






Pursuant to a widely accepted general definition of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, '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 a State.'  ICTY, *The Prosecutor v Dusko Tadić* (<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>), Appeals Chamber, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, §70*. In other words, there is an international armed conflict whenever there is a resort to armed force between states, regardless of the intensity of such force. In contrast, for a non-international armed conflict to exist, two cumulative criteria must be fulfilled. First, there must be 'protracted armed violence' in the sense that a certain threshold of armed violence has been reached in terms of intensity. Second, at least one side to the conflict is an organized armed group. The distinction between international and non-international armed conflict is thus based on two factors:



- The structure and status of the parties involved is different. International armed conflicts involve sovereign states. In contrast, non-international armed conflicts involve states and organized armed groups.  *International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (http://www.rulac.org/assets/downloads/2011_Contemporary_Challenges_report.pdf), 31st *International Conference of the Red Cross and Red Crescent, 2011, p 8*.
- The threshold of the intensity of violence is different. The level of violence required to trigger an international armed conflict is significantly lower than that necessary to constitute a non-international armed conflict.  *For a further discussion of these differences, see M. Milanovic and V. Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in N. White, C. Henderson (eds), Research Handbook on International Conflict and Security Law, Edward Elgar, 2012, available at SSRN (<https://ssrn.com/abstract=1988915>).*

The criteria of the threshold of violence and the degree of organization of the armed group distinguish situations of non-international armed conflicts from situations of internal disturbances, riots, terrorism, or high criminality that are not subject to international humanitarian law. If the threshold or organization criteria are not fulfilled, the situation does not amount to a non-international armed conflict.  *Therefore, situations characterized by high degrees of armed violence are excluded from this definition when there is no organized armed opposition group. This is an inherent limitation in the definition under non-international humanitarian law with its purpose to trigger the application of international humanitarian law. Yet, this does not mean that such other situations of armed violence are of lesser concern or have less serious humanitarian consequences.*

From a humanitarian law perspective, there is no other category of armed conflict.  *Similarly, international criminal law (<http://www.rulac.org/legal-framework/international-criminal-law>) distinguishes between war crimes committed during international and non-international armed conflicts, using the same definitions as international humanitarian law. Some argue that Article 8 (2)(f) of the Statute of the International Criminal Court introduces a third category, while others reject this distinction. Be that as it may, Article 8(2)(f) provides for the subject matter jurisdiction of the International Criminal Court for the purposes of determining the circumstances when violations of rules included in Article 8(2)(f) entail individual criminal responsibility. Yet, it does not purport to set up an additional category of non-*


international armed conflict with a distinct set of rules. See S. Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (http://www.rulac.org/assets/downloads/Vite_Typology_of_Armed_Conflicts_IRRC.pdf), 91 (873) International Review of the Red Cross, 2009, pp 80-83.

Many contemporary armed conflicts appear to not fit well into either one or the other category because they combine elements of traditional non-international armed conflicts within a single state with international interventions to a varying degree and in various forms or spill over into other states' territories. Such challenges to contemporary conflict classification (http://www.rulac.org/classification/contemporary-challenges-for-classification) relate to the fragmentation of armed conflicts, the relevance of consent, the targeting of non-state armed actors abroad, the use of proxy forces and interventions by foreign forces, including multinational forces.

While one may attempt to distinguish between new types or typologies of armed conflict, such categories are descriptive and do not carry any legal significance: for the purposes of international humanitarian law, each situation has to be qualified as an international or non-international armed conflict. Similarly, while some question the legal dichotomy between international and non-international humanitarian law, there are no other categories of armed conflict under international humanitarian law.  *L. Cameron, B. Demeyere, J-M. Henckaerts, E. La Haye and I. Müller, with contributions by C. Droege, R. Geiss and L. Gisel, 'Article 3: Conflicts Not of an International Character' (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169872), ICRC, Commentary on the First Geneva Convention, 2016, §472.* As a consequence, these two categories accommodate a broad range of situations, ranging from asymmetric contexts where one side may only intervene from the air and deploy advanced technology and weapons to situations featuring many multiplying and fragmenting non-state armed groups. The RULAC project follows this approach and distinguishes between international and non-international armed conflicts, but not between other types of conflicts. However, it is possible that there are parallel international and non-international armed conflicts taking place in the same state.  *For further information, see the fragmentation of armed conflicts (http://www.rulac.org/classification/contemporary-challenges-for-classification#collapse1accord) in the classification section.*


