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Tribes, thugs, terrorists and the law: can non-conventional armed violence be regulated?

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Executive summary

The primary role of international law in situations of massive violence is to channel and contain the use of force. However, non-conventional armed violence, particularly when this involves criminalised violence outside or on the margins of traditional armed conflict, is an area in which the law encounters numerous obstacles.

This paper discusses the limits and constraints on conventional international law, primarily human rights and humanitarian law, when it is presumed to apply to the tribes, thugs and terrorists who underpin much of what is understood as non-conventional armed violence. In so doing, it draws heavily on analysis of the patterns of armed violence prevalent in Iraq and Syria in recent years, when attacks by tribes and terrorists (the precursors to the Islamic State of Iraq and the Levant) increased as a result of the inability of state authorities to exercise the monopoly of force and to control territory.

The brutality of organised crime in Latin America has likewise raised questions about the appropriateness and effectiveness of military responses, and has led to calls for new forms of humanitarian control over criminal groups. Drawing on these examples, the article considers how international law has adapted to new forms of violence in recent decades, and, on the basis of empirical evidence, highlights the most important impediments to more comprehensive international regulation of non-conventional armed violence.

Introduction

Use of violence on a massive scale by non-conventional armed actors challenges many established categories of international law. Legal norms largely fail to take due account or appropriately regulate such non-conventional violence. It is an endemic phenomenon on the fringes of armed conflict, where it flourishes in the shadow of weakened or absent state institutions. Three distinct sources of non-conventional violence pose the most acute problems under existing international law, as will be discussed in this paper. These can best be summarised as tribal networks, thugs (organised crime) and terrorists.

First, a considerable number of the world's most notorious armed groups are built around tribal cohesion. The Afghan Taliban, the Sudanese Janjaweed, the Somali al-Shabaab and the Libyan Misrata militia are a few prominent examples. Tribal networks represent social, economic and political structures that exist in parallel to formal state structures. Tribes range from a few hundred to more than a million people and offer vital cohesive structures where ordinary institutions are weak or have disintegrated.

For this reason, tribal structures have a tendency to strengthen or re-emerge when the presence of state authorities diminishes. In the latter period of the Ba'ath regime in Iraq, the weakening of the state through war and sanctions reactivated kinship networks across Iraqi society. Similar processes of "re-tribalisation" have been visible in Libya and Syria since 2011. Tribes ascend as ordinary power structures disintegrate, offering a minimum of security and cohesion, often in alliances of convenience with violent entrepreneurs. The current resurgence of radicalised jihadist groups in the Middle East is closely linked to their ability to engage tribal networks in countries such as Iraq, Syria and Yemen. Simultaneously, the increasing

scope and intensity of tribal-associated violence in Africa, the Middle East and Central Asia has led to uncertainty about how to classify contexts in which tribes are the driving forces of violence, and, consequently, how international law regulates this violence.

Second, the tide of organised criminal groups (OCGs) is causing governments in Latin America to struggle with destabilisation of already weak social and political structures. OCG activities have exposed the inability of governments to perform their most basic function: maintaining internal security. Certain OCG activities may even be motivated by the objective of exposing this incapacity of the state. Mexico's drug-related violence, for example, has surpassed the levels that typically characterise the drug trade, and has reached a level more typical of armed conflict. The drug wars in Mexico caused an estimated 57,000 deaths from 2006 to 2012 (Cave, 2012; Sánchez, 2012: 474). The highly organised nature of these criminal syndicates, coupled with the duration and intensity of the violence produced by their tactics, has led numerous scholars to question whether the situation should indeed be classified as an armed conflict (Bergal, 2012: 1042; Wotherspoon, 2012; Talbot Jensen, 2012: 713).

Finally, terrorism is a dominant feature of non-conventional violence. The term "terrorist" remains controversial, and the search for a legal definition of terrorism has been likened to the quest for the Holy Grail. "Terrorism" refers, in essence, to premeditated, politically motivated violence perpetrated against non-military targets by non-state actors. However, even a relatively stringent definition encompasses a broad array of violent acts, ranging from minor, sporadic attacks by lone offenders to concerted, massive and coordinated attacks resembling those of conventional armies.

These attacks are also highly concentrated in areas of armed conflict. At the global level, 82% of the 17,958 deaths ascribed to "terrorist attacks" in 2013 originated in five countries.[1] Four of these countries were in armed conflict-like situations.[2] Attacks against soft targets are commonly used by terrorists to manipulate broader developments in a given armed conflict, by escalating levels of violence or spoiling attempts to settle ongoing disputes.

The elusive character of terrorism, combined with the highly politicised understanding of who is and who is not a terrorist, exacerbates challenges to regulation by international law. How to incorporate regulation of terrorism into pre-existing structures of international law has therefore been the subject of heated discussions in legal circles since the 1970s. These debates have increased in urgency since 2001.

