

Article

# Between Law and Reality: ‘New Wars’ and Internationalised Armed Conflict

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## I. Introduction: The Challenge of ‘New Wars’

The law of armed conflict is premised upon a number of distinctions. Distinctions between times of war and peace, between state and non-state actors, between combatants and civilians, between internal wars and international conflicts, and even the distinction between the military and private security military companies. ‘New wars’ pose unique challenges for international law as they slowly erode many of these distinctions. A challenge to international humanitarian law (IHL) is for its rules to remain relevant in situations where the nature of conflict has transformed and sharp dichotomies no longer apply. One of the key distinctions in the law of armed conflict is the one between so-called ‘internal’ wars and international armed conflicts. ‘New wars’ do not easily fit in such neat legal categories, however. Even conflicts that may seem internal take place in a globalised context in which international actors play an ever-increasing role. While traditional inter-state wars have diminished, there are few wars that can be described as purely ‘internal’ in nature. The purpose of this contribution is to discuss how these ‘new wars’ present a challenge to the non-international/international armed conflict dichotomy.

While international law evolves at a slow pace, war is constantly changing and evolving. The nature of the belligerents, the means and methods of warfare they employ, the goals pursued by the warring parties, and the international context in which they take place are all in a state of flux. The law of armed conflict developed with particular assumptions about the nature of war and the interests of the parties involved.<sup>1</sup> It is easy to see how rules developed in this context may lose their relevance as new forms and patterns of warfare emerge. Historians and political scientists continue to debate whether these ‘new wars’ indeed represent a wholly new type of armed conflict or if they are simply modern manifestations of patterns of violence that have occurred for centuries.<sup>2</sup> To an international lawyer, this phenomenon presents a different challenge. Do ‘new wars’ present such a shift in the armed conflict paradigm that the continued relevance of current law is called into question? Or is it simply a trend to which existing international law is capable of responding and adapting?

In this way, ‘new wars’ represent a break from the old patterns of warfare upon which much of the law of armed conflict is based. ‘New wars’ deviate from the Clausewitzian ideal type, where trained and regulated armies representing states take part in a duel, primarily to weaken the enemy and gain control of territory. ‘New wars’ may involve both state and non-state actors; they may be motivated by ethnic rivalry, or economic gain. The control of territory may have less strategic significance in this context, as fighters battle for access to the

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<sup>1</sup> N. Lamp, ‘Conceptions of War and Paradigms of Compliance: The ‘New War’ Challenge to International Humanitarian Law’ *Journal of Conflict and Security Law* 2011-16 265.

<sup>2</sup> See S. Kalyvas, ‘“New” and “Old” Civil Wars: A Valid Distinction?’ *World Politics* 2001-54, p.99.

apparatus of the state or to control minerals and other resources. There is a blurring of the lines between combatant and non-combatant. The civilian population, rather than being spared attack, are often subject to gross human rights violations and bear the brunt of the fighting. Whilst 'old wars' were typically fought between states, 'new wars' are often seen as internal in nature. This contribution discusses whether such a distinction in law matches the complex reality of 'new' wars, which, while internal in nature, are highly 'internationalised'.

## II. International/Non-International Armed Conflict Dichotomy

Modern wars are often described as 'internal' conflicts, in contradistinction to wars that involved two or more rival states. Historically, the law of armed conflict applied to sovereign states that fought against one another.<sup>3</sup> International law therefore perceived internal conflict as something that lay primarily outside of its purview. Although internal conflicts certainly took place, they remained largely an internal matter for that state, covered by its domestic law. Over time it became clear that there needed to be a level of regulation that applied to internal wars as well.<sup>4</sup> Events such as the Spanish Civil War demonstrated a need for rules of warfare that would cover conflicts that did not fit the classical model of inter-state warfare. In 1948, the International Committee of the Red Cross (ICRC) presented a report which recommended that the international humanitarian law standards of the Geneva Conventions should apply "[i]n 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".<sup>5</sup> This proposal was rejected, however, in favour of Common Article 3 to the Geneva Conventions which clearly establishes that the application of the rules of humanitarian law will depend on the nature of the conflict. Common Article 3 was primarily developed in order to regulate non-international conflicts. Compared with the rest of the Geneva Conventions, which contain a high degree of regulation of armed conflict, Common Article 3 is relatively modest in this respect. It contains only what are seen to be the 'core' elements of the Geneva Conventions, such as the humane treatment of those who are not taking part in combat, and obliges parties to take care for the sick and the wounded.<sup>6</sup> It is now beyond doubt that these rules contained in Common Article 3 represent customary international law. They apply in any armed conflict, irrespective of whether it is international or non-international in character.<sup>7</sup>

A further weakness of Common Article 3 is the difficulty in its application. It contains no definition of "conflict not of an international character". Some argue that the lack of a definition allows the law to adjust itself to changing circumstances, and therefore does not overly limit the application of Common Article 3.<sup>8</sup> In reality, however, the lack of definition has simply allowed states to deny that the Article applies to their conflict, for instance, by

<sup>3</sup> "In Western thought, there was a long tradition of regarding civil conflict as fundamentally different from true war... this meant that none of the rituals associated with war-making and war-waging was applicable to struggles against mere law breakers. Nor did the rules on the conduct of war apply... The result was a clear dichotomy between domestic enforcement and true war." S. Neff, *War and the Law of Nations, A General History*, Cambridge: Publisher, 2005 p. 250-1.

