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## Organized armed groups in the International Humanitarian Law

### *Los grupos armados organizados en el Derecho Internacional Humanitario*

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**ABSTRACT:** States comply with international treaties because they have negotiated, signed and ratified them; however, organised armed groups are not part of these processes and still have an obligation to comply with basic rules of war. This document argues that the Internacional Humanitarian Law must be respected by all those involved in a conflict; besides, it provides arguments for organised armed groups to commit to a norm that they have not directly accepted. International Humanitarian Law as an erga omnes norm shows a specific nature and application, which is why it applies to all citizens, it is a customary norm for which it obliges respect for the norm by all individuals. Finally, an armed group regroups citizens of a country, so they must respect the norms established for the State.

**KEYWORDS:** Humanitarian Law, Military forces, Armed conflicts, Treaties.

**RESUMEN:** Debe entenderse que los Estados cumplen con los tratados internacionales porque ellos los han negociado, firmado y ratificado; sin embargo, los grupos armados organizados no son parte de estos procesos y aun así tienen la obligación de cumplir con normas básicas de la guerra. Este documento argumenta los motivos por lo que el Derecho Internacional

Humanitario debe ser respetado por todos los intervinientes en un conflicto; además, brinda argumentos para que los grupos armados organizados se obliguen a una norma que no han aceptado directamente. Se especifica que el Derecho Internacional Humanitario es una norma erga omnes, por lo que rige a todos los ciudadanos; es una norma consuetudinaria por lo que obliga el respeto a la norma por parte de todos los individuos y finalmente, un grupo armado está conformado por ciudadanos de un país, por lo que deben respetar las normas fijadas para el Estado.

**PALABRAS CLAVE:** Derecho Humanitario, Fuerzas armadas, Conflicto armado, Instrumento internacional.

## **INTRODUCTION**

War has been seen by several states as an alternative to conflict resolution, as it “kills the enemy” and determines the power of one state over another. This is why it is vitally important to determine that States, organised armed groups, national liberation movements and individuals within a levée en masse have certain rights and obligations to respect according to the role they play in an armed conflict.

This publication seeks to determine the motives, specifically of organised armed groups, for respecting International Humanitarian Law (IHL), it is understood that these are not part of the stages for the creation of an international norm such as treaties, conventions or agreements.

After defining the armed groups as a recognised party to an armed conflict, an attempt will be made to determine the obligations under treaty law, customary law and doctrine, in order to finally identify the internal causes of the armed groups organised to accept and respect IHL.

This work has been written because, when analysing the subjects that can intervene in an armed conflict, it is visualised that the Armed Forces are obliged to respect IHL. After all, their States have ratified the Geneva, Hague and New York Conventions (which are the primary sources within this

branch). However, when talking about armed groups, there is no legal link that leads to an obligation to respect IHL rules, since as we have said, they cannot negotiate or ratify treaties, but even within this margin. Also, it has been visualised that over time, most of the Organised Armed Groups (OAG) have respected and complied with the mentioned rules within the armed conflicts that have developed.

Academically, the following research project will determine the reasons why an organised armed group respects and complies with international humanitarian law. José Manuel Sánchez (2016) states that “the question arises concerning non-State entities or armed groups that have no connection with government forces, but rather as such dissident forces participate in an armed conflict of a non-international character” (p. 77). For this reason, the need arises to determine the reasons these armed groups have for respecting the legal order.

Within the following lines, we will seek to determine if there is a rule that obliges Organised Armed Groups to respect International Humanitarian Law.

When considering state of the art on this subject, it can be seen that this approach has not yet been determined; however, a small approach refers to the fact that armed groups have been considered as subjects of Public International Law when a conflict exists since this is a means of linking them to international norms.

## **1. ORGANISED ARMED GROUPS: SUBJECTS OF PUBLIC INTERNATIONAL LAW**

Wars have never been a distant reality to the development of society. All history has witnessed an armed conflict that has helped to create and determine standards.

Considering then that, “if states have relations, those relations must be directed by rules that require careful observance, and are called international laws”. (Alcorta, 2009, p. 10)

Thus, on 22 August 1864, with the signing of the Geneva Convention, IHL was born. For Salmon (2012):

International Humanitarian Law applies to situations - armed conflicts - which should not exist if the law is respected. The apparent tension between fighting or regulating these situations would be solved by a Law that, approaching military logic, tries to rationalise and reorient them to the only justifiable objective in the framework of an armed conflict: to defeat the enemy. (p. 19)

In other words, IHL humanises and regulates war, to limit the power of armed forces and groups fighting in a war, avoiding causing more havoc than expected when talking about a situation like this.

### **1.1. International Humanitarian Law as a branch of Public International Law**

IHL is a branch of Public International Law; born from the laws of States, “then International Law not only arranges relations of a public nature but also of a private nature since they are born under the laws or customs of different States and therefore can indirectly affect the links that it is in their interest to maintain” (Alcorta, 2009, p. 10). Therefore, it should be evident that it is the sovereign States by mandate of the people, who are linked to rules of international character in order to strengthen their relations.

According to Sassóli, Bouvier and Quintin (2011):

Public international law can be composed of two branches: a traditional branch consisting of the law regulating coordination and cooperation created by states - and a new branch consisting of the constitutional and administrative law of the international community of 6.5 billion human beings. (p. 9)

Therefore, the aim is to create a norm that links the signatories and ratifiers of international norms (States) with their sovereign members and trainers (citizens), this link being

the basis of the Social Contract since without a doubt the respect of citizens for the norms imposed by the State arises from the tacit acceptance when granting a portion of our freedoms to live in society.

To be precise, with the Social Contract, citizens grant a portion of their liberties to a superior entity called the “State”, so that it can regulate their coexistence, dictate rules and watch over their rights in daily relations, being, therefore, the necessary foundation for the laws written and ratified by the State to oblige those who are part of it.

