



ماعت للسلام والتنمية وحقوق الإنسان
Maat For Peace, Development, and Human Rights

A White Paper

Armed Groups in Light of the International Humanitarian Law

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Preamble



During the past decade, armed groups became a key party to a large number of armed conflicts worldwide and in most of the armed conflicts in the Middle East today. According to the report of the International Committee of the Red Cross, the number of armed groups in the last seven years only is much more than the number of armed groups that appeared in the past seventy years

which requires developing a clear, precise definition of the term “armed groups”.

Therefore, the International Humanitarian Law Unit at Maat issued this white paper as part of the series entitled “What Do You Know about International Humanitarian Law”, which was released by the Unit in January 2021, to introduce International Humanitarian Law?

How Armed Conflicts Are Classified?

Since the adoption of the four Geneva Conventions in 1949, and subsequently the first and second Additional Protocols in 1977, International Law has clearly and formally defined non-international armed conflicts as a classification of armed conflicts.



Thus, armed conflicts become classified into



Non-International Armed Conflicts



International Armed Conflicts

Thus, these are the only two areas of application of International Humanitarian Law

The armed conflict is mainly classified by the parties involved. The international armed conflict is a war in its classic form.

Who Are the Parties of the Armed Conflict?



The parties to the armed conflict are persons of public international law, such as between a state and another state, a state and a group of states, or a state and an international organization. International armed conflicts also include cases of occupation and wars of national liberation against colonialism and apartheid regimes.



The non-international armed conflict is armed conflicts between states and non-state armed groups or between armed groups.

Notice

The first classification - the international armed conflict - does not pose a problem regarding the definition of its parties. The problem lies in the non-international armed conflict, where non-state armed groups are in all cases at least one of the parties to this conflict, which necessarily calls for defining what is meant by those groups



When we say that this entity or those individuals make an “armed group”, we are facing a non-international armed conflict. Therefore, the relevant provisions of international humanitarian law apply?

When this entity or those individuals do not meet specific criteria, so we are not faced with an armed conflict in the first place, but rather situations of internal disturbances and tension, and therefore, there is no room for the application of international humanitarian law at all?



The legal framework governing non-international armed conflicts is the common Article 3 of the Geneva Conventions, Additional Protocol II and the rules of customary international humanitarian law. Therefore, the definition of an armed group has its legal basis today in Article 1 of Additional Protocol II

which defines non-international armed conflicts as

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Those which occur in the territory of one of the high contracting parties between its armed forces and dissident armed forces or other organized armed groups and exercises, under responsible command, such control over a part of its territory as to be able to carry out continuous and coordinated military operations and be able to implement this right (Protocol)

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Therefore, this definition has stipulated four main elements in the armed group



To control part of the territory of the State.



