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## THE INTERNATIONAL HUMANITARIAN LAW AND THE FIGHT AGAINST ISIS

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**Annotation.** The present article discusses the framework of international law for the fight against a terrorist group the so-called Islamic State, or ISIS that is sometimes considered one of the most dangerous terrorist groups. The article dwells on the question in what circumstances is the international humanitarian law applicable in the fight against this terrorist group. The criteria of organization and intensity that are applied in the armed conflict are discussed in the context of the fight against ISIS. Furthermore, different types of armed conflict – international and non-international – are discussed in order to state whether the fight against ISIS falls within one of those categories. Finally, the question of individual criminal responsibility of ISIS is raised.

**Keywords:** ISIS, terrorist groups, international and non-international armed conflict, international humanitarian law.

### INTRODUCTION

The Islamic State (former name Islamic State in Iraq and the Levant, hereinafter referred to as ISIS) stands with al-Qaeda as one of the most dangerous jihadist groups, after its gains in Syria and Iraq.<sup>1</sup> In June 2014, the group formally declared the establishment of a “caliphate” – a state governed in accordance with Islamic law, or Sharia, by God's deputy on Earth, or caliph. ISIS demands that Muslims across the world swear allegiance to its leader – Ibrahim Awad Ibrahim al-Badri al-Samarrai, better known as Abu Bakr al-Baghdadi – and migrate to territory under its control.<sup>2</sup> It has grown out of a terrorist group called Islamic State of Iraq and the Levant, which formed in 2004. By 2014, Islamic State in Iraq had occupied large parts of territory in Iraq and Syria.<sup>3</sup> It was estimated by US National Counterterrorism Center that ISIS In 2014 controlled a territory in Tigris-Euphrates river basin similar to the

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<sup>1</sup>What is 'Islamic State'? *BBC News* [interactive] 2 December 2015 [accessed 2016-04-12]. <http://www.bbc.com/news/world-middle-east-29052144>

<sup>2</sup>Ibid.

<sup>3</sup>Sterio, M. The Applicability of the Humanitarian Intervention "Exception" to the Middle Eastern Refugee Crisis: Why the International Community Should Intervene against ISIS. *Suffolk Transnational Law Review*, 2015, 38: 325-357, p. 326.

size of United Kingdom. Due to the active air strikes and ground operations it has lost about a fourth of its controlled territory since then.<sup>4</sup>

ISIS is considered the “most deadly terrorist organization operating today and the greatest threat to world peace, amassing more fighters, more funding, and more territory than any other terrorist movement.”<sup>5</sup> It is known for its strict interpretation of Sharia law, but also for brutalities such as beheadings or burning its prisoners alive.<sup>6</sup> “ISIS directly jeopardizes the right to life of people in Iraq and Syria, and potentially the whole world. The group commits acts that ‘shock the conscience of mankind’ and ‘present a danger to international peace and security.’ For example, the organization burned a Jordanian hostage to death in a locked cage.”<sup>7</sup> Are the members accountable according to international law? What body of rules applies in the fight against ISIS? These are important questions to answer as the necessity of the fight against ISIS is evident.

International humanitarian law (hereinafter – IHL) is a body of rules that apply during armed conflict. These rules seek, for humanitarian reasons, to limit the effects of armed conflict. IHL protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.<sup>8</sup> Why is it pertinent while speaking about ISIS? ISIS gains territory through military actions and the international coalition, led by the United States, is conducting military acts against ISIS. As it is more thoroughly discussed below, the situation amounts to armed conflict – a threshold of the application of IHL rules.

In order to answer a question whether ISIS is held accountable according to IHL one needs to consider several related issues. First is the issue of the existence of armed conflict which is determined by two factors – the intensity of the conflict and the organization of the parties to the conflict. The second question is whether the members of the armed group are

<sup>4</sup>What is 'Islamic State'? *BBC News* [interactive] 2 December 2015 [accessed 2016-04-12]. <http://www.bbc.com/news/world-middle-east-29052144>.

<sup>5</sup>Lekas, A. #ISIS: the Largest Threat to World Peace Trending Now, *Emory International Law Review*, 2015-2016, 30: 313-351, p. 314.

<sup>6</sup>Almasy, S. ISIS Video Purportedly Shows Beheadings of Kurdish Fighters in Iraq. *CNN*. [interactive] 31 October 2015 [accessed 2016-04-12]. <http://edition.cnn.com/2015/10/30/middleeast/isis-iraq-hawija-executions-video/>; Bartlett, E. UN report details the disturbing extent of Isis atrocities in Syria. *Independent*. [interactive] 17 September 2014 [accessed 2016-04-12]. <http://indy100.independent.co.uk/article/un-report-details-the-disturbing-extent-of-isis-atrocities-in-syria--IJTLVIZn4x>

<sup>7</sup>Lekas, A. #ISIS: the Largest Threat to World Peace Trending Now, *Emory International Law Review*, 2015-2016, 30: 313-351,

<sup>8</sup>International Committee of the Red Cross. Advisory Service on International Humanitarian Law. *What is International Humanitarian Law?* [interactive] July 2004 [accessed 2016-04-12]. [https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf).

bound by the rules of IHL as members of a non-state terrorist group and in what ways are they accountable.

Therefore **the aim** of the present article is to reveal the relevant norms of international humanitarian law applicable in the fight against ISIS. To achieve this aim the following **tasks** are set: to determine whether the criteria for the armed conflict are applicable in the fight against ISIS; to reveal the type of armed conflict taking place; to establish the possible venues of bringing the members of ISIS to responsibility for the crimes committed.

