Abstract

The regulation of internal armed conflict by international law has come a long way in a very short space of time. Until the early 1990s, there were a minimum of international law rules applicable to internal armed conflict. Today, the situation has changed almost beyond recognition with a healthy body of international law applicable to internal armed conflict. This change has taken place in three principal ways – through analogy to the law of international armed conflict, through resort to international human rights law, and through the use of international criminal law. Each of these approaches stressed its similarity to internal armed conflict or to international humanitarian law. They proved immensely important, filling in what was a more or less blank canvas. However, there are limits to how far they can take us.

Today, the canvas is no longer blank and a step back is needed in order to assess the existing state of affairs. Focusing not on the similarities between international and internal armed conflicts or between the various bodies of international law, but on their differences, will allow us to ascertain what further work is in order. It will allow us to identify gaps in regulation and refine relevant rules. It will also force us to re-think our approach to particular issues. Only in this way will we be able to develop the international law of internal armed conflict further.

1 Introduction

The increased regulation of internal armed conflict by international law is to be applauded. The problems posed by internal armed conflicts are well-known – they represent the vast majority of armed conflicts in the world today; they give rise to many of the most egregious atrocities; and yet, historically, they suffered from lack of regulation.

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The regulation of internal armed conflict has come about in two distinct stages. The first relates to the period up to approximately the early 1990s. During this time, there existed minimal regulation of internal armed conflict. Until 1949, and the conclusion of Article 3 common to the four Geneva Conventions, generally speaking, only internal armed conflicts recognized as reaching the level of belligerency or insurgency were regulated by international law. Others were regulated on an ad hoc basis, but these were relatively few in number. In the period between 1949 and the early 1990s, a broader category of internal armed conflict was regulated, but by relatively few rules of international humanitarian law. At the conventional level, regulation took place through the Hague Convention for the Protection of Cultural Property and Protocol II Additional to the 1949 Geneva Conventions. At the customary level, the situation proved rather more uncertain.

Things have changed dramatically in the period since the early 1990s, which represents the beginning of the second stage of regulation. Today there exists a clear corpus of international law – conventional and customary – governing internal armed conflict. This body has developed along three principal lines. First, the law of internal armed conflict has been modelled on, and assimilated to, the law of international armed conflict. The law of international armed conflict is considered the high watermark of legal regulation, the pinnacle to which the law of internal armed conflict should aspire. Secondly, the law of internal armed conflict has drawn on international criminal law to fill out its substantive content. Thirdly, it has drawn on international human rights law. Indeed, international criminal law and international human rights law have become linked inextricably with international humanitarian law in the regulation of internal armed conflict. These three approaches – regulation by analogy to the law of international armed conflict, the use of international criminal law, and the resort to international human rights law – have led to the creation of an ‘international law of internal armed conflict’.

The international law of internal armed conflict developed along these three lines primarily because of the resistance of states to the direct regulation of internal armed conflict through international humanitarian law. Thus, it was only through these creative means that the law of internal armed conflict could be built up. States have been far less reluctant to regulate the conduct of international armed conflict; thus, historically, that branch of law has been more advanced than its internal counterpart. In light of the criticism of the international/internal armed conflict distinction and the advantages of a uniform body of international humanitarian law, analogizing to the law of international armed conflict made perfect sense. As regards international human rights law, in the period between 1949 and the early 1990s, the development of that body of law gained far greater traction than did the law of internal armed conflict. Given the similarities between international human rights law and the ‘Geneva’ aspects of international humanitarian law, international human rights law has proven attractive in the regulation of internal armed conflict. The huge growth of international criminal law since the mid 1990s, coupled with the close relationship between international criminal law and international
humanitarian law, has meant that that body, too, has proven useful in regulating internal armed conflict.

However, each of these approaches suffers from certain limitations and gives rise to some difficulties. This is due, primarily, to the existing focus to date on the similarities between international armed conflicts and internal armed conflicts, and between international humanitarian law on the one side and international criminal law and international human rights law on the other. Insufficient attention has been paid to the differences between each of them. Regulation by analogy and resort to other bodies of law can take us only so far. In order to proceed to a third stage of regulation, one which truly meets the particularities of the internal armed conflict situation, we need to pay closer attention to the differences between these conflicts and these bodies.

The primary difference between an international and an internal armed conflict is the actors taking part in them. International armed conflicts are traditionally fought between states; internal armed conflicts are fought between a state and a non-state armed group or between opposing armed groups. The difference, then, is obvious, yet the implications of this difference have not been followed through. The differing actors involved in the two types of armed conflict suggest that, at the very least, certain legal norms cannot be transposed directly from the international armed conflict to the internal armed conflict without some modification. Yet, introducing armed groups into the equation has not always resulted in a translation of the relevant norms.

The differences between international humanitarian law on the one hand and international criminal law and international human rights law on the other also pose potential difficulties. International criminal law gives rise to individual criminal responsibility and, accordingly, certain provisions of war crimes law are interpreted in a narrower fashion than their international humanitarian law counterparts. If care is not taken, this narrower reading of a war crime will come to replace the broader interpretation of the international humanitarian law rule. Complexities also arise in the use of international human rights law. International human rights law was designed originally to govern the state/individual relationship, with the state the bearer of the obligation and the individual the possessor of the right. If international human rights law is to be applied directly in situations of internal armed conflict, this vertical relationship may require re-thinking, with non-state armed groups potentially being held subject to human rights obligations.

These differences do not suggest that the existing approaches of regulation by analogy and resort to other bodies of international law have been misplaced, nor do they call for a wholesale transformation of the applicable law. The regulation of internal armed conflict through international law has come a long way in a very short space of time. The existing approaches filled what was largely a blank canvas; but, today, the canvas is no longer blank. Accordingly, a step back is needed in order to assess where the law currently stands and what further work needs to be done. How would this third stage of regulation, this re-envisioned international law of internal armed conflict, look? At least four things are ripe for consideration. First,
in existing regulation, which have resulted from regulation by analogy, would be identified and new norms would be created so as to fill those gaps. Secondly, existing norms which are beyond the reach of non-state armed groups would be identified and tailored to meet the capabilities of the armed group while retaining their essence. Thirdly, all the rules would be binding on all parties to the conflict and not solely on one side or the other. Fourthly, the methodology by which the norms are created would be revisited.

This article considers these issues and proceeds in the manner set out above. Section 2 briefly describes the minimal regulation of internal armed conflict up to the 1990s. Section 3 demonstrates that there is, now, a detailed body of international law applicable to internal armed conflict and that this body of law has come about primarily through analogy to the law of international armed conflict as well as through resort to international criminal law and international human rights law (section 3A). However, these approaches suffer from some drawbacks and have taken us only so far, primarily because of a tendency to emphasize similarities while failing to recognize important differences (section 3B). Section 4 proposes a re-envisaging of the international law of internal armed conflict, outlining certain concrete measures which need to be taken in order to make the international law of internal armed conflict truly fit for purpose.

2 Stage 1: Minimal Regulation of Internal Armed Conflict

The body of international law which regulates internal armed conflict has changed beyond all recognition. Traditionally, states have been reluctant to allow international law to regulate internal armed conflict due to a perception that this constitutes a violation of state sovereignty and interference in their internal affairs.1 Thus, prior to the Geneva Conventions of 1949, there was little by way of regulation of internal armed conflict through international law. Only rarely was internal violence regulated by international law, primarily through recognition of insurgency or belligerency.2 A second means of regulating the fighting — important, and today rather neglected — was regulation through the conclusion of *ad hoc* agreements between the warring factions, or through unilateral declarations issued to one side’s own forces.3 However, this too was somewhat infrequent.

Post-1949, and until as late as the 1990s, international law regulated internal armed conflicts well beyond the limited category of recognized insurgency or

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1 See, e.g., Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974–1977, v, at 103, para. 15 (Delegate of Romania); v, at 381, para. 9 (Delegate of Iraq); vii, at 61, para. 11 (Delegate of Pakistan); vii, at 72, para. 75 (Delegate of Chile); viii, at 205, para. 17 (Delegate of Argentina).
3 See, e.g., Tratado de Regularización de la Guerra (26 Nov. 1820), concluded in the course of the Colombian war of independence. See also the Instructions of General Dufour of 4 Nov. 1847 and 5 Nov. 1847, issued in the course of the Swiss civil war of 1847. Both pre-date the Lieber Code.
belligerency and was not limited to the *ad hoc* conclusion of bilateral agreements or unilateral declarations. However, only a minimum of conventional and customary international law rules applied to internal armed conflict. At the conventional level, this consisted of Article 3, common to the four Geneva Conventions of 1949 (‘common Article 3’); Article 19 of the 1954 Hague Convention for the Protection of Cultural Property (‘1954 Hague Convention’); and Protocol II Additional to the 1949 Geneva Conventions, concluded in 1977 (‘Additional Protocol II’).

Each instrument provided only a modicum of protection for those caught up in an internal armed conflict. Almost immediately after it was concluded, common Article 3 was hailed as a ‘convention in miniature’. However, that very expression was first used during the Diplomatic Conference at which the Article was adopted as a criticism of the provision and the meagre regulation of internal armed conflict. Article 19 of the 1954 Hague Convention, though useful, is limited in its subject matter, necessarily so as it is a provision in a treaty regulating the protection of cultural property. Additional Protocol II, still the only treaty devoted solely to the law of internal armed conflict, represents a pared-back version of what had been hoped for and its sparse text betrays its nature as a last-minute compromise.

At the level of customary international law, the position was even less clear. It was generally agreed, at least by the mid-1980s, that there was some customary international humanitarian law of internal armed conflict; however, identification of the customary rules proved rather more elusive. The International Court of Justice in *Nicaragua* took the view that the rules contained in common Article 3 reflected ‘elementary considerations of humanity’ applicable in international and internal armed conflicts alike. But beyond this, the position proved rather murky. General Assembly Resolutions 2444 (XXIII) (1968) and 2675 (XXV) (1970), with their various protections for the civilian population, were considered to reflect the state of customary

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\[\text{5} \quad \text{Final Record of the Diplomatic Conference of Geneva, ii-B, (Federal Political Department: Berne, 1949), at 98 and again at 326 (Delegate of USSR).}
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\[\text{7} \quad \text{For the view that customary international law in civil war had evolved as early as the 1930s see Cassese, ‘The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts’, in A. Cassese (ed.), \textit{Current Problems of International Law} (1975), at 287.}
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\[\text{8} \quad \text{\textit{Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)} [1986] ICJ Rep 14, at para. 218.}
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international law applicable to all armed conflicts.\(^9\) However, even this may be to overstate the case. GA Resolution 2675 (XXV) contains a prohibition on the resort to belligerent reprisals against the civilian population, yet a similar conclusion reached 30 years later attracted considerable criticism.\(^10\) Leading commentators expressed their views on the customary international law status of particular Additional Protocol II provisions, but the relevant provisions were few and far between and the views of commentators were not always consistent with one another.\(^11\) As late as 1994, the Commission of Experts appointed to investigate violations of international humanitarian law committed in the former Yugoslavia wrote that ‘it is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in’ common Article 3, Additional Protocol II, and Article 19 of the 1954 Hague Convention.\(^12\) Thus, precisely which rules, beyond common Article 3, had customary status was unclear and did not benefit from uniform agreement.

Various attempts were made to develop the body of law applicable to the regulation of internal armed conflict. However, these initiatives existed at the level of private bodies – principally the International Committee of the Red Cross, the International Institute for Humanitarian Law, and the Institut de Droit International.\(^13\) Although these private initiatives were important, states never really took up the various proposals. Thus, until the early 1990s, the regulation of internal armed conflict through international law proved minimal.


3 Stage 2: A Body of International Law Applicable to Internal Armed Conflict

Today, the situation is altogether different; there has been a revolution in the regulation of internal armed conflict. A healthy body of international law exists – conventional and customary in nature – which is applicable to internal armed conflict. This body, which may be characterized as the ‘international law of internal armed conflict’, has emerged through three principal means. First and primarily, it has been modelled on the law of international armed conflict. The second way in which it has developed is through resort to international criminal law. Thirdly, international human rights law has played an important role in the regulation of internal armed conflict.

