

MAIN CAUSES OF CIVILIAN VULNERABILITY IN A NON-INTERNATIONAL ARMED CONFLICT: AN APPRAISAL OF THE LEGAL FACTORS

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ABSTRACT

There may be legal as well as non-legal factors that are the main causes of the civilian harm in a non-international armed conflict. In view of the lessons taken from civil wars that occurred around the world, the report of the UN Secretary General, and cases decided by international tribunals, the paper identifies the legal factors that contribute to the vulnerability of civilians in a civil war situation and examines each and every factor in search of possible solution or amelioration.

Keywords: Non-international armed conflict; protection of civilians; common Article 3; violations with impunity

INTRODUCTION

During the past 60 years the main victims of war have been civilians. The protection of civilians during armed conflict is therefore a cornerstone of the international humanitarian law (IHL). IHL also identifies and protects particularly vulnerable civilian groups such as women, children and the displaced.

The focus of this paper is on the vulnerability of civilians in a non-international armed conflict. This area of research is chosen due to two reasons:

1. Most of the present-day armed conflicts are non-international in nature; and
2. Civilians are the most vulnerable type of people during hostilities and this is more so in protracted internal armed conflicts.

BACKGROUND: THE VULNERABILITY OF CIVILIANS

In many of today's armed conflicts, civilian casualties and the destruction of civilian infrastructure are not simply by-products of war, but the consequence of the deliberate targeting of non-combatants. In many conflicts, belligerents target civilians in order to expel or eradicate segments of the population, or for the purpose of hastening military surrender.

One feature of internal conflicts today is that the dividing line between civilians and combatants is frequently blurred. Combatants often live or seek shelter in villages, and sometimes use innocent civilians, even children, as human shields. In some cases, communities provide logistic support to armed groups, either voluntarily or under compulsion, and become targeted as a consequence.

In some cases, civilians have been systematically tortured and killed. During the 1994 genocide in Rwanda, entire families were executed in their homes and entire villages

brutalized in an orchestrated campaign of mass extermination that claimed more than 500,000 lives. In Sierra Leone, since 1997, more than 5,000 civilians have suffered mutilations. In Burundi, over a quarter of a million people have been killed and hundreds of thousands repeatedly displaced.

Combatants target civilians in conflict by, among other things, attempting to restrict their access to food and/or other forms of life-saving assistance, or, indeed, deliberately starving them. In 1992 in Somalia, for instance, the parties to the conflict deliberately impeded the delivery of essential food and medical supplies, while during the siege of the enclaves in Bosnia and Herzegovina, civilians were systematically deprived of assistance necessary for their survival.

What are the factors that determine the civilian toll? One is the attitude toward civilian casualties in a targeted state. Where the population is known to support the enemy side, and enemy forces depend on and live among that population, as in the Vietnam War, the population is treated ruthlessly and is either a direct target or taken as 'collateral damage.' Civilian casualties in this case ran into the millions.

Another reason is that attacks that kill civilians may hasten the end of a war, a key factor in the NATO expansion of the attacks on civilian facilities in Serbia during its war with Yugoslavia and also a major consideration in the war against the Taliban.

The Sri Lankan civil war is a recent non-international armed conflict which clearly demonstrates the vulnerability of civilians. The number of civilian casualties has been subject to intense debate. While the loss of civilian lives has been prevalent during the entire conflict, the final five months saw the heaviest casualty rate. United Nations, based on credible witness evidence from aid agencies as well as civilians evacuated from the *Safe Zone* by sea, estimated that 6,500 civilians were killed and another 14,000 injured between mid-January 2009 (when the *Safe Zone* was first declared) and mid-April 2009. *The Time*, the British daily, estimates the death toll for the final four months of the war (from mid-January to mid-May) to be 20,000.

Allegations of war crimes have been made against the rebel Liberation Tigers of Tamil Eelan (LTTE: Tamil Tigers) and the Sri Lankan military. The alleged war crimes include attacks on civilians and civilian buildings by both sides; executions of combatants and prisoners by both sides; and acute shortages of food, medicine, and clean water for civilians trapped in the war zone.

