Deconstructing the Thematic Dichotomy between International and Non-International Armed Conflicts in International Humanitarian Law

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Abstract

This paper sets out to examine the desirability or otherwise of the retention of the legal distinction between International Armed Conflict (IAC) and Non-International Armed Conflict (NIAC) owing to its importance in International Humanitarian Law (IHL) and for the recognition of the legal status of fighters in an armed conflict. Captivating as the standpoints of legal scholars on its retention or otherwise, there is yet the debate on internationalization of armed conflict which, fused with the two divides of armed conflicts, compels the writer to posit that the distinction between the two types of armed conflict is no longer desirable and should be abolished. Espousing the above, the work raises two fundamental questions - whether the rules of IHL as applicable to NIAC are sufficient to meet the current realities of armed conflicts? Whether the legal distinction between IAC and NIAC is still relevant given the dynamics of contemporary armed conflicts? Evident in the array of treaty laws already tilting towards unification, the paper proposes the development of a single body of IHL rules to regulate all types of armed conflict, regardless of nomenclature, in order to meet the changing nature of contemporary armed conflicts. The paper concludes with the novel but firm submission that non-state armed opposition groups be granted combatant status subject however to trial by the courts or tribunal set up for that purpose in the event of violations of IHL rules. This will allow for human protection which is one of the core values of IHL.

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1. Introduction

Many contemporary armed conflicts take place largely within states territory and involves armed confrontation between the forces of the state and non-state armed groups within the state. International humanitarian law (IHL) distinguishes between two types of armed conflict, which are international armed conflict (hereafter IAC) and non-international armed conflict (hereafter NIAC). IAC is the type of armed conflict that exists between two or more sovereign states, while NIAC is the type of armed conflict that exists between a sovereign state on one hand and its non-state armed groups on the other hand or amongst two or more non-state armed groups themselves, who do not operate under the authority of the state.[2] Even when a foreign state extends its military support to the government of a state where there is a NIAC, the said conflict still retains its status as a NIAC. But, when a foreign state extends it military support to the non-state armed group, the existing NIAC will metamorphose into an internationalized armed conflict.[3] This type of armed conflict, though not specifically provided for by any IHL treaty, has found practical application within the rules of both IAC and NIAC through objective criteria determined by the courts and scholars alike on a case by case analysis.[4] Internal disturbances and tensions such as riots, isolated and sporadic acts of violence or other acts of a similar nature, do not qualify as NIACs.[5]

Unlike IACs, many armed opposition groups may be aiming at state control, changing political leadership or securing states' resources such as oil, diamond, gold, etc.[6] It is very typical for NIACs to have the size, equipment, training and tactics of wars which are common to IACs; their activities are

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2 Chris Wigwe, *International Humanitarian Law* (Read wide Publishers, 2010) 323

3 Ibid

4 Veronika Bilkova, 'New Challenges to the Classification of Armed Conflicts' (2015) 20 Recueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre <https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/reindrom34&section=23> accessed 12 February 2021

5 See article 1(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 7 December 1978, 1125 UNTS 609 (1977) (entered into force 6 June 1978) (hereafter APII)

6 Wigwe, (n 1)

coordinated in the form of guerrilla warfare.[7] International law paid more attention to the law of IAC especially as a result of the effects of the World War II on the war victims, notably the civilians. It was in their bid to prevent the sufferings that result from war that led to the formation of the rules of IHL to regulate the conduct of war whenever it arose. International law has made efforts in outlawing war and any resort to the use of force amongst states. These efforts have however proved futile, because there has not been an outright ban on the use of force amongst states. Therefore, wars (armed conflict) still occur on a daily basis in the world today.

Article 2(4) of the United Nations (UN) Charter[8] provides that:

> "all members shall refrain in their international relations from the threat or use of force against the territorial integrity and political independence of any state, or any other manner inconsistent with the purposes of the United Nations"

The above provision has however not prevented the use of force between states and their non-state armed groups. It is thus submitted that article 2(4) does not apply to non-state entities and this accounts for the increase in NIACs. IHL is therefore applicable in these NIACs to regulate the conduct of hostilities by ensuring that parties to the conflict limit the conduct of hostilities to the rules of IHL applicable to those conflicts. This means that the principles of IHL must be respected and applied by all parties to the conflict.

But, there are questions which beg for answers - Are the rules of IHL as applicable to NIAC sufficient to meet the present day realities of armed conflicts? Is the legal distinction between IAC and NIAC still relevant given the dynamics of contemporary armed conflicts? Scholarly literature in support of the abolition as well as the retention of this distinction abound. This paper shall examine both arguments and conclude by making a case for the abolition of this distinction. The paper shall make a proposal for the development of a single body of rules which regulate the two types of armed conflict so as to meet the changing nature of contemporary armed conflict.

