Applying a Sovereign Agency Theory of the Law of Armed Conflict

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Abstract

The current bifurcated conflict classification paradigm for applying the Law of Armed Conflict (LOAC) has lost its usefulness. Regulation of state militaries was originally based on the principle that the armed forces of a state were acting as the sovereign agents of the state and were granted privileges and given duties based on that grant of agency. These privileges and duties became the bases for the formulation of the modern LOAC. During the twentieth century, the LOAC became bifurcated, with the complete LOAC applying only to armed conflicts between sovereigns and only few provisions of the law applying to armed conflicts that were not between sovereigns. This bifurcation has led to a lack of clarity for the sovereign’s agents in LOAC application and given states the ability to manipulate which law applies to application of force through their agents. The applicability of the LOAC should no longer be based on the manipulable and unclear conflict classification paradigm, but should instead return to its foundations in the sovereign’s grant of agency. Thus, anytime a sovereign applies violent force through its armed forces, those armed forces should apply the full LOAC to their actions, regardless of the type or classification of the conflict.

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I. INTRODUCTION

War is a challenge to law, and the law must adjust. It must recognize that the old wineskins of international law, domestic criminal procedure, or other prior frameworks are ill-suited to the bitter wine of this new warfare. We can no longer afford diffidence. This war has placed us not just at, but already past the leading edge of a new and frightening paradigm, one that demands new rules be written. Falling back on the comfort of prior practices supplies only illusory comfort.¹

In the aftermath of the terror attacks on September 11, 2001, then-Assistant Attorney General Jay Bybee argued in a memo to Department of Defense General Counsel William Haynes that the Geneva Conventions did not apply to either al-Qaeda or the Taliban, essentially leaving these battlefield

¹ Al-Bihani v Obama, 590 F3d 866, 882 (DC Cir 2010) (Brown concurring).
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fighters in a “no-law” zone. Additionally, White House Counsel, Alberto Gonzales, notoriously described provisions of the Geneva Conventions as “quaint” and “obsolete.” Many who have since reviewed Bybee’s memo have declared that this was a disingenuous reading of the law and that the Bush Administration was manipulating its interpretation of the law and US Treaty obligations to accomplish specific policy objectives. In the end, the US Supreme Court forced the Bush Administration to change its interpretation of the application of the law, but debate continues on the issue of what law applies.


5 In Hamdan v Rumsfeld, the Supreme Court stated:

The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being “international in scope,” does not qualify as a “conflict not of an international character.” That reasoning is erroneous. The term “conflict not of an international character” is used here in contradistinction to a conflict between nations. So much is demonstrated by the “fundamental logic [of] the Convention’s provisions on its application.” Common Article 2 provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-a-vis one another even if one party to the conflict is a nonsignatory “Power,” and must so abide vis-a-vis the nonsignatory if “the latter accepts and applies” those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory “Power” who are involved in a conflict “in the territory of” a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase “not of an international character” bears its literal meaning.


6 Professor Yoram Dinstein writes:

Sometimes, while the scale and effects of an armed clash between States are substantial, both sides stick to a fiction (which does not mirror the true state of affairs and need not be accepted by third States) that a mere incident “short of war” has occurred. Conversely, the issuance of a declaration war does not mean that hostilities will necessarily ensue, so that a technical state of war may remain technical. Nonetheless, it is clear that since war must be waged between two or more States, figures of speech like “war on terrorism” must be taken as metaphorical. A “war on terrorism” may segue into a real war when—like in Afghanistan in 2001—one State (the United States) went to war against another (Afghanistan) owing to the support given by the latter to terrorists.
As the above quote from the 2010 DC Circuit case of Al-Bihani v Obama reflects, the terror attacks and the US government's response sparked a decade of consternation that has pervaded governments, practitioners, and academics concerning the applicability of the law to the actions of transnational terrorists.

At the root of the arguments by Gonzales, Bybee, and others is the law of armed conflict's (LOAC) applicability paradigm established by the 1949 Geneva Conventions and broadened by their subsequent 1977 Additional Protocols. These Conventions and Protocols were promulgated against the backdrop of the proliferation of intra-state conflicts involving organized armed groups that were not state forces, but were using state-level violence to carry out armed conflicts. The LOAC provided no protection for either non-State participants in such conflicts or victims. Organizations such as the International Committee of the Red Cross (ICRC) argued to extend the existing laws of armed conflict to these internal conflicts. States resisted the ICRC's suggestion because they viewed these conflicts as areas where international law had no purview.

Recognizing state resistance but still committed to extending the coverage of the LOAC to victims in these internal armed conflicts, the ICRC proposed in 1949 to bifurcate the LOAC into provisions pertaining to armed conflicts between states, termed international armed conflicts (IAC), and armed conflicts between state forces and other organized armed groups within that state, termed non-international armed conflicts (NIAC). The intent was not only to provide

But usually the “war on terrorism” is prosecuted through ordinary law enforcement measures or even incidents “short of war,” without waging an all-out war.


9 In the decades following the adoption of the Geneva Conventions, the world saw an increase in non-international armed conflicts, including wars of national liberation, terrorist organizations and irregular forces working within a failing State. Recent examples include activities of the Taliban, Hizbollah, Hamas, al-Qaeda, the Islamic Courts Union, and Al-Shabbab.

10 See Section II.

11 See id.
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greater protections to victims of armed conflict, but also to encourage the armed
groups to comply with the LOAC.

States finally agreed to this methodology, which was included in the 1949
Geneva Conventions as Article 3. At the urging of the ICRC, many states
extended this bifurcation in 1977 through the promulgation of two Protocols to
the 1949 Geneva Conventions. These Additional Protocols solidified the
bifurcation and, for those states who became parties, added great detail to the
provisions applying in both IAC and NIAC.

From the beginning, the intent of the ICRC (and presumably of the states
who acceded to the 1949 Geneva Conventions and 1977 Protocols) was to add
protections to the victims of armed conflict and encourage greater compliance
with LOAC across a wider range of conflicts. However, history shows that this
bifurcation has had little effect, if any, on non-state compliance with the
LOAC and has mainly acted to limit states who seek to be compliant. Further,
as illustrated by the case of the US' response to the war on terror, it has focused
the application of law almost exclusively on conflict classification. If a State calls
an armed conflict an IAC, it is bound by one set of duties and authorities, and if
it calls it a NIAC, it is bound by another. Further, if it avoids calling a conflict an
armed conflict at all, it can use its armed forces to do things that are not covered
by the LOAC, thus potentially creating the "no law" zone the US sought with
regard to terrorists.

In addition to the US' dilemma, recent events in Colombia, Russia, and
Mexico demonstrate this problem. By focusing on the conflict classification,
whether an IAC, NIAC, or even as something other than armed conflict at all,
states are able to determine the law that applies as a matter of policy, rather than
as a matter of fact.

12 Geneva Conventions (cited in note 7).
13 For a list of states party to API, see API at 396–434 (cited in note 8). For a list of states party to
APII, see APII at 667–98 (cited in note 8).
14 See M. Cherif Bassiouni, The New Wars and the Crisis of Compliance with the Law of Armed Conflict by
Non-State Actors, 98 J Crim L & Criminol 711, 807–08 (2008) (arguing that states' ability to
manipulate conflict classification encourages noncompliance by non-state actors).
15 See Human Rights Watch, Colombia: Investigate Spate of Killings by Armed Groups (July 8, 2011),
(visited Oct 28, 2011) (cataloguing recent attacks on civilians by armed groups and calling on the
Colombian government to investigate and intervene).
16 See Paola Gaeta, The Armed Conflict in Chechnya Before the Russian Constitutional Court, 7 Eur J Intl L
563 (1996) (discussing the decision by the Russian Constituional Court to declare Russia's
conflict with Chechnya as subject to API).
17 See Carina Bergal, The Mexican Drug War: The Case for Non-International Armed Conflict Classification,
34 Fordham Intl L J 1042, 1088 (2011) (arguing that Mexico has not officially declared its
situation against the drug cartels as a NIAC, but that it should do so).
The inherent problems with the IAC/NIAC bifurcation are not recent discoveries. Almost immediately after the promulgation of the 1977 Protocols, Professor Michael Reisman argued that the bifurcation would be inaccurate and unnecessarily limiting. The ranks of detractors have grown since the US' war on terror has so ably illustrated the shortcomings of the paradigm. Governments, academics, and even ICRC officials now recognize that the conflict classification paradigm for LOAC applicability is not sufficiently meeting its originally intended goals. While there are many detractors of the current system, there is no general agreement on how to move forward in fixing the gaps in the existing law. No one has suggested an alternative to the current focus on conflict classification as the method of determining which law applies.

This Article argues that the international community's focus on conflict classification to determine which law applies is misplaced and does not facilitate application of fundamental LOAC protections. Rather than using the type or existence of armed conflict as the gauge for LOAC applicability, this Article argues that states should apply the full LOAC every time they utilize their armed forces as state agents to apply sovereign force. This turns the focus from what a state chooses to call a conflict to the forces a state chooses to use to deal with a conflict. Application of the LOAC to all forceful activities by state sovereign forces is drawn from the historical development of the LOAC and will provide a more solid foundation upon which to place the LOAC, diminishing the potential for political manipulation of the law.

Applying the sovereign agency theory of the LOAC, rather than the conflict classification paradigm, will avoid the current pervasive debate between

IAC and NIAC that has caused so much consternation. In addition, applying the full LOAC every time a state uses its armed forces will mean that the starting point for humanitarian protections is always the most robust of possible alternatives. It will provide clarity for armed forces, making them more efficient and effective. History has shown that applying the full LOAC to all forceful activities of a state’s armed forces is a manageable approach, though it has only been done as a matter of policy to this point. For the sovereign agency theory of LOAC applicability truly to overcome the problems inherent in the conflict classification paradigm, however, it must be accepted as a matter of law.