The rules of war have been part of international custom over the years; however, after the Second World War, the normative frameworks were positive with the 1949 Geneva Conventions and their additional protocols, the Hague Conventions and the New York Conventions, being the normative basis applicable in these situations. The Geneva Conventions or the Law of Geneva are part of the “*ius in bello*”, which is a set of rules that must be applied when a war has started; while the New York Conventions or the Law of New York is part of the “*Ius ad bellum*” that defines the legitimate reasons why a State can wage war so that it can be classified as a just war in all areas of development. (Valencia, 2013, p. 25)

The law of war, therefore, is based on the evident and historical reality, where States confront each other using force for different reasons and objectives, it being useless to determine both aspects since they are equal to the number of wars that have taken place in history and that will take place in the future. However, the objective of IHL, as will be seen below, is to protect civilians and those who have ceased to participate in hostilities.

“States must transform treaties into regulations following their contexts. It will generate a coherent legal system that makes treaties not just desirable measures in the abstract, but concrete norms with protocols for implementation” (Salvador Lara, 2018, p. 128). Therefore, it is clear that the obligation to respect and implement arises from the sovereign will of states to integrate international norms into their domestic order.

Another obligation of the States is to teach in times of peace their citizens and their armed forces the rules that IHL disseminates; “the general messages must generate an environment in which society as a whole understands that not everything is permitted in the framework of armed conflicts, and thus, a greater acceptance is expected, and respect for them is increased”. (Olivera Astete, 2018, p. 141)

## **1.2. Subjects of International Humanitarian Law**

Within this context, “not every conflict is armed and not every form of violent opposition can be considered armed conflict” (Valencia, 2013, p. 97). Thus, for an armed conflict to develop, minimum requirements must be met, and at least two parties must be involved, which can be State Armed Forces, Organised Armed Groups, National Liberation Movements and “*Levée en masse*”.

The State Armed Forces emerge as a subject of international law as they are the ones who defend the sovereignty of the states by a mandate that is proper to national norms. Therefore, “as IHL is conceived as a legal body that regulates belligerent interstate relations, it obliges the armed forces to respect it without the need to give express acceptance, provided that the States have obliged themselves”. (Sassóli, Bouvier and Quintin, 2011, p. 9)

National liberation movements (NML) develop when a colonising power finds itself controlling territory and the organisation of a state, outside the power, and therefore NMLs aim to become independent considering the principle of self-determination of peoples.

On the other hand, *levée en masse* refers to a specific moment when the citizens of a village take up arms to confront the attempted occupation of a foreign state force. Organised armed groups will be developed in the following pages as subjects of international law participating in non-international armed conflicts and their obligations to the international community.

When an armed conflict occurs between the armed forces of two states, it is called an international armed conflict (IAC), and the legal framework applicable to this specific case contains the four Geneva Conventions of 1949 with Additional Protocol I of 1977, the Law of the Hague and the Law of New York.

However, inter-state armed conflicts have decreased in recent years, and new ways of waging war have emerged. Within this framework, organised armed groups (OAGs) are formed to fight for ideals far removed from the formation of states, that is, they seek to fight states, in the first instance, to fight for fixed objectives.

In recent years, after all the struggles for decolonisation, “the war of national liberation has been elevated to the rank of an international armed conflict” (ICRC, 2008, p. 4); therefore, the National Liberation Movements are a recognised part in the development of an IAC, and this determination to link to the legal frameworks applicable to each situation is essential.

The law, in general terms, prohibits the use of force between states as a legitimate means of resolving disputes, which would lead us to understand that states cannot confront their citizens. “On the contrary, IHL allows that, on its territory, a state may use force against groups or individuals as long as it is to promote compliance with the law” (Melzer, 2016, p. 55). It is from this premise that, tacitly, organised armed groups monitored by IHL develop to confront other armed entities in an armed conflict.

### **1.3 Organised armed groups and non-international armed conflicts**

The regulation for Organised Armed Groups is quite limited in International Humanitarian Law, since:

States have long regarded internal conflicts as short-term separations that can be controlled by domestic law because no state is ready to accept that its citizens can wage war against its government. (Sassóli, Bouvier and Quintin, 2011, p. 228)



Therefore, in Non-International Armed Conflicts (NIIAC), the applicable legal framework is the law of the Hague, the law of New York and concerning the conduct of hostilities, article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II (APII). It is evident within the development of applicable law for the CANI that States have the primary and principal responsibility for the care of citizens, although it is attempted to link this duty of care to the GAO. (Kalshoven and Zebveld, 2005, p. 18)

It must be understood that States must apply IHL in a CANI because they have ratified the Geneva Conventions, which does not prevent the application of internal regulations in the country, however, as it is a more specific rule that seeks to protect citizens and guides the authorities of a State in their actions when directing force against combatants. On the other hand, a CANI can be “internationalised” when a state other than the territory of the conflict supports the organised armed group by creating a scenario where states confront.

The IIAA “refers to situations of “armed conflict”, in which “hostilities” and “military operations” take place, but it does not refer to “parties in the conflict” either. This complete silence reflects the fear of many Governments that mere reference to an adverse party in specific circumstances will be interpreted as a form of recognition of that group” (Kalshoven and Zebveld, 2005, p. 156). Furthermore, the protocol only provides for one possibility of developing a CANI: between the armed forces and a GAO, removing the possibility that even extensive fighting between several armed groups without the involvement of government forces could be considered an armed conflict.

However, the international custom has shown that armed conflicts can develop between two GAO’s and it is of the utmost importance to use legal frameworks that regulate these situations from the perspective of the environment in which they take place. Therefore, when we speak of GAO’s, we are talking about non-international armed conflicts (CANI) which can be of two types: Armed Forces against a GAO or GAO against another GAO; four fundamental elements must be fulfilled for it to enter the category of CANI:

– One essential definition is that of armed *force* or *violence*.

– A temporary one which is the *prolongation* in time.

– The *organisational* element of the group participating in the conflict.

