

**BEYOND A CATEGORICALLY ZERO
SUM GAME**

A New Approach to the Laws of War

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If an event in the physical world contradicts all scientific forecasts, and thus challenges the assumptions on which the forecasts have been based, it is the natural reaction of scientific inquiry to reexamine the foundations of the specific science and attempt to reconcile the scientific findings and empirical facts. The social sciences do not react the same way. They have an inveterate tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts. This resistance to change is uppermost in the history of international law.¹

I. Introduction

The laws regulating war are traditionally traced to the 1648 Treaty of Westphalia, which established a prejudice in international relations against interference in another nation's internal affairs. The Peace of Westphalia was attributed as the first attempt to establish "something resembling world unity on the basis of states exercising untrammelled sovereignty over certain territories and subordinated to no earthly authority".² Until World War II, it was rarely argued that international law governed anything other than conduct amongst nation states. Threats to international peace and security were conceived solely in terms of state aggression. State sovereignty and territorial integrity marked both the constitutional foundations and the constitutional limits of international law.

In response to the horrors of the holocaust, the Geneva Conventions and the Charter of the United Nations were born but were limited by fear of interference in the internal politics of any nation. This fear limited the ability of these institutions to fully respond to the evolution of conflict. Instead, categorization was the tool used by states to avoid applying international human rights to all people in armed conflict, thereby maintaining absolute sovereignty. *Jus ad bellum* and *jus in bella*; *international* and *non international* armed conflict; *state* and *non-state* actors; *terrorism* and *crime*, are now well-known categories of international law. Some of the distinctions, such as *jus ad bellum* and *jus in bella*, clear in form and consistent in application, have provided guidelines for the application of law. Others, such as the differentiation between non-

¹ Hans J. Morgenthau "Positivism, Functionalism, and International Law" (1940) 34(2) AJIL 260.

² Leo Gross "The Peace of Westphalia, 1648-1948" (1948) 42(1) The American Journal of International Law 21.

international and international armed conflict, are more difficult to apply. Virtually void of clarity in form and application, these problematic categories have nonetheless largely been maintained. Where one of these troublesome categories failed to adequately cover an emerging threat, another category has simply been created.

The assumption has been that the proliferation of categorization will lead to greater security. The facts suggest that these divisions instead are creating disenfranchised parties in international society. When not afforded protections and when prevented from participating in the international legal system because they cannot neatly be categorized, or because the categorization is purposely used to disenfranchise them, they are pressed to use means outside the law to be heard. The result: the device used to regulate, afford protections, and limit the effect of conflict – the laws governing war – are themselves actively eroding the criteria of what constitutes law. In doing so the laws are undermining their power and their legitimacy by creating the very problems they are being called upon to resolve. In the wake of September 11, 2001, Mary Robinson, Former President of Ireland and UN High Commissioner for Human Rights, gave a lecture on the topic of Justice on March 20, 2006. She said:³

Unfortunately, what I saw and heard was undemocratic regimes using the tragedy in the United States to pursue their own repressive policies, secure in the belief that their excesses would be ignored. New laws and detention practices were introduced in a significant number of countries, all broadly justified by the new international war on terrorism. The extension of security policies in many countries has been used to suppress political dissent and to stifle expression of opinion of many who have no link to terrorism and are not associated with political violence. I will never forget how one Ambassador put it to me bluntly in 2002: 'Don't you see High Commissioner? The standards have changed.'

Despite a pronounced effort to create categories with a beneficial legal effect, this dissertation contends that this disjuncture in war law between adequate categories and facts is the result of not a legal, but rather a political background ideology of the liberal democratic order which determines and imposes a characterization of “legitimacy” or “illegitimacy” on non-state actors posing contemporary threats. Struggles between

³ In Lord Steyn "Democracy, the rule of law and the role of judges" (2006) 243(3) EHLRL 244, 1.

dominant and suppressed groups over whether the suppressed are legitimate political entities in both the political and legal realm are ubiquitous throughout history. The laws of war confirm that the overarching political evaluation of legitimacy has immense legal consequence. The 1999 North Atlantic Treaty Organization's (NATO) intervention in Kosovo, broadly viewed as illegal but legitimate⁴, provided a political but illegal solution to a contemporary threat to international peace and security. The allied response in Kosovo made it undeniably clear that the liberal democratic view of legitimacy proved crucial to the way in which the conflict was addressed. In contrast, in April 2007, during his tour of the Middle East, UN Secretary General Ban Ki Moon refused to meet the Palestinian Prime Minister Ismail Haniya of Hamas. This was despite the fact that Haniya was the legally elected leader "in a region rather short of elected leaders".⁵ Why did Ban refuse? Israel and the US regard Hamas as a terrorist organization, and therefore politically illegitimate.⁶ The possibility for war law to adapt to emerging threats to peace and security has consequently been perverted through *ad-hoc* legal categorization driven by political considerations.

In practice, politics generates legal categories. States determine what treaties they will grant legal status to in accordance with their political interests. In the laws of war, power politics dictates categorization. Clearly these categories are fulfilling a political agenda of global powers to maintain internal control and in doing so are arguably functioning precisely how they are intended. To complicate matters, liberal democracies ostensibly pursue the classical liberal objective: to secure an environment that enables the individual to enjoy free market productivity and day-to-day life. They pursue this objective under the auspices of international peace and stability, citing this as a justification for categorization to achieve freedom so that threats disturbing this objective – planes flying into towers, attacks in malls, civil unrest – are not a daily concern for the individual. While politics will always play into the equation to an extent, the goal of international stability to secure individual freedom is at odds with the effects of legal

⁴ Michael Byers *War Law: Understanding International Law and Armed Conflict* (Atlantic Books, London, United Kingdom, 2005) 4.

⁵ Ramesh Thakur "Law, Legitimacy and the United Nations" (2010) 11(1) *Melbourne Journal of International Law* 27.

⁶ *Ibid.*

categorization driven purely by political decrees of the legitimacy of a suppressed group. This discrepancy must be addressed to create a more robust effort, first to prevent, and then to respond, to contemporary threats to international peace and security when they emerge.

Today, much of the international upheaval and unrest in international society is the result of the expulsion of some members of its society. Politically motivated decisions about legitimacy exclude certain actors from participating beneficially in international law procedures dealing with war and human rights. This upheaval and discontent, the basis of much contemporary threat, is broadly analogous to examples of political and legal upheaval within particular nation states. The ‘Arab Spring’ is a gleaming example of the exclusion of certain groups from participation in internal politics leading to great dysfunction and unrest. Nonetheless the outcome had some positive effect. If the international community legitimizes citizens, as the United Nations did by intervening in Libya, the population can become engaged in international humanitarian law. This effect was evidenced in post-liberation Libya when dissident factions bombed the American Embassy, killing the American Ambassador, which led to an uprising of the Libyan people against the militant group thereby forcing the group to disarm. Where people were granted rights and those rights were enforced, there was strong motivation to ensure those rights were not lost.

This dissertation is about the status of human rights and their relationship to the laws of war. It urges the laws of war to conform to the liberal prescription for good society, based on respect for the equality and autonomy of individuals, which is assured through the recognition and application of the fundamental legal rights of the person.⁷ It emphasizes that non-state actors causing violence should be categorized as legitimate actors for the purpose of accessing international law procedures, particularly if they are to be subject to international law obligations. It contends that this liberal prescription is in line, rather than at odds, with a system where realism is synonymous with state interests and state power. It emphasizes that by enfranchising those actors perpetrating contemporary threats to participate in the system, the actors assume both the protection

⁷ David P. Forsythe *Human Rights in International Relations* (Cambridge University Press, Cambridge, 2006), 3.

the system affords its participants but also the responsibility the system imposes to adhere to the rules. It states that the international laws of war should become more inclusive by extending to any group engaging in violence.

