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The Conflict Between Armed Conflicts: Dispensing with the Distinction Between International and Non-International Armed Conflicts

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Disclaimer

Foreword by Catherine Turner

When state delegates gathered at the diplomatic conference in Geneva in 1949 they did so with the memory of the first and second world wars fresh in their minds. The Second World War had given rise to the concept of 'total war'. The impact on civilians had been catastrophic and this was reflected in the adoption of the Fourth Geneva Convention for the Protection of Civilians. While the Geneva Conventions undoubtedly made significant progress in the protection they extended to civilians and those who were *hors de combat* the scope of this protection was limited to wars being waged between states. States were much less willing to extend the scope of this regulation to internal wars or rebellions. This reluctance to extend the applicability of the laws of war to internal wars is reflected in the legal distinction drawn in the Conventions between international armed conflict (IAC) and non-international armed conflict (NIAC). While the Geneva Conventions apply in their entirety to IACs, their application to NIACs is restricted to the limited provisions of Common Article 3 to the Conventions. The protection offered to civilians in NIAC was extended by the two Additional Protocols to the Geneva Conventions, which entered into force in 1977. However, the distinction between the two types of conflict was maintained in the Protocols, with the result that the standard of legal regulation of NIACs still falls far short of that provided during an IAC. In recent years the International Criminal Tribunal for the former Yugoslavia (UN-ICTY) has taken an innovative approach to the interpretation of the Geneva Conventions, reading key provisions of the Geneva Conventions as customary law and thereby applicable to NIAC, but this approach relies on a certain degree of judicial activism and is not reflected in the text of the Conventions themselves.

The era of large-scale international armed conflict has now largely passed. Modern conflicts are much more likely to be non-international in nature, involving not only state parties but an array of non-state armed groups. They are also much more likely to be fought in densely populated areas with severe consequences for the civilian population. Drawing on the rules of combatant status, Ben McGuckin explores the reasons why the law distinguishes between international and non-international armed conflict. In so doing, he presents a powerful critique of attempts to protect the interests of states at the expense of civilians who find themselves caught up in armed conflict.

Abstract

The Geneva Conventions of 1949 created a legal distinction between international and non-international armed conflicts. This strict divide was upheld by the Additional Protocols of 1977. The principal reasons for this divide was that states did not want international law dictating what could be done by the state to quash an internal rebellion. International armed conflicts had a robust set of laws regulating them, while non-international armed conflict regulation was under-developed and insufficient. However, international law has come a long way since the Geneva Conventions and Additional Protocols. In recent years, there has been a convergence between the law of international and non-international armed conflicts, with the majority of the laws of the former being applicable to the latter. However, some discrepancies remain, the most significant of which is the concept of combatant status. The principal concerns of sovereignty which originally drove the distinction, while still being important at the political level, are becoming overstated today and have become diluted with the concerns of humanitarian protection for those in non-international armed conflicts. With these concerns of humanitarian protection in mind, this paper argues for a unification of the laws of armed conflict under a single framework.

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I would like to extend a special thanks to Dr Catherine Turner, my supervisor for this paper. Her insight and guidance has allowed me to develop as an academic and I am sure she will remain a close colleague and friend throughout my future career.

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About the Author

Ben McGuckin completed his undergraduate studies in Law at Northumbria University, graduating with First Class Honours in July 2016. He then proceeded to complete the LLM in International Law and Governance at Durham University, where he was awarded a Distinction.

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List of Abbreviations

GCIII	Third Geneva Convention
IAC	International Armed Conflicts
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
NIAC	Non-International Armed Conflicts
POW	Prisoner of War

Introduction

> *Whenever a large body of citizens believe themselves justified in resisting the Sovereign, and are sufficiently strong to take arms, war should be carried on between them and the Sovereign in the same manner as between two different Nations, and the belligerents should have recourse to the same means for preventing the excesses of war and for re-establishing peace as are used in other wars (Vattel 1916: 339).*

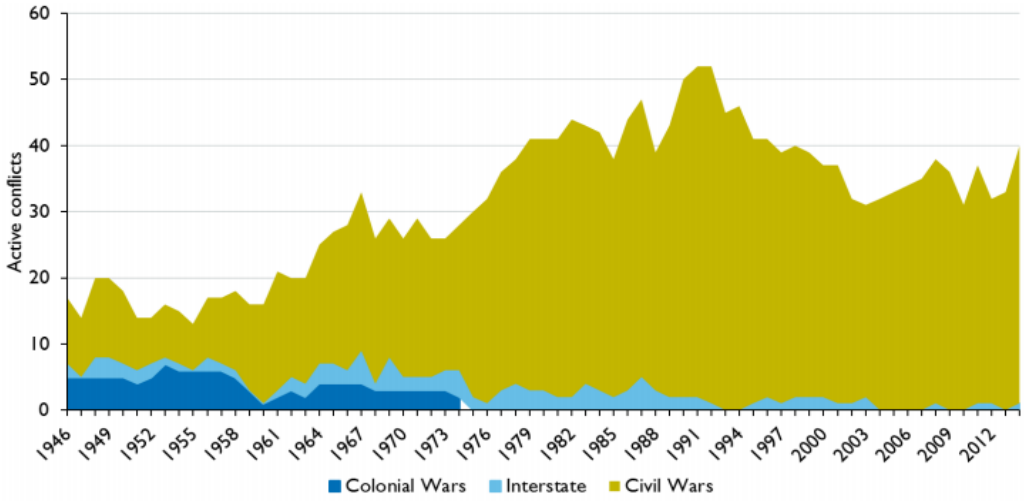
This quote from Emer Vattel in the 18th Century explains that if a civil war broke out between the sovereign government and its people, the war should be treated as between two states, meaning that the entirety of international law applicable to wars between states would become applicable to the internal war. However, the current legal regime is very different to the time of Vattel. Today, a bifurcated framework exists in which the classification of an armed conflict determines what legal rules must be followed. The two types of conflict are international armed conflicts (IAC) and non-international armed conflicts (NIAC). The disparity between the legal regulation of the two types of conflict is immediately apparent when one looks at the protections available under the current classification system. In IACs, the entirety of the Geneva Conventions [1] and Additional Protocol I (Protocol Additional to the Geneva Conventions, 1949 and Protection of Victims of International Armed Conflicts, 1977: Additional Protocol I) are applicable. In contrast, if a situation is classified as an NIAC, only Common Article 3 to the Geneva Conventions (CA3) and Additional Protocol II (Protocol Additional to the Geneva Conventions, 1949 and Protection of Victims of Non-International Armed Conflicts, 1977: Additional Protocol II) apply, together comprising a mere 16 substantive articles of protection for those involved in NIACs.

The traditional arguments for having this distinction between conflicts are rooted in the idea of state sovereignty and that international law has no place regulating the internal affairs of the state (Oppenheim 1912: 12). International law is meant to regulate relations between sovereign states, and NIACs, being between a state and non-state actors, fall outside of its remit. These concerns have not disappeared (Pejic 2007: 77). The contemporary arguments for

[1] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949; Geneva Convention Relative to the Treatment of Prisoners of War, 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949.

eliminating the distinction and creating a harmonized framework stem from notions of humanity (Crawford 2007; *Prosecutor v Tadić* 1995) and that the dichotomy fails to fully protect those involved in armed conflicts (Vité 2009). Further, there are contemporary challenges to the dichotomy, such as transnational terror groups and cyber warfare which add weight to the argument that the distinction should be dispensed with (Schmitt 2013). However, international lawyers have constructed "paper worlds" which do not reflect the reality of the situation (Watkin 2012: 7). As one author has put it, "much of international law is announced in books and articles with little input from nations" (Kelly 2008: 261). This is why this paper argues for the removal of the distinction between IAC and NIAC through an entirely new legal framework which codifies the unification of the laws.

There has also been a distinct shift in the nature of conflicts since the promulgation of the Geneva Conventions in 1949. This is one argument used by proponents of a harmonized law of armed conflict which does not recognise a distinction between IAC and NIAC (Crawford 2007). It has been widely recognised that the nature of conflicts has changed since the end of the Cold War (Greditsch *et. al*. 2002), with "contemporary forms of hostilities [being] less frequently conflicts between States than a variety of armed struggles involving not only States, but a growing number of organised armed groups motivated by a wide range of interests" (Haines 2012: 9). Kofi Annan recognised this, stating that "wars between sovereign States appear to be a phenomenon in distinct decline. Tragically, however, the lives of millions of people around the globe continue to be blighted by violence [in NIACs]" (Annan, 1977). This shift can be seen in the graph below.[2]



[2] Gleditsch, N. P, et al, 'Armed Conflict 1946-2001: A New Dataset' (2002) 39 Journal of Peace Research 615.

The classification of conflicts is crucial as it will affect how the conflict is regulated, such as the rules relating to the protection of civilians, the means and methods of warfare, and the rules regarding treatment of those detained during the conflict.

Chapter One sketches a history of the regulation of armed conflicts before the Geneva Conventions and Additional Protocols. The concepts of insurgency and belligerency are explained, charting the evolution of the legal regulation of armed conflicts, as well as showing why states wanted a distinction between IAC and NIAC for the current framework. The chapter then assesses the current framework and argues that it is unsuitable for modern conflicts and that the distinction should be removed in favour of a unified framework.

Chapter Two presents a detailed analysis of how the distinction has been significantly eroded through customary international law. The chapter looks at cases from the International Criminal Tribunal for the Former Yugoslavia (ICTY), in particular the *Tadić* (*Prosecutor v Tadić* 1995) decision, to show that the rules for NIAC have become analogous to the rules operating in IAC, but that this does not go far enough and a new framework must be worked on by states in order to concretise the fact the distinction has lost its weight. Indeed, the Appeals Chamber in *Tadić* said that the "distinction has gradually become more and more blurred," (*Prosecutor v Tadić* 1995: 97) noting that "international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict" (*Prosecutor v Tadić* 1995: 97). As well as the ICTY, the Customary International Law Study conducted by the International Committee of the Red Cross (ICRC) is used to show that the regulatory lacunae which existed between IAC and NIAC have been ameliorated through customary law and that the regulation of IAC and NIAC is much the same.

Dapo Akande (2012: 35) asserts that there is "by no means complete unity in the law applicable to these two forms of conflict." Therefore, the final chapter explores combatant status, one of the remaining significant differences between IACs and NIACs and, given this, assesses whether a truly uniform framework is achievable. While there are other barriers to the unification of the laws of armed conflict, such as the law of occupation, these will not be discussed as it is necessary to focus on the issue of combatant status, as the imperative of any unified framework will be to offer equal protection for all participants.

