INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICTS

THE LAW APPLICABLE DURING NON-INTERNATIONAL ARMED CONFLICTS

International humanitarian law distinguishes between international and non-international armed conflicts. All of international humanitarian law applies during the former. During non-international or internal armed conflicts, however, only a small part of the law applies, namely:

- **Common Article 3 of the Geneva Conventions**
- **Additional Protocol II of 1977**
- The provisions of the 1954 Cultural Property Convention which relate to respect for cultural property (Article 19)
- The 1977 United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
- The 1993 Chemical Weapons Convention
- The 1997 Landmines Treaty

The 1993 Statute of the ad hoc International Criminal Tribunal for the Former Yugoslavia is applicable to conflicts, international or internal in nature, while the Statute of the Rwanda Tribunal applies to situations of non-international armed conflict. The Statute of the permanent International Criminal Court gives the Court jurisdiction over violations of international humanitarian law whether committed in international or non-international armed conflicts.

HISTORICAL DEVELOPMENT OF THE LAW APPLICABLE IN NON-INTERNATIONAL ARMED CONFLICTS

The distinction made by humanitarian law between international and non-international armed conflicts has a political basis. Traditionally, states were reluctant to grant any international legal status to rebels, to recognise rebel movements or to legitimise warfare by anyone other than its armed forces. When rebels took up arms against states, states preferred to deal with them under their national law, trying them as common criminals. In this case, the resort to force itself would be illegal, and the rebels would be tried for war crimes even without any other violation of international humanitarian law. International law precluded interference by other states in the internal affairs of other states, and states were allowed to use necessary means to suppress rebellions and preserve the territorial integrity of the state. Further, only states were considered as subjects of international law, and it was not conceived how non-state actors, such as rebels, could derive rights and duties under international law. At the same time, it was clear that the humanitarian problems created by internal armed conflicts demanded some sort of an international response.

It was not until the nineteenth century that the first attempts to apply the laws of war to non-international armed conflicts were made. For this purpose, insurgents were put on a par with belligerents, that is, to a state party to an international armed conflict. This was done by means of a legal construction known as ‘recognition of belligerency’.

In 1921 the Xth International Conference of the Red Cross adopted a resolution relating to civil war. In 1938 the XVIth International Conference of the Red Cross supplemented the 1921 Resolution with a new resolution relating to the role and activities of the Red Cross in time of civil war.
The adoption of the 1949 Geneva Conventions and common Article 3

The first international legal regulation of non-international armed conflict had to wait until 1949 with the inclusion in all four of the Geneva Conventions of a common Article 3, dealing specifically with non-international armed conflict.

Application of Common Article 3 of the Geneva Conventions

Common Article 3 applies as a minimum to armed conflicts ‘not of an international character occurring in the territory of one of the High Contracting Parties’. While the conflict must take place on the territory of a State Party, it does not have to involve the armed forces of the state, but could involve two or more armed groups.

Common Article 3 sets out a number of rules which must be applied during an internal armed conflict. But at what point does a conflict become a non-international armed conflict to which common Article 3 applies? The article does not specify the conditions in which it applies, nor does it stipulate that the conflict must be of a particular scale or duration. According to the ICRC Commentary on common Article, however, certain conditions must be satisfied before common Article 3 is applicable. They include the requirements that non-state actors possess an organised military force and an authority responsible for its acts, act within a determinate territory, and have the means of respecting and ensuring respect for the Convention. However, these criteria are not obligatory and are intended as indicia only. According to the Commentary, the scope of application of the article must be ‘as wide as possible’. At the very least there must be an armed conflict of a certain intensity, and the Commentary alludes to conflicts which have some resemblance to classic inter-state conflicts, with at least two armies facing each other off.

Once the conflict crosses the threshold to become a conflict not of an international character, it applies regardless of the rebels’ consent to be bound. While common Article 3 applies automatically once a conflict becomes a non-international armed conflict, and the Parties need apply only that Article and can ignore the other Articles of the Conventions, they are encouraged and should endeavour to apply the Conventions in their entirety. They can bring all or part of the Conventions into force by the adoption of special agreements. However, the ‘application of the preceding provisions shall not affect the legal status of the Parties to the conflict’.

