

# DRAWING LINES IN THE SAND — CHARACTERISING CONFLICTS FOR THE PURPOSES OF TEACHING INTERNATIONAL HUMANITARIAN LAW

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*[Any discussion of the law that applies in armed conflict is usually prefaced with an analysis of the distinctions that are drawn between armed conflicts and other acts of violence, and between international and non-international armed conflicts. Most international humanitarian law courses begin by analysing these distinctions and thereby drawing the boundaries within which an examination of the subject matter takes place. In the context of the decisions in Hamdan v Rumsfeld, this think piece seeks to explore the distinctions drawn by international humanitarian law in relation to these threshold issues, and the way in which they impact on our teaching of the subject. It argues that the concern with classification undermines two of the law's fundamental claims — its claim to pragmatism and its claim to humanity. It suggests alternative questions to ask when teaching the classification of armed conflicts that may open up discussion of the boundaries drawn by the law and thereby facilitate the potential for reform.]*

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## I INTRODUCTION

One of the first concepts that I was taught as a student of international humanitarian law is that the law creates a distinction between international and non-international armed conflicts. I discovered that the classification of a conflict as either international or non-international dictates the application of the major treaties in this area — the *Geneva Conventions*<sup>1</sup> and the Additional Protocols<sup>2</sup> —

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<sup>1</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*') (collectively, '*Geneva Conventions*').

and determines whether states are under an obligation to criminalise breaches of the law in domestic legislation. I also learnt that there is a minimum threshold for deciding when an armed conflict exists (as distinct from ‘sporadic acts of violence’<sup>3</sup>) and that the term ‘war’ is of little or no relevance when applying the law once hostilities have commenced. This knowledge was acquired prior to 11 September 2001 and the advent of the ‘war on terror’.

Although the distinction between international and non-international armed conflicts has been heavily criticised, as a lecturer of international humanitarian law I replicate this training by ensuring that in the first two classes of the undergraduate course I discuss the definition of the term ‘armed conflict’ and the fundamental importance of the characterisation of a conflict with reference to the decisions of the Trial and Appeals Chambers of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) in *Tadic*.<sup>4</sup> Thus, I draw boundaries which represent the lines within which a discussion of the principles of international humanitarian law will take place for the rest of the course. In the same two classes, I usually draw students’ attention to an article by Chris af Jochnick and Roger Normand in the *Harvard International Law Journal* entitled ‘The Legitimation of Violence: A Critical History of the Laws of War’.<sup>5</sup> In this article, the authors question the idea that ‘the laws of war serve to restrain or “humanise” war’.<sup>6</sup> In challenging the fundamental assumptions behind this branch of international law, the authors make particular reference to the distinction between combatants and non-combatants<sup>7</sup> and the rules which aim to limit the range and type of weapons employed. In both areas, the rules of international humanitarian law (at least in the form of treaties) are more developed in relation to international armed conflicts than civil wars. Consequently, on the one hand I reiterate the importance of classification in international humanitarian law and on the other hand I question its application.

When teaching international humanitarian law, I tend to emphasise two of the law’s principal claims — its claim to pragmatism (that it is a pragmatic response to states’ willingness to resort to war despite the prohibition on armed conflict in art 2(4) of the *Charter of the United Nations*), and its claim to humanity (that it is designed to protect the victims of armed conflict). But arguably, the importance that we attach to defining an armed conflict for the purposes of teaching the principles of international humanitarian law undermines both these claims. In

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<sup>2</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘*Additional Protocol I*’); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘*Additional Protocol II*’).

<sup>3</sup> *Additional Protocol II*, above n 2, art 1(2).

<sup>4</sup> *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* Case No IT-94-1-AR72 (2 October 1995); *Prosecutor v Duško Tadić (Trial Chamber Opinion and Judgment)* Case No IT-94-1-T (7 May 1997); *Prosecutor v Duško Tadić (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999).

<sup>5</sup> Chris af Jochnick and Roger Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War’ (1994) 35 *Harvard International Law Journal* 49.

<sup>6</sup> *Ibid* 50.