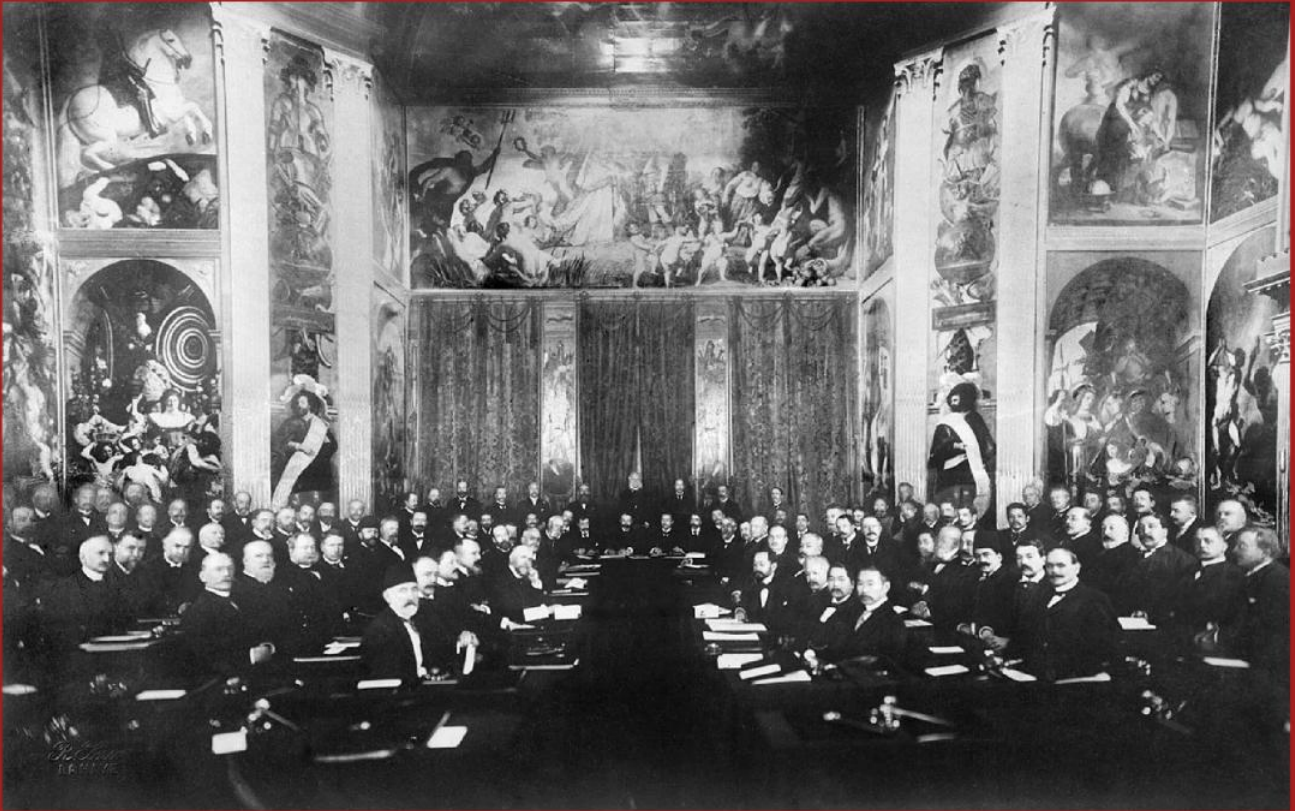
To operate under responsible leadership.



To be able to implement applicable provisions of international humanitarian law.



To carry out continuous and coordinated military operations.



Prior to the Second Protocol, the Hague Regulations relating to the Laws and Customs of War on Land of 1907 set forth four criteria, two of which are consistent with what came in the Second Protocol, stipulating the applicability of the laws of war, its rights and duties to the armed group.



To have a fixed distinctive badge.



To be headed by a person responsible for his subordinates.



To abide by the laws and customs of war.



To carry a weapon openly.

Despite what was stated in the Hague Regulations and subsequently the Second Geneva Protocol, we cannot say that these six criteria are sufficiently clear to distinguish armed groups. Therefore, the jurisprudence of the courts came to clarify the criteria for classifying non-state armed groups.

Beginning of the Statute of the International Criminal Tribunal for the former Yugoslavia



In its judgment in the 1997 Tadic case, the tribunal established two elements that must be present in a conflict to be considered a non-international armed conflict:

Organizing the parties involved.

The intensity of the conflict.

The court reconsidered the judgment in the 2005 Limage case and determined that the armed group should have an “organizational structure”, however, in its judgement in the 2000 Musima case, the International Criminal Tribunal for Rwanda made it clear that such an organizational structure does not necessarily have to be on par with or similar to those in regular state armies. Also in this regard, the judgements of the International Criminal Tribunal for the former Yugoslavia stated that

there can only be armed conflict between parties organized enough to confront each other by military means

The International Criminal Tribunal for the former Yugoslavia in the 2008 Boskoski and Tarkolovsky case came back to explain the matter much more clearly, and put a number of explanatory factors to be taken into account when evaluating the issue of organization in an armed group to assess the applicability of this description - the description of the armed group - from the point of view of International humanitarian law. Note that none of the following factors is necessary to know whether a system criterion is satisfied or not. In its aforementioned judgement, the court divided these factors into 5 main groups, as follows:

First Group

Factors indicating the existence of a leadership structure



Creation of a high command or staff that appoints commanders and gives them directions, publishes internal regulations, regulates the supply of arms, authorizes military action, assigns tasks to individuals, issues political statements and is informed by field units of all developments. In addition to the existence of regulations defining the organization and structure of the armed group; the presence of an official spokesperson; Communicating through data announcing military operations; The presence of a headquarters, the existence of internal regulations that determine the ranks of personnel and the duties of commanders.

