Re-envisaging the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran

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The prevailing view of the form which the effort to regulate non-international armed conflicts should take has been summarized by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the Tadić interlocutory appeal on jurisdiction: ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife’.¹ This mirroring approach of emulating the laws applicable in international armed conflicts in the non-international context was subsequently adopted by the drafters of the Rome Statute of the International Criminal Court in 1998; the drafters chose to include a list of war crimes applicable in cases of non-international armed conflicts which resembled (though was still narrower than) the list of crimes applicable in international conflicts. The recent Kampala ICC review conference expanded the non-international crimes list, further narrowing the gap between the ‘international’ and the ‘non-international’ lists of crimes.² Taking a similar position, the 2005 study on customary international humanitarian law (IHL) published by the International Committee of the Red Cross concluded that all but a handful of the rules identified as customary applied in international and non-international armed conflicts equally.³

Given the traditional resistance by states to assuming the same degree and range of constraints which apply in international armed conflicts in internal ones, humanitarian advocates have sought to advance the regulation of internal armed conflicts by supplementing IHL with norms borrowed from international criminal law (ICL) and international human rights laws (IHRL). The resulting international law of internal armed conflicts has thus been a patchwork of norms which ostensibly apply to all non-international armed conflicts, drawn from the IHL of international conflicts, ICL, and IHRL, often proving to be incoherent, unworkable, and ineffective.

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Sandesh Sivakumaran’s contribution to this volume\(^4\) takes a critical view of the path taken in developing the law of internal armed conflicts, rightly rejecting the trend of a wholesale and potentially misguided transplantation from the international to the internal and cautioning against the practice of blinkered borrowing from ICL and IHRL without carefully considering the fundamental differences among these various fields. Instead, Sivakumaran calls for a more nuanced legislative methodology of adaptation and complementation from both traditional and non-traditional sources,\(^5\) of reciprocal bargaining between states and non-state actors,\(^6\) and of allocating responsibilities among warring parties in a mutually beneficial way.\(^7\) He also urges his readers to think about the specific characteristics of each particular internal conflict in tailoring the often broad or vague principles of the law to the conflict at hand.\(^8\)

Sivakumaran’s ambition is programmatic. He does not presume to offer a detailed manual for the law which would be applicable to internal conflicts, nor does it appear that he necessarily believes in a one-manual-fits-all kind of enterprise. What he does set out to do is to offer guidance on the method of developing the law. To ensure that his suggestions do not remain in the realm of theoretical contemplation, the author proceeds to present concrete examples of how his proposed methodology might work in practice, as when treating non-state enemy combatants\(^9\) or in allocating responsibility between the government and a non-state actor in a territory under the latter’s control.\(^10\)

Whether one agrees with his ultimate doctrinal suggestions or even with the specifics of his proposed methodology, Sivakumaran’s analysis is fresh and thought-provoking, propelling the reader to reconsider the prevailing contemporary approach to the regulation of non-international armed conflicts. Given that it is this type of conflict which has plagued the world in recent decades, and continues to do so, Sivakumaran’s work is a constructive and valuable intervention in one of the most important bodies of international regulation. It also invites further elaboration and exploration of some points it raises. It is with this air that my following thoughts in reaction to the piece are offered.

A first thought concerns the definition of ‘internal armed conflicts’ which appears in the title and is then repeated throughout the article, but which is nowhere fully defined by Sivakumaran. The author juxtaposes ‘internal’ with ‘international’,\(^11\) but it remains unclear whether ‘internal’ is synonymous with ‘non-international’. This is not merely a semantic question. Many of the examples and arguments which the author forwards draw on types of civil wars and other conflicts that take place within

\(^5\) Ibid., at 40–43.
\(^6\) Ibid., at 29.
\(^7\) Ibid., at 26.
\(^8\) Ibid., at 34.
\(^9\) Ibid., at 25.
\(^10\) Ibid., at 36.
\(^11\) Ibid., at 18.
a single territory, such as in Colombia, Sierra Leone, Sri Lanka, or Nepal. But it remains unclear whether and to what extent his methodological approach as well as specific suggestions would remain equally compelling in other types of non-international armed conflicts; for instance, the one between the United States and Al Qaeda, the one between Israel and Hamas, or the one between Uganda and the LRA.

Unlike the FARC or the LTTE, Al Qaeda does not have control over any territory. While FARC members are relatively easily identifiable, Al Qaeda is an amorphous organization, the affiliates and members of which are dispersed and undisclosed. FARC members are Colombian citizens, subject to clear IHRL protections; Al Qaeda members have varied nationalities, operating in and from varied territories, with far weaker human rights claims vis-à-vis the United States.

