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Classic Distinctions and Modern Conflicts in International Humanitarian Law

Exploring the Struggles and Consequences of Maintaining the
Original Distinctions in International Humanitarian Law
between Peace and War and International and Internal
Conflict.

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Summary

International Humanitarian Law has at its core distinctions and classifications: The sphere between jus in bello and jus ad bellum. Between Civilian and Combatant. Between proportional and indiscriminate attack. Between acceptable and prohibited targets. However the two most central distinctions in International Humanitarian Law are the distinction between War and Peacetime and between International and Non- International Armed Conflict.

This essay will explore the significance of these two distinctions and how they impact the application and effect International Humanitarian Law has on war. However it will find that war has changed to an extent that it no longer fits into the established classes. These distinctions are arbitrary, dated, and inflexible serving not to help implement the law but to hinder its application and so fail it's object and purpose of mitigating all suffering in all forms of war.

Abbreviations

AP	Additional Protocol to the Geneva Conventions
CA 3	Common Article 3 to the Geneva Conventions
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FSA	Free Syrian Army
GC	Geneva Convention
IAC	International Armed Conflict
ICRC	International Committee of The Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IZAC	Internationalized Armed Conflict
NIAC	Non-International Armed Conflict
POW	Prisoner of War

- I. Introduction
- II. The Law
- III. War has Changed
- IV. The Eroded Distinction
 - a. *Tadić*: Classifying the Conflict
 - b. *Tadić*: Blurring the Borders
- V. From Peacetime to War
 - a. Object and Purpose of IHL
 - b. The Evolution of NIAC Recognition
 - i. The Framework of *Tadić*
 - ii. The Evolution of *Tadić*
 - c. The Harm of a Strict Elements Test
 - d. Syria
- VI. The Distinction between NIAC and IAC
 - a. The Imbalance in the Law
 - i. The Legal Differences
 - ii. New Conflicts: IAC or NIAC?
 - b. The Effect of Internationalisation
- VII. The Way Forward
 - a. Progress Beyond the Law
 - b. Another Source of Conflict Recognition
- VIII. Conclusion

I. Introduction

In the year 2012 internal armed conflict claimed 37,576 lives. Those individuals died in battles all over the world, in conflict of an internal nature waged between factions, governments, soldiers, militias, freedom fighters and rebels. But that number pales in comparison to the number of lives lost in the true wars: the potentially devastating International Armed Conflicts between States and their highly organised and lethal established armed forces. That number was 365.¹

In modern times the state of war has shifted. Wars used to be fought between States with the stakes being much higher and the casualty list much longer. Single States have the power to unleash billions of dollars of war machinery and hundreds of thousands of personnel operating globally, turning land, sea and air into conflict arenas. So when two of these powers clash the potential for destruction is almost unbearable to consider. The world has already seen these scenarios play out in the 20th Century and the effect was so great as to unite all States and more impressively, all political sides, into taking solid steps to prevent the next ‘War to end all Wars’. The Geneva Conventions were ratified; Hague Rules codified and International Humanitarian Law clearly established and brought to prominence. International Human rights law was also jumpstarted and human lives everywhere were held to their inherent and equal value.² The period since then has seen numerous Humanitarian Law instruments adopted, weapons decommissioned, Tribunals established, and practices changed. The law has made great progress in its aim of mitigating human suffering in war.³ And in truth, the number of casualties has dropped astoundingly⁴ and today true State to State International Armed Conflict is rare. But, war has changed. The humanitarian legal system has seen the demise of the style of conflict it was born out of. A new style is now being played out. Not between vast armies in the Fields of Flanders or shores of Normandy, but in markets of Bagdad, the playgrounds of Homs, the village centres of South Sudan. Civilians, soldiers and fighters are dying in these conflict scenarios yet few of these fit the conflicts

¹ Lotta Themnér and Peter Wallensteen, “Armed Conflicts , 1946-2012” (July 2013) 50(4) Journal of Peace Research 509 available at <http://jpr.sagepub.com/content/50/4/509.full.pdf+html>

² UN General Assembly, *Universal Declaration of Human Rights* , 10 December 1948, 217 A (III), Article 1

³ Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (2nd Edition, Oxford University Press, 2008) 13

⁴ Lotta Themnér and Peter Wallensteen (n 1) 510

envisioned by the Geneva Conventions. These conflicts then fall to unclear and inadequate regulation by the regime seen as “*lex specialis*” to regulate conflict.

This thesis aims to explore the deficiency of International Humanitarian Law, and indeed international law, in protecting victims and applying to war in the current age. In particular the biggest failing encountered is the obsession with classification of conflicts and the inflexibility of the hard law itself.

The current International Humanitarian Law (IHL) regime distinguishes between three main scenarios. International Armed Conflict (IAC), Non-International Armed Conflict (NIAC), and situations falling short of armed conflict entirely. While this system was apt in the period it was drafted and reflected the world at the time it contains a structure of unnecessary distinction and strict classification which is at odds with the relevant aim to be achieved, that of mitigating the suffering of war. This thesis aims to show that the distinction between conflicts results in lopsided protection, unclear law for both lawyers and soldiers on the ground, and that the tests involved are inflexible and often lead to misclassifications or inadequate protection. It will also be seen how this structure of distinction is further irrelevant and harmful as war is no longer split between two categories, but into multiple categories and controversial classes some not even envisioned in IHL.⁵ Additionally the lines drawn that distinguish armed conflict and the triggering of IHL from “peace time” internal disturbances are overly strict and inflexible, meaning the law is ill-suited to the fluid and evolving scenarios, excluding situations that should otherwise merit IHL application.

The distinctions and archaic classifications and their flaws will be broken down into the two main scenarios where they operate.

First, the distinction between peacetime and armed conflict, with a particular focus on the inflexibility of the threshold tests that signal the evolution of internal disturbance to NIAC.

Second, the distinction between IAC and NIAC, its irrelevance, lop sided protection and ill suitability to the multiple new forms of conflict.

Ultimately these distinctions result in a failure to achieve the object and purpose of IHL, the mitigation of human suffering and regulation of conflict, by providing imbalanced protection, overly legalistic assessments, inflexibility in response to realities and unclear rules for both

⁵ Sylvain Vit , ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’ (March 2009) 91(873) *International Review of the Red Cross* 69, 83

academics and soldiers. This work will conclude by looking to ways forward to develop the law and the possibility of using International Human Rights Law (IHRL) to plug the gaps.

First however it is necessary to examine briefly the current sources of the law, and demonstrate the functioning of the system as it stands today.

II. The Law

As with most areas of law, International Humanitarian Law and the Laws of Armed Conflict (LOAC) have generally been retroactive, often inspired by severe events. The American Civil War gave rise to the Lieber Code on the conduct of hostilities and the battle of Solferino famously inspired the Red Cross movement and the Geneva Law system⁶. The most prominent laws governing warfare and conflict today are the four Geneva Conventions (GC) of 1949 inspired by the atrocious events of the Second World War. The first three of these mainly built on pre-established protections set out in prior treaties but all four importantly shifted the base of International Humanitarian Law from an interstate system to an international homocentric system.⁷ They introduced rules on individual criminal responsibility and the concept of grave breaches and fundamental protections. International Armed Conflict as a category has remained unchanged and is now extremely regulated both from a *jus ad bellum* and *jus in bello* perspective. What is necessary to know for a discussion on conflict classification is the applicable law to conflict and when the vast rules of the Geneva Conventions triggered. When is a situation an IAC or NIAC and what applies?

As Article 2 common to the Geneva Conventions states:

“In addition to the provisions which shall be implemented in peacetime, the present Convention 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.”

In essence IACs are rather simple. When two States (the High Contracting Parties) clash with armed force, the situation is an IAC and the full system of Geneva rules and regulation is

⁶ Theodor Meron, *The Making of International Criminal Justice : The View from the Bench: Selected Speeches* (Oxford University Press, 2011) 19

⁷ *ibid* 20

triggered. As the ICTY put it: “an armed conflict exists whenever there is a resort to armed force between States”.⁸

When it comes to NIACs and their place in International Humanitarian Law however the applicable law is more complex. First, a threshold must be reached whereby a situation has developed (or deteriorated) into such a state as to be distinguished from mere internal violence or disturbance. This rather less clear and concrete trigger and the pitfalls and impact of this threshold test will be examined in a later section. Second, the full raft of measures contained in the Geneva Conventions do not apply to NIACs even once that threshold has been passed. Only Common Article 3 (CA 3) and Additional Protocol II (AP II) contain provisions which apply to cases of internal conflict.

Common Article 3 applies to armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. It provides a fundamental layer of protection to persons taking no part, or who are no longer part, in the hostilities. It allows the ICRC to become involved, and encourages the parties to make agreements to abide by the other provisions of the Geneva Conventions. It is a widely applicable article, essentially ensuring some minimum of protection⁹ in any scenario that has reached the threshold of armed conflict. However it is still only a measure of minimum protection, open to interpretation with few explicit rules and little regulation of actual the conduct of the hostilities on a par with the provisions on IACs.

The second layer of law applicable in internal armed conflict is Additional Protocol II. It contains more detailed and specific provisions, however still does not regulate the actual conduct of the hostilities to a level comparable with IACs. The content of the protocol is limited to basic provisions of humane treatment and humanitarian protection of the wounded and sick and the civilian population. It also has a higher threshold of application than CA 3 by requiring that the non-state actors be “under responsible command, exercise such control

⁸ ICTY, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A (2 October 1995) para. 70

⁹ ICJ, *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ) (27 June 1986) 218

over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.¹⁰

This higher threshold of internal conflict, itself creating a further distinction and classification within NIACs, has made AP II technically inapplicable to many armed conflicts in which the government has become ineffective and where warring parties fight each other. These will often be the most brutal and arguably the most in need of regulation and International Humanitarian Law applicability.

What is the rationale behind this divide between international and internal conflicts?

In essence the distinction between NIAC and IAC doesn't have a humanitarian principle behind it.¹¹ The reality is that the two were split by the concerns of States that the application of the rules governing IACs to internal conflicts would impact the status of parties to any internal conflict rising within their borders.

The Domestic Law of every State gives privilege to its police and military forces against those who threaten the society or State and they want to preserve that privilege. Application of the rules governing IACS may upset that. State forces are accorded a particular status by the rules of IHL, combatant status, which give them a right to participate in the hostilities. This entitles them to Prisoner of War (POW) status and its protections, to use force and immunity from prosecution for their belligerent acts. If internal armed conflicts were accorded the same rules as IACS then those that rebel against the State would also be granted this special status and so have a right to use force against the State and the State would not have the ability to prosecute them for acting against it. Therefore the distinction between the internal and international was made.¹² However despite these concerns, this distinction has led to an imbalance in the law and complicated the application of IHL, which is what will be explored in this essay.

