Volume 91 Number 873 March 2009

INTERNATIONAL REVIEW of the Red Cross

Classifying the conflict: a soldier's dilemma

Andrew J. Carswell*

Andrew Carswell is ICRC Regional Delegate to the Armed and Security Forces of Southern Africa, based in Pretoria. He is a former legal officer and military prosecutor of the Canadian Forces Office of the Judge Advocate General.

Abstract

Modern armed forces are employed in a wide array of operations that range from peacetime riot control to outright international armed conflict. Classifying these various scenarios to determine the applicable international law is rendered difficult by both the lack of clarity inherent in the law and the political factors that tend to enter the decision-making process. The author describes the major challenges of legal classification facing the military leadership, and proposes a solution to ensure that the intended beneficiaries of the law – from soldiers to civilians – do indeed receive its protection.

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The conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an internal conflict that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.

ICTY Appeals Chamber, Tadić *Decision*[1]

* This article reflects the views of the author and not necessarily those of the ICRC. The author thanks Jonathan Somer for reviewing a previous draft of this article, and both Garth Abraham and Christopher Black for their helpful comments. Any errors are attributable solely to the author.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

Great leaders are almost always great simplifiers, who can cut through argument, debate and doubt, to offer a solution everybody can understand.

General (retd) Colin Powell[2]

The principles of the law of armed conflict, also known as the law of war or international humanitarian law (IHL), are simple to summarize for soldiers. Many militaries today carry pocket-sized codes of conduct that list the fundamentals: fight only enemy combatants and destroy only military objectives; collect and care for the wounded, whether friend or foe; do not attack or harm enemy personnel who surrender; do not kill, torture or abuse prisoners of war; treat all civilians humanely; do not engage in rape or looting.[3] In the majority of cases, adherence to these sorts of simple and ostensibly obvious rules will guide a military commander and his subordinates towards a form of warfare that respects the fundamental tenets of IHL: humanity, military necessity, distinction, proportionality, precaution and the prevention of unnecessary suffering.

Unquestionably, these rules – which form the core legal component of modern soldier training – will serve as a useful humanitarian starting point for any conceivable military operation. Nevertheless, today's troops are assigned roles that range from riot control to domestic counter-insurgency to more traditional international armed conflict, and they are expected, and indeed required, to grasp the legal nuances associated with the sliding scale of conflict. Failure to do so may have drastic consequences for the implicated troops.

Although the finer points of legal classification can be absorbed through appropriate training, there are significant challenges to be overcome before armed forces can be expected to respect the legal framework objectively applicable to their operations. The first challenge for many militaries is to move beyond a training curriculum that emphasizes the law of armed conflict to the exclusion of other relevant law, including international human rights law (IHRL). The second challenge is for the military leadership to identify and assimilate the blurred and controversial line between mere internal disturbances and tensions, which are largely governed by a combination of domestic law and IHRL, and non-international armed conflict, where IHL becomes applicable. The third and most daunting challenge is to overcome the potential politicization of legal classification resulting from the intersection of the international law governing the use of force in international relations, or *jus ad bellum*, and the law protecting the potential and actual victims of armed conflict, or *jus in bello*. This paper examines several contexts in which this phenomenon is most likely to occur, from peace support operations to the 'war on terror'.

1 International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Merits (Appeals Chamber), 2 October 1995.
2 Oren Harari, *The Leadership Secrets of Colin Powell*, McGraw-Hill Professional, New York, 2003, p. 260.
3 This statement of rules is an excerpt from the South African National Defence Force's *Code of Conduct for Uniformed Members of the South African Defence Force*, adopted 15 February 2000, available at www.dcc.mil.za/Code_of_Conduct/Files/English.htm (visited 6 May 2009).

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

IHL and IHRL are not abstract bodies of law, and their successful application boils down to the will of political leaders and military commanders to apply their principles and influence the behaviour of troops on the ground. As such, this paper summarizes some of the most important challenges of legal classification facing the military leadership, and proposes a solution for simplifying the process in order to encourage lawful behaviour throughout the full range of military operations.

Military legal training and international humanitarian law

As a general rule, armed forces play a constitutional role that is predominantly based upon the defence of the realm against foreign adversaries, and their training reflects this reality. It is therefore unsurprising that their legal education, if any, is primarily focused on the law of armed conflict. This natural tendency is reinforced by states' legal obligation to ensure the practical application of this law within their forces. Article 87 of Additional Protocol I[4] requires military commanders to

(1) prevent, suppress and report to the chain of command breaches of IHL;
(2) ensure that members of the armed forces are aware of their IHL obligations; and
(3) in cases where they are aware that their subordinates have either committed or are about to commit a breach of IHL, to prevent such violations or initiate appropriate disciplinary or penal action.