In arguing that the “full LOAC” should apply when a state employs its military to exercise sovereign force, this would include those customary provisions that normally apply during IAC as well as any conventional obligations imposed by a state’s specific treaty obligations. As will be further explained in Section V, despite the positive law that makes clear distinctions between the law applicable in NIAC and the law applicable in an IAC, the practice of states,23 judicial decisions of international tribunals,24 and the writings of scholars25 all demonstrate that the gap between the customary law applicable in NIAC and IAC is decreasing. Some key areas of difference still remain, such as combatant immunity26 and occupation. While these are definitely critical areas of the LOAC, they represent only a small portion of the LOAC as a whole.

Therefore, for the purpose of this paper, with respect to the sovereign agency theory presented herein, the LOAC refers to the LOAC as it currently applies in IAC to any individual state. This includes the application of human rights law as appropriate.27 Arguing to apply the full body of the LOAC will trigger concerns by states such as those raised in prior negotiations as catalogued below.28 Despite these valid arguments by states, the benefits of the sovereign agency theory to a state’s armed forces outweigh the traditional concerns about applying the full LOAC to situations other than IAC.

Section II of this paper describes the current paradigm of LOAC applicability based on conflict characterization and includes a brief historical review of the bifurcation of the LOAC into provisions regulating NIAC and

23 See Section V.E.1.
24 See Section V.E.2.
25 See Section V.E.3.
28 See Section II.
IAC separately. Section III then reviews the effect of the bifurcation of the LOAC to show that it has not been effective either in curbing the violence against victims of armed conflict or in promoting LOAC compliance by participants in armed conflict, but instead has become a political tool to manipulate the applicable law, leading to a lack of clarity on the battlefield. The section will also highlight the increasing call to dissolve the bifurcation. Section IV argues that looking to the type of armed conflict for LOAC applicability is no longer sufficient to preserve the fundamental principles of the LOAC. Rather, states should apply the LOAC to any use of armed forces to apply sovereign force. This proposal reemphasizes the underlying principle of agency and is expressed most significantly in the sovereign state’s granting that agency to members of its armed forces. Section V outlines the benefits of the sovereign agency theory and argues that history supports its application. Finally, Section VI analyzes some recent developments that have positioned states to make just such a transition in the law and offers a way forward to complete the transition.

II. THE CURRENT BIFURCATED PARADIGM

"[T]he terms 'international' and 'non-international' conflict import a bipartite universe that authorizes only two reference points on the spectrum of factual possibilities. The terms are based on a policy decision that some conflicts... will be insulated from the plenary application of the law of armed conflict—even though such conflicts may be more violent, extensive and consumptive of life and value than other 'international' ones. The terms are, in effect, a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation. This exclusion is not one that comports easily with the manifest policy of the contemporary law of armed conflict, which seeks to introduce as many humanitarian restraints as possible into conflict, without judgments about its provenance, its locus, or about the justice of either side's cause." 29

By the early nineteenth century, states recognized two principal forms of armed conflict: armed conflict between two or more states and civil wars. 30 Interstate conflict, or what has become known as IAC, invoked all the principles of the laws of war as they were then understood. During civil wars, on the other hand, states often did not apply such international rules and the treatment of opposing fighters was considered a matter of domestic concern. This difference of application “was based on the premise that internal armed violence raise[d] questions of sovereign governance and not international regulation.” 31

The middle of the nineteenth century began a time of progressive codification of the LOAC. Starting with the Lieber Code of 1863, states wrote and applied rules to their armed conflicts. Such treaties and conventions moved the development of the LOAC forward, expanding its coverage and raising the level of detail in its provisions. In addition to States, one of the organizations that played a significant role in LOAC development was the ICRC. The concept of the ICRC originated in Henri Dunant’s experience after the Battle of Solferino and his determination to provide assistance to victims of armed conflict. Initially, the ICRC’s work focused on conflicts between sovereign states. However, the ICRC soon recognized the plight of victims of civil wars, or non-international armed conflicts, to which the LOAC did not extend. As early as the 1912 IXth International Conference of the Red Cross, meeting in Washington, DC, the ICRC presented a report entitled “The Role of the Red Cross in case of Civil War or Insurrection,” which contained a draft convention extending some rights under the LOAC to victims of civil wars. This initiative was not well received by the majority of the participants, who felt that “the Red Cross Societies have no duty whatever to fulfil [sic] toward rebel or revolutionary troops, which the laws of [a] country can only consider as criminals.”

Despite this setback, the ICRC continued to advance the idea of codifying protections for victims of non-international armed conflicts. At the Xth International Committee of the Red Cross, the Conference adopted a resolution that “recognized that victims of civil wars and disturbances, without any

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33 Interestingly, the US Civil War was a NIAC, yet the rules Lieber promulgated to govern Union forces in the conduct of that armed conflict came to be the basis for the formulation of modern IAC law.

34 See, for example, Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (Declaration of Saint Petersburg), 138 Consol TS 297 (1868); Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague Convention of 1899), 32 Stat 1803 (1899); Final Act of the Second Peace Conference (The Hague Convention of 1907), 36 Stat 2277 (1907); Treaty Between the United States and Other Powers Providing for the Renunciation of War as an Instrument of National Policy (The Kellogg-Briand Pact), 46 Stat 2343, 94 League of Nations Treaty Ser 57 (1928).

35 See generally Henry Dunant, A Memory of Solferino (Intl Comm Red Cross 1986).

exception, are entitled to relief, in conformity with the general principles of the
Red Cross.” Though the resolution had no binding effect on states, it reflected a
thaw in the opposition to applying basic international law protections to armed
conflicts more broadly.

In 1938, in the wake of the Spanish Civil War, the ICRC convened the
XVIth International Conference of the Red Cross in London. At the
Conference, the “question of non-international armed conflicts was given
attentive study by the legal commission of the Conference, which recognized all
the difficulties inherent in it.” In the end, the members of the Conference were
still unwilling to apply the LOAC directly to non-international armed conflicts
that, in their view, invaded the prerogative of the sovereign. The result was that
the members of the Conference only agreed to increased study by the ICRC on
the application of humanitarian principles during civil wars.

World War II exhibited an exponential rise in wartime costs to civilians,
both in terms of lives lost and property damage. Increasingly lethal weapons
led to increased effects on civilians. In the aftermath of the war, the ICRC
embarked on another review of the LOAC. This effort resulted in the ICRC’s
submitting proposals for rules applicable in cases of non-international armed
conflict to the XVIIth International Committee of the Red Cross in Sweden in
1948. After reviewing the ICRC’s submissions, the members of the Conference
“recognized the innumerable difficulties which were going to be raised by the
problem of non-international armed conflict, and [they] suggested that this
question be referred to the [upcoming] Diplomatic Conference.”

At the 1949 Diplomatic Conference, which would ultimately produce the
Geneva Conventions, the ICRC reiterated its previous call to apply the full
LOAC to non-international armed conflicts. While some delegates were in favor
of the changes and viewed acceptance of the ICRC’s proposals as an “act of

38 Id at 2–3.
39 See id at 3.
40 See Ronald R. Lett, Olive Chifese Kobusingye, and Paul Ekwaru, Burden of Injury During the Complex Political Emergency in Northern Uganda, 49 Canadian J Surgery 51, 53 (Feb 2006) (“The proportion of civilian war-related deaths has increased from 19% in World War I, 48% in World War II, to more than 80% in the 1990s.”). See also Lisa Avery, The Women and Children in Conflict Protection Act: An Urgent Call for Leadership and the Prevention of Intentional Victimization of Women and Children in War, 51 Loyola L Rev 103, 103 (2005) (“During the last decade alone, two million children were killed, another six million were seriously injured or left permanently disabled, and twice that number of children were rendered homeless by the ravages of war.”).
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courage," the majority remained opposed to such a sweeping measure. Those opposed argued that:

To compel the Government of a state in the throes of internal convulsions to apply to these internal disturbances the whole body of provisions of a Convention expressly concluded to cover the case of war would mean giving its enemies, who might be no more than a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition.  

The issue was sent to a Mixed Commission that was tasked with examining articles that were common to all four proposed Conventions. Within these "common" articles were those that determined the applicability of the LOAC. In accordance with the traditional approach, Article 2 of the Conventions described the conflicts to which the full LOAC would apply. Article 2 states:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

This paragraph poses two significant limitations to the application of the Conventions. The first is that there must be an armed conflict, and the second is that it must be between two High Contracting Parties. With the Geneva Conventions universally adopted, the effect of this limitation is to restrict the applicability of the Conventions to armed conflicts between states. This, of course, was not what the ICRC and others were seeking. They wanted a broader application of the LOAC.

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44 Id at 43–44.

45 Geneva Conventions (cited in note 7).

In response to the ICRC’s desire for a broader application of the LOAC, a small working party was formed to “draw up a text containing definitions of the humanitarian principles applicable to all cases of non-international conflicts, together with a minimum of imperative rules.” Drawing from general preambular language and rules originally intended for the preamble to the convention concerning civilians, the working group produced the provision that would eventually become Common Article 3, which provides limited protections for those who are involved in non-international armed conflicts, including for fighters not acting under the direction of a sovereign. Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

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48 Id.
49 Geneva Conventions, Art 3 (cited in note 7).
50 Id.
Like Article 2, Article 3 only applied to armed conflicts, but in contrast to Article 2, Article 3 was specifically applicable only to those armed conflicts not of an international character occurring in the territory of one of the states party.

A sensible reading of this language might lead the reader to think that the drafters meant Article 3 to cover the complete field of conflicts taking place in the territory of a signatory not covered by Article 2—and eventually the US Supreme Court decided just that—but it is clear that this was not the intention of the parties at the time the Conventions were drafted. Although not explicit in either the text or commentary, the records of the Conventions clearly show that most states believed that Common Article 3 would only apply when the fighting reached “the threshold of intensity associated with contemporaneous international warfare” and opposing armed groups forced the state to respond with its armed forces. The states party also believed that this provision was actually meant to govern civil wars or insurrections, and that they were not considering conflicts with transnational non-state actors. The ICRC viewed this restricted scope as only a limited success; they recognized that these provisions represented only the “most rudimentary principles of humanitarian protection.”

