

# THE CHALLENGES OF CLASSIFYING ARMED CONFLICTS IN INTERNATIONAL HUMANITARIAN LAW\*

## Abstract

Under International Humanitarian Law, there are two recognised types of armed conflict, each governed by its legal regime – international armed conflict and non-international armed conflict. Notwithstanding, armed conflicts nowadays encompass a wide array of situations that do not necessarily fit into this traditional armed conflict paradigm. This often creates a lot of difficulties for lawyers, policymakers, and international organisations faced with the challenge of classifying these situations. The complexities that arise from classifying these situations directly impact the applicable law and often have important consequences for armed forces personnel. These complexities often arise due to the limitations inherent in the existing law and the political factors most States employ in their decision-making. This article utilises the doctrinal method. It explores the significance of the existing classification of armed conflicts as well as some modern classifications and whether or not they fit into the existing dichotomy of armed conflicts. It also examines some of the complexities and controversies that arise in the classification of armed conflicts. While advocating for an amendment or creation of new regulations that envisage modern-day conflict, it concludes by demonstrating that through a careful appraisal, the existing legal paradigm may still sufficiently address modern armed conflict situations.

Keywords:, Armed Conflict, Armed Groups, Extraterritorial Armed Conflict, Geneva Conventions 1949, International Humanitarian Law.

## 1. Introduction

International humanitarian law (IHL), also known as the law of war or the law of armed conflicts, is a legal paradigm that seeks, for humanitarian reasons, to mitigate the effects of armed conflict. It aims to protect persons who are no longer participating in hostilities and restricts the means and methods of warfare. However, IHL does not apply to every form of violence. It only applies to situations of armed conflict.<sup>1</sup> The moment an armed conflict is deemed to exist, actions taken in

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<sup>1</sup> Akande Dapo, 'Classification of Armed Conflicts: Relevant Legal Concepts' (August 20, 2012) in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) chapter 3; Oxford Legal Studies Research Paper No 50/2012.

relation to that conflict must comply with IHL. Consequently, where there is no armed conflict, the rules of IHL will not apply. In the case of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other similar acts short of armed conflict, other bodies of law, such as domestic or human rights law, will be applicable.

The foundation of the law of armed conflict is built around state-centric concepts of sovereignty and territory and is designed for either interstate or internal armed conflicts.<sup>2</sup> It traditionally has been delineated by territorial boundaries. Consequently, international armed conflicts (IACs) may generally only occur between states. Non-international armed conflicts (NIACs), or conflicts where non-state armed groups either fight a state or each other, have traditionally been geographically limited to the confines of a state.<sup>3</sup> Accordingly, for there to be an effective legal regulation of any armed conflict, determining the nature of that armed conflict is of great significance.

Despite the significance of the distinction between international and non-international armed conflicts, these distinctions are still subject to several difficulties, especially in the light of contemporary armed conflicts, which are not often neatly defined into these categories<sup>4</sup>.

Accordingly, the purpose of this article is to highlight and examine some of the most important controversies, difficulties and consequences that may arise from the classification of armed conflict.

This article is divided into seven sections. Section one introduces the issues. Section two examines the concept of armed conflicts. Section three analyses the classification of armed conflicts. Section four challenges the classification dogma of armed conflict. Section five evaluates modern armed conflicts and the controversial classifications that may exist for armed conflict. Section six highlights the significance of classifying an armed conflict, and section seven concludes the article.

## **2. The concept of armed conflict**

Understanding the notion of armed conflict is a prerequisite in determining whether a situation is subject to IHL or not. For such a fundamental concept, it is startling to find no definition of the term

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<sup>2</sup>Sasha Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' 2013 89 INT'L L. STUD 696.

<sup>3</sup>Ibid.

<sup>4</sup> For example, the ICTY Appeals Chamber in the Tadic decision held that the armed conflict in Yugoslavia could have been characterised as both internal and non-international, or as an internal conflict alongside an international one, or as an internal conflict that had become internationalised because of external military support, or as an international conflict that had subsequently been replaced by one or more internal armed conflicts or some type of combination. If we look critically at such situations, they are quite difficult to analyse or break down. The same can be said of the armed conflict in Syria, which grew from a popular uprising which started in February – March 2011 to become a complex set of conflicts involving myriad contending parties that include both State and non-State actors.

‘armed conflict’ in the treaty texts, even though it is used freely in both the Geneva Conventions and its Additional Protocols. Instead, there appear to be differing opinions as to what constitutes an armed conflict. The closest the Treaty provisions get to a definition occurs in Article 1(2) of Additional Protocol II where it refers to what an armed conflict is not: ‘[t]his 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’.

A much clearer attempt at defining the concept of armed conflict put forward by the International Committee of the Red Cross (ICRC), referred to an armed conflict as any difference that arises between two states that leads to the intervention of armed forces. This definition, whilst casting the net wide, is not supported by State practice. Moreover, it is too state-centric in its approach and does not capture the way contemporary conflicts occur, the clear majority of which are not between states. A much more favourable definition was put forward by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’). According to the ICTY:

[...] an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states, or in the case of internal conflict, the whole territory under the control of a party, whether or not actual combat takes place there.

This definition has since been widely accepted as a useful formulation of the concept of an armed conflict in customary international law and has been affirmed both in national<sup>5</sup> and international<sup>6</sup> jurisprudence. Notwithstanding, one criticism with this definition is that it does not give an insight into the threshold of violence necessary for the determination of an armed conflict, even though words such as: ‘resort to armed force’, ‘protracted’ and ‘organised’ may help in some ways. Whatever the case, the ICTY’s decision is much more adequate, especially since it covers a wide range of hostilities that may be contained in the notion of armed conflicts and indicates the multidimensional aspect of the concept. To this end, Lubell opined that it would be difficult to think of any event that would be instinctively labelled as an armed conflict which does not fit into the ICTY description above.

