



## UvA-DARE (Digital Academic Repository)

### Reconciling the Irreconcilable: Some Thoughts on Belligerent Equality in Non-International Armed Conflicts

Gill, T.D.

**DOI**

[10.1007/978-94-6265-527-0\\_12](https://doi.org/10.1007/978-94-6265-527-0_12)

**Publication date**

2022

**Document Version**

Final published version

**Published in**

Netherlands Yearbook of International Law 2020

**License**

Article 25fa Dutch Copyright Act (<https://www.openaccess.nl/en/in-the-netherlands/you-share-we-take-care>)

[Link to publication](#)

**Citation for published version (APA):**

Gill, T. D. (2022). Reconciling the Irreconcilable: Some Thoughts on Belligerent Equality in Non-International Armed Conflicts. In M. den Heijer, & H. van der Wilt (Eds.), *Netherlands Yearbook of International Law 2020 : Global Solidarity and Common but Differentiated Responsibilities* (pp. 343-357). (Netherlands Yearbook of International Law; Vol. 51). Asser Press. [https://doi.org/10.1007/978-94-6265-527-0\\_12](https://doi.org/10.1007/978-94-6265-527-0_12)

**General rights**

It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

**Disclaimer/Complaints regulations**

If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: <https://uba.uva.nl/en/contact>, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.

*UvA-DARE is a service provided by the library of the University of Amsterdam (<https://dare.uva.nl>)*

# Chapter 12

## Reconciling the Irreconcilable: Some Thoughts on Belligerent Equality in Non-international Armed Conflicts



Terry D. Gill

### Contents

12.1 Introduction	343
12.2 What Belligerent Equality Means	344
12.3 Equality of Belligerents in Civil Conflicts under Traditional International Law	348
12.4 The Effect of the Adoption of Common Article 3, of Additional Protocol II and of Customary Humanitarian Law on the Equal Application of Obligations and the Status of Parties to a Non-international Armed Conflict	349
12.5 The Relationship of Domestic Law and the Humanitarian Law of Armed Conflict and Its Impact on the Notion of Equality of Belligerents in Non-international Armed Conflict	352
12.6 Concluding Remarks: Is Belligerent Equality a Misnomer in the Context of Non-international Armed Conflict?	354
References	356

**Abstract** This short chapter is on the topic of equality of belligerents in the context of non-international armed conflict as a contribution to the theme of this volume on equality and inequality in international law. It is intended to act as a reflection on the extent to which the principle applies in non-international armed conflicts (NIAC) and in particular how the principle of belligerent equality should be seen in relation to the law on the use of force under international law and its relationship with domestic law.

**Keywords** Belligerent equality · international humanitarian law · non-international armed conflict · domestic law · combatant privilege · *jus ad bellum*

### 12.1 Introduction

This short chapter is on the topic of equality of belligerents in the context of non-international armed conflict as a contribution to the theme of this volume on equality

---

T. D. Gill (✉)  
Criminal Law Section, University of Amsterdam, Amsterdam, The Netherlands  
e-mail: [t.d.gill@uva.nl](mailto:t.d.gill@uva.nl)

and inequality in international law. It is intended to act as a reflection on the extent to which the principle applies in non-international armed conflicts (NIAC) and in particular how the principle of belligerent equality should be seen in relation to the law on the use of force under international law and its relationship with domestic law. It will not address related questions such as why International Humanitarian Law (IHL, also referred to as the law of war/armed conflict/LOAC) applies to armed groups, whether the division between international armed conflicts and non-international armed conflicts should be maintained, whether the principle of equality of belligerents results in the applicability of IHL to the territory of States participating in a multinational operation in support of a government of another State which is confronted by an insurgency, or whether armed groups (or for that matter States) are entitled to detain persons belonging to the other party in the context of a non-international conflict under IHL. Neither will any attention be given to which substantive rules apply in NIAC beyond what is strictly necessary to identify the applicable law, or on how they should be applied. All of these topics are without doubt relevant and some are related to a greater or lesser degree to the question of belligerent equality, but they are nevertheless separate from the core question whether the principle of belligerent equality exists in NIAC and if it does to what extent it applies and addressing them here in any degree of detail would risk turning this short chapter into a monograph. I will also not go into the applicable rules of international human rights law and how they relate to the law of armed conflict, other than pointing out where they may coincide or conflict with each other in specific situations. Finally, it should be stressed that this chapter deals solely with the notion of equality of belligerents in the context of non-international armed conflict. Nothing said here should be seen as having any bearing on its validity and function in international armed conflicts. This piece is structured as follows. First I will start with a discussion of what the principle of belligerent equality means- or at least how I perceive it; what it is supposed to do and what it does not address. Second, I will give some attention to how the equality of belligerents was implemented through recognition of belligerency in the period before the notion of non-international armed conflict existed and how this practice fell into disuse to be replaced by the current legal regime applicable to NIAC. I will then go on to examine whether the equality of belligerents under IHL is negated by the lack of combatant privilege and prisoner of war status in NIAC and the fact that domestic law recognizes no equality between a government and any armed group engaged in an insurrection. I will also address the question of how application of obligations under IHL relates to the notion of belligerent equality. I will then close with a few concluding remarks and a suggestion.