- The inclusion of armed conflict *between groups* alongside the traditional notions of international - between states - or non-international - the armed conflict between state authority and the armed group. (Salmón, 2012, p. 30)

When talking about the existence of armed violence, military operations - or those that can be taken as military - are necessary for a limited time, produced by a group that meets the required levels of intensity and organisation, and there must be confrontations with another group of the same characteristics or with state armed forces.

When a CANI takes place between armed groups, it should be seen that “when faced with a group with its characteristics, there are others with the same tendencies, the same development. Each group considers itself autonomous and with the free exercise of its rights, is limited to a specific territory, and does not consent to the interference of the others in what it believes to be its particular direction. (Alcorta, 2009, p. 3)

When he talks about:

A conflict must have a duration in time, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (TIPY) has changed this term by intensity, explaining that it then requires a level of organisation and violence for a conflict to be considered as non-international. (Sassóli, Bouvier and Quintin, 2011, p. 23)

Another way to identify a CANI, according to the Correlates of War Project of the University of Michigan (COW), is to consider that there are armed combats in the territory of a state, involving the state and other organised forces, there are at least a thousand deaths related to these combats, of which the weakest actor caused at least 5%. (Valencia, 2013, p. 99)

Since these elements are minimum requirements to reach a level of intensity that allows IHL to be the legal framework, this is based on the fact that in the law of war killing the adversary is permitted, although it is proposed, through the Martens clause, that:

Both the national government and the non-State armed groups must abandon the attitude of reproach in the face of their adversary's conduct and begin to recognise in the other, their enemy, and the innocent third party outside the conflict, a human being who has the right to be a person. (Valencia, 2013, p. 19)

One important thing when talking about GAO's is to determine the status of the interveners since obviously we cannot talk about combatants since we are not in an IAC; however, those who are part of a GAO must:

- Carry weapons openly and visibly.
- Have clear identification, which may be a uniform.
- Have a hierarchically superior person, i.e. a GAO must have a command structure, and
- They must respect and be bound by IHL.

These characteristics help to make a clear distinction between those who take part in hostilities directly and those who do not. It is necessary to clarify that not all those taking direct part in hostilities are members of a GAO, as they may be civilians who, for a given time, have supported one or other of the armed forces with individual acts that have had a given threshold of harm, direct causation, and a nexus of belligerency.

Since the action of a GAO is allowed to influence the reality of a country, and it seeks to give obligations to its acts

to defend the rights of those who do not take a direct part in the hostilities, “organised armed groups are considered ‘parties’ to an armed conflict, regardless of any formal recognition of belligerency by the opposing state” (Melzer, 2016, 53). It is the first moment in which they are seen as subjects of international public law, although this condition does not allow them to participate in the creation of norms or international conversations proper to states. Therefore, “this recognition does not imply that they are legitimate or have full legal personality under international law” (Melzer, 2016, p. 54). From this it follows that not having legal personality, they cannot adhere to international treaties, thus giving rise to the first obvious question within IHL, why are they obliged to respect a rule that they have not accepted, considering that, the rest of the subjects even negotiated the birth of such rule?

It can be added that the GAO’s are not the only accepted subjects of international law that do not constitute States since we can also find international organisations, non-governmental organisations, transactional businesses, civil and religious associations, and even insurgent and terrorist groups that currently have an impact at the international level. However, they are not clearly defined within the rules governing individual relationships.

Furthermore, one of the most relevant parts of the IIAA that concerns this work is the visualisation that an adverse party does not arise when talking about armed conflict, which leads us to ask whether it is binding on non-state parties to a conflict (Kalshoven and Zebveld, 2005, p. 156)

In conclusion, it has been determined that the rights and obligations that have been granted to organised armed groups by states to ensure compliance with international rights and norms effectively make them subjects of international law, which places them on an equal footing, within an armed conflict, with state forces. However, it is imperative to determine under what conditions these parties to the conflict are obliged to comply with the norm since under no circumstances do they have the capacity to negotiate, create, sign or ratify norms of international law.

## **2. STATE OF THE ART AND NON-INTERNATIONAL ARMED CONFLICTS.**

Non-international or internal armed conflicts have a clear origin since the end of the Cold War, as it was in this period that citizens started to organise themselves to defend their ideas, such organisation quickly led to clashes between state forces and newly formed groups. Although this reality is now ordinary among the population, it was quite radical at the time because it was not normal for a group to organise itself to go against the State. Then, the clashes were between a dominant and sovereign State against a poorly organised group with limited weapons equipment, this being one of the reasons why the CANI regulations are so recent and respond to the interest of States seen as international legislators. (Melzer, 2016, p. 30)

When defining the CANI, in order to understand the context in which they are developed and how the international community sees them, we can find conventions, jurisprudence, customs and doctrine.

### **2.1. Conventional Law for International Humanitarian Law**

“From 1949, rules were also drafted for internal armed conflicts, the signing of multilateral treaties being a prerogative of States, as the main international legislators” (Kalshoven and Zebveld, 2005, p. 17). In 1949, the Geneva Conventions were born as a primary source applicable in armed conflicts and obligations began to be developed for armed groups that emerged as a contradiction to state forces. As mentioned above, international norms are created by the will of states; however, they are binding on individuals, that is, their citizens, as they are the ones who grant state sovereignty.

Thus, “with the adoption of common Article 3 of the 4 Geneva Conventions, the position in which the CANI are presented as internal problems of the States changes radically, establishing minimum guarantees of respect for life in these situations” (Sassóli, Bouvier and Quintin, 2011, p. 22)—beginning in 1949 a modern IHL. Thus, it includes subjects of international law whose actions concern the whole community and tacitly imposes on them the duty to respond to that community.

Within the international conventions, the CANI is governed by article 3 of the Geneva Conventions and Additional Protocol II of those conventions.

