ARMED CONFLICTS AND THE USE OF FORCE

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Abstract: This study focuses on the notion of armed conflicts and its relevance in international law. Several items were discussed: Are the terms "armed conflict" and "war" two different concepts covering different legal situations? Or is the term "war" already legally outdated? What role does "a legal state of war" (or "state armed conflict"?) play in case of international conflicts? What is the relationship between armed conflicts and so called "measures short of war" (or short of armed conflict?) Which role do subjective and objective factors play in determination whether an armed conflict exists? When armed conflict is commenced and terminated? Is it still correct to limit "international armed conflicts" to conflicts among states only or does this term include also hostilities in which non-state actor (Al Qaeda) participates as well? What is the relationship between "armed conflict" and "breach of peace", "act of aggression", "military intervention", "military operation". When do "armed hostilities constitute an armed attack and when do they constitute an "armed conflict"? The term armed conflict has become the relevant legal term since 1949 Geneva Conventions were signed.

Resumé: Studie se koncentruje na vývoj a význam dnes již právního pojmu "ozbrojený konflikt" v mezinárodním právu. Práce se dotýká některých otázek jako např.: Jsou pojmy "ozbrojený konflikt" a "válka" dva různé pojmy pokrývající různé právní situace? Nebo je pojem "válka" již právně zastaralý? Jaký význam má existence "válečného stavu" (nebo stavu ozbrojeného konfliktu?) v případě ozbrojeného konfliktu? Jaký je vztah mezi ozbrojeným konfliktem a tzv. opatřením "short of war" (nebo "short of armed conflict")? Důležité z hlediska humanitární ochrany je i určení, kdy ozbrojený konflikt začíná a končí. Problematikou významu ozbrojených konfliktů v mezinárodním právu se aktuálně zabývá i zvláštní výbor ILA.

Key words: armed conflict, war, use of force, armed attack, intervention.

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Introduction

Prior to World War I, the definition of war was generally based on an armed contest, on an actual manifestation of the use of force between two or more states.[1] War was traditionally defined as a state of belligerency between sovereigns. "Classical" international law come to an end with the Hague Conventions (1899 and 1907) and the Covenant of the League of Nations (1919). In the General Treaty for the Renunciation of War, which is known as the Kellogg-Briand Pact or as the Pact of Paris (1928), the parties solemnly declared that "they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in the relations with one another".[2] The UN Charter, in Art. 2, para. 4, provides that: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".[3] The Charter mentions the world "war" only in its preamble, merely stating an intent to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind. Art. 2, para. 4, prohibits the use of force, regardless of whether a state of war has been declared. The exceptions to the prohibition of the use of force consist of the right of states to individual and collective self-defence against an armed attack, as embodied in Art. 51 of the UN Charter, and cases where the relevant measures are approved by the UN Security Council. The Security Council has primary responsibility for the maintenance of international peace and security and the right to determine the existence of a threat to the peace, breach of the peace, or act of aggression. The UN Charter, as the basis of the UN collective security system, has avoided using the term "war", except in the preamble to the Charter. This term was elaborated in classical international law.

Since the adoption of the UN Charter, the concept of "war" has been frequently substituted in writings, textbooks and treaties by the concept of "armed conflicts". The Geneva Conventions on Protection of Victims of War of 1949, and Additional Protocols I and II of 1977, use the concept of armed conflicts. The Geneva Conventions, which form the cornerstone of international humanitarian law, marked sixty years of existence on August 2009. They introduced definitely the concept of

[1] H. Lauterpacht, quoting a number of views and definitions collected by McNair, stated that "war is contestation between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases". See H. Lauterpacht, (Ed.). *International Law: A Treatise by L. Oppenheim*. New York: David McKay Co. Vol. II: Disputes, War and Neutrality, 1952, p. 202.
F. Martens wrote in 1886 that: "Die Autoren des Völkerrechts fassen den Krieg als die bewaffnete Selbsthilfe auf, zu der die Staaten greifen nachdem alle andern friedlichen Mittel zur Beseitigung des Streites erschöpft werden", in F. Martens, *Völkerrecht. Das Internationale Recht der Zivilisierten Nationen*, Berlin 1986, p. 476.

[2] Treaty for the Renunciation of War (Kellogg-Briand Pact), quoted in L. Henkin, R. S. Pugh, O. Schachter, H. Smit, *International Law, Cases and Materials*, St. Paul 1987, p. 871.

[3] Charter of the United Nations, New-York 2005.

"armed conflict" as a legal term into international law. J. Pictet in his Commentary maintained the view that this term designates the "de facto situation" only.[4] The expression "armed conflict" is also embodied in, for example, Arts. 44 and 45 of the Vienna Convention on Diplomatic Relations of 1961 and in the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict. There is no explanation of the term "armed conflict" in these or other instruments. In this regard, certain questions may be raised, such as: What is the distinction between the concepts of "war" and "armed conflict"? Are the terms "armed conflict" and "war" two different concepts covering different legal situations? Is the term "war" presently already outdated or does it still have its own legal meaning? Is it correct to state that the concept of "armed conflict" is much broader than the concept of "war" in classical international law? What role does "a state of war" play in contemporary international law in cases of international conflict? Is it advisable for "a state of war" to have different meanings in international law and in national law (martial law)? Is armed conflict justifiable in cases where an enforcement action is undertaken by the Security Council or in the case of peacekeeping operations? What is the relationship between armed conflicts and the so called "measures short of war" (or short of armed conflict?)? Is it still correct to limit "international armed conflict" to conflicts among states only or does this term also include armed hostilities in which non-state actors (Al Qaeda) participate as well? Which role do subjective and objective factors play during determinations of whether an armed conflict exists? What is the relationship between "armed conflict" and "breach of the peace", or "act of aggression" (Art. 39 of the Charter), military intervention, "military invasion", "military operations", "any situation which might lead to international friction" (Art. 33 of the UN Charter)? When do "armed hostilities" constitute an armed attack and when do they constitute an "armed conflict"? This question may also be raised in the case of "border incidents" and other international or internal disturbances (the sending of armed bands, groups, irregulars of mercenaries by or on behalf of a state (see the Definition of aggression). What influence does an international armed conflict have on international and internal legal relations? What effects does it have on the rights and duties of third states and their obligation to remain neutral during armed conflicts? What role is played by the intention of parties to recognise an armed conflict or to refuse to be involved in an armed conflict? Does an armed conflict always come into existence when armed hostilities occur? A very material issue for humanitarian protection is the issue of how to define the concept of an armed conflict and how to determine when it started and ended. The law of armed conflicts is embodied in international treaties and in customary law rules which are binding on all states. The concept of armed conflict can encompass a wide range of various issues. The concept of armed conflict does not in and of itself provide a clear and precise answer and in fact it is not always entirely clear which facts or situations constitute an "armed conflict".

