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Research Paper

"International Humanitarian Law with Special Refrence to Non-Selfgoverning Territories (NSGTs)"

Dr. YUMNAM PREMANANDA SINGH
Head & Associate Professor
Dept. of Law, Manipur University

Abstract
The main objective of the paper is to highlight the basic idea about International Humanitarian Law that also popularly known as Law of War that is applicable only when there is a war or an armed conflict situation and the inter-relationship of that branch of Public International Law in the situation of status of Non-Self-Governing Territories (NSGTs) under modern Public International Law. The paper will try to highlight the New York Law, Hague and Geneva Laws occupying the field with a case study Western Saharafor better understanding of the matter in our disposal.
Key words: *armed conflict, International Humanitarian Law, Non-self-Governing Territories, Public International Law*

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Part A: International Humanitarian Law

IHL is the body of international law that seeks, for humanitarian reasons, to regulate war or armed conflict. IHL is founded on the following basic principles:
- **distinction** (between civilians and combatants; civilian objects and military objectives)
- **'elementary considerations of humanity'** (prohibits inflicting unnecessary suffering, injury and destruction) and the so-called "**Martens Clause**" (in cases not covered by treaties "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principle of humanity and from the dictates of public conscience)
- **military necessity** (the use of military force is only justified to the extent that it is necessary to achieve a definite military objective)
- **proportionality** (the collateral harm must not be "excessive in relating to the concrete and direct military advantage anticipated" when an attack is launched against a military objective)
- independence of *jus in bello* from *jus ad bellum*

Principal sources of IHL are four Geneva Conventions of 1949 supplemented by its two Additional Protocols of 1977 and body of customary laws.India is party to Geneva Conventions and not a party to its Protocols.

Defining Armed Conflict:

International Humanitarian Law (IHL) is one of the most powerful tools the international community has at its disposal to ensure the safety and dignity of people in times of war. It seeks to preserve a measure of humanity, with the guiding principle that even in war there are limits.

IHL is triggered by the existence of an armed conflict. The most authoritative definition of armed conflict is:

"An armed conflict exists whenever there is resort to armed force between states or *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State. IHL applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, IHL continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat takes place there*" (ICTY, Tadic:1995).

This test was subsequently endorsed by the International Committee of Red Cross (ICRC) and the Rome Statute of International Criminal Court. The ICTY consequently interpreted the term **“protracted armed violence**” to refer to the “intensity of the conflict”.In *La Tablada* it was held that a mere thirty hours of intense and organized hostilities can be sufficient to justify invoking IHL (IACHR, 1997:para 156) and in *Hamdan* (US SC:2006) it was insisted to apply minimum standard of IHL even to members of al Qaeda.

Typology of armed conflicts under International Humanitarian Law (IHL):

Reading of Geneva Conventions of 1949 and its two Protocols of 1977 with writings of International Committee of the Red Cross (ICRC: 2008) IHL distinguishes two types of armed conflicts, viz. International (IAC) and Non-international Armed Conflicts (NIAC). Depending on the type of armed conflict applicable laws are also different.

IAC occurs when one or more *States have recourse to armed force against another State*, regardless of the reasons or the intensity of the confrontation. Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required (common Article 2, the Geneva Conventions of 1949).Apart from regular, inter-state armed conflicts, IAC also includes armed conflicts in which peoples are *fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination* (wars of national liberation)(Article 1(4), Additional Protocol I to the Geneva Conventions of 1977).

Most armed conflicts today are non-international (internal) in nature. Two legal sources must be examined in order to determine what a NIAC under the IHL.

(a) NIACs within the meaning of Common Article 3 of the Geneva Conventions of 1949

Common Article 3 applies to “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”. These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only.

In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. Two criteria are usually used in this regard(Tadic:1997, para. 561-568 & Limaj:2005, para.84):

(1) The hostilities must reach *a minimum level of intensity*. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.

