Part I:
Fundamental Considerations

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

A History of Division(s): a Critical Assessment of the Law of Non-International Armed Conflict

Raphael Schäfer

A. Introduction

In recent times, the internal division of IHL into the law applicable to IACs and NIACs respectively has come into criticism: authors commented on this division using descriptions such as 'artificial', 'arbitrary', 'undesirable', or 'difficult to justify'.[1] Research projects have been initiated due to the 'difficulties arising from the application of this bifurcated system'[2] and the ICTY in its *Tadic* decision simply ignored the division with regard to the existence of a conflict when it stated:

> we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[3]

Drawing on this much-cited paragraph of the ICTY, one may ask why international law sees itself compelled to distinguish between these two types of conflicts, especially as the law of NIAC had been developed

---

1 Rogier Bartels, 'Timelines, Borderlines and Conflicts' (2009) 91 IRRC 35, 40.

2 Columbia Law School (Human Rights Institute), Harmonizing Standards for Armed Conflict <http://www.law.columbia.edu/human-rights-institute/counter-terrorism/harmonizing-standards-armed-conflict> accessed 19 November 2017. See, on this, Sarah Cleveland, 'Harmonizing Standards in Armed Conflict' (EJIL: *Talk!* 8 September 2014) <https://www.ejiltalk.org/harmonizing-standards-in-armed-conflict/> accessed 19 November 2017.

3 *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1 (2 October 1995) para 70. See also James G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85 IRRC 313; Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 LJIL 441.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

analogously to the rules governing the law of IAC.[4] *Antony Anghie* famously argued that

> the formulation and operation of the dynamic of difference … generates the concepts and dichotomies – for example, between private and public, between sovereign and non-sovereign – which are traditionally seen as the foundations of the international legal order.[5]

And, indeed, it seems to be true that this division can also be distinguished in IHL with its concept of IACs between sovereigns on the one hand and NIACs between a sovereign and an organised armed group on the other. If we broaden our view and look at international law more generally, it can even be read as a history of division: a division between 'us and them', or, as *Anne Orford* put it, a division of international law and its others.[6] To a certain extent, the term 'international law' still hints at its infamous imperial past.[7] The value of critical legal scholars' analyses identifying not only the imperial past of today's international law, but also its still inherent imperial structures cannot be overestimated in order to create a truly 'global' law.[8]

The (hi)stories in the textbooks concerning international law's past often only serve to legitimise present-day law and, for this reason, only seldom contain footnotes: 'one assumes that the story presented is so obvious or well known that [it] speaks itself and requires no proof.'[9] This is what one may call a narrative or a foundational myth – 'a benchmark … that is no longer called into question.'[10] International law is full of these foundational myths – just remember the reoccurring declaration of 'Hugo Grotius as Father of International Law' or the 'Westphalian Origins of International Law' to name but a few.[11] These narratives have indeed been important, as

---

4 Sandesh Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict' (2011) 22 EJIL 219, 221.

5 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 9.

6 Anne Orford (ed), *International Law and Its Others* (CUP 2006).

7 Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire. Historical Explorations* (OUP 2017).

8 For more on global law, see Rafael Domingo, *The New Global Law* (CUP 2006).

9 Thomas Skouteris, 'Engaging History in International Law' in José M. Beneyto, David Kennedy (eds), *New Approaches to International Law – The European and the American Experiences* (TMC Asser Press 2012) 99, 105.

10 Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 293 (hereafter Bianchi, *International Law Theories*).

11 See more generally Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28 LJIL 743, 748 et seq.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

they safeguarded the functioning of the international legal system because of their terminating effect: if a convenient and comprehensible explanation for the present is provided,[12] why should we then bother with the fact that *Alberico Gentili* was anticipating *Grotius*[13] or that the Holy Roman Empire of German Nation was a non-'Westphalian' entity up to its dissolution in 1806?[14] Narratives or founding myths work, as long as they can explain the present.[15] As soon as this is no longer the case, however, inconvenient questions will be asked that do not fit into the system.[16]

In this contribution, I follow the recently emerging critical reading of IHL and argue that today's IHL also follows a negative distinction. It shall be shown that what used to be called 'laws of war' is still present in IHL and that the overall legal corpus – contrary to what its denomination 'international humanitarian law' might suggest – does not stand in a (purely) humanitarian tradition: If IHL were truly humanitarian, why is there a need to alter the level of protection depending on the nature of the conflict in question?[17] Or, to put it even more bluntly: do dum-dum bullets cause less atrocious effects in non-international armed conflicts than they do in international ones?[18] This division, however, is of course no new

---

12 Cf Amanda Alexander, 'A Short History of International Humanitarian Law' (2015) 26 EJIL 109: 'These histories help to inform the current understanding of the nature and purpose of international humanitarian law.'