Chapter one outlines the changing nature of contemporary threats to peace and security and international law's adaptation to these threats through categorization, and provides examples of how and why it has worked well. Chapter two highlights the weaknesses of categorization and provides examples of its failures, with an emphasis on what can be taken from these failures to strengthen the laws of war and their relationship to human rights. Chapter three examines the source of international law's power and the implications of inconsistent categorization on the legitimacy of the laws of war with a view to moving beyond the categorization as currently conceived and strengthening the legitimacy of war law.

II. The changing nature of threat and International Law's adaptation

While overall global conflict is decreasing, 95% of conflicts raging worldwide are intrastate (conflict within one state).⁸ If the fundamental premise upon which laws address threats to international peace and security has now changed, then is that the law created to regulate and manage interstate behavior equipped to cope with this new reality? The conflict in the Gaza, for instance, has generated substantial debate as to its international or non-international character. Lack of clarity or a system to resolve this question prevents either framework (non-international or international) of applicable law from being implemented. The larger question is why the distinction matters. There is an argument to be made, supported by indications of a gradual erosion of traditional Westphalian notions of sovereignty, such as the broad acceptance of the Responsibility to Protect,⁹ that the international community should take interest in any persons in dire need, whether in peace or war or a mixture of the two. The establishment of one broad legal framework, applicable to any state of conflict, adhering to a broader commitment to universal human rights, could have a substantial positive effect in allowing these standards and rules of engagement to apply without debate. It would prevent further disenfranchisement of people formally deemed illegitimate. Using human rights as a lever, this framework would generate greater legitimacy and credibility for the laws as law from the very actors the laws seek to control.

Instead, international war law has splintered into a series of categorizations to make sense of the fundamentally different nature of contemporary threats to peace and security. In some respects, where the categories are clear and readily applicable, categorizations demarcate fundamentally different ideas and are consequently useful in providing a language and a legal framework from which to work. One such example is the category of *jus ad bellum*, which sets out when it is lawful to use force in international relations and the category of *jus in bella*, which defines what is legal in an

⁸ Human Security Report Project, 'Conflict Terminations: Interstate vs Intrastate' (2012) available at <http://www.hsrgroup.org/our-work/security-stats/terminations-intrastate-interstate.aspx>.

⁹ There is broad international acceptance that where states are unwilling or unable to protect its civilians, there is a responsibility to protect: See Alex Bellamy *Responsibility to Protect* (Polity Press, Cambridge, 2009).

armed conflict. Where there is a clear, broad category that espouses the values inherent in the rule of law, the law is applied and broadly speaking works as it is intended. On the other hand, the dichotomy between international armed conflict and non-international armed conflict is an example of categorization in international law that is more problematic in achieving clear and precise distinctions, and frequently results in the exclusion of groups deemed illegitimate. The differentiated approach, largely devoid of principles of the rule of law, threatens the validity of the laws of armed conflict.

a. Emergence of Categorization: Why the Jus Ad Bellum/Jus In Bella Distinction Works

The broadest category in the laws of armed conflict is the distinction between *jus ad bellum* and *jus in bella*. *Jus ad bellum* defines when it is lawful to use force (to resort to armed conflict) in international relations; *jus in bella* defines what is legal in the conduct of an armed conflict. The prohibition on the use of force is enshrined in Article 2(4) of the United Nations (UN) Charter.¹⁰ Peremptory norms, fundamental principles of international law that are accepted by the international community of states as a norm from which no derogation is ever permitted, prohibit the use of force between states with only few exceptions. The right to individual and collective self-defense is one such example, however that exception is limited by the requirement that enforcement measures must be decided or approved by the UN Security Council. The exception of *jus ad bellum* is triggered only when the enemy has violated the peremptory norm prohibiting the use of force.¹¹

A central branch of *jus in bella*, International Humanitarian Law (IHL), limits the use of violence in armed conflicts by establishing protection for those who have not or no longer participate in hostilities. Further, it limits the violence to only what is necessary to achieve the aim of the conflict – weakening the military position of the opponent – regardless of the legality of the *jus ad bellum*. Codified largely by the 1949 Geneva Conventions and the 1977 Additional Protocols, the International Commission of the Red

¹⁰ Charter of the United Nations, 1945.

¹¹ Marco Sassoli "Ius ad Bellum and Ius in Bello-The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?" in Michael and Pejic Jelena Schmitt (ed) *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff Publishers, The Netherlands, 2007), 242.

Cross has also identified a large body of customary rules of IHL applicable both to international and non-international armed conflict.¹²

The separation of the two reflects the recognition that though international armed conflicts are prohibited at law, they nonetheless still occur. So while international law (*jus ad bellum*) must work to prevent armed conflict in the first place, pragmatically the law has developed to recognize that if armed conflict breaks out, the law must be flexible enough respond and regulate warring parties. The division of the categories works for two reasons. The first is that the categories are clearly defined, leaving little room for interpretation as to when their application is warranted. Second and fundamental to the success of categorization, the distinctions themselves are largely universally applied. *Jus ad bellum* dictates the rules of the use of armed conflict between states, precisely the circumstances for which international law was established to regulate. The existence of *jus in bella* is theoretically more problematic due to unclear distinctions between international and non-international armed conflict. However when the hurdle is made to declare the conflict international, the laws of war apply equally to all who are entitled to participate directly in hostilities, irrespective of the justness of their cause.¹³ The clarity and consistency of application satisfy the rule of law and specific criteria of legality, concepts later explored in the body of this paper, which in turn generates fidelity to the law and power to the laws regulating war.

Central to this dissertation is the proposition that the principle espoused in equal application is crucial to the success of *jus in bella* because of its reflection of values inherent in the rule of law and universal human rights. Values of consistency, generality, and legitimacy, generate fidelity and commitment – or at the very least a base level of respect – are the benchmarks that give legitimacy and thus power to international humanitarian law. Because of this quality, the equal application principle should be the model for the use of categorization as a whole. The rival proposition – that there should be differentiation of the rights and obligations of combatants under the laws of war – is not only unsound and impossible to meaningfully implement, but it misses crucial

¹² Jean-Marie and Doswald-Beck Henckaerts, Louise (ed) *Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2005).

¹³ Adam Roberts "The equal application of the laws of war: a principle under pressure" (2008) 90(872) *International Review of the Red Cross* 931.

opportunities and has dangerous consequences (these will be illustrated with comparable differentiation in other categorizations of the laws of international armed conflict).

b. The Principle of Equal Application

Recognized for over 150 years as a basis of the laws of war, the principle of equal application is confirmed in the four Geneva Conventions of 1949, where silence in the Conventions attest that the cause of a war, or the justness of any party, does not disturb the principle's effect. Common Article 1 states that "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".¹⁴ The Conventions go on, in Common Article 2, to stipulate that irrespective of whether there is a declaration of war, or even if a state of war is not formally or informally recognized by one of the parties in a conflict, the law applies. The legitimacy of the actors or their cause plays absolutely no role in the application of IHL.

Adam Roberts reflects that this widely accepted principle is the product of over half a millennium of hard-won experience. Specifically, four main reasons for its survival exist. The first is that between the sixteenth and the eighteenth centuries, the principle emerged as part of an underlying philosophy of the laws of war simply because alternative options proved more problematic. Political philosophers of the time, such as Hugo Grotius and Alberico Gentili, both maintained that the distinction between lawful and unlawful resort to war and the deep importance of the notion of 'just' war for the maintenance of peace and security was crucial. Despite their emphasis of the justness of war, each emphasized the idea of *temperamenta belli*: moderation in the conduct of war. In particular, Grotius proposed the notion of imposing humane limitations on the means by which wars were waged.¹⁵ So too did Jean-Jacques Rousseau, who consistently advocated for limitations in war. In his view, all combatants in war are essentially innocent and thus all should be deserving of protections provided by this doctrine of equality. This view was molded largely on the limited wars fought with limited means for limited objectives, which characterized conflict in the eighteenth century.¹⁶ Rousseau's

¹⁴ Geneva Conventions 1949.

