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Re-envisaging the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum

Sandesh Sivakumaran*

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I am grateful to Professor Gabriella Blum for her thoughtful response to my article.[1] Blum's response invites further consideration of three principal issues. She notes my use of the terminology of 'internal' as opposed to 'non-international' armed conflict and its juxtaposition with 'international' armed conflict and queries whether my 'methodological approach as well as specific suggestions would remain equally compelling in other types of non-international armed conflicts'.[2]

The choice of terminology was deliberate. I find the descriptor 'non-international' to be somewhat misleading as it unhelpfully defines the category by what it is not. It suggests that there is but one armed conflict and, if it is not international in character, by default it is non-international. However, in practice, an internal/non-international armed conflict is identified in a rather different manner. For example, in order for an internal/non-international armed conflict to exist, the violence must reach a certain level of intensity; yet, for an international armed conflict to exist one dominant view is that there is no such requirement. The category of internal/non-international armed conflict is thus in no way a default category which serves to catch those conflicts which are excluded from the international category. Yet this is what is suggested through the use of the terminology of 'non-international' armed conflict.

What the terminology of 'internal' may suggest is that it is limited to those conflicts which are fought entirely within the territorial boundaries of a state. However, even this may be true only up to a certain point. For example, an internal armed conflict with a certain overspill, such as onto the high seas or into the territory of a third state, is still characterized as an internal armed conflict. That overspill does not remove the

* Lecturer, School of Law, University of Nottingham. E-mail: sandesh.sivakumaran@nottingham.ac.uk.

1 Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', 22 *EJIL* (2011) 219; Blum, 'Re-envisaging the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran', 22 *EJIL* (2011) 265.

2 Blum, *supra* note 1, at [267].

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conflict from the category of an internal armed conflict. So too many armed conflicts with a cross-border element. The example given by Blum of the conflict between Uganda and the Lord's Resistance Army (LRA),[3] the latter being based in South Sudan, demonstrates that many conflicts with a cross-border element are actually akin to the traditional internal sort, albeit with some straddling of an international boundary. Other conflicts of this type include that between Turkey and the Kurdistan Workers' Party (PKK), the PKK being partly based in Northern Iraq. Thus, the example which dominates the literature, of the armed conflict between the United States and Al Qaeda, assuming for the present purposes that it is indeed an armed conflict, is by no means the most pertinent example of an internal armed conflict with a cross-border element. When viewed in this light, many conflicts with a cross-border element tend to be of the same sort as those conflicts fought entirely within the boundaries of a single state.

Thus, the methodology proposed in my article, albeit with some tailoring as needs be – room for such tailoring indeed being built into the proposed methodology – would serve to cover these conflicts howsoever described. For example, the limits to an analogy to the law of international armed conflict remain; the capabilities of the armed groups would still prove important; the methodology by which the law is determined would still include statements of armed groups; caution would still need to be exercised when drawing from international human rights law and international criminal law; and so on and so forth.[4]

Blum also expands on the role of human rights norms in the regulation of internal armed conflict, considering in particular the beneficiary of such rights. She notes that international humanitarian law 'was always meant for the regulation of the relationship between a country and its enemies (broadly defined)', while international human rights law 'was meant primarily for the regulation of the relationship between a government and its own nationals'.[5] She is in distinguished company in this respect, with a Trial Chamber of the Special Court for Sierra Leone holding that international humanitarian law 'was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law'.[6]

However, it seems to me that international humanitarian law is itself undergoing modification in this respect. Ever since international humanitarian law regulated internal armed conflicts, there must have been some extension beyond the state–enemy relationship, if only because civilians in the state in question may support neither the state nor the armed group. In this way, international humanitarian law protects entities which cannot be considered the enemy, howsoever that enemy may be defined. Contrary to the view of the Special Court, it would also seem that international

[3] *Ibid.*, at [267].

[4] Sivakumaran, *supra* note 1, at 236–263.

[5] Blum, *supra* note 1, at [268].

[6] *Prosecutor v. Sesay, Kallon and Gbao*, SCSL-04-15-T, Judgment, 2 Mar. 2009, at para. 1453.

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humanitarian law does contain intra-group protections. The protections afforded to child soldiers, for example, are expressly designed to regulate the relationship *within* a party to the conflict. Nor is this the only example. Courts established to try violations of international humanitarian law are required to be regularly constituted and to offer due process safeguards. Importantly for these purposes, the courts may, and do, try both enemy forces and members of the party which created the courts. International humanitarian law itself, then, contains rules which are intended to protect members of the group from intra-group violence. Thus, while I agree with Blum that the beneficiaries of human rights law could prove a useful line of further research, so too could the beneficiaries of international humanitarian law.

Finally, Blum raises the important issue of reciprocity. She queries whether my 'insistence on reciprocity is a pragmatic argument about compliance or a more deontological claim about fairness' but goes on to question it on both grounds.[7] She also suggests that 'reciprocity has effectively been eliminated as an organizing principle of [international humanitarian law] as a matter of both law and practice'.[8] However, in my view, the death of reciprocity has been vastly overstated and it remains crucial to the operation of international humanitarian law.

To take two examples from practice, states have refrained from entering into treaties for fear that they would be binding themselves by norms to which the armed group against which they are fighting would not be subject. For example, during the internal armed conflict in Sri Lanka, the Government of Sri Lanka indicated that it would be willing to ratify the Ottawa Convention on anti-personnel mines if the Liberation Tigers of Tamil Eelam (LTTE) took on a similar commitment.[9] Given that the armed group would be bound by reason of the state ratification, this suggests the need not only for reciprocity but for a heightened version of reciprocity in which both parties would be bound by explicit commitments to the same or a similar instrument. It is not just states which stress the need for reciprocity of obligation. For their part, armed groups have questioned why they are bound by particular rules when the states against which they fight are not. Thus, in the context of the law relating to child soldiers – the law providing different obligations for states and armed groups – the National Democratic Front of the Philippines has expressed concern that standards are being imposed upon it 'that are not even made absolutely applicable to States'.[10] This does not mean that reciprocal obligations have to be perfectly symmetrical; indeed, as Blum notes, sometimes they probably cannot.[11] However, they can remain reciprocal at the general level while allowing for differences as between the opposing parties at the level of detail. Room for movement within a reciprocal obligation does not render the principle of reciprocity nugatory.

[7] Blum, *supra* note 1, at [269].

[8] *Ibid.*

[9] Geneva Call and Program for the Study of International Organization(s), *Armed Non-State Actors and Landmines: Volume I* (2005), at 31.

[10] National Democratic Front of the Philippines, Letter to UN Secretary-General Ban Ki Moon, 24 Nov. 2008.

[11] Blum, *supra* note 1, at [269–270].

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