The methods used are analysis of scientific literature and documents, comparative and teleological analysis.

## THE EXISTENCE OF ARMED CONFLICT WITH ISIS

### The Definition and Importance of the Notion of Armed Conflict

The notion of armed conflict is not defined in the Geneva Conventions<sup>9</sup>, neither Common Article 2, nor Common Article 3 to the Geneva Conventions provide for the definition of this notion. Common Article 2 states that the Convention applies 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.” Furthermore, it is stated that the rules of IHL are applied “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.”<sup>10</sup> Furthermore, Common Article 3 is applicable “in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”.<sup>11</sup>

As it is stressed by the International Committee of the Red Cross, one of the important actors in formulating and applying IHL rules, “the ICTY and ICTR have confirmed that the

<sup>9</sup>1949 m. rugpjūčio 12 d. Ženevos konvencija (I) dėl sužeistųjų ir ligonių padėties veikiančiose armijose pagerinimo. *Valstybės žinios*, 2000, Nr. 63-1905; 1949 m. rugpjūčio 12 d. Ženevos konvencija (II) dėl sužeistųjų, sergančiųjų ir skęstančiųjų ginkluotųjų pajėgų narių jūrose padėties pagerinimo. *Valstybės žinios*, 2000, Nr. 63-1906; 1949 m. rugpjūčio 12 d. Ženevos konvencija (III) dėl elgesio su karo belaisviais. *Valstybės žinios*, 2000, Nr. 63-1907; 1949 m. rugpjūčio 12 d. Ženevos konvencija (IV) dėl civilių apsaugos karo metu. *Valstybės žinios*, 2000, Nr. 63-1908.

<sup>10</sup> Common Article 2 of the Geneva Conventions.

<sup>11</sup> Common Article 3 of the Geneva Conventions.

applicability of humanitarian law should be determined according to the prevailing circumstances instead of the subjective views of the Parties to the armed conflict.”<sup>12</sup>

The most widely used definition of armed conflict was stated in the Tadic case decided by International Criminal Tribunal for former Yugoslavia. The Tribunal stated that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>13</sup>

The beginning of an armed conflict is the moment when the full application of one or other IHL regime starts. Therefore the qualification of a situation as being that of armed conflict is a legal fact of utmost importance.<sup>14</sup> The exact qualification of armed conflict has wide implication in international law. The contractual obligations change, the refugee law is evaluated differently, the laws of neutrality and arms control change.<sup>15</sup> But the main consequence is that the rules on the use of deadly force – in the time of armed conflict a legal belligerent, a combatant is entitled to use deadly force against the enemy – that is, an enemy combatant. In peacetime the use of such force is regulated by human rights obligations and may be used only when it is absolutely necessary and proportionate to the aims set out in the international human rights treaties.

The Use of Force Committee, set up by the International Law Association to analyze the notion of armed conflict in the present realities, after carrying out extensive research, has outlined that “at least two characteristics are found with respect to all armed conflict: 1) the existence of organized armed groups; 2) engaged in fighting of some intensity. In addition to

<sup>12</sup>International Committee of the Red Cross. *Commentary of 2016*. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. [interactive] [accessed 2016-04-12]. <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF-0C12563CD002D6B0B&action=openDocument>; Commentary of Article 2. It is explained further: „How States characterize the armed confrontation does not affect the application of the Geneva Conventions if the situation evidences that the State concerned is effectively involved in hostile armed actions against another State. The fact that a State does not, for political or other reasons, explicitly refer to the existence of an armed conflict within the meaning of Article 2(1) in a particular situation does not prevent it from being legally classified as such.“ Para. 22.

<sup>13</sup>International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Duško Tadić a/k/a „Dule“*. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995. Case No. IT-94-1-AR72. [interactive] [accessed 2016-04-12]. <<http://www.icty.org/x/cases/tadic/acdec/en/51002.htm>>, para. 70.

<sup>14</sup>Žilinskas, J. Ginkluoto konflikto samprata tarptautinėje humanitarinėje teisėje ir jos taikymo problemos moderniuose ginkluotuose konfliktuose. *Jurisprudencija*, 2008, t. 2(104): 91–100, p. 92.

<sup>15</sup>Vasiliauskienė, V. Ginkluoto konflikto samprata ir „karas su terorizmu“. *Teisė: mokslo darbai*. 2012, 82: 180–197, p. 182; Final Report on the Meaning of Armed Conflict in International Law, delivered at the Hague Conference (2010). Use of Force Committee. International Law Association [interactive]. [accessed 2016-04-12]. <http://www.ila-hq.org/en/committees/index.cfm/cid/1022>.

these minimum criteria respecting all armed conflict, IHL includes additional criteria so as to classify conflicts as either international or non-international in nature”<sup>16</sup>. Therefore these criteria are in turn analyzed below in order to determine whether the conflict with ISIS meets those criteria and may be considered armed conflict in the sense of IHL.