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<sup>5</sup> HH & others (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022, para. 257.

<sup>6</sup>*Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Judgement, paras. 56 – 57 (June 12, 2002); *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgement of Acquittal, paras. 15 – 17 (June 16, 2004).

Apart from successfully putting forward an all-encompassing definition of armed conflict, what is evident upon reading this dictum proffered by the ICTY is that it describes the two main categories of armed conflicts traditionally recognised by IHL viz. international armed conflict (“a resort to armed force between States”) and non-international armed conflicts (“protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”).

### **3. The classification of armed conflicts**

#### **A. International armed conflicts**

The regulation for international armed conflicts is provided for by the whole of IHL, that is, the entirety of the Geneva Conventions of 1949, The Hague Conventions which preceded them and Additional Protocol I (AP I) 1977 relating to the protection of victims of international armed conflicts<sup>7</sup>.

Article 2 Common to the four Geneva Conventions 1949, provides that the Convention shall apply to ‘all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties’. High contracting parties denotes State parties. As such, the Convention will only be applicable between two or more states. In addition to this, AP(I) relating to the protection of victims of international armed conflict may apply if the concerned States are parties to it<sup>8</sup>.

As straightforward as the definition seems, some complications may arise. The first consideration of complexity in this regard relates to the intensity of international armed conflict. In contrast to a non-international armed conflict, the severity and the duration of the international armed conflict is not relevant. In theory, an armed conflict will exist whether or not it takes place over time and regardless of whether it has resulted in large casualties or not<sup>9</sup>. Similarly, a military occupation of a territory by a State without resistance by the territorial State or a declared state of war without actual combat would all amount to an international armed conflict.<sup>10</sup> Given this, one may rightfully opine

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<sup>7</sup> Akande Dapo, ‘Classification of Armed Conflicts: Relevant Legal Concepts (August 20, 2012)’ in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) chapter 3; Oxford Legal Studies Research Paper No 50/2012, p. 34. Available at SSRN: <<https://ssrn.com/abstract=2132573>> or <http://dx.doi.org/10.2139/ssrn.2132573> Accessed 20 August 2020

<sup>8</sup> Additional Protocol I 1977, Art. 1(3).

<sup>9</sup> Sylvain Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 (873) *International Review of the Red Cross* 69, 72 <<https://www.icrc.org/en/international-review/article/typology-armed-conflicts-international-humanitarian-law-legal-concepts>> Accessed 20 August 2020.

<sup>10</sup> O. Uhler and H. Coursier, ‘Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War: Commentary’, Geneva, ICRC, 1958, 21; C. Greenwood, ‘The Concept of War in Modern International Law’, 36 *Int’l & Comp. L. Q.* 1987, 295.

that the threshold for an international armed conflict is low. Yet, in practice, isolated minor incidents or skirmishes that involve armed forces may not necessarily lead to an armed conflict<sup>11</sup>. The UK Ministry of Defence, for example, does not regard an accidental bombing or unintentional border incursion as an armed conflict<sup>12</sup>. Dinstein notes that Incidents such as the exchange of fire between border patrols of neighbouring States or the shooting down of an aircraft belonging to another state or naval torpedo of vessels flying another flag are common occurrences,<sup>13</sup> which do not necessarily escalate to the point of war, in the sense of common Article 2.

From all of these, it follows that an international armed conflict is dependent on how parties to the conflict appraise a situation as opposed to an objective analysis of such situations.<sup>14</sup> Dinstein and Solis seem to suggest that a minor skirmish or incident will not necessarily be an armed conflict provided it ends quickly and neither party intends to engage in armed conflict.<sup>15</sup> This approach, however, is questionable in light of the fact that it leaves the application of the law at the discretion of the states concerned. Moreover, it appears that the intensity requirement creates a legal vacuum in situations that fall short of that level of intensity. Consequently, it will seem that the better approach is to regard the resort to armed force as an armed conflict entirely, regardless of how small the intensity is. The effect of this is that no legal vacuum will exist where the rules of IHL are inapplicable<sup>16</sup>.

## **B. Non-international armed conflicts**

Non-international armed conflicts are regulated by the much more limited regulations in common Article 3 Common to the 1949 Geneva Conventions (Common Article 3) and very scarcely, Additional Protocol II (APII) 1977 depending on the situation<sup>17</sup>. In addition to these, are the rules that are determined to be customary IHL rules<sup>18</sup>.

In contemporary times, non-international armed conflicts are the most common armed conflicts. The archetypal types of non-international armed conflicts are fought between governmental armed

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<sup>11</sup> Emily Crawford and Alison Pert. *International Humanitarian Law*. (1st ed., Cambridge University Press, 2015), p. 53.

<sup>12</sup> UK Ministry of Defence, 'The Manual of the Law of Armed Conflict', (Oxford University Press, 2004), p. 29.

<sup>13</sup> Y. Dinstein, 'War, Aggression and Self-Defence', 5th edn (Cambridge: Cambridge University Press, 2011), 11.

<sup>14</sup> Elizabeth Wilmhurst, 'Conclusions', in Wilmhurst, ed., *International Law and the Classification of Conflicts* (Oxford: Oxford University Press, 2012), 478, 499 in Gary D Solis, *The Law of Armed Conflict* (Cambridge University Press 2016) 162

<sup>15</sup> Y. Dinstein, 'War, Aggression and Self-Defence', 5th edn (Cambridge: Cambridge University Press, 2011), 11; Gary D Solis, 'The Law of Armed Conflict: International Humanitarian Law in War' (Cambridge University Press 2016) 162.

<sup>16</sup> Emily Crawford and Alison Pert. 'International Humanitarian Law' (1st ed., Cambridge University Press, 2015), p. 54.