## **12.2 What Belligerent Equality Means**

Before discussing whether the principle of belligerent equality applies in NIAC, it is necessary to determine what it actually means. The notion of belligerent equality is rooted in the traditional law of war and is related to the principle that sovereign States

were and still are equal entities under international law. During the eighteenth and nineteenth centuries, war in the legal sense was exclusively waged between States and was premised on a horizontal relationship between the contending parties. Under the international law of that era, States were legally free to wage war at their discretion, although if force was used in the absence of a 'state of war', it did require some kind of legal justification. During this period, the law of war initially emerged during the eighteenth century as a set of customary rules and practices which were gradually codified during the course of the nineteenth century, first at the national and later at the international level. This body of law was seen by the latter half of the eighteenth century as completely separate from considerations that States put forward to justify resort to war on the basis of self-preservation or redress for injury.<sup>1</sup>

By the early twentieth century, the law relating to the use of force had developed into a nascent *jus ad bellum* which limited recourse to war to situations of self-defence or redress for refusal to accept a binding decision by a third-party dispute settlement procedure or a recommendation by the Council of the League of Nations on a question which threatened international peace or stability. The development and further codification of the law of war continued to develop independently of the question whether resort to war was justified under this emerging set of rules regulating under which conditions war was justified. By the time the Second World War broke out, war as an instrument of national policy had become unlawful and resort to war was legally restricted to self-defence or as a collective enforcement measure on the basis of a decision by the League Council.<sup>2</sup> But this was seen as wholly separate from the binding nature of the law of war on all parties to a war, irrespective of whether it was justified or amounted to aggression, as is evident from the separation between the crime of aggression and war crimes in the Charters of the International Military Tribunals following World War II. The decisions of the Nuremberg Tribunal reaffirmed this distinction and made clear that despite the illegality of the resort to war by the Axis Powers, this did not signify that all belligerent acts performed by members of the armed forces of those States during the conflict were illegal under the law of war.<sup>3</sup> The legality or lack thereof of acts performed in the course of the

---

<sup>1</sup> The separation of the law of war from the justified resort to war or *jus ad bellum* was a product of the Enlightenment resulting in the gradual supplanting of natural law just war theory by the "voluntary" positive law of nations, and other developments such as the professionalization of armed forces in service of the State and the desire to limit warfare to avoid the almost total lack of restraint which had characterized much of the warfare of the Reformation. Early theorists, such as Emmerich de Vattel and Christian Wolff, reflected this in their writings. See de Vattel 1758 and Wolff 1749, Chapters 6 and 7. See also Neff 2008, 111–115; Fleck 2013, p. 20.

<sup>2</sup> The League of Nations Covenant (Articles 10–14) limited war to situations where third party resolution or recommendations of the League Council were rejected. Self-defence was considered an inherent right. See Gill and Tibori Szabo 2019, 472–73. The Kellogg-Briand Pact of 1928 outlawed war as an instrument of national policy and had 63 States party at the time WWII broke out. See Dinstein 2017, 87.

<sup>3</sup> Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement differentiated between Crimes against Peace (aggression) and War Crimes in violation of the Laws

war was judged solely on the basis of whether they were unlawful under the law of war and not on the basis of whether they were committed in the context of an illegal war of aggression.<sup>4</sup>

With the adoption of the UN Charter which provides for a primary role of the Security Council in the maintenance of international peace and the prohibition of the recourse to force under Article 2(4) of the Charter, subject to the exceptions contained in the Charter, there was initially some doubt whether the equal application of the law of war was still relevant, particularly in relation to enforcement action by the UN Security Council. For example, some jurists opined in the immediate aftermath of the establishment of the UN that the law of war, premised as it was on the horizontal relationship of equality of belligerent States, was not applicable to situations where the Security Council was engaged in suppressing a breach of the peace or act of aggression.<sup>5</sup> However, soon after the outbreak of the Korean War, the UN and participating States in the UN endorsed action to repel the invasion of South Korea made clear that the law of war was fully applicable to all belligerent parties. This was accompanied by a further development of the law of war in the Geneva Conventions of 1949 which saw an expansion of protection of various categories of persons and for the first time a provision to make a minimum degree of protection applicable in intra State conflicts. More to the point for the present discussion, there was no question of reducing or abolishing the equal application of the law for reasons related to the legality or illegality of the resort to war.<sup>6</sup>

This brings us to the question of what belligerent equality actually signifies and what its effect is. During the period prior to the emergence of the legal regulation and later prohibition of recourse to force, it was essentially a reflection of the sovereign equality of States and their corresponding horizontal and largely reciprocal relationship. The discretion of States to wage war went hand in hand with a desire to restrict the destructive effects of war to some extent and avoid the excesses that had characterized the wars of the of the first part of the Early Modern Era when conflicts such as the Thirty Years War had caused widespread devastation. The law of war was applicable to all parties in a war, irrespective of their motives for engaging in

---

and Customs of War. The Nuremberg Subsequent Trials held in the American Zone of Occupation endorsed the separation and the principle of belligerent equality in relation to acts performed in the course of hostilities in the *Justices* trial decision in 1947 (US vs. Altstoetter et al.) 3 NMT 954, 1027.