### **The existence of armed conflict with ISIS – intensity criterion**

The analysis of state practice and *opinio juris*, the jurisprudence of international courts and most authors agree that warlike acts have to reach a certain level of intensity to be considered armed conflict.<sup>17</sup> The factors taken into account are the nature, character, frequency of terrorist acts, the number of fighters that both sides of the conflict have, the number and kind of the arms used, the duration of the conflict and its territorial prevalence, the nature of the state response to the abovementioned acts and similar factors.<sup>18</sup> The intensity criterion in non-international armed conflicts<sup>19</sup> has also a temporal aspect – that is, to consider a particular situation to be a non-international armed conflict it has to be established that the armed violence was protracted. According to the jurisprudence of the International Criminal Tribunal for Yugoslavia, protraction is not as important as intensity.<sup>20</sup>

In this particular case this criterion is evident. From January 2014 ISIS had taken control of parts of territory in Iraq and Syria. The first two cities taken were Fallujah and Raqqa.<sup>21</sup> In the middle of 2014 ISIS took over Mosul.<sup>22</sup> In August 2014 US president Barack Obama authorized strikes against ISIS.<sup>23</sup> Later the US forces were joined by other States (Australia, Belgium, Canada, Denmark, the Netherlands, Bahrain, and the United Arab

<sup>16</sup>Ibid.

<sup>17</sup>International Committee of the Red Cross. *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* [Interactive]. Opinion Paper, March 2008. [accessed 2016-04-12]. <<http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>>, p. 3.

<sup>18</sup>*Final Report on the Meaning of Armed Conflict*, op. cit., p. 30; International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Ljube Bošković, Johan Tarčulovski*. Trial Judgement of 10 July 2008. Case No. IT-04-82-T. [interactive]. [accessed 2016-04-12].

[http://www.icty.org/x/cases/boskoski\\_tarculovski/tjug/en/080710.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf), para. 177. Vasiliauskienė, V. Ginkluoto konflikto samprata ir „karas su terorizmu“. *Teisė: mokslo darbai*. 2012, 82: 180–197, p. 186.

<sup>19</sup>They are explained further in the article.

<sup>20</sup>International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Ramush Haradinaj et al.* Trial Judgement of 3 April 2008. Case No. IT-04-84-T. [interactive]. [accessed 2016-04-12] <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>, para. 49.

<sup>21</sup>John, T. Timeline: The Rise of ISIS. *Time*. [interactive] 9 October 2015 [accessed 2016-04-12] <http://time.com/4030714/isis-timeline-islamic-state/>

<sup>22</sup>Ibid.

<sup>23</sup>Ackerman, S. Obama Authorises Air Strikes on ISIS to Help Iraqis Besieged on Mountain. *The Guardian*. [interactive] 8 August 2014 [accessed 2016-04-12]. <http://www.theguardian.com/world/2014/aug/08/obama-authorises-iraq-air-strikes-against-isis>.

Emirates, later Jordan, Egypt, Turkey, Russia), and their airstrikes were extended from the territory of Iraq to cover Syria.<sup>24</sup> It has been counted that from the start of the air attacks' campaign through November 2015 there were 8 289 air strikes carried out against ISIS controlled territories.<sup>25</sup> But for the moment ISIS still holds a considerable territory that allows it to conduct armed actions to sustain the territory and aiming at the holding of new territory.

### **The organizational criterion in an armed conflict with ISIS**

The organizational criterion refers to the existence of “an armed group with a certain level of organization that would essentially enable it to implement international humanitarian law”<sup>26</sup>. The important factors include “existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport, and distribute arms; the group's ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth.”<sup>27</sup> The International Criminal Tribunal for the former Yugoslavia outlined several groups of factors and indicators which help to reveal the organization level of the armed group:

“1) the existence of a command structure; indicators: e.g. the existence of headquarters; a general staff or high command; internal regulations; the issuing of political statements or *communiqués*; the use of spokespersons; identifiable ranks and positions.

2) military (operational) capacity of the armed group; indicators: e.g. the ability to define a unified military strategy; to use military tactics; to carry out (large scale or coordinated) military operations; the control of certain territory, and territorial division into zones of responsibility;

3) logistical capacity of the armed group; indicators: e.g. the existence of supply chains (to gain access to weapons and other military equipment); ability for troop movement; ability to recruit and train personnel;

4) the existence of an internal disciplinary system and the ability to implement IHL; indicators: e.g. the existence of disciplinary rules or mechanisms within the group; training;

<sup>24</sup>Fantz, A. Which Nations are Attacking ISIS? *CNN*. [interactive]. 2 December 2015 [accessed 2016-04-12]. <http://edition.cnn.com/2015/12/02/world/war-on-isis-whos-doing-what/>.

<sup>25</sup>Ibid.

<sup>26</sup>Pejic, J. The protective scope of Common Article 3: more than meets the eye. *International Review of the Red Cross*. March 2011, Vol. 93, No. 881: 189—225.

<sup>27</sup>Ibid.

5) the armed group's ability to speak with one voice; indicators: capacity to act on behalf of its members in political negotiations; to conclude cease fire agreements.”<sup>28</sup>

There are many indications that ISIS fulfills the abovementioned requirements.

