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International law´s premature farewell to the concept of war*

O adeus prematuro do Direito Internacional ao conceito de guerra

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Abstract

According to the dominant view, the supposedly state-centric concept of war has been successively replaced after the Second World War by the concepts of use of force, aggression, and armed attack in international security law, on the one hand, and the concept(s) of armed conflict in international humanitarian law, on the other. Based on an analysis of post-war codifications, in particular, international human rights law, this article argues that it is yet still too premature to bid farewell to war as a concept that for centuries has shaped the practice and theory of international law. Rather, it should be treated as a dynamic umbrella concept recognizing that non-state actors may be capable of committing acts of war, i.e., armed attacks triggering a state´s inherent right to self-defence. As further explained by the authors, this 21st century concept of war might be located in international law´s general part, thus overstretching its different subareas and without altering the *lex specialis*-concepts contained therein.

Keywords: armed conflict; armed attack; warfare; belligerents; non-state actors.

Resumo

Segundo a opinião dominante, o conceito de guerra, supostamente estadocêntrico, foi substituído, após a Segunda Guerra Mundial, pelos conceitos de uso de força, agressão e ataque armado, no Direito Internacional da Segurança; assim como pelo(s) conceito(s) de conflito armado, no Direito Internacional Humanitário. Fundada em análise de codificações pós-guerra, em particular, do Direito Internacional dos Direitos Humanos, o presente artigo sustenta que ainda é cedo para considerar a guerra como conceito efetivamente abandonado pelo Direito Internacional. Em vez disso, os autores sugerem tratá-lo como conceito-quadro dinâmico, que hoje reconhece a capacidade de atores não-estatais cometerem atos de guerra, i.e., ataques armados, desencadeando o direito inerente à autodefesa do Estado atingido. Esse conceito de guerra pode ser localizado na Parte Geral do Direito Internacional, toldando as suas diferentes subáreas, inclusive, sem alterar os conceitos *lex specialis* contidos nelas.

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Palavras-chave: conflito armado; ataque armado; condução de guerra; beligerantes, atores não-estatais.

1 Introduction

Eloquent silence surrounds the concept of war in international law and its doctrine in the 21st century. A short look into the discipline´s most popular textbooks and encyclopaedias leaves little doubt: War is no longer a central theme of international law.[1] Rather, it is treated as a remnant of an era in which nation-states were perceived as its sole subjects and war-making an ill-restricted exercise of sovereignty. According to the currently dominant view, the supposedly state-centric concept of war has been successively substituted after the Second World War by the seemingly more adequate concepts of the modern (but inconsistently still so-called) *jus ad bellum* and *jus in bello*. This is particularly true for the concepts of use of force, aggression and armed attack in international security law (ISL), on the one hand, and the concept(s) of armed conflict in international humanitarian law (IHL), on the other.[2]

The purpose of this contribution is to challenge this well-established notion by asserting that it is still too premature to bid farewell to war as a concept that for centuries has shaped the practice and theory of international law. Even though it is certainly true that the 'w--word' has been consciously avoided in the substantive provisions of the 1945 UN Charter[3] and assigned only a marginal role in modern IHL, states have nonetheless incorporated the term into other post-war codifications. This points to the possibility, if not, necessity, to treat war as a dynamic concept that has gone through fundamental changes since the end of the Second World War, as well recognized by related disciplines, in particular, conflict studies. A first step that may re-establish international law´s capacity to dialogue more directly with these findings and, at the same time, designating war again a more eminent place in the international legal order is to perceive it as an umbrella concept in its own right, without being limited to situations of armed conflict pursuant to IHL. Rather, it might be located in international law´s general part, overstretching its different subareas, IHL and ISL included.

For unfolding this hypothesis, this contribution first engages critically with a series of path dependencies developed in the aftermath of the Second World War. Section 1 therefore briefly sketches the state of affairs of the discussion on war in contemporary international law. It does so by historically reconstructing how this discipline has gradually lost sight of this concept with the advent of the 1945 UNC and the four 1949 Geneva Conventions[4] as most important documents of the modern *jus ad bellum* and *jus in bello*.

Section 2 then shows that term 'war' still forms part of contemporary international law. This is particularly true for international human rights law (IHRL) where the 'w-word' can be found in numerous derogation and reservation clauses. In addition, international criminal law (ICL) also contains some links, although less obvious. For instance, crimes against humanity, through requiring a 'generalized or systematic attack against any civilian population'[5] effectively criminalize the waging of war against determinate social groups in settings not necessarily qualifying as armed conflicts. They might therefore be perceived as war crimes *lato sensu* (as opposed to war crimes *stricto sensu*, i.e., serious violations of IHL). Against this background, the authors argue that the current notion of war as a special case of international armed conflict is unnecessarily at odds with the need to interpret and systemize existing 'hard law'-provisions both coherently and dynamically, e.g. for giving more

[1] See, e.g., SHAW, Malcolm N. *International law*. 9. ed. Cambridge: New York: CUP, 2021. p. 1054; GLAHN, Gerhard von; TAUBLEE, Janes L. *Law among nations*: an introduction to public international law. 11th. ed. New York: Routledge, 2017. p. 509; GRANT, John. P.; BARKER, J. Craig. *Parry & Grant Encyclopaedic Dictionary of International Law*. 3rd. ed. Oxford: New York: OUP, 2009. p. 7. Not treated any more under an own heading in: WOLFRUM, Rüdiger (ed.). *Max Planck encyclopedia of public international law*: index and tables. Oxford: New York: OUP, 2013.

[2] See, e.g., KLABBERS, Jann. *International law*. 2nd. ed. Cambridge: CUP, 2017. p. 206; GREENWOOD, Christopher. The concept of war in modern international law. *International Comparative Law Quartely*, v. 36, n. 2, p. 283-306, apr. 1987.

[3] 1945 Charter of the United Nations, 1 *UNTS* XVI [hereinafter UNC].

[4] 1949 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, 75 *UNTS* 31; 1949 Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at See, 75 *UNTS* 85; 1949 Convention (III) Relative to the Treatment of Prisoners of War, 75 *UNTS* 135; 1949 Convention (IV) Relative Convention Relative to the Protection of Civilian Persons in Time of War, 75 *UNTS* 287 [hereinafter GC I-IV].

[5] Art. 7 (1), 1998 Rome Statute of the International Criminal Court, 2187 *UNTS* 90 [hereinafter ICC Statute].

sense to more specific (or subordinate) concepts such as 'war crimes' and 'public emergency'.

Section 3 finally attempts to scrutinize the hypothesis that the concept of war may overstretch the notions of armed conflict as an umbrella concept to be located in international law´s general part. It first depicts its organizational requirement by focussing on non-state actors as potential belligerent parties, historically excluded from the concept of war. Of course, such groups are not authorized to use armed force against whomsoever. On the contrary, international law promotes the domestic criminalization of such delinquency, amongst others, for preventing und supressing human rights abuses[6]. Yet, in extreme cases, certain non-state actors may dispose of the factual capacity to resort to armed violence in such an organized manner that it challenges not only a state´s monopoly of violence, but fundamental human rights and the rule of law. The ICC has therefore effectively recognized that crimes against humanity (war crimes *lato sensu*) can be promoted by organized criminal groups as well.[7] This is an important difference in comparison to the concept of an organized armed group, widely seen as central element for the determination of being party to a non-international armed conflict (NIAC).

Besides, any concept of war that recognizes non-state actors as belligerent parties requires a threshold element that sorts out situations 'short of war'. This means that there must be clear evidences for the existence of a state of war between identifiable adversaries. According to the authors´ view, the armed violence of non-state actors can indeed be considered as amounting to 'acts of wars' as soon as they trigger a state´s right to respond to such violence with the military means necessary for its containment. It therefore might make sense to treat armed attacks that justify the lawful exercise of the right to self-defence as 'acts of war' that, depending on the state´s reaction, might trigger a state of war and thus the state of exception required for suspending derogable human rights.

Such broad notion of war not only seems reasonably receptive for the concepts introduced after WWII for avoiding any reference to the classical state-centric concept of war – in particular, IHL´s concept(s) of armed conflict. As discussed below, it also offers new options to engage with the discussions on so-called 'new', 'small' or 'low-intensity wars', the 'war(s) on terror(ism)' and the 'war(s) on organized crime' included.

2 International law´s farewell to the concept of war

The most significant step towards getting rid of war as a legal concept was the adoption of the 1945 UNC. A key decision was to mention the 'w-word' only in its preamble, but to omit it completely in its substantive provisions. An important motif for this decision was the general conviction that the classical concept of war had proven, as further detailed below, to be too vulnerable to abusive interpretations, undermining not only its effective outlawing but also its trigger function for the laws of war. Against this backdrop, surrogate terms were inserted into the UNC and other important treaties, such as the 1949 GC I-IV. Soon, they created both new conceptual tracks and path dependencies. Today, younger generations of students and scholars of international law therefore almost take it for granted that war has become an outdated concept, successively abandoned and substituted by (seemingly) more modern concepts after WWII.

2.1 War in classical international law

It is worth remembering though, that international law has, of course, a much longer history. Before the Second World War, the making of war and peace had been as one, if not, the discipline´s central theme. Over centuries, it was a concept not only of doctrinal interest, but of utmost importance for determining its scopes of application.

Cicero, e.g., defined war broadly as a 'contest or contention carried on by force'.[8] He also grumbled about

[6] See, e.g. GUERCKE, Lene. State responsibility for a failure to prevent violations of the right to life by organized criminal groups. *Human Rights Law Review*, v. 21, n. 2, p. 329-57, June 2021.

[7] See, e.g. INTERNATIONAL CRIMINAL COURT. *Prosecutor v. Germain Katanga*. Judgment pursuant to article 74 of the Statute, ICC-01/04-01/07, 7 Mar. 2014, para 1119. See also KRESS, Claus. On the outer limits of crimes against humanity: the concept of organization within the policy requirement: some reflection on the march 2010 Kenya decision. *Leiden Journal of International Law*, v. 23, n. 4, p. 855-873, Dec. 2010.