[4] J. Picted, *Commentary on the Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva 1952, p. 32

From a historical point of view, the term "armed conflict" is not entirely new in international law. It has always accompanied the concept of war as its manifestation or expression. Hague Convention IV of 1907 stressed that parties should make an effort to seek means to preserve peace and to prevent "armed conflict" between nations. The preamble to this Convention provided, in the so-called Martens clause, basic guidance on the humanitarian conduct of states in war: "Until a more complete code of the law of war can be issued, the High Contracting Parties think it expedient to declare that in cases not included in the regulations adopted by them, populations and belligerents remain under the protection and the rule of the principles of the Law of Nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." [5]

This article addresses only some of the issues raised.

II. Definition of Armed Conflicts

It seems to be difficult to reach a general, workable and acceptable definition of an international armed conflict and of how such a conflict is to be determined. There are of course different definitions contained in international treaties and in the judicature of international courts (international case law). As a rule, armed conflicts are generally defined as the use of armed force by one or more states against another state or several states (international armed conflict) or between one or more armed groups against their own government or between armed groups themselves (internal conflict). There are also various armed conflicts of a "mixed" (or "changing") character. The sending, by or on behalf of a state, of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state may also lead to an armed conflict of an international or "mixed" character. Efforts to draft a more workable definition of an armed conflict are aimed at strengthening the role of international humanitarian law and ensuring that it is applied consistently. To avoid confusion, it is still useful for certain reasons to distinguish between "international armed conflicts" and "non-international conflicts". It is nevertheless equally desirable and useful to support the universal humanitarian protection of victims of war and to provide for all other "armed conflicts" in a "joint" future instrument, whenever possible. Some authors maintain that the legal distinction between internal and international armed conflict is becoming altogether outdated. In their view, in the future there should be only one body of international humanitarian law which applies to all armed conflicts, whether the conflicts are of an international or internal character.[6] International humanitarian

[5] Convention Respecting the Laws and Customs of War on Land, reprinted in A. Roberts and R. Guelff, *Documents on the Laws of War,* 1989, p. 43, or D. Schindler and J. Toman, *The Laws of Armed Conflicts,* 1988, p. 63, or United Nations Treaty Series 287; A. Cassese noted that: "Since time immemorial wars have been armed conflicts involving in their cruelty and devastation the whole population of contending parties", see *International Law in Divided World*, Oxford University Press 1994, p. 255.

[6] G. J. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, see http://www.icrc.org/Webleng/siteeng0.nsf/htmlall/5PYAXX/$File/irrc_850_Stewart.pdf

law distinguishes between two basic types of armed conflicts, specifically between a) international armed conflicts and b) non-international armed conflicts.

The ICRC offered the following definitions which are in harmony with prevailing legal opinion:

- "international armed conflict exists whenever there is resort to armed force between two or more states"
- "non-international conflicts are protracted armed confrontation conflicts occurring between governmental armed forces and the forces of one or more armed groups, or between such groups, arising on the territory of a state (party to the Geneva Conventions). The armed confrontation must reach a minimum level of intensity and the parties to the conflict must show a minimum of organisation".[7]

In writings on international law it is in exceptional cases possible to find a more detailed division of armed hostilities, a division into "four concepts", specifically war, international conflict, non-international armed conflict and civil war. Civil wars may be "large scale" or "small scale".[8] Under this concept, only war and international armed conflict needs to be discussed within the context of armed conflict, while the others "relate" specifically to civil war. The prevailing view, however, incorporated all civil wars into the concept of non-international conflicts.

1. International Armed Conflicts

The four Geneva Conventions stipulate, in their common Article 2, that the present Conventions "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".[9] It seems that the Conventions differentiate between two forms of armed hostilities, specifically between (declared) "war" and (other) "armed conflicts". Here a declared war is only one example of an armed conflict. It is quite evident that declarations of war have almost become history since the end of World War II. According to Art. 2, the Conventions 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 term "High Contracting Parties" means the states that are parties to these Conventions. If one of the parties to a conflict is not a party to these Conventions, the parties thereto remain bound by the present provisions in their mutual relations and also in relation to any state that accepts and applies the provisions thereof. It is affirmed that international

[7] ICRC, How is the Term "Armed Conflict" Defined in International Humanitarian Law? Opinion Paper, March 2008, see http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article170308/$file/Opinion-paper-armedconflict.pdf.

[8] K. J. Partch, Armed Conflict, in R. Bernhardt, *Encyclopedia of Public International Law*, Vol. I., Elsevier, 1990, p. 251.

[9] The Geneva Conventions of 12 August, ICRC Geneva 1949, pp. 23, 51.

humanitarian law is valid irrespective of "whether the states and governments involved in the conflict recognize the government of the adverse party".

According to the ICRC, an "international armed conflict occurs when one or more states have recourse to armed force against another state, regardless of the reasons or the intensity of this confrontation".[10] Relevant humanitarian rules shall be applicable even in the absence of open hostilities. No formal "declaration of war" or "recognition of the situation" is required. As early as 1952, J. Pictet stated in his Commentary on the Geneva Convention that "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Art. 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts or how much slaughter takes place".[11] According to the former ICRC lawyer H. P. Gasser, "any use of armed force by one state against the territory of another, triggers the applicability of the Geneva conventions between the two states... It is also of no concern whether or not the party attacked resists ..."[12] In the view of D. Schindler, "the existence of an armed conflict" within the meaning of Art. 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two states clash with each other..."[13] Under all these definitions, including the ICRC one, an international armed conflict encompasses any use of force or arms between two or more states (belligerents), irrespective of the intensity of the armed conflict. On the other hand, many other writers primarily consider the "intensity" of the armed conflict to be decisive for such a qualification or existence of "armed conflict". According to the Uppsala Peace and Conflict Research Center "an armed conflict is a contested incompatibility which concerns government and/or territory where the use of armed force between two parties, of which at least one is the government of a state, results in at least 25 battle-related death. It is open to debate why this (non-legal) definition drafted by the peace research center went to the trouble of mentioning a minimum number of 25 victims per year".[14]

The concept of an "international armed conflict" is generally viewed as being much broader then the traditional concept of a "war". K. J. Partch maintains that it includes a) the use of force in a warlike manner between states (whether they recognize themselves as being at war of not); b) all measures short of war; c) wars of national liberation. Under the concept of armed conflict, the problem of whether states recognize themselves as being at war with one another has been eliminated.[15] In 1985, the Institute of International Law adopted a resolution containing a definition

[10] K. J. Partch, op. cit. (note 8), p. 257; op. cit. (note 7).