ISIS controls quite large portions of the territory in Iraq and Syria. Sometimes it had been estimated to be the size of Belgium, but other authors distinguish between different types of control. “The attack zones are the most straightforward and are meant to depict those areas in which ISIS has participated in or perpetrated armed clashes or kinetic engagements (such as IEDs). Support zones are areas in which ISIS enjoys freedom of movement and from which such attacks are often staged: they are areas in which ISIS does not necessarily possess defensible control, but in which ISIS forces can nonetheless travel and operate with relatively low risk. Control zones, then, are areas in which we have assessed ISIS to have a larger degree of defensible control [...] in which a counter-ISIS force would be faced with serious ISIS resistance.”<sup>29</sup> It is noted that “this does not add up to the territory “the size of Belgium” that has been attributed to ISIS, but rather to a tattered patchwork of infrastructure and cities—which is also, perhaps, a fair way to describe state control in parts of Iraq and certainly Syria.”<sup>30</sup>

Regarding command structure it can be noted that ISIS is not merely a terrorist group, but it purports to be a terrorist state. The press publications indicate that ISIS has the Military Council, the Shura (Consultative) Council, the Judicial Authority, The Defence, Security and Intelligence Council, The Islamic State Institution for Public Information.<sup>31</sup> Furthermore, the information seized from the former militants “reveal another parallel structure which suggests an executive branch of the State, a sort of “cabinet” dedicated to the daily administration of the state.”<sup>32</sup>

It can also be noted that the group does very well with recruiting new members – there are calculations that it had succeeded to recruit as many as 30 000 members from all over the

<sup>28</sup>International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Ljube Bošković, Johan Tarčulovski*. Trial Judgement of 10 July 2008. Case No. IT-04-82-T. [interactive]. [accessed 2016-04-12]. [http://www.icty.org/x/cases/boskoski\\_tarculovski/tjug/en/080710.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf), para. 194-203.

<sup>29</sup>Gilsinan, K. How ISIS Territory Has Changed Since the U.S. Bombing Campaign Began. *The Atlantic*. [interactive] 11 September 2015 [accessed 2016-04-12] <http://www.theatlantic.com/international/archive/2015/09/isis-territory-map-us-campaign/404776/>

<sup>30</sup>Ibid.

<sup>31</sup>Neria, J. The Structure of the Islamic State (ISIS). *Jerusalem Center for Public Affairs*. [interactive] 8 September 2014 [accessed 2016-04-12] <http://jcpa.org/structure-of-the-islamic-state/>

<sup>32</sup>Ibid.



world to come and fight in Iraq and Syria for ISIS.<sup>33</sup> It has members from Great Britain, Kyrgyzstan, Egypt, Libya, Germany, France, Turkey and other countries.<sup>34</sup>

Regarding the ability to implement the norms of IHL, it can be noted that ISIS does not act according to the norms of IHL, in fact, it is systematically infringing those rules, its actions do amount to war crimes and crimes against humanity<sup>35</sup>. Therefore there can be doubts whether according to this feature ISIS may be considered a party to an armed conflict. But ICTY has stated in a similar case that “[w]here members of armed groups engage in acts that are prohibited under international humanitarian law, [...] they are liable to prosecution and punishment. However, so long as the armed group possesses the organizational *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organization required to be a party to an armed conflict.”<sup>36</sup> Therefore, despite this fact ISIS may be considered party to an armed conflict, which confers them with rights and duties of a party to armed conflict.

## INTERNATIONAL OR NON-INTERNATIONAL ARMED CONFLICT WITH ISIS?

International humanitarian law is applied in cases of international or non-international armed conflicts.<sup>37</sup> These two types of conflicts are regulated by the Geneva Conventions on the protection of victims of armed conflicts and their additional protocols. Other authors single out five sub-types of armed conflicts:

1. international armed conflicts – the rules applied include Hague conventions of 1907, all provisions of GC of 1949 and other principles of customary IHL;

<sup>33</sup>Danner, C. Report: ISIS Has Recruited as Many as 30,000 Foreigners in the Past Year. *Daily Intelligence*. [interactive] 27 September 2015 [accessed 2016-04-12]. <http://nymag.com/daily/intelligencer/2015/09/isis-has-recruited-as-many-as-30000-foreigners.html>

<sup>34</sup>Foreign Fighters Continue to Flock to Syria and Iraq. *The New York Times*. [interactive] 8 December 2015 [accessed 2016-04-12]. [http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html?\\_r=0](http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html?_r=0)

<sup>35</sup>Ellis, R. U.N. Panel Details ISIS Abuses in Syria, Says They Amount to War Crimes. *CNN* [interactive]. 14 November 2014 [accessed 2016-04-12] <http://edition.cnn.com/2014/11/14/world/meast/isis-war-crimes/>

<sup>36</sup>International Criminal Tribunal for former Yugoslavia. *Prosecutor v. Ljube Bošković, Johan Tarčulovski*. Trial Judgement of 10 July 2008. Case No. IT-04-82-T. [interactive]. [accessed 2016-04-12]. [http://www.icty.org/x/cases/boskoski\\_tarculovski/tjug/en/080710.pdf](http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf), para. 205.

<sup>37</sup>Vité, S. Typology of armed conflicts in international humanitarian law: legal concepts and actual situations. *International Review of the Red Cross*, March 2009, Vol. 91, No. 873: 69—94, p. 70.



2. international armed conflicts where people are fighting against colonial domination, alien occupation or racist regimes, and which are foreseen in Article 1(4) of I Additional Protocol to the Geneva Conventions;

3. non-international armed conflicts that are regulated by the Common Article 3 and applicable norms of customary IHL;

4. a subset of non-international armed conflicts that are regulated by the II Additional Protocol;

5. non-international armed conflicts having acquired the features of international armed conflict.<sup>38</sup>

As it can be seen from the description of the types of conflict, they differ in the amount and extent of rules that are applied. Furthermore, the rights and duties of the persons participating in the different armed conflict differ, that is, they are more narrowly defined in non-international armed conflict.<sup>39</sup> Even though there is some expansion of the rules applicable in non-international armed conflict, the bodies of rules applicable are not identical.