The violence associated with tribes, thugs and terrorists often has features in common with low-intensity armed conflict in terms of scale, scope and detrimental effects on civilian populations. In legal terms, however, the violence is often perpetrated by actors *other* than parties to an armed conflict, thereby falling short of unequivocal regulation by international humanitarian law (IHL). IHL is applicable exclusively to parties to situations that qualify as "armed conflict" under Common Article 2 (international armed conflict) or Common Article 3 (non-international armed conflict) to the 1949 Geneva Conventions I–IV. Tribes, thugs and terrorists frequently operate on the periphery of armed conflict, thriving in the chaos or lawlessness commonly associated with it, but without qualifying as "parties" under international law. In such situations, international law primarily addresses the (largely absent) state actor.

This paper explores how international law applies to non-conventional actors such as tribes, thugs and terrorists. It presents some of the barriers that exclude non-conventional actors from the proper reach of international law, pointing to reasons for the law's inability to respond to this mounting threat in a more comprehensive manner. The paper ends by drawing attention to an approach that may potentially address certain of the law's shortcomings.

International law and the taming of non-conventional armed violence

Over the past half-century, international law has been involved in a slow and uneasy advance into regulating certain types of non-conventional armed violence. Conflicts in which one or both parties are non-state actors have been brought into the realm of humanitarian law (the laws of armed conflict). After the Second World War, in 1949, a minimum set of rules was extended to internal conflict through Common Article 3 to the Geneva Conventions. The Hague Convention on Cultural Protection (1954) and Additional Protocol II to the Geneva Conventions (1977) cemented and extended the application of humanitarian law to internal conflicts. With the end of the Cold War, international regulation of such conflicts gained even more traction, and is now broadly established in conventions, customary law, legal doctrine and jurisprudence.[3] These efforts to domesticate non-conventional armed conflicts through international law have resulted in three major developments.

International law of armed conflict applies to non-state actors

The core of humanitarian law applies to armed conflicts between states and non-state actors, and between non-state actors. By implication, it applies directly to non-state actors. These rules ignore the lawfulness or legitimacy of the violent struggle of each party under

1 Syria, Iraq, Afghanistan, Pakistan and Nigeria; (Institute for Economics and Peace, 2014:15).
2 The International Committee of the Red Cross (ICRC) classified the situations in Syria and Afghanistan as armed conflicts in 2013. The Geneva Academy (2013) identified Syria, Afghanistan and Nigeria as armed conflicts in the same year. The Iraqi government characterised the situation in Iraq in mid-2013 as a civil war.
3 The most prominent confirmations in treaty law are the Rome Statute of the International Criminal Court (ICC), Articles 8 (2) (c)–(f) (war crimes in non-interstate conflicts); the United Nations (UN) Convention on Certain Conventional Weapons, Amended Protocol II (1996) and Amended Article 1 (2001); and ICRC's study on customary international humanitarian law (International Committee of the Red Cross: 2005).

domestic or international law. Instead, they apply automatically when the basic criteria for classification as parties to an armed conflict are fulfilled by two opposing parties.

This development in the application of the law corresponds to the fact that involvement of non-state actors on at least one side has become a persistent pattern in modern armed conflicts. In principle, inasmuch as tribal networks, thugs and terrorists are parties to an armed conflict, they will be bound *directly* by the rules of international law restricting what belligerents may do in situations of hostilities, and how they may treat enemies in their hands also outside these hostilities.

There is less difference between the laws of interstate and non-interstate conflict

The rules applicable to non-interstate conflicts have largely been shaped by analogies from interstate armed conflict (i.e. Geneva Convention Common Article 2 conflicts). Hence, rules established in order to restrict violence between conventional armies have been extended to conflicts between state and non-state actors, or between non-state actors.

Increased emphasis on the rights of the individual and victims of violence by non-state actors has been seen as an appropriate departure from "anti-humanitarian formalism", in which conventional and non-conventional conflicts were treated very differently. The effect is that roughly the same rules now apply to all-out interstate war and protracted, low-intensity armed conflict, with the exception of rules relating to the status of combatants, military occupation and neutrality, which remain exclusive to interstate armed conflict. Consequently, the international norms that may apply to tribes, thugs and terrorists operating in these contexts are modelled on norms applicable to major armies in interstate hostilities. Implicitly, the rules are moulded for very high levels of violence.

The legal distinction between war and peace has diminished

The conditions under which non-conventional armed violence thrives – the grey zones between regulated peace and fully fledged armed conflict – are themselves covered by international law in an unprecedented manner. Contemporary doctrines of international law stipulate that international treaties continue to be binding irrespective of armed conflict. Notably, the application of human rights conventions (that is, international human rights law (IHRL)) has extended far into the realm of armed conflict. This evolution has reduced the *legal* distinction between situations of massive violence and peace.

From the notion that IHRL protects individuals in the midst of armed conflict, it follows that state authorities retain their human rights obligations even when facing an insurgency by the state's own citizens. More generally, this development reflects the increased legalisation of international affairs. The overarching aim of this process is to contain and channel different forms of armed conflict in order to reduce its prevalence to the strictest minimum. From this perspective, the application of humanitarian law to non-state actors and the application of human rights law within an armed conflict, *including* to non-state actors, seems perfectly appropriate.

The new legal orthodoxy is that the two regimes of humanitarian law and human rights law are complementary in a situation of violence, whether this is the result of traditional armed conflict or not. The deplored legal "black hole" of non-conventional armed violence thus seems to be narrowing, insofar as many more situations of violence have been brought under the realm and within the reach of international law.