Classification based on legal criteria and facts

The classification of situations of armed violence is fraught with difficulties. Some governments deny that they are involved in armed conflicts, arguing that they are engaged in counter-terrorism operations not governed by international humanitarian law. Others apply international humanitarian law to situations that do not amount to an armed conflict. The main reason for doing so is because the rules governing use of force and detention of individuals for security reasons are generally less restrictive under international humanitarian law (http://www.rulac.org/legal-framework/international-humanitarian-law) than under international human rights law (http://www.rulac.org/legal-framework/international-human-rights-law). Non-state armed groups may exaggerate the level of violence or their degree of organization.

Yet, the question whether or not there is an international or non-international armed conflict depends on the factual circumstances in light of the relevant legal criteria that are described in the classification section. The subjective views of the parties may be an indicator to be taken into account, but are not determinative. In this sense, the classification of a situation is objective: it is a determination based on facts in light of relevant legal criteria and does not depend on the subjective will of the parties to a conflict. The facts determine whether or not there is a situation of armed conflict. Various actors may take a different view of the same facts and arrive at different conclusions.  *Other actors that may make such determinations include for example international commissions of inquiry or international courts in order to determine whether international humanitarian law applies. The International Committee of the Red Cross undertakes such classifications as part of its mandate, but does not always make them public. According to the 2016 ICRC Commentary to Geneva Convention I, 'classification must be made in good faith, based on the facts and the relevant criteria under humanitarian law.'* L. Cameron, B. Demeyere, J-M. Henckaerts, E. La Haye and I. Müller, with contributions by C. Droege, R. Geiss and L. Gisel, 'Article 3: Conflicts Not of an International Character' (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169865), ICRC, *Commentary on the First Geneva Convention*, 2016, §392.


Contemporary armed conflicts are increasingly complex due to the multitude of state and non-state parties involved in different forms and to varying degrees. As further explained in the section on contemporary challenges (<http://www.rulac.org/classification/contemporary-challenges-for-classification>), the classification of such situations is also subject to debate from the perspective of international humanitarian law. Any classification exercise thus involves certain methodological choices, which, for the RULAC project, are explained in the classification section. Other actors who make different methodological choices may arrive at different classifications.



Why classify? The consequences of classification

While different definitions of armed conflict may be used for different purposes, the question whether or not a situation of armed violence amounts to an armed conflict under international humanitarian law carries important consequences in the international legal system.  *An example of such a different purpose would be refugee law. In its December 2016 guidance on claims for refugee status related to situations of armed conflict and violence, the UNHCR specifies that for the purposes of refugee status, the classification of a situations as an international or non-international armed conflict 'within the meaning of international humanitarian law' is not required and that 'many situations of armed conflict and violence are not designated as an armed conflict for humanitarian law purposes, yet the means employed and their consequences may be just as violent or harmful'. UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions*, HCR/GIP/16/12 (http://www.rulac.org/assets/downloads/UNHCR_Guidance_Armed_Conflict_2016.pdf), 2 December 2016, p 4. Similarly, under the European Council Directive 2004/83/EC (http://www.rulac.org/assets/downloads/EU_Council_Directive_2004_83_EC.pdf), third party nationals or stateless persons who do not qualify as refugees are entitled to subsidiary protection if they face a real*



risk of suffering serious harm. Such serious harm can consist of a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international and internal armed conflict'. In January 2014, the European Court of Justice decided that, for the purposes of the directive, an internal armed conflict exists 'if a State's armed forces confront one or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorized as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organisation of the armed forces involved or the duration of the conflict'. See Court of Justice of the European Union, Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides (<http://curia.europa.eu/juris/document/document.jsf?text=&docid=147061&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=14337>), Fourth Chamber, Judgment, Case C-285/12, 30 January 2014, §35.


First, the existence of an armed conflict renders international humanitarian law applicable: international humanitarian law (<http://www.rulac.org/legal-framework/international-humanitarian-law>) applies during times of armed conflict. If there is no armed conflict in the sense of international humanitarian law, states must apply international human rights law (<http://www.rulac.org/legal-framework/international-human-rights-law>).