¹⁵ Christoph Stumpf *The Grotian Theology of International Law* (De Gruyter, Berlin, 2006).

¹⁶ Roberts, above n 13, at 939.

stress on restraint in war and the equal application of the rules to all belligerents is an important legacy in the laws of war. This philosophy was later to become the basis upon the International Committee of the Red Cross was founded.

In the nineteenth century, the principle of equal application became embedded in a robust tradition of seeking uniform treaty codification of rules regulating warfare. The tradition began with the 1856 Paris Declaration on Maritime Law, which hails to be the first multilateral convention open to accession by all states, and which formally ended the Crimean War. Paradoxical as it may seem, according to Roberts, the “type of instrument which was the very basis of modern international law emerged in the fields of war”. This was no accident: “[w]ar is pre-eminently a field in which certain rules of conduct are needed – and they have to be available before the outbreak of hostilities, as it is so difficult to create new rules once war has broken out”.¹⁷

In the twentieth and twenty-first centuries, the principle of equal application has become entrenched in court decisions, state practice, and the opinions of lawyers. Where the notion of the illegality of the aggressive use of force gained strength, the principle did not weaken. Decisions from the 1946 International Military Tribunal at Nuremberg rejected excuses for the non-application of the law and implicitly accepted the principle’s application more explicit indications are clear from subsequent US military tribunals, such as the *Hostages* case.¹⁸ There, the tribunal cited international lawyer L. Oppenheim:

Whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of international law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral states. This is so, even if the declaration of war is ipso facto a violation of international law...

The continued salience of the equal application principle is confirmed by state adherence and legal decisions.

The experience of the International Red Cross and Red Crescent Movement, and most importantly the International Committee of the Red Cross (ICRC) – the body designated to take action in war – confirms the principle of equal application. The body,

¹⁷ Ibid 940.

¹⁸ *The United States of America v. Wilhelm Leist, et. al.* in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Volume XI/2.

an important impartial humanitarian organization, has been recognized in the 1949 Geneva Convention and the 1977 Additional Protocol I. Multitudes of resolutions from this body have favored the principle of equal application in IHL. In a 1986 resolution from the 25th International Conference, the ICRC “strongly reiterated the traditional Red Cross principles of neutrality towards belligerents, thus never to take sides or engage in controversy, and of impartiality in the relief of suffering, without discrimination based on nationality, race, religious beliefs, class or political opinions”.¹⁹ Poignantly for the purposes of this dissertation, the resolution goes on to read:²⁰

- (1) *regrets* that disputes about the legal classification of conflicts too often hinder the implementation of international humanitarian law and the ICRC’s work,
- (2) *appeals* to all Parties involved in armed conflicts to fully respect their obligations under international humanitarian law and to enable the ICRC to carry out its humanitarian activities.

By 2005 the ICRC took for granted that the rules must apply equally to all, indicating the principle as an absolute obligation, not one dependent on reciprocity between parties. The principle of impartiality is inherently linked to the equal application principle; its emphasis on humanity makes reliance on political criteria to determine the application of rules senseless.²¹

c. A Differential Approach

Despite its historical significance, the equal application principle has faced challenge in the past decade. Some academics and international law practitioners have called for a departure from the principle of equal application.²² After other avenues for conflict management, such as diplomacy and negotiations, have failed, they propose a differential approach, similar to Common but Differentiated Responsibilities (CDRs)

¹⁹ Roberts, above n, 13 at 942.

²⁰ Resolution I, ‘Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions’, *Handbook of the International Red Cross and Red Crescent Movement*, 13th edn, ICRC and IFRC, Geneva, 1994, p. 742.

²¹ Jelena Pejic, ‘Non-discrimination and armed conflict’, *International Review of the Red Cross*, No. 841 (2001), pp. 183-94.

²² See: Center for International Sustainable Development, ‘The Principle of Common but Differentiated Responsibilities: Origin and Scope’ (2002) *available at* http://cisdl.org/public/docs/news/brief_common.pdf.

found in areas of international law including international environmental law and international trade law, which link obligations with capabilities. The approach questions whether holding powerful parties to a higher standard of IHL compliance than weaker parties might better maximize humanitarian welfare in conflict situations. Proposals for such a departure have emerged particularly in the realms of humanitarian interventions and counterinsurgency operations. Some have called for lowering the standard of compliance of the law as incentive for nations like the United States to intervene in cases of gross crimes against humanity. Other scholars have suggested raising the standard of compliance of the law to preserve the integrity of the liberal democratic values espoused by the intervening states.²³

With a differentiated approach based on the ‘justness’ of a cause, one can easily see its normative appeal and envisage pressures to apply the laws of war with this differentiated lens. Situations of this nature could include a state acting in self-defense following an act of aggression by an adversary, taking what would in different circumstances otherwise be unlawful measures against that adversary. Similarly, a case could be made for treating unequal combatants differently where a weaker party facing a substantially more robust combatant violates the rules. World powers who are involved with global military commitments, particularly in the engagement of intervening in complex humanitarian emergencies, have contended the principle of equal application is detrimental to their efficient execution of their international roles. Moreover, it would be very convenient for a UN mandated force, when conducting an enforcement action, to be granted immunity from hostile action; any attacks against the UN force would therefore constitute a war crime. Finally, UN peacekeeping operations do have legal protections from attack; evidence that in practice, laws of war already apply unequally.²⁴ Ultimately, arguments against a unified system have been postulated that if humanitarian welfare is akin to the protection of the environment or the liberalization of trade, it is “questionable whether the formal equality of IHL as it stands, is either effective or just”.²⁵

²³ Gabriella Blum "On a Differential Law of War" (2011) 52(1) Harv Int'l LJ 163.

²⁴ Roberts, above n 13 at 946-47.

²⁵ Blum, above n, 23 at 217.

Blum identifies three ways in which IHL could integrate CDRs. States could adopt a “differential legislative scheme” which would outline different IHL rules for strong and for weak parties. For example, parties in an armed conflict could specifically be prohibited from using aerial warfare against parties that do not possess air forces or alternatively lack the ability to defend such aerial attack. Alternatively, prosecutors could hold members of stronger parties to higher standards with regards to charges and sentences than members of weaker parties. A third method of integration could be for decision makers to apply the same rules of IHL to strong and weak parties but interpret the rules differently based on the relative strength of a particular party.²⁶ By this account, richer countries could be held to higher standards of medical evacuation and treatment of wounded combatants, for example, or richer countries could face greater restrictions on destruction of property for operational purposes.²⁷

The normative appeal of a differentiated approach is not to be understated. There is, as it has been noted, much to make of unequal application between unequal combatants already existing at a practical level. Inequalities assume various forms. Many contemporary conflicts include elements of established, organized armed forces under government control combatting against lightly armed irregular forces, often labeled as “guerillas” or “terrorists”. Claims are sometimes made that parties weaker in military force should be exempted from certain obligations under the laws of armed conflict because they lack the resources to conduct themselves in the same manner as their adversaries. Appeals for exemptions may be targeted at obligations, such as that which occurs when a party is unable to keep prisoners of war in camps that are not exposed to the fire of the combat zone because they lack a safe rear adjacent area in their ongoing military operation. A differential legislative scheme, as Blum proposes, would reflect the reality that the unequal combatant cannot practically adhere to the law as it is constructed even if an intention to do so was there, thus satisfying one element of Fuller’s test of substantive law, addressed later in the body of this dissertation, by not asking the impossible.

²⁶ Kevin Jon Heller "On a Differential Law of War: A Response" (2011) 52(April) Harv Int'l LJ , 238.

²⁷ Blum, above n 23 at 186-87.