<sup>17</sup> Ibid.

<sup>18</sup> ICRC, 'Customary IHL Database' <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>> Accessed 25 August 2020.

forces and rebel factions, or between various armed groups in one State, without any international intervention by another State or the United Nations. Nevertheless, it is not always easy to determine when a situation of violence in a State is to be classified as a non-international armed conflict.

Common Article 3, whilst providing for non-international armed conflicts, does not explain precisely when the Convention will apply and who should have the authority to determine if a situation should be classified as ‘non-international’<sup>19</sup>. Common Article 3 only purports to apply to “an armed conflict not of an international character, occurring in the territory of one of the High Contracting Parties”. Prima facie, ‘not of an international character’, purports to exclude the scope of armed conflicts captured within the ambit of Common Article 2 to the four Geneva Conventions 1949 (Common Article 2). To the drafters of the Convention, Common Article 3 was understood in the light of civil wars<sup>20</sup>, especially with the devastating effects of both the Spanish Civil War (1936 – 1939) and the Second World War<sup>21</sup>. In this respect, Corn notes that Common Article 3 came to be understood as primarily intra-state conflicts, or internal armed conflicts<sup>22</sup>. This may serve as an explanation for why non-international armed conflicts are often equated with internal armed conflict. For instance, the UK Manual of the Law of Armed Conflict discusses the application of Common Article 3, AP II and customary international law in the context of internal rather than non-international armed conflict<sup>23</sup>.

Similarly, David Turns contends that ‘if the British and Iraqi States are not at war with each other, but there is a conflict going on in Iraq, it cannot be international according to the definitions in the Geneva Conventions or AP I. Therefore, by default almost, it must be non-international, or effectively internal’<sup>24</sup>. Many other examples exist to this extent. It is thus tenable to submit that Common Article 3 armed conflicts have now become synonymous with internal conflicts, because such conflicts take place within the engaged State’s territory.<sup>25</sup> Whilst this claim may be sensible, they appear to complicate contemporary internationalised and transnational armed conflict, which will be explained later. Besides, Crawford and Pert posit that Common Article 3 could have a much wider in scope and could include conflicts between armed groups even without State involvement<sup>26</sup>.

<sup>19</sup> Emily Crawford and Alison Pert. ‘International Humanitarian Law’. (1st ed., Cambridge University Press, 2015) 61.

<sup>20</sup>Ibid. at p. 62.

<sup>21</sup>Frederic Siordet, ‘The Geneva Conventions and Civil War’ (1950) 3 IRRC Supplement at 112 – 14.

<sup>22</sup>G.S Corn, ‘Hamadan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict’, 40 *Vanderbilt Journal of Transnational Law* (2007) 295, at 307.

<sup>23</sup> ‘UK Manual of the Law of Armed Conflict’, 31 – 3.

<sup>24</sup> David Turns, ‘The "War on Terror" Through British and International Humanitarian Law Eyes: Comparative Perspective on Selected Legal Issues’, 10 *N.Y. City L. Rev.* 435 (2007). Available at: <<http://academicworks.cuny.edu/clr/vol10/iss2/15>> Accessed 4 July 2020.

<sup>25</sup> Lubell, Noam. ‘Extraterritorial Use of Force Against Non-State Actors’ (Oxford University Press, 2010) 100

<sup>26</sup> Emily Crawford and Alison Pert. ‘International Humanitarian Law’. (1st ed., Cambridge University Press, 2015) 61

Some more specific criteria for identifying Common Article 3 conflicts were put forward by the ICTY in the *Tadic* case<sup>27</sup>. The Appeals Chamber of the ICTY referred to a non-international armed conflict as a situation of ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’<sup>28</sup>. This test has been adopted by the Article 8(2) (f) of the Statute of the International Criminal Court (ICC) and excludes ‘situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’.<sup>29</sup> In practice, these criteria have been interpreted as alluding more to the intensity of the armed violence as opposed to the duration<sup>30</sup>. The relevant indicative factors for accessing intensity include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also suffice<sup>31</sup>. In addition to these, it has been suggested that there must be a minimal level of organisation by the armed groups.<sup>32</sup> Indicative factors of a level of organisation include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a territory; access to weapons<sup>33</sup> inter alia. Where the conflict is between armed groups, such criteria must also be satisfied.

Given the diversity of situations, whether a situation amounts to a non-international armed conflict is a question of fact and does not depend on political considerations of the parties involved.<sup>34</sup> However, no designated authority can make this assessment. Although Courts and tribunals, particularly the international criminal tribunals, may make these assessments, it often takes place after the conflict has long concluded and bears no assistance to those who were involved in the conflict at the time.<sup>35</sup>

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<sup>27</sup>Tadic Jurisdiction, para 70.

<sup>28</sup>Tadic Jurisdiction, para 70.

<sup>29</sup> Rome Statute of the International Criminal Court (ICC), Art. 8(2)(d) and 8(2)(f).

<sup>30</sup>International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Ramush Haradinaj et al.*, Trial Chamber I (Judgement), Case No. IT-04-84-T, 3 April 2008, para. 49.

<sup>31</sup>Ibid.

<sup>32</sup>International committee of the Red Cross Opinion Paper, ‘How is the Term ‘Armed Conflict’ Defined’ p.3<<https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm>> Accessed 20 September 2020.

<sup>33</sup>ICTY, *The Prosecutor v. Ramush Haradinaj et al.*, Trial Chamber I (Judgement), Case No. IT-04-84-T, 3 April 2008, para.60.

<sup>34</sup> Emily Crawford and Alison Pert. ‘International Humanitarian Law’. (1st ed., Cambridge University Press, 2015), p. 65

<sup>35</sup>Ibid.