13 See eg Peter Haggenmacher, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture' in Hedley Bull, Benedict Kingsbury, Adam Roberts (eds), *Hugo Grotius and International Relations* (OUP 1992) 133.

14 See eg José-Manuel Barreto, 'Cerberus: Rethinking Grotius and the Westphalian System' in Martti Koskenniemi, Walter Rech, Manuel Jiménez Fonseca (eds), *International Law and Empire. Historical Explorations* (OUP 2016) 149, 159 et seq; Michael Axworthy and Patrick Milton, 'The Myth of Westphalia' (*Foreign Affairs* 22 December 2016) <https://www.foreignaffairs.com/articles/europe/2016-12-22/myth-westphalia> accessed 19 November 2017.

15 Bianchi, *International Law Theories* (n 10) 292.

16 Peer Zumbansen, 'Die vergangene Zukunft des Völkerrechts' (2001) 34 Kritische Justiz 46.

17 For the discussion during the conference, see Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) 605 et seq; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (CUP 2010) 88.

18 Deidre Willmott, 'Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2004) 5 Melbourne Journal of International Law 196, 197.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

finding, as the debate accompanying the codification of the Additional Protocols even witnessed the accusation of engaging in 'selective humanitarianism'.[19]

The contribution's key argument is that the subject protected by the laws governing the NIAC is not primarily the human being as such, but the state's integrity. A finding, which is well hidden by the traditional humanitarian reading of the discipline. By applying a conceptual history approach, however, the contribution aims at showing that the laws-of-war thinking is especially predominant in the context of a NIAC.

B. What's in a Name? The Different Denominations of the Jus in Bello

The Prussian military theorist *Carl von Clausewitz* famously called war 'a true chameleon, because it changes its nature in some degree in each particular case.'[20] The same might be true for the legal regime which is supposed to govern the conduct of belligerents: the *jus in bello*. Traditionally known as the laws of war, this terminus went out of use after the Second World War in favour of the terms 'Law of Armed Conflict' and 'International Humanitarian Law'. Although war as such has *de jure* been abolished, its very concept proves to be unimpressed and *de facto* keeps preoccupying mankind as previously.

The term 'International Humanitarian Law' initially referred to the 1949 Geneva Conventions,[21] but obtained, as *Peter Haggenmacher* argues, 'quasi-official status' through the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974 to 1977).[22] But it was not until the 1981 Conventional Weapons Convention that a reference to IHL could be

19 David P. Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 AJIL 279 (hereafter Forsythe, 'Legal Management of Internal War').

20 Carl von Clausewitz, *On War* (1873) Book 1, Chapter 1: 'What is War?'.

21 Theodor Meron, 'The Humanization of Humanitarian Law' (200) 94 AJIL 239 (hereafter Meron, The Humanization of Humanitarian Law').

22 Peter Haggenmacher, 'On the Doctrinal Origins of *Ius in Bello*: From Rights of War to the Laws of War' in Thilo Marauhn and Heinhard Steiger (eds), *Universality and Continuity in International Law* (Eleven International 2011) 325 (hereafter Haggenmacher, 'On the Doctrinal Origins of *Ius in Bello*').

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

found in an international treaty[23] – and then only in a remarkably blurry construction of an 'international humanitarian law applicable in armed conflict' (Art. 2).

