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The International Laws of Civil and Colonial Wars
A History, 1918-1949

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Abstract

This thesis interrogates, from the perspective of legal history, the particular legal constructs that international law has developed to capture civil and colonial wars as objects of international legal (ir)relevance. At the same time, it is a story of the distribution – or lack thereof – of rights, duties, status and privileges to various political communities and actors involved in the affair of civil and colonial wars. The angle proposed is a legal history of the international legal discourses produced during the period between 1918 and 1949. Including both the interwar period and the Second World War and its aftermath, this period differs from more traditional periodisations. But when tailor-made for the specific question of the relationship between international law and civil and colonial wars, the work of periodisation reveals 1918-1949 as a decisive yet under-researched period of legal history. One of the claims made in this thesis is that civil and colonial wars followed distinct trajectories within the legal discourses produced between 1918 and 1949. Their integration within a shared legal category with the 1949 Geneva Conventions constitutes, in this sense, something of a historical anomaly.

This thesis examines the reproduction of legal discourses inherited from the late nineteenth century, their transformation, as well as the challenges they faced from emerging, experimental, and sometimes short-lived legal discourses. The core argument is that 1918-1949 is a crucial period whereby traditional legal discourses on civil and colonial wars either lost their grip or reach their limits to the point that they became increasingly impractical and vulnerable to discursive rivals. They were discourses, although still dominant, whose structures became unsuitable terrains for translating the many projects pursued by various actors belonging to the discipline of international law or using its language.

In the case of civil wars, the traditional discourses of state-centrism came to be either rejected or radically re-imagined, whereas the discourse of humanitarianism experienced a substantial transformation allowing it to extend its reach to civil wars. A more institutional vision led to the emergence of legal discourses in which civil war was seen as a crucial aspect of the international legal order, directing it towards localising and suppressing civil wars. Conversely, in the case of colonial wars, the traditional discourse of ‘civilisation’ proved its robustness. But it did so in revealing its own inability to fulfil beyond a cosmetic way the logic of ‘conditional inclusion’ upon which it was nevertheless founded. Colonial war remained the limit situation of the period in which the strongest exclusive dimensions of the discourse of civilisation not only endured but were also pushed to their paroxysmal logics.

TABLE OF CONTENTS

Acknowledgment 7

Note on Translations 8

List of Abbreviations 9

Author's Declaration 10

INTRODUCTION. LEGAL HISTORY, THEORY, METHOD 11

1. The Objects of Civil and Colonial Wars 15

1.1. War as Law and Fact 16

1.2. Civil War 18

1.3. Colonial War 20

2. The Fate of Legal Discourses: Reproduction, Revaluation, and Change 21

2.1. International Law as Discipline and Language 22

2.2. Archaeology of the International Legal Discourse 24

2.3. Structures, Events, Scales 28

3. Theorising 1918-1949 32

3.1. From Scarcity to Profusion: International Law and Civil and Colonial Wars before 1918 and after 1949 32

3.2. The Decay of the Laws of War and the Reinvigorating of International Law, 1918-1949 36

3.2.1. From Jus in Bello to Jus ad Bellum: Between Dismay and Disenchantment 37

3.2.2. An Era of Experimentations 39

4. Structure of the Thesis 41

CHAPTER 1. BETWEEN ROUSSEAUISM AND GOVERNMENTALISM: TWO NUANCES OF STATE-CENTRISM IN THE (NON)REGULATION OF CIVIL WARS 45

1. Rousseauism: The Obsession of Formal Status 46

1.1. No States, No War 48

1.2. The Right to Self-Determination and the Shadow of Civil War: The Discipline of International Law and its Interwar Anxieties 51

1.3. The 'Legal Abyss separating a Government from a Group of Rebels' 53

2. Governmentalism: The Recognition of Belligerency Doctrine and the Move from States to Proto-States 55

2.1. 'Interstate War in the Making' 57

2.2. The Structural Problem of Recognition 61

2.3. Between Commercial, Humanitarian, and…Interventionist Considerations? 65

3. Conclusion 70

CHAPTER 2. MORALISING THE LAWS OF WAR: HUMANITARIANISM AND THE RED CROSS TURN TO CIVIL WARS 72

1. Civil War and its Innumerable Victims: From Belligerents to Individuals 73

1.1. The Moral Basis: Relief and Humanitarian Principles during Civil War 75
1.2. The 1921 Red Cross Conference: Moralising Civil War 75
1.3. The 1938 Red Cross Conference: Consolidation and Opportunism 78

2. Between Humanitarian Advocacy and Demonisation: Humanitarians, Insurgents, and the Various Mobilisations of the Laws of War 82
2.1. The Laws of War to the Rescue of IRA Prisoners..... 82
2.2. Laws of War Language and Moral High-Ground 86

3. Anti-Communism as Humanitarianism? 90
3.1. Red Cross and Red Scare 90
3.2. Humanitarian Gatekeeping 93
3.3. Counterrevolutionary Humanitarianism: The Strange Apoliticism of Georges Lodygensky..... 95

4. Conclusion 98

CHAPTER 3. LOCALISING CIVIL WARS: THE INSTITUTIONALISATION OF 'NON-INTERVENTION' 101

1. A 'Curious Form of Neutrality': Justifying the Non-Intervention Agreement 103

2. The London Committee: The Institutional Life of the NIA and the Technical turn of the Localisation Discourse.....109

3. From Embodiment to Escape: International Law and Interwar Politics 114
3.1. Anti-Communism at the London Committee 115
3.2. International Law and the Neutralisation of Domestic Politics..... 118

4. A Legal Experiment under Pressure: The Return of Traditional International Law.. 120
4.1. Humanitarianism: Doing Nothing Differently..... 120
4.2. The Temptation of Rousseauism and Governmentalism 123

5. Conclusion 127

CHAPTER 4. SUPPRESSING CIVIL WARS: BETWEEN PREVENTION, SOLIDARITY AND LEGITIMISM 129

1. Civil War as a Horizon: Self-Determination, Occupation and Transitory Regime in the Preventive Suppression of Civil War in Upper Silesia.....130
1.1. Controlled Self-Determination 131
1.2. A 'Legal Cure' for Upper Silesia 133

2. A *Jus a Bellum* for Civil War? Legitimism and Suppression in the Americas.....137
2.1. Regional Specificities, Universal Ambitions..... 137
2.2. Constitutional Legitimacy and Solidarity during Civil War 139
2.3. Towards Civil War as Aggression..... 143

3. Civil War and International Legal Order: Legitimism and Suppression in the Jurisprudence of Georges Scelle and Carl Schmitt.....145
3.1. Liberal-Democratic Legitimism: Scelle's Federalism and Civil War 146
3.2. Sovereignty as Fiction, Federalism as Fact 149
3.3. From Military Duel to Judicial Duel 151
3.4 International Law and Normality: Schmitt's 'Principle of Legitimacy' 152

3.5. The State, The Jus Publicum Europaeum and the 'Liquidation of Civil War' .. 155
3.6. A Fragile Edifice: International Law and the Civil War Paradigm 161

4. Conclusion 166

CHAPTER 5. COLONIAL WARS AS CIVILISATION: EXCEPTION, CONDITIONAL INCLUSION, AND RACIAL IMAGINERY 168

1. Colonial Wars in the Legal No Man's Land: Necessity, Race, and Legal Formalism 170

1.1. Self-Determination in the Shadow of Colonialism 170
1.2. Colonial Wars as Necessity, Arbitrariness as Prevention 172
1.3. From Exception to International Treaties: Excluding through Domestic and International Laws..... 176
1.3.1. Colonialism without Colonies: Protectorates and Mandates 177
1.3.2. Euphemism and Domestic Law Imaginary in Mandatory Syria..... 180
1.3.3. Exclusion through Formalism during the Rif War 182

2. From Rejection to Proportionality: Challenging the Civilisational Divide as a Dead-End 189

2.1. Dashing Hopes: the Rif War and the Non-Intervention of the League of Nations and the ICRC..... 189
2.1.1. The League of Nations as a 'Bureaucracy of Rejection': Taking 'Civilisation' Seriously 191
2.1.2. Colonial Humanitarianism: The Return to Belligerents..... 195
2.2. Civilisation and Armed Repression in Mandated Territories..... 198
2.2.1. The Bondelswarts Affair: Aeroplanes and Maintenance of Law and Order.. 199
2.2.2. The Great Syrian Revolt: Civilisation, Reasonableness and Proportionality 203

3. Colonial War as a Pattern of Legal Argumentation 208

3.1. 'Coloured troops:' Racial Prejudices as Legal Arguments 208
3.1.1. Between Racist and Positivist Commitments..... 209
3.1.2. The Colonial Contradictions of the Category of 'Coloured Troops' 211
3.2. Epilogue: Ethiopia, French Black POWs, and the Racialisation of the Law in Wars between Members of the 'Family of Nations' 214

4. Conclusion 217

CONCLUSION..... 221

BIBLIOGRAPHY 225

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Finally, I was lucky to have my PhD funded by a College of Social Science Scholarship, which gave me the luxury to focus on my research.

Note on Translations

Given the centrality of the French language in the history of international law, many of the sources used in this thesis are in French. Translations from French to English are my own. The few translations of Italian and Spanish sources are also my own.

For the German sources used in this thesis, I am grateful to my friend Melissa Schweizer who kindly agreed to translate them.

List of Abbreviations

ACICR	International Committee of the Red Cross Archives
AJIL	American Journal of International
AP1	First Additional Protocol to the Geneva Conventions of 1949
BCICR	International Committee of the Red Cross Library
BYIL	British Yearbook of International
CADN	French Diplomatic Archives of Nantes
Cmd	Command Papers of the British Parliament
DBR	Doctrine of belligerency recognition
GC	Geneva Conventions (1929, 1949)
HC	House of Commons
IAC	International Armed Conflict
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IRRC	International Review of the Red Cross
LoN	League of Nations
NIA	Non-Intervention Agreement (Spanish Civil War)
NIAC	Non-international Armed Conflict
POW	Prisoner of War
R.C.A.D.I.	Collected Courses of the Hague Academy of International Law
RGDIP	Revue Générale de Droit International Public
UN	United Nations
UNGA	General Assembly of the United Nations

Note: when used, abbreviations of academic publications follow the Cardiff Index to Legal Abbreviations.

Author's Declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Printed Names: Rémi Fuhrmann

Date: 09/04/2025

Signature: RF

INTRODUCTION.
LEGAL HISTORY, THEORY, METHOD

> [B]ut these men could by no stretch of imagination be called enemies. They were called criminals, and the outraged law, like the bursting shells, had come to them, an insoluble mystery from the sea.[1]

In September 1951, the French General De Lattre de Tassigny launched a seduction campaign in the United-States. Its aim was to convince Washington and the American public opinion to support the French war effort in Indochina. This diplomatic journey would lead De Lattre to preach the French cause in a wide range of contexts, from meetings with President Truman and high-ranking officials in the Military and Department of State to appearances on popular television shows like *Meet the Press*.[2] In one of his public addresses, De Lattre, in his typically hesitant English, described the war in Indochina:

> I know you are very interested by the question of Indochina. And I am very interested to explain you exactly what job we are making there. Indeed, we are not making a colonial war … it is finished that kind of story and those who always think that have missed the boat. We are there to help the associated Nations that are now independent. We are there to help them to make their independence a real thing. And we are not only giving to them their independence, but we are guaranteeing this independence… And the war we are making with them to protect them is a very hard war against an enemy whose name is Hồ Chí Minh and Việt Minh and which is absolutely a communist enemy. You know, we are making there the war against communism.[3]

At first glance, a sentence such as 'making [war] with them to protect them' may suggest some kind of clumsy oxymoron that is best explained by De Lattre's rudimentary English. But in framing France's campaign in Indochina as a war against communism rather than a colonial war, De Lattre proved how good his mastery of cold-war narratives was; he knew that anticommunism was the currency of the moment whereas the colonial imaginary had long since lost its former lustre by 1951. De Lattre's task was to guarantee that the Indochina war was anything but a war brutally waged by an agonising Empire. And little linguistic skill was needed to convey the idea that France was waging a war in the name of the 'free world.'

---

[1] Joseph Conrad, *Heart of Darkness* (OUP, 1899, 2008) 117.

[2] André *Kaspi.* 'La mission du général de Lattre aux Etats-Unis, 13-25 septembre 1951' (1992) 79 Revue française d'histoire d'outre-mer, 213.

[3] The address appears to follow a meeting with high-ranking officials from the U.S. military. The video is available online. Critical Past, 'French General Jean De Lattre De Tassigny speaks about France's intention of helping Indochina' (*Critical Past*, 18 September 1951) <https://www.criticalpast.com/video/65675043811_General-Jean-De-Lattre-De-Tassigny_Frances-intention_independent-country_Communists> accessed 10 January 2025.

It does not require much effort for an international lawyer today to recognise in De Lattre's speech a rhetoric with which the discipline of international law has gradually become more and more accustomed since. Phrases and formulas like *war on terror*,[4] *anti-terrorist operation,*[5] or *maintenance of order*[6] have been mobilised to euphemise, excuse, and legitimise violations of international law. With the deployment of this language, armed conflicts thus qualified get projected into a universe in which most pre-existing international legal constructs – rules, doctrines, legal categories, concepts etc. – lose their hold and can be transcended. Whatever higher necessity may be raised against international law ultimately aims at snatching a given armed conflict from the grasp of whatever legal constructs with which international law might surround it. Even though a similar 'reframing' exercise has also been widely used in the case of interstate conflicts and wars of aggression, this is practice which has particularly marked civil and colonial wars throughout the history of international law.

This thesis interrogates, from the perspective of legal history, those particular legal constructs that international law has developed to capture civil and colonial wars as objects of international legal (ir)relevance. At the same time, it is a story of the distribution – or lack thereof – of rights, duties, status and privileges to various political communities and actors involved in the affair of civil and colonial wars. The angle proposed is a legal history of the international legal discourses produced during the period between 1918 and 1949. Including both the interwar period and the Second World War and its aftermath, this choice differs from more traditional periodisations. But when tailor-made for the specific question of the relationship between international law and civil and colonial wars, the work of periodisation reveals the 1918-1949 era as a decisive yet under-researched period of legal history (see section 3). If the choice to treat civil and colonial wars together partially derives from their

[4] On the war on terror see Antony Anghie's chapter 'On making war on the terrorist: imperialism as self-defence'. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005) 273-309. See also Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43 Osgoode Hall L.J. 45. For a colonial genealogy of the figure of the 'unlawful combatant' that emerged from the 'war on terror' narrative see 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* (CUP 2006) 265-317.

[5] This has been most recently used by Azerbaijan to depict its large-scale military operation in Nagorno-Karabakh which eventually resulted in Baku gaining exclusive control over the region and the mass exodus of the Armenian population. For a brief overview see Sheila Paylan, 'The Dangerous Ramifications of Recognizing the End of Nagorno-Karabakh' (*Opinio Juris*, 21 March 2024) <https://opiniojuris.org/2024/03/21/the-dangerous-ramifications-of-recognizing-the-end-of-nagorno-karabakh/> accessed 10 January 2025.

[6] One of the most glaring examples is France's use of the formula (*opération de maintien de l'ordre*) to speak of the Algerian war of independence. On this topic see Sylvie Thénault, *Algérie : des « événements » à la guerre Idées reçues sur la guerre d'indépendance algérienne* (Le Cavalier Bleu 2012) 51-61.

initial common exclusion from the sphere of legitimate violence in international law,[7] it indicates neither similar legal-historical trajectories nor their interchangeability. That choice is rather commanded by the sudden integration of civil and colonial wars within the common legal category of *non-international armed conflict* (NIAC) in the context of the adoption of the 1949 Geneva Conventions and their Common Article 3.[8] The initial draft conventions conceived the category as 'cases of an armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion.'[9] Although the subsequent drafts and final conventions only kept the formula 'armed conflict not of an international character,'[10] civil and colonial wars were still treated together and subjected to the application of the same set of rules. One of the claims made in this thesis is that despite this, civil and colonial wars followed in fact quite distinct trajectories within the legal discourses produced during the 1918-1949 period. Their integration within a shared legal category in positive international law in 1949 constitutes in this sense something of a historical anomaly. That being said, it is these different trajectories that this thesis first wants to highlight. As subsequent chapters show, the international legal discourses mobilised in reaction to conflicts (in the material as well as the conceptual senses) were treated differently depending on whether it was a war between Europeans or Westerners within the same political (and metropolitan) unit, or a war with evident colonial dimensions.

Methodologically, this thesis is driven by a problematic which is applied to both civil and colonial wars. The aim is to decipher the discursive modalities through which the dynamic of inclusion/exclusion played out in the context of the relationship between international law and civil and colonial wars. Its main argument is informed by the principle that the exclusion of an object from the realm of international law constitutes as much a legal construction as its inclusion;[11] or as stressed by Hilary Charlesworth, 'the silence of international law may be as important as its positive rules and rhetorical structures.'[12] The premise of the thesis is

[7] Even if a stronger emphasis is put on the exclusion of colonial wars compared to civil wars, see Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021) 91-115.

[8] Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GCI) art 3.

[9] Bibliothèque du Comité Internationale de la Croix Rouge [hereafter BCICR], ICRC, Seventeenth International Red-Cross Conference, *Draft Revised or New Conventions for the Protection of War Victims* (1948) 5.

[10] BCICR, ICRC, Seventeenth International Red-Cross Conference, *Revised and New Draft Conventions for the Protection of War Victims* (1948) 10; GCI (n 8).

[11] As Nathaniel Berman has observed in relation to the Rif war, its exclusion from the international legal domain 'was itself a legal construction.' Nathaniel Berman, 'The Appeals of the Orient: Colonized Desire and the War of the Rif' in Karen Knop (ed) *Gender and Human Rights* (OUP 2004) 202. Sundhya Pahuja has also well demonstrated that 'part of international law's work is continually to define…what is inside and what is outside its categories.' Sundhya Pahuja, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (CUP 2011) 26.

[12] Hilary Charlesworth, 'Feminist Methods in International Law' (1999) AJIL 379, 381.

that civil and colonial wars have always been central to the discipline and language of international law, which both emerged in the context of the European modern state and European colonialism.[13] Civil and colonial wars entered the scene of international law neither in 1918 nor in 1949; they have not been left in a limbo of unaddressed social needs which international law merely failed to take into consideration for decades.[14] Put differently, this thesis does not focus on how a hypothetical problem was solved, but rather on 'the process by which *this* became the problem to solve and *that* became the context for its solution.'[15] The aim is not to discover the 'real' problems that civil and colonial wars caused in a specific social context and how international law responded to those. For law is as much the product of society as society the product of law,[16] all this does not mean that social reality – however one defines it – does not influence the production of legal discourses. Concrete situations or events obviously prompted the people and institutions orbiting around the discipline of international law to mobilise or develop legal discourses on civil and colonial wars. But they did so under the constraint of 'legal forms [that] set limits' on what can be 'imagine[d] as practical options.'[17]

The following chapters examine the reproduction of legal discourses inherited from the late nineteenth century, their transformation as well as the challenges they faced from emerging, experimental, and sometimes short-lived legal discourses. The core argument of the thesis is that 1918-1949 is a crucial period whereby traditional legal discourses on civil and colonial wars either lost their grip or reach their limits to the point that they became increasingly impractical and vulnerable to discursive rivals. They were discourses, although still dominant, whose structures became unsuitable terrains for translating the many projects pursued by various actors belonging to the discipline of international law or using its

[13] On this topic, the work of Antony Anghie and Martti Koskenniemi has become canonical. If Koskenniemi has focused on the emergence of international as a discipline and a profession, whereas Anghie has rather focused on the language of international law in relation to colonialism, they both offer unvaluable narratives regarding the emergence of the discipline of international law in the late nineteenth century. See Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harv.Int'l L.J. 1; Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001).

[14] Robert Gordon has well analysed and criticised what he has called *evolutionary functionalism*. It is an approach that wholeheartedly assumes a mechanical relation between *law* and *societies* in which 'societies have needs' and 'law adapts to changing social needs' and whose aim is to 'construct (or, as is rather more common, to assume without much discussion) a typology of stages of social development and then to show how legal forms and institutions have satisfied, or failed to satisfy, the functional requirements of each stage.' Robert W. Gordon, 'Critical Legal Histories' (1984) 36 Stan.L.Rev. 57, 60-65. See also Robert W. Gordon, 'Historicism in Legal Scholarship' (1981) 90 Yale L.J. 1017.

[15] David Kennedy & Martti Koskenniemi, *Of Law and the World: Critical Conversations on Power, History, and Political Economy* (Harvard University Press 2023) 33.

[16] Pierre Bourdieu, 'La force du droit : Éléments pour une sociologie du champ juridique' (1986) 64 Actes de la Recherche en Sciences Sociales 3.

[17] Gordon, Critical Legal Histories (n 14) 111.

language. In the case of civil wars, the traditional discourses of state-centrism came to be either rejected or radically re-imagined, whereas the discourse of humanitarianism experienced a substantial transformation allowing it to extend its reach to civil wars. A more institutional vision led to the emergence of legal discourses in which civil war was seen as a crucial aspect of the international legal order and collective security, directing it towards localising and suppressing civil wars. Conversely, in the case of colonial wars, the traditional discourse of 'civilisation' proved its robustness. But it did so in revealing its own inability to fulfil beyond a cosmetic way the logic of 'conditional inclusion' upon which it was nevertheless founded.[18] Colonial war remained the limit situation of the period in which the strongest exclusive dimensions of the discourse of civilisation not only endured in more or less mitigated forms but were also pushed to their paroxysmal logics.

Most of the discourses analysed in the following chapters, whether traditional or emerging, followed a structure in which civil and colonial wars were defined as objects that required an action on the part of international law: civil wars required to be ignored and rejected towards the domestic sphere, to be humanised, localised or even supressed; colonial wars and their combatants required to be (partially) included within or left out of the 'civilised' club, to be fought with various degrees of brutality or humanity etc,. As such, even the act of excluding indicates that civil and colonial wars had the dignity of legal objects, thus making it possible to write their legal history. In this way, it is also a legal history in which the position within the discipline of international law of various actors such as states, insurgents or colonised people, but also institutions, mechanisms or doctrines, is interrogated.

1. The Objects of Civil and Colonial Wars

This thesis constitutes an attempt to reconstruct how civil and colonial wars were grasped by the language of international law through some of its discourses during the period from 1918 and 1949. Part of the analysed body of discourse, however, does not proceed from abstraction; while some series of statements set out general principles to be applied to civil and colonial wars, others rather provide sui-generis answers to specific situations. Many conflicts such as the Spanish, Russian, Irish or Upper Silesian civil wars, or colonial wars

[18] Ntina Tzouvala has presented legal arguments 'resting implicitly or explicitly on the *standard of civilisation*' as oscillating between a 'logic of biology' and a 'logic of improvement.' While the former 'erects unsurpassable barriers against non-Western communities acquiring equal rights and obligations under international law based on some purportedly immutable difference between 'the West and the rest'', the latter 'offers a prospect of inclusion that has … been firmly conditional upon capitalist transformation.' Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP 2020) 2.

like the Rif war or the Syrian uprisings against France, thus perform two functions in the following chapters. On the one hand, they are material situations illustrating the limits or the resilience of some legal discourses. On the other hand, they are material situations that might have triggered and made possible the emergence of new legal discourses (see section 3). Accordingly, this oscillation between attempts to grasp civil and colonial wars both in their abstraction and materiality involves a sort of pre-theoretical conception of such conflicts. This is necessary in order to determine which past situations and the resulting international legal responses can be classified as civil or colonial wars and therefore deserve to be analysed. In other words, and as insufficient and biased these kinds of attempt always are, a pre-legal conception of civil and colonial wars is required.