[11] J. Pictet, op. cit. (note) 4, p. 31.

[12] H. P. Gasser, International Humanitarian Law: An Introduction, in P. Haug, (ed.), *Humanity for All. The International Red Cross and Red Crescent Movement*, Berne 1983, p. 510.

[13] D. Schindler, *The Different Types of Armed Conflicts according to the Geneva Conventions and Protocols*, RCADI 1979-2, p. 131, ICRC Opinion paper, March 2008, p. 2.

[14] http://per.uu.se/research/UCDP/dataanpublicationsofarmedconflict.htm

[15] See note 8, p. 251.

of an international armed conflict: "Armed conflict means a state of war or a conflict which involves armed operations which by their nature or extent are likely to affect the operations of treaties between States parties to the armed conflict and third States, regardless of formal declaration of war or other declaration by any or all of the parties to the armed conflict."[16] At this very session, the ILC rejected a proposal to codify the law of armed conflict, stating that war was prohibited and that a regulation of its conduct was not useful.[17] The ILC is presently considering this wording for the purpose of its work on the effects of armed conflicts on treaties.

Article 1 (4) of the Additional Protocol extended the concept of international armed conflict to "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".[18] In fact this provision has never been applied in practice and the process of decolonisation has already ended. A number of major military and political powers (e.g. the United States and Israel) are not parties to this Protocol. Some provisions, however, are part of customary international law and in this way are binding on all states.

2. Non-international Armed Conflicts

Armed conflicts not of an international character are legally regulated in the common Art. 3 which applies to "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties". Each party to the conflict is bound to apply as a minimum certain provisions to armed conflicts in which a non-governmental armed group (or groups) are involved. Such an armed conflict may involve hostilities between governmental forces and dissident armed forces or other organised armed groups (bands), but not between such armed groups themselves, An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the parties to the conflict. Additional Protocol II develops and supplements Art. 3 common to the Geneva Conventions and shall be applied to all armed conflicts which are not covered by Art. 1 of Additional Protocol I. Protocol II "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other act of a similar nature, as not being armed conflicts". This stipulation clearly distinguishes "internal" armed conflicts from less serious forms of armed (non-international) violence. However, no clear threshold of military violence and its intensity is indicated here. The Protocol does not relate to armed conflicts which may occur only between two

[16] ILC Report on the work of its fifty-ninth session (2007), GAOR Sixty-second Sess. Supp. No. 10 (A/62/10), par. 284-288, quoted in Report of the Seventy-Third Conference, ILA, Rio de Janeiro, 2008, p. 835.

[17] See GAOR, 4th Session, Supp. No 10, Doc. A/925, par. 8.

[18] Protocols Additional to the Geneva Conventions of 12 August 1949, ICRC Geneva 1977, p. 4.

or more non-state armed groups. In comparison with the Geneva Conventions, the Protocol uses a narrower definition of a non-international armed conflict for its purposes.

Protocol II., in Art. 3 on "non- intervention", stipulates that:

a) Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
b) Nothing in the Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contacting Party in the territory of which that conflict occurs.[19]

According to D. Schindler, in a non-international conflict, "the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character... In addition, the insurgents have to exhibit a minimum amount of organization. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements"[20] H. P. Gasser explained that "non-international armed conflicts are armed confrontations that take place within the territory of a state between the government on the one hand and armed insurgent groups on the other hand... Another case is the crumbling of all government authority in the country, as a result of which various groups fight each other in the struggle for power".[21]

Armed conflicts may be of a different scale, character and intensity. They are different kinds of armed violence or situations. Some of them may fall short of an armed conflict (e.g. at the early stage). Not all cases of armed violence, internal uprising or disturbance, guerrilla uprising, armed incidents (e.g. at borders) necessarily represent an armed conflict. The question is, however, where and how can one determine the threshold which separates minor armed incidents and disturbances from international and internal conflicts. In this connection we may also ask whether the distinction between international and non-international armed conflicts is outdated from the point of view of international law regulations and protection? At present, some so-called "internationalised conflicts" are difficult to differentiate from international conflicts as well as from internal conflicts. This distinction between international armed conflicts and armed conflicts of a non-international character (internal armed conflicts) is embodied in the 1949 Geneva Conventions and both of the Additional Protocols of 1977.

[19] Ibid., p. 91.
[20] J. Schindler, op. cit. (note 13), p. 147.
[21] H. P. Gasser, ICRC Opinion paper, March 2008, p. 5.

III. Distinction between War and Armed Conflict

1. New Development

The modern international law of war is now called the law of armed conflicts or "international humanitarian law".[22] Sometimes all three terms are used interchangeably. Critics of the term "law of war" argued after the adoption of the UN Charter in 1945 that international law prohibits the use of force with the exception of the self-defence and enforcement measures of the Security Council, and that therefore the idea of a legal regulation of wars is a contradiction in terms. Some authors also argued that war cannot be regulated by law, because doing so makes the use of force less effective or renders the possibility of war more acceptable. Some have also expressed the view that "states of war" as such may no longer exist as a legitimate state of affairs.[23]

There is a common view that the distinction between a "war" and an "armed conflict" is closely connected with the developments in international law since 1945, when the principle of the prohibition of the use of force was established in Art. 2 (4) of the United Nations Charter." Since then, questions have arisen in this connection not only with regard to whether the concept of "war" has been replaced by the concept of "use of force" or "armed conflict" but also whether there is still any room left for the concept of "war" in the sense of a rupture of all peaceful relations between two or more states and the replacement "of the law of peace by the law of war". The theory of international law distinguishes, or at least used to distinguish, between "war" and measures short of war that do not necessarily produce a state of war. Declarations of war, as the point at which war actually commences, have in fact been phased out since the end of the Second World War. For that reason, a state of war was, depending on which side resorted to the first use of force, deemed to exist if accompanied by *animus belligerendi*. However, not every first use of armed force must necessarily lead "to war" or to an "armed conflict". This depends on an evaluation of certain objective and subjective criteria concerning the use of force. It is the parties involved in the hostilities which first and foremost may preliminarily decide on the character of all armed hostilities between them. It is in all cases the UN Security Council that must play the decisive role in determining the danger that such hostilities present to international peace and security. As was already stated, the term "law of war" has been replaced by the term "law of armed conflict". This is not only a change in terminology but in certain ways also a change in content. Originally there was a distinction made between "Hague law" and "Geneva law". Presently both of these groups are often "united" under the cover of "international humanitarian law". Already in 1966, the International Court of Justice came to the conclusion that the "law of the Hague" and the "law of Geneva" have become so closely interrelated

[22] Ch. Greenwood, The Law of War (International Humanitarian Law), in Evans, M. D., *International Law*, Oxford 2003, pp. 789-817. Shaw, M. N., *International Law*, Cambridge 2003, p. 1054-1079.