<sup>7</sup> See especially the authors’ follow up article, Chris af Jochnick and Roger Normand, ‘The Legitimation of Violence: A Critical Analysis of the Gulf War’ (1994) 35 *Harvard International Law Journal* 387, 399.

this think piece, I seek to analyse the concern of international humanitarian law with drawing distinctions when defining an armed conflict and reflect on the way in which this impacts on our teaching of the law. This think piece explores the definition of an armed conflict, the distinction between internal and international armed conflict, and the concept of an internationalised armed conflict. The idea for this discussion arose from the judgment of the United States District Court of Appeals decision in *Hamdan*<sup>8</sup> where the majority held that as the *Geneva Conventions* only recognised two categories of armed conflict — international and internal — neither *Geneva Convention III* as a whole nor Common Article 3 applied to the conflict in Afghanistan with al Qaeda.<sup>9</sup> This ruling can be contrasted with the broad approach to the application of *Geneva Convention III* in the decision of Justice Robertson in the US District Court for the District of Columbia<sup>10</sup> and the ultimate conclusion of the majority of the Supreme Court<sup>11</sup> in the same case on Common Article 3. Although the Supreme Court's decision can be praised on the basis that it removes the possibility of a gap in the application of the law, international humanitarian law's fixation with classifying conflicts remains. After setting out the elements of classification in *Hamdan* and international humanitarian law more generally, this think piece will turn to the impact of classification in the context of the law's claims to pragmatism and humanity. The focus in this last section is on the way in which the concern with definitions and divisions may influence our teaching of international humanitarian law and our ability to imagine the potential for reform.

## II HIGHLIGHTING THE PROBLEM WITH CLASSIFICATION: *HAMDAN V RUMSFELD*

The starting point for this discussion is the US case of *Hamdan* — a case which evidences the problem with classification in the law of armed conflict in the context of the 'war on terror'. Following the terrorist attacks in New York and Washington DC of 11 September 2001 and the identification of al Qaeda as the culprits by the US Administration, President George W Bush approved military action in Afghanistan against the Taliban government and al Qaeda pursuant to a resolution authorising the use of military force.<sup>12</sup> *Hamdan*, a Yemeni national, was one of many individuals who was captured in Afghanistan and handed over to US troops. He was then transported to Guantánamo Bay in Cuba. In his petition for the writ of habeas corpus challenging the administration's authority to try him by military commission, *Hamdan* argued that he could not be tried by such a body until his status as a prisoner of war had been determined by a competent tribunal as required by *Geneva*

<sup>8</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33 (2005).

<sup>9</sup> *Ibid* 41.

<sup>10</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 344 F Supp 2d 152 (2004).

<sup>11</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 548 US \_\_ (2006) 1, 68.

<sup>12</sup> For further background to the *Authorization for Use of Military Force Resolution of 2001*, SJ Res 23, 107<sup>th</sup> Cong (2001) and the *Hamdan* decisions, see Sarah Finnin, 'Salim Ahmed Hamdan, Petitioner v Donald H Rumsfeld, Secretary of Defense: Has the Bush Administration's Experiment with Military Commissions Come to an End?' (2006) 7 *Melbourne Journal of International Law* 372.

*Convention III*.<sup>13</sup> The US Government responded to this argument by claiming that *Geneva Convention III* was not applicable to the situation, as Hamdan was not captured in a conflict between the US and Afghanistan (the High Contracting Parties to *Geneva Convention III*) but ‘in the course of a “separate” conflict with al Qaeda’.<sup>14</sup> Justice Robertson rejected this classification. He held that the protections afforded by the *Geneva Conventions* are ‘triggered by the place of the conflict, and not by what particular faction a fighter is associated with’.<sup>15</sup> As Hamdan’s status had not been appropriately determined in accordance with *Geneva Convention III*, Justice Robertson ruled that he could not be tried by a military commission.<sup>16</sup>

This ruling was overturned by the majority of the Court of Appeals of the District of Columbia, which found that the *Geneva Conventions* did not apply to al Qaeda and its members as the *Conventions* only envisaged two types of armed conflict — international armed conflicts and civil wars.<sup>17</sup> In relation to the first category, the Court of Appeals referred to the words of Common Article 2 of the *Geneva Conventions* and came to the conclusion that as al Qaeda was not a state or a signatory to the *Conventions*, the conflict with al Qaeda could not be regarded as an international armed conflict. Second, the conflict did not fall within the purview of Common Article 3 because the ‘war against terrorism in general and the war against al Qaeda’ was a conflict that was international in scope as it was not confined to one particular country.<sup>18</sup> Therefore, the Court of Appeals discerned a gap in the application of the *Geneva Conventions* in relation to conflicts that are international in scope, but do not involve two states or High Contracting Parties.<sup>19</sup> The result of this ruling is that the judges envisaged a war where the laws of war have no application. The gap identified by the Court of Appeals was removed by the Supreme Court when it reversed the Court of Appeals decision by deciding that Common Article 3 applied.<sup>20</sup> The Supreme Court stated that an international armed conflict was a ‘clash between nations’, whereas the aim of Common Article 3 was to provide minimum protections in situations involving rebels in conflicts not of an international nature.<sup>21</sup> In accordance with the view expressed in the commentaries to the *Geneva Conventions*, the Court took a broad approach to Common Article 3 and came to the conclusion that it operated in Hamdan’s circumstances.<sup>22</sup> This in turn dictated whether or not the military commissions were subject to the fair trial

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<sup>13</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 344 F Supp 2d 152, 160 (2004).