1.1. War as Law and Fact

From a legal perspective, war is not a mere sociological reality to which international law inevitably reacts. It is rather an institution[19] – something which is 'essentially constructed by law.'[20] Accordingly, the international legal regimes properly dedicated to the question of war – the law on the use of force (*jus ad bellum*) and IHL (*jus in bello*) – can be treated, in their present or past occurrences, as 'political discourses on legitimate violence.'[21] This work of (de)legitimation has been historically carried out against standards erecting how war was to be fought, for what reasons, and by whom.[22] As Nathaniel Berman puts it, 'the legal construction of war serves to channel violence into certain forms of activity engaged in by certain kinds of people, while excluding other forms engaged in by other people.'[23] Traditional accounts, however, rely on a hermetic separation between IHL and the law on the use of force in which the former is confined to the evaluation of the 'how', while the latter is concerned with the 'why' and the 'whom.'[24] Yet this hermetic separation does not stand up scrutiny, and IHL is as much concerned with how war is waged as it is with who wages it and for what reason.[25]

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[19] Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 Colum.J.Transnat'l L. 1, 5; David Kennedy, *Of War and Law* (Princeton University Press 2006) 13-45. The first chapter of Kennedy's book is evocatively titled 'War as a Legal Institution.'

[20] Alejandro Lorite Escorihuela, 'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011) 19 Mich.St.Int'l L.R 299, 365.

[21] Ibid 320.

[22] Rémi Fuhrmann, 'Légitimités conflictuelles: le droit international humanitaire entre légitimité du statut et légitimité de la cause' (2024) 61 Can.Y.B.Int.L 37.

[23] Berman, Privileging Combat (n 19) 5.

[24] A concise illustration of this traditional approach can be found in Marco Sassòli, Antoine A. Bouvier & Anne Quintin, *How does Law Protect in War? Volume I Outline of International Humanitarian Law* (3rd edn, ICRC 2012) 14-15.

[25] Fuhrmann, Légitimités conflictuelles (n 22). In this article I develop the idea that the distinction between jus ad bellum and jus in bello collapses in different situations, specifically in the context of IHL's rules on *levée*

The reason why this assumption has become a rarely questioned commonplace in the discipline might be found in the humanitarian narrative which has dominated the field of IHL.[26] For obvious reasons, the humanitarian narrative posits IHL's neutrality and impermeability to questions of legitimacy.[27] On the contrary, the fact that the jus ad bellum distinguishes between lawful and unlawful use of force makes it a regime more straightforwardly associated with questions of legitimacy, prompting, for example, comparison between old just war doctrines and the UN Charter[28]. Taken as a form of *evolutionary functionalism*,[29] the humanitarian narrative simultaneously assumes a radical break with a violent past of undisciplined wars and a continuity with hundreds of years of effort to progressively humanise wars.[30] War is thus a social reality to humanise, while IHL's role is to fulfil such humanitarian promise. This leaves room for the notion of progress to permeate the whole narrative, transforming certain exclusionary aspects, such as the initial exclusion of civil and colonial wars from the realm of IHL, as mere historical obstacles that were meant to be overcome. It is against this backdrop that several critical scholars have emphasised the constructive role of law in relation to war. For what interests this research, it means that the statist,[31] colonial[32] and anti-revolutionary[33] origins, dimensions, or biases of IHL have played a role in legitimising certain forms of collective violence to the detriment of others, thereby creating a lasting understanding of what does and does not constitute *war*.

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en masse and wars of national liberation. The latter constitutes the most symptomatic example with the First Additional Protocol to the Geneva Conventions providing that 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination' ought to be qualified as IACs and no more as NIACs. This is important chiefly because through that qualification based on the reason to wage war, members of national liberation movements are entitled to the combatant privilege and the POW's status, something which is denied to members of armed groups taking part in a NIAC. Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (8 Jun 1977) 1125 UNTS 3 art 1 (AP1).

[26] Rotem Giladi, 'The Jus ad Bellum/Jus in Bello Distinction and the Law of Occupation' (2008) 41 Is.L.R. 246, 256-257.

[27] Jean d'Aspremont, 'The Roles of Legitimacy in International Legal Discourses: Legitimizing Law vs Legalizing Legitimacy' in Heike Krieger & Jonas Püschmann (ed) *Law-Making and Legitimacy in International Humanitarian Law* (Elgar 2021) 31.

[28] See for instance Stephen C. Neff, *War and the Law of Nations: A General History* (CUP 2005) 277-394; Bernard Bourdin, 'Le droit de guerre juste: Histoire et retour d'un concept après la Première guerre mondiale' (2017) 105 Recherche de Science Religieuse 541, 545.

[29] Gordon, Critical Legal Histories (n 14). See footnote 14.

[30] I have discussed this humanitarian narrative in more details in Rémi Fuhrmann, 'Les Temps du Droit International: Temporalité et Histoire Critique' (2024) 65 Cah.de Droit 559, 574-576.

[31] Lorite Escorihuela, The Politics of Distinction (n 20) 299; Berman, Privileging Combat (n 19); Eyal Benvenisti, Doreen Lustig, 'Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874' (2020) 31 EJIL127.

[32] Moyn, Humane (n 7); Mégret, From savages (n 4); Will Smiley, 'Lawless Wars of Empire? The International Law of War in the Philippines, 1898–1903' (2018) 36 LHR 511; Rotem Giladi, 'The Phoenix of Colonial War: Race, the Laws of War, and the 'Horror on the Rhine'' (2017) 30 LJIL 847; Lauri Mälksoo 'The Legacy of F.F. Martens and the Shadow of Colonialism' (2022) 21 Chinese JIL 55; Helen M. Kinsella, 'Settler Empire and the United States: Francis Lieber on the Laws of War' (2023) 117 Am.Pol.Sc.R. 629.

[33] Benvenisti and Lustig (n 31).

As such, the distinction between jus in bello and jus ad bellum is not based on the former's agnosticism on the question of legitimate violence, unlike the latter. Having both in common to be a 'vocabulary of persuasion about legitimacy,'[34] their functional separation into separate regimes rather expresses different modalities of legitimation.[35] What all of this means is that once international law addresses something one can call war, it addresses what has already been the object of a work of legal categorisation.[36] Applied to contemporary international law, it implies that the three types of war – aggressions, self-defence or collective use of force authorised by the Security Council – contemplated by the UN Charter, as well as the categories of International Armed Conflicts (IACs) and NIACs[37] to which IHL's rules apply, do not encompass all the forms that war might take from the perspective of sociology, history, anthropology, philosophy or political science. Nor that they exhaust the meanings that can be given to the signifier *war*.

The choice made in this research, however, is to rely on notions that do not refer to current international legal categories. Civil and colonial wars are not used as synonyms, for example, of NIACs or wars of national liberation as defined in the AP1.[38] In order to reduce the threat of a teleological reading of the past, this choice makes it easier not to search the past for conflicts corresponding to current legal categories.

1.2. Civil War

The notion of civil war has often been obscured by the inherent immorality and horror that have been attached to it.[39] As will be shown in the following chapters, international lawyers have not been immune to this perception. This has much to do with the legacy of the Modern political thought in which civil war, especially in the universe of social contract theories, occupies a central yet repulsive position. The paradigmatic example is Hobbes' social contract theory in which the whole state edifice is meant to stand against civil war,[40] translating the idea that 'the assertion that civil war does not exist is one of the first axioms

[34] Kennedy, 'Of War and Law' (n 19) 141.
[35] Fuhrmann, Légitimités Conflictuelles (n 22).
[36] Pahuja, Decolonising International Law (n 11) 26. On the specific question of war see Mary L. Dudziak, 'Making Law, Making War, Making America' in Michael Grossberg & Christopher Tomlins (ed) *The Cambridge History of Law in America* (CUP 2008) 682.
[37] For a discussion on the deeply political dimensions of the work of legal qualification of NIACS see Berman, Privileging Combat (n 19); Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Brill 2012) 74; Fuhrmann, Légitimités Conflictuelles (n 22).
[38] AP1 (n 25). Wars of national liberation are defined as 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.'
[39] For a history of civil war through the prism of the history of ideas see David Armitage*, Civil Wars: A History in Ideas* (Yale University Press 2017).
[40] Thomas Hobbes, *Leviathan: The Matter, Forme, and Power of a Common-Wealth Ecclesiastical and Civil* (Floating Press 2009, 1651).

of the exercise of power.'[41] Therefore, as Giorgio Agamben has observed, 'civil war seems to be for the moderns… something that one must seek to render impossible at every cost, yet that must always be remembered through trials and legal persecutions.'[42]

Unsatisfied with the tendency in political philosophy to equate civil war with the state of nature or the 'war of all against all,' Michel Foucault developed a de-metaphorized conception of civil war.[43] Far from being the dissolution of the polity into the multitude, Foucault's civil war breaks with an inter-individual and pre-social imaginary in assuming that 'there is no civil war that is not a confrontation of collective elements.'[44] In other words, war, whatever forms it might take, is the 'more collective… and more social' form of violence;[45] instead of inducing a dissolution of the collective, 'civil war is the process through which a certain number of new collectivities, which had not previously seen the light of day, are constituted.'[46] A civil war is thus a 'process whose characters are collective and whose effects are... the appearance of new collective characters'.[47] Unlike many, Foucault had little interest in conceptualising civil war as a paradigm whose essence would refer to a radical and absolute form of enmity or a specific form of violence[48] – which in turn explicitly or implicitly colours interstate war and violence with a more noble or humanised dimension. Foucault's civil war rather finds its essence in the lieu where the conflict takes place and in the political motivations of the opponents: 'civil war takes place on the stage of constituted political power; it is fought to retain or conquer power, to confiscate or transform it.'[49]

It is on the basis of this definition that the present thesis has identified as 'civil wars' some conflicts in response to which international law was mobilised. The principal merit of Foucault's definition is to encompass various forms of intrastate conflicts. With its elements of conquest, confiscation and transformation of power, the definition covers situations ranging from the vague notions of insurrection and rebellion to the more concrete notions of revolution, secession, and coup d'état. For they encompass this wide variety of conflicts taking place in the same political unit, notions such as *civil war*, *insurrection, uprising, civil*

[41] Michel Foucault, *La Société Punitive: Cours au Collège de France 1971-1973* (Seuil 2023) 31.
[42] Giorgio Agamben, *Stasis: Civil War as a Political Paradigm* (Stanford University Press 2015) 22.
[43] Foucault, La Société Punitive (n 41) 47-52.
[44] Ibid 51.
[45] Pierre Clastres, *Archéologie de la Violence: La Guerre dans les Sociétés Primitives* (Éditions de l'Aube 2004, 1977) 7.
[46] Foucault, La Société Punitive (n 41) 52.
[47] Ibid.
[48] Carl Schmitt and his *theory of the partisan* is a good example. Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* (Telos 2007, 1963).
[49] Foucault, La Société Punitive (n 41) 53.

conflict, or *intrastate war/conflict* are used interchangeably. Similarly, recourse to the more precise notions of revolution or coup d'état is only intended to confine the discussion to a particular type of civil war.

1.3. Colonial War

Foucault's anchoring of civil war to elements of conquest, confiscation and transformation of power could well apply to many colonial wars. However, assuming that struggle over power takes place in the same political unit contradicts the nature of colonialism. The fact that some colonies had been integrated within the territory of colonising states should not commend the reification of the colonial argument of the indistinction between the metropolitan and colonial territories. Although the Mokrani Revolt in Algeria and the Paris Commune *formally* took place within the territory of France in 1871,[50] there is nevertheless xa difference of nature between the two conflicts. Likewise, a colonial war can take place in already colonised as well as not yet colonised territories. In his 1961 *Law and the Algerian Revolution*, Mohammed Bedjaoui defended a continuum between the French war of conquest waged in 1830 and the war of national liberation which started in 1954.[51] The initial phase of conquest, the various anticolonial revolts as well as the colonial occupation for more than a century were all assumed to be part of the same colonial war which started in 1830 and eventually ended in 1962.

Accordingly, the colonial war category can refer to situations as varied as colonial conquests, wars of national liberation, colonial insurrections and revolts, or even colonial military occupation. It means that the Italian invasion of Ethiopia in 1935, while having been an interstate war, most notably between two members of the League of Nations, was as much a colonial war as the Rif war that opposed the French and Spanish colonial powers to Muḥammad bin 'Abd al-Karim al-Khattabi's Riffian combatants (known as Abd el-Krim). Therefore, the use of the category of colonial war in this research does not necessarily posit 'a qualitative comparison of objects, but a formal or structural homology…between relations;'[52] relations that always involve a coloniser or a would-be coloniser on the one hand, and colonised or would-be colonised peoples or political communities on the other

[50] Algeria was divided in Departments, like every part of the metropolitan territory.
[51] The legal argument defended by Bedjaoui was that of the restoration of an Algerian state that was deemed to have existed prior to the French conquest. He argued that Algeria was not *terra nullius* but a territory with an effective government in 1830, which made it impossible for France to legally acquire Algeria by means of annexation and occupation. Mohammed Bedjaoui, *Law and the Algerian Revolution* (International Association of Democratic Lawyers 1961) 17.
[52] Alejandro Lorite Escorihuela, 'Global Animal Law, Pain, and Death: An International Law for the Dominion' in Vincent Chapaux, Frédéric Mégret & Usha Natarajan (ed) *The Routledge Handbook of International Law and Anthropocentrism* (Routledge 2023) 247.

hand. Beyond these structural relations, colonial war could mean a variety of additional things which are by no means secondary or superficial. Take, for instance, the assimilation of the category of colonial war to 'racial wars,'[53] 'total war on a local scale'[54] or even a form of 'absolute hostility.'[55] This rapprochement of notions is of an undoubtable heuristic value, but, at the same time, still partake in the definition of the colonial war category as a relation between (would-be) colonisers and (would-be) colonised.

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Every discourse involves a certain kind of 'violence done to things,'[56] which inevitably arises out of the 'fundamental inadequation' between language and reality.[57] The aforementioned definitions of civil and colonial wars do not escape such an unpleasant state of affairs. But at the very least, they are deemed to be formulated at a level of generalisation which does not preclude to appreciate the specific meanings given to civil and colonial wars within the language of international law. As much as it is possible to escape the influence that law holds on the conception of things that one can develop, even with a sociological ambition, these two definitions have been developed as *pre-legal* as possible. For the purpose of this research, these two definitions therefore attempt to approach the materiality of somethings called civil and colonial wars, in order to appreciate, against this backdrop, the additional layer of meaning that the language of international law imposes on it.

2. The Fate of Legal Discourses: Reproduction, Revaluation, and Change

So far, notions of legal discourse, language, and discipline have been used to refer to the objects of inquiry of the present legal history. This section precises these notions and to provide the theoretical and methodological outline of the thesis. At its most basic level, the method followed starts from the understanding of international law as a discipline and a language, out of which can be extracted discursive practices. While being structuralist, the approach that is proposed also attempts to highlight the interaction between people and events that underlies the reproduction, change or emergence of discursive structures.

[53] Achille Mbembe, *Politiques de l'Inimitié* (La Découverte 2016) 11.
[54] A. Dirk Moses, 'Empire, Colony, Genocide: Keywords and the Philosophy of History' in A. Dirk Moses (ed) *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (Berghahn Books 2008) 26.
[55] Achille Mbembe, 'Necropolotics' (2003) 15 Public Culture 11, 25.
[56] Michel Foucault, *L'Ordre du Discours* (Gallimard 1971) 55.
[57] Roland Barthes, *Leçon* (Seuil 1978) 22.

2.1. International Law as Discipline and Language

In her recent and polemical book *International Law and the Politics of History*, Anne Orford observes that historical scholarship always involves an account of what international law is, which, in turn, inevitably influences what kind of history is to be written.[58] Every history of international law starts from an explicit or implicit conception of the very object of international law. Defining what counts as law and what does not, is, therefore, an operation of sorting what counts as historical material and what does not. There is neither a unique answer nor a right answer to this preliminary question. For international law, notes David Kennedy, can be approached from an infinite number of angles: 'as a body of texts, a pattern of doctrines and a set of institutions, but also as a profession, an academic field, an ideological and political project, a domain of professional expertise, a style of analysis or mode of thought.'[59]

In mainstream approaches, international law is often presented as a set of rules and principles with a relatively stable meaning[60] and whose purpose is to ensure 'order among states.'[61] Instead of framing international law as 'a bundle of rules governing relations among states,' Kennedy was pioneer in analysing it as 'a discipline, in which people … pursue projects … in a shared vocabulary, through the apparatus of shared professional practices and institutions.'[62] At an elementary level, such framing favors an analysis of 'the dynamics of international law in terms of a space that is constituted by the dialectics of language and people.'[63] Put differently, 'international law is a discipline with a set of structural constraints marked by vocabulary, images and concepts that any participant in the international legal debate must have internalized as basic.'[64]

Thinking of international law as a discipline of 'people with projects'[65] pursued through a common language, that is by nature constraining, tells several things. In the first place, it indicates that international law is not a sphere reserved to people with a specific professional status – legal scholars, judges, diplomats etc, – but to people having projects susceptible of finding a translation in the language of international law. This framing allows to demonstrate

[58] Anne Orford, *International Law and the Politics of History* (CUP 2021) 255.
[59] Kennedy & Koskenniemi, Of Law and the World (n 15) 40.
[60] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006) 569.
[61] Anghie, Imperialism (n 4) 5. Anghie presents the 'problem of order among states' as the 'defining dilemma of the discipline.'
[62] David Kennedy, 'Tom Franck and the Manhattan School' (2003) 35 N.Y.U.J.Int'l Law & Pol. 397, 398-399.
[63] Alejandro Lorite Escorihuela, 'Cultural Relativism the American Way: The Nationalist School of International Law in the United States' (2005) 5 Global Jurist Frontiers 1, 19.
[64] Ibid 21.
[65] See in general David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

that not only states or legal scholars deployed the language of international law on the topic of civil and colonial wars. Actors as various as insurgents, humanitarians, military, anti-colonial figures, colonial officials, statemen (rarely statewomen), or individuals and groups from what is now called civil society also mobilised international law in that context. As will become clear in the following chapters, some actors proved more successful in this endeavour than others. Some, chiefly legal scholars, were mastering the language well enough to formulate *acceptable* ideas or to even deviate from traditional discourses. Others, such as certain states and their agents, powerful or legitimate enough, could either embody traditional discourses or emerging ones. A few newcomers were able to translate their projects into the language of international law and lucky enough to find accommodating discursive structures to do so. Conversely, less fortunate individuals and groups saw their projects hitting unsurmountable barriers for lack of mastery of the international legal parlance or hospitable discursive structures. In other words, the fact that international law is indeed 'people with projects' does neither entail an equal ability to 'speak the law'[66] nor an equal distribution of the professional skills and knowledge to do so. For every discourse, notes Foucault, is the object of a more or less strict process of 'rarefaction…of the speaking subjects':

> [N]o one shall enter the order of discourse if one does not satisfy certain requirements or if one is not, from the outset, qualified to do so. More precisely: not all the regions of discourse are equally open and penetrable; some of them are fiercely defended (they are differentiated and differentiating), while others seem to be almost open to all winds and put at the disposal of every speaking subject, without prior restrictions.[67]

International law is without doubt of the first type and was already, to a large extent, a field of expertise from 1918 onwards. For the actors whose status did not enable them to speak the law from the outset, mastering the grammar of international law was fundamental. As will be shown – for example with Irish Republican women's groups or colonised people and their allies –, lack of mastery of the codes, vocabularies, or the use of the 'wrong' channels of dissemination, often proved fatal in their attempt to become speaking subjects within the discipline of international law.

In the second place, the language of international law is both indeterminate and constraining. As suggested by Kennedy, 'the incredible spread of legal institutions, vocabularies, professional ways of thinking about things—among politicians, citizen advocates, corporate public relations folks, and lawyers—may have been fueled by the perception that the law is

[66] Pahuja, Decolonising International Law (n 11) 154.
[67] Foucault, L'Ordre du Discours (n 56) 38-39.

both malleable and decisive, or at least might be.'[68] International law's indeterminacy is therefore both real and perceived as such, making of the international legal plane a favourable 'terrain of struggles'[69] where compete various and contradictory projects. Yet this indeterminacy of international law should not lead to an understanding of the discipline as a receptacle of endless argumentative possibilities. When Martti Koskenniemi posited that international law's indeterminacy makes it 'possible to defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments,'[70] it was far from saying that *anything* can be said. Koskenniemi's 'descending and ascending patterns of justification' are the elements that make international law indeterminate as legal arguments oscillate between these two poles.[71] But instead of suggesting international law's infinite plasticity, it rather suggests that indeterminacy takes place within the boundaries of these 'two separate structures' that put constraints on the way international legal arguments can be made.[72] It is something which is well captured by what Justin Desautels-Stein calls *structured indeterminacy* :

> The train of legal indeterminacy and its caboose of judicial discretion only make sense in the semiotic context of legal constraint, that is, in the context of the deep rules of legal grammar. There is certainly a free play of legal argument here, but it is a free play only intelligible from inside the governing forms of the structure.[73]

These structures, however, are not of divine provenance but rather the outcome of the historical evolution of 'international law's intellectual culture' which recognises as '*disciplinarily valid*' specific models of argumentation.[74] That is this dialectic between discourses that were recognised as 'disciplinarily valid' and others that attempted to be so that the present research seeks to address.

2.2. Archaeology of the International Legal Discourse

To explore the deep grammar of legal discourses on civil and colonial wars, this research relies on the Foucauldian archaeological method[75]. Central to the idea of archaeology is to consider discourses as 'practices that systematically form the objects of which they speak.'[76]

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[68] Kennedy & Koskenniemi, Of Law and the World (n 15) 180.
[69] Kennedy, A World of Struggle (n 65).
[70] Koskenniemi, From Apology to Utopia (n 60) 591.
[71] Ibid 59.
[72] Justin Desautels-Stein, 'A Context for Legal History, or, This is not your Father's Contextualism' (2016) 56 Am.J.Legal Hist. 29, 37.
[73] Justin Desautels-Stein, 'Structuralist Legal Histories' (2015) 78 L.& Contemp.Prob. 37, 56.
[74] Akbar Rasulov, 'From Apology to Utopia and the Inner Life of International Law' (2016) 29 LJIL 641, 664.
[75] See in particular Michel Foucault, *Histoire de la folie à l'âge classique* (Gallimard 1961); Michel Foucault, *Naissance de la Clinique* (PUF 1963); Michel Foucault, *Les Mots et les Choses : Une Archéologie des Sciences Humaines* (Gallimard 1966); Michel Foucault, *L'Archéologie du Savoir* (Gallimard 1969).
[76] Foucault, L'Archéologie du Savoir (n 75) 70.

These discursive practices, in return, are made of rules that put limits on what is thinkable in a given period.[77] One of the aims of the following chapters is to explore what was thinkable within the discipline of international law as regards civil and colonial wars, and how were stratified the different ways in which this specific *problem* was formulated, and solved.