A Panel of experts appointed by UN Secretary General Ban Ki-Mon to advise him on the issue of accountability with regard to any alleged violations of IHL during the final stages of the conflict in Sri Lanka found 'credible allegations' which according to them, if proven, indicated that war crimes and crimes against humanity were committed by the Sri Lankan military and the Tamil Tigers. The panel has called on the UNSG to conduct an independent international inquiry into the alleged violations of international humanitarian law. The Sri Lankan government has denied that its forces committed any war crimes and has strongly opposed any international investigation. The Lessons Learnt and Reconciliation Commission, a formal commission of inquiry, was appointed by the Sri Lankan President, to review the conflict from 1983 to 2009. On 27 July 2012, Sri Lanka brought out a road map fixing time lines for investigating alleged war crimes by its army.

The most recent civil war is one happening in Syria. Two years of armed conflict—with more than 100,000 dead, 2 million refugees, 4.5 million internally displaced persons and an entire population brutalized by incessant violence—has left deep wounds. Thus far, outside

pressure appears to have had little impact on bringing the war to a close. In the meantime, Syria's civilian population continues to suffer extreme violence with little hope of respite.

FINDINGS AND DISCUSSIONS

The year 2009 marks the tenth anniversary of the consideration by the Security Council of the protection of civilians in armed conflict as a thematic issue. A decade ago, members of the Security Council questioned whether situations of internal armed conflict constituted a threat to international peace and security, and thus a matter for Council consideration. Currently, based on the experience of conflicts in such places as Afghanistan, Chad, the Central African Republic, the Democratic Republic of the Congo, Liberia, Rwanda, Sierra Leone, Somalia and the Sudan, the regional dimensions and destabilizing effects of internal conflicts have been firmly recognized and the Council is progressively more willing to address the protection needs of civilians in such situations. The UN Secretary General submitted to the Security Council a comprehensive report on the protection of civilians in armed conflicts on 29 May 2009.

On the basis of the report of the Secretary General, the lessons taken from civil wars that occurred around the world and the decisions of international courts and tribunals, the following can be summarized as the main causes of civilian harm during hostilities:

1. Loopholes in the applicability of the law;
2. Inadequacy of treaty law protecting civilians in non-international armed conflicts;
3. Weaknesses in enforcement mechanism that encourages violations with impunity;
4. The attitude and mindset of parties to armed conflicts; [Parties tend to win the war by hook or by crook, to win quickly with high tech warfare and little exposure of own service personnel to ground fighting, and to avoid own casualties (the war in Afghanistan is a good example of this). This attitude of winning the war by hook or by crook may lead to:
 - a. Deliberate targeting of civilians;
 - b. Indiscriminate attacks;
 - c. Use of horrendous weapons, and
 - d. Use of human shields.]
5. Lack of or inadequate dissemination of IHL to military personnel;
6. The nature of internal armed conflict situations that tends to blur the distinction between combatants and civilians; and
7. Increased reliance on private military and security companies, with sometimes fatal consequences for civilians [The alleged killing of civilians by the US Blackwater private security personnel in Iraq is a good example].

These factors can be divided into two categories: legal and non-legal. The legal factors are loopholes in the applicability of IHL the inadequacy of the law, and most importantly, non-compliance and violations with impunity. The rest are non-legal. The present paper is concentrating only on the legal factors.

The Issue of Applicability

Whenever there are hostilities, the very first excuse made by a party which does not want to be bound by IHL is that the situation is not one of armed conflict and hence the law does not apply. They almost always challenge the applicability of IHL. If IHL is not applicable, how can civilians be protected. That is why the first main cause of the vulnerability of civilians in hostilities is the rejection of a party to an armed conflict of the applicability of IHL.

IHL is specifically designed to apply to the situation of an 'armed conflict.' There must be an armed conflict in order that IHL is applicable. IHL draws a distinction between two different types of armed conflict: international and non-international. As a general rule, different set of rules applies to different type of armed conflict.

International Armed Conflicts

Common Article 2 of the 1949 Geneva Conventions states that:

“In addition to the provisions which shall be implemented in peace-time, 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.”

“The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

The following four types of armed conflicts are deemed to be international armed conflicts:

- I. Inter-State armed conflict;
- II. Occupation of territory of another State;
- III. Internationalized armed conflict (e.g. if a foreign state intervenes with its armed forces on the side of the rebels fighting against government forces);
- IV. National liberation movement (armed conflict between a State and a people exercising the right to self-determination)(Art. 1(4), Additional Protocol I)

Non-International Armed Conflict

Simply put, armed conflicts that do not fall within the definition of international armed conflict are non-international. But from practical point of view, the definition is not that simple.

