Leiden Journal of International Law, 20 (2007), pp. 441–465
© Foundation of the Leiden Journal of International Law Printed in the United Kingdom doi:10.1017/S092215650700413X

Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts

EMILY CRAWFORD*

Abstract

This article examines the possibility of creating a law of armed conflict that could be uniformly applied to both international and non-international armed conflict. The article looks at the history of modern armed conflict, and charts the progression of warfare from a predominantly interstate event to that which is more likely to be characterized as non-international or internal. The increasing prevalence of non-international armed conflicts throughout the twentieth century has lead to ongoing moves on behalf of the international community to bring the regulation of such conflicts further within the ambit of international regulation. With this in mind, the article argues that such moves have blurred the historical distinction between types of armed conflict to the point where the distinction could be eliminated altogether. By looking at international treaties, tribunals, and state practice, this article asserts that the law of armed conflict could be uniformly applied, with the aim of ensuring that all participants in armed conflict are equally and humanely treated.

Key words

harmonization of humanitarian law; humanitarian law; regulation of non-international armed conflicts

1. Introduction

When the International Criminal Tribunal for the former Yugoslavia (ICTY) delivered its decision in *Tadić*,[1] one of the issues it addressed was that of the growing irrelevance of the legal distinction between international and non-international armed conflict. In handing down its decision, the Tribunal stated that the practical nature of modern armed conflict has almost rendered irrelevant the legal distinction between types of armed conflict.[2] Moreover, the Tribunal stated that there are compelling, humanitarian reasons for reducing, if not eliminating, such distinctions.[3] In doing so, the ICTY blurred the traditional legal differentiation between types of armed conflict.

* BA (Hons.), LL B University of New South Wales; Ph.D. candidate, University of New South Wales. I am indebted to Associate Professor Rosemary Rayfuse for her comments on this article.

1. *Prosecutor v. Tadić*, Case No. IT-94–1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 (hereinafter *Tadić*).
2. See ibid., paras. 97–98.
3. See ibid., paras. 97, 119.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

In suggesting that the law of armed conflict could and should be applied more uniformly to all armed conflict, the Tribunal drew on significant debate that has taken place over the last thirty years. This debate has centred on the increasing similarity between types of armed conflict and the diminution of one particular type of conflict, the international armed conflict. In the years since the drafting of the 1949 Geneva Conventions,[4] and particularly since the introduction of the 1977 Additional Protocols,[5] armed conflict has been transformed from an endeavour which was largely the sole provenance of states to one more likely to be conducted within state borders and between individuals of the same nationality. Moreover, the incidence of non-international armed conflict[6] has increased exponentially,[7] far outstripping international armed conflict as the most prevalent form of armed conflict.

International law currently recognizes two types of armed conflict: international and non-international. Currently, the rules for international armed conflict are far more exhaustive than those in place for non-international armed conflict. This raises a conundrum in that international law has in place a comprehensive set of rules governing a type of armed conflict which is no longer the norm. In contrast, the rules applicable to the more prevalent type of conflict – non-international armed conflict – are comparatively limited. Further complicating the situation is the fact that some current armed conflicts are not easily characterized as entirely 'international' or 'non-international'. This is due to complicating elements such as international intervention for either humanitarian or military reasons, the violation of international human rights as a result of the targeting of civilians, and the exodus – sometimes forced – of non-combatants into third states. The indistinct nature of these types of armed conflict makes them difficult to categorize and regulate.

4. The Geneva Conventions, as they are collectively known (and as they will be referred to in this article) are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (hereinafter Geneva Convention I or GC I); the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (hereinafter Geneva Convention II or GC II); the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (hereinafter Geneva Convention III, the POW Convention, or GC III); and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (hereinafter Geneva Convention IV, the Civilians Convention, or GC IV). These are reprinted in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts* (2004), at 459.
5. The Additional Protocols comprise the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 1125 UNTS 3, and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, 1125 UNTS 609. They are generally known as Protocol I and Protocol II (or the Additional Protocols, collectively) and will be referred to as such in this paper. They are reprinted in Schindler and Toman, *supra* note 4, at 775.
6. It should be noted that while internal armed conflicts may also be non-international in nature, not all non-international armed conflicts are also internal armed conflicts. The terms may not be used synonymously. This article will use the terminology of the Conventions, and discuss non-international armed conflicts, except in instances where the specific conflict being discussed has been categorized as an internal armed conflict.
7. A study conducted by the Department of Peace and Conflict Research at Uppsala University, in conjunction with the Conditions of War and Peace Programme at the International Peace Research Institute in Oslo, categorized and analysed all armed conflicts that had taken place following the Second World War. The study found that of the 225 armed conflicts which had taken place between 1946 and 2001, the majority – 163 – were internal armed conflicts. Comparatively few – 42 – were qualified as inter-state or international armed conflicts. The remaining 21 were categorized as 'extra-state' – which were determined as being a conflict involving a state engaged against a non-state group, with the non-state group acting from the territory of a third state. For more on this study, see N. Gleditsch et al., 'Armed Conflict 1946–2001: A New Dataset', (2002) 39 *Journal of Peace Research* 615.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

With these factors in mind this article asks whether the legal distinction between international and non-international armed conflicts remains viable or whether international law should move to maintain its consonance with the situations it seeks to regulate by developing a unified legal regime applicable to all armed conflicts. As both the *Tadić* decision and the recently published International Committee of the Red Cross (ICRC) study on the customary status of international humanitarian law (IHL)[8] demonstrate, there is considerable precedent to support the elimination of the legal distinction between international and non-international armed conflicts.

This article examines the case for a unified body of international humanitarian law, applicable in both international and non-international armed conflicts. Section 2 begins with a discussion of the evolution of the legal conceptualization of armed conflicts and the distinction between the types of armed conflict, from the pre-Geneva Conventions era up to the Additional Protocols.[9] Section 3 examines the post-Protocols era, culminating in an analysis of the *Tadić* decision and the academic debate which has flowed from it. Section 4 explores whether the continuing legal distinction between types of armed conflict remains tenable, specifically in the light of the ICRC study, and section 5 analyses and assesses the legal and policy arguments regarding the creation of a uniform code of conduct in all armed conflict. It will be concluded that while there are sound policy reasons for doing so, there remain a number of major constraints in the current international legal system to impede the creation of a unified law. Finally, it should be noted that the approach to international humanitarian law in this article is from a 'protection' viewpoint, coming from the idea that humanitarian law should seek to protect individuals in times of armed conflict. This is in contrast to the perspective that IHL seeks to protect and guide states in their armed conflicts with other states or entities. The emphasis in this article is that the laws of armed conflict must serve to protect the individual, and be interpreted to uphold this intent.

2. The origins and development of the distinction between international and non-international armed conflicts

2.1. Pre-1949 conceptions of armed conflict

Prior to the twentieth century, classical international law recognized two types of armed conflict.[10] The first type – the conventional conception of 'war' – was understood as an armed conflict between two states. If such conflict occurred, the

8. J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules, Vol. 2: Practice* (2005) (hereinafter ICRC study).
9. Due to the limited scope of this article, attention will be paid explicitly to the development of international humanitarian law as it was expressed in the major international and diplomatic conferences which resulted in the drafting of the Geneva Conventions and the Additional Protocols. While state practice is obviously of critical importance, it is not possible to explore, in depth, the practice of states regarding international and non-international armed conflicts in such a short article. As such, the landmark work of the Geneva Conventions and the Additional Protocols will instead serve as the arbitrary milestones and signifiers of the state of the law of armed conflict.
10. See D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979-II) 163 *Recueil des cours* 121, at 125.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

laws of war automatically became applicable; the laws of neutrality would also come into effect between the belligerents and any third states. The second type of war was 'civil war', which was a condition of armed conflict between a state and an internally located insurgent movement that had taken up arms against its own state. This was traditionally considered to be a matter of purely domestic concern, and did not usually involve any international legal regulation at all. Only if the 'host' state or a third state recognized the insurgents as belligerents did the laws of war come into effect between the parties.[11]

These classifications stood until the early part of the twentieth century. However, the atrocities of the Second World War and the Spanish Civil War prompted a rethinking of the system for regulating armed conflict. The immediate postwar era saw a push towards further codification and clarification of the laws of armed conflict, with attention focused on maintaining the fundamental principle of distinction between civilians and combatants, and upholding the notion that those *hors de combat* should be treated humanely. These principles found further elucidation in the Geneva Conventions of 1949.