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid* 161.

<sup>16</sup> *Ibid* 162.

<sup>17</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33, 41 (2005).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.* Senior Circuit Judge Williams, in a concurring opinion, agreed with the Court’s conclusion, but stated that, in his view, the reference to a conflict ‘not of an international character’ refers to conflicts between a signatory and a non-state actor: at 44.

<sup>20</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 548 US \_\_ (2006) 1, 66. The Supreme Court refrained from deciding the question whether the conflict was within the scope of the more extensive protections offered by *Geneva Convention III*.

<sup>21</sup> *Ibid* 66–7.

<sup>22</sup> *Ibid* 69.

procedures mandated by Common Article 3 and the *Uniform Code of Military Justice*.<sup>23</sup>

These three decisions offer three separate opinions on the way in which the conflict in Afghanistan with al Qaeda should be classified: Justice Robertson described it as an international armed conflict within the *Geneva Conventions*;<sup>24</sup> the Court of Appeals also characterised it as an international conflict (but one that was outside the scope of the *Geneva Conventions*);<sup>25</sup> and the Supreme Court decided (at the very least) that the protections afforded in non-international armed conflicts should be applied.<sup>26</sup> The *Hamdan* cases demonstrate the painstaking and sometimes frustrating discussions that take place in applying (or misapplying) the law of armed conflict to a situation that may not easily be characterised as either an internal or international armed conflict. They also demonstrate the difficulty in situating international terrorist actions within existing legal classifications. The different rulings encapsulate some of the definitional issues in international humanitarian law, as well as the difficulties in utilising these definitions in a system that lacks a formal mechanism for classifying conflicts.<sup>27</sup> In the next section, two separate characterisation problems will be dealt with in turn.

### III CLASSIFICATION AND CONFLICT

#### A *Armed Conflicts versus Other Violence*

The first and most fundamental step in determining the application of international humanitarian law is to decide whether a state of armed conflict exists. In *Hamdan*, the judges of all three US courts appeared to have little doubt that an armed conflict existed, but had difficulty in describing that conflict as either international or internal, or establishing the boundaries of that conflict. Was the 'war on terror' confined to Afghanistan (for the purposes of applying the *Geneva Conventions*) or was it a worldwide (if not international) conflict? The use of the term 'war on terror' by President Bush gives rise to questions regarding the appropriate nomenclature to describe situations of violence or conflict. Greenwood has stated that '[t]raditional international law was based upon a rigid distinction between the state of peace and the state of war'.<sup>28</sup> While the law no longer requires a state of war to exist, at the very least there must be an armed conflict. The *Geneva Conventions* apply 'to all cases of declared war or

<sup>23</sup> Article 21 of the *Uniform Code of Military Justice*, 10 USC §§ 821 (2000) provides that military commissions may have jurisdiction 'with respect to offenders or offenses that by state or by the law of war may be tried by military commissions'. According to the Supreme Court, the President must comply with the law of war (the international law of armed conflict) when utilising the authority in art 21.

<sup>24</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 344 F Supp 2d 152, 161 (2004).

<sup>25</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 415 F 3d 33, 41–2 (2005).

<sup>26</sup> *Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense*, 548 US \_\_ (2006) 1, 48.

<sup>27</sup> In relation to the need for a mechanism to classify conflicts, see Olivier Dür, 'Humanitarian Law of Armed Conflict: Problems of Applicability' (1987) 24 *Journal of Peace Research* 263, 270–1.

<sup>28</sup> Christopher Greenwood, 'Scope of Application of Humanitarian Law' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 39, 39.

any other armed conflict which may arise between two or more of the High Contracting Parties'.<sup>29</sup> The term 'war' is unimportant given that Common Article 1 provides that the application of the *Geneva Conventions* does not depend on whether a state of war is recognised between the parties. Additionally, declarations of war have all but ceased in practice.<sup>30</sup> While 'war' is frequently used as an emotive term (the 'war on terror' representing one such example<sup>31</sup>), the advent of art 2(4) of the *UN Charter* has resulted in the word having few legal implications.<sup>32</sup> We are reassured in this assessment by the commentary to the *Geneva Conventions*.<sup>33</sup> No one could doubt that this is a step forward in terms of implementation and enforcement — it would be all too easy for states to undertake hostilities and 'pretend' that they are not committing an act of war, thereby circumventing the applicable law.<sup>34</sup>