The rules for applying international humanitarian law

International law has two distinct functions in relation to violence: it simultaneously restrains and legitimises the use of force. While human rights law imposes strict limits on the use of force, humanitarian law implicitly permits a much more extensive reliance on massive and lethal force.

International humanitarian law applies to state and non-state parties to armed conflicts alike. Hence, when the forces of Bashar al-Assad's Syrian regime engaged in hostilities with the Free Syrian Army from February 2012, and when Iraqi state forces fought Islamic State of Iraq and the Levant (ISIL) insurgents in 2014, both situations qualified as non-international armed conflicts.[4] IHL applies to the parties' mutual conduct, and individuals of both parties may be held accountable under international law by a competent institution for its violation.

The effects of this evolution in international law are that some armed actors are subject to legal regulation in certain situations, while others are not. IHL is modelled on rather strict dichotomies in which different situations and perpetrators of violence are held to account based on formal distinctions. These categories were created on the assumption that non-state armed groups would resemble state actors, that they would be "conventional" insurgents. In the International Committee of the Red Cross (ICRC) Commentary to Common Article 3 to the Geneva Conventions (1958), Jean Pictet indicated that the provisions of that article were meant for non-state actors with almost conventional military capabilities. However, the highly non-conventional nature of tribes, thugs and terrorists makes IHL dichotomies intended for more conventional actors largely unsuitable.

4 For Syria, see UN Human Rights Council (2012) 3rd Report 3rd Report of the independent international commission of inquiry on the Syrian Arab Republic, 16. August. UN Doc. A/HRC/21/50 para 12.

Pairing

The first step in deciding on the application of international law is to identify two entities (parties) involved in mutually hostile acts. IHL obligations are directed at *parties* to the conflict, and only by extension to individuals linked to each party. For example, a radical jihadi group directing violent acts against a vague entity such as "Christians" does not engage in such a paired relationship.

Each entity in the pair, or "dyad", must have a certain level of basic organisation. Furthermore, hostilities comparable to armed conflict must occur between the two. The fact that there is an armed conflict in Syria is not sufficient to determine applicability of IHL to a given armed group. Nor will applicability of IHL to a group automatically extend to its relations with any entity other than that with which it is paired. If Jabhat al-Nusra, the al-Qaeda-affiliated group in Syria, engages in hostilities with ISIL, the extent to which IHL applies must be determined without reference to the fighting between Jabhat al-Nusra and the Syrian regime. In case of tripartite fighting, each pairing must be identified and qualify separately. IHL does not regulate anarchic violence.

Intensity of hostilities

When two states alter their normal non-violent interaction and exchange military firepower, there is no doubt that these hostile acts are governed by IHL. Conventional use of force may very quickly escalate into major hostilities, and IHL applies automatically "from the very first shot". Exempting minor incidents not involving the armed forces of both states, and misunderstandings halted prior to escalation, applicability of IHL is fairly straightforward.

An entirely different situation arises with non-conventional armed violence. The normal state of affairs within a given national territory is the inherent right – and even duty – on the part of state authorities to resort to the use of force to maintain law and order and protect its citizens from threats to their security arising within the state's borders. Conversely, individuals and non-state actors are prohibited under domestic law from engaging in the use of force beyond very limited acts of individual self-defence.

The use of force by state authorities under these conditions is restricted by IHRL, which prohibits the use of force unless it is absolutely necessary and strictly proportionate to the objective. The state has the right to employ certain means intended *not* to harm innocent bystanders, such as riot control agents (with chemical components) and dum-dum bullets (which may cause severe injuries to intended targets such as criminals or individuals perceived to be security threats, but which reduce the risk of collateral damage). Detention may take place only subject to sentencing by a court in compliance with fair trial standards.

When the prevalent levels of violence escalate to a point at which IHL applies, two changes occur:

(i) certain legal restrictions on the state actor are relaxed, notably with respect to deprivation of life or liberty of specific categories of individuals;
(ii) the non-state actor is henceforth a direct subject under international law, with restrictions similar to those imposed on the state actor as regards the armed conflict.

Although no treaty offers a definition of armed conflict, it has been established under international law that violence within the territory of a state must rise beyond the level of violent riots, social tensions and disturbances for IHL to apply.[5] A *qualified* level of intensity of hostilities is therefore necessary in interactions between state authorities and a non-state actor for an internal "armed conflict" to arise.

However, during the 1990s, international criminal jurisprudence pushed this threshold downwards. The *Tadic* case in the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1995 stipulated that "protracted armed violence" was sufficient for IHL to apply in internal conflict.[6] This development suggests that a larger number of intrastate conflicts and situations of non-conventional armed conflict are now covered by humanitarian law.

Numerous conflict situations nevertheless still fall short of the threshold. A "surge" in Iraq in 2007 of national government forces, US forces and tribal networks organised as the Sahwa was capable of recapturing Sunni areas of Iraq from the Islamic State of Iraq (ISI, the precursor to ISIL). During this effort, these different forces were clearly operating jointly as a party against ISI, and IHL applied.