2.2. The Geneva Conventions and post-1949 legal conceptions of armed conflict

The Geneva Conventions of 1949 redefined the concepts of 'war' and 'civil war' as 'international armed conflict' and 'non-international armed conflict' (or 'armed conflict not of an international character'[12]). International armed conflict as defined in the Geneva Conventions is essentially similar to traditional legal notions of the concept of 'war', revolving around the idea of a condition of belligerency[13] in existence between two states. However, as defined in Article 2 common to the four Conventions, the notion of armed conflict is, arguably, somewhat broader, since it incorporates all instances of 'declared' war, as well as any and all other engagements between states where armed forces are used.[14] In this respect the

11. In practice, this kind of recognition of belligerency was exceptionally rare, with Detter noting that, historically, there have only been a mere handful of instances where third states (and even fewer host states) gave formal recognition to an insurgent movement. See further I. Detter, *The Law of War* (2003), 41. For a more exhaustive analysis of the both the concept of recognition and the nature of recognition of insurgency and belligerency, see W. Wilson, 'Recognition of Insurgency and Belligerency', (1937) 31 *ASIL Proceedings* 136, and H. Lauterpacht, *Recognition in International Law* (1947) (specifically chs. 12–17).
12. As termed in Common Article 3.
13. In this instance, the word 'belligerency' is used in its non-legal sense. That is to say, belligerency is used synonymously with armed conflict, or armed hostilities.
14. Detter argues that the concept of 'declaring war' was effectively redundant by the time of the Geneva Conventions anyway. See Detter, *supra* note 11, at 9; C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), 43; see also generally D. Schindler, 'State of War, Belligerency, Armed Conflict', in A. Cassese (ed.), *The New Humanitarian Law of Armed Conflict* (1979), 3. The Hague Conventions III of 1907 (Hague Conventions III Relative to the Opening of Hostilities, 1907, 3 NRGT, 3 série, 437, Art. 1) contained an obligation to make a declaration of war. Unsurprisingly, no such equivalent condition is contained in the Geneva Conventions. Indeed, as Detter notes, it could hardly be expected that, following the banning of war in the UN Charter, such a provision could be maintained; declarations of war in this instance would be 'politically awkward' and thus there was no need to include a provision requiring a declaration of commencement of hostilities. Detter, *supra* note 11, at 12. For a more historically oriented assessment of the importance of 'declaring war', see M. Glover's *The Velvet Glove: The Decline and Fall of Moderation in War* (1982), 19.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

Geneva Conventions have widened the scope of the law applicable in international armed conflicts.[15]

During the negotiations of the Geneva Conventions there was also discussion as to whether the law of war in its entirety should be applicable in instances of civil war (or, as newly termed, non-international armed conflict). The suggestion was, however, rejected, since 'States were not prepared to accept an obligation to apply the fullness of the detailed and complicated provisions of the Conventions in such internal situations'.[16] This difference in treatment was a reflection of the international law system as it stood at that time. Civil wars had traditionally been seen as matters of purely domestic concern. Unless there was recognition of belligerency,[17] states generally resisted any international involvement in their civil conflicts and, furthermore, were reluctant to cede any of their sovereign rights to the international legal order.[18] However, the scope, intensity, and brutality of the Spanish Civil War demonstrated to states that they could not ignore non-international armed conflicts entirely. If steps were being taken to address the lacunae of existing laws of armed conflict, then non-international armed conflicts had also to be examined.

To that end the Geneva Conventions introduced Article 3 common to all four Conventions,[19] which set down some fundamental, albeit limited, principles governing conduct in non-international armed conflicts. In doing so, the Conventions replaced the traditional notion of 'civil war', and brought such conflicts within the partial provenance of international law. Often called a '"mini-convention" or a "convention within the conventions"',[20] Common Article 3 provides some minimal guarantees for ensuring respect for the fundamental principles of international humanitarian law in non-international armed conflicts.[21]

While the move towards introducing some form of international legal regulation of non-international armed conflict may have been considered groundbreaking, the protection afforded by Common Article 3 for participants in non-international armed conflicts is of a considerably lower level than that afforded in the case of international armed conflicts.[22] Important legal consequences therefore follow from

---

15. See F. Kalshoven and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (2001), 38.
16. Ibid., at 38. See also *Final Record of the Diplomatic Conference of Geneva, 1949*, Vol. IIB, 9–15; J. Pictet (ed.), *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), 38 (regarding the drafting history of Common Article 3).
17. Which was, as noted, extremely rare. See note 11, *supra*.
18. See M. Sassòli and A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (1999), 202. Georges Abi-Saab refers to this state reluctance to apply all the laws of war to all armed conflicts as the 'natural consequence of the sovereignty reflex of states'. G. Abi-Saab, 'Non-International Armed Conflicts', in UNESCO, *International Dimensions of Humanitarian Law* (1988), 217.
19. Or Common Article 3, as it is also known.
20. Kalshoven and Zegveld, *supra* note 15, at 69.
21. In case of armed conflict 'not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict' must provide basic protection for 'persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause'. There are also prohibitions on various acts, including murder, torture, the taking of hostages, humiliating and degrading treatment, and summary sentencing and executions, with further provision that the 'wounded and sick be collected and cared for'.
22. Compare one article – Common Article 3 – which deals specifically with internal armed conflict, with the 400 or so provisions of the Geneva Conventions relating to international armed conflict.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

whether a conflict is designated as international or non-international. Accordingly, characterization of the conflict is crucial to determining what level of protection is provided for combatants and civilians – especially those wishing to rely on the protection afforded under the Third Geneva Convention regarding prisoners of war.

In the decades following the end of the Second World War, there were fundamental changes in the manner in which armed conflict was conducted, and by whom. Internal and non-international armed conflicts were becoming more frequent, in large part due to the processes of decolonization fracturing traditional states and administrations, revealing sometimes centuries-old ethnic, religious, cultural, and clan-based tensions. This was seen in a number of instances, including the Hutu–Tutsi conflicts in Rwanda following independence from Belgium and the continuing tensions and conflicts, consequent to Britain's removal in 1948 from the area, in what was known as the British Mandate of Palestine, comprising modern-day Israel, Jordan, and the territories currently governed by the Palestinian Authority.

These 'new' non-international armed conflicts were also marked by new levels of brutality. The vast bulk of casualties in non-international armed conflicts were invariably civilians or non-combatants. The *de minimis* rules provided for in Common Article 3 were insufficient to the task of regulating such widespread and brutal conflict. There also emerged a type of armed conflict that possessed qualities of both international and internal armed conflict. This hybrid creation came to be known as 'internationalized' armed conflict.[23]

Given these developments, it became evident that a revision of the law was required. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts was convened in Geneva in four stages from 1974 to 1977. The Conference led to the adoption of the Protocols Additional to the Geneva Conventions.

2.3. Additional Protocol I: wars of national liberation as international armed conflicts

One of the major changes to the regulation of armed conflict resulting from the Additional Protocols was the elevation of the so-called 'wars of national liberation' from a non-international armed conflict to the stratum of an international armed conflict. Additional Protocol I provides for its application in situations that are deemed to be

> Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[24]

23. The ways in which a conflict can become internationalized vary; foreign intervention and the flow of refugees from a war zone across state borders are ways in which a traditional internal armed conflict becomes internationalized. See Schindler, *supra* note 10, p. 126; J. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', (2003) 85 *International Review of the Red Cross* 313.
24. Additional Protocol I, *supra* note 5, Art. 1(4).

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

However, while the inclusion in an international regulatory system of what were traditionally considered to be civil wars was innovative, the Protocol has numerous drawbacks. 'National liberation wars', as envisaged in Article 1(4), are limited in definition. As Schindler argues, not all wars fought in the name of self-determination can be considered 'wars of national liberation' under the provisions of Additional Protocol I. In particular, where an armed conflict is fought against an oppressive regime that is neither colonial nor alien in origin, nor racist in its policies, the Protocol does not apply, and the combatants are not designated as lawful. Wars fought against anything other than those three types of domination fall outside the ambit of Protocol I.[25] Further complication arises where more than one 'liberation movement' becomes involved in a conflict. The Protocol contains no system for determining which liberation movement can be considered the 'legitimate' representative of those seeking self-determination. In addition, where liberation movements are engaged in conflicts against one another rather than against the state, the Protocol again does not apply.[26]

Additional Protocol I is thus somewhat obsolescent, in that its limited scope allows only for the Protocol's applicability in a finite number of situations. At the time of the Protocol's adoption Schindler argued that Protocol I would become anachronistic before it could ever be put into practice: 'once the last remains of European colonialism and of the predominance of the white race will be overcome, the provisions on wars of national liberation will probably not be applied anymore'.[27] Furthermore, he also noted that the restrictive ambit given to the Protocol seemed arbitrary:

> Why should the victims of a war of secession, such as in Biafra and Bangladesh, be less protected than those in a war against colonialism or a racist regime? Of course, one can answer that it is just as wrong to treat victims of international and non-international armed conflicts differently. As long as humanitarian international law distinguishes between international and non-international conflicts, such injustice will be inevitable.[28]

2.4. Additional Protocol II: non-international armed conflicts

In the years following the drafting of the Geneva Conventions, the changing nature of armed conflict, in terms of means, methods, and participants, and the increase in frequency and brutality of non-international armed conflicts,[29] made it evident that

---

25. Schindler, *supra* note 10, at 137.
26. For more detailed assessment of Protocol I, see M. Bothe, K. Partsch, and W. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (1982); G. Aldrich, 'New Life for the Laws of War', (1981) 75 AJIL 764; H. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions* (1979–1981); Y. Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987).
27. Schindler, *supra* note 10, at 144; Schindler's argument held true nearly twenty years later. When writing on the development of international humanitarian law (IHL) in the twentieth century, he noted that the inclusion of 'wars of national liberation' in the stratum of international armed conflict had lost its importance with the end of colonialism and apartheid. See D. Schindler, 'International Humanitarian Law: Its Remarkable Development and Persistent Violation', (2003) 5 *Journal of the History of International Law* 165, 173.
28. Schindler, *supra* note 10, at 138.
29. As seen in the conflicts in the Congo and Yemen, for example, where civilians were often targeted, 'POWs' and other detainees were often summarily executed, and as seen in the Yemeni civil war, poison gas was

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

the minimum provisions of Common Article 3 were barely adequate to address this escalating type of conflict. The need to develop new laws was apparent.