<sup>4</sup> See R. Bartels, 'Timelines, borderlines and conflicts: The historical evolution of the legal divide between international and non-international armed conflicts' 91 *International Review of the Red Cross* (2009) 35.

<sup>5</sup> J. Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 31, quoted in J. Stewart, 'Towards a single definition of armed conflict in international humanitarian law: a critique of internationalized armed conflict', *International Review of the Red Cross* 850 2003-85 p. 313.

<sup>6</sup> For detail on the substantive legal differences between international and non-international armed conflict, see Stewart 2003, *supra* note 5, pp. 319-323.

<sup>7</sup> L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press 2002, p. 273.

<sup>8</sup> See Moir 2002, *supra* note 7, 32; A. Cullen, 'Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law' *Military Law Review* 2005-183, p. 66.

arguing that the fighting has not reached the level of intensity required for being considered an ‘armed conflict’. Furthermore, it is difficult to ascertain, especially in the light of modern conflict, what “not of an international character” entails. At which point does a demonstration, a riot or civil disturbance within a state become a non-international armed conflict? At which point will a state’s support for separatists in a neighbouring state transform that conflict into an ‘international’ armed conflict?

Whether or not a situation is an ‘armed conflict’ will depend largely on whether it is considered international or non-international. For instance, even a minor use of force between sovereign states may be considered an armed conflict. This is because “[t]he magnitude of the use of force is irrelevant; international humanitarian law, and thus the law of war crimes, is applicable even to minor skirmishes (“first shot”).”<sup>9</sup> However, in the case of *internal* conflict there is a higher threshold, whereby a situation must reach a certain level of intensity. The Rome Statute, for instance, sets out that the law that regulates non-international armed conflict:

“does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”<sup>10</sup>

This definition of an ‘armed conflict’ was developed in the ICTY’s *Tadić* decision.<sup>11</sup> It sets out that for the law to apply to an internal armed conflict the situation must meet some basic requirements: the situation must be ‘protracted’ and must take place between ‘organised armed groups’. Also, the conflict must have reached a certain level of intensity. The Rome Statute explicitly excludes application to “riots and sporadic acts of violence of a similar situation”. Werle argues therefore that the law of war crimes “can only come into play if an intra-state conflict is *comparable to an inter-state conflict*, due to the organisation of the parties and the increased power and amenability to control of belligerents connected with it”.<sup>12</sup> However, this raises the question of what ‘comparable to an inter-state conflict’ exactly means. There is no longer any typical form of inter-state conflict, just as there is no typical internal conflict. Werle explains that the distinction is necessary because in an inter-state conflict “two armies face each other, the danger of escalation with incalculable consequences begins ‘with the first shot’” whereas “scattered outbreaks of violence in intra-state conflicts do not endanger world peace”.<sup>13</sup> However, this reasoning seems to be based on a mischaracterisation of modern internal conflicts. It is entirely possible that isolated or sporadic acts of violence within states may threaten international peace and security. Internal conflicts like the war in Syria are capable of destabilising an entire region by drawing in neighbouring countries or by creating massive refugee flows. Moreover, in modern warfare ‘sporadic acts of violence’ such as terrorism and guerrilla tactics are often a key part of the belligerents’ military strategy. The question is at which point do these ‘sporadic acts of violence’ develop into a fully-fledged armed conflict? As the nature of armed conflict changes, the legal meaning of ‘armed conflict’ will necessarily have to be adapted. In *Prosecutor v. Rutaganda*, it was stated that the definition of ‘armed conflict’ established by the

<sup>9</sup> G. Werle, *Principles of International Criminal Law*, The Hague: T.M.C. Asser Press 2005, p. 287.

<sup>10</sup> Rome Statute of the International Criminal Court (‘Rome Statute’), Art. 8 (f).

<sup>11</sup> “[A]n armed conflict exists whenever there is a resort to armed conflict between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State” ICTY, *Prosecutor v. Dusko Tadić*, ‘Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction’, IT-94-1-A, 2 October 1995, para. 70.

<sup>12</sup> Werle 2005, *supra* note 9, p. 290 (emphasis added).

<sup>13</sup> *Ibid*

ICTY is still “termed in the abstract, and whether or not a situation can be described as an “armed conflict”, meeting the criteria of Article 3, is to be decided upon a case-by-case basis”.<sup>14</sup>

In many cases though, the question of whether an ‘armed conflict’ exists will be straightforward. The more problematic legal question is whether the conflict is international or non-international in nature. This question is made more difficult given the nature of modern conflict and the internationalisation of ‘new wars’. The question whether a conflict is international in character was also discussed in *Tadić*. The conflict in the former Yugoslavia was a very complicated one and is sometimes categorized as a ‘mixed’ conflict, involving both international and internal elements. For instance, the support that the Federal Republic of Yugoslavia (FRY) provided the Bosnian Serbs in Bosnia Herzegovina changed over the course of the conflict. These international armed conflicts do not meet the typical patterns of interstate war. The ICTY held that a conflict may become international if the rebel group is acting as the ‘agents’ of another state. The Chamber looked at whether the Bosnian Serb forces could be regarded as being agents of Yugoslavia; it asked whether Yugoslavia had “sufficiently distanced itself from the VRS [Bosnian Serb Army] so that those forces could not be regarded as *de facto* organs or agents of the VJ [Federal Yugoslav Army] and hence the Federal Republic of Yugoslavia.”<sup>15</sup> The Appeals Chamber summarised its position that