In subsequent years, however, ISI persisted in a looser form. It operated in parts of Anbar near the border with Syria and in Nineveh, where the Iraqi state was particularly weak. ISI dwelt in urban areas of Mosul, relying on organised crime and protection money or tax levied on local populations for finance, and on alliances with local tribes to ensure a foothold in the countryside. The group was violent but generally avoided clashes with security forces. Instead, it operated by means of terrorist attacks. As a result, the level of occasional hostilities with Iraqi security forces was insufficient for IHL to apply. Individuals linked to ISI were instead considered criminals or terrorists under domestic law. Human rights law restricted the use of force by the Iraqi state authorities, while no restrictions under international law applied directly to ISI.

Firmness of organisation

International humanitarian law is premised on the existence of organised and disciplined (military) entities on both sides. A state and its military is *ipso facto* an organised

5 See Additional Protocol II to the Geneva Conventions, Article 1 (2). This restriction is applicable to so-called Common Article 3 conflicts by virtue of customary law.
6 ICTY, ***Prosecutor v. Tadic***, 2 October 1995, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70: "whenever there is [...] protracted armed ***violence*** between governmental authorities and organized armed groups or between such groups within a State" (my italic).

entity. Since any exchange of force between states is by nature a clash between two organised entities, there is no question about interstate violence passing this threshold.

Non-state entities, however, must fulfil an inherent and basic requirement of *organisation* before the rules of IHL apply and may have the desired impact. A notable challenge not experienced in interstate conflict is how to determine that a group of people with no status, rule or function under international law beyond that of being individuals actually rises to the status of party to an armed conflict.

In recent years, the requirement of organisation has been somewhat relaxed. While treaty provisions refer to members of the armed forces (of non-state groups), jurisprudence has suggested that it is sufficient that a group attain "some degree of organisation" for its activities to be distinguished from "banditry, unorganized and short-lived insurrections, or terrorist activities".[7] The US Supreme Court, in the 2006 *Hamdan* case, further lowered the required level of organisation by accepting the loosely organised al-Qaeda network as satisfying the organisational criteria to become party to an armed conflict in the sense of international law under Common Article 3 to the Geneva Conventions.[8] This relaxation in jurisprudence seemingly extends the application of IHL to numerous non-conventional armed actors previously beyond its scope.

Despite the loosened requirement of firmness of organisation, hostilities must nevertheless be traceable to a party. In June 2013, the Iraqi authorities declared that Iraq was descending into a new civil war. Violence had skyrocketed, causing close to 1,000 deaths per month. However, the proclamation by the authorities and the casualty numbers were not themselves enough to satisfy the requirements for IHL to apply. A closer look revealed that the main non-state actors driving the violence were highly diverse. Attacks on government facilities and security forces alternated between ISI (jihadists), Naqshbandiyya (essentially Ba'athists), and other, minor groups with divergent ideological orientations and objectives.[9] Disenfranchised and marginalised Sahwa groups with strong tribal links in the predominantly Sunni Muslim provinces of Anbar, Nineveh and Saladin increasingly clashed with Iraqi security forces as part of improvised or organised demonstrations. Finally, incidents of sectarian killings with unknown assailants reappeared.

The situation in Iraq in the summer of 2013 therefore involved a very high level of hostile acts, but these acts originated from a diverse set of independent actors. While hostilities may have been overwhelming from the perspective of the authorities, the conglomerate of independent actors involved did not meet the criteria of a "party". Consequently, IHL would restrict no Iraqi actor – neither incipient insurgents nor the Iraqi security forces. IHRL would restrict the Iraqi state authorities as they tried to control these threats, arguably with a certain degree of relaxation of standards on the use of lethal force. The behaviour of the actors driving the increasing levels of non-conventional armed violence would classify as grossly criminal acts under domestic law, but no restrictions would arise under IHL.

Territorial control

Another important element is that of territorial control. It is not a requirement for applicability of IHL that both or either parties exercise territorial control – except for the explicit criteria in Additional Protocol II to the Geneva Conventions, a protocol applicable exclusively to non-interstate conflicts of a specific kind.[10] If both parties satisfy the basic requirement of *organisation*, and the level of hostilities reaches a sufficiently high threshold of *intensity*, both parties will be bound by the same rules of humanitarian law in their conduct. However, in determining whether a non-state actor qualifies as a party, territorial control may be used as a relevant measure.

While fragmentation is a recurrent trend in modern armed conflict, the Syrian civil war has reached something of an extreme. Armed groups number in the hundreds. Persistent and exclusive territorial control will in such a situation imply that a group has a level of military organisation and strength necessary to be a party to the conflict on account of its ability to take, hold and defend land and people.

This was exactly the situation that arose in the Kurdish areas of Syria following the withdrawal in 2012 of Assad regime forces from Kurdish enclaves. Kurds in Syria were largely left in charge of their own territories. Their organisational structures were firm, and mirrored those of other autonomous state bodies. Nevertheless, IHL did not apply because of the absence of hostilities of sufficient intensity between them and other actors for a considerable amount of time. The Kurds were organised, but hostilities were not sufficiently intense. In such a situation of territorial control by a non-state actor, human rights obligations would formally apply to the absent state.