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7 Ibid

8 Charter of the United Nations, 24 October 1945, 1 UNTS XVI (1945) (entered into force 24 October 1945) (hereafter UN Charter)

The paper is divided into four parts. Part one deals with the introduction. Part two discusses the concept of armed conflicts as well as IAC and NIAC as defined in the treaty laws. Part three deals with the legal distinction between IAC and NIAC, the concept of internationalized armed conflict and the need for the abolition of the legal dichotomy between the IAC and NIAC. Part four concludes the work and makes recommendations.

2. The Concept of Armed Conflict

There is no consensus as to what constitutes an armed conflict at international law as there is no generally or universally agreed definition of the term. The issue of definition of the term has been intensively debated by experts in International Law.[9] IHL treaties[10] also did not offer any definition of the term, armed conflicts, in any of the Treaties or Protocols regulating the conduct of armed conflicts. It has been argued that this is not an oversight by the drafters of these treaty laws but a deliberate attempt to avoid technicalities that may arise if a definition is given.[11] An attempt to define the term armed conflict was made by the International Committee of the Red Cross (ICRC) in its Commentary to the Geneva Conventions of 1949. Armed conflict was therefore described as:

> "Any difference which arises between two or more states and leading to the interventions of members of the armed force is an armed conflict within the meaning of article 2 common to the Geneva Conventions of 1949 even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts or how much slaughter takes place."[12]

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9 Erik Melander, 'The UCDP Armed Conflict Definition' <https://www.undp.org> accessed 12 February 2021

10 The basic treaty laws which govern international humanitarian law are the Geneva Conventions, their Additional Protocols, The Hague Regulations and all other Conventions regulating the conduct of warfare. In all of these treaty laws, there is no definition given to the term armed conflict.

11 Wigwe, (n 1), 33: This was the problem when the laws of war were in operation as states would argue that they were not at war just so the laws of war would not apply to them. In other to correct this, a definition of armed conflict was avoided so that new categories of hostilities would fall with the open ended interpretation given to the term.

12 J. Pictet, International Committee of the Red Cross (ICRC) Commentary to the First Geneva Convention of 1949

A comprehensive and workable definition of the term armed conflict has been developed by the International Criminal Tribunal for the former Yugoslavia (ICTY). Thus, in the case of The *Prosecutor v Dusko Tadic,*[13] the Tribunal defined armed conflict thus:

> "…an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state"

The ICTY definition of armed conflict encompasses both IAC and NIAC under IHL. Hence, as pointed out by Bilkova, the ICTY rather than defining armed conflict as such, it simply describes two main categories of armed conflict that have been traditionally recognized under IHL that is, IAC and NIAC.[14]

IAC is defined under article 2 common to all four Geneva Conventions[15] (hereafter GCs) as follows:

> "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 a common Article 2 type of armed conflict, two or more states are engaged in armed conflict against each other and all four of the 1949 Geneva Conventions apply. It is immaterial whether one of the states deny the existence of the state of war, IHL applies notwithstanding. In addition, to the provisions of the Geneva Conventions being applicable, where the conflict in question is a war of national

13 Case No IT-94-1-A, ICL 93 (ICTY 1999).

14 Bilkova, (n 3)

15 See for example article 2, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (hereafter GC III)

liberation, Additional Protocol I[16] also applies for states that have ratified it.[17] It has been noted that the situation referred to in article 1(4) of the API has not been officially recognized in practice.[18] This is because the states that might be concerned did not ratify the protocol. World War II, the Korean and Vietnam war, as well as the U.S. invasion of Afghanistan are all examples of international armed conflict in which at least two states were fighting each other, so they were common Article 2 conflicts.[19]

It must be noted that a declaration of war is not required for an IAC to exist, hence calling into application the provisions of common article 2 of the Geneva Conventions (GCs). The last declaration of war was on August 8, 1945, when, one day before Nagasaki was atom-bombed, Russia declared war on Japan.[20] Given the UN Charter,[21] the world is unlikely to see another formal declaration of war. Call it a war, a police action, or a conflict, if it is an armed conflict between two or more states, it is a common Article 2 conflict in which all the GCs and API apply.[22]

NIACs on the other hand, are those armed conflicts that are covered under common article 3[23] and Additional Protocol II. CA3 provides thus:

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16 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 7 December 1978, 1125 UNTS 3 (1977) (entered into force 6 June 1978) (hereafter API) provides that: the situations referred to in the preceding paragraphs include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.

