19. Targeting (Law of War Perspectives)

International law includes a set of rules concerning armed conflict. Commonly called the "law of war," this body of law in some contexts may be called "International Humanitarian Law" ("IHL") and in others the "Law of Armed Conflict" ("LOAC," pronounced low-ack). Some have suggested the former term is more popular amongst academics and other civilians, while the latter is more common amongst military lawyers (particularly NATO military lawyers). For our purposes, the distinction does not matter, and so we will use these terms interchangeably below.

When does IHL/LOAC apply?

The following excerpt is from the International Committee of the Red Cross:

IHL applies in two very different types of situations: *international armed conflicts and non-international armed conflicts.* Technically, the latter are called "armed conflicts not of an international character". It has been held, but is not entirely uncontested, that every armed conflict which "does not involve a clash between nations" is not of an international character, and that the latter phrase "bears its literal meaning". All armed conflicts are therefore either international or non-international, and the two categories have to be distinguished according to the parties involved rather than by the territorial scope of the conflict.

A. International armed conflict

The IHL relating to international armed conflicts applies "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 notion of "armed conflict" has, from 1949 onwards, replaced the traditional notion of "war". According to the Commentary, "[t]he substitution of this much more general expression ('armed conflict') for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict [...] even if one of the Parties denies the existence of a state of war

[...]." The ICTY confirmed in the *Tadic* case that "an armed conflict exists whenever there is a resort to armed force between States [...]". This definition has since been used several times by the ICTY's Chambers and by other international bodies. When the armed forces of two States are involved, suffice it for one shot to be fired or one person captured (in conformity with government instructions) for IHL to apply, while in other cases (e.g. a summary execution by a secret agent sent by his government abroad), a higher level of violence is necessary.

The same set of provisions also applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance [...]." In application of a standard rule of the law of State responsibility on the attribution of unlawful acts, a conflict between governmental forces and rebel forces within a single country becomes of international character if the rebel forces are de facto agents of a third State. In this event, the latter's conduct is attributable to the third State and governed by the IHL of international armed conflicts.

According to the traditional doctrine, the notion of international armed conflict was thus limited to armed contests between States. During the Diplomatic Conference of 1974-1977, which lead to the adoption of the two Additional Protocols of 1977, this conception was challenged and it was finally recognized that "wars of national liberation" should also be considered as international armed conflicts.

B. Non-international armed conflict

Traditionally, non-international armed conflicts (or, to use an outdated term, "civil wars") were considered as purely internal matters for States, in which no international law provisions applied.

This view was radically modified with the adoption of Article 3 common to the four Geneva Conventions of 1949. For the first time the society of States agreed on a set of minimal guarantees to be respected during non-international armed conflicts.

Unlike violence between the armed forces of States, not every act of violence within a State (even if directed at security forces) constitutes an armed conflict. The threshold of violence needed for the IHL of non-international armed conflicts to apply is therefore higher than for international armed conflicts. In spite of the

extreme importance of defining this lower threshold below which IHL does not apply at all, Article 3 does not offer a clear definition of the notion of non-international armed conflict. During the Diplomatic Conference, the need for a comprehensive definition of the notion of non-international armed conflict was reaffirmed and dealt with accordingly in Article 1 of Additional Protocol II.

According to that provision, it was agreed that Protocol II "[s]hall apply to all armed conflicts not covered by Article 1 [...] of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol [...]".

It should be noted that this fairly restrictive definition applies only to Protocol II. It does not apply to Article 3 common to the four Geneva Conventions. Practically, there are thus situations of non-international armed conflict in which only common Article 3 will apply, because the level of organization of the dissident groups is insufficient for Protocol II to apply, or the fighting is between non-State armed groups. Conversely, common Article 3 will apply to all situations where Protocol II is applicable.

Moreover, the ICC Statute provides an intermediary threshold of application. It does not require that the conflict be between governmental forces and rebel forces, that the latter control part of the territory, or that there be a responsible command. The conflict must, however, be protracted and the armed groups must be organized. The jurisprudence of the ICTY has, in our view correctly, replaced the conflict's protracted character by a requirement of intensity. It requires a high degree of organization and violence for any situation to be classified as an armed conflict not of an international character.

