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The convergence of the international humanitarian law of non-international and international armed conflicts – the dark side of a good idea

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Daniel Thürer has long expressed an interest in International Humanitarian Law (IHL), both in scholarly writings and practicing it, *inter alia* as a member of the International Committee of the Red Cross (ICRC). IHL protects persons affected by armed conflicts. Most armed conflicts today are not international armed conflicts opposing states. Rather, they are, in the words of common Article 3 to the 1949 Geneva Conventions “not of an international character.” This concept includes civil wars and extraterritorial armed conflicts against an armed group (such as the conflict pitting NATO member states against the Taliban in Afghanistan). However, the bulk of IHL is codified in treaties for international armed conflicts (IACs). Of all the rules in the Geneva Conventions, only common Article 3 cited above applies to non-international armed conflicts (NIACs). When some additional conditions are fulfilled, Additional Protocol II of 1977 also becomes applicable. This paucity of the written law is not an oversight, but due to a deliberate decision by states who, in their Westphalian obsession for sovereignty, refused - in 1949 and again in 1977 - to accept the same or even similar rules for both situations.¹ In this contribution, I will first show that nevertheless the IHL regulating IACs has come much closer to that regulating NIACs in the last 20 years. I will be short in describing the many advantages of this development, because they are uncontroversial. I will instead focus mainly on two disadvantages: First, IHL becomes less realistic for armed groups; and second states have taken advantage of this

* I would like to thank Ms. Yvette Issar, LL.M., doctoral student and research assistant at the University of Geneva for having revised this text.

¹ For 1949, see Jean S. Pictet (ed.), *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1958, p. 36, and for 1977, see Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, 1987, paras 4360-4418.

development initiated by humanitarians to reciprocate by invoking in NIACs rights they allegedly had under the traditional IHL of IACs, to the detriment of those affected by NIACs. Those two disadvantages are very rarely mentioned in generally enthusiastic or neutral scholarly writings about this convergence.² Admittedly, these two disadvantages are not the reason why many states in the South remain sceptical about this development or try to evade it by denying the existence of any armed conflict on their territory. In my conclusion I will try to show possible ways to overcome those disadvantages through a completely new approach to NIACs.

The contemporary tendency to close the gap between the two branches

Most scholars today argue either explicitly or implicitly that the distinction between IACs and NIACs should disappear,³ often without clarifying whether the claim to the monopoly of the lawful use of violence inherent in the modern state (which, when properly enforced, has very beneficial effects for those living in a state) should be abandoned. The result would be either to grant combatant immunity to insurgents in NIACs or to abolish combatant immunity from prosecution for acts of hostility not violating IHL – and therefore prisoner of war status – even in IACs.

In reality, the law of NIACs in the last few decades *has* indeed gotten closer to the law of IACs.⁴ This started with the case law of the international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). In its first decision in the *Tadić* case, the ICTY held that

² I found recent scepticism for the reasons mentioned in this article and some others, only by Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford, 2012, pp. 65-77, 429 and 473, and Cecilie Helvestveit, *The Geneva Conventions and the dichotomy between international and non-international armed conflict: curse or blessing for the “principle of humanity”* in: Kjetil Mujezinović Larsen *et al.* (eds), *Searching for a ‘Principle of Humanity’* in *International Humanitarian Law*, Cambridge, 2013, pp. 99-105.

³ See e.g. James G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, *International Review of the Red Cross (IRRC)*, vol. 85, pp. 313-350; Lindsay Moir, *Towards the Unification of International Humanitarian Law?* in: Richard Burchill *et al.* (eds), *International Conflict and Security Law*, Cambridge 2005, pp. 108-18, and Emily Crawford, *The treatment of combatants and insurgents under the law of armed conflict*, Oxford, 2010, pp. 6-7, 31, 37-46 and 171-173.