A Identifying the International Law of Internal Armed Conflict

1 Modelling on the Law of International Armed Conflict

a Conventional international humanitarian law

International humanitarian law treaties concluded in the last two decades regulate internal armed conflict as a matter of course. This is not to say that international armed conflicts and their internal counterparts are always treated alike; on occasion, their legal regulation varies. However, international humanitarian law treaties do apply to both sorts of armed conflicts. Yet, when drafting an international humanitarian law treaty, it is the international armed conflict that treaty negotiators have in mind. This is necessarily the case with ‘older’ treaties, which were intended to apply solely to international armed conflict, with their extension to internal armed conflict coming about at a later date through amendment. However, even in respect of treaties which are intended to govern both international and internal armed conflict, the template used remains that of the international armed conflict. This is even true of the sole treaty that applies to internal armed conflict alone.

Consider the case of ‘older’ treaties which are sometimes amended to bring internal armed conflict within their purview. During the first Review Conference for the Convention on Certain Conventional Weapons (Convention on CCW), the Mines Protocol (Protocol II to the Convention on CCW) was amended to include internal armed conflicts within its scope. The original limitation to international armed conflict was recognized as a shortcoming, given that the majority of casualties of land mines are to be found in states involved in an internal armed conflict. Some years later, the framework Convention on CCW itself was amended, precisely so

14 The amended scope of application reads: ‘This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the four Geneva Conventions of 12 August 1949. 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’ (Art. 1(2)).

as to apply to internal armed conflict. This amendment had broad support. Indeed, certain states had taken the view that the Convention should apply to internal armed conflict even prior to the amendment. Accordingly, Protocols I–IV to the framework Convention are applicable to internal armed conflict for states which ratify the amendment to the framework Convention. Thus, drafting the instrument with the international armed conflict in mind is necessarily the case for the more historical treaties; but it is equally true of more recent treaties designed for application in all types of armed conflict.

That the international armed conflict is viewed as the archetypal armed conflict becomes apparent when we consider two instruments – the Rome Statute of the International Criminal Court ('Rome Statute') and the 1954 Hague Convention. Article 8 of the Rome Statute contains two lists of war crimes: those applicable in international armed conflict and those applicable in internal armed conflict, with the former list being far more extensive than the latter. The list of war crimes in internal armed conflict was largely drawn from the list of war crimes applicable to international armed conflict. This is exemplified in Belgium’s proposal to the Review Conference of the Statute of the International Criminal Court to add to the list of war crimes applicable in internal armed conflict. Belgium provides as its justification for the inclusion of certain weapons in the list of war crimes applicable in internal armed conflict the fact that ‘[t]he use of the weapons listed in this draft amendment is already incriminated by [Article 8(2)(b)(xvii)–(xix)] of the Statute in

16 Art. 1 of the framework Convention originally provided that the ‘Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions . . . including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions’. This was amended during the second review conference to ‘also apply to situations referred to in Article 3 common to the 1949 Geneva Conventions’.

17 There was no opposition to the extension; indeed, numerous states spoke in favour of the amendment. See ‘Second Review Conference of the States Parties to 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’, CCW/CONF.II/2.

18 When the President of the United States transmitted the Convention to the Senate for its advice and consent as to ratification, the President proposed that ratification should be accompanied by a declaration that the US would apply the Convention ‘to all armed conflicts referred to in Articles 2 and 3 common to the Geneva Conventions of 12 August 1949’ (reproduced at 88 AJIL (1994) 748, at 751). In turn, the Senate, in giving its advice and consent, stated as a priority for strengthening the Protocol ‘[a]n expansion of the scope . . . to include internal armed conflicts’: Resolution of Ratification, at para. 3(c)(3), 141 Congressional Record S4568, S4569 (24 Mar. 1995), cited in Matheson, supra note 15, at 160.


case of an international armed conflict’.21 Thus, the model was, and is, that of the law of international armed conflict.

For its part, the 1954 Hague Convention contains a number of rules relating to the protection of cultural property in situations of armed conflict. Article 19 provides that, ‘[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property’. This provision is not a model of clarity; quite what is meant by the provisions that relate to the respect for cultural property is unclear. Different views have been expressed on the subject, with some taking the position that the reference is to Article 4 of the Convention alone,22 while others that it is rather broader.23 I do not want to enter into the debate here, simply to show that even treaties intended to be applicable to all armed conflicts are actually designed for an international armed conflict; often, their application to internal armed conflict is tagged on at the end.

Conclusion of treaties with international armed conflict in mind holds true even of the sole treaty applicable only to internal armed conflicts. Additional Protocol II, modelled as it was on Additional Protocol I, took as its starting point the law of international armed conflict.24 This approach led to something of a debate at the Diplomatic Conference. Some delegates took the view that the two protocols should ‘closely resemble’25 one another, or mirror one another to the largest extent possible.26 Others took the view that such an approach would be inappropriate.27 One delegate recognized that ‘several of the complexities of draft Protocol II were attributable to their having been discussed by experts too familiar with similar provisions in draft Protocol I’.28 These positions should not always be taken at face value, given that some delegations wanted little or no regulation of internal armed conflict, while others favoured a single protocol applicable to all armed conflicts. However, ultimately, the approach adopted was one of drawing on Additional Protocol I.

21 Res ICC-ASP/8/Res. 6, Annex III: Belgium: Proposal of Amendment. The proposal was supported by Austria, Argentina, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia, and Switzerland.
25 Official Records, supra note 1, Delegate of Sweden, v, at 142, para. 7. See also Delegate of Australia, xi, at 209, para. 42 (‘resemble’); Delegate of FRG, xi, at 208, para. 39 (‘to adopt the language’).
26 Ibid., Delegate of Norway, xi, at 249, para. 21. See also Delegate of Finland, v, at 186, para. 15 (‘The special conditions of non-international conflicts would require different rules, but whenever possible the two protocols should be on identical lines’).
27 Ibid., Delegate of USA, xiv, at 67, para. 72; Delegate of Romania, viii, at 221, para. 33; Delegate of Indonesia, xi, at 248, para. 18.
28 Ibid., Delegate of Canada, v, at 184, para. 6.
What these examples demonstrate is that when drafting a treaty, the negotiators have international armed conflict as the archetypal situation in mind. The rules are then extended to apply to internal armed conflicts, or internal armed conflicts are added onto the scope of application clause of the treaty. This is despite the relatively few international armed conflicts that take place, at least when compared to their internal counterparts. This approach gives rise to some difficulties, such as lack of clarity surrounding which provisions are actually applicable to internal armed conflict; other difficulties are discussed below.  

b Customary international humanitarian law

The customary international humanitarian law of internal armed conflict also has increased in recent years. Until the 1990s, the view that there were more than simply a handful of customary rules applicable in internal armed conflict was never seriously entertained, and identifying even those rules proved rather problematic. In the last two decades, the relevant customary international humanitarian law has grown dramatically. Although there remains some debate as to precisely which rules have customary status, that there is a sizeable body of custom is no longer questioned. This is due, primarily, to two important contributions, namely the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the customary international humanitarian law study conducted under the auspices of the International Committee of the Red Cross. Equally, other important lists of customary international humanitarian law rules exist and should not be overlooked.

The ICTY has identified a body of customary international humanitarian law applicable equally to internal armed conflict and to international armed conflict. In the area of conduct of hostilities alone, various chambers have held that such rules as the prohibition on attacks against civilians and attacks against civilian objects, the prohibition on the wanton destruction of property, the protection of cultural property and religious objects, the prohibitions on plunder and pillage, and the prohibition on the use of chemical weapons are all of customary status and applicable to international and internal armed conflicts alike. Although they were criticized

29 Sect. 4B1.
30 See supra, text at notes 7–12.
35 See, e.g., Strugar, supra note 33, at paras 227–228; Hadžihasanović, supra note 34, at paras 26–30.
37 See, e.g., ibid., at paras 47–48.
38 See, e.g., ibid., at paras 37–38.
39 Tadić Interlocutory Appeal on Jurisdiction, supra note 9, at paras 120–124.
at first for going too far, such criticisms have since receded. States themselves have drawn up a list of war crimes applicable to internal armed conflict, and, by implication, a list of customary international humanitarian law rules applicable thereto. The ‘assimilation thesis [of Tadić] was put to the vote of the community of States’ and passed. Although there has been some hesitation over particular war crimes and there has been criticism that certain violations really should have found their place on the list of war crimes in the Rome Statute, today, the debates tend to turn on the criminalization of the rule rather than its applicability to internal armed conflict. Similar criticisms of the ICTY jurisprudence are often directed at the so-called ‘fourth Tadić condition’, namely that violation of the particular rule ‘must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule’, rather than any of the first three ‘Tadić conditions’, namely the violation of a rule of international humanitarian law, the customary or conventional nature of that rule, and the severity of the violation. Accordingly, it can be concluded that there exists a sizeable body of customary international humanitarian law applicable to internal armed conflict.

Such a conclusion is supported by the customary international humanitarian law study. That study, conducted pursuant to a mandate from the International Conference of the Red Cross and Red Crescent, took nearly 10 years to conclude and involved some 150 experts. One of its purposes was ‘to determine whether customary international law regulates non-international armed conflict in more detail than does treaty law and if so, to what extent’. The study found that of 161 rules of customary international humanitarian law, 149 are or may be applicable in internal armed conflict.

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43 The ‘four Tadić conditions’ are set out in Tadić Interlocutory Appeal on Jurisdiction, supra note 9, at para. 94. For criticism of the fourth Tadić condition see, e.g., G. Mettraux, International Crimes and the ad hoc Tribunals (2005), at 51–52. For criticism of the application of the fourth Tadić condition to particular rules see, e.g., Prosecutor v. Galic, Judgment, IT-98-29-A, 30 Nov. 2006, Separate and Partially Dissenting Opinion of Judge Schomburg, at paras 4–22.


47 Henckaerts and Doswald-Beck, supra note 31.
methodology, the general tenor of the study has not been criticized, nor has its conclusion that a large number of international humanitarian law rules are applicable to situations of internal armed conflict. Accordingly, it is of undoubted importance, as demonstrated by its citation in judgments of leading courts and tribunals almost immediately after publication.

In order to derive customary international humanitarian law rules applicable to internal armed conflict, the general approach has been to analogize to the law of international armed conflict. The ground-breaking Tadić interlocutory appeal on jurisdiction is illustrative of this approach. As the ICTY Appeals Chamber asked, ‘Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?’.

Or, as was put so eloquently later on, ‘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 has been the consistent approach of the ICTY. For example, in Halilović, an ICTY Trial Chamber stated that ‘[w]hen an accused is charged with violation of Article 3 of the Statute, based on a violation of Common Article 3, it is immaterial whether the armed conflict was international or non-international in nature . . . there is no need for the Trial Chamber to define the nature of the conflict in the present case’. And this approach has extended beyond common Article 3. Sometimes, the ICTY will go so far as to read into a customary Additional Protocol II provision all the detail of the customary rules of international armed conflict. So, for example, Article 13(2)
of Additional Protocol II reads, in a rather minimalist fashion, ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack’. The customary equivalent of the provision has been interpreted by the ICTY as including a prohibition on indiscriminate attacks; a prohibition on disproportionate attacks, which itself has been interpreted as giving rise to a requirement that certain precautions be taken; and a prohibition on attacks against civilian objects, which, in turn, has given rise to a prohibition on the ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity’. These more detailed rules stem from the law of international armed conflict, in particular from Additional Protocol I and the Hague Regulations.

The general idea is that there is a common body of law applicable to both sorts of armed conflict and which is derived from the law of international armed conflict. This reflects the position taken by the ICTY Office of the Prosecutor (OTP), which has been to argue that ‘the essential substance of the detailed API [Additional Protocol I] provisions concerning unlawful attacks applicable to international conflicts is also contained in the single relevant sentence in APII [Additional Protocol II] which is applicable to internal conflicts. This is a conscious effort on the part of the OTP, successful to date, to argue that the law concerning unlawful attacks against civilians is, in substance, the same in both international and internal conflicts.’