Although the terms are often used interchangeably, each of them conveys a different message. *Haggenmacher* uses the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* to illustrate this assumption. When the Court refers to 'the protection of the civilian population', it speaks of 'international humanitarian law.'[24] When referring to the 'deprivation of life', however, it uses the term 'law applicable in armed conflict.'[25] This is remarkable in so far as it reminds us of the very essence of war (or 'armed conflict'):

> the right for both [belligerent parties] to proceed to mutual destructions of life and property, until one is overpowered by the other. This hostile relationship is the central fact of war, and it should be mentioned first in all its radicality. Humanitarian restrictions, eminently desirable as they are, logically come afterwards. To be sure, the general idea of restrictions, be they humanitarian or otherwise, is inherent in the very idea of a *law* applying to war.[26]

This example should underline that the terms we use also have a strong influence on our idea of reality: there is a big difference if one speaks about the *jus in bello* as 'international humanitarian law' or as 'law of armed conflict'. As much as the general call for 'humanised warfare' is to be welcomed, it must never detract from the fact that even an ideal IHL will always remain at most only the second-best solution. We must not forget that the application of IHL always follows on a previous failure and entails the loss of life – however humanely it may be conducted. Additionally, it is often neglected that 'international law consists of a family of professions' and does not exclusively belong to the realm of international legal scholars.[27] International law, understood in this sense, consists of 'a group

23 Cf Page Wilson, 'The Myth of International Humanitarian Law' (2017) 93 International Affairs 563, 564 (hereafter Wilson, 'The Myth of International Humanitarian Law')

24 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 257, para 78.

25 Ibid, 240, para 25.

26 Haggenmacher, 'On the Doctrinal Origins of *Ius in Bello*' (n 22) 326.

27 Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner, 'Introduction' in Jean Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper and Wouter Werner (eds), *International Law as a Profession* (CUP 2017) 1.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

of people pursuing projects in a common professional language'.[28] This point prominently gained momentum through a letter to *Jakob Kellenberger*, then President of the ICRC, by US Department of State Legal Advisors *John Bellinger* and *William Haynes*.[29]

As the current competition between 'international humanitarian law' on the one hand and 'law of armed conflict' or 'laws of war' on the other shows, the language of international law can also be used to pursue a political agenda by its respective stakeholders.[30]

C. The Current Jus in Bello: Its Humanitarian Present and Military Past

In order to better understand the current conception of the *jus in bello*, it is worthwhile to take a critical look at the structural path it followed. The historical analysis of international law, as conducted in the course of the 'turn to history', aims at challenging the master narratives and unveiling ideology beyond the norms, thereby explaining 'why' (in contrast to 'how') international law is the way it is today.[31] 'Tradition' proves to be of crucial importance in this regard, as it furthers the perception of progress in

28 David Kennedy, 'One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream' (2007) 31 NYU Review of Law & Social Change 641, 650.

29 John Bellinger III and William J. Haynes II, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*' (2007) 89 IRRC 443 (hereafter Bellinger and Haynes, 'A US government response to the ICRC').

30 Wilson, 'The Myth of International Humanitarian Law' (n 23) 568 et seq. With regard to the 'war' against terrorism, see Frédéric Mégret, '"War"? Legal Semantics and the Move to Violence' (2002) 13 EJIL 361, 363 (hereafter Mégret 'Legal Semantics and the Move to Violence'). More generally on international law and language with the example of self-determination, see Christopher J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009) 10 Chicago Journal of International Law 1.

31 For this approach, see eg Olivier Corten, 'Les Aspects Idéologiques de la Codification du Droit International' in Régine Beauthier and Isabelle Rorive (eds), *Le Code Napoléon, un ancêtre vénéré? Mélanges offerts à Jacques Vanderlinden* (Bruylant 2004) 495.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

international law.[32] From this viewpoint, tradition is, to a certain extent, always an artificial construct,[33] if not even an invention.[34]

Martti Koskenniemi, following up on the Kunzian Pendulum,[35] famously argued that international law would develop between two extremes – apology and utopia.[36] If we look at IHL and its determining elements from this perspective, we see the principles of 'military necessity' and 'considerations of humanity' as two corresponding poles. While the former is committed to the classical understanding of state sovereignty, the latter strives for the final perfection of humanity's ideal. Even IHL's two main sections[37] are roughly attributed accordingly: whereas the 'law of the Hague' supposedly stands for the military past, the 'law of Geneva' promises the glorious humanitarian future. Even if 'Geneva' seems to have displaced 'the Hague' in conceptual terms during the narrative efforts to put IHL into a humanitarian tradition,[38] we (still) see its underlying laws-of-

32 Cf Russell A. Miller and Rebecca M. Bratspies (eds), *Progress in International Law* (Brill 2008); Tilmann Altwicker and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 EJIL (2014) 427; Thomas Skouteris, 'The Idea of Progress' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook on the Theory of International Law* (OUP 2016) 939.