It can be argued that it would be very difficult for rebels to comply with all of the provisions of the Geneva Conventions or to apply them in their entirety. In particular, for many rebel groups, the strict conditions of the Third Convention concerning prisoners of war would be challenging to meet. It is also unlikely that many states would be willing to grant POW status to rebels. It would also be difficult to apply in the case of a non-international armed conflict the provisions relating to aliens in the territory of a Party to the conflict. Indeed, the definition of ‘protected person’ in Article 4 of the Fourth Convention is inapposite in the case of a non-international armed conflict. Common Article 3 does not offer any definition of protected persons, although the civilian population enjoys protection under the Article against the acts prohibited.

The inclusion of the clause that the application of all or parts of the Conventions by the Parties shall not affect their legal status was considered essential by states attending the 1949 Geneva Diplomatic Conference. Many were opposed to any international regulation of non-international armed conflicts, despite the humanitarian imperatives. Without this clause, common Article 3 would never have been included. It means that rebels can be punished for the fact of taking up arms, even if they comply with the laws of war.
**Obligations of parties under common Article 3**

**Common Article 3** sets out a general obligation on Parties to non-international armed conflicts, followed by specific prohibitions and a specific obligation. The general obligation in paragraph 1 extends towards all persons taking no active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, injury, detention, etc. Such persons must in all circumstances be treated humanely, without any adverse distinction being made, based on race, colour, religion, sex, birth or wealth, etc. This general obligation of humane treatment is in fact one of the fundamental principles of international humanitarian law, which applies in all types of armed conflicts. While what constitutes ‘humane treatment’ is not defined in the article, examples of inhumane treatment are given in the sub-paragraphs (a) to (d).

Sub-paragraphs (a) through (d) enumerates a number of specific prohibitions. The following acts are and shall remain prohibited at all time and in any place whatsoever:

- a. violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
- b. taking of hostages;
- c. outrages upon personal dignity, in particular humiliating and degrading treatment;
- d. 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 civilized peoples.

These prohibitions, particularly (a) and (c) are general enough to include a variety of treatment; it was felt that to include a restrictive list of prohibitions would be to limit the protection afforded by the article.

The question whether common Article 3 prohibits reprisals is open to debate. While there is no general prohibition on reprisals, reprisals involving any of the above-enumerated acts would be prohibited. So too would be any reprisals that involved inhumane treatment. Arguably, reprisals involving the use of violence against the civilian population would by implication be prohibited.

Paragraph 2 of Article 2 imposes a specific obligation: the wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the ICRC, shall be able to offer its services to the Parties to the conflict. The obligation extends not only to sick and wounded of the Parties to the conflict but also to the civilian population.

**Critique of common Article 3**

While the adoption of common Article 3 was a welcome development, and while the Article in a sense expresses the essence of international humanitarian law, earning it the name of a ‘convention in miniature’, its very generality creates problems. It is not clear how far its protection extends. For instance, the Article is silent on the protection to be given to doctors and other medical personnel as well as medical units and transportation. It does not deal with the protection of the emblem. There are no provisions relating to treatment of detainees, or to methods and means of warfare. Common Article 3 is also silent on the question of the general protection of the civilian population. There is no express prohibition of attacks against the civilian population or rules on the conduct of hostilities aimed at sparing the civilian population. Neither is there regulation of relief operations during non-international armed conflicts.

**The adoption of Additional Protocol II**

**Additional Protocol II of 1977** was adopted to address some of the deficiencies in the law regarding
non-international armed conflicts. As an entire Protocol, as opposed to a single article, it regulates in
greater detail than common Article 3 situations of armed conflict within a single state. However,
especially in comparison with Protocol I, addressed to international armed conflicts, it is very
inadequate. It leaves unaddressed many aspects of non-international armed conflicts, in particular,
the permissible methods and means of warfare, and also lacks a criminal enforcement mechanism
equivalent to the grave breaches provisions.