Based on a criminal justice and law enforcement paradigm, international human rights law is more restrictive than international humanitarian law, in particular in relation to the use of force against individuals and the detention of individuals for security reasons. In other words, classification serves to identify the applicable legal regime, which, in turn, helps to identify the applicable substantive rules. For example, discussions on the legality of the targeted killings of individuals by drone strikes routinely start with the identification of the applicable regime, international humanitarian law or international human rights law.  However, human rights law continues to apply during times of armed conflict. Its interplay with international humanitarian law, in particular in relation to the use of force and detention continues to be subject to intense debates. Moreover, some criticize the focus on identifying the applicable legal regime as 'an approach that obfuscates, rather than clarifies' because 'analysts tend to treat the regime choice as a proxy for the applicable codes of conduct, but it is a bad proxy.' M. Hakimi, 'Taking Stock of the Law on Targeting, Part I' (<https://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i/>), EJIL Talk Blog, 12 December 2016.

International humanitarian law also imposes duties on states that do not exist outside armed conflict. In particular, international humanitarian law provides rules for the provision of humanitarian relief, including an obligation to 'allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.'  ICRC Customary International Humanitarian Law Study, Rule 55 (https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule55). There is no corresponding obligation outside international humanitarian law.  In this respect, see the draft articles on the protection of persons in the events of disasters adopted by the ILC in 2016 which provide, amongst others, that the affected states have the 'primary role in the direction, control, coordination and supervision' of relief assistance (Article 10); requires the consent of the affected state for external assistance and such consent shall not be

withheld arbitrarily (Article 13); and that 'the affected State may place conditions on the provision of external assistance' (Article 14). International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters, UN doc A/71/10 (http://www.rulac.org/assets/downloads/ILC_Protection_of_persons_A_71_10_2016.pdf), 2016, §48 following. See also the comments submitted by the ICRC, International Law Commission, Draft Articles on the Protection of Persons in the Event of Disasters, UN doc A/CN.4/696 (http://www.rulac.org/assets/downloads/ILC_Protection_of_Persons_A_CN4_2016.pdf), 14 March 2016. The comments of the ICRC (http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/pop_icrc.pdf&lang=E) are also available on the website of the International Law Commission.

In addition to substantive differences, the scope of application of international humanitarian law and international human rights law is different. International humanitarian law binds all parties to an armed conflict, including non-state armed groups.  *Different explanations why and how international humanitarian law binds non-state armed groups are put forward, see for example J. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups'* (http://www.rulac.org/assets/downloads/Kleffner_Applicability_IHL_2013.pdf), 93 (882) *International Review of the Red Cross*, 2011, p 443. In contrast, there are on going discussions whether and under what circumstances international human rights law applies to non-state armed groups.  *D. Murray, 'Human Rights Obligations of Non-State Armed Groups', EJIL Talk Blog* (<http://www.ejiltalk.org/book-discussion-introducing-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-2/>), 2 November 2016.


Second, in terms of accountability, serious violations of international humanitarian law are criminalized as war crimes. War crimes (<http://www.rulac.org/legal-framework/international-criminal-law#collapse2accord>) may only be committed in connection with an armed conflict. In contrast, relatively few human rights treaties require criminalization of serious human rights violations.  *An example of such treaties are the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>) and *International Convention for the Protection of All Persons from Enforced Disappearance* (<http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx>).


Third, the existence of an international armed conflict may trigger the law of neutrality,  *The law of neutrality applies in case of the resort to armed force between states. Its rules are modified in case of enforcement action authorized by the Security Council under Chapter VII of the United Nations Charter. See M. Bothe, 'The Law of Neutrality', in D. Fleck (ed), Handbook of International Humanitarian Law, Oxford University Press, 2013, §1103.* affect the operation of international treaties,  *International Law Commission, Draft Article on the Effects of Armed Conflicts on Treaties, UN doc A/66/10* (http://www.rulac.org/assets/downloads/ILC_Effect_on_Armed_Conflicts_A_66_10_2011.pdf), §100, 2011. Notably, in Article 2(b) the International Law Commission adopts the same definition of international and non-international armed conflicts that involve states as the Appeals Chamber of the International Criminal Tribunal in the *Tadić* (<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>) decision (<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>). and be relevant for arms control treaties.  *For example, the 2013 Arms Trade Treaty* (

content/uploads/2013/06/English7.pdf) prohibits the transfer of arms if the exporting state 'has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a party' (Article 6(3)). If export is not prohibited, the exporting state shall 'asses the potential that the arms 'could be used to commit or facilitate a serious violation of international humanitarian law' (Article 7(1)(b)(i)). For further information on the arms trade treaty, see '2013 Arms Trade Treaty' (<http://www.weaponslaw.org/instruments/2013-arms-trade-treaty>), *Weapons Law Encyclopedia Website*, Geneva Academy, 14 September 2015.

