The treaty laws that relate to non-international armed conflicts are considerably less comprehensive than the laws relating to international armed conflicts.

The origins of this distinction in the law can be traced back to the earliest writings on the place of law in the conduct of armed conflicts, which held that only international armed conflicts were to be subject to international law. Non-international armed conflicts – civil wars – were illegal rebellions against legitimate authorities. Private citizens who rebelled against the governing authority of their State did so without lawful sanction; and so the governing authority was entitled to act against these rebels without constraints under international law.

The exception to this position was in cases of civil war where the rebels were powerful and organised enough to mount a serious campaign against the sovereign authority:

*When a party is formed within the State which ceases to obey the sovereign and is strong enough to make a stand against him, or when a Republic is divided into two opposite factions, and both sides take up arms, there exists a civil war ... civil war breaks the bonds of society and government ... it gives rise to two independent parties, who regard each other as enemies and acknowledge no common judge... these two parties must be regarded as forming ... two distinct Nations ... that being so, it is perfectly clear that the established laws of war ... should be observed on both sides in a civil war.*

(Emmerich de Vattel, Droit des Gens ou Principes de la loi naturelle appliqués à la conduit et aux affaires des nations et des souverains, Book III, chapter XVIII, at 338).

Large-scale civil wars were thus essentially similar to international wars and so should fall under the laws of war. This belief led to the development of the doctrine of ‘recognition of belligerency’. In recognising belligerency, the State was acknowledging that the insurgents were essentially a de facto State authority themselves. Consequently, the full ambit of the laws of armed conflict would come into effect between the insurgent party and the State.

However, when steps were taken to draft and adopt detailed international agreements to regulate the use of specific weapons in armed conflict, or to better protect the wounded in armies in the field, such rules were deemed applicable to international armed conflicts only. States were reluctant, if not outright opposed, to having any international rules dictating permissible conduct in their internal affairs.

The adoption of the Geneva Conventions in 1949 introduced Common Article 3 into the international regulatory system. For the first time, an international treaty sought to regulate conduct in non-international armed conflicts. Additional regulation came in the form of Additional Protocol II. Additional Protocol II supplements and develops Common Article 3, giving more detail to the provisions outlined in Common Article 3. There are now considerably more (and more detailed) provisions regarding humane treatment of all persons who do not or no longer take direct part in hostilities, as well as persons whose liberty has been restricted, as well as special protections for women and children.

In addition, Protocol II introduces ‘Hague Law’ (rules on the methods allowable in armed conflicts) to non-international armed conflicts. Thus, Protocol II contains rules on:

- protection of the civilian population;
- protection of objects indispensable to the survival of the civilian population;
- protection of cultural objects and places of worship;
- the prohibition on forced movement of civilians; and
- protection of works and installations containing dangerous forces.

However, the most profound changes in the regulation of armed conflict have actually come in the field of customary international law. It is now the case that in nearly all areas of the law of armed conflict, the rules that apply to international conflicts are equally applicable to non-international armed conflicts. As noted by the UN.
Non-international armed conflict

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Commission of Enquiry on Darfur [2]:

… a body of customary rules regulating internal armed conflicts has thus evolved in the international community… some States in their military manuals for their armed forces clearly have stated that the bulk of international humanitarian law also applied to internal conflicts. Other States have taken a similar attitude with regard to many rules of international humanitarian law.

Case Study: Duško Tadić

The International Criminal Tribunal for the Former Yugoslavia (ICTY), in the case of Duško Tadić

Tadić was a member of a paramilitary force operating in the Prijedor region of Bosnia and Herzegovina, during the armed conflict that beset the former Yugoslavia during the 1990s. Tadić was arrested and charged with war crimes and crimes against humanity, as outlined in the statute of the ICTY. As part of his defence strategy, Tadić argued that the Tribunal lacked the jurisdiction to examine his acts, as the statute of the ICTY was set up to deal with international armed conflicts only – not internal armed conflicts. The Appeals Chamber undertook a systematic evaluation of the international law relating to internal armed conflicts; though they dismissed Tadić’s argument in this instance, the Appeals Chamber did acknowledge that traditionally, States did not allow international legal regulation of internal armed conflicts. They agreed that, historically, States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.

(Prosecutor v Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, 2 October 1995, at para 96)

Developments in International Criminal Law

This expansion of the law of non-international armed conflict is largely due to the developments in international criminal law since the 1990s, which have expanded the rules of international law applicable to non-international armed conflicts. The increasing involvement of international law in non-international armed conflicts has continued with the creation of a number of international tribunals for the prosecution of criminal acts committed in times of non-international armed conflict. These include the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court. The Rome Statute of the International Criminal Court (ICC) includes non-international armed conflicts within its ambit, making violations of Common Article 3 of the Geneva Conventions a war crime. (See for instance Art. 8(2)(c)-(f), Rome Statute of the International Criminal Court, 2187 UNTS 90 (1998); see generally the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a International Criminal Court, Rome, Italy, June 15-July 17 1998; UN Doc. A/CONF.183/9 (1998)). A number of provisions of Protocol II have also been included in the war crimes ambit. The criminalisation of violations of Common Article 3 and Protocol II is a considerable development, as war crimes were traditionally considered breaches of the law of international armed conflict only.

There are, however, distinct areas of IHL that remain part of the law of international armed conflicts only. These are the issues of combatant and POW status, and the rules regarding occupied territory. Firstly, combatant and POW status remains limited to international armed conflicts. States remain resistant to allowing the combatant’s privilege to be extended to include rebels and insurgents. As a practical matter, there is no such thing as occupied territory – at least as is understood in international armed conflicts. Only foreign territory can be occupied; thus the rules on belligerent occupation remain limited to international armed conflict. There is also some debate about whether certain weapons prohibited in international armed conflicts are permissible in non-international armed conflicts. However, as noted by the ICTY, these strict demarcations seem less justifiable:

*It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing*
unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State? If 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 aforementioned dichotomy should gradually lose its weight.

(Prosecutor v Tadi?, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, at para 97).