It has been suggested that the lack of a definition allows the law to adjust itself to changing conditions, and therefore does not overly limit the application of Common Article 3.<sup>36</sup> However, the lack of definition has simply allowed states to deny that Common Article 3 applies to their conflict,<sup>37</sup> especially since such a position means that the states are susceptible to certain political and international ramifications<sup>38</sup>. Consequently, States deny that a conflict has reached the level of intensity required by a non-international armed conflict. They instead prefer to describe such conflicts as merely an internal disturbance, upheavals, riots and the like.<sup>39</sup>

To narrow the gap and provide clear answers to the blurred issues raised in Common Article 3, APII was provided to develop and supplement common Article 3. AP II does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, but will apply only to armed conflicts which take place on the territory of a party 'between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol'.<sup>40</sup>

In contrast to Common Article 3, the requirements set out in AP II are much more rigorous than the threshold for Common Article 3 in several ways. Firstly, it excludes conflict which arises solely between organised armed groups and applies only if government forces are involved in the armed conflict. Secondly, there is the requirement that organised armed groups exercise control over a territory. This requirement is designed for situations in which the rebel group is contending power, with the government, for authority over the State or part of it. The requirement of control over territory is linked to an ability to carry out continued and concerted military operations as well as an ability to implement the Protocol. Moreover, AP II applies to non-international armed conflicts taking place in the territory of a Party between its armed forces and organised armed groups.<sup>41</sup> The effect of this requirement will only be understood in the light of internationalised conflict, i.e., in the situation where a third state becomes involved in a non-international armed conflict because the third

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<sup>36</sup>L. Moir, 'The Law of Internal Armed Conflict', (Cambridge University Press, 2002) p. 273.

<sup>37</sup>Ibid.

<sup>38</sup> Jan Wouters, Philip de Man and Nele Verlinden, 'Armed Conflicts and The Law'. (Intersentia 2016) 162. Most states deny the existence of a non-international armed conflict because of increased scrutiny from the international community and the United Nations. Consequently, they prefer to describe such situations as internal disturbances which are not subject to the rules of IHL but domestic law enforcement. By so doing, such state(s) save themselves from the scrutiny and increased focus of the international community.

<sup>39</sup>Ibid.

<sup>40</sup>Additional Protocol II 1977, Art. 1(1).

<sup>41</sup>Ibid.



state is not involved in hostilities on its territory, Additional Protocol II will not be applicable. This point will further be expounded upon later.

There are thus, very significant ramifications in terms of the more limited scope of Additional Protocol II. Overall, every non-international armed conflict is regulated by Common Article 3, whereas a much more limited subset of non-international armed conflict is regulated by Additional Protocol II, as well as Common Article 3. Melzer, suggests that the Protocol's high threshold is indicative of States' reluctance to expand the international regulation of internal armed conflicts unless they develop into situations comparable to international armed conflict.<sup>42</sup> The effect of AP II is that it provides an objective threshold of factual criteria against which the existence of a non-international armed conflict cannot be denied. Similarly, it provides that situations of "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other similar acts" do not constitute armed conflicts.

#### **4. Challenging the classification dogma**

The classification of conflicts as international or non-international discussed above is easy to apply if it is thought of in terms of a conflict being between two (or more) States or within one State that may or may not involve the territorial State party. The ICRC has indicated that as far as the law is concerned, there are no other types of armed conflicts<sup>43</sup>. Yet, notwithstanding the significance of the dichotomy between international and non-international armed conflicts, in theory, the dichotomy is not as clear in practice, especially in the light of contemporary armed conflicts, which do not neatly fit into these categories.

Today, conflicts are not necessarily restricted to hot battlefields (within a particular geographic location), and with a mixture of asymmetric and conventional tactics, it seems that modern wars escape traditional conflict classifications. This is because conflict participants now engage along a broad spectrum of operations and lethality.<sup>44</sup> For instance, a conflict may spill across national borders; an armed group might be fighting in one State but based in another, or a government might be overtly and covertly supporting one of the parties to a civil war in another state<sup>45</sup>. These situations today have been aptly titled as "hybrid conflicts" because it seemingly captures the increased

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<sup>42</sup> Nils Melzer and Etienne Kuster, 'International Humanitarian Law' (ICRC 2016) p. 68-9 <[https://www.jep.gov.co/Sala-de-Prensa/Documents/4231\\_002-IHL\\_WEB\\_13.pdf](https://www.jep.gov.co/Sala-de-Prensa/Documents/4231_002-IHL_WEB_13.pdf)> Accessed 16 September 2020.

<sup>43</sup> International committee of the Red Cross Opinion Paper, 'How is the Term 'Armed Conflict' Defined' p.3 <<https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm>> Accessed 20 September 2020.

<sup>44</sup> Robert Gates, 'U.S. Secretary of Defense, Remarks' at Maxwell Air Force Base, Alabama (Apr. 15, 2009), <<http://archive.defense.gov/Speeches/Speech.aspx?SpeechID=1231>> Accessed 29 August 2020).

<sup>45</sup> Emily Crawford and Alison Pert. *International Humanitarian Law* 72.

complexity in armed conflicts, the multiplicity of actors involved, and the blurring of lines between the traditional categories of conflict.<sup>46</sup> As such, prognosticators believe that this trend towards ambiguity, rather than being an exception, is becoming the norm.<sup>47</sup> This has led some scholars to opine that the existing dichotomy of armed conflict is unsatisfactory,<sup>48</sup> out-dated, no longer corresponding to the situation on the battlefield and a challenge to the humanitarian purposes of the law of war.<sup>49</sup> Vite, for instance, claims that “Armed conflicts are in reality not as clearly defined as the legal categories. Some of them may not exactly tally with any of the concepts envisaged in international humanitarian law. This raises the question of whether those categories need to be supplemented or adapted to ensure that these situations do not end up in a legal vacuum”.<sup>50</sup>

Nevertheless, some scholars believe that the current dichotomy is still sufficient and no modification is needed. Pejic, for example, has stated that “the distinction between international and non-international armed conflicts remains relevant”.<sup>51</sup> This appears to be the position of the ICRC. Even though the dichotomy may occasionally give rise to difficulties, the ICRC nonetheless, believes that: “there does not appear to be in practice, any current situation of armed violence between organised parties that would not be encompassed by one of the two classifications”.<sup>52</sup> To what extent, however, is this true?