<sup>4</sup> *Ibid.* See also the *High Command* trial decision 1948 (US vs. von Leeb et al.) Law Reports of Trials of War Criminals, UN War Crimes Commission XII, 68–69 wherein the defendants were acquitted of Crimes against Peace and were held accountable for “the manner in which they behaved in the waging of war.” (p. 69) and the decision in the *Hostages* case (US vs. von List et al. 1948, 11 NMT, 1230, 1247.

<sup>5</sup> See e.g. Moussa 2008, 963 referring to the 1<sup>st</sup> Session of the ILC and the question whether the law of war had any validity in view of the UN Charter at 965–66. See also Lauterpacht 1953, 206ff.

<sup>6</sup> The commentary to the Geneva Conventions and the position of States are unequivocal in their recognition of the principle of belligerent equality in international armed conflicts since World War II. See Article 2 Geneva Conventions and commentaries and commentary to the Preamble to Additional Protocol I. See in general one of the most influential contributions on the topic by Meyrowitz 1970.

war and acted as a restraint on the destruction and provided for quarter to be granted to enemies who had laid down their arms and surrendered at discretion and protection from attack to undefended localities. It also provided that persons captured in the course of hostilities were to be spared and treated according to their rank and released at the close of hostilities if they had not already been exchanged on the basis of agreement during the course of the conflict. The equality of belligerents essentially meant that the law of war would be applied by and to all State parties to an armed conflict without regard to their reasons for resorting to war on the mutual understanding that they generally respected the law in the conduct of operations and treated captured adversaries accordingly.<sup>7</sup>

Once the resort to war (later to include any use of armed force between States) became subject to legal regulation and later prohibition, the equality of belligerents continued to have essentially the same function; namely to ensure that the applicability of the law of war (later referred to as the law of armed conflict or international humanitarian law) was not dependent upon the legality or illegality of the use of force under international law and applied to all parties, irrespective of justifications or motivations of the parties in resorting to force. This remains so to the present day, at least as concerns armed conflicts between States. The essential rationale now has changed somewhat and is now primarily concerned with ensuring that the humanitarian protection of civilians and persons *hors de combat* is not affected by the legality or illegality of the recourse to force.<sup>8</sup> Equality of belligerents does not signify that the parties to a conflict necessarily have equal or even comparable military capabilities or skills. Nor does it stipulate when the law commences and ceases to apply, where it applies, to whom it applies or how it applies to specific situations; those questions are determined by other rules of the law of armed conflict and in some cases by other relevant international law.<sup>9</sup> It simply provides that in an international armed conflict the legality of the recourse to armed force under the contemporary *jus ad bellum* contained in the UN Charter and customary law will in no way effect the application of the law of armed conflict to all parties to a conflict and that correspondingly if an act is lawful under the latter body of law, the act is not rendered unlawful as a result of whether the State in question did or did not have a legal justification to resort to force in the first place.<sup>10</sup> It is also related to the notion that the parties to an armed conflict are, in principle, bound by the same or at least similar rights and obligations under the law of armed conflict, although this is no longer primarily based upon reciprocity,

---

<sup>7</sup> See sources cited in n. 1 *supra*. For a succinct assessment of how war related to social attitudes and political developments in the 18<sup>th</sup> and 19<sup>th</sup> centuries, see Howard 2008. On the reciprocal and horizontal nature of the traditional law of war, see Greenwood 1983, 221 at 227.

<sup>8</sup> Greenwood 1983, 227; Moussa 2008, 967; Bugnion 2002, pp. 16–17.

<sup>9</sup> The temporal, personal and geographical scope of application of the law of armed conflict are questions dealt with by specific rules and other sources such as the rules relating to combatant and civilian status in the Geneva Conventions and Additional Protocol I, and in relation to the area of war certain rules contained in those conventions and other applicable rules, such as the law of neutrality. See *inter alia* Kleffner 2013, 43ff.

<sup>10</sup> See sources cited in notes 3–7 *supra*.

nor does it necessarily mean that States will always have identical obligations, since they may not be parties to the same treaties in all cases.

