

Lieber Series

The Lieber Code and the Regulation of Civil War in International Law

DAPO AKANDE* & LAWRENCE HILL-CAWTHORNE**

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INTRODUCTION

In this paper, we consider one particularly interesting feature of the Lieber Code,¹ which is the fact that it was drawn up by the U.S. Government to regulate the conduct of its armed forces in a civil war. In so doing, we hope to explore the extent to which there may

*Professor of Public International Law; Co-Director of the Oxford Institute for Ethics, Law & Armed Conflict and of the Oxford Martin Programme on Human Rights for Future Generations, University of Oxford; Yamani Fellow, St. Peter's College, Oxford.

**Lecturer in Law, University of Reading.

1. General Orders No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863) [hereinafter Lieber Code], *reprinted in* 2 FRANCIS LIEBER, CONTRIBUTIONS TO POLITICAL SCIENCE 245, 247–74 (1881).

be links between the Lieber Code and the contemporary regulation of non-international armed conflicts. In particular, we explore some similarities and contrasts between the views on the regulation of civil war that existed at the time of the drafting of the Lieber Code and the position that exists today.

I. THE REGULATION OF CIVIL WAR AT THE TIME OF THE LIEBER CODE

When examining the Lieber Code, one is struck by the general nature of its provisions. As the official title of the document indicates, this was, after all, a set of “instructions” intended for the regulation or “the government” of state forces in a specific conflict. And yet the generality with which it was drafted is a clear reflection of Francis Lieber’s desire to set out a general view of the laws of war. The “instructions” were intended to be a codification of the then-existing customary norms applicable in wars between States,² hence the unofficial title (“Lieber Code”) by which they have come to be known.

One particularly interesting feature of this dual purpose of the Lieber Code is that this codification of the laws of war was meant to apply not in a war between states, but in a civil war. There appears therefore to have been an assumption that those rules applicable in wars between states could simply be extended without amendment in the American Civil War. This is interesting for a number of reasons.

First, its uniqueness within international law at the time is striking. It is clear that Lieber was drafting an instrument that was intended to be meaningful under international law, as opposed merely to being a domestic policy, evidenced not only by its codificatory approach, but also by its references to the “law of war” and “law of nations.”³ Yet, at that point in time, international law did not generally provide for the regulation of internal matters. That is to say, international law did not speak to a state’s relations with its own citizens, for this was considered to be of internal, domestic concern. Rather, international law focused on inter-state relations and regulated primari-

2. Elihu Root, *Francis Lieber*, 7 AM. J. INT’L L. 453, 456–57 (1913); R. R. Baxter, *The First Modern Codification of the Laws of War: Francis Lieber and General Orders No. 100*, 26 INT’L REV. RED CROSS 234, 235 (1963); J. J. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC’Y INT’L L. PROC. 112, 115 (2001).

3. See, e.g., Lieber Code, *supra* note 1, art. 27 n.1 (referring to the law of war as a branch of the law of nations); J. G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1, 42 (1965) (noting the Code’s codificatory purpose and thus its grounding in international law).

ly those matters in which these relations were directly engaged.⁴ One such matter was war between two or more states, to which the various customary rules of warfare applied under international law. Generally falling outside this, however, were internal, civil conflicts—for these had no direct bearing on inter-state relations. Thus, the laws of war applied only where the legal concept of “war” existed, which was defined as a solely inter-state matter.⁵

The application in the Lieber Code of the laws of war to the U.S. Civil War is also interesting because the federal government had not explicitly recognized the Confederacy as a belligerent, and, under the law at the time, it was only through such recognition that the laws of war would apply in internal conflicts.⁶ It is, of course, true that the U.S. Supreme Court,⁷ among others,⁸ considered the Union’s actions (particularly the proclamation of blockade two years earlier) to indicate an implicit recognition of belligerency, but this had not been made explicit.⁹ That the Lieber Code should codify the law of war and apply to a civil war was, therefore, significant.

Finally, that the Code provided for the detailed regulation of the conduct of state armed forces in a civil war is especially of interest given the trajectory of subsequent developments and debates in

4. 2 L. OPPENHEIM, *INTERNATIONAL LAW: WAR AND NEUTRALITY* 266 (2d ed. 1906).

5. *Id.* at 58. This point is elaborated in Lawrence Hill-Cawthorne, *Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict*, 64 *INT’L. & COMP. L.Q.* 293 (2015).