Why distinguish between international and non-international armed conflicts?


The distinction between international and non-international armed conflict matters for several reasons.


On the one hand, there is no generic category of armed conflict under international humanitarian law, but two discrete categories, i.e. international and non-international armed conflicts. These categories are based on different criteria to assess whether or not a given situation amounts to an international or non-international armed conflict. In other words, every classification of a situation of armed violence for international humanitarian law purposes invariably requires the distinction between international and non-international armed conflicts.  *M. Milanovic and V. Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict', in N. White, C. Henderson (eds), Research Handbook on International Conflict and Security Law, Edward Elgar, 2012, available at SSRN (<https://ssrn.com/abstract=1988915>).*

Second, despite the convergence in the legal regime governing international and non-international armed conflicts under customary international humanitarian law, there remain important differences. Generally, the rules governing non-international armed conflicts are less detailed than those governing international armed conflicts.  *For a detailed discussion of the differences, see S. Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (<http://doi.org/10.1093/ejil/chq083>), 22(1) *European Journal of International Law*, 2011, p 219 (free access); D. Akande, 'When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict and Why Does this Matter?' (<http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>), *EJIL Talk Blog*, 18 October 2016; D. Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts', in E. Wilmshurst (ed), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, p 34, available at SSRN (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132573); M. Milanovic and V. Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' (<https://ssrn.com/abstract=1988915>), in N. White, C. Henderson (eds), *Research Handbook on International Conflict and Security Law*, Edward Elgar, 2012, available at SSRN (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988915).*

Most notably, there are important differences in terms of status. During international armed conflicts, international humanitarian law (<http://www.rulac.org/legal-framework/international-humanitarian-law>) formally recognizes the status of combatants, civilians, and other persons who are hors de combat, namely the wounded, sick and shipwrecked, and prisoners of war. These are technical terms in international humanitarian law, defined for its purposes. Civilians and persons hors de combat are

granted special protection under the four 1949 Geneva Conventions (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>). There is no equivalent special protection regime based on status during non-international armed conflicts.

In addition, combatant status carries two important consequences: First, combatants are immune from criminal prosecution for belligerent acts they commit that comply with international humanitarian law: They enjoy so-called combatant immunity or privilege. Second, combatants are entitled to prisoner of war status if they fall into the hands of the enemy.  *The referent of 'combatant' is inferred from the definition of prisoner of war status under Article 4 (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=2F681B08868538C2C12563CD0051AA8D>) of the 1949 Geneva Convention III and Article 44 (<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=524284F49042D4C8C12563CD0051DBAF>) of the 1977 Additional Protocol. It includes the regular armed forces of the state in question and 'members of other militias and members of other volunteers corps, including those of organized resistance movements, belonging to a Party to the conflict', provided that they fulfil certain conditions. Violations of international humanitarian law do not deprive combatants of their status. Due to the absence of combatant status for members of non-state armed groups during non-international armed conflicts, they may be punished for the mere fact of taking up arms or for acts that are potentially lawful under international humanitarian law.*

Finally, the Statute of the International Criminal Court (<http://www.rulac.org/legal-framework/international-criminal-law#collapse3accord>) also distinguishes between war crimes committed during international armed conflict and those during non-international armed conflicts. While there is substantial overlap between the two, there are also differences. For example, starvation as a method of warfare is only listed as a war crime during an international armed conflict.  *See also D. Akande, 'When Does the Use of Force Against a Non-State Armed Group Trigger an International Armed Conflict and Why Does this Matter?' (<http://www.ejiltalk.org/when-does-the-use-of-force-against-a-non-state-armed-group-trigger-an-international-armed-conflict-and-why-does-this-matter/>), EJIL Talk Blog, 18 October 2016.*

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