The resulting legal gap linked to territorial control exercised by a non-state actor has therefore prompted debate on the question of the human rights obligations of such unofficial groups. One legal approach hinges on the principle of territory, as a result of which the local Kurdish administration would be directly bound by IHRL by virtue of

7 ICTY, *Prosecutor v. Limaj,* 30 November 2005, Judgment (Trial Chamber), para. 89.
8 US Supreme Court, *Hamdan v. Rumsfeld* (No. 05184) 415 F. 3d 33, 2006
9 Such as the Islamic Army in Iraq, Ansar al-Islam, Jaish al-Mujadiheen and Kata'ib Thawarat al-Ishreen.
10 Territorial control is an independent criterion under Additional Protocol II to the Geneva Convention; see Article 1 (2). This is not the case under customary law more broadly.

the Syrian territory upon which it exercises governmental authority. An alternative approach emphasises a principle of effectiveness: the Kurdish entity would be bound by international law to the extent that it exercises state-like authority and prerogatives.

The debate about the nature and scope of these obligations is controversial and unsettled. While the application of human rights law would secure the rights of people under the control of the non-state actor, it would also provide a certain legal shield for non-state actors exerting sovereign powers. The implicit "recognition" involved in applying to these actors the standards of international law makes this an extremely sensitive political issue. The possible application of international law to tribes reverting to tribal justice, or jihadists establishing Sharia courts, also adds complications. Furthermore, there are fears that human rights obligations on non-state actors could in practice dilute the obligations of the formal state actor (i.e. in the case of the Kurds mentioned above, the Syrian state based in Damascus). The contested question of direct human rights law obligations for non-state actors must in any case be kept separate from a different human rights question relevant to non-state actors – that of human rights *appended* to humanitarian law.

Under Additional Protocol II to the Geneva Conventions, applicable in internal conflicts where the non-state actor exercises territorial control to the exclusion of the state, a considerable set of legal restrictions apply to the state-like activities performed by the non-state actor. These are seen by many as evidence that non-state actors that are parties to armed conflicts are also bound by human rights obligations to the extent that they perform state-like acts, such as holding judicial proceedings. However, these obligations are essentially appended to their status as a party under IHL.

In the Kurdish enclaves, therefore, when hostilities eventually erupted with other armed groups, IHL and appended human rights protections would apply to the extent that the opposing entity satisfies the requirements of IHL. Once armed conflict is a fact, there are no convincing arguments why IHRL should not – by extension – apply to the entity that exercises state-like authority. It could then be argued that the same rules must apply to both entities of the opposing pair, hence introducing IHRL obligations on violent non-state actors through the back door. As an example, humanitarian law applies to the Free Syrian Army. If the group seeks to punish a hostile individual for acts related to the armed conflict, they cannot execute him summarily. If they want to execute him, they must try him first and, IHRL will inform the type of standard that must be followed during his trial.[11]
The cumulative effects of these developments in the law suggest that non-state actors, including the non-conventional armed actors that this paper has labelled tribes, thugs and terrorists, are increasingly bound by humanitarian and appended human rights law to the extent that they engage in hostilities and exercise control over populations or perform acts commonly associated with sovereign powers. This limits the freedom of action of these forces in using their large disruptive and destructive potential. It serves humanitarian purposes and increases accountability of non-state actors for a range of abuses.

Legal obligations on non-state actors

The content of IHL rules reflect the fact that these norms are intended for specific types of actors and activities. Two types of rules of humanitarian law apply specifically to non-state actors, and are discussed below.

Obligations to protect victims of war

Rules on victims of war essentially protect defenceless persons who find themselves in the hands of a party to a conflict that they do not support. These rules are often referred to as "Geneva law", and were introduced for application to internal conflicts with the Geneva Conventions in 1949.[12] This expansion in the remit of the law was largely driven by a desire to increase basic protection for humans at the mercy of their enemies in civil wars and other non-interstate conflicts: defenceless people such as civilians or belligerents who have been captured or otherwise placed *hors de combat* by a party and face a great risk of suffering abuse or acts of vengeance.

These rules restrict the treatment of defenceless persons in the hands of a party to an armed conflict. They stipulate a duty to protect victims of war and an obligation of humane treatment of enemies or populations in an armed group's hands, prohibiting torture, summary executions and killing of hostages.[13] Parties are also obliged to provide medical care to the injured and sick, irrespective of affiliation.[14] Human rights obligations appended to IHL are, in essence, elaborations of these obligations.

Restrictions on the conduct of hostilities

Rules on the conduct of hostilities are quite different. They stipulate restrictions on attacking enemy fighters and civilians over whom a party to an armed conflict does not (yet) have control. These rules, the so-called Hague law, regulate the very core activity of violence. Unlike Geneva law, their full applicability to non-state actors was not definitively established until the 1990s.[15] Their expansion to internal conflict was in part due to a desire to extend the

11 See Common Article 3 to the Geneva Conventions.
12 They are contained in the 1949 Geneva Conventions (Common Article 3 and Additional Protocol II for non-international armed conflicts). They were introduced for cultural objects in 1954.
13 Geneva Convention, Common Article 3 (1).
14 Geneva Convention, Common Article 3 (2).
15 Notably with the establishment of the UN ad hoc tribunals in the early 1990s, certain weapons conventions during the 1990s, the ICC Rome Statute in 1998 and, eventually, the seminal ICRC *Study on Customary International Humanitarian Law* in 2006.

elementary protection provided in international conflicts to civil wars, but it was also pragmatic.