[23] K. J. Partch, op. cit. (note 8), p. 252; See also, "many persons frequently consider war and law inconsistent", in: *Oppenheim's International Law*, op. cit. note 1, p. 202.

that they are viewed as having gradually formed a single comprehensive system, known today as "international humanitarian law".[24] However, some distinction is still made between the regulation of warfare, the ways and means of warfare (it would be strange to speak about, for example, "humanitarian bombing") and the explicit humanitarian protection of victims of war. On the other hand, there is a certain overlap between the two cases as concerns humanitarian protection. Military actions (warfare) do not have humanitarian considerations as their only aim, but also the defeat of the "enemy" and victory in the conflict. I. Brownlie expressed the view that the term "armed conflict" perhaps does not extend to an "unopposed invasion" or "peaceful occupation", although some legal protection should be extended to the population in such cases. This exception arises when a resistance movement begins. This author also wrote that "any formulation of a definition of war *de lege ferenda* would undoubtedly correspond closely to the concept of an armed conflict, i.e. the material aspect of war."[25] There is an opinion that "war" and "armed conflicts" are two concepts which cover different situations. In the Encyclopaedia of International Law, it is stated, e.g. that: "it may be deduced that armed conflict is not to be seen as a broad genus of which war has become merely a species, largely without independent significance. On the contrary, it is the war in the legal sense that the laws of war apply in full as a matter of principle, whereas certain rules of the laws of war are now applied also to situations described as "armed conflicts". The two concepts in this view thus cover different situations and accordingly each has its own legal importance."[26] In another section of this same publication it is possible to read a different wording, one that makes reference to "war in the sense of armed conflict" or "military conflicts which are not recognized as wars by international law". In conformity with this statement, an opinion was expressed that Articles 2 and 3 of the Geneva Conventions and Protocols declared "certain humanitarian rules within the laws of war to be applicable to armed conflicts" which the parties concerned do not recognize as giving rise to a state of war between them, to unresisted occupation and to armed conflicts not of an international character. Only wars in the legal sense require application of the laws of war in "full" as a matter of principle, whereas certain rules of the laws of war are now applied also to situations described as "armed conflicts".[27] J. G. Starke wrote about wars, armed conflicts and other hostile relations. In addition to this, he spoke of "non-war armed conflicts"[28] F. Kalshoven, like J. Picted, distinguished the "essentially legal concept of war" from the "purely factual

[24] ICJ Reports 1966, The Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, p. 226.

[25] See "Any formulation of a definition of war de lege ferenda would undoubtedly correspond closely to the concept of an armed conflict, i.e. the material aspect of war", I. Brownlie, *International Law and the Use of Force by States*, Oxford 1963, p. 27.

[26] W. Meng, War, in R. Bernard, *Encyclopaedia of Public International Law*, Vol. 4, p. 1338.

[27] Ibid., p. 1338.

[28] J. G. Starke, *Introduction to International Law*, London 1989, pp. 526-547. See "war, armed conflicts and other relations".

notion" of an "armed conflict".[29] It seems, however, that the term "armed conflict" has gradually taken on its own legal meaning.

The document that had a decisive impact on the definition of war was the Briand-Kellogg Pact of 1928, and mainly the prohibition of the use or threat of force in Art. 2, para. 4, of the UN Charter. Art. 2, para. 4, sought to eliminate not only war from the affairs of the international community, but also any use of force and even the threat of force. There is no uniform legal definition of war, however. The *animus belligerendi* still plays its role in the determination of the existence of a state of war. An armed conflict probably cannot be recognized as war if both parties to the conflict have been denying the existence of a state of war. The mere intention to wage war, without a clear public manifestation of it, does not necessarily lead to a state of war. The legal definition of war is not an easy one, even at present. Without a declaration of war by the parties, without their intention to wage war, it is difficult to recognize "war" in a legal sense. There are in fact hundreds of "armed conflicts" in existence that are not recognised as "wars". On the other hand, there are many examples where a state of war legally came into existence after a declaration of war without an actual commencement of hostilities. In this way the term "war" remains somewhat subjective and states are in principle free to use it or not to use it. After the UN Charter prohibited "the threat or use of force against the territorial integrity or political independence of any states or in any other manner inconsistent with the purpose of the United Nations", the term "war" lost most of its importance. Moreover, all of the Geneva Conventions and both Additional Protocols refer to "armed conflicts" only. Nevertheless, the question may be raised as to whether there is a "war" in a material sense in view of the scale and intensity of a particular armed conflict.

The UN Security Council, however, is empowered under Art. 39 of the Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression. Aggression was defined in the 1974 resolution of the UN General Assembly.[30] Another important resolution of 1970 – The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations – stressed the prohibition of the use of force.[31] There is criticism with regard to an "imprecise" definition of "aggression" and of "armed attack". So far, no definition of aggression was included into the Statute of the International Criminal Court. Again, a very important question may be raised. Is international peace still a fundamental value of the international community and of international law or has the peaceful approach come to be subordinated primarily to the other fundamental values such the protection of human rights and a western standard of democracy? When governments have used

[29] F. Kalshoven, *Arms, Armaments and International Law*, Recueil des Cours de Academie de Droit International, 1985 II, p. 290. See... "the understanding was that in contrast with the essentially legal concept of "war", "armed conflict" would be a purely factual notion".

[30] Doc. UN A /RES/ 3314/XX19.

[31] Doc. UN A/RES/2625/XXV.

force, they have nearly always claimed self-defence as their legal justification. It is legitimate to also ask where are the limits for the use of force. International law of international security presently seems to be at the crossroads of a new development.

The UN Charter is a very important legal basis for the assertion that the use of force other than in self-defence or with the authority of the UN Security Council is illegal. Art. 2, para. 4, only restates and reinforces customary international law. It is commonly accepted that Art. 2, para. 4, has become a principle of customary law that is binding on all states and has the character of *jus cogens*.

2. Classical International Law and "War"

The historical development of the "law of war" started with the distinction between just and unjust wars. Such a view is to be found as early as in the work of St. Augustine A.D. 354-430, St. Thomas Aquinas (1225-74). Hugo Grotius (1583-1645), was the first writer to publish a comprehensive and systematic treatise on the law of war and peace, titled *De Iure Belli ac Pacis Libri Tres* and first published in 1625. To him, war was a judicial and punitive procedure for redressing wrongs suffered. The horrors of war were accepted as natural: "*Modum agendi quod attinet, vis ac terror maxime propria bellorum*".[32]

In classical international law, "war" was a legally recognised instrument of national policy and an attribute of a state's sovereignty. International law and legal scholars distinguished between the law of war and the "law of peace". Until the 20th century there existed no principle of international law that limited the right of states to go to war. War was seen as an integral part of state sovereignty. War was originally a legal institution which could arise between sovereign states only. Civil wars were not covered by the concept of war.