Customary Law also figures in the regulation of conflicts, and in particular has made a great effort to apply to both classes of conflict. The International Committee of the Red Cross (ICRC) has conducted a comprehensive study on the relevant customary law and found a

¹⁰ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Article 1

¹¹ Alison Duxbury, 'Drawing Lines in the Sand – Characterising Conflicts for the Purposes of Teaching International Humanitarian Law' (2007) 8 Melbourne Journal of International Law 259, 271

¹² Dieter Fleck (n 3) 613

great deal of IAC provisions now apply to NIACs.¹³ However a complete transplant has not occurred¹⁴ and customary law has its downsides compared to more concrete forms of hard law in that it is open to dispute and contestation, as can be seen by the United States' criticisms of the methodology of the ICRC study.¹⁵ This thesis will refer in part to the role of custom, however the main focus will be on the more strict forms of hard law. While custom fulfils a role in ensuring adequate protection and regulation is applicable to all forms of conflict, the continued existence of the distinctions and thresholds set by the Geneva Law creates dispute and conflict within the law itself and continues to have negative consequences for its application. Additionally one could argue that the applicability of IAC provisions to NIACs via custom is itself evidence that the distinction between the two is unnecessary and an obstacle International Humanitarian Law has to overcome to achieve its objective of reducing suffering in war.

When speaking of the protections of IHL it should be noted that the general principles of armed conflict that guide the regulation of IACS do also apply via custom to NIACS.¹⁶ For the purposes of this essay the disparities and distinctions in protection between the two will largely be focused on the Geneva Law provisions and the complications and disputes associated with classifying the conflicts to establish which law is applicable. While under Geneva Law there is a glaring imbalance between the two, custom and principle has ensured that there are fundamental guarantees and protections active in NIACS.

Finally an analysis of International Humanitarian Law cannot be complete without the realities of how the hard law has been applied and interpreted. The jurisprudence of various tribunals reveals the problems and limitations and inflexibility of the hard law. In particular the International Criminal Tribunal for the former Yugoslavia's (ICTY) *Tadić* judgments consider many of the issues of conflict classification and their distinct rules, and the legacy of these judgments has shaped the development of IHL.

International Human Rights law equally has a role to play. This, along with domestic law, is the regime that governs those situations that fall short of an armed conflict, internal or

¹³ Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Law' (ICRC and Cambridge University Press 2005, 2009)

¹⁴ ICTY, *Tadić* Interlocutory Appeal (n 8) para 126

¹⁵ John B. Bellinger, III and William J. Haymes II, 'A US government response to the International Committee of the Red Cross study 'Customary International Humanitarian Law' (June 2007) 89 (866) International Review of the Red Cross 69

¹⁶ Dieter Fleck (n 3) 264

international. Human Rights Law remains applicable in times of conflict however IHL is *lex specialis*, more suited to governing the situations arising in conflict. The effect of this is that Human rights law must be interpreted in light of the more specific and detailed humanitarian law. However as will be examined later, Human Rights Law can have some impact on conflict regulation.

Having established the applicable law sources in IHL and the two established classes of conflict it is time to see the current state of modern war.

III. War Has Changed

The primary change in warfare for the context of this essay is the move away from State to State conflicts to NIACs. In 2012 there were 32 conflicts, of which only 1 was international.¹⁷ This could be rightly be heralded as an achievement of the *jus ad bellum* sphere of IHL, which has controlled and reduced the resort to force between States, however the reality is that now the conflicts being waged are simply of a different sort from those primarily figured at the time of drafting the Geneva Conventions. These new internal conflicts carry their own thresholds and demarcation process to distinguish them from internal disturbances, yet the lines are rarely clear, obfuscating the point at which IHL is applicable. Further despite being the predominant form of armed conflict, fewer rules and protections apply than in IACs.

Another move away from the classic view of conflict as IAC or NIAC is the rise of Internationalised conflicts. These will be discussed in more detail but in essence arise from the involvement of a foreign State in an internal conflict, creating new challenges in trying to fit the resulting mixed scenario into the two tier system and establishing which set of the distinct rules should be applied to a situation that fits equally into both.

The distinction between peacetime operations and armed conflict is also being blurred by the role of armed forces in the modern world. The role of the armed forces has expanded from traditional operations against foreign State forces, now with the potential for them to be deployed in domestic situations from firefighting¹⁸ to riot control, hostage rescue,¹⁹ fighting

¹⁷ Lotta Themnér and Peter Wallensteen (n 1) 510

¹⁸ BBC News, 'Firefighters go on Strike' (November 2002) at http://news.bbc.co.uk/2/hi/uk_news/2465745.stm

¹⁹ BBC News, '1980: SAS rescue ends Iran embassy siege' at http://news.bbc.co.uk/onthisday/hi/dates/stories/may/5/newsid_2510000/2510873.stm

drug wars²⁰ to actual combat against internal armed groups. While there are legal thresholds and safeguards to ensure military forces are the last resort or are employed more as a supporting role there is the reality, especially in the lead up to a NIAC, that they will be operating on domestic soil against their own citizens. This has been the case in Syria, Mali, Chechnya, even now at the time of writing in Eastern Ukraine.²¹

These internal scenarios mean that, no matter the motive of the State, the soldiers being deployed will be operating under multiple regimes of law: domestic law, International Human Rights Law, and International Humanitarian Law. This means it is more necessary than ever to have a clear and easily established system of classification in order to ensure that the proper action is taken, law is applied, and responsibility established. With several regimes of law and levels of humanitarian law in play the task of reconciling these systems, which are often at odds with each other, is a hard task for politicians, lawyers and commanders alike. Additionally the object and purpose of the armed forces clashes rather obviously with civil and human rights laws, therefore the transition from war fighting to law enforcement or support is a very difficult change of role. The threshold between peace time operations and armed conflict in IHL needs to be able to encompass the multiple roles armed forces carry out; ensuring combat roles are not seen as police operations.

There are also forms of war and use of force which were not envisioned at the time of drafting. An example of this is Multiple Objective Armed Intervention. The international community has developed a new regime of war based on intervention for the sake of the international community and its values.²² Peacekeeping, reprisals, sanctions and humanitarian intervention are aspects of this new 'altruistic war' which, while it lacks the aggression of traditional war, can still result in armed conflict. This new frame of war, while primarily an issue of *jus ad bellum*, does affect the laws of war by challenging the regime's strict IAC or NIAC divide. Military operations are rebranded as "control operations", and are carried out to prevent violence, keep protagonists apart or protect populations. War here merges in its rhetoric with international security operations. International and Multinational forces operate

²⁰ Nick Mirnoff and William Booth, 'DEA intelligence aids Mexican Marines in Drug War' The Washington Post (December 4th 2010) at <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/03/AR2010120306820.html>

²¹ BBC News, 'Ukraine says Donetsk 'anti-terror operation' under way' (15th April 2014) at <http://www.bbc.com/news/world-europe-27035196>

²² Francois-Bernard Huyghe, 'The Impurity of War' (March 2009) 91(873) International Review of the Red Cross 21, 29

alongside, or independently from, the internal forces. The actors involved and the exact role of the armed forces complicate the distinction and classification of the situation as internal or international. Equally the classic threshold and indicators of armed conflict become blurred and convoluted, questioning the existence of an armed conflict at all.²³

Perhaps the best example of the shifting spectrum of war is on display in the concept of “three-block warfare”. The term explains the multiple sides of forces in war. Coined by a US General: “In one moment in time, our service members will be feeding and clothing displaced refugees, providing humanitarian assistance. In the next moment, they will be holding two warring tribes apart - conducting peacekeeping operations – and, finally, they will be fighting a highly lethal mid-intensity battle – all on the same day... all within three city blocks”.²⁴

In particular conflict with the traditional view of armed conflict is the realisation now by the stronger States of the threat of remote attacks.²⁵ Cyber warfare can contain the same aggression of a normal attack, it can be a form of espionage, disruption, sabotage, yet there are brand new difficulties in identifying the attack itself, its effects and those responsible for it. Intensity and Organisation, the central factors used to establish the existence of an armed conflict, along with territorial issues are all convoluted in cases where none of it can be determined. Strict distinctions and classifications cannot always accurately describe these situations. The definition and form of war and armed conflict is evolving, so it is not surprising that our classifications are going to have to adapt to it.

IV. The Eroded Distinction

Modern conflicts have evolved since the interstate wars of the 20th Century and while the old classifications remain the relevance and value of the IAC and NIAC divide is weakening.

One of the most fundamental sources of jurisprudence and development of International Humanitarian Law has been the International Criminal Tribunal for the former Yugoslavia. In particular *Tadić* gave the world the base interpretation of what constitutes an NIAC based on Common Article 3 and established the threshold for classifying a situation as an armed conflict. In particular *Tadić* reveals the blurring of the gap in legal theory between IACs and

²³ Francois-Bernard Huyghe (n 22) 29

²⁴ Francois-Bernard Huyghe (n 22) 30, quoting General Charles Krulak, Comandant US Marine Corps, National Press Club, 10 October 1997

²⁵ *ibid* 32

NIACs and can be seen to call in to question the usefulness of the distinction between the two when it leads to imbalanced protection.

A. Tadić: Classifying the Conflict

The tribunal in *Tadić*²⁶ was faced with the task of classifying the conflict in former Yugoslavia. The accused argued that the court did not have sufficient jurisdiction as Articles 2 and 3 of the ICTY statute only covered international armed conflicts, maintaining the crimes charged occurred in the context of a NIAC. The prosecution took the approach that the conflict was international, made so by the involvement of the UN and the international community. The Appeals Chamber rejected both these arguments, stating that the conflict was both international and internal and it had jurisdiction over both, effectively bypassing the hurdle posed by classifying the conflict as one form or the other. Following that, it was up to the Trial Chamber to decide on the classification of each of the individual cases and pursue them using the relevant regulations.²⁷

Had the Appeals chamber held the whole conflict as international they could have applied the full body of International Humanitarian Law to their cases, including the grave breaches provisions contained in CA 3. But they would then lose the ability to consider the internal aspects of the conflict and to affirm that serious violations of international law committed in internal wars are crimes under International Customary Law. By choosing this dual route they were able to still apply International Humanitarian Law to NIACs and keep them under their jurisdiction. As Meron states, this need to retain jurisdiction over the internal aspects was due to the knowledge that the most horrific and intense fighting and breaches occurred in the internal aspects.²⁸

It is worth to note that while this approach was creative and provided the court the opportunity to apply the law to the fullest, it does seem that it is a clever response to a needless problem. One of the points contended here is that the distinction and classification between conflicts creates more obstacles and requires those seeking to fulfil the aim of International Humanitarian Law, reduction of suffering in conflict, to resort to complicated and convoluted interpretations and approaches merely to apply the law to scenarios that clearly merit its application. Here the court's jurisdiction was challenged on the basis that

²⁶ ICTY, *Tadić*, Interlocutory Appeal (n 8) para 91

²⁷ Theodor Meron (n 6) 219

²⁸ *ibid*

there are two separate types of conflicts and the court can only look at one. The courts response was that not only could it look at both, but that the conflict had elements of both types. If that is the case then what is the distinction actually proving or even attempting to achieve. If the law feels that the two types are sufficiently distinct as to require different jurisdiction and regulation then how can a conflict be both? This dual approach and its own complications will be discussed further but it serves to question the need for a distinction between the two conflict classifications.