Despite the minimal effect of Common Article 3 in extending protections to victims of NIAC, its creation signified the beginning of the application of the LOAC to NIACs, an area that previously had been governed almost solely by domestic law. Though application of the complete LOAC was rejected, there was now, at least, some recognition among states that NIACs were no longer exempt from the direct application of international law.

Since the adoption of the 1949 Geneva Conventions, the majority of conflicts that have occurred throughout the world have been non-international.

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52 Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law 37 (Cambridge 2010). See Baxter, 28 Brit YB Intl L at 323 (cited in note 41) (arguing that the treatment of certain guerrillas and saboteurs is outside the coverage of the Geneva Conventions).
53 Cullen, The Concept of Non-International Armed Conflict at 37 (cited in note 52).
56 Stewart, 85 Intl Rev Red Cross at 317 (cited in note 31).
in character.\textsuperscript{57} In its assessment of these armed conflicts, the ICRC determined that Article 3's numerous loopholes “made it no longer possible to ensure sufficient guarantees to the victims in question.”\textsuperscript{58} The ICRC responded by continuing its efforts to expand protections for victims of all armed conflicts.

At the XXth International Conference of the Red Cross held in Vienna in 1965, the members adopted Resolution XXVIII, which included principles for the protection of civilians in armed conflict, without regard to how that conflict was characterized. These principles were subsequently adopted in UN General Assembly (UNGA) Resolution 2444 on Respect for Human Rights in Armed Conflict. Article 1 of the Resolution states:

1. ‘Affirms’ resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, inter alia, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:

   (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

   (b) That it is prohibited to launch attacks against the civilian populations as such;

   (c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.\textsuperscript{59}

The ICRC/UNGA Resolution is significant for two relevant reasons. First, the Resolution makes no distinction between various types of armed conflict. On its face, the Resolution applies equally to all forms of armed conflict. Second, the Resolution calls on all governments to apply to all forms of armed conflict principles previously understood to apply only to IACs, again without concern for the characterization of the conflict. While the principle of distinction described in paragraphs (b) and (c) is one of the most fundamental principles of the LOAC and is designed to protect victims of war, it is important to note here the ICRC’s urging for a new application of the LOAC to armed conflict generally. In keeping with this new approach, “the legal studies of the ICRC were broadened to cover all the laws and customs applicable in armed conflicts, because the insufficient character of the rules relative to the conduct of hostilities often affected the application of the Geneva Conventions in conflicts of all sorts.”\textsuperscript{60}

\textsuperscript{57} See Michelle Mack, \textit{Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts} \textsuperscript{5} (Intl Comm Red Cross 2008), online at http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf (visited Oct 19, 2011).

\textsuperscript{58} Conference of Government Experts at 7 (cited in note 36).

\textsuperscript{59} General Assembly Res No 2444, UN Doc A/RES/2444 at ¶ 1 (1968).

\textsuperscript{60} Conference of Government Experts at 7 (cited in note 36).
The ICRC’s next move, in furtherance of its twin objectives of broadening the protections of victims of armed conflict and encouraging compliance with the LOAC, was to submit a draft to a Conference of Government Experts in 1971, recommending the application of the full LOAC to civil wars if a foreign military became involved. The ICRC’s efforts were successful on this point, and the resulting Report of the Government Experts on the issue of applicability of LOAC to non-international armed conflicts proposed:

When, in case of non-international armed conflict, the Party opposing the authorities in power presents the component elements of a State—in particular if it exercises public power over a part of the territory, disposes of a provisional government and an organized civil administration, as well as of regular armed forces—the Parties to the conflict shall apply the whole of the international humanitarian law applicable in international armed conflicts.

Eventually, the ICRC put forward its proposals to the Conference of State Parties. Finding that the majority of states in the Conference preferred to maintain the distinction between IACs and NIACs, the ICRC abandoned the “single protocol” approach. In preparation for the 1977 Diplomatic Conference, the ICRC proposed two separate protocols, one dealing with IAC and one with NIAC. These two proposals provided the basis for the Additional Protocols, the adoption of which ultimately solidified the bifurcation of the LOAC.

The bifurcation of the LOAC is clearly expressed in the applicability paragraphs of each Protocol. API, Article 1, paragraphs 3 and 4 state:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

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61 See Stewart, 85 Intl Rev Red Cross at 313 (cited in note 31).
62 Conference of Government Experts at 15 (cited in note 36). The same report also concluded that when a third State becomes involved in the conflict, the entire LOAC should apply. Id at 21.
64 API, Art 1 ¶¶ 3–4 (cited in note 8).
By referring to Common Article 2 in paragraph 3, API is designed to apply to the standard IAC. However, paragraph 4 carves out a significant change in that understanding by including three types of conflict that had traditionally been considered NIACs. Despite the argument made in the Commentary that conflicts waged against colonial domination, alien occupation, and racist regimes should be considered to be inter-state, their inclusion in API shows that the differentiation between IACs and NIACs was one of political expediency, rather than a principled division of LOAC application. In other words, the transformation of conflicts waged against colonial domination, alien occupation, and racist regimes from being governed by the law relating to NIACs to that regulating IACs had little to do with the factual nature of the conflicts and much to do with the political mood at the time.

In contrast to the expansionist scope of API, the applicability provision of APII draws a more limiting line. Article 1 states:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Using Common Article 3 as a basic point of reference, paragraph 1 artfully limits the coverage of APII by requiring the armed groups be under responsible command, exercise control of territory, and have the capacity to carry out sustained and concerted military operations. The Commentary confirms the limiting purpose of the Protocol, stating “the Protocol only applies to conflicts

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66 See Stewart, 85 Intl Rev Red Cross at 318–19 (cited in note 31) (“[T]he inclusion of such conflicts within the scope of Article 1(4) confirms that the dichotomy between international and non-international conflict is far from strict or principled: international armed conflict is not a synonym for inter-State warfare, nor does the full extent of international humanitarian law presuppose that the collective belligerents must be States.”). See also Crawford, 20 Leiden J Intl L at 449 (cited in note 30); Cullen, The Concept of Non-International Armed Conflict at 83 (cited in note 52) (“The motivation behind [codifying wars of national liberation as international armed conflicts] was intrinsically political.”).

67 APII, Art 5 (cited in note 8).
of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict.\textsuperscript{68} Thus, it appears that the same group of states who were sympathetic to those trying to rid themselves of external pressures, such as those mentioned in API, were not as sympathetic to the idea of opposing domestic groups wanting to have the same rights within their own territory under APII.

Nevertheless, APII did successfully extend many humanitarian provisions to those who qualified under the Protocol. Michael Schmitt observed that:

Additional Protocol II contained articles addressing the protection of children, detainees, internees, the wounded, sick, and shipwrecked, and set forth restrictions on prosecution and punishment. Perhaps most importantly, it established a protective regime for the civilian population, including prohibitions related to targeting, terrorizing, or starving civilians; dams, dykes, and nuclear electrical generating stations; cultural and religious objects and places of worship; the forced movement of civilians; and relief agencies and humanitarian assistance.\textsuperscript{69}

All of these had been previously unrecognized within the context of NIACs. Therefore, the extension of such protections to civilians was a significant development in the LOAC, appearing, at least, to increase substantially the protections for the victims of armed conflict.

The legal effect of the promulgation of the API and APII was the cementing of conflict classification as the standard for LOAC application. The Protocols divided the application of the law into two categories and assigned rights and responsibilities within them, effectively requiring a threshold question regarding conflict characterization in every discussion of applicable law. As Emily Crawford has observed, “characterization of the conflict is crucial to determining what level of protection is provided for combatants and civilians.”\textsuperscript{70}

Unfortunately, the conflict classification paradigm for determining the applicability of the LOAC and the corresponding legal protections provided during armed conflict has proven ineffective. As will be demonstrated by the next section, rather than encouraging states and non-state actors to provide greater protections for victims of armed conflict, it has instead incentivized states to manipulate the conflict classification to limit the protections they must provide on the battlefield.

\textsuperscript{68} Sandoz, Swinarski, and Zimmerman, eds, \textit{Commentary} at 1348, ¶ 4447 (cited in note 63).


\textsuperscript{70} Crawford, 20 Leiden J Intl L at 449 (cited in note 30).
III. INEFFECTIVENESS OF THE BIFURCATION

"Under these circumstances, and in the absence of an impartial body charged with authoritatively determining the status of armed conflicts, it is fair to assume that parties will characterize conflicts in terms that best suit their own interests."\(^\text{71}\)

As mentioned earlier, the bifurcation of the LOAC applicability paradigm was solidified with the promulgation of the two Additional Protocols. The international community’s response to the promulgation of API and APII was mixed: many hailed them as a great humanitarian breakthrough, while others faced the promulgation of API and APII with determined skepticism.\(^\text{72}\) The US’ view at the time of promulgation is particularly insightful with respect to the perceived problems with the provisions of the Additional Protocols. While the US believed that many of the provisions of the Protocols were already customarily binding and that others were significant advancements in the LOAC,\(^\text{73}\) certain specific provisions caused serious concern.

Although some viewed API as fundamentally flawed,\(^\text{74}\) it is really APII that should be the test of the bifurcation’s effectiveness in dealing with NIACs. APII

\(^{71}\) Stewart, 85 Int'l Rev Red Cross at 344 (cited in note 31).

\(^{72}\) Even though the UK eventually ratified API, it took more than twenty years, and they issued sixteen statements at the time of signing to clarify their interpretation of the treaty. See Letter from Christopher Hulse, Ambassador of the United Kingdom, to the Swiss Govt (Jan 28, 1998), online at http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE7577CC1256402003FB6D2?OpenDocument (visited Oct 14, 2011); Schmitt, 50 Va. J. Int'l L 813 (cited in note 69).