33 Thomas Kleinlein, 'International Legal Thought: Creation of a Tradition and the Potential of Disciplinary Self-Reflection' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2016* (OUP 2017); for an example of tradition building see Georg Schwarzenberger, 'A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474' *The Manchester Guardian* (28 September 1946) and Gregory S. Gordon, 'The Trial of Peter von Hagenbach. Reconciling History, Historiography and International Criminal Law' in Kevin J. Heller and Gerry Simpson (eds), *The Hidden History of War Crime Trials* (OUP 2013) 13.

34 Jean d'Aspremont, 'The International Law of Statehood and Recognition: A Post-Colonial Invention' in Thierry Garcia (ed), *La Reconnaissance du Statut d'Etat à des Entités Contestées* (Pedone 2018, forthcoming).

35 Josef L. Kunz, 'The Swing of the Pendulum: From Overestimation to Underestimation of International Law' (1950) 44 AJIL 135.

36 Martti Koskenniemi, *From Apology to Utopia* (CUP 2006).

37 Jean Pictet, *The Principles of International Humanitarian Law* (ICCR 1967) 10 et seq.

38 Meron, The Humanization of Humanitarian Law' (n 21); Thilo Rensmann, 'Die Humanisierung des Völkerrechts durch das Ius in Bello – Von der Martens'schen Klausel zur "Responsibility to Protect"' (2008) 68 ZaöRV 111; Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, ICRC 2011). For a general

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

war-driven thinking.[39] This disparity, however, may lead to severe discrepancies between the stakeholders: the above mentioned letter of US legal advisors is a luminous example of this matter, as they saw themselves obliged to raise their voice in a discourse which had become detached from their position and remind the more progressive scholars that also customary IHL – be it focused on the principle of humanity as much as it may – still indisputably has to rely on state practice and *opinio juris* as a source of international law.[40] This is exactly where the special difficulty of law regimes operating between extremes lies: to provide a satisfactory and feasible solution for both sides, as the most utopian rules will never prevail if its apologetic element fails.

Were this not already difficult enough, the task is further complicated by another, temporal division: little scrutiny is needed to realise that IHL was made in 'and' for different times.[41] It is not without reason that the joke arose concerning the law which always comes one war late into existence. Even if it is not any longer visible in its denomination, IHL was designed on the 19th century prototype of conflict: the war between two sovereign nation States in a classical Westphalian sense. The 1859 Battle of Solferino, famously built up to IHL's founding myth by *Henry Dunant*,[42] is an early example of the ensuing industrialised warfare.[43] However, this conflict, which served as the blueprint for the developing IHL, has always been more the exception than the rule.[44]

From today's point of view, it can be seen as the product of a time which had significant and clear distinctions like the ones between a State and a non-State, a combatant and a civilian, or an international conflict and an

---

perspective cf Eric J. Hobsbawm and Terrence O. Ranger (eds), *The Invention of Tradition* (CUP 1983).

39 Scott Horton, 'Kriegsraison or Military Necessity? The Bush Administration's Wilhelmine Attitude towards the Conduct of War' (2006) 30 Fordham International Law Journal 576.

40 Bellinger and Haynes, 'A US government response to the ICRC' (n 29) 443 et seq.

41 With regard to the Geneva Conventions of 1949, see Rosa Brooks, 'The Politics of the Geneva Conventions: Avoiding Formalist Traps' (2005) 46 VJIL 197 (hereafter Brooks, 'The Politics of the Geneva Conventions').