(2) Non-governmental groups involved in the conflict must be considered as “*parties to the conflict*”, meaning that they possess organized armed forces. This means for example that these forces have to be under *a certain command structure* and have the capacity to sustain military operations. (the armed groups in question must reach a minimum level of organization)

In the current state of IHL, the *motives* of the non-governmental groups, for example, to cover only groups endeavoring to achieve a political objective as a further condition of NIAC has no legal basis(Limaj).

(b) NIACs in the meaning of Article 1 of Additional Protocol II to the Geneva Conventions of 1977

A more restrictive definition of NIAC was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts “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” (Article 1(1), AP II). This instrument does not apply to wars of national liberation, which are equated with IACs by virtue of Article 1(4) of Additional Protocol I. This definition is narrower than the notion of NIAC under common Article 3.

In practice, it is often difficult to identify situations that meet the criteria of application established by Additional Protocol II.

In this context, it must be reminded that Additional Protocol II “develops and supplements” common Article 3 “without modifying its existing conditions of application”. This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC in general. The Statute of the International Criminal Court, in its Article 8, para.2 (f), confirms the *existence of a definition of a NIAC not fulfilling the criteria of Protocol II*. Common Article 3 thus preserves its autonomy and covers a larger number of situations.

Law applicable to Non InternationalArmed Conflicts (NIACs) conflicts:

The rules of IHL applicable in situations of NIACs are found in both treaty and customary law.

Common Article 3 of the Geneva Conventions of 1949 specifically applies in the case of conflicts “not of an international character”. Common Article 3, which is sometimes referred to as a “ treaty in miniature”, stipulates the *minimum protection* that must be afforded to all those who are not, or who are no longer, taking an active

part in hostilities, for examples, civilians, members of armed forces of the parties to the conflict who have been captured, are wounded, or surrendered. It provides for humane treatment and non-discriminatory treatment for all such persons, in particular by prohibiting acts of violence to life and person specifically murder, mutilation, cruel treatment and torture, the taking of hostages, and outrages upon personal dignity, in particular humiliating and degrading treatment. It prohibits also the passing of sentences and carrying out of executions without judgment being pronounced by a regular constituted court providing all judicial guarantees recognized as indispensable. Finally, it imposes an obligation on the parties to collect the wounded and sick and to care for them.

The application of the common Article 3 shall not affect the legal status of the Parties to the conflict.

Article 3 is the bedrock of IHL as affirmed by the International Court of Justice (ICJ), recognized within customary law as the *absolute minimum of humanitarian treatment* applicable during armed conflict of any legal qualification. (Nicaragua, ICJ 1986, para. 218) It is considered as a pre-emptory norm of international law from which no derogation is permitted i.e.*jus cogens*.

Additional Protocol II (adopted in 1977) supplemented common Article 3, (without modifying its existing conditions of application) which was specifically enacted to apply to certain situations of NIAC; it strengthened protection beyond the minimum standards contained in common Article 3.

Like common Article 3, Additional Protocol II provides the humane and non-discriminatory treatment of all those who are not, or who are no longer, taking part in hostilities. Most of provisions of Protocol II are now considered as a part of *customary IHL*and, thus, *binding on all parties to NIACs*.

It expands the protection provided by common Article 3, by including prohibitions on collective punishment, acts of terrorism, rape, enforced prostitution and indecent assault, slavery and pillage. It sets out specific provisions and protections for certain categories of persons such as children, persons deprived of liberty for reasons related to the conflict, persons prosecuted for criminal offences related to the conflict, persons who are wounded, sick and shipwrecked, medical and religious personnel, and the civilian population (attacks on civilian populations, starvation as a methods of combat, and forced displacement are all prohibited).

A limited number ofother treaties of humanitarian law, human rights – particularly non-derogable and domestic laws – in the State in which a conflict is taking place are also apply to situations of NIAC. The treaty rules applicable in NIACs are, in fact, rudimentary compared to those applicable in IACs.