\(^{74}\) When President Reagan sent the Protocols to the Senate, his letter of transmittal made exactly this point. He characterized API as “fundamentally and irreconcilably flawed” and stated that “we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war.” Ronald Reagan, Letter of Transmittal to the US Senate (Jan 29, 1987), reprinted in 81 Am. J. Int'l L 910, 911 (1987).

At the heart of the US’ objection was the potential degradation of the principle of distinction. Article 44.3 of API, while couched in terms of protecting the civilian population, may in fact provide a license for fighters not to distinguish themselves as battlefield participants and still receive the benefits of civilian protections. According to Abraham Sofaer, the US Department of State Legal Advisor at the time, this rule would allow fighters to “hide among civilians until just before an attack.” Dupuis, Heywood, and Sarko, 2 Am. U. J. Int'l L. & Pol'y at 460 (cited in note 73).
Applying a Sovereign Agency Theory of the Law of Armed Conflict has many important provisions, including the incorporation of a number of IAC provisions into the NIAC legal paradigm. The US had fewer objections to APII than to API, but the limiting criteria for the application of provisions in APII offered states few opportunities for application of the Protocol’s

It now appears that Sofaer’s prediction has become reality. See Ben Farmer, *Taliban Plans to Melt into Civilian Population*, (Telegraph Feb 10, 2010), online at http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7205751/Taliban-plans-to-melt-away-into-civilian-population.html (visited Oct 14, 2011); Statement of Jakob Kellenberger, *Sixty Years of the Geneva Conventions*, ¶ 9 (cited in note 21) (“[C]ombatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms.”). But see generally Anthea Roberts and Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 Yale J Intl L 102 (2011) (cataloguing armed conflicts where the armed groups have voluntarily accepted the obligations to conform with international law as contemplated in API, Art 96). If every person on the battlefield who decides to take up a weapon will accrue the same privileges as a uniformed combatant, even if he chooses to not wear a uniform and mark himself as a target, he has no incentive to differentiate himself. It seems obvious that encouraging battlefield fighters to fight as civilians will inevitably lead to more civilian casualties as combatants struggle to distinguish the fighters amongst the civilians.

As Schmitt observes, another primary concern with API was that it would “place rebel groups on an equal footing with the armed forces by affording them the more comprehensive protections of the law of international armed conflict, even though their actions demonstrated a disdain for law generally.” Schmitt, 50 Va J Intl Lat 812 (cited in note 69).

The author has argued elsewhere that, despite the ICRC’s intent with API to encourage LOAC compliance and extend coverage of full LOAC protections to situations previously not known as IAC (such as fights against racist regimes, alien occupation, and colonial domination), the Protocol has had the opposite effect. Instead of encouraging armed groups to comply with the LOAC, it has incentivized them to fight from within civilian populations, effectively bringing the hostilities even closer to the civilians. Eric Talbot Jensen, *The ICJ’s “Uganda Wall”: A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 Denver J Intl L & Poly 241, 251–57 (2007); Eric Talbot Jensen, *Combatant Status: It is Time for Intermediate Levels of Recognition for Partial Compliance*, 46 Va J Intl L 209, 226–31 (2005).

See, for example, APII, Arts 7 (protection and care of the wounded), 8 (obligation to search for the wounded), 9–11 (protection of medical personnel and equipment), 12 (the ICRC emblem), 13 (protection of the civilian population), 14 (protection of objects indispensable to the population), 15 (works containing dangerous forces) (cited in note 8).

See id. President Reagan also transmitted APII to the Senate. Schmitt describes the view of the President and State Department:

Despite the altered balance symbolized by Additional Protocol II, President Reagan submitted the instrument to the Senate in 1987 for advice and consent. In his letter of transmittal, the President opined that the agreement was, with certain exceptions, a positive step toward the goal of “giving the greatest possible protection to the victims of [noninternational] conflicts, consistent with legitimate military requirements.” The Legal Adviser to the State Department characterized the instrument’s terms as “no more than a restatement of the rules of conduct with which United States military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency.”

Schmitt, 50 Va J Intl Lat 812 (cited in note 69) (citations omitted).
protections. In fact, in the years since ratification, the vast majority of claims under APII to an armed conflict have come from international bodies or third party states and not from the state within whose borders the conflict is occurring.  

Instead, states have tended to avoid the applicability of these Protocols to their conflicts. State arguments supporting this resistance take various forms. Some states, such as Israel, claim to be involved in a conflict that does not fit into either category but is in a different category altogether. Or, as discussed in relation to the US in the introduction to this paper, states argue that for various reasons, the categories do not apply, or, at least, the law does not apply. As will be discussed below, Mexico is also hesitant to apply officially Common Article 3 or APII to its current fight against narcotics trafficking. These are but a few examples that highlight the manipulability of the conflict classification methodology.  

By dramatically restricting the number of conflicts to which its provisions would apply (protections under APII can only be triggered by sufficiently broad violence), the bifurcation model has effectively withheld international protections for the victims of armed conflicts unless the host state is willing to admit that the internal struggle has reached the stage where their opposing armed groups control territory and can conduct sustained and concerted military operations. Such a government statement would have the natural effect of legitimizing those armed groups with whom the state is involved in the domestic conflict. This powerfully disincentivizes states to take such action, with the practical effect of denying critical protections to victims in these types of armed conflicts.  

Furthermore, often no clear distinction exists between different types of armed conflict or between armed conflicts and lesser uses of force. For example, there is now almost always some form of third state involvement in internal armed conflicts, prompting the designation of a whole new category of armed conflict, that is, “internationalized armed conflict.” In Colombia, “[t]he armed dissident movements have developed a confusing combination of alliances and

77 See Cullen, The Concept of Non-International Armed Conflict at 110 (cited in note 52).
78 See Gaeta, 7 Eur J Intl L at 568 (cited in note 16).
80 See Section IV.
81 See Roberts and Sivakumaran, Yale J Intl L at *27 (forthcoming) (cited in note 74) (discussing State hesitancy towards any acts that might lead to legitimization of armed groups).
82 Stewart, 85 Intl Rev Red Cross at 315 (cited in note 31).
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simultaneous clashes with other actors in organized crime. The armed dissident groups have also developed ties with the drug trade, where they frequently levy taxes against drug producers and transporters in exchange for protection."83 Blurring lines between categories only adds further complication to the existing classification scheme that determines the applicable law in a given situation.

In the end, the bifurcated system has developed such that there is a danger that states will manipulate the law for political purposes, choosing how they intervene in the affairs of another state as a means of ensuring that particular provisions of law will apply to the conflict. As Stewart put it:

States and non-state actors have proved equally willing to favour or fabricate accounts of foreign participation in internal conflicts for their own wider political gain. As a result, the characterization of armed conflicts involving international and internal elements, and the applicable law that flows from that characterization, are frequently "the subject of fierce controversy of a political nature."84

While this type of manipulation of the law for political purposes is certainly not a new phenomenon, with regard to the LOAC, it demonstrates that the bifurcation of applicable law has not worked. Instead of accomplishing the desired goals of protecting victims and encouraging state compliance, the bifurcation of the LOAC has had the opposite effect.

The problem has been well noted in the past decade, with increasing calls for dissolution of this bifurcated system between IAC and NIAC. James Stewart, writing for the ICRC on this point, argues, "Commentators agree that the distinction is ‘arbitrary,’ ‘undesirable,’ ‘difficult to justify,’ and that it ‘frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs.’"85 Schindler agrees:

Why should the victims of a war of secession, such as in Biafra and Bangladesh, be less protected than those in a war against colonialism or a racist regime? Of course, one can answer that it is just as wrong to treat victims of international and non-international armed conflicts differently. As long as humanitarian international law distinguishes between international and non-international conflicts, such injustice will be inevitable.86

84 Stewart, 85 Intl Rev Red Cross at 342 (cited in note 31) (citations omitted).
85 Id at 313 (citations omitted).
This sentiment was also echoed in the International Criminal Tribunal for the former Yugoslavia (ICTY) Tadić case.87

These and a host of other similar statements88 highlight the illogic of the existing bifurcation, particularly from the standpoint of desiring to protect victims. How can it possibly be argued that victims in NIAC are less deserving of international protections from the ravages of armed conflict than those in IAC?89 Equally troubling is the proposition that, unless a state voluntarily admits that it is in an NIAC, the state has no obligation to apply the basic protections of Common Article 3 to the victims of that armed conflict.90 Certainly these civilians—most often citizens of the host country—deserve equal protection as those in an IAC from the ravages of the state’s armed forces. Clearly, in light of all of these concerns, it is time to reexamine the paradigm of LOAC application.

87 In addition to the quote beginning Section V, the Tadić Appellate Court also argued that “[i]f international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the [bifurcation between IAC and NIAC] should gradually lose its weight.” Prosecutor v Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Case No IT-94-1-I, ¶ 97 (Oct 2, 1995).

88 See McDonald, 1 YB Intl Humanitarian L at 121 (cited in note 20) (“With the increase in the number of internal and internationalized armed conflicts is coming greater recognition that a strict division of conflicts into internal and international is scarcely possible, if it ever was.”). See also Meron, et al, 85 Am Socy Intl L Proc at 85 (cited in note 18) (citing Michael Reisman’s remark that the bifurcated system serves as “a sweeping exclusion device that permits the bulk of armed conflict to evade full international regulation”).

89 See Crawford, 20 Leiden J Intl L at 483–84 (cited in note 30), arguing:

[I]mplementation is intimately linked to applicability, and applicability goes directly to the issue of distinction between types of armed conflict. Moreover, where there are tiers of applicability, where the practical situations are equivalent but those affected are treated differently, then compliance and enforcement will always be a problem. The promotion of gradations of humanitarian concern will always leave open the possibility of favoring the lowest permissible level of treatment. Therefore, the reasons for creating a unified approach, with no possibility of “lower” levels of treatment, become more compelling.