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largely the same rules apply to IACs and NIACs and that under customary international law, the concept of war crimes is equally applicable in NIACs.⁵ States accepted this revolutionary finding rather favourably and they included almost the same crimes for IACs and NIACs in the Statute of the International Criminal Court, however still preferring to list them separately.⁶ At least Switzerland has recently pursued this road to its end and incriminated war crimes in both categories of conflict in the same provisions of its criminal code,⁷ “unless the nature of the offence requires otherwise.”⁸ Outside the criminal field, recent treaties on the use of weapons and on the protection of cultural property have applied the same rules to both categories of conflict.⁹

In a separate development, the conclusions of an ICRC Study on Customary International Humanitarian Law list 136 (if not 141) rules out of 161 as applicable to both categories of conflict, and many of them resemble the treaty rules of Protocol I, which was drafted for IACs.¹⁰ In addition, the increasing influence of International Human Rights Law certainly equally contributed to this convergence, simply because the category of armed conflict does not matter for human rights law.

Arguably, the last two issues for which the difference between IACs and NIACs still matters are status (combatant and POW status only exist in IAC, and combatants may not be punished in IACs for the mere fact of having committed acts of hostility) and occupied territory, a concept difficult to extend to NIACs, and for which IHL rules protecting civilians are much more detailed.

⁵ See in particular ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Duško Tadić alias “Dule”*, 2 October 1995, paras. 96-136.

⁶ See the difference between Art. 8(2)(a) and (b) and Art. 8(2)(c) and (e) of the *ICC Statute*, 17 July 1998.

⁷ See Arts 264c-264j of the Swiss Criminal Code.

⁸ Art. 264b of the Swiss Criminal Code (“si la nature de l’infraction ne l’exclut pas”).

⁹ See *Amendment to Article 1* [in particular paras 2 and 3] of the *1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, in Order to Extend it to Non-International Armed Conflicts* (December 21, 2001), 2260 U.N.T.S. 82; Art. 19 of the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* (May 14, 1954), 249 U.N.T.S. 240, and Art. 22 of the *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (March 26, 1999), 2253 U.N.T.S. 212.

¹⁰ See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, 2005.

Advantages of this development

Daniel Thürer correctly wrote: “This is a favourable development. It means that the victims of non-international armed conflicts come in for greater protection under international humanitarian law. It is also a reasonable development. Is it just to make protection for those affected by hostilities dependent on the character of the conflict? Human beings deserve the same protection, regardless of whether they are affected by a battle taking place within one country or across borders.”¹¹ This echoes what the ICTY wrote in the much applauded *Tadić* decision: “[T]he distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals [...], as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If international law [...] must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”¹² One could add that the application of different rules for protection in IACs and NIACs obliges humanitarian players and victims to classify the conflict before they can invoke those rules. This can be theoretically difficult and is always politically delicate.¹³

The risk of making the law less realistic for armed groups

All law has to take into account the social reality it seeks to govern. IACs are fought between states. When they adopted IHL of IACs, they took the social reality of states as belligerents into account. NIACs are by definition fought at least as much by armed groups as by governmental armed forces. If only the needs, difficulties and aspirations of the latter are taken into account by the law, because it is drawn by analogy from that accepted for IACs, it will be less realistic and less effective.

The current tendency to bring IHL of NIACs closer to that of IACs may have a negative side effect in this respect. Scholars and judges

¹¹ Daniel Thürer, “International Humanitarian Law: theory, Practice, Context”, in: *Collected Courses*, vol. 338, 2008, p. 54

¹² *Tadić* (note 5), para. 97.

¹³ Elizabeth Wilmshurst, (ed.), *International Law and the Classification of Conflicts*, Oxford, 2012.

sometimes forget that IHL of NIACs also binds armed groups. Hereafter, I will provide a few examples for how this may lead to rules binding armed groups which are not realistic for them. Unrealistic rules, however, do not protect anyone.

