

Defining armed conflicts under the Additional Protocols: is there a need for further clarification?

Andrew CLAPHAM

Professor of International Law,
Graduate Institute of International and Development Studies

Introduction

I have been asked to address the following question: *Defining armed conflicts under the Additional Protocols: is there a need for further clarification?*

My problem is, of course, that the Protocols do not really define armed conflicts but rather refer to other instruments to do this. The first Protocol refers back to Common Article 2 of the four 1949 Geneva Conventions and to the UN General Assembly's Friendly Relations Declaration of 1970, and the second Protocol refers back to Common Article 3 to the four 1949 Geneva Conventions, which it supplements and develops, and then also includes a negative definition of what is not included. So my remarks will inevitably have to stray beyond what is strictly found in the Protocols. Rather than outlining the full scope of the Protocols let me turn straight away to the real question of interest for this Round Table: *is there a need for clarification?*

I propose to highlight a few areas where there is confusion and where clarification might be in order. I am sure the word 'clarification' was deliberately chosen by the organizers; we are not talking here about amendment, adjustment or adding a new treaty. The academic debates are rather well worn and I think it might be more helpful if I try to highlight a few areas where I have come across confusion, and where indeed I can admit that I myself may have been confused, and where clarification would, therefore, be welcome.

What forms could such clarification take? We could consider that one sort of clarification could come in the form of resolutions of various organizations or even the Red Cross Conference, or alternatively another form could be in guise of a full discussion in Sanremo. We could consider future statements from government representatives and these could at least dispel some confusion with regard to those particular parties to the Protocols; and lastly, of course, it is my hope that in the question and

answer session the participants will come forward with lucid explanations clearing any remaining fog that surrounds this topic.

1. Armed conflicts under Additional Protocol I

Armed conflicts under Additional Protocol I include inter-state conflicts covered by the 1949 Geneva Conventions where both states are a party to this Protocol (some states may choose to apply the Protocol up to a point even when the other party is not bound, and article 96(2) allows for the application of the Protocol as a matter of law where a state which is not a party accepts and applies its provisions.¹

1.1 Military operations by a state against a non-state actor in another state without the consent of the territorial state

But in recent times one particular area of confusion has divided commentators. What happens when a state engages in an armed conflict with a non-state armed group in the territory of another state without that state's consent? Let us assume this is the situation when a Protocol I Party decides to bomb areas controlled by Daesh/ISIS in Syria. One way would be to look at this and describe it as an armed conflict between a state and a non-state armed group properly covered by Common Article 3 and the relevant customary international law.

Another way, however, suggests that Syria's lack of consent means that we are in the presence of an international armed conflict and so Common Article 2 and Protocol I would apply (at least for those states in the coalition fighting ISIS that are also a party to Protocol I (Syria being a party since 1983).

I admit to this Round Table that this is causing confusion, and clarification is indeed in order. I have engaged various experts in

¹ A separate question would be where a state chose to apply Additional Protocol I in a conflict where the other party had not ratified the Protocol or made a declaration. Interestingly, the Swedish International Humanitarian Law Committee suggested that 'Above all, a state that has ratified the Protocol should not too readily and categorically choose a line of non-application in relation to an adversary that has not ratified. The principle of reciprocity is intended to give reasonable protection against obvious military disadvantages (a "safety net"), not to be an unconditional mechanism for setting aside the provisions of the Protocol.' Report reproduced in part in M. Sassòli, A.A. Bouvier, and A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, 3rd edn (Geneva: ICRC, 2011) Volume II, document 76 electronic version only, available at www.icrc.org/en/download/file/19456/icrc-0739-part-ii-vol-i.pdf.

conversation, their responses often start with something along the lines, ‘well, this is academic, the rules for this sort of aerial bombardment are the same under customary international law’, but our conference is on the Protocols and in the legal world away from targeting decisions whether the First Additional Protocol applies as a matter of law may matter.