B. Tadić: Blurring the Borders

The main impact of the *Tadić* decision is that there has been a blurring between the borders of IACS and NIACS. This is seen in several ways.

Firstly, in ICTY jurisprudence there is often no need to determine whether a conflict is international or not. The same normative rules govern both kinds aside from the applicability of grave breaches provisions.²⁹ This can be seen in the Appeal Judgment of *Dragomir Milosevic*³⁰ where the Appeals Chamber noticed the Trial Chamber had not made the distinction on the nature of the conflict, citing both Additional Protocol I and Additional Protocol II without specifying which one applied. The appeals chamber stated:

“Although the Appeals Chamber considers that the Trial Chamber should have made a clear finding as to the nature of the armed conflict or the applicability of the Additional Protocols, the Appeals Chamber finds the references to the relevant provisions of both Additional Protocols permissible given they form part of customary international Law and apply both in international and internal conflicts.”³¹

This is an example of two distinct set of rules, each governing a distinct class of conflict, being applied to the same conflict.

The ICTY has even emphasised the unreasonableness of having a distinction between the two where the result is an imbalance in protection. *Tadić* Appeals chamber:

“Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums, or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and

²⁹ Theodor Meron (n 6) 220

³⁰ ICTY, *Prosecutor v Dragomir Milosevic*, Appeal Judgment, IT-98-29/1-A (12 Nov 2009)

³¹ *ibid* 23

yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If International Law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”³²

This reaffirms a commitment to the object and purpose of IHL and erodes the value of a distinction between the two forms of conflict where result is a loss of protection. As the distinction has become increasingly blurred and devalued, it is not surprising that a growing number of rules and principles that were exclusive to IACs have been recognised as extending to NIACS. An example of this can be found in the expansion of the scope of several weapons conventions, rendering them applicable in non-international armed conflicts.³³ The narrow rules on prohibited weapons, while originally only assigned to IACS, make little sense not to apply to NIACS. *Tadić*:

“Indeed, 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. This fundamental concept has brought about the gradual formation of general rules concerning specific weapons, rules which extend to civil strife the sweeping prohibitions relating to international armed conflicts.”³⁴

One thing that marks these decisions as particularly important for the development of the law and the erosion of the dichotomy is that they have succeeded where political will failed. This approach to conflict recognition and the extension of IAC regulation to NIAC regulation was proposed at the conference that created Additional Protocol II, yet was voted down.³⁵

Further evidence of the erosion of the divide between the two can even be seen in the hard law itself. Additional Protocol I article 1(4) includes those internal conflicts which amount to wars of self-determination, colonial revolution and against racist regimes as IACs. So the

³² ICTY, *Tadić*, Interlocutory Appeal (n 8) para 97

³³ Dieter Fleck (n 3) 623

³⁴ ICTY, *Tadić*, Interlocutory Appeal (n 8), paras 119-120

³⁵ Theodor Meron (n 6), 223

dichotomy between the two systems is slowly being worn away,³⁶ and questions the relevance of having two regimes that only serve to obfuscate the simple principles of the law³⁷.

Despite the erosion, the questionable relevance and the blurring of the distinct classifications of armed conflict, these classes still remain an inherent part of IHL. As such they are still applied and their requirements need to be satisfied. This next section will discuss the hindrance they cause to satisfying the objectives of IHL both in the distinction between IAC and NIAC but also the distinction between internal disturbance and armed conflict.

V. From Peacetime to War

One of the main features of the current International Humanitarian Law regime is that while it is self-evident that it should regulate all types of conflicts it is equally self-evident that it can only be applicable once the situation actually qualifies as an armed conflict. This is spelled out quite clearly in the provisions governing the applicability of the Geneva Law in that it will not apply to situations of internal disturbances or riots.³⁸ At first this may seem a fair situation: a specific set of rules for a specific reality should only be applicable once passed into that reality. In order to be classed as a conflict the situation must satisfy the definition of armed conflict. However the issue argued here is that the test to satisfy the definition of armed conflict now serves as a hindrance. While the definition and trigger for IHL in an IAC is simple, the trigger for law applicable to a NIAC is not. It has become increasingly legalistic and has led to not only a more complicated classification process, but has damaged the object and purpose of the law by excluding certain conflicts and their victims from the scope of its definition and thereby from the application of International Humanitarian Law . The essential element of this failure is that the process of classifying a situation as an armed conflict, as opposed to an internal disturbance, has moved from a practical and fact based assessment to an elements test.³⁹ Unless certain proposed elements are independently satisfied, a situation cannot be designated an armed conflict even when the totality of the facts and circumstances cry out for International Humanitarian Law regulation.

³⁶ James G. Stewart, 'Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict' (June 2003) 85 (850) *International Review of the Red Cross* 313, 318

³⁷ Andrew J. Carswell, 'Classifying the Conflict: A Soldiers Dilemma' (March 2009) 91(873) *International Review of the Red Cross* 143, 149

³⁸ Additional Protocol II (n 10) Art 2.2

³⁹ Laurie R. Blank and Geoffrey S. Corn, 'Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition' (2013) 46 *Vanderbilt Journal of Transnational Law* 693, 708

This section will explore the object and purpose of International Humanitarian Law in relation to classifying a situation as an armed conflict along with the evolution of the strict elements test.

A. Object and Purpose of International Humanitarian Law

Looking at the applicability of International Humanitarian Law as a means to distinguish between peacetime (and the applicable legal regime of IHRL) and war time is failing to take into account a major purpose and element of International Humanitarian Law: to curtail suffering in war. This purpose has been overtaken by the obsessing over identifying the demarcation line between peacetime where IHRL applies, and applying the *lex specialis* of wartime International Humanitarian Law. The emphasis is on establishing which system to use, forgetting the overall purpose of those systems. The Syrian civil war is an apposite example of this which will be explored later.

As we have seen, the trigger for an IAC in Common Article 2 is a rather simple one. The real grey area then lies in when a situation amounts to a NIAC.

Nothing in the Commentary to CA 3 implies that the drafters wished it to result in limiting recourse to armed conflict. What they wanted was to have it be a reliable and highly pragmatic remedy to the reality of internal armed conflict, which is more amenable to a totality of the circumstance assessment than a technical legal assessment.⁴⁰ In the commentary the goal was clear: to maximise the applicability of International Humanitarian Law.

CA 3 was always intended to bring maximum protection and extend as much regulation as possible to armed conflicts in general. In early drafting the idea was to extend the whole text of the Conventions to apply in internal conflicts. An extra paragraph was added to Common Article 2 of the Geneva Conventions providing:

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

⁴⁰ Laurie R. Blank and Geoffrey S. Corn (n 39) 708

and shall have no effect on that status.”⁴¹

However while this was the intention legally, the political intent was not of the same mind and a more basic and less reaching draft was approved by the States, which is the current version of CA 3.⁴² But even in this reduced form the object was always to bring in and enable IHL, not to limit it. CA 3’s protection is automatic in its application and is not tied to any other condition of reciprocity, preliminary discussions on the nature of the conflict or particular clauses.⁴³

Additional evidence of the desire for a wider scope of CA 3 is seen in the drafter’s rejection of a more precise definition of armed conflict, or a list of specific conditions to be satisfied for one to exist. While commentators did feel that the term “armed conflict” was vague and undefined, this was held to be preferable to attaching strict interpretations or conditions on the definition in order to ensure legitimate scenarios were not excluded on technicalities.⁴⁴

B. The Evolution of NIAC recognition

Given the design for wide applicability and the resulting protection, how then is the distinction between NIAC and internal disturbance a hindrance?

The tests used to classify a situation as an armed conflict have taken an overly legalistic approach and moved towards a strict elements test which ultimately limits the applicability of International Humanitarian Law, counter to its object and purpose.

The commentaries to the Geneva Conventions indicate that a totality of circumstances test was to be used in assessing a situation and that CA 3 application is not to be dependent on particular conditions.⁴⁵ It was to have a maximum sphere of application so following that stance, any attempt to classify conflicts or distinguish them must not unduly impede or restrict the application of CA 3.

While the commentaries and drafting process provide some guidelines and discussion on the importance of CA 3, the issue was thrown to the front of international discourse by the

⁴¹Jean Pictet, ‘Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War’ (1960 ICRC Geneva) 30

⁴² ibid 34

⁴³ ibid

⁴⁴ ibid 35

⁴⁵ ibid 36

conflict in the Balkans following the breakup of Yugoslavia. In attempting to extend international criminal responsibility to acts committed in NIACS, the identification of the demarcation point between armed conflicts was essential not as a matter of policy or theory but as a jurisdictional matter. This resulted in the *Tadić* opinion which was the formative opinion on analysing the existence of an armed conflict and the case which set the methodology which then evolved into the “elements test”.⁴⁶

1. The Framework of *Tadić*

The ICTY in *Tadić* originally framed its approach in line with the protective purpose of the law.⁴⁷ It defined a situation of internal armed conflict as:

“whenever there is protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”⁴⁸

This definition of internal armed conflict is widely accepted and is held as the main definition and starting point used in conflict assessment today.

The Appeals Chamber considered armed conflict to have a wide temporal and geographic scope, supporting the notion of a widely applicable definition of armed conflict. This led to rules of CA 3 being held to apply outside of the theatre of actual combat missions and reach beyond the time of the actual hostilities⁴⁹. This broad interpretation of the scope of the law enables a wider assessment of the situation on the ground and can cover more acts, more locations, and so protect more victims.