To that end, Additional Protocol II was drafted, to address non-international armed conflicts and fill some of the lacunae left by the regulatory system of Common Article 3. Additional Protocol II applies to

> All armed conflicts not covered by Article 1 . . . of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[30]

Additional Protocol II is limited in scope by a number of qualifiers. Before the Protocol can be activated, dissident forces have to exercise control over part of their host state's territory.[31] The fighting must be sustained or protracted, and rise above mere 'internal tensions', 'riots', and other 'isolated and sporadic acts of violence'. The applicability of the Protocol is also dependant on the dissident forces being able to 'implement' the Protocol. Thus where an armed group does not retain some measure of territorial control, or is unable to implement the Protocol, the Protocol does not apply.

In addition, the issue of multiple non-state parties[32] to the conflict is not addressed. Unlike Common Article 3, which foresees the possibility of multiple dissident groups engaging in a non-international armed conflict, Article 1 of Protocol II determines that the Protocol is applicable only in situations of armed conflict between a dissident armed group and the armed forces of a high contracting party and not as between different armed groups. Furthermore, any situation where there is no recognized government, but only insurgent or opposition groups fighting one another for control, as witnessed in Angola and Somalia, for instance, results in the inapplicability of Protocol II. The cumulative effect of these restrictions is that Protocol II remains significantly more limited than Common Article 3.

3. Post-1977 changes to the nature of armed conflict and the *Tadić* case

While going some way to addressing the new realities of modern armed conflict, the Protocols fell short of the mark in some major respects. Most significant of these was the creation of a more restrictive regime for the regulation of non-international

used in bombing runs on villages. See K. Boals, 'The Relevance of International Law to the Internal War in Yemen', and D. McNemar, 'The Post-Independence War in the Congo', in R. Falk (ed.), *The International Law of Civil War* (1971).

30. Additional Protocol II, *supra* note 5, Art. 1(1).
31. This recalls one of the crucial elements in the test for belligerency status. See Lauterpacht, *supra* note 11, ch. 12. Protocol II is further limited in that it does not cover situations of internal violence or unrest which do not reach a level of sustained or protracted armed conflict, defined in Art. 1(2) as 'internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'. Additional Protocol II, *supra* note 5, Art. 1(2).
32. That is, non-state parties engaged in conflict either between themselves, or multiple non-state actors all engaged against the current government or administration.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

armed conflicts. Furthermore, the authors of the Protocols neglected to ensure some form of legal recognition of 'mixed' armed conflicts. These are armed conflicts that may have started as internal conflicts but due to factors which may include third-state intervention or to the scope and magnitude of the conflict, have become something that transcends categorization as internal.[33] The need to broaden international humanitarian law to accommodate this type of armed conflict has been argued for by the ICRC for some time. In 1971, the ICRC submitted a report to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, recommending that

> When, in case of non-international armed conflict, one or the other party, or both, benefits from the assistance of operational armed forces afforded by a third State, the parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts.[34]

This suggestion was intended to ensure that participants in internationalized armed conflicts would have the same prisoner-of-war rights as combatants in international armed conflicts. However, the recommendation was rejected by the Conference. Many government experts worried that the institution of such a rule would encourage parties to a civil war to seek foreign involvement in order to trigger the application of the Conventions. Additionally, it was feared that insurgent groups would use this provision as a mechanism to enhance their international standing.[35]

What 'internationalized' armed conflicts contributed to the arena of armed conflict in general was a continued blurring of the traditional distinctions between international and non-international armed conflict. Indeed, as Bassiouni and Manikas noted, state practice generally was clearly beginning to blur the traditional boundaries that separated the legal norms prescribed for internal and non-international armed conflicts:

> The evolution of the law illustrates the growing tendency to apply basic humanitarian norms regardless of whether the individuals to be protected are combatants or non-combatants, or whether the conflict is essentially international or intra-state. Increasingly, factors such as the level of violence, the threat to regional and international stability and the importance of the international humanitarian norm to be protected trigger international humanitarian interventions. If the international community is

33. See Schindler, *supra* note 10, at 126.
34. ICRC, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1971), para. 290; see also Stewart, *supra* note 23, at 314. In the report tendered by the ICRC the following year on the same issue, the Committee made a more restrained recommendation – in this instance suggesting that the full body of IHL be applicable only once an internal armed conflict was internationalized by third-state intervention on behalf of *both* sides to the conflict; this suggestion also failed to win approval. See ICRC, *Report on the Work of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts* (1972), I, paras. 2.332–2.350.
35. See W. Reisman and J. Silk, 'Which Law Applies to the Afghan Conflict?', (1988) 82 AJIL 459, 466; see also H.-P. Gasser, 'Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon', (1983) 33 *Auckland University Law Review* 145. The matter of internationalized internal armed conflicts was also discussed by the ICTY in *Tadić*, where the Appeals Chamber examined the criteria for internationalization. See *Prosecutor v. Tadić*, Case No 94-1-A, Judgement, 15 July 1999, para. 84 (hereinafter *Tadić* Appeal Judgement).

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

> to take effective action in such situations, new operating definitions of international and non-international conflicts are needed.[36]

That the rules governing international armed conflict were, in practice, becoming applied more often in non-international armed conflicts[37] underscores a fundamental point that numerous academics had been making for decades: that the gradations of legal protection and regulation for the different types of armed conflict were a false distinction, and the distinction between international and non-international armed conflict was becoming meaningless.[38] Moreover, continuing the distinction between types of armed conflict was, as Reisman argues, an unacceptable 'policy error'[39] in need of rectification:

> The terms 'international' and 'non-international' conflict import a bipartite universe that authorizes only two reference points on the spectrum of factual possibilities. The terms are based on a policy decision that some conflicts . . . will be insulated from the plenary application of the law of armed conflict – even though such conflicts may be more violent, extensive and consumptive of life and value than other 'international' ones. The terms are, in effect, a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation. This exclusion is not one that comports easily with the manifest policy of the contemporary law of armed conflict, which seeks to introduce as many humanitarian restraints as possible into conflict, without judgments about its provenance, its locus, or about the justice of either side's cause.[40]

The primarily academic debate regarding the blurring of legal boundaries between types of armed conflict was furthered with the decision of the Appeals Chamber of the ICTY in the interlocutory appeal on jurisdiction in the *Tadić* case.[41]

---

36. M. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1996), 479.
37. See, for instance, the statement made by the Democratic Republic of the Congo in 1964, in which the Congolese government declared its intention to abide by certain principles of humanitarian conduct in its civil war, including limiting its action to military objectives, and calling for the ICRC to observe its commitment to upholding basic humanitarian standards. Public Statement of Prime Minister of the Democratic Republic of the Congo, 21 October 1964, repr. in (1965) 59 AJIL 614, 616. See also the Operational Code of Conduct for Nigerian Armed Forces, issued in 1967, which stated that, in Nigeria's conflict with the Biafran rebels, Nigerian troops were 'in honour bound to observe the rules of the Geneva Convention'. Directive to All Officers and Men of the Armed Forces of the Federal Republic of Nigeria on Conduct of Military Operations, para. 3, available at http://www.dawodu.com/codec.htm (accessed 28 Sept. 2006). See also L. Moir, *The Law of Internal Armed Conflict* (2002), 79–84 (briefly analysing the Nigerian civil war, specifically in relation to adherence to Geneva law).
38. See, for example, Reisman and Silk, *supra* note 35, at 465 (arguing that the 'distinction between international war and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law').
39. W. Reisman, 'Application of Humanitarian Law in Noninternational Armed Conflicts: Remarks by W. Michael Reisman', (1991) 85 *ASIL Proceedings* 83, at 90.
40. Ibid., at 85.
41. The scope of this article does not permit any sort of extensive analysis of the *Tadić* case. For an assessment of the case and its significance, see M. Scharf, 'Case Note on *Tadić*', (1997) 91 AJIL 718; C. Greenwood, 'International Humanitarian Law and the *Tadić* Case', (1996) 7 EJIL 265; M. Sassòli and L. Olsen, 'The Judgment of the ICTY Appeals Chamber on the Merits in the *Tadić* Case', (2000) 839 *International Review of the Red Cross* 733; C. Warbrick and P. Rowe, 'The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadić* Case', (1996) 45 ICLQ 691. For further information on the history of the case and appeals, with full transcripts, see the ICTY webpage at http://www.un.org/icty/index.html. It should also be noted that debate regarding the characterization of the armed conflict in the former Yugoslavia was not limited to the ICTY in *Tadić*. Indeed, much analysis and argument on this issue was witnessed in the UN General Assembly and in the Security Council. This debate