A similar approach is taken by the customary international humanitarian law study. That study compiles all the relevant practice (treaties, military manuals, national legislation, case law, and the like) on a particular issue without separating out that relating to an international armed conflict from that relating to an internal armed conflict. The rules identified from this practice are divided into those pertaining to international armed conflict and those pertaining to internal armed conflict, but by and large single rules cover both conflicts. Given that, historically, international armed conflict benefitted from far greater legal regulation than internal armed conflict, it would seem that the law of international armed conflict has been extended to regulate internal armed conflict, and not that a ‘new’ body of law applicable to internal armed conflict has been created. Thus, in their introduction, the authors of the study note that ‘the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those

59 Ibid., at para. 228; Hadžihasanović, Rule 98 bis Decision, supra note 34, at paras 29–30.
60 Additional Protocol I, Arts 50–52; Hague Regs, Art. 25.
61 Fenrick, ‘The Prosecution of Unlawful Attack Cases before the ICTY’, 7 Yrbk Int’l Humanitarian L (2004) 153, at 166. Fenrick was formerly Senior Legal Advisor, Office of the Prosecutor, ICTY, though the article was written in a personal capacity.
62 See Henckaerts and Doswald-Beck, supra note 31, ii.
63 Ibid., i. Only in rare cases does the rule diverge as between the two.
in Additional Protocol I, but applicable as customary law to non-international armed conflicts’. 64

Ultimately, then, it is from the law of international armed conflict that the law of internal armed conflict has emerged. It is the law of international armed conflict to which internal armed conflicts get tagged on (the treaty-extension approach) which forms the archetype we have in mind (the treaty-creation approach), and to which we analogize (the approach of custom). That the general approach – be it of conventional law or customary law – has been to model on the law of international armed conflict is unsurprising. In so far as the legal regulation of internal armed conflict is concerned, the traditional view is that it is the law of international armed conflict which represents the high watermark and the standard towards which to aim. It is simply a matter of ‘[c]ommon sense’ that the relevant rules ‘should be equally applicable in international and non-international armed conflicts’. 65 This is demonstrated in the ever-increasing tendency to call for a uniform body of international humanitarian law and the removal of the international/non-international distinction. 66

2 Resort to International Criminal Law

The second and third ways in which the international law of internal armed conflict has emerged is through resort to bodies of international law other than international humanitarian law. Accordingly, the international law of internal armed conflict is precisely that – a body of international law and not solely of international humanitarian law. Two bodies in particular have come to play a crucial role in the regulation of internal armed conflict, namely international criminal law and international human rights law. Resort to international human rights law is considered in the next part; for now, we turn to international criminal law.

International criminal law has become inextricably linked with international humanitarian law. International criminal law is, of course, a useful means by which international humanitarian law may be enforced. Reliance on international criminal law has proven necessary to enforce international humanitarian law and sanction

64 Ibid., at p. xxix.

65 Ibid. According to Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’, 16 EJIL (2005) 741, at 742: ‘there is little question . . . that most humanitarian lawyers consider the law of international armed conflicts to be an ideal – the lex ferenda – toward which the law of internal armed conflicts should be developed’.

those who committed serious violations of it. However, the usefulness of international criminal law for international humanitarian law is not limited solely to the realm of enforcement.

For so long, the definition of an internal armed conflict proved elusive, with neither common Article 3 nor Additional Protocol II defining the term. In Tadić, the ICTY held that an armed conflict exists ‘whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’.67 And this definition has proven instructive, being applied within,68 and more importantly for the purposes of this article outside,69 international criminal law circles.

The international criminal tribunals have also interpreted various international humanitarian law provisions. In interpreting the relevant war crime, international criminal tribunals have interpreted the underlying provision of international humanitarian law upon which the war crime is based.70 On many an occasion, this has meant putting flesh on the bare bones of a conventional provision.71 Indeed, one of the major achievements of the international criminal tribunals has been the development of international humanitarian law. Just as international human rights law rejuvenated international humanitarian law in the late 1960s and early 1970s,72 international criminal law has reinvigorated international humanitarian law in the mid 1990s and 2000s.

3 Resort to International Human Rights Law

The third way in which the international law of internal armed conflict has developed, and the second body of international law which has played an important role in this development, is international human rights law. In the early years, international humanitarian law and international human rights law were treated rather separately.

67 Tadić Interlocutory Appeal on Jurisdiction, supra note 9, at para. 70.
71 See, e.g., text supra at notes 55–60 on the interpretation of Art. 13(2) of Additional Protocol II.
72 This was due, in large part, to GA Res 2444 (XXIII) and the Reports of the Secretary General on ‘Respect for Human Rights in Armed Conflicts’, A/7720 (1969) and A/8052 (1970). International humanitarian law during the period in question has been described as ‘approach[ing] stagnation’: Meron, ‘The Humanization of Humanitarian Law’, 94 AJIL (2000) 239, at 247.
and there was little interaction between them. Today, it is well accepted that international human rights law applies in situations of armed conflict. This is the view expressed both in the principal international humanitarian law treaties and in the principal international human rights law treaties. The view that international human rights law continues to apply in time of armed conflict is also accepted by many states and a wide range of international courts and tribunals and other international law bodies. The relationship between international human rights law and international humanitarian law has also given rise to a burgeoning literature. The applicability of international human rights law to situations of internal armed conflict is also well accepted. Indeed, its necessity has been accepted by those otherwise sceptical of the applicability of international human rights law to armed conflicts. And some go so far as to say that its application to internal armed conflict is even more pertinent than to international armed conflict.

International human rights law has been used in situations of internal armed conflict in a number of different ways. It has been used as an interpretational tool, to interpret provisions of international humanitarian law. For example, international human rights law concepts have been used to define similar concepts in international

72 Additional Protocol I, Art. 72; Additional Protocol II, preamble.
73 See, e.g., ICCPR, Art. 4; ECHR, Art. 15; IACHR, Art. 27.
humanitarian law, as was the case with the definition of torture.\footnote{Prosecutor v. Kunarac, Kovac and Vukovic, Judgment, IT-96-23-T and IT-96-23/1-T, 22 Feb. 2001, at paras 465–497.} International human rights law has also filled out some of the gaps which exist in international humanitarian law, as with the requirement to investigate certain losses of life.\footnote{The Public Committee Against Torture in Israel v. The Government of Israel, HCJ 769/02 (2006), at para. 40. Such a requirement is considered to have been taken from international human rights law: see, e.g., Schondorf, ‘The Targeted Killings Judgment’, 5 J Int’l Criminal Justice (2007) 301. See also Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2006/53 (2006), at paras 33–43, who draws on international human rights law.}

More controversially, international human rights law has been used directly to regulate internal armed conflict rather than to inform regulation through international humanitarian law. This ‘human rights law of internal armed conflict’ is primarily a construct of scholars and has taken off in the literature in recent years.\footnote{See, in particular, Abresch, supra note 65; Martin, ‘Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict’, 64 Saskatchewan L Rev (2001) 347.} Proponents of the idea point to the judgments of the European Court of Human Rights (ECHR) in \textit{Isayeva} and \textit{Isayeva, Yusupova and Bazayeva} for support.\footnote{App. Nos 57947/00, 57948/00, and 57949/00, \textit{Isayeva, Yusupova and Bazayeva v. Russia}, Judgment of 24 Feb. 2005; App. No. 57950/00, \textit{Isayeva v. Russia}, Judgment of 24 Feb. 2005.} However, it remains unclear whether the ECHR considered the situation in question to be an internal armed conflict or, rather, a state of internal tensions and disturbances; it is equally uncertain whether the Court was applying international humanitarian law or human rights law. There are no explicit pronouncements on the point and there are contradictory indications within the judgment itself. For example, while the ECHR used the language of international humanitarian law, speaking of ‘legitimate military targets’, ‘disproportionality in the weapons used’, and ‘illegal armed insurgency’,\footnote{See respectively \textit{Isayeva, Yusupova and Bazayeva}, supra note 83, at paras 175 and 197; \textit{Isayeva}, supra note 83, at para. 180.} it also referred to ‘law-enforcement’ and being ‘outside wartime’.\footnote{\textit{Ibid.}, at para. 191.} Nevertheless, the predominant view is that the ECHR was applying human rights law directly in these cases to regulate an internal armed conflict, and a ‘human rights law of internal armed conflict’ is increasingly posited in the literature.\footnote{See, e.g., Abresch, supra note 65; Krieger, supra note 79.} This approach of a ‘human rights law of internal armed conflict’ can be usefully broken down into two schools of thought. The ‘unification’ school takes the view that there should be a unified body of law applicable in situations of peace and internal armed conflict, regardless of the intensity of that conflict.\footnote{\textit{Ibid.}, at para. 191.} The ‘threshold’ school seeks to split up the law of internal armed conflict depending on the intensity of the violence. A low-intensity internal armed conflict would be regulated through international human rights law; a high-intensity internal armed conflict would be governed by international humanitarian law; the dividing threshold would be that
of Additional Protocol II. Both schools are premised on common ideas, namely that: there is little by way of international humanitarian law that regulates internal armed conflict; that international humanitarian law suffers from a lack of specificity; that states rarely accept that an armed conflict is taking place, thus denying the very applicability of international humanitarian law; and that the relationships inherent in an internal armed conflict can be considered akin to those present in human rights law.

Unquestionably, then, whether through modelling on the law of international armed conflict or through resort to international criminal law and international human rights law, a substantial body of international law rules has emerged to govern internal armed conflict.

B Critiquing the International Law of Internal Armed Conflict

The development of a body of international law applicable to internal armed conflict should not be underestimated. It came about at a time of some hostility on the part of states, and we have moved from little regulation to a healthy body of international law in a very short space of time. The three existing approaches of regulation by analogy, resort to international criminal law, and resort to international human rights law have proven extremely useful and have taken us a long way. It is also understandable why these three approaches were followed. Each has close links to international humanitarian law and internal armed conflict, albeit in different ways. And it would have been rather more difficult, perhaps even impossible, to conjure up new rules than to extend existing rules to a different situation. They have all proven useful in filling what was previously a (relatively) blank canvas.

However, the canvas is no longer blank and these three approaches can take us only so far. Accordingly, it may be useful to revisit where things stand today. We can now ask ourselves whether the law of international armed conflict should be the law on which we model or the pinnacle to which we aim. It is one thing to seek to reach the level of protection that that body of law affords; it is another altogether to model the rules upon it. Similarly, it is not clear why international human rights law should fill the gaps left by international humanitarian law. International human rights law could be used to identify the deficiencies in international humanitarian law, but international humanitarian law could be the body which resolves them. Equally, it is not clear that the secondary rule – international criminal law – should be used to interpret the primary rule – international humanitarian law – given that there are important differences between them.

88 See Kretzmer, supra note 82, at 40–44; Gaggioli and Kolb, supra note 86, at 158–162.
90 Abresch, supra note 65, at 746–747; Krieger, supra note 79, at 274.
91 Abresch, supra note 65, at 756; Krieger, supra note 79, at 275.
92 Ibid., at 275.
To reach the second stage of regulation, we focused on the similarities between internal and international armed conflicts, and on the similarities between international humanitarian law and the other bodies of international law. To move forward to a third stage of regulation, our focus needs to shift to the differences between the various bodies. Paying closer attention to these differences would allow us to identify gaps in existing law, difficulties with the application of certain rules, and methodological problems in the way the rules are drawn up. This section does not seek to question the endeavour of regulating internal armed conflict, nor is it intended to take away from what has been achieved to date. Rather, by offering a critical appraisal, it hopes to increase the effectiveness of the international law of internal armed conflict. Only in this way may we move to a more tailored body of law: one that is truly fit for purpose.

1 Differences between Internal Armed Conflict and International Armed Conflict

The principal difference between the international and the internal armed conflict is the actors that take part in each of them. International armed conflicts are fought between states. In theory, they also could be fought between a state and a national liberation movement; in practice, however, a state is unlikely to accept that it is involved in a war of national liberation, as it would be tantamount to accepting that it is a racist regime, an alien occupier, or a colonial dominator.93 By contrast, internal armed conflicts are fought between states and non-state armed groups, or between opposing armed groups. The difference in actor, namely the involvement of armed groups, is obvious, but the consequences of this difference have not been followed through. At the very least, the difference suggests that when drawing from the law of international armed conflict and applying it to situations of internal armed conflict care needs to be taken. Certain norms may prove impractical or may need translating to the situation at hand; other norms may have been intended to bind states alone. However, it is not at all clear that this difference in actor is borne in mind when determining the applicable law; indeed, on occasion, it would seem to be overlooked entirely.

Really to get to grips with non-state armed groups and what their involvement in internal armed conflict means for its regulation, a greater understanding of the practice and workings of non-state armed groups is in order. Several reasons explain our relative lack of knowledge in this regard. At the practical level, engagement with non-state armed groups may be viewed as interfering in the internal affairs of states.94 Attempts by non-state armed groups to interact with the international community are sometimes rebuffed or met with silence. In addition, non-state armed groups are often

93 Additional Protocol I, Art. 1(4). The Delegate of Israel at the Diplomatic Conference of 1974–1977 noted that ‘paragraph 4 had within it a built-in non-applicability clause, since a party would have to admit that it was either racist, alien or colonial – definitions which no State would ever admit to. By including such language, the Conference had, to his regret, ensured that no State by its own volition would ever apply the article’: CDDH/I/SR.36, at para. 61.

characterized as terrorists and outside actors which engage with them may face prosecution. At the legal level, the approach to customary international law has been to focus on *opinio juris* over and above that of state practice, or to privilege certain forms of state practice over others. While that position may be sensible as regards the formation of customary international law, an unintended consequence has been a more general neglect of the practice and working of armed groups. At the Diplomatic Conference of 1974–1977, the delegate of Ghana remarked that ‘the Conference should keep the experience of the liberation movements constantly in mind when studying those articles’. The same surely must be true of non-state armed groups.