[8] CICERO, Marcus T. Cicero, *Orat. c.* 45 (B.C. 55), cited after

the conditions for a *bellum justum* as well as restrictions concerning the means and methods of warfare, in particular, vis-à-vis non-combatants. According to his view, there would be no such legal limits, however, with regard to enemies that could not claim any lawful combatant status. Pirate communities would therefore simply be classified as *hostes humani generis* 'excluded from the human community and punishable for their lack of respect for the common right of all people'.[9]

The notion that *jus gentium* is in essence about peace and war whose rules, however, only apply to the hierarchically structured collectives capable of taking part in international relations eventually passed through important transformations with the emergence of the so-called 'modern', i.e., the secular Westphalian state as a sovereign territorial unit. Gradually, these entities became treated by Western heads of state and scholars as international law´s only 'true' subjects. As a consequence, 'less modern', or, simply, different forms of statehood and social organization were excluded from the international order as subjects in their own right.[10] In turn, this notion reinforced the traditional distinction between public war (*bellum publicum*) and private war (*bellum privatum*) in such a way that the latter was more and more outsourced from the beginning codification of international law as, in essence, an *jus europeum publicum*.

Hugo Grotius´ seminal work *De Jure Belli ac Pacis* (1625) is illustrative in this respect. Published shortly before the Peace of Westphalia, the Dutch scholar built upon Cicero´s generic definition of war, however conceiving the latter as a 'state of contending parties, considered as such'.[11] Recognizing that private wars were the older phenomenon, he conditioned the authority to legitimately wage war to a just, i.e., public cause. Although admitting the possibility of mixed wars, Grotius maintained that robber bands and pirates could never become lawfully engaged in any type of war under international law.[12] Governments therefore had no obligation to respect its formalities. Rather, they would be obliged to persecute these illegal enemies as criminals.

The discussion on just war conceived as a concept of natural law came to a preliminary end in the 19th century, when positivist Western governments and academics began to advocate for a *liberum jus ad bellum* as a consequence of state sovereignty.[13] Thus, the decision to wage war became perceived as a non-legal, i.e. moral and political question. This notion found its most famous expression in von Clauswitz´s definition of (interstate) war as the continuation of politics with other means.[14] As many other of his coevals, he was by no means ignoring the fact that 'small' or 'civil wars' were quite a frequent reality.[15] However, due to the treatment of sovereign states as exclusive subjects of international law, occidental scholars now treated them as internal affairs, in principal, falling outside the scope of the international legal order. Exceptions were the recognition of insurgency and belligerency.[16] Effectively, however, this implied the upholding of an unrestricted *jus ad bellum internum* against all sorts of public enemies.

The (re-)emergence of large-size and hierarchically structured armies, capable of executing not only orders but also sophisticated strategies and tactics, reinforced the perception that the rather disorganized and asymmetrical internal wars were fundamentally different from conventional interstate warfare. As the latter were idealized as following the formal logic of a duel between gentlemen,[17] their written regulation by interna-

WRIGHT, Quincy. Changes in the concept of war. *American Journal of International Law*, v. 18, n. 4, p. 755-767, Oct. 1924.

[9] POLICANTE, Amedeo. *Hostis Humani Generis:* pirates and empires from antiquity until today. 2012. 332 f. Thesis (Doctoral of Philosophy) – Goldsmiths College, University of London, Department of Politics, University of London. London, 2012.

[10] BARTELS, Rogier. Timelines, borderlines and conflicts. The historical evolution of the legal divide between international and non-international armed conflicts. *International Review of the Red Cross*, v. 91, n. 837, p. 35-67, Mar. 2009.

[11] See GROTIUS, Hugo. *On the law of war and peace.* Altenmünster: Verlag J. Beck, 2001. p. 6.

[12] STUMPF, Christoph A. *The grotian theology of international law*: Hugo Grotius and the moral foundations of international relations. Berlin: Walter de Gruyter, 2006. p. 206.

[13] As the interpretation of the above-cited classical authors is, in part, subject to academic controversies, this applies to the *liberum jus ad bellum* as well. See, e.g., SIMON, Hendrik. The myth of liberum ius ad bellum: justifying war in 19th-Century legal theory and political practice. *European Journal of International Law*, v. 29, n. 1, p. 113-136, 2018.

[14] VON CLAUSEWITZ, Claus. *On war*. Washington D.C.: Princeton University Press, 1976. p. 28.

[15] See, e.g., DAASE, Christopher. *Clausewitz on small war*. Oxford: OUP, 2015.

[16] HIGGINS, Rosalyn. Internal war and international law. *In*: BLACK, Cyril E.; FALK, Richard A. (ed.). *The future of the international legal order*: conflict management. Washington D.C.: Princeton University Press, 1971. v. 3. p. 81-121; BARTELS, Rogier. Timelines, borderlines and conflicts. The historical evolution of the legal divide between international and non-international armed conflicts. *International Review of the Red Cross*, v. 91, n. 837, p. 35-67, Mar. 2009. p. 49-51.

[17] NEFF, Stephen C. *War and the law of nations*: a general history.

tional law therefore seemed desirable and viable, in particular, for limiting certain inhumane acts and effects. Indeed, the incipient process of codification of the *jus in bello* in the middle of the 19th century departed from the rationalist ideas of both organizational symmetry and contractual reciprocity between equal sovereigns, that is, 'civilized' nation states.[18]

An important (politically welcome) consequence was the exclusion of other forms of armed struggle from the sphere of IHL, if conducted by collectives without the status of a nation-state and therefore not disposing of 'regular armed forces'. This was particularly true of the horrifying wars waged by colonial powers or the companies authorized by them to do so. All over the world, they massacred entire peoples that dared to stand up against their foreign oppressors, treated as 'irregular fighters' or 'unlawful combatants'.[19] By the end of the 19th century, international law´s dominant notion of war thus became radically state-centric, as expressed by Lassa Oppenheim´s classical definition of war as 'a contention between two or more states, through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases' which is popular until today. [20]

Determining the existence of such a state was of course of fundamental legal importance. It was widely presumed that such a state would automatically suspend the international law applicable in peacetime, e.g., commercial contracts between belligerent parties. It required the evidence of a 'somewhat mystical *animus belligerendi*'.[21] In practice, however, this was a rather tricky question in the absence of a formal declaration of war. Even aggressed states often had no real interests in suspending treaties whose execution had relevance for their war chest.

Against this background, the 1907 Hague Convention (III) on the Opening of Hostilities sought to bring more transparency by obliging states 'that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war'.[22] At the same peace conference, another, although still timid, step was taken towards the restriction of the *liberum jus ad bellum*. States finally agreed to no longer recourse to armed force for the recovery of contract debts claimed from another government on behalf of its nationals.[23]

After the First World War, further restrictions to the *jus ad bellum* were finally accepted. It suffices here to mention the 'cool off-mechanism' of the League of Nations[24] that obliged its members to submit themselves to an arbitration procedure before taking up arms, the 1925 Locarno Pact[25], and, last but not least, the 1928 Briand-Kellogg Pact 'on the Renunciation of War as an instrument of national policy'.[26] However, the latter neither defined war in an attempt to overcome its traditional, highly subjective notion, nor did it stipulate any conditions for the lawful exercise of the states´ inherent right of self-defence. It thus became possible to deny its applicability by asserting 'acts short of war' or citing the right to self-defence as fig leafs for justifying the beginning of military operations on foreign territory.[27]

2.2 War in the aftermath of the Second World War

Against this background, several efforts were made after the Second World War to avoid this fateful term. The most prominent example is the UNC. As is well

Cambridge: CUP, 2008. p 137.

[18] VON BERNSDORFF, Jochen. The use of force in international law before World War I: on imperial ordering and the ontology of the Nation-State. *European Journal of International Law*, v. 29, n. 1, p. 233-260, 2018. p. 238.

[19] MÉGRET, Frédéric. From savages to unlawful combatants: a postcolonial look at international law´s "other". *In*: ORFORD, Anne (ed.). *International law and its others*. Cambridge: CUP, 2005. p. 265-317.

[20] OPPENHEIM, Lassa. *International law*: a treatise: war and neutrality. London: Longmans, Green and Company, 1906. v. 2. p. 58.

[21] MCDOUGAL, Myers S.; FELICIANO, Florentino P. The initiation of coercion: a multi-temporal analysis. *American Journal of International Law*, v. 52, n. 2, p. 241-259, Apr. 1958. See, also MANCINI, Marina. The effects of a state of war or armed conflict. *In*: WELLER, Marc (ed.). *The Oxford handbook of the use of force in international* law. London: OUP, 2015. p. 988-1013. p. 989.

[22] Art. 1, 1907 Hague Convention (III) Relating to the Opening of Hostilities, 205 *CTS* 263.

[23] Art. 1, 1907 Hague Convention (II) for the Limitation of the Employment of Force for Recovery of Contract Debts, 205 *CTS* 250.

[24] Art. 12, 1919 Covenant of the League of Nations, 225 *CTS* 288.

[25] 1925 Treaty of Mutual Guarantee, done ate Locarno, 54 *LNTS* 289.

[26] 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, 94 *LNTS* 57.

[27] See ROSCHER, Bernhard. The "renunciation of war as an instrument of national policy". *Journal of the History of International Law*, v. 4, p. 293-309, 2002; CASSESE, Antonio. *International Law*. 2nd. ed. London: New York: OUP, 2003. p. 37.

known, none of its substantive provisions mentions the 'w-word'.[28] Article 2 (4) UNC prohibits the use of force, thus not only proscribing wars of aggression, but also (most) 'acts short of war".[29] It even forbids the qualified threat to use armed force. In addition, Article 16 of the 1919 Covenant of the League of Nations, once speaking of a 'recourse of war', was reformulated in Article 39 UNC through reference to a 'threat to peace, breach of peace, or act of aggression'.[30] In the aftermath of the Second World War the hopes that the UN would achieve its mission to guarantee lasting peace on earth were so strong that its constitutive document even lacks any reference to the already well established *jus in bello*: It was assumed that such reference would undermine the prohibition of the use of force.[31] However, applying exclusively between states 'in their international relations', the UNC does not impose any restrictions on the *jus ad bellum internum*.[32] What it does, though, is to provide some 'anchors' for its future disciplining, in particular, by promoting the recognition of human rights and the right to self-determination

Last but not least, the UNC also aspires to avoid abusive interpretations of the right to self-defence by conditioning its lawful exercise to an armed attack.[33] The response to it has to be immediate and proportional and can be terminated by a binding decision of the Security Council. Hence, in modern ISL, the concept of war is no longer assigned any specific function. Rather, it has been replaced by broader, more inclusive concepts. It therefore might be regarded as an inconstancy to refer to them as *jus ad/contra bellum*. Ultimately, making sense of these 'good old' terms depends on the notion of war that is adopted.

