IHL & IRREGULAR WARFARE: CHALLENGES POSED BY ASYMMETRIC WARFARE TO INTERNATIONAL HUMANITARIAN LAW

RESEARCH ARTICLE

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**List of abbreviations**

IHL: International Humanitarian Law  
IAC: International Armed Conflicts  
NIAC: Non-International Armed Conflicts  
4GW: Fourth Generation Warfare  
API: Additional Protocol I  
APII: Additional Protocol II  
GC: Geneva Conventions  
ICTY: International Criminal Tribunal for Former Yugoslavia  
ICTR: International Criminal Tribunal for Rwanda  
ICRC: International Committee of the Red Cross  
ICC: International Criminal Court  
FSA: Free Syrian Army
Abstract

The nature of armed conflicts have changed dramatically in the 21st century. Conflicts between two or more states are rare while non-international armed conflicts between government forces and organized armed groups or between such groups themselves are now common. The wars in Syria, Iraq and Afghanistan are prime examples of such type of conflicts. These conflicts are asymmetrical in nature since there is a huge difference in the capabilities of opposing sides. Moreover, the conflicts are now being waged in urban centers among huge concentration of civilian populations. The civilian casualties in these conflicts are massive. This has raised quite a few questions on the effectiveness of international humanitarian law or the law of armed conflicts. The law of armed conflicts explicitly prohibits the targeting of civilians and has set limits to an armed conflict. However, asymmetric warfare has set new challenges for IHL. The rules of an international and non-international armed conflict are clear but as far as non-international armed conflict is concerned, the warring parties use various tactics to suppress IHL. States normally do not acknowledge the existence of an armed conflict even when all the requirements of a non-international armed conflict as provided in Tadic Case are fulfilled. Ignorance of rules of IHL and lack of political will to implement such rules are also some challenges to effectiveness of rules of IHL. It is now very important to clearly set the criteria or requirements of a non-international armed conflict. This research paper aims to pass various types of asymmetric warfare through Tadic Test in order to ascertain whether that particular type is a non-international armed conflict covered by IHL or mere internal disturbances or other situations of violence covered by domestic law of the state. It also aims to overview some of the challenges being faced by IHL from asymmetric warfare.

INTRODUCTION

International Humanitarian Law (IHL) also known as the law of war or the law of armed conflict is a set of rules that seeks to limit the effects of an armed conflict. It protects non-combatants and combatants who are rendered non-combatants due to injury or other reasons during an armed conflict and places restrictions on means and methods of warfare employed by the parties to an armed conflict. IHL is based on the principle that even war has limits and that humanity is to be preserved amidst an armed conflict.

Persons ‘hors de combat’ and those who do not take direct part in hostilities are protected without any distinction under IHL and cannot be military targets. IHL includes the ‘Geneva Conventions’, the ‘Hague Conventions’ and the ‘Customary Rules of IHL’. IHL has distinguished an armed conflict into two types i.e. International Armed Conflicts (IAC) and Non-International Armed Conflicts (NIAC). However, many

IHL experts have provided a third type of an armed conflict known as Internationalized Non-International Armed Conflict. This third type is yet to be recognized by IHL.

In contemporary world, the nature of armed conflicts is changing. Since the 1990’s, Non-International Armed conflicts are rampant. Warfare today is rarely taking place between states along a frontline, but instead conflict between states and organized armed groups with considerably different military resources and organization are common. The organized armed groups engaged in these conflicts against their governments within their respective territories or with other organized armed groups within one country are using irregular or asymmetric tactics to achieve their strategic objectives.

This transition from IAC to NIAC has set new challenges for IHL. States engaged in controlling such non-state actors who are waging irregular or asymmetric warfare within their territories do not acknowledge the existence of NIAC even if all the requirements of NIAC are fulfilled. In addition to that, the intensity of such conflicts and the organizational structure of armed groups keeps on shifting above and below the minimum threshold provided by IHL which differentiate Non-International Armed Conflict from internal disturbances or other situations of violence not coming under the ambit of International Humanitarian Law.