Many of the world's militaries valiantly attempt to put these obligations into practice by disseminating IHL as widely as possible to the rank and file. Others have gone further and are pursuing the integration of IHL into all relevant aspects of their doctrine, education, field training and justice systems.[5]

However, despite the natural emphasis placed on IHL in modern military legal training, this body of law only becomes relevant at the point where armed conflict, as legally defined, begins. Prior to that point,[6] the legal framework applicable to military operations is a combination of domestic law, IHRL[7]

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, entered into force 7 December 1978 (hereinafter 'Additional Protocol I').
5 For an overview of the International Committee of the Red Cross's approach to IHL integration in the military context, see *Integrating the Law*, ICRC, Geneva, May 2007, available at www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0900/$File/ICRC_002_0900.PDF (visited 5 May 2009).
6 As well as after the end of the armed conflict.
7 IHRL evidently binds the state within its national territory, but also applies in cases where its military exerts its power or effective control over individuals abroad: see for example International Court of Justice (ICJ), *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, ICJ Reports 2005, para. 216. See also Cordula Droege, 'Elective affinities? Human rights and humanitarian law', *International Review of the Red Cross*, No. 871 (2008), pp. 509–20; Françoise Hampson, 'The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body', *International Review of the Red Cross*, No. 871 (2008), pp. 566–72.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

and other specific international conventions.[8] After that point, IHRL – as far as it is not derogable – continues to coexist with and even supplement IHL. However, the interaction between these two bodies of law, including the resolution of conflicts through the application of the *lex specialis* principle,[9] is subject to ongoing legal controversy.[10] The challenge for the military leadership is not only to identify the point at which one legal classification evolves into another, but to reconcile the competing bodies of law within the relevant classification. It is then incumbent upon the leadership to translate those legal obligations into practice.

A NATO platoon commander deployed to Afghanistan is expected to be well-acquainted with the law of targeting, and will understand the principles of proportionality and precaution by virtue of his standard law of armed conflict training. He will appreciate that if Taliban soldiers engage his patrol with small arms and rocket propelled grenades from within a village, his troops are required to ensure that any incidental loss to the civilian population or its infrastructure resulting from their armed reaction is not excessive in relation to the direct military advantage anticipated.[11]

If that same officer is ordered six months later to quell a peacetime domestic riot in his home country and applies the principles of IHL, he might be inclined to order his subordinates to resort to their rifles against violent agitators, all the while diligently avoiding collateral damage to bystanders. In the absence of an imminent threat to the life of his troops or another person, that decision would represent a fundamental breach of international human rights law.[12] In most countries it would also land him before a court martial for charges up to and including murder. Accordingly, the importance of context- and mission-specific training – the appropriateness of which is contingent upon the legal classification of the conflict – cannot be overstated.

8 For example, the Rome Statute of the International Criminal Court, 17 July 1998, entered into force 1 July 2002 (applicable to states parties in the context of repression of the most serious international crimes); the United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994 (applicable to states parties in the context of the suppression of piracy on the high seas); and the International Convention for the Suppression of Terrorist Bombings, 15 December 1997, entered into force 23 May 2001 (applicable to states parties in the context of domestic anti-terror operations).

9 See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, para. 106.

10 See Droege, above note 7, and Marco Sassòli and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killings and internment of fighters in non-international armed conflicts', *International Review of the Red Cross*, No. 871 (2008), pp. 599–627.

11 Art. 51(5)(b), Additional Protocol I.

12 See, for example, Art. 6(1), International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, entered into force 23 March 1976; *Guerrero v. Colombia* (R.11/45), ICCPR, A/37/40 (31 March 1982) 137, para. 13.2–13.3.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

INTERNATIONAL REVIEW of the Red Cross

The legal spectrum of military operations

Situations other than armed conflict: reconciling IHRL and domestic law

Since the conclusion of the Cold War, armed forces have increased their operations outside the traditional armed conflict paradigm. There are various scenarios in which the state's police and security forces are likely to be overwhelmed by events on the ground, ranging from the relatively innocuous (e.g. security for an international summit) to outright national crisis. Accordingly, armed forces may be called into a limitless variety of domestic operations that fall short of armed conflict, including riot control, manning checkpoints, securing routes, cordon and search, escort duties, hostage rescue and anti-piracy, to cite but a few examples. Theoretically the domestic law governing such operations should reflect IHRL, but in practice the military leadership may be placed in the awkward position of reconciling the law of their political masters with the international obligations undertaken by the state.

Even in those states that genuinely attempt to abide by international law, doctrine, training and orders dictated in domestic operations must take into account 'hard law' treaties such as the International Covenant on Civil and Political Rights (ICCPR), their legal interpretations given by bodies such as the UN Human Rights Committee, the binding or persuasive case law of relevant regional human rights commissions and courts such as the European Court of Human Rights, and an ever-increasing body of non-binding 'soft law' that builds upon and provides detailed guidance for the implementation of 'hard law', such as the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[13] and the Code of Conduct for Law Enforcement Officials.[14] During periods of serious internal tension, the military leadership will also have to grapple with internal and external pressure to eliminate civil rights such as habeas corpus. However, it is only in very limited cases of public emergency threatening the very life of the nation that the government may formally derogate from certain provisions of IHRL; even then, a core of the most fundamental rights must remain intact.[15]

Reconciling these wide-ranging and potentially conflicting sources of law can be a monumental task for even the most senior officers. Moreover, unlike police officers, soldiers are not as a rule rigorously trained regarding the nuances of escalation of force in situations such as riots and crowd control. Whereas military training is primarily geared towards the destruction of the enemy force's military capacity (hence the IHL emphasis), IHRL restricts the use of lethal force by law enforcement officials except as a last resort in order to protect lives.[16] Switching

13 Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August–7 September 1990 (hereinafter BPUFF).
14 Adopted by General Assembly Resolution 34/169 of 17 December 1979.
15 Art. 4, ICCPR. For a regional example see Art. 15, European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, entered into force 21 September 1970).
16 *Ibid.*; Art. 9, BPUFF.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

from 'war fighting' mode to a peacetime 'law enforcement' mode is a difficult task that requires a high degree of discipline and mission-specific training.