Parties bound by humanitarian law in NIACs:

All parties to NIACs - whether *State actors*(and other persons or groups acting in fact on their instructions or under their direction or control) or *armed groups*- are bound by the relevant rules of IHL. **States** are explicitly bound by the treaties to which they are party and by applicable customary law. In addition, Article 1 common to the four Geneva Conventions requires that States Parties must, in all circumstances, **not only “respect”, but also “ ensure respect**”, for humanitarian law. Although only States may formally ratify or become party to the various international treaties, **armed groups** party to a NIAC also must comply with common Article 3, customary IHL, and, where applicable, Additional Protocol II. The extensive practice of international courts and tribunal and other international bodies affirms this obligation.

Even *States not party to an armed conflict* are required by common Article 1 to Geneva Conventions to neither encourage a party to violate IHL nor to take action that would assist in such violations. Furthermore, common Article 1 is generally interpreted as requiring States not party to an armed conflict to endeavor--- by means of positive action--- to ensure respect for IHL by parties to a conflict.

IHL applicable in International Armed Conflicts (IACs):

There are over 30 international instruments in force dealing with the law of IACs. The most important among them are:-

- 1949 *Four Geneva Conventions*:

1. Geneva Convention for the Amelioration of the condition of the wounded and sick in armed forces in the field
2. Geneva Convention for the Amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea
3. Geneva Convention relative to the Treatment of prisoners of war
4. Geneva Convention relative to the Protection of civilian persons in time of war

- Protocol Additional to the Geneva Convention of 12 August 1949, and relative to the Protection of victims of International Armed Conflicts (*Protocol I*).

Other relevant IHL treaties, Human Rights treaties, domestic laws and most importantly *customary IHL* are also simultaneously applicable during IACs.

Part B: Non-self Governing Territories (NSGTs)

Non-self Governing Territories:
Under Chapter XI of the Charter of the United Nations, the Non-Self-Governing Territories are defined as "territories whose people have not yet attained a full measure of self-government”. The General Assembly, by its resolution 66 (I) of 14 December 1946, noted a list of 72 Territories to which Chapter XI of the Charter applied. In 1963, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the "Special Committee on Decolonization" or the "C-24") approved a preliminary list of Territories to which the Declaration applied (A/5446/Rev.1, annex I). Today, 17 Non-Self-Governing Territories, as listed below, remain on the agenda of the C-24. Member States which have or assume responsibilities for the administration of such Territories are called administering Powers (www.un.org).

Table showing list of NSGTs by region

TERRITORY	LISTING AS NSGT	ADMINISTERING POWER	LAND AREA (sq.km.)	POPULATION [1]
		AFRICA		
Western Sahara	Since 1963	[2]	266,000	597,000
		ATLANTIC AND CARIBBEAN		
Anguilla	Since 1946	United Kingdom	96	15,397
Bermuda	Since 1946	United Kingdom	53.35	64,054
British Virgin Islands	Since 1946	United Kingdom	153	31,197
Cayman Islands	Since 1946	United Kingdom	264	69,914
Falkland Islands (Malvinas) [3]	Since 1946	United Kingdom	12,173	Approximately 3,200
Montserrat	Since 1946	United Kingdom	103	4,519
Saint Helena	Since 1946	United Kingdom	310	5,562
Turks and Caicos Islands	Since 1946	United Kingdom	948.2	44,542
United States Virgin Islands	Since 1946	United States	352	104,000
		EUROPE		
Gibraltar	Since 1946	United Kingdom	5.8	34,003
		PACIFIC		
American Samoa	Since 1946	United States	200	57,637
French Polynesia	1946-1947 and since 2013	France	3,600	278,400
Guam	Since 1946	United States	540	168,485
New Caledonia	1946-1947 and since 1986	France	18,575	271,407
Pitcairn	Since 1946	United Kingdom	35.5	46
Tokelau	Since 1946	New Zealand	12.2	1,647

(Last updated: 17 August 2021)
(Source: www.un.org/dppa/decolonization/en/nsgt)

International Trusteeship System(www.un.org)**:**
In 1945, under Chapter XII of its Charter, the United Nations established the International Trusteeship System for the supervision of Trust Territories placed under it by individual agreements with the States administering them.
Under Article 77 of the Charter, the International Trusteeship System applied to:

- territories held under mandates established by the League of Nations after the First World War;
- territories detached from "enemy States" as a result of the Second World War; and
- territories voluntarily placed under the System by States responsible for their administration.