**An international armed conflict** is a situation where there is “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”<sup>40</sup> Other situations that are considered armed conflict are “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,”<sup>41</sup> and the fight for liberation as outlined in I Additional Protocol.<sup>42</sup> Therefore in this case there are two opposing states fighting against each other. In the fight against ISIS, in Iraq the international coalition mentioned above is fighting alongside the national Iraqi and Sunni forces, and therefore there is no collision and no armed force between states. The situation is slightly different in Syria, as the coalition does not have permission or a request for help from the (still) Syrian government. Some authors even state that it is convenient for Bashar Al-Assad

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<sup>38</sup>Glennon, M.J.; Sur, S. (eds.) *Terrorisme et droit international/Terrorism and international law*. Leiden/Boston: Martinus Nijhoff Publishers, 2008, p. 370; Weissbrodt, D., Andrus, B. The Right to Life in Armed Conflict: Disabled People's International v. United States. *Harvard International Law Journal*, Vol. 29 (1988). HeinOnline, [www.heinonline.com](http://www.heinonline.com), Grenoble [žiūrėta 2016 01 23]. p. 70.

<sup>39</sup>David, É. *Principes de droit des conflits armés*. Troisième édition. Bruxelles: Éditions Bruylant, 2002, p. 104.

<sup>40</sup>Common Article 2 of Geneva Conventions.

<sup>41</sup>Common Article 2 (2) of Geneva Conventions.

<sup>42</sup>1949 m. rugpjūčio 12 d. Ženevos konvencijų Papildomas protokolai dėl tarptautinių ginkluotų konfliktų aukų apsaugos (I protokolai). *Valstybės žinios*, 2000, Nr. 63-1909. Article 1(4).

to have ISIS in their territory<sup>43</sup>. Therefore it could be stated that the conflict becomes similar to an international armed conflict. But on the other hand, the regime of Bashar Al-Assad is not the target of the coalition air offence actions, and does not (at least at the moment) direct action against the coalition forces. The situation could change in the future, as the Islamic coalition led by Saudi Arabia is forming and conducting training in order to get involved in Syrian crisis.<sup>44</sup> In this scenario the situation could amount to an international armed conflict, as the Saudi coalition views Assad regime as terrible as ISIS and might conduct military action against it also.

**A non-international armed conflict** is defined in Common Article 3 of the Geneva Conventions as “occurring in the territory of one of the High Contracting Parties”. This might be considered as meaning that a non-international armed conflict has to take place in the territory of a single state. But then the conflicts which are spread in several states are left in the legal vacuum and not regulated. J. Pejic, an expert of IHL of the International Red Cross Committee, stresses that a non-international armed conflict is a conflict where one of the parties is a non-governmental armed group.<sup>45</sup> In the present day conflicts the dividing line between international and non-international armed conflicts is not as clear as in the case of “classical” civil war or insurgency. The proposal of ICRC was to apply the rules of international armed conflict whenever at least one foreign State is involved in a non-international armed conflict. But this proposal was rejected and “a differentiated approach has become widely accepted, distinguishing between whether an outside State fights in support of the State Party to the conflict or in support of the armed group.”<sup>46</sup> The first scenario is a

<sup>43</sup>Baker, A. Why Bashar Assad Won't Fight ISIS. *Time*. [interactive] 26 February 2015 [accessed 2016-04-12]. <http://time.com/3719129/assad-isis-asset/>

<sup>44</sup> “Most of the ground troops are from Saudi Arabia’s armed forces, with the majority having been deployed from the Royal Saudi Land Forces (RSLF) and Saudi Arabian National Guard (SANG). These troops are joined by specialized forces from the armies of Pakistan, Egypt, Malaysia, Morocco, UAE, Sudan and Jordan. In addition, troops from Senegal, Tunisia, Comoros, Djibouti, Mauritania, Mauritius, Maldives, Kuwait, Bahrain, Qatar, Chad and Oman committed personnel to the joint exercises. From the East, Indonesia, and Brunei (alongside Malaysia) have formed a joint coordinating committee with the Saudis. Finally, the Saudis and Turks recently set up a coordination committee for military affairs to plan future large-scale operations into Syria via the Turkish border, and in laying the groundwork for such an eventuality, the first batch of a squadron of Saudi F-15s will soon arrive at the Turkish Incerlik airbase.” Obaid, D. Saudi Arabia’s Master Plan Against ISIS, Assad and Iran in Syria. *The National Interest*. [interactive] 16 February 2016 [accessed 2016-04-01] <http://nationalinterest.org/feature/saudi-arabias-master-plan-against-isis-assad-iran-syria-15221>

<sup>45</sup>Pejic, J. The protective scope of Common Article 3: more than meets the eye. *International Review of the Red Cross*. March 2011, Vol. 93, No. 881: 189—225, p. 199-200.

<sup>46</sup>International Committee of the Red Cross. *Commentary of 2016*. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. [interactive]

situation of non-international armed conflict, as there is no opposition between the two states. “In the second case, the original armed conflict between the non-State armed group and the State Party also remains **non-international** in character (unless the intervening State exercises a certain degree of control over the armed group). At the same time, in the second case a parallel **international** armed conflict between the intervening foreign State and the State party to the original armed conflict also arises, because in that instance two States are opposed.”<sup>47</sup> In the case of ISIS, in the territory of Iraq it is very clear that coalition actions are aimed against ISIS with the consent and request of Iraqi government, therefore there is no opposition between the two states. On the other hand, the situation in Syria is less clear, as the coalition acts without the express request of Syrian government, which is itself fighting insurgents on its soil. The target of the air strikes is ISIS, not the Syrian Government or its forces, but the absence of consent makes things more complicated. But the possible solution could be the attention to the fact that the States do not oppose the (still) present Syrian government, which makes it a non-international armed conflict.