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

For the first time, a judicial body stated that the increasingly widespread and brutal internal and non-international armed conflicts that had occurred in the post-Second World War era had brought about a fundamental change in the nature of modern armed conflict. Maintaining the legal distinction between the types of armed conflict was becoming less tenable as the categories of armed conflict began to multiply and blur.[42] As the ICTY saw it, state practice was beginning to undermine the traditional notions of the strict separation of types of armed conflict:

> [I]n the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.[43]

The Tribunal noted further that 'what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife'.[44] In drawing these conclusions, the ICTY looked at a number of sources, including the practice of states involved in civil and internal wars, from the Spanish Civil War,[45] through to the conflicts in the Democratic Republic of the Congo,[46] Nigeria,[47] and El Salvador.[48] The Tribunal also looked at UN resolutions,[49] declarations made by the European Union,[50] and state military manuals.[51]

---

was primarily focused on the matters of the claims brought by Bosnia and Herzegovina in the ICJ against Yugoslavia (Serbia and Montenegro); on the issue of the claims by Yugoslavia (Serbia and Montenegro) to recognition as the successor state of the former Yugoslavia, and thus to the former Yugoslav seat in the UN; and on the matter of the arms embargo on the former Yugoslavia. See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Federal Republic of Yugoslavia (Serbia and Montenegro))*, Request for the Indication of Provisional Measures, 20 March 1993, [1993] ICJ Rep. 3, 325. For analysis of this area, see C. Gray, 'Bosnia and Herzegovina: Civil War or Inter-state Conflict? Characterization and Consequences', (1996) 67 *British Year Book of International Law* 155.

42. See *Tadić*, *supra* note 1, para. 97 (ICTY Appeals Chamber noting that the growing influence of human rights law has made the distinction between types of armed conflict less tenable).
43. Ibid., para. 97.
44. Ibid., para. 119. Nevertheless, it should be noted that the ICTY Appeals Chamber's statements on the 'rightness' (and 'wrong-ness') of the gradations of humanitarian protection were not actually fundamental to the final ruling on the character of the conflict in the former Yugoslavia, but rather *dicta*. It should also be noted that the ICTY did not actually criticize the distinction between types of armed conflict, or question its legality; rather it commented, as an aside, as to whether such a distinction was 'right' (as opposed to 'legally correct').
45. Ibid., paras. 100–101.
46. Ibid., para. 105.
47. Ibid., para. 106.
48. Ibid., para. 107.
49. GA Res. 2444, UN Doc. A/7218 (1968); GA Res. 2675, UN Doc. A/8028 (1970) (discussed in *Tadić*, *supra* note 1, paras. 110–112). The Appeals Chamber, at paras. 113–114, also discussed Security Council resolutions regarding IHL; these are mentioned in this article in section 4, *infra*, regarding the customary international law of armed conflicts.
50. *Tadić*, *supra* note 1, paras. 115–116.
51. The German *Military Manual*, as cited in ibid., para. 118.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

In the wake of the *Tadić* decision a considerable portion of academic debate approved the Tribunal's statements about the diminution of the distinction between types of armed conflict. Aldrich noted, 'reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories – international and non-international – into which international humanitarian law is divided'.[52] Detter concurred, asserting that 'it is difficult to lay down objective criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulation of rules of the Law of War for the two types of conflict'.[53] Despite such acknowledgement, however, academic debate remained circumspect. While most agreed that the inequality in applicability of laws of armed conflict was an undesirable condition, few were prepared to say that the laws could be universally applied. Zegveld argues that 'while there is . . . a clear trend in international practice to diminish the distinction between humanitarian law for international as opposed to for internal conflicts, the distinction between these conflicts has not been abolished'.[54] Indeed, some authors are wary of this perceived conflation of the laws of war. As Sassòli and Olson see it, there is a risk that standards of protection might be reduced if such universal applicability were to be adopted, since states would always seek to preserve their sovereignty in preference to safeguarding the rights of their nationals, especially over the rights of their current and future adversaries.[55]

Indeed, it should be noted that, despite its argument of 'legal blurring', the ICTY was itself cautious in its assessment of how far this blurring has gone, asserting that

> The emergence of the . . . general rules on internal armed conflict does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.[56]

An example of this circumspection is demonstrated in the decision of the ICTY not to argue that grave breaches could be committed in non-international armed conflicts, which remains a significant distinction between international and non-international armed conflict.[57]

52. G. Aldrich, 'The Laws of War on Land', (2000) 94 AJIL 42, at 62.
53. Detter, *supra* note 11, at 49.
54. L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), 35.
55. Sassòli and Olson, *supra* note 41, at 746.
56. *Tadić*, *supra* note 1, para. 126. See also ibid., paras. 100–126 (outlining those principles of conduct in international armed conflict that have been extended to cover internal armed conflicts, rules which are essentially correlate to the protections of Common Article 3, including protection of civilians and civilian objects, protection for those *hors de combat*, the requirement that targeted objects must be legitimate military objects, the prohibition on perfidy, and the affirmation that the dual principles of distinction and proportionality should be upheld).
57. Note, however, that Judge Abi-Saab, in his separate opinion, did argue that grave breaches could be committed in non-international armed conflicts. By taking a teleological approach to the Geneva Conventions, Abi-Saab argued that 'a strong case can be made for the application of Art. 2 [of the ICTY Statute], even when the incriminated act takes place in an internal conflict'. Ibid., Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, at 2.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

4. The ICRC study on IHL and the customary international law status of the laws of armed conflict[58]

Policy arguments for doing away with the distinction between international and non-international armed conflict have a long pedigree. Lauterpacht argued, even before the adoption of the Geneva Conventions, for the universal application of the rule of law in armed conflicts:

> A clearly ascertained state of hostilities on a sufficiently large scale, willed as war at least by one of the parties, creates *suo vigore* a condition in which the rules of warfare become operative . . . once a situation has been created which, but for the constitutional law of the state concerned, is indistinguishable from war, practice suggests that international law ought to step in in order to fulfil the same function which it performs in wars between sovereign states, namely, to humanize and regularize the conduct of hostilities as between the parties.[59]

However, policy arguments alone are not enough to make a viable case for the elimination of the distinction between types of armed conflict. Support for the proposition needs to be found in other sources of international law, namely state practice and *opinio juris*.[60] As noted in *Tadić*, there is historical precedent, going back as far as the Spanish Civil War, to support the contention to eliminate the distinction.[61] Thus, while the traditional distinction between types of armed conflict has indeed been a hallmark of IHL, this demarcation has not always been strictly observed. Indeed, as Abi-Saab notes,

> This legally radical separation of internal wars from the international level, was not . . . as rigorously observed in practice as it sounded in theory. One can cite numerous instances, both before, and particularly after the Napoleonic wars, of intervention by major European powers against democratic uprisings in Europe, not to speak of their increasing interest in conflicts arising in different parts of the Ottoman Empire, and in their extra-European spheres of influence as a prelude to their formal colonization; or of the intervention of the United States in the frequent internal upheavals in Latin America.[62]

---

58. For more on the ICRC study, *supra* note 8, see generally J.-M. Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', (2005) 87 *International Review of the Red Cross* 175; and M. MacLaren and F. Schwendimann, 'An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law', (2005) 6 *German Law Journal* 1217.
59. Lauterpacht, *supra* note 11, at 246.
60. Why the customary status of IHL rules is of such importance lies with their universal applicability. IHL rules, difficult to formulate and apply at the best of times, even with widely accepted treaties, are only part of the picture. It is the universal applicability of customary international law that is of critical importance – for a state which may deny the applicability of a specific rule of international law as outlined in treaty form (because it is not party to the treaty) has no such recourse if that same rule is also to be found in customary international law. Thus if foundations for a uniform code of conduct in armed conflict can find enough of a basis in customary international law, the kinds of arguments forwarded by states during the drafting of the Conventions and the Protocols regarding the inapplicability of international law to internal conflicts can be refuted, due to the alternate source of the obligation found in state practice and *opinio juris*.
61. Indeed, the Appeals Chamber in *Tadić* noted that state practice as far back as the Spanish Civil War 'revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large-scale civil wars'. See *Tadić*, *supra* note 1, para. 100.
62. Abi-Saab, *supra* note 18, at 217.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

Prior to the drafting of the 1949 Geneva Conventions states were given the option to include certain types of non-international armed conflict within the full ambit of the Geneva Conventions. The ICRC presented a report which recommended that the full range of international humanitarian law apply in 'all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion'.[63] The original Draft Conventions for the Protection of War Victims contained a fourth paragraph in Common Article 2 which related to non-international armed conflict. In this draft, it was outlined that

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Conventions shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in no way depend on the legal status of the Parties to the conflict and shall have no effect on that status.[64]