2 Differences between International Humanitarian Law and International Criminal Law

Just as there are important differences between international and internal armed conflicts, so too there are important differences between international humanitarian law and international criminal law, and between international humanitarian law and international human rights law. Each of the bodies is built round different assumptions and constructed round different relationships. International humanitarian law works on the premise of equality of belligerents; international human rights law traditionally has been constructed round the relationship between the state and the individual. International criminal law is based on individual criminal responsibility; international humanitarian law seeks to strike a balance between military necessity and humanity. The bodies are closely related, suggesting that each can usefully draw upon the other; however, the differences suggest that ideas from one body cannot be imported into another *ipso facto* and without more.

International humanitarian law and war crimes law are two closely related bodies; after all, a war crime is essentially a violation of international humanitarian law. Other conditions may attach, for example that the violation be serious, or that the violation entail the individual criminal responsibility of the violator; but the essence of a war crime is that it is a violation of international humanitarian law. Accordingly, the international criminal tribunals have had to interpret international humanitarian law provisions in order to pronounce on the guilt or innocence of individuals accused of war crimes. These interpretations provide useful guidance in understanding the relevant international humanitarian law rule. Indeed, it is not an overstatement to observe that international humanitarian law can no longer be understood fully without recourse to the work of the international criminal tribunals.

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96 Tadić Interlocutory Appeal on Jurisdiction, *supra* note 9, at para. 99.
However, given that international criminal law relates to ‘the most serious crimes of international concern’ and that war crimes give rise to individual criminal responsibility, the war crime is sometimes drawn up or interpreted in a narrower fashion than its international humanitarian law equivalent. This is unsurprising; in certain instances, it may even be necessary. However, it does mean that some care needs to be taken before transposing from international criminal law to international humanitarian law. It should also be recognized that secondary rules are being used to interpret primary rules, which represents a departure from the usual order of things. And this has been criticized: ‘it would have been better, from a methodological point of view, to identify the norms applicable to conduct of hostilities in non-international armed conflicts first, before proceeding to criminalization’.

That the international criminal law standard is not always co-terminous with the international humanitarian law standard can be illustrated through three examples. Consider, first, the issue of child soldiers. The relevant provision of Additional Protocol II provides that ‘children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities’. This stands in contrast to the equivalent war crime as well as the equivalent provisions in the law of international armed conflict and international human rights law, all of which are narrower. The war crime relates to ‘[c]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities’. Whereas Additional Protocol II prohibits children from taking any part in hostilities, only an aspect of that prohibition has been criminalized, namely the active participation of children in hostilities.

Or take the law of targeting. Article 13 of Additional Protocol II provides that ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack’. No harm need result from the attack. This should be contrasted with the equivalent war crime. The ICTY has taken the view that, at the time of the armed conflicts in the former Yugoslavia, the war crime of unlawful attacks against civilians required that the attack result in death, serious bodily injury, or equivalent harm. Consider a third, related, example – the disproportionate attack. Article 57 of Additional Protocol I prohibits attacks ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’. This is considered applicable to internal armed conflict through

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103. Rome Statute, Art. 8(2)(e)(vii). See also Statute of the Special Court for Sierra Leone, Art. 4(c).
customary international law.\footnote{See, e.g., \textit{Hadžihasanovic} Trial Judgment, \textit{supra} note 56, at para. 45; Henckaerts and Doswald-Beck, \textit{supra} note 31, Rule 14.} The Rome Statute lists as a war crime in international armed conflict such attacks which are ‘clearly excessive in relation to the concrete and direct overall military advantage anticipated’.\footnote{Rome Statute, Art. 8(2)(b)(iv).} The insertion of the words ‘clearly’ and ‘overall’ creates a higher threshold for the war crime as compared to the international humanitarian law norm.\footnote{\cite{Von Hebel and Robinson, supra note 20, at 111; Arnold, ‘War Crimes – para. 2(b)(iv)’ in Triffterer (ed.), \textit{supra} note 20, at 339.} Accordingly, future case law of the International Criminal Court on the point should not be taken as a reflection of the international humanitarian law standard. Indeed, it may be that that provision is not even reflective of customary international criminal law on point; rather it goes to the delimitation of the crime for the purposes of the International Criminal Court alone.

Accordingly, international humanitarian law rules and their associated war crimes are closely related. However, it cannot be assumed that the interpretation of the latter will always inform the former. If appropriate care is not taken, interpretations of the war crime could end up in the narrowing of the protections afforded by international humanitarian law.\footnote{\cite{On other dangers international criminal law poses for international humanitarian law see Sassòli, \textit{supra} note 70, at 117–119.}}

\section*{3 Differences between International Humanitarian Law and International Human Rights Law}

It is often said that there is a convergence between international humanitarian law and international human rights law in terms of ‘goals, values and terminology’.\footnote{\cite{\textit{Kunarac} Trial Judgment, \textit{supra} note 80, at para. 467.}} This is true; however, care still needs to be taken when using international human rights law to interpret international humanitarian law. Even at the level of complementary norms, application directly from the one to the other may not be appropriate and some tailoring of the norm may be needed. As the ICTY recognized, ‘notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law’,\footnote{\textit{Ibid.}, at para. 471. See also \textit{Prosecutor v. Krnojelac}, Judgment, IT-97-25-T, 15 Mar. 2002, at para. 181. See generally Cryer, \textit{supra} note 98.} for the two bodies diverge in terms of the identity and role of the actors as well as sanctions for their violation.\footnote{\textit{Kunarac, supra note 80, at para. 470.}} Furthermore, what, at first sight, seems to be complementary may turn out, upon further reflection, to be quite different. For example, silence on the part of international humanitarian law should not always be equated with a gap in protection for, sometimes, that silence may be deliberate.\footnote{\textit{Olson, supra note 29, 454.}} Equally, the presumption that the norm which grants greater protection is the more specific norm
and so can be applied by way of the *lex specialis* principle is, while attractive, not always entirely accurate.\(^{114}\)

A more fundamental difference between the two bodies of law arises in respect of the principle of equality of belligerents. That principle is one which is fundamental to international humanitarian law,\(^{115}\) including the international humanitarian law of internal armed conflict.\(^{116}\) The principle holds that all parties to an armed conflict have the same rights and obligations as a matter of law, irrespective of the ‘justness’ of the cause; the idea being that if one side is not bound by particular rules, the side that is bound will not comply with them.\(^{117}\) It has been opined that the principle of the equality of belligerents is important in an international armed conflict, but is unworkable in an internal armed conflict, as members of the armed group may be prosecuted for taking part in the hostilities.\(^{118}\) While this may be true of domestic law, through which the ‘fighter’ may be prosecuted, insofar as international (humanitarian) law is concerned, the principle of equality as between the parties remains intact.\(^{119}\)

Given that, traditionally, international human rights law governs the relationship between the state and the individual, with the individual considered the beneficiary of the right and the state the guarantor of the obligation, international human rights law does not contain an idea corresponding to that of equality of belligerents.\(^{120}\) Difficulties arise, then, in the regulation of internal armed conflict directly through international human rights law – the so-called ‘human rights law of internal armed conflict’. One of the problems with direct regulation through human rights law is that it is based on the assumption that non-state armed groups have human rights obligations. If they do not, then regulation through human rights law would be inappropriate for it would be binding on only one of the parties to the conflict, with the other side being left unregulated (by human rights law); in a conflict between armed groups, neither side would be regulated through human rights law. If non-state armed groups do

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120 As the Kunarac Trial Judgment, *supra* note 80, at para. 470, observes: ‘international humanitarian law purports to apply equally to and expressly bind all parties to the armed conflict whereas, in contrast, human rights law generally applies to only one party, namely the state involved, and its agents’. 
have human rights obligations, this would be to transform the nature of human rights which has been conceptualized hitherto as between the state and the individual.  

The principle of equality of belligerents arises not just at the broader level of whether non-state armed groups have human rights obligations, but at the level of the norms themselves. This is exemplified by the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts. Insofar as states are concerned, there is a prohibition on using children under the age of 18 years to take a direct part in hostilities and compulsorily recruiting them into their armed forces.  

Children under the age of 18 years can enter into ‘schools operated by or under the control of the armed forces’. This should be compared with the prohibition in respect of non-state armed groups which relates to all forms of recruitment and use of children under the age of 18 years. This may be objectionable to the non-state armed group for imposing more onerous standards on it as compared with the state against which it is in conflict. Thus, the National Democratic Front of the Philippines (NDF-P), in a letter to the UN Secretary-General, expressed concern that standards were being imposed upon it ‘that are not even made absolutely applicable to States’. And another armed group has questioned why the state against which it is fighting is allowed to recruit children under the age of 18 into its military academy. If, as a matter of course, international human rights law is going to impose more rigorous standards on non-state armed groups than those by which states are willing to abide, human rights law may not be best suited to the direct regulation of internal armed conflict.

4 Stage 3: Re-envisioning the International Law of Internal Armed Conflict

The disparity in actors and differences between the legal regimes raise rather important issues. They do not warrant a wholesale transformation of the applicable law, but they do suggest that a greater focus on the differences could prove useful. Indeed, taking the differences seriously would necessitate certain concrete changes to the regulation of internal armed conflict. These changes lie primarily in four areas. First, regulation through analogy has resulted in certain gaps in the law of internal armed conflict. These gaps would be identified and filled. Secondly, insufficient regard to the involvement of non-state armed groups has meant that it is unclear whether certain

121 This may be changing. For recent developments see A. Clapham, Human Rights in the Private Sphere (1993); A. Clapham, Human Rights Obligations of Non-State Actors (2006); P. Alston (ed.), Human Rights and Non-State Actors (2005).
122 Arts 1 and 2.
123 Art. 3.
124 Art. 4.
125 NDF-P, Letter to UN Secretary-General Ban Ki Moon, 24 Nov. 2008.
categories of norms are binding upon them. Such questions would be laid to rest, and in the future no such uncertainty would arise. Thirdly, certain norms which are beyond the capabilities of the parties to the conflict would be tailored to meet the particularities of the situation while retaining their essence and fundamental attributes. Fourthly, the methodology by which the norms are created would be altered. This section explores these issues, setting out the contours of a re-envisioned, but still realistic, body of international law of internal armed conflict.

A Identifying the Gaps and Creating New Norms

1 Limits of Analogy

As discussed above, analogizing to the law of international armed conflict is useful as it is not to create new law but to apply existing law to a broader context. Sometimes, to analogize may be the only possible means of deriving applicable rules. However, there are a number of problems with regulation through analogy, principal among which is what happens when an analogy cannot be drawn or proves inappropriate. To date, the answer has been to end the matter there, with no further attempt to regulate the situation taking place. Accordingly, where there is no analogous rule in the law of international armed conflict, or where the relevant rule proves inappropriate, that particular aspect of internal armed conflict is left unregulated. Two examples serve to illustrate the point.

First, consider the law of belligerent occupation. The accepted view is that the law of belligerent occupation is particular to international armed conflict. Reflecting such orthodoxy, the rules relating to belligerent occupation in the customary international humanitarian law study apply to international armed conflict alone. This may be for good reason. Some of the rules comprising the law of belligerent occupation reflect a careful balance between the three principal actors, namely the occupying power, the occupied people, and the displaced sovereign. For example, the rules relating to the requisitioning of property reflect the competing interests of the different actors. The occupying power can take into its possession certain property belonging to the sovereign ‘which may be used for military operations’, but requisitions from the general population are prohibited ‘except for the needs of the army of occupation’. As regards ‘public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country’, the occupying power acts as usufruct. This tripartite division between occupier, occupied, and sovereign cannot be mapped neatly onto situations of internal armed conflict. As such the matter is generally considered to end there.