In practice, major powers already enjoy a differential standard in the current laws of war regime simply by choosing abstention from agreements they deem undesirable. Russia, China, India, and the United States – four countries representing a substantial chunk of the world's population and military force – are not parties to the 1997 Ottawa Convention on Anti-Personnel Mines, nor to the 1998 Rome Statute of the International Criminal Court. Neither India nor the United States is party to any of the 1977 Protocols additional to the Geneva Conventions.²⁸ The United States often makes partial abstentions from the current war law regime and remains a non-party to multiple war law treaties. One such example would be the failure to ratify the 1977 Additional Protocol I. The United States has labeled it the terrorist's charter, arguing that it benefits terrorist actions in movements for national liberation. Indications that it would adhere to components of Protocol I now comprising customary international law have yet to come to fruition. The Ottawa Treaty, which bans the use of land mines, was rejected largely because the US Administration sees value in land mines, particularly between North and South Korea. The US rejected the statute of the ICC largely out of the suspicion that their troops would become targets to overzealous prosecutions. In this light, the practical reality is that power politics dictate differentiation whether it is institutionalized or not.

A differentiated approach could hold further incentives to weaker parties. A scheme of CDRs that “raise the bar for the more powerful but only on the condition that the weaker party complies with its own, relatively lower obligations”²⁹ could encourage non-state actors and rebel groups to comply. Heller notes, however, the probability of major states supporting such a scheme is remote. For guerilla groups to truly feel incentivized to adapt to differentials, the notion of a CDR would have to be “pushed to a breaking point”.³⁰ Heller contends to truly incentivize a rebel group to comply with a differentiated scheme of IHL would ultimately mean granting belligerents status to entitle rebels with combatants' privileges and POW treatment upon capture. States using categories to prevent equal application of the law are extremely unlikely to allow differentiation go a step further: to limit their rights while expanding the rights of these

²⁸ See Parties to those Treaties, last retrieved from <www.icrc.org/ihl> 29 August 2012.

²⁹ Blum, above n 23, *supra* note 1 at 205.

³⁰ Heller, above n 26 at 245.

disenfranchised groups. Heller himself recognizes this idealized version of differentiation highlights its fallibility.

Ultimately, despite the normative appeal of imposing differentials in the laws of war, it is precisely because the principle of equal application exists that the categorization and its legal effect of *jus in bella* remains valuable. The problem returns to one of interpretation, application, and implementation. The differential approach violates values espoused by the rule of law, which requires the same general rule applied evenhandedly to everyone. Admittedly, whilst the rule of law requires a general rule uniformly applied, the law also requires flexibility. In domestic law, where equal application generates unsatisfactory results, there are two approaches: implied exceptions are identified, or alternatively, the courts of equity can be used to mitigate the rigors of the common law. Similar mechanisms to allow for flexibility might be incorporated into the operation of the laws of war.

The crucial drawback to the differential approach, however, is that it fails to adhere to the tenets of the rule of law. The criterion of generality is by definition eliminated. Where differentiated legislation seeks to redress asking the impossible, in reality it creates comparable problems to those it hopes to resolve. The principle of equal application is not to be misconstrued as a principle of *universal* application. While the success of the principle depends in part on maintaining the distinction between international armed conflict (where relevance of the principle is clearest) and other kinds of conflict (where there are admittedly difficulties in consistent application), the principle remains salient in some situations that are not clear interstate conflict because it includes all groups who *are* participating in combat, rather than simply groups that international law considers *ought* to be participating in combat. Conflict in Bosnia in 1992 and Afghanistan in 1998 prompted the United Nations Security Council to acknowledge these persuasive reasons for keeping equal application.³¹

Broad, inclusive categorization with universal application provides protection, but it also provides clarity and guidance. The threats it seeks to manage can engage with clearly defined regulations and protections, even embrace them. As the next chapter

³¹ Roberts, above n 13 at 948.

illustrates, the present alternative – exclusive, inconsistent, unequal categorization in the laws of armed conflict – not only does not work, but also only serves to further disenfranchise which in turn creates more discontent, thereby detracting from the power of the law.

III. Difficulties with Categorization

While the *jus ad bellum/jus in bella* distinction has been used with relative success, this section will consider the difficulties with other attempts at categorization. Until 1949, there was simply the law of war. The 1949 Geneva Conventions – four treaties and three additional protocols – grew out of a body of incrementally developed law dating back to the Lieber Code, to establish the contemporary standards of international law for the humanitarian treatment of the victims of war.³² In the wake of new threats to peace and security, a contemporary struggle in the international legal community has emerged over the substantive content of international rules constraining state behavior in irregular wars. To adapt, international law splintered into two disparate categories of war: international armed conflict (waged between two or more states) and non-international conflict (waged between two or more parties within a single state). The latter category has been characterized as a distinct category, but the development of regulatory laws within that category has been neglected because of Westphalian notions of state sovereignty. States have used sovereignty as a shield from external regulation and attempts to intervene; and laws governing what happens in the confines of a border have consequently suffered from an albeit purposeful lack of attention. The problems raised by this categorization and whether every conflict can fall between these two categories will be addressed in this chapter.

The use of international law to extend to regulate actions beyond that of the state is hindered by the underlying sense of jurisdictional limits of the Westphalian system. Consequently there is a hesitancy to acknowledge a single corpus of law applicable to all armed conflicts. However, in practice the dividing line between the two types of war are often extremely difficult to delineate. From a legal perspective, the fundamental character of an armed conflict as international or non-international is a factual inquiry that can arise more than once during the course of a conflict. There is also a broader inquiry about the logic behind why standards should differentiate simply by virtue of a generally arbitrary distinction between international and non-international. Such a distinction certainly has no relevance to the victims of war who seek protection. Crucially, each new distinction

³² Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863.

has the effect of disenfranchising those to whom certain protections or benefits do not extend, thereby creating more divisions and discontent. For these reasons, there are serious questions to be asked regarding the utility of the categorization at all. Instead, the ambiguity of definition and application of the categorization seems to seriously undermine the attempt to strengthen the law, resulting instead in the very opposite.

The utility of the categorization in the realm of IHL needs to be questioned largely because of profound conceptual ambiguities resulting from developments in war law. Pursuant to the Geneva Conventions of 1949, the laws of war apply to any “armed conflict” between states, irrespective of whether there has been a formal declaration of war from either state.³³ Furthermore, Article 3 to the Geneva Conventions explicitly regulates non-international armed conflict.³⁴ Though there is an element of subjectivity in determining the existence of international armed conflict, this category has not proved problematic. The existence of non-international armed conflict, however, has an ambiguous threshold of application, which has caused acute problems for classification.³⁵ There are two general difficulties with the distinction. The first is determining whether a non-international armed conflict has evolved to become an inter-state conflict. The second exists where determining the point at which an internal disturbance has reached the threshold of “armed conflict” as understood at international law. The Israeli aerial attack on the Gaza Strip in the winter of 2008 is a salient example of the difficulty in ascertaining the transition from a non-international to an international conflict.

a. The Confusion of Categories: The Nature of Conflict in Gaza

The Israeli commencement of an aerial bombardment on the Gaza Strip on December 27, 2008 illustrates the ambiguity with the distinction between non-international conflict and international conflict. Dubbed “Operation Cast Lead”, and augmented with a ground invasion on January 3, 2009, Israel claimed the assault was an exercise of its sovereign right to self-defense, necessary to halt rocket fire from the Gaza

³³ See Geneva Conventions, *supra* note 27, art. 2.

³⁴ See Common Article 3. Its reference to “each party” accommodates conflict within one state between two non-state actors.

³⁵ Derek Jinks "September 11 and the Laws of War" (2003) 28(1) Yale J Int'l L , 10.