6. On belligerency, see STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 258–75 (2005).

7. *The Prize Cases*, 67 U.S. (2 Black) 635, 652 (1863).

8. See, e.g., Lindsay Moir, *The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949*, 47 *INT’L. & COMP. L.Q.* 337, 345–46 (1998) (viewing the blockade and Lincoln’s later criticism of third states for not observing their obligations under the law of neutrality as tacit recognition).

9. Quincy Wright, *When Does War Exist?*, 26 *AM. J. INT’L L.* 362, 364 (1932); Quincy Wright, *International Law and the American Civil War*, 61 *AM. SOC’Y INT’L L. PROC.* 50, 52 (1967) (“The United States Department of State at first contended that insurrection, however large, did not confer belligerent rights on the insurgents, but it found it difficult to sustain this position after the President had proclaimed a war blockade . . .”). It could be argued that Lincoln intended to recognize as belligerents the Confederate forces via his blockade, and the language of the proclamation of blockade tends to support this view, as it explicitly stated that it was made in conformity with the law of nations, an assertion that could only be accurate if a state of war existed in which third States were bound under the law of neutrality. See Proclamation No. 81: *Declaring a Blockade of Ports in Rebellious States* (Apr. 19, 1861) (issued by President Abraham Lincoln), available at <http://www.presidency.ucsb.edu/ws/?pid=70101>; Quincy Wright, *The American Civil War (1861–1865)*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 42, 45–46 (Richard Falk ed., 1971).

this field. In particular, the notion that there should be detailed regulation of internal armed conflicts via application of the laws of war *in toto* is one that, for a large part of the twentieth century, was rejected by states. This difference between the approach taken, on the one hand, by Francis Lieber and the Union in the American Civil War and, on the other hand, that taken in contemporary international law, to the regulation of internal armed conflicts is the focus of the remainder of this Article.

II. THE LIEBER CODE AND THE CONTEMPORARY LAW OF NON-INTERNATIONAL ARMED CONFLICT

It is important to recall that at the time of the American Civil War, international law regulated “war” through a single, unified body of law, which did not generally apply to internal conflicts. This presumption of non-application was rebutted only where there was recognition of the belligerency of the insurgent group. If such recognition occurred, the laws of war would then apply in their totality to that conflict; the view being that, with such recognition, the situation now fell within the legal definition of “war.”¹⁰ There was, therefore, a single body of rules relating to war, which either applied as a whole or did not apply at all. Even before the crystallization of the doctrine of belligerency, certain “writers had insisted that customary norms concerning the conduct of warfare did apply to the parties to civil war.”¹¹ The Lieber Code seems to be an example of this idea of the underlying unity of the laws of war, as it codified the entire *corpus* of that law and applied it to the American Civil War.

Today, we no longer have this unified legal framework where application is conditioned on the single binary determination of whether or not a war exists. Instead, rather than being faced with a single question (“is there a war in the legal sense?”) we now are faced with two, mutually exclusive questions: Is there an international armed conflict? Is there a non-international armed conflict? This is the result of two fundamental changes made by states in the process of adopting the four Geneva Conventions in 1949. First, the legal category of war, which traditionally determined the application of the laws of war, was replaced with a new, factual criterion of “armed conflict.”¹² Second, this new threshold of “armed conflict”

10. NEFF, *supra* note 6, at 258–75.

11. Howard J. Taubenfeld, *The Applicability of the Laws of War in Civil War*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 499, 502 (John Norton Moore ed., 1974).

12. Conference of Government Experts on the Reaffirmation and Development of

was bifurcated into international and non-international armed conflicts, each with its own legal regime.¹³ Conflict classification, unnecessary under the laws of war at the time of the Lieber Code, has become an essential question in the application of international humanitarian law (IHL), as different legal rules follow from classification of a conflict as either international or non-international.¹⁴ This is especially so in the case of treaty law, which lays down only the most basic obligations on parties to non-international armed conflicts, compared with the far more comprehensive regulation of international armed conflicts.¹⁵ Even with regard to customary international law, which in many areas is considered to have weakened or eliminated the distinction,¹⁶ a number of rules that apply in international armed conflicts remain inapplicable in non-international conflicts. This difference is perhaps clearest in the cases of the regulation of detention and the granting of combatant/prisoner of war status, all of which are the subject of numerous rules in international armed con-

International Humanitarian Law Applicable in Armed Conflicts, May 24–June 12, 1971, *Protection of Victims of Non-International Armed Conflicts*, 13 (August 1971); Christopher J. Greenwood, *Scope of Application of Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 45, 45–50 (Dieter Fleck ed., 2008).