Today, there is a general tendency to reduce the difference between IHL applicable in international and in non-international armed conflicts. The jurisprudence of international criminal tribunals, the influence of human rights and even some treaty rules adopted by States have moved the law of non-international armed conflicts closer to the law of international armed conflicts, and it has even been suggested in some quarters that the difference be eliminated altogether. In the many fields where the treaty rules still differ, this convergence has been rationalized by claiming that under customary international law the

differences between the two categories of conflict have gradually disappeared. The ICRC study on customary International Humanitarian Law comes, after ten years of research, to the conclusion that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which are based on rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts.

C. Other situations

IHL is not applicable in situations of internal violence and tension which do not meet the threshold of non-international armed conflicts. This point has been clearly made in Article 1(2) of Additional Protocol II, which states: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts [...]."

LOAC and Basic Concepts Involving the Use of Lethal Force

The following passages are from the International Committee of the Red Cross's recent study of the customary international law rules associated with LOAC.

Rule 1. The Principle of Distinction Between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The three components of this rule are interrelated and the practice pertaining to each of them reinforces the validity of the others. The term combatant in this rule is used in its generic meaning, indicating persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status. This rule has to be read in conjunction with the prohibition to attack persons recognized to be *hors de combat* and with the rule

that civilians are protected against attack unless and for such time as they take a direct part in hostilities....

No official contrary practice was found with respect to either international or non-international armed conflicts. This rule is sometimes expressed in other terms, in particular as the principle of distinction between combatants and non-combatants, whereby civilians who do not take a direct part in hostilities are included in the category of non-combatants. ....

Rule 3. Definition of Combatants

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.

Summary

State practice establishes this rule as a norm of customary international law in international armed conflicts. For purposes of the principle of distinction (see Rule 1), members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts.

Non-international armed conflicts

Common Article 3 of the Geneva Conventions and Additional Protocol II refer to "armed forces" and Additional Protocol II also to "dissident armed forces and other organized armed groups". These concepts are not further defined in the practice pertaining to non-international armed conflicts. While State armed forces may be considered combatants for purposes of the principle of distinction (see Rule 1), practice is not clear as to the situation of members of armed opposition groups. Practice does indicate, however, that persons do not enjoy the protection against attack accorded to civilians when they take a direct part in hostilities (see Rule 6).

Persons taking a direct part in hostilities in non-international armed conflicts are sometimes labelled "combatants". For example, in a resolution on respect for

human rights in armed conflict adopted in 1970, the UN General Assembly speaks of "combatants in all armed conflicts". More recently, the term "combatant" was used in the Cairo Declaration and Cairo Plan of Action for both types of conflicts. However, this designation is only used in its generic meaning and indicates that these persons do not enjoy the protection against attack accorded to civilians, but this does not imply a right to combatant status or prisoner-of-war status, as applicable in international armed conflicts. The lawfulness of direct participation in hostilities in non-international armed conflicts is governed by national law. While such persons could also be called "fighters", this term would be translated as "combatant" in a number of languages and is therefore not wholly satisfactory either. ...The uncertainty about the qualification of members of armed opposition groups is further addressed in the commentaries to Rules 5 and 6.

Interpretation

... While in some countries, entire segments of the population between certain ages may be drafted into the armed forces in the event of armed conflict, only those persons who are actually drafted, i.e., who are actually incorporated into the armed forces, can be considered combatants. Potential mobilization does not render the person concerned a combatant liable to attack.

Rule 4. Definition of Armed Forces

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.

Summary

State practice establishes this rule as a norm of customary international law applicable in international armed conflicts. For purposes of the principle of distinction, it may also apply to State armed forces in non-international armed conflicts.

International armed conflicts

...In essence, this definition of armed forces covers all persons who fight on behalf of a party to a conflict and who subordinate themselves to its command. As a result, a combatant is any person who, under responsible command, engages in hostile acts in an armed conflict on behalf of a party to the conflict. The conditions imposed on armed forces vest in the group as such. The members of such armed forces are liable to attack.