Strip into southern Israel.³⁶ Israel, a state and a party to the Geneva Conventions, came into conflict with Hamas, neither a state nor a party to any international convention. Consequently, as international law currently stands, the categorization of the conflict as international or non-international is important. The categorization specifies the applicable legal framework during the conflict and the corresponding obligation of the parties; and, it dictates any enforcement of breaches of law in the aftermath of the conflict, particularly with regard to penal prosecutions.³⁷

At first glance, the task to categorize conflict seems relatively straightforward. However, differing views as to the status of Hamas, Gaza, and the varying interpretations of relevant legal standards make a legal distinction rather involved. The general proposition is that categorization of an international conflict is limited to conflict between states even where a warring party is not recognized by a government.³⁸ Non-international conflict is defined as conflict between a non-state entity and a state or between two non-state groups. Consequently the logical classification of the Gaza conflict is that it was non-international, as Hamas is a non-state entity. It would further complicate matters if this occurred after the election of Hamas to government.

Confusion arises, however, because some acts of violence erupted over a territorial line and did not remain within the confines of Gaza. Common Article 3 to the Geneva Conventions confirms that a non-international conflict occurs “in the territory of one of the High Contracting Parties”. A leading interpretation holds that a non-international conflict takes place within the territory of one state.³⁹ The Additional Protocol II to the Geneva Conventions Article 1.1, and 8.2(f) of the Rome statute use formulations to that effect. By this account, non-international conflict must occur within

³⁶ George E Bisharat "Israel's Invasion of Gaza in International Law" (2010) 38(1) Denv J Int'l L & Pol'y 41.

³⁷ Mastorodimos "The Character of the Conflict in Gaza: Another Argument towards Abolishing the Distinction between International and Non-international Armed Conflicts" (2010) 12 International Community Law Review 437-38.

³⁸ See Article 43.1 of Protocol Additional to the Geneva Conventions, August 12 1949 and Relating to the Protection of Victims in International Armed Conflicts (Protocol I), Geneva, June 8, 1977.

³⁹ See Jean Pictet *The Geneva Conventions of 12 August 1949 : Commentary to Convention III* (1952), p 37 “it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with ‘armed forces’ on either side engaged in ‘hostilities’ – conflicts in short, which are in many respects similar to an international war, but take place within the confines of a single country”.

the confines of one state boundary. *Tadic* confirms this, defining it as “protracted armed violence between governmental authorities and organized armed groups or between such groups *within* a State”.⁴⁰ This interpretation is further attested by leading international humanitarian law practitioners like Schmitt and Dinstein in documents such as the “Manual on the Law of Non-International Armed Conflict”⁴¹ which account for a fourth source of international law confirmed in Article 38(1)(d) of the International Court of Justice (ICJ). On this reading, the conflict in Gaza does not satisfy the test for non-international conflict. Further layers of analysis could be applied to the precise character of this conflict, all with no clear outcome.

The complexity of defining the character of a conflict is not to be understated. On April 3, 2012, the Office of the Prosecutor at the International Criminal Court issued a statement denying the Prosecutor’s competence to decide on the validity of Palestine’s acceptance of the ICC jurisdiction. This was in response to the declaration made by the Palestinian National Authority in January 2009⁴² accepting jurisdiction of the International Criminal Court over crimes committed on the territory of Palestine pursuant to Article 12 (3) of the ICC statute.⁴³ The answer to the Prosecutor’s conundrum turned on whether Palestine is a state, as only states may make declarations per Article 12(3) of the ICC statute. The Prosecutor decided: “competence for determining the term ‘state’ within the meaning of article 12 rests, in the first instance, with the United Nations Secretary General who, in case of doubt, will defer to the guidance of the General Assembly. The Assembly of State Parties of the Rome Statute could also in due course

⁴⁰ *Prosecutor v Tadic*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.70.

⁴¹ Michael et. al. Schmitt *The Manual on the Law of Non-International Armed Conflict with Commentary* (International Institute of Humanitarian Law, 2006) p 2.

⁴² Ali Khashan, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009 < <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>> Last retrieved 2 September 2012.

⁴³ The provision allows States not party to the ICC Statute to accept the jurisdiction of the Court over crimes committed on the territory of Palestine or by its nationals. If the declaration is accepted as a basis for ICC jurisdiction, it will grant the ICC jurisdiction over genocide, war crimes and crimes against humanity committed on Palestinian territory since July 2002. Significantly, declaration would give the ICC jurisdiction over acts of Palestinians but also over acts by Israeli officials and nationals in Gaza and the West Bank.

decide to address the matter in accordance with Article 112(2)(g) of the Statute”.⁴⁴ As Akande notes, the Prosecutor is putting the contentious decision with serious legal implications back on states to safeguard himself and his office from allegations that he is taking political decisions.⁴⁵

The Prosecutor’s position, however, has garnered some protest. The Prosecutor ignored Palestine’s admission to UNESCO. His view was that the UN Secretary General and the General Assembly must bear the ultimate position on the status of the statehood of Palestine. “All states” can accede to the statute, the phrase used in the Statute of the ICC, is a common treaty phrase. However the interpretation of “all states” has been problematic in determining which entities in particular qualify as states with the consequential right to accede to the treaty. The position of the UN Secretary General has been articulated accordingly:⁴⁶

...If he [the Secretary General] were to receive an instrument of accession from any such area, he would be in a position of considerable difficulty unless the [General] Assembly gave him explicit directives on the areas coming within “any State” or “all States” formula. He would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such a determination, he believed, would fall outside his competence. He therefore stated that when the “any State” or “all States” formula was adopted, he would be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula, other than those falling within the “Vienna formula”, i.e. States that are Members of the UN or members of the specialized agencies, or Parties to the Statute of the International Court of Justice...

Consequently, as the General Assembly confirmed in 1973,⁴⁷ the Prosecutor’s view would be the correct procedure: the Secretary General of the United Nations would decide on statehood issues arising from treaties to which he is depository, but must defer to the General Assembly in contentious cases. However, despite the fact that there is no doubt contention over the question of a state of Palestine, the Secretary General only

⁴⁴Dapo Akande. ‘ICC Prosecutor Decides that He Can’t Decide on the Statehood of Palestine. Is he Right?’, 5 April 2002, <<http://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/>>, last retrieved 2 September 2012.

⁴⁵ Ibid.

⁴⁶ Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties, ST/LEG/7/Rev.1, para 81.

⁴⁷ Ibid, para 82.

seeks guidance from the General Assembly in cases which fall out of the “Vienna formula” as indicated in the Summary of Practice quoted above.

The Vienna Formula is found in Article 81 of the Vienna Convention of the Law of Treaties.⁴⁸ It refers to States that are members of the United Nations, or any UN specialized agency, or of the International Atomic Energy Agency or a party to the Statute of the International Court of Justice. While Palestine is not a member of the United Nations, it has now become a member of UNESCO, a UN agency, placing Palestine squarely within the Vienna formula, which consequently allows ascension to treaties open to all states without UN General Assembly reference.⁴⁹ By this complicated but nonetheless legally valid construction, there is evidence to support a finding that Palestine has acquired the status of a state.

Conversely, the recognition of Palestine as a state is not universal by other states, making it difficult to surmount the lack of some key characteristics of a state. Additionally, it has been argued that the 1988 declaration of independence is a merely symbolic rather than legal declaration of statehood; emphasis has been placed on the argument that there were no actual claims of statehood after the Oslo agreements.⁵⁰ The decision of the Office of the Prosecutor to the Palestinian Authority’s declaration to the International Criminal Courts is further evidence of the tenuous nature of the claim to statehood. Furthermore, even if a state of Palestine was affirmed, Hamas was neither the *de facto* ruler of Palestine nor the legitimate government.⁵¹ At the time of the conflict, Hamas controlled the Gaza strip, only one part of the territory claimed by Palestinians. If Hamas had controlled the entire territory of Palestine, the *de facto* existence of the government would not have relieved the state of its international obligations and the Geneva conventions consequently would have been applicable through the accession to

⁴⁸ Vienna Convention on the Law of Treaties, 1969.

⁴⁹ Akande, Dapo. ‘ICC Prosecutor Decides that He Can’t Decide on the Statehood of Palestine. Is He Right?’ EJIL: Talk! <http://www.ejiltalk.org/icc-prosecutor-decides-that-he-cant-decide-on-the-statehood-of-palestine-is-he-right/> retrieved 4 September 2012.