Let me give two examples of why this matters. In the first place the Protocol (in Articles 11 and 85) creates a supplementary set of grave breaches with obligations to extradite or prosecute such war crimes. Many states have these crimes as part of the national legal orders and yet do not have the equivalent customary war crime committed in a non-international armed conflict. So, knowing whether the acts are covered by Additional Protocol I as a grave breach under treaty law may mean the difference between a court having jurisdiction or having no jurisdiction.

Secondly, under the Arms Trade Treaty the mandatory prohibition on transfers apply to arms that could be used to commit a war crime defined in a treaty to which the transferring state is a party.² Again, for lawyers working in this area one could be faced with a question as to whether one is dealing with a grave breach under Protocol I (rather than a customary war crime) is key and so one would need to know whether one is in the presence of a possible future grave breach of the Protocol and for that one would need to know whether the acts concerned took place in an international or non-international armed conflict.

The latest ICRC Commentary to the First 1949 Geneva Convention has entered into the fray with the following comment: “Any unconsented to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter’s sphere of sovereignty and thus may be an international armed conflict under Article 2(1).”³

The language seems to be cautious: it *may* be an international armed conflict under Article 2. The Commentary is a bit firmer later on: “It is useful to recall that the population and public property of the territorial State may also be present in areas where the armed group is present and some group members may also be residents or citizens of the territorial State, such that attacks against the armed group will concomitantly affect the local population and the State’s infrastructure. For these reasons and others, it better corresponds to the factual reality to conclude that an international armed conflict arises between the territorial State and the

² See for more detail: S. Casey-Maslen, A. Clapham, G. Giacca, and S. Parker, *The Arms Trade Treaty: A Commentary* (Oxford: OUP, 2016) at 235-6.

³ ICRC, *Commentary on the First Geneva Convention*, 2nd edn (Cambridge: CUP, 2016) at para. 237, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>.

intervening State when force is used on the former's territory without its consent."⁴

Of course, the same Commentary admits that 'This does not exclude the existence of a parallel non-international armed conflict between the intervening State and the armed group.'⁵

This makes some sense if the intervening state were to capture members of this armed group – the intervening state would not grant these rebels prisoner of war status or combatant immunity. But their attacks on the state's infrastructure, even if aimed at the non-state group, may be considered an international armed conflict and so governed by Protocol I.

This is legally defensible, but I am not sure that it is clear that everyone agrees. It has recently been argued, for example, by Professor Noam Lubell that Article 2 applies to an armed conflict that 'arises between two or more' states. So he concluded in an article published in 2017 that 'it is submitted that the notion of "between" still carries weight, as it can be understood as pointing to the combination of the objective and subjective aspects of belligerent intent and *animus belligerandi*'.⁶ He, and others (such as Professor Terry Gill) would separate cases where there was obviously an international armed conflict, 'due to the nature of the activities and the amount of harm caused',⁷ from other uses of force directed against a non-state actor where there is no intent to engage the host state in an armed conflict.

Professor Dinstein, our chair, has recently stated that in this context 'as long as the governments wage hostilities only against the insurgents, the two NIACS [Iraq and Syria] remain non-international in character. The legal position is transformed only if States become entangled in combat with each other.' Later he summarizes 'Once there are two States locked in combat with one another, the armed conflict becomes an IAC.'⁸ We might factor in at this point that states are not usually keen to consider that they are in an armed conflict with another state where there is no need to do so.

Clarity on the role of the relevance of a state's state of mind would be useful to understanding whether Protocol I applies where a state is acting abroad without the consent of the host state.

⁴ *Ibid.* at para. 262.

⁵ *Ibid.* at para. 261.

⁶ N. Lubell, 'Fragmented Wars: Multi-Territorial Military Operations against Armed Groups', vol. 93 *International Law Studies* (2017) 215-50 at 236.

⁷ *Ibid.* at 233 and T.D. Gill, 'Classifying the Conflict in Syria', vol. 92 *International Law Studies* (2016) 353-80 at 373 who lists a number of factors he considers are more persuasive than the issue of consent.

⁸ Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd edn (Cambridge: Cambridge University Press, 2016) at 36.

