
International Law

Discussion Questions

Gleider Hernández, *International Law* (2nd edition, Oxford University Press, 2022)

Chapter 15, The Law of Armed Conflict

Question 1. *What types of ‘armed conflict’ are defined under international law? What are the differences between them? Analyse with reference to the relevant treaties, case law and practice.*

The first point students should focus on is understanding the distinction between ‘international armed conflicts’ and ‘non-international armed conflicts’, as that distinction has informed the law of armed conflict for a long time. First, a definition of an international armed conflict (IAC) would make reference to Common Article 2 of the Geneva Conventions (CA 2) and the concept of ‘High Contracting Parties’. Simply put, IACs involve conflicts between States, and disputes between a State and a non-State actor or two non-State actors does not qualify as an IAC. Additional Protocol I would also be relevant as it governs the scope of application in relation to IAC; with reference made to the limitations in terms of State Parties and examples of how some States have limited this definitional expansion.

Of course IACs must be contrasted with non-international armed conflicts (NIACs). NIAC is defined by relation to territory rather than actors: a NIAC emerges under Common Article 3 of the Geneva Conventions as existing *within* a High Contracting Party’s territory. Additional Protocol II (AP II) has made further refinements on the definition and the ‘catchall’ of Common Article 3. Importantly, a NIAC under either Common Article 3 or AP II requires a ‘protracted’ level of violence (see *Tadić* judgment on interlocutory appeal at the ICTY) for a NIAC to

exist, whereas under CA 2, the mere presence of two opposing States suffices to constitute an IAC. This difference in thresholds is one of the key differences.

The best responses will also consider the fact that a State's intervention on behalf of a non-State actor in a NIAC may *internationalise* a conflict when there is either a direct intervention, or in situations where the non-State actor acts on behalf of the State (see the ICTY judgment in *Tadić* Appeals Chamber).

Question 2. *How does a military officer address the distinction between 'civilian' and 'military' objectives?*

Interestingly, 'civilians' are a residual category, one of the last to be defined and to find protection under the law of armed conflict. It took until the 1977 AP I (Art 50(1) for the definition of 'civilians' to be embodied as a residual category of protected persons that neither fell under another category of protected persons (such as the wounded and sick, or medical personnel) but who were not combatants and thus legitimate targets.

The relevance of the definition of 'civilians' comes to the fore when engaging with the principle of 'distinction' (Art 48 AP I), a 'cardinal' rule of customary international law. The principle of distinction emphasises the importance of protecting the civilian population and civilian objects at all times, as they are not 'targetable'—unlike military objects and installations, which may be legitimately targeted (AP I, Art 51).

The distinction between civilian and military objects would assume that there is a clear line between the two categories which is not realised in practice. What of, for example, ancillary services to the military such as catering and IT procurement, or 'dual-use' targets such as a civilian radio transmitter that also transmits military messages? In more difficult cases, there is also the concept of 'direct participation in hostilities' according to which civilians or non-military actors who actively

engage in hostile acts lose their civilian protection and may be targeted as combatants. Crucially, under Art 45 AP I they do not enjoy the protection of regular combatants and only enjoy the minimum guarantees afforded to all persons (e.g. not to be tortured, or suffer violations of *jus cogens*) under Art 75 AP I.

Question 3. *What are 'dual use' objects and how are they regulated under international law?*

The notion of 'dual use' in the law of armed conflict governs situations, objects and installations which might simultaneously have both civilian and military purposes. Though Article 52(3) of API establishes a presumption that in cases of doubt as to whether a potential target may be civilian or military, it should be regarded as enjoying the protections of civilians and civilian installations. This presumption operates in principle as a caution against the possibility of abuse because the entire exercise of targeting functions on the logic that a belligerent may in principle unilaterally decide to identify a target and attack it.

The solution? Well, if a belligerent to a conflict decides to target something/someone that may be of 'dual use', it bears the burden of establishing that the attack was 'proportionate' but also whether it took all reasonable precautions to avoid civilian or collateral damage (Art 57(2) AP I). An example of a dual-use installation was that of the Radio-Television Serbia tower bombed by NATO in Belgrade, where NATO took a number of measures to avoid any possible civilian casualties or 'collateral damage' (damage that was not the subject of the targeting operation and that was ultimately ancillary to it); these were deemed to have constituted adequate precautions by the ICTY in a 2000 Fact-Finding Report.