128 See Rules 41, 129A, 130.
129 Regulations respecting the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 1907, Arts 53 and 52 respectively.
130 Ibid., Art. 55.
No rules of international humanitarian law have been developed to regulate the territory under the control of a non-state armed group in an internal armed conflict. Yet, not infrequently, non-state armed groups control sizeable tracts of territory. Mention can be made of the Communist Party of Nepal-Maoist (CPN-M), the Revolutionary United Front (RUF) in Sierra Leone, the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, the Revolutionary Armed Forces of Colombia (FARC), and the Sudan People’s Liberation Movement/Army (SPLM/A). Perhaps in part because of the silence of international humanitarian law in this regard, international human rights law has stepped in to fill the gap. Special procedures mechanisms of the UN Human Rights Council have taken the view that, particularly in the situation where non-state armed groups exercise control over territory and have a political structure, they can be expected to comply with human rights standards. Nevertheless, it is difficult to comprehend that, once territory falls under the control of a non-state armed group, international humanitarian law has little or nothing to offer.

As a second example take the issues of combatant immunity and prisoners of war. The idea of combatant immunity and the prisoners of war regime are bound up in the law of international armed conflict. No treaty provision applicable to internal armed conflict contains mention of the concepts. At the Diplomatic Conference of 1949, an attempt to introduce a rule prohibiting prosecution merely for taking part in an internal armed conflict did not succeed. Some 25 years later, at the Diplomatic Conference of 1974–1977, a proposal to introduce prisoner of war status into the law of internal armed conflict similarly failed. At the level of customary international law, alongside the law of belligerent occupation, this is one of the few areas of real difference between internal and international armed conflict. And there is near-unanimity among commentators that this is the exclusive domain of the law of international armed conflict.

The greatest benefit of combatant and, in turn, prisoner of war status is the non-prosecution for mere participation in the armed conflict. Accordingly, this would be the most controversial aspect of application to internal armed conflict. States view

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132 For the proposal see Final Record, supra note 5, ii-B, 44 (Norway). See also ii-B, 49 (UK); ii-A, 322 (Norway). For criticism see ii-B, 50 (Burma); ii-B, 99 (Denmark).

133 For the proposal see Official Records, supra note 1, v. at 91, para. 6 (Norway); viii, at 359, para. 15 (Sweden); v, at 187, paras 20–21 (Bangladesh). For criticism see viii, at 293, para. 41 (Burundi).


members of non-state armed groups against which they are in conflict as criminals or traitors,\textsuperscript{137} and, increasingly, terrorists. States may also fear that to treat the captured fighters as prisoners of war would be to enhance the status of the armed group.\textsuperscript{138} But immunity from prosecution is a crucial incentive for compliance with international humanitarian law.\textsuperscript{139} In international armed conflict, combatants who violated international humanitarian law would be prosecuted for war crimes but those who respected the law would be free from prosecution. This should be contrasted with the situation in internal armed conflict, where fighters would be prosecuted either way, whether for violations of international humanitarian law or for taking part in hostilities. As such, there is little incentive on the part of the fighter to comply with international humanitarian law. At the Conference of Government Experts of 1947, it was noted that limitation of partisans’ right to prisoner of war status ‘might induce them to disregard the laws of war, thus making the position of the occupying Power more difficult and the conflict more pitiless’;\textsuperscript{140} this is equally true of non-state armed groups. If states are unwilling to grant prisoner of war status to fighters or grant them immunity from prosecution as a matter of law, it may be thought that other incentives would have been drawn up in order to induce compliance, but, by and large, this has not been the case.\textsuperscript{141} Article 6(5) of Additional Protocol II, with its exhortation towards the granting of an amnesty, is important but can carry us only so far. Lack of relevant analogy ends all discussion on point.

2 \textit{Filling in the Gaps}

Yet there is no reason why there should be a gap in international humanitarian law as regards either of these two areas. The law of belligerent occupation is, in reality, a composite category which contains a number of different rules. The composite category should be broken down into its component parts in order to ascertain which rules can be applied to territory under the control of non-state armed groups and which cannot.

Certain general protections and prohibitions contained in the law of belligerent occupation are already applicable to internal armed conflict, whether through comparable treaty provisions or through customary international law – for example, the protection of civilian hospitals; the prohibition of collective penalties, pillage, and reprisals; the prohibitions of deportation and forcible transfer; and the right to due proceedings in accordance with the principles of natural justice.

\textsuperscript{137} See, e.g., ICRC Commentary on the Additional Protocols, supra note 24, at 1332; Crawford, supra note 136, at 74.
\textsuperscript{138} Solf, supra note 135, at 59.
process and judicial guarantees. These would remain applicable. The principles behind other rules, although more controversial, equally may be applicable. Take, as an example, the maintenance of law and order in the territory under the control of the armed group. Can it really be said that the armed group is under no responsibility to maintain law and order in the territory under its control? Or, rather, the principle expressed in Article 43 of the Hague Regulations could have some role to play: ‘[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country’. There is respected authority for the view that such rules are unworkable in situations of internal armed conflict. However, of late, views to the contrary have started to be expressed. The alternative would be that there is no entity both able and responsible for maintenance of law and order in the territory in question. This is not to say that we can transpose the entirety of the law of belligerent occupation ipso facto and without more to regulate the territory controlled by non-state armed groups. Other rules of the law of belligerent occupation may remain inapplicable. Issues relating to protected persons, taxation, or the requisitioning of property may prove difficult to apply. What this demonstrates is the need to move beyond the idea that the entire category of ‘the law of belligerent occupation’ has no applicability to internal armed conflict. If we go back to one of the earliest examples of conventional regulation of internal armed conflict, the Tratado de Regularización de la Guerra, concluded between Simón Bolívar and Pablo Morilla in 1820, that Convention did include a provision on occupied territory, and provided that inhabitants of occupied territory ‘shall be respected, their liberty and security shall be guaranteed, whatever may be or may have been their opinions, sentiments, services and conduct with respect to the warring parties’. The difficulties are not insurmountable.

When we do regulate by analogy, we also need to look beyond analogy to the law of international armed conflict alone. Analogy to other areas may also prove useful. Thus, if we continue with the example of the maintenance of law and order in the territory under the control of the armed group, analogy to the courts of unrecognized governments may be instructive. For example, applying the approach taken by the International Court of Justice in its Namibia advisory opinion to the situation at hand, while official acts of the non-state armed group in respect of the territory under its control may be invalid, this invalidity would not extend to acts ‘which can be ignored only

142 Baxter, supra note 127, at 531.
144 However, even the concept of protected persons has now been interpreted using ideas of ‘allegiance and control’: Prosecutor v. Tadić Judgment, IT-94-1-A, 15 July 1999, at para. 168.
145 For a rare view to this effect see Fleck, supra note 135, at 628.
146 Translation of the author. Art. 11 reads: ‘Los habitantes de los pueblos que alternativamente se ocuparen por las armas de ambos gobiernos serán altamente respetados, y gozarán de una absoluta libertad y seguridad, sean cuales fueren o hayan sido sus opiniones, destinos, servicios y conducta con respecto a las partes beligerantes’.
to the detriment of the inhabitants of the territory’. Or, to turn to a situation closer to the one in question, the United States Supreme Court, in considering the status of certain confederate ‘legislation’, reasoned that ‘acts necessary to peace and good order among citizens . . . which would be regarded as valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government’. Such approaches may help us in our consideration of how to regulate territory under the control of non-state armed groups.

The second gap in regulation identified above related to the lack of an equivalent to combatant immunity and the prisoners of war regime. Yet the applicability of the prisoners of war regime to internal armed conflict is far more nuanced than we give it credit for. There is an important distinction between prisoner of war status and treatment of individuals as prisoners of war. Even if captured ‘fighters’ do not benefit from prisoner of war status, they may well be afforded treatment akin to that of prisoners of war. Along these lines, the UK Military Manual provides that ‘[w]herever possible, treatment equivalent to that accorded to prisoners of war should be given’. And in many respects, treatment akin to that afforded to prisoners of war can indeed be provided, the relevant rules finding a parallel in the law of internal armed conflict. Thus, in such areas as humane treatment, conditions of detention, and due process guarantees, there are equivalent rules in the law of internal armed conflict.

Even on the specific issue of immunity from prosecution, the situation is rather nuanced. The law has us believe that combatant immunity has no place in internal armed conflict, and that may well be true as a matter of law, but the practice is rather more complicated. In large-scale internal armed conflicts, states often do grant prisoner of war status, or they may refrain from prosecution, or grant amnesty. In the first few months of 2010 alone, an amnesty was enacted in Afghanistan and imprisoned members of the Justice and Equality Movement (JEM) were released as part of a ceasefire agreement in Sudan. However, some aspects of the rules may be difficult, if not impossible, to transpose, for example the rules relating to the identification of prisoners of war, the provisions relating to the financial resources of prisoners of war, or the Protecting Powers regime. As with the law of belligerent occupation, then, the prisoners of war regime is a composite category which needs breaking down into

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150 UK Ministry of Defence, supra note 9, at 390.
151 See Crawford, supra note 136, at 78–117.
152 Common Art. 3; Additional Protocol II, Arts 4, 6.
153 This was true of, e.g., the Swiss civil war, the US civil war, the Spanish civil war, the Algerian war of independence, the Nigerian (Biafra) civil war, and the armed conflicts in Bosnia and in Croatia.
155 Geneva Convention Relative to the Treatment of Prisoners of War, Arts 4 and 58–68.
its component parts. Only then will it become apparent which rules are suitable for transposition to an internal armed conflict and which are not. As James E. Bond has noted, ‘[a]ssimilating a rebel to a prisoner of war for one purpose does not dictate assimilating him to a prisoner of war for all purposes’.  

Regulation by analogy works only to the extent that there is an analogy to be had. Where there is no analogous rule or the relevant rule is not appropriate, gaps in regulation are created. These gaps need to be identified and filled. This could be done through breaking down composite categories or by drawing on areas other than the law of international armed conflict. A greater regard to the practice of internal armed conflict may also inform the content of the law.

B Binding All Parties by All Rules

1 Treaty Law

It is crucial for the principle of equality of belligerents that all the rules which regulate internal armed conflict are binding on all the parties involved in the conflict. Given that treaties are binding only on parties to them, a difficulty immediately becomes apparent. Are international humanitarian law treaties intended to bind armed groups? The answer – yes – is relatively straightforward with respect to certain treaties. Common Article 3, the 1954 Hague Convention, the Convention on CCW (as amended), and Amended Protocol II to the Convention on CCW all provide that ‘each party to the conflict shall be bound to apply’ certain rules. In treaties which apply to internal armed conflict, it is usual to refer to the ‘parties to the conflict’ so as to make it clear that all parties to the armed conflict – whether states or armed groups – are bound by the relevant instrument. Additional Protocol II does not contain reference to ‘parties to the conflict’. The ICRC draft had proposed a provision that ‘[t]he rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them’, however, the provision was deleted. Importantly for our purposes, deletion was not undertaken because the Protocol was intended to bind states alone; rather, it hinged upon states’ concern with affording non-state armed groups recognition. Thus, it too was intended to be binding on states and armed groups alike. The question then arises how these treaties bind non-state armed groups when they are not parties to them, but that issue will not be taken up here.


157 Common Art. 3; 1954 Hague Convention, Art. 19; Convention on CCW, Amended Art. 1(3); Amended Protocol II to the Convention on CCW, Art. 1(3).

158 Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Art. 5, in Official Records, supra note 1, i.

159 See ICRC Commentary on the Additional Protocols, supra note 24, at 1345; Abi-Saab, supra note 4, at 231; Moir, supra note 4, at 96.

However, the answer to whether conventional law is intended to bind non-state armed groups is rather more difficult in respect of certain other treaties. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict usefully illustrates the point. The Optional Protocol provides that ‘[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years’. 161 Does the provision purport to create obligations for states and armed groups? Views on the question are mixed, but the majority (and, it is suggested, better) view is that the provision is binding on states alone and does not purport to bind armed groups. 162 Accordingly, it would seem that it was intended to bind only one of the parties to an internal armed conflict.