The judgment further shows the tribunal as looking to the object and purpose of the Conventions in terms of linking their scope of application with their purpose:

“In addition to these textual references, the very nature of the Conventions - particularly Conventions III and IV - dictates their application throughout the territories of the parties to the conflict; any other construction would substantially defeat their purpose.”⁵⁰

⁴⁶ Laurie R. Blank and Geoffrey S. Corn (n 39) 716

⁴⁷ *ibid* 717

⁴⁸ ICTY, *Tadić*, Interlocutory Appeal (n 8), para 70

⁴⁹ *ibid* para 69

⁵⁰ *ibid* para 68

However, the *Tadić* definition's threshold has a complication for the troops on the ground and lawyers in general. In a temporal perspective the test contradicts itself. International Humanitarian Law applies 'from the initiation' of a non-international armed conflict, but the situation can only be gauged as a non-international armed conflict once the violence becomes "protracted", so how are those on the ground supposed to know when International Humanitarian Law has begun to apply? They have to make a real time assessment which can leave them vulnerable to changing responsibilities and privileges under the law as the classification may change before they are aware of it.⁵¹

But the biggest issue around conflict recognition is the move from a totality of circumstances test to an overly strict elements test in satisfying the *Tadić* definition.

2. The Evolution of *Tadić*

Originally the Trial Chamber in *Tadić* took the above definition and the Commentary's broad guidelines⁵² and attempted to set out the parameters of non-international armed conflict. In doing so it established the base of the two-pronged elements test which would later become the standard approach in establishing the existence of NIACS.⁵³

The Trial Chamber held:

"The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law. Factors relevant to this determination are addressed in the Commentary to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field..."⁵⁴

In addition to identifying intensity and organisation as aspects, the chamber noted that other factors relevant to the determination were listed by the commentaries.⁵⁵

⁵¹ Andrew J. Carswell (n 37) 151

⁵² Jean Pictet, GC III Commentary (n 41) 35

⁵³ Laurie R. Blank and Geoffrey S. Corn (n 39) 178

⁵⁴ ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-T (7 May 1997) para 562

⁵⁵ *ibid*

This test of **intensity of conflict** and **organisation of the parties** was relied on and followed by other chambers and cases in the ICTY for several years. However this approach has evolved case by case and a more strict and limited approach has been filtered through. What was once simply a means of interpreting evidence in the context of two of many factors has become a formal test for two sole factors.

In 2004 *Prosecutor v Milošević*⁵⁶ altered the approach to the assessment of an armed conflict. Rather than setting out the definition established in *Tadić* and then looking at the evidence of the situation on the ground, and making a decision based on an overall understanding of all aspects of the conflict, from participants to methods, time and locations and plenty other factors and elements; the Tribunal began to state the definition and then immediately list two factors: intensity and organization.⁵⁷

It was held that:

“For the purposes of this Motion, the relevant portion of the *Tadić* test, which has been consistently applied within the Tribunal, is “protracted armed violence between governmental authorities and organized armed groups”. This calls for an examination of (1) the organisation of the parties to the conflict and (2) the intensity of the conflict.”⁵⁸

This approach takes no account of the several other factors mentioned in the Commentary, which are cited alongside a call to ensure that CA 3 is applied as widely as possible and without a fixation on any specific criteria.⁵⁹ It also ignores several basic factors that should seem evident for consideration in conflict assessment, such as government recourse to military force and the insurgent’s intent to adhere to the Conventions provisions. However this approach was followed and reinforced in a number of cases.

The *Limaj* case⁶⁰ devotes forty-two paragraphs to the analysis of the intensity of the fighting and thirty-four to organisation. This had the effect of establishing these factors as more consequential and determinative.⁶¹

⁵⁶ ICTY, *Prosecutor v Milošević*, Decision on Motion for Judgment of Acquittal, IT-02-54-T (16 June 2004)

⁵⁷ Laurie R. Blank and Geoffrey S. Corn (n 39) 720

⁵⁸ ICTY, *Milošević*, Judgment of Acquittal (n 56) para 17

⁵⁹ Jean Pictet, ‘Commentaries on the Geneva Conventions of 12 August 1949, Vol. I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field’ (1960 ICRC Geneva) 49 - 50

⁶⁰ ICTY, *Prosecutor v Limaj*, Judgment, IT-03-66-T, (30 November 2005)

⁶¹ *ibid* paras 92-169

In *Haradinaj* the court formulated its test on past precedent, therefore relying on the previous cases and reinforcing their approach as the essential approach. It then focused extensively on the facts of the fighting within the aspect of intensity and organisation.⁶²

In *Boškoski* the ICTY had to make a fresh assessment on the existence of an armed conflict. Here the court reaffirmed that the drafters intended for a wide application of CA 3, and supported the stance that the factors mentioned were merely examples, not definitive elements. However it then proceeded to narrow its frame, following *Limaj*, and focused on organisation and intensity.⁶³ The decision to focus on these two is well reasoned, they are undoubtedly valuable indicators, and other indicators are not being expressly dismissed. But damage arises as default resort to these two in assessing armed conflict gives rise to a supposition and stance that there is an inherent weight and importance attached to these two as prime indicators. They are the first ones to be considered and take precedence over others, almost to the point where they are completely forgotten, or at least are not considered to the same extent. The court in *Limaj* even referred to them as “the two determinate elements of armed conflict”.⁶⁴ In assessing armed conflict the analysis of intensity and organisation has become its own strict test. This has the potential to restrict the application of IHL from situations that merit it.

Further evidence that organisation and intensity are evolving into outright factors to be tested and satisfied is the deepening of their substance and the development of their own indicators. The ICTY has found numerous facts that demonstrate the intensity of a conflict, from ground level realities such as number of troops and equipment to external happenings like UN Security council involvement. This multitude of facts and indicators are used to prove, not the existence of an armed conflict, but the intensity of the fighting.⁶⁵ The organisation factor has seen the same development. Originally the analysis of organisation was rather superficial and lacking detail with the ICTY looking for a minimum degree of organisation. While *Limaj* may have contributed to the evolution of this strict elements test by elevating the two to the status of “determinate factor”, the court still assessed them to find a minimum standard had been reached.⁶⁶ But this gradually changed. Organisation gained its own set of indicators and factors that needed to be met in order for it itself to be satisfied as a requirement of armed

⁶² ICTY, *Prosecutor v Haradinaj*, Judgment, IT-04-84-T, 3rd April 2008 paras 39-99

⁶³ ICTY, *Prosecutor v Boškoski*, Judgment, IT-04-82-T (10 July 2008) para 175

⁶⁴ ICTY, *Limaj* (n 60) para 89

⁶⁵ Laurie R. Blank and Geoffrey S. Corn (n 39) 722

⁶⁶ ICTY, *Limaj* (n 60) 89

conflict. *Boškoski* considered five categories of factors which would establish organisation.⁶⁷ This, as with intensity,⁶⁸ resulted in the focus shifting from searching for a minimum standard of these ‘determinate factors’ to the two being considered independent requirements.⁶⁹ This again takes conflict assessment further away from the highly applicable CA 3 base and into a more formalised elements test of two independent determinative factors.

Common Article 3 was supposed to offer a minimum protection and while of course it is necessary to ensure that there is an adequate threshold, a strict test is less than suitable to assess the rapidly developing, complex, and often underreported arena of NIACs. The main issue of having a strict elements test is that it over-formalises the assessment that takes place, narrows down the applicable factors and reduces the flexibility of the law in its application, flexibility that is essential when dealing with the real world of war. In a world where NIACs are the main form of conflict, with a particular penchant for brutality, an inflexible and narrow test can result in a delay in triggering IHL or worse completely exclude the situation from regulation, leaving only IHRL and domestic law as the applicable regimes.

C. The Harm of a Strict Elements Test.

One of the main dangers of failing to correctly classify a conflict a situation as a NIAC or simply an internal disturbance is the corresponding powers granted to the State. Whether and when a State is allowed to respond with combat force to internal dissent is a complex question.

History seems to demonstrate that States err on the side of aggressiveness when they are threatened by dissident movements. This is not surprising and expecting a State to wait calmly until an opposition has truly formed into something that can pose an effective challenge is not practical and is counterintuitive.

Proponents of a strict elements test argue its merits by claiming that until the elements are satisfied the government may only respond with police and law enforcement measures,⁷⁰ which IHRL regulates. Essentially they are saying that both sides are affected by the non-classification of the situation as armed conflict. But this only works in the clear examples far removed from the threshold of armed conflict. In reality the situation can rapidly develop

⁶⁷ ICTY, *Boškoski* (n 61) paras 199-203

⁶⁸ Laurie R. Blank and Geoffrey S. Corn (n 39) 723

⁶⁹ *ibid* 722

⁷⁰ Laurie R. Blank and Geoffrey S. Corn (n 39) 739

crossing that threshold at the slightest action or reaction. Having a strict test for that threshold flies contrary to the reality of the situations where International Humanitarian Law is designed to operate.

The trigger of IHL application is not just the line between peacetime and war, but it also represents the more fundamental demarcation between **law and no law at all**. Peacetime law is general seen as ill-suited to contain the violence, hence the importance of humanitarian law. Reluctance to identify armed conflict means that the situation is only governed by ineffective laws. It creates a gap in the law, an invitation to unrestricted warfare. It should also be noted that the type of governments who will respond with heavy handed repression through combat are also the ones who will not feel bound by IHRL norms. Leaving government responses to IHRL when International Humanitarian Law is championed as the appropriate system to regulate conflict is not an adequate approach. International Humanitarian Law is the best regime to apply to regulate government response in situations involving armed force and assessing which of these constitute armed conflict is best applied through a totality of circumstances assessment.

An example of how a strict elements test is ill suited to the reality of the situation is in Failed and Weak States.

The conflict which will be waged in a failed State will typically fall below most IHL classifications as it is likely to be waged between armed groups. Without any outside or internal State forces involved the conflict will not be an IAC and APII will not apply. This leaves only CA3 to regulate the conflict. But only if the thresholds are passed.

The conflict will still have to satisfy the *Tadić* inspired test of organisation and intensity that has become rigid. As discussed above reliance on these two as independent factors is problematic and this is on full display in failed and weak State conflicts.⁷¹ The organisation of groups in these scenarios will be basic at best and usually small scale with a local focus. Warring factions will be the main players as opposed to a united front or large scale force. These groups are equally holding different aims to what traditional armed conflict supposes. They have little desire to seize central power, instead aiming for control over local points. They have no interest in taking over State functions or responsibility, making them even less like traditional anti regime movements.

⁷¹ Robin Geiss, 'Armed violence in fragile states: Low-intensity conflicts, spillover conflicts, and sporadic law enforcement operations by third parties' (March 2009) 91(873) *International Review of the Red Cross* 127, 134

The intensity of the violence also will be difficult to ascertain. With low organisation reducing the capability for effective or widespread combat operations the violence fluctuates and is often sporadic⁷². Equally, as with their organisation, the motives for violence are different from the traditional sphere of war. Warring local groups are less likely to have overcoming the enemy as an objective, instead preferring to create chaos and disrupt the traditional power balance to prevent the return of an organised system.⁷³

However perhaps the most apt example of this narrow approach to the thresholds of Object and Purpose can be seen in one of the most violent and brutal conflicts being waged today. One that has seen over 100,000 lives lost, civilians targeted and even chemical weapons deployed while the international community debates the classification of the conflict.