When talking about international treaties, it is essential to understand the procedure that these must go through before they become a binding rule for a state. Therefore, while a state does not sign a treaty, it is not a party to it since “a treaty applies to the Parties that have approved it, and is not necessarily annulled by a subsequent treaty on the same subject, the situation that often arises is that some states are parties to the new treaty, while others are only parties to the previous one” (Kalshoven and Zebveld, 2005, p. 19). Then, it can be understood that while the Geneva Conventions are one of the most widely accepted and approved international instruments within the international community, Additional Protocol II has not had the same acceptance, as it tacitly represents an acceptance by states of a failure to deal with internal problems. However, the most significant number of norms contained in this body of law is part of international custom, which, as will be analysed below, in the absence of a persistent objector, is binding on all states.

“Only the Additional Protocol to the Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts sets out the requirements for the application of that treaty, which does not imply a general definition of armed conflict or a scheme that must necessarily be followed in all cases of non-international armed conflict” (Salmon, 2012, p. 29). For this reason, the requirements of control of territory, organisation and identification are not the only requirements that a GAO must comply with within a non-international conflict, nor do they represent as such, a limitation to categorise an organised group as a GAO, considering that, by granting it this status, IHL begins to rule as it is the special rule.

When speaking of compliance and respect for IHL rules, it should be understood that “IHL rules are rules of an erga omnes nature because States have assumed a dual obligation to respect and ensure respect for IHL rules” (Salmon, 2012, p. On the other hand, when speaking of the obligation to ensure

respect, it is understood that the international community influences the actions of a State, since, in the case of a violation of IHL, it is the high contracting parties who must demand compliance with the responsibilities set forth.

As in any context, the laws of war have been violated for several generations, so mechanisms have been implemented to demand respect for them, since “as with all areas of law, failure to comply with the rules cannot lead to the conclusion that they should disappear; on the contrary, measures should be taken to promote and ensure compliance” (Salvador Lara, 2018, p. 124). Thus, the States Parties to the Geneva Conventions are obliged to respect the conventions and educate their citizens so that, being aware of IHL, they promote its compliance. Article 1 of the Geneva Conventions promoted this obligation, an article that has now become part of international custom.

Several authors have identified and fixed by Article 3 of the 1949 Geneva Conventions as the essential rule of IHL since in addition to setting rules for the management of the CANI. It determines the conduct that the parties to a conflict should have concerning persons not directly participating in the hostilities, since “a contrario sensu, the persons not protected by common Article 3 are those who take a direct part in the hostilities”. (Valencia, 2013, p. 175)

When a CANI was developed, the participants began to wonder whether “the Geneva Conventions would apply in their entirety to internal armed conflicts; however, this question was also expressly answered in the negative” (Kalshoven and Zebveld, 2005, p. 44). It leads us to limit the obligations of the GAO's, thus encouraging States to have more commitments to the international community by having a responsibility to care for the actions of their citizens. However, it is a responsibility that arises because no state is prepared for the Geneva Conventions to become rules of armed conflict since they would become responsibilities for both parties.

## **2.2 Customary law as a source of international humanitarian law**

Before the rules contained in international treaties became favourable, customary rules were the ones that States were obliged to respect, which is why “at the same time, it is reaffirmed that, increasingly, IHL rules are considered customary and, as such, rules that must be applied by all States based on universality” (Salmon, 2012, p. 38). It seeks to promote respect for rules that have been practised throughout history, creating responsibilities for those who are not obliged to comply with them and expanding the margins of regulation over which the international community has the capacity to intervene.

As already mentioned, “treaties are only binding on the contracting parties; but a series of treaties between different states may perhaps determine the same principles and accept common solutions” (Alcorta, 2009, p. 126), giving way to a new form of rule development. Then, it allows states that are not bound by a treaty to have an obligation to respect those rules for the purpose they have, which, in the case of IHL, seek to preserve the species, act with humanity and respect basic rules so that war has limitations.

In a CANI, one of the most relevant sources of IHL is international custom, since as we have seen, written treaties are limited when developing this type of conflict, being:

Customary law which is vital in protecting victims when one of the parties involved in the conflict is not a party to the treaty, the application of custom is a preference of international courts since it is also the only way to apply international standards in some countries. (Sassóli, Bouvier and Quintin, 2011, p. 61)

The first is based on the fact that State practice must be sufficiently abundant for it to be recognised at the regional or international level as a uniform and many acts, which is accompanied by the *opinion juris*, i.e., those who comply with this act are convinced that their action is because it constitutes a legal obligation and that if they refrain from complying with it. Then, it could give rise to responsibility before the international



community. Thus, the custom is binding on all states except persistent objectors, which are states that have entirely rejected the practice from the moment of its creation, so there is no acceptance or conviction that such action represents a norm.

Because of this, it follows that international custom, it becomes a means of ensuring that war is waged based on the principles of humanity and distinction, the fundamental bases of a just war. “However, the content of customary rules is less clear, and it is necessary to examine this practice extensively and carefully in a context of poor compliance”. (Salmon, 2012, p. 55)

Organised armed groups throughout history, participate as subjects of international law in an exceptional situation such as an armed conflict. Within this participation, they have shown respect for a practice that has been approved by States.

This tacit acceptance, which is seen in the practice of the GAO, makes the customary rules applicable in the CANI and produces an evident advantage in the international community because, “IHL is a dynamic legal body that is determined by the practice and opinion of States, with custom emerging as a means of rapid adaptation to new challenges that an international treaty would not cover for the time it takes to negotiate”. (Melzer, 2016, p. 22)

The International Committee of the Red Cross has developed a document with the customary rules accepted by all States parties to the Geneva Conventions, Valencia (2013), mentions that the importance of having a clear list of these rules arises from the fact that:

Initially, this qualification allows it to require individual States to respect specific humanitarian standards that are based on international instruments that have not been adopted in their domestic legislation. The second is that it allows specific treaty rules of international armed conflict to apply to non-international armed conflicts, and the third is that it allows certain customs of war that are not regulated by any international

instrument but must be observed by the parties to an armed conflict to be identified. (p. 75)

Consequently, the ICRC's work is extremely relevant as it is the guardian of IHL, and by mandate of the Geneva Conventions, it is responsible for identifying cases in which international intervention or specific humanitarian aid is required.