Stripped to its basics, the Foucauldian notion of discourse refers to a set of statements following the same rules and belonging to the same 'discursive formation.'[78] It follows that archaeology permits to define the 'rules of formation' of these discourses.[79] It is a methodological tool of arrangement through which various textual fragments can be enclosed, on the basis of their structural similarities, into a common discursive formation: archaeology asks how a specific problem is formulated and solved in the perspective of identifying and mapping different types of discourse accordingly. The chapters of this thesis proceed in identifying six discourses – *Rousseauism, governmentalism, humanitarianism, localisation, suppression,* and *civilisation* – with distinct inner logics allowing to present various and scattered fragments as belonging to a same discursive structure. Of course, these discourses allow a wide range of manifestations, some of them even appearing contradictory. Under the surface, however, often lie structural similarities. Conversely, archaeology does not rely on the 'function of the author' to 'overcome the contradictions that are found in a series of texts' or even in the same text.[80] Archaeology involves a suspicion towards traditional unifying principles and does not consider the unity of the text or the *oeuvre* to be immune to suspension.[81] The purpose is rather to establish to what extent different fragments can be 'systemised'[82] and partake of the same discursive formation, even if those fragments may contradict others from the same text or *oeuvre*.

In the field of law, *legal* discourse can be assimilated to the notion of *legal thought* developed by Duncan Kennedy in the context of the history of U.S. law:

> [T]he conceptual apparatus, the reasoning techniques, the legal ideals and the key images that the elite bar, including judges, treatise writers and important lawyers,

[77] Thomas Flynn, 'Foucault's mapping of history' in Gary Gutting (ed) *The Cambridge Companion to Foucault* (CUP 2005) 33.
[78] Foucault, L'Archéologie du Savoir (n 75) 161.
[79] Ibid 228.
[80] Michel Foucault, *Dits et Écrits 1954-1988 : Tome I 1954-1969* (Gallimard 1994) ch *Qu'est-ce qu'un Auteur?,* 802.
[81] Ibid 791.
[82] Foucault, Naissance de la Clinique (n75) 18.

> deploy when they make legal arguments or give opinions or declarations about what the law "is" or ought to be'.[83]

Applied to the discipline of international law during the 1918-1949 period, Kennedy's definition only requires a little twist. Instead of solely considering the 'opinions or declarations' emanating from figures like judges, professional lawyers or scholars, the following chapters analyse those of the 'people with projects' discussed in the previous section. Thereby, the sources mobilised are various and go beyond what is generally understood as the traditional sources of international law. In addition, no hierarchy is established between sources.[84] The only criteria for identifying the relevant sources are therefore their time of production – between 1918 and 1949 – and their propensity to manifest a legal opinion on what the law was or needed to be regarding civil and colonial wars. As a result, the present thesis makes use of sources, mainly in English and French, emanating from diverse institutional sites:

i- Treaties, including multilateral and regional instruments.
ii- Scholarly writings, including (international) law journals, (international) law treatises, textbooks or specialised monographs, Hague Academy collected courses, and, more broadly, writings of professional (international) jurists.
iii- Military documentations, chiefly military manuals.
iv- Documents from the League of Nations and other international bodies, including minutes, resolutions, decisions, petitions.
v- Documents of various provenance (newspapers, parliamentary debates, speech transcripts, civil society media) containing legal opinions of non-lawyers, including politicians, (anti-colonial) revolutionaries or insurgents, human rights advocates, humanitarians.
vi- Archives from the International Committee of the Red-Cross (ICRC, Geneva), the International Committee for the Application of the Agreement Regarding Non-Intervention in Spain (British National Archives, Kew Gardens) and the French archives on the Moroccan Protectorate and Syrian Mandate (Archives Diplomatiques, Nantes).

As discussed above, all these sources are read through a specific problematic aimed at analysing how the dynamic of inclusion/exclusion played out in the context of the relationship between international law and civil and colonial wars. Put differently, a different problematic applied to the same sources would tell another story and would make visible other things; in the case of certain sources, a different problematic could also render civil and colonial wars invisible. This follows the principle that knowledge is an '*active process*'[85]

[83] Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (first published 1975, Beard Books 2006) ch *Thirty Years Later*, ix.
[84] As Akbar Rasulov argues, law is a 'field of discursivity' where there cannot be 'any fundamental distinction between rules, doctrines and concept.' Rasulov, Inner Life of International Law (n 74) 660.
[85] Akbar Rasulov, 'The Discipline as a Field of Struggle: The Politics and the Economy of Knowledge Production in International Law' in Andrea Bianchi & Moshe Hirsch (ed) *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP 2021) 191.

fundamentally different from what can be gained through observation.[86] It is only through an implicit or explicit *problematic* that knowledge is constructed.[87] Facts do not speak for themselves – this is the *empirical illusion*–[88] and making them say something beyond the common sense is only possible through a particular *problematic*[89]. As Ntina Tzouvala puts it, reading past texts through a problematic 'enables us to question and leave behind the common sense of the discipline [and] unseats the idea of the texts of international law being 'out there' and the act of doctrinal interpretation or of historical engagement consisting in rediscovering an already-existing meaning.'[90]

A small proportion of the sources used – in particular the French colonial archives on the Rif war and the Syrian uprisings – are loosely related to the disciplinary boundaries of international law. Unlike other sources, they do not, at first glance, reveal legal opinions on the relationship between international law and civil and colonial wars. They rather belong to what Nathaniel Berman has called *the larger domain*, which he has developed in reaction to the apparent silence of international law on the question of the Rif war.[91] In his study, Berman does not only highlight the silence of positive law or international legal institutions, but also the absence of engagement with the colonial conflict by international jurists and international law journals.[92] Symptomatic of this silence were the words of Georges Scelle when finally asked whether or not the League of Nations had competence on the war of the Rif: 'In my view, the League of Nations has without a doubt no competence at all in the Moroccan affair. The Rif, the Riffans, Abdel-Krim, have no international personality of any degree… Legally, one cannot even say that there is a war – an international war, of course, because there is a war in the larger sense of the term.'[93] From that apparent irrelevance of international law as regards his object of study, Berman concluded that an interdisciplinary move was needed:

> My turn to cultural and political writers in this study is thus not some arbitrary interdisciplinary move. Rather, it was international law itself, in the authoritative voice of Georges Scelle that projected the War of the Rif into a 'larger domain'. The localization of this 'larger domain' as outside law was itself a legal construction.

[86] Gaston Bachelard, *Le Rationalisme Appliqué* (PUF 1949) 56. Bachelard affirms that a problematic must precede any 'experiment that seeks to be instructive.'
[87] Ibid.
[88] Pierre Macherey, *Pour une Théorie de la Production Littéraire* (Maspero 1966) 23.
[89] Bachelard, Rationalisme (n 86) 55.
[90] Ntina Tzouvala, Capitalism as Civilisation (n 18) 11.
[91] Berman, The Appeals of the Orient (n 11).
[92] Ibid 202.
[93] As quoted in Ibid.

> Specifically, this boundary between law and non-law was an artefact of the discipline's interwar relationship with colonialism.[94]

Moving beyond disciplinary boundaries is required by the discipline itself, especially in case of colonial conflicts when law's main action is often to confine itself to irrelevance. The rejection of some objects outside the realm of international law, its silences, become the very objects of study and not mere epistemological obstacles. From that perspective, Berman considered the writings of socialist, communist, and surrealist authors as 'proto-legal or crypto-legal' debates forming 'an indispensable part of international legal history'[95] and revealing a 'variety of notions of international legal order.'[96] The same applies to some of the colonial archives used in this research which, echoing the silence of international law, shed light on the legal imaginary that surrounded colonial wars.

2.3. Structures, Events, Scales

Archaeology of discourse, like structuralism more generally, is a work of systematisation which may vex the agency of actors and the impact events have on structures. In the field of history, structuralism has largely emerged in opposition to what Fernand Braudel called *Histoire évènementielle*.[97] For Braudel and many followers of the *Annales* school, events were seen as short-lived distractions which were not likely to inform on the reproduction of structures over time. On the contrary, the 'excessive smoke' produced by events might distract one from structures, which are better explained by a *longue durée* approach.[98]

Yet the dialectic between events and structures has been a preoccupation of many structuralists. Foucault's incorporation of the genealogical method to complement his archaeological approach is one symptom of a hankering to adopt a less static view of structures, especially of discursive structures.[99] Although archaeology and genealogy are sometimes presented as separated intellectual projects,[100] Foucault often used them in a complementary way: archaeology intervenes at the level of the 'identification and description of types of discourse' while genealogy completes the picture with the analysis

[94] Ibid 203.
[95] Ibid 204.
[96] Ibid 196, 204.
[97] Fernand Braudel, 'Histoire et Sciences sociales: La longue durée' (1958) 13 Annales 725, 728.
[98] Ibid 727-728.
[99] See the now classical Michel Foucault, 'Nietzsche, la Généalogie, l'Histoire' in Suzanne Bachelard and others (ed) *Hommage à Jean Hyppolite* (PUF 1971) 145.
[100] The rupture is often situated with the publication of *Surveiller et Punir* which is properly genealogical unlike Foucault's previous work. However, especially in his lectures at the Collège de France, both approaches are intertwined.

of the 'historic, economic and political conditions of appearance and formation' of discursive practices.[101]

A robust theory of the dialectic between structures and events can be found in the writings of anthropologist Marshall Sahlins and historian William H. Sewell Jr. Without giving contingency or agency the leading role, they attempt to make sense of how the reproduction of structures over time shapes events and people's practices, while these ones can also be instrumental in the change of structures or the emergence of new ones. An event, as Sahlins presents it, is 'a *relation* between a happening and a structure (or structures)' from which derives a 'dialogue between the received categories and the perceived contexts.'[102] Within this dialectic, structures are subjected to a 'functional revaluation': 'in action or in the world … the cultural categories acquire new functional values. It follows that the relationships between categories change: the structure is transformed.'[103] However, this work of 'reproduction and the accumulation of small revisions' do not contradict the tendency of structures to maintain themselves.[104] But some events – those that Sewell elevates to the status of *historical events* – are difficultly predictable from 'the gradual changes' that every existing structures experience.[105] For they 'result in transformations of structures,' they are of a different nature from 'most ruptures [which] are neutralized and reabsorbed into the pre-existing structures'[106]

Put differently, structures are of a mortal nature and always run the risk of becoming unable to absorb whatever might occur in a specific social context:

> [T]he use of conventional concepts in empirical contexts subjects the cultural meanings to practical revaluations. Brought to bear on a world in-itself and potentially refractory, the traditional categories are transformed… [E]xperience of human subjects, especially as communicated in discourse, involves an appropriation of events in the terms of *a priori* concepts. Reference to the world is an act of classification, in the course of which realities are indexed to concepts in a relation of empirical tokens to cultural types.[107]

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[101] Michel Foucault, *Dits et Écrits 1954-1988 : Tome II 1970-1975* (Gallimard 1994) ch *De l'archéologie à la dynastique*, 405, 406.
[102] Marshall Sahlins has presented his approach through the concept of 'structure of the conjunction': 'By the "structure of the conjuncture" I mean the practical realization of the cultural categories in a specific historical context, as expressed in the interested action of the historic agents, including the microsociology of their interaction.' Marshall Sahlins, *Islands of History* (University of Chicago Press 1985) xiv.
[103] Ibid 138.
[104] William H. Sewell, Jr., 'Historical Events as Transformations of Structures: Inventing Revolution at the Bastille' (1996) 25 Theory and Society 841, 843.
[105] Ibid 843.
[106] Ibid.
[107] Sahlins, Islands of History (n 102) 145.

Disruptive events are therefore those that, against pre-existing structures, 'introduce new conception of what really exists … and what is possible.'[108] Typically, these types of events occur in a context of 'dislocation of structures' where 'ordinary routines…are open to doubt [and] new possibilities are thinkable.'[109] The present research thus alternates between attention to ordinary discursive routines – their reproduction and the way they underwent functional revaluation – and the impact that specific *legal* events had on pre-existing structures and their influence on the emergence of new and concurrent discursive practices.

As a result, the following chapters are an exercise of 'playing with scales'[110] where macro and micro perspectives are brought together to offer a more exhaustive mapping of the international legal discursive landscape of the 1918-1949 period. For focusing exclusively on the macro level might preclude one from seeing 'the moments when people contest the rules of the game.'[111] Accordingly, some chapters focus on well-established and inherited discourses which were routinely deployed in a large variety of contexts to address a large variety of situations. In this case, the archaeological approach is sufficient, and the all-encompassing nature of these discourses permits to render them intelligible without focusing on their conditions of possibility. Other chapters, on the contrary, focus on emerging discourses whose structural logics can only be grasped through a closer analysis of the specific events or the limited documentation from which they emerged.

By nature, emerging discourses are constituted by a less voluminous mass of texts than firmly rooted discourses. The variety of sources and speaking subjects encompassed by traditional discourses thus makes way to more limited documentary series, often institutionally situated, and to a less diverse range of speaking subjects. Moving to this level, without abandoning the ambition of shedding light on structural logics, nonetheless requires a reduction of scale dear to the tenets of *micro-history*. More than anything else, micro-history is defined by the operation of a 'reduction of scale of observation.'[112] Carlo Ginzburg, in the same micro-historical gesture, has written a book based on the reconstruction of the mental universe of a miller, and another one based on a close analysis of a limited number of Piero della Francesca's paintings.[113] Common to both is not a specific

[108] Sewell, Historical Events (n 104) 861.
[109] Ibid 867.
[110] Jan de Vries, 'Playing with Scales: The Global and the Micro, the Macro and the Nano' (2019) 242 Past & Present 23.
[111] Kennedy, A World of Struggle (n 65) 77.
[112] Giovanni Levi, 'On Microhistory' in Peter Burke (ed) *New Perspectives on Historical Writing* (Pennsylvania State University Press 2001) 99; Carlo Ginzburg, 'Some Queries Addressed to Myself' (2013) 18 Cyber Review of Modern Historiography 90, 93.
[113] Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Routledge 1980); Carlo Ginzburg, *The Enigma of Piero: Piero Della Francesca* (Verso 2002).

focus on similar objects of investigation – there is little in common between Menocchio the miller and Piero della Francesca, or between the types of culture they represent – but a microscopic attention to a limited documentation and a reduced context of production.

As Giovani Levi, another leading figure of micro-history, explains, such reduction of scale is not about displacing the attention towards more parochial issues. In his study of the daily life of a specific Piedmontese village during a limited period, he justified his object of investigation as follows:

> These were the day-by-day strategies of one fragmented segment of the peasant world in the seventeenth century. By analogy, they suggest more general themes and problems, and they test some of the hypotheses that a more distant and less microscopic view has accustomed us to accept.[114]

This indicates that the micro is always connected to the macro and that focusing on a smaller number of actors or contexts is anything but an abandonment of structures. It is rather an acknowledgment that structures are also 'the result of interaction and of numerous individual strategies, a fabric that can be reconstituted only from close observation.'[115] What is assumed in this research is that this *fabric* of structures needs to be minimally addressed in the case of discourses that underwent a deep functional revaluation, as well as for those that emerged as alternatives to dominant discourses. For focusing on these specific contexts of production also informs on the well-established discourses' weakness and inability to capture what various actors within the discipline of international law experienced. In other words, what strategies dictated by specific events became impossible to translate within the dominant discursive structures which prompted the emergence of new discursive practices? To answer this question, a closer look at specific *legal* events or documentations which came to embody new discursive practices is undertaken.

Thus, a close analysis of changing or emerging discourses in specific contexts, whether historical or textual, coexists with a more surface-level analysis of the dominant discourses which, by nature, are more diffused. Without constituting a shift towards a contextualist approach in the vein of the history of ideas[116], this choice nevertheless assumes that rendering discourses intelligible when they appear as alternatives to dominant ones is difficultly undertakable in isolation of their context of production. As such, a specific attention is dedicated to discursive practices that had been produced in the context of

[114] Giovanni Levi, *Inheriting Power: The Story of an Exorcist* (University of Chicago Press 1988) xvi.
[115] Carlo Ginzburg, 'Microhistory: Two or Three Things That I Know about It' (1993) 20 Critical Inquiry 10, 33.
[116] For the canonical description of the contextualist approach of the *Cambridge School* see Quentin Skinner, 'Meaning and understanding in the history of ideas' (1969) 8 History and Theory 3.

structure-changing/transforming events or documentation: the 1921 and 1938 Red-Cross Conferences, the International Committee for the Application of the Agreement Regarding Non-Intervention in Spain, the Upper-Silesian crisis, the Pan-American codification of international law, the jurisprudence of Georges Scelle and Carl Schmitt, the Rif war, and the Syrian Revolts.

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This combination of the macro and the micro in the study of legal discourses is deemed to ultimately make justice, in the best way possible, to the discursive international legal landscape as regards civil and colonial wars from the period studied. The virtue of such dialectic, Ginzburg notes, consists in 'a constant back-and-forth between micro- and macrohistory, between closeups and extreme long shots, so as to continually thrust back into discussion the comprehensive vision of the historical process through apparent exceptions and cases of brief duration.'[117] It is an approach that is believed to be well suited for a period which was marked by the seal of legal experimentation.

3. Theorising 1918-1949

This section aims to situate the 1918-1949 period within the history of international law and illustrate its distinctiveness on the specific issue of civil and colonial wars. A brief overview of the attitudes of the pre-1918 and post-1949 periods towards civil and colonial wars is therefore proposed in order to appreciate the specificity of the 1918-1949 period, which constitutes the core of the research. The period between 1918-1949 is then introduced as characterised by the loss of influence of the field par excellence of international law, the laws of war, and by the many legal experiments that took place in the discipline. And insofar as every periodisation requires a theoretical justification, such a decision, nevertheless, remains marked by the arbitrary.

3.1. From Scarcity to Profusion: International Law and Civil and Colonial Wars before 1918 and after 1949

Coming back to De Lattre's mission in the United-States in 1951, his juggling act between different qualifications of the Indochina war eventually led him to depict the conflict as a civil war. In a speech addressed to the *National Press Club* in Washington, he recalled two important things. In the first place, since 1949, the war in Indochina had ceased to be a colonial war and had turned into a civil war.[118] The reason for that unexpected change was

[117] Ginzburg, Microhistory (n 115) 27.
[118] Maréchal De Lattre, *La Ferveur et le Sacrifice: Indochine 1951* (Plon 1988) 347.

to be found in a bill of the French Parliament which transformed the French Indochinese colonial possessions into *Associated Nations* within the newly established *French Union*.[119] The question of the colonial character of the war – or lack thereof – dealt with, De Lattre could focus on legitimising, not the French suppression of anticolonial resistance, but the French military assistance provided to the newly independent states of Vietnam, Laos, and Cambodia. In addition of denying the colonial dimension of the Indochina War, De Lattre's attempt arguably orbited around the idea that France was acting lawfully. Under the framing of the French war effort as mere military assistance to governments trying to subdue an insurrection was lying the assumption that such conflicts were domestic in essence – and therefore outside international (legal) scrutiny.

These rhetorical efforts, however, can be read in dialogue with two international legal developments regarding civil and colonial wars that had unfolded during the two years that preceded De Lattre's mission in the United-States. In the first place, in August 1949, the adoption of the Geneva Conventions led to the first positive legal framework regulating civil and colonial wars altogether. At the time international law operated the indistinction between civil and colonial wars, De Lattre dedicated his energy to distinguish them. In the second place, in July 1950, were for the first time mobilised the UN Charter mechanisms of collective security in the context of the (internationalised) civil war in Korea.[120] De Lattre's speeches were, of course, deployed on the terrain of anticommunism and not meant to be legally sound. But read from a juridical perspective, his public interventions mobilise several legal constructs which are superfluous from an anti-communist perspective, and essentially irrelevant from a legal one. Devoting time and energy to distinguish a colonial war from a civil war was far from being as strategic as distinguishing a war against communism from a colonial war. Since civil and colonial wars were both subject to the new rules of the common article 3 of the Geneva Conventions and potentially characterizable as a 'threat to the peace' under the UN Charter,[121] De Lattre's efforts missed the target if the implicit purpose was to give a domestic flavour to the Indochina war in order to avoid international legal scrutiny.

From 1949 onwards, civil and colonial wars would become increasingly difficult to ignore within international law. Both types of conflicts are today objects of engagement of various bodies of international law, including but not limited to IHL, Human Rights Law,[122]

[119] Ibid.
[120] UNSC Res 84 (7 July 1950) UN Doc S/RES/84.
[121] Charter of the United Nations (24 October 1945) 1 UNTS XVI art 39.
[122] For the application of Human Rights Law in situation of armed conflicts, including civil and colonial wars see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 para 25; *Legal*

international criminal law,[123] the law of self-determination,[124] the law on the use of force,[125] and investment law.[126] From UN interventions in Congo or East Timor[127] to the establishment of international criminal courts in the midst of conflicts as in Ex-Yugoslavia or Rwanda, from the elevation of anticolonial wars of national liberation as IACs and lawful use of force[128] to the reinforcement of the NIAC regime,[129] from the application of human rights law to civil and colonial wars to the increase of regional human rights courts cases pertaining to human rights violations during such conflicts, the reach of international law has been considerably extended.

Such was not the case before 1918, although one has to be careful, as already mentioned, not to conflate international law's silence with international law's irrelevance. Of course, international law's main aim was to exclude civil and colonial wars from the international legal sphere. From the outset of codification efforts, civil and colonial wars were not categorised as wars in the legal sense and the laws of war were not to apply to insurgents and colonised or would-be colonised people .[130] It was thus not an outrage for someone like Gustave Moynier, the co-founder of the International Committee of the Red-Cross (ICRC), to assert that international law was not applicable to civil wars.[131] Similarly, the projection

Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136 para 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* (Judgment) [2005] ICJ Rep 168 para 216.

[123] See for instance the provisions of the Rome Statute on NIACs. Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 arts 8(2)(c) & 8(2)(f).

[124] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res 1514 (XV) (14 Dec 1960); *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Res 2105 (XX) (20 Dec 1965); *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, UNGA Res 2625 (XXV) (24 Oct 1970); *Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes,* UNGA Res 3103 (XXVIII) (12 Dec 1973).

[125] Particularly relevant are Chapter VII of the UN charter, as well as the development of the so-called 'responsibility to protect.' UN Charter (n 121) chapter VII; Report of the Secretary-General, 'Implementing the responsibility to protect' (2009) UN Doc A/63/677.

[126] Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (CUP 2021).

[127] See Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011).

[128] AP1 (n 25) art 1; Declaration on the Granting of Independence to Colonial Countries and Peoples (n 124).

[129] Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

[130] The paradigmatic case is the 1868 St Petersburgh Declaration which defined war as a relationship between states only with the implicit exclusion of civil wars. In addition, colonial wars were explicitly excluded through a reciprocity clause as a result of British demands to leave colonial possessions outside the realm of the laws of war. See in particular the debates at the conference in Georg Friedrich von Martens, *Nouveau Recueil Général des Traités, Conventions et autres Transactions Remarquables, Vol 18* (Librairie de Dieterich, 1873) 450-475. On the exclusion of the colonial world from the Declaration see also Scott Keefer, ''Explosive Missals': International Law, Technology, and Security in Nineteenth-Century Disarmament Conferences' (2014) 445, 454; On war as a relationship solely between states in international law see, for instance, Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green, and Co.1906) 58. On the colonial origins of the laws of war see Mégret, From savages (n 4).