The minimum applicable law in a non-international armed conflict is the common Article 3 to the Geneva Conventions. International Court of Justice has stressed that “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity [...]’.”<sup>48</sup> Therefore it is important to apply this article to all possible situations of armed conflict. Furthermore, there are customary IHL rules that are in times

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[accessed 2016-04-12]. <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C1-2563CD002D6B0B&action=openDocument>, Commentary to Article 3, para 54.

<sup>47</sup>International Committee of the Red Cross. *Commentary of 2016*. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. [interactive] [accessed 2016-04-12].

<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument>, Commentary article 3, para. 54.

<sup>48</sup>International Court of Justice. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Decision of 27 June 1986. I. C. J. Reports 1986, p. 14, p. 103, para. 218.

more extensive and wide ranging than the concise notions of Common Article 3, and these are as well applicable in non-international armed conflicts.<sup>49</sup>

In this particular case, the fight against ISIS is a situation of a non-international armed conflict that extends to the territory of two states, that is, Iraq and Syria. It is important to name the territory that the conflict is taking place in, as the armed conflict cannot extend to the territory of the whole world but to the particular state and territory where the armed conflict is taking place. Therefore the coalition partners are in armed conflict with ISIS in the mentioned states, but not on their own territories.

### IS ISIS BOUND BY INTERNATIONAL HUMANITARIAN LAW?

The challenge with the current powerful terrorist groups is that „there is sometimes a rejection of IHL, which some parties do not feel bound by. In addition to this, recent armed conflicts have seen a rise in the deliberate commission of violations of IHL by some non-State armed groups and their use of media to publicize those violations.”<sup>50</sup> Thus, what are the obligations of non-state actors in armed conflicts? ICRC outlines that „all parties to an armed conflict—both states and non-state armed groups—are responsible for complying with the requirements of international humanitarian law. That is, each party must respect and ensure respect for the laws of war by its armed forces and other people or groups acting on its orders or under its direction or control.”<sup>51</sup> Of course, so far armed groups cannot “ratify or formally become party to IHL treaties; only States can do so. As a result, armed groups may consider themselves technically not bound by the international obligations specified in treaty law.”<sup>52</sup> ICRC furthermore outlines the steps that could be taken in order to enhance the adherence to IHL by armed groups. It is important to stress that “importantly though, once IHL has become applicable because the lower threshold of a non-international armed conflict has been reached, it binds every party to that conflict – irrespective of whether the concerning party would in

<sup>49</sup>International Committee of the Red Cross. *Customary IHL*. [interactive] [accessed 2016-04-12] <https://www-icrc.org/customary-ihl/eng/docs/home>.

<sup>50</sup>*International humanitarian law and the challenges of contemporary armed conflicts*. 32nd International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 8-10 December 2015. [interactive] Geneva, Switzerland. 8-10 December 2015 [accessed 2016-04-12] <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>

<sup>51</sup>Q & A on Laws of War Issues in Syria. *Reuters*. [interactive] 10 August 2012 [accessed 2016-04-12] <https://www.hrw.org/news/2012/08/10/q-laws-war-issues-syria>

<sup>52</sup>International Committee of the Red Cross. *Increasing Respect for International Humanitarian Law in Non-International Armed Conflict* [interactive] 22 April 2008 [accessed 2016-04-12] <https://www.icrc.org/eng/resources/documents/publication/p0923.htm>

itself be insufficiently organised (with respect to the criteria that brought about the non-international armed conflict).<sup>53</sup> ICRC stresses that “relevant IHL norms on the conduct of hostilities will govern the behaviour of foreign fighters, regardless of their nationality, in both IAC and NIAC. Foreign fighters are thus subject to the same IHL principles and rules that are binding on any other belligerent.”<sup>54</sup>

This can be further illustrated by the fact that the Rome Statute of International Criminal Court lists war crimes as crimes for which the individuals are responsible. For example, in Lubanga case, the leader of an armed group called *Force patriotique pour la libération du Congo*, Mr. Lubanga Dyilo, was convicted of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting of children under the age of 15 years into the *Force patriotique pour la libération du Congo* [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under article 8(2)(e)(vii) of the Rome Statute).<sup>55</sup> Therefore it can be proved that members of armed groups that are not related to a particular state are also responsible for violations of IHL.