D. Syria

The timeline of the Syrian Civil War's escalation from protest movements to civil war is a fitting example of the current inflexibility and overly legalistic approach to conflict recognition. Before being recognised as an armed conflict the situation was one of internal unrest or disturbance: No International Humanitarian Law regime applied and IHRL and national law was expected to be the bulwark against violence and conflict, protecting the victims and controlling the aggressors. It was only once the coveted threshold of organisation and intensity was reached that the International Humanitarian Law regime of internal armed conflict, and as we have discussed this has several levels of protection each requiring its own assessment and threshold, was able to be applied.

What originally started as a protest movement descended into chaos. The context of these demonstrations was the Arab spring, with government after government being forced out and talk of revolution widespread, a context that the world and the Syrian government were very aware of.

The Civil Uprising Stage.

The unrest, while there had been rumblings in the previous months, started on the 15th of March 2011 and continued for the next few months. These protests spanned several cities, multiple regions and comprised upwards of 100,000 protesters. The protesters were immediately met with security forces deploying water cannons, beatings, warrantless arrests

⁷² Robin Geiss (n 71) 135

⁷³ *ibid*

and live ammunition.⁷⁴ While this constituted unnerving and brutal behaviour by an authoritarian regime, it is understandably still nowhere near an armed conflict. IHRL is quite fairly the applicable law.

The Military Response

In April however the Government deployed its military forces. This is undoubtedly a clear indicator that a situation is evolving from civil unrest to a scenario requiring the regulation IHL provides. The city of Daara was besieged. Hardly a common police tactic for dealing with protesters, tanks, live ammunition and 6000 troops engaged⁷⁵ in operations to hunt down “terrorist groups”, or protesters depending on the perspective. During April several other towns received the same treatment as Daara, at the end of which 1000 people were killed.⁷⁶

Following this response by the government, military officials and soldiers defected. The first armed insurrection occurred on the 4th of June, however this was mainly carried out by militia and protesters. Further towns were besieged and on the 29th of July the formation of the Free Syrian Army (FSA) was announced by defecting officers; comprising armed volunteers and ex Syrian army personnel.⁷⁷ Over the following months, more defections from the State forces and allegiances from local groups increased the FSA’s numbers and the violence escalated. Large scale military operations on towns and residential areas were carried out with both sides using heavy weaponry and the State forces employing tanks, gunships and mortars.⁷⁸ At this point the situation was still only governed by national law and the State’s adherence to its human rights obligations.

The Independent International Commission of Inquiry on the Syrian Arab Republic was established on 22 August 2011 by the Human Rights Council, several months into the chaos on the ground. Its reports only serve to highlight the inflexibility and strict application of the formalised test. The Commission in its first report in November 2011, while finding gross human rights violations, felt that the situation was still not that of an armed conflict as the

⁷⁴ Human Rights Watch, ‘Syria: Security Forces Kill Dozens of Protesters’ (25th March 2011) at <http://www.hrw.org/news/2011/03/24/syria-security-forces-kill-dozens-protesters>

⁷⁵ Anthony Shadid, ‘Syria Escalates Crackdown as Tanks Go to Restive City’, New York Times (25th April, 2011) at <http://www.nytimes.com/2011/04/26/world/middleeast/26syria.html>

⁷⁶ International Federation for Human Rights (FIDH), ‘Bashar Al Assad: Criminal Against Humanity Report of human rights violations committed in Syria. March – July 2011’ (28th July 2011) at <http://www.fidh.org/IMG/pdf/reportsyria2807eng.pdf>

⁷⁷ Laurie R. Blank and Geoffrey S. Corn (n 39) 725

⁷⁸ *ibid* 726

requisite level of intensity had not yet been reached.⁷⁹ The second report in February 2012 acknowledged that the violence had increased to a level that could satisfy the intensity requirement but the organisation of the FSA was still unascertainable.⁸⁰ However when comparable events assessed in early ICTY cases satisfied that threshold, this strict test seems to be out of step with the present reality.⁸¹ Thousands of fighters had perished and both sides, in particular the State, were making full use of military tactics and equipment yet the situation was still not severe enough to trigger even the base protections of CA 3.

It was not until July 2012 that the ICRC announced that the situation had risen to a level of a NIAC and so triggered IHL application.⁸² Fifteen months of State forces targeting protesters, reprisals by militias, denial of humanitarian aid, shelling of residential areas, civilian targeting as the regime unleashed its military on its own population in response to a protest movement, and then met with force by rebel forces, with no accountability under the IHL regime as it did not apply. It simply seems illogical and at odds with the object and purpose of IHL that this situation had to descend to such a level, whereas had the conflict been against a neighbouring State IHL would have applied from the first shots. Law in general is retroactive but considering the wide scope desired in IHL and the almost instantaneous application of the law in IACs, the trigger for a NIAC is simply inept.

VI. The Distinction between NIAC AND IAC

The difficulties and contradictions in law caused by the demarcation point between peace and war have been shown above. However there is another hurdle to the realisation of the object and purpose of IHL. The imbalance in protection based on a classification within conflict, one we have already seen as eroded and at odds with modern warfare. This section will explore the complications and deficiencies of the distinction in International Humanitarian Law between IACs and NIACs, revealing that the dichotomy is no longer an accurate reflection of the current forms of warfare and is lacking in its protection for the most common conflicts being fought, NIACS.

⁷⁹ United Nations General Assembly, Human Rights Council 17th Special Session, 'Report of the independent international Commission of inquiry on the Syrian Arab Republic' (23 November 2011) UN Doc. A/HRC/S-17/2/Add.1 para 99

⁸⁰ United Nations General Assembly Human Rights Council 19th Session, 'Report of the independent international Commission of inquiry on the Syrian Arab Republic' (22 February 2012) UN Doc. A/HRC/19/69 para 13

⁸¹ Laurie R. Blank and Geoffrey S. Corn (n 39) 728

⁸² Stephanie Nebehay, 'Exclusive: Red Cross ruling raises questions of Syrian war crimes', Reuters, at <http://www.reuters.com/article/2012/07/14/us-syria-crisis-icrc-idUSBRE86D09H20120714>

A. The Imbalance in the Law.

The advance of nuclear weaponry and the lack of tolerance for direct aggression has had an impact on the prevalence and resort to genuine International Armed Conflict. It could be said that International Humanitarian Law has fulfilled its role well in relation to *jus ad bellum*. Conflict now is less transparent, with States waging war by proxy such as the US in Nicaragua or acting behind an invitation such as Russia in Afghanistan, even relying on the fog of war and politics to hide their influence in internal conflicts.⁸³ Even Russia's recent takeover of Crimea, an armed annexation of sovereign territory was all done under a claim of internal strife, with flagless soldiers, and without a shot fired somehow fell short of both an IAC, and due to the previously mentioned flaw in the strict elements test, a NIAC.

1. The legal differences.

The first issue with the distinction between the internal and international conflict is the imbalance in the regulation and protection. The substantive differences in the law are striking, with the weight of the law overwhelmingly focused on the States and their IAC's. The GCs and their protocols contain close to 600 articles, of which only CA 3 and the 28 articles in AP II apply to NIACs. So to say that there is an imbalance of Geneva Law is an understatement.

The content of these provisions contains a further imbalance in the regulation of the hostilities. CA 3 only covers those who are not, or are no longer, participating in the conflict meaning it leaves the combatants largely unregulated, and does the minimum to regulate the actual combat or protect civilians from effects of hostilities. AP II does provide more substance for the protection of civilians, yet it must be remembered that AP II requires a higher threshold of organisation in order to be applicable. It seems that civilians are thought to have a varying degree of vulnerability, only really threatened when organised (and possibly more disciplined and obedient) forces clash. AP II's protection is also less than that of the level applicable in IACS. Its provisions⁸⁴ do not provide the same detail on civilian protection such as the provisions on the prohibition of indiscriminate attack⁸⁵, unnecessary suffering and environmental damage as contained in AP I.

⁸³ James G. Stewart (n 36) 316

⁸⁴ Additional Protocol II (n 10), Article 13

⁸⁵ Additional Protocol I, Art 51, Art 35(2) and Art 35(3)

The imbalance in law between the two conflict classes is not just contained to Geneva Law. The disparities are also echoed in other legal regimes, such as International Criminal Law, where the Rome Statute of the ICC limits the grave breaches regime to international conflicts and also contains less comprehensive provisions that apply to non-international conflicts⁸⁶. This illustrates that the divide and distinction between the two conflicts, and the ensuing gap in protection is being compounded and upheld in international law and, given the fairly recent adoption of the ICC statute, show that not much has prompted change or lawmakers aren't motivated to rectify it.

Perhaps the most drastic difference between the two is the lack of combatant privilege and POW status in NIACs. As a result those engaged in an internal conflict against the State do not have the right to attack their enemy, the State forces, and they may be charged under domestic law to that effect. State forces however have that right and the corresponding immunity. From the perspective of the non-state actor, there is little value in IHL as there is less regulation over the conduct of hostilities and they merit neither right nor protection of combatant status.

However there has been some move to align the two. While unfortunately nothing as clear as strict treaty law convergence or assimilation, custom has attempted to bridge the distinction placed between the two. The court in *Tadić* found that several rules stemming from IACs were applicable as custom in NIACS.⁸⁷ Legal experts have also commented on the merge of the two bodies and there is some feeling that the *opinion juris* and practice of States and international organisations now supports the finding of criminal responsibility to grave breaches of ICL even when committed in a NIAC.⁸⁸ However again it should be pointed out that this is not backed by more express forms of hard law and as mentioned above the ICC statute in fact goes the opposite way. The ICRC has equally made moves that show the divide is becoming less strict, with its acknowledgment that national legislation, international legal instruments and judicial reasoning reveal that the States are moving away from a two tier structure, yet that organisation still adheres to that system of conflict classification.⁸⁹

⁸⁶ James G. Stewart (n 36) 321

⁸⁷ ICTY, *Tadić*, Interlocutory Appeal (n 8) para 127

⁸⁸ James G. Stewart (n 36) 322

⁸⁹ International Committee of the Red Cross, 'International Humanitarian Law and the challenges of contemporary armed conflicts', Report of 31st International Conference of the ICRC' Geneva (2011) 31IC/11/5.1.2, 12

2. New conflicts: IAC or NIAC?

The next issue is that International Humanitarian Law still dissects conflicts into the two categories of IAC and NIAC, with neither regime being appropriate or applicable. The current form of war is largely Internationalised Armed Conflicts.

Despite the critical departure from a formal declaration of war, and the then progressive base level of protection provided by CA 3, both the Geneva Conventions and the Additional Protocols fail to dictate what law to apply in a conflict that has both international and non-international aspect.