“in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending on the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state”.<sup>16</sup>

The precise question arose from the issue of whether the Grave Breaches regime would apply. As the Chamber accepted that Grave Breaches applied only to international conflicts it was necessary to determine whether or not the conflict was international in character.<sup>17</sup> The Appeals Chamber decided that the conflict remained international in nature throughout the conflict due to the continued support of the Republic of Yugoslavia. However, a subsequent decision by the International Court of Justice seems to have diminished the direct role of the FRY in supporting the *Republika Srpska* and the VRS, as it considered that the latter were not organs of the FRY<sup>18</sup>, nor did it exercise effective control over operations in which certain crimes were committed.<sup>19</sup> In reality, the war in the former Yugoslavia was a mixed conflict; at times irregular forces operated with considerable financial and logistical backing from foreign armies, yet this support changed and dissipated over time. The ICTY has been asked to consider in numerous trials whether the conflict was international in character. However, the set of criteria established in *Tadić* has been notoriously difficult to apply, as it gives little guidance as to the requisite level and type of intervention required by a state to categorise a conflict as international.<sup>20</sup> The question of foreign intervention is likely to arise in modern

<sup>14</sup> ICTR, *Prosecutor v. Rutaganda*, ‘Judgment of 6 December 1999’, ICTR-96-3, para. 91.

<sup>15</sup> ICTY, *Prosecutor v Dusko Tadić*, What kind of decision?(the same for footnote 16)IT-94-1-T, 7 May, 1997, para. 587.

<sup>16</sup> ICTY, *Prosecutor v. Dusko Tadić*, Appeals Judgement, IT-94-1-A, 15 July 1999, para. 84.

<sup>17</sup> *Idem*, para. 80.

<sup>18</sup> ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, para 388.

<sup>19</sup> *Idem*, para. 413.

<sup>20</sup> “Regrettably, the possibility of direct military intervention that only indirectly involves an internal armed conflict as in the *Blaskic* and *Kordic & Cerkez* Judgements, and the absence of any meaningful threshold test for what extent of direct military intervention will internationalize a conflict, suggests the absence of a principled basis for distinguishing internationalized armed conflicts from those “international in character alongside an internal armed conflict”. Stewart, *supra* note 5, p. 30.

conflicts that involve a high level of foreign support, such as the war in Syria. ‘Support’ may come in a variety of ways, including financial and political, and will not always be in the form of direct military intervention.

The abovementioned problems with Article 3 were to be addressed by further protocols that would apply to non-international conflicts, thereby strengthening the regulation of internal conflicts. Additional Protocol II 1977 (APII) was developed for this purpose. APII extends the regulation of armed conflict in internal wars considerably. However, APII only applies in very limited circumstances and has been ratified by only a relatively small number of states. Therefore, as its application is restricted to the most intense internal armed conflicts<sup>21</sup> it has been applied rarely. This Additional Protocol requires that belligerents must have a high degree of organisation and that they exercise control over territory. As a result, although it adds to substantive legal rules covering internal conflict, the Protocol is even more restrictive in its application than Common Article 3. Like Common Article 3 it is only meant to apply in circumstances where rebels have reached a stage in which they look and act ‘like a state’. In modern warfare, where control of territory is far less important than in previous eras and belligerents are less likely to have an organised command structure, the Additional Protocol is less likely to be applicable.

There is therefore a significant legal difference between international and non-international armed conflicts within conventional law. However, the distinction is being blurred by the development of customary international law. Some rules pertaining to international armed conflict are increasingly being regarded as applicable in all armed conflicts. The notion that customary international law has developed to cover non-international armed conflict was discussed in *Tadić*. The Appeals Chamber stated that some rules applied to both international and as non-international armed conflicts. These include:

“[the] protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and a ban of certain methods of conducting hostilities.”<sup>22</sup>

As the Appeals Chamber stresses, however, not all rules have reached customary status. The Chamber pointed out that it is not the rules themselves, but the ‘essence’ of the rules that has been transposed into customary law. It stated that “only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts”, and that “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”.<sup>23</sup>

The codification of war crimes that took place in the drafting of the Rome Statute has gone a long way in identifying the categories of war crimes that are applicable in non-international armed conflicts, contributing to further blurring the international/non-international distinction. The Statute recognises that many of the crimes once applying only to

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<sup>21</sup> The Protocol applies to “all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (...) [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.”

<sup>22</sup> *Tadić (Jurisdiction)*, para. 127.

<sup>23</sup> *Idem*, para. 126.

international conflict now also apply to non-international conflict.<sup>24</sup> This indicates that these crimes might have reached the status of customary law and apply to all armed conflicts. However, the Rome Statute still retains a distinction between international and non-international armed conflict. Article 8 sets out the crimes applicable in international armed conflicts (Art. 8 (2)(a)&(b)) and those that apply in a non-international armed conflict (Art. 8 (2) (c) & (e)). The decision to retain the distinction in the Statute demonstrates that there is still a view that there are different bodies of law which apply to international and non-international conflict. Although the development of customary law is blurring the distinction between these types of conflicts, the Rome statute shows that such a distinction still exists.

