular relevance here. First, the ICC Statute makes it possible to prosecute acts falling under AP II on customary law grounds, without it being necessary for all the criteria required in the first article thereof to be met. These treaty-based criteria are so strict that in the end, this instrument applies in relatively few cases.⁶³ This definition, borrowed from the early case law of the ICTY, has in a way given it a second life.⁶⁴ It will be possible to prosecute breaches of some of its provisions on the basis of a more flexible definition. Secondly, this “new” definition is especially helpful in determining when customary IHL pertaining to NIACs begins to apply. Since Articles 8(2)(e) and (f) expressly refer to “armed

63 See in this connection A. Cullen, above note 53, p. 112; Dieter Fleck, “The Law of Non-International Armed Conflicts”, in: D. Fleck, above note 16, p. 624; Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd ed., Manchester University Press, Manchester, 2008, p. 83; D. Schindler, above note 16, p. 149.

64 This shift in thinking is particularly noteworthy when compared with the view expressed by Dietrich Schindler in 1979: “The attempt to develop the rudimentary provisions of [common Article 3] by adopting Additional Protocol II has, therefore, proved rather unsuccessful [owing to the introduction of requirements for its applicability]. However, Additional Protocol II may be considered as a first step towards a larger recognition of rules of humanitarian law in non-international armed conflicts. The next step should be to lower the threshold of application of Additional Protocol II so as to assimilate its field of application to the one of Article 3.” D. Schindler, above note 16, p. 149.

conflicts not of an international character”, it is no longer necessary to ponder whether the relevant customary law applies only to situations covered by common Article 3 or also to those falling under AP II. Once there is a “protracted” armed conflict between governmental authorities and armed groups, or between such groups, customary IHL applicable to NIACs will become operative.

The result is that customary rules stemming from treaty law, in particular from AP II, could apply in situations not covered by those instruments. Articles 8(2)(e) and (f) thus simplify the implementation of customary IHL in non-international armed conflicts. The customary IHL applicable in NIACs therefore greatly facilitates the protection of persons affected by this kind of conflict. By adopting the definition proposed by the ICTY, in light of the Tribunal’s interpretation thereof in its subsequent case law and provided that standardization prevails, the ICC Statute can considerably extend the scope of protection. The threshold of Article 8(2)(f) would be as low as that of common Article 3,⁶⁵ because the protracted duration of the conflict is in fact only one of the factors used to assess the level of intensity of the violence. This provision would therefore set a very low threshold for the application of IHL. The material conditions listed in AP II do not have to be present in order to require the parties to a NIAC, possibly even a low-intensity one, to abide by IHL, including the rules drawn from AP II or from IHL pertaining to IAC. Furthermore, adopting this definition as the threshold for the applicability of customary IHL pertaining to NIAC would imply that treaty-based rules on IACs would now possibly be enforceable in armed conflicts where no State is involved. This would be a remarkable one-off in public international law in terms of the formative elements of custom.

Conclusion

While a number of indicators make it possible to say with certainty that IHL applies to a given situation, it is often difficult to say precisely *when* it begins to apply, above all since nowadays armed clashes are sometimes the result of equivocal conduct. Among the challenges in determining the beginning of the application IHL discussed in this paper, no mention has been made of the significance of declarations made when violence erupts. The States concerned, or third States, or even other bodies, can make contradictory statements depending on their interests. One State will refuse to consider that it is involved in a NIAC in its territory in order to reject the application of IHL, while another will justify some of the measures it is taking by referring to the “global war on terror”.

In any event, such positions must have no effect on the applicability of IHL. There is no need for any authority to decide that an armed conflict exists, or that IHL is applicable, for the latter to be operative. In spite of this, the opposing sides’ assessment of the situation they face may indeed have unacceptable consequences in terms of access to humanitarian assistance or the effective

65 See in this connection D. Fleck, above note 63, p. 624.

protection of victims of armed conflict. If parties refuse to acknowledge that IHL applies, they may use this argument to deny humanitarian agencies access to territory where there are persons affected by the armed conflict. Determining when IHL starts to apply may therefore prove to be a complex exercise with fundamental operational implications, and one which moreover fails to produce a very precise result. However, it may generally be concluded that the opinions of the parties to the conflict involved are irrelevant for its classification.

IHL pertaining to IAC begins to apply as soon as one State employs force in the territory of another State without the latter's consent, provided that the violence is of a collective nature, regardless of the kind of objects or persons targeted. Such violence may take the form solely of capture. It is not necessary to assess the intensity of the violence or to look for the existence of any *animus belligerendi* to determine that a situation can be classified as an IAC under IHL.

In the case of NIACs, it is well settled that the two key criteria are the organization of the parties to the conflict and the level of intensity of the violence. These criteria have formed the subject of in-depth analyses in case law and literature. Some challenges stem from the temporal element of the "protracted duration" of the violence, especially in view of its implications in the initial phase of the application of customary IHL.

Although the negotiators of the Geneva Conventions, who remain the leading authorities in the matter, deliberately chose not to provide a strict definition of, or set a precise starting point for, the applicability of IHL, in order to retain as much flexibility as possible when it came to implementing IHL in practice, this lack of precision creates a number of complex challenges. Yet potential legal conundrums should never serve as a pretext for undermining the practical application of IHL. Besides, if this holds true when determining the crucial moment marking the beginning of the applicability of IHL, it is also true regarding the *end* of applicability of IHL.⁶⁶ The question of the end of applicability of IHL has its own inherent challenges and uncertainties. Among them, the lack of clarity regarding the point at which military operations may be deemed to have ended is one of great importance. Above all, the challenges related to postponing or staggering the end of IHL's application must be better understood, especially because they are completely different in form from those related to the beginning of its application.

66 See Marko Milanovic, "The End of Application of International Humanitarian Law", in this issue of the *Review*.