Pursuant to Article 76 of the Charter, the basic objectives of the International Trusteeship System in accordance with the purposes of the United Nations included: to promote the political, economic, social and educational advancement of the inhabitants of the Trust Territories and their progressive development towards self-government and independence; and to encourage respect for human rights and fundamental freedoms for all and recognition of the interdependence of the peoples of the world.

In order to supervise the administration of the Trust Territories, and to ensure that Governments responsible for their administration took adequate steps to prepare them for the achievement of the Charter goals, the United Nations established the Trusteeship Council under Chapter XIII of the Charter.

The Charter authorized the Trusteeship Council to examine and discuss reports from the Administering Authority (as per Article 81 of the Charter) on the political, economic, social and educational advancement of the peoples of the Trust Territories; to examine petitions from the Territories; and to undertake special missions to the Territories.

In the early years of the United Nations, 11 Territories were placed under the International Trusteeship System.

All 11 Territories have either become independent States or have voluntarily joined neighboring independent countries. In 1993, the last Trust Territory to do so was the Trust Territory of the Pacific Islands (Palau) under the administration of the United States. The Security Council terminated the United Nations Trusteeship Agreement in 1994 for that Territory, after it had chosen free association with the United States in a plebiscite in 1993. Palau became independent in 1994, joining the United Nations as its 185th Member State. With no Territories left in its agenda, the Trusteeship Council suspended its operations on 1 November the same year.
Today, the Trusteeship Council continues to exist as an organ of the United Nations, and meets as and where occasion requires it.

Part C: Occupation and International Humanitarian Law

This part of article is mostly based on the writing of ICRC (2004) and other available material in public domain.
Defining occupation and start to apply the law of occupation:
Article 42 of the 1907 Hague Regulations (HR) states that a “Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Occupation is a question of facts. Therefore, the definition of occupation, as set forth in Article 42 of the Hague Regulations, does not rely on a subjective perception of the prevailing situation by the parties to the armed conflict, but on an objective determination based on a territory’s *de facto* submission to the authority of hostile foreign armed forces (Ferrano, 2012).
The International Court of Justice (ICJ) also endorsed the above notion of occupation in its series of judgments most notably recent two amongst other are its Advisory Opinion of 2004 on the *Legal Consequences of the Construction of a Wall in the occupied territory* and in its 2005 decision on *Armed activities on the Territory of the Congo (DRDC V. Uganda*). The Court relied exclusively on Article 42 of the Hague regulations to determine whether an occupation existed in the territories in question and whether the law of occupation applied in those situations. In this regard, mention also be made that Supreme Court of India (1970) in also held that Article 42 of the Hague Regulations was the only legal basis on which the determination of a state of occupation should be made.
According to their common Article 2, the Four Geneva Conventions of 1949 apply to any territory occupied during internal hostilities. They also apply in situations where the occupation of state territory meets with no armed resistance [4].
The legality of any particular occupation is regulated by the UN Charter and the law known as *jus ad bellum.* Once a situation exists which factually amounts to an occupation the law of occupation applies – whether or not the occupation is considered lawful. This was expressly stated by the US Military Tribunal at Nuremberg. In *Von List case* (1949:59), the Tribunal in unequivocally declared that ‘International law makes no

distinction between a lawful and unlawful occupant in dealing with the respective duties of occupant and population in occupied territory’.

Therefore, for the applicability of the law of occupation, it makes no difference whether an occupation has received Security Council approval, what its aim is, or indeed whether it is called an “invasion”, “liberation”, “administration” or “occupation”. As the law of occupation is primarily motivated by humanitarian considerations, it is solely the facts on the ground that determines its application.