The law of war is the body of international law which relates to the conduct of war and to the protection of the victims of war. Its aim is to limit the suffering caused to combatants and to all those who are described as the victims of war. The practices of states, and many writers, attest to the difficulty of reaching a general definition of "war" in the past and establishing when armed hostilities constitute war.[33] As a rule it depended on the position of one or more parties to the conflict, admitting, confirming or declaring that war exists. Very often, however, states reserved the right to determine that war exists irrespective of the characterization of the parties to the conflict. In certain situations, third states have in practice referred to objective criteria apart from the position adopted by the parties to the conflict. Determining whether an armed conflict constituted war was never a simple matter. Besides, there

[32] Hugonis, Grotii, *De Jure Belli ac Pacis Libri Tres*, Washington 1913 (reproduction of the edition of 1646), Lib. III, cap. 1, VI, p. 427. According to Grotius' "*belli definitio*", this definition includes *bellum* "*status per vim certantantium qua tales funt*..." In this connection, Cicero was mentioned as a source (*Cicero dixit Bellum Certationem per vim*), ibid. p. 1.

[33] See "War became such a subjective concept in state practice that to attempt a definition was to play with words", Brownlie, I., op. cit. (note 25), p. 27.

could be war without military hostilities and there could be fighting without the existence of war in the legal sense of the word. The question was raised whether, for example, the 1982 conflict between the UK and Argentina can be characterised as a "war" in the traditional sense. A state of war with Argentina did not exist. The parties to the armed conflict denied that they were at war.[34] Some authors speak of "war armed conflicts" and "non-war armed conflicts". States frequently prefer to use the term "international conflicts" in order to avoid being accused of aggression or for some other reasons. For example, in connection with the Suez Canal armed conflict (the newspapers wrote about it as a war), the British Lord Privy Seal declared on November 1 1956 that: "Her Majesty's Government do not regard their present action as constituting war... There is no state of war, but there is a state of conflict..."[35] The Japanese invasion of Manchuria in 1937 was clearly an outbreak of international hostilities but neither side formally declared "war".[36]

War is a term which has a deep psychological and emotional impact. Armed hostilities often resulted in full-scale combat with considerable loss of lives, destruction of property and national resources. In classical international law, the state of war involved the termination of commercial contracts, invalidation or suspension of international treaties etc. The use of the term "war" is no longer a criterion for the application of international humanitarian law. Moreover, the concept of war has become less clearly distinguishable from the more general concept of armed conflict. We are also witnessing the changing concept of "war" and its legal consequences.

3. Legal State of War

In the early nineteenth century, a state of war doctrine developed which considered war to be a legal state of affairs that ensues not from large scale hostilities but from the intention of one or more states concerned. A state of war did not exist from a legal point of view if the contending parties did not acknowledge such state. The legal status of the state of war therefore depended on the subjective determination of the parties involved and not on any objective criteria. States engaged in hostilities often denied that they were in a state of war. This concept was also referred to as a "war in the legal sense", "de jure war", "war in the legal sense" or a "war in the sense of international law". In 1927, the Secretary–General of the League of Nations observed: "... from the legal point of view, the existence of a state of war between two States depends upon their intention and not upon the nature of their acts. Accordingly, measures of coercion, however drastic, which are not intended to create and which are not regarded by the State to which they are applied as creating a state of war, do not

[34] See "it is a moot question whether the conflict between the United Kingdom and Argentina April – June 1992 ... could be characterised as a 'war' in the classic sense ... notwithstanding the official attitude of the British Government that a state of war with Argentina did not exist", quoted in Starke, J.G., op. cit. 28, p. 526.

[35] See Starke, J. G., op. cit. 28, p. 528.

[36] War, The Theory and Conduct of, The New Encyclopaedia Britannica, Vol. 29, Macropaedia 2002, p. 634.

legally establish a relation of war between the States concerned".[37] After the adoption of the UN Charter, some authors expressed the view that a "state of war" may no longer exist as a legitimate state of affairs and stressed the incompatibility of a state of war with the UN Charter: See, for example, the following observation: "Probably the Charter intended also to abolish the concept of state of war, including the concept of belligerency and neutrality", which observation went on to state that: "the framers of the UN sought to outlaw war as well as lesser use of force".[38]

The concept of a state of war described in the doctrine of international law presently plays only a small role due to the new character of existing armed conflicts, but it still exists. A state of war proclaimed by a state's authorities may survive the end of actual armed hostilities. In practice, since 1950, in most conflicts the parties involved have not admitted being in a state of war. It is not always easy to decide what effects a state of war or the existence of an international (or internal) armed conflict have on the rights and duties of third states and whether and to what extent they are obliged to stay neutral. Generally speaking, the changing concept of war and state of war has shifted away from a termination of all legal relations between states. The current development of international law also influenced the right of states to neutrality. The decisions of states on how to proceed would depend on the consideration of all of the specific circumstances of the armed conflict, including the position of the UN Security Council, military and political coalitions and public opinion.

Apart from the clear tendency in international law to avoid the term "war", this concept may have an objective meaning. The state of war doctrine still remains an institution of international law. But its meaning is not so dominant. Third states and the international community as a whole will be able to make their own determination of whether or not there is a "war" or an "armed conflict", irrespective of the position of the parties to the conflict. This position of the parties concerned, however, will have a serious impact on the mutual relations between the parties themselves. In the Anglo-Argentine conflict in the Falklands, the British Prime Minister, M. Thatcher, declared in the House of Commons on 26 April 1982 that "a state of war" does not exist.[39] A state of war may objectively exist between Israel and Hamas, but Palestine has not been recognised as a state. Objective criteria may play the decisive role in a determination of the existence of any armed conflict or even the existence of a "state of war" in today's international law. The position of parties to the conflict may have important probative effects.

[37] Report of the Secretary – General of the League of Nations, 1927, quoted in Brownlie, I., op. cit. (note 25), p. 38.

[38] See L. Henkin, R. C. Pugh, O. Schachter, H. Smit, *International Law Cases and Materials*, St. Paul 1987, pp. 666-667.

[39] In connection with the eventual repatriation of Argentine prisoners of war, she declared: "They are not prisoners of war. A state of war does not exist between ourselves and the Argentina ..." This statement was corrected by the Ministry of Defence's confirmation of the prisoner of war status of the captured Argentine military personnel, in H. McCoubrey, *International Humanitarian Law*, Modern Developments in the Limitation of Warfare, Ashgate, 1998, p. 60.