IHL is quite clear on the rules of an International Armed Conflict. The threshold of such conflicts is very low and the application mechanism of IHL to such kinds of conflicts is very effective. However, when it comes to Non-International Armed Conflicts, the states or organized armed groups exploit the gaps in International Humanitarian Law rules on NIAC. Asymmetric warfare in particular has raised many questions on the effectiveness of IHL.

This research paper seeks to explain the impacts of irregular warfare between states and non-state actors, commonly the organized armed groups, on IHL. The conditions and requirements of a NIAC will be discussed in order to understand whether a particular type of asymmetric warfare falls under the ambit of IHL and what are its impacts on the law of armed conflicts.

**Non-International Armed Conflict**

In 21st century, asymmetric or irregular warfare between states and non-states actors or between non-state actors within one country are very common. Such kinds of conflicts are referred to as NIAC. ‘A non-international or internal armed conflict refers to a situation of violence involving *protracted armed confrontation* between government forces and one or more *organized armed groups*, or between such armed groups themselves, arising on the territory of a state\(^3\). As soon as the existence of NIAC is established, the rules of IHL are applicable on all parties involved without any distinction. However, there are certain conditions or requirements which must be met in order for a conflict to be called a NIAC. These conditions are important because they distinguish a NIAC from internal disturbances, riots or other situations of violence.

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1. **Types of Non-International Armed Conflicts:**

International Humanitarian Law provides two types of non-international armed conflicts. These are non-international armed conflicts in the meaning of Common Article 3 and non-international armed conflicts falling within the definition provided in Article I of Additional Protocol II (APII). These types are very important in order to understand the threshold of the armed conflict. In stark contrast to Common Article III which does not define the threshold or condition of non-international armed conflict, the standards of APII are much higher than those of Common Article 3. These two types are similar in the sense that neither of them provides any explicit and complete definition or condition of non-international armed conflict. However, International Criminal Tribunal for Former Yugoslavia (ICTY) has played an important role in describing the conditions and requirements of a non-international armed conflict.

2. **Conditions/Requirements of a Non-International Armed Conflict:**

The conditions or requirements of a non-international armed conflict are provided in the International Criminal Tribunal for Former Yugoslavia, Tadic and Haradinaj Cases. The Tadic Case for the first time provided the two basic conditions of non-international armed conflict which were interpreted in Haradinaj Case.

(a) *The Prosecutor v. Dusko Tadic (Jurisdiction of the Tribunal)*

Tadic Case is important because it explicitly provided the conditions and requirements of a non-international armed conflict. The Appeals Chamber held in Tadic Case 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 a state”. According to the judgement of the tribunal, two requirements, ‘protracted armed violence’ and ‘a certain level of organization’ are needed for the existence of a non-international armed conflict under international law.

(b) *The Prosecutor v. Ramush Haradinaj et al*

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This case was also tried under ICTY in which the question of the threshold of non-international armed conflict was answered. The Trial Chamber interpreted the requirements of non-international armed conflict as provided in Tadic Case i.e. “protracted armed violence” and “organization”. The Haradinaj judgement accepted that the criterion of protracted armed violence must be interpreted as referring more to intensity of the armed violence than to its duration. Regarding the organization criterion, the Trial Chamber concluded that an “armed conflict can exist only between parties that are sufficiently organized to confront each other with military means”.

These two cases provided the basic conditions which distinguish a non-international armed conflict from internal disturbances. These two conditions are to be taken together in order to determine the nature of situation. As emphasized by the International Criminal Tribunal for Rwanda (ICTR), these two criteria are ‘clearly related and should be considered together when assessing whether a particular situation amounts to an armed conflict’.

**Asymmetric Warfare: The Contemporary Method of War**

The wars in 21st century are increasingly asymmetrical in nature. States these days are rarely challenged by other states into an open armed conflict. Rather, weaker domestic armed groups having different motivations are now engaged in life and death struggle against stronger government forces or among themselves. The warring parties are increasingly unequal and the militarily weaker party employ unlawful methods of warfare in order to overcome the adversaries’ strength. Such kinds of wars are being waged in urban centers with civilians often used as human shields by the organized armed groups.