Despite the progressive convergence of the two bodies of law, some argue that significant *lacunae* remain. Willmott provides examples of certain types of conduct that are not covered by Article 3 or customary international law. He argues that atrocities such as the use of certain types of weapons, widespread damage to the environment, use of human shields, improper use of flags and use of starvation as a method of warfare cannot be prosecuted at the ICC for internal conflicts.<sup>25</sup> Werle, on the other hand argues that, since the creation of the ICC, there is no longer a relevant difference between international and non-international conflict: “under the ICC statute and in accordance with customary international law, protection of persons in non-international armed conflict is largely comparable to their protection in international armed conflict.”<sup>26</sup> Others have argued that the distinction is no longer of any practical difference. Cassese correctly pointed out that “there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts”.<sup>27</sup>

Despite the development of customary law moving in that direction, there is still no single body of law that applies to all types of armed conflict.<sup>28</sup> The international/non-international armed conflict dichotomy has been subject to much criticism.<sup>29</sup> In *Lubanga*, the Chamber noted that:

“It is to be observed at the outset that some academics, practitioners, and a line of jurisprudence from the *ad hoc* tribunals have questioned the usefulness of the distinction between international and non-international armed conflicts, particularly in light of their changing nature.”<sup>30</sup>

Legal scholars have also questioned the continued relevance of the dichotomy. Some argue that there should be a single body of international law that applies to armed conflict, irrespective of the categorisation of the conflict. Bassiouni argues that:

“It is anachronistic that these different legal regimes and sub-regimes apply to the same socially protected interests and reflect the same human and social values, but

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<sup>24</sup> Some examples of crimes that are now included to apply to *all* armed conflict include: Rape and Sexual Violence 8(2)(d)(vi); Pillaging a town or place 8(2)(d)(v); and Declaring that no quarter will be given 8(2)(d)(x).

<sup>25</sup> D. Willmott, ‘Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court’ *Melbourne International Law Review* 2004-5(1).

<sup>26</sup> Werle, *Principles of International Criminal Law The Hague*:T.M.C. Asser Press 2009, p. 284.

<sup>27</sup> Memorandum of 22 March 1996 to the Preparatory Committee for the Establishment of the International Criminal Court, quoted in Stewart, *supra* note 5, 322.

<sup>28</sup> Willmott 2004, *supra* note 25.

<sup>29</sup> Stewart 2003, *supra* note 5, p. 313; C. Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’, *The Journal of Criminal Law and Criminology*, 2007, 98-748.

<sup>30</sup> ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ‘Judgement pursuant to Article 74 of the Statute’, Doc. ICC-01/04-01/06, 14 March 2012, para. 539.

differ in their applications depending on the legal characterization of the type of conflict. Governments maintain these distinctions for purely political reasons, namely, to avoid giving insurgents any claim or appearance of legal legitimacy.<sup>31</sup>

The Lawyers Committee for Human Rights argued that “[i]t is untenable to argue that the perpetrators of atrocities committed in non-international armed conflict should be shielded from international justice just because their victims were of the same nationality.”<sup>32</sup> Reisman and Silk go further, arguing that:

“The ‘distinction’ between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known. One of the consequences of the nuclear stalemate is that most international conflict now takes the guise of internal conflict, much of it conducted covertly or at a level of low intensity. Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.”<sup>33</sup>

One of the main criticisms of the distinction is that, while a different set of legal rules apply to both types of conflict, those regimes tend to converge and overlap. In many cases, it will make little difference whether the conduct took place in a non-international armed conflict. In *Lubanga*, classification of the conflict as non-international in character meant that the crimes involved would be covered by Article 8(2)(e)(vii) of the Rome Statute (“Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities”) rather than Article 8(2)(b)(xxvi) (“Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities”). As the Court notes, apart from the difference between ‘armed forces or groups’ in non-international armed conflicts and ‘national armed forces’ in international armed conflicts, the elements of the crime are similar.

Another criticism is that in practice, it will be difficult for the actors involved to be certain what kind of conflict is taking place. For the law of armed conflict to be effective, it should be relatively straightforward for the belligerents to know which set of rules applies to them. While the dichotomy might make for an interesting academic debate, it is more difficult to make this distinction in a battleground setting, especially if the parties lack full knowledge of the situation at hand.

Furthermore, it makes little difference to the victims whether they are involved in a non-international or an international armed conflict. If one of the goals of the law of armed conflict is to prevent unnecessary suffering and protect civilians, there is little reason to continue treating these wars differently. The ICTY has pointed out that the dichotomy makes little sense when it comes to the goal of protecting human beings:

“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

<sup>31</sup> Bassiouni 2008 supra note 29, 731. Bassiouni recommends that there be a new Protocol drafted to the Geneva Conventions that would “eliminate the disparities in protections between all forms of conflicts, and to give combatants willing to abide by IHL the status of lawful combatant and that of POW.”

<sup>32</sup> Lawyers Committee for Human Rights, *Establishing an International Criminal Court: Major Unresolved Issues in the Draft Statute* New York: 1998 section IV: <http://www.iccnw.org/documents/2PrepCmtEstablishICCLCHR.pdf>.