### **12.3 Equality of Belligerents in Civil Conflicts under Traditional International Law**

In the period prior to World War II, there were no specific rules of the law of war which applied to insurrections or civil wars. In fact, international law did not apply as a rule to such conflicts unless there were specific reasons to apply it, as when one or both parties engaged in belligerent acts at sea, there was outside intervention in a civil conflict, or the conflict spilled over into the territory of another State. In such cases, a recognition of belligerency could result in the law of war being applied to the contending parties in an internal conflict.<sup>11</sup>

Recognition of belligerency was therefore dependent on whether a conflict had an appreciable direct effect on third States and alternatively and/or additionally whether the conflict had reached the stage of a full-fledged civil war whereby both parties controlled a significant portion of the State's territory, disposed of organized armed forces with a command structure and conducted their operations in accordance with the law of war as a rule, notwithstanding possible violations by individual commanders (or groups of) individual fighters so long as these were not systemic in nature.<sup>12</sup>

However, despite the seemingly reasonably objective nature of these criteria, there was no automatic grant of belligerency once these criteria were fulfilled as a matter of law, although recognition of belligerency by an outside State in the absence of these objective criteria was considered a breach of neutrality. Instead it was a matter which was left to the discretion of either the State where the internal conflict was taking place, and/or third States whose interests were directly affected, for example, as a result of measures of blockade or other belligerent measures which affected their vessels or nationals. Once a recognition of belligerency was made by the parent State, either explicitly or implicitly, the law of war as it then applied between States would apply to both the regular government and the party which had taken up arms against it. The law of neutrality applied to any third State recognizing belligerency.<sup>13</sup> In the absence of any such recognition, only the domestic law of the State where the internal conflict was occurring would apply and anyone captured by the regular forces who had engaged in hostile acts could be punished for taking part in a rebellion on charges of sedition or treason and for unprivileged belligerency, resulting in criminal liability for crimes such as murder, arson and other serious violations of criminal law. Persons who engaged in belligerent acts at sea without belonging to the regular

---

<sup>11</sup> On recognition of belligerency see e.g. Sivakumaran 2012, 9–14; Dinstejn 2014, 108–113, Moir 2002, 3–11.

<sup>12</sup> Sivakumaran 2012, 10–11.

<sup>13</sup> Sivakumaran 2012, 14–16; Moir 2002, 9–11, Dinstejn 2014, 108–110.

armed forces or without license from a State, or recognition as a belligerent were subject to trial and punishment as pirates. In most cases, such charges could result in capital punishment.<sup>14</sup>

The practice of recognition of belligerency fell increasingly into disuse in the latter part of the nineteenth and early twentieth century, with the American Civil War being the last major internal conflict in which it was applied. By the time the Russian and Spanish Civil Wars took place in the Interbellum years between World Wars I and II, it had fallen out of use, despite those conflicts clearly qualifying for such recognition on the basis of the objective criteria of being full-fledged civil wars, conducted by organized armed forces and with significant outside involvement.<sup>15</sup>

The reasons for this decline are not directly relevant to this discussion other than to note that where such conflicts were increasingly seen as clashes between rival ideologies which viewed the causes their opponents were fighting for as inherently unacceptable, it became less likely that the parties would see each other as legitimate participants in an armed conflict on an equal footing, but instead as persons fighting on behalf of a repugnant ideology which allowed for no acceptance as “equals”. For example, despite verbal undertakings to respect the provisions of the Geneva Conventions, the parties in the Spanish Civil War executed captured enemy fighters on a regular basis.<sup>16</sup>

#### **12.4 The Effect of the Adoption of Common Article 3, of Additional Protocol II and of Customary Humanitarian Law on the Equal Application of Obligations and the Status of Parties to a Non-international Armed Conflict**

The adoption of what is now Common Article 3 during the negotiations leading to the Geneva Conventions of 1949 saw for the first time a specific application of elements of the law of armed conflict to non-international armed conflicts in an international convention. The negotiating history leading to the adoption of Common Article 3 has been examined thoroughly elsewhere and need not be repeated here other than to

---

<sup>14</sup> Moir 2002, 17–18 where he notes “The laws of war were *not* (emphasis in the original) automatically applicable to internal armed conflicts in the nineteenth and early twentieth centuries. States may have observed them in some cases through the doctrine of recognition of belligerency (either tacit or express), but this was done out of self-interest and for practical purposes, rather than through the belief that they were so bound by international law”. In the absence of recognition of belligerency persons engaged in armed revolt could be (and often were) treated as traitors. At sea, persons who engaged in belligerent acts without being recognized as belligerents or acting by or on behalf of a State were considered pirates under nineteenth century international law. Indeed one of the chief motivations for recognition of belligerency was the occurrence of belligerent acts at sea such as imposition of blockade. See Moir 2002. See also Kelly 2013, 33–36.

<sup>15</sup> Moir 2002, 19–21; Sivakumaran 2012, 18–19.