The rules of IHL relevant to occupied territories become applicable whenever territory comes under the effective control of hostile foreign armed forces, even if the occupation meets no armed resistance and there is no fighting.

The rules of international humanitarian law relevant to occupied territories become applicable whenever territory comes under the effective control of hostile foreign armed forces, even if the occupation meets no armed resistance and there is no fighting.

The question of “control " calls up at least two different interpretations. It could be taken to mean that a situation of occupation exists whenever a party to a conflict exercises some level of authority or control within foreign territory. So, for example, advancing troops could be considered bound by the law of occupation already during the invasion phase of hostilities. This is the approach suggested in the ICRC's *Commentary to the Fourth Geneva Convention* (1958).

An alternative and more restrictive approach would be to say that a situation of occupation exists only once a party to a conflict is in a position to exercise sufficient authority over enemy territory to enable it to discharge *all* of the duties imposed by the law of occupation. This approach is adopted by a number of military manuals.

Important principles governing occupation

The duties of the occupying power are spelled out primarily in the 1907 Hague Regulations (Articles 42-56) and the Fourth Geneva Convention (GC IV, Articles 27-34 and 47-78), as well as in certain provisions of Additional Protocol I and customary international humanitarian law.

Agreements concluded between the occupying power and the local authorities cannot deprive the population of occupied territory of the protection afforded by international humanitarian law (GC IV, Article 47) and protected persons themselves can in no circumstances renounce their rights (GC IV, Article 8).

The main rules o f the law applicable in case of occupation state is summed up in ICRC (2004) writing as:

- The occupant does not acquire sovereignty over the territory.
- Occupation is only a temporary situation, and the rights of the occupant are limited to the extent of that period.
- The occupying power must respect the laws in force in the occupied territory, unless they constitute a threat to its security or an obstacle to the application of the international law of occupation.
- The occupying power must take measures to restore and ensure, as far as possible, public order and safety.
- To the fullest extent of the means available to it, the occupying power must ensure sufficient hygiene and public health standards, as well as the provision of food and medical care to the population under occupation.
- The population in occupied territory cannot be forced to enlist in the occupier's armed forces.
- Collective or individual forcible transfers of population from and within the occupied territory are prohibited.
- Transfers of the civilian population of the occupying power into the occupied territory, regardless whether forcible or voluntary are prohibited.
- Collective punishment is prohibited.
- The taking of hostages is prohibited.
- Reprisals against protected persons or their property are prohibited.
- The confiscation of private property by the occupant is prohibited.
- The destruction or seizure of enemy property is prohibited, unless absolutely required by military necessity during the conduct of hostilities.
- Cultural property must be respected.
- People accused of criminal offences shall be provided with proceedings respecting internationally recognized judicial guarantees (for example, they must be informed of the reason for their arrest, charged with a specific offence and given a fair trial as quickly as possible).
- Personnel of the International Red Cross/Red Crescent Movement must be allowed to carry out their humanitarian activities. The ICRC, in particular, must be given access to all protected persons, wherever they are, whether or not they are deprived of their liberty.

End of occupation:
The normal way for an occupation to end is for the occupying power to withdraw from the occupied territory or be driven out of it. However, the continued presence of foreign troops does not necessarily mean that occupation continues.
A transfer of authority to a local government re-establishing the full and free exercise of sovereignty will normally end the state of occupation, if the government agrees to the continued presence of foreign troops on its territory. However, the law of occupation may become applicable again if the situation on the ground changes, that is to say, if the territory again becomes “actually placed under the authority of the hostile army “(H R, Article 42) – in other words, under the control of foreign troops without the consent of the local authorities.