The findings of the Independent International Commission of Inquiry on the Syrian Arab Republic, which was established on 22 August 2011 by the Human Rights Council through resolution S-17/1, which investigated human rights violations in Syrian civil war, dwelled also on the accountability of armed groups. It stated that “although not a State party to the Geneva Conventions, organized armed groups must nevertheless abide by the principles of international humanitarian law. During non-international armed conflicts, serious violations of international humanitarian law committed by members of such groups are prosecutable as war crimes. Non-State actors may also bear responsibility for gross abuses of human rights, in particular those that amount to international crimes.”<sup>56</sup>

<sup>53</sup><http://armedgroups-internationallaw.org/2012/08/09/the-organisational-requirement-for-the-threshold-of-non-international-armed-conflict-applied-to-the-syrian-opposition/>

<sup>54</sup>International Committee of the Red Cross. *The applicability of IHL to terrorism and counterterrorism*. [interactive] 01 October 2015 [accessed 2016-04-18] <https://www.icrc.org/en/document/applicability-ihlterrorism-and-counterterrorism>

<sup>55</sup>International Criminal Court. Case Information Sheet. The Prosecutor v. Thomas Lubanga Dyilo. Case No. ICC-01/04-01/06 [interactive] 10 February 2016 [accessed 2016-04-12] <https://www.iccpi.int/iccdocs/PIDS-publications/LubangaENG.pdf>

<sup>56</sup>United Nations Human Rights Council. Resolution adopted by the Human Rights Council at its seventeenth special session S-17/1. *Situation of human rights in the Syrian Arab Republic*. [interactive] [accessed 2016-04-19] [http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ResS17\\_1.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/ColSyria/ResS17_1.pdf)

## POSSIBLE VENUES OF INDIVIDUAL RESPONSIBILITY OF ISIS MEMBERS

As it has been mentioned before, the members and leaders of ISIS have committed heinous crimes. What are the possibilities to punish the members of ISIS for these infractions? The criminal tribunals of today may be categorized into three categories: the ad-hoc tribunals (the International Criminal Tribunals for the Former Yugoslavia, created in 1993, and the International Criminal Tribunal for Rwanda, created in 1994), hybrid tribunals, composed of national and international justice elements<sup>57</sup>, and the International Criminal Court.

Statute of International Criminal Court was adopted in 1998 and entered into force in 2002. The International Criminal Court is “the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.”<sup>58</sup> According to its statute, the Court has jurisdiction with respect to the following crimes: The crime of genocide; Crimes against humanity; War crimes; The crime of aggression.<sup>59</sup> The jurisdiction of the Court must be accepted by becoming a Party to its Statute (Article 12(1)), or “by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.” (Article 12 (3)). Such acceptance is not necessary when the situation “in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” (Article 13(2)).

The problem with the jurisdiction of ICC is that neither Syria nor Iraq are among the State Parties to the Rome Statute. Syria has signed the Rome statute, but failed to ratify it. Therefore the possible venues of trying and sentencing the members of ISIS are Iraq’s and Syria’s acceptance of ICC jurisdiction on the basis of Article 12(3) or the referral of the situation to the ICC by the United Nations Security Council according to the Article 13. As it

<sup>57</sup> The Serious Crimes Panels in the District Court of Dili, East Timor (2000); the Panels in the Courts of Kosovo (2001); The Special Court for Sierra Leone (2002); The War Crimes Chamber of the Court of Bosnia-Herzegovina (2005); The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea (2006), The Special Tribunal for Lebanon (2009), located in Leidschendam, the Netherlands. Radziejowska, M. Awaiting Justice: Prospects for Prosecuting War Crimes in Syria. Policy Paper. The Polish Institute of International Affairs. No. 31 (79), [interactive] [accessed 2016-04-18] [https://www.ciaonet.org/attachments/24347/uploads\\_p.2](https://www.ciaonet.org/attachments/24347/uploads_p.2).

<sup>58</sup> International Criminal Court. *About the Court*. [interactive] [accessed 2016-04-18] [https://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx)

<sup>59</sup> Rome Statute of the International Criminal Court [interactive] [accessed 2016-04-18] <https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, Article 5.



outlined by the Court, “territorial or personal jurisdiction of the Court applies if a crime referred to in article 5 of the Statute is committed on the territory or by a national of a State Party (Article 12(2)) or a State not Party to the Statute which has lodged a declaration accepting the exercise of jurisdiction by the Court (article 12(3)).”<sup>60</sup>

It can be noted that two situations were referred to the ICC by the Security Council – that is, the situation in Darfur, and the situation in Lybia<sup>61</sup>. But it can be noted that “both referrals exclude the possibility for the ICC to pursue nationals of non-member states. A possible referral of the situation in Syria would most likely repeat this caveat and attempt to restrict the ICC prosecutions to Syrian nationals or residents, thus leaving many acts allegedly committed by perpetrators coming from foreign countries beyond the reach of justice.”<sup>62</sup> Furthermore, the referral of the situation requires unanimity between the permanent members of the Security Council, where Russia and China are for the moment vetoing any such decisions. Another venue to punish the responsible persons is the creation of a special tribunal, as it was in the case of the breaking of Yugoslavia, when the International Criminal Tribunal for Yugoslavia was created, and with genocide in Rwanda, after which the International Criminal Tribunal for Rwanda was created. These two tribunals having reached most of their goals, will be replaced with the International Mechanism for the Criminal Tribunals. Another possibility as mentioned above is the mixed, or so called hybrid tribunals where the international experts work together with the national experts. This possibility is not as expensive as the international tribunals and is closer to the events and to the society in question. Other possibility is national jurisdiction, but it has to work effectively. As for the moment in Syria the existence of the civil war precludes such possibility. Furthermore, if members of ISIS would travel to other countries, the principle of universal jurisdiction would allow those countries to detain such persons and try them in their courts. Therefore there are quite a few possibilities to bring ISIS members who have perpetrated war crimes and crimes against humanity to justice.