There has been much debate around this subject, with some arguing that there is an "academic and political fatigue" concerning the issue (Watkin 2012: 6). However, it is necessary to continue to advocate for a unified framework of the laws of armed conflict. The question must be asked: is there a way back to Vattel's position where one law of armed conflict applies no matter the characteristics of that conflict?

1 The Current Framework

The purpose of this chapter is to sketch the history of the regulation of armed conflicts and how this has influenced the current law. The chapter begins by discussing the history of NIAC regulation i.e. the concepts of insurgency and belligerency. The chapter will then go on to detail the distinction created by the Geneva Conventions and the problems associated with these instruments in light of modern conflicts. Finally, the discussion will turn to an analysis of how the distinction has been affected (if at all) by the Additional Protocols to the Geneva Conventions.

1.1 The Birth of a Legal Distinction

Before detailing the current regime, it is necessary to explain why the international community wanted a bifurcated regime when it drafted the Geneva Conventions and Additional Protocols.

Before the Geneva Conventions, the classification of conflicts was very different. Traditionally, wars were fought between states – they had a monopoly on the use of force – which meant they were reluctant to allow international law to regulate hostilities involving non-state actors. This, coupled with the view that "States solely and exclusively [were] the subjects of international law" (Oppenheim 1912: 12 para 13) meant that international law did not regulate internal conflicts. The regulation of internal conflicts was "within [states'] *domaine reservé*" (Sivakumaran 2012: 9) and not the place of international law. However, states would, from time to time, be faced with internal uprisings which rose to such an intensity they mirrored a war between states. The international community felt there was a need to regulate these conflicts. Yet, such regulation was ad-hoc and recognition of these situations was determined by the states themselves. This highlights the central argument for having a distinction – the sovereignty of states to deal with internal conflicts without international regulation.

Historically, there were three stages of internal conflict: rebellion, insurgency, and belligerency (Moir 2003: 4). The intensity of the conflict is what often determined the classification. A rebellion was the least violent of the three, a situation the police could easily intervene with and quell the violence. (Falk 1964: 197) This was an internal matter and did not require international regulation. Insurgency involved "serious violence coupled with the inability of the government to suppress the violence" (Sivakumaran 2012: 10). This meant the

violence was protracted, involved more participants, and that the outcome was uncertain. However, states had discretion to recognise a situation of insurgency. Such recognition could be politically damaging to the state, as it could demonstrate the state was unable to control its population, sending a damaging message to the international community. However, if states did recognise insurgency, this "created a factual relation in the meaning that legal rights and duties between insurgents and outside States exist[ed] only in so far as they [were] expressly conceded and agreed upon for reasons of convenience…or economic interest" (Lauterpacht 1947: 276-277) From this, it can be delineated that relations between the insurgents and outside states were created if a situation was recognised as insurgency, but this did not "give rise to a specific set of rights and obligations" (Sivakumaran 2012: 10) between the state and the insurgent group. It seems that insurgency was recognised so that political relations could be maintained between the state in which the conflict was occurring and outside states, not for reason of humanity.

Recognition of belligerency was when the situation reached such a level that the belligerents were to be treated in the same manner as the parties to a war between states. Belligerency was defined as:

> *The existence of a de facto political organisation of the insurgents, sufficient in character, population and resources, to constitute it…a State among the nations, reasonably capable of discharging the duties of a State; the actual employment of military forces on each side, acting in accordance with the laws and customs of war. (Wheaton 1866: 35)*

This was a high threshold to meet, as the rebellion would have to be highly organised to the point of being able to "discharge the duties of a State", making it unlikely that any rebel force would meet this threshold. As with insurgency, the recognition of belligerency was at the discretion of the state; recognition of belligerency was simply a recognition of war, not a recognition of a "government or political regime" (Moir 2003: 5). However, this fails to account for the political message that recognition of belligerency would send to the international community. Herbert Smith (1937: 18) correctly acknowledges that if the state recognised the existence of war, then "recognition of the insurgent government follows as a necessary consequence. Wars can only be carried out by governments and there must be at least two parties to every war"[3] However, this is different today with the Geneva framework

[3] An example of a recognition of belligerency is Britain's recognition of belligerency in Spain in 1819.

recognising that a party to an NIAC does not need to be a government (All Geneva Conventions 1949: Article 3). But, as with insurgency, recognition was mostly done out of national self-interest (Walker 1893: 115). However, there are some instances in which recognition of belligerency was done in the name of humanity.[4] Once belligerency was recognised, the situation was 'upgraded' to a civil war, to which the entirety of the *jus in bello* was applicable (Sivakumaran, 2012: 15). It is interesting that the protections in situations of belligerency were more robust than the protections available under Geneva law today. Geneva law contains no combatant immunity for those participating on the side of an organised armed group, nor does it accord prisoner of war (POW) status to captured members of an organised armed group.[5] Although the full corpus of the *jus in bello* was to be applied in cases of belligerency, the problem was that conflicts were only characterised as such when the state wanted to recognise it.

It should be noted that the idea of law serving humanity is a relatively recent development in international humanitarian law (IHL) (Coupland 2001). With this in mind, it can be delineated that the law of belligerency was not concerned with the effect of the conflict on the population, but rather ensuring there was a level playing field for the hostile parties. The system was therefore not fit for the protection of those involved in the conflict.

1.2 The Current Regime: The Geneva Conventions and Additional Protocols

The foregoing shows that there was a need to regulate NIACs through positive law as there was too much power in the hands of states to engage international regulation – there needed to be objective criteria to classify a conflict which engaged international regulation. The Geneva Conventions created the contemporary legal distinction, arguably creating more problems than were solved.

The bifurcation exists through two articles which are common across the Geneva Conventions: Common Article 2, which outlines the scope of application for all four Geneva Conventions; and Common Article 3, which regulates NIACs.

[4] In the Greek war of independence in the 1820s, the British government recognised the situation as one of belligerency. The Foreign Secretary stated that recognition was done "not out of any partiality to the Greeks, but because we think it for the Interest of humanity to compel all belligerents to observe the usages by which the spirit of civilisation has mitigated the practice of war" and that, thorough not following these rules, the situation would degenerate into "one of indiscriminate rapine and massacre" (Smith 1932: 296).

[5] This issue will be looked at in more detail in Chapter 3.

1.2.1 Common Article 2

Common Article 2 stipulates that the Geneva Conventions shall apply "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (Geneva Conventions 1949: Article 2). It can be discerned that there does not need to be a formal declaration of war in order for the Geneva Conventions to become applicable to an IAC. Although a formal declaration of war will engage the Conventions, so will the existence of an armed conflict between two states which are Parties to the Conventions. However, there is no definition of the term "armed conflict" within the article, nor in any other instrument regulating armed conflicts. According to the ICRC, the inclusion of "armed conflict" was deliberate so as to create a wider scope of application of the Conventions (Pictet 1952: 32). The ICRC attempted to provide a definition of armed conflict which states that an armed conflict is "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2…It makes no difference how long the conflict lasts, or how much slaughter takes place" (Pictet 1952: 32). However, this definition is not a legal definition and is too broad with the use of the phrase "any difference arising between two States." The fact that there is no definition of "armed conflict" in the article is regrettable as it causes uncertainty. However, the ICTY has filled this lacuna. The case of *Tadić* gave the first definition of what constitutes an IAC in the context of the Geneva Conventions. According to *Tadić*, an IAC will exist "whenever there is resort to armed force between States" (*Prosecutor v Tadić* 1995: 70). This means that the classification of an IAC is subject to an objective criterion i.e. the resort to armed force. Therefore, armed conflict "is not a technical, legal concept but a recognition of the fact of hostilities" (Greenwood 2009: 250). Once an IAC is determined, the entirety of the Geneva Conventions is applicable.

1.2.2 Common Article 3

At the Diplomatic Conference of 1949, "no other issue [had] given rise to such a long discussion...as the question of the extension of the Convention[s] to war victims of conflicts not of an international character" (Final Record of the Diplomatic Conference of Geneva 1949: Vol II-B, 325 (USSR)). The main concern of states was that extending application of the Conventions to NIACs would erode sovereignty. This led the Burmese delegate to advocate for the complete removal of any notion of application of the Conventions to NIACs, stating that to do so would represent a "very serious danger to sovereignty and civilian rights" (Final

Record of the Diplomatic Conference of Geneva 1949: Vol II-B, 327 (Burma)). However, more states were receptive to the idea of international regulation of NIACs. The Mexican delegation said, "the rights of the State should not be placed above all humanitarian considerations" (Final Record of the Diplomatic Conference of Geneva 1949: Vol II-B, 11 (Mexico)) This shows that states were becoming more receptive to international law governing internal conflicts, due to the way they are fought and how they can often be more brutal due to the "fratricidal hatred" they engender (Pictet 1952: 39). Concerns of humanity were becoming more apparent and important for states.

The Diplomatic Conference of 1949 led to the adoption of Common Article 3 (CA3), which marked "a decisive step in the evolution of modern law and tending to limit the sovereignty of the state for the benefit of the individual" (Pictet 1985: 47). The provision contains minimum guarantees for those "not taking an active part in hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat"* i.e. those who are no longer active combatants. (All Geneva Conventions 1949: Article 3). However, a principles approach is adopted, meaning that it does not directly transplant provisions applicable in IAC to NIAC, but instead consolidates the principles of the Conventions into a single provision, leading to the provision being labelled a "convention in miniature" (Pictet 1985: 48). CA3 applies to armed conflicts "not of an international character occurring in the territory of one of the High Contracting Parties" (All Geneva Conventions 1949: Article 3). There is no definition of a "conflict not of an international character," which creates ambiguity, allowing states to "evade the responsibility to adhere to its provisions" (Cullen 2010: 57). If the scope of application is ambiguous enough for states to not comply with it, the provision is vacuous. However, the *Tadić* case has clarified what is meant by a conflict not of an international character. The Appeals Chamber held that an NIAC will exist when there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" (*Prosecutor v Tadić* 1995: 70). This creates objective criteria against which the existence of an NIAC can be determined. This is a welcome movement away from the situation discussed above with belligerency where the power to engage international regulation was left with states. However, since this is not contained in CA3, it would seem that the Geneva Conventions have not altered the situation discussed above with belligerency and insurgency, in terms of providing a framework in which an armed conflict's existence can be objectively ascertained. Moir (2003: 34) rightly points out that this is "unsatisfactory from a humanitarian standpoint," highlighting that the distinction is being viewed more from a humanitarian standpoint rather than from the perspective of

sovereignty. This serves as an example of why the bifurcation must be removed and one corpus of law must be applied to all conflicts. Although, this ambiguity is ambivalent. While ambiguity is one of the failings of the provision, it is also one of its crucial elements. By having a definitional lacuna in the Conventions, the concept of NIAC has been allowed to evolve since 1949. The "weakness in protecting civilian population and discretion in qualifying armed hostilities [is] balanced by an increased flexibility and an enhancement of the protection of the civilian population in non-international armed conflicts" (Spieker 2001: 141). An example of this flexibility is demonstrated in *Hamdan v Rumsfeld* (2006), where the Supreme Court of the United States classified the "war on terror" as an NIAC. This has crucial implications for the conduct of hostilities, such as Al-Qaeda members detained at Guantanamo Bay not enjoying POW status under the Third Geneva Convention. Many have disputed the judgment in *Hamdan* (Shamir-Borer 2007), with scholars using this as ammunition to assert that the current framework is inadequate to address contemporary conflicts involving transnational terror groups (Greenwood 2002: 301; Tønnesson and Goldblat 2002: 389). This further highlights "the degree to which contemporary conflict is challenging traditional international law concepts" (Watkin 2007: 272) and adds weight to the proposition that the distinction should be abolished and replaced with a new framework, so as to ensure protection for all those involved in conflicts.

