IHL triggers & distinction between IACs and NIACs

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Applicability of IHL

• *Jus ad bellum* and *jus in bello*
• IHL applies when there is an armed conflict
  • In reality: a battle over IHL applicability
• Temporal applicability:
  • Outbreak of armed conflict
  • Cession of armed conflict
    • **IAC:** General closure of military operation GCIV art. 6, AP I art. 3(b), end of captivity of POWs GCIII art. 5(1), and/or end of military occupation art. 6 GCIV
    • **NIAC:** End of AC AP II art. 2(2). Tadic: once reached threshold of AC IHL applies until peaceful settlement reached
• Territorial applicability
  • Principle of unity of territory – whole territory
  • Actual armed conflict takes place (when specific factual conditions are met)
  • Nexus - armed conflict
• IHL rules separate between IAC and NIAC
• Mixed armed conflict = If NIAC and IAC can be separated in same conflict context.
• NIAC can be labelled as internationalized or transnational and sometimes become IAC.
• Depending on IAC/NIAC – applicability of IHL rules varies:
  • IAC: most IHL treaty rules
  • NIAC: Common Article (CA 3) GCs and AP II + some newer weapons conventions
    • Customary international law has expanded the legal regime, but still no combatant privileges in NIAC.
Definition of ’Armed Conflict’

• Not defined in any treaty – developed through practice

• Tadic case ICTY:
  ”[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State“

• ICC Statement in Lubanga case:
  ”in the absence of two States opposing each other, there is no international armed conflict”
Political aims?

"the determination of the existence of an armed conflict was based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant."

ICTY Limaj case
International armed conflict (IAC)

• Common Article (CA) 2 GC:
  • ”all cases of declared war or of any other armed conflict”
• Armed conflict: ”resort to armed force between two or more States”
  • No requirement regarding duration or intensity of violence
  • Occupation – even if no hostilities take place
• Liberation wars
  • Art. 1 (4) AP I extends definition of IAC to fight against colonial domination, alien occupation and apartheid exercising their right of self-determination
  • Art. 96(3) AP I declaration to undertake to apply AP I
    • Only one declaration so far – NDFP in 1996
Non-International Armed Conflict (NIAC)

• CA 3 GC: armed conflict of a non-international character
  • Tadic case: “Protracted armed violence”, which requires
    • Certain intensity
    • Certain level of organization of the parties
  • Between State and organized armed groups (OAGs) or between OAGs
  • Not internal disturbances
• “Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.”
NIAC

• AP II: Applicable only between State party and OAG
• OAG has to:
  • Control territory of the State
  • Have a command structure
  • Be able to carry out military operations, and
  • Be able to implement AP II
IAC or NIAC?

• States and or/ OAGs using force internationally
• Classification based on the nature of the parties or of geography?
Internationalized Armed Conflict

• Dimension regarding the parties to the conflict

A. Another State intervenes in a NIAC (with its own forces)
   I. Becomes IAC – regardless of which side the intervening State supports
   II. Remains NIAC – if it supports the territorial State
   III. Both IAC and NIAC (mixed) – if States intervene to support the OAG against the state – see it as two parallel conflicts
   IV. Becomes IAC (in whole) – if supports OAG with very close relation
   V. IAC or NIAC depending on the reaction of the territorial state – if AC between two OAGs and another State intervenes.
   - Different schools of thought:
     1. Always IAC if state intervenes in another state w/o consent of that state
     2. Remains NIAC even if w/o consent BUT the military action is only directed against the OAG (not against the state as such)
B. Participants in NIAC act for another State’s behalf (no forces of its own)

I. Effective control vs. overall control - 2 standards for State responsibility and character of AC

II. Effective control = OAGs actions trigger State responsibility

III. Overall control (lower form of control, but still control regarding organizing, coordinating or planning military action in addition to financing, training and equipping the OAG) = IAC
Overall control test (Tadic-fallet)

• The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.

• Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.
Art. 8 ILC Draft Articles on State Responsibility:
The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

• ICJ – overall control not for state responsibility but possibly for classification of AC
‘Mickey’s a mouse. Donald’s a duck. Pluto’s a dog. What’s Goofy?’
‘Goofy’s a dog. He’s definitely a dog.’
‘He can’t be a dog. He drives a car and wears a hat’
‘Oh god. That’s weird. What the hell is Goofy?’
Transnational Armed Conflict

• Geographical dimension of AC (taking place in more than one State)
  I. State A fights OAG based in State B. Hostilities takes place in State A = NIAC
  II. State A fights OAG with spillover effects in State B
     I. NIAC - if State A only attack targets on OAG. Also, if State B consents State A:s action.
     II. IAC - if targets also involve State B:s infrastructure. Depending on the relation between OAG and State B it is a mixed or IAC in its whole.
  III. State A fights OAG based in State B with conflict taking place in State B = NIAC, but consent of State B can play a role here.
  IV. State A fights OAG based in several States and hostilities take place in several States (war on terror) = NIAC

• Most commentators: Parties to AC identifies if rules of IAC/NIAC apply.
End of AC?

• Jus ad bellum, jus in bello, just post bellum?
  • Special set of rules for post-conflict?