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<sup>46</sup> U.S. Department of Defense, Quadrennial Defense Review Report 8 (2010) <[https://www.defense.gov/Portals/1/features/defenseReviews/ODR/ODR\\_as\\_of\\_29JAN10\\_1600.pdf](https://www.defense.gov/Portals/1/features/defenseReviews/ODR/ODR_as_of_29JAN10_1600.pdf)> Accessed 20 August 2020.

<sup>47</sup> U.S. Department of the Army, TRADOC Pam. 521-3-1, The United States Army Operating Concept 2016 – 28, 2-2 (a) (2010) <<https://fas.org/irp/doddir/army/opcon.pdf>> in The Law of Armed Conflict’s “Wicked” Problem: Levée en Masse in Cyber Warfare 2013 89 *Int’ L. Stud* <<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1042&context=ils>> Accessed 5 September 2020.

<sup>48</sup> G.S. Corn, ‘Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, al Qaida and the Limits of Associated Militia Concept’, vol. 85 *Int’ L. Stud* p. 183. <<http://stockton.usnwc.edu/cgi/viewcontent.cgi?article=1123&context=ils>> Accessed 5 September 2020; W.K. Lietzau, ‘Combating Terrorism: The Consequences of Moving from Law Enforcement to War’, in D. Wippman and M. Evangelista (eds), *New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts* (Ardsey, NY: Transnational, 2005), 42.

<sup>49</sup> Dr. Veronica Bilkova, ‘New Challenges to the Classification of Armed Conflicts’ 2015 20 *Recueils de la Societe Internationale de Droit Militaire et de Droit de la Guerre* <[http://heinonline.org/HOL/Page?handle=hein\\_journals/reindrom34&div=23&g\\_sent=1&casa\\_token=uDjG3Cm3Y14AAAAA:eBJD70tYong9E-PyoE0IbNhGTETUbCCA2qfMjm4uMRVP1r-ESep7Zf6ww2lxY62uamCbK9Mk&collection=journals](http://heinonline.org/HOL/Page?handle=hein_journals/reindrom34&div=23&g_sent=1&casa_token=uDjG3Cm3Y14AAAAA:eBJD70tYong9E-PyoE0IbNhGTETUbCCA2qfMjm4uMRVP1r-ESep7Zf6ww2lxY62uamCbK9Mk&collection=journals)> Accessed 30 August 2020

<sup>50</sup> Sylvain Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ 2003 No. 873, *International Review of the Red Cross*, <<https://www.icrc.org/eng/resources/documents/article/review/review-873-p69.htm>> Accessed 21 September 2020.

<sup>51</sup> J. Pejic, ‘Status of conflict’, in E. Wilmschurst *et al.* (eds.), ‘Perspectives on the ICRC Study on Customary International Humanitarian Law’ (Cambridge, Cambridge University Press, 2007) 77.

<sup>52</sup> ICRC, ‘International Humanitarian Law and the challenges of contemporary armed conflicts’, Report of the 3111 *International Conference of the Red Cross and Red Crescent*, 3 IJC/11/5.1.2, Geneva, ICRC, 2011, p. 8, <<<https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf>>> Accessed 10 September 2020.

On paper, it will seem that all of the conflicts are envisaged by the current, existing dichotomy. However, in practice, it is highly problematic, with legal obligations being almost impossible to determine. Such a difficulty can be understood if one considers the on-going ‘global war on terror’. Hostilities between a state or states and a transnational or extraterritorial network operating in and from numerous other states, but not necessarily with their support, is anything but an exact match for the traditional concepts of international and non-international armed conflicts. By their nature, such conflicts are not international because they do not involve state parties, while the fact that it occurs on numerous frontiers raises questions as to it being non-international.<sup>53</sup> Owing to the complications in classifying conflicts nowadays, conflicts are now being described as containing several distinct categories of conflict (some occurring simultaneously, including international, non-international, transnational or extraterritorial and internationalised non-international armed conflict),<sup>54</sup> as well as being a ‘new’ type of conflict. Vivid examples may include the military actions against the Taliban, Al-Qaeda, Hezbollah, ISIS, Boko Haram and such other armed groups. For example, whilst the Boko Haram situation may have started as an internal conflict, it is now characterised by a prominent level of foreign involvement by other West African states, such as Benin, Cameroon, Chad and Niger. The same thing can also be deduced from the ISIS situation. In this respect, whilst the classification remains relevant, it may be insufficient in practice and therefore necessary to supplement or adapt such situations to prevent them from ending up in a legal vacuum. Even though such conflicts are not provided for under IHL, they may be understood in the light of the extrapolations of the existing rules of humanitarian law, practice and doctrine<sup>55</sup>.

## 5. Modern classifications

As already stated in the preceding sections, in contemporary times, it has become increasingly difficult to classify and qualify the nature of an armed conflict. As such, a variety of categories have been modified to ensure that no lacuna exists. However, it must be stated that the classic typology of armed conflicts remains and embodies these new modifications.

