Chapter 5

The Concept of “Armed Conflict” in International Armed Conflict

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Introduction

There are a number of treaties of quasi-universal application that govern the conduct of belligerents in international armed conflict. They include, inter alia, the 1949 Geneva Conventions and the 1977 Additional Protocol I to the Geneva Conventions. In all these treaties, the concept of “armed conflict” is of vital importance for their actual application. Common Article 2, paragraph 1, of the Geneva Conventions stipulates as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. (emphasis added).

For its part, Additional Protocol I in Article 1, paragraph 3, provides that “this Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions” (emphasis added).¹

* Editor’s Note: Professor Asada requested this version of his chapter despite the fact the Committee did not rely on this version because it omits certain significant facts, for example, that the British vessel HMS Troubridge engaged the Danish vessel in the Red Crusader incident, and that the UK government took no position on the application of the Geneva Conventions to Iran’s detention of British sailors in 2007. Despite the omissions, this version still demonstrates that Professor Asada found no examples of states applying the 1949 Geneva Conventions to low intensity engagements of armed forces.

¹ The scope of application of Additional Protocol I is also provided in Article 1, paragraph 4, regarding the so-called national liberation conflict, which will not be specifically addressed in this chapter. Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict art. 1, June 8, 1977, 1125 U.N.T.S. 17513.
Thus, “armed conflict” is the trigger concept that gets the rules of international humanitarian law to operate and to override some of the peacetime rules of international law. Indeed, as Professor Vaughan Lowe says, “War – armed conflict – has a radical legal effect.”

However, no definition is given to the term “armed conflict” in the Geneva Conventions, the Protocol, or in any other international humanitarian law treat-

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2 See International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171. In the Legality of the Threat or Use of Nuclear Weapons Case of 1996, the International Court of Justice (ICJ) discussed the relationship between the ICCPR and the law of armed conflict. It pointed out that “the protection of the International Covenant of [sic] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” It further pointed out, in relation to Article 6 of the ICCPR on the right not arbitrarily to be deprived of one’s life, that this right applies also in hostilities, but added that “[t]he test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8). The ICJ observed in the Israeli Wall Case of 2004 that “[a]s regards the relationship between international humanitarian law and human rights law, there are … three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.” However, the Court did not elaborate on this point any further. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 178 (July 9). For the views of human rights treaty bodies on the relationship between human rights law and international humanitarian law, see Int’l Covenant on Civil and Political Rights [ICCPR], Human Rights Comm., General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004); Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), Inter-Am. C.H.R., 41 I.L.M. 532, 533 (2002). They affirm that both human rights law and humanitarian law are applicable in situations of armed conflict. For the response of the United States to the decision by the IACHR, criticizing, among other things, that in applying humanitarian law the Commission has acted without authority, see Response of the United States to Request for Precautionary Measures – Detainees in Guantanamo Bay, Cuba, Inter-Am. C.H.R., 41 I.L.M. 1016, 1020-21 (2002).

3 Professor Lowe goes on to write that: “Combatants in States’ armed forces may kill and destroy property within the laws of war without fear of facing trial for murder or criminal damage.” Vaughan Lowe, International Law 282-83 (2007).

4 It is obvious from the phrase at the end of Common Article 2, paragraph 1, of the Geneva Conventions, that there is no longer any need for a formal declaration of war or for a recognition of the state of war as preliminaries to the application of the Geneva Conventions (or Additional Protocol I). In this connection, a question may be asked about whether the Conventions are applicable, when a State declares