It would be convenient to explain the Optional Protocol away by reference to its nature as a human rights instrument, and to say that international humanitarian law instruments applicable in internal armed conflict bind all parties to the conflict. However, that is not always clear. Article 1 of the Second Protocol to the 1954 Hague Convention, which governs international and internal armed conflicts alike, defines the word ‘Party’ as ‘a State Party to this Protocol’. 163 Thus, the phrase ‘Parties to the Conflict’ in the Protocol refers to states which are both parties to the Protocol and parties to the armed conflict. 164 At the final plenary meeting of the drafting of the Protocol, the Chairman of the Drafting Committee stated that ‘[t]he Drafting Committee considered that the term “parties to a conflict” could also apply to non-State parties to a conflict by virtue of Article 22 which provides that the Second Protocol applies to non-international armed conflicts and that this Protocol is to be interpreted in that sense’. 165 This is a useful clarification; however, it is likely that only in certain instances will the phrase ‘parties to the conflict’ be read as inclusive of non-state armed groups. For example, Article 11(9) of the Protocol provides for communication with the International Committee of the Blue Shield by Parties to the conflict, and it is not clear whether this would include non-state armed groups. 166 It is unlikely that that was the intention, as, usually, provisions relating to interaction with third states or international organizations are limited to

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161 Art. 4(1).
163 Art. 1(a).
165 Ibid., at para. 36.
166 See Henckaerts, ‘New Rules for the Protection of Cultural Property in Armed Conflict’, 835 IRRC (1999) 593, at n. 65, who notes that the issue was not considered.
states. However, I am not seeking to answer the question here; rather, to illustrate that whether states, in concluding international humanitarian law treaties, intend to bind all parties involved in an internal armed conflict is not always entirely clear.

To illustrate the issue further, consider the Ottawa Convention on Anti-Personnel Mines and the Convention on Cluster Munitions. The Ottawa Convention is applicable to internal armed conflict. However, its Article 1 provides that ‘[e]ach State Party’ undertakes never to do certain things; nowhere is there reference to non-state armed groups or ‘parties to the conflict’. The efforts of the International Campaign to Ban Landmines and of Colombia to include non-state armed groups within the Convention proved unsuccessful. The Convention on Cluster Munitions is also applicable to internal armed conflict. That Convention does contain reference to armed groups, but only in its preamble: ‘[r]esolved also that armed groups distinct from the armed forces of a State shall not, under any circumstances, be permitted to engage in any activity prohibited to a State Party to this Convention’. This is a considerable step forward being the first time that a multilateral international humanitarian law convention contains express reference to armed groups. However, that makes it all the more surprising that the body of the Convention is limited to states parties.

The lack of express application to non-state armed groups has proved problematic for certain states involved in an internal armed conflict. For example, Sri Lanka expressed the view that it would ratify the Ottawa Convention only when the LTTE made a similar commitment; and Sudan ratified the Ottawa Convention only after the SPLM/A signed Geneva Call’s Deed of Commitment, which in large part reflects the Ottawa Convention. States parties to the Ottawa Convention more generally have recognized the need for engagement with non-state armed groups in the prohibition of anti-personnel mines. At the Lugano Conference of Government Experts, ‘[t]here was widespread agreement among the experts that reciprocity would be an essential condition for the effective prohibition or restriction of the use of any given conventional weapon’. This clearly remains true today.

167 See, e.g., Protocol on Explosive Remnants of War (Protocol V to the CCW Convention), which applies to internal armed conflict (Art. 1(3)) and limits its provisions on co-operation and assistance to ‘High Contracting Parties’ (Arts 6–11).


169 See Maslen, supra note 168, at 67 and 77–78.


171 Docherty, supra note 162, at 961. Observes: ‘[w]hile only a statement of resolve, this clause has rhetorical force in that it uses the word “shall,” the strongest language of obligation under the law. NSAGs cannot legally join the convention, but the clause implies that states parties have a duty to prevent them from violating its provisions’.

172 Bongard, Decrey Warner, and Somer, supra note 126.

173 See Declaration of the Third Meeting of the States Parties (Managua Declaration), at para. 12.

These three instruments – the Second Protocol to the 1954 Hague Convention, the Ottawa Convention, and the Convention on Cluster Munitions – illustrate the approach described above, that treaties are drafted with international armed conflict in mind. This leads to difficulty when they are applied to an internal armed conflict in which at least one of the parties is a non-state armed group. It would pose even greater difficulty to internal armed conflicts fought between opposing armed groups. Accordingly, insufficient account has been taken of the difference in actors involved in the various types of armed conflict, and this has led to real difficulties for states involved in internal armed conflicts. When drafting an international instrument designed to apply to internal armed conflict, it is crucial that it binds, and is intended to bind, all parties to the conflict.

2 Human Rights Obligations of Non-state Armed Groups

The problem of equal application of the law arises not just in respect of conventional international humanitarian law. If international human rights law is going to be used to regulate directly internal armed conflict, the question arises whether non-state armed groups have human rights obligations. For a long time this question was overlooked, not least by international humanitarian lawyers; however, more recently, the issue has started to attract attention.

A number of theoretical bases have been put forward to explain how and why non-state armed groups may be bound by international human rights law. Mention can be made of: (1) equality of obligation – if one party is bound by an obligation, so too must the other side be bound;\(^{175}\) (2) intrinsic principles, whether expressed as ‘demands of the international community’,\(^{176}\) as ‘one of the great principles of international law’ observable in ‘borderline situations outside the normal configurations of inter-State relationships’;\(^ {177}\) or as an ‘integral part of [the] international order for the maintenance and reestablishment of peace and security’;\(^ {178}\) (3) obligations as the correlative of rights\(^ {179}\) – if non-state armed groups benefit from human rights, they must also


\(^{176}\) See, e.g., Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, E/CN.4/2006/53/Add.5 (27 Mar. 2006), at para. 25; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel, A/HRC/2/7, 2 Oct. 2006, at para. 19.

\(^{177}\) Tomuschat, supra note 175, at 586–587.

\(^{178}\) Institut de Droit International, ‘The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties’ (Session of Berlin, 1999), Art. III.

be subject to obligations; and (4) through effective control over territory.\textsuperscript{180} Of these rationales, the ‘territorial control’ explanation has attracted the most support and represents, by some margin, the predominant view to date.\textsuperscript{181} It is sometimes expressed as an expectation of the international community,\textsuperscript{182} while at other times as a binding legal obligation on the part of the non-state armed group.\textsuperscript{183}

However, even if we are able to find a theoretically-satisfying reason to explain how non-state armed groups are bound by international human rights law, the matter does not end there. Two additional hurdles need to be overcome. First, we will have to shift our attention to the state. In addition to non-state armed groups themselves, states will have to accept that non-state armed groups are bound by international human rights law. And this proposition may be difficult for states to accept for fear of likening non-state armed groups to states.\textsuperscript{184} Hence, by and large, the view that non-state armed groups have human rights obligations has been expressed by UN bodies and truth commissions.\textsuperscript{185} However, it is true that, occasionally, states take the

\textsuperscript{180} Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2005/7, supra note 131, at para. 76.

\textsuperscript{181} The approach taken by the Special Rapporteur on extrajudicial, summary, or arbitrary executions, ibid., has been adopted in later reports of the Special Procedures mechanisms of the Human Rights Council. See, e.g., ‘Human Rights in Palestine and Other Occupied Arab Territories’, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, 25 Sept. 2009, at paras 305 and 1370; Report of four special procedures mechanisms, A/HRC/2/7, supra note 176, at para. 19; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Sri Lanka, E/CN.4/2006/53/Add.5 (27 Mar. 2006), at paras 26–27; ‘Human Rights Situation in Palestine and Other Occupied Arab Territories’, Combined report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Rapporteur on violence against women, its causes and consequences, the Representative of the Secretary-General on the human rights of internally displaced persons, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, the Special Rapporteur on the right to food, the Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on the right to education and the independent expert on the question of human rights and extreme poverty, A/HRC/10/22, 20 Mar. 2009, at para. 22.


\textsuperscript{184} This seems to be recognized in the Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions, E/CN.4/2005/7, supra note 131, at para. 76.

\textsuperscript{185} For the practice see Fleck, supra note 179; Clapham, Human Rights Obligations of Non-State Actors, supra note 121, at 281–289; Clapham, ‘Human Rights Obligations of Non-State Actors in Conflict Situations’, 88 IRRC (2006) 491.
position that non-state armed groups are bound by human rights obligations.\textsuperscript{186} This is not to say that the idea always will be limited to non-state circles. Indeed, it is often at this level that novel concepts are first introduced before later being accepted by states. However, to date, our (limited) focus has been on persuading non-state armed groups to acknowledge that they are bound by international human rights law; states themselves may not always be persuaded.

Secondly, and more problematically, the method by which international human rights law binds non-state armed groups may not fit with the situations in which human rights law purports to regulate internal armed conflict. As discussed above, the most accepted means by which human rights law is considered to be binding on non-state armed groups is through territorial control. When armed groups are in effective control over a certain quantum of territory, human rights obligations are considered to attach to them. Below this threshold, armed groups may not be under an obligation to comply with human rights. Yet, if we refer back to our discussion of when human rights law purports to regulate internal armed conflict, it was precisely the opposite situation. It was below the level of an Additional Protocol II armed conflict that the conflict would be regulated by international human rights law, i.e., when the non-state armed group does not exercise territorial control.\textsuperscript{187} Clearly, this mismatch is problematic if human rights law purports to regulate internal armed conflicts.

To be clear, this is not to say that human rights obligations cannot be envisaged as binding non-state armed groups and therefore regulating internal armed conflict directly. Nor am I arguing that the hurdles cannot be overcome. Rather, what this part reveals is that resort to another body of law – here international human rights law – without consideration of the differences between it and international humanitarian law may defeat the purpose for which it is intended to be used.

C Tailoring Existing Norms to Meet the Particularities of the Situation

1 Capabilities of Non-state Armed Groups

The involvement of non-state armed groups has an impact, not just on which norms are applicable to internal armed conflict, but also on the content of those norms. In particular, a difficult issue relates to the capabilities of non-state armed groups.\textsuperscript{188} During the Diplomatic Conference of 1974–1977, many spurious points were made by delegates in an attempt to prevent or minimize regulation of internal armed conflict through international law. Primary among these were references to state sovereignty.\textsuperscript{189} However, one concern adduced by several delegations was justified, namely whether non-state armed groups had the capacity to comply with the rules being drafted.\textsuperscript{190} As things turned out, delegates need not have been overly

\textsuperscript{186} See Tomuschat, supra note 175, at 576.

\textsuperscript{187} See supra, text at notes 87–88.

\textsuperscript{188} See Sassoli, supra note 141.

\textsuperscript{189} See supra note 1.

\textsuperscript{190} Official Records, supra note 1, vii, at 61, para. 11 (Pakistan); viii, at 309, para. 55 (India); viii, at 337, para. 71 (Canada); viii, at 339–340, para. 82 (Iran); viii, at 340, para. 87 (India); viii, at 345, para. 18 (Italy).
concerned. The rules making their way into the final text of Additional Protocol II require minimal capacity on the part of the armed group, several of them primarily calling for restraint.\textsuperscript{191} As such, the requirement of the Protocol for ‘armed groups which, under responsible command, exercise such control over a part of a territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol’\textsuperscript{192} was simply not needed. Indeed, as some states later opted to do, the rules found in Additional Protocol II could actually be applied in an armed conflict of a lower threshold, for example that of common Article 3.\textsuperscript{193} And the Additional Protocol II threshold has attracted severe criticism.\textsuperscript{194}

However, the threshold of the Protocol should not detract from the fact that there is an ‘intimate nexus’ between threshold and normative content.\textsuperscript{195} As the delegate from Canada to the 1974–1977 Diplomatic Conference put it, ‘[t]he key to the height of [the] threshold we suggest lies in the expression “to implement this Protocol”, for the threshold of the Protocol will now clearly depend upon the contents of the Protocol’.\textsuperscript{196} And during the Diplomatic Conference, many states were unwilling to express their position on the applicability and content of particular rules without first knowing the threshold for application of the Protocol.\textsuperscript{197} That the normative content and the threshold for application of the Protocol may seem out of sync does not render suspect the very existence of a nexus. This nexus deserves some consideration, given the tendency in recent years, by some highly influential bodies, to lower the threshold while, at the same time, increasing the normative content.