Armed conflict: the two regimes of IHL

In contrast to IHRL, which was developed to civilize the relationship between governments and the individuals within their power, IHL was born on the battlefield.[17] It governs the exceptional circumstance of armed conflict, limiting means and methods of warfare to those that are necessary to weaken the enemy force, and providing protection for individuals who are not, or are no longer, taking part in hostilities.

Within IHL there are two separate legal regimes, one governing international and the other non-international armed conflict. In the case of the former, the rules are comprehensively stated in the four Geneva Conventions,[18] Additional Protocol I[19] and specific treaties touching on means and methods of warfare.[20] For example, an intelligence, military police or logistics officer can understand virtually the entire legal regime regulating the treatment of prisoners of war by opening the Third Geneva Convention.[21] The international criminal law regime also benefits from provisions triggering universal jurisdiction in the case of grave breaches of the Conventions and Protocols.[22]

In contrast, non-international armed conflict requires a thorough knowledge of the constitution and domestic law of the state in question, Article 3 common to the four Geneva Conventions, Additional Protocol II,[23] the customary law of IHL, IHRL and relevant articles of the Rome Statute of the International Criminal Court.[24] The development of customary IHL in the field of non-international armed conflict – especially regarding the conduct of

17 Indeed, the Geneva Convention of 1864 – the first IHL treaty – was the result of a diplomatic effort following Henry Dunant's horrific experience at the Battle of Solferino in 1859, where the military medical services of the battling French and Austrian troops were totally insufficient to deal with the scale of casualties in the field.

18 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (hereinafter GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 (hereinafter GC II); Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (hereinafter GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (hereinafter GC IV); all of which entered into force 21 October 1950. Every state has ratified these Conventions.

19 Where the Additional Protocols are not applicable *qua* treaty, most of their substantive provisions are applicable in the form of customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005.

20 Some provisions of these treaties have also taken on the status of customary international law.

21 As supplemented by Additional Protocol I. IHRL does, however, continue to play a role, with IHL remaining the *lex specialis*.

22 GCs I–IV, Arts. 49–50, 50–1, 129–30 and 146–7 respectively; Additional Protocol I, Art. 85.

23 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977, entered into force 7 December 1978 (hereinafter Additional Protocol II).

24 Rome Statute, above note 8.

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hostilities – continues to fill the gap left behind by the relatively thin treaty regime, although the extent of that development remains controversial.[25]

Officers and soldiers will inevitably ask the question: why do we need two separate IHL regimes that thoroughly obfuscate the simple principles of the law? Should we not protect victims of armed conflict regardless of legal classification? To answer these seemingly simple questions, one must understand the international system itself and the nature of state sovereignty. Although the twentieth and early twenty-first centuries have witnessed a marked erosion of the Westphalian system of near-absolute state sovereignty, states have yet to abandon the notion that rebel movements within their borders are essentially criminals who are not entitled to the status and protection associated with the law of international armed conflict. Because states view internal conflict through the lens of criminal justice, there is no concept of a legally 'protected person' in the non-international regime.

Conclusion

In summary, although the legal framework applicable during international armed conflict is relatively straightforward, both non-international armed conflict and situations falling short of armed conflict require a very nuanced understanding of several sources of law. In practice, this means that the vast majority of activities carried out by today's military forces are governed by a blurry combination of international and domestic laws that do not readily translate into clear and decisive operational orders and rules of engagement. However, these concerns pale in comparison with the challenge of defining the point at which non-international armed conflict actually begins.

The gateway to armed conflict

International armed conflict

The legal threshold for international armed conflict is unambiguous and almost beyond argument. It applies at the first resort to force between two state-armed forces,[26] triggering the application of the fullest breadth of detailed IHL provisions.[27] Bearing in mind that the first exchange of military fire may result in

25 See, for example, Elizabeth Wilmshurst and Susan Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007.

26 See Art. 2 common to the four Geneva Conventions, and Jean Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, p. 32. See also Art. 1, Additional Protocol I.

27 As discussed above, states parties are bound by the four Geneva Conventions, Additional Protocol I, and a long list of treaties governing various limitations upon means and methods of warfare. Non-parties are bound by applicable customary IHL.

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wounded soldiers, prisoners and the potential for collateral civilian damage, it is only logical that IHL should apply from the outset of armed hostilities. This body of law also applies in the case of foreign occupation that meets no armed resistance. However, traditional inter-state conflict is a relatively rare breed in the twenty-first century.