⁵⁰ Mastorodimos, above n 37 at 442.

⁵¹ This might be different today, see comment on p 21.

Additional Protocol I in 1989 or customary law. Under this circumstance, those provisions do not apply.⁵²

Categorization of international or non-international armed conflict is of consequence as it determines the legal framework of protection. In the realm of law developed through treaties, there are vast differences between the categories. The Geneva Conventions 1949, the Hague Conventions that came before them, and Additional Protocol I of 1977 apply to international armed conflicts. Enshrined in the treaties are hundreds of articles that detail the rules regulating the conduct of hostilities (what is sometimes referred to as “Hague Law”), and provide clear rules relating to the protection of those who no longer or have not played any role in the conflict (the “Geneva Law”). Treaty rules applicable to non-international armed conflicts are, in contrast, sparse. The only real regulations of the conduct of hostilities in conflicts of a non-international nature are found in Common Article 3 of the 1949 Geneva Conventions, the provisions of Additional Protocol II of 1977 and article 8(2) (c) and (e) of the Statute of the International Criminal Court.

In contrast to the protections afforded to non-participants in international armed conflict, Common Article 3 provides only basic protection to the same category of people. No rules at all specifically regulate the conduct of non-international hostilities. Wilmshurst notes that the less than twenty substantive provisions that comprise Additional Protocol II and the ICC Statute sections that speak to non-international conflicts “extend...the rules relating to the protection of victims of armed conflict and introduce some modest rules relating to the conduct of hostilities but fall far short of establishing a regime of international humanitarian law close to that established for international armed conflicts”.⁵³

To some extent, the legal distinctions governing the conduct of hostilities between international and non-international are eroding, perhaps evidencing a tacit acceptance of the banality of the distinction. Recent treaties governing conduct of hostilities in all situations include the Biological Weapons Convention 1972, the Chemical Weapons

⁵² Mastorodimos, above n 37 at 443.

⁵³ Elizabeth Wilmshurst *International Law and the Classification of Conflicts* (Oxford University Press, Oxford, 2012) 35.

Convention 1993, the Convention Prohibiting Anti-Personnel Land Mines 1997, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property 1999 and the 2001 amendment which extends the Convention on Conventional Weapons and its protocols to non-international armed conflicts.⁵⁴ Developing customary international law is also arguably filling gaps between the two categories, making the dichotomy between international and non-international conflict less stark. This approach was affirmed by the Appeals Chamber of the International Criminal Tribunal on Yugoslavia (ICTY) in *Tadic (Appeal on Jurisdiction)*:⁵⁵

Notwithstanding...limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules...cover such areas as protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

The ICTY went on to highlight the absurdity of the distinction:⁵⁶

Elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.

While it can be said that it is unclear whether international law has the jurisdiction, the scope of international law must be interpreted widely to give jurisdiction, as it is the only tool that can do what is both morally and legally required and have the same rules for international and non-international conflict. The International Red Cross affirmed this approach in its 2005 comprehensive study of customary international law. The study found there to be evidence of state practice going beyond treaty law to expand the rules applicable to non-international armed conflicts.⁵⁷

⁵⁴ Ibid.

⁵⁵ *Tadic Jurisdiction*, para 127.

⁵⁶ Ibid, para 119.

⁵⁷ J Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law Study* (2004).

These problems of categorization are not limited to the experience in Gaza. Similar confusion has arisen surrounding the precise nature of the conflicts in Northern Ireland 1968 – 1998; in the Democratic Republic of Congo 1993 – 2010; in Columbia; in Afghanistan 2001 – 2010; in South Ossetia 2008; in Iraq 2003 – onward; in Lebanon in 2006; and with the “war” against Al-Qeda.⁵⁸ Despite clear evidence from case law, treaties, and practitioners of international law that the distinctions are eroding, formally they still remain. These distinctions are crumbling because international law was conceived to regulate the relationship between states alone. To be effective, international law must govern relationships within states by granting non-state actors equal status in law. Each distinction disenfranchises, divides, and creates more “other”. In the face of mounting evidence revealing the extremely limited utility and practicality of categorization in this context, the realist explanation returns to the power and potency of discerning not legal distinctions, but rather the distinction of legitimacy as a matter of politics. As has been argued, the political agenda will only suffice as long as the objective of the individual being free to engage in day-to-day life without threats to security is generally maintained. Increased threats to security will render the current political course obsolete. For this reason, broadening categorization to a framework of law that is triggered once a conflict begins is the best way forward to deal with these issues.

⁵⁸ Wilmshurst, above n 53 at 10.

IV. The Effect of Inconsistent Categorization on the Legitimacy of War Law

This dissertation contends that the assumption that categorization, division, and separation will equate to increased security is fundamentally wrong. The focus instead must turn to inclusion, participation, and universal human rights. To this end, every effort should be made to liberalize international relations, and by extension, international law, to an inclusive model that conforms to the liberal prescription of good society. From a classical liberal perspective, good society is based on respect for the equality and autonomy of individuals, and is guaranteed through the recognition of fundamental legal rights of the person. Political decrees of legitimacy coupled with inconsistent unequal application of seemingly arbitrary categorization thwarts good society. One radical way to achieve this given the current confines of the jurisdiction of international law is for the establishment of an international government, run according to the rule of law and respect for human rights, with jurisdiction over the domestic affairs of the individual states which moves beyond the jurisdictional limits of international law as currently conceived. Failing that, non-state actors should be subject to obligations of international law and should be able to participate in the generation of those obligations.

In a system of law that relies upon parties meeting their obligation and with no reliable enforcement, much must depend upon a commonly shared belief that rules of international law will consistently and predictably be applied. The question that must be answered is what is international law for? Weil contends that from the outset, what was eventually to become international law bore the stamp of an end that has never changed: to “ensure the coexistence – in peace, if possible; in war, if necessary – and the cooperation of basically disparate entities composing a fundamentally pluralistic society”.⁵⁹ The laws of war were established to reduce anarchy through the elaboration of norms of conduct enabling orderly relations between sovereign and equal states and to serve the common aims of members of the international community. To achieve this objective, focus should turn away from political decrees of illegitimacy and legal categorization, which as currently implemented lead only to ostracized and disenfranchised people. Focus should now turn to acknowledging the legitimacy of non-

⁵⁹ Prosper Weil "Towards Relative Normativity in International Law?" (1983) 77(3) AJIL 418.

state actors (distinct from acknowledging the legitimacy of their cause) thereby bolstering fidelity to the law.

The categorization process is itself provoking a crisis of legitimacy in international law. The consequences of this crisis are twofold. First, the status of the laws of war as ‘law’ is questionable. Though that may in itself be an unnecessary categorization of international law as law, the scheme of international law derives its power from legitimacy. Part of that legitimacy comes from the rhetorical value of law. Inconsistent and arbitrary categorization has resulted in the derailment of the legitimacy of the laws of armed conflict themselves. Predictable and consistent application of the categories cannot be relied upon. Rather than promoting legitimacy and fidelity with the laws of war by establishing and maintaining universal tenets akin to the rule of law, the labels have instead resulted in further contempt of and disregard for international law, jeopardizing any substantive test of ‘law’ and consequently its legitimacy and power.