The ICTY concludes that command responsibility must necessarily apply in NIACs.¹⁴ Although one may wonder whether this rule results from general (state) practice, it is a result of logical legal thinking as far as state agents are concerned. Did the judges however realize that their pronouncement implies that command responsibility also applies in armed groups, in which commanders may not have the legal capacity to punish members who have committed violations, as required by IHL of IACs to avoid responsibility for crimes committed by their subordinates?¹⁵ Do they really require a commander of an armed group to conduct a trial to avoid criminal responsibility for war crimes committed by his or her subordinates? Would this be admissible under Human Rights Law?

When the ICRC claims in its aforementioned Study that most rules of customary IHL, many of which parallel rules of Protocol I applicable as a treaty to IACs, apply equally to NIACs,¹⁶ did it bear in mind that for each of these rules this implies that they are also binding upon armed groups? To take but one example, the ICRC considers (mainly based upon the practice of Human Rights bodies) that there is a customary IHL prohibition of arbitrary detention. The ICRC interprets this prohibition as requiring that the basis for internment must be previously established by law and that “a person deprived of liberty [must be given] an opportunity to challenge the lawfulness of detention”.¹⁷ Did the ICRC realize that this either requires armed groups to legislate and to institute *habeas corpus* proceedings or that they may never detain anyone? Is the latter realistic? Parties to armed conflicts intern persons, to hinder them from continuing to bear arms, so as to gain a military advantage. If the non-state actor cannot legally intern members of government forces, it

¹⁴ See Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Prosecutor v. Hadzihasanović et al., ICTY, Appeals Chamber, 16 July 2003.

¹⁵ See Art. 86 (2) *in fine* of Protocol I.

¹⁶ Henckaerts and Doswald-Beck (note 10).

¹⁷ *Ibid.* at 350.

is left with no option but either to release the captured enemy fighters or to kill them. The former is unrealistic, the latter a war crime.¹⁸

In my view, before drawing, *qua* customary law or otherwise, analogies between the IHL of IACs and NIACs, a serious reality check from the perspective of armed groups should be made.

States invoke the analogy equally to the detriment of persons affected by armed conflicts

The idea of applying IHL of IACs by analogy to NIACs was originally prompted by a humanitarian concern; to improve the protection of persons affected by NIACs through the application of more detailed and protective rules. Two assumptions were underlying: first that no protection would exist without the application of IHL; second that the application of additional rules of IHL could only improve the fate of the persons affected. Both assumptions have proven to be partially erroneous.

First, since the Geneva Conventions were adopted in 1949, Human Rights Law has developed and its applicability even in times of armed conflicts is uncontroversial (although it remains controversial whether and in what circumstances it applies extraterritorially). Pictet wrote in 1958 that “the scope of application of [their common] Article [3] must be as wide as possible. There can be no drawbacks in this [...]. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries [...]. What Government would dare to claim before the world, in a case of [...] mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?”¹⁹ For the entire IHL of NIACs, expanded by analogy from that of IACs, this is clearly no longer true: if one follows the prevailing *lex specialis* approach, IHL rules prevail over more protective Human Rights rules on the same subject matter.²⁰ In NIACs, the more detailed the rules of IHL are, the greater is

¹⁸ Article 8 (2)(e)(x) of the Rome Statute. See also Henckaerts and Doswald-Beck (note 10), p. 161.

¹⁹ Pictet (note 1), p. 36.

²⁰ See, also for references, Marco Sassòli, *Le droit international humanitaire, une lex specialis par rapport aux droits humains?* in: Andreas Auer/Alexandre Flückiger/Michel Hottelier (eds.), *Les droits de l'homme et la constitution, Etudes en l'honneur du Professeur Giorgio Malinverni*, Geneva, 2007, pp. 375-395.

the risk for the comparatively more protective Human Rights rules to be crowded out by this *lex specialis*. Common Article 3 and even Protocol II leave many crucial questions open, e.g. when a fighter belonging to an armed opposition group may be targeted or for what reasons and according to what procedure he or she may be detained. For those questions, treaty IHL could therefore not constitute the *lex specialis* and Human Rights Law would apply. Once however the rules of IHL of IACs are considered to apply (*qua* customary law), fighters may be attacked at any time until they surrender or are otherwise *hors de combat* and they may be detained without any individual procedure until the close of active hostilities. The results are drone attacks against suspected associates of Al-Qaeda and detention in Guantánamo.