Further, it is not clear what threshold must be reached in order for CA3 to be engaged. State practice appears to be mixed. While there have been situations where an immense level of violence has existed which have merely been classified as "banditry" (Cullen 2005: 83-88), there have been cases juxtaposing this. For example, the Inter-American Commission of Human Rights held that a clash of thirty hours between the Argentine army and rebel soldiers engaged CA3 (*Juan Carlos Abella v Argentina* 1997: 155-156). The *travaux préparatoires*[6] of CA3 shows that the threshold of application is higher than first appearances suggest. The ICRC states that "it must be recognized that the conflicts referred to in Article 3 are armed conflicts…which are in many respects similar to an international war, but take place within the confines of a single country. In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front" (Pictet 1958: 36). From this, it can be seen that the ICRC understood "conflicts not of an international character" to be equivalent to a civil war. Since the threshold of a civil war was tantamount to an IAC, it would seem logical to attribute the same threshold to CA3. Again, this creates confusion and uncertainty

[6] This term encompasses the debates and all other preparatory work done before the treaty was concluded.

surrounding the classification of a NIAC and further bolsters the claim here that the classification should be removed and a unified framework created to regulate any armed conflict.

The last sentence of CA3 is particularly interesting. It states that application of CA3 "shall not affect the legal status of the Parties to the conflict" (All Geneva Conventions 1949: Article 3). Although it is explicit that the legal status of Parties is not affected, "States have been, and always will be, reluctant to admit that a state of armed conflict exists" (U.K. Ministry of Defence 2004: 386). While the legal status of a non-state party will be unaltered, it is the political status of these groups that states are concerned with (Greenberg 1970: 70). So while the sentence reiterates that CA3 is meant to serve a humanitarian purpose, states remain reluctant to admit an armed conflict is occurring, due to the disadvantages such an acknowledgement would have, such as the appearance that the state is unable to control its population; the insurgents being afforded some sort of international legitimacy; and the fact recognition of an armed conflict engages basic IHL instruments which limit the means the state can employ to bring about an end to the conflict (Cullen 2010: 57). This further highlights the continuing struggle between sovereignty and humanity in this debate.

1.2.3 The Additional Protocols

The Additional Protocols sought to add more protections for those involved in armed conflicts and have introduced concepts which have been of great benefit from a humanitarian point of view, such as the concept of distinction between combatants and civilians (Additional Protocol I 1977: Article 48; Additional Protocol II 1977: Article 13). The inclusion of this principle, specifically in Protocol II, according to Louise Doswald-Beck (1989: 138), represents a "major step forward". However, due to the incredibly high threshold for Protocol II to apply, the inclusion of this principle and, by extension, Protocol II as a whole, does not represent a major step forward.

At the 1971 Conference of Government of Experts and 1974-1977 Diplomatic Conference, the favoured view was to maintain the distinction between conflicts. The Nigerian delegation argued that a single instrument was "far ahead of its time" and that while "humanitarian principles were indivisible, different rules had to be made for different situations" (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-1977: Volume VIII, 17). However, the Norwegian delegation argued that sovereignty should be

subservient to humanitarian protection and that the existence of a distinction between conflicts creates "selective humanitarianism" (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-1977: Volume VIII, 12). This is demonstrative of humanitarian concerns becoming more forceful and sovereignty concerns becoming diluted when it came to the regulation of NIACs.

Additional Protocol I

Protocol I deals exclusively with IACs. However, it also regulates some *de facto* NIACs with the rules of IAC. Article 1(4) states that conflicts in which people are "fighting against colonial domination and alien occupation and against racist regimes in the exercise of their self-determination" come within the remit of the Protocol. This further blurs the distinction between IAC and NIAC and has been "seen by many as an attempt by Third World states to strike a political blow against Western imperialism" (Moir 2003: 90). However, Gerald Draper has maintained that these types of conflicts should be governed by Protocol II, due to their *de facto* internal nature (Draper 1979: 150). It is worth noting that Article 1(4) has never been applied in practice as it can be difficult to define the situations to which the provision applies (Akande 2012: 49). It is odd that this particular type of internal conflict has been singled out for different treatment in the current classification regime. Absent motivation, there is nothing separating non-state actors in these conflicts from non-state actors in other NIACs – they are still non-state actors fighting against the sovereign power. The hallmark of the classification regime is that the actors in the two types of conflicts are different. If states are willing to allow the rules of IAC to apply to certain types of armed conflict, it is submitted that this should be expanded to all NIACs under a new framework.

Additional Protocol II

It has been asserted that Protocol II represents a "last-minute compromise" of transplanting the law of IAC to NIACs (Sivankumaran 2011: 49). Last-minute does not go far enough in explicating how much of a failure Protocol II is. The central problem with Protocol II is that its threshold of application is much higher than CA3:

> *This Protocol…shall apply to all armed conflicts which are not covered by Article 1 of [Additional 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. (Additional Protocol II 1977: Article 1)*

This threshold has rarely been met for any NIAC since its inception and where the threshold has been met, the Protocol has been practically irrelevant. For example, in the aftermath of the Rwandan genocide, while the International Criminal Tribunal for Rwanda held that "the material conditions…relevant to Additional Protocol II [had] been fulfilled" (*Prosecutor v Akayesu* 1998: 627), the Protocol was powerless to protect civilians, as the Parties to the conflict did not comply with the Protocol – "the new humanitarian law failed utterly" (Moir, 2003: 125) Further, the conflict in El Salvador highlights the ineffectiveness of Protocol II. When one analyses the conflict in El Salvador, it is apparent that the difficulty of applying the Protocol lay in whether Farabundo Martí National Liberation Front (FMLN) was under a responsible command and exercised such control over territory to enable them to carry out sustained and concerted military operations and to implement the Protocol. This highlights that the key point when it comes to classification of armed conflicts is that it is the actors who are involved, which makes it relatively easy to determine when there is an IAC and causes confusion and uncertainty when dealing with NIACs. However, while both parties to the El Salvador conflict accepted that the Protocol applied, as with Rwanda, it was of little practical relevance, with both government and FMLN forces committing horrific acts of barbary (Moir, 2003: 121-122).

It is odd that an instrument offering more protection to those involved in NIACs sets a higher threshold for these protections to apply. This goes against the object and purpose of IHL – to mitigate suffering during armed conflicts. While the treaties and international decisions show a growing humanisation of IHL, in practice, with this threshold of applicability, the humanization effort has stalled. Further, while Protocol II was meant to supplement CA3, it has in fact created a separate legal regime due to its threshold of applicability. Therefore, there are effectively two different legal regimes governing NIACs: CA3 and Protocol II. With CA3 offering minimal protection and Protocol II having a practically impossibly high threshold to reach, the law becomes vacuous and ineffective. It has also been argued that there is a third regime for NIACs, the threshold created by The Rome Statute of the International Criminal Court (henceforth: Rome Statute; Rome Statute of the International Criminal Court, adopted 1998, in force 2002). The Statute states that Article 8(2)(e) applies only 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" (Rome Statute: Article 8(2)(f)). All that needs to be noted here is that there are at least two, possibly three, different regimes governing NIACs. The current framework is confusing and can result in people falling between the gaps of legal protection. This is why a unified framework which does not recognise a distinction between IAC and NIAC must be seriously considered.

1.3 Conclusion

From the above discussion, it can be seen that the treaty law regarding the classification of armed conflicts is rather straightforward when it comes to IAC. If there is resort to armed force between states, the Geneva Conventions and Protocol I will apply, offering robust protections to all those involved in the conflict. However, the classification of NIACs is confused, fragmented, and inadequate for contemporary conflicts. From a legal point of view, three regimes exist for NIACs: CA3, Protocol II, and the threshold of the Rome Statute in terms of prosecuting individuals for war crimes committed in NIACs. The result of this codified system leaves the law in disarray and unable to properly protect those involved in internal conflicts. However, has customary international law gone some way to eroding the distinction between conflicts? It is to this question to which we now turn.

2 Blurring the Distinction: Analogizing the Law of International Armed Conflict

This chapter focuses on how the dichotomy between IAC and NIAC has been diluted through customary international law, particularly through analogizing the law of IAC to NIACs. The approach of the ICTY will be analysed, particularly the *Tadić* decision, which will demonstrate that the distinction has been weakened through analogous application of IAC law to NIAC situations. The ICRC study of customary international humanitarian law (henceforth: ICRC Study; Henckaerts and Doswald-Beck, 2005: Volume I, Volume II) will also be assessed to show that the distinction exists in theory for the vast majority of rules, therefore showing that the current classification regime can be discarded in favour of a simpler regime better suited to protect those in contemporary conflicts.

The central point in this chapter will be that, although the distinction has been eroded through customary international law, this is not enough to completely erode the distinction and protect those involved in conflict. If the distinction has been done away with in all but the treaties, a new treaty should be concluded to highlight this change, bringing clarity and simplicity.

2.1 What is Customary International Law?

Before beginning an analysis of the ICTY and the ICRC Study, it is pertinent to explain what customary international law is. Under Article 38(1) of the Statute of the International Court of Justice, there are four sources of international law, one of which is "international custom, as evidence of a general practice accepted as law" (United Nations 1946: Article 38(1)(b)).[7]

As can be seen from the articulation in the statute, there are two elements to customary international law: a general practice (state practice) and that the practice is accepted as law, otherwise known as *opinio juris*. This latter criterion must constitute a "clear and continuous habit of doing certain actions…under the aegis of the conviction that these actions are, according to international law, obligatory or right" (Oppenheim 1955: 26). Essentially, the state must do a particular action out of a sense of legal obligation. The International Court of Justice (ICJ) has elaborated on the state practice element, stating that it must be "widespread and representative" and that the practice of specially affected states is of importance when looking at whether custom has been established (North Sea Continental Shelf Cases 1969: 73-77).