<sup>16</sup> Moir 2002, 20; Thomas 1963, 714–15.

point out that the provision represents a compromise and resulted from the rejection of proposals to apply the whole of all four Geneva Conventions to internal conflicts.<sup>17</sup> It is crystal clear in the application of the basic humanitarian obligations contained in it to all parties to a non-international armed conflict. This equal applicability of the obligations is set out in unequivocal terms in the text and is reflected in the commentaries to the provision and in case law. This means in a nutshell that both the State and any non-State parties to a NIAC are under an unconditional obligation to apply the elementary humanitarian protections incorporated in Article 3, regardless whether the other party does or does not do so. The provision is premised upon the conflict having reached a certain but not wholly determinate degree of intensity and the parties having a reasonable degree of organization. The reasons for the applicability of the obligations contained in Article 3 to non-State armed groups need not concern us here other than to note that it is generally accepted that they do and that there are various possible reasons why they do.<sup>18</sup> Additionally clear from the text and negotiating history is that the equal applicability of the obligations contained in Article 3 to all parties in no way affects the status of the parties or implies any degree of recognition of belligerent status or immunity from the application of domestic law by the State to any non-State party. This means that while all parties are under an equal obligation to meet the obligations provided for in Article 3, this in no way affects the legality of measures by the State to suppress and punish acts which are deemed as criminal under its domestic law or provides immunity from prosecution for acts which would be lawful in an international armed conflict, such as conducting hostilities in accordance with the law of armed conflict.<sup>19</sup>

With the adoption of Protocol II which supplements the protections contained in Common Article 3, there was no change in either the equal applicability or in the lack of change in status of the parties and the applicability of domestic law to anyone fighting on behalf of a non-State party to a NIAC. The negotiations leading to Protocol II have likewise been thoroughly examined elsewhere and it is not necessary to repeat what has been said about them.<sup>20</sup> The States involved in negotiating Protocol II were, if anything, even more adamant that the adoption of the obligations contained in the draft text in no way implied recognition of belligerent status, affected their right to suppress rebellion or allowed for any degree of outside intervention in the

---

<sup>17</sup> Sivakumaran 2012, 40–42; Moir 2002, 23–29.

<sup>18</sup> There are various theories on why Common Article 3 and by implication other provisions of humanitarian law treaties apply to insurgents, ranging from the prescriptive jurisdiction of the State to a possible *jus cogens* customary status of basic humanitarian protection. See Moir 2002, 52–58. It matters little which theory one chooses since it is generally agreed that IHL obligations are binding on insurgents. For what it is worth, my view is that this is due to a combination of reasons; the theories put forward are by no means mutually exclusive and all or at least most of them have some merit.

<sup>19</sup> This is abundantly clear from both the text and the negotiating history of Common Article 3, notwithstanding the opinions of various writers to the contrary. See e.g. Moir 2002, 65–66. As discussed below, the equal application of the obligations does not in my view in any way confer belligerent status on the insurgents, absent some kind of recognition or statement to that effect.

<sup>20</sup> Sivakumaran 2012, 49–52; Moir 2002, 91–96.

conflict on behalf of an insurgent movement than had been the case in relation to Common Article 3 of the Geneva Conventions. On the other hand, there can be no doubt that the obligations contained in the Protocol are equally applicable to all parties to a conflict falling within the material scope of Article 1 of the Protocol in States which are parties to it. While Additional Protocol II expands to some extent the basic humanitarian protections set out in Common Article 3, it is more restrictive in material scope and has only been applied in a limited number of internal armed conflicts. Be that as it may, for our discussion it suffices to point out that it neither expands nor restricts the equal application of its provisions and the lack of any effect thereof on the status of the parties or the relationship of IHL to domestic law in NIAC.<sup>21</sup>

As to whether customary IHL relating to NIAC affects the equal application of IHL to all parties and their status, the answer is likewise negative. While customary IHL expands the scope of regulation of NIAC considerably by applying many, indeed most of the rules contained in Additional Protocol I relative to the conduct of hostilities in international armed conflicts to non-international armed conflicts, this does not change the relationship of the parties in a NIAC, the applicability of domestic law to such conflicts which precludes any immunity for acts committed by members of opposition armed groups unless the State chooses to grant a degree of immunity, imply recognition of belligerent status or in any way affect the applicability of any such rules which in fact have obtained customary status to both State and non-State parties. Without going into whether all the rules listed in the ICRC Customary International Humanitarian Law Study as applicable in NIAC have in fact obtained customary status, there is no doubt that to the extent they have, they have binding effect on all parties to a non-international conflict. In short, armed groups have some degree of legal personality under IHL and can be bearers of rights and obligations, although there are few, if any rights which IHL confers on armed groups in the context of NIAC, other than the rights to basic humanitarian protection and treatment which result from the obligations incumbent upon the State or other party which is their opponent. The rules relating to conduct of hostilities which make up the bulk of customary rules which according to the ICRC customary law study are applicable in NIAC, while binding on both parties, do not confer any rights as such on members of armed opposition groups to lawfully conduct hostilities in accordance with their provisions, despite their being liable to prosecution for their violation.<sup>22</sup>

---

<sup>21</sup> During the negotiations for AP II, a significant number of States made clear they did not accept any diminution of the authority of their national law or any recognition of belligerent status and insisted on inclusion of this in the text of the protocol. At the same time, the binding nature of the provisions of AP II on all parties to it and on armed groups engaged in an insurgency on the territory of a State party is equally clear as pointed out by Moir and others. See e.g. Moir 2002, 95–99; Sivakumaran 2012, 48–52.