Field of Application of Additional Protocol II

According to its Article 1, Additional Protocol II applies to armed conflicts which take place on the
territory of a High Contracting Party and which involve the armed forces of the state and one or
more armed rebel groups. The Protocol thus does not apply to situations of fighting between or
more armed groups but not involving the armed forces of the state. This requirement is a major
limitation on the application of the Protocol, particularly as contemporary conflicts often are waged
between rebel groups without the involvement of the state. A further limitation on the Protocol’s
applicability, as compared with common Article 3, is the stated requirement that the rebel groups
must operate under a responsible command and control a portion of the national territory. The logic
of this requirement is that if the rebel group does not control some territory, then, as a practical
matter, it will probably not be in a position to carry out sustained and concerted military operations
and to implement the Protocol. However, the control requirement may also make some states less
willing to admit the applicability of the Protocol, since for a state to admit the application of Protocol
II is to concede that it has lost control of a part of its national territory.

The requirements of having a responsible command and exercising control over territory are
probably a practical necessity, since without meeting these conditions, most rebels will not be able
or willing to apply the Protocol. Many of the types of rebel groups operating today are very loosely
organised, with sometimes a deliberately unstructured command in order to avoid criminal
responsibility of the leaders or are engaged in activities which deliberately aim at violating the law.
However, according to the ICRC Commentary on Additional Protocol II, an organisation akin to that
of a regular army is not necessary.

The requirement in Article 1 that, in order for the Protocol to apply, the fighting be sustained means
that operations should be kept going continuously. According to the Commentary, at the beginning
of a conflict, military operations rarely have such a character, and thus in most cases only common
Article 3 will apply to the first stages of a conflict.

The Protocol does not apply automatically when the above conditions are met; instead, there is an
additional criterion: the armed groups opposing the state must evidence their willingness to be
bound by the Protocol (this willingness could be indicated by actually applying its terms or by making
a declaration that they intend to be bound). Unless the rebels claimed to be the legitimate
government, in which case it could bind them automatically even without their consent, the Protocol
only kicks in once they demonstrate their willingness to be bound by it.

Whereas common Article 3 specifies that the application of its provisions or even the application by
agreement of all or part of the Conventions does not affect the legal status of the Parties to the
conflict, Protocol II does not contain an equivalent provision. This was not considered to be
necessary since nowhere in Protocol II is there a reference to the ‘Parties’ to the conflict. The
application of Protocol II by the parties does not constitute recognition of belligerency nor does it
change the legal nature of the relations between the parties involved in the conflict. Protocol II does
not establish any special category of protected persons, nor does it create any special legal status.
All persons deprived of their liberty for reasons relating to the armed conflict enjoy the same legal
protection. The Protocol applies automatically once the objective criteria for its application have been met. Of course, in practice, it can be difficult to make such an objective assessment, and there is no body invested with the power to make it.

Protected persons

The persons enjoying the protection given by the Protocol are ‘all persons affected by an armed conflict as defined in Article 1’. All such persons shall benefit equally from the Protocol. The Protocol must be applied ‘without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (…)’. The Protocol applies to all residents of the country engaged in a conflict, irrespective of their nationality, including refugees and stateless persons.

Prohibited acts and guarantees

Protocol II sets out a list of fundamental guarantees in Article 4. It states, as a general principle, (1) that ‘All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.’ Article 4 prohibits several acts, specifically, violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal treatment; collective punishments; taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; slavery and the slave trade in all their forms; pillage; threats to commit any of the foregoing acts.

Under paragraph 3, children shall be provided with the care and aid they require. The article stipulates what this means, including an education and reunion with their families if possible. Most importantly, subparagraph (c) prohibits recruiting children younger than 15 into the armed forces or armed groups or involving them in hostilities. Under subparagraph (d), children younger than 15 who do participate in hostilities shall not lose their special protection.

Article 5 of Protocol II sets out some additional guarantees relating to persons whose liberty has been restricted. Article 6 regulates penal prosecutions and guarantees rights of due process to all persons accused of crimes relating to the armed conflict.

Part IV of the Second Protocol deals with protection of the civilian population. Under Article 13:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.