Non-international armed conflict

The situation is nowhere near as clear-cut in the more predominant case of non-international armed conflict. One of the most difficult legal determinations the political and military leadership must make is whether the situation within its borders has evolved from mere internal disturbances and tensions to an armed conflict to which IHL is applicable. The decision as to whether a situation has crossed that line is laden with political controversy, since a state will only reluctantly admit that it has lost its monopoly over the use of force, or that a group fundamentally opposed to the government's interest is entitled to the status associated with recognition as an armed belligerent. To complicate matters further, within the IHL of non-international armed conflict there are different thresholds for the application of the two principal instruments, Article 3 common to the four Geneva Conventions of 1949, and Additional Protocol II of 1977.

Common Article 3

Article 3 is the bedrock of IHL, recognized within customary law as the absolute minimum of humanitarian treatment applicable during armed conflict of any legal qualification.[28] The article applies 'in the case of armed conflict not of an international character' occurring on the territory of a state party to the Geneva Conventions,[29] but the article does not further define the threshold at which such a conflict begins. The most authoritative definition of armed conflict is contained in the ICTY Appeals Chamber's decision on jurisdiction in the *Tadić* case:

> [W]e find that an armed conflict exists whenever there is a resort to armed force between States or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within the State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of

28 ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, Merits, ICJ Reports 1986, para. 218.

29 The territorial component has lost its practical significance since currently every state in the world is party to the four Geneva Conventions of 1949.

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internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[30]

From a temporal perspective, this test presents an irreconcilable contradiction for military commanders operating on the ground. If IHL applies 'from the initiation' of a non-international armed conflict, but a situation can only be gauged as an armed conflict at such time as the armed violence in question becomes 'protracted', how is the foot soldier to know at what point IHL begins to apply?[31] Indeed, if the armed violence in question dies out before it becomes 'protracted', IHL will never have entered into the equation. Effectively, the law is asking commanders to make an *ex post facto* determination regarding a series of events that has yet to occur.

The term 'protracted' includes elements of both intensity and duration of violence, neither of which were controversial in the 1992–5 conflict in the former Yugoslavia, but which will remain contentious in lower-profile confrontations. In addition, as the Appeals Chamber suggests, the armed groups in question must reach a minimum level of organization. The Inter-American Commission on Human Rights held in its *La Tablada* decision that a mere thirty hours of intense and organized hostilities can be sufficient to justify invoking IHL,[32] and other tribunals have made different determinations based on different circumstances. However, even if one accepts a particular international or domestic tribunal's approach, it is one thing for an independent legal body to look at the totality of the circumstances present within a national conflict and decide that it has crossed the threshold required by law, and quite another for the military leadership on the ground to make a similar determination regarding one or a series of violent acts attributed to a non-state actor.

Additional Protocol II

The second Additional Protocol develops and supplements the basic protections contained in Common Article 3. It also breaks new ground in the form of limited treaty provisions governing the conduct of hostilities.[33] However, the military leadership must grapple with a different, higher, legal threshold. The treaty only applies to non-international armed conflicts that take place on the territory of a party to the protocol, between its armed forces and an organized non-state armed group. Additionally, that armed group must be under 'responsible command' and

30 ICTY, *Prosecutor v. Dusko Tadić*, Appeals Chamber, decision of 2 October 1995, para. 70 (emphasis added). This test is reflected in Art. 8(2)(f) of the Rome Statute, above note 8.

31 Marco Sassòli, *Transnational Armed Groups and International Humanitarian Law*, Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, Winter 2006, No. 6, pp. 6–7, available at www.hpcr.org/pdfs/OccasionalPaper6.pdf (visited 6 May 2009).

32 Inter-American Commission on Human Rights, Report No. 55/97, Case No. 11.137: Argentina, OEA/Ser/L/V/II.98, Doc. 38, 6 December 1997.

33 See Part IV, Additional Protocol II.

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'exercise such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol'.

Even a neutral and independent observer to an emerging armed conflict will have difficulty establishing the requisite nature and degree of control that a rebel faction must exercise to engage the application of the Protocol.[34] However, the reality is that neither the state's military nor its civilian masters will normally be inclined to admit that they have lost control of a significant segment of their sovereign territory, regardless of the actual situation on the ground. The issues of responsible command and ability to implement the Protocol are equally subjective determinations.

Conclusion

In summary, the applicability of either Common Article 3 or Additional Protocol II is uncontroversial in only the most evident cases of non-international armed conflict. Arms carriers are therefore placed in the precarious position of adjusting their strategy and tactics to legal determinations that are both convoluted and politically influenced. Indeed, the consequences of an imprecise definition of armed conflict that is interpreted by state authorities predisposed to denying its existence are most likely to be felt by IHL's intended beneficiaries.

Legal classification and the separation of *jus ad bellum* from *jus in bello*

One of the fundamental tenets of international law is the separation between the law governing the right of states to resort to the use of force against one another (*jus ad bellum*, the core of which is contained in the United Nations Charter),[35] and the law that protects victims and places limits upon means and methods of warfare (*jus in bello*, the core of which is contained in the Geneva Conventions and their Additional Protocols). The two must remain separate for the simple reason that despite the prohibition on the use of force between states at the heart of the UN Charter, armed conflicts do occur; and the politics of deciding who has breached that law (which is logically at least one side) should not have a bearing on the protection of war victims. As the preamble to Additional Protocol I clearly states,

> the provisions of the Geneva Conventions and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any distinction based on the nature and the origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.