13. Compare common Article 2 (on international armed conflicts) and common Article 3 (on non-international armed conflicts) of the four Geneva Conventions of 1949. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

14. See, e.g., Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 32 (Elizabeth Wilmshurst ed., 2012); Jelena Pejic, *Conflict Classification and the Law Applicable to Detention and the Use of Force*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS*, *supra* note 14, at 80. See generally EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* (2010).

15. The treaty law of non-international armed conflict principally comprises common Article 3 to the four Geneva Conventions of 1949 and Additional Protocol II. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. Certain other weapons conventions apply in all situations, including non-international armed conflicts.

16. See, e.g., JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL I: RULES & VOL. II: PRACTICE* (2005); Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

flicts but absent from both conventional and customary rules applicable in non-international conflicts.¹⁷

These two key changes that occurred in the regulation of war by international law, when compared with the previous approach exemplified by the Lieber Code, may be characterized as both progressive (by building upon humanitarian ideas in the Lieber Code) and regressive (by stepping back from the advances made by the Lieber Code). The progressive change relates to the threshold criterion for the application of IHL and, in particular, the substitution of the factual notion of “armed conflict” for the legal notion of “war.” One of the major limitations on the applicability of the laws of war under the traditional regime was that application was largely dependent on the will of the states involved. War was a technical legal concept that allowed for manipulation of the point at which the laws of war applied.¹⁸ This was especially the case for civil wars, where recognition of belligerency, without which the laws of war were inapplicable, was granted at the will of the relevant state. There was no obligation to recognize belligerency, even where the insurgents met the various factual criteria.¹⁹ This meant that, where states did not wish to be limited by the restrictions imposed by the laws of war, they could simply avoid application of that entire body of rules. By 1949, however, states were comfortable with the idea that some aspects of the laws of war should apply automatically—for example, without recognition of belligerency, which by that stage had largely fallen into disuse.²⁰ The new concept of “armed conflict” was thus adopted, such that in both international and non-international armed conflicts, the application of IHL would now be automatic once the various factual criteria were met.

The regressive change concerns the rejection of the concept seemingly accepted in the Lieber Code, that internal conflicts could be regulated comprehensively through complete and unitary application of the laws of war. While states may have been comfortable with the idea of automatic applicability of IHL by 1949, it is clear that they were no longer comfortable with a unitary framework which

17. See Pejic, *supra* note 14; CRAWFORD, *supra* note 14; Marco Sassoli & Laura M. Olson, *The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT’L REV. RED CROSS 599 (2008).

18. See OPPENHEIM, *supra* note 4.

19. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 34 (1890); HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 246 (1947); NEFF, *supra* note 6, 264–66.

20. Moir, *supra* note 8, 351–53.

could extend to internal armed conflicts, and instead of following the example set by the Lieber Code and the American Civil War, they opted for a more basic set of prohibitions to apply in such situations. This was true not only in 1949, in the drafting of the Geneva Conventions, but also in 1977, with the drafting of the two Additional Protocols, the first for international armed conflicts and the second, far shorter, for non-international conflicts.²¹

The traditionally unified nature of the laws of war, exemplified by the Lieber Code, has therefore been replaced with an explicitly bifurcated approach to the regulation of armed conflict since the mid-twentieth century. Attempts have been made since 1949 to bridge the divide between the laws that apply in international and non-international armed conflicts, yet these attempts have largely come not from states but rather from organizations (such as the International Committee of the Red Cross) and certain commentators. Those advocating the elimination of the distinction and the equal application of IHL to international and non-international conflicts alike tend to do so on two grounds. First, it is felt that eliminating the distinction and applying IHL *in toto* in non-international conflicts would serve the goal of humanizing such conflicts.²² Second, harmonization would avoid the complex questions of classification that currently have to be answered before determining the applicable legal regime.²³ These arguments notwithstanding, in all the circumstances where states have had the opportunity to return to the unitary model, they have not done so. In 1949, the distinction was codified in the Geneva Conventions. In 1977, when Additional Protocols I and II to the Geneva Conventions were adopted, states accepted a few more rules for non-international conflicts but preserved the general distinction and created a high applicability threshold for the Second Additional Protocol.²⁴ Twenty years later, when drafting the Rome Statute for the International Criminal Court, states adopted two separate categories of war crimes depending on the character of the conflict, with fewer violations of IHL in non-international armed conflicts en-

21. See *supra* note 15 and accompanying text.

22. Alison Duxbury, *Drawing Lines in the Sand: Characterising Conflicts for the Purposes of Teaching International Humanitarian Law*, 8 MELB. J. INT'L L. 259 (2007); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 755–56 (2004); CRAWFORD, *supra* note 14.