Asymmetric warfare can be fought at different levels and can take different forms. There is an operational level i.e. the covert operations, terrorism etc. A military strategic level i.e. the guerrilla warfare etc. and a political strategic level i.e. the moral or religious war etc.

Asymmetrical warfare is defined as a “warfare in which opposing groups or nations have unequal military resources and the weaker opponent uses unconventional weapons and tactics such as terrorism, to exploit the vulnerabilities of the enemy”\(^7\). Whether a war is symmetric i.e. an IAC or asymmetrical in nature, the rules of IHL will apply to all the warring parties without any distinction.

However, this contemporary method of asymmetrical warfare has raised many challenges for the implementation of IHL. States and non-state actors alike try to maneuver around the rules of IHL by not accepting the existence of NIAC even if all the requirements of such a conflict are fulfilled. It has become increasingly important to take all kinds of asymmetrical warfare separately and pass them through ‘Tadic Test’ to determine whether it is a NIAC or not so that rules of IHL may be applied.

1. **Kinds of asymmetrical warfare:**

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Generally there are three kinds of asymmetrical warfare\textsuperscript{9}. These are insurgency, guerrilla warfare and terrorism. Insurgency is defined as “movement within a country dedicated to overthrowing the governments. An insurgency is a rebellion”\textsuperscript{10}. It is generally an armed struggle against the central government of a state and enjoys large support within the masses. The American war of independence against British colonial forces is one of the best examples of such type of asymmetrical warfare.

Guerrilla warfare is defined as “irregular military actions such as harassment, sabotage, hit and run tactics etc. carried out by small and usually independent forces”\textsuperscript{11}. The war waged by Afghan Mujahedeen against Soviet forces in Afghanistan is one of the best examples of guerilla warfare in history.

The third major type of asymmetric warfare is terrorism. Terrorism is defined as “the unlawful use of violence and intimidation, especially against civilians, in pursuit of political aims”\textsuperscript{12}. Each one must be passed through ‘Tadic Test’ to determine whether they fall under the category of NIAC or not.

2. Is asymmetric warfare always non-international in nature?

Asymmetric warfare is normally waged by organized armed groups against superior government forces within a state. However, it is not necessary that an asymmetric armed conflict is always NIAC. In 2006, Israel launched a full scale military offensive against an organized non-state armed group Hezbollah within the territory of another state, Lebanon. If this intervention would have taken place with the permission of the government of Lebanon, it would have been a NIAC. However, no such permission or approval was given by Lebanese government and it resulted in large scale destruction of Lebanese infrastructure. This conflict was clearly asymmetric in nature due to the fact that a government military was fighting an armed group. The law of IAC, with its detailed humanitarian guarantees, would be applicable because of the cross-border component\textsuperscript{13}.

3. Tadic Test:

In Tadic Case, the Appeals Chamber provided a comprehensive definition of armed conflict in both international and non-international armed conflicts. The two conditions or requirements of a non-international armed conflict given by the Appeals Chamber are important in order to distinguish an armed conflict from banditry, unorganized and short lived insurrections, or terrorist activities, which are not subject to IHL. These two conditions are “protracted armed violence” and “organized armed groups” and these are also known as Tadic Test. By simply applying Tadic Test to certain situation of violence, it can be determined whether it is NIAC or not.

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a. Protracted armed violence:

Protracted armed violence is not to be taken in its literal meaning. It refers more to the intensity of the armed violence than to its duration as interpreted in Haradinaj Case\(^{14}\). In this sense, not only protracted conflicts such as between Syrian regime forces and FSA, but also some short term conflicts as occurred in La Tablada which occurred approximately 30 hours, can be classified as NIAC.

b. Organized armed group:

Neither Common Article 3 to four Geneva Conventions (GC) nor Article 1(4) of APII provides any explicit criteria of an organized armed group. However, ICRC commentary on APII states that ‘some degree of organization of the insurgent armed group or dissident armed forces, but this not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority\(^{15}\).