17 Since the adoption of Additional Protocol I, the field of application of the law of IAC has ceased to be limited to inter-state conflicts *stricto sensu*. Therefore, for states that have ratified the Protocol, the situations referred to in common article 2 of the Geneva Conventions also include armed conflicts in which peoples are fighting in the exercise of their right of self-determination. See article 1(4) of API

18 Sylvain Vite, 'Typology of Armed Conflicts in International Humanitarian Law' (2009) 91 International Review of the Red Cross <https://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf> accessed 24 April, 2021

19 Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 2010) 150 – 151

20 Ibid

21 Article 2(4) of the UN Charter

22 Solis, (n 18)

23 Article 3 Common to the GCs

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
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> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
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>   To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
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> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
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> (b) taking of hostages;
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> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
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> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The Provisions of CA3 apply in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. However, the provision has been argued to be marvellously vague since it offers no definition of what constitutes NIAC; it only applies to it. Hence, it will not always be an easy task to distinguish a NIAC under CA3 from internal disturbances or an organized form of violent banditry.[24] The provision only assumes that an armed conflict situation

[24] Jed Odermatt 'Between Law and Morality: New Wars' and Internationalized Armed Conflict' (2013) 20 Amsterdam Law Forum <https://www.researchgate.net/publication/340947344_Between_Law_and_Reality_'New_Wars'_and_Internationalised_Armed_Conflict> accessed 24 April 2021

becomes non-international when the situation in question reaches a level which distinguishes it from other situations of internal disturbances and tensions, such as riots, isolated or sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Article 1 of APII provides as follows:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. 2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The provisions of APII stipulate that the treaty specifically covers situations of NIACs occurring in the territory of a High Contracting Party between its governmental forces and dissident armed forces or other organized armed groups. Its provisions are very limited in application and are complemented by customary international humanitarian law rules (CIHLR). Article 1 of APII provides for the material field of application of NIACs.

3. Evolution of The Law on NIAC

NIACs are generally speaking, civil wars.[25] Traditionally, the law of armed conflicts applied to sovereign states that fought against one another. Only States in the true sense could wage war, non-state entities were initially not

[25] Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing, 2008) 257

recognized as capable of being legally involved in war.[26] International law therefore perceived NIACs as something that lay primarily out of its purview.[27]

Although NIACs certainly took place, they remained largely an internal matter for the state, covered by its domestic law.[28] States were reluctant toward any kind of international regulation due to the perception that it would constitute a violation of its sovereignty and interference in its domestic affairs.[29] There was however minimum regulation of NIAC until the 1990s. By the time of the coming into force of the GCs and the inclusion of CA3, international law regulated only those NIACs which only reached the level of insurgency or belligerency, while the few others were regulated on an *ad hoc* basis.[30] A broader category of these NIACs were regulated in the period between 1949 and early 1990s. Sequel to this, The Hague Convention for the Protection of Cultural Property and API came into being.. However, during this period, under customary law, the situation was more uncertain.[31] The first attempt by the ICRC in 1912 to introduce a draft convention which sought to expand the role of the Red Cross to civil conflicts, was met with serious opposition.[32] The general view at the 1912 conference was that any attempt to provide help by the Red Cross would amount to aiding insurgents and was therefore an unacceptable interference. Overtime, it became clear that there needed to be a level of regulation that applied to internal wars as well.[33]

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26 Ibid

27 Odermatt, (n 23)

28 Ibid

29 Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflicts' (2011) 22(1) European Journal of International Law <http://www.ejil.org/article.php?article=2139&issue=105> accessed 24 April 2021

30 Preethi Lolaksha Nagaveni and Amit Anand 'International and Non-International Armed Conflicts and Application of International Humanitarian Law as Lex Specialis' <https://eprints.lancs.ac.uk/id/eprint/125074/1/International_and_Non_International_Armed_Conflicts_and_Applicati_on_of_International_Humanitarian_Law_as_Lex_Specialis.pdf> accessed 25 April, 2021

31 Ibid

32 Philippe Abplanalp, 'The International Conferences of the Red Cross as a factor for the Development of International Humanitarian Law and the Cohesion of the International Red Cross and Red Crescent Movement' <https://international-review.icrc.org/sites/default/files/S0020860400089609a.pdf> accessed 24 April, 2021

33 R. Bartels, 'Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-International Armed Conflict' (2009) 91 International Review of the Red Cross <https://international-review.icrc.org/sites/default/files/irrc-873-3.pdf> accessed 1 May 2021