Equal rules applicable to military operations irrespective of the formal classification of the conflict or parties are a major benefit for educational and practical purposes. Military operations can henceforth be subject to the same restrictions of distinction, proportionality and prohibition of unnecessary suffering irrespective of the formalities of classification – that is, whether military operations are conducted as part of interstate or non-interstate hostilities, an evaluation that may be complicated and sensitive. By 2005, it was fairly well established in international law that Hague law applies to internal conflicts and, by implication, to non-state actors.[16]

The rules regulate the conduct of hostilities by restricting the means and methods of that can be used, obliging parties to provide quarter and stipulating targeting rules; through the principle of distinction (i.e. the obligation to direct attacks only against military objectives); and through the rule of proportionality, according to which the expected loss of civilian life and destruction of civilian property must not be excessive in relation to the direct and concrete military advantage that is anticipated.

The IHL rules governing the obligations bestowed upon non-state actors are summed up in the table below. If non-state actors engage in qualified violations of these norms, they may be held accountable under international law for war crimes or crimes against humanity.[17]

Enemies Fighters and civilian population not under control	**Captives** Defenceless, presumed hostile in the hands of party	**Subjects** Under control of non-state actor
Hague law	Geneva law (+ human rights law)	Human rights law?

Unwanted side effects

The main difference between the rules applicable to interstate conflict and those applicable to non-interstate hostilities is the rudimentary character of the latter. They are simpler and cruder. While their details may be ambiguous, they are easier to implement for less sophisticated organisations.

The not-so-good news is that these rules have two very distinct features, with effects in intrastate conflict that are quite different from those in interstate conflict. Both features specifically affect non-conventional armed actors such as tribes, thugs and terrorists.

First, when a situation of violence reaches the threshold for armed conflict, a new relationship between the state and the non-state actor is established, and their interrelationship is governed by humanitarian law. However, the individuals pertaining to the non-state party will thereby have certain of their human rights protections exchanged for rights under humanitarian law. Use of force is no longer restricted on the basis of protection of the innocent bystander. The rules of IHL distribute the dangers of violence more evenly than law enforcement and human rights law. Belligerents may be directly targeted, while non-belligerents (civilians) may suffer death as an unintended but foreseeable consequence. In general, these rules are more appropriate for the protection of persons caught up in hostilities associated with armed conflict.

The challenge is that these rules have been shaped by wars between conventional armies. A significant effect is that a low threshold for the application of IHL to situations of violence involving non-conventional armed actors may mean that the rules created for fully fledged war between two conventional armies suddenly apply. The prohibition of "arbitrary deprivation of life and liberty" under human rights law is instantly exchanged for targeting rules intended for *massive* interstate hostilities. While the effect on rules governing the protection of victims of war is limited, since the restrictions they impose are absolute irrespective of context, the implicit authorisation associated with rules on the conduct of hostilities is a recipe for the escalation of violence, rather than its restraint. International law does not, therefore, really prescribe a slow gradation of the use of force. Rather, from the moment when IHL applies, the nature and amount of lethal force allowed for by international law changes dramatically.

A second concern is the lack of the underlying structures that are inherently present in interstate armed conflict. The most essential principle of targeting is that of a distinction between lawful and unlawful targets. In interstate conflict, the line is drawn based on who are enemy combatants; the derived category of (enemy) civilians is protected. The latter may not be directly targeted, unless they themselves cross the line of distinction and participate directly in hostilities, in which case they lose their immunity from being targeted.

In intrastate conflict, there is no fixed category of "combatant" from which the dividing line may be derived. The decision as to which persons perform a combat function can be made only by considering the people belonging to the enemy *party*. The line of distinction is intended to separate enemy belligerents from enemy civilians, not enemies from "innocent" or "unaffiliated" civilians. When Iraqi forces engage tribal networks affiliated with ISIL,

16 The ICRC *Study on Customary International Humanitarian Law* (2005) suggested that 149 out of a total of 161 customary rules apply in such conflicts.

17 War crimes are qualified violations of humanitarian law, while crimes against humanity are systematic violations of human rights obligations in war or in peace; see Charter of the International Military Tribunal at Nuremberg, Article 6 (b) and (c). War crimes by non-state actors for both Geneva and Hague law are within the jurisdiction of the ICC Rome Statute (see Article 8 (2) (c)–(f)). It is explicitly stated that organisations may be held liable for crimes against humanity under the statute (see Article 7, "Elements of crimes").

where is the line drawn between lawful and unlawful targets? It is most likely in practice that a party to a conflict charged with drawing the line of distinction within the enemy party will adopt a *broad* presumption of combat function or direct contribution to hostilities. The number of enemies classified as belligerents, and thereby lawful targets, will tend to expand. This inherent weakness will commonly lead an actor to interpret IHL in a manner that serves its own interests, effectively pushing the rules towards a less restrictive interpretation.

The three 'T's of non-conventional armed violence

These characteristics of IHL are exacerbated in particularly unhelpful ways when non-conventional armed actors such as tribes, thugs and terrorists are considered.