34 Assistance can be derived from Sylvie-Stoyanka Junod, 'Article 1 – Material Field of Application', in Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff Publishers, Geneva/The Hague, 1987, pp. 1347–56.

35 Charter of the United Nations, 26 June 1945, entered into force 24 October 1945.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

Insofar as IHL is concerned, it is entirely irrelevant if a state decides to use force against another state without any title of legality under *jus ad bellum*: the humanitarian concerns remain the same on the ground, and the lack of legal justness of war claimed by one or both sides cannot be offered as an excuse for the subversion of those concerns.[36] Nevertheless, the process of legal classification to determine the applicable *jus in bello* – that is, the IHL of international or non-international armed conflict – sometimes requires an analysis of the *jus ad bellum*. Given the inherently political nature of such a determination, it would be naive to presume that states will undertake it with complete objectivity.

As the Trial Chamber of the International Criminal Tribunal for Rwanda aptly noted in its *Akayesu* decision,

> It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto.[37]

However, a core aspect of international law is its reliance upon states themselves to ensure its implementation. IHL is no exception to this tendency, and in the absence of a central judicial authority vested with the power independently to classify conflicts at their outset, the law depends upon the goodwill of its own subjects to ensure its objective application.[38] Moreover, by the time independent domestic or international tribunals are in a position to make an objective determination of the applicable law, the damage may already have been done by states that have set a lower standard for the protection of IHL's supposed beneficiaries.

In practical terms, the problematic intersection of *jus ad bellum* and *jus in bello* at the level of legal classification may take place in a variety of contexts, including proxy conflicts, wars of independence, peace support operations and the so-called 'war on terror'. In each of these cases, states are effectively being asked to make an objective qualification of a situation in which they maintain a strong political interest, leaving their armed forces in a precarious position of legal uncertainty.

36 For a more detailed analysis see François Bugnion, '*Jus ad bellum, jus in bello* and non-international armed conflicts', *Yearbook of International Humanitarian Law*, Vol. 6 (2003), pp. 167–198.

37 International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement (Trial Chamber I), 2 September 1998, para. 603.

38 As a neutral and independent humanitarian body, the ICRC is competent to classify conflicts to ensure that it maintains a legally consistent approach and protects the actual and potential victims of conflict. However, in order to preserve its neutrality, it will not generally publicize its findings in circumstances where it might be perceived as taking a controversial position regarding the *jus ad bellum*.

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Proxy conflicts

It is strongly arguable that a conflict between a state and a non-state actor should be classified as non-international, regardless of where that conflict takes place.[39] If another state comes to the assistance of the host state, the non-international qualification does not change. If, on the other hand, the non-state actor is fighting as an agent or proxy for another state, the conflict will be qualified as international, since effectively one state is fighting against another.[40] This would be the case regardless of whether the non-state actor is fighting against the state on whose territory it is based, or whether it attacks a third state across borders.

The legal test for classification in this case is whether the state allegedly responsible for the conduct of the non-state armed group has 'effective'[41] or 'overall'[42] control of the latter, a complex determination based upon all aspects of the relationship. However, given the fact that states will rarely admit their responsibility for a third-party armed group, the exercise of classifying such a conflict can take place in a political minefield. Even if the requisite level of control is objectively established, the non-state actor will most likely have an incentive to deny that it is being controlled by the state in question, since an acknowledgement of that relationship could engage both the political and international legal responsibility of its closest allies. As such, the non-state actor would have a disincentive to publicly apply the more fulsome body of IHL related to international armed conflict, even if it is objectively applicable. The price of such a political decision might ultimately be paid by the parties to the conflict if they or their agents were *ex post facto* held to the higher international standard in a court of law, but the real price would likely be paid by the victims of conflict themselves.

Wars of independence

A similar politicization of IHL may be observed in the case of wars of independence, where a particular political or ethnic group is attempting to secede from its existing government and form a separate state. International armed conflict as defined in both treaty and customary IHL must engage two existing and internationally recognized states, and because state recognition is a political process intertwined with *jus ad bellum*, the two types of law may again cross paths at the level of legal qualification.

For example, towards the beginning of the conflict in the former Yugoslavia, classification of the conflict between the Yugoslav government and

39 For a discussion of this principle, which is not without controversy, see Sassoli, above note 31, pp. 8–9.
40 See Jonathan Somer, 'Acts of non-state groups and the law governing armed conflict', *American Society of International Law Insights*, Vol. 10, No. 21 (2006).
41 *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, above note 28, para. 115 (regarding the alleged control of Nicaragua's Contras by the US).
42 *Prosecutor v. Dusko Tadic*, above note 1, para. 131 (regarding the alleged control of Bosnian Serbs by the Federal Republic of Yugolsavia).