In considering whether certain rules of international humanitarian law are applicable to an internal armed conflict, the ICTY has taken the view that it need only determine whether there existed an armed conflict at the time in question. It has dispensed with the further issue of whether the Additional Protocol II criteria are satisfied. Thus, customary rules of Additional Protocol II have been applied to all internal armed conflicts and not simply those meeting the Additional Protocol II threshold.\textsuperscript{198} On one occasion, the ICTY seems to have gone so far as to say that the Additional Protocol

\begin{footnotes}
\item[191] E.g., Arts 4(2), 13(2), 14–17.
\item[192] Additional Protocol II, Art. 1(1).
\item[193] See Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (1987). One of the ‘Recommended Understandings and Reservations’ reads: ‘[t]he United States declares that it will apply this Protocol only to those conflicts covered by Article 3 common to the Geneva Conventions of 12 August 1949 and to all such conflicts, and encourage all other States to do likewise’ (at 7).
\item[194] See, e.g., Official Records, supra note 1, vii, at 84 (Cameroon); vii, at100 (Italy); vii, at 199, para. 30 (Syria). See also Cullen, ‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law’, 183 Military L Rev (2005) 66, at 95.
\item[196] Official Records supra note 1, vii, at 77. See also Delegate of ICRC, viii, at 204, para. 15; Delegate of ICRC, ix, at 234, para. 52.
\item[197] See, e.g., ibid., xi, at 248, para. 17 (Delegate of Indonesia); xi, at 249, para. 19 (Delegate of Denmark).
\item[198] See, e.g., Strugar Trial Judgment, supra note 33, at 220–222, 227–233.
\end{footnotes}
II threshold is not required even for the application of Additional Protocol II *qua* treaty. 199 The general trend of ‘reading out’ the strict Additional Protocol II threshold is continued in the Rome Statute. The list of war crimes in internal armed conflict is split into violations of Common Article 3 (Article 8(2)(c) of the Rome Statute) and other serious violations of the law of internal armed conflict (Article 8(2)(e)). There is some confusion whether the latter provision is subject to a higher threshold than the former, given that it applies in a ‘protracted armed conflict’. 200 However, the better (and majority) view is that it is not: and even if it is, the threshold is not that of Additional Protocol II. 201 This trend of omitting the Additional Protocol II threshold is taken further in the customary international humanitarian law study which does not introduce any threshold for the application of the various rules identified. 202

Increasing the normative content while simultaneously reducing or removing any threshold brings with it a danger of overloading. At some stage, a tipping point will be reached whereby the normative content overwhels the capacity of an armed group. To increase the obligations to such an extent that the armed group is unable to meet them serves no useful purpose. The danger is that the armed group cannot comply with them, which may, in turn, lead to non-compliance on the part of the state; this leads to violations spiralling out of control. Alternatively, increasing the normative content may have the unintended effect of raising the threshold at which an internal armed conflict can be said to exist. An internal armed conflict is defined by reference to a certain intensity of violence and a certain measure of organization on the part of the armed group. 203 The latter is judged, in large part, on the ability of the armed group to implement international humanitarian law and to enforce breaches of it. 204 Increasing the content of international humanitarian law may be, then, to require a greater degree of organization of the armed group, raising the threshold of an internal armed conflict. Just as scope affects content, content affects scope.

The capabilities of non-state armed groups also come into question in resorting to international human rights law. International human rights law was designed for states. As such, the question has to be asked whether non-state armed groups are in a 200 Rome Statute, Art. 8(2)(f). 201 See generally Sivakumaran, ‘Identifying an Armed Conflict Not of an International Character’, in C. Stahn and G. Sluiter (eds), The Emerging Practice of the International Criminal Court (2009), at 363. 202 This has been criticized. See Bothe, ‘Customary International Humanitarian Law: Some Reflections on the ICRC Study’, 8 YIHL (2005) 143, at 175. 203 See Prosecutor v. Tadić, Opinion and Judgment, IT-94-1-T, 7 May 1997, at para. 562; Limaj Trial Judgment, supra note 199, at para. 84; Prosecutor v. Haradinaj et al., Judgment, IT-04-84-T, 3 Apr. 2008, at paras 37–60. 204 Additional Protocol II, Art. 1(1); Limaj, supra note 199, at paras 113–117.
position to be able to comply with them. Take, as an example, one of the key contributions of international human rights law to the right to life in armed conflict. If an individual is killed as a result of the use of force, an investigation has to be carried out. Not only should the investigation be independent and impartial, but it should involve \textit{inter alia} evidence-collection and the reconstruction of events, ballistic examination, and forensic examination and autopsy.

However, it is important not to overstate the point. The danger of overloading is not true of all non-state armed groups; some do have significant capabilities. For example, it is often thought that non-state armed groups are incapable of establishing courts; yet, many have done precisely that. This is true, for example, of the LTTE in Sri Lanka, the Frente Faribundo Martí para la Liberación Nacional (FMLN) in El Salvador, the CPN-M in Nepal, the RUF in Sierra Leone, the FARC in Colombia, the NDF-P in the Philippines, the Kosovo Liberation Army (KLA), and the SPLM/A and the JEM in Sudan. Of course many others do not, and cannot, create courts. What this demonstrates is that armed groups are simultaneously more and less capable than we give them credit for. Armed groups are not monolithic entities. As with states, the term ‘armed group’ captures a wide array of actors, from those in control of a sizeable tract of territory and which act as \textit{de facto} states, to those which barely meet the international humanitarian law requirement of organization. Some engage solely in guerrilla tactics; others, albeit far fewer, have air and sea capabilities. Many armed groups are divided into military wings, intelligence wings, and political wings, the last often based abroad; and some armed groups have divisions such as those on human rights. As such, although we speak of ‘armed groups’, it is important to realize that there are many different types of armed groups, different divisions within an armed group, and some armed groups are more capable than others. This has consequences for the normative content of particular rules.

2 Translating the Norms

Some of the concerns surrounding the capabilities of non-state armed groups would be less problematic if the content of the more demanding norms were ‘translated’ to meet the particularities of an internal armed conflict. However, this is not something we tend to do. Instead, we focus on the passage from \textit{Tadić} to the effect that that which is prohibited in international armed conflict cannot but be prohibited...
We overlook a later passage which makes it clear that ‘this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts’. In our effort to humanize internal armed conflict and to provide maximum protection to those caught up in it, these words of caution are ignored. This is done for the noblest of reasons, but it may prove counterproductive.

Certain rules of the law of international armed conflict are applicable to internal armed conflict without more; they translate across perfectly. Others are not so readily transferable; they do not provide the best fit and require some adjustment. Thus, translation, in this context, refers to the moulding of the rule to meet the specificities of the internal armed conflict, including the abilities of non-state armed groups. This is not to say that particular rules should be watered down almost out of existence. The core of the norm would remain intact. However, outside that core, there is room for interpretation so as to make the obligation achievable for armed groups. The idea that a norm contains a core alongside associated obligations already finds expression in conventional international humanitarian law. For example, Article 5(1) of Additional Protocol II contains the core of the protections afforded to detained persons: ‘the following provisions shall be respected as a minimum’. Beyond this minimum core, other obligations arise, but they are dependent on the capacity of the detaining entity: ‘[t]hose who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions’.

A related idea is that of the general norm and more specific norms linked with the general norm. There is usually little problem at the level of generality: ‘[t]he civilian population as such, as well as individual civilians, shall not be the object of attack’; ‘children shall be provided with the care and aid they require’. It is at the level of detail that difficulties arise. For example, consider a norm which finds mention in Common Article 3, Additional Protocol II, and the law of international armed conflict, say protection of the wounded and sick. Common Article 3 provides, without more, ‘[t]he wounded and sick shall be collected and cared for’. Additional Protocol II puts some flesh on these bare bones, containing as it does an entire part on the wounded, sick and shipwrecked. It refers to respect and protection for the wounded and sick, their humane treatment, and medical care; searching for and collection of the wounded and sick; and specific protection for medical and religious personnel and medical

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211 Tadić Interlocutory Appeal on Jurisdiction, supra note 9, at para. 119.
212 Ibid., at para. 126.
213 Additional Protocol II, Art. 5(1).
214 Additional Protocol II, Art. 5(2) (emphasis added).
215 Additional Protocol II, Arts 14 and 4(3).
216 Common Art. 3(2).
217 Additional Protocol II, Pt III.
218 Additional Protocol II, Art. 7.
units and transports.\textsuperscript{220} The law of international armed conflict contains an entire convention on the wounded and sick.\textsuperscript{221} That convention, in addition to providing for the general protections which find reflection in Common Article 3 and Additional Protocol II, contains such provisions as medical examination prior to the burial or cremation of the dead and the creation of a Graves Registration Service.\textsuperscript{222} It is these minutiae which go beyond the capabilities of many a non-state armed group. Thus, as Frits Kalshoven has written, ‘it seems safe to state that all the sophisticated rules of the [Geneva] Conventions, which actually are based on the presupposition of a highly organized governmental apparatus, have no place among the principles applicable in non-international armed conflicts as a matter of customary law’.\textsuperscript{223}

Let me reiterate that I am not advocating ‘reading down’ the protections of international humanitarian law. Rather, I am suggesting that some of the norms need adapting to meet the realities of the situation. In this there is nothing particularly revolutionary. After all, this is the approach already taken by conventional international humanitarian law. A number of Additional Protocol II provisions explicitly take into account the capacity of the actor, through reference to ‘all appropriate steps’, ‘within the limits of their capabilities’, ‘to the fullest extent practicable’, ‘all possible measures’, and the like.\textsuperscript{224} Generally speaking, there has been no objection to these provisions, nor should there be provided they are interpreted in a sensible manner. Indeed, at the 1974–1977 Diplomatic Conference, the ‘apparent tendency to tone down the imperative obligation . . . by using such phrases as “within the limits of their capabilities”’ was criticized, not because of the move from absolute to relative obligations, but because ‘it was a recognized general principle that no one was compelled to do the impossible’.\textsuperscript{225}

And there exist more striking examples in practice of the tailoring of norms to take into account non-state armed groups. Two examples illustrate the point. The definition of torture in international law, at least in international human rights law, requires the involvement of ‘a public official or other person acting in an official capacity’.\textsuperscript{226} Originally considered to refer to a state official, the ICTY held that ‘the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law’.\textsuperscript{227} This was due primarily to the involvement of non-state armed groups in

\textsuperscript{220} Additional Protocol II, Arts 9–12.
\textsuperscript{221} Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I).
\textsuperscript{222} Geneva Convention I, Art. 17.
\textsuperscript{224} Additional Protocol II, Art. 4(3)(b) (‘all appropriate steps shall be taken’); Art. 5(2) (‘within the limits of their capabilities’); Art. 7(2) (‘to the fullest extent practicable’); Art. 8 (‘all possible measures’); Art. 17 (‘all possible measures’).
\textsuperscript{225} Official Records, supra note 1, viii, at 345, para. 18 (Delegate of Italy).
\textsuperscript{226} Convention against Torture, Art. 1.
\textsuperscript{227} Kunarac Trial Judgment, supra note 80, at para. 496. This was upheld by the Appeals Chamber: Prosecutor v. Kunarac, Kovac and Vukovic, Judgment, IT-96-23/1-A, 12 June 2002, at para. 148.
internal armed conflict. Similarly, in the context of conscription of child soldiers, the Special Court for Sierra Leone took the view that although conscription usually refers to ‘government policies requiring citizens to serve in their armed forces’, it cannot be limited to such a formal process given that armed groups are not conventional military organizations.\(^\text{228}\)

Accordingly, it is well-established that international humanitarian law is ‘not grounded on formalistic postulates’.\(^\text{229}\) And it has been said that, ‘from the moment, if not before, that it was accepted that humanitarian law applies to non-international armed conflicts, then it follows that definitions included in the provisions that apply to such conflicts ... cannot be defined solely in terms of State actors’.\(^\text{230}\) If these propositions are true, and it is suggested that they are, they surely work both ways. Just as the rules may be interpreted broadly so as to hold non-state armed groups accountable, they may also be interpreted in a way that makes compliance with them feasible. After all, Common Article 3 encourages non-state armed groups, together with the state in question, ‘to bring into force, by means of special agreements, all or part of the other provisions of the [Geneva] Convention[s]’. And these special agreements are considered a useful means through which respect for international humanitarian law can be ensured.\(^\text{231}\) It simply cannot be that we are encouraging armed groups to bring into force law with which they are incapable of complying.\(^\text{232}\)

What this means, in turn, is that there has to be a certain ‘shaping’ of the norm. Let us take, as an example, the setting up of courts in internal armed conflicts. According to Common Article 3, the courts in question have to be ‘regularly constituted’.\(^\text{233}\) If this is interpreted as requiring legal enactment, the interpretation should not be limited to state law, for that would be to render the courts of non-state armed groups inherently unlawful. Rather, it should be enough that the courts are established pursuant to a ‘law’ of the armed group.\(^\text{234}\) Similarly, due process guarantees should be interpreted in a way that both respects the minimum core – the essence of a fair trial – but is achievable by the armed group.\(^\text{235}\) As the FMLN argued, ‘the type of tribunal and law required by Protocol II have to be adapted to the conditions and capacity of the contending party; the particular mechanisms necessary for defense must be adjusted


\(^{229}\) *Tadi´ Appeal Judgment*, supra note 9, at para. 96; *Brima*, supra note 228, at para. 734.