At the other end of the spectrum, a state of conflict must be in existence before the majority of articles in the *Geneva Conventions* come into operation. The commentaries to the *Geneva Conventions* do not suggest a minimum threshold of violence, but indicate that '[a]ny difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2'.<sup>35</sup> This description leaves open the question as to the sort of differences that can be classified as armed conflicts for the purposes of international humanitarian law. The most frequently quoted passage to describe the threshold test for an armed conflict is found in the judgment of the ICTY in *Tadic*, where it was held that:

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.<sup>36</sup>

This definition provides some answers to the question whether there is a state of armed conflict. First, there must be a minimum degree of intensity in the hostilities — that is, the resort to armed force or 'protracted' violence between two parties. Second, the entities involved in the violence must have a certain level of organisation.<sup>37</sup> The importance that states attach to the minimum

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<sup>29</sup> *Geneva Conventions*, above n 1, Common Article 2.

<sup>30</sup> Christopher Greenwood, 'The Concept of War in Modern International Law' (1987) 36 *International and Comparative Law Quarterly* 283.

<sup>31</sup> See Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 *European Journal of International Law* 993, on the use of the term war by the US Administration after the 11 September 2001 terrorist attacks. See also references to the 'war on poverty' and the 'war on drugs' in David Kennedy, *Of War and Law* (2006) 1.

<sup>32</sup> Greenwood, 'The Concept of War in Modern International Law', above n 30, 283.

<sup>33</sup> See Jean Pictet (ed), *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Volume 1)* (1952) 32.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* (citation omitted).

<sup>36</sup> *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* Case No IT-94-1-AR72 (2 October 1995) [70]. On the question of what constitutes an 'armed attack' for the purposes of art 51 of the *UN Charter*, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) (Merits)* [1986] ICJ Rep 14, 195 ('*Nicaragua*').

<sup>37</sup> *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* Case No IT-94-1-AR72 (2 October 1995) [70].

threshold is evidenced by the definition of an internal armed conflict for the purposes of *Additional Protocol II*. When drafting this treaty, states were clear that internal security situations, such as ‘riots, isolated and sporadic acts of violence and other acts of a similar nature’,<sup>38</sup> were not to be considered within the ambit of international humanitarian law. This position has recently been reaffirmed with the adoption of the *Rome Statute* which uses the same language to distinguish internal armed conflicts from other acts of violence for the purposes of defining war crimes.<sup>39</sup> In its interpretative declaration to the *Rome Statute*, France reiterated the necessity of drawing a line between armed conflicts and the commission of ordinary crimes, including terrorist offences.<sup>40</sup>

The problem of identifying the appropriate threshold test for an armed conflict is further complicated by international terrorism. The *Hamdan* decision demonstrates the problem that law, and particularly international humanitarian law, has in dealing with terrorist actions that cross borders. The decision as to whether Common Article 3 applied to the fact situation determined whether Hamdan and other Guantánamo Bay detainees would be tried by ‘a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples’.<sup>41</sup> Underlying the view of the US Government that the detainees at Guantánamo Bay should be denied particular fair trial procedures was the belief that as alleged terrorist offenders, they were not entitled to the protections afforded by international humanitarian law (or indeed, other aspects of criminal trial procedures). This leaves open the question whether international terrorist actions, such as the 11 September 2001 attack on the US (perhaps when combined with other attacks by the same group) can be classified as part of an armed conflict? Although international humanitarian law, and international law more generally, have failed to comprehensively define terrorism, there is no doubt that terrorist actions are prohibited in armed conflict. The distinction between civilians and combatants and the prohibition on indiscriminate attacks in warfare forbid terrorist activities that are primarily directed against civilians.<sup>42</sup> International humanitarian law also includes a few specific references to terrorism — for example, *Additional Protocol I* prohibits ‘[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population’.<sup>43</sup> Article 33 of *Geneva Convention IV* prohibits ‘all measures of intimidation or of terrorism’ and art 4 of *Additional Protocol II* bans ‘acts of terrorism’ in times of internal armed conflicts.<sup>44</sup> These provisions demonstrate that the prohibition on acts of terrorism in armed conflict is well established. They also indicate that terrorism is different from armed conflict

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<sup>38</sup> *Additional Protocol II*, above n 2, art 1(2).

<sup>39</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 8(2)(c), (d) (*‘Rome Statute’*).

<sup>40</sup> Rome Statute of the International Criminal Court, *Declarations and Reservations — France: Interpretative Declaration to the Rome Statute of the International Criminal Court* (9 June 2000) [3].

<sup>41</sup> *Geneva Conventions*, above n 1, Common Article 3(1)(d).

<sup>42</sup> *Additional Protocol I*, above n 2, art 51. See also Hans-Peter Gasser, ‘Acts of Terror, “Terrorism” and International Humanitarian Law’ (2002) 84 *International Review of the Red Cross* 547, 555–6.