[131] Quoted in Rosemary Abi-Saab, *Droit Humanitaire et Conflits Internes: Origines et* évolution de la réglementation internationale (Pedone 1986) 31.

of colonial wars towards a sphere of exception was consistent with the routine distinction between *civilised* and *uncivilised* political communities.[132] Even the Lieber Code of 1863, considered to be the first modern legal instrument to regulate civil war, was in an ambiguous relationship with civil and colonial wars. As shown by Helen M Kinsella, the Lieber Code was grounded in a vision of the 'public war' reserved to sovereign states and standing in opposition to 'Native Wars.'[133] Moreover, the Lieber Code associated the status of belligerent and the privilege of combatant with individuals 'armed by a sovereign government', a status and a privilege which were granted to soldiers of the Confederate armies.[134] Given that Confederate soldiers were considered 'armed by a sovereign government', the relationship between the Lieber Code and the conventional developments of IHL regarding NIACs appears uncertain.[135]

As exclusionary as it was, international law also provided more inclusive – that is not to say more progressive – avenues in which civil and colonial wars were not excluded from the outset. The doctrine of belligerency recognition, for instance, was already well-established in 1918. As a result, some civil wars and insurgents were deemed to fall under the empire of international law (see Chapter 1 for a discussion on the doctrine after 1918).[136] Rebels, civil wars, and revolutions were also already a 'problem' for international investment law.[137] The so-called Martens clause, on its end, provided a potential escape from the inapplicability of the laws of war during civil and colonial wars:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.[138]

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[132] The most symptomatic and infamous example of the standard of civilisation is, of course, to be found in the writings of James Lorimer. For his infamous portrayal of humanity as divided into 'three concentric spheres' – 'civilised,' 'barbarous' and 'savage' see James Lorimer, *The Institutes of International Law: A Treatise of the Principles of Jurisprudence as Determined by Nature* (T&T Clark 1872) 101.
[133] Kinsella, Settler Empire (n 32).
[134] 'Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863)' reproduced in Dietrich Schindler & Jirí Toman., *The Laws of Armed Conflicts*, Martinus Nijhoff 1988) 3-23, art 57.
[135] As noted by Eyal Benvenisti, the influence of the Lieber Code on the codification of the laws of war is not to be found in principles or rules, but rather in its codified form. Eyal Benvenisti, *The International Law of Occupation* (OUP 2012) 72.
[136] See for instance Antoine Pillet, *Les Lois Actuelles de la Guerre* (Rousseau 1898) 26-33. But more importantly, see Institut de Droit International, 'Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection' (Session de Neuchâtel, 8 September 1900).
[137] Greenman, State Responsibility and Rebels (n 126) 22.
[138] Convention with Respect to the Laws and Customs of War on Land, 29 July 1899, Treaty Series 403, Preamble.

If the application of the clause to situations of civil war, and even more in cases of colonial wars,[139] remains dubious, the vagueness of the text suggests that such interpretation was possible. The principle of reciprocity, upon which was often justified the non-application of international law to insurgents or colonised people, was also challengeable. Arguably, the absence of reciprocity clause in the Geneva Convention of 1864 – something that would change from the 1868 St Petersburg Declaration onwards –[140] left open the possibility of arguing for the application of the Convention outside the context of a war between Parties. Likewise, the laws of war were not universally seen as inapplicable or irrelevant in the context of colonial warfare; humanitarian as well as imperial concerns prompted various actors to defend the application of the laws of war in the colonial context.[141] Even one of the more quintessential texts of colonial international law, the Final Act of the Berlin Congress, contained a paternalistic provision imposing a duty of 'preservation' of the 'natives' to colonial states.'[142]

Arguments against the total exclusion of civil and colonial wars from international law, or most likely against unleashing unconstrained violence during such conflicts, were rare yet available before 1918. International law was not unequivocally exclusive, and civil and colonial wars were not left in a limbo. However, the exclusion/inclusion dynamic was mainly articulated through the medium of the laws of war (IHL).[143] This started to change after 1918 as the laws of war started to lose their preponderance within the discipline.

3.2. The Decay of the Laws of War and the Reinvigorating of International Law, 1918-1949

Unlike the two other periods briefly discussed, the 1918-1949 period was not characterised by a high activity regarding the codification of the laws of war. But this disengagement went beyond the lack of codification and was more fundamental. To a large extent, the discipline withdrew its attention from the laws of war, mainly to the benefit of the emerging *jus ad bellum*. This trend did not go unnoticed, and international lawyers were perfectly conscious of the plight of the laws of war. As far as the diagnosis was consensual, the discipline was still divided between those for whom this disengagement was unfortunate, and those for

[139] Matthias Goldmann, 'The ambiguity of colonial international law: Three approaches to the Namibian Genocide' (2024) 37 LJIL 580, 598.
[140] Emily Crawford, 'The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL' (2018) 20 JHIL 544, 561.
[141] Christopher Szabla, 'Civilising Violence: International Law and Colonial War in the British Empire, 1850–1900' (2023) 25 JHIL 70.
[142] General Act of the Berlin West Africa Conference (26 February 1885) art 6.
[143] The use of the term *laws of war* is justified by the fact that it was the term used at this time to address what we now call IHL or law of armed conflict (LOAC).

whom it appeared as a necessity. Ultimately, the laws of war were starting to lose their position as international law's field par excellence. They were put in concurrence with other projects and new ways of thinking about the relationship between war and international law. It was a period of uncertainty for the regime and its consolidation and development after 1949 were far for granted.

3.2.1. From Jus in Bello to Jus ad Bellum: Between Dismay and Disenchantment

Compared to the two periods discussed above, the codification of the laws of war between 1918 and 1949 was close to anecdotal. Some treaties were eventually adopted[144] while some projects did not materialise.[145] But whether in scope or energy, these attempts to enrich the laws of war were not nearly as ambitious as the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1949. If states were reluctant to develop the laws of war, it was, according to Josef L Kunz, a shared responsibility. It is the combined lack of engagement and interest of states and 'legal science' in the laws of war that led to this lethargy of the field.[146] Thus, when at the Hague Academy in 1931 Hans Wehberg complained about the scarcity of efforts to codify the laws of war,[147] that is the discipline as a whole which was held responsible.

The main reason behind this neglect of the laws of war is to be found in the move operated within the discipline from *jus in bello* to *jus ad bellum*. International jurists from this period were fully conscious of the evolution of their discipline, and this move from *jus in bello* to *jus ad bellum* is not a retrospective construction of what happened. After WWI, Arnold D. McNair noted, 'most international lawyers devot[ed] their energies to the development of the Law of Peace and to the promotion of means for avoiding war.'[148] It was no longer the

[144] The most important developments were the 1925 Geneva Protocol and the 1929 Geneva Conventions. Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare (adopted 17 June 1925, entered into force 9 May 1926) 94 LNTS 65; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 304; Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 344.

[145] Among those projects, The Washington Conference of 1922 on the Limitation of Armaments is well known for its failure to enter into force. Treaty relating to the Use of Submarines and Noxious Gases in Warfare (adopted 6 February 1922, not entered into force). A list of past treaties and projects can be found in the IHL databases of the ICRC: ICRC, 'Historical treaties and documents' (*IHL Databases*) <https://ihl-databases.icrc.org/en/ihl-treaties/historical-treaties-and-documents> accessed 22 February 2023.

[146] J.L Kunz, 'Plus de Lois de la Guerre ?' (1934) 41 RGDIP 22, 22,24.

[147] Hans Wehberg, 'La contribution des conférences de la paix de la Haye au progrès du droit international' (1931) 37 R.C.A.D.I. 527.

[148] Arnold D. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) 11 Transactions of the Grotius Society 29, 29.

time to think 'of the laws of war, but of laws against war.'[149] But attitudes vis-à-vis such evolution were not as uniform as was the diagnosis regarding the decay of the laws of war.

The first type of reaction was one of dismay. While the plight of the laws of war was acknowledged, this state of affair was seen through a mix of nostalgia, regret, and scepticism regarding the emergence of *jus ad bellum*. In an article evocatively titled *The Laws of War: Their Rise in the Nineteenth Century and Their Collapse in the Twentieth*, Sterling E. Edmunds dramatically advanced that if the laws of war were to be taught, it should be 'in the department of political history.'[150] States, he observed, 'returned to the practice of the absolutist conceptions of the pre-nineteenth century order', and the laws of war 'vanished.'[151] In this case, the decay of the laws of war, while unfortunate, was directly associated with the events of WWI. In contrast, this 'indifference' towards the laws of war in the post-war period was a 'strange anomaly' for J.L Kunz.[152] Departing from Edmunds' defeatism, Kunz wanted to reinvigorate the laws of war from its current apathy in face of the uncertainty of the emerging *jus ad bellum.*[153] Kunz shared a concern that Alberic Rolin had already expressed in 1919 when he underlined the danger of the contemporary desire to 'bury' the laws of war in order to 'bury the war.'[154] For those advocates of the laws of war, these were perfectible,[155] and the abandonment of the regulation of war in order to materialise its prohibition was marked by a dangerous idealism.[156]

The opposite reaction was characterised by a disenchantment vis-à-vis the laws of war. Not only were they ineffective and widely violated during WWI, but they were also part of the problem. Disenchantment here led to think about the problem of war differently. Even catastrophism did not lead to the kind of defeatism that can be found in Edmund's text. For instance, while sharing the same position as Edmund by asserting that 'international law has dissolved in blood and in smoke,' another jurist saw an opportunity as there was 'a place of law vacant in the world.'[157] More generally, unlike the attitude that Hans Morgenthau attributed to internationalists of blaming the facts rather than questioning the adequacy of

[149] Lord Shaw, 'Civilisation and Law: America' (1920) 6 Transactions of the Grotius Society 17, 21.
[150] Sterling E. Edmunds, 'The Laws of War: Their Rise in the Nineteenth Century and Their Collapse in the Twentieth' (1929) Va.L.Rev. 321, 321.
[151] Ibid 322.
[152] Kunz, Plus de Lois de la Guerre (n 146) 24.
[153] Ibid.
[154] Alberic Rolin, 'Les Fossoyeurs du Droit de la Guerre' (1919) 26 RGDIP 129, 129.
[155] For Kunz, for instance, future developments should avoid the inclusion of *si omnes* clauses. Kunz, Plus de Lois de la Guerre (n 146) 37.
[156] James W. Garner, 'Les Lois de la Guerre. Leur Valeur. Leur Avenir' (1936) 17 Rev.drt.intern.et leg.comp. 96, 97.
[157] Shaw, Civilisation (n 149) 17.

the devices,[158] some internationalists did blame the device. The laws of war were seen as a problem mainly because they had for a long time monopolised the attention of the discipline. As J.W Garner put it, the problem resided in the fact that international law, in most of its developments, was regulating 'situation arising from the existence of the war.'[159] A more comprehensive critic ultimately presented the laws of war as a diversion:

> [T]he failure of international law to provide solutions to the problems of peace has been at least in part due to the fact that the attention of writers and statesmen has always been diverted from the law of peace to the law of war. This preoccupation with the law of war has not only diverted attention from the difficult, but infinitely more important problems of peace, it has also rendered comparatively barren efforts at international 'legislation' which might have led to the best results.[160]

Disenchantment, however, was not only the result of this 'diversion.' Another outcome was also the lack of enchantment potential of the laws of war. The prohibition of war was regarded as being more utopian and thus more desirable than the mere regulation and limitation of it. The so-called pragmatism of the laws of war,[161] and the corollary of war as an inevitable feature of human societies, were seen as incapable of enchanting and attracting people to international law:

> There is also at least a case for thinking that it has undermined the whole moral force of international law in the minds of people at large. A law, of which the most discussed and the most conspicuous part, and of which it was often erroneously asserted that the only 'real' part, was the law of war, could not command much popular respect.[162]

For the sake of enchantment, the emerging *jus ad bellum* and the establishment of the system of the League of Nations were more promising in the post war period – and the hope of outlawing war was often accompanied by the hope of making the laws of war superfluous.[163]

3.2.2. An Era of Experimentations

The choice of the 1918-1949 period is determined by the specific legal history of civil and colonial conflicts. It goes against a more traditional periodisation such as the interwar period or the 1919-1945 sequence going from the creation of the League of Nations to the creation of the UN. But these different periods do not only share the arbitrariness of delineation. If

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[158] Hans Morgenthau, 'Positivism, Functionalism, and International Law' (1940) 34 AJIL 260, 260.
[159] J.W Garner, 'La Reconstitution du Droit International' (1921) 28 RGDIP 413, 415.
[160] Ralph W. Aigler, 'The League of Nations and the Laws of War' (1920-1921) BYIL 109, 115. It was initially published anonymously. The article was nevertheless re-published in the Michigan Law Review with the name of the author. Ralph W. Aigler, 'The League of Nations and the Laws of War' (1921) 19 Mich.L.Rev. 837.
[161] As stated by Clyde Eagleton in 1932, international law had recognised its 'incompetence' regarding war and out of this pragmatic acknowledgment, had limited itself to the attenuation of its horrors. Clyde Eagleton, 'Faut-il Proscrire seulement les Guerres d'Agression ou toutes les Guerres ?' (1932) 39 RGDIP 498, 507.
[162] Aigler, League of Nations (n 160).
[163] Garner, Lois de la Guerre (n 156).

1918 constitutes an obvious and traditional starting point, 1939, 1945, or 1949 offer three legitimate ruptures from the standpoint of legal history. The outbreak of the second world war in 1939 can be seen as the factual death of the system of the League of Nations while 1945 concretised the formal replacement of the organisation by the UN. Yet on the narrower issue of civil and colonial conflicts, it is difficult to find a clearer rupture than the adoption of the common article 3 of the 1949 Geneva Conventions. What all these potential legal-historical periodisations discussed have in common, however, is that they can all be characterised as an era of legal experimentation. The difference ultimately resides in the rupture that put an end to this era of experimentation. When the UN was created or the common article 3 adopted, a specific project, with a major impact on the discipline, materialised. It is assumed here that the adoption of the Geneva Conventions in 1949 constitutes the legal project that best captures the legal imaginary of the discipline as regards civil and colonial wars.

As the interwar period has been characterised as an era of legal experimentation and 'exploration,'[164] one may be tempted to speak of a 'long' interwar period for the international legal history of civil and colonial conflicts.[165] Encapsulating the rupture of 1949 thus aims at preserving the coherence of a period marked by legal experimentation and which can be closed by the adoption of common article 3. To cut back to 1939 or 1945 would be to artificially end a period when the relationship between international law and civil and colonial conflicts was still undecided as no major legal projects prevailed.

As discussed above, the post WWI period was marked by a certain degree of disenchantment regarding an international legal order whose most traditional expression was the laws of war. With the discipline moving from *jus in bello* to *jus ad bellum*, discouraging war came to be 'recognized as a central theme of the post-World War conventional development.'[166] International treaties dedicated to the prohibition of war and collective security like the Versailles treaty, the Locarno Agreement, the Briand-Kellog Pact,[167] or unsuccessful

[164] Nathaniel Berman, ''But the Alternative Is Despair': European Nationalism and the Modernist Renewal of International Law' (1993) 106 Harv.L.Rev. 1792, 1805.
[165] This comes from Historians, especially Fernand Braudel and Eric Hobsbawm, who have challenged the traditional historical delineation with concepts such as 'the long sixteenth century' (1450–1640) for Braudel, 'the long nineteenth century' (1789-1914), and 'the short twentieth century' (1914-1991) for Hobsbawm: Fernand Braudel, *La Méditerranée et le Monde Méditerranéen à l'Epoque de Philippe II* (Armand Collin 1990); Eric Hobsbawm, *The Age of Empire 1875-1914* (Vintage Books 1989) 6; Eric Hobsbawm, *The Age of Extremes: The Short Twentieth Century, 1914-1991* (Vintage Books 1994).
[166] Quincy Wright, 'The Present Status of Neutrality' (1940) AJIL 391, 398.
[167] Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188; Treaty of Mutual Guarantee, done at Locarno, October 16, 1925, Final Protocol of the Locarno Conference of the same Date and Collective Note to Germany dated London, December 1, 1925, regarding Article 16 of the Covenant of the League of Nations (adopted 16 October 1925,

projects such as the Geneva Protocol[168] attracted much attention and debates. In 1940 Quincy Wright thus noted that 'the introduction of new concepts, such as aggression, insurrection, defense, support, sanctions, has been deplored by some and approved by others.'[169] Traditional approaches were put in competition with emerging models, concepts, and ways of thinking regarding the relationship between international law and different objects. For Nathaniel Berman, 'international law's changing relationship to colonialism and nationalism during the interwar period'[170] led to legal and institutional experimentations.[171] Berman presents for instance the 1947 Plan for Palestine as the embodiment of the 'legal techniques' that were experimented during the interwar period, namely *self-determination, minority protection guarantee, provisions for individual emigration and citizenship internationalization,* and *supranational integration*.[172] But these experiments did not provide a clean slate to the discipline, and the legal techniques inherited from the previous period were still alive, especially regarding civil and colonial conflicts.

In a period of decay of the laws of war and legal experimentation, the disciplinary reflex that would have previously considered the inclusion or exclusion of civil and colonial wars through the medium of the laws of war was undermined. This led the discipline to approach civil and colonial conflicts from different and often contradictory perspectives.

4. Structure of the Thesis

This thesis analyses six different international legal discourses 'in order to outline the complex intersections of old and new ideas, interests and institutions'[173] by focusing on the specific objects of civil and colonial wars. Chapters 1-4 focus on the five discourses through which the relation between civil wars and international law was articulated. In sharp contrast, only one chapter (chapter 5) is dedicated to the specific relation between international law and colonial wars. Rather than an arbitrary choice, this asymmetry in the space dedicated to civil war compared to colonial war is in itself part of the argument of this thesis, for the relation between colonial wars and international law remained predominantly governed by the traditional discourse of civilisation. The profusion of competing and sometime

entered into force 14 September 1926) 54 LNTS 289; General Treaty for Renunciation of War as an Instrument of National Policy (adopted 27 August 1928, entered into force 25 July 1929) 94 LNTS 57.

[168] *Draft Protocol for the Pacific Settlement of International Disputes* (1924) League of Nations General Assembly Docs Annexe II 135.

[169] Wright, Neutrality (n 166).

[170] Berman, Appeals of the Orient (n 11) 197.

[171] *See* in particular: Nathaniel Berman, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (1992) 4 Yale J.L.& Human. 351; But the Alternative is Despair (n 164); 'Between Alliance and Localization: Nationalism and the New Oscillationism' (1994) 26 N.Y.U.J.Int'l.L.& Pol. 449; Appeals of the Orient (n 11).

[172] Berman, But the Alternative is Despair (n 164) 1795-1796.

[173] Michael Fakhri, *Sugar and the Making of International Trade Law* (OUP 2014) 6.

contradictory approaches regarding civil wars, which saw a constant oscillation between traditional and innovative discursive practices, was hardly replicated in the context of colonial wars. Therefore, what was thought and imagined for civil wars was at the same time often set aside for colonial wars. The smaller space dedicated to colonial wars in this thesis thus indicates that the exclusionary character of international law was more persistent for colonial wars than civil wars.

Chapter 1 focuses on the two most traditional legal discourses on civil war, which despite adopting different stances regarding the inclusion of civil wars within international law, were grounded on state-centric principles. The first one, *Rousseauism*, was premised upon the idea that civil war was an exogenous object of international law. It perpetuated the idea that civil war was not a war in the legal sense from the perspective of international law, and that insurgents did not and cannot possess legal subjectivity. As a corollary, it assumed that international law's rights, duties, privileges, and status could only be attributed to established states. The second one, *governmentalism* saw civil war as an inevitable feature of the international order. Through the doctrine of belligerency recognition, *governmentalism* adopted a more functional approach than *Rousseausim*: under certain circumstances, insurgents were to gain legal subjectivity. The whole discourse was based on a functional channelling of civil war into the interstate model of war which only mitigated the state-centrism of *Rousseausism*. The inclusive dimension of governmentalism, however, was contingent upon a disciplinarisation of non-state actors through a conditional recognition of legal subjectivity on the basis of criteria indicating state-like characteristics.

Chapter 2 traces the evolution of the humanitarian discourse produced in the context of the Red Cross movement and its extension to the object of civil war. The diffusion of a narrative associating the multiplication of civil wars in Europe after 1918 as a humanitarian catastrophe, and even as a 'new era,' prompted the Red Cross community to operate a moralisation of the laws of war. Rather than legally challenging *Rousseauism* or engaging in the difficult process of belligerency recognition, *humanitarianism* set out to humanise civil wars through moral principles aimed at circumventing the absence of positive legal regulations. It led to a reconceptualization of the law of war as a legal regime designed not primarily for the belligerents, but for the 'victims'.

Chapter 3 analyses the discourse of *localisation* that underpinned the 'non-intervention' system established by European powers to answer the Spanish civil war. Constructed in opposition to the logics of *Rousseauism, governmentalism, and humanitarianism*, the discourse of *localisation* was articulated around the understanding of civil war as threat to

international peace. Accordingly, through an institutionalisation of a paradoxically 'interventionist' system of 'non-intervention,' this chapter shows that international law's role regarding civil war was revaluated. Its new aim was to avoid international contagion and to prevent civil wars from spreading.

Chapter 4 engages with the discourse of *suppression* which assumed that international law could function and be mobilised to neither localising, humanising, accompanying nor ignoring civil wars, but to suppressing them. This approach permeated various bodies of literature, including the legal answers to the Upper-Silesia crisis, the nascent international law of civil war in the Americas, as well as the jurisprudence of Carl Schmitt and Georges Scelle. As demonstrated in this chapter, this gave rise to various interpretations of the meaning that suppression could have, and to different methods for achieving it. But central to these different interpretations was the idea that the suppression of civil wars was a collective preoccupation which deserved to be addressed by a coherent international legal order.

Chapter 5 focuses on the discourse of *civilisation*, which, regarding the relation between international law and colonial wars, maintained its preponderance during the 1918-1949 period. The dichotomy between civilised and uncivilised communities and polities, in more or less explicit forms, maintained its grip over the formulation of legal arguments supporting the inclusion or exclusion of colonial wars from the realm of international law. This chapter highlights that although it allowed limited inclusive avenues, the discourse of *civilisation* remained predominantly exclusionary. International law's receptiveness to exclusionary arguments, ranging from formalist to racial reasonings, eventually left (would-be) colonised people involved in or victims of colonial wars in a situation where the language of international law offered almost no emancipatory potential.

The structure of this thesis owes a lot to the idea of 'modular history' developed by Rose Parfitt in her book *The Process of International Legal Reproduction*.[174] In the same way that Parfitt's various 'items' apparently form independent legal histories, the five chapters of this thesis, as well as the six discourses they analyse, are all 'designed to tell a story of [their] own.'[175] But when these autonomous legal histories are read together, Parfitt notes, 'each new historical item is designed to alter our perception of the whole, bringing certain elements into relief while rendering other less visible.'[176] This thesis proceeds in the same way: each

[174] Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019) 16-56.
[175] Ibid 55.
[176] Ibid.

chapter adds another layer to the broader history, with every discourse interacting with the previous ones. Therefore, *governmentalism* constituted a functional answer to the strictness of *Rousseauism*, whereas *humanitarianism* circumvented these two discourses through a move from law to morality. The discourse of *localisation*, on its end, was an alternative to these more traditional approaches, albeit always vulnerable to the return of *Rousseauism, governmentalism, and humanitarianism*. The idea of suppressing civil wars by means of international law, in spite of its novelty, was also in an ambiguous relationship with *Rousseauism*. And finally, the discourse of *civilisation* typically kept colonial wars away from the discourses developed in the context of civil wars.