Two significant conflicts aided in changing the position on NIACs: The Spanish Civil War which was fought between 1936 – 1939 and World War II which was fought between 1939 – 1945. The Spanish civil war was neither solely a Spanish conflict nor was it civil.[34]

The war was in fact heavily internationalized.[35] For its gross disregard for the principle of distinction and the tremendous loss of civilian life and property, the Spanish civil war remains significant. It is also notable because it was a NIAC in which domestic laws rather than the Geneva Conventions of 1949 applied. The Spanish civil war represents a turning point in the international regulation of civil wars in many respects.[36] Its well-publicized atrocities by both sides led to an international call for civil conflicts to be made more humane, largely through the efforts of the ICRC. The killing of so many civilians demonstrated the need to impose limitations on the means and methods of warfare in internal armed conflicts and the concerns raised in the war were significant factors in framing the 1949 Geneva Conventions.[37]

World War II is history's largest war in terms of geographic span, state involvement, and casualties. It was also a watershed for the law of armed conflicts.[38] The war recorded deaths over fifty million, almost two-thirds of them civilians.[39] The massive atrocities committed against minority groups within individual nations during the Second World War, contributed to a political willingness to at least superficially regulate some aspects of civil war.[40]

In 1948, the ICRC presented a report which recommended that the IHL standards of the Geneva Conventions should apply "[i]n all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory

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34 Solis, (no 1)8

35 J. Stewart, 'Towards a Single Definition of Armed Conflicts in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 (850) International Review of the Red Cross <https://www.icrc.org/en/doc/resources/documents/article/other/5pyaxx.htm> accessed 1 May 2021

36 Eve La Haye, War Crimes in Internal Armed Conflicts (Cambridge University Press, 2008) 38

37 Solis (n 18)

38 Ibid

39 Ibid

40 Stewart (no 29)

of one or more of the High Contracting Parties".[41] This proposal was rejected, however, in favour of Common Article 3 to the Geneva Conventions which clearly establishes that the application of the rules of humanitarian law will depend on the nature of the conflict.[42] Common Article 3 was primarily developed in order to regulate NIACs. Thus, the International Court of Justice (ICJ) held that the provisions of CA3 are a minimum yardstick, which also applies in NIACs besides the more elaborate rules governing these conflicts, and is to be considered as part of the elementary considerations of mankind.[43] Its adoption lowered the threshold for application of IHL in situations of NIACs, thereby broadening the scope of NIACs.[44] CA3 has evolved as one of the key provisions of the GCs and IHL in general.

Odermatt notes that there are some weaknesses in the provisions of CA3[45]. According to the author, when compared with the rest of the provisions of the GCs, which contain a high degree of regulation of armed conflict, CA3 is relatively modest in this respect.[46] Also, CA3 has been described as a "miniature convention".[47] It contains only what are seen to be the 'core' elements of the GCs, such as the humane treatment of those who are not taking part in combat, and obliges parties to take care for the sick and the wounded.[48] Another weakness of CA3 is the difficulty in its application. The provision contains no definition of "conflict not of an international character". It only assumes that an armed conflict situation becomes NIAC when the situation in question reaches a level which distinguishes it from other situations of internal disturbances and tensions such as riots, isolated or sporadic acts of violence and other acts of a similar nature. Some have argued that the lack of a definition allows the law to adjust itself to changing

41 J. Pictet (ed.), Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War, International Committee of the Red Cross (ICRC), Geneva, 1960, 31, quoted in Stewart, (n 29)

42 Odermatt, (n 23)

43 Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States*), Judgement on the Merits, ICJ, Reports 1986, p. 392, para 218

44 Ibid

45 Odermatt, (n 23)

46 Ibid

47 J.Pictet (ed) Commentary on the Geneva Convention of 12 August 1949, Vol. IV: Geneva Convention Relative to the Protection of Civilian Population in Time of War, International Committee of the Red Cross (ICRC), Geneva, 1958

48 Stewart, (n 29)

circumstances, and therefore does not overly limit the application of CA3.[49] In reality, however, this lack of definition has simply allowed states to deny that CA3 applies to their conflict, for instance, by arguing that the conflict has not reached the level of intensity required for it to be termed a NIAC, thereby precluding IHL's applicability and maintaining that domestic criminal law and human rights law apply to the situation.[50]

The weaknesses of CA3 notwithstanding, it is now beyond doubt that the rules contained in CA3 represent customary international law. They apply in any armed conflict, irrespective of whether it is international or non-international in character.[51] The problems associated with the provisions of CA3 were to be addressed by a further protocol, which would strengthen the regulation of NIACs.