Second, the categorization of threats has a direct effect on the opportunities available to address or resolve the threat, often from the outset. While conflict continues, politicians and international law practitioners spend valuable time and resources characterizing the nature of the conflict. The most significant consequence is that the categorization of threats and actors has had the effect of excluding the use of potentially viable legal frameworks for engagement and negotiation to seek legal solutions to the reliance of less effective political solutions. Palestine has struggled ferociously to gain legal recognition in order to participate in international society and in international law. Because the state and its peoples are considered illegitimate, even broadly labeled “terrorists”, their legal standing is continually rejected. Preventing recourse for the people of Palestine to be heard is serving only push them to militancy because the message is that there are no further legal options available. This dissertation contends that as soon as the law recognizes Palestinians either as a nation, or as a group that nonetheless falls under international law, the energy of those people has enormous potential to shift from being a militant organization to a politically-savvy movement. Consequently, this dissertation turns to consider the source of international law’s power for an explanation as to why the rule of law is imperative to generate fidelity to the laws of war from the actors those laws seek to regulate.

a. The Legitimacy of International Law

There is a long-standing debate amongst practicing lawyers and legal academics over whether international law is in fact law at all. Whether or not international law is or is not law is in itself largely irrelevant. Its relevance is strongest when acknowledging law's rhetorical value. The legitimacy of international law, however, is enormously important because the scheme of international law has power in the international community, the extent of which directly corresponds with its legitimacy. By increasing participation and decreasing categories, international law can generate more legitimacy, which in turn has the potential to generate more power by producing increased fidelity. Fidelity, which combines a distinctive legal legitimacy and a sense of commitment among those to whom the law is addressed, in turn creates legal obligation, allowing the scheme to more effectively manage the actors it seeks to regulate.

The most problematic yet widely held assumption of international law is that concepts of domestic law can be neatly exported into the international realm. When the domestic test for 'law' is used as the marker for assessing the viability of its international counterpart, the outcome will always be distorted. If the assumption that the defining features of law-enactment by a superior authority, application by courts, and centralized enforcement- are the tests for all law, the latter will never measure up. The danger in using the domestic counterpart as a marker is that the value of international law is obscured, and efforts to improve it will inevitably fall short. Why are international law and its domestic cohort discordant? The answer lies in part in source and in part in substance.

Article 38(1) of the Statute of the International Court of Justice provides the most authoritative sources of international law:⁶⁰

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting state;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations; and
- d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for determination of rules of law.

⁶⁰ Statute of the International Court of Justice, as annexed to the Charter of United Nations, June 26, 1945, 59 Stat. 1055, 1060(1945), T.S. NO. 993, 3 Bevens 1153, 1976 Y.B.U.N. 1052 (hereinafter I.C.J. Statute).

While the source of international law is thus broadly identifiable, it is only authoritative to the extent that political will regulates its application; it is applicable only to the extent that politics deem it to be. This system of governance is conceived of in strictly consensual terms: parties are bound only by rules to which they have agreed, either through treaty or through consistent patterns of behavior that over time gave rise to customary international law.⁶¹ Ultimately, international law was developed to provide guidance to monarchs, (and later to governments), in their international engagement and to provide a framework for trade and to place some constraints on war. To some extent, international law satisfied those objectives. Despite its varying record of success in regulating state behavior, the Westphalian structure does to an extent meet the objectives of governing state interaction.

By contrast, in the domestic context, ‘law’ is widely conceived of as a system of commands, obligations, and rules that regulate relations among individuals and associations, and the sources of legitimate coercive authority in society.⁶² Its power compels behaviour and enforces compliance with the rules. To meet the test for validity, there are two fundamental pre-conditions for legitimacy (which lead to compliance). First, it must exist within a coherent structural framework – a constitution – that defines the government’s authority, and by so doing, limits it, thus preventing arbitrary authority. Of critical importance for a free person’s understanding of law that there is an overarching structure within which the subsidiary aspects of the law develop. Second, one source of coercive authority – the rule of law – is supported by popular sovereignty or public accountability through reasonably democratic popular controls over the creation, interpretation, and enforcement of laws; the three broad ways in which law develops.⁶³

This definition of domestic law has practical implications. The first is that the sources of domestic law are identifiable and authoritative. The second is that the mechanism for interpreting and resolving conflicts and disputes among parties under law is agreed upon. The third is that the source of law enforcement (including execution and compliance activities) as well as the methods and procedures for declaring and changing

⁶¹ Byers, above n 4 at 3.

⁶² John R. Bolton "Is There Really "Law" in International Affairs?" (2000) 10(1) Transnational Law and Contemporary Problems .

⁶³ Ibid.

the law, is also agreed upon. The second and third implications of domestic law stand in stark contrast to the challenges faced by its international legal counterpart. Thus the assumption that international law is congruent, or should be congruent, with domestic law is an assumption that must be resisted.

Toope and Brunnee warn that when we assume that the defining features of domestic law, and thus *all* law, are formal enactment by a superior authority, application by courts, and centralized enforcement, there is a risk in misjudging how law operates in international society, obscuring its potential power, and misdirecting even the best-intentioned efforts to improve it.⁶⁴ From where, then, is the power of international law derived? One answer lies in substance.

In light of the aforementioned difficulties of making direct comparisons with domestic and international law, it is ironic to use legal theorist Lon Fuller's theory of domestic law to formulate a response to the question of the source of international law's power. Toope and Brunnee defend the use of Fuller's theory of domestic law as important for understanding international law because it reveals that the problem with the domestic law analogy "is not necessarily the analogy as such, but the assumptions that commonly shape it".⁶⁵ Judging the value of international law by the defining features of domestic law (and, by extension, the defining features of all law) – formal enactment by a superior authority, application by courts, and centralized enforcement – will always find international law lacking. By understanding the legal substance of international law, but more importantly its source of legitimacy, and how it can operate in international society, legal scholars, lawyers, and theorists will be better able to create or improve the laws of war to harness and reflect their potential power.

According to Fuller, adherence to specific criteria of legality is what distinguishes law from other types of social ordering. These criteria are: generality; promulgation; non-retroactivity; clarity; non-contradiction; not asking the impossible; and congruence between rules and official action.⁶⁶ The creation of norms that meet these criteria linked to norm applications that satisfy these requirements amounts to a 'practice of legality'

⁶⁴ Stephen J. Jutta Brunnee and Toope *Legitimacy and Legality in International Law* (Cambridge University Press, New York, 2010).

⁶⁵ *Ibid*, at 6.

⁶⁶ Lon L. Fuller *The Morality of Law* (Yale University Press, New Haven, 1969) 39 and 46-90.

where actors are able use law to pursue their purposes and organize their interactions. These components are crucial to generating what Fuller called ‘fidelity’ – a distinctive legal legitimacy and a sense of commitment among those to whom the law is addressed – which in turn creates legal obligation. By this account, the hierarchical form associated with domestic law is insufficient to characterize ‘law’, either domestic or international, and may not be essential.

Consider Fuller’s criteria of legality applied to the categorization of international or non-international armed conflict. As canvassed in the body of this thesis, generality of application is foregone in favour of a political decree of legitimacy. With no clear adjudicative body, there is no clear and consistent formula of promulgation; and even if a central source of law were to exist, as the Westphalian system currently stands, the actors the law seeks to control would likely have no standing to engage with that process. As legal scholars and law practitioners themselves largely cannot conclude as to the precise status of international versus non-international armed conflict, Fuller’s criteria of clarity fails. Furthermore, the practical distinguishing feature within the division of international and non-international armed conflict is that a more extensive set of rights and obligations exists for humans entangled in an international conflict. Humans entangled in a non-international armed conflict are not afforded those same rights. The distinction no doubt fails congruence between rules and official action if you speak to the individual not afforded more extensive rights simply because of the nature of the conflict in which they are ensconced. And while the distinction may not neatly satisfy Fuller’s original conception of non-contradiction, it seems contradictory nonetheless. The trials of Nuremberg and the imposition of crimes against humanity demonstrate that international law will not preclude non-retroactivity. In failing to clearly articulate which laws apply, the law is essentially asking the impossible.⁶⁷ As it stands, the distinction clearly fails to meet Fuller’s purposive test of law, but more importantly, it fails to give these laws legitimacy.