CHAPTER 1. BETWEEN ROUSSEAUISM AND GOVERNMENTALISM: TWO NUANCES OF STATE-CENTRISM IN THE (NON)REGULATION OF CIVIL WARS

To speak of international law as a discipline obsessed by the state is a truism. International law, Frédéric Mégret notes, remains a 'discourse on the construction of the centrality of the state' whose role is to 'limit the possibilities of imagining forms of legality other than those emanating from states.'[177] As soon as this inclination towards the state is understood as a discursive construct, the evidence of the state as the legitimate and desirable political organisation, and of a world divided into sovereign states, loses its hold. What emerges instead are discourses supporting this specific model. As Susan Marks puts it, 'this has to do not with the status of international law as a product of state power, but with state power as a product of international law.'[178]

Between 1918 and 1949, international law's most traditional approaches to civil war, inherited from the late nineteenth century, strengthened this model. *Rousseauism*, which perpetuated the idea that civil war was not a war in the legal sense from the perspective of international law, and that insurgents did not and cannot possess legal subjectivity, assumed that international law's rights, duties, privileges, and status could only be attributed to established states. *Governmentalism*, as expressed through the doctrine of belligerency recognition (DBR), adopted a more functional approach allowing under certain circumstances insurgents to gain legal subjectivity: by means of belligerency recognition, a civil war was transformed into a war in the legal sense involving two belligerents, which opened the door to the legal regulation of civil conflicts. But this was conditional on insurgents showing state-like attributes and being a *de facto* government.

Despite adopting two different stances vis-à-vis the legal regulation of civil war, both approaches were yet grounded on state-centric principles. Rousseauism was conservative and formalist in the sense of erecting established states as the sole legitimate actors of the international system. Governmentalism, on the other hand, differed only in that it recognised and accompanied potential changes in the distribution of statehood. But the state remained the ultimate and most legitimate form of political organisation contemplated by the governmentalist approach, and statehood the only legitimate purpose of collective violence. Accordingly, the DBR may be one of the purest manifestations of 'the legal construction of

[177] Frédéric Mégret, 'L'Étatisme Spécifique du Droit International' (2011) 24 RQDI 105, 106-107.
[178] Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 LJIL 339, 346. Or, as Sundhya Pahuja posits, 'international law does not just 'apply' to nations, but also brings them into being.' Pahuja, Decolonising International Law (n 11) 26.

war' as a way 'to channel violence into certain forms of activity engaged in by certain kinds of people while excluding other forms engaged in by other people.'[179] In other words, another manifestation of what Rose Parfitt calls 'international legal reproduction,' that is, 'the process through which new subjects of international law are brought into being and later disciplined.'[180] For that reason, governmentalism maintained a close relationship with Rousseauism as it was only concerned with a specific form of collective violence and with specific insurgents. Situations and insurgents which did not meet the criteria allowing belligerency recognition were, in a sort, left to Rousseauism.

Both approaches also reached some of their limits between 1918 and 1949 and faced challenges from alternative discourses (see Chapters 2, 3 and 4). Their logics, however, still animate certain contemporary discussions and remain available discursive tools to argue about the inclusion or exclusion of civil wars in international law.

1. Rousseauism: The Obsession of Formal Status

This section aims to show that state-centric biases regarding civil war did not vanish after WWI. They were still emphatically expressed in a strict form of *Rousseauism*, that is, a discourse on legitimate violence focusing on legitimate actors. The main characteristic of this approach is to share the same logic as Rousseau's conception of war and the law of war. The argument is not that Rousseau was explicitly used as a model within the discipline, but that his theory of war provides a critically helpful reference point for understanding the state of disciplinary debate at the time. According to Rousseau's theory, war is essentially a legal institution, belonging to the sphere of legitimate violence by virtue of being waged according to a certain conduct, but first and foremost by being only a relationship between legitimate actors – states.[181] The legal category of war thus both imposes a 'delimitation of the nature of participants' and a 'delimitation of the nature of the activity itself.'[182]

In this approach, civil war is associated with the dissolution of the collective and reduced to 'the war of all against all.'[183] Foucault noted that this vision relies on the fiction that civil war is a relationship between individuals, which ignores that 'there is no civil war that is not a confrontation between collective elements.'[184] From this fiction derives Rousseau's conception of war as a public event that can occur only between 'things' – states – and not

[179] Berman, Privileging Combat (n 19) 5.
[180] Parfitt, Legal Reproduction (n 174) 12.
[181] Jean-Jacques Rousseau, *Principe du droit de la guerre* (Vrin 2014).
[182] Lorite Escorihuela, The Politics of Distinction (n 20) 331.
[183] Foucault, La Société Punitive (n 41) 47-53.
[184] Ibid 51.

between individuals.[185] Warlike violence which does not occur between two states or more is therefore presented as mere *brigandage*.[186] The first distinction Rousseau makes is thus to delimitate between legitimate and non-legitimate actors of war – what one would call privileged and unprivileged agents of war in contemporary legal vocabulary.[187] It is only after has been made this first distinction that the rights, duties, privileges and status of the laws of war can be distributed, and that war can be limited or humanised.

During the 1918-1949 period, this approach found its more coherent expression – and in direct reference to Rousseau – in Carl Schmitt's *Jus Publicum Europaeum* concept of war.[188] In his nostalgic and fantasised history of international law, Schmitt presented the legal institution of war, past but desirable, as follows:

> War now became a "war in form" … [O]nly by limiting war to conflicts between territorially defined European states, could a conflict between these spatially defined units be conceived of as personae publicae [public persons] living on common European soil and belonging to the same European "family." Thus, it was possible for each side to recognize the other as justi hostes. Thereby, war became somewhat analogous to a duel … In a certain sense, European soil became the theatre of war (theatrum belli), the enclosed space in which **politically authorized and militarily organized states** could test their strength against one another under the watchful eyes of all European sovereigns.[189]

As the duel, war was still a potentially mortal activity, but an activity whose access was limited to gentlemen recognising each other as equal. Civil war, on the other hand, was the irruption of unauthorised actors into a sphere of activity where they do not belong. In other words, war is not synonymous with collective violence. According to Rousseauism, it is the quality of the participants involved in a conflict, not its material reality, that qualifies a given conflict as a war for legal purposes. This pattern of legal argumentation, having had its heyday in the late nineteenth century, restrained its presence in the discipline between 1918 and 1949, and even if it was less powerful and more ambivalent after WWI, traces of it remained.

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[185] Jean-Jacques Rousseau, *Du Contrat Social* (LGF 2011) 74-75; Principe du droit de la guerre (n 181) 46.
[186] Ibid, Contrat social 76; Ibid, Principe du droit de la guerre 60.
[187] Lorite Escorihuela, The Politics of Distinction (n 20) 325.
[188] Carl Schmitt, *The Nomos of the earth in the International Law of the Jus Publicum Europaeum* (Telos Press 2006, 1950). Even if the *Nomos of the Earth* was published in 1950, it was written before 1949 and the adoption of the Geneva Conventions, hence the absence of discussion on this fundamental aspect. In his *Theory of the Partisan* published in 1963, Schmitt discussed the Geneva Conventions in detail.
[189] Ibid 141-142. Our emphasis. For a discussion on Schmitt's approach to international and civil war which cannot be reduced to Rousseauism see Chapter 4 section 3. For the essential colonial dimension of Schmitt's *jus publicum europaeum* see chapter 5.

1.1. No States, No War

The question of war in the international legal discourse is often linked to the broader issue of the subjects of international law. Despite the (contested) emergence of new international legal subjects such as international organisations, minorities, nations, or even individuals after 1918, it was still defended that international law was 'a law between states only and exclusively.'[190] Many textbooks of the period begin with this clear definition of international law as a strictly interstate matter,[191] even when this assertion is contradicted by the subsequent treatment of manifestly non-inter-state matters governed by international law. The same contradiction goes for the question of the definition of war.

While the doctrine of the recognition of belligerency in case of insurrection was a well-established – though non uniform – doctrine (see section 2 of this chapter), it was still routinely assumed during the 1918-1949 period that civil war did 'not strictly speaking belong to international law.'[192] Civil wars, C.G Fenwick posited, 'belong within the class of domestic questions which are outside the control of international law.'[193] Rousseauism was informed by an understanding of war in the 'legal sense' and not in the 'material sense.'[194] Outside the still discussed question of formal declaration of war[195], the 'legal sense' of war was to be found in the quality and identity of the parties contending. As consistently stressed through Oppenheim's *International Law* reeditions, 'to be a war, the contention must be *between states*.'[196] This conception of war as a 'struggle solely between states'[197] led for instance René Cassin, one of the future drafters of the UN Declaration of Human Rights and Nobel prize winner, to peremptorily state that 'insurgents are not belligerents.'[198] And since

[190] Hersch Lauterpacht, 'Revolutionary Propaganda by Governments' (1927) 13 Transactions of the Grotius Society 143, 143.
[191] Lassa Oppenheim, *International Law: A Treatise, Vol I Peace* (3rd edn edited by Ronald F. Roxburgh, Longmans, Green and Co. 1920). In Oppenheim's textbook, which was reedited several times by Roxburgh, McNair and Lauterpacht from 1918 to 1949, it is for instance stressed that 'international law is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other.' Similar definitions can be found in T.J Lawrence, *Principles of International Law* (7th edition revised by Percy H. Winfield, D.C. Heath & Co 1923) 3; George Grafton Wilson, *Handbook of International Law* (3rd edition, West Publishing Co 1939); Paul Fauchille, *Traité de Droit International Public: Paix* (Rousseau 1922) 207.
[192] While he was using the precedent of the US civil war, the author was cautious enough to indicate that it was not exactly a precedent belonging to international law. Eugene Audinet, 'Des Restrictions apportées aux Droits Patrimoniaux des Sujets Ennemis dans la Guerre 1914-1918' (1920) 27 RGDIP 289, 325.
[193] C.G. Fenwick, 'Can Civil Wars be Brought under Control of International Law' (1938) 32 AJIL 538, 538.
[194] Quincy Wright, 'When Does War Exist?' (1932) 26 AJIL 362, 367.
[195] On this issue see Ibid.
[196] Lassa Oppenheim, *International Law: A Treatise, Vol II War and Neutrality* (3rd edn edited by Ronald F. Roxburgh, Longmans, Green and Co. 1921) 68. Author's emphasis. Strangely, this part was still present even in the reedition published after the adoption of the 1949 Geneva Conventions.
[197] Karl Struppe, *Éléments du droit international public universel, européen et américain* (Éditions Internationales 1930) 330.
[198] René Cassin, 'Le Droit International et la Non-Immixtion dans les Guerres Civiles' (1936) n27 Les Cahiers des Droits de l'Homme 636, 636.

war requires at least two belligerents, 'in the absence of the existence of two belligerent communities,'[199] a conflict such as a civil war was not a war from the perspective of international law.

This expulsion of civil war towards the domestic sphere was of course consistent with positivist premises and was not necessarily linked to an absolutist conception of the state. The 'fact that civil warfare ha[d] not been regulated by treatises and conventions but has been governed by national policies and usage'[200] made it difficult to identify a legal basis, whether conventional or customary, for including civil war within international law. On the conventional side, the core of the laws of war remained the same as before 1918, and the few conventions adopted after 1918 did not extend their reach to civil war. The emerging *jus ad bellum* was also silent on this issue in its most representative manifestations.

Two main outcomes flowed from the exclusion of civil war from international law alongside insurgents' lack of legal personality. The first outcome was the non-application of the laws of war to civil conflicts. A good illustration can be found in Paul Fauchille's textbook: 'A distinction must be made according to whether the war is international or civil. International war is the only one subject to the laws of war.'[201] Based on the same premise, the British *Manual of Military Law* provided that 'rioters or insurgents are wholly under the ordinary civil law' – by which term was meant the totality of the domestic legal order and especially criminal law – 'and are in no respects subject to military law, or to the *customs of war.*'[202] In this strict and formal conception of war as a public event, carried out by public authorities, it was unconceivable to think of the rights, duties, status, and privileges of the laws of war not deriving from the sovereign state. As G. Grafton Wilson put it, 'the forces entitled to the rights of the laws of war are those duly enrolled in state forces or at least under its control and for whose act the state is responsible.'[203] This was of course consistent with the core of the laws of war, and more particularly with the 1907 Hague Regulations which provided that the 'laws, rights, and duties of war' only applied to 'armies [and] militia and volunteer.'[204] The illegitimacy of the insurgents, these 'unprivileged agents of war',[205] derived from the fact that their resort to force was neither sanctioned by the state nor carried out on its behalf. Unlike militia, volunteer and even individuals taking arms in the context of a *levée en*

[199] Ibid.
[200] Norman J. Padelford, 'International Law and Insurgency' (1937) 37 Die Friedens-Warte 191, 191-192.
[201] Fauchille, Droit International (n 191) 11.
[202] War Office, *Manual of Military Law* (His Majesty's Stationary Office 1929) 2.
[203] George Grafton Wilson, 'The Guerrilla and the Lawful Combatant' (1943) 37 AJIL 494, 495.
[204] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907) (2 A.J.I.L. (Supp.) 90 (1904)) art 1.
[205] Lorite Escorihuela, The Politics of Distinction (n 20) 325.

masse,[206] insurgents were for this reason unentitled to the combatant privilege or the protections of the laws of war, such as the POW status.

From this stems a second and arguably more impactful outcome, that is that rebels, insurgents, or any subversive entities, 'not being a recognized state, cannot by their own acts initiate war.'[207] In the jargon of Carl Schmitt, they were not 'jus belli' holders.[208] It remains unclear whether this right to wage war was only denied to insurgents by domestic law – by constitutional or criminal laws for instance – or also by international law itself. Symptomatic of this ambivalence is a small passage of a resolution of the US Senate of February 1923:

> Whereas, war between nations has always been and still is a lawful institution, so that any nation may, with or without cause, declare war against any other nation and be strictly within its legal rights; and Whereas, revolutionary war or wars of liberation are illegal and criminal, to wit: high treason, whereas, under existing international law, wars of aggression between nations are perfectly lawful.[209]

Quincy Wright rightly noticed how difficult it was 'to tell whether Senator Borah [was] under the impression that revolutionary wars [were] "high treason" under international law as well as under the municipal law of the state in question.'[210] Given that rebellions and revolutions were unlawful in most domestic orders, it was generally assumed – as it is still largely the case today – that it was pointless for international law 'to make revolution unlawful within the state.'[211]

A marginal yet divergent voice, however, considered civil war as a violation of the domestic and international orders altogether. This was well illustrated by Georges Scelle for whom insurgents were always violators of municipal law and international law at the same time.[212] According to Scelle's theory of *dédoublement fonctionnel,* a government was both a national and an international government.[213] As a result, insurgents' refusal 'to recognise the legally established competence of national governments that are at the same time international governments' was constitutive of the unlawfulness of civil war both domestically and

[206] Hague Regulation 1907 (n 204) art 2.
[207] Quincy Wright, 'Changes in the Conception of War' (1924) 18 AJIL 755, 759. In the same vein, Thomas Baty stressed that rebels 'are not independent nor entitled to wage war.' Thomas Baty, 'Abuse of Terms: Recognition, War' (1936) 30 AJIL 377, 378.
[208] Schmitt, Nomos of the Earth (n 188) 143.
[209] Quoted in Wright, Conception of war (n 207) 759.
[210] Ibid.
[211] Padelford, International Law and Insurgency (n 200) 192.
[212] Georges Scelle, 'La Reconnaissance des Insurgés et la Guerre Espagnole' (1937) 37 Die Friedens-Warte 65, 67.
[213] Georges Scelle, *Précis de Droit des Gens : Principes et Systématique* (Editions Sirey 1932) 43, 55-56, 217. For a discussion on Scelle's theory see Antonio Cassese, 'Remarks on Scelle's Theory of "Role Splitting" (dédoublement fonctionnel) in International Law' (1990) 1 EJIL 210.

internationally.[214] In each case, however, the analytical emphasis was still put on the quality of the actors involved in a conflict and not on the material aspect of it.

1.2. The Right to Self-Determination and the Shadow of Civil War: The Discipline of International Law and its Interwar Anxieties

The persistence of Rousseauism and its concern to distinguish between legitimate and illegitimate actors was also consistent with some anxieties generated by the new principle of self-determination. Although the 'Wilsonian Moment' aroused enthusiasm and many rapidly disappointed expectations, especially outside Europe,[215] the discipline of international law met self-determination with mixed reactions. As well illustrated by the Aaland Islands dispute, a part of the discipline was eager to circumscribe and limit the principle of self-determination. In 1920, the *Report of the International Committee of Jurists*[216] created by the Council of the League of Nations took the role of taming this new principle. By emphasising state's sovereignty and on the absence of positive law on the matter, the report supported the idea that self-determination was seriously limited.[217] Commenting on the report few months after, Philip Marshall Brown insisted that it amounted 'to a statement that there [was] no absolute right of self-determination [and] that the fate of the Aaland Islands … [was] to be determined ultimately by the concert Powers.'[218] In other words, a part of the discipline was not ready to 'accept the Wilsonian confidence that the new principles could be translated directly into legal form, [and] could not simply reverse the positivist view that the state must take legal precedence over the nation.'[219]

In that regard, self-determination was a symptomatic example of the interwar 'paradoxical relationship between "primitivism" and experimentalism' that has been studied by Nathaniel Berman.[220] In what Berman calls 'international legal modernism,' self-determination represented an example of attempt to combine legal experimentation with primitive forces like nationalism, which was simultaneously seen as a vital force enabling a renewal of international law, yet an irrational, explosive, and passionate expression that should be channelled and limited.[221] The obsession with formal status and the state as the only

[214] Scelle, La Reconnaissance des Insurgés (n 212) 67.
[215] Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (OUP 2007) 5.
[216] The committee was composed of Professors F. Larnaude, A. Struycken, and Max Huber.
[217] *Report Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question* (October 1920) League of Nations Official Journal Spec Supp 3, 5.
[218] Philip Marshall Brown, 'The Aaland Islands Question' (1921) 15 AJIL 268, 270.
[219] Berman, But the Alternative is Despair (n 164) 1803.
[220] Berman, Modernism, Nationalism, and the Rhetoric of Reconstruction (n 171) 352.
[221] Berman, But the Alternative is Despair (n 164).

legitimate subject of international law was thus echoing the fear that the new principle of self-determination would unleash chaos. The parallel between self-determination and civil war, the former being the cause of the latter, was for instance suggested by Scelle. According to him, and considering the nature of international law at this time, civil war was the only mechanism available to realise self-determination.[222] In the absence of pacific and legal mechanisms put in place to realise self-determination, Scelle saw in the principle a mere 'proclamation of anarchy and the freedom to light braziers from which the general fire can emerge.'[223] Through the voice of the more conservative internationalist Antoine Pillet, this 'reckless' and 'perilous' invention was 'a call for insurrection' encouraging and fuelling the 'revolutionary spirit' of some countries, which would inevitably lead to destruction and endless wars.[224]

Far from being trivial, Pillet's association of revolution and self-determination highlights the deep anguish experienced by some internationalists vis-à-vis the emerging principle. Pillet's fears regarding self-determination eventually echoed how Leon Trotsky defined revolution as 'the forcible entrance of the masses into the realm of rulership over their own destiny.'[225] Pillet's concern about the risk of violent irruptions was finally secondary: what mattered was the initial sin of international law to give a say to the masses over their own political destiny. It was an outrage that peoples, 'who have absolutely no understanding of how to organise their destiny,' or worst, colonised and 'less civilised' peoples, could have a voice under international law.[226] As a last resort, he called upon a quasi-sanctified approach of statehood:

> We believe that a serious mistake was made when the right of peoples to self-determination was proclaimed, that in reality, for order to reign in the world and for justice to prevail in international relations, this right must be recognised only in rare cases and under many conditions, that certain subordinations are beneficial to all, that the principle of the preservation of States makes it difficult for each people to

[222] Georges Scelle, 'La Carence du Droit' (1936) n27 Les Cahiers des droits de l'Homme, 638. As also noted by Philip Marshall Brown, 'the right to self-determination has never been clearly defined, nor have rules been formulated for the practical application of this fundamental principle of international law and order.' Philip Marshall Brown, 'Self-Determination in Central Europe' (1920) 14 AJIL 235, 235. Hans Wehberg, while having a relatively positive view on self-determination, noted that the establishment of the principle had for corollary the fact that no limits were imposed on peoples regarding the settlement of their domestic affairs, 'even if this settlement meant waging war.' Hans Wehberg, 'La Guerre Civile et le Droit International' (1938) 63 R.C.A.D.I. 1, 10.

[223] Scelle, La Carence du Droit (n 222) 639. Theodore S. Woolsey expressed a slightly different but connected critic stressing that self-determination would lead to a 'multiplication of small political units,' which would eventually produce 'instability' and trigger 'aggression.' Theodore S. Woolsey, 'Self-Determination' (1919) 13 AJIL 302, 304.

[224] Antoine Pillet, *La Guerre et le Droit* (Uystpruyst-Dieudonné 1922) 104, 108, 111-113. It is worthy to note that Pillet's long diatribe against the principle of self-determination takes place in lessons that were supposed to deal with the question of war and law.

[225] Leon Trotsky, *History of the Russian Revolution* (Penguin 1932) 15.

[226] Pillet, La Guerre et le Droit (n 224) 112-113.

> get out of the situation in which it finds itself, and that it is necessary to adhere to this, on pain of losing everything.[227]

This passage is not only symptomatic of a commitment to perpetuate the state as the only legitimate political structure in the international order, but also to perpetuate the existing distribution of statehood within the order.[228] Restricting the sphere of legitimate violence to states was thus perfectly consistent with the perpetuation of the status quo. For some internationalists, self-determination was a loose principle which promised more than what international law could concede. To tame the nationalist, secessionist or even anti-colonial aspirations that became associated with the principle of self-determination, it was the duty of reasonable international jurists to recall that 'a population does not have arbitrary power to determine its fate'[229] nor a minority the right 'to assert selfishly a right of self-determination in opposition to larger …interests.'[230] The formalism of Rousseauism, without being necessarily motivated by the realisation of this outcome, was to many extent a reaction, in its political sense, to what was seen as the 'forcible entrance' of various masses into the realm of international law.