APII was developed to fill the lacunae left by the regulatory gaps of CA3. By the provisions of article 1 of APII, the rules contained therein apply only to armed conflicts which take place in the territory of a state party 'between the armed forces of the state and its dissident armed forces or other organized armed groups within the state, which under responsible command, exercise such control over a part of the territory as to enable them carry out sustained and concerted military operations and to implement this Protocol.' APII develops and supplements CA3 without modifying its existing conditions of application. As with CA3, a NIAC within the meaning of APII can only exist if the situation attains a degree of violence that sets it apart from cases of internal tensions and disturbances. In essence, the APII shall not apply to cases of internal disturbances such as riots, isolated and sporadic acts of violence and other acts of a similar nature not being armed conflicts.[52]

However, unlike CA3, the application of APII in a NIAC is very limited in scope. The provision requires that for an armed conflict to fall within the meaning of APII, it must involve a state as a party to the conflict and the conflict taking place within the territory of the state. This goes to show that there are different thresholds in the application of CA3 and APII and as such, at least two types of NIAC exist, those covered by CA3 only, and

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49 Ibid
50 Wigwe, (n 1), 327
51 L. Moir, *The Law of Internal Armed Conflict*, (Cambridge University Press 2002) 273.
52 Article 1(2) of APII

those covered by APII and CA3. In practice therefore, a conflict may fall within the material field of application of CA3 without fulfilling the conditions determined by APII. Conversely, all the armed conflicts covered by APII are also covered by CA3.

4. The Legal Distinction Between International and Non-International Armed Conflicts

Traditionally, the law of armed conflict was applied only to wars between states.[53] This however changed with the passage of time and the distinction between the law of IAC and NIAC were made by the Geneva Conventions of 1949 and further confirmed by the API and APII to the GCs. The GCs in its entirety, The Hague Conventions which preceded them and the API apply to IACs.[54]

These treaties contain the rules relating to the conduct of hostilities and rules relating to the protection of those who do not take part, or who no longer take part in hostilities.[55] The law of NIACs on the other hand has a limited number of treaty rules applicable to them. As already noted above, they are limited to the provisions of CA3 and APII. The coming into force of the Statute of the International Criminal Court (ICC Statute) made Article 8(2)(c) and (e) of the Statute applicable in NIACs. It must also be mentioned that some of the rules of customary law applicable in IACs are now applicable to NIACs as well.

It has been noted above that an IAC under the GCs is any conflict which takes place between two or more states. In addition to this, IAC under API covers situations in which people are fighting against their government in exercise of their rights to self-determination. The term IACs refer to conflicts that exist between two or more sovereign states whether or not either of them recognizes the state of war. The parties are also of necessity bound to apply the rules of IHL applicable in IAC. On the other hand, NIACs are armed conflicts that exist between a sovereign state on the one hand and its non-state armed groups on the other hand or amongst two or more non-state armed groups themselves who do not operate under the authority of the state.

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53 Bartels, (n 32)

54 Nagaveni and Anand, (n 29)

55 Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (1st edn, Oxford University Press, 2021) 54.

The legal distinction between IAC and NIAC is very important in IHL because it remains the part of the law that recognizes the legal status of fighters in an armed conflict. It is also as a result of this distinction that legal scholars have made various standpoints on retention or otherwise of the distinction. This distinction is also relevant here as it will enable the writer draw the fine lines between the two types of armed conflict as well as aid in maintaining the position that the distinction between the two types of armed conflict is no longer desirable and should be abolished.

The primary distinction between IAC and NIAC lies in the actors who take part in them. First and foremost, IACs are fought between the States,[56] which is not the case in NIACs.[57] Development of laws regulating NIACs grew in a slower pace compared to that of IACs. States were reluctant for any kind of regulation due to a perception that it would constitute a violation of its sovereignty and interference in its domestic affairs. Secondly, when it comes to treaty law, IAC is regulated by a vast majority of treaty laws regulating armed conflict. The whole of the four GCs and API, as well as all the rules of customary law[58] and in addition, the Hague Conventions and all weapon conventions[59] apply to IAC. NIAC on the other hand is regulated by CA3 to the GCs and APII. However, a few provisions of some weapon conventions[60] apply to NIACs as well as the cultural property protection convention[61] and its Second Protocol. Mention must be made of the fact that some of the rules of customary law are now applicable to non-

56 See common article 2 to the GCs

57 See article 1 of APII

58 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Rules: Volume 1* (Cambridge University Press, 2005) (hereafter ICRC Study on Customary International Humanitarian Laws Rules)

59 See for example the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001) 10 October 1980, 1342 UNTS 137 (1980) (entered into force 10 Oct. 1983)

60 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, September 1992, 1975 UNTS (1992) (entered into force 29 April 1997) See section article 1 thereof.; The Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended (Amended Protocol II) 3 Dec. 1996 (entered into force 3 December 1998)**,** See article 2(6) thereof.; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) 10 October 1980, 1342 UNTS 137 (1980) (entered into force 10 Oct. 1983), See article 1 (3) thereof.