90 One might argue that civilians are not left unprotected in these situations, but are covered by domestic law and international human rights law. This might be true to the degree that states apply these laws any better than they apply Common Article 3. However, the argument of this paper is that international law has proscribed a lex specialis during armed conflict and that the lex specialis should be sufficient to provide meaningful protections in the situations in which it applies as a matter of fact. It is unsatisfactory to say that it is not necessary for the applicable law to provide adequate and meaningful coverage because another set of laws will fill the gap. If the law of armed conflict should apply based on the facts of the situation, it is that law that must be sufficient for the situation.
IV. THE SOVEREIGN AGENCY THEORY OF LOAC APPLICABILITY

"War then is a relation, not between man and man, but between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders. . . . The object of war being the destruction of the hostile State, the other side has a right to kill its defenders while they are bearing arms; but as soon as they lay them down and surrender they become once more merely men, whose life no one has any right to take."

As outlined above, governments, scholars, and practitioners hotly debate the applicability of the LOAC to various conflicts around the world. These arguments almost exclusively revolve around the determination of the existence of an armed conflict and the subsequent characterization of that conflict as either an IAC or a NIAC. The continuing debates demonstrate not only the impotence of the current LOAC applicability paradigm, but also illustrate the validity of the sovereign agency theory.

Rather than continue to rely on the current paradigm where characterization of the conflict determines the applicable law, states should return to the roots of the application of sovereign force and combatancy—the principle of agency. Any time a state deploys its military to an armed conflict, it imbues those forces with agency and exempts them from the individual consequences of traditional criminal activities, such as murder and destruction. As long as a member of the military is acting as the state’s agent and taking advantage of this immunity, the full provisions of the LOAC should apply, including the protections for victims of armed conflict.

A. Sovereignty and the Development of the LOAC

While rules regulating warfare have existed since the beginning of recorded history of war, they have not always been regularized in their application. The

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92 See notes 21–23.
93 See Section IV.D.1.
95 See Fleck, ed, Handbook of International Humanitarian Law at 8–10 (cited in note 91) (describing the development of several areas of international law).
seventeenth century opened on a scene of savage warfare that caused Hugo Grotius to write:

I saw prevailing throughout the Christian world a license in making war of which even barbarous nations should be ashamed; men resorting to arms for trivial or for no reasons at all, and when arms were once taken up no reverence left for divine or human law, exactly as if a single edict had released a madness driving men to all kinds of crime.\(^\text{96}\)

Grotius authored one of the seminal works in international law in an attempt to right this uncontrolled culture of violence.

Later that same century, the Treaty of Westphalia solidified states as sovereigns and the primary actors in the international community.\(^\text{97}\) It also empowered states with the monopolization of violence through standing armies and navies.\(^\text{98}\) As sovereigns acted to bring state-level violence under their control and organize standing armies, a system of agency developed between sovereign and soldier. As the quote from Rousseau at the beginning of this section indicates, the soldier was not viewed as an individual but as an agent of his sovereign until such time as he could no longer fight or laid down his arms. Then, he reverted to his status as an individual and was treated as such.

The monopolization of legitimate violence through the use of sovereign forces was never absolute, but was nonetheless given recognition. In response to this recognition, the laws and customs regulating warfare grew to focus on how the sovereign’s armies and navies used force.\(^\text{99}\) Because members of the standing army and navy were acting in the sovereign’s name and at his will—as his agents—they were granted certain privileges and correspondingly were required to comply with certain duties. One of the most important privileges of being the state’s agent was the principle of combatant immunity. Under the developing law, personal acts of violence in the course of armed conflict did not carry individual criminal responsibility.\(^\text{100}\) As long as the soldier or sailor was acting on

\(^{96}\) Id at 19.

\(^{97}\) But see Jordan Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 Va J Intl L 977, 1003–04 (2011) (arguing that though states play a primary role, there is clearly a strong role for non-state actors).


\(^{100}\) See The Judge Advocate General’s School, US Army, *A Treatise on the Juridical Basis of the Distinction Between Lawful Combatant and Unprivileged Belligerent* 14 (1959) (on file with author); Allison Marston
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the bidding of his sovereign and in compliance with the rules that were
developing to govern that use of force, he was granted immunity for his warlike
acts.

This combatant privilege and its ties to sovereignty are reflected in the US’
“Instruction for the Government of Armies of the United States in the Field,”
issued under the direction of President Lincoln during the American Civil War.
Article 57 of the Lieber Code, as it has come to be known, clearly ties the idea of
combatancy and combatant immunity to the grant of the sovereign. “So soon as
a man is armed by a sovereign government and takes the soldier's oath of
fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not
individual crimes or offenses.” The prerequisite to the privilege was being
armed by the sovereign and taking the oath of fidelity to the sovereign’s wishes.

Correspondingly, in IAC, those who are the agents of the state traditionally
have had the responsibility to distinguish in their warfare between those who are
likewise agents of the opposing sovereign and those who are not and direct their
hostilities only against those who are. This duty for state agents to limit their
violence to those engaged in combat is known as the principle of distinction and
is one of the foundational principles of LOAC. Because traditional inter-state
war is fought between sovereigns represented by their armed forces, the citizens
of the state are neither considered participants nor targets in that armed conflict
and therefore benefit from the duty for state forces to distinguish.

In application of this principle of distinction, states reciprocally recognized
that the agents of the state are granted individual immunity for what would
otherwise be criminal acts, because they are not performing those violent acts on
a personal level, but as the agent for the sovereign. As long as the soldier acts
within his agency, he is immune from personal responsibility for his warlike


102 Id.

103 API Article 48 states, “In order to ensure respect for and protection of the civilian population and
civilian objects, the Parties to the conflict shall at all times distinguish between the civilian
population and combatants and between civilian objects and military objectives and accordingly
shall direct their operations only against military objectives.” API, Art 48 (cited in note 8). See
also Lieber Code (cited in note 32).

104 See W. Michael Reisman, Holding the Center of the Law of Armed Conflict, 100 Am J Intl L 852, 856
(2006) (“At the very heart of the law of armed conflict is the effort to protect noncombatants by
insisting on maintaining the distinction between them and combatants.”). See also Michael N.
Schmitt, The Principle of Discrimination in 21st Century Warfare, 2 Yale Hum Rs & Dev L J 143, 144
(1999); Jeanne M. Meyet, Tearing Down the Façade: A Critical Look at the Current Law on Targeting the
Will of the Enemy and Air Force Doctrine, 51 AF L Rev 143, 146 (2001). The modern formulation of
the principle of distinction is found in API Article 48. See note 103.
acts. However, the moment a combatant steps outside of his role as agent and directs his attacks against a civilian who is not acting as an agent for the opposing sovereign, he opens himself up to personal responsibility for his actions.

Because the tradition, practice, and reciprocity that had evolved from the granting of agency to a sovereign's military revolved around interstate conflicts, states had not allowed those rules to diffuse into other types of armed conflict prior to the bifurcation of the LOAC system. This division unhinged the foundation of LOAC formulation from the granting of agency to a sovereign's actors to conflict classification. Current conflicts demonstrate that a return to sovereign agency as the primary determiner of LOAC applicability, including an expansion into all armed conflicts, will resolve some difficulties that have developed from the LOAC bifurcation paradigm.

B. Sovereign Agency Applicability

Rather than the current LOAC bifurcation paradigm, states should accept a theory of expanded sovereign agency and apply the full LOAC every time they utilize their armed forces to apply sovereign force. Acceptance of this paradigm turns the focus from how states choose to label a conflict to the types of forces a state employs in a conflict.

Three illustrations of conflicts in which the current paradigm falls short of creating a clear answer for LOAC applicability are presented below. In each, the applicability of the LOAC under an agency theory would be completely clear.

C. The No-Law Zone

As the introduction section of this Article highlights, the Bush administration argued that the attack by transnational terrorist organizations against the United States on September 11, 2001 did not fit neatly within the current bifurcated paradigm of LOAC applicability. Based on a simple textual reading, as understood by the states at the time of promulgation, the Bush administration asserted that the conflict with al-Qaeda was neither an IAC, because there were not two states at war with each other, nor a NIAC, because it

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Article 57 of the Lieber Code states, "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies." Lieber Code, Art 57 (cited in note 32).

Id at Art 44.
was not a traditional civil war and because of the transnational nature of al-Qaeda.  

The arguments on each side of this issue have been openly debated and are
not important to the purposes of this Article. It is sufficient here to simply
draw attention to the fact that the debate exists. For the law to remain so unclear
regarding its applicability to situations as critical to the international community
as the attacks of September 11 and subsequent terrorist attacks reflects poorly
on the value of the legal paradigm. The Bush administration applied the law in a
way that best suited its purposes. In doing so, it manipulated the law to
accomplish the US’ policy aims. The LOAC ought not to lend itself to such
manipulation.

Under an agency paradigm, once the US determined it was deploying its
armed forces to use violence against al-Qaeda and the Taliban, the applicable law
would be a non-issue. The deployment of the state’s armed forces would require
the full application of the LOAC. And for those members of the military who
were called on to apply that law, the clarity would likely be a welcome relief.

D. The “Not Armed Conflict” Claim

Under the current LOAC applicability paradigm, to reach the level of
“armed conflict” requires a certain quality of hostilities. As the Commentary
states:

The expression “armed conflict” gives an important indication in this
respect since it introduces a material criterion: the existence of open
hostilities between armed forces which are organized to a greater or lesser
degree. Internal disturbances and tensions, characterized by isolated or
sporadic acts of violence, do not therefore constitute armed conflict in a
legal sense, even if the government is forced to resort to police forces or
even to armed units for the purpose of restoring law and order.