<sup>22</sup> According to the ICRC customary law study, there are some 141 rules of customary IHL applicable in NIAC. Whether or not this is true, it does not affect the binding nature of such obligations to the extent that any or all are customary law binding on both States and non-State armed groups if they are to have any meaning. The only way customary law could plausibly bind armed groups is through some degree of legal personality under international (humanitarian) law. Nevertheless, this

## 12.5 The Relationship of Domestic Law and the Humanitarian Law of Armed Conflict and Its Impact on the Notion of Equality of Belligerents in Non-international Armed Conflict

In the absence of outside intervention on behalf of a non-State armed group or insurgent movement there are no rules of international law which govern the recourse to force in an internal armed conflict, although the right of the State to suppress armed rebellion on its territory under its domestic law is acknowledged under international law. If force is used anywhere by a State against another State, for example, as a result of outside intervention in an internal conflict on behalf of an armed group, or by a State against an armed group located on another State's territory, the *jus ad bellum* does become relevant in relation to the legality of the use of force between the States in question. But the international law rules relating to the use of force do not govern the use of force between a State and a non-State armed group located on that State's territory or the use of force by one armed group against another armed group unless one or more of the armed groups is acting on behalf of or under the control of an outside State. The absence of the applicability of the *jus ad bellum* to the hostile relationship between a State and armed groups operating within that State's territory or between such armed groups removes one of the main components from the notion of equality of belligerents in such situations.<sup>23</sup> Since, as we have seen, the notion of equality of belligerents has as one of its main premises the complete separation of the international legal rules relating to the use of force from the application of the law of armed conflict, the lack of any such rules in relation to the use of force by or against armed groups within a State (barring outside State involvement or non-consensual use of force on another State's territory) means that belligerent equality is not (wholly) relevant to such situations.<sup>24</sup> Instead, the legality of the use of force by a State against a non-State actor is subject to that State's domestic law. It is unlawful under the domestic law of any State for an armed group to use force against that State or against any other entity or individual without its authorization and subject to its control. On the other hand, State authorities, including the armed forces alongside the police, will usually always have authorization of one sort or another to suppress any insurrection or use of force by a non-State armed group or movement on its territory under its domestic law.

However, as we have also seen, the applicability of the rules of the law of armed conflict to all parties to a non-international armed conflict is well established in both treaty and customary humanitarian law. Hence it is also true to say that another component of the notion of belligerent equality is not affected by the fact that the

---

in no way affects the parallel applicability of domestic law and the power of the State to make any action committed by an armed group a criminal offence, regardless whether it conforms to such customary rules. See Dinstein 2014, 16–17.

<sup>23</sup> Dinstein 2014, 4–6.

<sup>24</sup> See the opening substantive section of this chapter, Sect. 12.2, and the references cited there.

conflict is non-international in character at least as far as obligations under IHL are concerned. Equality of obligation is without doubt a part of the notion of belligerent equality and to the extent a particular rule is unlawful for both parties under IHL, it is evidence that the notion of belligerent equality is not completely absent in relation to NIAC. But unless an act is lawful or unlawful under *both* IHL and domestic law there is no true equality of obligation as long as the application of domestic law is unaffected by the legality of an act under IHL. In relation to the basic protections provided for in Common Article 3 and to a certain extent supplemented under Additional Protocol II and customary law this is true for both parties. Acts prohibited under Common Article 3 (and under AP II or customary IHL, in so far as applicable) will be unlawful for both States and non-State armed groups under IHL and under domestic law as well and their commission will more likely than not constitute a war crime which would render immunity for their perpetration void, at least under international law.

But many other acts which might be lawful under IHL such as conducting hostilities in accordance with its rules will not be lawful for members of armed opposition groups under domestic law and the fact they are lawful under IHL will not have any effect within the domestic legal system, except to the extent the State chooses to give their legality under IHL any weight or influence, for example, by granting immunity for acts which were lawful under IHL or overriding a conviction by means of an amnesty or pardon. While this is encouraged under IHL, the State is under no obligation to do so and any degree of consideration it gives to the fact that an armed group conducted itself according to the law of armed conflict in conducting its operations is completely at its discretion. By contrast, the conduct of hostilities by State armed forces will likewise be subject to both IHL and domestic law, but while violations would be punishable in principle under both, just as they are for armed groups, conducting hostilities by them in conformity with IHL will in contrast to the situation for armed groups not be an offence under domestic law, but on the contrary will be considered necessary and even laudable. What is true of the conduct of hostilities probably also holds true for detention as such (not the treatment of persons once detained, which is governed by Common Article 3 and where applicable Additional Protocol II). Leaving aside whether IHL implicitly provides a legal basis for detention in non-international armed conflict, it will always be unlawful for an armed group to detain members of any State's armed forces or other persons connected to the conflict under domestic law. In contrast, the detention of members of the armed group by the State will be sanctioned under domestic law and to the extent it might conflict with other obligations upon the State, such as those arising under international human rights law, this can be set aside in most cases by a derogation which meets certain conditions.<sup>25</sup> In internal armed conflicts where the opposing parties are