23. Duxbury, *supra* note 22; Deidre Wilmott, *Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. INT'L L. 196 (2004).

24. Additional Protocol II, *supra* note 15, art. 1(1).

tailing individual criminal responsibility.²⁵

III. WHY DO WE HAVE THE DISTINCTION BETWEEN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS?

This leaves us with two descriptive and normative questions: Why have states been so reluctant to return to the unitary model of the Lieber Code in regulating armed conflict, and should the distinction they drew in 1949 between international and non-international armed conflicts now be eliminated? In answering these questions, one might point to several key considerations. The first relates to the progressive step taken by States in 1949 referred to above, that is, the introduction of a purely factual criterion for the application of the laws of war in both international and non-international conflicts. Given that states had relinquished their control over the application of IHL, it has been suggested that they were even less willing than they might otherwise have been to extend IHL *in toto* to non-international conflicts.²⁶ At least under the unitary model, so the argument goes, states could still control when the entire body of rules would apply to internal conflicts.

The second factor in explaining states' reluctance to unite the laws of international and non-international armed conflict relates to what might be termed a general category of "sovereignty concerns," covering broadly those concerns about international law limiting states' rights in domestic, civil conflict. Such concerns have often been voiced both in the abstract (for example, that draft common Article 3 would "strike at the root of *national sovereignty*")²⁷ and as more specific objections (for example, that providing the same rules for international and non-international conflicts would inhibit states' abilities to quell rebellion within their jurisdictions and maintain order).²⁸ While these sovereignty concerns are often expressed as a basis for upholding the general distinction between international and

25. Rome Statute of the International Criminal Court art. 8, July 17, 1998, 2187 U.N.T.S. 3.

26. GEOFFREY BEST, WAR AND LAW SINCE 1945, at 171(1997).

27. See, e.g., 2-B FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 10, 98-99 (1949), available at http://www.loc.gov/tr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-2-B.pdf [hereinafter 2-B FINAL RECORD]; 7 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977), at 71, 81 (1978), available at http://www.loc.gov/tr/frd/Military_Law/pdf/RC-records_Vol-7.pdf.

28. See, e.g., 2-B FINAL RECORD, *supra* note 27, at 10-11, 13.

non-international armed conflicts, they are especially preoccupied with those provisions relating to the status of fighters and, by implication, issues of detention. Equivalence in the law applicable in international and internal conflicts would mean that states are no longer free to apply their ordinary laws to those taking up arms against them; they would no longer be able to prosecute them for rebellion and the acts that come with it. As Emily Crawford has noted, the “accepted wisdom” behind the refusal to grant immunity to non-state fighters is that this “is fundamentally at odds with the modern system of the international law of sovereign states.”²⁹ The comments of the Pakistani delegate at the 1974–1977 diplomatic conference illustrate this well: “In his [the Pakistani delegate’s] country insurgents would be executed, and any attempt to impose international legislation . . . would, in his opinion, constitute interference with the sovereign right of States.”³⁰ Interestingly, the Lieber Code did not exclude prosecution for rebellion, and indeed, indictments were issued for the highest ranking members of the Confederacy in the aftermath of the Civil War.³¹

The third and fourth factors that help to explain states’ reluctance is their concern that greater regulation of internal conflicts would legitimize armed opposition groups,³² and that this might, additionally, “internationalize” the conflict by encouraging intervention by other states.³³ The concern with legitimizing opposition groups is most clear when speaking of combatant status and immunity, described above. Yet it is also a more general concern often expressed when considering any form of regulation of internal conflicts under international law, reflected in common Article 3(4), which makes clear that the legal status of the parties to the conflict is not altered by the application of the minimal rules found in common Article 3. The additional concern with intervention was also one shared by the Union authorities in relation to the American Civil War, who feared in-

29. CRAWFORD, *supra* note 14, at 154.

30. 8 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977), at 360 (1978), available at http://www.loc.gov/tr/frd/Military_Law/pdf/RC-records_Vol-8.pdf.