This 'maximalist approach'[65] would have led to the application of the Four Geneva Conventions to non-international armed conflicts. However, the suggested Article 2(4) was met with considerable resistance when it was first presented at the XVII International Red Cross Conference held in Stockholm in 1948, and again when submitted to the Diplomatic Conference in Geneva in 1949. The proposal was eventually abandoned in favour of the minimal approach of Common Article 3, which instead left only the basic principles of the Conventions applicable in non-international armed conflicts.[66]

However, despite this resistance on the part of states, there have been continuing moves towards embracing a more inclusive and universal approach to the regulation of armed conflict. In particular, the UN General Assembly during the late 1960s passed two resolutions that recognized and affirmed the need to ensure uniform and basic rules in armed conflict, regardless of the character of the conflict.[67] More recently there has been a furtherance of this philosophy, reflected in UN Security Council resolutions 788 (1992), 972 (1995), and 1001 (1995) on Liberia,[68] 794 (1992) and 814 (1993) on Somalia,[69] 993 (1993) on Georgia,[70] and 1193 (1998) on Afghanistan, all of which refer to the importance of the parties to the conflict to respect IHL,

63. J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol III: Geneva Convention Relative to the Treatment of Prisoners of War* (1960), 31. See also Stewart, *supra* note 23, at 313.
64. Pictet, *supra* note 63, at 31.
65. Abi-Saab, *supra* note 18, at 220.
66. Note, however, that in Common Article 3(2) there is provision allowing for all or part of the Conventions to be made applicable under special agreements between parties to the conflict.
67. GA Res. 2444, UN Doc. A/7218 (1968); GA Res. 2675, UN Doc. A/8028 (1970). Both these resolutions were unanimously adopted. Indeed, these resolutions were noted by the Appeals Court in *Tadić* as being demonstrative of the international community's expectance of both the application of and compliance with certain universal rules in armed conflicts, regardless of characterization. See *Tadić*, *supra* note 1, paras. 110–111; see also (1973) 67 AJIL 122, 124 (statement of the US Department of Defence confirming the US position that Resolution 2444 was declaratory of existing customary international law).
68. All three resolutions appealed to 'all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law'.
69. The Resolution condemned breaches of international humanitarian law, including 'the deliberate impeding of the delivery of food and medical supplies'.
70. The Resolution reaffirmed 'the need for the parties to comply with international humanitarian law'.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

without making the distinction as to the 'type' of IHL to be observed.[71] Furthermore, the UN Secretary-General's Bulletin for Peacekeeping Forces, issued in 1999, does not distinguish between the types of IHL that UN peacekeeping forces should observe.[72] The Bulletin's field of application, as outlined in its section 1.1, simply determines that 'the fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement'.[73]

As already noted, support for the case to eliminate the distinction between types of armed conflict needs more than policy reasons. Furthermore, declarations from the UN and the ICRC are not, of themselves, enough to make the case. More extensive support needs to be found in state practice. Does current state practice support the contention that the line between types of armed conflict has been blurred to the point where the distinction could be legitimately done away with? A significant step towards answering this question has been taken with the publication by the ICRC of their landmark study on the customary status of international humanitarian law. The stated aim of the study is to assess what elements of contemporary international humanitarian law can now be considered as enjoying customary status – in particular, those more recent treaties which do not enjoy the same level of ratification as the Geneva Conventions.[74] The methodological approach of the study was to examine both national and international sources demonstrative of state practice, and then categorize such practice in six overarching groups including the principle of distinction, specially protected persons and objects, specific methods of warfare, weapons, the treatment of civilians and persons *hors de combat*, and implementation of IHL.

71. While one cannot draw too weighty a conclusion based on declarations by the Security Council – or the specific refusal to draw attention to the 'type' of international humanitarian law applicable in each instance – the resolutions are demonstrative of a certain attitude which, together with other acts of states, is persuasive in suggesting moves towards a more uniform approach to regulation of armed conflict. Indeed, Schindler notes that the fact that 'practically all humanitarian law treaties adopted since 1995 have been made applicable to both international and non-international armed conflicts' is demonstrative of the growing international acceptance of this 'progressive assimilation' of the dual laws of armed conflicts into one body of law. Schindler, *supra* note 10, at 177. However, one of the more significant treaties which preserves the distinction between types of armed conflict is the Rome Statute of the International Criminal Court. See D. Willmott, 'Removing the Distinction between International and Non-international Armed Conflict in the Rome Statute of the International Criminal Court', (2004) 5 *Melbourne Journal of International Law* 196.

72. See Observance by UN Forces of International Humanitarian Law, 6 August 1999, UN Doc. No. ST/SGB/1999/13 (1999) (bulletin of UN Secretary-General).

73. Ibid.

74. As Henckaerts notes, 'the great majority of the provisions of the Geneva Conventions, including common Article 3, are considered to be part of customary international law. Furthermore, given that there are now 192 parties to the Geneva Conventions, they are binding on nearly all states as a matter of treaty law. Therefore, the customary nature of the provisions of the Conventions was not the subject as such of the study. Rather, the study focused on issues regulated by treaties that have not been universally ratified, in particular the Additional Protocols.' Henckaerts, *supra* note 58, at 187. The customary status of the Conventions was noted by the ICJ in two decisions, *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, [1996] ICJ Rep. 2 (hereinafter *Nuclear Weapons* Advisory Opinion), paras. 79, 82 (regarding the Conventions in total); *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 27 June 1986, [1986] ICJ Rep. 14 (hereinafter *Nicaragua* case), para. 218 (regarding Common Article 3). The Geneva Conventions recently became the first international treaties to be universally ratified, with the accession of Nauru and Montenegro, on 27 June 2006 and 2 August 2006 respectively.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

The conclusions drawn at the end of the nearly ten-year-long process are that the Additional Protocols have had profound effects on state practice, more than the ratification records of both Protocols would suggest.[75] Importantly, the basic principles of Protocol I have been found to have significantly wide acceptance among states. The study argues that a great many of the provisions in Protocol I are reflected in customary international humanitarian law.[76] Similar far-reaching effects have also been witnessed with respect to the provisions of Protocol II, with many of its fundamental principles having now achieved the status of customary international law.[77] In addition, the study suggests that, where gaps exist in Protocol II, specifically with regard to the conduct of hostilities, the principles of distinction, and proportionality, state practice has filled in these gaps, creating rules that are parallel to those contained in Protocol I. Furthermore, the study asserts that rules regarding protected persons and objects, and specific methods of warfare, have also been embraced by states in their dealings in non-international armed conflicts.[78] The study also suggests that respect for and protection of humanitarian relief for civilians in need and humanitarian personnel and objects have crystallized into customary international humanitarian law in non-international armed conflicts. Again, these rules are not expressly provided for in Protocol II.

The overarching finding of the ICRC study is that there is a more uniform approach to the regulation of conduct in all armed conflict than had been previously thought. Indeed, of the 161 customary rules of humanitarian law as determined by the ICRC

75. Henckaerts, *supra* note 58, at 187.
76. ICRC study, *supra* note 8. These include the principle of distinction between civilians and combatants and between civilians and military objectives (Rules 1 and 7); the prohibition on indiscriminate attacks (Rules 11–13); the principle of proportionality in attack (Rule 14); the obligation to take feasible precautions in attack and against the effects of attack (Rules 15–24); the obligation to respect and protect medical and religious personnel, medical units, and transports (Rules 25 and 27–30); humanitarian relief personnel and objects (Rules 31–32), and journalists (Rule 34); the obligation to protect medical duties (Rule 26); the prohibition of attacks on undefended localities and demilitarized zones (Rules 36–37); the obligation to provide quarter and to safeguard an enemy *hors de combat* (Rules 46–48); the prohibition of starvation (Rule 53); the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54); the prohibition of improper use of emblems and perfidy (Rules 57–65); the obligation to respect the fundamental guarantees of civilians and persons *hors de combat* (Rules 87–105); the obligation to account for missing persons (Rule 117); and the obligation to respect specific protections afforded for women and children (Rules 134–137).
77. Henckaerts, *supra* note 58, at 188. See also *Tadić*, *supra* note 1, para. 117 (observing that 'many provisions of [Additional Protocol II] can now be regarded as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles'). The ICRC study asserts that the provisions of Protocol II which now enjoy customary status include the prohibition of attacks on civilians (Rule 1); the obligation to respect and protect medical and religious personnel, medical units, and transports (Rules 25 and 27–30); the obligation to protect medical duties (Rule 26); the prohibition of starvation (Rule 53); the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54); the obligation to respect the fundamental guarantees of civilians and persons *hors de combat* (Rules 87–105); the obligation to search for and respect and protect the wounded, sick, and shipwrecked (Rules 109–111); the obligation to search for and protect the dead (Rules 112–113); the obligation to protect persons deprived of their liberty (Rules 118–119, 121, and 125); the prohibition of forced movement of civilians (Rule 129); and respect for the specific protections afforded to women and children (Rules 134–137). See ICRC study, *supra* note 8.
78. Ibid., Rules 7–10 (on distinction between civilian objects and military objectives); ibid., Rules 11–13 (on indiscriminate attacks); ibid., Rule 14 (on proportionality in attack); ibid., Rules 15–21 (on precautions in attack); ibid., Rules 22–24 (on precautions against the effects of attack); ibid., Rules 31–32 (regarding humanitarian relief personnel and objects); ibid., Rule 34 (regarding the protection of civilian journalists); ibid., Rules 35–37 (on protected zones); ibid., Rules 46–48 (on denial of quarter); ibid., Rules 55–56 (on access to humanitarian relief); ibid., Rules 57–65 (regarding deception).