Part C: Case Study: Western Sahara

Western Sahara [5]:
Basic Facts
- Population*: 567,000
- Land area*: 266,000km²

Western Sahara is a sparsely-populated area of mostly situated on the northwest coast of Africa. It is composed of the geographical regions of Rio de Oro (River of Gold). It is used to be a former Spanish colony, but in 1967 when the Spanish troops left the territory, instead of gaining independence Western Sahara was annexed by Morocco. According to the EU Foreign Policy Chief, Federica Mongherini, “Western Sahara status remains that of a non-self-governing territory. According to the United Nation’s documents Western Sahara has been on the United Nations list of Non-self Governing Territories since 1963. Morocco claims Western Sahara on the grounds that a few Sahrawi tribes once pledged their allegiance to the Sultan of Morocco. Although the ICJ recognizes legal ties between Morocco and some Sahrawi tribes they concluded that there was no tie of territorial sovereignty between Western Sahara and Morocco and that the people of Western Sahara have the right to self-determination.

Western Sahara is claimed by two different parties. On the one hand, it is claimed by Morocco, as an integral part of its country – the Southern Provinces. On the other hand, Western Sahara is claimed by the Polisario Front [6], a rebel national liberation movement, fighting for the independence of Western Sahara, as the Sahrawi Arab Democratic republic. About 85% of the region of Western Sahara is controlled and administered by Morocco, including all of the coastline and natural resources in the area. The rest of the area is controlled by the Polisario Front exiled in Algeria. Morocco built walls through Western Sahara to split the Moroccan controlled area, from the so-called “Free-Zone”. Or “Liberated Territories” controlled by the Polisario Front and in order to stop Polisario fighters coming into the country.

It is a fact that in 1979, under the pressure from the Polisario Front, Mauritania abandoned all claims to Western Sahara and the two sides signed a peace treaty. Morocco quickly moved in to claim the land left by Mauritania. In 1982, the Sahrawi Arab Democratic Republic was admitted to the Organization of African Unity (OAU), as the government of Western Sahara. In protest to this, Morocco withdrew its membership, claiming that if SADR is a member then they are out. In 1991, after 16 years the war ended with a UN-brokered truce and Morocco and the Polisario Front signed a cease-fire agreement. Part of the cease-fire agreement was that a referendum [7] would take place within 6 months, but despite several attempts, this has still yet to happen to this day (Fakhry & Konstantaropoulou, 2018).

Legal questions arise whether there existed a non-international armed conflict between Spain and any non-state armed groups, or amongst such groups:

1.1 Period prior to Morocco’s entry into Western Sahara in December 1975 - Of the liberation movements, Polisario and the FLU (*Frente de Liberation y de la Unidad*) were the most involved in violence. Both groups clearly satisfied the Tadic criterion of being organized armed groups, taking into account the following relevant factors. Polisario in particular had significant
In this period prior to Morocco’s entry into Western Sahara in December 1975, the legal question arises whether there existed a non-international armed conflict between Spain and any of these non-state armed groups, or amongst such groups, as a result of there being ‘organized’ armed groups involved in sufficiently ‘intense’ military violence. Of the liberation movements, Polisario and the FLU were the most involved in violence. Both groups clearly satisfied the *Tadić* criterion of being organised armed groups, taking into account the following relevant factors. Polisario in particular had significant numbers of fighters; the ability to recruit members (including through Sahrawi defections from Spanish forces); a capacity to acquire and replenish weapons (including from foreign states such as Libya); logistical support (including bases), even in foreign states such as

Algeria; structures for financing, training, command and discipline; a political programme embodied in its national liberation objectives; and contacts with foreign states directed towards realizing its aims.

The more critical issue is whether the violence was sufficiently intense. The bulk of attacks on Spanish targets were mounted by Polisario rather than the FLU. Relevant factors include that Polisario used military weapons; attacked military and governmental targets; the attacks were geographically widespread; there was considerable loss of life, injury and destruction of property; the violence persisted in intensity over a period of months and escalated over time; Spain responded by deploying military forces and did not treat the situation as a mere matter of policing or law enforcement; 'prisoners of war' were ostensibly taken, and Polisario purported to treat them in accordance with the Geneva Conventions;36 thousands of people were displaced; and the situation attracted international attention, including the concern of the UN and the ICRC. While individual attacks viewed in isolation might be characterized as mere 'terrorist' crimes, in their totality they crossed the threshold of intensity of a non-international armed conflict (Saul, 2017).