31. Lieber Code, *supra* note 1, arts. 154, 157; Taubenfeld, *supra* note 11, at 502.

32. See, e.g., 2-B FINAL RECORD, *supra* note 27, at 10.

33. See HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS (1987) for statements made, during the drafting of Additional Protocol II, by the representatives of Yugoslavia (at 47, ¶ 6) and Mexico (at 49, ¶ 14).

tervention by the British.³⁴ This fear, however, was eliminated with the preliminary Emancipation Proclamation in September 1862.³⁵ In 1949 and 1977, on the other hand, this concern of intervention by other states featured prominently.³⁶ Such concern with intervention might reasonably be regarded as misguided, as there is no clear, empirical evidence that equal application of the laws of armed conflict increases the likelihood of intervention by other states. Moreover, as one of the present authors pointed out in an earlier work:

[T]he idea that intervention by the international community follows from a classification of a conflict is to some extent erroneous. Firstly, the UN Security Council has in recent years demonstrated its capacity and willingness to intervene in non-international conflicts. Secondly, international law does not permit unilateral “humanitarian intervention” and therefore does not permit forceful unilateral intervention by States within another State based on the nature of a conflict going on in that other State. However, it is probably fair to recognize that adding to the rules that apply to non-international armed conflicts increases the opportunity for other States to assert that violations of international law are occurring and may also increase opportunity for lawful non-forcible countermeasures (sanctions or other forms of political pressure) taken by other States and directed at addressing violations by the States engaged in the conflict.³⁷

Despite these points, concerns regarding intervention continued to be a significant factor in undermining attempts to bring the law applicable in international and non-international conflicts closer together.

A fifth factor one must take into account, particularly regarding the normative question of whether the law should be harmonized, relates to the question of what the otherwise applicable rules would be; this factor was not so prominent in 1949 or 1977, but has been receiving increasing attention more recently. Generally speaking, throughout the history of the laws of war, the assumption has been that these rules have a humanizing influence on warfare, which restrict the powers that the contending parties would otherwise have. This lies at the heart of those humanitarian arguments in favor of

34. Wright, *The American Civil War*, *supra* note 9, at 59.

35. *Id.*

36. *See supra* note 33 and accompanying text.

37. *See Akande, supra* note 14, at 38.

eliminating the distinction between international and non-international conflicts, referred to above.³⁸ This assumption is explained by the fact that, absent rules drawn from the laws of war, the parties to an internal conflict historically were otherwise unencumbered by international law.³⁹ And yet today, at least in relation to civil wars, that assumption of freedom but for IHL no longer applies, with international human rights law (IHRL) and domestic law applying as the default legal regimes. Consequently, the view of IHL as a restrictive, humanizing force has begun to unravel, given that far more protective standards have developed under IHRL and risk being displaced were IHL to apply *in toto* in non-international conflicts.⁴⁰ This is exacerbated by the fact that harmonization would involve extending not only the prohibitive rules of IHL to non-international conflicts, but also those rules that confer certain authorizations on states, such as the right to intern civilians,⁴¹ which are absent from the current law of non-international armed conflict.⁴²

As a result, there is now a concern that certain commentators have raised against harmonizing the law of international and non-international armed conflict, which comes from the opposite perspective of the statist concerns raised above. This concern is premised on the view that harmonization would in fact confer additional powers on states, which they would otherwise not have. Indeed, it is a concern that has played out in recent conflicts, where certain states have relied on a so-called “armed conflict model” for regulating their military operations against non-state actors with a view to exploiting the more permissive rules of IHL.⁴³ This is also a result of the expansion in practice of the category of non-international armed conflicts, beyond wholly internal, civil wars, to include transnational military op-

38. See *supra* note 22 and accompanying text.

39. See discussion above on the inter-state nature of classical international law, *supra* note 4.

40. See David Kretzmer, *Rethinking the Application of IHL in Non-International Armed Conflict*, 42 *ISR. L. REV.* 8 (2009); Hill-Cawthorne, *supra* note 5.

41. Such a right exists in the law of international armed conflict. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27(4), 41–43, Aug. 12, 1949, 75 *U.N.T.S.* 287.

42. See, e.g., *Serdar Mohammed v. Ministry of Defence*, [2014] *EWHC* (QB) 1369 (Eng.); Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, *EJIL: TALK!* (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>.