Without claiming to be exhaustive, this section will examine some dilemmas encountered in practice by referring to a few of these types of situation whose classification and qualification may present considerable challenges. This section will briefly examine what is now known as

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<sup>53</sup> ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’ Report Prepared by the International Committee of the Red Cross (Geneva, 2003) 31.

<sup>54</sup>S Murphy, ‘Evolving Geneva Convention Paradigms in the “war on Terrorism”; Applying the Core Rules to the Release of Persons Deemed “Unprivileged Combatants”’ The George Washington University Law School Public Law School Public Law and Legal Theory Working Paper (2007) no 239 14-32; D Pokempner, ‘The “New Non-State Actors in International Humanitarian Law’ 38 *George Washington International Law Review* (2006) 551 553-4.

<sup>55</sup> Jan Wouters, Philip de Man and Nele Verlinden, ‘*Armed Conflicts and the Law*’ (Intersentia 2016) 175.

extraterritorial or transnational conflicts and internationalised non-international armed conflict which is prevalent today, especially in the light of the ‘global war on terror’.

### **A. Extraterritorial or Transnational Armed Conflicts**

Extraterritorial forcible measures are situations in which a state (the foreign state) will use force on the territory of another state (the territorial state) but where that force is not primarily directed at the territorial state but rather is directed at a non-state armed group based in that state.<sup>56</sup>

The idea of extraterritorial armed conflicts became popular after the terrorist attacks of 9/11. Describing the difficulty that exists under IHL, Lubell contends that “A conflict between a state and a transnational network operating in and from numerous other states, but not necessarily with their support, is anything but an exact match for the traditional concepts of international and non-international armed conflicts. Not being a conflict between states creates difficulties in defining it as international, while the fact that borders are crossed raises questions of whether it is non-international”<sup>57</sup>.

*Prima facie*, transnational armed conflicts do not sit very well with the rules of IHL. Consequently, as a result of this quandary, Corn has suggested that there is a need for IHL to recognise a new and different form of armed conflict that takes cognisance of transnational aspects of these conflicts, but which ultimately recognises such conflicts as between States and non-State groups.<sup>58</sup> However, this approach has not received favourable backing from pro-IHL scholars, who have sought to apply IHL as it exists, to the State and the non-State group. However, Moir suggests that any consideration of the subject of transnational armed conflict must be examined with consideration to the attitude of the state in whose territory the non-state actor is located<sup>59</sup>. Moir appears to suggest that caution should be tempered with when exercising force on another State’s territory because, as discussed earlier, the very exercise of force by one State on the territory of another state could amount to an international armed conflict depending on how the state appraises the situation.<sup>60</sup> Consequently, Jan Kleffner suggests that international armed conflict in this context may only apply if in the conduct of activities on the territorial state’s territory against the non-state armed group, hostilities between the two states occur, either through armed resistance on the part of

<sup>56</sup> Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in E Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012).

<sup>57</sup> Lubell, Noam. ‘Extraterritorial Use of Force Against Non-State Actors’ (Oxford University Press, 2010) 93-94.

<sup>58</sup> G.S Corn, ‘Hamadan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict’, 40 *Vanderbilt Journal of Transnational Law* (2006) 295.

<sup>59</sup> Moir L, ‘It’s a Bird! It’s a Plane! It’s a Non-international Armed Conflict!: Cross-border Hostilities between States and Non-state Actors’ in Harvey C, Summers J and White N (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014) 79.

<sup>60</sup> *Ibid.*

the host state or through attacks upon governmental targets and infrastructure as opposed to operations strictly limited to the non-state targets<sup>61</sup>.

On the contrary, according to Lubell, transnational armed conflict may be regarded as non-international armed conflicts, if force is solely directed at the non-state group<sup>62</sup>. Common Article 3 speaks of ‘armed conflict, not of an international character occurring in the territory of one of the High Contracting Parties’. According to Lubell, such a requirement does not necessarily prevent a non-international armed conflict from straddling more than one State. Scholarly commentaries in support of this, contend that the reference to ‘one of the High Contracting Parties is simply a reference to the fact that this provision in the Conventions only applies where violence or conflict occurs in the territory of, at least, one party to the Conventions, without an intention to limit the scope of Common Article 3 to situations where violence occurs solely within the territory of only one of the parties.<sup>63</sup> Moreover, it is argued that since the conflict involves only a State and a non-state group, it must be non-international. In *Hamdan v. Rumsfeld*<sup>64</sup>, the US Supreme Court held that all transnational armed conflict that does not involve a conflict between nations is not a conflict of an international character. Overall, this atypical conflict still presents practical complications and in many cases, appears to be unsettled.

All things considered, transnational conflicts of the type in question against terrorist groups, should in principle, be viewed from the perspective of NIACs. They are not IACs because they do not involve two or more state parties. Thus, regardless of their extraterritorial nature, the nature of the classification would not change, since the classification of a conflict is dependent on the parties to the conflict.

Extraterritorial conflicts become much more complicated when multiple groups and territories are involved. Under such situations, questions arise as to the geographical scope of the application of IHL. In such situations, the NIAC conflict remains the same. It would not change because of added distance or territories. The underlying point about these scenarios is that IHL is not constrained by distance and applies insofar as there are parties to the conflict. The fact that elements or cross-border

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<sup>61</sup> J. K. Kleffner, ‘Human Rights and International Humanitarian Law: General Issues’, in T.D. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford: Oxford University Press, 2010), 56–7.

<sup>62</sup> Lubell, Noam, ‘Extraterritorial Use of Force Against Non-State Actors’ (Oxford University Press, 2010) 100-01.