The conflict between Israel and Hamas is considered by many observers to be a non-international armed conflict, and yet is very different from both the Colombian and the US–Al Qaeda ones. Hamas members are well organized, have clear control over a territory, but they operate from a disputed territory outside of Israel proper. They also benefit from material support from countries such as Iran and Syria.

The Ugandan case, as do several conflicts in the Great Lakes region, combines elements of internal and international armed conflicts, where the armed groups which are locally based but enjoy foreign support and affiliations fight both within the state’s territory and from outside its borders.

As the author points out, different types of conflicts and different types of non-state armed groups lend themselves to different types of regulation. But he mostly focuses on organization and control over territory as differentiating features among non-state actors (although he mentions, in passing, some others). But the question whether the insurgent group is domestic or internationally-based – a question which Sivakumaran does not highlight – seems crucial to me; for it affects not only the pragmatic aspects of the application of any norm, but also the rationale for the norm to begin with. Consider, for instance, the practice of borrowing from IHRL to complement IHL: the nationality and area of operation of the non-state actor are critical for both the jurisprudential and normative bases for applying human rights obligations. In addition,

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12 Ibid., at 37.
13 A conflict deemed by the US Supreme Court to be a non-international armed conflict: see Hamdan v. Rumsfeld, 548 US 557, 630 (2006).
16 Sivakumaran, supra note 4, at 34–37.
one may well consider that whether the insurgent group is fighting a democratic or a non-democratic regime should also have a bearing on the regulation of the conflict. Another distinguishing feature may be the types of claims raised by the non-state actor, e.g., equality, autonomy, secession, religious hegemony, etc.

All of this suggests that it may be impossible to envisage one body of rules which would be applicable to all internal (and, more so, all non-international) armed conflicts. It also suggests that in designing such an edifice it might be wise to rely more on standards than on strict rules, at least in some spheres. In any case, there could be little doubt that the high variance among these different subsets of conflicts requires special attention. Sivakumaran acknowledges this point, but he stops short of detailing its full implications.

A second observation, which is related to this last one, concerns the role of human rights norms in the legal architecture of internal armed conflicts. Sivakumaran rightly cautions against direct application from the field of IHRL to that of IHL, delineating the pitfalls and limitations of such application. The major challenge Sivakumaran identifies lies in the question whether non-state actors themselves have human rights obligations. If not, he says, the application of IHRL is asymmetrical, binding only the state and not the armed group (and in a conflict between armed groups binding on no one). If armed groups do have human rights obligations, then the original understanding of IHRL as regulating the conduct of the government vis-à-vis its citizens must be reconceptualized.

There is no doubt that the subjection of non-state actors to human rights obligations is a critical point, and it invites further thinking about the stakes involved in making such a determination, especially when one considers the underlying trend of supplementing IHL with IHRL. A primary difference between the two fields is not only in who is the bearer of obligations but also in who is the designated beneficiary: IHL was always meant for the regulation of the relationship between a country and its enemies (broadly defined), while IHRL was meant primarily for the regulation of the relationship between a government and its own nationals. Assumptions about basic duties of allegiance on the part of the obligation-bearer towards the rights-bearer, the roles of governments as caretakers of their populations, the political accountability of governments to their citizens, the compromises struck among competing rights—all permeate IHRL in ways which are less true, and in part not at all true, for IHL.

In fact, this exact difference in the ambition and assumptions of the two bodies of law not only makes the transposition from one to the other problematic; it may very well be at the kernel of the traditional objection by governments to expanding the IHL of internal armed conflicts. This difference is also material to the question whether all internal conflicts are of a similar kind: governments may feel differently about extending IHRL-like protections to rebels from amongst their own citizens than they would with regard to external insurgents. And such differences in the types and locations of

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17 Ibid., at 44.
18 Ibid., at 21–23.
19 Ibid., at 22.
non-state armed groups must affect the question whether these groups themselves should be held to human rights obligations, and vis-à-vis whom.

As a follow-up to this point, while Sivakumaran rightly identifies states’ reluctance as the main obstacle to the development of the law of internal armed conflict, uncovering what drives that reluctance is a necessary step in thinking about how to push the law forward. Sivakumaran urges us to study the operation and motivations of non-state armed groups, but it may be that we must also study the motivations of states. For instance, why is it that states have traditionally been reluctant even to acknowledge that they are in a state of armed conflict (see, for instance, Russia’s avoidance of defining its conflict with the Chechen rebels as an ‘armed conflict’), even at the cost of being held to stricter standards of human rights obligations than under IHL.