43. This, of course, has been at the heart of the U.S. conflict with al-Qaeda. See Noam Lubell, *The War (?) Against Al-Qaeda*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS*, *supra* note 14, at 421.

erations between states and non-state armed groups. In such situations, states need not worry about the sovereignty concerns noted above, for they are operating outside their own territory. This is to be contrasted with traditional internal conflicts, such as that in Northern Ireland, where states have been at pains to deny that the situation has reached the level of a non-international armed conflict, for fear that they would be seen as having lost control.⁴⁴ In non-international conflicts fought abroad, on the other hand, states can benefit from the enhanced freedom they enjoy under IHL without it affecting their perceived control domestically.

Finally, it must be noted that it is not the case that IHL is more permissive than IHRL for *every* matter to which they both apply. Targeting and detention of individuals are, of course, the two major areas in which IHRL, as it has come to be developed in jurisprudence, is more protective than IHL. However, when it comes to the protection of civilian objects, and the targeting thereof, the picture might be different, and this could have implications for our normative question regarding the desirability of eliminating the distinction. In international armed conflicts, states are prohibited from directly targeting civilian objects.⁴⁵ It is often asserted that this rule has now crystallized into a customary norm applicable in all armed conflicts, including non-international armed conflicts.⁴⁶ However, interestingly, when states had the opportunity to codify this rule for non-international conflicts in the Rome Statute, they did not do so, and instead the targeting of civilian objects was listed as a war crime only in international armed conflicts.⁴⁷ When considering the default norms that would otherwise apply in relation to civilian objects in non-international conflicts, one can see an advantage for states in *not* fully embracing harmonization in this particular area. Thus, in the context of a non-international armed conflict within the territory of the state concerned, the default rules under international law are those found in IHRL. Under IHRL, states have the power to destroy (civilian) objects (such as private property) for certain purposes, subject to various constraints; that is to say, human rights treaties, as interpreted by their respective institutions, do not prohibit the targeting

44. SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 200–04 (2012).

45. Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(1), June 8, 1977, 1125 U.N.T.S. 3.

46. See, e.g., HENCKAERTS & DOSWALD-BECK, *supra* note 16.

47. Rome Statute, *supra* note 25, art. 8(2)(b)(ii).

of civilian objects as such.⁴⁸ If, however, one brings the law of international and non-international armed conflict together in this area and introduces into the latter the IHL rule that limits the power of contending parties to target civilian objects, the state would be *more* constrained than under human rights law; one would arrive at the curious situation whereby the power of the state domestically would be *more* restrained in time of war than in time of peace.⁴⁹ This, of course, is an exception to the generally more permissive nature of IHL compared with human rights law. In this sense, it appears a vestige of the traditional view, noted above, of IHL as a constraining body of law, limiting the otherwise unencumbered power of the state. In international armed conflicts, the absolute nature of this IHL norm is understandable, given the inter-state considerations at play; in non-international conflicts, however, no such considerations apply. Moreover, harmonizing the law here would create an incentive for states to expand their view of what constitutes a military objective, rendering an increasing number of objects targetable *ipso facto*.⁵⁰

IV. CONCLUSION

It was noted at the outset that the Lieber Code was especially important for international lawyers in two respects: on the one hand, it is a general codification of the laws of war, yet at the same time, it represents an application of those rules in the context of a civil war, and it was thus setting forth an assumption that the laws of war as they apply in an international armed conflict could similarly apply in an internal conflict. This represented a unified, coherent legal regime, which by the mid-twentieth century had been replaced with a bifurcation of the law applicable in international and non-international armed conflict. States in 1949 clearly rejected the idea, exemplified by the Lieber Code, that the law of armed conflict could simply extend to internal, civil conflicts, and they have since then continued to re-assert the general distinction between international and non-international conflicts. Today, we return full circle to the question of whether or not the same rules ought to apply in these sit-

48. See, e.g., Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1 (protection of property), Mar. 20, 1952, 213 U.N.T.S. 262.

49. See generally Noam Zamir, *Distinction Matters: Rethinking the Protection of Civilian Objects in Non-International Armed Conflicts*, 48 ISR. L. REV. 111 (2015).

50. This has, of course, been a point of contention, even in the context of international armed conflicts. See, e.g., YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 94 (2d ed. 2010) (suggesting that the prospective long-term and large-scale military advantage of an attack has to be assessed as a whole).

uations. That question was answered affirmatively in the American Civil War, and yet today we are faced with important factors that did not exist at that time. These include a new, automatic threshold for the application of IHL, the development of alternative legal regimes under international law, and a significantly changing typology of armed conflict. Whether these contextual changes require us to answer the question differently from Lieber remains a key controversy in contemporary IHL.