An obvious difficulty with this paradigm is the fact that a state must determine if
the violence occurring within its borders has risen to the level of a NIAC. A
state has a significant disincentive to do this, because once the conflict is termed
a NIAC the state must accept certain international law obligations and apply
specific portions of the LOAC. Such a decision places significant burdens on the
state. Further, the last sentence of the above quote from the Commentary is

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108 See, for example, Benjamin Wittes, Law and the Long War: The Future of Justice in the Age of Terror
Panel on Terrorism, Counter-terrorism, and Human Rights 50 (2009), online at
109 See Section V.C.
troubling. It allows the use of armed forces for the purpose of restoring law and order, but places this situation outside even the application of Common Article 3. Such a result would potentially leave military forces applying sovereign violence in a domestic situation with no applicable international legal paradigm upon which to base their use of force decisions.

The current situation in Mexico illustrates this dilemma. For the past several years, Mexico has been involved in a battle against illegal drug cartels to “ensure [Mexico’s] future as a nation.” The violence has been well documented and far exceeds the death totals in Afghanistan for the same period. The situation is such that many are concerned that Mexico will become a failed state. In response to the escalating violence, Mexico has deployed almost 50,000 military and police forces, working side by side to face the well-armed and well-trained “forces” of the cartels, which some estimates place at around one hundred thousand. The military forces have been given “policing powers” and are already coming under fire for civilian abuses and arbitrary arrests. As a result of these alleged abuses, the Inter-American Court of Human Rights urged Mexico’s government to try soldiers in civilian courts, rather than military tribunals—a recommendation that it appears the Mexican Supreme Court has adopted.

It is unclear what rules the Mexican military and police are applying to their engagements with the cartel forces. When cartel members are captured, it appears they are being tried as criminals under domestic law, without reference

111 For an excellent analysis of this issue, see Bergal, 34 Fordham Int'l L J at 1042 (2011) (cited in note 17).
114 See Carter, Foot Soldiers (cited in note 113); US to Boost Mexico Border Defence (cited in note 113).
115 See Attorney General Leading War (cited in note 112).
118 See Mexican Court Orders Civilian Trials (cited in note 116).
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Applying a Sovereign Agency Theory of the Law of Armed Conflict to international law.119 The scope and intensity of this conflict appear clearly to meet the level of “armed conflict” envisioned in the Protocols. Nevertheless, Mexico has not conceded that this conflict is an “armed conflict” and has not agreed to apply the provisions of APII to the situation.120

This situation in Mexico is another example of how the current LOAC applicability paradigm is failing to provide clarity in armed conflict or work toward greater compliance. In contrast, under the agency theory, once Mexico decided to deploy the military to combat the violence from the cartels, the military would have no question about what law to apply. In applying the full LOAC, the principles of distinction, targeting, and civilian immunity would bind the Mexican forces as a matter of law. The power of this change, with its obvious benefits to the victims of armed conflict, seems clear.

E. Special Armed Conflicts

Under the current bifurcated LOAC paradigm there is no category for “special” armed conflicts. However, the State of Israel, in its dealings with the occupied territories, has resisted the claim that the conflict is either an IAC or a NIAC. Instead, governmental statements and Supreme Court decisions have described the conflict in various ways,121 making arguments which are rooted in conflict classification for LOAC applicability. For example, Israel’s ministry of defense is hesitant to call the conflict an NIAC for fear of providing some form of international legitimacy to its enemies.122

Under the sovereign agency theory, Israel’s deployment of its forces to use and combat violence would clarify the requirement for Israeli Defense Forces (IDF) to apply the LOAC in every military operation within the occupied territories. This would include both targeting principles and the principle of distinction.123 The LOAC trigger would be the deployment of the IDF, not the


120 Mexico has not signed APII. See APII at 667–99 (cited in note 8) (listing signatories).

121 For various decisions and statements concerning the characterization of the conflict in Israel, see Geneva Academy of International Humanitarian Law and Human Rights, Rule of Law in Armed Conflicts Project – Israel, online at http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=113 (visited Oct 15, 2011).

122 See Public Committee against Torture in Israel, ¶ 22 (cited in note 79) (discussing the delicate balance in international human rights law between humanitarian considerations and military need and success).

123 I do not mean to imply that I think the IDF is not applying these principles now. However, I believe that the application of the LOAC lacks clarity to the international community.
government’s decision on conflict classification. Because the trigger would be automatic upon deployment of the IDF, it would not serve to legitimize those with whom the IDF was fighting.

F. Disaster Relief: Non-Application

It is important to point out that under an agency theory, not all uses of the military would be governed by the LOAC—only those where the state intends to use sovereign violence in fulfilling its mission. There have been many recent deployments of military forces to provide assistance after a natural disaster. In such cases, it is not the intention of the state to use violence as a means of accomplishing its objectives. Where disaster relief deployments are domestic, and armed forces stay within the borders of their own state, the sovereign is not anticipating the use of sovereign force and may deal with any resulting criminal violations under its domestic laws.

Additionally, where deployment is to another host state that has suffered the disaster, the LOAC would not apply. As in the domestic setting, in cases involving a host state, the sovereign is not sending its forces in its name with the intention of doing violence. Hence, the state does not expect its forces to be governed by the LOAC with its accompanying privileges and immunities. In most of these cases, the status of the deploying forces is governed by a “status of forces agreement” or an exchange of letters between the host state and the sending state. Depending on the substance of the agreement, a member of the military who commits criminal activity in the host nation is subject to that host nation’s domestic laws and does not benefit from the sovereign’s grant of immunity.

The above examples illustrate situations in which the current LOAC applicability paradigm does not provide the protections it is intended to provide. Transition to an agency theory where the military is governed by the LOAC any time it is used as the sovereign’s agent to do violence would provide clarity to an area of international law and benefit states in many practical ways.

124 See Matthew Lee and Julie Pace, Obama Haiti Earthquake Response: We Have To Be There For Them In Their Hour Of Need’ (Huff Post Jan 13, 2010), online at http://www.huffingtonpost.com/2010/01/13/obama-haiti-response-we-h_n_421770.html (visited Oct 15, 2011).


Applying the sovereign agency theory of LOAC rather than the conflict classification paradigm will avoid the current pervasive debate between IAC and NIAC which has caused so much consternation. In addition, applying the full LOAC every time a state uses its armed forces will mean that the starting point for humanitarian protections is always the most robust possible. It will also provide clarity for armed forces, making them more efficient and effective.

A. Avoiding the IAC/NIAC Debate

Applying the sovereign agency theory will reduce the misapplication and manipulation of the current LOAC paradigm by states. Connecting application of the LOAC with its responsibilities and privileges to a state’s decision to deploy its armed forces reinforces the LOAC at its foundation. If a state believes a situation to be of such “intensity and scope” as to warrant the engagement of the armed forces, then it is likely facing an external threat to its survival or an internal threat to its monopolization of state-level violence. In its response to such threat, the state will certainly claim the sovereign privileges from prosecution for its armed forces. Additionally, the state will likely authorize the use of force as a first response to the opposing forces. As Geoff Corn persuasively argues, applying force as a first resort is one of the major differences between the state’s application of police force and armed military force. In claiming these and other LOAC privileges, the state must also accept the reciprocal responsibilities inherent in the LOAC, such as the aforementioned

127 Tadić at ¶ 119 (cited in note 87).

128 The ICRC Commentary to APII states, "[T]he Conference chose in favour of the solution which makes the scope of protection dependent on intensity of the conflict. Thus, in circumstances where the conditions of application of the Protocol are met, the Protocol and Common Article 3 will apply simultaneously, as the Protocol's field of application is included in the broader one of Common Article 3. On the other hand, in a conflict where the level of strife is low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply." Sandoz, Swinarski, and Zimmerman, eds, Commentary at 1350, ¶ 4457 (cited in note 63).

129 The ICRC Commentary to APII states, "The term 'armed forces' of the High Contracting Party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, 'regular armed forces,' in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)." Id at 1352, ¶ 4462.

130 See Corn, 1 J Intl Humanitarian Legal Studies at 74–75 (cited in note 27).
principle of distinction and proper targeting methodologies, in order to protect civilians from becoming victims of the armed conflict.

An agency approach to LOAC application diminishes the potential for state manipulation because it is unlikely that a state would avoid deploying its armed forces against a force that threatened its survival or monopolization of force, just to avoid application of the LOAC. The risks are too high. Though now many states have robust police forces, where there is a threat to the state, the state will likely employ its armed forces.

B. More Robust Baseline of Protections

From the perspective of victims of armed conflict, adopting the sovereign agency theory of LOAC applicability will provide the most robust baseline of protections. As explained in the introduction, applying the full LOAC under the sovereign agency theory means that any time a state employs its military to apply sovereign force, the members of the military will apply the LOAC applicable in TAC. This body of laws is the most extensive and provides the most detailed and robust protections for both victims of and participants in armed conflict.

Thus, under the sovereign agency theory, the military would always apply the IAC rules when forces are used in a NIAC, regardless of whether the conflict is a traditional counterinsurgency or one against transnational terrorist organizations—such as the current conflict in Afghanistan. That means that all the customary rules on weapons, attacks, targeting, and even detention would apply. In addition, all conventional law obligations such as arms control, weapons prohibitions, and other pertinent treaty obligations would also apply. The application of this extensive body of law would likely increase the protections for both victims of armed conflicts and those who participate in them. Even if compliance with the LOAC is imperfect, as it certainly is, setting the standard to meet the highest and most robust application of protections will be a better starting point than allowing states to determine for policy purposes which set of laws they desire to apply.

C. Clarity through Application to Armed Forces

From the perspective of participants in armed conflict, application of the sovereign agency theory would also provide much needed clarity. Under the current paradigm, states must determine what type of conflict they believe they

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131 See Section V.E.3.
132 The application of IAC detention principles to a counterinsurgency will raise grave concerns by states, particularly those who have not become parties to APII. See Section V.E.1.
are participating in before knowing what law will apply. Or, more insidiously, states may determine what law they want to apply and then characterize the conflict appropriately. Even for those states who are not attempting to manipulate the law, the increasing diversity in the types of missions for which states are currently using their armed forces is sufficient to cause confusion and political consternation with regards to providing their armed forces with appropriate legal guidance as to the law to apply.