<sup>33</sup> W. Reisman, & J. Silk, ‘Which law applies to the Afghan conflict?’ *American Journal of International Law* 1988-82, p. 465.

protection when armed violence has erupted 'only' within the territory of a single 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."<sup>34</sup>

It is no longer the case that international conflict is any more serious or causes greater destruction than other types of war. Internal wars can involve high numbers of civilian casualties and may involve intense human suffering, as can be seen from the horrific wars that took place since the end of the Cold War in sub-Saharan Africa, the Balkans and elsewhere. From a moral point of view, there is little reason to treat the victims of these armed conflicts differently depending on whether violence took place between two states or between the state and armed rebels.

Despite this criticism, the distinction remains a key part of the law of armed conflict, and it is unlikely that a single body of law applicable to all armed conflicts will develop in the foreseeable future. This is because states continue to view the dichotomy as having legal significance. As discussed above, states decided to retain the distinction in the Rome Statute. This could have been a chance for states to largely do away with the distinction between international and non-international conflict. Cryer *et al.* argue for example that the Rome Statute should have included a list of war crimes that apply to all armed conflicts, supplemented by a list of crimes that apply only to international conflicts.<sup>35</sup> Yet international criminal courts and tribunals still devote considerable attention to the question of whether the alleged criminal behaviour took place during an international or a non-international armed conflict. This position of states is often dismissed as one based on political rather than legal reasons. It is argued that states are simply unwilling to apply the laws of war to internal conflicts as this may have the effect of 'legitimising' rebels, terrorists and other armed groups. These concerns are not entirely unjustified, however. This is because the relationship between the state and non-state actors is markedly different from inter-state relationships. Whether a conflict is international or non-international in character fundamentally alters the nature of the parties to the conflict and their relationship to one another.

In the two categories of conflict the nature of the parties is markedly different. The Geneva Conventions were originally developed with the view that they would apply only to state parties.<sup>36</sup> States are assumed to be fully capable of fulfilling their obligations under international law and have international legal personality. In contrast, rebel groups, secessionists or armed militias have limited international legal personality and are less likely to be capable of implementing these obligations. This is because states are more likely to have a developed military command structure, to have military manuals that set out the legal obligations of their fighters and to have courts or military tribunals that can prosecute those who breach these rules. The approach that has been taken with regards to rebel groups is that legal obligations begin to apply only when they take part in the fighting and have reached a level of organisation and control that is comparable to that of a state. The laws of war may be inapplicable or inappropriate to circumstances in which the belligerents are not comparable to a state since they are relatively unorganised or irregular.

It is not only the type of groups that differs in international and non-international armed conflicts; the relationship between these groups is also fundamentally different. Moir argues

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<sup>34</sup> *Tadić (Jurisdiction)*, para. 97.

<sup>35</sup> R. Cryer, H. Friman, et al., *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press 2007, p.232: 'Such a list would not entail any change in customary law, but simply a clearer presentation of the existing legal situation'.

<sup>36</sup> T. Meron, 'International Criminalisation of Internal Atrocities', *American Journal of International Law*, 1995 89, pp.554-577.

that the two streams of law developed separately because of this difference in the relationship between the parties.

“The situation is markedly different in that the position within a State is not analogous to its international relations. It is clearly unusual for a state to employ force in its relations with other states. In contrast, force is frequently used within the State’s own territory and against its own citizens, ranging from everyday enforcement action against common criminals to large-scale operations aimed at quelling riots or other civil disturbances.”<sup>37</sup>

States are regarded as being legally equal under international law. In an international armed conflict, therefore, the conflict is between two equal sovereign entities. An internal armed conflict, on the other hand, takes place between legal *unequals*. According to the Weberian definition of statehood, the state is a set of institutions that maintains a monopoly over the legitimate use of coercive force within a territory.<sup>38</sup> In an internal war, the use of force by insurgents is seen as illegitimate, as only the state is presumed to have the right to use coercive force within its territory. In an international armed conflict, the parties to the conflict have the *right* to engage in war and an individual cannot be prosecuted for the act of taking part in hostilities. In a non-international armed conflict, it is the state that remains the only party that may legally employ armed force. It may use force to put down a rebellion, to deal with armed rebels and terrorists and may charge them for taking part in hostilities under its domestic legal system. However, when IHL is applied to internal conflicts, the fighters are given at least *some* level of legal status, and acquire rights and duties as combatants. A state that wishes to put down a rebellion or prevent civil war is unlikely to treat those who threaten state authority as having any legal rights, let alone as legal equals. Accordingly, the state will not bestow upon the other party any status other than ‘criminal’, ‘rebel’ or ‘terrorist’.