1.2 The Continuing Effect of Article 1(4) of the First Additional Protocol

A second thorny issue with regard to what constitutes an armed conflict under Protocol I is, of course, the effect of Article 1(4). For a long time, this controversial provision was considered to be of purely academic interest. It allows for authorities representing peoples ‘fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination’ to make a unilateral declaration under Article 96(3) addressed to the Swiss Federal Council as depositary. Such a Declaration was made by the Polisario Front and so with regard to Morocco, which is a party to the Protocol, the provisions of the Geneva Conventions and the Protocol are in force. This Protocol internationalizes certain types of self-determination struggle. Again, commentators are divided on which type of group might fall in this category. Leaving aside the history of this provision which is well known, what clarification could be useful for future conflicts? Let us assume for the sake of argument today and for this Round Table on the Protocols that we need not answer the question whether there is equivalent customary law on this topic, or, if there is, whether some states could be considered persistent objectors.⁹

What might the states parties agree to clarify? My guess is that any clarification would result in most parties seeking a very narrow reading of what sort of authorities would today be entitled to trigger the Protocol in this way. Rather than expending time and energy on this topic it seems that the issue would be better dealt with as each authority claims to be entitled to make such a declaration under the Protocol. Drawing up criteria would seem overly ambitious in the absence of obvious candidates. In short I am not suggesting that this is an area ripe for clarification.

2. Additional Protocol II

Let me turn now to Additional Protocol II and again tackle two controversies.

⁹ Discussed in detail by A. Cassese, ‘Wars of National Liberation’, in C. Swinarski (ed.), *Studies and Essays in International Humanitarian Law and Red Cross Principles: Essays in Honour of Jean Pictet* (The Hague: Martinus Nijhoff, 1984) 314-24 and G. Abi-Saab, ‘Wars of National Liberation in the Geneva Conventions and Protocols’, vol. 165 *RCADI IV*, (1979) 353-445; M. Bothe, K.J. Partsch, and W.A. Solf, M. Eaton *Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd edn (Leiden: Nijhoff, 2013) at 45-51.

2.1 Conflicts outside the territory of the State Party

The first concerns the assumption that because the wording of Article 1 seems to limit its application to conflicts which happen in a state's own territory it cannot apply to, for example, the multinational forces in Afghanistan fighting the Taliban.¹⁰ Article 1(1) states: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) *and which take place in the territory of a High Contracting Party* between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Emphasis added).

From a humanitarian perspective it makes no sense to deny the applicability of the protective measures in the Protocol to conflicts where the state is a party to the Protocol but the fighting takes place outside its borders. Having reached the threshold for the application of Protocol II there would be little doubt that customary international humanitarian law applies to the extraterritorial force and the rebel group. In Afghanistan the situation is rendered even more bizarre by the fact that Afghanistan has been a party to the Protocol since 2009. On a formal reading this could lead to the strange result that the conflict between the Afghan Government and the Taliban is covered by the Protocol, but the conflict between the non-Afghan states parties to the Protocol and the Taliban is not.¹¹ Imagine those

¹⁰ See R.S.M. Geiß, 'Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?', vol. 93 *IRRC* (2011) 11-46 at 16: 'Furthermore, the wording of Article 1(1) of Additional Protocol II suggests that it applies only to armed conflicts between the contracting state and opposing non-state parties that control part of that state's territory. It thus seems that states other than Afghanistan that are party to the armed conflict are not directly bound by Additional Protocol II either, even if they have ratified it.' (Footnote omitted); similarly J. Pejic, 'The protective scope of Common Article 3: more than meets the eye', vol. 93 *IRRC* 881 (2011) 189-225 at 201. Contra A. Bellal, G. Giacca, and S. Casey-Maslen, 'International law and armed non-state actors in Afghanistan', vol. 93 *International Journal of the Red Cross* 881 (2011) 47-79, esp. at 60-61.