42 Henry Dunant, *Un Souvenir de Solférino* (1862).

43 Michael Howard, *War in European History* (OUP 2009) 97 et seq (hereafter Howard, *War in European History*).

44 Arthur van Coller, 'The History and Development of the Law of Armed Conflict (Part 1)' (2014) 17 African Yearbook of International Humanitarian Law 44.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

internal one,[45] all of which are being questioned today.[46] IHL, despite the reforms of 1949 and 1977, is still operating on this basis. Especially when it comes to the regulation of NIACs, States are reluctant to grant too many concessions, as the principle of reciprocity known from IACs will most probably not function. *Antonio Cassese* explains this in the following:

> On the contrary, Governments are much less, if at all, interested in having rebellions within their territory governed by international law. Their main concern is to retain enough freedom to crush promptly any form of insurrection. Their sovereignty and territorial integrity cannot but oppose any sweeping encroachment by international law. This is why so few international rules govern internal conflicts.[47]

It is therefore not surprising that the ICRC's first attempt to also extend IHL to civil wars on occasion of the 1949 conferences led only to CA 3 as a minimum yardstick.[48] The accompanying controversy also left its traces in the wording of this 'convention in miniature' as its very last sentence contains, what Cassese calls, a 'legal enigma':

> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

It seems to be rather obvious from a political perspective that

> international law-makers wanted to dispel the fear expressed by States that such a norm on civil wars would give more power, and to some extent a promotion, to the rebels by having them gain international legitimacy.[49]

However, this is diametrically opposed to the fact that CA 3 established certain obligations with corresponding rights of the rebels, thereby declaring them – very limited – subjects of international law.[50]

---

45 Jed Odermatt, 'Between Law and Reality: "New Wars" and Internationalised Armed Conflict' (2013) 5 Amsterdam Law Forum 19.

46 Rosa E. Brooks, 'War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror' (2004) 153 University of Pennsylvania Law Review 675, especially 711 et seq.

47 Antonio Cassese, 'Current Trends in the Development of the Law of Armed Conflict' in Paolo Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law* (OUP 2008) 3, 6 (hereafter Cassese, 'Current Trends in the Development of the Law of Armed Conflict').

48 Antonio Cassese, 'Civil War and International Law' in Paolo Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law* (OUP 2008) 110, 116 et seq.

49 Ibid, 119.

50 Ibid.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

From this perspective, IHL can even be seen – from a highly nonconformist and controversial point of view – as a means to support warfare, as it provides an ever-adapting regime to what seems to be inseparable from mankind:

> International humanitarian law in particular has this universal vocation, since it applies to all men and countries. In formulating and perfecting this law, to which it gave birth and of which it encourages the promotion and dissemination, the International Committee of the Red Cross has sought precisely this common ground and put forward rules acceptable to all because they are fully consistent with human nature. This is, moreover, what has ensured the strength and durability of these rules.[51]

'Formulating and perfecting this law' has been one of the central concerns of IHL since the famous Martens Clause stated: 'until a more recent code of the laws of war is issued.'[52] Amounting to an already 'theological-like' promise[53] of IHL, it mainly makes us endure the cruelties of warfare instead of questioning them. 'International humanitarian law as an accomplice of warfare' and 'the Geneva Conventions as the Magna Charta of the war time criminal' are suspicions which are hard to endure.

Interestingly and somewhat tellingly, however, a reality in which there would be no need for this legal corpus anymore – as utopian as it might seem – is never considered in the progress-influenced accounts of IHL.[54] What is regularly omitted in the standard founding myth is that the 1864 Geneva Convention's (unintentional) side effect on warfare is, in a certain sense, comparable to the usage of the railway: According to *Michael Howard*, the Battle of Solferino was the 'first war in Europe to demonstrate

---

51 Jean Pictet, 'Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions' in Henry Dunant Institute (ed), *International Dimensions Humanitarian Law* (Martinus Nijhoff 1988) 3.

52 Regarding the controversy of the meaning of the Martens Clause, cf Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997) 37 IRRC 125; Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 EJIL 187.

53 On this concept, see further Martti Koskenniemi, 'International Law as Political Theology: How to Read *Der Nomos der Erde*?' (2004) 11 Constellations 492.