1.3. The 'Legal Abyss separating a Government from a Group of Rebels'[231]

At the background of this potential multiplication of subjects under international law – minorities, nationalities, insurgents, colonised or formerly colonised peoples – the period was marked by the militarisation of political movements and the erosion of the state's monopoly over legitimate violence.[232] In this context, Rousseauism was also (and still is) a discourse available for states whose monopoly over legitimate violence was wavering. In a given conflict that was no more asymmetrical from the military point of view, or asymmetrical at the expense of the legal government, the aim was to recall the legal asymmetry existing between the state and insurgents. Put differently, Rousseauism was not

[227] Ibid 113.
[228] Pillet's limited exception in which the right of self-determination was contemplated was for former European states that ceased to be independent, such as Poland. Pillet rejected, for example, the claims of self-determination of Latvia, Estonia or Ukraine, which were not independent states in the past. Ibid 111.
[229] Émile Giraud, 'Le Droit des Nationalités : sa Valeur, son Implication' (1924) 31 RGDIP 17, 39.
[230] Marshall Brown, Self-Determination in Central Europe (n 222) 235-236.
[231] League of Nations, *Verbatim Record of the Seventeenth Ordinary Session of the Assembly of the League of Nations*: *Intervention of M. Narciso Bassols (United States of Mexico) at the Thirteenth Plenary Meeting* (2 October 1936) 5.
[232] Enzo Traverso, *À Feu et à Sang: De la Guerre Civile Européenne 1914-1945* (Stock 2007) 71; Johann Chapoutot *Le Meurtre de Weimar* (PUF 2015) 10-19. George Mosse's concept of *brutalization of politics*, that is the 'continuation of wartime attitudes into peace', grasps this legacy of WWI in post-war European societies. George L. Mosse, *Fallen Soldiers: Reshaping the Memory of the World Wars* (OUP 1991) 159.

necessarily associated with an actual state monopoly over legitimate violence, but often to a mere (and desperate) claim over it.[233]

From the perspective of statemen whose state was facing an insurrection, Rousseauism was self-evident and represented the orthodoxy; it was not even necessary to state the obvious in the international forum. The Spanish civil war, however, constitutes a situation whereby the state and its allies found themselves forced to loudly remind the legal asymmetry existing between the legal government and the insurgents. Spain brought the subject of civil war before the League of Nations, and alongside its allies, explained to the world that if a war were to be recognised, it could only be an international war triggered by the German-Italian military intervention. But if the Spanish conflict was merely a civil war – that is a conflict solely between Spanish forces – the League of Nations and international law would be simply irrelevant as the Spanish ministry of foreign affairs Julio Álvarez del Vayo explained: 'I touch upon aspects of the matter which might be regarded as an internal affair of Spain, that does not mean that the Spanish Government asks the League to intervene, nor even that it would be ready, without further ado, to accept the League's intervention.'[234] What made it an international legal matter, however, was the 'Fascist aggression' of Germany and Italy which transformed a purely domestic matter into an international war of aggression.[235]

Outside this categorisation of the 'Spanish question' as a war of aggression, the Spanish government, through the voice of Álvarez del Vayo, conveyed its unwillingness to recognise that there were two parties involved, let alone that there was a war in the legal sense:

> The error consists in talking as though in the Spanish question there were "two parties". Valencia and Burgos or Salamanca are employed as synonymous expressions for capitals containing two Governments, neither of which can be unilaterally satisfied without provoking the other. I think there can be no question that for those States Members of the League that do not wish to commit the same breach of international law and of the Covenant as has been perpetrated by the Governments recognising the rebels, there is no Government in Spain other than that which I represent here … We should certainly understand each other better if, instead of talking about Valencia and Salamanca or Burgos, we spoke of Spain, Germany and Italy.[236]

[233] See in general Max Weber, *The Vocation Lectures* (Hackett Publishing Company (2004) 1919) ch *Politics as a Vocation,* 33.
[234] *Ninety-Fifth (Extraordinary) Session of the Council: Appeal by the Spanish Government* (11 December 1936) League of Nations Official Journal 18 (1937) 10.
[235] Ibid.
[236] *Records of the Eighteenth Ordinary Session of the Assembly, Minutes of the Sixth Committee: Intervention of M. Álvarez del Vayo (Spain) at the Eighth Meeting* (27 September 1937) League of Nations Official Journal Spec Supp 175, 55.

In a mix of rejection of the 'curious form of neutrality' that had been taken by the non-intervention policy[237] (see Chapter 3), and even of the premises of the doctrine of the recognition of belligerency (see section 2), the Spanish government and its allies urged the international community to not 'cross the legal abyss separating a Government from a group of rebels.'[238] Governments like Mexico or the Soviet Union – with the irony of being two regimes born from recent revolutions[239] – made themselves the voice of what they saw as the international legal orthodoxy. For those 'real friends of Spain' who were willing to 'live according to the principles of law,'[240] it was needed to reaffirm the strict distinction between the legal and legitimate government on the one hand, and the unlawful and illegitimate insurgents on the other hand.[241]

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Focusing on established states as the sole legal subjects of international law, Rousseauism both encapsulated a positivist commitment and a pledge toward the maintenance of the status quo. But Rousseauism was also increasingly disconnected from the perceived social reality international law was deemed to regulate, which rendered such formalism increasingly suspect to those advocating for a more functional approach.

2. Governmentalism: The Recognition of Belligerency Doctrine and the Move from States to Proto-States

This section turns its attention to the DBR and its mitigation of Rousseauism's statist bias. Without being a radical break, the doctrine aimed at overcoming Rousseauism's strictness to include certain civil conflicts within the realm of international law. This was undertaken through a move from the conception of war as a contention only between states, towards a more functional conception of war as a contention that could also happen between states and *proto states*. Accordingly, rebel or insurgent groups could gain international legal existence and become belligerents on the condition of meeting certain criteria of organisation, hierarchy, and territorial control – thus showing a *de facto* exercise of governmental

[237] League of Nations, *Verbatim Record of the Seventeenth Ordinary Session of the Assembly of the League of Nations*: *Intervention of M. Ossorio y Gallardo (Spain) at the Fourteenth Plenary Meeting* (3 October 1936) 3.
[238] 13th Plenary Meeting (M. Narciso Bassols) (n 231) 5.
[239] As noted by Umut Özsu, '[i]n an effort to consolidate their domestic authority and stave off foreign intervention, socialist states had long relied upon strong conceptions of sovereignty.' Umut Özsu, *Completing Humanity: The International Law of Decolonization, 1960–82* (CUP 2023) 91.
[240] 14th Plenary Meeting (M. Ossorio y Gallardo) (n 237) 3.
[241] Ibid 2-3; *Records of the Eighteenth Ordinary Session of the Assembly, Minutes of the Sixth Committee: Intervention of M. Litvinoff (USSR) at the Ninth Meeting* (28 September 1937) 63; 13th Plenary Meeting (M. Narciso Bassols) (n 231) 5.

authority. The doctrine, therefore, only consisted in a mitigation of Rousseauism's statist bias through its replacement by a mere 'governmentalist bias.'[242] As for the contemporary legal regime on civil war, the governmentalist bias proceeds to include intrastate conflicts only on the basis of their resemblance to interstate ones.[243] For it was the stable and consensual aspect of the doctrine, the governmentalist part survived and still animates NIAC's categories through criteria of organisation, hierarchy and territorial control.[244] But the non-consensual parts of the doctrine, namely the legal consequences of recognition and the problem of the act of recognition itself, became pre-eminent and ultimately illustrated the structural deficiency of the doctrine.

In 1918, the DBR was hardly a new feature of international law. It was already a well-established doctrine according to which certain civil wars were to be partially included within the realm of international law. The governmentalist criterion of the doctrine had found its authoritative expression in a resolution of the Institut de Droit International on the 'Rights and Duties of Foreign Powers as regards Established and Recognised Governments in case of Insurrection' adopted in 1900 during the Neuchatel session:

> Third Powers cannot recognise the rebellious party the character of belligerent:
> 1. If it has not acquired a distinct territorial existence through the possession of a definite portion of the national territory;
> 2. If it has not the elements of a regular government exercising in fact the manifest rights of sovereignty over this portion of the territory;
> 3. If the fight is not carried on in its name by organized troops, subject to military discipline and conforming to the laws and customs of war.[245]

As will be demonstrated, these criteria (the Neuchatel criteria) remained the most authoritative reference for discussions on the DBR from 1918 onwards. To date, the practical applicability of the doctrine has proven difficult to identify. As Boyd van Dijk suspects, the doctrine was probably only applied during the US civil war and the Greek war of independence.[246] Yet the doctrine was part of the routine of the discipline and reached a paradoxical stage of its existence between 1918 and 1949. While it became a disciplinary reflex to dwell on the doctrine for international jurists whenever discussions about civil war arose, it simultaneously became a doctrine marked by a seemingly insurmountable indeterminacy. The Spanish Civil War is certainly the event which most exemplified what was a combination of mainstreamness and growing perception of the irrelevance of the

[242] Berman, Privileging Combat (n 19) 19.
[243] Lorite Escorihuela, The Politics of Distinction (n 20) 338.
[244] See our discussion on the lasting presence of the state in the regulation of NIACS. Fuhrmann, Légitimités conflictuelles (n 22).
[245] Institut de Droit International, Droits et devoirs (n 136).
[246] Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions* (OUP 2022) 102.

doctrine. It first triggered a massive engagement with the issue of belligerency recognition within academia and international law journals – whereby the lack of consensus over the doctrine became flagrant. The dusty doctrine was in a sort reactivated after decades of relegation[247], only to expose – decisively? – its flaws and inadequacy.

At the same time, major international legal actors either kept avoiding the doctrine, like the Red Cross community (see chapter 2), or as the European powers within the *London Committee*, sailed away from the doctrine by setting a concurrent approach grounded on a rejection of the DBR (see chapter 3). This lack of institutional engagement certainly played a part in the difficult crystallisation of a clear structural bias, or at least of a dominant one. The doctrine was therefore largely confined to academia and, despite major efforts to highlight legal precedents and state practice in past civil wars, the customary nature of the recognition of belligerency remained weak.[248] As the most 'traditional' alternative available to partially overcome Rousseauism, it also created discontent and became a counter-model against which other alternatives were built (Chapters 3 and 4).

2.1. 'Interstate War in the Making'

The stable feature of the DBR was the assumption that, under certain conditions, insurgents could acquire international legal personhood. As Hans Wehberg put it, the doctrine was meant to recognise insurgents as a 'provisional subject of international law.'[249] Dwelling on this provisional character, Santi Romano even dared to draw an analogy between insurgents recognised as belligerents and the International Association of the Congo. Prior to becoming the Congo Free State, Romano posited that the Association acquired the status of a 'future State' through the recognition by certain states of its flag 'as that of a friendly state.'[250] But in the case of civil war, the situation was not provisional because the outcome was ineluctable or planned as for the Congo Free State. The provisional character of the recognition was explained by the fact that in any conflict, insurgents would either be defeated – and ceased to *legally* exist – or become a new *de jure* government. For Alf Ross, belligerency recognition thus permitted to consider insurgents as 'an embryonic state as long as the fight last[ed]' – 'the issue of the fight [deciding] whether or not a state [was] to be

[247] As noted by Hans Wehberg, before the beginning of the Spanish Civil War in 1936, the 1903 book of Rougier was certainly the last attempt, at least in Europe, to systematically address the question of the relationship between civil war and international law, especially through the doctrine of belligerency recognition. Hans Wehberg, La guerre civile et le droit international' (1938) 63 R.C.A.D.I. 1, 10; Antoine Rougier, *Les Guerres Civiles Et Le Droit Des Gens* (L. Larose 1903). On the same issue see Padelford, International Law and Insurgency (n 200) 191.
[248] See for instance Wehberg, Guerre Civile (n 247) 105.
[249] Ibid 101.
[250] Santi Romano, *Corso di Diritto Internazionale* (4th edn, Cedam 1939) 73.

born.'[251] Unlike Rousseauism, the doctrine was therefore grounded on functionalist premises. But rather than acknowledging a radical change of the international landscape as a community of states, the aim of the doctrine was merely to accompany a potential change in the distribution of statehood. The granting of certain rights and duties to insurgents was conditional on their ability to behave like a state during a civil war and, if victorious, to become a state accustomed to acting as a state is supposed to. The DBR was therefore one manifestation of the larger concern of international law with the 'consolidation of the state as a concept and practice.'[252]

The doctrine was not meant to regulate all forms of intrastate conflict, but only those that resembled interstate warfare. The inclusion of some civil wars was performed through a functional revaluation of the legal term *war* as to include not only conflicts between two states but also conflicts between a *de jure* government and a *de facto* government.[253] Belligerency recognition was thus first and foremost seen as the recognition of a factual situation[254] to which most of the international jurists did not attach any moral judgment. Yet this was not the case of Norman J. Padelford for whom the DBR embarked international law on the dangerous path of rewarding insurgents whenever they 'become violent and lawless enough.'[255] For the majority of international jurists, however, the tone had a sociological flavour was and oriented towards providing *objective* criteria to determine when insurgents constituted a state 'in the making'[256] – hence transforming a civil war into an 'interstate war in the making.'[257]

Beyond the strict formalism of Rousseauism, and to establish that a *de facto* government was 'in force' rather than 'legally valid,'[258] the Neuchatel criteria continued to be the most authoritative precedent on which international jurists relied. The three Neuchatel criteria – territorial control, exercise of governmental authority on the controlled territory, organised and military disciplined troops fighting in accordance with the laws of war – remained the almost undebated conditions that insurgents' groups needed to meet to be recognised as

[251] Alf Ross, *A Textbook of International Law* (Green and Com 1947) 103.
[252] Parfitt, International Legal Reproduction (n 174) 80.
[253] Alfred Verdross, 'Règles Générales du Droit International de la Paix' (1929) 30 R.C.A.D.I 271, 342; Ross, Textbook (n 251) 103, 123, Wehberg, Guerre Civile (n 247) 101, 108; H.A. Smith, 'Some Problems of the Spanish Civil War' (1937) BYIL 18, 18.
[254] Georges Scelle, 'La Guerre Civile Espagnole et le Droit des Gens' (1938) 45 RGDIP 265, 271; Smith, Spanish Civil War (n 253) 18; Louis Le Fur, *Précis de Droit International Public* (Dalloz 1939) 367; Louis Le Fur, *La Guerre d'Espagne et le Droit* (Les Éditions Internationales 1938) 48; Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 176.
[255] Padelford, International Law and Insurgency (n 200) 192.
[256] Raoul Genet, *Principes de Droit des Gens* (LGDJ 1944) 147.
[257] Scelle, La Reconnaissance des Insurgés (n 212) 67.
[258] Ibid 65.

belligerents. And even when the Resolution was not explicitly mentioned,[259] the criteria laid down were largely identical, the only exception being the occasional amputation of the requirement for insurgents to fight in accordance with the laws of war. More generally, this also illustrates the importance that the Institut de Droit International retained within the discipline of international law despite the emergence of the League of Nations and the Permanent Court of Justice.

A symptomatic expression of the *governmentalist* criteria of the DBR, and of the lasting influence of the Neuchatel Resolution, can be found in Hans Kelsen's criteria he held to be necessary for a civil war to become a war in the legal sense:

> (1) The insurgents must have a government and a military organization of their own.
> (2) The insurrection must be conducted in the usual technical forms of war, i.e., the war must be more than a mere petty revolt and must assume the true characteristics of a war as that term is generally understood.
> (3) The government of the insurgents must in fact control a certain part of the territory of the state in which the civil war takes place, i.e., the order established by the insurgents must be effective for a certain part of the territory of this state.[260]

As for most international jurists' opinions, Kelsen's criteria only differ linguistically from the Neuchatel Resolution. If some chose concision whereas others went into more details,[261] all agreed that the combination of territorial control, military organisation, and exercise of governmental authority constituted a pertinent test to demonstrate the 'state-like character'[262] of insurgent groups.[263] Even outside the legal academia, this was largely seen as representing the legal orthodoxy, leading for instance the Spanish Nationalists to claim belligerent rights on the basis of their fulfilment of the governmentalist criteria:

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[259] The Resolution is for example quoted in Genet, Droit des Gens (n 256) 152; Georges Scelle, 'La Guerre Civile Espagnole et le Droit des Gens: Chapitre II' (1939) 46 RGDIP 197, 222; Wehberg, Guerre Civile (n 247) 88.

[260] Hans Kelsen, 'Recognition in International Law: Theoretical Observations' (1941) 35 AJIL 605, 616.

[261] Georges Scelle thus provided examples proving the governmental quality of insurgents: tax collection, administration of justice, recruitment of troops, management of public services, maintaining international trade. Scelle, La Reconnaissance des Insurgés (n 212) 67; Georges Scelle, *Droit International Public* (Domat-Montchrestien 1944) 130. Regarding territorial occupation, Louis Le Fur stressed that recognition of belligerency should at least happen when insurgents are in control of more territories than the legal government. The fact that the Spanish Nationalists rapidly found themselves in control of ¾ of the territory was, according to him, a proof that recognition of belligerency was required. Le Fur, Droit International (n 254) 367.

[262] Ross, Textbook (n 251) 123. For Thomas Baty, recognition of belligerency meant recognising as belligerent persons 'possessing some few of the attributes of statehood.' Thomas Baty, 'So-Called "De Facto" Recognition' (1922) 31 Y.L.J. 469, 470.

[263] A combination of those three criteria can for instance be found in Oppenheim, International Law 1921 (n 196) 76; Scelle, La Reconnaissance des Insurgés (n 212) 67; Scelle, La Guerre Civile Espagnole (n 254) 273; Genet, Droit des Gens (n 256) 152; Ross, Textbook (n 251) 123; Berthold Singer, *International Law* (T.H Flood and Co Company 1918) 127; Verdross, Droit International de la Paix (n 253) 342; Wehberg, Guerre Civile (n 247) 88, 108; Fred K. Nielsen, 'Insurgency and Maritime Law' (1937) ASIL.Proceedings 144, 146; Padelford, International Law and Insurgency (n 200) 192.

> There exist to a full extent in National Spain these conditions necessary to request that [belligerent rights] may be recognized:
> (a)The possession of, and full sway over, a portion of National Spanish territory which greatly exceeds that held by the enemy .
> (b) A legal and regular government which de facto exercises over said portion of territory the rights inherent in sovereignty.
> (c) A regular land and air army, perfectly organized and subject to strict military discipline, which affords a guarantee of order and which is striving with undoubted success for the integrity of the country, respecting and causing to be respected, with the utmost scrupulousness, the laws and customs of warfare, and acting under the direction of a generalissimo on behalf of the nation and its government …[264]

Even the Spanish Government did not frontally oppose this interpretation and primarily justified – in a way that was entirely consistent with its statements at the League of Nations – its unwillingness to recognise insurgents as belligerents on the basis of the foreign intervention in favour of the Nationalists.[265] But even if the Spanish conflict was a genuine civil war and not an international war of aggression, the Spanish Government, while not contesting the criteria laid down by the insurgents, would have maintained its position because of the 'deliberate employment of methods of warfare contrary to principles of humanity' by the Nationalists.[266]

One noticeable exception can yet be found in the British literature with Arnold McNair and Hersch Lauterpacht adding the fourth condition 'that the rights of another state' must in addition be affected,[267] making it 'necessary for outside states to define their attitude by means of recognition belligerency.'[268] But even with this higher threshold, as remains the case today for NIACs, intensity alone proved nothing if not an emanation of insurgent groups manifesting state-like characteristics. Civil war was therefore seen as an event with only three possible outcomes: a military victory of the *de jure* government and a return to the ante bellum situation, or, in the case of a victory of the insurgents, either a change of government or the creation of another state in the event of secession. To a large extent, the DBR embodied Walter Benjamin's dialectic between *law-preserving violence* and *law-making violence*.[269] Unlike Rousseauism that only contemplated law-preserving violence as

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[264] *Text of the Reply by the Insurgents Authorities Rejecting the Plan for the Withdrawal of Volunteers and for the According of Belligerent Rights, August 21, 1938,* reproduced in Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (MacMillan 1939) 596.
[265] Spanish Government, 'Texte Intégral de la Réponse du Gouvernment Espagnol au Plan de Retrait des Étrangers d'Espagne' *Journal des Nations* (Geneva, 3 August 1938) 3.
[266] Ibid.
[267] Arnold D. McNair, 'The Law relating to the Civil War in Spain' (1937) 53 L.Q.Rev. 471, 476.
[268] Lauterpacht, Recognition in International Law (n 254) 176.
[269] Walter Benjamin, 'Critique of violence' in *Reflections: Essays, Aphorisms, Autobiographical writings* (New-York, 1978).

legitimate, governmentalist criteria allowed the inclusion of both within the realm of legitimate violence, while simultaneously shutting the door to other forms of violence.

The governmentalist dimension of the doctrine was also consistent with a certain *zeitgeis*t within the discipline. At least since the 1885 Berlin Conference, effectiveness was increasingly becoming the currency of international law.[270] In 1928, vested with the authority of the Permanent Court of Arbitration, Max Huber confirmed this trend in the Island of Palmas Case. As the sole arbitrator in the dispute over the sovereignty of the Palmas Island between the United-States and the Netherland, Huber decided that *effective occupation* was a definitive title of sovereignty unlike the more formalistic *right of discovery*.[271] And from Huber's functional assertion that sovereignty 'involves the exclusive right to display the activities of a state'[272] easily derives the no less functional principle that legal subjectivity ought to be granted to insurgents exercising 'the apparent rights of sovereignty.'[273] Effectiveness, envisaged as a mere sociological acknowledgment, was thus the core principle of the governmentalist criteria.[274] For it was not grounded on any effectiveness, Hans Kelsen rejected for instance the validity of the recognition of governments in exile as belligerents.[275] In a sense, and unlike Rousseauism, the DBR sailed away from the 'formal mystique of sovereignty.'[276]

2.2. The Structural Problem of Recognition

This functional dimension of the DBR was indeed consistent with some evolutions of international law after 1918. In 1933, the *Montevideo Convention on the Rights and Duties of States* (hereafter Montevideo Convention) provided a functional definition of the state with a bright future ahead of it.[277] The criteria laid down for a community to qualify as a state – possessing 'a permanent population … a defined territory, [a] government … and [the] capacity to enter into relations with the other states[278] – obviously share great similarities with the governmentalist criteria discussed above. But unlike the DBR, the

[270] General Act of the Berlin Conference (n 142) chap 7.
[271] *Island of Palmas Case (Netherland v. USA) Award* (1928) PCA Rep 829, 846.
[272] Ibid 839.
[273] Wehberg, Guerre Civile (n 247) 88.
[274] For an explicit mention of 'effectiveness' as an essential feature of the doctrine see Scelle, La Guerre Civile Espagnole (n 254) 273; Scelle, Droit International (n 261) 130; Ross, Textbook (n 251) 103; Verdross, Droit International de la Paix (n 253) 342-343.
[275] Hans Kelsen, 'Théorie générale du droit international public' (1932) 42 R.C.A.D.I 117, 294.
[276] Martti Koskenniemi, 'What Use of Sovereignty Today?' (2011) 1 AsianJIL. 61, 66.
[277] On the subject of the Montevideo Convention as being part of a fabricated and 'imaginary genealogy' linking it to the modern doctrine of statehood see Jean d'Aspremont, *International Law as a Belief System* (CUP 2017) 79.
[278] Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 art 1.

doctrine of statehood deployed in the Montevideo Convention was not plagued by any act of recognition. By asserting that 'even before recognition' a given state can exercise the rights associated with sovereignty, the Montevideo Convention rejected the question of recognition towards the political and diplomatic spheres.[279]

Unlike the Montevideo Convention, the DBR was fully integrated within the broader doctrine of recognition. Alongside with the recognition of states and governments, the belligerency recognition constituted the core of the subject of recognition in international law, which until today, has proved to be a major source of dissent within the discipline. The consensus over the governmentalist criteria was a first step only leading to endless debates and uncertainties vis-à-vis the *declaratory* or *constitutive* effect of recognition, its legal or political nature, its mandatory or obligatory character, the method to express it, and the choice of those entailed to grant it.