From a practical viewpoint, states and insurgents alike have routinely dismissed the application of IHL to their conflicts. For IHL to be effective, the belligerents must feel that they are legally bound by a shared set of rules. It is evident from the atrocities that have taken place in internal conflicts that this is simply not the case. Rebels may feel that the law does not apply to them. States, on the other hand, routinely dismiss that the law of armed conflict applies to their internal struggles and are often unwilling to categorise their internal disturbances as ‘armed conflicts’. For example the Russian Federation and Turkey have not considered their internal conflicts with separatists as armed conflicts under international law. In dealing with the Chechen or Kurdish separatists, these states see themselves as conducting internal operations against terrorists rather than anything comparable to an ‘armed conflict’ and therefore deny the application of international humanitarian law. Abresch points out that this decision is due to political rather than legal considerations: “The problem is that to apply humanitarian law is to tacitly concede that there is another ‘party’ wielding power in the putatively sovereign state”.<sup>39</sup>

Solomon argues that the main reason for the distinction is the concern of states that their ability to deal with internal unrest will be weakened if they apply rules of armed conflict to internal situations: “the distinction was also deeply rooted in the view that the rules of international armed conflict would, if applied to civil wars, affect the status of insurgents and

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<sup>37</sup> Moir 2002, *supra* note 7, p.34.

<sup>38</sup> M. Weber, *The Theory of Social and Economic Organization*, Place of publication: The Free Press 1947/1964, p.154.

<sup>39</sup> W. Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ *European Journal of International Law* 2005-16, p.756.

the territory they hold”.<sup>40</sup> The fear is that by applying the rules of armed conflict, and not only the domestic laws of the state, the insurgents would gain an invaluable commodity: international status. By treating a situation as an ‘armed conflict’ the state is not only conceding that the situation has spun out of control, but it also implies that the armed group has obtained a status other than a mere rebel, insurgent or terrorist. Although the Conventions state that the application of IHL does not affect the status of the parties, states continue to feel that it does. This concern about status should not be underestimated, however. Particularly in weak and failing states that find it increasingly difficult to assert their sovereignty, international legitimacy is an increasingly important tool.

The concern, then, is not so much about the restriction on the state’s use of force, but the message that the application of international humanitarian law sends about the nature of the parties to the conflict. As Fleck points out:

“Importantly, the concern that the application of the laws of war in internal situations would or could obstruct the government’s ability to prosecute the conflict was *not* fundamentally based on anxiety about restrictions related to methods and means of conflict. The concern was based, instead, on uneasiness about the laws’ implications for the status of parties to the conflict, and, in particular, on state’s concerns about restrictions on their ability to sanction individuals under domestic law for their belligerent acts.”<sup>41</sup>

For instance, although Article 3 contains legal provisions to apply the basic elements of IHL to internal conflicts, the Article has rarely been applied by states. Moir points out that states have been unwilling to admit that these basic legal provisions apply to their conflicts:

“When faced with internal difficulties, States tend to disregard the provisions of common Article 3, often denying that the situation is an armed conflict at all. Article 3 may assert that its application has no effect on the legal status of the parties to the conflict, but States fear the opposite, and to an extent they are right to do so—the insurgents must receive some measure of legal personality to the extent they gain rights and obligations under the article.”<sup>42</sup>

Moreover, in some cases international humanitarian law is simply unsuited for internal armed conflict, since the application of rules developed for international conflicts may not be so easily applied to an internal war.<sup>43</sup> As Stewart points out, “much of the Geneva Conventions simply cannot be applied in civil conflicts because their operation turns on notions of belligerent occupation of territory and enemy nationality, concepts that are alien to civil conflicts.”<sup>44</sup> The methods used may also differ. In an internal conflict, the methods employed may be closer to counter-terrorism, riot control or general law enforcement than what is considered the means and methods envisaged by IHL.<sup>45</sup> Simply applying the law of international armed conflict to all armed conflicts, regardless of their status, may simply be impractical in some circumstances. States continue to view the two types of conflicts as fundamentally different, and are likely to continue to do so.

### III. Reality: ‘Internationalised’ Armed Conflicts

<sup>40</sup> S. Solomon, ‘Internal Conflicts: Dilemmas and Developments’, *The George Washington International Law Review* 2006-38, p.582.

<sup>41</sup> Fleck, ‘The Law of Non-International Armed Conflict’ in *The Handbook of International Humanitarian Law*, Oxford: Oxford University Press 2008, p.612.

<sup>42</sup> Moir 2002, *supra* note 7, p.274.

<sup>43</sup> “Law enforcement operations in internal disturbances will generally follow specific rules which are not fully comparable to military operations in an armed conflict.” Fleck, *supra* note 41, p.618.

<sup>44</sup> Stewart 2003, *supra* note 5, p.345.

<sup>45</sup> Fleck 2008, *supra* note 41, p.618.

The law of armed conflict is still premised on the distinction between international and non-international armed conflicts. However, a close examination of the types of conflicts that have taken place since the end of the Cold War demonstrates that such a sharp distinction no longer exists in practice (if it ever did). Many of the 'new wars' may be classified as non-international armed conflicts under international law. In reality, they may be better described as being 'mixed' conflicts, since they involve both internal and international elements. Bassiouni, for instance, states that "[t]he conflicts in Rwanda and in the Great Lakes area of Africa, including the Congo and Uganda, are characterized as internal ethnic and tribal warfare, notwithstanding the involvement of combatants from several states."<sup>46</sup> While they were internal conflicts, the conflicts in the Great Lakes region were also marked by high levels of foreign involvement by other African states. They involved the presence of foreign fighters and spilled over into neighbouring states. While they may have involved internal grievances and ethnic identities, they were also about access to resources and international markets. It seems anomalous to describe a conflict termed 'Africa's World War'<sup>47</sup>, which involved nine African states and many more armed groups, as a series of 'internal' conflicts. These and other 'new wars' are far from international conflicts in the traditional sense, involving standing armies and declarations of war, nor do they meet the strict legal criteria for being considered as an international armed conflict under international law. Yet, the level of intervention that takes place in these wars makes them something more than merely internal or 'tribal' conflicts.