4. Measures "Short of War" and "International Interventions"

States often conducted military operations against other states and did not characterize these operations as "war" but as an "intervention", "reprisals" or "blockade". The aim was to avoid "a state of war" and its legal impact. Consequently, after taking military action, the states frequently pointed to the absence of a state of war. The attacked party had the possibility to qualify the hostilities as a "state of war" or to accept the limited character of the armed conflict. This lesser qualification could bring some advantages to the weaker states concerned. The application of the law of neutrality by third powers was not necessary in such a case. In this period, third states generally preferred to accept the legal characterization applied by the more dominant party or parties to the conflict. The more powerful states were in exceptional cases even prepared to ignore the statement of the lesser state that the military acts concerned were creating a "war".

There are various forms of military hostilities which did not constitute "war" in the legal sense, for example reprisals, interventions to protect nationals and their property in foreign countries, peaceful blockades, isolated incidents etc. These measures "short of war" were considered to be legal. Limited conflicts resulted from accidents, mistaken action or unauthorized acts etc. The effects of a state of war did not come into existence in these cases. Hostile measures "short of war" may start from minor border incidents and end up being large scale military operations. There is no such generally accepted concept as measures "short of armed conflicts." A lack of coherent terminology sometimes leads to some confusion.

Intervention is a term which was frequently applied to any interference in the internal affairs of a state. Subsequently this term was restricted to "dictatorial interference", in the narrow sense of the term. The term itself was sometimes a source of confusion. It was often used to describe any justifiable use of force, irrespective of whether or not it created a state of war. From minor incidents it may range to full scale armed international or internal conflicts. Humanitarian intervention to protect the lives and property of nationals appeared in the practice of states in the nineteenth century. The legality of such interventions is and always was the subject of controversy both in doctrine and in state practice. Bowett, for example, took the position in 1958 that humanitarian intervention had been lawful before the UN Charter was enacted and remained lawful thereafter.[40]

In 2007, SIPRI issued the monograph titled "Humanitarian Military Intervention" which dealt with international interventions of "all kinds" and described the outcomes of 17 past "military operations" in Iraq, Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and East Timor. The main idea put forward by this publication was that "repeated humanitarian interventions since 1991 have confronted the idea of sovereign immunity in the name of protection civilians from harm". Only "human security" is considered to be "justifiable circumstances". Here humanitarian military intervention is considered to be justifiable when it is a response to politically induced humanitarian crises and is

[40] See supra note 38, p. 696.

used for stopping mass killing. The term "humanitarian military intervention", or "humanitarian intervention" for short, is defined as the treat or use of force across state borders by a state (or group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied, and the use of military personnel to assist the delivery of humanitarian aid to people in need. In the view of the author, the UN Security Council can authorize humanitarian military intervention, or intervention can occur "without legal authorization". It seems that in this case, "legitimate action" with positive humanitarian results has priority over the "legal prohibition" of such action. Natural law is grounded in moral reasoning. The book describes four types of humanitarian military intervention in terms of their aims: a) to assist aid delivery; b) to protect aid operations; c) to save the victims and d) to defeat the perpetrators.[41]

The debate over humanitarian intervention intensified after the 1999 military operation in Kosovo that was not endorsed by the UN Security Council. Former UN Secretary–General Kofi Annan initiated the idea of a duty inherent in state sovereignty to safeguard the lives and livelihoods of civilians. In his report to the UN General Assembly in September 2005, he stated that there is an emerging norm on international responsibility to protect civilians in the event of genocide and large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.[42] The General Assembly endorsed this concept of the sovereign responsibility to protect civilians by using armed force.[43] This concept, if accepted without the approval of the UN Security Council, may open the way not only to military interventions for various reasons but also to modifications to the non-use of force principle. There is already a tendency to speak about the precedents of past humanitarian interventions and legitimate cases for humanitarian intervention.

IV. Distinction Between International and Non- International Armed Conflicts

Some authors maintain that there should be a single body of international humanitarian law which applies to all armed international and internal conflicts. Serious conflicts may start accidentally. If an armed conflict breaks out, be it legally or illegally, the rules of international humanitarian law must be applicable in order to protect the victims of the armed conflict. Regardless of the justification for any resort to armed force and its legitimacy or illegitimacy, certain humanitarian

[41] T. B. Seybolt, *Humanitarian Military Intervention, The Conditions for Success and Failure*, Oxford 2007, pp. 3, 5, 6, 13.

[42] Report of the Secretary – General, In larger freedom: towards development, security and human rights for all, UN doc. A/59/2005, 21. March 2005; http://www.un.org/recureworld. Report of the High – level Panel [...].

[43] UN GA Resolution 59/314/2005; "http://www.un.org/documents/resga.htm.

principles must be observed to protect the parties to the conflict and civilians from unnecessary suffering. A violation of these international rules involves the international responsibility of a state and the criminal liability of the individuals concerned for war crimes and crimes against humanity. Nevertheless, international humanitarian law still applies different rules to international and internal armed conflicts. The view was expressed that there is a need to reach a single definition of armed conflict and to remove the dichotomy between international and internal armed conflicts.[44] This is a call for a "single law of armed conflict which would include not only international and internal armed conflicts, but also the so-called internationalized armed conflicts containing both international and non-international elements. At present there is a substantive difference between the legal regulation of international and internal armed conflicts. Only Article 3 common to the Geneva Conventions, and the articles of Additional Protocol II, apply to internal conflicts. The Hague law is not applicable to internal armed conflicts. The combatants in non-international armed conflicts are not afforded prisoner of war status. Former ICTY President A. Cassese expressed the view that "there has been a convergence of the 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...".[45]

International practice seems to suggest that a pre-existing internal armed conflict may be rendered international by foreign military intervention. Already in 1996, Ch. Gray asked the question of whether the conflict in Bosnia and Herzegovina was a "civil war" or an "interstate conflict".[46] In the Tadic case, the Appeal Chamber of the ICTY came to the conclusion that an internal armed conflict may become international if another state intervenes in that "conflict" or some of the participants in the internal armed conflict act on behalf of that other state".[47] In the Blaškič case,

[44] See "the distinction between international wars and internal conflicts is no longer tenable or compatible with the thrust of humanitarian law as the contemporary law of armed conflict has come to be known", in W. M. Reisman and J. Silk, *Which law applies to the Afghan conflict?* AJIL 1988, No. 1, p. 465. See also, I. Detter, *The Law of War*, Cambridge University Press, London 2002, p. 49.

[45] A. Cassese, *Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court*, in G. J. Stewart, op. cit. (note 6), p. 322.

[46] Ch. Gray, *Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences*, in BYIL 1996, Oxford 155.