<sup>43</sup> *Additional Protocol I*, above n 2, art 51(2).

<sup>44</sup> *Additional Protocol II*, above n 2, art 4(2)(d).

properly conducted and that whereas one type of action is absolutely prohibited, the other is not.<sup>45</sup> When terrorist actions could meet the minimum threshold for a non-international armed conflict, but may be excluded from the protection of that law for other reasons, then the law has difficulty in justifying its exclusion based solely on the definitions adopted in international humanitarian law.

### B *International versus Internal/Non-International Armed Conflicts*

The second distinction that is frequently cited when discussing international humanitarian law is the untenable and frustrating line that is drawn between international and internal armed conflicts.<sup>46</sup> The difficulties that are created by dividing armed conflicts into these two categories are aptly demonstrated by the various discussions in the *Hamdan* decisions. Very few, if any, commentators would argue that there is a purely humanitarian reason for distinguishing between international and internal armed conflict for the purposes of applying rules that aim to protect the victims of armed conflict or that regulate the means and methods of warfare. International armed conflicts are defined as those between two states (or for the purposes of the *Geneva Conventions*, ‘High Contracting Parties’), while the boundaries of non-international armed conflicts are defined by Common Article 3 and *Additional Protocol II*. The requirements of Common Article 3 apply in cases of ‘armed conflict not of an international character occurring in the territory of one of the High Contracting Parties’. In contrast, *Additional Protocol II* has a more structured (and restrictive) approach, in that it applies to armed conflicts:

which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.<sup>47</sup>

The problem in defining hostilities between a High Contracting Party and a non-state actor taking place in the territory of another state has led at least one commentator to suggest that there should be another category: extra-state conflicts.<sup>48</sup> Leaving aside the problem of introducing yet another category to cover such situations, the definition of an international armed conflict is further

<sup>45</sup> Although art 2(4) of the *UN Charter* prohibits the threat or use of force, two exceptions are recognised: self-defence (art 51) and action by the Security Council (pursuant to ch VII).

<sup>46</sup> See W Michael Reisman and James Silk, ‘Which Law Applies to the Afghan Conflict?’ (1988) 82 *American Journal of International Law* 459, 465:

The ‘distinction’ between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law ... Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.

See also James G Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict’ (2003) 85 *International Review of the Red Cross* 313; Deidre Willmott, ‘Removing the Distinction between International and Non-International Armed Conflict in the *Rome Statute of the International Criminal Court*’ (2004) 5 *Melbourne Journal of International Law* 196.

<sup>47</sup> *Additional Protocol II*, above n 2, art 1(1).

<sup>48</sup> Roy S Schöndorf, ‘Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?’ (2004) 37 *New York University Journal of International Law and Politics* 1, 3.



complicated by the extension of the phrase in *Additional Protocol I* to include ‘armed conflicts in which people are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right to self-determination’.<sup>49</sup> As is observed by Stewart, art 1(4) of *Additional Protocol I* confirms that the ‘dichotomy between international and non-international conflict is far from strict or principled’.<sup>50</sup>

The lack of principle behind this distinction is reinforced by the recognition of another possibility — an internationalised armed conflict — a phrase which describes ‘internal hostilities that are rendered international’.<sup>51</sup> The phrase ‘internationalised armed conflict’ is not found in an international humanitarian law treaty, instead, the term arose from the need to deal with situations where one state controls the activities of a paramilitary force or group within another state.<sup>52</sup> In *Tadic*, and subsequent cases arising from the Yugoslav conflict, the ICTY posited the test of ‘overall control’ in seeking to determine whether a conflict was international or non-international.<sup>53</sup> Thus, if it can be shown that one state is in overall control of military or paramilitary forces that are fighting against the government of another state then there will be evidence of an international armed conflict. The overall control test was distinguished from the ‘effective control’ test as stated by the International Court of Justice in *Nicaragua* on the basis that the ‘effective control’ test espoused by the ICJ placed the threshold for control too high.<sup>54</sup> The Tribunal recognised that the level of control required to internationalise a conflict may vary depending on whether the actions were undertaken by a paramilitary group or a group that is not organised in a military structure.<sup>55</sup> Only in a system which creates a distinction between the rules that apply in international and internal armed conflict, would the concept of an internationalised armed conflict be considered necessary.

The International Committee of the Red Cross (‘ICRC’), in its 2005 study of customary international humanitarian law, has attempted to downplay the significance of this distinction by stating that the evidence now demonstrates that ‘many rules of customary international law apply in both international and non-international armed conflicts’.<sup>56</sup> Despite this finding, the study continues to replicate the division between international and non-international armed conflict in its discussion of individual principles.<sup>57</sup> This method of dealing with the

<sup>49</sup> *Additional Protocol I*, above n 2, art 1(4).