¹¹ F. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, 87 *International Law Studies* (2011) 187-213, see esp fn79 at 213 'When the conflict is of the requisite intensity for Additional Protocol II to be applicable, but it is not applicable because the conflict occurs in the territory of a State not a party to the conflict, it should be treated as an Additional Protocol II conflict for these purposes. It is beyond the scope of this article to consider whether Article 1.1 of Additional

who are seeking to explain the legal regime to the Taliban, as one set of authors wrote perhaps rhetorically: “Do the Afghan forces apply Additional Protocol II but not the foreign military? What are the Taliban supposed to do? Try to distinguish between Afghan forces and foreign military forces in their conduct of hostilities and adapt their methods of warfare accordingly? Are they relieved of their Additional Protocol II obligations when fighting foreign military forces?”¹²

The same authors argue that because the Protocol is taking place in the territory of a party to the Protocol (Afghanistan) then the parties to the armed conflict are bound by the Protocol as they are fighting on the same side as Afghanistan.

“At the very least, the forces of states that are also party to Additional Protocol II should be considered formally bound by its provisions in their military operations in Afghanistan, as they are engaged in the armed conflict that pits Afghanistan government forces against at least one armed group meeting the Protocol’s criteria for application. Otherwise this could lead to interoperability concerns, as well as a possible lack of clarity in operations between the different parties to the conflict.”¹³

This is not a view shared by all the intervening states parties to the Protocol. It is an area that could do with some clarification.

2.2. *The Intensity of Fighting Threshold in Additional Protocol II*

The last area which remains unclear for several commentators is whether today we really have two separate thresholds of intensity for the triggering of Common Article 3 and Additional Protocol II. Several commentators suggest that in addition to the requirement that the organized armed group control territory there should be a greater intensity of violence before the Additional Protocol applies.¹⁴ This is a result of the difficulties in arriving at the adoption of the Protocol, and has perhaps been compounded by the language of the Rome Statute. But, today, does the

Protocol II should be amended to replace “its armed forces” by “the armed forces of a High Contracting Party.”

¹² At 61.

¹³ *Ibid.* at 61.

¹⁴ Y. Sandoz, C. Swinarski, and B. Zimmermann (ed.s), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva/Dordrecht: ICRC/Nijhoff, 1987) at 1343ff; F. Hampson, Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law, 87 *International Law Studies* (2011) 187-213 at 195-7 and 203; Y. Dinstein, *Non-International Armed Conflicts in International Law*, (Cambridge: CUP, 2014) 39-50; G. Abi-Saab, ‘Les protocoles additionnels 25 ans après’, in J.-F. Flauss (ed), *Les nouvelles frontières du droit international humanitaire* (Brussels: Bruylant, 2003) 17-39 at 24-5.

Protocol really require a greater level of intensity of violence than that required to trigger Common Article 3? And there is the parallel question of whether customary international law operates with two thresholds.

So far the International Criminal Court seems to have avoided creating two separate thresholds. The UK Military Manual seems only to demand that to move from Common Article 3 to Additional Protocol II the dissidents should ‘achieve a degree of success and exercise the necessary control over a part of the territory.’¹⁵ Again to the extent that most of these issues are today discussed under the rubric of customary international law, perhaps it might be said that we should not waste time on such ‘academic’ questions, but I fear that these issues do get litigated as matters of treaty law, in many states only the treaty will be part of national law, and so having clarity about this threshold in Additional Protocol II is, I think, useful and (as explained by Professor Françoise Hampson) essential when one considers the possible interoperability with human rights law.¹⁶ As Professor Dinstein highlights, the requirement for ‘sustained and concerted military operations’ in Article 1 of AP II seems to require more than that required to trigger Common Article 3.¹⁷ The Sanremo Manual on the Law of Non-International Armed Conflict similarly suggests a ‘higher’ threshold for the Applicability of Additional Protocol II.¹⁸

I can see arguments for clarifying the contents of the two thresholds related to the level of military action rather than pretending that both Common Article 3 to the Four Geneva Conventions and the Second Additional Protocol are triggered as a result of the same level of violence. It makes sense for us to consider a rather low threshold for those in the hands of the enemy under Common Article 3, and a higher one for rules concerning the conduct of hostilities and the extra obligations we find in AP II.¹⁹

¹⁵ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004) at para 3.9.

¹⁶ F. Hampson, ‘Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law’, 87 *International Law Studies* (2011) 187-213.

¹⁷ Y. Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge: CUP, 2014) at 46-7.