Application of Tadic Test to different types of asymmetric warfare:

1. Insurgency:

The key characteristics of insurgency include, but are not limited to, strong leadership, environment, ideology, phasing, use of violence, and control of population\(^{16}\). If these characteristics are compared with the requirements of NIAC, provided in Tadic Case, it can be ascertained that an insurgency is a non-international armed conflict and that the rules of NIAC i.e CA 3 of the four GC, the Hague Conventions, APII and the Customary rules of IHL among others will apply to insurgency.

2. Guerrilla warfare:

The characteristics of guerrilla warfare are quite similar to that of an insurgency. The command and control structure of a group waging such kind of warfare is highly centralized. Guerrilla warfare is waged over a long period of time and its intensity keeps on shifting between high and low. However, it is protracted and is carried out by organized armed groups\(^{17}\). The best example of a guerrilla warfare is that of Soviet-Afghan war in which Afghan Mujahedeen waged a long and violent guerrilla war against Soviet forces which


\(^{15}\) Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (Editors), ICRC Commentary on the Additional Protocol II of 8 June 1977 to the Geneva Conventions of 12 August 1949, p.1352, para 4463


ultimately had to withdraw from Afghanistan. This shows that guerrilla warfare also clears the Tadic Test and can be labeled as NIAC with all relevant rules of IHL applicable on it.

3. **Terrorism:**

There is no single definition of terrorism. However, in stark contrast to insurgency and guerrilla attacks, the targets of those who plan or carry out terrorist attacks are mostly civilians and civilian objects. The aim is to terrorize the people to achieve an objective. It is one of the basic principles of IHL, that regardless of the type of armed conflict, civilians are to be considered protected persons and cannot be targeted. Those who violate this principle, are to be tried by ICC for war crimes or other charges according to the nature of their acts. However, whether IHL applies to every terrorist act, is a complicated question to answer.

IHL does not apply to every act of terrorism. IHL applies to those acts committed in armed conflict that would commonly be considered “terrorist” if they were committed in peacetime. Article 4 of the fourth Geneva Convention states that “collective penalties and likewise all measures of intimidation or of terrorism are prohibited.” Article 51 of API states that “the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread ‘terror’ among the civilian population are prohibited.” APII also states that acts of terrorism in furtherance of achieving a military objective or as part of a military strategy are prohibited.

The interpretation of above laws clearly point towards the fact that terrorist acts committed by armed forces of a state or organized armed groups for any reason are strictly prohibited and that relevant rules of IHL will be applicable to such acts. However, isolated acts of terrorism committed by an individual or a non-state actors are to be dealt with by the domestic law of the state.

The application of Tadic Test on acts of terrorism further explains this phenomenon. If a terrorist act is committed by an army of one state against civilian population of other state or by an organized armed group which is busy waging a protracted armed struggle against the government or other organized armed group(s), then such acts of terrorism shall fall under the ambit of IHL and those responsible shall be tried by the ICC. Understanding of this principle will help in differentiating terrorist acts covered by IHL and those covered by the domestic laws of a state.

**Challenges posed by asymmetric warfare to international humanitarian law**

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1. Urban warfare:

Unlike third generation or conventional warfare, the fourth generation or asymmetrical warfare is increasingly being fought in urban centers. The warring parties constantly use civilians as human shields. Moreover, the use of artillery and airstrikes in urban areas is leading to increased civilian casualties. IHL strictly prohibits the targeting of civilians in all kinds of armed conflict. The ‘Principle of Distinction’ was formed to protect civilians. However, asymmetric warfare has posed great challenge for this principle of distinction. The warring parties try to bypass this principle by taking the defense of proportionality or necessity. There is an ongoing need to assess the effectiveness of the existing rules for the protection of civilians and civilian objects, to improve the implementation of those rules for the protection or to clarify the interpretation of specific concepts on which the rules are based. However, this must be done without disturbing the framework and underlying tenets of existing IHL, the aim of which is precisely to ensure the protection of civilians.