These increasingly diverse types of missions include fighting non-state organized armed groups, conducting counterdrug operations against narcotics traffickers, dismembering transnational criminal business networks, and forcefully separating belligerents or implementing peace agreements. In each of these cases, there is much debate as to what type of conflict categorization applies—if the LOAC applies at all. These real situations present concerns that

135 See, for example, Römer, Killing in a Gray Area at 2 (cited in note 83) (noting that in 2007, Colombian military and police “officially killed 2,703 members of different ‘guerrilla groups,’ ‘self-defense groups,’ and ‘criminal bands’”). In 2008, the military and police killed 1,564. Id.
137 See, for example, Cornelius Friesendorf, The Military and the Fight against Serious Crime: Lessons from the Balkans, 9 Connections 45, 52–53 (2010) (showing that, while ineffective, the military still was asked to take on this mission in Bosnia); United States Pacific Command, Our Mission, online at http://www.pacom.mil/web/site_pages/staff%20directory/jiatfwest/jiatfwest.shtml (visited Nov 2, 2011) (“Joint Interagency Task Force West combats drug-related transnational organized crime to reduce threats in the Asia-Pacific region in order to protect national security interests and promote regional stability.”). See generally National Security Council, Strategy to Combat Transnational Organized Crime, online at http://www.whitehouse.gov/administration/eco/nsc/transnational-crime (visited Nov 2, 2011) (talking about using all the elements of national power, including the military, to combat transnational crime).
138 See Security Council Res No 1291, ¶¶ 1, 4, 7–8, UN Doc S/RES/1291 (2000) (establishing the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in order to facilitate the parties’ fulfillment of their Ceasefire Agreement obligations as well as authorizing MONUC to take “the necessary action, in the areas of deployment of its infantry battalions and as it deems it within its capabilities, to protect United Nations and co-located [Joint Military Commission] personnel, facilities, installations and equipment, . . . and protect civilians under imminent threat of physical violence”).
the current LOAC paradigm struggles to address. Such confusion is not helpful to those participating in armed conflicts.

The UK Law of Armed Conflict Manual highlights the issue. Regarding what law applies to armed conflicts, the manual states:

There is thus a spectrum of violence ranging from internal disturbances through to full international armed conflict with different legal regimes applicable at the various levels of that spectrum. It is often necessary for an impartial organization, such as the International Committee of the Red Cross, to seek agreement between the factions as to the rules to be applied.\(^{139}\)

If a third party is required to seek agreement on the applicable law, it seems obvious that there exists a lack of clarity, which inevitably puts the armed forces in an untenable situation of not knowing what legal standards to apply during hostilities. Furthermore, if this decision of what law to apply is to be the matter of negotiation between the parties, it will inevitably be politicized and prone to manipulation based on policy considerations, rather than made as a legal determination. While these policy battles are fought, military forces on the ground are left with few legal answers.\(^{140}\)

By way of example, in the Tadić jurisdictional appeal decision, the ICTY characterized the conflict in the Former Yugoslavia “at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.”\(^{141}\) Of course, this type of a post-hoc determination about conflict classification is completely unhelpful to the military facing a deployment to the conflict zone. If trained jurists, such as those sitting on the ICTY, have to struggle with these questions years after the conflict and with a clear view of the facts and still respond that the conflict in question was of different types at different times, how can one expect even the most well-meaning government to be able to discern a clearer answer in advance and adequately prepare its armed forces to apply the correct LOAC provisions at the applicable times and in the appropriate ways?\(^2\)

From the perspective of the member of the military called on to apply the LOAC, the sovereign agency theory provides much needed clarity and simplicity. Militaries almost universally train to the IAC standards and then adjust from those standards to meet other mission requirements.\(^{142}\) Having a

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140 See Marc L. Warren, The First Annual Self-Warren Lecture in International and Operational Law, 196 Mil L Rev 129, 138 (Summer 2008) (describing the challenges faced by troops in Iraq when important decisions were delayed by policy concerns).
141 Tadić, ¶ 73 (cited in note 87).
commitment in advance that, regardless of the mission, militaries need only train on and then apply the IAC standards would greatly increase the efficiency of that training and the effectiveness of its application in the operational environment.

In contrast to the lack of clarity under the current bifurcated LOAC paradigm, under an agency theory of LOAC applicability, every time a state deploys its military to use violence, it is clear that the full LOAC applies. The standard is clear and straightforward in its application both by the state and by the state’s forces.

D. A Manageable Approach

Some may argue in response that applying the full LOAC is an unmanageable approach—that states will not want to accept such a legal obligation. However, recognizing the need for clarity across the many contemporary missions that states assign to their armed forces, states are already moving toward a default agency theory of LOAC applicability. This is best illustrated in the practice of the US.

Since the end of the Cold War and the diminishing likelihood of great power military confrontation, the US military has been used in a number of other roles, including peace operations, disaster relief, humanitarian aid and support for counterdrug operations. 143 These missions have often been termed some version of “Operations Other than War,”144 highlighting their non-traditional nature and distinguishing them from interstate armed conflict.

In response to these non-traditional missions, the US promulgated a policy that “[m]embers of the [Department of Defense (DoD)] Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”145 In other words, the US military, as a matter of policy, has already implemented the agency theory of LOAC applicability. The military recognized the benefit of clarity and the

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benefits of a single legal paradigm. Though not done as a matter of law, and not recognizably steeped in the theory of agency, the practical effect of the DoD policy is that the US is already complying with the agency theory and would require little adaptation to apply it as a matter of law.

The US' experience is not unique. In a recent study concerning the customary nature of the LOAC, the ICRC analyzed state practice and then articulated its analysis of what principles of the LOAC could be considered customary. While not all states agreed with the ICRC's conclusions, the study found that most of the customary provisions of IAC concerning targeting and the treatment of the victims of armed conflict were being applied equally in NIAC by states.

In combination with the ICRC's conclusions, the fact that one of the most active and most capable militaries in the world has decided to implement policies that have the effect of applying the agency theory to military operations should not be discounted as insignificant. Rather, it should be persuasive that a transition to agency theory would not only be legally more justified but also that such a transition would not be difficult.

E. Issues

Though applying the agency theory to LOAC applicability would certainly increase protections for victims of armed conflict and decrease the manipulability of law application, several issues would still need to be addressed. As will be described below, these issues are also not adequately addressed by the current paradigm.

1. Areas of special concern.

There are some areas of special concern that states might consider too binding. One example might be the limitation on certain weapons systems, such as riot control agents, which are common in the arsenal of domestic police forces but which many countries have agreed to not use against opposing forces.

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148 For a list of the Rules that includes a designation as to which rules apply to IAC, NIAC, or both, see generally Henckaerts and Doswald-Beck, eds, 1 Customary International Humanitarian Law (cited in note 146).
in armed conflict. In this case, the Chemical Weapons Convention would not prevent a military from using riot control agents in situations other than as a method of warfare. As an example, the military of Mexico would be precluded from using riot control agents against the cartel forces while conducting hostilities, but could still use them in other situations.

As mentioned above, another example of the application of LOAC that might cause some concern to states is detention and treatment of detainees. Under an agency theory, the armed forces would treat all detainees in compliance with the appropriate Geneva Convention. However, this would not preclude appropriate criminal proceedings for those who violate applicable law, whether international or domestic in character. Detention of a criminal by armed forces in a domestic environment does not prevent the transfer of that criminal to a domestic criminal system where he may be tried for his criminal activities. Further, even those held as prisoners of war can be tried for certain criminal acts and crimes in violation of the laws of war.

2. Reciprocity with non-state actors.

An agency theory of LOAC applicability will also not solve the problem of non-state organized armed groups who refuse to comply with the LOAC. The agency theory’s roots in the concept of sovereignty place ultimate importance on the grant of sovereign authority to the armed forces as the basis for the privileges and responsibilities contained in the LOAC. Since non-state organized armed groups by definition do not represent a state, agency theory would have no claim on getting the armed groups to comply. Unfortunately, the current LOAC regime also does not encourage non-state reciprocity. Rather, there is a compelling argument made by numerous scholars and members of the military that the current LOAC regime in fact encourages non-compliance and

150 Id at Art 1.5.
151 See Geneva Conventions (cited in note 7).
152 See Stewart, 85 Intl Rev Red Cross at 320 (cited in note 31) (“Most significant from a political perspective is the fact that there is no requirement in either common article 3 or Additional Protocol II that affords combatants prisoner-of-war status in non-international armed conflicts, nor is there anything preventing parties from prosecuting enemy combatants in those circumstances for having taken up arms.”). But see Bellinger and Padmanabhan, 105 Am J Intl L at 208–09 (cited in note 22) (arguing that even applying the Geneva Conventions will not provide solutions to some of the most vexing current issues in detention operations).
incentivizes fighters to use the LOAC as a shield to give them an advantage when fighting compliant forces.\textsuperscript{154}

However, as recently noted by Anthea Roberts and Sandesh Sivakumaran, there are many examples of non-state armed groups voluntarily taking on LOAC responsibilities.\textsuperscript{155} This is an important development in the LOAC and would be welcomed under the sovereign agency theory also. Unilateral but binding statements by organized armed groups that they will apply the full LOAC should be welcomed by all participants in armed conflicts.

3. Working with law enforcement.

A final problem arises where armed forces and other state forces, such as police or border control personnel, would be required to work together against a particular armed group, such as is currently occurring in Mexico.\textsuperscript{156} Applying an agency theory of LOAC could result in different groups of state forces who are fighting side by side being governed by different sets of rules. This type of situation may make a state vulnerable to the potential for political manipulation. For example, if military forces are functioning where use of force as a first resort is authorized, a savvy government might ensure there are military intermixed with the local police so that the military can begin engagements, triggering the ability for the police to respond in self defense or defense of others.