The two main IHL treaty law applicable in the situation of non-international armed conflicts are

1. Common Article 3 to the Geneva Conventions; and
2. Additional Protocol II (AP II).

Application of Common Article 3

Common Article 3 provides, inter alia, that:

“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...”

The most important criterion is that there must be an “armed conflict”. What is an armed conflict? Treaty law does not answer the question. And at the same time, there is as yet no universally accepted definition of the term.

Fortunately enough, in the Tadić case (1997), the Appeals Chamber of the International Criminal Tribunal for former Yugoslavia (ICTY) adopted an acceptable definition of armed conflict:

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 this definition, the threshold for the application of common Article 3 is relatively low. The sole requirement is a state of protracted armed violence, involving organized non-governmental armed groups. There is no requirement that the insurgents exercise territorial control.

Although this definition has been relied upon as authoritative in subsequent ICTY cases, whether it will come to be widely accepted and used by States remains to be seen.

Application of Additional Protocol II

Article I of the Additional Protocol II defines non-international armed conflict as follows:

- I. This Protocol ...shall apply to all armed conflicts which are not covered by Article 1 of the (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.
- II. This Protocol shall 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, as not being armed conflicts.”

Certain criteria are required for the application of 1977 Additional Protocol II, namely:

- a. A confrontation between the armed forces of the government and opposing “dissident” armed forces;
- b. That the dissident armed forces are under a responsible command; and
- c. That they control a part of the territory as to enable them to “carry out sustained and concerted military operations” and to implement the Protocol.

The definition of a non-international armed conflict in AP II has a threshold that is so high in fact, that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until the rebels were well established and had set up some form of de facto government.

As far as the issue of applicability is concerned, the loopholes of treaty law can be summarized as follows:

- I. That there is no authoritative definition of ‘armed conflict’ in treaty law and thus it is difficult even for the minimum standards in common Article 3 to be applicable;
- II. That the threshold for a ‘non-international armed conflict’ in AP II is so high and most internal armed conflicts may well be excluded;
- III. Those in practices, most of the States where there are protracted internal armed conflicts do not ratify AP II and thus are not bound by it.

How to remedy this is food for thought for all of us and one of the possible solutions is to see whether the definition of ‘armed conflict’ laid down in Tadić case has been widely accepted

by States as authoritative in order that at least common Article 3 is applicable for the protection of civilians.

The Adequacy of the Law

The distinction between international and non-international armed conflict is important, as the body of law that applies to international armed conflict is substantial whereas that applying to internal armed conflicts is slight. We have more than enough provisions in treaty law to protect civilians in international armed conflicts. However, in respect of the internal armed conflicts, treaty law is much less developed and seems to be inadequate.

Applicable Treaty Law

1. International armed conflict:

As far as the protection of civilians are concerned,

- a. There is the entire Geneva Convention IV (Civilian Convention), containing 159 Articles with detailed provisions protecting civilians.
- b. This civilian convention is again supplemented by the Additional Protocol I (AP I) with 102 Articles, including specific provisions relating to method and means of warfare and the entire Part IV (Articles 48-56) dealing with protection of the civilian population.

2. Non-international armed conflict

- a. Common Article 3 does not deal directly with the conduct of hostilities.

No rule of protection of the civilian population is included as such.

But it requires “humane treatment” at all times for those not involved in hostilities. Interpreted broadly, this would preclude attacks on the civilian population as a whole.

- b. Additional Protocol II: Article 13 says that the civilian population as such, as well as individual civilians, shall not be the object of attack. Apart from that there are no other elaborated provisions giving specific protections to civilians such as those in the Geneva Convention IV or AP II. There are certainly gaps, e.g. the lack of specific protection against indiscriminate or disproportionate attacks, or against the use of civilians as ‘human shields’ to deter military operations.

We may fairly conclude that as far as the content of the law is concerned, common Article 3 and AP II are much more limited, compared to their counterparts applicable in international armed conflicts although it can be argued that wider protections could be available to non-international armed conflicts under customary international law.