[47] Prosecutor v. Tadič, IT – 94 – 1AR72, Decision in the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras. 70, 84, 127.
"The ICTY Appeals Chamber in the Tadic Jurisdiction Appeal declared that: International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached..." The Appeals Chamber also noted that: "It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State" (par. 84).
C. Greenwood, *International Law and the Tadic Case*, EJIL 1996, N. 2, see also http://www.ejil.org/journal/Vol7/No2/art8-01.htmlTopofPage.

the ICTY found evidence to characterize the conflict in Bosnia and Herzegovina as "international" due to Croatia's direct intervention.[48] The war or armed conflict in Afghanistan is not and never was either purely internal or international. It is not clear when and under what circumstances military intervention will be sufficient to make an internal conflict into an international conflict. It is true that a strict division of armed conflicts into international and internal ones frequently proves to be very difficult, if not impossible. In fact, there were some contradictory decisions rendered even by the different chambers of the ICTY.

If we attempt to define an armed conflict in general, it is necessary to decide what is the role played by objective factors (the factual circumstances) and what is the role played by the subjective recognition of the existence of a such armed conflict by the parties involved, and by third parties (and the U.N.). The objective factors or criteria include, for example, different forms of armed attack (aggression), the existence of hostilities and belligerency at some level or the occupation of a substantial part of a state's territory, the existence of organised armed forces and responsible command. The purely subjective factors include the "recognition" of such armed conflict and "belligerency". The states concerned may sometimes argue that the hostilities did not amount to an armed conflict. The main purpose of a legal and workable definition of armed conflict is therefore to define the situation in which states are obliged to apply the rules of international humanitarian law. This means that there are situations which due to their limited scale or duration are not armed conflicts (limited, sporadic or isolated cases, low intensity border incidents etc.) The term "an armed conflict" as used in the Geneva Conventions and Additional Protocols I and II is still rather "vague" for its proper implementation.

The slightly modified definition of armed conflict in the common Art. 3 of the Geneva Convention appeared, as was mentioned, in certain decisions of the ICTY, especially in the Tadic case. The ICTY maintains that the "temporal and geographical scope of both internal and international conflicts extends beyond the exact time and place of hostilities". In the Tadic case, the ICTY mentioned particularly the organised nature of the groups and the duration and intensity of the armed violence or the seriousness of the attacks. There are different armed conflicts of different natures in today's world. The international courts are entitled to make their own determination of the nature and character of an armed conflict, depending on the specific circumstances of each case. The ICTY (the Appeals Chamber), in the 1997 Prosecutor v Tadic case, defined an armed conflict as "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". It also stressed that international humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or in the case of internal conflicts until a peaceful settlement is achieved. It should be stated that the Appeals Chamber did not raise the requirement that the insurgents

[48] Prosecutor v. Blashič, IT-95-14, Judgement, 3 March 2000 par. 75, 76 and 94.

exercise territorial control or meet their obligation under Art. 3 common to the 1949 Geneva Conventions, or that government be forced to employ armed forces, that the government must be a party to the conflict or that the insurgents must be recognised as belligerents. The Appeals Chamber's definition of armed conflict does not accept Pictet's idea that Art. 3 should apply also to situations not amounting to armed conflicts. The Rwanda Tribunal stated in the Rutanga case that the definition of armed conflict by the ICTY Appeals Chamber is abstract and whether or not a situation can be described as "an armed conflict" meeting the criteria of Art. 3 is to be decided upon on "a case-by-case basis".[49]

V. Commencement and Termination of Armed Conflicts

1. *Commencement of Armed Conflicts*

If there is no universally accepted definition of "an armed conflict", it is concurrently difficult to determine when an international conflict starts and ends. It is exceedingly complicated to cover all possible cases and manifestations in a single definition. In fact, the absence or lack of a generally accepted (authoritative) definition of an armed conflict did not cause serious problems with regard to the protection of victims of war in armed conflicts in the past. Sometimes it is rather difficult to say when an armed conflict has come into being. States generally recognize when a conflict occurs. There are some cases when the existence of an armed conflict cannot be denied due to its scale and intensity. Nevertheless, it could be useful to find some method which could be used for making such a determination. The presence of a military force (not a police force) may be the first, but not the only, indication of whether a situation has already escalated into an armed conflict. The use of military force was accepted as a necessary criterion for the application of the common Art. 3 of the 1949 Geneva Conventions. Another possible criterion should be the "recognition of belligerency". An armed conflict can hardly occur without real fighting. The question of whether or not an armed conflict really exists was not resolved in literature in a satisfactory manner and it should be the subject of further legal examination. The practice of states is not uniform or conclusive in this area. It seems that international and non-international armed conflicts differ in many legal effects, causes and aims. Not only is it the case that frequently there are different reasons behind the commencement of international and non-international armed conflicts, but the commencement of armed hostilities also manifests itself in different ways and takes different forms. The question of whether an armed conflict has occurred should be determined depending on: a) the existence of any act of aggression (see, e.g. the definition); b) the intention and declaration of the parties to the conflict, c) the position of the UN Security

[49] See note 47. The Appeals Chamber held that an armed conflict exists whenever there is a resort to armed force between governmental authorities and organized armed groups or between such groups within a state (70).

Council, General Assembly and regional organisations as well; d) the position of third states.

In the case of international armed conflicts according to the already mentioned definitions, any international armed attack (!) in fact brings into existence an international armed conflict. Any international armed conflict may so start upon the first use of force. It is not clear whether a "state of armed conflict" means the same thing from a legal point of view as a "state of war" or whether such concept does in fact have any legal meaning. There is still the problem of distinguishing between a "war" and an "armed conflict" from a legal point of view. No doubt there is a connection between the development of international law and the existing clear tendency to replace or substitute the concept of "war" with the concept of "armed attack", especially within the framework of the activity of the ICRC. Does this mean that the terms *jus ad bellum* and *jus in bello* are also outdated? Is it possible to speak about "war in the sense of armed conflict", and what does it mean? Some authors make a distinction between a "war proper" and the category of "non-war armed conflicts". Is it possible to initiate an armed conflict without the commencement of armed hostilities? In several cases, during the World War, various states declared war against Germany without starting any armed action or hostilities. Another question that may be raised is whether the cessation of hostilities concurrently also means the end of the armed conflict? Is it possible to maintain the view that an armed conflict may develop into a "regular war" or to insist that the term "an armed conflict" is a "new", more acceptable, neutral denotation of the classical term of "war" and its "euphemism"? The terms "war" and armed conflicts have both been used together in international law for centuries. The present-day concept of an "international conflict" evidently makes it possible to achieve better humanitarian protection at an earlier stage.