¹⁸ M.N. Schmitt, C.H.B. Garraway, Y. Dinstein *The Manual on the Law of Non-Armed Conflict* (Leiden: Nijhoff, 2006) at 3 (Available at www.scribd.com/document/108685710/Manual-on-the-Law-of-Non-International-Armed-Conflict-Prof-Michael-N-Schmitt).

¹⁹ Hampson makes a convincing case that human rights bodies are unlikely to accept status-based targeting without applying a human rights law test of conduct and absolute necessity in ‘NIACS generally or specifically in the case of NIACS between the threshold of Common Article 3 and that of Additional Protocol II,’ ‘Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law’, 87 *International Law Studies* (2011) 187-213 at 203. She also makes the point that prohibited weapons under Hague law may be necessary for law enforcement purposes (expanding

Also at a more political and journalistic level there is still a sense that some conflicts move from rebellion though insurgency into something called ‘civil war’. In the past, this term was seen to have specific legal implications but today, however much we insist that there is only one type of non-international armed conflict (a NIAC), Reuters, the BBC and the *New York Times* spend considerable time writing about whether the conflicts in Iraq or Syria constitute a civil war, and the authorities may choose to deny that there is a civil war (rather than some sort of insurgency or conflict) as acceptance that there were a ‘civil war’ would be to admit that they have lost control. Perhaps there is still an understanding of civil war that suggests that each side may have just as much legitimacy, and outside powers should refrain from any intervention, even assistance to the government. In short this second higher threshold may matter, especially if it is consciously, or unconsciously, assimilated to civil war in matters beyond the technical issue of when the Additional Protocol II applies.²⁰

3. Summary

I have suggested that we could usefully work towards greater clarity on three topics

1. Whether lack of consent triggers Additional Protocol I when a state in conflict with a non-state actor is bombarding a non-state actor on the territory of a state which has not consented to such an armed conflict?

bullets and riot control gas) and, therefore, one should be cautious about lowering the threshold.

²⁰ See D. Armitage, *Civil Wars: A History* (New Haven: Yale University Press, 2017) at 220-222. The new DOD *Manual on the Laws of War* suggests that civil wars could lead to recognition of belligerency which could in turn trigger the laws of neutrality or if it is the state engaged in the conflict to the application of the laws of international armed conflict. 17.1.1.1 *NIAC and Civil War*. ‘Civil war is a classic example of a non-international armed conflict. For example, a non-international armed conflict could involve the open rebellion of segments of a nation’s armed forces (sometimes called dissident armed forces) against the incumbent regime, each claiming to be the legitimate government... In some cases of civil war, the insurgent party has been recognized as a belligerent, and, at least in some respects, the law of international armed conflict would be applied by the States choosing to recognize the insurgent party as a belligerent.’ The footnote in the original reads: *See, e.g.,* LIEBER CODE art. 150 (“Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government”). See also D. Luban, ‘Military Necessity and the Cultures of Military Law’, 26 *Leiden Journal of International Law* (2013) 315-49 at 324; M. Sassòli, The Convergence of the International Humanitarian Law of Non-International and International Armed Conflicts - The Dark Side of a Good Idea, in G. Biaggini, O. Diggelmann, and C. Kaufmann (ed.s), *Polis und Kosmopolis -Festschrift für Daniel Thürer* (Baden-Baden: Nomos, 2015) 679-89.

2. Does Additional Protocol apply to a state fighting abroad against an armed group in an armed conflict taking place on the territory of a party to Additional Protocol II? The language of 'in the territory of a High Contracting Party' and 'its armed forces' suggests to some that when you go abroad the Protocol does not apply as a matter of law, while for others it is enough that that the conflict takes place in a territory of a party to the Protocol and the other states fighting in that armed conflict are bound by the Protocol as a matter of law.

3. When an armed group has control of territory and fulfils the other requirements of Additional Protocol II do we require a higher level of violence (perhaps evidenced by sustained and concerted operations) than we would for Common Article 3 before the Protocol is applicable? If we do require a higher threshold should we avoid the language of civil war because this has a considerable amount of historical baggage?