<sup>50</sup> Stewart, above n 46, 318–19.

<sup>51</sup> *Ibid* 315.

<sup>52</sup> For an explanation of the type of situations where a conflict may be classified as international, see *Prosecutor v Tadic (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999) [84]; Christine Byron, ‘Armed Conflicts: International or Non-International?’ (2001) 6 *Journal of Conflict and Security Law* 63, 80–3.

<sup>53</sup> *Prosecutor v Tadic (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999) [131]. See, eg, *Prosecutor v Blaskic (Appeals Chamber Judgment)* Case No IT-95-14 (27 September 2006); *Prosecutor v Kordic and Cerkez (Appeals Chamber Judgment)* Case No IT-95-14/2 (17 December 2004).

<sup>54</sup> *Ibid* [124]. See also *Nicaragua* [1986] ICJ Rep 14, 64–5.

<sup>55</sup> *Prosecutor v Tadic (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999) [137].

<sup>56</sup> ICRC, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law — Volume I: Rules* (2005) xxix.

<sup>57</sup> See, eg, *ibid*, which divides the evidence for many of the rules into international and non-international armed conflicts.

individual rules of international humanitarian law is understandable — the aim behind the ICRC's study is to identify whether particular principles of international humanitarian law have attained the status of customary international law. Given that the law currently distinguishes between international and non-international armed conflicts, the study must deal with each type of conflict separately. But the division of the study into international and non-international armed conflict demonstrates that international lawyers, even in very recent documents, continue to revert to traditional boundaries when describing legal principles.

#### IV CHARACTERISATION AND THE TEACHING OF INTERNATIONAL HUMANITARIAN LAW

International humanitarian law is certainly not the only area of law, international or domestic, that relies upon carefully constructed definitions to determine threshold issues. But international humanitarian law provides detailed provisions, perhaps more prescriptive than any other area of international law,<sup>58</sup> designed to protect people in the most serious situations of violence. Consequently, the failure to classify a state of affairs as an 'armed conflict' has grave legal consequences. The characterisation of a situation has at least two important implications for the teaching of international humanitarian law. First, it undermines international humanitarian law's claim that it is a pragmatic body of law. Second, it creates silences about other types of conflict and violence that are not defined as armed conflicts or are excluded from the ambit of international armed conflicts. This results in the removal of certain types of suffering from our discussion of international humanitarian law principles and undermines the law's claim to humanity.

International humanitarian lawyers pride themselves on the law's pragmatism. For example, in response to questions concerning the prohibition on the use of force in the *UN Charter*, it is frequently claimed that the law of armed conflict applies whether or not the conflict is classified as legal or illegal according to the *jus ad bellum*. Such debates are deemed irrelevant when faced with the need to ensure that the victims of armed conflict fall within the protections offered by international humanitarian law. Consequently, the Appeals Chamber in *Tadic* was able to proclaim that:

This body of law is not grounded in formalistic postulates. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible.<sup>59</sup>

But the various distinctions adopted in the law of armed conflict are not based on 'detering deviation', nor are they designed to ensure that the law is grounded in effectiveness. They are inspired by realism, but not the realism that the judges of the ICTY appeared to have in mind in the above passage. Instead, the description of the situations in which the law of armed conflict operates is

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<sup>58</sup> For example, *Geneva Convention III*, above n 1, sets out rules relating to the amount of baggage that a prisoner of war ('POW') may take if transferred (25 kilograms): art 48; the establishment, management and termination of POWs' accounts: arts 64–6; and the amount of monthly advances of pay to POWs: art 60.

<sup>59</sup> *Prosecutor v Tadic (Appeals Chamber Judgment)* Case No IT-94-1-A (15 July 1999) [96].

dictated by states' desire to limit the application of the law in certain situations. For example, the definition of armed conflict in *Tadic* and the exclusions in *Additional Protocol II* are not based on any particular formulation of the type of violence they should bring this area of law into play. Instead, the list of issues that is outside the purview of this branch of the law in *Additional Protocol II*, evidence states' concern with ensuring that the prescriptive articles regarding the treatment of personnel in armed conflicts should not intrude upon states' ability to deal with security situations which they regard as largely internal in nature.<sup>60</sup> For example, as is highlighted by McCoubrey and White, the provisions in art 1 of *Additional Protocol II*, including the requirement of 'territorial administration', exclude the activities of the Irish Republican Army in Ireland, the Basque Separatists in Spain, and the Shining Path in Peru.<sup>61</sup> By confining the application of *Additional Protocol II* in this way, states have ensured that international legitimacy is not given to groups that fight within their borders. This conclusion is reinforced by art 3(1) of *Additional Protocol II* and the primary emphasis placed on ensuring that state parties have responsibility 'by all legitimate means' for maintaining 'law and order' and for defending 'the national unity and territorial integrity of the State'. Furthermore, the distinction between international and internal armed conflicts merely represents a 'compromise between the concept of sovereignty and humanitarian concerns'.<sup>62</sup> It is a pragmatic compromise, given our understanding of what states will accept, but it is not a satisfactory compromise.