2. Termination of Armed Conflicts

An armed conflict may be ended on the basis of mutual agreement of the parties by a unilateral declaration, by a military victory, by the capitulation of one party, by an armistice or by an action of the UN Security Council. As was noted by H. Lauterpacht: "A war may be terminated in three different ways: 1. belligerents may abstain from further acts of war, and glide into peaceful relations without expressly making peace through a special treaty; 2. they may formally establish the condition of peace through a special treaty of peace; 3. a belligerent may end the war through subjugation of his adversary".[50] There are also other reasons for cessation of hostilities which may have an immediate effect or may occur gradually, in stages step by step. The end of fighting does not necessarily mean the end of an armed conflict or "war". For a real termination of an armed conflict, the will of the parties to the conflict or a decision of a "superior" institution (UN Security Council) are probably the decisive factors. The intention to end the armed conflict may be shown by a unilateral or

[50] Lauterpacht, H., op. cit. 1, p. 596.

mutual declaration of parties. If one party objects to such declaration, the armed conflict probably does not cease to exist. The cessation of armed hostilities does not necessary terminate a "state of war", once such a state has arisen. But not all cases of armed conflicts receive recognition as conflicts involving a "state of war". Some armed conflicts may even be ended via a cessation of armed hostilities. This depends on the dimension and extent of the conflict and on the intentions of the parties to the conflict (intentions which may differ). The attitude and reaction of third parties (parties not in the conflict) also plays a certain role.

VI. War Against Terrorism

The "war" against Osama bin Laden and Al Qaeda is something different. The difference between war in the sense of international law and the so-called war against terrorism is substantial and noticeable.[51] Nevertheless, the American administration likened the effects of a terrorist attack to the effects of a real war. In the words of George W. Bush, who was the U.S. president at the time, the war on terrorism became "a war for freedom". As he stated, "a faceless enemy has declared war on the United States of America. So we are at war". According to the forty-third president of the United States, the war on terrorism draws legitimacy from "God's directive". This approach clearly indicates that from the very beginning the American administration wanted to treat crimes of terrorism under the laws of war. Many scholars and legal professionals have voiced concerns as to "what are the boundaries of the Bush administration's war on terrorism". There are many objections to the controversial terms used by the American administration, terms such as "enemy combatant" or "unlawful combatant". The Geneva conventions refer to the term of "combatant" only. In contrast with a "traditional war", the "war against terrorism" has become extended for an indefinite period of time as a permanent part of state policy and international policy. In an eternal "war on terrorism", it is difficult to arrive at an end of such war and such a situation is therefore very dangerous for human rights, which must henceforth exist under conditions of permanent "wartime". It seems clear that there probably cannot be any real armistice, capitulation or peace treaty in the war on terrorism.

The Security Council, in Resolution No 1368/2001 which was adopted the day after the September 11 attacks, noted that it was "determined to combat by all means threats to international peace and security caused by terrorist attack" and condemned such attacks "like any act of international terrorism, as a threat to international peace and security". In Resolution 1373/2001, the Security Council reaffirmed the need to combat by all means, in accordance with the Charter, threats to international peace and security caused by terrorist acts. The attacks of September 11 are considered to be an armed attack against the United States, for which Art. 51 of the UN Charter was invoked by the United States, which was accordingly entitled to respond by

[51] J. Mrázek, International Law and the Fight Against Terrorism, in J. Blahož, V. Balaš, K. Klíma, J. Mrázek, *Democracy and Issues of Legal Policy in Fighting Terrorism: A Comparison*, Praha, 2009, pp. 149-177.

force on the basis of the inherent right of individual or collective self-defence. As a result of this, the United States launched an armed attack on Afghanistan, as a state responsible for the terrorist attacks and for sponsoring the activities of Al-Qaeda. However, there are serious doubts that an ordinary armed conflict with the Al-Qaeda movement exists, since this movement has none of the attributes of a state such as territory, population and government. The Security Council has condemned terrorism as a threat to international peace and security on several occasions. But this does not necessarily mean that there is a full scale "war" with Al-Qaeda within the meaning of international law.

VII. Conclusions

The law of armed conflicts still distinguishes between international armed conflicts and non-international armed conflicts. Different rules are applied depending on whether an armed conflict has an international or non-international character. This distinction remains reasonable and justified for several legal and political reasons. On the other hand, there are certain reasons for extending uniform humanitarian protection to all types of armed conflicts. There is a tendency to view the existing dichotomy as outdated and to eliminate the distinction between international and internal armed conflicts. In May 2005, the Executive Committee of the ILA approved a mandate for the Use of Force Committee to prepare a report on the general meaning of war or armed conflict. In the initial report, the Committee determined that all armed conflicts have at least the following two features: 1. The existence of organized armed groups and, 2. Engaged in fighting of some intensity. It was stressed that "the existence of armed conflict" is not something that can be denied by governments as a matter of policy. The initial report stressed that presently there is a growing convergence between the rules governing international and non-international armed conflicts. The Committee supported the position that armed conflict is to be distinguished from incidents, border clashes, internal disturbances and tensions such as riots, isolated and sporadic acts of violence, banditry, unorganised and short-lived insurrections or terrorist activities, civil unrest and single acts of terrorism. The report addressed the lack of clarity with regard to the meaning of the term armed conflict and stressed that a "state of armed conflict" (not mentioning a state of war) exists if "the criteria of organised armed groups and intensity of the hostilities are satisfied".[52]

The term armed conflict has become the relevant legal term in international law since the signing of the Geneva Convention. There were many incidents, clashes and armed hostilities which were not "recognised" and treated as armed conflicts. In the view of the ICRC, international humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict. Cases of this type are governed by the provisions of human rights law and such measures of domestic legislation as may be invoked. According to the ILA's initial report, "rioting, even when it

[52] Initial Report on the Meaning of Armed Conflict in International Law, in The International Law Association, Report of the Seventy – Third Conference, Rio de Janeiro, pp. 814-842, 271-295.

is widespread, resulting in death or serious destruction is not considered armed conflict because of the lack of organisation". In many UN documents the term "war" has been deliberately replaced by "armed conflict", mention is made of "situations of armed conflict" which "constitute war crimes", as well as of "areas of armed conflict", "conflict prevention and resolution", the "root causes of armed conflict", "conflict zones", "post-conflict situations" etc. The great majority of armed conflicts (more than 80 percent) are "internal" and involve non-state actors. This fact requires a new approach to the humanitarian protection of all victims of all armed conflicts.

The ILA Committee's final report will be called "The Definition of Armed Conflict under International Law". There are always difficulties with the definition of any term or concept in international law. It would seem to be desirable, and possible, to redefine the term "armed conflict" in a general way that would be acceptable for the majority of states. A number of various definitions have already been submitted and the discussion on the desirability of particular definitions will continue. The determination of the existence of an "armed conflict" will always primarily rest on an evaluation of the particular circumstances involved.