Moreover, internal wars will often take place in a globalised context in which various outside actors will have an interest and play a role. This not only includes neighbouring states, but also powerful states such as the US and regional powers who have an interest in the conflict. It involves international and regional organisations such as the United Nations, the European Union or the Arab League. International private bodies such as NGOs and humanitarian organisations, multinational enterprises, the international media and religious bodies also play a crucial role in the conflict. Furthermore, the internet, social networks and the role of Diasporas are also increasingly important in 'internationalising' armed conflicts.

The Syrian Civil war is an example of an armed conflict that, while being 'internal' in nature, follows the pattern of internationalisation of new wars. The Assad regime is supported, not only by the armed forces of Syria, but also by fighters from Iran<sup>48</sup> and Hezbollah<sup>49</sup> as well as other foreign fighters and extremist groups. The war has spilled over into incidents with Syria's neighbours, notably violence in Turkey.<sup>50</sup> The pivotal role of foreign support in terms of diplomatic, financial and logistic assistance to either side is also typical of 'new wars'. None of this, however, has transformed the conflict in Syria to an international armed conflict under international law. The ICRC, for example, has classified parts of the conflict as 'non-international' in character,<sup>51</sup> and the Commission of Inquiry on Syria treats the conflict as a

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<sup>46</sup> Bassiouni, *supra* note 29, p.748.

<sup>47</sup> G. Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe*, Oxford: Oxford University Press, 2011.

<sup>48</sup> 'Iranian soldiers fighting for Assad in Syria, says State Department official', *The Washington Post*, 21 May 2013.

<sup>49</sup> 'Hezbollah chief defends group's involvement in Syrian war', *The Washington Post*, 22 May 2013.

<sup>50</sup> 'Syria denies Turkey Reyhanli car bombs role', *BBC News*, 12 May 2013 at: <http://www.bbc.co.uk/news/world-middle-east-22499326>. accessed date?

<sup>51</sup> "The ICRC concludes that there is currently a non-international (internal) armed conflict occurring in Syria opposing Government Forces and a number of organised armed opposition groups operating in several parts of the country..." 'Syria: ICRC and Syrian Arab Red Crescent maintain aid effort amid increased fighting', International Committee of the Red Cross, 17 July 2012 at:

non-international armed conflict to which Common Article 3 applies.<sup>52</sup> Yet treating the conflict in Syria as ‘internal’ in nature belies the fact that it is characterised by significant international elements. It is transforming into the site of a regional war involving states like Iran, Lebanon, Turkey and Israel, and may later involve direct or indirect intervention by Western forces.<sup>53</sup>

The internationalisation of internal wars poses a challenge for the law of armed conflict. Wars like those in Syria involve large-scale fighting, with the commission of atrocities and high levels of civilian casualties. One trend has been to apply international human rights law (IHRL) to these conflicts. The Commission of Inquiry in Syria, for instance, was not only interested in violations of IHL in Syria, but also human rights violations. Interestingly, it notes that these human rights obligations are binding upon non-state armed groups as well as the Syrian state: “at a minimum, human rights obligations constituting peremptory international law (*ius cogens*) bind states, individuals and non-state collective entities, including armed groups. Acts violating *ius cogens* – for instance, torture or enforced disappearances – can never be justified.”<sup>54</sup> The applicability of human rights norms to non-state actors is generally a topic of debate in international law, but there is a trend towards armed groups being bound by core human rights norms, especially those representing *ius cogens*.

It has been argued that the application of international human rights law to ‘new wars’ would be more appropriate in some circumstances.<sup>55</sup> In contrast to IHL, which was developed to regulate conduct between states, IHRL law is a system that also regulates the relationship between the state and its citizens. It is therefore arguably more appropriate in regulating internal armed conflicts. In applying IHRL the state maintains its prerogative to fight those who challenge state authority, but the way in which it does so is regulated by an existing body of international law. Furthermore, by applying IHRL, there is less of a concern that it will bestow status or legitimacy upon internal rivals, a key concern associated with applying IHL. Abresch makes the convincing argument that in certain situations, IHRL may be more capable of applying to an internal conflict than IHL, giving the example of the European Court of Human Rights’ use of the ‘right to life’ article in cases of armed conflict:

“The ECtHR’s approach has the potential to induce greater compliance, because it applies the same rules to fights with common criminals, bandits, and terrorists as to fights with rebels, insurgents, and liberation movements. To apply human rights law does not entail admitting that the situation is ‘out of control’ or even out of the ordinary.”<sup>56</sup>

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<<http://www.icrc.org/eng/resources/documents/update/2012/syria-update-2012-07-17.htm>>. accessed date?

<sup>52</sup> Independent International Commission of Inquiry on the Syrian Arab Republic, ‘Report of Commission of Inquiry on Syria’ - A/HRC/22/59, 5 February 2013, p. 51 at:<http://www.ohchr.org/EN/HRBodies/HRC/IIICISyria/Pages/IndependentInternationalCommission.aspx> accessed date? .