This definition of armed forces builds upon earlier definitions contained in the Hague Regulations and the Third Geneva Convention which sought to determine who are combatants entitled to prisoner-of-war status. Article 1 of the Hague Regulations provides that the laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling four conditions:
It further specifies that in countries where militia or volunteer corps (so-called "irregular" armed forces) constitute the army, or form part of it, they are included under the denomination "army". This definition is also used in Article 4 of the Third Geneva Convention, with the addition of organized resistance movements. The Hague Regulations and the Third Geneva Convention thus consider all members of armed forces to be combatants and require militia and volunteer corps, including organized resistance movements, to comply with four conditions in order for them to be considered combatants entitled to prisoner-of-war status. The idea underlying these definitions is that the regular armed forces fulfil these four conditions *per se* and, as a result, they are not explicitly enumerated with respect to them. The definition contained in Additional Protocol I does not distinguish between the regular armed forces and other armed groups or units, but defines all armed forces, groups and units which are under a command responsible to a party for the conduct of its subordinates as armed forces of that party. Both definitions express the same idea, namely that all persons who fight in the name of a party to a conflict – who "belong to" a party in the words of Article 4 of the Third Geneva Convention – are combatants. The four conditions contained in the Hague Regulations and the Third Geneva Convention have been reduced to two conditions, the main difference being the exclusion of the requirements of visibility for the definition of armed forces as such. The requirement of visibility is relevant with respect to a combatant's entitlement to prisoner-of-war status (see Rule 106). Additional Protocol I, therefore, has lifted this requirement from the definition of armed forces (Article

43) and placed it in the provision dealing with combatants and prisoner-of-war status (Article 44).

... Only the failure to distinguish oneself from the civilian population or being caught as a spy or a mercenary warrant forfeiture of prisoner-of-war status.

The definition in Article 43 of Additional Protocol I is now generally applied to all forms of armed groups who belong to a party to an armed conflict to determine whether they constitute armed forces. It is therefore no longer necessary to distinguish between regular and irregular armed forces. All those fulfilling the conditions in Article 43 of Additional Protocol I are armed forces.

Incorporation of paramilitary or armed law enforcement agencies into armed forces

Specific practice was found concerning the incorporation of paramilitary or armed law enforcement agencies, such as police forces, *gendarmerie* and constabulary, into armed forces.... Incorporation of paramilitary or armed law enforcement agencies into armed forces is usually carried out through a formal act, for example, an act of parliament. In the absence of formal incorporation, the status of such groups will be judged on the facts and in the light of the criteria for defining armed forces. When these units take part in hostilities and fulfil the criteria of armed forces, they are considered combatants. In addition, Additional Protocol I requires a party to the conflict to notify such incorporation to the other parties to the conflict. ... In the light of the general obligation to distinguish between combatants and civilians (see Rule 1), such notification is important because members of the armed forces of each side have to know who is a member of the armed forces and who is a civilian. Confusion is particularly likely since police forces and *gendarmerie* usually carry arms and wear a uniform, although in principle their uniforms are not the same as those of the armed forces proper. ...

Rule 5. Definition of Civilians

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.

Summary

State practice establishes this rule as a norm of customary international law applicable in international armed conflicts. It also applies to non-international armed conflicts although practice is ambiguous as to whether members of armed opposition groups are considered members of armed forces or civilians.

International armed conflicts

... Some practice adds the condition that civilians are persons who do not participate in hostilities. This additional requirement merely reinforces the rule that a civilian who participates directly in hostilities loses protection against attack (see Rule 6). However, such a civilian does not thereby become a combatant entitled to prisoner-of-war status and, upon capture, may be tried under national law for the mere participation in the conflict, subject to fair trial guarantees....

Non-international armed conflicts

The definition that "any person who is not a member of armed forces is considered to be a civilian" and that "the civilian population comprises all persons who are civilians" was included in the draft of Additional Protocol II. The first part of this definition was amended to read that "a civilian is anyone who is not a member of the armed forces or of an organized armed group" and both parts were adopted by consensus.... However, this definition was dropped at the last moment of the conference as part of a package aimed at the adoption of a simplified text. As a result, Additional Protocol II does not contain a definition of civilians or the civilian population even though these terms are used in several provisions. It can be argued that the terms "dissident armed forces or other organized armed groups … under responsible command" in Article 1 of Additional Protocol II inferentially recognized the essential conditions of armed forces, as they apply in international armed conflict (see Rule 4), and that it follows that civilians are all persons who are not members of such forces or groups. Subsequent treaties, applicable to non-international armed conflicts, have similarly used the terms civilians and civilian population without defining them.