Customary international law, however, is "notorious for its imprecision" (Koroma 2005: xii) and "dangerously manipulable" (Charlesworth 1998: 44). This is significant for IHL as it means it is easier for states to avoid applying these customary rules, or not apply them in full, as they could legitimately argue that the customary rule is inapplicable to them or the rule does not exist at the customary level. Due to these difficulties of customary international law, a new regulatory framework is required to concretise the dilution of the distinction. While customary international law has almost fully eroded the distinction, we must not be satisfied with such imprecision in regulating NIACs. It must be remembered that IHL is practiced not only by military lawyers, but by military personnel. When conventional rules become blurred with customary international law, the confusion becomes apparent. From a practical point of view,

[7] The other three sources being treaties; general principles of law recognised by civilized nations; and scholarly teachings and judicial decisions may be used as subsidiary means for the determination of rules of law, Article 38(1)(a),(c), and (d).

having a unified body of law applicable to any type of conflict would be easier for military personnel to follow.

2.2 Some Preliminary Developments

As early as 1968, it was accepted that there were some rules that applied regardless of the classification of the conflict. General Assembly resolutions 2444 (United Nations 1968: Resolution 2444) and 2675 (United Nations General Assembly 1970: Resolution 2675) stated that there was a necessity of applying basic humanitarian principles in all conflicts, with no distinction as to their classification. This was the impetus for future bodies to argue that the distinction had become blurred and rules existed that applied to all conflicts. Further, the Appeals Chamber in *Tadić* said, *inter alia,* that these resolutions were declaratory of customary international law (*Prosecutor v Tadić* 1995: 112).

As discussed in the previous chapter, CA3 is applicable in "conflicts not of an international character". However, developments in customary international law have changed this position. The ICJ has held that the rules of CA3 represent norms of customary international law and are a "minimum yardstick" (Case Concerning Military and Paramilitary Activities In and Against Nicaragua 1986: 218) to be applied in IAC due to them being "elementary considerations of humanity" (Case Concerning Military and Paramilitary Activities In and Against Nicaragua 1986: 218). Although the decision was met with some negativity, these sentiments were directed towards the legal reasoning employed by the judges in the case, not the actual decision of holding that CA3 applies regardless of the classification of the conflict.[8] The fact the ICJ held that CA3 is applicable in IAC is significant for two reasons. First, it demonstrates that there has been a shift towards humanity in IHL, with a universal minimum benchmark of humanity being applicable to both types of conflict. Secondly, it highlights how customary law can be used to do this, in that a provision intended for use exclusively in one type of conflict has been made applicable to the other. The position of the ICJ has been confirmed in multiple cases. In *Halilović,* the ICTY Trial Chamber held that "when an accused is charged with violation of Article 3 of the Statute [for the International Criminal Tribunal for the Former Yugoslavia], based on a violation of Common Article 3, it is immaterial whether the armed conflict was international or non-international in nature" (*Prosecutor v Halilović* 2005: 25; *Prosecutor v Delalić* 1998: 300-301; Prosecutor v Tadić 1995: 98). This shows that

[8] For some of these negative reactions, see: dissenting opinion of Judge Jennings in the *Nicaragua* case (Meron 1989).

the dichotomy between conflicts was starting to lose its weight, with minimum humanitarian standards that were applicable in NIACs being applied in IACs.

These early developments were limited, however. There was doubt as to whether there were any customary rules applicable to NIAC which did not stem from CA3 or Protocol II (Final Report of the Commission of Experts 1994: 54). This view is not tenable today, as there is a healthy corpus of law applicable to NIAC which finds its roots in instruments applicable to IAC. This contemporary position was foreshadowed by the Human Rights Division of the UN Observer Mission in El Salvador, which applied by analogy the provisions of Protocol I to the NIAC in El Salvador (Second Report of the United Nations Observer Mission in El Salvador 1991: 69; Third Report of the United Nations Observer Mission in El Salvador 1992: 131). There was a growing desire for NIACs to be regulated by the rules applicable in IACs.

2.3 The ICTY – Protection by Analogy

The ICTY was set up to try those who had breached IHL during the conflict in the Former Yugoslavia. The tribunal has, *inter alia*, dramatically changed IHL and has been explicit in its adoption of a humanitarian agenda, putting emphasis on a shifting away from traditional arguments of IHL being state-oriented and moving towards a human-being-oriented IHL (*Prosecutor v Tadić* 1995: 97).

The ICTY recognised that the lacuna between the regulation of IACs and NIACs was no longer definitive – there was scope for the distinction to be diluted, if not removed entirely. More importantly, there was a new role for international courts to develop the law: "the new international law would be elaborated not in the conference room but in the judges' chambers" (Zahar 2012). The *Tadić* case is of paramount importance when looking at how customary international law has affected the distinction between conflicts. It asserted that there is a corpus of international law applicable to NIACs which found its roots outside of CA3 and Protocol II. This trend continued in multiple cases, for example the Trial Chamber in *Martić* stated that "there exists…a corpus of customary international law applicable to all armed conflicts irrespective of their characterization" (*Prosecutor v Milan Martić* 1996: 11).

However, the way in which the ICTY identified these customary rules was not to focus on the traditional methods of analyzing state practice and *opinio juris* as the ICJ stipulated. The Appeals Chamber remarked:

> *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 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…dichotomy should…lose its weight (Prosecutor v Tadić 1995: 97, italics added).*

As can be seen from this paragraph, the Appeals Chamber asserts that the law of IAC should apply to situations of NIAC because of the growing concern of international law with the protection of people. The people affected by the horrors of NIACs are no different to the people affected by IACs, so the rules for both types should be analogous. This shows that the ICTY was driven by a humanitarian imperative to dilute the distinction. Sovereignty concerns were becoming less imperative for NIACs.

How did the ICTY analogize IAC law to NIACs? The Court identified that customary rules protecting the civilian population first emerged in the Spanish Civil War (1936-39), stating that "State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law" (*Prosecutor v Tadić*, 1995: 100). The Appeals Chamber relied on statements from UK Prime Minister Chamberlain, who stated that "direct and deliberate bombing of non-combatants is in all circumstances illegal" (House of Commons Debates, 23 March 1938: 1177); and that any attacks must be "legitimate military objectives and must be capable of identification [and] reasonable care must be taken in attacking those military objectives so that by carelessness a civilian population…is not bombed" (House of Commons Debates, 21 June 1938: 937-38). The Chamber also drew on state practice from China in which IAC law was applied to an NIAC (*Prosecutor v Tadić* 1995: 102). Further evidence was relied on from Nigeria to confirm this trend of states applying the rules of IAC in NIACs in regards to protecting civilians and captured combatants, as well as the rules regarding the conduct of hostilities (*Prosecutor v Tadić* 1995: 106). As can be seen, very little evidence was relied upon in the articulation of these customary norms and it does not seem to comport with the criteria set out by the ICJ. It seems that the ICTY was driven by a "moral imperative" to analogize the law, dispensing with a robust analysis of state practice and *opinio juris* in favour of doing what seemed to be right from a humanitarian perspective (Zahar 2012: 19). However, it is submitted that this is not problematic and demonstrates that a unified law is possible. The tenor of the legal commentary

is that the method used by the ICTY was dubious, but that the result was, in the end, the correct direction of the law (Zahar 2012: 19). For example, Alexander Zahar characterizes the work of the ICTY in this regard as "meta-international law" (Zahar 2012: 48) in which a body of law has developed which is not accepted by states, but is nevertheless accepted and applied as law, even though there is no real justification for the norms' existence other than the proclamation by the bodies who found the existence of the norm in the first instance (Zahar 2012: 48). This demonstrates that while the distinction has been diluted through customary law, a formal ratification of this must be concluded in a treaty which is accepted by states.

The reasons for the ICTY dispensing with the robust analysis set forth by the ICJ stem from its function. It has already been expressed that the ICTY adopted an explicit humanitarian agenda at its inception and is solely concerned with the application and development of IHL, while the ICJ is concerned with international law more broadly. This further highlights the sovereignty-humanity divide that is the driving force behind the distinction between conflicts.

The Appeals Chamber also adopted this method regarding rules relating to the means and methods of warfare, holding that the rules of IAC are also applicable to NIAC. This was evidenced by the German Military Manual of 1992, which provided that "Members of the German army…shall comply with the rules of [IHL] in the conduct of military operations *in all armed conflicts, whatever the nature of such conflicts*" (Humanitäres Völkerrecht in bewaffneten Konflikten 1992: 211, italics added). The Appeals Chamber went on to explain that:

> *Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife (Prosecutor v Tadić 1995: 119).*

Again, this language of humanitarianism and morality is used to analogize the law of IAC, making it applicable to NIACs. That the distinction between conflicts has lost its weight in regards to the means and methods of warfare is reflected in the numerous amount of weapons treaties which have been promulgated before and after the *Tadić* decision which contain no

reference to a distinction between conflicts – the weapons are prohibited universally, regardless of the nature of the conflict.[9]

The Appeals Chamber in *Tadić*, however, made two observations in terms of the customary rules regulating NIACs:

> *(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 (Prosecutor v Tadić 1995: 126).*

Firstly, the Appeals Chamber acknowledges that not all rules have been extended to NIAC. At the time of the judgment, this would be difficult to argue with. Now, however, with the ICRC Study, it is the case that only a number of rules have not been extended to NIAC.[10] Secondly, the Appeals Chamber acknowledged that the way NIACs have become regulated by customary international law is by the *principles* of the rules regulating IAC becoming applicable in NIAC, as opposed to the specific provisions being applicable. This was shown in Chapter One in relation to how CA3 was developed. However, this may not be as much of a limitation. Sivakumaran (2012: 58) asserts that applying principles as opposed to the provisions is of "lesser importance" due to how those principles have been applied, in that the bare provisions of the rules of NIAC have been fleshed out with the more detailed regulations contained across the law of IAC. An example of this is unlawful attacks on civilians. Additional Protocol II (1977: Article 13(2)) provides: "the civilian population as such, as well as individual civilians, shall not be the object of attack." *Prima facie*, the provision is bare. However, it has been interpreted to include the same obligations existing under Protocol I, such as a prohibition on

[9] For example, see the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II, and III) (adopted 10 October 1980; entered into force 02 December 1983) 1342 UNTS 137; Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on their Destruction (adopted 3 September 1992; entered into force 29 April 1997) 1974 UNTS 45; Additional Protocol to Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, Protocol on Blinding Laser Weapons) (adopted 13 October 1995; entered into force 30 July 1998) 1380 UNTS 370; Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction (adopted 18 September 1997; entered into force 1 March 1999) 2056 UNTS 211; Convention on Cluster Munitions (adopted 3 December 2008; entered into force 1 August 2010) 2688 UNTS 39.