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

study, 17 are solely applicable in international armed conflicts, and only six are solely applicable in non-international armed conflicts. To put this in a somewhat rudimentary statistical context, of the 161 customary rules of IHL, 138 rules – or 85 per cent – are uniformly applicable in all armed conflicts.

However, despite the fact that the study is extensively researched, and makes some persuasive arguments, it should be kept in mind that it is an academic work, and not a declaration of the law to which states are bound. States may yet refute its findings, especially on some of the more controversial suggestions. Indeed, some academics have already criticized the study for failing to establish adequately the precise normative status and weight it accords the statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone.[79] Criticism can also be levelled at the study for placing too significant an emphasis on state military manuals as being evidence of state practice and *opinio juris*. It does not always follow that a rule is included in a military manual for reasons of obligation; the rule may be the result of a policy initiative and have nothing to do with international law per se.[80] Such reliance on military manuals could perhaps skew the findings prematurely to conclusion of customary status. Nonetheless, the study retains its value as an interpretative adjunct.

5. Is there scope for a harmonized law of war?

If the fundamental principles of a uniform law of armed conflict can already be shown to exist in both treaty and customary law, arguments for the creation of such a uniform code become all the more persuasive. States will have little cause to reject the creation of a uniform law if its roots can be found in a number of pre-existing obligations. Indeed, what the ICRC study argues is that there is striking uniformity in the application of IHL witnessed in state practice regarding armed conflicts, regardless of the characterization of the conflict.

However, of the rules of customary law which remain applicable solely in international armed conflicts, those which find no correlate in internal and non-international armed conflict relate specifically to combatants and prisoner-of-war status, specifically

1. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.

2. The armed forces of a party to the conflict consist of all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.[81]

---

79. See generally R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study', (2006) 11 *Journal of Conflict and Security Law* 239.

80. See further discussion on the flaws and strengths of the ICRC study in S. Balgamwalla, 'Review of Conference "The Reaffirmation of Custom as an Important Source of International Humanitarian Law"', (2006) 13 *Human Rights Brief* 13 (summarizing critiques of the study by Joshua Dorosin, Assistant Legal Adviser to the US State Department, Professor Michael Matheson, Lt. Col. Burrus Carnahan, J. J. Paust, and Col. W. Hays Parks).

81. See ICRC study, *supra* note 8, *Vol. I: Rules*, at 11–17. See also ibid., Rules 106–108 (determining that 'combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

What falls outside the universal rules are those crucial factors regarding, among other things, combatant status, namely who may be 'permitted' to participate in an armed conflict.[82] Those who fail to distinguish themselves from the civilian population – 'irregular' fighters who do not meet the criteria for combatant – are designated unlawful or unprivileged combatants,[83] and are unable to enjoy the protection of the prisoner-of-war (POW) Convention.[84]

With that in mind, the pertinent question to ask is, therefore, 'is there scope for *all* participants in armed conflict to be treated in a similar fashion, regardless of status?' It should not be arguable that because someone may be classified as an unprivileged combatant, whether in international or non-international armed conflict, they therefore lose all rights to basic humanitarian protections. For, at the very least, leaving aside IHL protections, there are basic procedural and substantive human rights protections that are applicable, even in times of warfare. This principle was affirmed by the International Court of Justice (ICJ) in the *Nuclear Weapons* advisory opinion[85] and restated by the Court in the advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[86]

---

operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status'; 'combatants who are captured while engaged in espionage do not have the right to prisoner-of-war status' and '[t]hey may not be convicted or sentenced without previous trial'; and 'mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status' and '[t]hey may not be convicted or sentenced without previous trial'). See also ibid., *Vol I: Rules*, at 384.

82. See Schindler, *supra* note 27, at 178 (discussing the impracticality of a uniform code without consideration of the POW situation). Schindler notes also the additional stumbling block of those issues in international war that have no correlate in internal armed conflict – specifically matters of occupied territory. For the purposes of this article, that issue will not be addressed.
83. See generally R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs', (1951) 28 *British Year Book of International Law* 323.
84. This was demonstrated in the US engagement in Afghanistan following the 9/11 attacks, where there was debate over whether Taliban and al-Qaeda fighters were to be considered legitimate or privileged combatants under Geneva law. According to the initial US position, at the commencement of hostilities with the Taliban and al-Qaeda, neither Taliban nor al-Qaeda fighters were to be considered POWs under Geneva law. The United States declared, however, that all captured Taliban and al-Qaeda fighters would be treated humanely. See White House Fact Sheet, 'Status of Detainees at Guantanamo', (7 February 2002), available at www.whitehouse.gov/news/releases/2002/02/20020207-13.html. Much academic and political debate followed the US statement of position. For further information on this debate see G. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants', (2002) 96 AJIL 891; T. Franck, 'Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror', (2004) 98 AJIL 686; J. Yoo and J. Ho, 'The Status of Terrorists', (2003–4) 44 *Virginia Journal of International Law* 207; M. Hoffman, 'Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law', (2002) 34 *Case Western Reserve Journal of International Law* 227; see also, more generally, C. Greenwood, 'International Law and the "War against Terrorism"', (2002) 78 *International Affairs* 301; G. Rona, 'Interesting Times for International Humanitarian Law: Challenges from the "War on Terror"', (2003) 27 *Fletcher Forum on World Affairs* 55.
85. See *Nuclear Weapons* Advisory Opinion, *supra* note 74, para. 25.
86. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, [2004] ICJ Rep. 136, para. 106. This principle has been affirmed also by the Inter-American Commission on Human Rights in *Abella v. Argentina*, Case No. 11.137, Report No. 5/97, *Annual Report of the IACHR 1997*, paras. 158–161; and again by the Commission in *Coard et al. v. United States*, Case No. 10.951, Report No. 109/99, *Annual Report of the IACHR 1999*, para. 39. The scope of this article does not permit even a cursory analysis of the interplay between human rights law and humanitarian law. For more on the dynamics of the application of human rights law in times of armed conflict, see R. Provost, *International Human Rights and Humanitarian Law* (2002); D. Warner (ed.), *Human Rights and Humanitarian Law: The Quest for Universality* (1997); H.-J. Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law', (2004) 86 *International Review of the Red Cross* 789; T. Meron, 'The Humanization of Humanitarian Law', (2000) 94 AJIL 239. For a more detailed assessment of the legal position of so-called unprivileged combatants, see generally

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

For the purposes of creating a unified law of war, all participants must receive equal treatment. However, current IHL affords different rights and protections for different participants depending on how their conflict is characterized. Thus, if the distinction between types of conflict were ever to be dropped, the matter of how the 'privileged/unprivileged' combatant demarcation could be resolved becomes pivotal. Before a uniform law of armed conflict can be created, a uniform approach to participants in armed conflicts will also need to be resolved. The question is how this is to be achieved.

Some authors or scholars have argued that those deemed 'unlawful combatants'[87] – those who take direct part in hostilities without being entitled to do so and are therefore unable to call on Geneva Convention III for protection – may yet find coverage under Geneva Convention IV, the convention regarding civilians. Convention IV provides protection (with some exceptions, including constraints for applicability based on nationality and territoriality, and subject to the schedule of permissible derogations outlined in Article 5 of the Convention[88]) for those persons who 'at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict of Occupying Power of which they are not nationals'.[89] As Dörmann argues, 'this definition seems all-embracing . . . a textual interpretation of the Conventions can only lead to the conclusion that all persons who are not protected by GC I–III, thus also persons who do not respect the conditions which would entitle them to POW status/treatment, are covered by GC IV'.[90]

An alternate but related argument is put forward by Jinks, who maintains that the significance of POW status is now mainly symbolic; that there exists an emergent 'protective parity'[91] which covers all types of combatants – regular and irregular – and that

---

S. Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"', (2005) 87 *International Review of the Red Cross* 39; L. Doswald-Beck, 'Human Rights and Humanitarian Law: Are There Some Individuals Bereft of All Legal Protection? Remarks by Louise Doswald-Beck', (2004) 98 *ASIL Proceedings* 353.

87. See the US Supreme Court decision of *Ex Parte Quirin et al.*, (1942) 317 US 1, 30–31, for a judicial statement on nature of 'unlawful combatants'. Note, however, that the ruling on the nature of unlawful combatants has been refuted by Baxter, *supra* note 83, and more recently by N. Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War', (2004) 43 *Columbia Journal of Transnational Law* 1, 14, who argue that the correct construction of unprivileged combat is not as a status which is illegal under international law but rather as not immunized under international law – and thus subject to domestic law.

88. See also D. Jinks, 'The Declining Significance of POW Status', (2004) 45 *Harvard International Law Journal* 367, 387–99 (outlining in detail the limitations, but nonetheless arguing that these limitations do not affect the protective regime applicable to unlawful combatants).