Second, and intimately related to the first drawback, when modern codified IHL was initiated by Henry Dunant after the battle of Solferino, IHL was seen as requiring states to do certain things, e.g. to collect and care for the wounded and sick, and as prohibiting other things, e.g. attacks on medical personnel. All existing treaty IHL may still be read in this sense. Some states, in particular the United States since the beginning of its “war on terror”, increasingly argue, however, that IHL equally provides authorization to do certain things. The question of whether states at all need authorization under international law or whether it is sufficient that they do not violate legal prohibitions has haunted international law since the famous Lotus case before the Permanent Court of International Justice (PCIJ).²¹ Daniel Thürer would certainly and correctly argue that the restrictive approach of the PCIJ of 1927 has been overcome by the increased density and constitutional character of international law.²² In the field of IHL he would add that under the famous Martens clause of 1899, “in cases not included in the Regulations [...], populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the

²¹ For a recent example, see Declaration of Judge Simma in: ICJ, Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, 22 July 2010.

²² Daniel Thürer, The Legality of the Threat or Use of Nuclear Weapons: the ICJ Advisory Opinion Reconsidered, in: Revista da Faculdade de Direito da UFMG, Belo Horizonte, n° 61, 2012, p. 223.

public conscience.”²³ This fundamental challenge for the theory of international (humanitarian) law is superseded by a very practical requirement of International Human Rights Law. Interferences into the right to life and into personal freedom must have a legal basis.²⁴ If IHL provides for an authorization to kill or to detain, this could constitute the necessary legal basis under Human Rights Law.

In IACs it is difficult to deny that IHL contains certain authorizations. Many consider that combatant privilege implies a “right to kill” enemy combatants.²⁵ Article 43 (2) of Protocol I indeed states that “combatants [...] have the right to participate directly in hostilities”. The case of deprivation of personal freedom of prisoners of war (POWs) is even clearer. Article 21 of Convention III states: “The Detaining Power may subject prisoners of war to internment.” No state has legislated to provide a legal basis for interning POWs or to provide for any procedure for deciding to intern POWs, which would be required by most domestic laws and International Human Rights Law if IHL itself was not a sufficient legal basis and did not implicitly exclude the need to conduct an individual assessment in the case of POW internment.

Treaty IHL of NIACs does not contain any similar rules which could be seen as authorizing deliberate killings or detention without trial. Admittedly, neither does it prohibit detention without trial or killing members of armed groups (except if they have laid down their arms). For such issues not regulated by IHL as the *lex specialis*, one would therefore normally have to look to Human Rights Law, which allows deliberate killings only if they are absolutely necessary to protect human life (or to quell a riot)²⁶, and detention only where there is a legal basis and the possibility to challenge the detention’s lawfulness before a court.²⁷ However, if the IHL of IACs is applied by analogy and *qua* customary law to NIACs, targeted killings of suspected associates of Al Qaeda are

²³ Preamble of *Convention (II) with Respect to the Laws and Customs of War on Land* and its annex: *Regulations concerning the Laws and Customs of War on Land*, The Hague, 29 July 1899; Thürer (note 11), p. 398-402.

²⁴ See, e.g., Art. 6 and 9 para. 1 of the *International Covenant on Civil and Political Rights*; Human Rights Committee, General Comment n° 6 – Article 6 (the Right to Life), HRI/GEN/1/Rev. 9 (Vol. I), 30 April 1992, para. 3.

²⁵ Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge, Second Edition, 2010, p. 33.

²⁶ See, e.g., Art. 2 of the *European Convention on Human Rights*.