Thus, even when a CANI is being developed, the ICRC can intervene to visualise the conditions of those detained because of the conflict or of civilians who have been captured. Furthermore, respecting the principles of the movement, it can adapt its behaviour to the needs of a specific population.

### **2.3 International Humanitarian Law developed in the doctrine**

For its part, legal doctrine has characterised a CANI, mainly on the basis that: “a) the parties to the conflict are not State[s]; b) armed confrontations take place in the territory of a State; c) open hostilities must have a minimum of the organisation; and d) armed confrontations must have a certain intensity” (Salmón, 2012, p. 131). As we can see, there is a general definition of a CANI, since all international law sources determine minimum characteristics and the existence of an armed group that has levels of intensity and organisation, which carries out armed confrontations that can be seen as attacks with military purposes within a territory that does not necessarily have to be controlled by that GAO, but which must be seen as having control over some territory within the State where the conflict is taking place.

Within a CANI, it is vitally important to determine the role of the State, the role of the armed forces and the role of the groups that are developing within a situation, because, effectively, a disadvantage is visualised among the subjects that may become involved in this type of conflict; thus, “international law can be one, but on the condition that it is such a law, that it is formed in all its parts as a logical and precise deduction from the principles and not as the arbitrary

policy of the States” (Alcorta, 2009, p. 5). It calls for States to attend to the needs of the population as a means of preventing internal armed conflict, but if this attention is late. An activity is developed that cannot be managed, the country where the conflict is taking place is obliged to comply with international norms neutrally because its citizens are still being talked about, even when they are fighting against the State armed forces. With even more reasonable when it is a confrontation between GAO’s since in this case, the State must act as a mediator to seek an effective solution to the conflict and oblige the parties to respect the rules of IHL in all areas.

As we have already discussed, IHL seeks to protect individuals who are not directly participating in hostilities or those who have ceased to participate in hostilities. This rule is the basis and method of development of an action that preserves humanity and respect for life. In this context, international human rights law is involved, which emerges as a normative framework applicable in times of peace and, subsidiarily, in times of war.

“IHL and International Human Rights Law (IHL) share, despite the existing differences, a common philosophy that consists in the preservation and protection of the human being” (Salmon, 2012, p. 32), this makes us understand that, in front of any situation, human life will always be protected, so every action of the international community and a specific State must be directed to such purposes.

Another of the fundamental differences between IHL and IHL is that “while the former imposes a duty of respect on the parties to the conflict, the latter imparts a duty of respect and guarantee at the head of the State. Therefore, IHL is not merely linked to the State, but rather it overcomes this barrier to control the behaviour of groups that may not be recognised by a government. (Valencia, 2013, p. 129)

In this context, it is understood that it is the IHRL that binds the State in a situation in which it may not be intervening, to ensure that human rights are fulfilled and that there are no

violations of international norms. On the other hand, IHL appears as a normative framework that sets limits and means for the behaviour of specific groups in a given situation.

One of the essential sources in IHL are the principles that apply in the conduct of war and the behaviour of the parties in these situations, the most representative being humanity, military necessity, proportionality and distinction.

Military necessity and humanity are the fundamental basis of IHL because “under the principle of military necessity the parties may resort only to those methods and means which are necessary to achieve the legitimate military objective of conflict and which are not otherwise prohibited by IHL” (ICRC and IPU, 2018, p. 10). In other words, the parties are allowed to use force as long as these acts bring them closer to their objective, in other words, help them win the war as quickly as possible, giving rise to the principle of proportionality, which states that incidental and superfluous damage must be weighed in the balance with a military advantage, and only when the latter has more weight can an action be said to have been legal under IHL based on the principle of military necessity.

Within humanity, there must be an understanding that there is a “prohibition on the parties to a conflict from inflicting suffering or causing destruction that is not required to achieve the legitimate objective of a conflict” (ICRC and IPU, 2018, p. 10). It follows from this short definition that the principle of humanity seeks to respect human dignity and to maintain those intrinsic characteristics of the human being, with his life being a right protected by maximum standards.

The principle of distinction is based on determining who actively takes part in the hostilities and who are the persons affected by the armed conflict that is taking place, and therefore obliges the parties to have elements that distinguish them from the civilian population and that each of their attacks is directed at military objectives and combatants; civilian objects and citizens are protected by international treaties and norms.

In conclusion, it should be understood that “the difficulty encountered in improving the protection regime in non-international armed conflicts is the obstacle posed by the principle of state sovereignty” (ICRC, 2008, p. 17) since no state or government is ready to accept that it may have internal problems with its citizens and that these problems may exceed certain limits.

Also, organised armed groups are obliged to comply with the norms of IHL, and with all the sources that have been developed in this text, even if they have not been part of the negotiation, creation or ratification of the same; a topic that will be developed below since it is vital to determine the reasons for a GAO to practice and respect these legal bodies.

### **3. ORGANISED ARMED GROUPS ARE OBLIGED TO RESPECT INTERNATIONAL HUMANITARIAN LAW**

As we have already seen, organised armed groups are subjects of non-international armed conflicts. However, there are no elements that link the GAO's with respect and obligations concerning International Humanitarian Law, which is why, within this margin, it must be understood that States and groups, from the moment, that hostility between the parties begin must seek to ensure that the principle of humanity is visualised in each of the acts that they carry out.

History has shown us how members of an organised armed group have responded before international courts for crimes committed in the CANI. It leads to a definite conclusion: individual responsibility arises, in fact, from non-compliance with treaties and conventions, and therefore there is a tacit obligation on citizens to respect the rules set by the States.

Initially, “the obligation to enforce IHL is a rule *erga omnes*, that is, it creates obligations vis-à-vis the international community as a whole, and all States have the right to invoke State responsibility in case of the breach” (Salvador Lara, 2018, p. 125). In other words, states must educate their citizens about IHL so that, if a GAO is formed, they are in a position to respect the minimum standards and, to develop a conflict with

the minimum guarantees of war. Otherwise, the state will be responsible for each of the violations carried out by its citizens before the international community, since all contracting parties can request that a state be responsible for violations of the law of Geneva, The Hague and New York.