The question of recognition in international law, Lauterpacht deplored, had long been 'obscured' by the 'controversy between the rival doctrines of the declaratory and the constitutive character of recognition.'[280] According to the former, the very act of recognition is what gives birth to a state, a government, or insurgents as legal subjects.[281] The declarative doctrine, on the contrary, stresses that recognition is a mere constatation of facts, which means that recognition implies acknowledging the existence of a legal subject instead of giving birth to it.[282] From the perspective of granting belligerent rights and duties to insurgents, if the constitutive doctrine seems to be grounded on logical premises, the declaratory doctrine seems to rely on shakier foundations. As observed by Lauterpacht, '[i]f recognition is purely declaratory of an existing fact, what, then, is its juridical significance?'[283] Indeed, if the legal existence of insurgents as belligerents precedes any act of recognition, then recognition becomes superfluous from a legal perspective. Advocating for the declaratory doctrine, Alf Ross thus suggested that insurgents should be granted '*ipso jure* an international legal status.'[284] In that case, while recognition is the 'law-creating fact' according to the constitutive doctrine, the *factual* fulfilment of governmentalist criteria

[279] This is provided in article 3 of the Convention: 'The political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organise itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts. The exercise of these rights has no other limitation than the exercise of the rights of other States according to international law.' Ibid art 3.
[280] Lauterpacht, Recognition in International Law (n 254) 1.
[281] Ibid 2.
[282] Rafael W. Erich, 'La Naissance et la Reconnaissance des États' (1926) 13 R.C.A.D.I 427, 461.
[283] Lauterpacht, Recognition in International Law (n 254) 42.
[284] Ross, Textbook (n 251) 123.

suffices in Ross' conception, giving to recognition a mere 'declaratory significance,' that is something essentially devoid of legal effects.[285]

Regardless of the convincing remarks of Lauterpacht and Ross, it seems that the constitutive character of the recognition of belligerency was generally accepted. For instance, while being an advocate of the declaratory doctrine in the case of recognition of states or governments, Rafael Erich nevertheless admitted that recognition was constitutive in the case of belligerent status.[286] Even Alf Ross, who held the constitutive doctrine as a 'practically absurd theory [and] an imaginative lucubration' still acknowledged this 'almost unanimous conception of the doctrine.'[287] But direct references to the constitutive character of the recognition of belligerency were rare.[288] The more decisive question that international jurists thought important to engage with was rather on the nature of recognition as a legal or political act.

As a matter of semantic, the legal/political distinction was prodigiously misleading. In this context, the adjective 'political' was closer to that of 'discretion.' As stressed by Lauterpacht, the view of recognition as a political act relied on the 'denial of the existence of a duty to recognize and of a right to recognition.'[289] It means that recognition of belligerency would still produce legal effects – i.e., granting international legal status to insurgents – but that the decision to do so remained strictly discretionary. The view that belligerency recognition was *facultative* and that there was neither a right to recognition nor a duty to recognise was widely shared amongst international jurists.[290] While stressing that Spanish Nationalists were entitled to be recognised as belligerents, McNair, for example, justified the British refusal to do so on the basis that his government was 'under no legal obligation to take this step' and that 'in not granting recognition,' it did not break any 'well-established custom.'[291] In the end, the sole legal obligation was the prohibition of premature recognition, that is to grant recognition prior to insurgents meeting the governmentalist

[285] Ibid 119.
[286] Erich, Naissance et Reconnaissance des États (n 282) 461.
[287] Ross, Textbook (n 251) 119, 123. He added that the constitutive doctrine 'would never have seen the light of the day if it had not originated as a purely constructive consequence of the false theory of international law as a conventional law.' The doctrine of recognition was also one of Ross' targets in his project of 'reconsideration of law in a realist direction leading to the strict appraisal of the legal phenomenon as fact.' Alejandro Lorite Escorihuela, 'Alf Ross: Towards a Realist Critique and Reconstruction of International Law' (2003) 14 EJIL 703, 731-732.
[288] Examples of direct reference can be found in Verdross, Droit International de la Paix (n 253) 343; Wehberg, Guerre Civile (n 247) 98.
[289] Lauterpacht, Recognition in International Law (n 254) 2.
[290] Scipione Gemma, 'Les Gouvernements de Fait' (1924) 4 R.C.A.D.I 293,409; Balladore Pallieri, 'Quelques Aspects Juridiques de la Non-Intervention en Espagne' (1937) 18 Rev.drt.intern.et leg.comp. 285, 287; McNair, Civil War (n 267) 498; Verdross, Droit International de la Paix (n 253) 343; Kelsen, Théorie générale (n 260) 293; Wehberg, Guerre Civile (n 247) 106-107.
[291] McNair, Civil War (n 267) 498.

criteria.[292] On the other hand, Lauterpacht was certainly the most vocal advocate of the legal nature of the recognition of belligerency. According to him, 'recognition [was] not in the nature of a grant of a favour or a matter of unfettered political discretion, but a duty imposed by the facts of the situation.'[293] Recognition of belligerency was thus legal in the sense of being a *legal relation* formed by two *jural correlatives*[294] – a right to recognition and a duty to recognise. But unlike Alf Ross who wished insurgents to gain international legal status *ipso jure*, recognition was not seen as superfluous, and as Scelle suggested, states were supposed to remain 'bona fide' interpreters of the factual situation.[295]

On the question of which states were entitled to either use their discretionary power of recognition or bound to comply with their duty to recognise, the general view was that third states were the primary recognising actors. Though opposed vis-à-vis the legal or political nature of recognition, Lauterpacht and McNair still agreed that recognition of belligerency only concerned third states whose rights and interests were affected by a given civil war.[296] Wehberg was less categorical, and although he recognized that the doctrine was particularly relevant for third states whose interests were affected, he could not conclude that recognition of belligerency was only reserved to the most affected states.[297] Recognition from the parent state, however, proved to be a more elusive question and was rarely addressed. Some like Kelsen or Verdross explicitly stressed that recognition could be granted either by the parent state or third states.[298] Verdross also remarked that the decision of third states to grant belligerent status was not contingent on the parent state doing so.[299] In that regard, Quincy Wright is certainly an exception as he held that third states were neither entitled to grant belligerency recognition nor 'to consider war in the legal sense as existing' if the parent state had not already, explicitly or implicitly, taken this step.[300]

The emphasis on third states, combined with the idea that recognition of belligerency was only producing effects between the recognising state and the two parties involved in a civil

[292] Hersch Lauterpacht, 'Recognition of Insurgents as a De Facto Government' (1939) 3 Mod.L.R. 1, 6.
[293] Lauterpacht, Recognition in International Law (n 254) 175. Georges Scelle and Louis Le Fur were other strong advocates of the legal hence obligatory nature of the recognition of belligerency. Le Fur, La Guerre d'Espagne et le Droit (n 254) 66; Le Fur, Droit International (n 254) 367; Scelle, La Carence du Droit (n 222) 639; La Reconnaissance des Insurgés (n 212) 67-68; La Guerre Civile Espagnole (n 254) 271.
[294] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Y.L.J. 16.
[295] Scelle, La Reconnaissance des Insurgés (n 212) 67. See also Lauterpacht, Recognition in International Law (n 254) 199.
[296] Lauterpacht, Recognition in International Law (n 254) 239; McNair, Civil War (n 267) 498. See also Singer, International Law (n 263) 127.
[297] Wehberg, Guerre Civile (n 247) 87-90.
[298] Kelsen, Théorie générale (n 275) 293; Verdross, Droit International de la Paix (n 253) 343.
[299] Ibid, Verdross 343.
[300] Wright, Conception of War (n 207) 759.

war,[301] meant that the doctrine consisted more of scattered isolated acts than of uniform and collective actions. But instead of seeing the doctrine as structurally limited, some authors like Wehberg and Lauterpacht advocated for a collectivisation of recognition in order to tame the decentralised nature of the international legal order. The situation whereby insurgents would be recognised as belligerents by some states and not by others – leading to a multiplication of different legal relations within the international community[302] – was not necessarily seen as a by-product of the practice of recognition. It was believed that a collectivisation of the process of recognition would sail away from national interests towards the more promising direction of 'general interest.'[303]

The importance of the parent state was nevertheless enhanced through the general view that recognition was not necessarily express, but also tacit.[304] While express recognition, especially from a third state, was often associated with a declaration, tacit recognition was chiefly linked to acts undertaken by the parent state. The most common example was the closure of the ports occupied by insurgents, not merely through a mere declaration, but through the establishment and enforcement of a real blockade.[305] A radical formalist objection could nevertheless be found in Hans Kelsen, who held the rights, duties, and legal effects associated with the grant of belligerent status to be contingent on the conclusion of a 'treaty of recognition' between the insurgents and the parent state or a third state.[306]

2.3. Between Commercial, Humanitarian, and…Interventionist Considerations?

Discussing the adoption of Common Article 3 in 1949, Kathryn Greenman has stressed that the ground-breaking character of the article was not to be found in that it consecrated a new concern of international law for civil wars. According to her, '[w]hat was ground-breaking about Common Article 3 was that it applied international law to civil war and revolution and imposed international obligations on rebels within a new framing of internal conflict as a humanitarian — rather than a primarily commercial — problem.'[307] Therefore, instead of being the primitive precursor of Common Article 3, the DBR 'framed civil war and revolution primarily as a problem for relations between states, particularly commercial

[301] Wehberg, Guerre Civile (n 247) 97-98.
[302] Ibid 111; Lauterpacht, Recognition in International Law (n 254) 253-255.
[303] Wehberg, Guerre Civile (n 247) 111.
[304] Le Fur, Droit International (n 254) 368; Verdross, Droit International de la Paix (n 253) 343; Wright, Conception of War (n 207) 759; Lauterpacht, Recognition in International Law (n 254) 194; Wehberg, Guerre Civile (n 247) 94.
[305] Lauterpacht, Recognition in International Law (n 254) 194; Wehberg, Guerre Civile (n 247) 94.
[306] Kelsen, Théorie générale (n 275) 293.
[307] Kathryn Greenman, 'Common Article at 70: Reappraising Revolution and Civil War in International Law' (2020) 21 MJIL 1, 4.

relations' in which '[h]umanitarian concerns were peripheral or even incidental to these regimes.'[308]

If the doctrine kept its predominant commercial nature between 1918 and 1949, humanitarian concerns were nevertheless seen as fundamental by many authors. Most international jurists presented the doctrine as being concerned with both sides, although some tended to completely overlook one dimension, or even deny any duality. This gave to the doctrine a rather eclectic character. Among the variety of different legal effects associated with the recognition of belligerency, international jurists were often cherry-picking those they perceived to be fundamental, secondary, or worth to be discussed or highlighted. In the end, the doctrine came to be considered flexible enough by some to be used as a tool to justify not humanitarian or commercial considerations, but to support the involvement of third states in regime change.

The most common effect of the recognition of belligerency was deemed to be the simultaneous application of the laws of war and neutrality.[309] The two parties to a civil war were supposed to enjoy belligerent rights – especially at sea – and according to some, to fight according to the rules of the laws of war; on the other hand, third states were to remain neutral. The most important consequence compared to a pre-recognition situation was that third states were not authorised to support the 'lawful' government anymore.[310] This generally accepted outcome of the application of the laws of war and neutrality had both humanitarian and commercial implications. While humanitarian concerns were mostly directed toward limiting violence and sheltering insurgents from harsh repression, commercial concerns focused on providing clarity and predictability to third states, foreign merchants, and investors regarding the disruption to trade and foreign assets caused by a civil war.

The fact that the DBR was indeed largely perceived as a commercial doctrine had the corollary of being perceived as an essentially maritime doctrine whose pedigree was Anglo-

[308] Ibid.
[309] See for instance Kunz, Plus de Lois de la Guerre (n 146) 47; Scelle, La Reconnaissance des Insurgés (n 212) 68; Scelle, Guerre Civile (n 254) 273; Kelsen, Théorie générale (n 275) 293; Kelsen, Recognition in International Law (n 260) 616. Some authors, however, only contemplated the application of the law of neutrality. See for instance Arnold McNair, *Legal Effects of War* (CUP 1944) 11. Lauterpacht also considered that the application of the law of neutrality was an outcome of the belligerency recognition, while the application of the laws of war was more a question of common sense and universal humanitarian principles, rather than a proper legal effect of the recognition. Lauterpacht, Recognition in International Law (n 254) 246. A similar approach can also be found in Albéric Rolin, *Le Droit Moderne de la Guerre I* (Dewit 1920) 143.
[310] Wehberg, Guerre Civile (n 247) 57; Pallieri; Non-Intervention (n 290) 292. On the other side, supporting insurgents, especially prior recognition, was obviously seen as a mere violation of state's sovereignty.

Saxon.[311] It was generally assumed that the doctrine was principally relevant in the context of a civil war taking place in a costal state.[312] The doctrine, however, was not meant to sanctify trade, but to provide more or less clear rules to third states and foreign merchants to navigate a disrupted situation with more clarity. The main issues were the access to ports, the free navigation within territorial waters, and the consequences of a potential extension of the conflict onto the high sea. In the absence of recognition, the law of peace was deemed to remain applicable and 'foreign shipping [was to] enjoy its normal right of innocent passage through territorial waters and …entitled to claim such access to the ports as is provided for by the commercial treaties in force.'[313] But once belligerency was accorded, both the insurgents and the parent state were allegedly entitled 'to exercise their belligerent rights against neutral commerce, both at sea and within their own waters.'[314] The purely Anglo-Saxon variant of *insurgency* recognition[315], was largely meant to limit such belligerent rights to the territorial waters.[316]

Through the recognition of belligerent rights, both parties were thus entitled to disrupt neutral commerce without being seen as mere pirates for the insurgents, or as violator of the law of peace for the parent state.[317] It was for instance contemplated that both parties could establish and enforce a blockade over ports controlled by the enemy party.[318] The right to visit and search foreign vessels for contraband was also an important consequence of the recognition of belligerency,[319] though it remains unclear whether this applied only to territorial waters or to the high sea as well.[320] Laying mines also seemed to be authorised both in territorial waters and on the high sea, at least as long as the parties would notify their positions to third states and foreign merchants.[321] But all these considerations were made

[311] Ibid 37. The fact that Lauterpacht's long study relies almost exclusively on the practice of the United-Kingdom and the United-States is symptomatic. Lauterpacht, Recognition in International Law (n 254) 175-269.
[312] A 'call for recognition' was thus harder to conceive for Berthold Singer if the conflict was taking place only on land, especially in a continental State without access to the sea. Singer, International Law (n 263) 127. For Lauterpacht, recognition from a 'distant continental State' with no real ties with the State in which a conflict takes place was likely to amount to a 'gratuitous gesture unfriendly to the lawful government and merely calculated to encourage the rebellion.' Lauterpacht, Recognition in International Law (n 254) 239.
[313] Smith, Spanish Civil War (n 253) 24.
[314] Ibid 24-25.
[315] On this specific notion of *insurgency recognition* see Lauterpacht, Recognition in International Law (n 254) 270-278.
[316] Vernon A. O'Rourke, 'Recognition of Belligerency and the Spanish War' (1937) 31 AJIL 398, 402.
[317] James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1928) 154.
[318] See for instance James W. Garner, 'Questions of International Law in the Spanish Civil War' (1937) 31 AJIL 66, 71-72; Wehberg, Guerre Civile (n 247) 48.
[319] Smith, Spanish Civil War (n 253) 24-25; Pallieri; Non-Intervention (n 290) 300; O'Rourke, Recognition of Belligerency (n 316) 398; Norman J. Padelford, 'Shipping during the Spanish Civil War' (1938) 32 AJIL 264, 264; Wehberg, Guerre Civile (n 247) 83-84.
[320] Genet, Droit des Gens (n 256) 147.
[321] Wehberg, Guerre Civile (n 247) 51; Smith, Spanish Civil War (n 253) 24, 29.

uncertain by the very uncertainties arising from the question of recognition. Whether recognition of belligerency by the parent state had legal consequences on third States, or only recognition from these individual third states led to legal consequences rendered the doctrine highly impracticable. If belligerent rights were to be applied at the will of third states, the right to establish blockades or to visit would for instance only apply to some foreign vessels whose state granted belligerency, while others would still be under the law of peace. As Vernon A. O'Rourke speculated, 'should every neutral Power in the world, Britain excepted, recognize a state of war in Spain, British merchantmen could still claim immunity form search.'[322] Similar considerations also plagued the question of responsibility for damages caused by a civil war. While some defended that recognition of belligerency from the parent state relieved it from its responsibility for damages caused by insurgents or within the territory controlled by them,[323] others defended the idea that such a relieve of state responsibility was contingent on third states recognition.[324]

On the humanitarian front, the situation was more readable though not immune to disagreement. The main outcome of the recognition of belligerency in the relation between the two belligerents was the application of the laws of war during hostilities.[325] If the purpose was to humanise the conflict and limit unconstrained repression from the parent state and recourse to reprisals by the insurgents,[326] the degree of commitment towards humanitarian considerations was variable. In the successive reeditions of Oppenheim's textbook, it was for instance affirmed that the protection of the laws of war surrounding insurgents ceased 'ipso facto' if the parent state was victorious.[327] As such, the 'legitimate' government was entitled to treat defeated insurgents 'as rebels according to the criminal law.'[328] Others seemed to consider that insurgents, being entitled to the POW status, were sheltered from being prosecuted as rebels or traitors, thus linking more clearly the concept of POW to that of *combatant privilege*.[329]

[322] O'Rourke, Recognition of Belligerency (n 316) 402.
[323] Verdross, Droit International de la Paix (n 253) 343. Hans Wehberg seemed to timidly defend a similar position. Wehberg, Guerre Civile (n 247) 99.
[324] See for instance Singer, International Law (n 263) 127-128.
[325] See for instance Le Fur, La Guerre d'Espagne et le Droit (n 254) 38; Padelford, International Law and Insurgency (n 200) 191-193; Norman J. Padelford, 'International Law and the Spanish Civil War' (1937) 31 AJIL 226, 228.
[326] Padelford, Spanish Civil War (n 325) 228.
[327] Oppenheim, International Law 1921 (n 196) 76.
[328] Ibid. For Scipione Gemma, the application of the laws of war was revocable at any time, thus allowing a State to substitute its martial law to the laws of war in order to prosecute insurgents. Gemma, Gouvernements de Faits (n 290) 410.
[329] Le Fur, Droit International (n 254) 367; Genet, Droit des Gens (n 256) 147; Padelford, Spanish Civil War (n 325) 228; Wehberg, Guerre Civile (n 247) 98.

This oscillation between commercial and humanitarian considerations was well illustrated by the problem of piracy. In the context of belligerency recognition, it was generally accepted that once recognised as belligerent, insurgents could not be treated as pirates.[330] The humanitarian dimension of the question of piracy was concerned with preventing insurgents at sea from being treated as mere criminals – or even as *hostis humani generis* – and exposed to the harsher treatment reserved to pirates. At the same time, it provided guidance for certain third states whose navies were patrolling the sea in order to protect maritime trade.

But in the absence of codification and with a state practice far from being widespread, consistent, or uniform, the doctrine of belligerency recognition finally came to be seen as plastic enough to be interpreted as allowing third states to support insurgents. It was certainly Louis Le Fur, with his common attitude of presenting positive law as reflecting natural law,[331] who articulated such an interpretation the more clearly. As part of his support for the Spanish Nationalists, he argued that belligerency recognition was not independent from the recognition of government or state.[332] Insurgents recognised as belligerents, he went one, were a government entitled to receive foreign assistance in their struggle.[333] From a less theoretical perspective, it meant that the German and Italian interventions against the Spanish government could be framed as lawful (see Chapter 3 for Italy and Germany's eagerness to substitute the non-intervention agreement for the DBR). For Le Fur, his interpretation of the DBR was, in that context, the facilitator of the natural right to resistance.[334]

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Le Fur's interpretation of the DBR was a pure product of the Spanish Civil War. In a sense, Le Fur was the academic varnish of the Italian and German interpretation of the doctrine (see chapter 3). Though unorthodox and not shared by many international jurists, the 'anomaly' represented by Le Fur's interpretation still sheds light on the governmentalist

[330] Hersch Lauterpacht, 'Insurrection et Piraterie' (1939) 46 RGDIP 513, 526; J. Mirwart, 'Piraterie et Reconnaissance Internationale' (1938) 45 RGDIP 341, 343-345; Pallieri, Non-Intervention (n 290) 300; O'Rourke, Recognition of Belligerency (n 316) 413; Raoul Genet, 'The Charge of Piracy in the Spanish Civil War' (1938) 32 AJIL 253, 261.
[331] Koskenniemi, Gentle Civilizer (n 13) 326.
[332] Le Fur, La Guerre d'Espagne et le Droit (n 254) 53; Le Fur, Droit International (n 254) 368. The general view, however, was that recognition of government and recognition of belligerency were two separated acts. See for instance Padelford, Spanish Civil War (n 325) 236.
[333] Le Fur, La Guerre d'Espagne et le Droit (n 254) 26.
[334] Ibid 4-5. See Chapter 3 for the essential anti-communist dimension of Le Fur's approach.

discourse as a whole.[335] Le Fur's arguments on that issue were indeed 'an inextricable part of the inter-war politics and not an overcoming.'[336] But so were the arguments of his republican counterpart Georges Scelle, who defended that positive law was strictly prohibiting intervention in favour of the 'rebels' while authorising support for the parent state.[337] Despite its governmentalist bias, the DBR thus proved unable to offer an adequate and consensual legal escape from the inter-war politics. It eventually led European powers to bury the doctrine and to substitute the governmentalist discourse for a discourse grounded on the idea of localisation (see chapter 3).

3. Conclusion

Despite their differences, Rousseauism and governmentalism were two discourses inseparable from the canons of state-centrism. Even within their own internal contradictions, the common denominator remained a commitment towards the idea that the state was the sole legitimate and desirable political unit of the international order. To support this idea, the formalism of Rousseauism indeed limited 'the possibilities of imagining forms of legality other than those emanating from the states.'[338] But it did so without the tool of international law and limited itself to refer the situation to the domestic domain. In other words, the role of international law was to enact its own irrelevance. Governmentalism, with its functionalist shift, adopted the slightly different approach of limiting forms of legality to those strengthening the reproduction of the international order as a community of states. For that reason, governmentalism was hardly an alternative to Rousseauism, but a mere mitigation. And through those two discourses on the (non)regulation of civil wars, international law also shaped its own identity by reinforcing the idea that the state was immutable.

If Rousseauism's strictness offered no prospect of regulation for civil wars, governmentalism also proved largely inefficient in that regard. Despite its meagre humanitarian dimension, the DBR remained largely unsuited for the broader humanitarian project of humanising war beyond interstate wars. Its high threshold and its seemingly unsurmountable indeterminacy meant that most intrastate conflicts could not be governed by international law. Constrained by state sovereignty and by a very restrictive conception of civil war, the Red Cross community chose to sail away from these two traditional legal answers to civil war and undertook a move from law to morality (chapter 2). But growing

[335] On the importance of the *anomaly* to understand the *normality* see Ginzburg, Microhistory (n 115); Perry Anderson, 'The Force of the Anomaly' (2012) London Review of Books.
[336] Koskenniemi, Gentle Civilizer (n 13) 342.
[337] Scelle, La Guerre Civile Espagnole (n 254) 277.
[338] Mégret, L'Étatisme (n 177) 107.

discontent also led to the development of other discourses more concerned about international law's ability to localise and eventually supress civil wars (chapters 3 and 4).

CHAPTER 2. MORALISING THE LAWS OF WAR: HUMANITARIANISM AND THE RED CROSS TURN TO CIVIL WARS

This chapter focuses on the dominant humanitarian approach regarding civil war that was developed during the 1918-1949 period within the Red Cross movement and which attempted to displace the laws of war from the legal positivist domain to the moral one. During a long period, humanitarianism was hardly a challenge to Rousseauism as it accepted the premises of it, namely the non-application of the laws of war to civil conflicts and the absence of two legally equal belligerents. Facing Rousseauism's hostility towards the regulation of civil wars, as well as governmentalism's uncertainties, the attitude adopted was not one of confrontation but one of avoidance. Instead of legally challenging Rousseauism or engaging in the difficult process of belligerency recognition, the choice was made to circumvent these traditional approaches by a move from the legal domain to the moral one. Waiting for a more opportune moment to push for the formal inclusion of civil wars within the laws of war, the whole project was transitive and sought to find a 'moral basis' for the limitation of war in lieu of a legal one.[339] Far from being avant-gardist, the 'moral basis' discourse was hardly detachable and distinguishable from the anti-communist and reactionary sentiment that brought it to life.