[10] There are only 12 rules identified by the ICRC study which are solely applicable to IACs (see Henckaerts 2005).

indiscriminate attacks (*Prosecutor v Tadić* 1995: 127; *Prosecutor v Galić* 2003: 57); a prohibition on disproportionate attacks (*Prosecutor v Hadžihasanović and Kubura* 2006: 45); and a prohibition on attacks against civilian objects (*Prosecutor v Hadžihasanović and Kubura* 2004: 98). Using this analogizing method, the succinct rules of Protocol II have been interpreted to contain more detailed rules at the level of customary law (Sivakumaran 2012: 58). Further, the Appeals Chamber immediately goes on to state that, despite these limitations, there exists a body of customary international law governing internal conflicts (*Prosecutor v Tadić* 1995: 127). These are: protection of civilians, particularly from indiscriminate attacks; protection of civilian objects, particularly cultural property; prohibition on means of warfare proscribed in IAC; protection of those who do not (or no longer) take active part in hostilities; and a prohibition on certain methods of warfare, such as perfidy (*Prosecutor v Tadić* 1995: 127). This shows that the law of NIAC has been expanded with the detailed principles of the laws relating to IAC. This trend has been reinforced by the Prosecutor of the ICC, saying that the "essential substance of the detailed [Protocol I] provisions concerning unlawful attacks applicable to [IAC] is also contained in the single relevant sentence in [Protocol II]" (Fenrick 2004: 166). This shows that the law of NIACs regarding unlawful attacks on civilians, while not written down in a detailed fashion in Protocol II, is the same as that in IACs. This demonstrates the need for not only the distinction to be dispensed with, but also for a new framework to be drawn up in which these detailed rules are codified so as to make it easier to apply.

2.4 The ICRC Study

In 2005, the ICRC published its study *Customary International Humanitarian Law*. The Study articulates the customary rules of armed conflict, detailing which rules apply to both types of conflict or are exclusive to one type. The Study asserts that, out of the 161 customary rules identified, 138 (or 85%) are applicable in both types of conflict and that only 12 apply exclusively to IAC. The ICRC adopted the analogizing method of the ICTY, expressly indicating that "the gaps in the regulation of the conduct of hostilities in Protocol II have largely been filled through State Practice, which has led to the creation of rules *parallel to those in Protocol I, but applicable as customary international law to [NIAC]*" (Henckaerts and Doswald-Beck 2005: Volume I: Rules, xxxv, italics added). For instance, where gaps exist in Protocol II in relation to the conduct of hostilities or protected persons in NIAC, the Study

asserts that state practice has filled these gaps and created rules which are parallel to those contained in Protocol I (Henckaerts and Doswald-Beck 2005: Volume I: Rules, xxxv).[11]

There are some rules that the ICRC identify as pertaining only to IAC, but which could easily be made applicable in NIAC under a unified regime. For example, Rule 114 of the Study states that:

> *[P]arties to the conflict must endeavor to facilitate the return of the remains of the deceased upon request of the party to which they belong or upon the request of their next of kin. They must return their personal effects to them (Henckaerts and Doswald-Beck 2005: Volume I: Rules, 441).*

While there was state practice of this rule in NIAC, there was a lack of *opinio juris* for the rule to be applicable as customary law (Henckaerts and Doswald-Beck 2005: Volume I: Rules, 414). However, the fact there has been state practice in relation to this rule demonstrates that states are not averse to returning remains to the other party or their families.[12] Further, after hostilities have ended, there does not appear to be any military, strategic, or logical reason for Parties to the conflict to retain the remains of the deceased. Additionally, the return of the deceased to the Parties, particularly the rebel side, may aid in settling the post-conflict environment. This is an example of how a rule which, although not customary due to a legal technicality, would face little difficulty in being applicable to all conflicts under a unified regime.

In terms of state reception of the Study, only the United States submitted a formal response, which was somewhat critical of the Study (Bellinger and Haynes 2007). This is not enough to classify as a negative reaction by the international community. It should be noted that the US response explains that more time would be needed to conduct a thorough review of the Study. At the time of writing, there has been no further publication from the US government regarding the Study. Indeed "the lack of an immediate protest signifies that States are unwilling to publicly denounce progressive IHL norms" (Nicholls 2007: 248). While the US was highly critical of the Study "the general tenor of the Study has not been criticized, nor has its conclusion that a large number of IHL rules are applicable to [both types of conflicts]" (Sivakumaran 2012: 61). The ICTY has cited the Study in numerous judgments and expressed

[11] Rules 7-10 (on distinction between military and civilian objects); Rules 11-13 (on indiscriminate attacks) pp. 25-34; Rule 14 (on proportionality) p. 46; Rules 15-24 (on precautions) pp. 51-74; Rule 34 (on protection of civilian journalists) p. 115.

[12] See, for example, the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, Part IV, Article 3(4).

that the rules are entirely accurate (*Prosecutor v Hadžihasanović* 2005). Further, the Study has been cited with approval by national courts in the United States (*Hamdan v Rumsfeld* 2006: 2797) and Israel (Public Committee Against Torture in Israel v Government of Israel 2006), which are of particular importance given the initial negativity towards the Study by the USA and Israel's continued reservations to application of IAC law in NIACs.

It must be remembered that customary international law has its limits. The ICRC identified customary international humanitarian law, but did not create those laws. Creation of international law remains solely a duty for states. Thus, while customary international humanitarian law has blurred the distinction between conflicts, a new framework is required which is created by states. François Bugnion (2007: 31) has stated that it may be possible for the ICRC Study to provide the foundations of a new codification of international humanitarian law. It therefore makes sense that the ICRC, together with the decisions of the ICTY, should be used as a skeleton for creating a unified framework which does not recognise a legal distinction between conflicts. Further, this new unified framework would require state consent, something which appears to be the problem surrounding the rules outlined by the Study and the ICTY.

2.5 Three Difficulties

While the efforts of the ICTY and ICRC analogizing the law of IAC to NIAC are welcome and demonstrate that the distinction is becoming less important, there are three difficulties with using this approach, which must be dealt with in order to show a unified body of law is possible, for if these difficulties remain the project runs into problems.

2.5.1 Scope Affecting Content.

In fleshing out the rules applicable in NIACs, there has been a tendency to "read out" the threshold of applicability of Protocol II while simultaneously raising the normative content of the law applicable to NIACs (Sivankumaran 2012: 66). However, this reading out of the threshold seems to have been confirmed in the Rome Statute. Article 8(2)(f) of the Rome Statute does not have a threshold of applicability as high as Protocol II (Rome Statute 1998: Article 8(2)(f)). In fact, the threshold of applicability is drawn straight from the *Tadić*

formulation,[13] which is significant given the number of ratifications of the Rome Statute.[14] This demonstrates a willingness of States to lower the threshold of applicability at which parties can become liable for violations of IHL. For example, the Rome Statute makes it a war crime to directly attack the civilian population (Rome Statute). This is also prohibited by the Additional Protocol II (1977: Article 13) but the Rome Statute's threshold of applicability is lower than that of Protocol II, showing that states are willing to lower the threshold of applicability for the application of these norms. Further, the ICRC Study does not introduce any threshold of applicability for the customary norms it identifies as applicable in NIACs as states did not recognise a higher threshold when applying customary norms to an NIAC (see e.g. Bothe 2005; Sivakumaran 2012: 67). By doing this, a risk is created whereby there is an overloading of normative content, leading to overwhelming non-State armed groups which are unable to implement the norms, which in turn could possibly lead to non-compliance (Sivakumaran 2012: 67). A solution to this would be to alter the threshold at which the norms become applicable in a unified framework – perhaps adopting a threshold between *Tadić* and Protocol II.

2.5.2 Differing Levels of Protection.

A second issue with this methodology is that differing levels of protection exist across conventional law and customary law. An example of this is the prohibition of child soldiers, where a disparity exists between Protocols I and II. Protocol I does not offer as much protection to children as Protocol II. Under the former, there is an onus on the Parties to take "all feasible measures" so that children under the age of fifteen do not take a direct part in hostilities (Additional Protocol I 1977: Article 77(2)). Additional Protocol II (1977: Article 4(3)(c)) demands that children under the age of fifteen shall not be allowed to take part in hostilities. It can be seen from these two provisions that Protocol II is more demanding than Protocol I, as the latter only requires Parties to take all feasible measures, whereas the former outright prohibits the practice. Further, Protocol II demands that children under the age of fifteen take no part in hostilities, ostensibly meaning no role whatsoever. There is scope that the wording of Protocol I – in that it specifically prohibits children under fifteen taking a *direct* part in hostilities – could be construed in a way where children under fifteen may still take part in the conflict, just not directly. In a unified framework, it is doubtful that states would be unwilling

[13] The *Tadić* formula being that an NIAC exists where there is "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" (see Chapter 1, page 13).
[14] There are currently 124 States parties to the treaty.

to grant the highest level of protection to children in any armed conflict. This is but one example where a new framework would offer the highest possible level of protection to those most in need of it.

There also exists a disparity between conventional law and customary law. For example, the law relating to the protection of works and installations containing dangerous forces is different at the conventional level, with the provisions contained in Protocol I not being as effective as those in Protocol II (Additional Protocol II 1977: Article 15; Additional Protocol I 1977: Article 56(2)). However, the ICRC has stated that the content of Protocol I is what applies at the customary level to both types of conflicts. This creates a scenario where there is a *lack* of protection at the customary level, due to the customary rule being the conventional rule with the least amount of protection. A unified framework would remedy this problem as the level of protection would be uniform across all conflicts, with the highest level of protection possible being used for the new framework.