It should be understood that IHL is not synallagmatic, since “the duty arising from Article 1 not only entails synallagmatic obligations between States Parties but obligations to all persons under their jurisdiction and outside their jurisdiction”. (Salvador Lara, 2018, p. 126), therefore, it obliges all individuals who are nationals of a signatory State, or those who work in the territory of a signatory State, to comply with the rules of IHL and at the same time, it requires that these individuals ensure the compliance of third parties. Without a doubt, this is a way to bind the GAO in the fulfilment of the obligations outlined in international treaties that regulate war; however, it is not a sufficient reason for an individual and his group to accept that a State can judge them for their acts or that even a State with all the power it has treats them as its equal, facts that occur in war.

Initially, in order for the regulations to be known and complied with by a group of nationals, they must be positive in their internal regulations, that is, “the implementation of IHL could not be complete if the sanctions for non-compliance with its stipulations were not regulated at the national level”. (Salvador Lara, 2018, p. 133). When a norm is found in the internal regulation, it facilitates the knowledge of the people who are under the norm, and by knowing a fact and its consequences, the people will avoid carrying out the actions typified so as not to have responsibilities.

Before continuing, the figure of universal jurisdiction must be understood, since from this figure arises the sole obligation that states have to judge those responsible for the four crimes regulated by the Rome Statute (genocide, crimes against peace, crimes against humanity and war crimes). Universal jurisdiction states that the state where the perpetrator is a national or where the crime was committed has preferential jurisdiction to judge the crimes he or she has committed;

but, if the state is not in a position to judge because it cannot (domestic rule does not contain the criminal type) or because it does not want to (the state runs the justice system), one of the state parties can bring this case to the International Criminal Court so that it can judge the citizen for his or her acts.

It follows that a State, as such, does not have an express obligation to criminalise the crimes outlined in the Rome Statute; however, this does not eliminate the responsibility that its citizens will have for the conduct committed since in no way does this lack of domestic legislation represent a condonation, but rather an impossibility of domestic prosecution.

### **3.1. A people's law that regulates behaviour**

The conventions, treaties and written rules governing armed conflict have been criminalised in recent years. In ancient times, it was customary to determine the ranks in which people could participate in armed conflict and to determine how war should be waged.

One of the principles that remain is that specified by Kalshoven and Zebveld (2005) in their work, since all cases that the rule did not provide for should be regulated by the principles of the law of nations, regardless of whether they were civilians or combatants, since these responded to civilised nations, the laws of humanity, and the demands of the public conscience.

Today it is remote to find the terms with which the norm differed in antiquity, but by understanding the environment it is known that when speaking of civilised nations one spoke of those countries that were not under a colonising power, so they could make their own decisions and develop them. The law of peoples is linked to handling these areas because, it is the right of foreigners who develop in national territory, how they were seen in antiquity to organised armed groups, as it was considered that, having conflicts with their state, they felt foreigners in their homeland.

### **3.2. What about organised armed groups?**

It should be understood that there is no way for a GAO to be involved in a negotiation regarding the creation or development of a treaty, as this is an exclusive attribution of States. Therefore, since they do not participate in this part of normative development, and since they are groups contrary to the ideology maintained by the State, there is an apparent conflict in determining what kind of obligations they have.

Moreover, “Governments are seldom willing to recognise insurgent groups as official parties to the conflict, even as a separate entity” (Kalshoven and Zebveld, 2005, p. 81). This recognition would lead to a tacit acceptance of the internal problems that states have and of the lack of control that the armed forces have over the handling of power and state sovereignty, making it difficult for a state, of its own free will, to classify a union of people as an armed group, considering the aspects that this would include.

As states are responsible for the actions of their citizens, they are also responsible for the actions of combatants opposed to the national armed forces, therefore “armed opposition groups engaged in an internal armed conflict must necessarily assume responsibility for the violations committed by their members”. (Kalshoven and Zebveld, 2005, p. 166)

### **3.3. International agreements or custom**

It should be understood initially that, in international relations, the principle of reciprocity is prohibited, since no state can argue the use of force as a means of revenge for the attacks it has received, although in some instances the United Nations Charter allows it.

In this margin a:

The first possibility to explain why GAOs are bound by IHL, this is because it includes provisions that each party to the conflict must respect because they are



created by agreement or custom, where States have given international legal personality to GAO's so that they have rights and obligations under those rules. (Sassóli, Bouvier and Quintin, 2011, p. 251)

With this it should be understood that by international custom or by agreements between states, it has been decided that the GAO can be considered as an international subject in the face of armed conflict, this to maintain a regulation that effectively protects the citizens of a given country and that, furthermore, regulates the means and methods that can be employed from both parties to a conflict so that the objectives for which they are fighting are obtained in an equal manner.

Although custom has shown that both the armed forces and the armed groups have applied the provisions mentioned in Additional Protocol II, the option should be considered that these groups may go against the principles set out. It should be made clear that this does not entitle the State to breach the obligations that have been developed by the Geneva Conventions and their signing, The ICTY is clear when it mentions that "humanitarian law is not based on a system of bilateral relations but establishes a set of absolute and unconditional obligations, making the principle of reciprocity irrelevant" (Salmon, 2012, p. 128). It makes clear the obligations of the parties, the rights that must be respected, the responsibilities that must be met in the event of a violation of the rule and, besides, establishes how the international community must respond in the event of a State's failure to comply.

This reason that compels the GAO is born from the idea that international law is based on a rational law in which nations must accept and apply a law that regulates the development of its very nature since it would be entirely illogical for human beings to seek to end their species due to a lack of regulation or lack of consensus between parties that are handling a situation with excessive hostilities (Alcorta, 2009, p. 34)

Another principle that has determined international custom is that members of armed groups who are fighting as a party away from the state lose their civilian status and can

be attacked under the same conditions as a combatant, i.e. for the principle of distinction, these people are called unprivileged combatants and therefore become a valid target for combat. It is a reason to oblige oneself because it allows them to attack State armed forces under the same conditions and that this assures them that after the conflict, they will not be able to be judged for crimes that as civilians they could be found responsible for, since it must be understood that, in war, the right to life is limited when it comes to parties and combatants in a mutual hostility environment.