In addition to the confusion around what laws are applicable to internationalised conflicts, the test for internationalisation itself is complex and contradictory.

The *Tadić* case considered the issue of internationalisation in its Appeal Judgment. The court found that:

“It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”⁹⁰

This test for internationalisation has been followed in numerous cases and as with many elements of the *Tadić* case, has become a foundation for legal practice and development on the issue. However there is some confusion and overly complex snags with the test that render it unsuitable for its purpose.

One catalyst for internationalisation occurs though combatants acting as agents of an outside State to the conflict. Here the jurisprudence on the issue is contradictory and its application is convoluted.

The ICJ considered internationalisation via agency in the Nicaragua case in order to determine any responsibility of the United States in the armed conflict where it established a test of “effective control” over the operations of the agents.⁹¹ In this test it looked to

⁹⁰ ICTY, *Tadić*, Judgment (n 54) para 84

⁹¹ ICJ, *Nicaragua Case* (n 9) 109

dependence and control and measured those in the light of equating the Nicaraguan Contras with an organ of the US or acting on behalf of the US government.⁹² In this case the US was not held responsible despite a high degree of control over and dependency by the Contras as the violating acts they committed could be committed without control of the US.⁹³ *Tadić* made to follow this approach however the *Tadić* Appeals Chamber overruled the Trial Chamber's support of this test arguing it as unpersuasive as it is not "consonant with the logic of the law of State responsibility"⁹⁴ and is "at variance with judicial and State practice" with courts departing from the notion of effective control.⁹⁵ The Appeals Chamber introduced a new test with three different standards of control for differing entities.⁹⁶

In overruling this method the correct approach for internationalisation via agency has not only become more contested but the new test proposed by *Tadić* has found problems in its application creating further confusion, even between the Appeals Chamber Judges.⁹⁷

This confusion and multiple standards of control not only leaves the correct route to internationalisation muddled for lawyers and judges, but its most serious impact is on the ground. And this is precisely where International Humanitarian Law needs to be the most apparent and applicable, if those engaged in the hostilities cannot determine which rules to apply then the whole exercise is rather pointless. Courts are able to view the situation with not only a complete picture but also in hindsight. Internationalised conflicts are often used to employ covert methods of warfare and the information will be largely unavailable to those on the ground thereby giving rise to differing views of the conflict.⁹⁸ Expecting commanders in the field to employ a test that itself is complex and uncertain and the subject of dispute, in real time, with limited information is a tall order. And as one author points out, the other side of the responsibility issue is equally ridiculous in that "one could convince a military commander to respect a different set of rules by arguing he is an agent of a foreign country".⁹⁹ Questions such as targeting, and in particular of POW status will remain unclear and up for debate until well after the fact, and in the case of punishments levied against those taking part in the hostilities, can be irreparable.

⁹² ICJ, *Nicaragua Case* (n 9) 109

⁹³ James G. Stewart (n 36) 324; *Nicaragua case* 115

⁹⁴ ICTY, *Tadić*, Interlocutory Appeal (n 8) para 116 - 123

⁹⁵ ICTY, *Tadić*, Interlocutory Appeal (n 8) 124 - 125

⁹⁶ *ibid* 137

⁹⁷ James G. Stewart (n 36) 326

⁹⁸ *ibid* 327

⁹⁹ *ibid*, Note 84 M. Sassoli and LM Olson.

The complexity and indecision on the issue will also affect external actors seeking to enforce humanitarian norms. And on the final stage, the lack of agreement on the test has impacted the courts themselves, delaying and muddling their decisions.

These current tests for internationalisation discussed above are derived from where International Law stands on assigning State responsibility, but they are being applied to International Humanitarian Law conflict classification, a real time arena that is ever evolving and with countless factors interacting that has instant consequences on the lives of those involved. They are ill suited to the task and undermine the possibility of consistent application of humanitarian norms.¹⁰⁰ They are largely only even possible to implement when looking back in time, and forget the object and purpose of international humanitarian law. Ex post facto assessments are of little use to those on the ground, the law should strive to be clear and easily interpreted by those actually engaged in the conflict. However as unfit as the tests may be, they are operating in a field where both lawyers and soldiers have to view conflict as one of two artificial options, which the newly internationalised conflict does not fit.

B. The Effect of Internationalisation

As we have seen the current view of armed conflict is that it is divided between an IAC or NIAC, which itself has two thresholds and applicable rules, the Internationalised Armed Conflict (IZAC) sitting in between. And unfortunately for the law and the strict classification ideology one conflict can fit into all of those categories. This has led to questions on the characterisation of what an internationalised conflict actually entails in terms of the applicable International Humanitarian Law. Is it the IAC regime or the NIAC regime? Stewart proposes that there is either a global or a mixed approach.

The Mixed Approach

The mixed approach to Internationalised conflicts is found once again in *Tadić*:

“In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, **be international in character alongside an internal armed conflict**)...”¹⁰¹

¹⁰⁰ James G. Stewart (n 36) 327

¹⁰¹ ICTY, *Tadić*, Judgment (n 54) para 84

The effect of this approach is that the internationalisation of a conflict only creates an international conflict between the parties belonging to States as only they are capable of conducting an IAC. So if a third State intervenes in an internal conflict the entire conflict does not become international. It only becomes international in respect of the State forces, and even then, only when they clash against each other. So a State assisting its neighbour government in an internal conflict is still only bound by NIAC rules and the conflict is considered an “Internationalised NIAC” ... which does very little on the ground as there are no specific rules governing that type of conflict in current IHL. It is either an IAC or a NIAC. In essence the situation has been given a new name but is legally still a NIAC, which begs the question as to why even discuss its internationalised nature.

The rationale for this approach stems from the Geneva Conventions themselves. An international armed conflict occurs between two high contracting parties (read: States).¹⁰² Non International Armed conflict occurs between a State and organised armed groups.¹⁰³ While it is not illogical to distinguish internal and international, that distinction is no longer apposite to view war today and having a disparity in the protection afforded these classes is contrary to the aim of IHL. In the decades that have passed we have moved away from a State centred and Westphalian attitude towards States and the conflicts seen in the world today equally reflect a move away from outright state to state warfare. In keeping with the argument that the distinction is at heart irrelevant and does more harm than good this idea of two concurrent classifications of conflict results in both jurists and actors on the ground, making artificial distinctions between the internal and international aspects of the conflict. This process is impractical, convoluted and imprecise.¹⁰⁴ The impact this mixed approach has on the situation on the ground is also largely impotent as it leaves the regulation to the less comprehensive NIAC regime, aside from the scenario where an external State is involved engaged against the host State, which anyway would be an IAC regardless of the existence of the NIAC. And while that approach may seem the cleanest way to view an internationalised conflict, it is of no use in scenarios amounting to proxy wars.

Given the decline in open State to State conflict, proxy wars and covert interference are valuable tools which following the mixed approach to internationalisation, fall through the gaps resulting in an IAC treated as a NIAC. The interfering State is unlikely to admit to its

¹⁰² Geneva Conventions, Common Article 2

¹⁰³ AP II Article 1, CA 3 Commentary

¹⁰⁴ James G. Stewart (n 36) 334

role due to the political ramifications, after all if it was willing to support the conflict publically it would have done so and there would be no proxy or covert operations. Without its direct involvement the conflicts cannot even be claimed to be simultaneously an IAC or NIAC. The distinction between IAC and NIAC, only compounded by a mixed approach to internationalisation, is not accurate to the real situation.

In effect what this approach calls for is an even more complex layer upon layer system based on relationships between troops and states that is only diagnosable after the fact. However for those affected by the chaos and violence, the effect of a shell or bullet is rather the same no matter who fired it. This approach is echoing the overly legalistic attitude that vexes the first stage classification of an armed conflict from an internal disturbance.

The Global Approach

The other approach to the effects of internationalisation is the global approach, where the full body of International Humanitarian Law is applied to the Internationalised Conflict. The arguments for this approach are much the same as the ones against the mixed approach: that it is more practical, simpler to apply and removes the artificial distinctions.¹⁰⁵ Equally from an object and purpose perspective applying the full protection and full regulation of armed conflict to an IZAC seems the natural response to its internationalisation; otherwise the situation is just a NIAC with a new external and irrelevant element. And from the perspective of those involved in the conflict it is very prudent to apply the full laws of war in a scenario where the classification may rapidly change or even retroactively be changed by a court, thus leaving them liable to violation of the laws.

There is considerable support for the global approach with several cases adopting that view, the United Nations Commission of Experts, the United States government and several academic scholars have advocated or adopted a blanket classification of State territories containing international and internal armed conflicts.¹⁰⁶

There is an understandable fear that the global approach would be overly trigger happy, in the sense that any incident of international force could be enough to internationalise the conflict, even when it is possible to see a clear distinction between the conflicts. It could also encourage non state actors to escalate the conflict to prompt international involvement in

¹⁰⁵ James G. Stewart (n 36) 334

¹⁰⁶ *ibid*

order to trigger full IHL and the connected combatant privilege. However given the system's current desire to separate, divide and compartmentalise conflicts, there is little reason why it would not be possible to establish some limits on the global approach to account for these scenarios.

While the global approach may seem like the more appropriate choice, and its popularity may grow with further adoption by States, it still stands as the outside view. The mixed approach was taken by the International Community when it adopted the stricter scope of CA 3, and rejected the ICRC's proposal to include full International Humanitarian Law to civil wars involving the intervention of foreign troops.¹⁰⁷ The mixed approach is also the one consolidated in the jurisprudence of the ICTY as we have seen.

The Reverse of Internationalisation

Aside from the difficulty of cramming IZACS into the distinct IAC or NIAC dichotomy, the other side is equally unclear and open to ineffectiveness and confusion. What is the effect when a conflict becomes internal again?

The current stance again stems from the Conventions, Commentary and ICTY. Article 6 of GCIV makes the point where International Humanitarian Law ceases to apply on "the general close of military operations".¹⁰⁸ This is given a wide interpretation by the commentaries, pointing to the last shot being fired and the final end of all fighting.¹⁰⁹ Once again this results in a wide field application of International Humanitarian Law in line with its purpose. But what is the status of internationalised conflicts. Given the unlikely result that the full regime even applies, does the law applicable scale down to that which covers NIACS once the internationalising element has gone?

The *Tadić* Appeals Chamber considered the issue and found that:

"International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States

¹⁰⁷ James G. Stewart (n 36) notes 7 and 90

¹⁰⁸ Geneva Convention IV, Art 6

¹⁰⁹ Jean Pictet, Commentary GCIV, 62

or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”¹¹⁰

Given the ICTY’s creation of the “mixed approach” on the effect of internationalisation it stand to reason that the correct interpretation is that the conflicts are dealt with separately with the cessation of International Humanitarian Law just as they were with the application of it. This means that an IAC can become a NIAC and the rules applicable are those for NIACs. This does seem a reasonable effect even from the “global approach” to internationalisation, as an internal conflict that could rage long after any international element has left should not be deemed international. However given the disparity in level of protection it seems counter intuitive to move from a more regulated conflict to a less regulated one.