2.5.3 Capacity and Political Will of Actors

The third problem relates to the capacity of the actors in NIACs. The rules of IAC were drafted to be able to be implemented by states, not non-state actors. It is settled that customary IHL is binding on non-state actors (McLaren and Schwendimann 2005: 1221), but they may not have the capacity to apply the rules applicable to them. This is the third difficulty encountered with the analogizing method. However, not all non-state groups have capacity problems. The real issue is the political will to apply IHL. Political will was raised by Frente de Libertaçáo de Moçambique during the 1974-77 Diplomatic Conference, who said that implementation was not a question of resources or expertise, "but the will to apply principles of humanitarian law" (Official Record of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-1977: 18). Contemporaneously, the Islamic State of Iraq and Syria (ISIS)[15] seems to have the capacity to apply IHL. To offer some brief evidence for this, the group holds large areas of territory, 'governing' an estimated eight million people[16] and is estimated to have an annual budget of over US$1bn (Gerges 2016: 21-22). The group also has councils which are responsible for

[15] The terrorist group goes by many names, such as Islamic State of Iraq and the Levant, Da'esh, or simply Islamic State.

[16] Although this number is in flux depending on the efforts to drive the group out of certain territories by Iraqi, Syrian and non-governmental forces.

finance, leadership, military matters, legal matters, security, intelligence, media etc. (Barrett 2014: 29-34) While it is beyond the scope of this paper to delve into detail of the capacity of ISIS, it should be evident from this summary that the group is highly organized and would have no issues of capacity in observing the rules of IHL under a unified system. The issue is the political will to observe the rules. The issue of incentivizing compliance with IHL is dealt with in Chapter 3.

How are issues of capacity to be remedied? Sivakumaran (2012: 74) suggests an approach which would work well in a unified body of law. A common core of a norm would be extrapolated and applied in any armed conflict, with interpretation being used outside of that norm to make it achievable for non-state groups. At first glance, this may cause some unrest as it may be perceived as a recipe for disparity where some groups are treated differently than others. An example would be a state being bound to observe all of the rules of IHL that have this capacity caveat, but with the organized armed group it is in conflict with not having to obey the same rules due to a lack of capacity (Sivakumaran, 2012: 74). However, this would not pose much difficulty as such an approach is already adopted in Protocol II. Article 5(2) states: "Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, *within the limits of their capabilities,* respect the following provisions" (Additional Protocol II, 1977: Article 5(2)). In doing this, a balance needs to be found between capacity and the rules imposed on parties to a conflict. Drafting a new unified framework in a way that would make application by non-state armed groups difficult would be counterproductive to the core rationale of IHL, to mitigate suffering.

2.6 Custom is Not Enough

It is submitted that while it is desirable for the law of IAC to be applied to NIACs, these pronouncements by the ICTY and the ICRC confuse the *de lege ferenda* with the *lex lata*.[17] "[I]t is not clear that States, acting through treaties or the customary international law process", have demonstrated a desire to dispense with the distinction between conflicts (Murphy 2012: 24). While judges, experts and bodies such as the ICRC are important in the international legal process, they are "not endowed with the capacity to make that extension of the law" (Murphy 2012: 24), i.e. they alone cannot remove the distinction between IAC and NIAC, there needs to be an input from states. This lends to the view that international judges and the ICRC are

[17] De lege ferenda means 'what the law should be', while lex lata simply means the current law. In this context, it means the courts are confusing what they think the law should be, with what the law actually is.

"quick to accept aspirational goals as customary law in order to allow the law to progress without the challenges created by relying on treaties" (Nicholls 2007: 246).

In light of this, it is asserted that customary international law is not strong enough to completely remove the distinction and there can be confusion with relying on both conventional and customary rules of IHL. Goldsmith and Posner (2006: 23) argue that customary international law has little to no effect on state behaviour; it is concerns of national interest and politics which guide state behaviour. This shows that we cannot remain confident that customary international law can effectively regulate armed conflicts and highlights the need for a new conventional framework without distinction as to the nature of the conflict for the purposes of applying the law. Further, IHL is rife with "deficiencies, loopholes, and ambiguity" (Cassesse 1986: 285). Due to this, MacLaren and Schwendimann (2005: 1241) acknowledge that "having customary rules written down is especially useful." It would be better for these customary rules, instead of merely being identified by the ICRC Study, to be codified in a treaty in which there is no distinction between conflicts. This would remove much of the ambiguity that surrounds the customary rules at present and would make the law easier to apply by military lawyers and personnel.

2.7 Conclusion

The foregoing analysis shows that the laws applicable to IAC and NIAC are mostly uniform, in that the majority of the rules for IAC are applicable in NIAC as a matter of customary international law. The analogizing method of the ICTY and ICRC has also been employed by other bodies, such as the Inter-American Commission of Human Rights, which stated that "many of the rules in Protocol I…are particularly useful referents for interpreting the substantive content of similar, but less detailed, provisions in Protocol II and Common Article 3" (Inter-American Commission on Human Rights, 3rd Report on the Human Rights Situation in Colombia 1999: Chapter IV, 44). However, as discussed, customary international law cannot be solely relied upon to dispense with the distinction and a new framework which has been accepted by states must be considered.

The analogy approach has worked for the vast majority of IHL norms and there is now a clear corpus of law, once only applicable to IACs, now applicable as customary international law to NIACs. This shows that the distinction is almost irrelevant. However, not all norms are applicable to NIACs and some norms, such as combatant status, have kept the distinction alive. It is to this pivotal issue to which we now turn to.

3 Combatant Status: The Last Hurdle

The issue of combatant status must be discussed as it represents the "most controversial aspect" of unifying the law (Sivakumaran 2012: 514). It would be unsatisfactory to argue for a harmonized law of armed conflict without discussing this crucial feature of IHL.[18] Further, the fact that customary international law has closed the majority of the regulatory gaps in NIAC renders the remaining regulatory differences "all the more egregious – and hence questionable" (McLaren and Schwendimann 2005: 1230).

In this chapter, the concept of combatant status will be discussed, along with combatant immunity and POW status. Further, the benefits of combatant immunity will be discussed in the context of post-conflict reconciliation. Recent developments and academic commentary will be scrutinised in order to determine whether it is possible for combatant immunity and POW status to be granted to non-state actors in a harmonised law of armed conflict, for if no such status can be granted the project reaches a blockade. In short, "is there cope for *all* participants in armed conflict to be treated in a similar fashion, regardless of status?" (Crawford 2007: 458).

3.1 What is a Combatant?

Currently, combatant status exists only in IAC and is the most significant difference between the IAC and NIAC. The term combatant is defined by Protocol I. Article 43(2) states that "[m]embers of the armed forces of a Party to a conflict…are combatants, that is to say, they have the right to participate directly in hostilities" (Additional Protocol I 1977: Article 43(2)). What constitutes "armed forces" is defined as "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates" (Additional Protocol I 1977: Article 43(1)). There are further criteria which must be met if a body is to be recognised as an armed force: it must be subject to an internal disciplinary system which enforces compliance of the rules applicable in an armed conflict (Additional Protocol I 1977: Article 43(1)). As well as this, combatants have an obligation to distinguish themselves from the civilian population (Additional Protocol I 1977: Article 43(3)). Although, Protocol I does envision scenarios whereby a distinction may not be possible and stipulates that, in such circumstances, combatant status will be retained so long as the individual: "carries arms openly

[18] It should be noted that there are other barriers that must be overcome if there is ever to be a uniform body of law applicable to armed conflicts regardless of their classification, such as occupation, belligerent reprisals, and the role of the ICRC, but it seems pertinent to deal with this most pivotal issue in this paper.

during each military engagement, and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate" (Additional Protocol I 1977: Article 43(3(a) and (b)). This is a narrow criterion for combatant status and, under a unified framework, this would need to be supplemented with other criteria. Luckily, such criteria already exist under the Third Geneva Convention (GCIII). GCIII outlines the criteria for POW status. It states that members of the armed forces are granted POW status (Geneva Convention III 1949: Article 4(1)), but that members of other militias and other volunteer corps may also be granted POW status, provided they are: "commanded by a person responsible for his subordinates; wear a fixed, distinctive emblem which is recognizable at a distance; carry their arms openly; and, perhaps most importantly, conduct their operations in accordance with the laws and customs of war" (Geneva Convention III 1949: Article 4(2(a)-(d)). It is submitted that this criterion would be suitable to guide the granting of combatant status to non-state actors under a new framework. In any universal framework, combatants would still need to distinguish themselves from civilians, which is what this criterion obligates fighters to do.

Advocating combatant status for non-state actors under a unified law is not a new position. During the 1949 Diplomatic Conference, the Norwegian delegate argued for protecting rebels in an NIAC as POWs and not punishing them "on the sole grounds of having taken part in the conflict" (Final Record of the Diplomatic Conference of Geneva 1949: Vol II-B, 44 (Norway)). This position was built upon by the United Kingdom, which suggested it would be "anomalous to protect insurgents by a Convention during the rebellion and treat them as traitors at the close of it" and that states should amend domestic law to preclude prosecution of defeated insurgents "on the sole grounds of having borne arms against the legal government" (Final Record of the Diplomatic Conference of Geneva 1949: Vol II-B, 49 (United Kingdom)). These suggestions were defeated and there was to be no protection for those in NIACs other than CA3. This was to be repeated at the 1974-77 Diplomatic Conference, where Norway advocated for a revised definition of POWs and one Additional Protocol which was to be universally applicable to all armed conflicts (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-1977: Volume VIII, 6). Again, this motion was defeated.

The traditional approach to combatant status is grounded in sovereignty concerns, but if IHL is becoming less sovereignty-oriented and more human-being-oriented, as shown throughout this paper, then surely these sovereignty concerns are diminished? The question is raised of why governments would want to willingly agree to a new framework which would

"repeal their treason laws and confer on their domestic enemies a license to kill, maim, or kidnap security personnel and destroy security installations" (Solf 1983: 59). The answer is that international law, shown above in *Tadić*, has evolved since the Geneva Conventions and Additional Protocols. Indeed, "the strength of such [sovereignty] concerns has…been ameliorated significantly in the recent years, primarily by acceptance of the list of war crimes in [NIACs]" (Sivakumaran 2012: 70). By making themselves liable for war crimes in NIACs, states have demonstrated that they are willing to trade at least some part of sovereignty in favour of humanitarian treatment of those in NIACs.

Interestingly, Protocol I extends the offer combatant status to NIACs. Article 1(4) of Protocol I allows for conflicts between a state and non-state group to be classified as an IAC from a legal standpoint, which means that the non-state actors will be granted combatant status under the Protocol, provided they meet the criteria discussed above. With 174 states having ratified Protocol I, it shows states have accepted this dilution of sovereignty in regard to a narrow type of conflict. Is it right that one type of NIAC should be given more protection than others purely due to the motivations of one of the parties to that conflict? From a humanitarian standpoint, the answer is in the negative. If states are prepared to allow for combatant status to be transferred to what is essentially an NIAC, this should also be done in all other NIACs. The motivation of a particular group should not grant them protections not available to those in NIACs not covered by Article 1(4).