89. Geneva Convention IV, *supra* note 4, Art. 4.

90. K. Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"', (2003) 85 *International Review of the Red Cross* 45, at 48. See also Jinks, *supra* note 88 (arguing this same point regarding GC IV). For a contrary view see J. Callen, 'Unlawful Combatants and the Geneva Conventions', (2003–4) 44 *Virginia Journal of International Law* 1025 (maintaining that GC IV does not extend so far as to cover those who take up arms in conflict against an enemy, yet are not 'regular' combatants). However, it should be noted that the protection afforded to persons under the Civilians Convention may not extend to include those caught up in non-international armed conflicts.

91. Jinks, *supra* note 88, at 375; see also Jinks, 'Protective Parity and the Laws of War', (2004) 79 *Notre Dame Law Review* 1493.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

> denying detainees POW status has no significant protective consequences and . . . yields no important policy advantages to the detaining state. The text, structure, and history of the Geneva Conventions strongly support two conclusions: (1) Geneva law protects unlawful combatants; and (2) this protection very closely approximates that accorded POWs.[92]

This 'protective parity' is a result of the convergence of the provisions on humanitarian protection for POWs and for civilians, and, moreover, for those who do not easily fit into either category. Together, these provisions form a system of basic, fundamental, and non-derogable humanitarian protections which nearly[93] equate with traditional POW status. These are primarily found in Geneva Convention IV, Common Article 3,[94] Article 75[95] of Additional Protocol I, and Articles 4 and 6 of Additional Protocol II.[96] These protections cover both procedural and substantive fundamental human rights and humanitarian considerations. They include provision for humane treatment,[97] prohibition of acts such as murder, torture, cruel treatment, and humiliating and degrading treatment,[98] prohibitions on corporal punishment,[99] and judicial guarantees in case of criminal charges being laid.[100] This convergence is especially notable in the provisions contained in Article 75 of Protocol I.

The universality of Common Article 3, in international as well as non-international armed conflicts, was recently affirmed by the US Supreme Court in *Hamdan*,[101] which determined that the provisions of Common Article 3 are

---

92. Jinks, *supra* note 88 at 375.
93. Nearly, but not quite; while POW status may be more symbolic than is perhaps thought (according to Jinks, *supra* note 88, at 374), what such a statement implies is that POW status is not completely devoid of importance. Certainly the United States in its dealings with Taliban and al-Qaeda fighters has demonstrated that it still considers POW status to be of paramount importance.
94. Of significance since the Geneva Conventions are, due to their wide acceptance and ratification record, considered to be accepted as customary international law and thus applicable to all. This was affirmed by the ICJ. See *Nicaragua* case, *supra* note 74, para. 218; see also *United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania (the Corfu Channel Case)*, Merits, 9 April 1949, [1949] ICJ Rep 22.
95. Cf. Art. 45(3).
96. Art. 44 of Protocol I also deals with POW status and 'lawful combatants'. As Dinstein sees it, Art. 44 reduces the conditions for what designates a lawful from an unlawful combatant to the point where the distinction 'becomes virtually nominal'. See Y. Dinstein, 'The Distinction between Unlawful Combatants and War Criminals', in Y. Dinstein (ed.), *International Law at a Time of Perplexity* (1989), 101, 106. Note also Art. 5 of GC III, which determines that where there is even a modicum of doubt as to the status of a participant in an armed conflict, the presumption should fall in favour of granting privileged combatant status to the individual in question (until the question of status can be determined by a competent tribunal). See also M. Mofidi and A. Eckert, '"Unlawful Combatants" or "Prisoners of War": The Law and Politics of Labels', (2003–4) 36 *Cornell International Law Journal* 59, 67. Jinks also draws attention to the wealth of human rights treaties that enshrine fundamental human rights protections – which often overlap with humanitarian protections – as contributing to the system of 'protective parity'. See Jinks, *supra* note 88, at 406; see also generally Jinks, *supra* note 91.
97. Common Article 3(1), Article 75(1) of Additional Protocol I, and Article 4(1) of Additional Protocol II.
98. Common Article 3(1)(a)–(c), Article 75(2)(a)–(e) of Additional Protocol I, and Article 4(2)(a)–(h) of Additional Protocol II.
99. Article 75(2)(iv) of Additional Protocol I and Article 4(2)(a) of Additional Protocol II.
100. Articles 64–78 of GC IV, Common Article 3(1)(d), Article 75(4)(a)–(j) of Additional Protocol I, and Article 6(2)(a)–(f) of Additional Protocol II. The legal guarantees of Common Article 3 are enumerated and expounded in far greater substantive detail in the Additional Protocols.
101. *Hamdan v. Rumsfeld et al.*, (2006) 126 S. Ct. 2749. This case was decided on 29 June 2006, the majority comprising Justices Stevens, Souter, Breyer, Ginsburg, and Kennedy, with Justices Thomas, Scalia, and Alito in dissent. Chief Justice Roberts took no part in the consideration or decision of the case. Since then the United States has enacted the Military Commissions Act of 2006, re-establishing the military commissions for prosecuting suspected al-Qaeda members, which the *Hamdan* decision had determined to be unlawful, both under the

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

applicable as a basic set of fundamental rules to be observed in armed conflicts, provided that the conflict takes place in the territory of a party to the Geneva Conventions.[102] The Court's decision has meant that Common Article 3 is established as the minimum legal standard applicable to all detainees captured in armed conflicts, regardless of whether such detainees have been classified as 'unlawful combatants'.[103] Furthermore, the Court made the connection between Common Article 3 judicial guarantees and Article 75 of Protocol I protections, noting that 'judicial guarantees' as understood under Common Article 3 can be linked to the concept of trial protections as understood under customary international law, as described in Article 75 of Protocol I.[104]

Arguably, one of the key elements in contention is not whether participants in non-international armed conflicts can be granted POW status, as can their counterparts in international armed conflicts. Rather, at issue is whether 'unlawful' combatants can ever be stripped of humanitarian protection entirely and whether 'unprivileged combatants' can ever be protected in ways similar to the protection afforded to international armed combatants (which, it seems, they can[105]). As the ICRC noted in its Commentary on the Civilians Convention,

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status*; nobody in enemy hands can fall outside the law.[106]

These are just some preliminary approaches to addressing the issue of barriers to a unified law of armed conflict. A more thorough analysis awaits, assessing the questions of combatants in more detail along with matters relating to occupied territories, belligerent reprisals, and the role of the ICRC, among others. However, what is clear is that there is scope to argue, given the customary status of the Conventions, the protective regimes of Common Article 3 and the Additional Protocols, and the more generalized statement of policy contained in the Martens Clause,[107]

US Uniform Code of Military Justice (UCMJ) and the Geneva Conventions. The new legislation limits the legal avenues available to detainees, including barring the right to file suit via the writ of habeas corpus, to challenge the legality of their detention, or to allege torture. The Act also broadly redefines the concept of 'combatant' to encompass persons who provide assistance to armed groups, so that they may be subject to trial and detention. The Act does, however, maintain Common Article 3 standards for detainees. The United States is thus still bound to Common Article 3 obligations in its treatment of detainees. For a more detailed assessment of both *Hamdan* and the Military Commissions Act see N. Katyal, '*Hamdan v. Rumsfeld*: The Legal Academy Goes to Practice', (2006) 120 *Harvard Law Review* 65; B. Moyer, 'Explaining *Hamdan*', (2006) 53 *Federal Lawyer* 8; S. Estreicher et al., 'The Limits of *Hamdan v. Rumsfeld*', (2006) 9 *Green Bag* 353.

102. See *Hamdan v. Rumsfeld, supra* note 101, decision of Justice Stevens, at 66. Moreover, the Court held that the Conventions are enforceable as US law, as well as international law.
103. It should be noted that, while of importance, the *Hamdan* decision is precedent for the US only.
104. Ibid., at 70.
105. See *supra*, 459–61, on the matter of protection for so-called unlawful combatants, and the possible humanitarian protections afforded for those who are not easily designated as lawful combatants.
106. J. Pictet (ed.), *Commentary on the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), 51 (emphasis in original).
107. The Martens Clause, contained in most of the major IHL treaties since its first enunciation in the preamble to the Hague Convention of 1907, is a general statement of policy which argues that, where the law is silent, parties to an armed conflict are not free to act in ways contrary to customary international law and the more

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

that there is a basis of protective consideration for *all* participants in armed conflict. The coalition of protective schemes, contained in both IHL and human rights law, provides a clear foundation for the creation of a unified law of conduct in armed conflict, with equivalent and uniform protection for all who participate.