1.2 Hostilities between Polisario and Morocco between 1975 and 2011:

The hostilities between Polisario and Morocco between 1975 and 2011 are best characterized as a non-international armed conflict. As mentioned earlier, Polisario was an 'organized' armed group and its capabilities increased over time. While it had only a few hundred fighters by October 1975, this grew to around 5,000 by 1977, reflecting Polisario's popular support, its capacity to recruit from amongst Sahrawi refugees, and Sahrawi defections from departing Spanish forces. This number has stabilized since then, with between 3,000 and 6,000 Polisario fighters in 2010, with the capacity to rapidly mobilize many more as needed.96 Polisario forces are formally organized under military-style command as the Sahrawi Popular Liberation Army, and controlled by the non-state 'government' of the Sahrawi Arab Democratic Republic (SADR), proclaimed on 27 February 1976. Its armed forces also have the capacity to sustainably arm, train and equip themselves, from initially capturing weapons or obtaining weapons left by Spanish forces, to receiving weapons and ongoing support from Algeria, and Libya in the early phase (1979−1982).

As regards the 'intensity' criterion for a non-international conflict, while the conflict has been far less violent than many internal wars, it has still readily crossed the threshold. As Moroccan forces entered Spanish Sahara, Polisario shifted the focus of its attacks from Spain to Morocco, with large number of military engagements across the territory and hundreds killed and wounded in December 1975 alone. Morocco's superior numbers and weaponry led Polisario to adopt guerrilla warfare tactics, eschewing fixed positions and mounting rapid hit and run attacks on Morocco's military bases, administrative centres and armed convoys. While the number of battle deaths is not a decisive criterion, it nonetheless indicates certain intensity: there were some thousands of deaths in the first few years of the conflict (Saul, 2017).

There is an alternative, more expansive legal view that the hostilities between Morocco and Polisario qualify as an international rather than a non-international conflict, because such fighting takes place in the context of the Moroccan occupation. Under IHL, occupation is part of, and can only be part of, an international conflict; a state evidently cannot be in foreign 'occupation' of its own territory. In another context, the Israeli Supreme Court found that armed conflict between an occupying power (Israel) and an insurgent group (the Palestinian militants) in occupied territory is part of the international armed conflict (SC of Israel, 2005).

Additional Protocol I of 1977 was adopted specifically to treat as international those conflicts involving non-state national liberation or self-determination forces, where the state is a party to the Protocol. For non-party states, such as Morocco between 1977 and 2011, the legal position remained unchanged, regardless of its political artificiality: there was a non-international conflict between the state and the non-state actor.

1.3 After Morocco ratified Protocol I in 2011:

After Morocco ratified Protocol I in 2011, the situation changed. The protracted conflict between Morocco and Polisario was transformed from a non-international to an international one, alongside the parallel international conflict constituted by Morocco's continuing foreign occupation of Western Sahara. [8]The intensity and organization criteria of a non-international conflict became no longer relevant. Further, no new outbreak of active hostilities was necessary to trigger an international conflict under Article 1(4) of Protocol I, given that, as discussed above, the parties maintain their hostile deployment, posture and intent, subject only to a temporary ceasefire and in the absence of a peace settlement. In June 2015, Polisario, as the recognized representative of the Sahrawi people, deposited a unilateral declaration of adherence to the Geneva Conventions and Protocol I

under the procedure provided for in Article 96(3) of Protocol I. The depository state, Switzerland, duly notified the declaration to states parties, formally accepting the first ever Article 96(3) declaration. Polisario thereby assumed the same IHL treaty obligations as Morocco.

Part D: Conclusion and Major Recommendations

From the above discussion based on the doctrinal research now it is clear that jus in bellow and jus ad bellum is two branches of Public International Law and International Humanitarian law is founded on the principle of independence of jus in bellow from jus ad bellum. Regarding definition and test to be applied for determination of existence of armed conflict in a given situation is the standard set by *Tadic* judgment.