2. Direct Participation in hostilities:

It is a general principle of IHL that only those persons who take direct part in hostilities can be targeted. The civilians must be considered protected persons and cannot be targeted. However, this concept of direct participation in hostilities is becoming increasingly complex. There has been a continuous shift of military operations away from distinct battlefields into civilian population centres, as well as an increasing involvement of civilians in activities more closely related to the actual conduct of hostilities. Even more recently, there has been a trend towards the “civilianization” of the armed forces, by which is meant the introduction of large numbers of private contractors, as well as intelligence personnel and other civilian government employees, into the reality of modern armed conflict. Moreover, in a number of contemporary armed conflicts, military operations have attained an unprecedented level of complexity and have involved a great variety of interdependent human and technical resources, including remotely operated weapons systems, computer networks and satellite reconnaissance or guidance systems.

Overall, the increasingly blurred distinction between civilian and military functions, the intermingling of armed actors with the peaceful civilian population, the wide variety of tasks and activities performed by civilians in contemporary armed conflicts and the complexity of modern means and methods of warfare have caused confusion and uncertainty as to how the principle of distinction should be implemented in the conduct of hostilities. These difficulties are further aggravated wherever armed actors do not distinguish themselves from the civilian population, such as during the conduct of clandestine or covert military operations or when persons act as “farmers by day and fighters by night.” As a result, peaceful civilians are more likely to fall victim to erroneous, unnecessary or arbitrary targeting, while members of the armed forces, unable to properly identify their adversary, run an increased risk of being attacked by persons they cannot distinguish from peaceful civilians – at the same time as they must, and should have been trained to, protect civilians. This is a major challenge posed by asymmetric warfare to IHL.

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22 ibid
3. Denial of the existence of an armed conflict:

Another major challenge posed by asymmetric warfare on IHL is the denial the existence of an armed conflict. It is generally observed that states do not acknowledge the existence of an armed conflict. There are many reasons for that the most prominent of which is to avoid any responsibility for the violations of the rules of IHL. For example, the conflict between Maoists and central government in India meets all requirements of non-international armed conflict. Despite of this fact, neither the Indian government nor the Maoists insurgents acknowledge its existence in order not to be liable for any violation of IHL.

4. Ignorance of IHL:

In modern armies, soldiers are generally taught the rules of IHL and ICRC itself visits military schools in conflict zones to educate the soldiers. However, the organized armed groups neither give access to ICRC to visit their training camps nor the trainers in such camps give any attention to propagating the rules of IHL among their fighters. This ignorance of the law significantly impedes efforts to increase respect for IHL and to regulate the behavior of the parties to conflicts.

5. Lack of political will to implement humanitarian law

A party may have no – or not enough – political will to comply with the provisions of humanitarian law. Where the objective of a party to a non-international armed conflict is itself contrary to the principles, rules and spirit of humanitarian law, there will be no political will to implement the law.

Conclusion

IHL rules regarding an international and non-international armed conflict are explicit and clear. However, asymmetric warfare has posed many challenges for IHL. The tactics used by parties in this kind of warfare and the sources employed are very different from those employed in a conventional armed conflict between two states. The parties to an asymmetric conflict generally do not acknowledge the existence of an armed conflict. The ICTY in Tadic Case provided two requirements of a non-international armed conflict. If a situation of violence meets these two requirements of conditions, it would be considered as a non-international armed conflict and the rules of IHL will apply. The asymmetric warfare has posed many challenges for IHL. ICRC needs to address these challenges effectively in order to ensure the protection of humanity during an armed conflict. The states also need to follow the rules of IHL to ensure the protection of civilians and their objects. The International Criminal Court must devise an effective mechanism to punish all those responsible for the violation of the rules of International Humanitarian Law.

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References