---

<sup>25</sup> The discussion on the topic of detention in NIAC is ongoing and the opinions on its legal basis and whether or not it is an inherent feature of armed conflict are divided, with both sides of the debate having some plausible arguments. See e.g. Hill-Cawthorne 2016, 66–76 for a good synopsis of the contending positions. Regardless of whether IHL confers a right to detain, it is always lawful for State agents to detain insurgents under domestic law and unlawful for insurgents to detain anyone, including in particular members of the armed forces or other State agents by armed groups under domestic law. Hence the lack of equality.

non-State armed groups the situation is essentially the same. Conducting hostilities by members of one armed group against another or detention by armed groups will always be unlawful under the domestic law of the State where the conflict is taking place, irrespective of whether the parties comply with IHL in the conduct of hostilities, unless the State chooses to grant some degree of immunity or pardon. Likewise, detention by an armed group of members of another armed group will always lack any basis in domestic law, regardless of whether it is conducted in accordance with IHL rules on treatment of detainees.

Consequently, we are left with a situation whereby notwithstanding the equality of application of Common Article 3 and to the extent relevant and applicable the rules laid down in Additional Protocol II and customary law, this does not result in any meaningful equality of rights and obligations between the parties to the conflict except in relation to acts prohibited under both IHL and domestic law. There is no gap between these in relation to basic humanitarian protection. Much of the law of armed conflict is, however, about how hostilities must be conducted and the capture and detention of persons pertaining to the adversary party in the context of the conflict. No real equality exists in relation to these actions since domestic law can set aside any lawfulness of an act carried out by (a member of) an armed opposition group under IHL unless the State chooses not to do so. In other words, prohibited acts under IHL are, in principle, unlawful for all parties, and acts which are lawful under IHL may or may not be lawful for all parties under domestic law, depending on what they consist of and what type of activity they relate to and whether the State chooses to make them offences within the scope of its domestic legal order. While it may be true that large scale and protracted internal conflicts may make it somewhat more likely that some degree of immunity will be granted for acts such as conducting hostilities in accordance with IHL for practical reasons, if not for any reasons relating to recognition of anything resembling belligerent status, there is no guarantee this will occur and no (emerging) right to 'combatant' immunity exists or is likely to be accepted anytime soon in NIAC. Hence, while some degree of immunity may be (conditionally) granted by the State to bring about an end to an internal armed conflict, this will not be due to any recognition of legal equality between the State and the armed group under that State's domestic law, since it is always dependent upon the State's discretion, as well as being in some cases simply a consequence of its practical inability to enforce its laws on members of an armed group.

## **12.6 Concluding Remarks: Is Belligerent Equality a Misnomer in the Context of Non-international Armed Conflict?**

When answering the question whether belligerent equality applies in NIAC, we are confronted with what seemingly appears to be a glass which is either half- full or empty. The absence of any relationship between the *jus ad bellum* and the law of

armed conflict because of the absence of the former in non-international conflicts makes any comparison between how the concept of belligerent equality works in the context of international armed conflicts and the relationship between domestic law and IHL in NIAC more or less pointless. The lack of immunity for (members of) armed groups for lawful acts under IHL in NIAC absent a grant of some degree of immunity by the State and the illegality of any rebellion or insurrection under domestic law removes another of the essential components of the notion of belligerent equality. Seen from that perspective, there does not appear to be any relevance of the notion of belligerent equality to acts performed in the context of a NIAC since their potential legality under IHL is rendered moot and the *jus ad bellum* is inapplicable *vis à vis* armed groups on the territory of the State. So far the glass looks to be empty.

On the other hand, the fact that the rules of IHL which are applicable in NIAC are equally applicable to all parties looks at first sight to at least partially compensate for this. At least this means that acts which are unlawful under IHL will be unlawful for both sides and even if the State fails to adequately uphold its obligations and take effective measures to enforce its obligations under IHL, this will in no way diminish the unlawfulness of any act which is prohibited under the law of armed conflict which is perpetrated by any State agent, no less than if it were committed by a member of an armed group or civilian. Equality of obligation is as stated previously also an essential element of the notion of belligerent equality, so it is fair to say that the notion of belligerent equality is not wholly absent in NIAC. But since the equality of obligation does not also include equality of rights under IHL seen in conjunction with domestic law, it is at best only half of the equation. Equality of obligation in the absence of equality of rights is not equality in any meaningful sense, although the fact that IHL obligations apply to all parties irrespective of the lawfulness of the State's right to suppress rebellion and insurrection does have real significance and provides for a legal regulation of actions under IHL (and in many cases also under international human rights law) which used to be completely outside the purview of international law until comparatively recently. So perhaps the glass is half-full after all.