Geoffrey Corn (2011: 259) identifies two questions in relation to the granting of combatant status: the "right type of conflict" and "right type of person" questions. The right type of conflict question is a simple one to answer – if the conflict is international in nature, then the right type of person question is asked. If the conflict is internal, there is no opportunity for the right type of person question to be asked. The right type of person question simply asks whether an individual has met the criteria for combatant status, i.e. complying with the rules set out in Article 4 of GCIII and Article 43 of Protocol I. Under a universal framework, the "right type of conflict" criteria would not exist as there would be universal application of a revised law to armed conflicts and the granting of combatant status would turn on the "right type of person" question, with the criteria stemming from Article 4 of GCIII and Article 43 of Protocol I. This comports with Corn's (2011: 279) assertion that, due to the majority of laws regulating NIACs becoming analogous to the law of IACs, the focus for any future framework should be on the right type of person question, not the right type of conflict question. This also comports with the direction of IHL, in that it is becoming more human-being-oriented, rather than state-oriented. Since a criterion for application would remain in place, states should be

more receptive to the idea of granting pre-emptive immunity and POW status as the new framework would not grant blanket protection and immunity to all involved in an NIAC - a threshold would still have to be met.

3.2 Combatant Immunity

The concept of combatant immunity in IAC is not codified, but it is universally accepted as law that combatants and POWs are not liable for prosecution for merely taking part in hostilities (Solf and Cummings 1977: 212). The rationale behind states being unwilling to grant immunity to those in NIAC is because to do so would be to forfeit their sovereign prerogative to criminally sanction those who have taken part in hostilities against the state – to deny combatant immunity is to "[prioritize]…sovereignty over humanitarian protection" (Corn 2015: 292). Further, the lack of combatant immunity in NIAC is supposedly a deterrent to those who would rise up against the state. However, recent events across the world have proven that this is losing its effect,[19] making it pertinent to examine the issue. The perception of those who rebel against the state is as terrorists and traitors, criminals. However, close inspection of the Commentary to the Third Geneva Convention reveals that in NIACs there is a difference between common criminals and those fighting against the state: "once the fighting reaches a certain magnitude and the insurgent armed forces meet the criteria specified in Article 4.A(2) [of GC III], the spirit of [Common Article 3] certainly requires that members of insurgent forces should not be treated as common criminals" (Pictet 1960: 40). This reiterates the argument that once the fighting reaches a certain intensity, the insurgents should be treated differently to those who may be involved in internal tensions and disturbances. There are examples where immunity has been granted when the conflict has been of significant duration and intensity. For example, in the US Civil War, Confederate officers and fighters were not prosecuted for merely taking up arms against the government (Sivakumaran 2012: 515). During the conflict in the Former Yugoslavia, an agreement was reached whereby the government agreed that "all prisoners not accused of, or sentenced for, grave breaches of [IHL]…will be unilaterally and unconditionally released" (Agreement on the Release and Transfer of Prisoners 1992: Article 3(1)).

Many of the arguments advanced for combatant immunity in IAC are argued to be inapplicable to NIAC because the state claims the monopoly on the use of force – there is no legal basis for the citizens to engage in hostilities against the state (Corn 2011: 283). However,

[19] For example, see the attempted coup d'état in Turkey in June 2016.

one of the cardinal rules of IHL is that it applies to parties to a conflict regardless of the lawfulness of that conflict. It would be plausible, within a new framework, to denounce the legitimacy of the non-state group's actions while offering combatant status. IHL is not concerned with the legitimacy of the hostilities, only the reduction of suffering of those involved in the conflict. If an extension of the concept of combatant immunity to NIAC is to be realised in a unified law of armed conflict, a provision would be required which ensures the legal status of non-state groups is not affected, in that they are not legally legitimised. Such a provision already exists under CA3 which states that if CA3 does become applicable, it does not "affect the legal status of the Parties to the conflict" (All Geneva Conventions 1949: Article 3) However, while this may act as a barrier to legal legitimisation, there is still a problem in that states may view the granting of combatant immunity and POW *status* as political legitimisation.

Geoffrey Corn (2015: 292) identifies five factors which are used as the rationale for combatant immunity in IAC, arguing that these are inapplicable to NIACs, for no reason other than combatant immunity does not exist in NIAC: 1) it protects participants from criminal sanction for taking part in hostilities the state initiated, but only if they comply with IHL; 2) it facilitates the deterrence of IHL violations; 3) it imposes an obligation on leaders to properly train subordinates; 4) it gives participants a collective sense of military professionalism; and 5) it gives participants a moral touchstone. It is argued that these are applicable to NIAC. The common core of these factors is the desire to enhance compliance with IHL, which relates to the political will of non-state groups to apply IHL mentioned above in Chapter Two. Enhancing compliance with IHL is most certainly a desire in NIACs just as much as in IACs. One only needs to look to current NIACs to see a plethora of IHL violations being committed.[20] If combatant immunity can incentivize fighters to comply with IHL, as far as they are capable, then surely this is applicable in NIAC. If members of rebel armed groups are to be prosecuted even if the comply with the conventional and customary rules of IHL, even to a greater extent than the government they are fighting, there appears to be little incentive to observe these rules and creates an asymmetric conflict whereby one side is not complying with IHL, which could lead to a dark road of both sides refraining from observing IHL. By offering the opportunity to qualify for combatant immunity, this could incentivise compliance with IHL. When dealing with this issue of combatant immunity, the purpose of IHL must not be forgotten – to mitigate

[20] For instance, the chemical weapons attacks in Syria (BBC Middle East 2017) and the use of human shields by ISIS in Mosul, Iraq (Time 2017).

suffering during armed conflict. If extending combatant immunity to opposition groups will incentivise compliance with IHL and thus reduce suffering, then it seems to be logical to do this.

What can be discerned from the above is that the barriers to granting combatant immunity to non-state actors in NIAC are rooted in policy. As discussed, it must be stressed that blanket combatant immunity would not be granted to every individual fighting against the government. Certain requirements would have to be met by non-state actors if they were to be accorded combatant immunity, just as participants in IAC have to meet certain requirements. In the literature, sentiments are expressed whereby such criteria would not comport with the tactics employed by opposition groups in NIAC (Corn 2015). This argument does not convince the present author. The law should not curry favour with non-state armed groups by giving consideration to the asymmetrical tactics employed by them. If the distinction between IAC and NIAC is to become obsolete, there needs to be legal parity between parties to a conflict, which includes the methods of warfare. Under the new framework, the onus would rest on the non-state groups to comply with the requirements set out to be classified as combatants and benefit from the consequent immunity. If they continued to employ tactics which fell outside the qualification framework, they would not benefit from immunity or POW status – the state would retain the prerogative to criminally sanction them for taking up arms. Although, a positive side-effect of the law not comporting to their tactics may be the altering of the behaviour of those groups, i.e. they would refrain from using tactics which could be considered perfidious and asymmetrical. While it is acknowledged that making themselves more distinguishable from civilians is disadvantageous to non-state groups, there can be no benefit without a cost. The benefits of combatant immunity and POW status come with the cost of becoming more distinguishable and more easily targetable. However, the cost of becoming more distinguishable from the civilian population is simply asking the non-state group to abide by the same rules that the state armed forces must comply with, which in turn helps in protecting civilians who suffer disproportionately in urban and guerrilla warfare.

The main cost of extending combatant immunity to non-state actors in NIACs is that the state forfeits the sovereign prerogative of criminally sanctioning those who take up arms against the state. A further cost is that the state risks bestowing political legitimacy upon the rebel group(s) (Corn 2011: 284). In turn, there needs to be an incentive for states to agree to this extension. It is submitted that the benefits outweigh these concerns. As discussed above, the main benefit is that granting the opportunity of combatant immunity to non-state actors could influence their behaviour and incentivise them to comply with IHL. Currently, there is

no legal incentive for such groups to comply with IHL as, even if they do, they remain liable for prosecution. In fact, the current regime creates a "perverse incentive to disregard humanitarian law" (Corn 2011: 287). Another benefit of extending the offering of combatant immunity is that it becomes easier for states to delegitimise non-state armed groups and discredit their conduct if they continue to disobey the dictates of the new framework and use perfidious tactics which do not fit the qualification criteria for combatant status. The new framework would mean that states show they are willing to sacrifice their sovereignty for the sake of humanity, but if non-state actors fail to comply, this would "add significant credibility to condemnation for failure to [comply with the rules]" (Corn 2011: 289).

Sivakumaran (2012: 520) observes that granting combatant immunity to non-state actors in NIACs has been more common than the law would suggest. However, in these instances, immunity was offered either post-conflict or when the conflict was ongoing, having reached a certain level of intensity – not before a conflict has broken out. It is submitted that states should endeavour to construct a unified framework in which immunity is offered before a conflict breaks out, where there is a chance for behaviour to be improved in advance, rather than during a conflict. If a new framework is to be crafted, however, in which combatant immunity is to be offered *before* a conflict begins, the instrument must be careful as to the threshold in which an armed conflict is established: too low and there could be a possibility of low-level violence being treated as an armed conflict in which the state cannot prosecute those who take up arms against them, too high and there is a real risk that the threshold is too high for it to be applied, leaving many people without protection under the new framework. For example, the coup that occurred in Turkey in July 2016 would not reach the threshold necessary for the new framework to be engaged, meaning the members of the Turkish military who rebelled would not benefit from immunity and would be liable for criminal sanctions for taking up arms against the Turkish government. It is not the purpose of this paper to fully elucidate the exact threshold of a new framework, but if and when another Diplomatic Conference is held to re-evaluate IHL, great care must be taken to establish a threshold which reflects the delicate balance that is required.

3.3 Prisoner of War Status and Parity of Protection

It should first be noted that there is a difference between POW *status* and POW *treatment.* Derek Jinks (2004) argues that POW status has become less significant over time and is now merely symbolic, with the treatment of detainees in IAC and NIAC being functionally

analogous – paving the way for a unified framework. In many NIACs, there have been unilateral undertakings by governments stating that they will treat captured insurgents as POWs and extend them the benefits of the GCIII. For instance, the UK Military Manual states that in NIACs "whenever possible, treatment equivalent to that accorded to POWs should be given" (U.K. Ministry of Defence 2004: 390) However, the use of the word "should" here expressly indicates that there is no legal obligation on the state to do this and that it is done solely for policy reasons. However, when one looks to the recent practice of the USA regarding detainees in Guantanamo Bay, it would suggest a total unwillingness to accord any sort of POW status to al-Qaeda members in the "War on Terror" (Military Order, 13 November 2001: Fed. Reg. 57,834). This has been done for policy reasons to safeguard national security.