54 The only exception this author was able to find is Yves Sandoz and Jérôme Massé, 'Values Worth Fighting for: The Additional Protocols at 40' (*Humanitarian Law & Policy*, 8 July 2017), <http://blogs.icrc.org/law-and-policy/2017/06/08/values-worth-fighting-additional-protocols-40/> accessed 19 November 2017: 'It is indeed only when the promise of world peace has been reached – and therefore the Geneva Conventions and their Additional Protocols cease to be relevant – that we can all truly celebrate'.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

the value of railways', which had the advantage that the 'forces could be maintained in good condition: the sick and wounded could be evacuated to base hospitals and replaced by fit men.'[55] This is one of the examples which strongly further the argument that the laws of war 'have been formulated, and in fact have served, to legitimate ever more destructive methods of combat.[56] IHL, 'with its soothing, almost effete touch,'[57] is only easing our conscience.

With this reading, it is comprehensible, although still lamentable, why IHL proves to be weakest when it comes to NIACs, which is where it is needed the most. AP II, which was supposed to confirm and clarify CA 3,[58] is the outcome of an intense diplomatic struggle and therefore necessarily a compromise.[59] Accordingly, the scholarly assessment was rather critical:

> Protocol II, as it emerged from the Diplomatic Conference in 1977, is a markedly debilitated instrument. Sovereignty and the fragility of many new States cast a blight over this embryonic development in humanitarian law in an area where it was particularly needed.[60]

The above mentioned very restricted international legal character of rebels in the end emerges as a false friend, as rebels, in contrast to peoples

> fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination … [are] not confer[red] any special status … [and] therefore retain, even from the standpoint of international law, the legal qualification impressed on them by municipal law – that of criminals.[61]

In doing so, IHL *de facto* condemns the rebels to victory and maybe even forces them to apply all means they deem necessary.

---

55 Howard, *War in European History* (n 43) 97 et seq.

56 Chris af Jochnik and Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv. Int'l L. J. 49, 51 (hereafter Jochnik and Normand, 'The Legitimation of Violence').

57 Mégret 'Legal Semantics and the Move to Violence' (n 30) 363.

58 Yves Sandoz et al, *Commentary on the Additional Protocols* (ICRC 1987) 1326 para 4365.

59 Forsythe, 'Legal Management of Internal War' (n 19).

60 Gerald I. A. D. Draper, 'The Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1977' in Michael A. Meyer and Hilaire McCoubrey (eds), *Reflections on Law and Armed Conflicts. The Selected Works on the Laws of War by the Late Professor Colonel G.I.A.D. Draper*, *OBE* (Kluwer 1998) 102, 109.

61 Cassese, 'Current Trends in the Development of the Law of Armed Conflict' (n 47) 6.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

Although the strict separation between the application of *jus in bello* and the underlying reasons of the conflict is one of the fundamental principles of IHL,[62] the suspicion arises that IHL distinguishes between IACs and NIACs in two protocols not only because of the formal different nature of those conflicts, but also because of the different material assessment when it comes to the 'legitimacy' of the conflict. Of course, an IAC is only legal under the very strict requirements of the UN-Charter. However, the traditional thinking in terms of State sovereignty involuntarily leads to a different evaluation: whereas wars between States have always been a legal reality in international affairs, internal conflicts have long been considered to fall within the very core of a State's black box, shielding it from international law's influences and leaving it to the sole discretion of the nation State – which, of course, is keen to secure its internal stability. This sovereignty-conditioned tension between the classification of a conflict as a 'mere' riot or a NIAC proper is perceptible in Art. 3 (1) AP II, which reads:

> Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

It is hardly surprising, consequently, that States are regularly eager to classify a conflict as a domestic one below the threshold of a NIAC.[63] In sum, this is another example of the focus on sovereignty of an allegedly humanised international legal system. In a sense, therefore, the NIAC is a *jus in bello* counterpart to the illegal secessionist movement in general international law. This, together with the (of course to be welcomed) absorption of 'fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination' by AP I, leads to the somehow outlandish outcome that a proper application of AP II is only possible when several powers are fighting for the predominance in a country with a government incapable of acting (i.e. a failed state). CA 3, which was framed under the lasting impressions of the Russian, Spanish, and Greek Civil Wars (which are also examples of the aforementioned type of conflicts which AP II can address

62 François Bugnion, 'Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts' (2003) 6 YbIHL 167, 188 (hereafter Bugnion, 'Jus ad Bellum').