In the *Tadic (Jurisdiction)* case, the Appeals Chamber expressed the view, although *obiter dicta*, that:

It cannot be denied that customary rules have developed to govern internal strife. These rules... cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

There is broad agreement that the law of internal armed conflicts includes principles regarding the protection of the civilian population. The *Tadic* case has also been reinforced by Article 8(2)(c) of the Rome Statute. Furthermore, the basic customary law

principles of military necessity, humanity, distinction and proportionality provide guidelines, as so the Hague Regulations of 1907, generally considered to be reflective of customary law.

Non-Compliance and violations with impunity

This is the most crucial and decisive factor for the vulnerability of civilians in armed conflicts.

Compliance with Common Article 3

The practical application of common Article 3 is widely perceived as having been disappointing, to say the least. One scholar, writing in 1987, even claimed that it had never been applied in any situation to date, despite numerous civil wars exceeding the minimum threshold.

Even in recent State practice, for every conflict in which the IHL has been observed to some extent, there have been many more where the IHL, particularly common Article 3, have failed to alleviate the suffering caused by hostilities, such as those in Angola, Rwanda, Afghanistan, Chechnya, Bosnia-Herzegovina and Sri Lanka.

Compliance with Additional Protocol II

Even many years after the adoption of the Additional Protocol II and despite the growth in the number of internal armed conflicts, little has changed with respect to the application of the Protocol. The main problem in this regard is that many of the states which have been grappled with internal armed conflict since 1977 have never indicated any consent to be bound by Additional Protocol II: Angola, Namibia, Mozambique and Somalia in Africa, Afghanistan and Sri Lanka in Asia and Haiti and Nicaragua in the Americas.

Enforcement: The Main Problem

The main problem lies not in the content of rules protecting civilians in a non-international armed conflict, but rather their enforcement. Neither common Article 3 nor AP II contains provisions governing their enforcement. In fact, the system as a whole has been devised for international armed conflicts.

An interesting question is why, as a matter of law, the provisions of common Article 3, or AP II, bind armed opposition groups that, of course, have not ratified the treaties in question. Perhaps the answer lies in the fact that law of war obligations are binding on individuals as well as States and are, therefore, binding on members of armed opposition groups

A possible solution to this problem is to rely on customary international law that has been developed through State practice and through the decisions of international tribunals like Nuremberg Trial, ICTY and ICTR, to fill in gap in treaty law.

Recent occurrences have had a profound effect on the development of customary international humanitarian law and its application to internal armed conflict. The Tadić case was the first to suggest that there is a body of customary international law applicable to internal armed conflict, and that the violation of these rules can involve individual criminal responsibility. The ICTR endorsed this in Prosecutor v Akayesu and stated “the violation of these norms (common Article 3 and Art. 4 of AP II) entails, as a matter of customary international law, individual responsibility for the perpetrator.”

The Rome Statute of the ICC represents a vital development in the laws of internal armed conflict. Article 8(2)(c) acknowledges violations of the laws of internal armed conflicts as war crimes. It is, therefore, now possible to punish those who committed war crimes in

violation of the law of internal armed conflict. Nevertheless, the Rome Statute is applicable only to those States that are parties to the Statute. Non-parties are not bound by it. As there are Major military powers like the United States of America, which strongly opposes the Rome Statute, it is difficult to assume that its provisions could create a new customary international law binding on all States.

RECOMMENDATIONS AND CONCLUSIONS

Whenever there is an accusation that IHL was violated, the alleged violator almost always argues that IHL is not applicable because the situation is not one of 'armed conflict'. The threshold for the applicability of AP II is quite high and most internal conflicts are out of its ambit. The only hope for the effective protection of civilians in a non-international armed conflict is for the overwhelming majority of States to adopt the definition of 'armed conflict' laid down in Tadić case and thereby making it a rule of customary law.

Even though common Article 3 and AP II are applicable to a given situation, the content of the law is much more limited in comparison to the content of the law in the case of an international armed conflict. By virtue of the innovative approaches taken in the Tadic case and Article 8(2) of the Rome Statute, there has been broad agreement that protecting civilians in a non-international armed conflict is well established outside and independently of the treaty law.

Traditionally it was very difficult to enforce the law of non-international armed conflict. However, thanks to the visionary decisions of ICTY and ICTR and the innovative trend of the Rome Statute, breaches of common Article 3 and APII now create individual criminal responsibility. This position can be strengthened by means of attracting more States to be parties to the Rome Statute of the International Criminal Court.

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