\(^{230}\) Cryer, *supra* note 98, at 522.


\(^{232}\) For the sake of clarity it should be noted that this approach differs from the criticism of the Optional Protocol to the Convention on the Rights of the Child discussed above. The translation idea is that the norm in question needs to be translated to the situation in which it is being applied, such translation including tailoring to the capabilities of non-state armed groups. The approach taken by the Convention on the Rights of the Child was more crudely that of different, lower, standards for states as opposed to non-state armed groups irrespective of capacity.

\(^{233}\) Common Art. 3(1)(d).


to the real possibilities of the zone where the trial is held’. Ultimately, as Marco Sassòli has noted, all the rules must be able to be complied with by both sides.

D Revising the Methodology for Determining the Rules

Modelling on the law of international armed conflict has affected not just the substantive rules of the law of internal armed conflict but also the methodology by which those rules are determined. All our attention has been on materials relevant to the international armed conflict, namely the grand multilateral international humanitarian law treaties, customary international law, and states’ military manuals. The very existence of materials concluded in, and particular to, internal armed conflict tends to be overlooked. For example, unilateral declarations issued by states in an internal armed conflict are rarely considered; bilateral agreements concluded between states and armed groups are ignored; and states’ action plans on the disarmament, demobilization, and reintegration of child soldiers are omitted from consideration. These materials are sometimes played down by the international community because they are viewed as politically motivated, short-lived, or papering over real differences. At other times, they are simply overlooked, or forgotten about because rarely do they have a counterpart in international armed conflict. Thus, for example, our analysis usually commences with the Lieber Code of 1863, yet there are at least two important examples of ad hoc regulation which pre-date that instrument. The Tratado de Regularización de la Guerra of 1820, concluded during the Colombian war of independence, contains provisions on the treatment and exchange of prisoners of war, the treatment of the wounded and sick, burial of the dead, and treatment of persons living in occupied territory. Along similar lines, the Instructions of General Dufour issued during the Swiss civil war of 1847 contain provisions on the treatment of prisoners and hostages, the wounded and sick, as well as the protection of religious property, and precautions against damage to property.

On occasion, these ad hoc instruments are noted and they do make an impact. The already mentioned Lieber Code was essentially a unilateral declaration issued by President Lincoln during the American civil war. It has had a greater impact than anyone could have imagined, leading as it did to much of the early codification of international humanitarian law. The 22 May 1992 Agreement between the warring factions in the conflict in the former Yugoslavia has been utilized to varying degrees as the basis for criminal prosecution by the ICTY. The ICTY Appeals Chamber in the Tadić Interlocutory Appeal on Jurisdiction did take bilateral agreements and states’

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237 Sassòli, supra note 141.
238 Tratado de Regularización de la Guerra (26 Nov. 1820).
239 Instructions of General Dufour (4 Nov. 1847; 5 Nov. 1847).
241 Agreement of 22 May 1992, reproduced in Sassòli and Bouvier, supra note 116, at 1765. For use by the ICTY, see, e.g., Tadić Interlocutory Appeal on Jurisdiction, supra note 9, at paras 88–89, 143; Galic’s Trial Judgment, supra note 57, at paras 24–25; Galic’s Appeal Judgment, supra note 43, at paras 81–85.
unilateral declarations into account in reaching the conclusion that there was a body of international humanitarian law applicable in internal armed conflict.\footnote{Tadić, supra note 9, at paras 100–127.} However, these are very much exceptions to the general approach of their being overlooked.

If states’ unilateral declarations, bilateral agreements, and the like are omitted from consideration, then those of non-state armed groups are ignored altogether. Yet there exist a vast number of such instruments, which together constitute a repository of rich information hitherto untapped. These instruments are of different sorts, and although there is not always a clear division between them, they usefully can be grouped along the following lines:

- **Unilateral declarations**: Unilateral declarations usually take the form of commitments to abide by the Geneva Conventions and/or Additional Protocols.\footnote{E.g., the declaration of the LTTE, 24 Feb. 1988; or of the Kurdistan Workers’ Party (PKK), 24 Jan. 1995.} However, they also include deeds of commitment, often on land mines and concluded under the auspices of **Geneva Call**,\footnote{For the Deed of Commitment and the groups in question, 41 at the time of writing, see www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm.} as well as plans of action, usually on child soldiers and concluded under the auspices of the local UN field presence.\footnote{E.g., the ‘Action Plan between the Moro Islamic Liberation Front (MILF) and the United Nations in the Philippines regarding the Issue of Recruitment and Use of Child Soldiers in the Armed Conflict in Mindanao’, 1 Aug. 2009.} They also include unilateral declarations of adherence to Additional Protocol I purportedly pursuant to Article 96(4) of that Protocol.\footnote{E.g., the NDF-P Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, addressed to the Swiss Federal Council, 5 July 1996; NDF-P Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, addressed to the ICRC, 5 July 1996.}

- **Bilateral agreements**: Bilateral agreements between a non-state armed group and the state against which it is in conflict on issues of international humanitarian law are sometimes concluded.\footnote{E.g., the Agreement of 22 May 1992, supra note 244: Memorandum of Understanding of 27 Nov. 1991 (Yugoslavia/Croatia), reproduced in Sassòli and Bouvier, supra note 116, at 1761. For a more recent example see the ‘Agreement on the Civilian Protection Component of the International Monitoring Team’ (Philippines/MILF), 29 Oct. 2009.} These include special agreements as envisaged by Common Article 3 but are wider than that reference. Bilateral agreements are also concluded between non-state armed groups and UN entities or humanitarian agencies, usually on issues relating to humanitarian assistance.\footnote{The classic example on the point is SPLM-United/Operation Lifeline Sudan, Agreement on Ground Rules, May 1996.}

- **Codes of conduct**: Much as states draw up military manuals, non-state armed groups draw up codes of conduct.\footnote{E.g., the Chinese People’s Liberation Army (CPLA)’s ‘Three Main Rules of Discipline’ and ‘Eight Points for Attention’, or the ‘National Resistance Army [of Uganda] Code of Conduct’.} These do not relate solely to issues of international humanitarian law, but rules finding expression in codes of conduct often do map onto international humanitarian law prohibitions. Perhaps the classic...
code of conduct is that of the Chinese People’s Liberation Army, a code which has been adopted by several unrelated non-state armed groups.  

Legislation: Again, just as states enact legislation, so too do non-state armed groups. This is particularly true of armed groups which are in control of territory or which act as de facto states. Such groups tend to have detailed penal codes; others draft constitutions or issue legislation. As with codes of conduct, much of this material does not contain reference to international humanitarian law by name, but through concepts contained therein. Others may be related to human rights issues or the protection of displaced persons.  

Responses to reports of UN entities or human rights organizations: Armed groups sometimes respond to reports of UN special rapporteurs or reports of human rights organizations, challenging particular facts or interpretations of the law. Given that states are encouraged to engage in such dialogue, equally non-state armed groups should be encouraged to enter into a conversation with the relevant body, particularly where the response does not take the form of an outright and unreasoned denial.  

Press releases/other statements: Non-state armed groups have also entered the information age, maintaining websites. These contain inter alia press releases and other statements setting out the groups’ position on various international humanitarian law issues. Statements may also be issued through other organizations.

The normative status of these instruments and this practice is unsettled. Leaving that to one side, they must at the very least inform our interpretations of international humanitarian law. They can provide us with a sense of what has proved acceptable and in which areas there is contestation. We would realize, for example, that a prohibition on the use of land mines is acceptable to a great many armed groups, with 41 signing Geneva Call’s deed of commitment and numerous others prohibiting their

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250 The CPLA’s Eight Points for Attention have been adopted by the RUF of Sierra Leone, as well as other Maoist groups.

251 E.g., the Public Legal Code, 2060 (2003/2004) of the CPN-M.

252 E.g., the Constitution of the Republic of Somaliland; Tamil Eelam Child Protection Act (Act No. 3 of 2006) (of the LTTE).

253 E.g., the ‘Charter of the North East Secretariat on Human Rights’ (of the LTTE); ‘Revolutionary Women’s Law’ (of the Ejército Zapatista de Liberación (EZLN)).


use through internal regulations and the like.\textsuperscript{258} And we would appreciate that a particular area of disagreement surrounds which individuals may be targeted lawfully. The KLA, for example, expressed the position that ‘all Serbian forces, whether the police, the military, or armed civilians, are our enemy’.\textsuperscript{259} And the PKK has opined that it may attack members of the armed forces, contra-guerrilla forces, the intelligence service, the gendarmerie, and village guards.\textsuperscript{260} Along similar lines, the NDF-P has taken the view that it may attack ‘units, personnel and facilities belonging to’ the armed forces, national police, paramilitary forces, and intelligence personnel.\textsuperscript{261} For its part, the FMLN argued that it could capture mayors and members of the civil defence, and target military advisors.\textsuperscript{262} Having regard to such practice would give us a far better sense of the state of international humanitarian law and the likelihood of compliance with particular norms. Greater resort to them in the methodology for determining the rules of the international law of internal armed conflict may also be in order.\textsuperscript{263}

5 Conclusion: Towards a Revised International Law of Internal Armed Conflict

The regulation of internal armed conflict has come a long way. Prior to the 1990s, there existed little by way of regulation in conventional or customary international law. Things have changed almost beyond recognition in the two decades since. The changes have resulted from essentially three approaches – analogy to the law of international armed conflict, resort to international criminal law, and resort to international human rights law. Modelling on the law of international armed conflict has given rise to the identification of a whole host of norms applicable to internal armed conflict. The involvement of international human rights law and international criminal law has given rise to a fleshing out of these rules. The three together have generated what I have called an international law of internal armed conflict. Without the three approaches, it is hard to envisage the existence of such a body at all. It is still difficult to imagine coming so far in such a short a space of time.

However, we are now at a point where critique of the current law and existing approaches may prove useful. To date, our focus has been on the similarities between internal armed conflict and international armed conflict, as well as between international humanitarian law and other relevant bodies of international law. Yet there are important differences between these areas. The actors involved in an internal armed conflict are not identical to those who participate in an international armed conflict. And this difference has important consequences. Resort to other bodies of

\textsuperscript{258} See the practice available at: www.genevacall.org/resources/nsas-statements/nsas-statements-2.htm.

\textsuperscript{259} Interview with Jakup Krasniqi, Spokesman of the KLA, published in Koha Ditore, 12 July 1998.


\textsuperscript{261} NDFP Declaration of Undertaking to Apply the Geneva Conventions of 1949 and Protocol I of 1977, 5 July 1996.

\textsuperscript{262} FMLN, supra note 236, at 8–9.

\textsuperscript{263} Roberts and Sivakumaran, supra note 257.
international law may ignore some of the differences in the ways in which those bodies are constructed and downplay the relationships between the relevant parties. Turning our attention to these differences is required if we are to move to the next stage of regulation, one which develops the law even further, but, more importantly, tailors the existing law to the particularities of the situation.

A wholesale reworking of the area is certainly not what is being argued in this article. Rather, what is being proposed is the need to take a step back in order to identify the difficulties with, and the gaps in, existing regulation. The internal armed conflict would be analysed so as to identify which of its aspects are still in need of regulation – territory under the control of non-state armed groups, and incentives for compliance with international humanitarian law being two obvious examples. Norms would be tailored to meet the particularities of the internal armed conflict. The core of the norm – the essence of the obligation – would remain intact but the norm itself would be shaped by the particularities of the internal armed conflict and the involvement of non-state armed groups therein. In particular, they would be rendered such as to make compliance with them feasible for the non-state armed group. For the majority of norms, it is likely that nothing would change; for others, the margins of the norm may be shaped to fit the situation; for still others, only the core may be applicable.

The methodology by which the rules are discerned may benefit from greater input by non-state armed groups or reference to other areas of law. At the very least, the materials emanating from non-state armed groups would inform the content of the rules and give us a better sense of the state of international humanitarian law from the perspective of non-state armed groups. Resort also would be had to other areas of the law which may inform the situation, such as the law relating to de facto regimes and unrecognized governments. More generally, we would develop our understanding of the workings of non-state armed groups and have greater regard to the practice of internal armed conflicts.

The international law of internal armed conflict bears a heavy burden, tasked as it is with regulating a situation which gives rise to many of the worst atrocities committed today. For it to meet this burden and live up to its promise, it is time to move past the broad-brush approach to regulation. The detail now needs to be filled in, and in a practical and realistic manner. It is to be hoped that with some tweaking, the international law of internal armed conflict can better meet its obligations.