<sup>63</sup> Sylvain Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations’ (2009) 91 (873) *International Review of the Red Cross* <<https://www.icrc.org/en/international-review/article/typology-armed-conflicts-international-humanitarian-law-legal-concepts>> accessed 12 September 2020; M. Sassoli, ‘*Transnational Armed Groups and International Humanitarian Law*’ Harvard University Program on Humanitarian Policy and Conflict Research, Occasional Paper Series, No. 6 (Winter 2006) 5

<sup>64</sup> US Supreme Court, *Hamdan v. Rumsfeld*, 548 U.S., 2006.

operations, multiple territories or large distances are involved does not change their classification as such. Thus, in terms of the scope of applicability of IHL, IHL can apply as far as possible and as wide as possible. The most important thing is not how far or how many territories IHL can apply to, but who the parties to the conflicts are.

## **B. Internationalised Non-international Armed Conflicts**

A non-international armed conflict can be internationalised in two ways, viz. if another State intervenes in that conflict through its troops or if some of the participants in the internal armed conflict act on behalf of that other State<sup>65</sup>.

The intervention of a foreign State in support of the established government upon its invitation will not make the on-going non-international armed conflict an international armed conflict. The rationale for this is that there is no conflict between two or more States – only between one State, supported by another, and an armed group<sup>66</sup>. In this regard, the relevant applicable law will be Common Article 3, since it regulates all non-international armed conflicts. Common Article 2 will not apply because it expressly provides that it ‘shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’,<sup>67</sup> with ‘High Contracting Parties signifying States’. Accordingly, since the conflict is not between States, it cannot be regulated by Common Article 2. Likewise, AP II appears to be inapplicable since it purports to apply between an armed group and the armed forces of the territorial State<sup>68</sup> (the State on which the conflict is occurring).

Where the forces of a foreign State intervene in support of the armed group or rebels fighting against a State, there will be two opposing States involved in a conflict. Hence, it will be an international armed conflict. The foreign State intervening through the introduction of its armed forces on the side of the rebels is hardly different from what will exist under an archetypal international armed conflict. That being said, the fact that there is an international armed conflict between the territorial State and the foreign State, does not necessarily affect the classification of the conflict between the non-state or rebel group. That conflict will remain a non-international armed conflict as long as the non-state group or rebel does not act on behalf of the foreign intervening state.

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<sup>65</sup> ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1 Appeals Judgement, 15 July 1999 (“Tadic Appeal Judgement”), para. 84.

<sup>66</sup> Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflict (RULAC), ‘Qualification of Armed Conflicts’, 12 May 2017, section 1(A), <[http://www.adh-geneve.ch/RULAC/qualification\\_of\\_armed\\_conflict.php](http://www.adh-geneve.ch/RULAC/qualification_of_armed_conflict.php)>; accessed 15 September 2020.

<sup>67</sup> Article 2 common to the four Geneva Conventions 1949.

<sup>68</sup> Additional Protocol II to the Geneva Conventions 1977, Art. 1(1).

Such a scenario is sometimes referred to as a ‘mixed conflict’<sup>69</sup>, which combines the characteristics that may derive from both international armed conflicts and non-international armed conflicts. In the *Nicaragua* case<sup>70</sup>, the International Court of Justice held that the conflict between the United States and Nicaragua was international and therefore governed by the rules applicable to international armed conflicts, while the conflict between Nicaraguan forces and the Contra rebels remained a non-international armed conflict.

Where a foreign state intervenes in a non-international armed conflict between a territorial state and an insurgent group, in such a way that the insurgent group acts on behalf of the foreign state, the conflict will move from a non-international armed conflict between the territorial state and the insurgent group to an international armed conflict between the territorial state and the foreign state because the foreign state is responsible for the actions of the insurgent group. In this regard, it becomes necessary to determine the degree of indirect intervention that legally amounts to an armed conflict between the territorial state and the foreign state. This is not always easy to determine and has consequently, led to numerous opinions between the ICJ and the ICTY.

Following from the 1986 *Nicaragua* case, in order for a non-international armed conflict to be transformed to an international armed conflict, the foreign state must have on the one hand, ‘complete dependence’ and control of the insurgent group and on the other hand, an ‘effective control’ over the insurgent group<sup>71</sup>. Indications of such criteria must be distinguished from foreign support. Support may be financial, but that does not connote effective control. Although it is difficult to draw a divide between support and effective control, an effective control appears to be in the line of a direct command as opposed to mere financial support. Notwithstanding, as a result of the difficulty that ensues in trying to ascertain what ‘complete dependence’ and ‘effective control’ could entail, the ICTY in the 1995 *Tadic* case, disregarded those criteria and instead, proposed that the foreign state must have an ‘overall control’.

In comparison, with the criteria put forward by the ICJ, the ‘overall control’ appears to be a lower threshold. In the *Bosnia Genocide* case<sup>72</sup>, the ICJ reiterated its ‘effective control test from

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<sup>69</sup> Sylvain Vite, ‘*Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*’ (2009) 91 (873) *International Review of the Red Cross* <<https://www.icrc.org/en/international-review/article/typology-armed-conflicts-international-humanitarian-law-legal-concepts>> accessed 12 May 2017

<sup>70</sup> ‘*Military and Paramilitary Activities in and against Nicaragua*’ (*Nicaragua v. United States of America*) ICJ Rep 1986, 14, para 219 (Nicaragua).

<sup>71</sup> *Ibid.* para 115.

<sup>72</sup> ‘*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*’ (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgement, ICJ Rep. 2007, p. 43 (“*Bosnian Genocide Case*”).

Nicaragua and rejected the Tadic reasoning. Its explanation for this was that the “overall control test” was appropriate in determining whether or not an armed conflict was international, whereas it was not appropriate in determining issues of State responsibility. The issue as to what criteria should be used is still very much unsettled. Nonetheless, if a situation involves the characterisation of conflict as international or non-international, it is highly likely that the criterion of overall control will be used. Where the situation involves attributing State responsibility, then the ‘effective control’ criterion will be used.