There is evidence from past conflicts that POW protection has been given to non-state forces. During the US Civil War, an Order from Major-General Grant stated that "persons acting as guerrillas without origin and without uniform to distinguish them from private citizens are not entitled to treatment of POWs when caught" (General Orders No 60 3rd July 1862, 1886: 69) This demonstrates that as early as the US Civil War, governments were willing to confer POW treatment to non-state actors, provided they distinguished themselves from civilians. Other conflicts highlight other issues concerning POW treatment and non-state actors. During the Algerian War of Independence, French forces instituted camps for detaining combatants who were captured while they bore arms openly (International Committee of the Red Cross 1962: 6). This shows that the French forces were willing to give favourable treatment to those insurgents who bore their arms openly, aiding in the distinction between those involved in the hostilities and civilians. However, this practice by no means establishes an *opinio juris*, therefore the treatment was accorded for policy reasons alone. Although this does demonstrate that states are receptive to treating captured fighters in NIAC in an almost identical way to those in IAC.

While there is no *opinio juris* for states treating non-state actors in the same way as regular POWs, there is evidence that robust protections for POWs in IACs already exist in the provisions governing NIACs. In fact, analysis of the protections available for detained persons under Protocol I (1977: Article 75) and the fundamental guarantees under Protocol II (1977: Articles 4-6) shows that they are identical in every way, save for one provision relating to the release and repatriation after the conflict has ended, which is understandable as combatant immunity does not exist under the law of NIAC, meaning there is no obligation to release detainees at the close of an NIAC (Additional Protocol I 1977: Article 75(6)). CA3 also offers protections to those who have been detained in NIAC, but lacks the detailed specificity of

GCIII. However, it is asserted that "the fundamental provisions of the POW Convention are…replicated in [CA3 and Protocol II]" (Crawford 2010: 79). GCIII contains detailed regulations concerning the treatment of POWs, for example the prohibition of coercive questioning (Geneva Convention III 1949: Article 17(4)). However, the fundamental guarantees provided in Protocol II and CA3 act as functional equivalents to bar treatment that is prohibited under the GCIII (Crawford 2010: 80; Pejic 2011). For example, the Appeals Chamber of the ICTY in *Mrkšić et al.* asserted that "Common Article 3 of the Geneva Conventions reflects the same spirit of the duty to protect members of armed forces who have laid down their arms and are detained as the specific protections afforded to prisoners of war in Geneva Convention III as a whole" (*Prosecutor v Mrkšić, Radić, and Šljivančanin* 2009: 70). This demonstrates that CA3, while not being as detailed as GCIII, requires an equal amount of protection to detained persons insofar as "humane treatment" is concerned. This was reinforced in *Delalić et al.* where the Trial Chamber held that the concept of humane treatment of captured participants is identical in NIAC as for IAC (*Prosecutor v Delalić, Mucić, Delić, and Landžo* 1998: 525).

What the foregoing analysis reveals is that the fundamental guarantees for detained persons in IAC and NIAC are virtually identical, save for the provisions relating to combatant immunity.

3.4 Post-Conflict Reconstruction and Reconciliation

Offering combatant immunity and POW status "is often a critical element in post-conflict reconstruction" (Crawford, 2010: 112), another reason for states to seriously consider offering combatant status under a unified framework. As discussed above, combatant immunity does not exist in NIAC, but something akin to it exists in Protocol II. Article 6(5) obligates the authorities in power at the end of hostilities to "endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict." In this way, the provision has the potential to act as a retroactive combatant immunity. Ostensibly a discretionary power, there is a legal obligation on the victors to consider amnesty for those who participated in the conflict. Although discretionary, states are becoming more receptive to granting amnesty to those who merely participated.[21] For example, the final peace agreement reached between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) includes

[21] The granting of amnesties has also shown to incentivise compliance with IHL (see Report of the Secretary-General on the Protection of Civilians in Armed Conflicts 2009: 44).

amnesties for political crimes.[22] The agreement contains the provision that broad amnesty will be given for political and related crimes to demobilised FARC members (Sánchez 2016). Essentially, this provision grants amnesty to those who took up arms against the state for the act of rebelling and crimes related to that, such as killing state forces. It must be remembered that armed conflicts are a temporary phenomenon, at some point it will end and there will have to be a process of reconstruction of the state in many respects, such as physical reconstruction of infrastructure, social reconstruction of a fractured society, and psychological reconstruction of those affected by the conflict, whether or not they have directly participated in it. This is not a task solely for the victor. The reconstruction must be a collaborative effort, engaged in by the victor and other stakeholders, such as rebel groups, if the state is to reach a consensus which avoids another conflict breaking out. By offering immunity to those who took up arms against the state and fully complied with the laws of IHL, this could aid in the reconstruction of the state.

3.5 Conclusion

The issue of granting combatant status to non-state groups in NIACs illuminates the driving forces behind the distinction – sovereignty and humanity. It is clear that while sovereignty concerns are becoming diluted due to humanity, such concerns are still important to states when it comes to this particular issue, but a unified framework is not impossible. In terms of POW status, it has been shown that the law of NIAC requires the same level of treatment of detained persons as in IACs, showing that parity of treatment would be possible under a unified framework. The problem lies in granting POW status. States are hesitant to grant POW status due to the consequent obligations to release prisoners at the close of hostilities and grant them immunity from prosecution. Again, this reflects the conflict between sovereignty and humanity.

Emily Crawford (2010: 169) accepts the reality that "the international community would not accept a legally enshrined provision of pre-emptive immunity for non-State actors participating in NIACs" and that states will only be receptive to the notion of granting pre-emptive immunity when it "serves their manifold political…interests." This is why the benefits of offering combatant status in NIACs under a universal framework must be highlighted. It has been shown that offering combatant status and its consequent immunity could have the benefit

[22] Political crimes encompass acts such as taking up arms against the State (see Colombian Penal Code, Title XVIII: Rebellion (Art. 467)). Other political crimes are: Sedition (Art. 468); Rioting (Art. 469); Conspiracy (Art. 471); and Seduction, usurpation and illegal retention of command (Art. 472).

of incentivising compliance with IHL, something crucial for NIACs, which are notorious for being more brutal in nature than IACs. Further, as discussed above, if rebel groups are offered the chance to qualify for immunity and fail to comply with the qualification criteria, i.e. making themselves distinguishable from civilians and complying with IHL, it will be easier for states to delegitimise their actions, which is an incentive for states to consider offering immunity under a unified framework. As well as this, the offer of combatant immunity may aid in settling the post-conflict environment.

If we are to fully embrace what the Appeals Chamber said in *Tadić*, in that IHL is becoming more human-being-oriented rather than state-oriented; if the distinction is to become obsolete, there must be parity of protection afforded to participants in armed conflict, whatever its nature.

4 Conclusion

This paper has demonstrated that the dichotomy between IACs and NIACs has, in practice, almost become obsolete, with the law regulating NIACs being almost akin to that regulating IACs. This has been a result of the efforts of the ICTY and ICRC using customary law to close the gaps, showing that protective parity in armed conflicts is possible. While it has been shown that there are problems with relying on customary law, such as different levels of protection at the conventional and customary levels, a new unified framework would remedy these problems. However, the work of the ICTY and the ICRC has not fully closed the gap and disparities remain, such as combatant status. It has been shown that this particular challenge is not insurmountable. A new framework is required if IHL is to serve its purpose of mitigating the suffering of those in armed conflicts. It will be a chance to finally codify the harmonization that has been occurring over the last few decades and remove the arbitrary distinction which is motivated by sovereignty considerations. It is submitted that the sovereignty concerns advanced by states for maintaining the distinction are *ad nauseam,* becoming less forceful and overstated today. The concept of humanity has begun to dilute these sovereignty concerns and IHL is becoming more human-being-oriented rather than focused on what is best for states. From a humanitarian perspective, there is benefit in moving towards a unified framework with parity of protection in all conflicts. For example, it has been discussed that providing the opportunity to acquire combatant status in NIACs may serve as an incentive for non-state groups to comply with IHL, which will have an effect of reducing the suffering of civilians as well as those participating in the conflict.

But the political reality must be appreciated. It seems that states are concerned with "reinforcing State security rather than strengthening protection for the victims of war" (Bugnion 2007: 31). Further, the significant projects which advanced IHL in the past were undertaken *after* major conflicts were over. For example, the Diplomatic Conference of 1949 was held after the Second World War and the 1974 Diplomatic Conference was held after most decolonization conflicts had ended (Bugnion 2007: 31). At the time of writing, there are still many ongoing conflicts across the world, such as the civil war in Syria, which shows no sign of ending in the near future; the conflict between Israel and groups in Palestine; and the "War on Terror". Until these conflicts show signs of ending, it is unlikely that such a project for a unified framework will get off the ground as states, especially those taking part in conflicts, will only want to enhance rules which will benefit their short-term interests. During these conflicts, "it is impossible to find a common denominator and to promote the general interest" (Bugnion 2007: 31), which is critical in such negotiations if IHL is to develop in the direction of protecting humanity, rather than state interests. Additionally, history tells us that the international community is uneasy with completely unifying the law of armed conflict. As Dapo Akande (2012: 37) notes, "whenever States have been presented with opportunities to abolish the distinction they seem reluctant to do so." While this paper argues for a unified law applicable to any armed conflict regardless of its nature and has presented arguments as to why this should happen, the core problem facing such an effort is the Westphalian system of the international community (Zahar 2012: 47). This highlights that the driving force of sovereignty, while becoming overstated and diluted, is not irrelevant when the political reality is considered. If humanity is to supplant sovereignty concerns and the distinction dispensed with, this debate must continue and not give in to the fatigue it has generated.

Forsythe (2003: 69) argues that, "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." This is what this paper argues for and it is imperative that lawyers, academics, NGOs, and all others interested in equal treatment in armed conflicts continue to advocate for the removal of the arbitrary distinction and work towards the construction of a unified law of armed conflict. The ICRC dreamt of an international humanitarian legal order which did not recognise a distinction between IAC and NIAC. A legal order "based on purely humanitarian ideas, i.e., that victims in *all* situations of armed conflict, whatever their nature, are subject to the same suffering and should be helped in the same way" (Sandoz *et al*. 1987: 1330). Perhaps

those who argue for a unified law of armed conflict are dreamers, but "a dream you dream alone is only a dream. A dream you dream together is reality."[23]

[23] Quote attributed to John Lennon.

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