Depending on the type of armed conflict applicable body of IHL also differs and International armed conflict also includes armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (commonly known as wars of national liberation). Non-international armed conflicts are also classified into two by applying relevant law of IHL viz. NIACS within the meaning of Common Article 3 of the Geneva Conventions of 1949 and NIACs in the meaning of Article 1 of Additional Protocol II to the Geneva Conventions of 1977. It is also found that Common Article 3 is *jus cogens* as per the customary International Law and judicial pronouncement. It is also interesting that most of provisions of protocol II are considered as a part of customary IHL and thus, binding on all parties to NIACs.

Today, 17 NSGTs are under the agenda of the C-24. It means after 60 years of adoption of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples there is still NSGS i.e. 'territories whose people have not yet attained a full measure of self-governance'. It also means that not only this 17 but it may be more territories that may be qualified as NSGTs.

Regarding occupation Article 42 of The Hague regulations can be regarded as the only legal basis on which the determination of the existence of a state of occupation can be made. The various component of a legal test derived from Article 42 are – the notions of 'effective control', and 'authority'. Once factual situation of occupation exists the law of occupation applies – whether or not the occupation is considered lawful.

Last but not the least, the case study of 'Western Sahara' – it a clear case of International armed conflict and law of occupation and IHL applicable to International armed conflicts are applicable. It is welcome motivated gesture and a lesson to be learnt for all the liberation wars and others that as did by Polisario for a unilateral declaration of adherence to the Geneva Conventions and Protocols and thereby assuming the same IHL treaty obligations as Morocco.

End Notes:

[1] All data is from United Nations Secretariat 2020 Working Papers on Non-Self-Governing Territories, and for Western Sahara, from UNdata, a database by the United Nations Statistics Division of the Department of Economic and Social Affairs, United Nations.
[2] On 26 February 1976, Spain informed the Secretary-General that as of that date it had terminated its presence in the Territory of the Sahara and deemed it necessary to place on record that Spain considered itself thenceforth exempt from any responsibility of any international nature in connection with the administration of the Territory, in view of the cessation of its participation in the temporary administration established for the Territory. In 1990, the General Assembly reaffirmed that the question of Western Sahara was a question of decolonization which remained to be completed by the people of Western Sahara.
[3] A dispute exists between the Governments of Argentina and the United Kingdom of Great Britain and Northern Ireland concerning sovereignty over the Falkland Islands (Malvinas).

[4] Occupation is a type of hostile activity constituting international armed conflict. Common Article 2 of the Geneva Conventions, including Article 2(2) concerning occupation (which is already implied in armed conflict covered by Article 1(1), 'contributes to establishing a distinction between international and non-international armed conflict': ICRC Commentary of 2016 to common Article 2 of the Geneva Conventions para 193).

[5] Western Sahara has been on the United Nations list of Non-Self-Governing Territories since 1963 following the transmission of information on Spanish Sahara by Spain under Article 73 *e* of the Charter of the United Nations. The General Assembly adopts on an annual basis a resolution on Western Sahara.

[6] In 1973, the Polisario Front was established to end the Spanish colonial rule in Western Sahara and to fight for the independence of the indigenous Sahrawi people. The conflict between Morocco and the Polisario Front led to what would become a 16-year long war [Western Sahara War 1975-1991]. Since the start of the military occupation in 1976, many Sahrawi men joined the liberation army and fought against the Moroccan state for several years.
[7] The Sahrawi people had to decide between three scenarios: the independence as the Sahrawi ArabDemocratic Republic (SADR), the Integration with the Kingdom of Morocco, or the Integration with the Islamic Republic of Mauritania.
[8] Throughout the 1960’s, the UN made an effort to decolonize the African continent by adopting the Declaration on the Granting of Independence to Colonial Countries and Peoples, which recognized that “All peoples have the right to self-determination …” and urged colonial powers to transfer power to the natives of their colonies. By 1980, the entire African continent had been decolonized, except for Western Sahara.

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