Tribes

Tribes do not exist as a separate category under international law. Most tribes will not satisfy the classical requirement of *organisation*, despite strong patrimonial and hierarchical structures. Hostile interactions between tribal networks and state forces will normally not reach the threshold of *intensity* necessary for the application of IHL. If they do, however, several challenges arise.

Tribes are enlarged networks of families. They are inherently civilian in nature, although tribal traditions often lead to the proliferation of firearms and lighter weaponry among a tribe's members. The lax criteria for enemy targeting under IHL in intrastate conflicts will often rely on presumptions of combat function based on whether a person is armed. In tribal cultures, this may effectively include almost all males.

Similar problems arise with the presumption of military function. The provision of logistical support to members of an extended family network is a highly unsuitable criterion for the identification of belligerents. Mothers feeding their family members do not qualify as "military logistical infrastructure", and thereby targetability. Inter-tribal marriages cannot be seen as alliances of co-belligerents or mergers that increase military might (although they may effectively be exactly that). These relations are essentially civilian and private, despite their implicit military value. In short, tribes mess up the dichotomies of IHL.

Tribes are often bound by tribal traditions, including tribal justice. These structures often co-exist with state institutions, and efforts to tame them are commonly an integrated part of state-building efforts in countries with strong tribal traditions. The application of IHL to tribal networks at a low threshold would implicitly recognise that these tribes exercise judicial powers. Furthermore, bestowing state-like responsibilities on tribal networks may subvert non-tribal sources of power and complicate efforts to re-establish order.

In summary, the application of IHL to tribal networks risks entrenching tribal structures in the armed conflict, while serving as justification to escalate and broaden, rather than restrict, the use of violence against tribes. .

Thugs

Recent developments in countries such as Mexico, Honduras, Brazil and El Salvador indicate that states may find themselves increasingly compelled to rely on military force in response to the threats posed by amplified criminal violence. The criminal *objectives* of OCGs suggest that they are a new incarnation of a law enforcement challenge. Yet the *nature* of the violence associated with OCGs may compel certain governments to respond with military capabilities and tactics inspired by armed conflict, rather than law enforcement, in order to re-establish government control over affected areas.

However, applying an IHL framework to the ongoing violence and hostilities embroiling drug cartels is not legally appropriate, nor would it provide the appropriate remedies. The amplified violence used by criminal syndicates is flexible, and may transform into other forms not contemplated by national state authorities. Adding to the complexity is the prevalent symbiotic relationship between criminal syndicates and weak governance structures. Furthermore, one of the most elementary premises of IHL does not apply to OCGs: the presumption of a political objective in the use of force, directed at an opposing party. The application of IHL to such entities would implicitly accommodate (and thereby legitimise) the massive use of force to secure criminalised economic dominance. A logic similar to that discussed above in the case of tribal networks could also be extended to OCGs.

Organised criminal groups are intrinsically unlawful under domestic law. Placing OCGs within the remit of IHL and IHRL would risk increasing their legitimacy and standing, adding an incentive for concerted violence. This is beyond what international law is willing to concede. It would misapprehend the criminal syndicates' true nature, and trigger a military approach and an accompanying legal regime that would allow for an escalation of state violence ill suited to meeting the challenges posed by organised crime.

Terrorists

The 9/11 attacks on the US epitomised the challenge of classifying terrorism as either an act of war (as it would be under IHL) or a crime (IHRL). As observed by Feldman (2002: 70), the attacks were "*crime* from the perspective of provenance, *war* from the perspective of intentionality, probably *crime* from the perspective of identity, and very possibly *war* from the perspective of scale" (my italic). (Feldman 2002, p. 470). The absence of an authoritative definition under international law means that, at least in the margins, the term is open to politicised manipulation and polemical interpretation.

Terrorists are individuals and groups that resort to using the *method* of terrorism. International criminal tribunals and states have relied on terrorism as an element enabling them to argue against the application of IHL, concluding that an armed conflict is something distinct from a situation in which acts of terrorism occur. The British government has observed that the term "armed conflict" of itself and in its context denotes a situation which is not constituted by the commission of ordinary crimes, including acts of terrorism whether concerted or in isolation.[18] ICTY jurisprudence on the existence of armed conflict distinguishes it from "isolated acts of terrorism" as a measure of *intensity*.[19]

These circumscriptions have two important consequences. First, the labelling of a group as terrorist has no influence on legal classifications under IHL or IHRL. Terrorists may operate outside armed conflict. Once IHL applies, questions about who are lawful targets are not influenced by the label of "terrorist organisation", which could be applied to any group. A person who is a terrorist under adjacent international law may nevertheless have civilian immunity under IHL, making it a violation of IHL to directly target him or her.

Second, once IHL applies to a group that has the label "terrorist", acts of violence committed by the organisation in the conflict (against enemy belligerents or civilians) are treated under IHL. Hence, terrorist organisations may carry out attacks that are not prohibited under IHL, or they may violate IHL in ways amounting to war crimes. Acts of violence committed by the terrorist group towards targets other than lawful or unlawful targets with the enemy party remain terrorist attacks under international law.