61 Second Protocol to The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 3511 UNTS (1999) (entered into force 9 March 2004), See article 1(f) thereof.

international armed conflict.[62] Thirdly, the threshold of intensity required for the application of IHL rules to armed conflicts is very low in IAC[63] and higher in NIAC[64].

Fourthly, with regards to actors involved in an armed conflict, IAC recognizes the status of combatants and as such actors who meet the necessary requirement for combatant status generally have a right to participate in hostilities. They can kill and may be killed. When captured, they enjoy prisoner of war status and entitled to be treated humanely.[65] Combatants may not be tried nor punished for taking part in so long as their affairs are conducted within the parameters of what is acceptable under the rules of IHL. The above cannot be said of non-state armed groups in a NIAC since they do not have combatant status.[66] Armed opposition groups in NIAC cannot claim prisoner of war status for their members that are involved in fighting, but fundamental procedural principles and safeguards under human rights law would apply to them.[67]

Fifthly, with respect to public property, seizure of military equipment. In an IAC, parties may seize military equipment belonging to the adverse party to the war as war booty. They may take public property in occupied territories that can be used for the operations of the military of the adverse party without the obligation to compensate the state to which it belongs. In a

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62 The ICTY has identified a body of customary international humanitarian rules which are equally applicable to international and non-international armed conflict and they include the prohibition on attacks against civilians, prohibition on attacks against civilian objects, prohibition on the wanton destruction of property, protection of religious objects and cultural property, prohibition on plunder, prohibition on the use of chemical weapons. See Sivakumaran, (n 28); It was rightly noted by the ICTY in the *Tadić* Case that "What is inhumane and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife". See, *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94–1-AR72, 119

63 This means that the situation envisaged by the relative instrument need not to exist. Thus as soon as the armed forces of one state find themselves with wounded or surrendering members of the armed forces or civilians of another state on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy state then they must comply with the relevant convention.

64 In practice, the threshold for intensity is reached every time the situation can be defined as 'protracted armed violence'. See the ICTY decision *in Prosecutor v Dusco Tadic* (supra)

65 See article 12 – 16 of GC III

66 Nagaveni and Anand, (n 29)

67 Wigwe, (n 1), 331

NIAC, such seizures are not regulated under international law[68] and as such cannot be allowed.

Sixthly, with respect to the release of persons whose liberty were deprived, in an IAC, prisoners of war must be released at the end of hostilities and repatriated without any further delay.[69] Civilian detainees must also be released as soon as possible at the end of hostilities between belligerent parties.[70] However, in NIAC, there is no universal treaty provision on the release of persons deprived of their liberty.[71]

Such release in a NIAC however may be concluded from council and regional organizations that such detainees must be released once the reason for the deprivation of their liberty ceases to exist. In such cases, an amnesty or other measures of liberty protection may be proclaimed.[72]

Finally, belligerent parties to an IAC may, where not expressly prohibited, resort to reprisals subject to stringent conditions. However, parties to a NIAC do not have such right to belligerent reprisals.[73] It is based on one or more of the above distinctions that some scholars have agreed that there needs to be a difference in the application of laws to these conflicts, while some were of the view that the laws could apply universally. It is the position of the writer that the laws of IHL should apply universally to the two types of armed conflicts recognized under IHL.

5. Internationalized Armed Conflict

Practice shows that there are different forms of intervention in an existing non-international armed conflict by other agents, be it states in support of the state or the non-state armed group in which the NIAC is taking place or multi-national forces for the purpose of keeping the peace in a NIAC. For the purpose of the work, the term internationalized armed conflict shall be discussed only in respect of intervention by states in an existing NIAC.