<sup>53</sup> On 28 May 2013 the EU lifted its arms embargo on Syria. ‘Syria arms embargo: EU divided despite consensus’ *BBC News*, 28 May 2013 at: <http://www.bbc.co.uk/news/world-europe-22688997>; See Council of the European Union, 3241st Foreign Affairs Council Meeting, Council conclusions on Syria, Brussels, 27 May 2013 at: [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/EN/foraff/137316.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137316.pdf) accessed date?.

<sup>54</sup> Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/19/69, 22 February 2012, para. 106.

<sup>55</sup> Abresch, *supra* note 39, p.757.

<sup>56</sup> *Idem*, p. 18.

Although there is a good argument to apply IHRL to some internal conflicts, there are also some apparent problems when it is applied to an internal armed conflict. Firstly, the law generally binds states who are a party to the Human Rights Conventions, but does not establish corollary duties on its citizens. Although it has been argued that IHRL equally applies to non-state actors such as rebel groups as it does to states,<sup>57</sup> it has proved difficult to apply IHRL to non-state groups. This stands in contrast to IHL, which establishes rights and duties upon both sides. Secondly, although IHRL applies at all times, not just during times of peace, some rights are capable of derogation in times of public emergency and war. Contrarily, IHL only applies in times of war, and can therefore be seen as a specialised form of IHRL that applies during armed conflict as *lex specialis*.<sup>58</sup> There is a growing consensus among experts that IHL and IHRL are not mutually exclusive and can therefore co-exist. Despite these criticisms, IHRL may be appropriate in regulating certain conflicts simply because states routinely dismiss the application of IHL to their internal conflicts. States such as the United Kingdom, Turkey and Russia denied application of IHL to their internal struggles, but IHRL was still able to regulate the conflict through applications to the European Court of Human Rights.<sup>59</sup> In these situations applying IHRL may help to promote compliance with a set of legal norms during armed conflict where states and rebels alike have determined that IHL obligations do not apply.<sup>60</sup> Ultimately, however, human rights law was not designed for application in armed conflict and can have only limited practical effect in such situations.

#### IV. Conclusion

‘New wars’ pose a number of complex and challenging questions for international law and the law of armed conflict. Recent debates have focused on the use of new technology such as the use of unmanned aerial vehicles or the use of private military and security companies, both of which are changing the nature of modern warfare. The development of new weapons systems or military tactics is something to which the law can adapt. Yet ‘new wars’ present a shift in the very nature of war itself. War is no longer a duel between competing states, but comprises a complex mix of internal and international elements, taking place in a globalised context involving an ever-greater number of state and non-state actors. In such conflicts, the traditional dichotomies upon which the law of armed conflict is based are simply outdated.

The first part of this contribution briefly examined the international/non-international dichotomy in international law. While this dichotomy is widely criticised by academics,

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<sup>57</sup> See Tomuschat, ‘The Applicability of Human Rights Law to Insurgent Movements’, in *Crisis Management and Humanitarian Protection*, Berliner Wissenschafts-Verlag, (2004), 588-581. Fleck, *supra* note 41, 621: “Whereas the binding effect of international humanitarian law on non-state actors was never seriously disputed, the extent to which this would also apply to underlying human rights norms was shadowed by a widely believed myth according to which human rights could be claimed against the state, but not against individuals. That myth may have been supported by a limited textual understanding of human rights conventions, but it was never keeping with custom, neither with practice, and cannot be upheld.”

<sup>58</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, para. 26; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion, 9 July 2004, paras. 101-106.

<sup>59</sup> Cf., e.g., *Isayeva, Yusupova and Bazayeva v. Russia*, ECtHR, App. Nos. 57947–49/00 (Feb. 24, 2005); *Güleç v. Turkey*, ECtHR, App. No. 21593/93 (July 27, 1998); *McCann and Others v. United Kingdom*, ECtHR, App. No. 18984/91 (Sept. 27, 1995).

<sup>60</sup> “Even in internal armed conflict, where the taking of human life becomes a daily reality, a minimum of legal protection shall be maintained. However, although IHL is the primary legal instrument designed to provide protection during armed conflict, human rights are not replaced altogether. IHL takes precedence whenever there is a conflict between the two sets of norms. But there are many blank spaces where IHL has not established any specific rules. In such instances, general human rights obligations can be invoked.” Tomuschat, *supra* note 57, p.575.

lawyers and in the jurisprudence of international courts and tribunals, it remains an important element in the law of armed conflict, and will not truly be eroded any time soon. The primary reason for this is the fact that states continue to see a fundamental distinction between the two types of conflicts. The second part examined how the dichotomy is extremely difficult to apply to 'new wars', which contain both internal and international elements. It is especially difficult in cases where the support given by outside parties will not amount to the necessary level to 'internationalise' the armed conflict, or where the belligerents are primarily non-state actors. As the Syrian Civil War demonstrates, there really is a 'crisis of compliance'<sup>61</sup> in these armed conflicts where significant atrocities are committed on both sides. How the 'old law' of armed conflict will adapt to these new wars remains a critical question for international law.

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<sup>61</sup> Bassiouni 2008, *supra* note 29.