### **3.4. As citizens, we respect the decisions of our state**

One of the arguments put forward by the doctrine is based on the fact that an organised armed group has been formed with the intention of fighting and achieving objectives that benefit the whole community, therefore, in their eagerness to achieve this they do not need to go against their population. It has been a much-discussed issue since reality has shown us that they do not necessarily seek to make their population well, but as an armed group, they seek means to survive in a conflict scenario.

Sassóli, Bouvier and Quintin (2011), argue that a State has power over the rules that are imposed on citizens living within a specific territory, which results in them being able to enforce IHL rules effectively. (p. 252)

In this way, it can be understood that IHL effectively coexists with domestic legislation that manages the internal order and has the power to prosecute all persons who violate the rules and then to give a punishment that reflects the coercive power of the State but helps a country to function correctly.

The duty, right and need for the International Committee of the Red Cross (ICRC) to intervene can be reflected within the internal rules since it has the power to teach citizens the basis of these rules and to encourage small groups to act on the principle of humanity, which is necessary for the human losses on both sides to be assessed in similar terms.

Salvador (2016) determines that IHL applies to armed groups because its members are obligated as individuals (p. 7), that is, if a citizen does not comply with the Rome Statute, he or she will have to answer for one of the four crimes, in this case, it will be the war crime, thus having obligations that arise directly from IHL.

In this sense, it is essential to establish that the jurisdiction of a country is born from the membership of a citizen, from the place where the crime was committed or from the specific “universal jurisdiction”, which refers to that, the most affected State has an obligation to prosecute and judge those persons who committed an international crime; however, there could be reasons for not wanting or not being able to do so. Therefore, any State can judge a person regardless of the nationality of the accused or the place where the crime was committed.

Therefore, international treaties would bind members of organised armed groups because they are part of a sovereign population that has ceded individual freedoms to the state to regulate the behaviour of society.

This theory has a small conflict as defined by Professor Ryngaert since to accept a jurisdiction it must accept state representation, and if we accept that representation, why have we formed an organised armed group, being a somewhat illogical reason but still convincing concerning what practice has shown us in recent years.

### **3.4.1. Colombia, an armed group and a revolution**

Currently, Colombia is the only country in the Americas that has an internal armed conflict, and it is essential to determine this point due to the number of internal disturbances that have been reflected in the area.

Within this armed conflict, the least privileged have been civilians and citizens who have been part of all the acts carried out by guerrillas who seek to terrorise the population so that, initially, they do not count the strategies to state members and subsequently, so that they do not find another solution but

to be part of the conflict and have the necessary protection for the development of their lives.

Colombia is an exemplary country in specific actions for the conflict that is developing in its country since it has effectively admitted having a CANI and has decided to apply the rules of IHL with the response and care from the ICRC, which leads to what Valencia (2013) catalogues as “late responsibility” since if a government has been unable to avoid internal armed conflict, must at least assume responsibility for establishing order and justice by legitimate means, respecting the life and inherent rights of the human person, protecting and alleviating the fate of the victims of a conflict that should always have been avoided. (p. 133)

It leads us once again to question what motivates non-governmental forces to respect IHL. Although there is an erroneous reason for these situations, namely, reciprocity, which, as we have already mentioned, does not respond appropriately to IHL and cannot be applied in wartime conflicts, an armed group respects its opponent because it needs to be respected. Moreover, a GAO is the only one who has the capacity to observe the behaviour of its opponent in order to denounce it, so there is a mutual care that facilitates the development of war within humanitarian terms.

### **3.5. Who has territorial control?**

It is essential to understand that when an armed group is formed, it must comply with a requirement in order to be considered as such, a requirement that is to have territorial control in a given area, so these groups need to determine what territorial control entails arises.

The control must be seen as the power to make decisions that favour a given group and that, also, make it possible to fulfil objectives that have been set at a given time in civilisation. It is necessary to understand that the population allows part of its freedoms to be transferred to the State in order to have favourable control.

When we speak of territorial control as such, we are referring to a capacity that initially only corresponded to the States, since they had the power to determine what actions would be developed in an area in order to comply with the needs and objectives of a civilisation.

It is why “armed groups that exercise de facto control over territory, by behaving as states, must assume the same international obligations that are attributed to the states themselves, including those established in IHL” (Salvador, 2016, p. 7). Thus, one more reason arises for the GAO to respect and comply with rules of an international nature that allow civilisation to develop even in an environment where it may be challenging to understand what civilisation is seeking.

## CONCLUSIONS

Armed conflicts, as we have seen, are part of our history, and they continue today in various forms.

International Humanitarian Law seeks to regulate and humanise war by visualising the current need for effective control and the preservation of humanity.

In an armed conflict, there are various participants, with States being the most popular and organised armed groups the newest. There can be international armed conflicts between two or more states, and non-international armed conflicts in which one of the parties may be a state and another party an organised armed group or where both parties are an organised armed group as long as it takes place on the territory of a state.

An armed group must meet the parameters of intensity and organisation. The organisation is measured by the internal hierarchy within the group, by the denomination they use to differentiate themselves, by the uniform and because they openly carry weapons. On the other hand, the intensity is measured by the fact that there must be conflicts over time, the number of victims that these conflicts produce and because they have control over a specific area that leads them to carry out their military operations and recruit citizens effectively.

When talking about organised armed groups, we have been able to conclude that they are considered as subjects of Public International Law at the moment of complying with the norms that are set forth, even though they are not a State, nor do they have the capacity to negotiate for the elaboration of a norm. However, this determination has been the result of several years of conflicts where States have had to give their hand in order to comply, since it is unacceptable that a group, within a State territory, can exercise force without being part of a State entity. This determination has led to the regulation of conflicts in all their forms and to the search for adequate protection of civilians, who should not suffer the damage of war, as far as possible when considering the situation.