The classifications adopted in international humanitarian law also undermine the law's claim to humanity by creating silences about certain types of conflicts and violence. The idea that international law excludes the experience of particular people has been critically discussed, most notably by feminist legal scholars.<sup>63</sup> More recently, the silences that international humanitarian law creates about the violence suffered by women in armed conflict have been examined.<sup>64</sup> Stark believes that the law on the use of force also creates silences about the 'the human experience of war'.<sup>65</sup> She has written that '[t]he law on the use of force is ... shaped by its negative space — who is not speaking, what is not said, and what cannot be said'.<sup>66</sup> Although Stark is writing of the application of the principles relating to the use of force (*jus ad bellum*), the same comment is also true of the distinctions created by international humanitarian law (*jus in bello*). Arguably, the threshold test for determining the existence of an armed conflict and the classification of non-international and international armed conflicts also create silences. For example, the second division discussed

<sup>60</sup> See Reisman and Silk, above n 46, 465.

<sup>61</sup> Hilaire McCoubrey and Nigel D White, *International Law and Armed Conflict* (1992) 318.

<sup>62</sup> Gasser, above n 42, 560.

<sup>63</sup> See Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613. See generally Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (2005).

<sup>64</sup> See, eg, Judith Gardam, 'Women and Armed Conflict: The Response of International Humanitarian Law' in Helen Durham and Tracey Gurd (eds), *Listening to the Silences: Women and War* (2005) 109.

<sup>65</sup> Barbara Stark, 'What We Talk about When We Talk about War' (1996) 32 *Stanford Journal of International Law* 91, 104.

<sup>66</sup> *Ibid.*

above — the distinction between international and non-international armed conflicts — may be based on an acceptance of the level of interference that states will tolerate in internal situations, but excludes those fighting in a non-international armed conflict from large parts of the protections offered by the law. This is despite the fact that ‘[a]rmed conflicts arising within states, “civil wars”, have a well deserved reputation for ferocity’.<sup>67</sup> The first distinction identified — the concern with defining the minimum threshold of an armed conflict — is treated as a rational method of establishing the boundaries of international humanitarian law. It establishes the borders within which killing and maiming is legitimate.<sup>68</sup> It also sets out the boundaries within which discussions concerning the application of the principles regarding the treatment of the wounded, sick and shipwrecked, the involvement of the Red Cross, the availability of prisoner of war status and the rights to particular trial procedures take place. In effect, the definition dictates the margins of international humanitarian law teaching.<sup>69</sup> Everything else is to be discussed in other subjects, including international human rights law, refugee law, international law or (international) criminal law. The application of these other branches of law in times of armed conflict is sometimes met with claims that international humanitarian law is *lex specialis* — a claim that is dealt with in the Report of the Study Group of the International Law Commission, *Fragmentation of International Law*.<sup>70</sup> The difficulty in determining whether an armed conflict has occurred or begun to occur also led to debates as to whether the terrorist attacks of 11 September 2001 should be denoted a war crime, a crime against humanity or an act of terrorism subject to domestic law.<sup>71</sup> While these debates are significant in terms of the legal classification of a particular situation, most notably for the purposes of prosecution, they do little to describe the suffering of those subject to conflict or violence.

The idea that boundaries created in international law teaching may inhibit rather than facilitate our understanding of the law and its possibility to achieve justice is not new. For example, Otto has written that educators need to rethink the boundaries ‘between human rights and trade law, between international peace, security and economics ... and between the international and the domestic spheres’.<sup>72</sup> Professor Chimni, in a recent public lecture at The University of Melbourne, suggested that international lawyers are overly concerned with

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<sup>67</sup> McCoubrey and White, above n 61, 317.

<sup>68</sup> Kennedy, above n 31, 8.

<sup>69</sup> Although the definition of an armed conflict is considered fundamental to the application of international humanitarian law, there are a number of commentators who believe that the principles of the law of occupation should apply by analogy to other military operations, such as peacekeeping operations. See discussion in Bruce Oswald, ‘The Law of Military Occupation: Answering the Challenges of Detention during Contemporary Peace Operations’ (2007) 8 *Melbourne Journal of International Law* 311.