Article 14 prohibits the starvation of civilians and attacks on objects indispensable for the survival of the civilian population. Article 15 prohibits attacks on works and installations containing dangerous forces. Article 16 prohibits directing attacks against cultural or religious sites. Article 17 prohibits the
forced movement of civilians. Protocol II also prohibits collective punishments. There is also a provision relating to the protection of objects indispensable to the survival of the civilian population. Starvation of the civilian population is prohibited.

**Critique of Additional Protocol II**

**Protocol II** is an improvement on common Article 3 in so far as it specifies in greater detail the fundamental guarantees which parties must respect during non-international armed conflicts. What is more noteworthy, however, is what is missing from the Protocol. It contains a mere 28 Articles as compared with the 102 of Protocol I. There are no provisions on methods and means of warfare. There is no provision granting general protection to civilian objects, although there is a provision dealing with protection of cultural objects and a prohibition against attacks directed against the civilian population. However, Protocol II fails to include some specific prohibitions included in Protocol I, including a direct prohibition against indiscriminate attacks, a direct prohibition against attacks on civilian objects, or indeed any provisions relating to the conduct of conflict. There is no specific prohibition of reprisals against the civilian population, although a prohibition against reprisals could be implied in Protocol II, in the same way as with common Article 3. Some provisions concerning treatment of persons whose liberty has been included (the Protocol omits use of the term ‘prisoner of war’, treating military and civilian detainees equally) have been included. There are no provisions dealing with combatant or POW status. Neither does Additional Protocol II say anything about the duty of commanders or of the High Contracting Parties and parties to the conflict with regard to repression of breaches of the fundamental guarantees.

**REPRESSION OF BREACHES IN NON-INTERNATIONAL ARMED CONFLICTS**

**The absence of a ‘grave breaches’ provision**

Unlike the Geneva Conventions and Additional Protocol I, neither common Article 3 nor Additional Protocol II provide for the repression of breaches of the law. Penal prosecutions of nationals are left up to the national authorities. Common Article 3 does not allude at all to how breaches of its provisions should be treated; in this absence, it is assumed that the matter is regulated by national law. Protocol II refers in Article 6 to Penal Prosecutions, but this refers to national prosecutions, and merely articulates the rights and duties applicable during national prosecutions of persons for crimes related to the armed conflict. The Article also states that at the end of hostilities, the authorities in power should endeavour to grant the broadest possible amnesty. However, it is clear from the *travaux preparatoires* of the Protocol that this was never intended to mean that national authorities should grant amnesties to persons who had committed war crimes. Rather, the amnesty was envisaged for persons whose only crime was to have participated in the conflict. In other words, the act of taking up arms should preferably not itself be punished.

Because of the absence of anything equivalent to the grave breaches provisions, complying the states to prosecute persons who had committed atrocities during non-international armed conflicts, it was long considered that war crimes, at least if we think of them as international crimes, could only be committed during an international armed conflict. Because no international criminal enforcement mechanism was envisaged for crimes committed in non-international armed conflicts, these were not war crimes strictly speaking—although they were prohibited acts committed during war—but crimes under national law. In an international sense, they could be considered as unlawful acts rather than crimes.

**Changing attitudes to war crimes in non-international armed conflicts**
In the last number of years, however, the attitude towards the international criminalisation of prohibited acts committed during non-international armed conflicts has radically changed. It is now widely considered that, despite the lack of a criminal law enforcement mechanism under treaty law relating to non-international armed conflicts, the international criminality of such acts is based on customary international law. This was the basis for the inclusion in the Statute of the ad hoc International Criminal Tribunal for Rwanda of jurisdictional provisions relating to acts committed in non-international armed conflicts, and the finding by the Appeals Chamber in the Tadiæ Appeals Decision on Jurisdiction of the International Criminal Tribunal for the former Yugoslavia that common Article 3 and the core of Additional Protocol II are customary in nature and that they give rise to individual criminal responsibility. This view has been upheld in subsequent jurisprudence and was reinforced by the incrimination of war crimes in non-international armed conflicts in the Statute of the International Criminal Court.