While State armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members

of such groups are liable to attack as such, independently of the operation of Rule 6. ...

Rule 6. Civilians' Loss of Protection

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities.

...[T]he Inter-American Commission on Human Rights held that civilians who directly take part in fighting, whether singly or as members of a group, thereby become legitimate military targets but only for such time as they actively participate in combat To the extent that members of armed opposition groups can be considered civilians (see commentary to Rule 5), this rule appears to create an imbalance between such groups and governmental armed forces. Application of this rule would imply that an attack on members of armed opposition groups is only lawful for "such time as they take a direct part in hostilities" while an attack on members of governmental armed forces would be lawful at any time. Such imbalance would not exist if members of armed opposition groups were, due to their membership, either considered to be continuously taking a direct part in hostilities or not considered to be civilians.

It is clear that the lawfulness of an attack on a civilian depends on what exactly constitutes direct participation in hostilities and, related thereto, when direct participation begins and when it ends. As explained below, the meaning of direct participation in hostilities has not yet been clarified. It should be noted, however, that whatever meaning is given to these terms, immunity from attack does not imply immunity from arrest and prosecution.

Definition

A precise definition of the term "direct participation in hostilities" does not exist. The Inter-American Commission on Human Rights has stated that the term "direct participation in hostilities" is generally understood to mean "acts which, by their nature or purpose, are intended to cause actual harm to enemy personnel and *matériel*". Loss of protection against attack is clear and uncontested, as evidenced by several military manuals, when a civilian uses weapons or other means to commit acts of violence against human or material enemy forces. But

there is also a lot of practice which gives little or no guidance on the interpretation of the term "direct participation", stating, for example, that the assessment of direct participation has to be made on a case-by-case basis or simply repeating the general rule that direct participation causes civilians to lose protection against attack. The military manuals of Ecuador and the United States give several examples of acts constituting direct participation in hostilities, such as serving as guards, intelligence agents or lookouts on behalf of military forces.

In a report on human rights in Colombia, the Inter-American Commission on Human Rights sought to distinguish "direct" from "indirect" participation: Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.

...It is fair to conclude, however, that outside the few uncontested examples cited above, in particular use of weapons or other means to commit acts of violence against human or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in State practice.
Several military manuals specify that civilians working in military objectives, for example, munitions factories, do not participate directly in hostilities but must assume the risks involved in an attack on that military objective. The injuries or death caused to such civilians are considered incidental to an attack upon a legitimate target which must be minimized by taking all feasible precautions in the choice of means and methods, for example, by attacking at night. The theory that such persons must be considered quasi-combatants, liable to attack, finds no support in modern State practice. ....

Rule 14. Proportionality in Attack

Rule 14. Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a

combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.

Interpretation

Several States have stated that the expression "military advantage" refers to the advantage anticipated from the military attack considered as a whole and not only from isolated or particular parts of that attack. The relevant provision in the Statute of the International Criminal Court refers to the civilian injuries, loss of life or damage being excessive "in relation to the concrete and direct *overall* military advantage anticipated" (emphasis added). The ICRC stated at the Rome Conference on the Statute of the International Criminal Court that the addition of the word "overall" to the definition of the crime could not be interpreted as changing existing law. Australia, Canada and New Zealand have stated that the term "military advantage" includes the security of the attacking forces.
Upon ratification of Additional Protocol I, Australia and New Zealand stated that they interpreted the term "concrete and direct military advantage anticipated" as meaning that there is a *bona fide* expectation that the attack would make a relevant and proportional contribution to the objective of the military attack involved. According to the Commentary on the Additional Protocols, the expression "concrete and direct" military advantage was used in order to indicate that the advantage must be "substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded".

Numerous States have pointed out that those responsible for planning, deciding upon or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time. ...