In this context it is an interesting, perhaps surprising, development that the states parties to the Rome Statute have chosen in recent years to broaden the scope of recognized war crimes in non-international armed conflicts. This is a departure from the traditional reticence towards greater regulation of such conflicts, and it would be worthwhile to inquire what brought about this change: an earlier development of customary law (as pronounced by the international tribunals)? An expectation by states of greater enforcement against non-state actors which would prove beneficial to state actors? A belief by most states parties that they would be immune to such conflicts (which mostly plague Africa or non-party states)? While all such explanations must remain conjectures, they may prove important indications of how future regulation might come about.

The relationship between IHL and ICL, both with regard to states’ assumption of obligations and more generally, is an important matter not only for internal armed conflicts but for international conflicts as well. Sivakumaran cautions against borrowing from ICL to interpret or complement the IHL of internal armed conflicts on the ground that, given the stricter application of ICL, ‘interpretation of the war crime could end up in the narrowing of the protections afforded by international humanitarian law’. But it is also possible that, given the greater threat of enforcement of IHL through ICL and concerns about the politicization of such enforcement, states would grow more reluctant to assume IHL obligations to begin with. This concern is in tension with my earlier observation about states’ willingness to assume obligations through the Rome Statute, but it remains to be seen how the evolution and expansion of international crimes regulation ultimately affects the future development of IHL.

Among Sivakumaran’s methodological suggestions on how to develop the norms governing internal armed conflicts is the principle of reciprocity. A central argument he makes is that humanitarian obligations must be made equally binding on all parties, state and non-state alike. Whether Sivakumaran’s insistence on reciprocity is a pragmatic argument about compliance or a more deontological claim about fairness remains unclear; but there is room to question it on either ground. This is

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20 Ibid., at 2.
21 Ibid., at 44.
22 Ibid., at 21.
23 Ibid., at 29–34.
especially true if one understands ‘reciprocity’ to mean ‘symmetry’, a point which Sivakumaran does not expound on.

Internal armed conflicts are rarely fought between equal adversaries: disparities in power, resources, popular support, international alliances – all make the warring parties differently situated, and therefore constrained to different degrees by similar rules. Moreover, despite the law being formally equal to all belligerent parties, with the outlawing of most belligerent reprisals and the rejection of the *tu queque* doctrine as a defence for war crimes, reciprocity has effectively been eliminated as an organizing principle of IHL as a matter of both law and practice.

All of this is, of course, true for international armed conflicts as well. Still, given that in contemporary conflicts there is almost never actual reciprocity on the battlefield, the reciprocal nature of the IHL applicable to international armed conflicts does not necessarily support the notion that further development of the law of internal armed conflict must also depend on a principle of reciprocity; it may just serve further to question it.

The author himself concedes, when discussing (creatively and compellingly) the possible allocation of responsibility in occupied territory, that some armed groups would not be able (even if willing) to meet the requirements of the entire law of belligerent occupation (and, implicitly, that holding them to such requirements would only set them up to failure); by definition, therefore, obligations could not be symmetrical or reciprocal unless they remained on the very abstract and general level of duties.

Conceptually, one could easily imagine arguments in favour of holding governments to stricter standards of compliance (e.g., they are usually more powerful and could therefore afford to be bound by additional constraints; in a case of domestic rebels, the government is fighting its own people, etc.). With a similar ease, one could imagine arguments of the opposite direction (states already have higher obligations to citizens in their territory; if they are democratic, they have won the popular will of the people, etc.). All these arguments are context-dependent and may be turned on their head; but they still invite further examination of the rationale of reciprocity.

Moreover, as a practical matter, if reciprocity is intended to create mutually beneficial agreements which entail incentives for compliance for both parties, one could conceive of bargains which are neither symmetrical nor reciprocal; nor is it necessary for exchanges to cover the same issue. For instance, one could imagine a system of rules which expanded the definitions of privileged non-state combatants and offered them immunity from domestic prosecution but expanded the prohibitions on perfidy or shielding as applied to these combatants.

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24 Although with regard to some norms (most notably, in the field of arms control), obligations are assumed on the basis of treaty participation, and some treaties allow reservations as well, all resulting in different states being officially bound by different rules.

25 Sivakumaran, *supra* note 4, at 36.
Such exchanges, once again, must depend on the type of conflict fought and the nature of the armed groups concerned. This means that they may also vary greatly from one context to another, making a coherent and uniform body of regulation inappropriate. If so, we may find ourselves travelling back in time to a world of bilateral exchanges that regulate particular conflicts. Such exchanges may still build upon universal absolute commitments, but the latter may be fewer than those currently at work. This may be a troubling eventuality to those who value uniformity in the rules binding and defining the international community or to those who fear a slippery slope of departure from painfully evolving consensual norms. But it may also be an effective and workable way of minimizing the harms and pains brought about by internal armed conflicts.