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Croatian forces required an analysis of the latter's political status vis-à-vis the former. Qualifying that conflict as international (as some states did by recognizing Croatia's independence as early as January 1992), and therefore applying at a minimum the customary IHL applicable to international armed conflicts, would have represented a political victory for Croatia, since its very objective was to seek political independence. Qualifying the conflict as non-international would have had the opposite effect. As such, the Federal Republic of Yugoslavia arguably had a political incentive to deny the formal applicability of the IHL of international armed conflict.[43]

Peace support operations

The legal qualification of conflicts involving peacekeeping troops has been discussed elsewhere, and the debate continues.[44] However, it is perhaps useful to state here that the politicization of IHL, leading to dangerously mixed messages for the military, is possible even in this altruistic domain. When states send their blue-helmeted troops to foreign lands with the noble mission of maintaining or securing the peace, it is perhaps trite to note that they do not wish for their soldiers to be perceived as taking an active part in the very conflict that they seek to resolve.[45] As recently remarked by the president of the ICRC,

> Indeed, practice shows that States and international organizations engaged in peace operations tend not to acknowledge that they are involved in an armed conflict and that IHL applies to their own actions or those of their agents. They sometimes erect sophisticated legal constructions to put across this view. Their denial is in line with their general reluctance to be perceived as a party to an armed conflict, especially when they are part of a peace operation.[46]

Peacekeepers, as representatives of both their home states and the international organizations whose mandates they seek to fulfil, and as beneficiaries of

43 On 27 November 1991, representatives of various parties to the conflict including the Federal Republic of Yugoslavia and the Republic of Croatia agreed in a Memorandum of Understanding to implement the full range of Geneva Conventions and their Protocols, but the agreement explicitly stated that it would 'not affect the legal status of the parties to the conflict'. See Michele Mercier, *Without Punishment: Humanitarian Action in the Former Yugoslavia*, East Haven, London, 1995, Appendix: Document IV, pp. 195–8.

44 The latest discussions occurred at the 2008 Sanremo Round Table, the proceedings of which are reproduced in Gian Luca Beruto (ed.), *International Humanitarian Law, Human Rights and Peace Operations: 31st Round Table on Current Issues of International Humanitarian Law*, International Institute of Humanitarian Law, Sanremo, September 2008. See also A. Faite and J. L. Grenier (eds.), *Expert Meeting on Multinational Peace Operations*, ICRC, Geneva, 11–12 December 2003.

45 The rare exception being robust Chapter VII peace enforcement missions where troops are mandated by the UN Security Council actively to engage a particular armed group, or to secure a territory in support of a government engaged in a conflict against rebel forces (e.g. International Security Assistance Force/NATO in Afghanistan).

46 Jakob Kellenberger, keynote address at the Sanremo Round Table, 4 September 2008, reproduced in Beruto (ed.), above note 45, p. 32.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

specific international legal protection, fall into an unusual position that gives rise to controversy concerning their legal status and the consequent classification of conflict. Whatever the outcome of that debate, it should never lose sight of the distinction between *jus ad bellum* and *jus in bello*. Regardless of the Security Council mandate given to a UN or regional peacekeeping force, which falls under the rubric of *jus ad bellum*, and regardless of the special protection to which peacekeepers are rightfully entitled under the Convention on the Safety of United Nations and Associated Personnel,[47] the application of IHL must hinge upon the facts on the ground.

Bearing in mind that there will be victims in any armed conflict – irrespective of who is pulling the trigger – it is essential that peacekeepers who engage in such conflict be bound by IHL rights and obligations. The express wording of Common Articles 2 and 3 of the Geneva Conventions reaffirms this as a legal fact, as does the UN Secretary-General's bulletin, Observance by United Nations Forces of International Humanitarian Law from a policy perspective.[48] This is further confirmed by Article 8(2)(b)(iii) of the Rome Statute, which provides that it is a war crime to attack peacekeepers 'as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict'. The wording clearly implies that peacekeepers cease to be protected as civilians upon engagement in conflict, which is consistent with the IHL principles of equality between belligerents and separation of *jus ad bellum* from *jus in bello*.

For the military leadership, the challenge is to extricate itself from the state politics that surround this issue and remember the basics: that their peacekeeping forces carry rifles because of the eventuality of armed conflict,[49] even if it is solely in self-defence; that in the case of armed conflict their troops can only benefit from the application of IHL; and that they will stand on firm moral, political and legal ground if they ensure that their troops are well versed in IHL and its particular application in the peace support context, regardless of mandate.

The 'war on terror'

In recent years states have been drawn into highly politicized debates relating to the legal rights of 'terrorists' within their jurisdiction. The 'terrorist' label has allowed states to claim, without foundation in international law, that entire classes of individuals are devoid of meaningful international legal protection. Inevitably, the political stigma of terrorism has also entered the domain of legal classification.

The problem begins with the term 'war on terror' itself, which is no more of a legal category of conflict than the 'war on drugs' or the 'war against illiteracy'. In order to classify a conflict accurately, one must look beneath the terrorist label

47 9 December 1994, entered into force 15 January 1999.
48 United Nations Secretariat, UN Doc. ST/SGB/1999/13, 6 August 1999.
49 As has been graphically illustrated by recent armed conflicts between MONUC troops and armed factions in the eastern Democratic Republic of Congo.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

and examine both the individual and his context. For example, in the case of the early (2001–2) Afghanistan war, the US-led Coalition was engaged in an international armed conflict with the Taliban's armed wing, since the latter were the armed forces of the de facto government of Afghanistan at that time.[50] As such, the Taliban's armed forces would have been legally qualified as combatants and, if captured, prisoners of war, whose treatment is governed by the Third Geneva Convention.[51] If in the context of this conflict Taliban soldiers did indeed partake in acts commonly labelled as terrorist, for example intentionally killing civilians or destroying civilian objects, upon capture they could be tried and punished in accordance with specific customary IHL provisions,[52] but their detailed humane treatment including fair trial would be legally guaranteed.[53]