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68 Dieter Fleck, 'The Law of Non-International Armed Conflict' in *The Handbook of International Humanitarian Law*, (Oxford University Press, 2008) 612.
69 See article 118 of GC III
70 See article 132 and 133 of GC IV
71 Dieter, (n 67)
72 Wigwe, (n 1), 331
73 Dieter, (n 60)

Internationalized armed conflict combines both characteristics of international armed conflict and non-international armed conflict. Depending on the configuration of the parties involved, fighting in the field may be between the forces of the territorial State and those of an intervening State, between intervening States taking action on both sides of the front line, between government forces (of the territorial State or of a third State) and non-governmental armed groups or between armed groups only.

This raises the issue of the legal definition of those situations that do not fit into the standard categories of conflicts established by international humanitarian law.[74]

The ICRC in its work considers that, depending on the warring parties, the law that applies in such situations varies from one case to the next. Inter-State relations are governed by the law of international armed conflict, whereas other scenarios are subject to the law of non-international armed conflict.[75] Thus intervention by a third State in support of a non-governmental armed group opposed to State forces results in the 'internationalization' of the existing internal conflict. The International Court of Justice (ICJ) in the Case concerning Military and Paramilitary Activities in and against Nicaragua favoured this fragmented application of IHL when in its analysis of the conflict, the Court differentiated between, on the one hand, the conflict between the Nicaraguan government and the contras, and, on the other, the conflict between that same government and the government of the United States.[76]

The test for internationalization was laid down in the *Tadić* case where the Appeals Chamber of the ICTY stated, "if an armed conflict takes place between two or more States, it is indisputably international. However, an internal armed conflict within the territory of a State may also become international depending upon the circumstances like those cases where another State intervenes in that conflict through its troops or those cases where some participants in the internal armed conflict act on behalf of that

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74 Vite, (n 17)

75 D. Schindler, 'International Humanitarian Law and Internationalized Internal Armed Conflicts', (1982) 22(230) International Review of the Red Cross <https://www.cambridge.org/core/journals/international-review-of-the-red-cross-1961-1997/article/abs/international-humanitarian-law-and-internationalized-internal-armed-onflicts/0052DC85D1677BD17500C1397D6ACFA2> accessed 6 June 2021

76 *Nicaragua v. United States of America* (supra), para 219.

other State."[77] This decision sparked up a considerable amount of academic debate by scholars who argued that it is difficult to apply objective criteria to determine whether an armed conflict is international or non-international in character. Some scholars agreed that there needs to be a difference in the application of laws while some were of the view that laws could be applied universally.[78]

Further, the concept of internationalized armed conflict has led to diverse scholarly arguments as to the relevance of the legal distinction between IAC and NIAC since the situation carries with it the elements of both IAC and NIAC, yet, no treaty law provides for rules applicable to this type of armed conflict.

6. The Need for The Abolition of the Distinction between IAC and NIAC

There have been a lot of controversy surrounding the distinction between IAC and NIAC. Within the treaty laws[79] regulating the two types of armed conflict, a significant difference exists.[80] Notwithstanding the above, some legal scholars have questioned the continued relevance of this distinction. Some scholars are of the view that the distinction between the two types of armed conflict is being eroded and this is evident in the fact that today, there is greater unity in the laws applicable to these two forms of armed conflict including the Biological Weapons Convention 1972, the Chemical Weapons Convention 1993 and the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999.[81]

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77 *Prosecutor v. Dusko Tadic* (Supra)

78 Emily Crawford, "Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts (2007) 20(2) Leiden Journal of International Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810175&download=yes> accessed 10 June 2021

79 See the GCs and API and APII

80 One significant difference between the two types of armed conflicts is that while, international armed conflicts are fought majorly between two or more independent states, non-international armed conflicts on the other hand are fought between a state on the one hand and its non-state armed groups on the other hand or between or amongst those non-state armed groups themselves.

81 L. Moir, 'Towards the Unification of International Humanitarian Law' in R. Burchill, N. White and J. Morris (eds), *International Conflict and Security Law* (Cambridge University Press, 2005) 108 as cited in Preethi Lolaksha Nagaveni and Amit Anand 'International and Non-International Armed Conflicts and Application of International Humanitarian Law as *Lex Specialis'* <https://eprints.lancs.ac.uk/id/eprint/125074/1/International_and_Non_International_Armed_Conflicts_and_Applicati_on_of_International_Humanitarian_Law_as_Lex_Specialis.pdf> accessed 25 April, 2021

It has also been stated that the distinction between IAC and NIAC is being blurred by the development of customary international law. Customary international law provides for broader rules that govern NIACs thereby help in filling the gap left by treaty laws.[82] Thus some rules that are applicable to IAC are now increasingly being regarded as applicable in all armed conflicts.[83]

This position was discussed by the Appeals Chamber of the ICTY in the *Tadic* decision when it stated the rules that apply to both types of armed conflicts to include:

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

The Appeal Chambers stresses, however that not all rules have reached customary status. It pointed out that it is not the rules themselves, but the essence of the rules that has been transposed into customary law.