As they are considered subjects of the DPI, they must respect and oblige themselves to act by international law, as they can be judged by international courts for all acts that are contrary to the rules drawn up. Since it is necessary to determine the rules that must be considered in a non-international armed conflict, it should be mentioned once again that the law of the Hague, the law of New York, article 3 of the Geneva Conventions and the Second Additional Protocol to the Geneva Conventions are the rules that regulate these particular situations, which are also part of the treaty law that has accepted the participation of organised armed groups as a subject and a party to an armed conflict, with their rights and obligations vis-à-vis international actors or actors with similar conditions.

International custom, as a source of IHL, has shown that organised armed groups have complied with the rules laid down from the time of their creation, without the existence of a persistent objector, so they must respect the general rules and ensure that their actions are proportional and humanitarian, avoiding causing harm to civilians, which is the reason for developing means of protection.

Finally, organised armed groups have obliged themselves to respect IHL for specific reasons listed below.

1. As a rule *erga omnes*, it requires the whole international community to respect it. Therefore, States have an obligation to educate their citizens in the minimum respect of the rules for the conduct of the war, thus ensuring that citizens are aware of how they should act in case of such a situation.
2. In the past, organised armed groups were seen as foreigners, even if they were in their land, and were therefore regulated by a law of nations. Today, international law, in regulating international relations, is considered to be the one that should consider and regulate the relations that may occur in international and non-international armed conflicts, since this form is the most impartial and transparent.
3. By custom, States have allowed citizens to unite to defend their interests when the right to assembly has been exceeded, they have indirectly responded with force to the force that is presented, so it has been admitted that certain groups can become a subject that confronts the State.
4. The organised armed groups are formed by citizens of a state who should respect its internal legislation (considering that the rules of war in most cases are already regulated in each country's regulations) and to accept the jurisdiction of the state in which I have developed.
5. Armed groups are taking on responsibilities that primarily correspond to States; therefore, they must respect the obligations that States have acquired internationally concerning the territory they control and the actions they exercise there.

In other words, there are clear reasons that link organised armed groups with the international responsibility to which they are a party in the event of non-compliance with an international norm, a responsibility that arises from the tacit obligation they have towards IHL.

## RECOMMENDATIONS

As we have already seen, there are sufficient reasons for organised armed groups to respect IHL; however, there are not enough rules to determine the ranges in which they should operate during an armed conflict. It could translate into a tremendous legal vacuum, since, although the customary law binds them, since those who sign, ratify or negotiate a treaty may refuse more intensely to comply with unwritten rules.

Within this margin, it is recommendable that a rule is developed which establishes that, throughout history, organised armed groups have already acted as a subject and party within an armed conflict. For this reason, they should be given the necessary recognition to ensure that the rules of war are fully complied with, all the while considering that, although they are not part of the treaties as such, receiving such recognition would empower States to care for their civilians sincerely as this type of situation is seen to develop.

The doctrine, for its part, has developed an issue that has been quite difficult for States, so using it to develop the rest of the sources of public international law could motivate the development of a complete legal framework that responds to all the needs raised.

Organised armed groups do have reasons and causes for responding positively to IHL. By clearly understanding them it is possible to determine the aspects to be improved and the laws that should be developed to fill the legal gaps that do exist, this as a more suitable means of conflict resolution where the law is respected by each of the parties to a conflict and where the lives of citizens can be seen and taken into consideration as the highest duty of protection that a State has, since it is civilians who allow the State to exist.



## REFERENCES

- Alcorta, A. (2009). *Curso de Derecho Internacional Público*. Buenos Aires: Pablo Coni.
- International Committee of the Red Cross (ICRC). (2008). *Derecho Internacional Humanitario: Respuestas*. Lima: Centro de Apoyo en Comunicación para América Latina
- Kalshoven, F. and Zebveld, L. (2005). *Restricciones en la conducción de la guerra*. 2d edition. Buenos Aires: Latín Gráfica.
- Melzer, N. (2016). *International Humanitarian Law: A comprehensive introduction*. Geneva: ICRC.
- Olivera Astete, J. F. (2018). Capítulo III: La importancia de las medidas de prevención en el Derecho Internacional Humanitario. In R. Méndez Reátegui, (ed.). *Derecho Internacional Humanitario: Ayer y Hoy*. Quito: Centro de Publicaciones de la PUCE.
- Salmón, E. (2012). *Introducción al Derecho Internacional Humanitario*. 3rd edition. Lima: CICR.
- Salvador Lara, J. (2018). Capítulo II: El Gran Mariscal Antonio José de Sucre: Precursor del Derecho Internacional Humanitario. In R. Méndez Reátegui, (ed.). *Derecho Internacional Humanitario: Ayer y Hoy*. Quito: Centro de Publicaciones de la PUCE.
- Salvador, I. (2016). Los grupos armados ante el derecho internacional contemporáneo, obligaciones y responsabilidades. *Revista electrónica de Estudios Internacionales*, (31), (pp. 1-23). DOI: 10.17103/reei.31.11
- Sánchez, J. (2016). *El ámbito de la aplicación del Derecho Internacional Humanitario*. Agenda Internacional (pp. 57-91).
- Sassóli, M., Bouvier, A. and Quintin, A. (2011). *How does law protect in war?* 3rd edition. Geneve: ICRC.

Inter-Parliamentary Union (IPU) and International Committee of the Red Cross (ICRC). (2018). *Derecho Internacional Humanitario: Guía práctica para los parlamentarios*. 2da edición. Paris: Courand et Associés.

Valencia, A. (2013). *Derecho Internacional Humanitario: Conceptos Básicos*, 2d edition. Bogotá: Oficina en Colombia del Alto Comisionado de las Naciones Unidas para los Derechos Humanos.

Zarama, J. (2018). *Exilio Colombiano: Huellas del conflicto armado más allá de las fronteras*. Bogotá: Centro Nacional de Memoria Histórica.

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