The example of Syria is instructive. Jabhat al-Nusra, when fighting against the Assad regime, is engaged in an armed conflict. An attack in Homs against a school for children of Syrian soldiers is therefore a violation of IHL, amounting to a war crime. An attack by the same group against Israel, or against another armed group in Syria (e.g. in a Kurdish enclave), may be a terrorist attack. Similarly, an attack by ISIL on an Iraqi town held by government forces is an attack under IHL. An ISIL member returning to his country of origin in Europe to carry out an attack against civilian or military infrastructure is in no dyadic or paired relationship, and the act is regarded as a terrorist attack under international law.

States nevertheless remain reluctant to accept that IHL applies to terrorists, because that implies that an attack is an act of war rather than an act of terrorism, which implicitly legitimises it. On the other hand, states tend to borrow permissions from IHL in their fight against terrorists, providing *ultima ratio* justifications for extended law enforcement measures such as targeted killings, use of force relying on principles of distinction, or detention policies based on the principles of IHL. This has been criticised as "attempts to dismantle important elements of [...] international law".[20] Either IHL applies to both parties, states and terrorists, with inherent disturbing effects, or, alternatively, IHL applies to neither, in which case IHRL restricts the state actor from relying on the use of force on a scale and with an intensity associated with armed conflict.

Conclusions

Notable progress has been made on the framework of international law applicable to non-interstate conflicts over the past decades. However, important challenges linked to international law and non-conventional armed actors persist. The dual effects of restraining and legitimising behaviour inherent in the application of international law complicate efforts to address these shortcomings.

Whether or not human rights law applies to non-state actors as a matter of principle concerns the very nature of human rights obligations. The question raises highly contentious issues linked to the law's criteria and its potential legitimising effects. This debate is of a general nature, extending far beyond the challenges linked to non-conventional violent actors. However, the inherently illegitimate nature of thugs and terrorists, and to some extent tribes, further complicates the issue of whether or not to apply IHRL to such actors. This is because of the implicit recognition it bestows in situations where they exercise de facto authority – often acquired by violent means.

Humanitarian law, for its part, is specifically restricted to situations of violence. However, extended application to non-conventional armed actors such as tribes, thugs and terrorists raises separate problems. IHL risks unduly restricting basic civil liberties and inappropriately allowing for the use of force in a way that would greatly exacerbate many of the problems associated with non-conventional armed violence. In particular, the desire to neutralise non-state actors by relying on IHL would entail a substantial relaxation of the restrictions imposed on the state's actions. This, in turn, could fuel the escalation of violence, and increase popular support for those perceived as standing up against such oppression.

A major challenge in situations of non-conventional armed conflict is, without doubt, the lack of appropriate respect for international law. However, as this article has highlighted, current interpretations of these rules are not shaped in helpful ways with regard to the characteristics of non-conventional armed actors such as tribes, thugs and terrorists, above all with respect to the rules on the conduct of hostilities.

18 Reservation by the United Kingdom to Article 1.4 and Article 96.3 of Additional Protocol II to the Geneva Conventions, reprinted in Roberts and Guelff (2000: 510).
19 ICTY, *Prosecutor v. Haradinadj Balaj and Brahimaj,* 3 April 2008, ,Judgment, para 38.
20 International Court of Justice (2005: 110, separate opinion of Bruno Simma, para. 38).

As currently applied, IHL does not offer a comprehensive system of gradation that could be used to constrain non-conventional armed violence. One important explanation for this situation is found in the origins of the rules in conflicts involving major clashes between conventional state armies. As a result, IHL seems to be associated more with legitimising escalation of the use of force than with imposing nuanced restraints that are adjusted to a particular situation of violence.

However, the normative structure of IHL could possibly allow for further developments in the law that could address some of these shortcomings. The dangers of escalating violence are mostly associated with rules on the conduct of hostilities. It might be possible to maintain a lower threshold for applying rules to protect victims of war, of the sort developed in state practice and jurisprudence in recent decades, while establishing a separate, higher threshold for invoking rules on the conduct of hostilities in situations of non-conventional armed conflict. In fact, a certain qualified threshold for rules on the conduct of hostilities in intrastate conflicts seems to be reflected in most treaty provisions negotiated by states in recent decades.[21]

The aim of this differentiated approach would be for humanitarian law to extend the rules protecting victims of war, while the rules on the conduct of hostilities might be applied only at the point where non-conventional armed violence reaches an intensity and structure in which these rules may actually have their intended effects – that is, the dual function of legitimising and constraining massive use of force – while also providing the most effective possible humanitarian protection to populations given the circumstances.

Such an approach would limit many of the current dangers and inadvertent effects of applying IHL to non-conventional armed violence. While sensitivities with regard to extending the remit of IHL would persist, a gradated system would appear to increase the humanitarian protection of affected populations, both at the lower and upper ends of the scale of non-conventional armed violence. In terms of its application to tribes, thugs and terrorists, IHL could become a more appropriate instrument for restraining rather than escalating violence, thereby improving international law's ability to regulate this type of organised violence fittingly and comprehensively.

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21 Compare, notably, Articles 8 (2) (c)–(d) of the ICC Rome Statute with Articles 8 (2) (e)–(f), and Article 1 (2) of Additional Protocol II to the Geneva Conventions with Common Article 3.

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