²⁷ See e.g. *ibid.*, Art. 5.

authorized (as the Obama administration argues). Similarly, the internment of members of armed groups based upon the laws of war and with no possibility to challenge the lawfulness of such detention would be authorized (as the Bush administration initially argued).²⁸ Intended to provide protection for all those affected by or involved in armed conflicts, IHL would not only thus become the justification for denying such persons and others any protections afforded by Human Rights Law and domestic legislation, but would also move away from being the protective legal regime envisaged by Henry Dunant, to becoming one that authorized the deprivation of life and of liberty during armed conflict. And the humanitarians who argued for an analogous application of IHL of IACs to NIACs could be seen as unintentionally complicit in this metamorphosis.

Thoughts about possible future solutions

Perhaps we have to rid ourselves of the historically justified idea that IHL of IACs constitutes the starting point for thinking about the law of armed conflict. IACs have fortunately become an exotic, somehow even anachronistic phenomenon in an international society turning into an international community governed by the international rule of law, if not by a tendency towards an international constitutional order. Both developments so dear to Daniel Thürer clearly describe reality. The controversy is only whether the glass is a quarter full, as he would certainly argue, or three quarter empty, as I fear it is. Anyway, pending the realization of such a better world, IHL of IACs should be kept, as it is, until the phenomenon it regulates (hopefully) totally disappears. As for all other armed conflicts, not of an international character, the phenomena thus called are so diverse that one set of rules may not be adequate for all of them. Some suggest to apply only Geneva-law-type rules to low intensity conflicts.²⁹ Others want to give Human Rights a greater weight in

²⁸ Marco Sassòli, *The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect*, in: *Proceedings of the 104th Annual Meeting of the ASIL*, vol. 104, 2011, pp. 277-280.

²⁹ See Françoise Hampson, *Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law*, in: Raul A. Pedrozo/Daria P. Wollschlaeger (eds), *International Law and the Changing Character of War*, *International Studies Vol. 87*, Newport, 2011, p. 196-197; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford, 2010, p. 155

low intensity conflicts or whenever hostilities are conducted far away from actual hostilities (e.g. with drones).³⁰ One suggestion is a “zone approach” based on “individualized threat requirement, a least-harmful-means test, and meaningful procedural safeguards for lethal targeting and law-of-war detention that take place outside zones of active hostilities.”³¹ Proponents of these approaches do not clarify whether they would also apply to non-state armed groups. Even I have raised the question of whether a sliding scale of obligations should be applied in such conflicts and – supreme heresy for a traditional IHL lawyer – the fiction of the equality of belligerents in NIACs be abandoned.³²

In any case, these issues should be discussed by states and scholars, without taking IHL of IACs as a starting point. Thus, combatant status and combatant immunity from prosecution would no longer be the initial stumbling block of any discussion. Most states would still insist that the regulation of at least civil wars comes under their sovereign domain. Once this is recognized and they are assured that such conflicts are fundamentally different from inter-state wars, even sovereignty-obsessed states will have to admit that they have accepted rules on other issues falling in this domain, such as air pollution, drug abuse, human rights or development. One may then look at the humanitarian problems arising in today’s armed conflicts and search for solutions in the form of rules. Those must also take the phenomenon of armed groups into account, just as states take diseases into account in international health law, although both phenomena are undesirable from their perspective: they will simply not disappear if they are ignored.

Probably many of those rules will be astonishingly similar to those which were traditionally developed for IACs, but not because of an *a priori* as a starting point, but because of the subject matter to be regulated. Pending agreement about such new rules, the existing ones would obviously continue to apply. If only common Article 3 and Protocol II were respected in good faith in the meantime, the fate of war victims would already be dramatically different from what it is now.

³⁰ See for instance Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, A/68/382, 13 September 2013.

³¹ Jennifer Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, *University of Pennsylvania Law Review* 161, 2013, p. 1209

³² Marco Sassòli, *Introducing a sliding-scale of obligations to address the fundamental inequality between armed groups and states?* *IRRC*, vol. 93, 2011, pp. 426-431.