It can be argued that the loss of the international element should trigger a reclassification, and this would be tenable if the level of protection were somewhat equal, merely tailored to suit the involved actors. However this argument for reclassification is not balanced. In a conflict where an international element is involved, but not operating against the State, the conflict remains classed as internal. How then could proponents of this approach argue the importance of the international element is sufficient for reclassification down to a lower level of protection when its presence does not move the class up? Additionally it may be in the best interest of the victims and the object of IHL to retain a higher level of protection with the loss of the International element. In many situations the presence of a foreign armed force may be preventing further violence and conflict, the loss of that element would open the gates to more vicious fighting and moving to a less comprehensive regime seems an odd response.

Ultimately internationalised conflicts show that the distinction between IAC and NIAC is no longer accurate and nor is it really relevant. What a conflict is called is of little importance to those being affected by it. It’s the disproportion of protection and regulation the law provides based on that classification. The need to establish first what set of rules applies to a conflict only serves to complicate the situation over an arbitrary distinction. And often the conflict fits cleanly into neither category resulting in even more arbitrary divides and complex tests, the results of which often lower the standard of protection. Were the protection more equal then the problems with the test for internationalisation and the confusion over what law applies to those internationalised conflicts would be cleared, and indeed the whole need for different classes would fade anyway.

¹¹⁰ ICTY, *Tadić*, Interlocutory Appeal (n 8) 70

VII. The Way forward

The dichotomy of IAC and NIAC is not working. Commentators are disparaging of the divide between international and internal conflict.¹¹¹ The distinction itself is outdated, arbitrary, unclear and inconsistent in its application, does not take into account current warfare, and has barely any effect other than to confuse and complicate the protections International Humanitarian Law can provide. The inflexibility of the line drawn between peacetime and war is equally damaging, having the effect of excluding IHL where it is most needed. However the way forward is not smooth.

Customary Law has made some inroads into closing the gap the IAC/NIAC distinction has caused. Many of the rules applicable in IACS are now applicable in NIACS, however this process has not resulted in a full transplant and so creates a further complex web of norms in terms of rules applicable to a conflict. Equally the development of custom is a long process and will be more open to political and legal dispute. As it stands custom will require more consolidation to court widespread acceptance and equally requires more expert legal knowledge when imparting these rules to those actually engaged in the hostilities. Is there a route to progress through Treaty Law?

One of the major obstacles to the Treaty law route is the difficulty of drafting a single definition of armed conflict that accurately encompasses the multiple levels of armed conflicts and satisfies the governments concern of being able to deal with internal matters. Given the erosion of absolute State sovereignty in the development of international law it could be argued that while internal matters are of course the States prerogative, once the State chooses to deploy armed forces and finds itself in an armed conflict it should agree that it is bound by a higher law, just as it would be over human rights violations, an equally internal issue.

If drafting a new definition of armed conflict proves too troublesome, the same effect can be achieved by simply correcting the imbalance between IACs and NIACs. This unfortunately will not solve the complexities and grey areas around the transition of an internal situation to an armed conflict and the general application of IHL, but it will ensure that all armed conflicts merit the same protection and remove the confusion created by IZACs. Several initiatives of this balancing act have already been mentioned: the finding by *Tadić* of the

¹¹¹ James G. Stewart (n 36) 344

applicability of some IHL provisions to internal conflicts, the ICRC customary law study, and the lack of distinction between conflicts in arms conventions. There have even been drafts at comprehensive legislation for NIACS, such as the San Remo Manual on the Law of Non-International Armed Conflict.¹¹² Experts have also made efforts to draft Minimum Humanitarian Standards whose application is not limited by type of conflict.¹¹³

However there are unfortunately some areas that will create controversy and tension in any attempt to harmonise the law of IACs and NIACs. The monopoly of force and combatant privilege are closely guarded by States and POW status is equally a feature they would wish to preserve as their own for fear of enabling their opponents in internal conflicts or limiting their ability to deal with their internal matters.

The States protectiveness over POW status cannot be underappreciated. In principle it legitimises raising arms against the State and therefore lends validation to not only attacks on the State, but the armed group and its movement against the State. However this effect can be limited. Applying the conditions for militia listed in 4A(2) of GC III to actors in internal conflicts would result in certain criteria to be met before gaining POW status and so the State will not lose the right to prosecute all members of the opposing force. It would also aid inspiring organisation and discipline and respect of the law from the actors. Additionally POWs can still be prosecuted for aggression, crimes against humanity, war crimes, genocide which further can curb the fear that a lack of prosecution will inspire rebellion. Regardless, States are very unwilling to release their monopoly on force and as some see it, limit their own sovereignty by being bound in their handling of internal matters.

This in essence is the biggest obstacle to reforming international law through treaty or statute: political will. International Humanitarian Law represents the extreme end of the spectrum of International Law where the most fundamental interests and even the very survival of a State, not to mention the power and authority of those individuals giving the orders and drafting the policy, are at stake.¹¹⁴ So it is not surprising that States will work in their own favour in designing the rules they consent to be bound by. Additionally IHL Organisations, such as the ICRC hold on to the current system and distinctions. Indeed due to these obstacles it is

¹¹² San Remo Manual on the Law of Non –International Armed Conflict available at <http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf>

¹¹³ Declaration of Minimum Humanitarian Standards, *reprinted in* Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) (Declaration of Turku) Art 1

¹¹⁴ Andrew J. Carswell (n 37) 158

actually most likely through that aforementioned development of customary law, and a continued erosion of the value and relevance of the distinctions, particularly between IAC and NIAC, that progress towards a more inclusive and balanced system will be made.

A. Progress Beyond the Law

New treaty law, development of custom or reform of the current IHL provisions may not be the only way forward. While the politics and policy of law-making can pose a problem to the development of International Humanitarian Law there is some ground from which progress can, and has been built. Very few States will openly deny the humanitarian imperative in armed conflict. All members of the UN have ratified at least the Geneva Conventions, and while a significant number have not ratified the AP II, they are still bound by CA 3, so some level of regulation of NIACs is in play. The way forward then is to take a more practical route and entrench International Humanitarian Law within not only the societies, hopefully including those in power who wish to wage war or support it, but within the Military Institutions themselves.¹¹⁵

There are several advantages to ingraining International Humanitarian Law norms, and the Military Institutions are the perfect targets. There is the obvious factor that they are the ones who participate in conflicts and therefore are the intended subjects of the effects of the law; their comprehensive and full understanding knowledge and acceptance of the laws of war is rather the point. But as Carswell notes, Militaries also evaluate and define themselves on discipline. Law, and in particular International Humanitarian Law, is in essence an exercise of discipline, a set of rules designed to control behaviour and action in a chaotic environment. One perspective is that by equating Law and discipline creates the notion that falling short of the International Humanitarian Law practices and principles means a lack of discipline. Adherence to IHL is therefore of inherent value to military institutions. Taking that view is a method of encouraging strict and full compliance with International Humanitarian Law.¹¹⁶ However there are some flaws in this approach. One disadvantage in particular is that encouraging strict discipline to the current system misses the central theme of this work: that the current system doesn't fit in today's wars. A second is that it has been strict adherence to the distinctions and classifications within IHL that have led to a dissonance with the reality on the ground. So while it is a valuable connection to make between the two in respect of

¹¹⁵ Andrew J. Carswell (n 37) 158

¹¹⁶ *ibid*

fostering value for general IHL compliance, what is needed is more flexibility, for soldiers and commanders to think beyond arbitrary lines and to apply the object and purpose of International Humanitarian Law to all conflicts.

Another move that again lies with the Military institutions is simply to just ignore the current imbalance of protection and apply full IHL to both internal and international conflicts. This has the advantage of removing any confusion as to which rules apply, conforms to the object and purpose of the law and reduces the risk of those involved being held to a higher standard of law if the conflict evolves or is found *ex post facto* to be of a different class.

One of the constraints on the above approach of a military incorporating International Humanitarian Law into its core policy is that, no matter its stance, it remains a servant of the State and its Government and so will be unable to separate itself from the political considerations that give rise to the problems of conflict classification.¹¹⁷ But this doesn't mean every detail of its actions must conform to the political ambition. It can still implement as much of the International Humanitarian Law protections as it can in its own operational practice. It can still give substantial effect to the object and purpose of International Humanitarian Law and conform itself to the full regime even if politicians are refusing to recognise the belligerency of the opposition. The military can hold itself to a higher standard than is required by law. Indeed the argument could be made that many laws are setting merely minimum standards of behaviour. Truthfully, individuals and States should be aiming a bit higher than the bare minimum in protecting humans from suffering. The UN has done this in relation to its peacekeeping troops by holding that they will conform to the full IHL regime no matter the external politics and their impact on conflict classification.¹¹⁸

Ideally best way to implement International Humanitarian Law through the military is full integration of the law in all aspects and levels, from training, to policy, establishing its principles as doctrines and as a foundation in internal justice systems.¹¹⁹ By entrenching the highest standard of law, such measures can at least insulate the military from the politics or legal sophism of classification. This will not only result in the higher standards of protection being applied to conflicts, but protect soldiers from the consequences of an subsequent

¹¹⁷ Andrew J. Carswell (n 37) 159

¹¹⁸ Secretary-General's Bulletin, Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13 (6th August 1999)

¹¹⁹ Andrew J. Carswell (n 37) 159

reclassification and has the potential to consolidate and strengthen the Customary Law on the issue.

There are limitations to leaving the military to fortify International Humanitarian Law. Essentially, they shouldn't have to. The legal experts and the law itself should hold the responsibility to safeguard its clarity and effectiveness and ensure its connection to reality.

Additionally there are some elements in IHL where the military has little power. An example of this is combatant privilege. No matter their treatment by the armed forces, those non state actors involved in NIACS under the current law will still be liable to prosecution and the States seem unlikely to give up this right. Equally if the political forces within a state begin to interfere with army practice there is little the military can do to contradict them. An example of this would be creating a new class of detainee, such as an "unlawful combatant."¹²⁰ The solution also requires the politicians and civilians to fully understand, appreciate and be motivated by International Humanitarian Law.