However, I would like to propose a somewhat different approach to this question. Or perhaps more to the point question whether we should even think in terms of belligerent equality in the context of NIAC. To be sure, the equal application of obligations under IHL is present and relevant and plays a very useful role. But that does not signify that the notion of belligerent equality is relevant to NIAC unless something akin to recognition of belligerency takes place. The absence of belligerent status of armed groups goes further than simply the lack of immunity from prosecution under domestic law for lawful acts under IHL. There simply is no question of equality of belligerents in the absence of anything resembling belligerent status in most contemporary non-international armed conflicts. The clear rejection of any recognition of belligerent status in both Common Article 3 and Additional Protocol II is not simply a matter of terminology. It is a rejection of any notion of equality between the parties altogether.

States party to IHL conventions which are applicable to both the State and to any armed opposition movement may be willing to accept they are bound by the

same obligations (even if in many cases they honour those obligations more often in the breach than in practice) and are, in principle, bound to punish violations of those obligations by both their own military and police personnel as well, as by members of the armed opposition which is party to the conflict. But in contrast to international armed conflict where being party to an armed conflict denotes at least legal equality between belligerents, no such equality exists in NIAC. States do not perceive armed groups engaged in rebellion or armed insurrection as their ‘equals’, they do not confer any recognition on them by accepting obligations and they do not grant them any rights other than the right to not be murdered or summarily executed upon capture and to receive basic humane treatment when incapacitated or detained and to be visited by an impartial organization such as the ICRC during detention. This is not much different than the rights anyone has under international human rights law, which coincides and complements these obligations without likewise in any way implying a recognition of a status of equality. In short, despite the equal application of obligations under IHL to all parties, there is no equality of belligerents in the absence of belligerent status. It would be a recognition of reality to stop using that term in relation to NIAC, except in the rare cases where an armed group is implicitly recognized as a belligerent. Instead of ‘equality of belligerents’, it would be more accurate to speak of ‘equality of obligations under IHL’. That is after all what there is; no more and no less.

## References

- Bugnion F (2002) Just Wars, Wars of Aggression and International Humanitarian Law (originally published in French in 84 IRRC, no 847 (2002) 523, reproduced in English at <https://www.icrc.org/en/doc/assets/files/other/irrc-847-2002-bugnion-ang.pdf>)
- de Vattel E (1758) Law of Nations, Book III (‘of War’)
- Dinstein Y (2014) Non-International Armed Conflicts in International Law. CUP, Cambridge
- Dinstein Y (2017) War, Aggression and Self-Defence, 6th edn. CUP, Cambridge
- Fleck D (ed) (2013) The Handbook of International Humanitarian Law, 3rd edn. OUP, Oxford
- Gill TD, Tibori Szabo K (2019) Twelve Key Questions on Self-Defense against Non-State Actors. 95 International Law Studies, 467, 472–73. Available at <https://digital-commons.usnwc.edu/ils/vol95/iss1/15/>
- Greenwood C (1983) The Relationship Between the Jus ad bellum and Jus in Bello. 9 Review of International Studies no. 4
- Hill-Cawthorne L (2016) Detention in Non-International Armed Conflicts. OUP, Oxford
- Howard M (2008) War In European History. OUP, Oxford
- Kelly MJ (2013) The Prehistory of Piracy as a Crime & its Definitional Odyssey. 46 Case Western Reserve Journal of International Law 25, 33–36
- Kleffner J (2013) Scope of Application of International Humanitarian Law. In: Fleck D (ed) The Handbook of International Humanitarian Law, 3rd edn. OUP, Oxford
- Lauterpacht H (1953) The Limits of the Operation of the Law of War. 30 BYIL, 206ff
- Meyrowitz H (1970) Le principe de l’égalité des belligérants devant le droit de la guerre. Éditions A. Pedone, Paris
- Moir L (2002) The Law of Internal Armed Conflict. CUP, Cambridge
- Moussa J (2008) Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law. 90, no. 872 IRRC 963

Neff S (2008) *War and the Law of Nations*. CUP, Cambridge

Sivakumaran S (2012) *The Law of Non-International Armed Conflict*. OUP, Oxford

Thomas H (1963) *The Spanish Civil War*. Penguin Books (1963)

Wolff C (1749) *Law of Nations Treated According to the Scientific Method*. Natural Law and Enlightenment Classics Series, K. Haakonssen Gen. Ed., Liberty Fund (2017)

**Terry D. Gill** Professor Emeritus of Military Law, University of Amsterdam.