On the other hand, members of Al Qaeda fighting in this international armed conflict did not fall within the legal definition of 'combatant'. They were neither members of Afghanistan's armed forces nor a militia both belonging to the state and meeting the four defining military characteristics set out in article 4(A)(2) of the third Geneva Convention. They were therefore legally 'civilians'. However, that title would not have shielded those taking a direct part in hostilities from being targeted,[54] nor would it have prevented them being interned for imperative reasons of security[55] or from being tried and punished for the very fact of firing at Coalition soldiers.[56] Had these 'civilians' carried out traditional terrorist acts within the theatre of conflict, they could also have been prosecuted before an impartial court. However, they too were entitled to humane treatment in the hands of Coalition forces.[57]

Conclusion

From the perspective of the military commander, the intersection of *jus ad bellum* and *jus in bello* at the level of legal classification means that his forces live with legal certainty in only the most clear-cut of cases. If the decision regarding classification is made on the advice of his political leadership rather than the objective facts

50 Both the Coalition states and Afghanistan were parties to the four Geneva Conventions, but neither Afghanistan nor the United States is party to Additional Protocol I.

51 Art. 4(A)(1) of GC III defines 'members of the armed forces of a Party to the conflict' as a category of individuals entitled to prisoner of war protection (i.e. combatants) without the requirement of fulfilling the four 'militia' prerequisites in 4(A)(2). To qualify as armed forces, they must have been under a command responsible to the Party and subject to an internal disciplinary structure per Art. 43(1) of Additional Protocol I. If we accept that the Taliban was the de facto government of Afghanistan at the time (they controlled 90 per cent of its territory), it is strongly arguable that their armed forces met all of these requirements and thus would have qualified as combatants.

52 For example, making the civilian population the object of an attack during an international armed conflict is a war crime to which universal jurisdiction applies. Henckaerts and Doswald-Beck, above note 19, Rules 156 and 157.

53 See Arts. 13, 99–108, GC III.

54 Henckaerts and Doswald-Beck, above note 19, Rule 6.

55 Arts. 4 and 78, GC IV.

56 Arts. 64–78, GC IV.

57 Arts. 27–34, GC IV.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

on the ground, the potential for undermining the humanitarian impact of IHL increases dramatically.

Conclusion: military discipline and the law

The problems of legal classification of a potential armed conflict reflect the problems of international law itself, limited by its decentralized model of sovereign states. As Hersch Lauterpacht famously stated,

> If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.[58]

In contrast to domestic law, international law does not benefit from a central government with executive, legislative and judicial arms exercising mandatory jurisdiction. Accordingly, international law relies heavily upon states to ensure its objective application. Although states are generally inclined to abide by the legal obligations they have voluntarily undertaken, IHL represents the extreme end of the spectrum of international law, where the most fundamental interests and even the very existence of the state may be at stake. Accordingly, it is not entirely surprising that governments may be inclined to assert their sovereignty by denying either the existence or the particular nature of armed conflict in which their militaries or their proxies are implicated.

Despite this unfortunate tendency of international politics, no state will openly deny the humanitarian imperative in armed conflict. Indeed, every state on the planet is a party to the Geneva Conventions, and the vast majority are party to the two Additional Protocols. The challenge, then, is to entrench IHL within military institutions in such a way that it is least vulnerable to political manipulation. If it is impossible to separate *jus ad bellum* completely from *jus in bello* at the level of legal qualification, at least from a strict *de jure* perspective, the solution might lie in a practical approach to the issue.

On one level, militaries evaluate themselves – even define themselves – on the issue of discipline. At its heart, IHL is a matter of discipline. It is rarely difficult to persuade military leaders that they and their subordinates must avoid damage to civilian lives and property, must treat prisoners humanely, and must care for the wounded of any uniform on the battlefield. In elementary terms, any behaviour falling short of such basic principles of humanity amounts to a lack of discipline.

On another level, there is increasing international agreement, reflected in customary IHL, that the humanitarian legal protections applicable to traditional international armed conflict are broadly applicable within the context of non-international armed conflict. Putting aside important issues of state sovereignty,

58 Hersch Lauterpacht, 'The problem of the revision of the law of war', *British Yearbook of International Law*, Vol. 29 (1952–3), pp. 381–2.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

there is no reason in principle why victims of a non-international armed conflict should be treated any differently from the victims of an international armed conflict. Indeed, the very customary IHL that is steadily filling in the gaps between the two types of conflict is derived in part from the practice of militaries themselves, many of which have written manuals confirming the application of the full range of IHL protections in both.[59]

As the servant of civilian government, the military leadership cannot completely shield itself from the political considerations that give rise to problems of legal classification during times of armed confrontation. Nevertheless, in peacetime a military may choose to build the fullest protections of IHL into its operational practice applicable to both types of armed conflict. The former UN Secretary-General apparently took a step in that direction when, in 1999, he directed that UN peacekeepers be bound by a series of concise rules reflecting the law of international armed conflict, applicable to all scenarios in which they are actively engaged as combatants.[60] If one accepts that fighting between UN troops and a non-state armed group which meets the requisite threshold is qualified as non-international armed conflict,[61] then it can be deduced that the Secretary-General was deciding as a matter of policy to hold his forces to a standard that is, in some cases, higher than that required by the law. By doing so, he 'fortified' the strict legal protection surrounding victims of non-international armed conflict, and thereby helped to defuse some of the controversy concerning the issue of legal qualification. State militaries can follow this example.