Another point of argument for the removal of the distinction between IAC and NIAC is the problematic definition of NIAC in CA3 where "armed conflict not of an international character" is not precisely defined in the convention or any other treaty. The definition is a negative one and does not convey in exact terms what NIAC is in reality. Even though CA3 defines principles of the convention, it does not contain certain specific rules with respect to NIACs.[84] It has also been argued that the distinction between IAC and NIAC is merely a policy error, which needs to be rectified since the distinction does not consider the various changes taking place in armed conflict, consequently leaving many gaps in the application of humanitarian law.[85]

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82 Nagaveni and Anand, (n 29)
83 Odermatt, (n 23)
84 Stewart, (n 29)
85 Crawford, (n 77)

State practice over the years have also been argued as a contributory factor towards the blurring of the legal distinction between IAC and NIAC. Bassionuni[86] argues that "the evolution of the law points to the fact that basic humanitarian norms are to be applied regardless of whether individuals to be protected are combatants or non-combatants, or whether the conflict is IAC or NIAC in character. New operating definitions of IACs and NIACs are to be evolved keeping in mind factors such as the level of violence and the threat to regional and international stability." Also, the categorization of certain crimes in the Rome Statute as war crimes applicable to NIAC has also been argued as contributing further to the blurring of this legal distinction. It was argued that the statute recognizes that certain crimes once applying to IAC now also apply to NIAC.[87]

7. Recommendations and Conclusion

This paper has discussed the concept of armed conflict, the different types of armed conflict recognized under IHL as well as the legal distinction between the two types of armed conflicts. It has also attempted a discussion on the concept of internationalized armed conflict and how the rules of IHL apply to such situations even though originally not provided for in the treaty laws regulating the conduct of hostilities. The paper has also discussed the arguments proffered by legal scholars on the need to do away with the legal distinction between IAC and NIAC as well as the need for the retention of same.

It is however the view of the writer that the distinction between IAC and NIAC have become undesirable. The rules of IHL applicable to IAC have become redundant following the realities of contemporary armed conflicts. The drafters of the GCs at the time did not have in their contemplation the new kinds of war that are now prevalent, hence, majority of the rules were channelled towards IAC. The present-day armed conflict is NIAC in nature, these conflicts often become internationalized by reason of intervention by a state in support of an armed opposition group or groups fighting against the state. The concept of internationalized armed conflict is not provided in any

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86 M. Bassiouni and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers, 1996), 479 as cited in Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20(2) Leiden Journal of International Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1810175&download=yes> accessed 10 June 2021

87 Odermatt, (n 23)

of the treaty laws regulating the conduct of hostilities. The determination of the applicable laws to such situation has been left to scholars and judges alike which are evident in the jurisprudence of the courts and tribunals as well as legal writings. In order to tackle the confusion in the interpretation of the laws applicable to these new wars, there is need to abolish the legal distinction and adopt a uniform set of rules on IHL like in other bodies of law such as the international criminal law and human rights law.

One strong contention on the retention of the distinction between IAC and NIAC lies in the status of combatants and prisoners of war. There is no gainsaying that by the provisions of the rules of IHL, this status is only reserved for the armed forces of a state and it has been argued that removing this distinction will mean granting combatant and prisoner of war status to non-state armed groups, a status reserved for members of the armed forces of a state fighting in defence of their states and not some criminals who have taken up arms to fight their governments. This argument notwithstanding, the writer vehemently posits that, non-state armed opposition groups should be granted combatant status. If they violate the rules of IHL in the course of their conduct in the hostilities, then they should be tried accordingly by the courts or tribunals set up for that purpose and the punishment reserved for such violations be meted to them accordingly. The basis for this proposition is that more often than not, these non-state armed groups have a just cause for fighting their government. It is the writer's opinion therefore, that this proposition will not amount to an abuse of the rules, but would rather allow for human protection which is one of the core values of IHL.

The decisions of the international courts and tribunals, the weapon conventions, the Rome Statute and most importantly the enlargement of the rules of customary law which strengthens further, the blurring of this distinction is a welcome development. It is seen that there is a clear pattern of confluence between IAC and NIAC, mainly through customary law and also through treaty law. However, human protection in times of armed conflict will be more secure and further strengthened through the unification of both rules. This will also cure every armed conflict classification issue that will arise in the future. The dynamism of contemporary armed conflict cannot be overlooked.