Second Group

Factors indicating the ability to conduct military operations in an orderly form



For example: the group's ability to define a unified military strategy and conduct large-scale military operations; the ability to control territory, and whether there is a territorial division in which the respective commanders create units and appoint officers to command

them; the ability of field units to coordinate their actions; actual publication of written and oral orders and decisions

Third Group

Factors referring to Logistic management

For example: the ability to recruit new personnel; providing military training; organized supply of arms; the use of a military uniform; The presence of communication devices that connect the headquarters to the units or units to each other.



Fourth Group

Factors indicating a level of discipline and ability to carry out basic obligations

means the obligations under **Common Article 3 of the Geneva Conventions**

Such as: establishing disciplinary rules and mechanisms; proper training; Existence of bylaws, and whether they are actually published to members of the group



Fifth Group

Factors indicating the group's ability to speak with one voice

For example: the ability to act on behalf of its members in political negotiations with foreign countries and international organizations; The ability to negotiate and conclude agreements, such as cease-fires and peace agreements





If the group involved in the armed conflict meets the criteria for an organization, what is the applicable law?

In light of the above, we are before an armed group that is a party to a non-international armed conflict in accordance with international humanitarian law, where the members acquire the rights or protection guaranteed under international humanitarian law as well as bear the obligations established under this law. It should be noted here that in order for Additional Protocol II to become applicable, the armed group must be:

- The organizing element ... took control of part of the territory of the state.**
- The state itself is the opposing party to the armed conflict and not another armed group.**

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If these two elements are not available, Common Article 3 of the Geneva Conventions and the rules of customary international humanitarian law apply without Additional Protocol II.

Does International Humanitarian Law Protect the Armed Group?

Although the armed group's fulfillment of the element of organization grants it the protection guaranteed by international humanitarian law, the protection acquired by an individual belonging to an armed group and carrying a weapon differs from that granted to an individual who belongs to the regular forces of the state. The latter acquires the adjective "fighter", and the former acquires the status of a warrior, not a fighter. The importance of distinguishing between the two terms lies in:

- ▶ A combatant, if captured by an enemy party, will not enjoy the protection guaranteed to prisoners of war in international humanitarian law, as he will not acquire the status of "prisoner of war."
- ▶ A fighter, on the other hand, if captured may not be tried for the killing he committed targeting military targets without prejudice to the rules of distinction, proportionality and precautions. However, an individual belonging to an armed group may be tried before the national courts of the state on the basis of his killing and taking up arms and under national law if no decisions have been issued by the state for amnesty, or neither the state nor the armed group has signed an agreement dealing with this matter.





On the other hand, we may find a problem in defining the armed group. To limit the mistake in this regard, any military forces officially subordinate to the state are within the regular forces or the state's armed forces. As for the term, armed groups may not be characterized by that specification, as it includes more than one form of the armed group.

Regular forces or armed forces are the official military forces that make up the national army of a country. The members of these forces officially follow the state; they are subject to its military laws and the instructions of its military leaders. The formations of these forces are highly organized, in addition to receiving military education and military training constantly. Also included in the regular armies are the military forces of an international organization. It is clear from these features that the armed forces of states do not pose a problem as we mentioned in terms of their identification, and we do not need to research the previously mentioned factors to know the extent of organization within those forces.

Shapes of armed groups

Among those forms are armed groups in the form of militias. There is no specific definition of militias and they overlap with other forms of armed groups. Militias don't seek to overthrow and confront the state and do not submit to it like other armed groups. One of the most prominent features that distinguish militias from other armed groups is the degree of organization that may be close to that of the official regular forces of the state. However, militia members are mostly non-professional and part-time soldiers, unlike regular forces.



You may not find a rivalry between the militias and the state. Rather, these militias may stand on the side of the state itself in the face of other states or armed groups or be affiliated with the state.

A. State-Affiliated Militias

The militia that is established or sponsored by the state or established without interference from the state becomes loyal to it. An example of state militia is the China Militia of the ruling Communist Party of China, the Bassij forces of the Iranian Revolutionary Guards, the Popular Mobilization Forces of the Iraqi armed forces, the Bolivarian Militia of the National Bolivarian Armed Forces of Venezuela, and the Red Army of The Bolshevik Party in the former Soviet Union.

