TOWARDS CONVERGENCE

IHL, IHRL and the Convergence of Norms in Armed Conflict
As the members of the Security Council well knew, in 1993, when the Statute was drafted, 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that had become internationalized because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.

The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal (unless direct involvement of the Federal Republic of Yugoslavia (Serbia-Montenegro) could be proven). It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects.
Number of articles in Geneva documents per type of armed conflict

- IAC: 530 articles
- NIAC: 29 articles
He is an enemy who has a state, a senate, a treaty, united and harmonious citizens, and some basis for a treaty of peace... [though] the word *hostis*, ‘enemy’, while it implies equality, like the word ‘war’ ... is sometimes extended to those who are not equal, namely, to pirates, proscribed persons and rebels; nevertheless it cannot confer the rights due to enemies, properly so called, and the privileges of regular warfare
When a party is formed within the state which ceases to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a civil war... civil war breaks the bonds of society and government... it gives rise to two independent parties, who regard each other as enemies and acknowledge no common judge.... these two parties must be regarded as forming... two distinct Nations... that being so, it is perfectly clear that the established laws of war... should be observes on both sides in a civil war.
Recognition of Belligerency

- The Institute of International Law set out the requirements for ‘recognition of belligerency’ in 1900, stating that a Third State would be committing an international wrong if it prematurely recognised the insurgent party without the fulfilment of certain requirements:

- Article 8 of the Regulations for Civil War:
  - Third States may not give recognition to the belligerency of the insurgent party:
    - If it has not won for itself a territorial existence by taking possession of a given part of the national territory;
    - It does not fulfil the conditions which must be met to constitute a regular government de facto exercising in that part of the territory the ostensible rights belonging to sovereignty; and;
    - If the struggle waged in its name is not conducted by organised forces subject to military discipline and coplying with the laws and customs of war.
Spanish Civil War 1936-1939
International Armed Conflict

- A state of belligerency between two sovereign States, regardless of a declaration of war
  - exists whenever there is a comprehensive use of a State’s armed forces against the armed forces of another sovereign State
  - an armed conflict is deemed to exist even if the hostilities fall short of war
In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

- Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.
Global Trends in Armed Conflict, 1946-2006

- Warfare Totals
- Societal Warfare
- Interstate Warfare

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Wars of National Liberation

- Defined in Protocol I as:
  - Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
Additional Protocol II

- 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 not covered by [Protocol I]… and which take place in the territory of a High Contracting Party:
  - Between its armed forces and dissident armed forces or other organised armed groups under responsible command
  - Which 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 [Adapted from Article 1(1) of Protocol II]

- Additional Protocol II does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.
Additional Regulation for Non-International Armed Conflicts - Treaties

- Cultural Property

- Permissible Weapons
  - Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980)
    - Amended Protocol II on Mines, Booby Traps and other Devices
    - Protocol IV on Blinding Laser Weapons
    - Protocol V on explosive remnants of war

Development of Customary IHL in Non-International Armed Conflicts

- State practice
  - Yemeni civil war
  - Congolese civil war
  - Nigeria v Biafra
UN Resolutions – General Assembly

- Resolution 2444, UN Doc A/7433 (1968)
- Resolution 2597, UN Doc A/7909 (1969)
- Resolution 2674, UN Doc A/8178 (1970)
- Resolution 2675, UN Doc A/8028 (1970)
- Resolution 2852, UN Doc A/8429 (1971)
- Resolution 2853, UN Doc A/8589 (1971)
- Resolution 3032, UN Doc A/8966 (1972)
- Resolution 3102, UN Doc A/9030 (1973)
- Resolution 3500, UN Doc A/10463 (1975)
- Resolution 31/19, UN Doc A/31/295 (1976)
- Resolution 32/44, UN Doc A/32/396 (1977)
UN Resolutions – Security Council

On Liberia
- UN SC Res. 1083, UN Doc S/RES/1083, 27 November 1996

On Somalia
- UN SC Res. 794, UN Doc S/RES/794, 3 December 1992

On Angola

On Georgia

On Afghanistan
The Bulletin’s field of application, as outlined in Section 1.1, states that ‘the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement.'
International Criminal Law

- ICTY
- ICTR
- ICC
Influence of International Human Rights Law

- Respect for Human Rights in Armed Conflicts: UN Resolutions
  - 2444 (1968)
  - 2597 (1969)
  - 2674 (1970)
  - 2676 (1970)
  - 2677 (1970)
  - 2852 (1971)
  - 2853 (1971)
  - 3032 (1972)
  - 3102 (1973)
  - 3500 (1975)
  - 31/19 (1976)
  - 32/44 (1977)
Inter-American Commission on Human Rights

“the provisions of Common Article 3 are essentially pure human rights law” – Abella v Argentina, Case 11.137
ICRC Customary International Humanitarian Law Study
Since the 1930s, there has been a gradual blurring of the distinction between the customary international law rules governing international conflicts and those governing internal conflicts. Put another way, there has been a convergence of two bodies of international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts... this convergence has come about due largely to the following four factors: (1) the increase in the number of civil conflicts; (2) the increase in the level of cruelty of internal conflicts; (3) the increasing interdependence of States; and, (4) the influence of universal human rights standards.... in short... certain forms apply as customary international law to internal and international armed conflicts alike