The post-war movement to banish the 'w-word' from international treaty law soon generated important conceptual changes in the *jus in bello*. The most influential decision was taken by the 1949 Diplomatic Conference in Geneva that eventually approved the GC I-IV. As with the Genocide Convention of 11 December 1949, but unlike the Universal Declaration of Human Rights[34] (UDHR), adopted a day before, these core documents of modern IHL still contain explicit references to 'war'.[35] However, the concept has no immediate relevance for the operation of these treaties: While the former treaty declares that 'genocide, whether committed in time of peace or in time of war, is a crime under international law',[36] the provisions of the latter are, in principle,[37] applicable to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.[38] Hence, the main progress achieved by the introduction of the broader concept of armed conflict consisted in the reference to a factual situation, so that the state of war is no longer a legal condition for triggering the *jus in bello*. By relying on empirical evidence for the existence of such a conflict, the applicability of IHL could now be determined with greater objectivity, no longer warranting the proof of a specific *animus belligerendi*.

As it seems, the relief of getting rid of the overly subjective approach to war was so great that it was opted to treat the uncertainties surrounding its successor concept with almost unconditional optimism, 'hoping for the good'. In his authoritative commentary, Pictet observes: 'It remains to ascertain what is meant by "armed conflict". The substitution of this much more general expression for the word "war" was deliberate. It is possible to argue almost endlessly about the legal

[28] Only in the preamble of the UNC the 'scourge of war ' is mentioned 'which twice in our lifetime has brought untold sorrow to mankind'.

[29] See, however, the express mentioning of 'war' and 'war of aggression' in the substantive provisions relating to the use of force in Art. 1, 1947 Inter-American Treaty of Reciprocal Assistance, 721 UNTS 324; Art. 5 (e), 1948 Charter of the Organization of American States, 1609 UNTS 199.

[30] MIKOS-SKUZA, Elzbieta. International law´s changing terms: "war" becomes "armed conflict". *In*: O´DONNELL, Mary E. (ed.). *What is war*?: An Investigation in the Wake of 9/11. The Hague: Brill Nijhoff, 2012. p. 17-29. p. 23.

[31] ILC, Report of the International Law Commission to the General Assembly, UN Doc A/CN.4/13 (1949), para 18; SCHOTTEN, Gregor; BIEHLER, Anke. The role of the UN security council in implementing international humanitarian law and human rights law. *In*: ARNOLD, Roberta; QUÉNIVET, Noëlle N. R. (ed.). *International Humanitarian Law and Human Rights Law:* Towards a New Merger in International Law. Boston: Martinus Nijhoff Publ., 2008. p. 277-313. p. 311.

[32] DINSTEIN, Yoram. Comments on war. *Harvard Journal of Law & Public Policy*, v. 27, n. 3, p. 877-892, 2004.

[33] Art. 51 UNC.

[34] UN doc. A/RES/217/A (III) (1948).

[35] See, e.g., Art. 23 GC I, Art. 37 (3) GC I, Art. 44 GC I, Art. 15 GC II, Art. 17 GC II, Art. 13 GC IV, Art. 14 GC IV.

[36] Art. I, 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 *UNTS* 277.

[37] Common Article 2 (1) GC I-IV, states that some of their provisions 'shall be implemented in peacetime'.

[38] Common Article 2 (1) GC I-IV, literally repeated in Art. 18 (1) of the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 *UNTS* 240.

definition of "war"'.[39] Since then, the prevailing view is that war is a special case of an international armed conflict, i.e. an armed conflict between states as the only (imaginable?) 'High Contracting Parties'.[40]

Another important achievement of the GC I-IV was common Article 3. This 'mini convention'[41] contains basic humanitarian as well as human rights standards for cases of 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. The provision thus applies to situations once (and still) referred to as 'small' or 'civil wars'. As seen above, before, with the exceptions of the recognition of insurgency and, above all, belligerency, such battlefields fell outside the scope of *jus in bello.*[42] Although representing an important step towards their international regulation, no attempt was made by states to better explain to what type of war situations common Article 3 actually applies. By virtue of this lack of contours, the most appropriate way to address such situations became referring to them negatively as non-international armed conflicts (NIACs) - opposed to international armed conflicts (IACs). States thus formally reconfirmed the historical 'two box-approach' that was further developed by the two 1977 Additional Protocols.[43]

Protocol I Relating to the Protection of Victims of International Armed Conflicts has many merits. Yet, the narrative with which it expands the concept of international armed conflict by including colonial wars of liberation needs to be handled with care. Formally, it is of course correct to observe that Protocol I also covers 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination'.[44] In practice, however, this provision never played any relevant role. It was adopted when most colonial wars of liberation had already been fought. What is more, however, is that a liberation movement, for triggering the applicability of Protocol I, must submit a 'unilateral declaration addressed to the depositary'.[45] i.e., the Swiss Council. More than 40 years after its solemn approval such an extension of the law of IAC has never been accepted in practice,[46] although there were indeed several claimants that sent such declarations of voluntary submission.[47] None of them was ever deemed apt for being willing and able to accept the onus of applying this body of law.

Admittedly, it is possible to assign Article 1 (4) Protocol I a post- or non-colonial interpretation, so that it is no longer an empty promise.[48] It is true, though, that the potential 'upgrading' of non-state actors to parties to an IAC continues to be an important motive for the non-recognition of the protocol´s provisions as customary international law.[49] In other words, in terms of substantive progress towards the opening of the laws of war for non-state actors, not much has changed since the approval of the GC I-IV shortly after WW II. In practice, the concept of international armed concept continues to be as state-centric as the traditional concept of war. It is a fact that organized armed groups claiming to fight for self-determination may, at a maximum, qualify as parties to a NIAC – without formal

[39] PICTET, Jean S. The Geneva Conventions of 12 August 1949: commentary. *In:* GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIANS IN TIME OF WAR, 4., 1958, Geneva. *Proceedings* [...]. Geneva: ICRC, 1958. p. 20. See also TURNS, David. The law of armed conflict (international humanitarian law). *In*: EVANS, Malcolm D. (ed.). *International law*. Oxford: New York: OUP, 2014. p. 821-845. p. 825.

[40] MIKOS-SKUZA, Elzbieta. International law´s changing terms: "war" becomes "armed conflict". *In*: O´DONNELL, Mary E. (ed.). *What is war*?: An Investigation in the Wake of 9/11. The Hague: Brill Nijhoff, 2012. p. 17-29. p. 29.

[41] BOOTHBY, William H. *Conflict law:* the influence of new weapons technology, human rights and emerging actors. Hague: Asser Press, 2014. p. 32.

[42] BARTELS, Rogier. Timelines, borderlines and conflicts. The historical evolution of the legal divide between international and non-international armed conflicts. *International Review of the Red Cross*, v. 91, n. 837, p. 35-67, Mar. 2009. p. 50.

[43] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 *UNTS* 3 [hereinafter Protocol I]; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 *UNTS* 609 [hereinafter Protocol II].

[44] Art. 1 (4) Protocol I.

[45] Art. 96 (3) Protocol I.

[46] SANGER, Andrew. The contemporary law of blockade and the Gaza freedom Flotilla. *Yearbook of International Humanitarian Law*, v. 13, p. 397-446, 2011. p. 427.

[47] KALSHOVEN, Frits; ZEGVELD, Liesbeth. *Constraints on the waging of war:* an introduction to international humanitarian law. 4th. ed. Cambridge: CUP, 2011. p. 85.

[48] See, however, A. Alexander, 'International humanitarian law, post-colonialism and the 1977 Geneva Protocol I', (2016) 17 *Melbourne Journal of International Law* 15, at 50.

[49] MUSHKAT, Roda. Who may wage war?: an examination of an old/new questions. *American University Law Review*, v. 2, n. 1, p. 97-151, 1987. p. 116; PETERKE, Sven; WOLF, Joachim. International humanitarian law and transnational organised crime. *In*: HAUCK, Pierre; PETERKE, Sven (ed.). *International law and transnational organised crime*. Oxford: OUP, 2016. p. 381-405. p. 384.

recognition as a combatant and prisoner of war status, but on pain of penalties such as 'treason' and 'conspiracy'.

One could cite the, indeed, tricky right to self-determination as a reason for this state of affairs that, in principle, must be interpreted dynamically in accordance with the realities of the post-decolonization era, in particular, for also belonging to the most important 'living instruments'[50] of IHRL, i.e., the 1966 Convenants.[51] Politically speaking, it is therefore a 'hot potato'. Yet, it is certainly no exaggeration to state that the much celebrated expansion of the concept of international armed conflict was a pyrrhus victory from the viewpoint of the (few) movements of the Global South, once invited to participate in the negotiation of AP I. In reality, these groups have (had) no chance of being recognized as parties to an IAC. In practice, most of them therefore continue to be treated as criminal, terrorist or other kind of illegal groups. The truth is that sovereign states effectively upheld their historic exclusion of non-state actors as, in principle, 'uncivilized' and therefore non--subjects of international law.