B. Dissident militias from the state

Militias may be dissidents from the armed forces of the state, and these militias often arise from civil wars, revolutions, and military coups. It consists of soldiers who served in the ranks of the state and then defected to form an independent militia. **Examples in the Arab region are the Libyan Arab National Army, the South Lebanon Army, and the Free Syrian Army.**



C. Non-State Militias

The militia may be established without being loyal to or against the state. So, it may arise as a military wing of a political movement or a national liberation movement. **Examples of this militia are the Lebanese Hezbollah and the Palestinian Izz al-Din al-Qassam Brigades. The militia may be created to protect a specific ethnic or religious group within the country while suffering persecution or disenfranchisement, such as the Rwandan Patriotic Front during the Rwandan Civil War and the Saharawi People's Liberation Army of the Polisario Front in Western Sahara.**

Note

When classifying armed conflict and determining the applicable law, it is necessary to define the relationship between the state and the armed group. The subordination of the militia to the state may result in the conflict turning from a non-international armed conflict to an international armed conflict if that militia is facing a state. The state may form its militia to expand the components of its national army, create a reserve army, support the ruling regime, avoid accountability for the violations committed, or the state cooperate with the militia to confront a common enemy. The international judiciary and legal jurisprudence resolved this matter by saying that the mere receipt of money and equipment or sometimes complying with the instructions of a state does not necessarily mean the militia's subordination to the state unless the state discloses this. Rather, it is stipulated that there be effective control over this armed group - the militia - and some have been strict, requiring that control be complete.

Are there other forms of armed groups other than militias?

Other forms of armed groups include terrorist groups and organizations. Considering a terrorist organization an armed group as a party to a non-international armed conflict always faces great difficulty as states often refuse to deal with these organizations on this basis. It views it as a terrorist organization whose members are outlaw criminals, against whom it acts according to its national law and at its discretion.



Does international humanitarian law protect terrorist organizations ?

International humanitarian law is not concerned with distinguishing between terrorist organizations and other armed groups if these organizations have fulfilled the criteria mentioned previously, especially since the term terrorist groups may often be used by the state to describe its opposition. From the point of view of international humanitarian law, the state did not consider terrorist organizations and armed groups to deprive it of the protection guaranteed by this law and did not have obligations under it.

Thus, international humanitarian law treats actors of terrorism that target civilians as prohibited and guarantees protection for civilians, whether it is an armed group or a state. International humanitarian law is not concerned with the actor and whether it is classified as a terrorist organization or not. Rather, it looks at the act itself, whoever committed it. The law dealing with those armed groups as terrorist organizations is another set of rules of public international law combating terrorism in United Nations Security Council resolutions, especially in the wake of the September 2001 ,11 attacks.



The most prominent judicial precedents in this regard:

In the US Supreme Court, in the case of Hamdan v. Rumsfeld in 2006, the US administration represented by the Ministry of Defense argued that the rules of international humanitarian law did not apply to a defendant charged with terrorism by a military court. This argument was based on the premise that the accused belongs to Al-Qaeda, is considered a terrorist organization, and therefore we are not just facing an armed group or an armed conflict. The appeal ruling came in favor of the US administration, considering that international humanitarian law does not apply in this case. The Supreme Court rejected the state's argument and the appeal ruling, ruling that the war on terrorism, in this case, is a non-international armed conflict and that the accused belongs to a non-state armed group. Therefore international humanitarian law is applicable, and the conflict is subject to at least the third common article of the Geneva Conventions.

Thus, international humanitarian law applies as long as the two main criteria are:

- ▶ **Classification of non-international armed conflict exists. i.e. level of organization and strength.**
- ▶ **The armed group party to the conflict has been classified as a terrorist organization according to the description of a state or group of states or even according to Security Council resolutions, so international humanitarian law deals with that group as an armed group like other non-state armed groups enjoying the protection guaranteed by law and bears the obligations laid down.**

Are organized crime gangs or what is known as the Mafia may qualify as armed groups or not



Jurisprudence states that if the confrontations between the state and these gangs become more intense, situations of disturbances, internal tensions, violence occasionally armed conflict, and those gangs display a level of organization consistent with the relevant standards; then we are faced with an armed group and a non-international armed conflict.

In conclusion

the images presented previewed do not include all forms of non-state armed groups. We may be facing an armed group that has reached a level of organization that complies with the relevant criterion until we are facing a non-international armed conflict, yet it has not been described as a militia, and it has not been classified as a terrorist organization, nor is it an organized crime gang. It is sufficient it consider the armed group in the light of the previous criteria to ensure that the organization criterion is met without the need to place it under a specific form of the armed group since international humanitarian law deals with the armed group as an armed group.



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