## 6. Significance of Classifying Armed Conflicts

The significance of classifying an armed conflict carries with it practical implications. Particularly, for any armed conflict to be effectively regulated, the identification of precisely the nature of that armed conflict, is an important question. Unless such a question (whether an armed conflict is international or non-international) is disposed of, ascertaining the applicable set of IHL rules would prove difficult since different rules apply to the distinct categories of conflicts.

Moreover, despite the convergence in the legal regime governing IACs and NIACs, under customary international humanitarian law there remain significant differences. Generally, the rules governing international armed conflicts by their very nature are more comprehensive than the rules governing non-international armed conflicts.<sup>73</sup> In terms of the relevant treaty law, there are vast differences. International armed conflicts are largely regulated by the whole of IHL, that is, the entirety of the Geneva Conventions of 1949 relating to the protection of those who do not, or who no longer take part in hostilities, the Hague Conventions which preceded them relating to the conduct of hostilities and AP I 1977 relating to the protection of victims of international armed conflicts.<sup>74</sup> Non-international armed conflicts, on the other hand, is regulated by the much more limited regulations in Common Article 3 and very scarcely, AP II 1977 depending on the particular situation.<sup>75</sup> In addition to these are the rules that are determined to be customary IHL rules.<sup>76</sup>

Furthermore, the question of the nature of armed conflict is important because of the impact it may have on military forces engaged in conflict and their activities as it relates to the status of participants, their consequent classification and treatment after capture by an opposing party, the

<sup>73</sup> Christopher Greenwood, ‘International Humanitarian Law and United Nations Military Operations’ (1998) 1 YIHL [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FC980F630033ABF9A8530D6CB7092622/S138913590000040a.pdf/international\\_humanitarian\\_law\\_and\\_united\\_nations\\_military\\_operations.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/FC980F630033ABF9A8530D6CB7092622/S138913590000040a.pdf/international_humanitarian_law_and_united_nations_military_operations.pdf) Accessed 24 August 2020.

<sup>74</sup> Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in E Wilmschurst (eds), *International Law and the Classification of Conflicts* (OUP 2012) 34.

<sup>75</sup> Ibid.

<sup>76</sup> ICRC, Customary IHL Database <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>> Accessed 10 September 2020.



conduct of hostilities and the use of weaponry<sup>77</sup>. Besides, there may be significant consequences for the imposition of individual criminal responsibility for breaches of the relevant law<sup>78</sup>. Ultimately, however, the nature of the armed conflict (whether international or non-international) must be determined because the body of rules regulating them is not the same<sup>79</sup>.

## 7. Conclusion

The core object of IHL as a legal paradigm is to reduce suffering in war. However, the classification of armed conflict which IHL seeks to regulate is not congruous with the reality of present-day armed conflict situations. Generally, the means and method of warfare have evolved. Most present-day armed conflicts have shifted from the notion of IACs and NIACs to a model of global operations or internal strife. While it is plausible to state that IHL is also evolving, it is submitted that maintaining the existing dichotomy of armed conflicts is more of a hindrance and a challenge to IHL's evolution. With the modern classifications, the relevance and suitability of the current dichotomy have been and is still consistently being questioned. Besides, for all of the extrapolations being made, there is now a patchwork of norms and convoluted tests, which has only made the task of conflict classification slow, arduous and unclear for lawyers, policymakers, international organisations and those on the ground.

Notwithstanding, this article has attempted to make sense of some of the modern armed conflict situations that challenge the existing classification of armed conflict. Whatever one thinks on this issue, the bottom line is that classification matters, and we ought to be careful of how we appraise these situations to prevent widening a particular conflict or misrepresenting certain situations. This article has demonstrated that through a concise and careful appraisal of these controversies, the existing classification may still be relevant today, at least for now. Whether new rules for the classification of armed conflict will be developed remains to be seen.

While the existing classifications and rules on IHL have been extrapolated to provide for such atypical armed conflicts, there are still a lot of unsettled debates. Therefore, it is submitted that the current classification is out-dated, and there is a cogent and urgent need for new rules that will regulate the classification of armed conflict. This is easier said than done because of the nature of politics in international law and the difficulty associated with the decentralised model of sovereign

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<sup>77</sup>David Turns, 'The International Humanitarian Law Classification of Armed Conflicts in Iraq Since 2003', *International Law Studies*, Vol. 86, p.98.

<sup>78</sup> Moir L, 'It's a Bird! It's a Plane! It's a Non-international Armed Conflict!: Cross-border Hostilities between States and Non-state Actors' in Harvey C, Summers J and White N (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe* (Cambridge University Press 2014) 7.

<sup>79</sup> Emily Crawford and Alison Pert, 'International Humanitarian Law' (1st ed., Cambridge University Press, 2015) 50.

states, which stands in contrast to what may be obtainable in domestic law. Notwithstanding, if potentially, IHL can get around sovereignty hurdles and the politics involved, drafting a new regulation will simplify and make things easier.

The classification of armed conflict is one of the contemporary legal challenges facing those working in IHL, as well as related fields. It must be pointed out that the challenges addressed here are not exhaustive but sufficient enough to highlight the pressing issues that relate to the classification of conflict recently or at least in the last two decades or so.

We cannot continue to overstretch the current regulations to always fit modern armed conflicts. There are bound to be serious problems if we continue on this path. Understandably, most proponents of IHL would rather stick to the knowledge of what exists. Nonetheless, the function of law is to provide for the needs of the society, which is subject to change. The result, then, is that law cannot and should not be stagnant. It must also evolve with the society. Thus, for the legal paradigm of IHL to be effective, the current realities of warfare must be taken into account for effective regulation. In other words, IHL must dissociate itself from arbitrary, politicised and antiquated classifications and distinctions.