Beyond writing manuals that confirm as a matter of policy[62] the application of the full extent of IHL to non-international armed conflict, armed forces can integrate those legal provisions into their doctrine, education, field training and justice systems.[63] Ideally, the entire body of relevant law should permeate the military operational environment, from operational orders to standard operating procedures to rules of engagement. By entrenching the highest standard of law, such measures can at least insulate the military from the intended or unintended consequences of politically motivated legal classification. This strategy has the advantage of simplifying the otherwise complex process of interpreting the many legal sources governing non-international armed conflict. In the long term, it may also serve to consolidate and expand the customary IHL of non-international armed conflict. Lastly, promoting the highest standard of law is a form of legal risk management that protects the military chain of command from the consequences of politically motivated under-classification, from courts martial to the International Criminal Court.

However, the approach of 'fortifying' the formally applicable law through military doctrine does have its limitations. First, there are certain elements that

59 With such modifications as are required. See Henckaerts and Doswald-Beck, above note 19, Vol. II.
60 UN Secretary-General's Bulletin, above note 49.
61 Which is not a matter devoid of controversy: see Faite and Grenier, above note 45.
62 And, potentially, as a matter of *opinio juris*.
63 See *Integrating the Law*, above note 5.

https://doi.org/10.1017/S1816383109990051 Published online by Cambridge University Press

cannot be completely reconciled between the international and non-international regimes. It is likely impossible to impose the international concepts of combatant privilege, protected persons and occupation on the non-international context (for example, no state will ever agree to rescind its right to prosecute non-state fighters who have fired at its military forces – for good reason).[64] Second, if the military's political masters decide to intervene directly in the legal classification process, for instance by creating their own category of detainees who are ostensibly bereft of any international legal protection, no amount of IHL-compliant military doctrine is going to override that decision. It is therefore incumbent upon the political authorities themselves to become conversant not only with the substantive provisions of IHL, but also the rationale of the law and its reciprocal benefits. In recent years the ICRC has promoted the development of national inter-ministerial IHL committees that can play a significant role in this process.

A similar strategy of 'fortification' could assist the military leadership in navigating the fine line between internal disturbances and non-international armed conflict. Following the same logic, since humane treatment within IHRL runs parallel to humane treatment in IHL, military doctrine and training can be built to promote a consistency of approach from one context to the other, regardless of the political controversies of classification. In borderline cases, where issues of targeting, collecting wounded and dealing with prisoners begin to take on relevance, military doctrine can ensure that the principles of IHL are effectively applied – irrespective of their formal legal application – all the while respecting the fundamental values of IHRL. However, the risk of such an approach is that there are indeed provisions of (wartime) IHL that fundamentally contradict the IHRL applicable during situations falling short of the legal definition of armed conflict.[65] In the absence of an objective classification, it will be impossible to determine which body of law should take precedence in cases of contradiction.

Finally, the shifting role of the military in society must be accompanied by a shift in legal emphasis. It is obvious that if the military is going to be employed in contexts other than armed conflict, it must be adequately trained outside the confines of IHL. In practice, this means that the IHRL concepts traditionally associated with civilian policing, from riot control to search and seizure, need to form part of the military vocabulary. Although IHRL can and should become the subject of mission-specific briefings, this law is far more likely to affect the behaviour of soldiers if, like IHL, it is systematically built into their doctrine, education, field training and justice systems.

Taken as a whole, the legal framework applicable to the spectrum of military operations is a patchwork of provisions that often overlap and occasionally conflict, and the formal application of those provisions is liable to political

64 Even if it chooses not to exercise that right in the name of peace: see Art. 6(5) of Additional Protocol II.

65 For example, IHL accepts that civilians can knowingly be killed as collateral damage as long as that damage is outweighed by the concrete and direct military advantage achieved in an attack (see Art. 51(5)(b) of Additional Protocol I). In the absence of a definite legal qualification, it is difficult to reconcile this provision of IHL with the right to life, as interpreted in peacetime, protected by IHRL.

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interference. However, the substantive principles of the law are relatively straightforward, as long as context is grasped. From the perspectives of clarity and avoidance of political influence, it is essential that militaries build the fundamental principles of the law into their operations with durability.

As long as militaries associate the law of armed conflict and the principles of humanity with discipline, it will not be difficult to convince them to strive towards creating patterns of operational behaviour that are both lawful and substantially protected from the whims of political change. At the same time, political authorities must become conversant with the legal framework applicable to military operations if they are to respect the requirement for objective legal classification. Ultimately, civilian and military authorities must speak the same language and understand the rationale behind the state's voluntary decision to abide by IHL and non-derogable IHRL in even the most trying political circumstances. Only then can the theory of the law be genuinely applied in practice.

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