63 Benjamin Zawacki, 'Politically Inconvenient, Legally Correct: A Non-International Armed Conflict in Southern Thailand' (2013) 18 JCSL 151.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

properly),[64] therefore remains 'the sole source of humanitarian regulation of internecine strife.'[65]

Bearing in mind the findings of this part, it is fair to second *Rotem Giladi* in touching the sore spot and showing quite plainly the dangers of the inherent problem of the very existence of IHL and its canonical history and narratives:

> Rather than deny that legal moderation of war does in fact lend it legitimacy, entrench the divorce between the projects to humanise war and to eliminate it, or theorise the service the former renders to the latter, proponents of humanity must constantly question the very legitimacy, the very morality and efficacy, of their own enterprise. Rather than celebrate the law's humanity – In its nomenclature and institutions, interpretation and theory – they must be committed to a sober, and sobering, accounting of its history, its effect, the costs it exacts and its inhumanity. To do that, IHL professionals need to turn to history that tells of errors, roads not travelled, and tasks yet to be accomplished.[66]

D. In Lieu of a Conclusion: Thoughts on the Global War on Terror and the Search for a New Concept

The importance of giving something a name can be seen in the context of the tremendous problems concerning the legal scope of the so-called 'Global War on Terror'. What seems to be common ground is that 'the formal framework of the Geneva Conventions does not fit the struggle against terrorism well', as too many of its threshold distinctions, *inter alia* the one between IACs and NIACs, 'are premised on the continued existence of a rapidly vanishing world.'[67]

But how do we then deal with a situation that is, allegedly, neither nor?[68] Many efforts have been made in international legal scholarship to give it

---

64 Bugnion, 'Jus ad Bellum' (n 62) 182.

65 David A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 11 Case W. R. JIL 37, 69.

66 Rotem Giladi, 'Rites of Affirmation: Progress and Immanence in International Humanitarian Law Historiography' (unpublished manuscript; the paper can be requested from rotem.giladi@helsinki.fi). See also Jochnik and Normand, 'The Legitimation of Violence' (n 56) 51.

67 Brooks, 'The Politics of the Geneva Conventions' (n 41) 199.

68 Kevin J. Heller, 'The Use and Abuse of Analogy in IHL' in Jens D. Ohlin (ed), *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 232 (hereafter Heller, 'Analogy in IHL').

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

some kind of name: 'Global Armed Conflict',[69] 'Global Civil War',[70] 'Transnational NIAC',[71] or 'Extraterritorial Armed Conflict'[72] are but only a few examples of a long list. What is common to all the suggested denominations is that they do not explain what their added value is to the law as it stands. This author has much sympathy for *Tawia Asnah's* conclusion that the newly (re)emerging 'language of war shapes and creates the international legal norms governing the use of force'[73] and believes the same phenomenon to be operating in the *jus in bello*. They all aim at creating a convenient legal concept for a reality which, allegedly, cannot be grasped therefore remains outside the existing legal language. However, a 'legal acceptance' – *ex factis jus oritur* – of a global armed conflict would yield to the attempt of the 'transnational terrorist' to destabilise the international legal order[74] and the US-led response of creating 'legal black holes' in the fight against terrorism.[75] Detaching international law from the ordering function its spatial limitation[76] provides can pose a severe risk, as *Carl Schmitt* already pointed out with regard to the partisans:

> [The 1949 Geneva Conventions'] foundations remain the conduct of war based on the state and consequently a bracketing of war, with its clear distinctions between

69 Jonathan Horowitz, 'Reaffirming the Role of Human Rights in a Time of "Global" Armed Conflict' (2015) 30 Emory International Law Review 2041.

70 Nehal Buta, 'States of Exception: Regulating Targeted Killing in a "Global Civil War"' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (OUP 2008) 243 (hereafter Buta, 'States of Exception').