<sup>70</sup> International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58<sup>th</sup> sess, UN Doc A/CN.4/L.682 (13 April 2006).

<sup>71</sup> See Cassese, above n 31; A P V Rogers, *Terrorism and the Laws of War: September 11 and its Aftermath* (2001) <<http://www.crimesofwar.org/expert/attack-apv.html>> at 18 October 2006.

<sup>72</sup> Dianne Otto, ‘Handmaidens, Hierarchies and Crossing the Public–Private Divide in the Teaching of International Law’ (2000) 1 *Melbourne Journal of International Law* 35, 60.

boundaries that exclude concern with the impact of the law on the lives of ordinary people.<sup>73</sup> I believe that when teaching international humanitarian law, we need to rethink the way in which we discuss the boundaries that are drawn by the law in defining its most fundamental concepts. This is not to suggest that international humanitarian law teachers fail to point out the deficiencies in the law, or are not uncritical of the distinctions that are drawn (particularly between international and internal armed conflicts). However, by commencing international humanitarian law courses with stated immutable definitions of armed conflict, international armed conflict and internal armed conflict we tend to foreclose discussion of questions such as: in what situations should international humanitarian law be applied? What sort of suffering and violence should be encompassed within the concept of an armed conflict? How could we encourage states to remove distinctions between internal and international armed conflicts in treaties? This problem is compounded by the fact that we emphasise two claims about the law: its pragmatism and its humanity. The first claim tends to constrain our ability to imagine the lines that should be drawn by international humanitarian law, whereas the second claim limits our ability to criticise those boundaries.

## V CONCLUSION

When we talk about war ... we do not talk about law.<sup>74</sup>

Contrary to the sentiment expressed in this think piece, it would seem that when it comes to discussing the law that applies *in* armed conflict, our vocabulary is filled with legal principles. The essence of this think piece is not that we do not talk about law when we talk of war, but that when we speak of international humanitarian law and its pragmatism and its humanity, we may limit our ability to suggest other methods of classification and the possibility for reform. Simpson has written in relation to the teaching of international law more generally, 'for all our progressivism we inject relatively little utopianism into our teaching'.<sup>75</sup> Rather than explain that international humanitarian law recognises a distinction between international and non-international armed conflict, perhaps I would be better placed to ask students to consider what are the fundamental principles that should be covered in a law of armed conflict and whether different rules should apply depending on whether the conflict is deemed international or internal. Perhaps it would be more consistent with the law's claim to humanity if I were to start by asking what types of suffering and violence should be included within this branch of the law, rather than setting out the definition in *Tadic* and explaining the background to the *Geneva Conventions*

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<sup>73</sup> B S Chimni, 'Third World Approaches to International Law: Past, Present and Future' (Sir Kenneth Bailey Memorial Lecture, delivered at the Melbourne Law School, 6 June 2007), reproduced in B S Chimni, 'The Past, Present and Future of International Law: A Critical Third World Approach' (2007) 8 *Melbourne Journal of International Law* 499.

<sup>74</sup> Stark, above n 65, 91–2 (citations omitted). As this comment was made in the context of a review of Thomas Ehrlich and Mary Ellen O'Connell, *International Law and the Use of Force* (2005), it appears to be mainly concerned with the actual use of force under international law, rather than international humanitarian law.

<sup>75</sup> Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law' (1999) 10 *European Journal of International Law* 70, 87.

and *Additional Protocol I* on the one hand, and Common Article 3 and *Additional Protocol II* on the other.

I had already decided on the title of this think piece when I came across a book entitled *Lines in the Sand*<sup>76</sup> at the Oxfam shop. *Lines in the Sand* is a collection of writing on war and peace, covering a range of conflicts throughout the world. The introduction to the book is directed to school students and reminds us that '[i]n places like Nigeria, Israel, Afghanistan, Kuwait, Kosovo, Rwanda, Vietnam, the Falklands, Iran and Iraq, bombs, bullets and landmines have done their deadly work'.<sup>77</sup> The collection's many poems and short stories describing wars and people's reactions to such wars do not distinguish between conflicts. Thus, they reaffirm the need to question the lines that are drawn by the law when describing armed conflicts. When I teach international humanitarian law at university I will continue to discuss the importance of the legal characterisation of an armed conflict, the legal distinction between international and non-international armed conflict, and the recognition of an internationalised armed conflict. But in teaching this subject I should emphasise that these are just that — legal distinctions — and do not define the suffering of peoples who are affected by violence and conflict, or the appropriate response to such tragedies.

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<sup>76</sup> Mary Hoffman and Rhiannon Lassiter (eds), *Lines in the Sand: New Writing on War and Peace* (2003).

<sup>77</sup> *Ibid* 4.