<sup>60</sup>International Criminal Court. The Office of the Prosecutor. Policy Paper on Preliminary Examinations. November 2013 [interactive] [accessed 2016-04-18] [https://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](https://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf)

<sup>61</sup>International Criminal Court. *Situations and cases*. [interactive] [accessed 2016-04-18] [https://www.iccpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](https://www.iccpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx)

<sup>62</sup>Radziejowska, M. Awaiting Justice: Prospects for Prosecuting War Crimes in Syria. Policy Paper. The Polish Institute of International Affairs. No. 31 (79), [interactive] [accessed 2016-04-18] <https://www.ciaonet.org/attachments/24347/uploads>



## CONCLUSIONS

Armed conflict is defined in international law as a situation when there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. This definition, developed by the International Criminal Tribunal for Yugoslavia in Tadic case, is widely used in international law doctrine. The intensity criterion of armed conflict is fulfilled in the case of fight against ISIS as the group controls parts of territory in Syria and Iraq, manages to defend the big part of the controlled territory, carries out military action in order to gain more territory. On the other side of the conflict there are the coalition forces which carry out air strikes against ISIS strongholds. Therefore it is clear that this conflict amounts to an armed conflict in the sense of intensity.

The organizational criterion requires the existence of two organized parties to a conflict. ISIS as a group recruits new members, carries out training, has hierarchical structure, requires obedience from its members, a part of which is even responsible for the non-military tasks of running the controlled territories. Therefore this group can be considered party to an armed conflict, the other side being the coalition forces, including the Iraqi and related armies.

The type of the armed conflict depends on the parties involved and their relation to each other. So far as the coalition partners have the consent of Iraqi government or do not oppose the government in place, as it is in Syria, the conflict remains a non-international armed conflict. But from the moment where there is opposition between two states, as it could be in the present conflict with Saudi Arabian forces opposing Syrian (still) government forces, the conflict could become an international armed conflict. The members of ISIS are bound by the rules of international humanitarian law due to the fact that they participate in an armed conflict. This rule also applies regardless of the nationality of the belligerents – that is, foreign fighters participating in the armed conflict are bound by the same rules as the other members of the armed group.

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## KOVA SU ISIS TARPTAUTINĖS HUMANITARINĖS TEISĖS KONTEKSTE

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### Santrauka

Straipsnyje analizuojama kova su teroristine grupe ISIS tarptautinės humanitarinės teisės normų kontekste. Ši grupuotė – viena pavojingiausių pasaulyje. Straipsnyje analizuojama, kokioms sąlygoms esant tarptautinė humanitarinė teisė pradeda veikti kovoje su tokia grupuote. Ginkluotas konfliktas

tarptautinėje teisė apibrėžiamas kaip situacija, kur naudojama ginkluota jėga tarp valstybių ar ilgai naudojama ginkluota jėga tarp vyriausybinių pajėgų ir organizuotų ginkluotų grupių ar tarp tokių grupių valstybės viduje. Ši apibrėžimą suformulavo tarptautinis baudžiamasis tribunolas buvusiai Jugoslavijai. Straipsnyje analizuojama, ar kova su ISIS atitinka tarptautinėje humanitarinėje teisėje susiformavusius intensyvumo ir organizuotumo kriterijus, kad galėtų būti laikoma ginkluotu konfliktu. Kova su ISIS atitinka intensyvumo kriterijų, nes ši grupė kontroliuoja Irako ir Sirijos teritorijos dalį, taip pat sugeba šią kontrolę išlaikyti, ir kariniais veiksmais siekia užgrobti daugiau teritorijos. Kita konflikto pusė – tarptautinė valstybių koalicija – taip pat atlieka karinius veiksmus, rengia oro išpuolius prieš ISIS. Jei kalbėtume apie organizuotumo kriterijų, reikia nustatyti, kad konflikte dalyvauja dvi organizuotos šalys, kad galėtume teigti, jog ginkluotas konfliktas vyksta. Taigi kalbant apie ISIS, pabrėžtina, kad ši grupė nuolat verbuoja naujus narius, juos apmoko, taip pat turi hierarchinę valdymo struktūrą, reikalauja paklusnumo iš savo narių, taip pat turi šaką, kuri atsakinga už civilinį užimtų teritorijų valdymą. Taigi ši grupuotė gali būti laikoma pakankamai organizuota ginkluoto konflikto šalimi. Nors ISIS nuolat pažeidinėja tarptautinės humanitarinės teisės reikalavimus, ji pajėgtų jų laikytis, jei panorėtų, taigi vien šio kriterijaus nesilaikymas neatima iš jos buvimo ginkluota grupe. Straipsnyje analizuojama, kokios rūšies ginkluotu konfliktu laikoma kova su teroristinėmis grupėmis. Pažymėtina, kad kova su ISIS šiuo metu laikytina netarptautiniu ginkluotu konfliktu. Straipsnyje taip pat aptariama ginkluotame konflikte dalyvaujančių ginkluotų grupių narių pareiga laikytis tarptautinės humanitarinės teisės reikalavimų. Plačiai pripažįstama, kad ginkluotų grupių, kurios dalyvauja ginkluotame konflikte, nariai privalo laikytis tarptautinės humanitarinės teisės reikalavimų, nors jie ir nėra valstybė ar valstybės pareigūnai. Tarptautinės humanitarinės teisės normos taikomos visiems konflikto dalyviams.

**Pagrindinės sąvokos:** ISIS, teroristinės grupės, tarptautiniai ir netarptautiniai ginkluoti konfliktai, tarptautinė humanitarinė teisė.

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