On this vein the focus should then shift to the lawyers. One professor of IHL has made the argument that the teaching of the law should be updated. It should be more general and move away from immediately stating the various conflicts as fixed inflexible classes. This roots the discussion solely in when IHL is applied, not when it *should be*. The focus needs to open on asking the students in what situations should IHL be applied. What changes those conflict situations enough to merit a change in the applicable law?¹²¹ Ask students what suffering should be covered, rather than starting at what *Tadić* defined and move from there. In teaching these distinctions professors and experts should emphasized that the distinctions and categories are just that – legal distinctions – and do not define the suffering of peoples who are affected by the violence and conflict, nor do they define the appropriate response to such tragedies.¹²²

Carswell very effectively sums up the route for progress: "The legal framework applicable to military operations is patchwork and contains overlapping provisions which may also conflict. It is liable to political interference and can become complex to the point it is ineffective. The substantive provisions are simple and straightforward however. Politicians must become conservant with the legal framework applicable to military operations if they

¹²⁰ Andrew J. Carswell (n 37) 160

¹²¹ Alison Duxbury (n 11) 71

¹²² *ibid* 272

are to respect the requirement for objective legal classification. Civilian and military officials must speak the same language and understand the rationale behind the States voluntary decision to abide by International Humanitarian Law and non derogable IHRL in even the most trying times. Only then can the theory of law be genuinely applied in practice.¹²³

B. Another Source of Conflict Regulation?

The IHL reform discussed above, such as a new single definition of armed conflict, or a harmonising of laws between conflict classes, focus mainly on minimising the negative impacts of having a distinction between IAC and NIAC. However they do not address the complications arising from the distinction between peace and war, and the applicable legal regimes. The major impact of the inflexible and formal thresholds and slow trigger of IHL is that it leaves those realities that merit IHL application only covered by national law and International Human Rights Law. This argument is in part based on the position that IHRL is not suitable to deal with the specifics and exigencies of armed conflict, where IHL is *lex specialis*.

IHL is specifically designed to regulate conflict and many of the provisions governing the conduct of hostilities could never have a place in Human Rights law and in places, such as the right to life vs the right to kill the enemy, the two regimes outright contradict each other. However a major theme of this paper has been the hindering of the object and purpose of IHL. While full and equal regulation of the myriad of scenarios and realities of armed conflict would be ideal, the priority is the mitigation of suffering in war. There is a growing view that IHRL actually offers greater protection to the individual and so there is some ground to shift the regulation from IHL to IHRL.¹²⁴ This section will explore the notion of using human rights to protect the victims of conflicts, as human rights law makes no distinction between classes of conflict, nor requires a threshold to apply.

The European Court's New Approach.

The European Court of Human Rights (ECtHR) has dealt with cases where it applied its own doctrines to conflict situations, drawing primarily on IHRL and in some ways conflicting

¹²³ Andrew J. Carswell (n 37) 161

¹²⁴ Sandesh Sivakumaran, 'How to Improve upon the Faulty Legal Regime of Internal Armed Conflicts in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law*, (Oxford University Press 2012) 525

with International Humanitarian Law.¹²⁵ This approach of the ECtHR could trigger a re-evaluation of strict adherence to the *lex specialis* doctrine¹²⁶ and has the potential to impact the approach to regulating NIACs. While this approach needs to be examined more and calibrated further it shows an interesting, potentially very effective, and holistic approach to dealing with the regulation of NIACs as part of international law, rather than getting mired in overly detailed distinctions between systems of law.

The ECtHR approach in a number of cases of has resulted in the court applying its own human rights doctrines on the use of force in law enforcement to large scale battles. The result is that the court breaks from tradition and applies IHRL directly to scenarios resembling armed conflict and without deference to International Humanitarian Law required under the *lex specialis* doctrine.¹²⁷

In *Isayeva II*¹²⁸ the ECtHR considered an armed conflict without deferring to IHL. It equally was able to implement a new approach to conflict regulation, one which IHL could not. In this case it was discussing a battle between Russian armed forces and over 1000 insurgents. Following International Humanitarian Law this would first have to be classified as either an internal disturbance (rendering it inapplicable), or as an internal conflict under CA 3 or AP II. In this case however the court characterised it as “an active resistance to law enforcement bodies”.¹²⁹ This approach then allowed the court to criticise the armed forces for not showing the sufficient degree of caution. By classifying the conflict in the context of a law enforcement operation the court completely removed the divisions and showed that its rules made no distinction in in the law’s application between police, armed forces, rioters or rebels. Instead of a divided and layered system they applied IHRL as one all-encompassing body of law, which of course echoes the universality and fundamental nature of IHRL.

The Court has analysed the conduct of hostilities in three separate conflicts in the three scenarios of differing intensities and has been able to apply the same doctrine, grounded in the right to life provision of Article 2 ECHR.¹³⁰ It has kept its approach consistent throughout

¹²⁵ William Abresch , ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 16 European Journal of International Law 741,742

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ ECtHR, *Isayeva v Russia*, App No 57950 (24 February 2005)

¹²⁹ *ibid* para 180

¹³⁰ William Abresch (n 125) 753

the different conflicts which would all have been categorised as distinct, with distinct rules applicable, in International Humanitarian Law.

There is also an advantage in this approach as not only does it eliminate the legal and technical problems of categorisation, and the imbalance of the protection, but also removes the political influence on classification. In each case the status of the conflict was contested or disputed by the State. Russia has refused to recognise a conflict in Chechnya, the same attitude was taken somewhat by UK regarding its struggle with the IRA. As we have seen not only can this denial of conflict be for the States advantage, but also a genuine political concern of legitimising rebels or admitting a loss of power by the State. Taking the approach of the ECtHR eliminates the need for States to accept the reality of the existence of an armed conflict. It enables the protection of victims in cases where there is foul play by the State and for the benevolent State to adhere to its obligations without legitimising its opponents or entering a new political and legal reality.

The suitability of applying IHRL to armed conflicts could be doubted. Yet IHRL is not detached from the concept of intense violence and social breakdown. For example Article 2 of the European Convention of Human Rights (ECHR) while guaranteeing the right to life also provides the circumstances in which life may be taken:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a. in defence of any person from unlawful violence;
 - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

Note the specific reference to “riot and insurrection”, essentially the scenario that can stray across the demarcation line into a NIAC. Equally human rights have long been established to apply in times of war unless derogated from.

Then there is the question of bypassing the *lex specialis* doctrine. It is firmly established that Human Rights law should be interpreted in light of IHL in situations of armed conflict. The ICJ gave a clear statement of how the doctrine functions in the Nuclear weapons case:

“The ICCPR doesn’t cease in times of war.... In principle the right to not arbitrarily be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life however then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Art 6 of the ICCPR, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the covenant itself.”¹³¹

However there is the option for the State to derogate from their human right obligations, in particular Article 2 ECHR in respect of deaths resulting from lawful acts of war, in times of war and public emergency.¹³² Why then has no State made a derogation of Article 2? It would seem logical that in the situation of a NIAC that the State would make full use of this derogation ability, bolstering its validity to use force both in IHL and IHRL and therefore clearly create the distinction between which regime it considers to be bound by. However due to largely political reasons, States do not like to declare states of emergency nor derogate from the “Right to life” article. Since there is no derogation from the more general law, thereby clearly indicating that they are operating completely under the more specific regime, it seems fair that the ECtHR would continue to apply its own IHRL doctrines to these scenarios.¹³³ Additionally States have even defended their actions under Article 2.2(a) and (c), therefore implying that that Article was applicable in the scenarios that could be construed as armed conflict.

Equally the rationale behind the *lex specialis* doctrine is that IHL has more specific rules appropriate to the situation. But this is not the case in NIACs where the applicable law is often only CA 3. Considering that human rights instruments contain provisions on due

¹³¹ ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996/24-25

¹³² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Article 15

¹³³ William Abresch (n 125) Note 12

process¹³⁴ and anti- discrimination of their rights “on any grounds of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”,¹³⁵ it is hard to see how the applicable IHL is more specific than the human rights regime.

Further support for the relevance of IHRL in the regulation of armed conflict can be taken from the preamble of APII, where in paragraph 3 the states recognise:

“in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.”¹³⁶

And the Martens Clause seems particularly relevant in the light of the rules governing NIACS:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”¹³⁷

The value of turning to IHRL in internal conflict can also be seen in its application by States. In some areas routine compliance with IHRL has been achieved, with strong regional and national regimes established to enforce human rights. There are binding courts and enforcement measures, and often a constitutional standing of human rights norms,¹³⁸ along with a strong desire and expectation of adhering to human rights norms being held by States and citizens alike. This strong adherence to its provisions can bolster the suitability of IHRL as having a role in internal conflict regulation.

While more a thought exercise than a call to abandon IHL in favour of a new regime, considering the role of human rights in conflict regulation can result in interesting protections and solutions to the gaps in the law. Human Rights can escape the legalistic definitional trap that International Humanitarian Law must contend with. Due to the universality of human

¹³⁴ ECHR Article 6

¹³⁵ ECHR Article 14

¹³⁶ Additional Protocol II (n 10) Preamble

¹³⁷ Martens Clause on the ICRC <http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm>

¹³⁸ Chapter 1 of the Basic Law for the Federal Republic of Germany (Grundgesetz) available at http://www.gesetze-im-internet.de/englisch_gg/index.html

rights, their application (if not contested by *lex specialis*) is not dependent on any classification between peace and war, or between internal or internationalised conflict and may provide a stronger and more effective regime at regulating and enforcing protection in NIACS.

VIII. Conclusion

International Humanitarian Law is a regime that has at its core distinctions and classifications while its object and purpose is universal in nature: to reduce suffering in war. The categories of conflict that the law seeks to distinguish are not consonant with the realities of modern war. Means and methods of warfare have evolved. The politics of warfare too have evolved. Ultimately war has shifted from an interstate affair to a model of global operations or internal strife. While the protections that IHL provides are evolving to match this shift, the persistence of the distinction between IAC and NIAC is a hindrance to the full implementation of these protections. The rise of the Internationalised Armed Conflict has called in to question the relevance and suitability of the current dichotomy. And the imposed irreconcilability between the two has left a patchwork of norms and convoluted tests, leaving the task of conflict classification slow, retroactive and unclear for both lawyers and those on the ground.

The strict adherence to the distinction between peace time and wartime has also worked against the object and purpose of IHL. An overly formalised test limited to two factors and an obsession over the demarcation point between internal disturbance and armed conflict has rendered the law inflexible, unable to see the suffering of those who witness insufficiently organised violence.

However the law is adapting. Custom is slowly spreading deep roots throughout the regime, paying no mind to arbitrary distinction. Judges are attempting to implement the law in accordance with its object and purpose, and States too are electing to look at the modern reality of war and suffering.

The arena of war International Humanitarian Law governs is chaotic and violent with suffering and death as central elements, any attempt to regulate such a field must be firmly rooted in that reality and take account of its objective before being mired in arbitrary, politicised and dated distinctions and classifications.

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