With few exceptions, most collectives engaged in armed struggle against a state´s government do not even qualify as organized armed groups in the sense of Protocol II Relating to the Victims of Non-International Armed Conflict. In essence, the main hurdle is that the criteria stipulated in Article 1 (1) Protocol II must be shown cumulatively.[52] More precisely, it has to be demonstrated that these groups fight 'under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations in order to implement this Protocol'.[53] This is a rather high threshold for a document that refuses to recognize that such actor dispose of combatant immunity and, thus, a prisoner of war status as well. They continue to be treated are 'irregular fighters' or 'unlawful combatants' who might be persecuted as criminals as long as the government is not willing to accept an amnesty law, e.g. as part of a peace treaty. Simultaneously, states agreed that '[T]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts'.[54] As there is no international body responsible to determine the Protocol´s applicability without delay, after armed fights have erupted, these conflicts effectively remain situations ' short of war', if the states affected dismiss IHL´s applicability.

Against this backdrop, international doctrine and jurisprudence have made an effort to give common Article 3 both a broader and more precise scope of application.[55] This has included efforts to expand this provision to 'extra-state' or 'transnational' armed conflicts with international terrorist groups, however last but not least, to obtain better grips on the legal challenges imposed by the 'war on terror'.[56] In addition, several proposals were made to unify the two bodies of law linked to existence of IACs and NIACs respectively.[57] The overall aim is to reduce IHL´s wicked complexity. Yet, states are so far not at all interested in overcoming this (for them) convenient situation. An important example is the 1998 ICC Statute that upholds the 'two box-approach'[58].

[50] EUROPEAN COURT OF HUMAN RIGHTS. *Tyrer v UK*. Merits, App. No. 5856/72, A/26, 25 apri. 1978, para 31; INTER-AMERICAN COURT OF HUMAN RIGHTS. *The right to information on consular assistance in the framework of the guarantees of the due process of law*. Advisory Opinion, OC-16/99, Ser. A No. 16 [1999], para 114.

[51] Common Art. 1 of the 1966 International Covenant on Economic, Social and Cultural Rights, 993 *UNTS* 3; and the 1966 International Covenant on Civil and Political Rights, 999 *UNTS* 171 [hereinafter ICCPR].

[52] SOLIS, Gary D. *The law of armed conflict*: international humanitarian law in war. Cambridge: CUP, 2010. p. 131; GREEN, Leslie C. *The Contemporary law of armed conflict*. 3rd. ed. New York: Juris Publ., 2008. p. 83.

[53] Art. 1 (1) Protocol II.

[54] Art. 1 (2) Protocol II.

[55] See, e.g., SIVAKUMARAN, Sandesh. *The law of non-international armed conflict*. Oxford: OUP, 2014. p. 54-100; PEJIC, Jelena. The protective scope of common article 3: more than meets the eye. *International Review of the Red Cross*, v. 93, n. 881, p. 189-225, 2011. p. 191-193; INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. *Prosecutor v. Haradinaj*. Trial Judgment, No. IT-04-84, 3 apr. 2008, paras. 49-60; *Prosecutor v. Boškoski*, Trial Judgement, No. IT-04-82-T, 10 July 2008, para 177.

[56] See, e.g., VITÉ, Sylvain. Typology of armed conflicts in international humanitarian law: legal concepts and factual situations. *International Review of the Red Cross*, v. 91, n. 873, p. 69-94, 2009. p. 88-92; PAULUS, Andreas; VASHAKMADZE, Mindia. Asymmetrical war and the notion of armed conflict: a tentative conceptualization. *IRRC*, v. 91, n. 873, p. 95-125, 2009; US SUPREME COURT. *Hamdan v. Rumsfeld*. 548 U.S. 557, 633, 126 S. Ct. 2749, 2797 [2006].

[57] See, e.g., CRAWFORD, Emily. Unequal before the Law: the case for the elimination of the distinction between international and non-international armed conflict. *Leiden Journal of International Law*, v. 20, n. 2, p. 441-465, 2007; INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA. *Prosecutor v. Tadić*. Appeal on Jurisdiction. No. IT-94-1-AR72, 2 oct. 1995 , para. 70.

[58] Art. 8 ICC Statute.

Summing up, the successive replacement of the concept of war by broader categories needs to be viewed critically as well, despite its uncontested merits. Shortly after the Second World War, states deliberately avoided entering into a more profound discussion on the shortcoming of the classical concept of war and its potential for revision. Rather, they preferred to opt for a seemingly more modern approach in which the 'w-word' would no longer play any central role. In retrospect, they often did so by inserting quite woolly terms into the treaties that make up ISL and IHL. As a consequence, many of them still lack conceptual contours that reasonably reduce the governments´ attempts to interpret them according to their own political interests. Mechanisms, such as the procedure for recognizing liberation movements as parties to IAC, effectively guaranteed the continued exclusion of armed non-state actors from the *jus in bello*. Besides, Protocol II and Common Article 3 to GC I-IV both establish a very high threshold or refer to situations that allow governments to deny the quality of a NIAC.

This state of affairs, although having the clear advantage of reinforcing the adherence to IHRL´s law enforcement paradigm, has yet important implications for the social acceptance and legitimacy of modern international law. In many parts of the world peoples have little doubt that they live in times of war – situations of protracted armed violence attributable both to non-state actors and the state as their repressor, widely unknown amongst the citizens of Western states and their representatives. Put simply, international law tells these peoples that they are wrong in their legal assessment, because war is 'dead' as a concept of international law and that there exist doubts concerning the consistent classification of the militarized violence to which they are exposed as a NIAC.

3 War in contemporary international law

However, it is often elegantly overlooked that the 'w-word' continued to be incorporated by states in other subareas of international law. This particularly holds true for IHRL that only emerged after the adoption of the 1945 UNC and the 1949 GCs and where the path dependencies stimulated by the above-described movement to no longer think war as a concept of international law have resulted in quite doubtful, in our opinion, unnecessary hermeneutic efforts, as further explained below.

3.1 International Human Rights Law

The term´s reappearance in the derogation clause of the 1950 European Convention of Human Rights might be considered as an 'historic accident' as this treaty was approved only shortly after the UNC and the GCs. Its Article 15 provides for the suspension of the ECHR´s non-derogable guarantees '[I]n time of war or other public emergency threatening the life of the nation'.[59] Most commentators today interpret the term 'war' as to refer safely to international armed conflicts, may be even armed conflicts in general.[60] However, it seems discussable whether this is really a dynamic interpretation of this, in principle, *lex generalis*[61] – or rather a convenient substitution of term 'war' through 'armed conflict'. True, paragraph 2 of the same provision exempts 'deaths resulting from lawful acts of war'. It thus invites for an interpretation congruent with the notions of IHL. Regardless, such interpretation is no dogmatic necessity, if one accepts the possibility that there might be 'acts of war' falling outside the scope of contemporary IHL and whose lawfulness might be judged through applying other legal regimes, IHRL included.

On the other hand, it is, of course, a valid argument that the term 'war' was deliberately avoided in the derogation clause of the 1966 ICCPR. According to Nowak, the 'original reference to war was struck in 1952 in order to prevent giving the impression that the

[59] Art. 15 (1) 1950 European Convention on Human Rights, 213 *UNTS* 221 [hereinafter ECHR].

[60] VAN DIJK, Peter; VAN HOOF, Godefridus J. H. *Theory and practice of the european convention on human rights*. 3rd. ed. Hague: Kluwer Law Int., 1998. p. 736; ABRESCH, William. A human rights law of internal armed conflict: the european court of human rights in Chechyna. *European Journal of International Law*, v. 16, n. 4, p. 741-767, 2005. p. 745; see also HUMAN RIGHTS COMMITTEE. *General comment No. 29 (2001)*. U.N. Doc. CCPR/C/21/Rev.1/Add11 [2001]. para. 3.

[61] INTERNATIONAL COURT OF JUSTICE. *Legal consequences of the construction of a wall in the occupied palestinian territory*. Advisory Opinion of 9 jul. 2004, [2004] *ICJ Rep*., 136, at 178, para. 106. However, see also ORAKHELASHVILI, Alexander. The Interaction between human rights and humanitarian law: fragmentation, conflict, parallelism, or convergence? *European Journal of International Law*, v. 20, n. 1, p. 161-182, 2008. p. 182.

United Nations accepted war'.[62] At the same time it is true that the clause, being applicable '[I]n time of public emergency which threatens the life of the nation',[63] also omits any explicit reference to IHL. However, as the International Court of Justice (ICJ) has put straight, the protection offered by the ICCPR 'does not cease in times of war, except by operation of Article 4'.[64] More curiously, the covenant mentions 'war' in another provision. It obliges its states parties to prohibit by law '[A]ny propaganda for war'.[65]

The derogation clause of the 1969 American Convention of Human Rights seems to ignore more rigorously the 'progress achieved' by the ICCPR.[66] By referring to "[I]n time of war", one may suspect that the ECHR was 'blindly copied'. However, a comparison of the wordings of the two clauses reveals textual differences, indicating that the states negotiating the ACHR were not at all 'mistaking', but consciously upholding the 'w-word'.

Against this background, it is interesting to observe that the 1984 UN Convention against Torture explicitly stipulates that '[N]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification'[67] for such inhumane practices. Likewise, the 1985 Inter-American Convention to Prevent and Punish Torture refers to '[T]he existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters'[68] that cannot be invoked for justifying the crime of torture.

Still in the 1980s, i.e. after the approval of the 1977 Protocols, both the ECHR and the ICCPR were supplemented by optional protocols on the abolition of capital punishment. The 1983 Protocol to the ECHR permits a state to 'make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war'.[69] Similarly, the 1989 Protocol to the ICCPR accepts reservations providing for 'the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime'.[70]

The states parties to the corresponding 1990 Additional Protocol to the ACHR had no serious reason to do it very differently and therefore declared 'that they reserve the right to apply the death penalty in wartime in accordance with international law, for extremely serious crimes of a military nature'.[71] In the same vein, the 1994 Inter-American Convention on Forced Disappearance delegitimizes any attempt to justify such practices by invoking 'exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency'.[72] The same wording is followed in the 2006 UN Convention against Forced Disappearance.[73]

The possibility to treat war as a concept that goes beyond those situations already covered by IHL finally shines through the 2003 Protocol on Women Rights in Africa. By encompassing violence against women 'in peace time and during situations of armed conflicts or of war'[74], it suggests an interpretation of the latter concept that is disconnected from the 'two-box-approach'.

As the case may be, the short look into IHRL has shown that the post-war movement to replace the term 'war' was actually rather limited, above all, to the (still so-called) *jus ad/contra bellum* and *jus in bello*. Doctrinal and jurisprudential efforts to interpret this enigmatic term in accordance with the concept(s) of armed conflict are neither a dogmatic necessity nor do they duly take into

[62] NOWAK, Manfred. *U.N. Covenant on civil and political rights*: CCPR Commentary. 2nd. ed. Kehl am Rhein: N.P. Engel, 2005. p. 89.

[63] Art. 4 (1) ICCPR, *supra* note 51.

[64] See INTERNATIONAL COURT OF JUSTICE. *Legality of the threat or use of nuclear weapons*. Advisory Opinion of 8 jul. 1996, [1996] *ICJ Rep*. 226, at 240, para 25.

[65] Art. 20 (1) ICCPR.

[66] Art. 27 (1) 1969 American Convention on Human Rights, 9 *ILM* 673 (1970) [hereinafter ACHR].

[67] Art. 2 (2) 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 *UNTS* 85.

[68] Art. 5 1985 Inter-American Convention to Prevent and Punish Torture, *OAS Treaties Series* No. 67.

[69] Art. 2 1983 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, *ETS* No. 114.

[70] Art. 2 (1) 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 1642 *UNTS* 414.

[71] Art. 2 (1) 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty, *OAS Treaties Series* No. 73.

[72] Art. X 1994 Inter-American Convention on the Forced Disappearance of Persons, OAS Doc OEA/Ser.P/AG/Doc 3114/94.

[73] Art. 1 (2) 2006 International Convention on the Protection of All Persons from Enforced Disappearance, 2716 *UNTS* 3.

[74] Art. 1 (j) 2003 Protocol to the African Charter on Human and Peoples´ Rights on the Rights of Women in Africa, CAB/LEG/66 6/Rev 1 (2003).

account the possibility of the term´s dynamic interpretation in an attempt to include 'new wars' characterized by the participation of various non-state actors.

Finally, it is worth recalling that the underlying assumption of the opting-out mechanisms contained in IHLR´s derogation clauses is that there might be extreme situations requiring extraordinary measures for the protection of the states´ institutions and the rule of law as essential conditions for the enjoyment of human rights.[75] Although not wrong as such, this gateway for heavy-handed actions has often been abused by governments.[76] The, generally speaking,[77] lax control of the prerequisites of a state of emergency by the competent international monitoring bodies underlines this observation.[78] By using 'public emergency' as an (ill-defined) umbrella concept, these mechanisms have so far abstained from developing a meaningful definition of situations of organized armed violence sufficiently serious to justify as 'times of war' the suspension of certain fundamental guarantees.[79]

This state of affairs hardly combines with the necessity to develop further the derogation clauses for both more effectively restricting the *jus ad bellum internum* and providing for basic standards to be observed under all exceptional circumstances - including situations of informal and asymmetrical warfare, whether national or transnational in character.

3.2 International Criminal Law

ICL further illustrates the fact that the classical notion of war as, in essence, an interstate armed conflict, is both semantically and systematically scarecely coherent with respect to its core crimes, in particular, so-called 'war crimes'. As further detailed below, it is yet no surprise that ILC´s most relevant core crimes can be perpetrated both by state and non-state organizations.

The offences explicitly referred to as 'war crimes' by the ICC Statute[80] criminalize (selected) serious violations of IHL. There is no longer any doubt that these crimes can be committed in the context of NIACs as well[81]. This important legal achievement is hardly compatible with the mainstream notion of war as a special case of IAC. Yet, this term might make sense,[82] if taken as an umbrella concept for all sorts of war situations that fall under the scope of IHL. Ultimately, it implies the tacit recognition of a less state-centric approach to war and its subordinate concepts in the beginning of the 21st century.

Murder, extermination, torture, forced disappearance and other inhumane acts only constitute crimes against humanity in accordance with the ICC Statute if committed 'as part of a widespread or systematic attack directed against any civilian population'.[83] The Statute defines this context element as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'.[84] It does not need much fantasy to perceive that an attempt was made by governments to criminalize the effective waging of a war against an identifiable social group and to expand this offence on non-state actors. And while, historically, crimes against humanity required more explicitly a war nexus,[85] in its

[75] SVENSSON-MCCARTHY, Anna-Lena. *The international law of human rights and states of exception*. Hague: Martinus Nijhoff Publ., 1998. p. 93; SCHREUER, Christoph. Derogation of human rights in situations of public emergency: the experience of the european convention on human rights. *Yale Journal of World Public Order*, v. 9, n. 1, p. 113-132, 1982. p. 113.

[76] Compare HELFER, Laurence R.; HAFNER-BURTON, Emilie M.; FARISS, Christopher J. Emergency and escape: explaining derogations of human rights treaties. *International Organization*, v. 65, p. 673-707, 2011. p. 683; GROSSMAN, Claudio. A Framework for the examination of states of emergency under the American Convention on Human Rights. *American University International Law Review*, v. 1, n. 1, p. 35-55, 1986. p. 36.

[77] See for a more nuanced analysis: ALOAIN, Fionnuala N. The emergence of diversity: differences in human rights jurisprudence. *Fordham International Law Journal*, v. 19, p. 101-142, 1995.

[78] See, e.g., FITZPATRICK, Joan. *Human rights in crisis*: the international system for protecting human rights during states of emergency. Philadelphia: University of Pennsylvania Press, 1994. p. 84.

[79] MICHAELSON, Christopher. Derogating from international human rights obligations in the "war against terrorism? ": a British-Australian perspective. *Terrorism & Political Violence*, v. 17, n. 1, p. 131-155, 2005. p. 138. See for some efforts made in the 1980s to clarify the term "public emergency": Syracuse Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc. E/CN.4/1985/4 (1984); Paris Minimum Standards of Human Rights in a State of Emergency. *American Journal of International Law*, v. 79, p. 1072-81, 1985.

[80] Art. 8 ICC Statute.

[81] Art. 8 (2) (c) ICC Statute.

[82] Indeed, there is no binding definition of this concept. See, for a more profound analysis on 'What is a War Crime?': SOLIS, Gary D. *The law of armed conflict*: international humanitarian law in war. Cambridge: CUP, 2010. p. 301-338.

[83] Art. 7 (1) *caput* ICC Statute.

[84] Art. 7 (2) (a) ICC Statute.

[85] See, e.g., Art. 6 (c) 1945 Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 *UNTS* 279.

modern version, they continue to do so implicitly. It therefore might be stated that they now encompass war crimes *lato sensu,* i.e. outside armed conflicts in terms of IHL.[86]

Our central point is, however, that once it has been accepted that the 21st century´s concept of war is potentially broader and less state-centric than the one of armed conflict, being the dominant concept of war in the 20st century, the former may contribute to greater systematic consistency in contemporary international law, if, last but not least, the concept could be located in international law´s 'general part'[87].

4 Building bricks for an updated concept of war

Whoever is willing to follow this, admittedly, still vague train of thought, owes at least a rudimentary answer to the tricky question of how to define war in a manner that aptly provides for both its coherent and responsible usage. After all, one must not forget that there were quite compelling legal and political reasons for the new conceptual tracks developed in the aftermath of the Second World War. Ignoring them, would mean neglecting their *modi operandi* and practical relevance for the smoothing functioning of the subrégimes to which they belong. This would be counterproductive and create tensions and gaps between the (mainstream) theory and prevalent practice of international law. Hence, it is mandatory to develop further the concept of war in such a manner that it keeps being compatible with the existent surrogate concepts. Moreover, the concept of war should dispose of sufficiently clear-cut contours for sorting out situations of internal unrest or disturbances whose classification as states of war would be rather doubtful from both the viewpoint of international treaty law and the findings of other disciplines such as conflict studies.

4.1 Organizational requirement: belligerent party

It is now well recognized even amongst international lawyers that most contemporary armed conflicts are generally marked by the involvement of a great diversity of non-actors – armed fighting units of warlords, terrorists and criminal networks, private military security companies, non-governmental organizations, etc.[88] Not all of these actors participate directly in the hostilities.[89] Hence, one of the central challenges is to determine the quality of such an actor as a belligerent party.

The criteria established for identifying a non-state party to a NIAC are basically derived from IHL´s notion of 'organized armed group'. As the purpose is to impose humanitarian obligations on such groups, Protocol II determines that they must have a 'responsible command" and "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.[90] As shown above, common Article 3 GC I-IV allows for a more flexible application of these criteria. Nonetheless, it is obvious that the regular armed forces serve as a model for an organized armed group which therefore is required to dispose of organizational structures at least in theory capable of conducing military operations in conformity with IHL standards.[91] In essence, the expectation of compliance with IHL´s standards is derived from a structure at least distantly

[86] It is noteworthy that the concept of war crimes has not only practical relevance within IHL and ICL, both also for other subareas of international law, as, e.g., international refugee law (see Art. 1 F (a) of the 1951 Convention Relating to the Status of Refugees, 189 *UNTS* 137) and regional ISL (see Art. 4 (h) of the 2000 Constitutive Act of the African Union, 2158 *UNTS* 3).

[87] It suffices here to indicate that this "general part" may be conceived as comprising international law´s most fundamental rules and principles, as, e.g., contained norms of *ius cogens*, the "Friendly Relations"-Declarations, UN doc. A/RES/2625 (1970) and the UDHR.

[88] See, e.g., THÜRER, Daniel. *International law*: theory, practice, context. Maubeuge: Ail Pocket, 2011. p. 246; DETTER, Ingrid. *The law of war*. 3rd. ed. Surrey: Ashgate, 2013. p. 8; BASSIOUNI, M. Cherif. The new wars and the crisis of compliance with the law of armed conflict by non-state actors. *Journal of Criminal Law & Criminology*, v. 98, n. 3, p. 711-810, 2008. p. 715.

[89] As is well known, the interpretation of this element for determining the conflict status of an individual is controversial. See, e.g., MELZER, Nils. *Interpretative guidance on the notion of direct in hostilities under international humanitarian law*. Geneva: ICRC, 2009; SCHMITT, Michael N. Deconstructing direct participation in hostilities: the constitutive elements. *International Law & Politics*, v. 42, p. 697-739, 2010.

[90] Art. 1 (1) Protocol II.

[91] See for the different theoretical approaches that have been developed: SASSÒLI, Marco. Taking armed groups seriously: ways to improve their compliance with international humanitarian law. *Journal of International Humanitarian Legal Studies*, v. 1, n. 1, p. 5-51, 2010. p. 12; KLEFFNER, Jann K. The applicability of international humanitarian law to organized armed groups. *International Review of the Red Cross*, v. 93, n. 882, p. 443-461, 2011.

comparable to 'civilized', uniform wearing soldiers instructed to respect the laws of war.

Leaving aside the, of course, legitimate interest of IHL to impose these standards on every party to an armed conflict, one might yet accept the sad reality that this expectation, has little pragmatism, if not, romance, in times of asymmetrical warfare by stigmatized non-state actors. Incidents like '9/11' or the 2015 terror attacks in Paris, but also the harm and devastation inflicted by militias or marauding bands in small villages or poor neighbourhoods all over the world do not really require the existence of a formally structured organization with different levels of hierarchized responsibilities. Rather, it is a fact that their destructive and highly lethal action can hardly be stopped exactly because these groups, although heavily armed, are clandestine and therefore informally structured underground organizations. They may become 'upperworld organizations' by controlling larger territories. However, where this is not the case, they rarely wear uniforms and have little incentive to respect any kind of rules, except their own one´s.

For comprehensible reasons, governments tend to react by treating the perpetrators of such armed violence as 'organized criminals', 'terrorists' or 'unlawful combatants'. Indeed, there often exists rudimentary information about the existence of networks disposing of a sort of foot soldiers headed by instructors (rather than true commanders) who execute the orders of a leader. The horrifying acts they commit may therefore be perceived as that of organized criminals who know all too well that the "game" they play tends to be a lethal business with 'no way back'. In states with a rather perforated monopoly of violence, they might be perceived as actors capable of establishing illegal forms of governance.[92] Independent of their motivation, their 'victory' basically consists of not being killed by a state or non-state rival – or triumph over them by committing a heroic suicide or other kamikaze act that causes harm and suffering on the adversary´s side.

Of course, extreme caution is necessary when applying labels like 'criminal' or 'terrorist organization' when discussing the quality of a group as a belligerent party. Some of them may indeed have – but this is a rather subjective question – a 'just cause'. In the end, every case is different. However, it is true, too, that such collectives have no legal authorization to wage war against whomsoever. At the same time, their armed violence often overtaxes the state´s obligation to guarantee law and order without recurring to (quasi-) military means, in particular, without involving its armed forces. As these groups may provoke 'times of war' as states of exception that justify the derogation of some human rights standards, they might be perceived as non-state belligerent parties. It therefore seems reasonable to relax the structural requirements applicable to organized armed groups and to accept the simple fact that there are organizations whose power to destruct and kill is evidently so advanced, that IHRL´s law enforcement-model can hardly be upheld by the state without gaps, if the latter is not willing to render part of the monopoly of violence or even territory to the respective non-state actor.

Against this background, the above-discussed possibility to consider crimes against humanity as war crimes *lato sensu*, i.e. committed in the context of war not (necessarily) recognized as armed conflict in terms of IHL, is of relevance. This is because the ICC has recognized that it suffices for 'private criminal organizations' (as opposed to the state as a criminal organization) to

> have sufficient means to promote or encourage the attack, with no further requirement necessary. Indeed, by no means, it can be ruled out, particularly in view of modern asymmetric warfare, that an attack against a civilian population may also be the doing of the a private entity of a group of persons […] not necessarily endowed with a well-developed structure that can be described as a quasi-State.[93]

On a more abstract level, it might even be stated that the controversy[94] behind the adequate interpreta-

[92] See, e.g., VON LAMPE, Klaus. *Organized crime*: analyzing illegal activities, criminal structures, and extra-legal governance. London: SAGE, 2016. p. 102; MÜLLER, Markus-Michael. Governing crime and violence in Latin America. *Global Crime*, v. 19, n. 3-4, p. 171-191, 2018. p. 175.

[93] *Prosecutor v. Germain Katanga*, *supra* note 7, para 1119. See also *Situation in the Republic of Kenya*, No. ICC 01/09, 31 March 2010, paras. 90-92. With regard to the latter decision, see KRESS, Claus. On the outer limits of crimes against humanity: the concept of organization within the policy requirement: some reflection on the march 2010 Kenya decision. *Leiden Journal of International Law*, v. 23, n. 4, p. 855-873, dec. 2010. p. 857-858, who already observed that 'one wonders why the Decision did not simply adopt the wide formulation contained in Article 2 of the United Nations Conventions Against Transnational Organized Crime'.

[94] See, e.g., O´KEEFE, Roger. *International criminal law*. Oxford: OUP, 2015; VON DER WILT, Harmen. Expanding criminal responsibility in transnational and international organised crime. *Groningen Journal of International Law*, v. 4, n. 1, p. 1-9, 2016. p. 1.

tion of the quality of the non-state actor responsible for an 'organizational policy' extends to the contemporary concept of a belligerent party and, thus, of war as well. As German sociologist Erhard Eppler stated two decades ago, criticizing Kaldor´s 'new war'-category[95]: 'the question, whether privatized violence is simply a forgotten form of war, already contains a part of the decision about what we are ready to accept'.[96] In his opinion, the answer should be negative, as it 'detracts from the more decisive question: May one oppose privatized violence with legitimate violence'.[97] One might agree with this statement at the same time recognizing that international law provides answers to the latter question. Indeed, 'governments and State officials are no longer permitted to simply resort to forcible measures against individuals and groups on their territory'.[98] This is pretty much the merit of IHRL whose derogation clauses, as shown above, exclude the treatment of such violent conflict as 'war'.

It is true, though, that one´s personal hermeneutic choice is in the end motivated by one´s own appraisal of the transformations of modern warfare. In Western countries, where the so-called 'modern state' can indeed impose its monopoly of violence with reasonable effectiveness, there might be a greater tendency to stick to a more-state centric notion of war, as, e.g. reflected in the scholarly opinion that only state-like organisations may encourage crimes against humanity. For those living under the rule of law it is relatively convenient to uphold the hypothesis that the notion of (international) armed conflict has substituted the concept of war.

In Africa, Asia and Latin America, however, most states are hardly comparable to their Western 'role models'. What is more is that their governments and peoples often experience extreme forms of large-scale armed violence by all sorts of state and non-state actors. They often occur in 'areas of limited statehood' and cause more victims than internationally recognized armed conflicts.[99] Downplaying these situations as 'short of war' might be considered a bit cynical. For a series of reasons, amongst them, the ensuring of fundamental rights ('human security'), armed forces can no longer avoid these dangerous places.[100] Against this backdrop, other disciplines, as, e.g. conflict studies, already recognize the existence of situations that deserve the label 'war', although falling short of being armed conflicts in terms of IHL.[101] It seems to us that a major obstacle that hinders international scholars to more directly engage with these findings is that they still rely on the 19th century concept of war or to update it only in part by accepting the concept of armed conflict as its 20th century substitute.

This dumbness is unnecessary and can be avoided by broadening the concept of war in so far as to adopt the organizational requirement to the troubling reality that even organized criminal groups, as defined by the 2000 UN Convention against Transnational Organized Crime[102], may wage war, even though rarely qualifying as parties to an armed conflict in terms of IHL. According to this convention, "'Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure'.[103] It suffices that the collective consists of 'three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes

[95] KALDOR, Mary. *New and old was*: organized violence in a global era. Cambridge: Polity, 1999.

[96] EPPLER, Erhard. *Vom Gewaltmonopol zum Gewaltmarkt?* Frankfurt a.M.: Suhrkamp, 2002. p. 87. (free translation of the authors).

[97] EPPLER, Erhard. *Vom Gewaltmonopol zum Gewaltmarkt?* Frankfurt a.M.: Suhrkamp, 2002. At 95. His critique has recently been appreciated by Kaldor in CHINKIN, Christine; KALDOR, Mary. *International law and new wars*. Cambridge: CUP, 2017. p. 6-7.

[98] HENDERSON, Christian. Internal strife and insurgency. *In*: MELZER, Nils; GEISS, Robin (ed.). *The Oxford handbook of international law of global security*. Oxford: OUP, 2021. p. 158-175.

[99] See, e.g., PETERKE, Sven. Urban insurgency, "drug war" and international humanitarian law: the case of Rio de Janeiro. *Journal of International Humanitarian Legal Studies*, v. 1, n. 1, p. 165-187, 2010. p. 166; KELLENBERGER, Jakob. Armed conflicts, international law, and global security. *In*: MELZER, Nils; GEISS, Robin (ed.). *The Oxford handbook of international law of global security*. Oxford: OUP, 2021. p. 254-271. p. 255.

[100] See, e.g., VAUTRAVERS, Alexandre. Military operations in urban areas. *International Review of the Red Cross*, v. 92, n. 878, p. 437-452, 2010. p. 438; RODILES, Alexandro. 'Law and violence in the global south: the legal framing of Mexico´s "NARCO WAR". *Journal of Conflict and Security Law*, v. 23, n. 2, p. 269-281, 2018. p. 271.

[101] See, e.g., HARBOM, Lotta; WALLENSTEIN, Peter. Patterns of major armed conflicts, 1997-2006. *In*: SIPRI yearbook 2007: armaments, disarmament and international security, appendix 2A. Oxford: OUP, 2008. p. 69-88. p. 69; HEIDELBERG INSTITUTE FOR CONFLICT RESEARCH. *Conflict Barometer 2020:* Disputes, Non-Violent Crises, Violent Crises, Limited Wars. Heidelberg, DE: HIIK, 2021. p. 9.

[102] 2000 United Nations Convention against Transnational Organized Crime, 225 *UNTS* 209 [hereinafter Palermo Convention].

[103] Art. 2 (3) Palermo Convention.

or offences […]'.[104] More precisely, it refers to 'serious crimes and offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit'.[105] The definition therefore does not apply to structured groups with a purely political cause, such as terrorists and rebels. One may therefore object that our proposal runs the risk of unduly criminalizing non-state actors that might have a legitimate, or, at least, a 'good cause'. This, however, would be a misconception, as we simply suggest relying on the structural requirements internationally recognized for determining the existence of organized criminal groups. The basic idea is to leave behind the stricter concept of organized armed group in terms of IHL as a reference point for identifying a belligerent party.

4.2 Threshold requirement: existence of a state of war

Another requirement is the assessment of whether such a collective is indeed 'at war' with a state or even non-state party. It needs to be established that there is indeed a state of war. With regard to NIACs, this requirement is examined by showing that the violence has reached a certain minimum threshold. However, a particular problem that emerges in situations of rather confuse violence difficult to attribute to a certain actor, is to qualify such acts as being relevant for the assessment to be made, i.e., acts of war.

There might be crimes and criminal acts that indeed have the quality of acts of war, yet, certainly not all of them – and *vice versa*. Likewise, not every act of violence, whether lawful or not, necessarily equates to an act of war. Hence, properly defining an act of war in line with international law is a challenging task. Yet, it is indispensable for both attributing a state of war to a 'structured group' and its delimitation from acts and situations of crime and violence 'short of war'.

Greenwood once observed: 'The term "acts of war" does not have the same precision or legal significance which it possessed when states more commonly declared themselves to be in a formal state of war'.[106] Certainly being aware of the transformations of warfare, he yet proposes a state-centric notion by considering as '[A]cts of war [..] all measures of force which one party, using military instruments of power, implements against another party in an international armed conflict'.[107] According to Greenwood´s view, only terrorist attacks attributable to another state can represent acts of war. If this link is missing, it is rather the attacked state´s military (re)action on foreign territory that triggers IHL.

It is of course possible to argue this way. As is well known, Protocol II, different from Protocol I and the GC I-IV, is void of any explicit reference to the terms 'war', 'warfare', 'victims' and 'prisoners of war'. Without a doubt, the 'w-word´s' banishing is a direct consequence of the ' two-box-approach' whose implied purpose is to avoid non-state belligerent parties being treated on equal footing with states. Nonetheless it seems that Greenwood´s definition is at odds with IHL´s general recognition of these actors as parties to a NIAC. Both Protocol II and common Article 3 GC I-IV (aspire to) impose obligations on them, e.g. by proscribing certain methods and means of warfare – i.e. acts of war. Protocol II does so by continuously referring to 'attacks'.[108] In IHL, this term is defined by Article 49 (1) of Protocol I meaning 'acts of violence against the adversary, whether in offence or in defence'. And while it is certainly true that it is 'unrelated to the concept of aggression or the first use of armed force',[109] while referring 'to the use of armed force to carry out a military operation at the beginning or during the course of an armed conflict", it can hardly be ignored that the term 'attack', as shown above, can also be found, although qualified by attributes, in the ICC Statute, the UNC as well as other international treaties. It might therefore be treated as a concept that overstretches different subareas of international law, without denying, that a special meaning has been attached to it in each of them. Anyway, these provisions may represent paths for further clarifying the

[104] Art. 2 (1) Palermo Convention.

[105] Art. 2 (1) Palermo Convention.

[106] GREENWOOD, Christopher. Scope of application of humanitarian law. *In*: FLECK, Dieter (ed.), *The handbook of international humanitarian law*. 2nd. ed. Oxford: New York: OUP, 2008. p. 45-78. para. 212.

[107] GREENWOOD, Christopher. Scope of application of humanitarian law. *In*: FLECK, Dieter (ed.), *The handbook of international humanitarian law*. 2nd. ed. Oxford: New York: OUP, 2008. p. 45-78. para. 212.

[108] See, e.g., Art. 11 (1), 13 (2), 14, 15 Protocol II.

[109] PILLOUD, Claude; DE PREUX, Jean. Art. 49. *In*: SANDOZ, Yves; SWINARSKI, Christophe; ZIMMERMANN, Bruno (ed.). *Commentary on the additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Norwall, M.A., USA: Martinus Nijhoff Publ., 1987. para. 1882.

conditions under which such attack may amount to an act of war.

Looking into ICL´s crimes against humanity and, more specifically, into its context element is of rather limited value. One might equate internationally recognized attacks with international crimes, thus neglecting the need to treat the (il)legality of acts of war as a separate issue. Yet it is worth remembering that our proposal is to perceive crimes against humanity as war crimes *lato sens*u for requiring a widespread or systematic attack against a civil population that has been promoted by a state or a non-state actor. It visualizes the existence of a sort of hidden nexus between attacks and acts of war.

One might therefore be tempted to condition the quality of the former as acts of war to a subjective element, a specific hostile intention once called *animus belligerendi*. However, relying on such *mens rea* would effectively run counter to modern international law´s objectivized approach to war situations for preventing abusive or simply inadequate interpretations.

A more promising approach may be derived from the UNC, where the concept of armed attack serves as a trigger for the right to self-defence[110]. This 'inherent right' of every state is the only circumstance precluding wrongfulness that permits governments to resort to the use of (proportional) armed force in their international relations without the Security´s Council´s authorization. One can even easily perceive this right as forming part not only of ISL, but of international law´s general part, too.

The wording of Article 51 UNC does not contain any explicit restriction with respect to the possible authors of an armed attacked. With good reasons, the majority of scholars defends that it must be attributable to a state.[111] Amongst these scholars, there is, however, a clear tendency to accept a relaxation of traditional attribution standards in order to extend the right to self-defence to armed attacks committed by non-state actors, in particular, terrorists.[112] Simultaneously, more and more scholars advocate an 'autonomous', less state--centric right to self-defence no longer conditioned to the attribution of the armed attack to a state.[113] It might be stated that the more abstract controversy revolving around this criterion is about the gradual unblocking of unilateral military reactions against non-state actors on foreign territory, i.e., without both the authorization of the Security Council and of the state in which the operations are conducted. Obviously, this controversy represents one of international law´s main intersections with the current discussions and findings of other disciplines on 'new' or 'low-intensity wars' as it revolves around the potential legal recognition of privatized warfare and the state´s right and duty to lawfully respond to it by military means, provided that less intrusive measures cannot be expected to produce relief.

Last but not least, as Blank has recently observed, 'the interplay between two foundational concepts in the two bodies of law [i.e., ISL and IHL, the authors] remains unexplored: the meaning of armed attack and the trigger for international armed conflict'[114]. This also holds true for NIAC. Different from IAC[115], such situations always require a minimum level of intensity of the violence. Yet, few doctrinal efforts have been made so far to better understand how far an armed attack,

[110] Art. 51 UNC.

[111] Compare, e.g., INTERNATIONAL COURT OF JUSTICE. *Armed activities on the territory of Congo* (Dem. Rep. Congo v. Uganda). Judgment of: 19 dec. 2005, [2005] *ICJ Rep.*, 168, at 222, para 146; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] *ICJ Rep.* 136, at 178, para. 139; CORTEN, Olivier. *The law against war:* the prohibition on the use of force in contemporary international law. Oxford: Portland: Oregon: Hart Publ., 2010. p. 196; GRAY, Christine. *International law and the use of force*. Oxford: OUP, 2008. p. 252; MOIR, Lindsay. *Reappraising the resort to force*: international law, jus ad bellum and the war on terror. Oxford: Portland: Oregon: Hart Publ., 2010. p. 156.

[112] See, e.g., SHAH, Niaz A. The "unwilling" and "unable" test in international law: the use of force against non-state actors in Afghanistan and Pakistan. *Asian Yearbook of Human Rights and Humanitarian Law*, v. 4, p. 109-138, 2020. p. 109. See also the critical comments by CORTEN, Olivier. The "unwilling or unable" test: has it been, and could it be, accepted? *Leiden Journal of International Law*, v. 29, p. 777-99, 2016.

[113] See, e.g., THIELBÖRGER, Pierre. The international law of the use of force and transnational organized crime. *In*: HAUCK, Pierre; PETERKE, Sven (ed.). *International law and transnational organised crime*. Oxford: OUP, 2016. p. 361-379. p. 375; WILSMHURST, Elisabeth. The use of force. *In*: MELZER, Nils; GEISS, Robin (ed.). *The Oxford handbook of international law of global security*. Oxford: OUP, 2021. p. 821-837. p. 828; VAN STEENBERGE, Raphaël. Self-Defence in response to attacks by non-state actors in the light of recent state practice: a step forward? *Leiden Journal of International Law*, v. 23, p. 183-208, 2010. p. 184.

[114] BLANK, Laurie R. Irreconcilable difference: the thresholds for armed attack and international armed conflict. *Notre Dame Law Review*, v. 96, n. 1, p. 249-289, 2020. p. 250.

[115] See, e.g., GRIGNON, Julia. The beginning of application of international humanitarian law: a discussion of a few challenges. *International Review of the Red Cross*, v. 96, n. 893, p. 139-162, 2014. p. 151; DINSTEIN, Yoram. *War, aggression and self-defense*. 3rd. ed. Cambridge: CUP, 2005. p. 193.

in particular, of a non-state actor, may also serve as a gatekeeper for these conflicts whose beginning is extremely difficult to determine. Much of the controversy surrounding the threshold element (intensified by the ICC Statute[116]) is about the inclusion of a temporal element into the analysis of the intensity of the violence, i.e their protracted nature.[117] Indeed, it seems relatively safe to state that, in principle, an armed attack in terms of Article 51 UNC can trigger IHL as a 'first strike', if followed by other use of armed force. This implies considering an armed attack as an act of war *lato sensu*, capable of proving a state of war.

It would exceed the limits of the present contribution to engross this thought, e.g. by exploring the discussion on the minimum gravity or the necessary 'scale and effects'[118] of an armed attack of non-state actor, the applicability of the 'accumulation of event' - or 'needle prick'- doctrine[119], etc. Rather, it is more important to shed further light on the difference between a single act of war and a 'state of war' or 'a time of war' that might be triggered by such act.

On the one hand, one could argue, that the main difference between the concept of NIAC and the proposed broad notion of war simply lies in the organizational requirement. According to this approach, it suffices to 'import' the criteria developed by doctrine and jurisprudence for determining the threshold of an NIAC. On the other hand, if one is ready to accept that there is actually no compelling reason for denying armed attacks the quality of acts of war, other dogmatic tracks soon surface.

If one treats an armed attack perpetrated by a non-state actor as a 'first strike' or 'coming out' of an organization as a potential belligerent party, the state´s reaction to it might be taken for determining the existence of a state of war. Due to its inherent right to self-defence, a state´s government has a series of options to react on the incident. It may decide to uphold the law enforcement model in strict compliance with IHLR and to persecute those responsible as criminals, if necessary, in accordance with the procedures of international cooperation in such matters. However, the government may also opt to respond to the attack with military force as an *ultima ratio*-decision, whose execution is disciplined by international law. Alternatively, or, cumulatively, a government might even officially declare (a state of) war against the non-state adversary, thus externalizing as well as personalizing a (sort of) an *animus belligerendi* that the other side already documented through the perpetration of the armed attack. For separating mere war rhetoric, the classical institute of recognition of belligerency might be revived and revisited.[120] For this, one may consider that such declarations are not meant to have any implications for the lawfulness of such non-state actors. Rather, the qualify them as 'unlawful belligerents'.[121]

It is worth recalling that such declarations of war against non-state actors already represent state practice, last but not least, known from the 'war on terror(ism)'. The '9/11' attacks, e.g. have not only caused commentators to qualify them as crimes against humanity.[122] They have also made the UN Security Council to expressly mention 'the inherent right to collective and individual self-defence' in its resolution that was approved a day after.[123] On the same day, the North Atlantic Treaty Organization (NATO) declared its intention to regard these deeds as an armed attack within the ambit of the 1949 Treaty of Washington – a decision thereinafter confirmed.[124] Little later, President Bush Jr. concluded in his address to the American Congress and the American Nation: 'On September the 11th, enemies of freedom

[116] Compare Art. 8 (2) (f) ICC Statute.

[117] CULLEN, Anthony. *The concept of non-international armed conflict*. Cambridge: CUP, 2010. p. 142.

[118] See, e.g., INTERNATIONAL COURT OF JUSTICE. *Military and paramilitary activities in and against Nicaragua* (Nicaragua v. United States). Judgment of: 27 jun. 1986, [1986] *ICJ Rep.*, 14, at 93, para. 195; BEER, Yishai. Regulating armed reprisals: revisiting the scope of lawful self-defense. *Columbia Journal of Transnational Law*, v. 59, n. 1, p. 117-168, 2020. p. 125.

[119] RUYS, Tom. *'Armed attack' and article 51 of the UN charter*. Cambridge: CUP, 2011. p. 168.

[120] As recently done, although restricted to an IHL perspective, e.g., by MCLAUGHLIN, Robert. *Recognition of belligerency and the law of armed conflict*. New York: OUP, 2020. p. 13.

[121] Compare HOFFMAN, Michael H. Terrorists are unlawful belligerents, not unlawful combatants: a distinction with implications for the future of international humanitarian law. *Case Western Reserve Law Journal*, v. 34, n. 2, p. 227-230, 2002. p. 229.

[122] See, e.g., ARNOLD, Roberta. The prosecution of terrorism as a crime against humanity. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, v. 64, p. 979-1000, 2004.

[123] UN doc. S/RES/1368 (2001), Preamble.

[124] Press Release, NORTH ATLANTIC TREATY ORGANIZATION. Statement by the North Atlantic Council. *NATO*, 12 sep. 2001. Available at: www.nato.int/docu/pr/2001/p01-124e.htm. Access on: 21 Jan. 2021; NORTH ATLANTIC TREATY ORGANIZATION. Invocation of Article 5 confirmed. *NATO,* 2 Oct. 2001. Available at: www.nato.int/docu/update/2001/1001/e1002a.htm. Access on: 21 Jan. 2021.

committed an act of war against our country'.[125] And he added: 'Our war on terror begins with Al Qaeda, but it does not end there.' One may relativize such statements as merely metaphorical because 'incorrect' in legal terms. In the light of the action, in particular, military operations, that followed this declaration of (a state of) war, one may also take them more seriously and try to assess their legal consequences by at least observing: They are compatible with international law, in particular, with Article 2 (4) UNC, in particular, after the occurrence of an armed attack. Another question is, of course, whether the measures taken in reprisal are lawful as well.

Finally, the formal derogation of human rights guarantees may also be proof of the existence of a state of war if triggered by an armed attack. While it is of course true that human rights monitoring is not required to determine the formal existence of such a situation as they can base themselves on the term 'public emergency' as an umbrella concept. France e.g. reacted to the coordinated terrorist attacks that killed 130 persons in the Paris region in November 2015 by officially notifying the UN Secretary General that the suspension of certain guarantees of the ICCPR was a necessary reaction to "a large-scale terrorist attack'[126]. At the same time, President Hollande spoke in a television address about a 'terrorist army' that had committed an 'act of war'.[127] There are probably numerous other examples of state practice, in particular, from rather forgotten situations in the Global South, showing that the mentioning of the term "war" in the derogation clauses of different human rights instruments might deserve a broader, more up-to-date interpretation than currently given to it by most scholars and international organs. It would imply to attach concrete legal consequences to the concept of war insofar, as it serves to justify relaxing the law enforcement paradigm, however, without going so far to make IHL applicable as well. Although this integrative approach, building upon the occurrence of an armed attack and a state´s reaction thereto may in practice not necessarily imply a different factual threshold in comparison to NIACs, and, besides, running risk of being accused of blurring the boundaries of ISL and IHL, it yet may be more coherent than only continuing to define war from the view point of IHL.[128]

5 Conclusion

A short look into international law´s long history has served as a reminder that war has been one of the discipline´s central themes until the end of the Second World War. The emergence of modern statehood made the old notion of the coexistence of public and private wars more and more disappear. Gradually, the latter became perceived as internal affairs, in principle, not regulated under international law. In the 19th century, the concept of war had become not only state-centric, but also linked to a radically binary division of the international legal order between the laws of peace and the laws of war.

In the aftermath of the Second World War, it was finally recognized that the classical concept had proven to be too exclusive and, at the same time, too vulnerable for abusive interpretations by governments. In an attempt to banish war as a legal concept, the 1945 UNC and the 1949 GC I-IV therefore introduced surrogate terms, such as the notion of armed conflict. Most scholars soon agreed that the concept of war had been replaced by the broader concept of international armed conflict. Simultaneously, common Article 3 GC I-IV was seen as an important step towards the re-inclusion of internal wars with non-state actors under international law. The doctrinal and jurisprudential efforts to develop the undefined notion of NIAC deflected much attention away from the debate on the transformations of warfare in so far as it became both politically dangerous and dogmatically cumbersome to engage with them by using the 'w-word'. It rather became commonplace to observe that the concept of war had been effectively abandoned by international law.

However, such notion elegantly overlooks that states continued to incorporate the term in different inter-

[125] TEXT: President Bush Address the Nation. *The Washington Post*, 20 sep. 2001. Available at: www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html. Access on: 21 Jan. 2021.

[126] UN doc. C.N.703.2015.TREATIES-IV.4 (Depository Notification) (2015). p. 1.

[127] Compare HENLEY, Jon; CHRISAFIS, Angelique. Paris terror attack: Hollande says ISIS atrocity was "act of war". *The Guardian*, 14 Nov. 2015. Available at: www.theguardian.com/world/2015/nov/13/paris-attacks-shootings-explosions-hostages. Access on: 28 Jan. 2022.

[128] See, e.g., DETTER, Ingrid. *The law of war*. 3rd. ed. Surrey: Ashgate, 2013. p. 36, who defines war as 'a sustained struggle by armed conflict of a certain intensity between States, or groups of a certain size, consisting of individuals who are armed'.

national treaties, in particular, into IHRL´s derogation clauses. This state of affairs points to the necessity of a dynamic interpretation of term 'war' without becoming stuck in IHL´s 'two box-approach'. Besides, a short look into ICL has not only revealed that an important part of international law´s vocabulary is today at odds with the traditional notion of war as an international armed conflict.

Against this background, the authors suggest to (re) consider the possibility to situate the concept of war in international law´s general part, overstretching as an umbrella concept its different subareas. Requiring the identification of a belligerent and a state of war, the organizational element may take into the account to lower standards that currently apply to an organized armed group as a party to an NIAC. This can be achieved, with some authority, by referring to the structural element of an organized criminal group. The state of war attributable to a non-state actor may be deduced from the fact that they could launch an armed attack that subsequently became treated as an act of war by the respective government.

The advantage of this approach is not only its apparent harmony with the surrogate concepts. Rather, it permits the interpretation of the term 'war' as contained in IHRL as well in other subareas of international law more coherently. Being thus a 'just cause' for the proclamation of a very specific public emergency, that allows relaxing IHRL´s law enforcement paradigm, however, without necessarily triggering the applicability of IHL, it can even be convincingly demonstrated, that the concept is not void of any legal consequences. By containing rules that restrict the state´s use of force, IHRL might even prove to be the more appropriate 'humanitarian law'. Another advantage is the approach´s facility to dialogue more directly with both contemporary state practice towards non-state actors which indicates the implicit recognition of governments that those actors, capable of launching armed attacks, may qualify as belligerents. Eventually, it also seems apt to engage more coherently with the findings of other academic disciplines.

Whether one approves the hypotheses presented above or not, it seems too premature to bid farewell to the concept of war in international law. On the contrary, it deserves much more scholarly attention.

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