Fuller’s commitment to ‘autonomy’ is explained at the domestic level in relative terms: as human interaction in social institutions; a “constructivist recasting that allows

⁶⁷ Ibid at 39 and at 46-90.

for social and political diversity”.⁶⁸ This tension at the domestic realm is a primary challenge in international law: to construct normative institutions while admitting and upholding the diversity of peoples in international society. This explanation of law and the rule of law do not require fundamental shared commitments to a single political morality or the existence of centralized political authority.⁶⁹ Law in this way is explained as a purposive enterprise satisfied through the criteria of legality, formed by human interaction and focused on managing that interaction in specific ways (though arguably the enterprise could and should be focused on managing the interaction in *general* ways to satisfy an element of flexibility that is addressed through mechanisms such as legal fictions and implicit exceptions in domestic law). Purpose coupled with the notion of reciprocity, rather than hierarchy, is what generates legal obligation; actors collaborate to build shared understandings and uphold a practice of legality. Ideally, the hierarchical form of enforcement is then secondary to the creation and effect that feeds the underlying sense of legal imperative to oblige and engage with the law.

Toope and Brunnee contend that this interactional, purposive framework is where international discourse should focus to think anew about international law. State consent or sources of international law, creation of courts and tribunals, or stronger enforcement mechanisms should not be dismissed as inconsequential; however the framework provides a different context from which to examine and “better appreciate the roles they play, their potential, and their limitations”.⁷⁰ The framework also places importance on the sustained effort required to build and maintain the reciprocity that grounds legal obligation and legitimacy.

Despite its lack of an authoritative system, as Henkin asserted three decades ago, “almost all nations observe almost all principles of international law and almost all of their obligations all the time”.⁷¹ According to Franck, nations ‘obey powerless rules’ because they are pulled toward compliance by considerations of legitimacy (or ‘right process’) and distributive justice. Koh, like Toope and Brunnee, believes Franck’s

⁶⁸ Jutta Brunnee and Toope, above n 64 at 21.

⁶⁹ *Ibid.*

⁷⁰ Jutta Brunnee and Toope, above n 64 at 7-8.

⁷¹ Harold Hongju Koh "Why Do Nations Obey International Law?" (1997) 106(8) *The Yale Law Journal* 2599.

position must go a step further: that a thoroughgoing account of *transnational legal process*: the complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems.⁷²

Using this lens of substance and rhetoric, this thesis contends that when international law satisfies Fuller's criteria, thereby gaining legitimacy, it does have both power as a scheme and potency as law. As a device used to regulate human rights, numerous domestic laws substantiate the power of international law where these human rights principles are enshrined. Broadening the application of laws of war to a general category of 'conflict', which adheres to the values espoused in the rule of law, would begin to effectively address contemporary threats to peace and security as they emerge.

A broad category that satisfies Fuller's criteria would be a strong foundation from which the laws regulating armed conflict could develop. Toope and Bruneel's interactional approach would go a step further to generate a sense of legitimacy from the actors whom the law seeks to control by broadening the law to encompass standing for those formerly excluded through categorization with a wider recognition of human rights and dignity in the international system. The system of categorization of conflict only addresses conflict once it erupts, and consequently is just one part of the solution. To more fully address the roots of international insecurity, which experience has shown includes boiling over from intrastate conflict a step further is required. This dissertation contends that the other part of the solution is a shift to legitimizing those currently prevented from engaging in the international system. Increased participation and universal human rights in the international system will empower and encourage engagement and participation from the actors which it seeks to control.

⁷² Ibid, 2602.

V. Conclusion

Political determinations of legitimacy coupled with problems of inconsistent and unclear categorization prevent valuable legal frameworks and tools for resolution from being employed to stabilize international peace and security. This continues to present major problems for international law. Division and uncertainty leads to disenfranchised peoples, which in turn leads to upheaval and unrest. Thus the contemporary threats posed by non-state actors point to a deeper concern, but also to an opportunity. Rather than simply address this defect in the laws of war, which can only regulate conflict once it begins, there is an opportunity to address some of the contemporary threats before they begin. Many contemporary threats, such as terrorism and civil unrest, are reminiscent of historical domestic calls for constitutional shifts, such as the human rights movement in the United States, which reflected at its core a desire for a commitment to human rights and the rule of law. Although realist theories of power politics imply that the international order will remain firmly as it stands, history provides examples within nation states where upholding the rule of law to the detriment of the power players was crucial to securing and maintaining order.

In the western world, the prevailing view is that democracy and the principles espoused by the rule of law are a better form of government than any other. As a result of the dominance of liberal democratic states in international society, this ideology is hailed as the cornerstone of legitimacy. Nevertheless Lord Steyn warns the assertion of the superior moral value of democratic government compared with the organization of society according to moderate Muslim principles, “ought not to be conceded without examination”.⁷³ He cautions that in light of Guantanamo Bay, Abu Ghraib, Fallujah, the Iraq war, and the “continuing revelations about so – called extraordinary rendition – a fancy phrase for kidnapping-the Muslim world may not be over impressed with protestations about the rule of law”.⁷⁴ In this light, the protestations are little more than a self-serving hypocrisy. He attests that the scale and outrage in the world of Islam is enormous. To echo the words of Winston Churchill in a speech made on July 20, 1910 to

⁷³Steyn, above n 3 at 2.

⁷⁴Ibid.

the House of Commons in the context of the treatment of crime and criminals, the mood and temper of the public in regard to the treatment of the ‘other’ is one of the most unflinching tests of the civilization of any country – and by extension, of international society. A calm dispassionate recognition of the rights of all people—a constant “heart-searching” by all charged with the duty of punishment – “these are the symbols, which, in the treatment of the other, of the [convicted terrorist, of the threat], mark and measure the stored up of international society and are sign and proof of the living virtue in it”.⁷⁵

Journalist David Rieff alludes to a more skeptical approach of universal human rights. “The universalizing impulse is an old tradition in the western world, and, for all the condemnation that routinely incurs today, particularly in the universities, it has probably done at least as much good as harm. But universalism easily declines into sentimentalism, into a tortured but useless distance from the particulars of human affairs”.⁷⁶ In practical terms, despite the warmth a theoretical proposition may generate, “combatants are as likely to know as much about the laws of war as they do about quantum mechanics”.⁷⁷ State interests most often trump personal rights, interpersonal equality often gives way to disrespect for – if not hatred of – ‘others’, violent conflict is persistent, and weak international institutions are easily demonstrated. “We recognize rights, but we often do not protect them.”⁷⁸

Yet despite evidence to the contrary, international pressure to dismantle Guantanamo Bay; public outcry over the mistreatment of prisoners in Abu Ghraib and other human rights violations in Iraq and Afghanistan; support of the intervention in Libya and revolution in Egypt are all indications that the internalization of human rights in domestic law is increasingly leading to the application of international human rights, in turn slowly broadening the legal definition of the laws of war. These are further signs that the international community is relinquishing some of its formerly state-centric approach. In recent years the creation of the International Criminal Court; the Responsibility to Protect; and on going debate about the need to turn focus to encompass socio-economic

⁷⁵ Ibid.

⁷⁶ David Rieff "The Humanitarian Illusion" *The New Republic* (March 16 1998) 28.

⁷⁷ David Scheffer, “The Clear and Present Danger of War Crimes,” Address, University of Oklahoma College of Law, February 24, 1998.

⁷⁸ Forsythe, above n 7at 4.

rights as well as civil-political rights suggest that the Westphalian tradition of absolute sovereignty is eroding. Within several nation states, notable members of judicial benches – President Cooke from New Zealand and Lord Steyn from the United Kingdom – have made clear declarations that the assumption that parliamentary supremacy will always trump human rights and the rule of law is now in question. These shifts implicitly acknowledge that inclusion and the universal protection of human rights is fundamental to the ability of law have effect. International law was established to bring order to international society. To achieve this objective, it must extend rights and obligations to every member of that society. This objective cannot be achieved by dictating inconsistent standards to all and simultaneously promoting exclusive protections to some. It is crucial that the application of both international war law and human rights be equally applied.

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