71 Heller, 'Analogy in IHL' (n 68) 245 et seq.

72 Sasha Radin, 'Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts' (2013) 89 ILS 696.

73 Tawia Asnah, 'War: Rhetoric & Norm-Creation in Response to Terror' (2003) 43 VJIL 797, 851.

74 Antonio Cassese, 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law' (2001) 12 EJIL 993.

75 S. Borelli, 'Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror"' (2005) IRRC 39, referring *inter alia* to the English Court of Appeal in R (on the application of Ferroz Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ. 1598, which expressed its concern (at para 64) as to the manner in which the applicant was detained at Guantánamo Bay, noting that 'in apparent contravention of fundamental principles recognised by [US and English] jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a "legal black-hole"'.

76 On the territorial question, see further Noam Lubell and Nathan Derejko, 'A Global Battlefield? Drones and the Geographical Scope of Armed Conflict' (2013) 11 JICJ 65.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

> war and peace, military and civilian, enemy and criminal, war between states and civil war. When these essential distinctions fade or are even challenged, they create the premises for a type of war that deliberately destroys these clear distinctions. Then, many cautiously stylized compromise norms appear only as the narrow bridge over an abyss, which conceals a profound modification of the concepts of war, enemy and partisan – a modification full of consequences …[77]

Attempts such as the recent decision of the ICC's Prosecutor, *Fatou Bensouda*, to 'request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan,'[78] reminding the conflict parties of the existing – and applicable – law, can therefore only be strongly welcomed.[79]

IHL is a legal discipline which heavily operates on the basis of divisions. These divisions regularly aim at a positive effect like the 'positive discrimination' between combatants and civilians, but also open loopholes as the so-called 'War on Terror' has shown. Moreover, IHL can be addressed with several pre-assumptions, causing it to appear in a slightly different light – the competing denominations of 'international humanitarian law' and 'law of armed conflict' being the most distinctly recognisable example.

However, these different understandings also lead to disparate histories of IHL, creating differing traditions and narratives as well as aiming at another future for the legal system. The divisions going through IHL, not only in terms of legal principles, but also on a meta-level, presumably play a decisive role in explaining why there is a 'persistent violation' of IHL

---

77 Carl Schmitt, *The Theory of the Partisan – Intermediate Commentary on the Concept of the Political* (1963), translated and published in Telos (2005) 11, 32, cited by Buta, 'States of Exception' (n 70) 243.

78 Statement of ICC Prosecutor, *Fatou Bensouda*, regarding her decision to request judicial authorisation to commence an investigation into the Situation in the Islamic Republic of Afghanistan (3 November 2017) <https://www.icc-cpi.int/Pages/item.aspx?name=171103_OTP_Statement> accessed 19 November 2017.

79 For further information, see Kevin J. Heller, 'Initial Thoughts on the ICC's Decision to Investigate Afghanistan' (*Opinio Juris*, 3 November 2017) <http://opiniojuris.org/2017/11/03/otp-decides-to-investigate-the-situation-in-afghanistan/> accessed 19 November 2017; Elvina Pothelet, 'War Crimes in Afghanistan and Beyond: Will the ICC Weigh in on the "Global Battlefield" Debate?' (*EJIL: Talk!*, 9 November 2017) <https://www.ejiltalk.org/war-crimes-in-afghanistan-and-beyond-will-the-icc-weigh-in-on-the-global-battlefield-debate/> accessed 19 November 2017.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

despite its 'remarkable development'.[80] It is tempting to demand a new codification in situations like these,[81] but the fate of AP II and the unbroken, overarching significance of CA 3 have shown that this will always result in new disappointment as long as the pre-existing distortions have not been eliminated.

Placing the entire debate about the future of IHL in a historical context reminds us of the fact that we are currently observing a realignment of an entire branch of international law. International law has so far witnessed only a few, if any, true 'Grotian Moments' – change is normally an insidious development. It is the task of the legal historian to detect such changes and to analyse the accompanying hidden forces. International legal scholarship should be reminded once more that the turn to the better has never been a given, as the comforting narrative of progress in international law can too easily be unveiled as what it is: a tale created to safeguard the power interests in maintaining the *status quo*.

80 Dietrich Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation' (2003) 5 Journal of the History of International Law (2003) 165.

81 Bugnion, 'Jus ad Bellum' (n 62) 191.

https://doi.org/10.5771/9783845289557-41 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY