EUROPEAN SOCIETY OF INTERNATIONAL LAW

Conference Paper Series

Conference Paper No. 18/2018

*2018 ESIL Annual Conference, Manchester
13-15 September 2018*

“International Law and Universality”

Wars of National Liberation and the Disruption of Hegemony in 1974

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Abstract:

The negotiations leading to what came to be Article 1(4) of the First Additional Protocol to the 1949 Geneva Conventions were so acrimonious that they threatened to wreck the 1974-1977 conference in Geneva, which eventually resulted in the two protocols. It is a fundamental precept of international humanitarian law that there is equality between belligerents, in the sense that the parties to an armed conflict have the same rights and duties in war. However, that privilege only applies to parties that are under a proper authority — traditionally only States – under the then prevailing hegemonic conception of such authority. When a number of Third World States and others introduced the idea of extending this combatant privilege also to national liberation movements in ‘armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,’ many Western States objected vehemently, and most others were sceptical. The idea was seen to violate the premise that international humanitarian law is neutral about the causes of conflict. Nevertheless, only a few months after the introduction of the amendments, most Western State had come to grudgingly accept it. Partly that was because of geopolitical and pragmatic reasons. However, partly, it is suggested, it was also because the amendment invoked the established concept of self-determination in order to ‘harmonize humanitarian law with contemporary general international law’. This shows that the universalizing language of IHL was malleable enough to accommodate contesting interests.

Keywords: Wars of National Liberation, National Liberation Movements, Additional Protocols to the 1949 Geneva Conventions, Hegemony, Universalism.

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1. Introduction

1.1 The problem

As Frédéric Mégret has noted, international humanitarian law (IHL) is a response to a ‘peculiarly Western problem’ — how to regulate war between States —formed along Western conceptions of war and law.¹ Hence, it seems to be one of many eminent examples of hegemony in international law – a set of globally valid norms formed by a particular will and a particular understanding which has become universal.

¹ Frédéric Mégret, ‘From “savages” to “unlawful combatants”: a postcolonial look at international humanitarian law’s “other”’, in Anne Orford (ed.) *International law and its others* (2006) 265, at 311.

However, while IHL may be a creature of a certain hegemony, it is not necessarily closed to impetus from other quarters or that it cannot be made to fit with other understandings. For instance It is not at all clear that IHL necessarily fits badly with the interests of Third World States.²

I will look at one instance in which the Third World was able to make IHL fit their interests, namely the discussions leading to Article 1(4) of the First Additional Protocol of 1977 to the Geneva Conventions, the provision that assimilates wars of national liberation to international armed conflicts. In order to put it in context, I will explain how it relates to fundamental notions of IHL like combatant privilege. Thereafter follows an analysis of the preparatory works for the Additional Protocols. Lastly, I will add some reflections on universalism, particularism and hegemony.

I need to bracket a number of issues, including these two: Whether the diplomats gathered in New York and Geneva spoke on behalf of the peoples of the Third World or not, and what the relations between present IHL and various non-Occidental conceptions of laws of war might be. Those issues are complex and interesting. However, my attention here is on what the negotiations have to say about universalism and hegemony, or, to be more precise, what they have to say about the possibilities to exploit hegemony. For that reason, it is sufficient to note that the Third World delegates presented ideas different from the prevailing orthodoxy and that a number of them were well able to challenge that orthodoxy in the contemporary IHL vernacular.

1.2 Traditional IHL and its presuppositions

As is well-known, the modern law of armed conflict, or IHL, grew out of a number of law-making efforts from the mid 19th century, including the 1864 Geneva Convention on Wounded in the Field, the Hague Conventions of 1899 and 1907 and eventually the four 1949 Geneva Conventions.

A fundamental precept of these conventions, grounded on both realistic and humanitarian precepts, is that there should be equality between belligerents, in the sense that the parties to an armed conflict have the same rights and duties in war; the *jus in bello* is independent of the *jus ad bellum*. This entails that combatants cannot be prosecuted for belligerent acts in accordance with IHL, regardless of whether the initial resort to war was in violation of the *jus ad bellum* or not.³ However, and this is important for the ensuing story, that privilege only applies to parties that are under a proper authority — that is, States. In a non-international armed conflict, the members of the non-State armed groups are guilty of rebellion and may be prosecuted by the territorial sovereign. Hence, if the status of armed conflict has set in, a special set of rules will apply which give a certain group

² Conversely, there are numerous examples of how western States have felt frustrated by the legal regimes on war and therefore have felt the need to bend or break the terms of those regimes (colonial wars, measures short of war, the war on terror, etc).

³ L.C. Green, *The Contemporary Law of Armed Conflict* (1993) 17 & 54-55; Charles Rousseau, *Le Droit des Conflits Armés* (1983) 24-26.

of people (combatants) ‘a limited license to take life and cause destruction,’⁴ but only if that group is under a proper authority.

This relates to another historically given aspect of IHL. It predominantly concerns international wars -- wars between States. Wars between States and non-State actors had previously been regulated through discretionary and analogical application of the laws of war (for instance in the American Civil War), and the first international regulation of non-international armed conflicts was the common Article 3 of the 1949 conventions. It is held to bind both parties to a non-international armed conflict equally, but it does not affect the inequality in liability; criminal liability attaches to rebel fighters, and to them only. It was clearly understood among the parties that this applied “particularly” to colonial wars.⁵ During the Geneva Conference of 1974-77, the Indian delegate explained the significance of this:

The adoption of the United Nations Charter after the Second World War gave an impetus to the intensification of wars of national liberation The imperial and colonial powers had, however, a clever pretext that the colonies were overseas parts of their metropolitan empires and hence armed liberations struggles were [non-international] armed conflicts.⁶

To sum up, international humanitarian law as provided for in the 1949 Geneva Conventions assumes that the world is divided into States with exclusive authority to use violence. Like other bodies of international law, IHL assumes that these ideas have universal valence and validity. It is clear that these ideas have been born and bred in certain social, political, philosophical and legal milieus, but it is equally clear that they have been universalized through the Geneva Conventions. There is no doubt that there is something hegemonic about this. But it is also the case that these universal ideas are sometimes malleable enough to be changed in order to suit the interests and ideas of subalterns.

2. Contestation in Geneva

2.1 Prehistory

When the 1949 Geneva conventions were negotiated among 63 States, there were very few Asian or African States present. Twenty-five years later, in 1974, when the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts opened with more than 120 delegations, the international political landscape and the balance of

⁴ Dieter Fleck, ‘Non-International Armed Conflict’, in Dieter Fleck (ed), *The handbook of international humanitarian law* (2nd ed, 2008), 580, at 612, para 1202. See also David Kennedy, *Of war and law* (2009) 167 and passim.

⁵ Jean S. Pictet (ed), *Commentary on the Additional Protocols to the Geneva Conventions* (1987) 46. See also Georges Abi-Saab, ‘Wars of national liberation and the development of humanitarian law’, in *Declarations on Principles: A Quest for Universal Peace* (2007): 143-173. 144. For some details, see N. Zamir, *Classification of conflicts in international humanitarian law: The legal impact of foreign intervention in civil wars* (2017) 26-27.

⁶ CDDH/SR.49, explanation of vote.

voting power had changed radically.⁷ The delegates that gathered in Geneva did so under the shadow of the Arab oil embargo, the US exit from Vietnam and the negotiations on the Establishment of a New International Economic Order. As expressed by the delegate from Tanzania, they were no longer ‘prepared to accept a humanitarian law drawn up solely in the interest of the imperialist Powers.’⁸ In order to be universal, Liliane Boa of the Ivory Coast explained, humanitarian law ‘should take account of the subsequent evolution of the situation, both as regards the former colonial powers and the colonised countries.’⁹

In a sense, the drafting history of the 1977 protocols begins already in 1968, when the UN organized a conference on human rights in Tehran.¹⁰ The conference was to a considerable degree a failure, but it did pass a resolution on human rights in armed conflict. After that, the UN continued to be interested in the issue. A number of controversial resolutions were adopted by the General Assembly, most recently before the conference and most significantly Resolution 3103 of 1973, which provided that ‘persons engaged in armed struggle against colonial and alien domination and racist regimes’ should enjoy the same status as combatants in an international armed conflict.¹¹ In addition, from 1969, the United Nations Secretary General had issued annual reports on the respect for human rights in armed conflicts. Around 1970, it was clear, however, that the UN deferred the treaty-making to the International Committee of the Red Cross (ICRC).¹² The ICRC on its part, initiated a discussion at the International Red Cross conference in 1969,¹³ thereafter invited government experts to meetings in 1971 and 1972, and had a preparatory discussion at the International Red Cross Conference in 1973.

It was generally agreed at the time that guerrilla warfare¹⁴ – as seen in Vietnam, the Middle East, Southern Africa, etc -- needed to be addressed. Guerrilla warfare could take place in an international armed conflict, in a non-international armed conflict and in wars of national liberation. How to regulate such warfare turned on the definition of combatant as well as on the application of IHL to wars other than wars between States.

Before the conference, the ICRC had concluded that a clear majority of States would not be willing to adopt the same regulations for non-international as for international armed conflicts.

⁷ Geoffrey Best uses the words “radical change”. For his recount, see Geoffrey Best, *War and Law since 1945* (1994), 343-345.

⁸ Tanzania CDDH/I/SR.3, para 23. Cf also Nigeria, CDDH/I/SR.4, para 34.

⁹ CDDH/I/SR.4, para 13.

¹⁰ These facts can be perused in many texts, but I have based myself on the eminently readable Keith Suter, *An international law of guerrilla warfare: The global politics of law-making* (1984).

¹¹ On this development, see, i.a., Jean J. A. Salmon, ‘La Conference Diplomatique sur la Reaffirmation et le Developpement du Droit International Humanitaire et les Guerres de Liberation Nationale,’ 12 *Revue belge de droit international* (1976) 27, at 32-33; I. P. Blischenko, ‘The National Liberation Movement and International Humanitarian Law’, 12 *Military Law & Law of War Review* (1973) 308, at 311; Jean S. Pictet (ed), *Commentary on the Additional Protocols to the Geneva Conventions* (1987) 43-46 & 47-49. See also D. W. Glazier, ‘Wars of National Liberation’, *Max-Planck Encyclopedia of International Law*, online, paras 6-8.

¹² Keith Suter, *An international law of guerrilla warfare: The global politics of law-making* (1984) 68.

¹³ The Red Cross international conferences are held every four years for the whole Red Cross movement, that is the ICRC, International Federation of Red Cross and Red Crescent Societies and the National Red Cross and Red Crescent Societies, as well as governments.

¹⁴ At this time, ‘guerrilla’ was still spelled with the original, Spanish spelling, while today ‘guerilla’ is more common in the English language.

Consequently, the ICRC submitted two draft protocols, of which the second one (AP II) was to cover non-international conflicts. ICRC explained that the legal status ‘of the parties was fundamentally unequal, since a part of the population would be fighting against the Government in power....’¹⁵

Almost all governments wanted to retain that distinction, but a great number of them wanted to internationalize a certain type of conflict, namely wars of national liberation (WNL). As we will see, that question almost wrecked the conference already during the first session in 1974. That was not foreseen by the West even at the eve of the conference,¹⁶ though they should have been warned. From 1970, there were a number of references to wars of national liberation in the UN Secretary General’s reports,¹⁷ but most Western governments failed to take notice.¹⁸ In the introductory report which the ICRC provided to the first preparatory conference of government experts in 1971, the term did not appear at all. In the report from the 1972 conference, by contrast, WNL appears 34 times in different permutations.

2.2 The negotiations in brief

The ‘atmosphere of confrontation’¹⁹ or even ‘violent controversy’²⁰ over wars of national liberation during the first session of the conference in 1974 has been recounted many times in different ways,²¹ but a skeleton narrative is nevertheless necessary. The conference opened on 20 February, but due to prolonged debates about whether to invite national liberation movements or not, the discussions on the drafts in Committee I began only on 11 March. The negotiations on Article 1 took 2/3 of the time allotted to that Committee. Four draft amendments to Article 1 were presented at the

¹⁵ CDDH/I/SR.22, para 13, published in *Official Records*, Vol. VIII, p. 203.

¹⁶ Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) 164.

¹⁷ See Respect for Human Rights in Armed Conflicts: Report of the Secretary-General, 18 September 1970, A/8052, paras 206 et seq, not least para 214.

¹⁸ The Canadian government, however, did react in its response to a query of the Secretary-General. 15 Respect for Human Rights in Armed Conflicts: Comments by Governments on the reports of the Secretary-General, Note by the Secretary-General, June 1971, A/8313 and add. 1, 2, 3, p 15.

¹⁹ The UK, CDDH/I/SR.36, para 85.

²⁰ Georges Abi-Saab, ‘Wars of national liberation and the development of humanitarian law,’ in R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 143, at 153.

²¹ Jean J. A. Salmon, ‘La Conference Diplomatique sur la Reaffirmation et le Developpement du Droit International Humanitaire et les Guerres de Liberation Nationale,’ 12 *Revue belge de droit international* (1976) 27; Philippe Bretton, ‘Remarques générales sur les travaux de la Conférence de Genève sur la réaffirmation et le développement du Droit humanitaire applicable dans les conflits armés’ 23 *Annuaire français de droit international* (1977) 197; M. Bothe, K.J. Partsch & W.A. Solf (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2 ed, Leiden, 2013); Keith Suter, *An international law of guerrilla warfare: The global politics of law-making* (1984) 128 et seq; David P. Forsythe, ‘The 1974 Diplomatic Conference on Humanitarian Law: Some Observations’, 69 *American Journal of International Law* (1975) 77; and more briefly J. H. H. Weiler, & A. Deshman, ‘Far be it from thee to slay the righteous with the wicked: An historical and historiographical sketch of the bellicose debate concerning the distinction between jus ad bellum and jus in bello’ 24 *European Journal of International Law* (2013) 25.

beginning, but the two that are most relevant for this discussion were proposal 5, from East European and other States, and proposal 11, submitted by Asian, African and other States. After a first round of discussions, these two proposals were amalgamated into proposal 41 and later, after some minor changes, presented as proposal 71. This proposal was then adopted by the committee towards the end of the first session, on 22 March 1974, by a vote 70-21-13.²² Most Western States, including Israel and South Africa, voted against. Five Western States abstained and two — Finland and Norway — voted for the amendment.²³ Several of the Western States who did not vote in favour stated that they might not necessarily be opposed to the idea as such, but were not happy with the formula used and thought that the decision was premature. The amendment was adopted by the plenary by the end of the fourth and final session as Article 1(4), together with the complementary article 96(3) on ‘Treaty relations upon entry into force of this Protocol’ (see below).²⁴

Deliberations on what came to be Article 1(4) were held in the first plenary session, in a number of meetings of the first committee, then again in the plenary towards the end of the first session and finally, in 1977, again in the plenary, since a vote was taken on that particular article.²⁵ A number of delegations made explanations of vote both in the committee and the plenary. There is, hence, a wealth of public material to analyse. In addition, the issue was discussed in a number of meetings in different configurations during the conference and, not least importantly, in meetings between government officials – sometimes with the ICRC – between the first and the second session. Some of these informal discussions have been referenced in writings by participants, while I have learned about them also through sources in the Swedish National Archives.²⁶

2.3 The two disruptive amendments

The overarching/overt purpose for the conference was to increase the humanitarian protection of the victims of war.²⁷ Humanitarian motives were particularly important for some Western countries, including those who believed that the amendment would extend the humanitarian protection of IHL to more conflicts; some of these States (notably Norway and Sweden) also believed that there should be no or little distinction between international and non-international conflict.²⁸ But the

²² CDDH/I/SR.13, para 42.

²³ It was adopted as Article 1 (2), but later moved to paragraph 4 of the same article.

²⁴ The US had made it known that it might not be able to continue the negotiations had the amendment been finally adopted during the first session. Chiffer 38 to Stockholm from Washington, Dossier HP 30B, Swedish National Archives.

²⁵ CDDH/I/SR.36, paras 40-58.

²⁶ The Swedish delegation was one of the most active ones during the conference, but its focus was on other issues, not least on what eventually came to be the Convention on Certain Conventional Weapons. Through its head of delegation, Hans Blix, it did however take a quite active part in the intersessional work on this issue, and even worked on a compromise formula.

²⁷ For that purpose, it was important not only to introduce rules but also to incentivize soldiers to comply with them. If rebels were to be treated as criminals, and perhaps even subjected to capital punishment, there would be little incentive for them to comply with IHL.

²⁸ Longva (Norway) said that his delegation had sponsored the amendment introduced by the Egyptian representative ‘because it felt strongly that all victims of war must be protected, regardless of the political or legal classification of the conflict.’ His delegation ‘reserved its right to propose at a later stage that the two

humanitarian argument was also invoked by a number of Eastern and Third World States.²⁹ Still, Third World States (though not the Eastern bloc), were much more reluctant to accept far-reaching rules regarding internal armed conflicts, for fear of undermining their stability.³⁰

For the Third World, the status of national liberation movements (NLMs) was of paramount interest in itself, and this pertained in particular to the status of NLM fighters, who ought to be recognized as legitimate combatants.³¹ In the ICRC draft before the conference, there was no provision on the status of wars of national liberation. The problem of combatant status of members of liberation movements had instead been addressed in a discussion adjacent to article 42 in the draft for the first protocol.³² The ICRC suggested that fighters in national liberation movements could receive the same treatment as combatants in an international armed conflict, without making national liberation wars international. However, this fell far short of what the Third World wanted. It was to deal with this that proposals 11 and 5 were introduced.

Proposal 11, which constituted the focus of the discussions before the release of the amalgamated proposal 41, was sponsored by a number of Third World countries, but also by Australia, Norway and Yugoslavia. It was introduced by the Egyptian lawyer and scholar Georges Abi-Saab, a leading draftsman and one of the dominating figures in the ensuing debate.³³

The situations referred to in the preceding paragraph [that is, international armed conflicts; PW] include armed struggles waged by peoples in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and defined by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The other main proposal, number 5, was submitted by the Soviet Union and its allies as well as by Algeria (which also sponsored proposal 11!), Tanzania and Morocco.

Protocols be amalgamated. It was therefore unable to consider the adoption of article 1 of either draft Protocol as final at the present stage.’ CDDH/I/SR.1, para 21.

Sweden would have preferred an intensity threshold, due to humanitarian considerations. Protocol from Nordic consultations on the development of international humanitarian law, Helsinki 3 September 1974, Memo Hjertsonsson 1974-09-11, p 4, Dossier HP 30B; Swedish National Archives. See also statement by Carl Lidbom, Minister of State, on March 7, Press Release 14 March, 1974, p 4, Dossier HP30B, Swedish National Archives

²⁹ Yugoslavia CDDH/I/SR.1, para 19.

³⁰ See M. Bothe, K.J. Partsch & W.A. Solf (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2 ed, 2013) 9; Geoffrey Best uses the words “radical change”. For his recount, see Geoffrey Best, *War and Law since 1945* (1994) 346.

³¹ N. Zamir, *Classification of conflicts in international humanitarian law: The legal impact of foreign intervention in civil wars* (Cheltenham, 2017) 40; Richard Baxter, ‘The Geneva Conventions of 1949 and Wars of National Liberation’, in Detlev F. Vagts, Theodor Meron, Stephen M. Schwebel, and Charles Keever (eds), *Humanizing the Laws of War: Selected Writings of Richard Baxter* (2013) 277, at 278.

³² International Committee of the Red Cross. Draft Additional Protocols to the Geneva Conventions of August 12, 1949 (1973) at 47, 48, 52.

³³ Egypt dominated the debate, according to a Swedish delegate. Doc 80:A, 336, 1974-03-12, Dossier HP 30B, Swedish National Archives

The international armed conflicts referred to in Article 2 common to the Conventions include also armed conflicts where peoples fight against colonial and alien domination and against racist regimes.

The final, amalgamated proposal number 71, which was adopted as Article 1(2) and later came to be Article 1(4), reads:

The situations referred to in the preceding paragraph include armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

From a Western perspective, the two original proposals 5 and 11 might have looked equally bad, but they differed in some quite significant respects. As we will discuss below, proposal 11 was based directly on an accepted principle of international law, the right of self-determination, but it does not point out the counterparty of the people that struggles for self-determination. It was clear, at least from the Egyptian perspective, that the application was potentially global and not restricted to the effects of colonialism.³⁴ This was a fact that was appreciated by a number of delegations, including some Western ones, like Germany and Australia, who thought that this global scope was a principled one and that it would extend the application of the protocol, and thus also its humanitarian benefits.³⁵

However, the potential application to non-colonial situations was a weakness to some delegations. Not only did it make the scope of application less certain, it could also threaten the territorial integrity of plurinational States. Further, there were two ongoing situations that many of the supporters wanted to be included, which were covered in proposal 5 but not necessarily in proposal 11, namely South Africa and, arguably, Rhodesia/Zimbabwe.³⁶ Here, the enemy of the national liberation movement was not an external colonial power but a domestic racist regime. This difference between the two groups did not come out in the open during the debates, though.

The non-reference to self-determination in proposal 5 meant that it was not based explicitly on an accepted principle of international law. Nevertheless, it could be argued, as Abi-Saab did (after the amalgamation), that '[s]truggles against colonial domination, alien occupation and racist regimes

³⁴ CDDH/I/SR.5, para 5. Abi-Saab later wrote, in somewhat more plain language: 'only a denial of equal access to government ... can give rise to a justifiable claim to self-determination in plural States.' Georges Abi-Saab, 'Wars of national liberation and the development of humanitarian law,' in R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 143, at 150. This view has been corroborated in doctrine. Michel Veuthey, 'Guérilla et droit humanitaire', *International Review of the Red Cross* (1983) 119, at 125. However, the ICRC Commentary takes a different position. Jean S. Pictet (ed), *Commentary on the Additional Protocols to the Geneva Conventions* (1987) 54-55.

³⁵ Germany, CDDH/I/SR.14, para 9; Australia, CDDH/SR.22, para 14. On the Australian position, see Georges Abi-Saab, 'Wars of national liberation in the Geneva conventions and protocols', 165 *Recueil Des Cours* (1979) 353, at 398

³⁶ One could, of course, make a very credible case that Rhodesia was still a British colony, since its independence had not been recognized.

were ... specific applications of the principle of self-determination...'³⁷ On the other hand, the terms used, 'colonial and alien domination and against racist regimes' were not legally defined, even though they had been used in a number of UNGA resolutions. These words were later modified to 'against colonial domination and alien occupation and against racist regimes', but the vagueness and 'political' character of the terms remained and was a frequent target of criticism by opponents, and commentators are still struggling to determine what they mean; 'racist regime' is vague and 'alien occupation' is ambiguous.³⁸ There was some hesitation, on the part of the sponsors of CDDH/I/ 11, about the merger, as voiced by Abi-Saab.

[M]ost of the criticisms, including those of political and subjective criteria, of reviving the doctrine of just war, and of envisaging only particular cases, were directed to CDDH/I/5; and though the principle of self-determination was also criticized for being too abstract and over-general to provide operational criteria, it was recognized even by the critics of the amendments as a valid legal premise.³⁹

2.4 The import into IHL: The principle of self-determination

The principle of self-determination of peoples, referenced in proposal 11 and implied in proposal 5, was at the heart of the discussions. It could entail different things, and each of them will be discussed in more detail. The first potential consequence of the principle of self-determination is that the territory and/or the people have a separate status. The second one is that such peoples are pursuing a just war, and therefore they should have a privileged or at least treatment equal to that of the other party. It was not always clear what delegates invoked when they referred to or discussed the principle and its various applications, but I am convinced that at least the leading figures in the debate were well aware of the distinctions, and I will therefore deal with them separately.

A. *Separate status?*

The first argument, following from the principle of self-determination (though not a necessary corollary), is that the territory and/or the people have a status separate from that of the metropolitan State. This could follow from the Friendly Relations Declaration (FRD), which provides that a people has a right to self-determination; it is a common definition of a legal subject that it is a figure that has rights in the particular legal system at hand.⁴⁰ The delegate of Uganda pointed out that 'the international community, expressing itself through the United Nations, had recognized that colonized peoples had identities of their own, different from that of the metropolitan power which

³⁷ CDDH/I/SR.36, para 68.

³⁸ See, for instance, Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) 167-168.

³⁹ Georges Abi-Saab, 'Wars of national liberation in the Geneva conventions and protocols', 165 *Recueil Des Cours* (1979) 353, at 387

⁴⁰ See, for instance, Jan Klabbbers, *International Law* (2013) 68.

had colonized them'.⁴¹ For several delegations, the focus was on the status of the NLM. Morocco, as well as Syria and Senegal, averred that the national liberation movement 'had a legal status in public international law because their right to self-determination was recognized in the Charter of the United Nations and other instruments.'⁴² Abi-Saab found that legal personality of the NLMs was due to their 'control of the population,' which gives them a representative capacity not only in so far as the prosecution of the war is concerned, but also regarding political issues. He compared them to recognized governments in exile.⁴³ Tanzania even went so far as to say that 'the liberation movements had been given a status akin to sovereignty,'⁴⁴ suggesting a conception of such peoples as proto-States, which seems to be plausible at least for colonies. From that point of view, it is not a big step to say that such subjects have the proper authority to wage a war.⁴⁵ And this may seem to tally with the State-like conception that came to be expressed three years later, when the final provisions were adopted, in Article 96(3) (first adopted as Article 84(3)), which speaks of the 'authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in Article 1, paragraph 4.'⁴⁶

The Friendly Relations Declaration further provides that '[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it'. Hence, one could argue, the law of self-determination, including Chapter XI of the Charter, has created a special kind of territory, the non-self-governing territory [NSGT], with a status different from the territory of the metropolitan State. A conflict between an NSGT and a State (the colonial State or others) cannot be taken to be an internal conflict, since it is not within the territory of the same legal subject. This was pointed out by Norway, Romania and Venezuela, and also invoked by Abi-Saab in his Hague lectures of 1979.⁴⁷ Bothe et al commented: 'On this basis the way was opened for the interpretation that the guarantee of territorial integrity and national unity refers to the metropolitan territory of the administering State only and that a similar guarantee is valid for each colonial unit separately.'⁴⁸

The opponents of the amendment did not really try to rebut this argument, and for good reasons. During the 1972 expert meeting, some experts claimed that 'struggles against colonialism and for self-determination could not be international conflicts if they took place entirely within the territory

⁴¹ CDDH/I/SR.5, para 30. See also Pan-Africanist Congress – PAC, CDDH/I/SR.6, para 14.

⁴² CDDH/I/SR.1, para 39. Syria, CDDH/I/SR.4, 23; Senegal, CDDH/I/SR.6, para 12.

⁴³ Georges Abi-Saab, 'Wars of national liberation in the Geneva conventions and protocols', 165 *Recueil Des Cours* (1979) 353, 410-412, quotation from p 411. Verwey corroborated this view; Wil D. Verwey, 'Decolonization and Jus ad Bellum: A Case Study on the Impact of the United Nations General Assembly on International Law', R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 121, at 126.

⁴⁴ CDDH/I/SR.6, para 2.

⁴⁵ On that issue, see generally Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988).

⁴⁶ However, in its explanation of vote, Canada stated that it "does not agree that national liberation movements have the capacity to contract a treaty either by international customary law or in accordance with the Vienna Convention on the Law of Treaties. CDDH/SR.46, explanation of vote.

For an excellent analysis of Article 96(3), in particular regarding the status of the NLM, see Heather A. Wilson, *International Law and the Use of Force by National Liberation Movements* (1988) 168-172.

⁴⁷ Norway, CDDH/I/SR.1, para 25; Romania, CDDH/I/SR.1, para 15; Venezuela, CDDH/I/SR.3, para 29

⁴⁸ M. Bothe, K.J. Partsch & W.A. Solf (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2 ed, Leiden, 2013) 47.

of a High Contracting Party.’ In 1974, in a forum in which each Statement was attributed to a State, it was no longer opportune to say that a war of national liberation took place within the territory of the colonial power. In fact, the representative of New Zealand (Quentin-Baxter), who voted against the amendment, nevertheless noted that

[t]he Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States ... followed the classical doctrine, save that it recognized that, colonial territories had an existence distinct from that of the countries administering them, and that relations between the administering countries and the colonial territories did not have a purely internal character.⁴⁹

Yet, the argument about the status of the territory, this argument was not widely invoked by the proponents, surely because it did not apply to South Africa.

B. Subjective intentions?

As mentioned above, the arguments of the proponents regarding the legal status of peoples with a right of self-determination, national liberation movements and non-self-governing territories were not countered by the opponents. Instead, they attacked a number of different but related features of the proposals, which they held to be unorthodox, if not heretic. The most important cluster of arguments claimed that the proposals, by allegedly attaching importance to the cause of the struggle, would blur the distinction between *jus ad bellum* and *jus in bello* and provide a privileged position to certain actors and thus upset the fundamental IHL principle of equality between the parties.

Firstly, the opponents frequently objected that the provision was subjective, in the sense that the terms would be difficult to interpret and to apply, as already referenced above. The relevance of this argument was generally not disputed by the proponents, although they claimed that it was exaggerated. From the point of view of the current discussion, that issue is less relevant.

A more interesting argument made by several opponents of the amendment, including France, Switzerland, Canada, Spain, Israel and Belgium,⁵⁰ was that the proposal was subjective in the sense that it would attach importance to the subjective intentions (‘self-determination’) of the protagonists. The French head of delegation, Christian Girard, said that

[c]onsideration of elements such as motivation, justice and legitimacy, which it was quite normal to discuss in the United Nations, would be fatal in an assembly held under the auspices of the ICRC. Humanitarian law must remain free of any notion of political motivation or subjective judgment, and his Government was not prepared, under any circumstances, to sacrifice that basic principle.⁵¹

⁴⁹ CDDH/I/SR.4, para 6

⁵⁰ Switzerland, CDDH/I/SR.3, para 13; Canada, CDDH/I/SR.3, para 16; Spain, CDDH/I/SR.3, para 19; Israel, CDDH/I/SR.14, para 5; Belgium, CDDH/I/SR.1, para 34.

⁵¹ CDDH/I/SR.1, para 49.

And in the words of the Reagan administration ‘...subjective distinctions based on a war’s alleged purposes would politicize humanitarian law and eliminate the distinction between international and non-international conflicts.’⁵²

However, to attach importance to the intentions of the parties is not alien to IHL. Until 1949, ‘war’ had been defined partly by the subjective intentions of the parties, that is, the intention to use military force to overtake one another.⁵³ One could have rebutted the argument about subjectivity by saying the intentions were necessary in order to distinguish the war of national liberation from other conflicts. For instance, if a guerrilla movement was unhappy, not with the colonial status of the territory, but with the policies of the colonial government, and wanted to have it replaced with another colonial government in the same metropolitan capital, that movement would not implicitly invoke the separate status of the NSGT but rather confirm the colonialist view that they belonged to the same State. By contrast, as expressed by some IHL experts, ‘if the authorities representing a people in conflict within the meaning of this article are seeking *in fine* the creation of a new State, a conflict could formally be qualified as international even though one of the belligerents is not (yet) established as a sovereign entity.’⁵⁴ In fact, it could be said that a people, by fighting against the colonial etc power for the purpose of secession, actually establishes, or at least confirms itself as a political community by invoking this right.

Such arguments were not, however, provided by the proponents. To the extent that the argument on subjectivity was rebutted, it was merely to State that the facts were objective. Abi-Saab, explained that ‘the criticism of subjectivity ...is ... based on a misunderstanding, because the amendment did not refer to the intention of liberation movements, but to their objective situation, and whether it warrants the application of the principle of self-determination or not.’⁵⁵

This objection to the amendment concerned the relevance of ‘subjective’ intentions, but equally if not more common were objections to the effect that the legal evaluation of these intentions – a “just war” or not -- should have no effect on the status of the parties.

⁵² Ronald Reagan, Letter of Transmittal, Jan. 29, 1987, MESSAGE FROM THE PRESIDENT TRANSMITTING AP II IIIIV, cited from US Department of Defense, *Law of War Manual* (2015), subsection 3.3.4, p 77, fn 39. 7

⁵³ The state of war is ‘le résultat de la volonté des États en conflit.’ Charles Rousseau, *Le Droit des Conflits Armés* (1983) 7. See also Elzbieta Mikos-Skuza, ‘International Law’s Changing Terms: ‘War’ becomes ‘Armed Conflict’’, in Mary Ellen O’Connell (ed.), *What is War? An investigation in the Wake of 9/11* (2007) 19, at 21-22.

⁵⁴ ‘International humanitarian law and other legal regimes: interplay in situations of violence’, Supplemental Report to the XXVIIth Round Table on Current Problems of IHL (San Remo), prepared by the ICRC, (Nov 2003) 4, < https://www.icrc.org/en/doc/assets/files/other/interplay_other_regimes_nov_2003.pdf>, visited on 3 November, 2018. See also Elizabeth Chadwick, ‘National Liberation in the Context of Post- and Non-Colonial Struggles for Self-Determination’ in Mark Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (2015) 845.

⁵⁵ Georges Abi-Saab, ‘Wars of national liberation in the Geneva conventions and protocols’, 165 *Recueil Des Cours* (1979) 353, at 380

C. *Just war?*

The right to self-determination could be taken to mean that NLMs, as representatives of peoples and territories, should have a right to be treated *better* than the unjust colonial, alien and racist governments, or that they should have the right to be treated on terms *equal* with such governments, including that their fighters should enjoy the combatant privilege.⁵⁶ The former view is in contravention of the fundamental tenet of IHL that parties to a conflict shall have the same rights and obligations, while the second view – that NLMs be elevated up to, but not beyond, that of State armed forces -- can be more easily fit with the equality axiom.

The opponents complained that the amendment undermined the equality of the parties by reintroducing the ‘mediaeval’ (Denmark and Draper from the UK⁵⁷) concept of just war into the *jus in bello*.⁵⁸ In the plenary, the UK said that

[s]ome delegations had even divided wars into just and unjust wars. Those were extremely dangerous approaches and totally alien to all the principles of international humanitarian law. They struck at the very heart of the Geneva Conventions and the philosophy of equality of rights and non-discrimination which inspired them. ... Humanitarian law was concerned not with who was right or wrong, but with the unfortunate victim of events, the human being, who was caught in the jaws of fate.⁵⁹

Professor Kalshoven, delegate for the Netherlands, explained that ‘[t]he sponsors of amendment ... 11 ... were ... introducing the idea that a distinction must be drawn between the parties according to the legitimacy or illegitimacy of their cause. Although it was true that humanitarian law was not immutably fixed, certain basic values must be respected, including the idea of equality between the parties.’⁶⁰ The causes cannot matter, because otherwise one would move ‘from the field of *jus in bello* to a zone which held dangers for the Conference, namely, *jus ad bellum*’, as Switzerland explained it, echoed by, *inter alia*, Israel and Denmark.⁶¹ Israel even said that ‘A rule which was intended to apply only to one type of belligerent was not a legal norm’.⁶²

⁵⁶ For a brief but stringent discussion of this purported effect of Article 1, see Stephen Neff, *War and the law of nations: A general history* (2005) 374.

⁵⁷ UK, CDDH/I/SR.4, para 25; Denmark, CDDH/I/SR.5, para 22.

⁵⁸ Cf also Prugh, US: Humanitarian law and its attendant responsibilities could not be based on vague concepts which introduced the concept of rightness or wrongness of a conflict, and thus jeopardized the granting of an equal degree of protection to all concerned. Para 51 CDDH/I/SR.1, para 51. A bit later in the proceedings, Pugh took a slightly more understanding position. CDDH/I/SR.14, para 26.’

⁵⁹ CDDH/I/SR.13, para 37

⁶⁰ CDDH/I/SR.4, para 40.

⁶¹ Switzerland, CDDH/I/SR.3, 13; Israel, CDDH/I/SR.14; Denmark, CDDH/I/SR.5, 22. As discussed in this article, one *jus ad bellum* aspect was definitely affected, namely the proper (or right) authority requirement. However, whether NLMs also had a just cause, and whether that was recognized in Article 1 (4), is disputed. For a full discussion of the potential *jus ad bellum* aspects of NLMs, see Olivier Corten, *The law against war: the prohibition on the use of force in contemporary international law* (2010) 135-149.

⁶² CDDH/I/SR.36, para 60. Wils

The fact that some delegations, like Madagascar, China and Albania, used the term ‘just war’ did not necessarily help to convince the West,⁶³ but neither of these delegations was very prominent in the debates. More influential sponsors sought to explain their position. Dayal of India thought that the introduction of ‘the idea of just and unjust wars, and consequently that of discrimination, had only confused the issue’ and that the issue was ‘simply’ ‘whether a specific type of conflict which was a major phenomenon of the time should be recognized as an international conflict’.⁶⁴ ‘Adoption of the amendment did not amount to acceptance of the so-called “just war” concept. It was intended to ensure equal protection of all victims on both sides in wars of national liberation,’ said Hans Wilhelm Longva of Norway.⁶⁵ He further explained ‘that the sponsors of amendment CDDH/I/II and Add.I did not contemplate introducing any form of discrimination between the parties. It should be noted in that respect that the national liberation movements were already applying the Conventions to a large extent.’⁶⁶

Abi-Saab explained that there would have been confusion if the proposal had ‘sought to give preferential treatment to one of the parties to a conflict. Yet it was the existing system that gave preferential treatment to one of the parties, by refusing protection to the national liberation movements...’⁶⁷ In fact, what came to be Article 1 (4) equalized the relations since, in internal conflicts, there is inequality; only the State side has proper authority, an implicit *jus ad bellum*.⁶⁸ Naturally, the opponents to the proposal could not – in 1974 -- say explicitly that they wanted to retain inequality between colonial governments and liberation movements, even though some of them surely wanted that.

The question of equality was eventually resolved by Article 96 (3), proposed by Egypt, Australia, Norway, India and East bloc countries in 1977, which provides that ‘the Conventions and this Protocol are equally binding upon all Parties to the conflict.’⁶⁹ After the adoption of this provision,

⁶³ Madagascar spoke of ‘just struggles’ (CDDH/I/SR.1, para 56). China: 17. The wars of national liberation were just wars waged against imperialist and colonialist domination. CDDH/I/SR.4, 17. the distinction between just and unjust wars, which should be the principal criterion in the development of international humanitarian law (Albania, on a different matter, CDDH/I/SR.12, 10)

⁶⁴ CDDH/I/SR.14, 18. Nigeria, CDDH/I/SR.14, 31. See also Salmon, who found that this was the prevailing view among the supporters. Jean J. A. Salmon, ‘La Conference Diplomatique sur la Reaffirmation et le Developpement du Droit International Humanitaire et les Guerres de Liberation Nationale,’ 12 *Revue belge de droit international* (1976) 27, at 48

⁶⁵ CDDH/I/SR.14, 11. This statement referred to CDDH/I/71, which was the amalgamation of proposals CDDH/I/5 and CDDH/I/11.

⁶⁶ CDDH/I/SR.4, 45

⁶⁷ CDDH/I/SR.5, 8.

⁶⁸ Similarly, Jean J. A. Salmon, ‘La Conference Diplomatique sur la Reaffirmation et le Developpement du Droit International Humanitaire et les Guerres de Liberation Nationale,’ 12 *Revue belge de droit international* (1976) 27, at 43.

⁶⁹ ‘3. The authority representing a people engaged against a High Contracting Party in an armed conflict of the type referred to in paragraph 2 of Article 1 of the present Protocol may undertake to apply the Conventions and the present Protocol in relation to that conflict by means of a unilateral declaration addressed to the depositary of the Conventions.

Such declaration shall, upon its receipt by the depositary, have in relation to that conflict the following effects:

- i. The Conventions and the present Protocol are brought into force for the said authority as a Party to the conflict with immediate effect.
- ii. The said authority assumes the same rights and obligations as those which have been assumed by a High Contracting Party to the Conventions and the present Protocol.

the UK delegate said that his delegation had been ‘relieved’ that it was not intended that ‘different rules of law should apply to opposing sides in a conflict’,⁷⁰ and Japan – firmly in the Western camp – explained that it found the provision to be ‘essential’.⁷¹

Nevertheless, not everyone was satisfied. During the negotiations, the US, the UK, Belgium and Denmark had argued that NLMs cannot fulfil many of the requirements of the Geneva Conventions and the envisaged protocol, for instance regulations on the treatment of prisoners of war, and on courts, tribunals, legal systems and appeals.⁷² This was countered by Egypt, Nigeria and Zanu (Zimbabwe African National Union), the latter one pointing out that the third Geneva Convention of 1949 on Prisoners of War also covered members of militias, volunteer corps and organized resistance movements,⁷³ while others asked rhetorically whether the provisions of the full body of Geneva law could be realistically fulfilled by States parties like Monaco and the Holy See. Nevertheless, even after the adoption of Article 96 (3), some delegates claimed that the Protocol and the Conventions would have to be applied by the State party to the conflict while the NLM would not be able to do so. Said Israel: ‘the Conference ... was now faced with a Protocol with detailed regulations which obligated non-State entities but could, not be applied by them.’⁷⁴ And two years after the adoption of the protocols, Draper still held that ‘[t]he damage to Humanitarian Law... is apparent because discrimination has been imported into it. ... Even with the palliative in ... Article 96 (3)... the international community is likely to be confronted with entities bound by a body of humanitarian law that they are unable to apply, even if they had the will to do so.’⁷⁵

3. Outcome: Orthodoxy preserved but disturbed

3.1 The outcome, and the road thereto

As mentioned, amendment 71 was adopted as Article 1 (4) in the plenary towards the end of the conference. It had been generally hoped that the amendment would be adopted by consensus, but Israel insisted on a vote on Article 1, which was adopted by 87-1 (Israel)-11 (UK, US, France and other Western States).⁷⁶ The Protocol entered into force already in 1978. It has 173 States parties, and while it took a long time for many States to ratify (21 years for the UK, 24 years for France),

iii. The Conventions and the present Protocol are equally binding upon all Parties to the conflict.’

⁷⁰ CDDH/I/SR.36, para 85.

⁷¹ CDDH/SR.46, Annex, explanations of vote

⁷² US in CDDH/I/SR.4, para 4; Israel in 1977, CDDH/ SR.36, para 63; Belgium, CDDH/I/SR.2, para 32.

UK (Draper), said that ‘[t]he Geneva Conventions and the draft Protocols had been devised for entities capable of applying them: in other words, States. CDDH/I/SR.4, para 25. See also Denmark: CDDH/SR.12, para 39

⁷³ Egypt, CDDH/I/SR.5, para 7; Nigeria, CDDH/I/SR.5, para 45; Zanu, CDDH/I/SR.6, para 4

⁷⁴ CDDH/I/SR.36, para 63.

⁷⁵ G. I. A. D. Draper, *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel GIAD Draper* (Leiden, 1998) 192. Cf the quote from Edmonds and Oppenheim, in text surround footnote 126.

⁷⁶ CDDH/I/SR.36, paras 40-58.

the list of parties now includes all major Western powers, except the US, as well as Russia and China (but not India or Pakistan).

Article 1 (4) is mentioned in military manuals, including the British one, which States that the condition ‘fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination’ must be assessed ‘objectively’,⁷⁷ and in the US Law of War Manual, which just briefly restates the US objections.⁷⁸ The provision is also regularly commented upon in textbooks and manuals on IHL, sometimes very briefly,⁷⁹ although the ICRC Commentary on this provision takes up some extraordinary 16 pages, and gives no hint that the provision was ‘fatal’ or that it ‘struck at the very heart of the Geneva Conventions’. According to some commentators, Article 1(4) may now even constitute customary law.⁸⁰

As indicated above, Western powers had been very slow to understand the determinacy of the Third World.⁸¹ A part of the reason for the difficulties in the negotiations was the rigid position by the West during the conference.⁸² Professor Partsch of Germany, a very thoughtful delegate, presented a compromise proposal at a WEOG⁸³ meeting, to the effect that the provisions of the protocol would be applicable to WNLs, but that such wars were not to be regarded as international. This idea received support from Australia, Canada and Ireland but was rejected by France, the UK, and the US.⁸⁴ Towards the end of the first session it was clear to everyone, including after statements by Egypt, Norway and the GDR, that the protocol would be equally applicable to both parties.⁸⁵ A number of WEOG States turned to accepting the principle that WNL should be covered.⁸⁶

The West’s process of reassessment continued in the intervening period between the first and the second session. Several meetings were held between various delegations, both within the Western camp (including at least two meetings among Western powers in London and two Nordic meetings)

⁷⁷ The Joint Service Manual of the Law of Armed Conflict, Joint Service Publication 383, 2004 Edition (2004) 30; see also 385-386.

⁷⁸ US Department of Defense, *Law of War Manual* (2015), subsection 3.3.4, p 77.

⁷⁹ There is just a brief mention in Jann Kleffner, ‘Scope of Application of International Humanitarian Law’, in Dieter Fleck (ed.) *The Handbook of International Humanitarian Law* (3rd Edition, 2013) 46 and a brief discussion in Fritz Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war: An Introduction to International Humanitarian Law* (3rd ed., 2001) 85-86. By contrast, compare the comprehensive discussion in M. Bothe, K.J. Partsch & W.A. Solf (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2 ed, 2013) 35-51. L.C. Green was fair but a bit critical; L.C. Green, *The Contemporary Law of Armed Conflict* (1993) 60-63.

⁸⁰ D. W. Glazier, ‘Wars of National Liberation’, *Max-Planck Encyclopedia of International Law*, online edition (January 2015). See also N. Zamir, *Classification of conflicts in international humanitarian law: The legal impact of foreign intervention in civil wars* (Cheltenham, 2017) 43.

⁸¹ According to the Swedish delegation, western delegation were badly prepared. During meetings in the regional western WEOG group, WNL was only referred to in passing until the end. Swedish report from the first session of the conference, HP30, Swedish National Archives, p 30,

⁸² Memo by Neergaard, on the laws of war, the Red Cross Conference in Geneva, 1974-03-28, p 2., Dossier HP30B, Swedish National Archives.

⁸³ WEOG is the regional group of Western and other States.

⁸⁴ Swedish report from the first session of the conference, HP30 P 30P 39. See also 80:A, 356, 1974-03-14. See also Georges Abi-Saab, ‘Wars of national liberation in the Geneva conventions and protocols’, 165 *Recueil Des Cours* (1979) 353, at 386.

⁸⁵ Swedish report from the first session of the conference, HP30, Swedish National Archives, p 30 & 41.

⁸⁶ Swedish report from the first session of the conference, HP30, Swedish National Archives, p 30 & 41.

and broader informal and important discussions in the margins of the annual San Remo conference on IHL, prior to the first London meeting.⁸⁷ The aim of the major Western powers was initially to revise Article 1 (4), with consequential amendments as a fall-back.⁸⁸ At San Remo, important negotiators were present, including Aldrich (US), Abi-Saab, Graefrath (GDR), Kalshoven, Miller (Canada) and Pictet (ICRC). At an informal meeting, professors Abi-Saab and Sultan of Egypt met Western delegates. The West generally signalled that it was ready to accept 1(4), provided that there was equality between the parties and that the article did not allow not apply to wars of cessation.⁸⁹ Third World had admitted that Western concerns over just and unjust wars were reasonable, and they were willing to consider additions to address this issue.⁹⁰ The conclusion made by the Western participants in London, where the San Remo meeting was reported, was that G77 were willing to consider some detailed amendments to 1(4). However, the report also found that there were different views within the Third World, and that there was a fear in that group that the coalition around 1(4) would 'bust' if the provision was reopened.⁹¹ It was generally agreed among Western States in London that it should be communicated to the Third World that there was an 'evolution' in the Western attitude.⁹² Third World representatives had declared that they were willing to form a group of jurists to consider any problems regarding the amendment; such a group was formed during the second session and its only clear result was what came to be the crucial Article 96 (3). As a result of these developments, the US and others made it known that they were willing to live with Article 1 (4), and this improved the atmosphere considerably.⁹³

⁸⁷ The Western working group on IHL was convened by UK in London 17-19 September. See UK document submitted to Sweden, received 13 August 1974, Dnr 252, Dossier HP30B, Swedish National Archives. The UK held that the main focus should be on efforts to amend the provision, while consequential amendments was a fallback. *Op cit*, p 2-3.

⁸⁸ Document from the UK, Received 13 August 1974, Dnr 252, Dossier HP30B, Swedish National Archives. Both Sweden and Finland had prepared amendments which combined an acceptance of the idea that WNLs should be covered with a provision on equal application. Protocol from Nordic consultations on the development of international humanitarian law, Helsinki 3 September 1974, Memo Hjertonsson 1974-09-11, annex 1 and 2, Dossier HP30B, Swedish National Archives.

⁸⁹ Report from conference in San Remo 6-9 September 1974, Memo Hjertonsson 1974-09-16, Dossier HP30B, Swedish National Archives, p 3-4 and appendix.

⁹⁰ Report of a meeting in humanitarian law in armed conflict 17-19 September 1974 in London, submitted by the British Embassy in Stockholm on 16.10.1974, Dossier HP30B, Swedish National Archives, p 7; Report from conference in San Remo 6-9 September 1974, Memo Hjertonsson 1974-09-16, Dossier HP30B, Swedish National Archives.

⁹¹ Report of a meeting in humanitarian law in armed conflict 17-19 September 1974 in London, submitted by the British Embassy in Stockholm on 16.10.1974, Dossier HP30B, Swedish National Archives, p 7; Report from conference in San Remo 6-9 September 1974, Memo Hjertonsson 1974-09-16, Dossier HP30B, Swedish National Archives.

⁹² Report of a meeting in humanitarian law in armed conflict 17-19 September 1974 in London, submitted by the British Embassy in Stockholm on 16.10.1974, Dossier HP30B, Swedish National Archives, p 8; Report from conference in San Remo 6-9 September 1974, Memo Hjertonsson 1974-09-16, Dossier HP30B, Swedish National Archives.

⁹³ Michael Bothe, 'The History of the Additional Protocols of 1977', in Robin Geiß, Andreas Zimmermann & Stefanie Haumer (eds.), *The International Committee of the Red Cross and the Additional Protocols of 1977* (2017) 57, at 68; M. Bothe, K.J. Partsch & W.A. Solf (2013). *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2 ed, 2013) 8. What prevailed afterwards was, in the words of the UK, 'a spirit of co-operation'. CDDH/I/SR.36, 85.

3.2 Why the West accepted

A. Political factors – they would not be affected

Why did the Western States change their mind, and not ‘resist more rigorously’?⁹⁴ One reason is that they made the assessment that there would be little damage to their interests. As already mentioned, commentators and participants generally foresaw only a limited number of situations to fall under the rubric, and that number fell even further when the colonialist government in Portugal was toppled shortly after the end of the first session. No one had much sympathy for the regime in Rhodesia, and neither South Africa nor Israel intended to ratify the protocol. The assessment by George Aldrich, the leading US negotiator, is telling:

In sum, paragraph 4 of Article 1 poses no threat to the United States or its NATO allies and needs no reservation. If it were feasible to apply [them], compliance with these treaties would bring significant humanitarian benefits. Such application and compliance have not been feasible and seem unlikely to become feasible for a multitude of reasons, both political and practical. In effect, the provision is a dead letter.⁹⁵

B. Legal factors – the import could be rationalized

But I submit that there were also important legal factors. Many of the negotiators on the Western side were IHL practitioners or prominent scholars, like Richard Baxter, Philippe Bretton, Robert Quentin-Baxter, Fritz Kalshoven, Antonio Cassese, Michael Bothe, Erik Castrén, Waldemar Solf, G.I.A.D Draper, L.C. Green, Karl-Josef Partsch and Luigi Condorelli. Typically, they had an attachment to IHL as such, but they were, of course, also knowledgeable about international law in general. This meant that they were wedded to some basic principles of IHL but that they also must have realised that IHL was a regime of international law, and not a completely isolated one.

For them it was crucial to retain the fundamental equality between the parties, and they did feel that they succeeded in that respect, through Article 96 (3).⁹⁶ When the French delegate explained his abstention on Article 1 during the final plenary, he referred to ‘confusion’, but not to any lack of equality between the parties,⁹⁷ and others (except Israel) spoke in similar terms, including terms sympathetic to the goal of the paragraph. In his later text-book, Kalshoven again complained about the elasticity of the wording, but not about any lack of equality.⁹⁸ The only remaining complaint in this regard – from outside the US and Israel – came from Draper, as referenced above.

⁹⁴ G. B. Roberts, ‘The New Rules for Waging War : The Case Against Ratification of Additional Protocol I’, 26 *Virginia Journal of International Law* (1985) 109, at 126.

⁹⁵ George H. Aldrich, ‘Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions’, 85 *American Journal of International Law* (1991) 1, at 7.

⁹⁶ George H. Aldrich, ‘Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions’, 85 *American Journal of International Law* (1991) 1, at 6. There were also as certain provisions in the preamble to the same effect.

⁹⁷ France, CDDH/SR.36, para 91.

⁹⁸ Fritz Kalshoven & Liesbeth Zegveld, *Constraints on the waging of war: An Introduction to International Humanitarian Law* (3rd ed., 2001) 85.

But these experts could surely also assess and appreciate the arguments of Abi-Saab about bringing the Protocol in line with international law in general. As mentioned, both during the negotiations and subsequently during the explanations of vote, it became clear that several important Western delegations were not opposed to the principle as such, but only to some terms used in the final formulation of the amalgamated amendment which was submitted to the vote, or had some apprehensions about possible interpretations which were not contemplated by the sponsors.⁹⁹ The Canadian delegate ‘hoped the situations intended to be covered by paragraph 4 would indeed be covered’, even though he had doubts on that score.¹⁰⁰ Ireland ‘fully sympathized with the aims behind the provisions of Article 1 [but] nevertheless regretted that a clearer and more precise definition of the situations to which paragraph 4 would apply had not been produced.’¹⁰¹

In the end, the fundamental principle of equality, a pillar of the orthodoxy, was retained. As explained above, the principle was actually never threatened, given that the leading delegations of the Third World bloc were clear about its continued application, but perhaps some of the Western delegations had not been aware of that (though they should have been). Nevertheless, the terms of the equation had changed; from equality only between States and States, there was now equality also between States and peoples fighting for self-determination. The invocation of the principle of self-determination had elevated the status of NLMs up to the level of States.

C. The Third World’s argument: IHL as a part of international law

And this brings us to the legal question about the relation between the proposals on WNL and pre-existing international law. The first argument made by a number of supporters of the amendment was that the provision on the international status of wars of national liberation was merely a codification of already existing international law, due to the string of UNGA resolutions mentioned above.¹⁰² While claims of codification are completely *comme il faut* in negotiations of this nature, the argument nevertheless failed to convince Western States, which generally had a conservative view of law-making. As Monaco (de la Pradelle¹⁰³) noted, ‘[i]t was doubtful whether the effect of the United Nations’ General Assembly resolutions had been to transform that positive law.’¹⁰⁴ In fact, most opponents did not even bother to rebut the codification argument.

⁹⁹ Georges Abi-Saab, ‘Wars of national liberation in the Geneva conventions and protocols’, 165 *Recueil Des Cours* (1979) 353, at 376

¹⁰⁰ CDDH/I/SR.36, para 94.

¹⁰¹ CDDH/I/SR.36, para 112.

¹⁰² Egypt, CDDH/I/SR.1 para 8; GDR, CDDH/I/SR.1, para 37; Poland, SR.11, para 53; Greece, SR.36, para 122 There was also some sympathy in doctrine for that view: According to Verwey, it is ‘an established principle today’ that national liberation struggles are not internal armed conflicts. Wil D. Verwey, ‘Decolonization and Jus ad Bellum: A Case Study on the Impact of the United Nations General Assembly on International Law’, in R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 121, at 127.

¹⁰³ He was the son of the very prominent French international law professor Albert de la Pradelle.

¹⁰⁴ CDDH/I/SR.4, para 21.

Another argument, building on established international law, was not only more interesting but likely also more important to the arguably two leading proponents of the amendment, Egypt and Norway. Abi-Saab explained:

An effort had been made to use generally-accepted legal concepts as a frame of reference, self-determination being one of the basic principles of contemporary international law ... Participants were thus not being asked to accept anything new; it was merely proposed that they should affirm explicitly in the field of humanitarian law what they had already accepted as binding law within the United Nations and within general international law.¹⁰⁵

It was accordingly about bringing 'written humanitarian law into step with what was already established in general international law, of which humanitarian law was an integral part.'¹⁰⁶ Longva of Norway said that '[i]n interpreting article 2, common to the 1949 Conventions, one could not neglect the subsequent development of international law with respect to non-self-governing territories.'¹⁰⁷ Romania added that '[t]he question was that of the relationship between humanitarian law and general international law, since the former could not be conceived in isolation from the latter.'¹⁰⁸ Hence, the purpose of the amendment was to bring IHL in line with other parts of international law. Instead of keeping the regimes separate, the idea was to harmonize IHL with the law of self-determination. Abi-Saab noted that 'the substance of the argument of the sponsors ... which is not based on a presumed hierarchical relation between [the UN and the Red Cross], but on the *unity* of international law; the purpose of the amendment was simply to harmonize humanitarian law with contemporary general international law, regardless of the form within which each has been, or is being, developed.'¹⁰⁹

As already indicated, this is a strong line of argument, in my view. IHL now has to take the law of self-determination into account, just as it has always been necessary for it to refer to the international law of statehood in order to determine who is a legitimate party in an armed conflict.

4. The mechanics of hegemony and counter hegemony in IHL

4.1 Universalism, particularism and hegemony in IHL

What does this event say about universalism and about hegemony?

In any conversation, certain things have to be assumed, and to make a legal argument is to invoke things that purport to be applicable to the universe which the parties share. However, while universals are necessary for communication and cooperation, they are also potentially hegemonic.

¹⁰⁵ CDDH/I/SR.1, para 10.

¹⁰⁶ CDDH/I/SR.36, para 70.

¹⁰⁷ CDDH/I/SR.1, para 25 & 26.

¹⁰⁸ CDDH/I/SR.1, para 53.

¹⁰⁹ Georges Abi-Saab, 'Wars of national liberation and the development of humanitarian law,' in R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 143, at 155.

Hegemony is exercised by controlling the governing ideas, to master the universe by mastering the universals, so to speak; it connects the idea of power with ideas like knowledge or world-view.

The usefulness of the concept of hegemony is that it in a word connects the idea of power with ideas like knowledge or world-view. My aim here is not to establish whether there is a hegemony or not, nor to discuss to what extent things in the world are determined by ideas or by matter. Further, I do not think that hegemony is necessarily bad; we need universals and the evaluation of them depends on our values of the substantive and procedural aspects. My purpose is to use this concept analytically to discuss the formation and contestation of instances of international law.¹¹⁰

Universals should fit all human conditions, that is, they should have universal valence and validity. That is, of course, impossible. Regardless of whether the particular that fills the universal is 'good', it must always be acknowledged that it is particular. In other words: Hegemony is a false universalism, contaminated by particularism.¹¹¹ One may think of universals – like 'State' or 'humanitarian' -- as essentially 'empty signifiers', at each place and time filled with particulars but also subject to contestation.¹¹²

There is no escaping the universals of international law, because even those who want to resist need to present a universally valid reason for that, for instance sovereignty. As B.S. Chimni expresses it: '[I]nternational law is the principal language in which domination is coming to be expressed in the era of globalization.'¹¹³

However, a hegemony is never monolithic. Any hegemony has cracks that can be exploited (because it is impossible to establish a consistent body of thought). Configurations of hegemony are different in different fields, and different hegemonic configurations – say human rights law and trade law -- have different influence.¹¹⁴ In a hegemony, certain crucial ideas are accepted, but these ideas can be interpreted differently, and contradictions can be exploited. And within each discourse there is contestation. While a Swedish pacifist or a Syrian warlord might feel equally estranged by present IHL,¹¹⁵ those who are inside the field know that there is endless argument between, say, the ICRC and the Pentagon. Discussions about universalism are often pursued in terms of North/South or centre/periphery. However, the geography of the universal's 'everywhere' is a nested geography. The center has allies in the peripheries, the peripheries have rhizomes in the center, everywhere is creolisation and hybridisation, and the center is never of one mind. And not to forget: Underneath

¹¹⁰ Cf Martti Koskeniemi, 'Hegemonic regimes' in Margaret Young (Ed) *Regime Interaction in International Law: Facing Fragmentation* (2012) 305, at 311. On hegemony in international relations, see usefully Robert W. Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method' 12 *Millennium Journal of International Studies* (1983) 162.

¹¹¹ Ernesto Laclau in Judith Butler, Ernesto Laclau & Slavoj Žižek, *Contingency, hegemony, universality: Contemporary dialogues on the left* (2000) 49-51.

¹¹² Ernesto Laclau in Judith Butler, Ernesto Laclau & Slavoj Žižek, *Contingency, hegemony, universality: Contemporary dialogues on the left* (2000) 56.

¹¹³ B.S. Chimni, 'Third World Approaches to International Law: A Manifesto', 8 *International Community Law Review* (2006) 3, at 3.

¹¹⁴ Cf Martti Koskeniemi, 'Hegemonic regimes' in Margaret Young (Ed) *Regime Interaction in International Law: Facing Fragmentation* (2012) 305, at 315.

¹¹⁵ Though for opposite reasons, of course.

the global hegemony, there will be local ones, in collusion with or in opposition to the global.¹¹⁶ (Hence, none of the representatives in Geneva represented his or her constituency in the full sense.)

4.2 Universalism, particularism and hegemony in Geneva

The Third World had an ‘automatic majority’ at the Geneva conference (in particular when supported by the Soviet bloc), but that would have been useless without eventual acceptance by other States. Even if the West had been politically ready to take the defeat in the vote because it did not mean much in concrete practice, that would have been much harder to do if it had not been possible for their many prominent legal advisors to come to terms with the new provision; it was – I submit -- necessary to make it fit with the established, ‘hegemonic’ language of IHL.

The delegates in Geneva had to invoke universal concepts in order to make their points. Multilateral discussions — in particular in areas such as international humanitarian law — must take place beyond tit-for-tat and look for common ground based on universally valid considerations. It is not good manners to say ‘this is right because I say so’. As noted by US negotiator George Aldrich ‘...a significant part of the challenge facing the negotiator is to understand and utilize ... shared precepts in order to foster broad agreement.’

One of Aldrich’s shared precepts, humanity, was often invoked during the debates on NLMs. Sovereignty was another one, crucial to the discussions on the scope of application of IHL.¹¹⁷ The Indian delegate explained ‘that the newly independent developing countries ... are jealous of their sovereignty and will guard it against any action which might constitute an interference in their internal affairs’¹¹⁸ Third World delegates were very reluctant to admit any privileges to combatants in non-international armed conflicts.¹¹⁹ Here the national hegemonic discourses of national unity in plurinational States took precedence, and could be invoked in the universal language of sovereignty.¹²⁰

The State, as predominantly conceived, is a Western invention. However, not only are there different Western conceptions of the State, there have also been a number of non-Western, pre-colonial political communities that have resembled States. The colonial legacy of statehood is perhaps the most deadly heritage of the colonial era, but the leaders of the colonized third world

¹¹⁶ Cf R.W. Cox, ‘Gramsci, Hegemony and International Relations: An Essay in Method’ 12 *Millennium Journal of International Studies* (1983) 162, at 171-172.

¹¹⁷ The third precept mentioned by Aldrich, military necessity, was less important to this particular debate.

¹¹⁸ CDDH/SR.49, para 77.

¹¹⁹ Perhaps this is understandable. As Waschefort puts it: ‘The experience for many African actors was that these newly independent African States fought for independence without the benefit of IHL, yet as soon as they gained independence, AP II was negotiated and all of a sudden they had to afford to insurgents the legal recognition that they themselves had never benefited from.’ G. Waschefort, ‘Africa and international humanitarian law: The more things change, the more they stay the same’, 98 *International Review of the Red Cross* (2016) 593, at 602

¹²⁰ The interests of the parties in Geneva was, of course, partly formed by hegemonic conceptions; for instance, a ‘national interest’ assumes a conception of the State. Nevertheless, within these confines, the interests could be very divergent, they could be fitted into various terms of the established discourse, and they could sometimes participate in the change of these terms.

seemed to have no other choice but to accept this formula, as the leaders of the OAU did in 1964, when they subscribed to the principle of *uti possidetis*.¹²¹ Rather than attack the concept of the State, Third World leaders have tried to establish their own nation-States¹²² and in that process they have also attacked a peculiar form of State, namely the colonial empire. That has led to many concrete conflicts, where the colonial States have claimed that conflicts in the colonies have been internal conflicts and even — like Portugal and France — that colonies were integral parts of the metropolitan States. So, the purpose of the efforts of the Third World was not to change the standard concept of the State, but to attack a peculiar type of State – and in particular the spatial extension of sovereignty and territory, and thus the line between domestic and international. The colonial empire was in a sense an aberration of the State, and the Third World was able to exploit that; in 1974, colonial justifications were difficult to explain, even among other parties to the Western political episteme.

However, in order to accomplish that, Third World delegates reached out beyond the discourse of IHL and invoked the law of self-determination. What was proposed was not some non-Western notion of armed conflict but a concept of war of national liberation that could be traced back to what Abi-Saab described as ‘generally acceptable legal concepts’ -- self-determination. By choosing to invoke the right of self-determination rather than rely on the more neutral and ‘IHL friendly’ criterion of a distinct territorial identity of colonies, they further delegitimised colonialism, and the West (a bit grudgingly) accepted this extension. In the process, the meaning of the term ‘international’ was changed, too, in ways that stretched the dominant meaning, but not beyond recognition. The Third World delegates accomplished this by using established language, though language from outside IHL, in order ‘to harmonize humanitarian law with contemporary general international law’. This shows that the universalizing language of IHL was malleable enough to accommodate contesting interests.

So, the result was a retained pillar of the orthodoxy – the equality between the parties – in which one of the fundamental values of the equation (the State) had been changed to ‘the State or the people fighting for self-determination’.

In the orthodoxy prevailing until 1977, international humanitarian law was supposed to be applied by entities that had the character of a State. Therefore, to the orthodox IHL lawyer, Article 1 (4) was repugnant, as Draper complained: ‘The damage to Humanitarian Law... is apparent because discrimination has been imported into it. ... Even with the palliative in ... Article 96 (3) the international community is likely to be confronted with entities bound by a body of humanitarian law that they are unable to apply, even if they had the will to do so.’¹²³

¹²¹ The so-called Cairo resolution of 1964, AHG/Res. 16(I), available at https://au.int/sites/default/files/decisions/9514-1964_ahg_res_1-24_i_e.pdf visited on 3 November 2018.

¹²² L. Laakso, & A. Olukoshi, ‘The crisis of the post-colonial nation-State project in Africa’, in A. Olukoshi & L. Laakso (eds.), *Challenges to the Nation-State in Africa*, Uppsala: Nordic Africa Institute (1996) 7, at 13. For a very perceptive account of this process, see Sundhya Pahuja, *Decolonising international law: development, economic growth and the politics of universality* (2011) 54-59. For another angle to the same development, see Antony Anghie, *Imperialism, sovereignty and the making of international law* (2007) 202-204.

¹²³ G. I. A. D. Draper, *Reflections on Law and Armed Conflicts: The Selected Works on the Laws of War by the Late Professor Colonel GIAD Draper* (1998) 192.

There was some irony in that development. As Mégret notes, ‘the emergence of modern international humanitarian law coincided with the apotheosis of perhaps the most outrageous and voracious colonizing spree in world history since the *conquista*.’¹²⁴ Abi-Saab explains that during this period, ‘relations which were formerly recognized ... as being of an international character were *internalized*, in the sense of being pushed out of the ambit of international law....’¹²⁵ By making the concept of State include colonies, the non-Western peoples were held outside the protection of the laws of war, and it was therefore only logical that the 1914 British military manual ‘emphasized that the rules of International Law apply only to warfare between civilized nations, where both parties understand them and are prepared to carry them out...They do not apply in wars with uncivilized States and tribes.’¹²⁶ Not without satisfaction, Abi-Saab noted in 1979 that ‘[t]he situation we are facing now is the exact opposite. Through what one is tempted to call poetic justice, a very strong tendency is shaping up within the international community to consider armed struggles which aim at overthrowing domination as international conflicts...’¹²⁷ If the Western construct of war is violence of the State in its external relations,¹²⁸ not only had the nature of violence changed, so had the constructs of both the State and its external relations.

¹²⁴ Frédéric Mégret, ‘From “savages” to “unlawful combatants”: a postcolonial look at international humanitarian law’s “other”’, in Anne Orford (ed.) *International law and its others* (2006) 265, at 269.

¹²⁵ Georges Abi-Saab, ‘Wars of national liberation and the development of humanitarian law,’ in R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 143, at 144.

¹²⁶ J. E. Edmonds and L. Oppenheim, *Land Warfare: An Exposition of the Laws and Usages of War on Land, for the Guidance of Officers of His Majesty’s Army* (1914), cited from Frédéric Mégret, ‘From “savages” to “unlawful combatants”: a postcolonial look at international humanitarian law’s “other”’, in Anne Orford (ed.) *International law and its others* (2006) 265, at 279.

¹²⁷ Georges Abi-Saab, ‘Wars of national liberation and the development of humanitarian law,’ in R. J. Akkerman, P. J. V. Krieken & C. O. Pannenberg (eds.), *Declarations on Principles: A Quest for Universal Peace* (1977) 143, at 144.

¹²⁸ Frédéric Mégret, ‘From “savages” to “unlawful combatants”: a postcolonial look at international humanitarian law’s “other”’, in Anne Orford (ed.) *International law and its others* (2006) 265, at 311.