6. Conclusions

The call for a uniform law of armed conflict is not new. The ICRC has long hoped that such a move would be embraced by the community of nations, both during the drafting of the Geneva Conventions and again during the conferences that led to the creation of the Additional Protocols.[108] Academic writers have also long called for a more universal applicability of law in armed conflict,[109] including calling for a closer alliance between human rights law and IHL,[110] a merging of IHL with human rights and refugee law,[111] and the creation of minimum humanitarian standards uniformly applicable in all armed conflicts.[112] What all these arguments have in common is the belief that any steps that lead to a more uniform and universal application of

---

generalized principles of humanity and public conscience. The Clause, as it exists in its 1907 form, reads as follows:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience. (Additional Protocol I, *supra* note 5, Art. 1(2))

See also GC I, *supra* note 4, Art. 63(4); GC II, *supra* note 4, Art. 62(4); GC III, *supra* note 4, Art. 142(4); GC IV, *supra* note 4, Art. 158 (4); Additional Protocol II, *supra* note 5, preamble; 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, GA Res. 39, UN GAOR, 47th Sess., Supp. No. 49, at 54, UN Doc. A/47/49 (1992), 32 ILM 800 (1993), preambular para. 5. It should also be noted that the Martens Clause appears in the military manuals (in one form or another) of the United States, Germany, and the United Kingdom. Although somewhat amorphous in expression, the Martens Clause is an important statement of one of the basic philosophies of international humanitarian law, which is that because the law does not deal with an issue outright (in treaty form), it does not therefore mean that states are free to act contrary to the fundamental principles of international humanitarian law. With regard to the creation of a uniform law of armed conflict, the Martens Clause could be an important element in ensuring that all those involved in armed conflict – civilian and combatant alike – are protected by law.

108. Cf. sections 2 and 3, *supra*.
109. M. Veuthey, 'The Need for a Universal Humanitarian Order', (2005) 7 *Foresight* 26.
110. The pioneering work in this area has been undertaken by Pictet, who has long argued for an alliance between IHL and human rights law (as well as the inclusion of relevant international law provisions contained in such fields as refugee and international labour law). See J. Pictet, *Development and Principles of International Humanitarian Law* (1985), esp. 33–34, 58–61. See also D. Koller, 'The Moral Imperative: Toward a Human Rights-Based Law of War', (2005) 46 *Harvard International Law Journal* 231.
111. See T. Hadden and C. Harvey, 'The Law of Internal Crisis and Conflict', (1999) 81 *International Review of the Red Cross* 833; Veuthey, *supra* note 109, at 32.
112. This arena has been dominated by the work of Theodor Meron, who has argued for the creation of minimum humanitarian standards applicable in armed conflict. See T. Meron, 'Contemporary Conflicts and Minimum Humanitarian Standards', in K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honor of Eric Suy* (1988), 623; T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', (1983) 77 AJIL 589; T. Meron and A. Rosas, 'A Declaration of Minimum Humanitarian Standards', (1991) 85 AJIL 375; T. Meron, A. Rosas, and A. Eide, 'Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards', (1995) 89 AJIL 215. See also D. Petrasek, 'Moving Forward on the Development of Minimum Humanitarian Standards', (1998) 92 AJIL 557; H.-P. Gasser, 'A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct', (1988) 262 *International Review of the Red Cross* 38. See also the work undertaken by the UN Commission on Human Rights, in their attempts to established minimum standards applicable in human rights and humanitarian law. See Resolutions 1997/21,

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

the laws that protect individuals at the time when all law seems to be silent[113] can only be beneficial.

However, since there are more than 600 articles in the Geneva Conventions and Additional Protocols, not to mention the other treaties that govern armed conflict, a legitimate argument can be made that what modern international humanitarian law requires is not additional treaties to govern conduct, but rather that more work goes into making compliance with and accountability under those existing rules better. As Henckaerts argues,

> The general opinion is that violations of international humanitarian law are not due to the inadequacy of its rules. Rather, they stem from an unwillingness to respect the rules, from insufficient means to enforce them, from uncertainty as to their application in some circumstances and from a lack of awareness of them on the part of political leaders, commanders, combatants and the general public.[114]

Veuthey concurs, arguing that

> A revision of existing international treaties would most probably diminish – not improve – the level of protection of civilians and detainees. A new codification, in today's international situation, seems difficult and would most probably not address the main difficulty, namely implementation.[115]

As of 2004 the ICRC had no immediate plans for any comprehensive revision of either the Geneva Conventions or the Additional Protocols.[116] As MacLaren and Schwendimann note,

> In principle, gaps in IHL could be filled by new treaty provisions rather than custom. Obtaining the state support necessary for their adoption and ratification would, however, be tricky, time-consuming and treacherous . . . the divisions prevailing in the state community and a climate dominated by 11.9.2001 might, if anything, lead to a codification to the detriment of the protection of individuals through the enhancement of coercive measures available for state security.[117]

Indeed, the question may be asked as to whether a uniform law of armed conflict would actually achieve anything. With so many already well-respected and uniformly ratified treaties covering the use of landmines, conventional weapons, the protection of cultural property, and the treatment of civilians and non-combatants in wartime, to name only a few,[118] one could ask whether a uniform law would contribute anything new.

1998/29, and 1999/65. See also the Report of the Secretary-General to the 1999 Commission, UN Doc. No. E/CN.4/1999/92.

113. A common axiom in international humanitarian law literature – used especially by critics of the field – is Cicero's famous phrase, 'inter arma enim silent leges', or 'in time of war, the law falls silent'.
114. Henckaerts, *supra* note 58, at 176.
115. Veuthey, *supra* note 109, at 27.
116. F. Bugnion, 'The International Committee of the Red Cross and the Development of International Humanitarian Law', (2004) 5 *Chicago Journal of International Law* 191, 211.
117. MacLaren and Schwendimann, *supra* note 58, at 1222.
118. See the ICRC website, 'What Treaties Make Up International Humanitarian Law?', at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList104/051F527B73B984E4C1256CF5004255F7, for a full listing of the 20 treaties that the ICRC considers as comprising modern IHL.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

However, bearing the circumstances of *Tadić* in mind,[119] it is reasonable to surmise that if a uniform law had been in place, there would be no need to ascertain whether the duty arose in treaty or custom, whether the war was international, non-international or some hybrid, or whether the participants were privileged combatants or unlawful combatants. The prima facie approach would always be one of 'does an armed conflict exist?' and 'have the laws of armed conflict been breached?', rather than having to debate the origins, status, and character of the conflict and the participants. As Forsythe has argued, 'in the best of all worlds, any time a state had to use its military forces to deal with a conflict, the full corpus of a revised and simplified IHL would be applicable. Such an approach would eliminate much debate about the difference between international and internal war, or between internal war and other forms of domestic violence.'[120]

Nevertheless, one of the primary concerns of modern IHL – implementation – remains. Regardless of how many laws exist, if they are not obeyed they are worth little. However, implementation is intimately linked to applicability, and applicability goes directly to the issue of distinction between types of armed conflict. Where there are tiers of applicability, where the practical situations are equivalent but those affected are treated differently, compliance and enforcement will always be a problem. The promotion of gradations of humanitarian protection will always leave open the possibility of favouring the lowest permissible level of treatment. Therefore the reasons for creating a unified approach, with no possibility of 'lower' levels of treatment, become more compelling.

As Sandoz argues, the ICRC study should be seen as 'a still photograph of reality, taken with great concern for absolute honesty, that is, without trying to make the law say what one wishes it would say'.[121] It is of critical importance, for the sake of all those who must implement and follow the rules, that the law must be assessed and determined for what it is, rather than what it should be. In the academic debate surrounding the distinction between international and non-international armed conflicts, the word 'should' appears frequently. That there *should* be a more consistent and equal application of law to all those affected by war is beyond dispute. Whether such a move is undertaken is the more problematic of the two premises.

Where the law seeks to protect the rights of people it is undesirable for there to be differing levels of sanctioned treatment. Indeed, as Veuthey has argued, by maintaining different levels of treatment, the purpose and spirit of the law of war is ultimately defeated:

> If we let inhumane practices happen in one conflict, we run the risk of being ourselves the victims of the same inhumanities. Our best self-interest is to guarantee the protection of every prisoner and every civilian, even in faraway places, even belonging to parties we do not like, even fighting for causes we would never support, because it is

119. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgement and Opinion, 7 May 1997, paras. 569–608; *Tadić* Appeal Judgement, *supra* note 35, paras. 68–97.

120. D. Forsythe, 'The International Committee of the Red Cross and International Humanitarian Law', (2003) 2 *Humanitäres Völkerrecht – Informationsschriften* 64.

121. Y. Sandoz, 'Foreword', ICRC study, *supra* note 8, *Vol I: Rules*, xvii.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press

> the only way to effectively protect out own rights and values, to guarantee the rights of our own prisoners and civilians.[122]

The common denominator in all armed conflicts remains the same. Wars are still fought by human beings, and human beings still bear the brunt of the effects of war. Despite the apparent hindrances to the creation of such a law, a uniform code of conduct, applicable in all situations which develop beyond the level of riots or sporadic violence, would arguably contribute much to the better application of and respect for fundamental humanitarian standards in armed conflict and thus to greater respect for the rights of human beings in all circumstances. A uniform approach to regulating conduct in armed conflict is achievable. This is not to say that there are not significant barriers to a unified approach. However, the ultimate aim of such a law – that of protecting those least able to protect themselves during times of conflict – should be sufficient incentive to overcome most, if not all, resistance to creation of such a law.

122. Veuthey, *supra* note 109, at 35.

https://doi.org/10.1017/S092215650700413X Published online by Cambridge University Press