The potential for such problems is undeniable and cannot be ignored. However, the intensity and scope of the conflict will have had to reach a certain level for the government to deploy its military. Given the level historically required to do that, it is likely that the opposing groups have sufficient firepower to warrant such a response. In the instances that this is not true, the government is certainly capable of controlling this situation by enacting its own situational restraints through rules of engagement.\textsuperscript{157}

\begin{footnotes}
\item[\textsuperscript{154}] See, for example, Col Charles J. Dunlap, Jr, \textit{Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts} \textsuperscript{2} (Kennedy School of Government, Harvard University, Humanitarian Challenges in Military Intervention Conference 2001), online at http://www.duke.edu/~pfeaver/dunlap.pdf (visited Oct 24, 2011) ("[T]here is disturbing evidence that the rule of law is being hijacked into just another way of fighting (lawfare), to the detriment of humanitarian values as well as the law itself.").
\item[\textsuperscript{155}] Roberts and Sivakumaran, Yale J Intl L at \textsuperscript{**35-36} (cited in note 74).
\item[\textsuperscript{156}] See Bergal, 34 Fordham Intl L J 1042 (cited in note 17).
\item[\textsuperscript{157}] Rules of Engagement (ROE) are orders by which commanders at all levels control the use of force by their subordinates. For the US, the primary ROE document is the Chairman of the Joint Chiefs of Staff's Standing Rules of Engagement, commonly referred to as the SROE. The SROE is classified "secret," but the basic instruction and Enclosure A titled "Standing Rules of Engagement for US Forces" are unclassified. Chairman, Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces, Encl A (Jun 13, 2005). The SROE details basic concepts of ROE that apply generally and then
\end{footnotes}
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Though these issues do deserve consideration when contemplating the adoption of the sovereign theory of LOAC applicability, they do not present insurmountable obstacles. The fact that the current LOAC paradigm is also incapable of dealing with these problems is some indication of the difficult nature of the issues.

VI. THE WAY AHEAD

"It is all war, whatever its cause or object, and should be conducted in a civilized way... There is no distinction from a military view between a civil war and a foreign war until after the final decisive battle."\(^{158}\)

While this agency theory may seem revolutionary, and it is certainly a revolutionary change in the current view of LOAC applicability, it is simply a return to the roots of the LOAC. As such, there are already many practices in place, and some developing, that presage a transition from the current bifurcated LOAC applicability paradigm to one of agency theory. State practice, international jurisprudence, and the work of scholars are already subtly moving the law in that direction.

A. State Practice

As mentioned above,\(^{159}\) the diversity of missions conducted by modern militaries has already driven state practice, as a matter of policy, to embrace the principles of the sovereign agency theory. The US has made it an official policy\(^{160}\) and customary practice seems to be collapsing the difference between IAC and NIAC. As state practice continues in this direction, it will make the transition to application of the full LOAC to all forceful operations of state armed forces much less difficult.

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sets out a methodology for establishing mission-specific ROE. The document is designed to “establish fundamental policies and procedures governing the actions to be taken by US commanders and their forces during all military operations and contingencies and routine Military Department functions occurring outside US territory.” Compendium of Current Chairman Joint Chiefs of Staff Directives *17 (Jan 15, 2009), online at http://www.dtic.mil/cjcs_directives/support/cjcs/cjcsi_comp.pdf (visited Oct 18, 2011). There are additional rules for the application of force within the US, which are contained in later enclosures.


\(^{159}\) See Section V.D.

\(^{160}\) See Dept of Def Directive 2311.01E, ¶ 4.1 (cited in note 145).

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B. International Jurisprudence

International courts have also expressed dissatisfaction with the bifurcation of the LOAC and have been slowly eroding the differences between IAC and NIAC. The ICTY has been especially proactive in this area. In several cases, it has been called on to determine which law applied to a particular aspect of an armed conflict and has struggled with doing so. Perhaps in response to this recognized difficulty, the ICTY has consistently narrowed the gap between the law applicable in IACs and NIACs.

For example, in *Tadić*, the Appeals Chamber held that customary rules governing internal conflicts include:

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\text{[P]rotection of civilians from hostilities, in particular from indiscriminate attacks, 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.}^{161}\]

Antonio Cassese, who was then president of the ICTY, concluded that “there has been a convergence of the two bodies on international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts.”\(^{162}\)

International jurisprudence, while not yet conclusive, is clearly trending toward a union of the IAC and NIAC rules. This demonstrates the lack of utility in continuing the differentiation between IAC and NIAC as the source for determining LOAC applicability. If the substantive differences have mostly lost their meaning, then the effort spent determining which law to apply is unnecessary.

C. Scholars

Many scholars agree with the international courts in this area. Perhaps the most profound statement on the growing convergence between the IAC and NIAC is International Institute of Humanitarian Law’s Manual on the Law of

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\(^{161}\) *Tadić* at ¶ 127 (cited in note 87). However, the same court also held “this extension [of IAC rules] has not taken place in the form of full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.” Id at ¶ 126.

\(^{162}\) Stewart, 85 Intl Rev Red Cross at 322 (cited in note 31). But see id at 323 (quoting *Tadić* to say, “this extension has not taken place in the form of a full and mechanical transplant of those rules into internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts”).
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Non-International Armed Conflict. Written by Yoram Dinstein, Charles H.B. Garraway, and Michael N. Schmitt, the manual "is a guide for behaviour in action during non-international armed conflict. While not a comprehensive restatement of law applicable in such conflicts, it nevertheless reflects the key principles contained in that law." An analysis of these "key principles" shows a distinct similarity to the IAC principles of LOAC, purposefully demonstrating the general application of these rules to armed conflict. For example, though the manual specifically deals with NIAC, the authors often quote API as the source for the rules in the manual.

Similarly, in its Customary Law Study, the ICRC found that numerous provisions of Protocol II are customary international law and apply in all armed conflicts. Each of these provisions has a corollary in IAC, further strengthening the claim of a narrowing gap.

D. Further Actions

With states' armies applying the agency theory as a matter of policy, and with that policy supported by the jurisprudence of international tribunals and the writings of eminent scholars, the way ahead is easily envisioned. States need to embrace the agency theory of LOAC applicability and apply the full LOAC, as a matter of law, to every employment of their armed forces to a mission where those armed forces are expected to use violence. Such a transformation would increase the clarity for militaries during armed conflict and eliminate the likelihood of conflict classification manipulation.

Practically, how should this transformation to a sovereign agency theory occur? States who are already applying the theory as a matter of policy, such as

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164 Id at *1.

165 Id at 5, ¶ 1.1.4 (defining military objective).

166 Henckaerts and Doswald-Beck, eds, 1 Customary International Humanitarian Law (cited in note 146). The provisions include the prohibition of attacks on civilians (Rule 1); the obligation to respect and protect medical personnel, units, and transports, and religious personnel (Rules 25–26, 28–30); the obligation to protect medical personnel (Rules 26, 30); the prohibition of starvation as a method of warfare (Rule 53); the prohibition of attacks on objects indispensable to the survival of the civilian population (Rule 54); the obligation to respect the fundamental guarantees of civilians and persons hors de combat (Rules 87–105); the obligation to search for and respect and protect the wounded, sick, and shipwrecked (Rules 109–11); the obligation to search for and respect and protect the dead (Rules 112–13); the obligation to protect persons deprived of their liberty (Rules 118–19, 121, 125); the prohibition of forced movement of civilians (Rule 129); and protections afforded to women and children (Rules 134–37). Id.
the US, could call for a Convention and propose a revision of the Geneva Conventions to accomplish this purpose. While this course of action could be very effective, it is highly unlikely. Perhaps more likely, states could make unilateral decisions to apply the full LOAC as a matter of law each time they employ their armed forces and either make those decisions public\textsuperscript{167} or incorporate this decision in their own domestic laws. As states embrace the sovereign agency theory, they could apply pressure on allies and others to do so also. In the end, individual state practice will be the most effective mechanism to accomplish this task over time. Eventually, API and APII would have to be significantly revised or abrogated in order to remove the codification of the LOAC bifurcation.

\textbf{VII. CONCLUSION}

The current LOAC applicability paradigm requires a state to classify the conflict and then determine what law applies based on that determination. Though this may appear to be a legal determination, history has demonstrated that the state's decision has been open to manipulation in order to accomplish policy objectives. The political manipulation of LOAC applicability, such as the 2002 decision by the Bush administration concerning the application of the law to the treatment of al-Qaeda and Taliban detainees, has contributed to the degradation in protection of the victims of armed conflict. It is time for the international community to rethink the current paradigm and select a more effective and principled basis for LOAC applicability.

The application of the LOAC to all activities by state sovereign forces during armed conflict is a much more effective means of protecting the victims of armed conflict and will provide a much more solid foundation upon which to place the LOAC. The fundamental principles of the LOAC, such as distinction and combatant immunity, are based on the monopolization of violence through the grant of agency from the sovereign to its armed forces. It seems appropriate, then, that anytime the state employs its armed forces to accomplish its violent ends, the rights and responsibilities of the sovereign's war-making powers should attend the use of force by the state's agents. Therefore, each time the armed forces of a state are used to conduct forceful operations, the full LOAC should be applied to their activities.

Perhaps most importantly (given recent history), tying the LOAC applicability to agency theory and the use of a sovereign's armed forces will diminish the potential for political manipulation of the law. Currently a state can

\textsuperscript{167} See \textit{Nuclear Tests Case (Australia v Fr)} 1974 ICJ 253, ¶ 44 (Dec 20, 1974) (holding that unilateral acts can have full legal effect between states).
deploy its armed forces and determine which law accompanies the military in its use of force. The law should not be so manipulable.

Given current state practice, the jurisprudence of international tribunals, and the work of international law scholars, the transition to an agency paradigm from a conflict typology paradigm would not require significant effort. For States such as the US, it would merely require the commitment to do, as a matter of law, what they are now doing as a matter of policy. Regardless of the effort, an agency theory of LOAC applicability would return the LOAC to its historical roots of sovereignty and advance the protections for victims of armed conflict that history has so carefully fostered.