Therefore, this chapter not only focuses on the structural dimension of the humanitarian discourse and its logic of moralisation of the laws of war, but also on how the perception of witnessing an unprecedented crisis can lead a professional community to develop new ways of thinking about international law and to revaluate existing discursive practices. In face of what was perceived as an era of crisis marked by the proliferation of civil wars, the traditional vision centred on the category of belligerent (i.e. states) from which derived the rights, duties, privileges, and status of the laws of war was outdated. Mostly based on ICRC archives, this chapter shows that the category of 'crisis' depends not on any objective reality, but on whether a professional community, be it the Red Cross or the invisible college of international lawyers, comes to a consensus regarding the qualification of a situation as such.

In that case, the anti-Communist engagement of many actors within the Red Cross played a decisive role in framing the post-1918 period as an era of crisis, which in turn prompted the development of the first comprehensive attempt to 'humanise' civil wars by means of international law. Such was not the case during the 1912 Red Cross Conference when a first

[339] Archives du Comité Internationale de la Croix-Rouge [hereafter ACICR], *Procès-verbal de la 2ème commission de la XVIème Conférénce Internationale de la Croix-Rouge* (Intervention of the ICRC Vice-President Paul des Gouttes) (1938), CRI-19/IV [2nd Commission Minutes 1938 (first version)].

attempt to adopt a resolution on civil war failed to gain consensus.[340] What changed between 1912 and the post-1918 period was not a sudden appearance of the phenomenon of civil war in Europe – though the magnitude of certain conflicts was higher – but a decline of the traditional and sacrosanct bias in favour of established governments. For the sympathies of many humanitarians often extended to insurgents rather than governments, such as the *Whites* in Russia and the *Nationalists* in Spain. Symptomatic of this anti-communist temper was the architect of the Red Cross turn to civil war, Russian émigré Georges Lodygensky, who never made his anti-communism a secret and whose whole oeuvre was based on the indistinction between humanitarianism and anti-communist commitments.

It comes at no surprise that such discourse was mainly developed during the International Red Cross Conferences of 1921 and 1938 as an answer to the Russian and Spanish civil wars. Despite the shock provoked by these events, no wide call to formally integrate civil wars within the legal-positivist realm of the laws of war arose. Instead, the ICRC and the national Red Cross societies pushed to establish their moral right to provide humanitarian relief to the victims of civil wars and to secure a humanitarian commitment from states. This turn to civil war within the Red Cross community was also rapidly seized by actors directly involved in civil conflicts – as will be demonstrated through the cases of Ireland and Spain.

1. Civil War and its Innumerable Victims: From Belligerents to Individuals

The humanitarian community, whether the ICRC or the national Red Cross societies, did not generally discuss the fact that the laws of war were not applicable to civil wars. This state of affairs was embraced without much discussion and was neither seen as an outrage nor a sign of backwardness. Unlike the doctrine of the recognition of belligerency, the humanitarian discourse did not try to find a legal basis outside conventional law to include civil wars within the realm of international law and the laws of war. It was emphatically recognised that the Geneva or Hague conventions were only applicable to states and that civil war was not governed by the laws of war.[341] According to the Ottoman Red Crescent, a state could

[340] For a brief discussion on the proposal brought forward the U.S and Cuban Red Cross societies, 'vehemently rejected' during the 1912 Red Cross Conference, see Kimberley A. Lowe, 'The Red Cross and the Laws of War, 1863-1949: International Rights Activism before Human Rights' in Jean H. Quataert and Lora Wildenthal (ed) *The Routledge History of Human Rights* (Routledge 2020) 81-82.

[341] ACICR, *Letter ICRC to Delegate Danish Red Cross* (22 February 1919) CR-22-1/1; Georges Lodygensky, 'La Croix Rouge et la Guerre Civile' (1919) IRRC 1159, 1160; Bibliothèque du Comité Internationale de la Croix Rouge [hereafter BCICR], Ottoman Red-Crescent: 10th International Red-Cross Conference, *La Croix-Rouge Internationale dans la Guerre Civile* (1921) 1; BCICR, ICRC, 16th International Red-Cross Conference, *Report on the Interpretation. Revision and Extension of the Geneva Convention of July 27 1929* (1938) 7-8; BCICR, ICRC, 16th International Red-Cross Conference, *Role and Activities of the Red Cross in Time of Civil War* (1938) 1; 2nd Commission Minutes 1938 (first version) (Intervention Chair M. Gorgé) (n 339).

not therefore 'be reproached for not observing the rules laid down in these conventions towards the rebels.'[342]

In the context of the two Red Cross conferences of 1921 and 1938, and even in the general context of the discipline of international law, rare were the explicit (and public) calls for a codification of rules applicable to civil wars.[343] This was also the result of the closeness that national Red Cross societies have had with their parent governments,[344] which often brought humanitarian and patriotic commitments into conflict. The reluctance of many national Red Cross societies to discuss a formal codification of the laws of civil war reflected, to a large extent, the position of their parent government.

The impossibility or unwillingness to 'solve' the question of civil war in the same way as the question of interstate war by means of international conventions was, however, accompanied by a widespread feeling of the advent of a historical era of civil wars.[345] And even in the aftermath of WWI, civil war was still presented as radically different from 'ordinary war'[346] and inherently worse.[347] Compared to interstate war, civil war, 'in which passions are even more frayed,' was seen as producing 'even more serious situations.'[348] This was an axiom which did not need evidence.[349] Yet this conception went beyond the humanitarian community. Hans Wehberg, who was not an advocate of a state-centric international law, was nevertheless convinced that peoples tended to wage interstate war without 'hatred' and 'solely because they feel the necessity to defend the homeland.'[350] This intrinsic difference of nature between the two forms of conflict eventually led Georges Lodygensky to stress that this new era of civil wars would have for result 'new victims and new sufferings.'[351] As a consequence, civil war was mainly approached in terms of 'the immense quantity of victims' it produces.[352]

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[342] Ottoman Red-Crescent, Report Civil War (n 341) 1.
[343] Hans Wehberg is certainly one of the most important exceptions. Wehberg, La Guerre Civile (n 247) 122-123.
[344] Lowe, Red Cross and the Laws of War (n 340) 90.
[345] Lodygensky, Guerre Civile (n 341) 1160-1162; ACICR, *Letter M.G Jenny (Kiev Committee) to ICRC* (15 May 1919) CR-22-1/18; ACICR, *Report Lodygensky to ICRC* (1920) CR-22-10.
[346] ICRC to Danish Red Cross (n 341).
[347] As Lodygensky argued, 'arbitrariness and contempt for divine and human laws reign supreme' during civil war. Lodygensky, Guerre Civile (n 341) 1165; BCICR, Ukrainian Red-Cross, 10th International Red-Cross Conference, *Rapport à la Xe Conference Internationale de la Croix Rouge* (1921) 32.
[348] Ukrainian Red-Cross, Report Civil War (n 347) 32.
[349] Ibid.
[350] Wehberg also added to his assertion was valid as long as the peoples were not 'systematically excited by propaganda against each other', which denotes a rather romantic vision of war. Wehberg, Guerre Civile (n 247) 8.
[351] Lodygensky, Guerre Civile (n 341) 1162.
[352] BCICR, 'Procès-verbaux des séances plénières' in *Dixième Conférence internationale de la Croix-Rouge: compte rendu* (1921) 157 [Minutes Plenary Sessions 1921].

1.1. The Moral Basis: Relief and Humanitarian Principles during Civil War

Unlike interstate war, which was a legal institution, civil war was only seen as a 'disaster' where there was 'neither legitimate governments nor insurgents, but innumerable victims.'[353] Because civil war was only about victims, the classical conception of the laws of war as a relation between belligerents to which rights, duties, privileges, and status were associated lost its influence. Rousseauism and governmentalism were therefore completely ignored as both shared the assumption that war could only be legally regulated insofar as at least two belligerents were involved. But unlike governmentalism, humanitarianism was not based on a functional approach to belligerency designed to lower the cost of access to this fundamental status. Rather, it was this traditional approach of the laws of war whereby victims of war – civilians, non-combatants, POWs – are 'incidental beneficiaries of an interstate system of rights and obligations'[354] which was part of the problem. Shifting from belligerents to victims, hence to individuals, required the adoption of a new strategy.

For Lodygensky, the 'elementary right of the human being' was to be protected through the intervention of the Red Cross in favour of the victims of civil wars.[355] This move towards the individual rights of the victims of civil war – combatants and non-combatants – was discursively undertaken through the elaboration of 'a moral code' that would transcend the inapplicability of the laws of war in situation not involving parties to specific conventions.[356] The elaboration of a language explicitly grounded on moral rather than legal obligations became the main vehicle to circumvent Rousseauism. It was necessary, therefore, to find a 'moral basis'[357] to limit and humanise civil wars.

1.2. The 1921 Red Cross Conference: Moralising Civil War

The inclusion of the topic of civil war in the agenda of the 1921 Conference was the result of the Bolshevik revolution and the civil war that ensued in Russia. In particular, the spontaneous creation of the *Kiev International Committee for Relief of Victims of the Civil War* (Kiev Committee) constituted a fait accompli that needed to be addressed. First established by the Red Cross societies of Denmark, Ukraine, Poland, and Russia (the former tzarist organisation) to organize the relief of the victims of the Russian civil war, the Kiev

[353] Georges Lodygensky, 'La Croix Rouge et la Guerre Civile (2e article) – En Russie de 1919 à 1920' (1919) IRRC 654, 654 ; BCICR, Former Russian Red-Cross, 10th International Red-Cross Conference, *La Croix-Rouge dans la Guerre Civile* (1921) 2.
[354] Lawrence Hill-Cawthorne, 'Rights under International Humanitarian Law' (2017) 28 EJIL 1187, 1187-1188.
[355] Lodygensky, Guerre Civile (n 341) 1167.
[356] Lowe, Red Cross and the Laws of War (n 340) 75.
[357] 2nd Commission Minutes 1938 (first version), (Intervention ICRC Vice-President Paul des Gouttes) (n 339).

Committee, mainly through the voice of its main architect Georges Lodygensky, rapidly advocated for a generalisation of the Red Cross intervention during European civil wars.[358] In two articles published in the International Red Cross Review, Lodygensky presented the role and actions of the committee which he described as 'forged by life itself.'[359] Building on the humanitarian legitimacy that the committee gave him, he began to campaign for a systematic involvement of the Red Cross, and in particular the ICRC, in situations of civil war.[360] He also started working closely with the ICRC and eventually played a decisive role during the negotiations of the 1921 Conference.[361]

This led to the adoption of the resolution XIV on civil war that was based on a motion proposed by Lodygensky. Through this resolution, the Conference firstly recognised the 'right and duty' of the Red Cross to provide humanitarian relief in case of 'civil war, social and revolutionary troubles.'[362] It further provided that 'all civil war victims' had 'without exception' the right to be rescued.[363] In the resolution, the ICRC was also mandated with the coordination of humanitarian relief if a National Red Cross was unable, 'by its own admission,' to undertake the necessary actions without the help of other Red Cross societies.[364] Unlike Lodygensky's proposal which disregarded state sovereignty, this was conditional on the 'consent of the government.'[365] Attention was also given to political prisoners and the conference condemned the system of 'political hostage.'[366] In that regard, the more controversial aspect of the resolution was the assertion that 'political detainees' should be 'considered and treated according to the principles which inspired the drafters of the 1907 Hague Convention.'[367] This tortuous formulation was meant to avoid direct reference to the status of POW. The initial and less cautious motion written by Lodygensky led to some debates since it was suggested that 'political detainees in times of civil war must be considered and treated by belligerent parties as prisoners of war, that is according to the principles of the 1907 Hague Convention.'[368] The direct reference to the status of POW and the mention of 'belligerent parties' led the German delegate, Paul Draudt, a Prussian officer, to stress that Lodygensky's proposal tended 'to recognise as legal the action of rebels without

[358] Lodygensky, Guerre Civile (n 341).
[359] Ibid 1170; Lodygensky, Guerre Civile II (n 353).
[360] Ibid.
[361] Logydensky, Report to ICRC (n 345); Former Russian Red-Cross, Report Civil War (n 353). The report of the former Russian Red-Cross, which Lodygensky co-authored, constituted the basis of the discussion.
[362] BCICR, 'Résolutions et vœux votés par la 10ème Conférence' in *Dixième Conférence internationale de la Croix-Rouge: Compte Rendu* (1921) Resolution XIV, 217.
[363] Ibid.
[364] Ibid.
[365] Ibid.
[366] Ibid 218.
[367] Ibid.
[368] Minutes Plenary Sessions 1921 (n 352) 162.

taking into account in any way the legitimate authority of the state.'[369] His critics, that the president of the ICRC Gustave Ador thought to be 'well-founded,'[370] was ultimately conveying the idea that a 'state can never renounce in advance its right to fight any revolution with all the means in its power.'[371]

By reminding the other delegates of the legal inequality existing between states and insurgents, Draudt obtained a modification of Lodygensky's motion, which resulted in the erasure of any reference to 'POWs' and 'belligerent parties.'[372] The reference to the 1907 Hague Convention – a treaty only applicable between states – was nevertheless retained, which probably explained why Draudt still advocated for the suppression of the modified passage.[373] Draudt's dogmatic attitude was in the end a good illustration of two different stances vis-à-vis Rousseauism. While some like Draudt felt constrained by a state-centric conception of the laws of war, others were ready to develop a subterfuge to circumvent the formal inapplicability of the Geneva or Hague conventions to civil wars. This was the case of Lodygensky who answered Draudt's criticism by defusing this legal obstacle. While he conceded that a convention such as the Geneva one was not straightforwardly applicable to civil war, he opposed that the convention's 'humanitarian principles,' which were 'comprehensible' to all, were to be applied even outside international wars, 'at least in all civilised states.'[374] Lodygensky's approach was essentially based on a separation of the laws of war into two bodies: their legal character on the one hand, and their humanitarian and therefore transcendent principles on the other. This position was also elaborated, more systematically and more radically, by the Ottoman Red Crescent. As a matter of coherence, the Ottoman Red Crescent agreed with the *legal* non-applicability of the Geneva and Hague Conventions outside international wars. But positive law was hardly the highest normative order, and the Ottoman Red Crescent held that applying the 'rules and principles' of these conventions during civil wars was a 'moral obligation.'[375] Such moral obligation was supposed to reside in the radical singularity of these conventions. Unlike other 'political treaties' to which they cannot be 'assimilated,' the Hague and Geneva conventions were deemed to bear 'the very expression of the moral development which mankind has achieved after so many centuries of effort and incessant struggle.'[376] The value of the laws of war

[369] BCICR, 'Procès-verbaux de la commission spéciale des délégués' in *Dixième Conférence internationale de la Croix-Rouge: compte rendu* (1921) 66 [Minutes Commission Special Delegates 1921].
[370] Ibid.
[371] Ibid.
[372] Ibid 67.
[373] Ibid.
[374] Ibid 66.
[375] Ottoman Red-Crescent, Report Civil War (n 341) 1.
[376] Ibid 2.

could not therefore only be deduced from 'contractual obligations,' nor their transcendental nature limited by legal-positivist considerations.[377]

The separation of the laws of war into two bodies, the 'splitting idea' as Boyd Van Dijk puts it,[378] eventually became a commonplace in the humanitarian vocabulary. During the Irish Civil War, for instance, the President of the ICRC, Gustave Ador, sent a telegram to the Irish government urging it to draw inspiration from 'the spirit of all existing international conventions.'[379] But this was far from consensual outside the humanitarian community, and in his answer to the ICRC, the Irish minister of foreign affairs was quick to inform the Genevan organisation that he was unwilling to 'discuss measures considered necessary by [his] government to repress [a] rebellion.'[380] The Spanish civil war, however, would provide a new opportunity for the Red Cross to consolidate the gains of 1921, but also to push the discursive cursor further.

1.3. The 1938 Red Cross Conference: Consolidation and Opportunism

The topic of civil war came back in the agendas of the 1937 meeting of experts for the revision of the 1929 Geneva Convention and the 1938 Red Cross Conference. In 1937, it was once again reaffirmed that the Geneva Convention was not covering situations of civil war and was inapplicable outside interstate conflicts.[381] The experts confined themselves to supporting the now well-established idea that the 'humanitarian principles' of the Convention should nevertheless 'be respected under all circumstances.'[382] In 1938, and unlike during the 1921 Conference, the ICRC took the lead and proposed a draft resolution. The text mainly focused on the 'sick and wounded' and 'the prisoners of war and political prisoners.'[383] In the first case, the ICRC proposed that 'the constitutional government and the responsible leaders of the revolutionary movement shall undertake to observe the provisions of the Geneva Convention, and to ensure their observation, and in particular the respect of the Red Cross emblem, by all combatant forces' in situations of civil war.[384] In the second case, the Committee advanced that 'civilian and military arrested or detained … shall be treated with humanity.'[385] Building on the momentum created by the relatively

[377] Ibid.
[378] van Dijk, Preparing for War (n 246) 108.
[379] ACICR, *Telegram ICRC President to Irish Government* (20 January 1923), CR-22(84)/83.
[380] ACICR, *Telegram Desmond FitzGerald to ICRC President* 26 January 1923), CR-22(84)/86.
[381] 1937 Report on the Interpretation, Revision and Extension of the 1929 Geneva Convention (n 341) 7-8.
[382] Ibid 8.
[383] BCICR, ICRC, Sixteenth International Red Cross Conference, *Role and Activities of the Red Cross in Time of Civil War* (1938) 12-13.
[384] Ibid 12.
[385] Ibid 13.

recent *Geneva Convention relative to the Treatment of Prisoners of War*,[386] the Committee was confident enough to propose a formulation similar to the one Lodygensky presented in 1921 before being modified: 'persons captured during military operations or armed combats should be treated like prisoners of war, according to the principles underlying the Hague Convention of 1907 and the Convention of July 27 1929 on the treatment of prisoners of war.'[387]

Compared to the resolution XIV of the 1921 Conference, the ICRC's proposal was more ambitious and consisted of an explicit call to apply by analogy the laws of war during civil conflicts with what was expected during an international war. For this reason, the draft resolution took the form of a draft convention. But in the general economy of the ICRC's report, the ambition borne by the draft resolution was shadowed by what the Committee thought achievable. Doubts were thus expressed regarding the application by analogy of the rules relative to POWs in comparison to what was reasonably achievable regarding the sick and the wounded:

> It appears easier to secure respect for the Geneva Convention than the observance of the rules for the treatment of prisoners of war. This fact is easily explained. The convention is based on elementary humanitarian sentiment, and it is natural that the authorities should be concerned in the fate of the wounded before providing for the well-being of prisoners. Moreover, on the outbreak of a civil war, certain acts subject to criminal law are invariably perpetrated so that the government may rightly consider some proportion of the prisoners to be criminals.[388]

Here again, the Geneva Convention was deemed to bear a transcendental dimension that could easily spark a humanitarian commitment from states, beyond what they were legally required to do during a civil war. The issue of POWs, on the contrary, was seen more difficultly reduceable to an apolitical humanitarianism. It led the ICRC to distinguish between three types of civil war and to precise the strategy which should be applied regarding prisoners in each of them:

i) *Disorder of secondary importance, sporadic unrest, strikes, a state of latent revolution by terrorists or revolutionary acts, riots, etc.*
ii) *Serious disturbances which the government endeavours to suppress with the help of the police or the military fighting against armed and organised forces; civil war or revolution in the proper sense of the world, with street fighting, etc.*

[386] Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 344.
[387] ICRC, Report Civil War 1938 (n 383) 13.
[388] Ibid 9.

iii) Civil war between two hostile political organisations (legal or otherwise), both exercising command over one part of the national territory and having each an army at its disposal.[389]

In the first scenario, the ICRC conceded that 'steps on behalf of prisoners appear to be excluded or to have no prospect of success, as the country's own penal code will alone be considered as applicable.'[390] For the two other types of civil war, however, intervention and activism were required: 'both parties should undertake to adopt the principles of the Geneva Convention and, as far as possible, to observe the spirit of the rules for the treatment of prisoners of war.'[391] While it illustrated, again, the distinction between the legal and humanitarian bodies of the laws of war, the third point also showed how the ICRC discourse was influenced by its own experience of the Spanish Civil War. The type of conflict described was indeed a direct reflection of the situation in Spain. In a way, the Spanish conflict allowed the ICRC to corroborate Lodygensky's postulate according to which there were no more 'legitimate governments nor insurgents' in some civil wars. The difficult situation in which the Spanish constitutional government rapidly found itself thus permitted the ICRC to establish four delegations (Madrid and Barcelona for the Republicans, Burgos and Sevilla for the Nationalists) and obtain a twin agreement from both parties.[392] The Republicans and the Nationalists accepted on the same terms relief from foreign Red Cross societies through the ICRC, respect of the Red Cross emblem, and verbal support for the establishment of an ICRC led agencies for civil prisoners and POWs.[393] This sort of a-legal situation where there was neither legitimate nor illegitimate authority in Spain continued during the conference with the participation of delegates from the Nationalist Red Cross. Accordingly, the ICRC erased all references to a legal or a rebel side in the minutes of the conference: the delegates of the two Spanish delegations – that inevitably confronted a lot especially in regards to the right denomination[394] – were referred to as the delegates of the 'Madrid Red Cross' and the 'Burgos Red Cross.'[395] And even if the first version of the minutes presented them respectively as the delegates of the 'Spanish Red Cross' and of the

[389] Ibid 10-11.
[390] Ibid 10.
[391] Ibid 10-12.
[392] ACICR, 'Mission du Comité International en Espagne, 330e circulaire' (18 September 1936) CR-212-GEN-02/212. This leads the ICRC to assert in its report that in such conflict, 'there must necessarily be two Red Cross societies' with one of them that must be 'more or less improvised.' ICRC, Report Civil War 1938 (n 383) 12.
[393] ICRC, 330e circulaire (n 392).
[394] 2nd Commission Minutes 1938 (first version) (n 339).
[395] BCICR, *Sixteenth International Red Cross Conference: minutes of the 1st, 2nd, 3rd and 4th Commission* (2nd Commission) (1938) 32-34.

'Spanish Nationalist Red Cross,' corrections were provided to choose a denomination in which no indication to a legitimate representative of Spain could be inferred.[396]

Building on the gains of 1921 and on its action in Spain, the ICRC's proposal still met defiance from an important part of the delegates. When summarising the discussion, the President of the 2nd commission indicated that this defiance resulted from the fact that the proposal was too contingent on the experiences of the Spanish Civil War; it was feared that these specific conditions might not be same in the future.[397] Although 'desirable', a more in-depth discussion should take place at a more favourable time.[398] The ambition of the ICRC was eventually tamed by a more cautious and vague approach according to which the conference should limit itself to 'recommend that efforts were made.'[399] Awaking 'public sympathy' was deemed sufficient, or even more efficient than legal or proto-legal provisions.[400] The final resolution nevertheless expended the gains of 1921 by pushing forward 'the application of the humanitarian principles' of the Geneva and Hague conventions towards the wounded, the sick, POWs and medical personnel.[401] The resolution also called for 'humane treatment for all political prisoners' and the 'respect of the life and liberty of non-combatants.'[402] But unlike the ICRC's draft resolution, the final text merely 'request[ed] the international committee and the national Red Cross societies to endeavour to obtain' the fulfilling of the different aspects of the resolution.[403]

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While the ICRC initially made the first step of a codification process by establishing rules that states and insurgents should apply, the conference shied away from this possibility and confined itself in a role of humanitarian advocacy. Though the Spanish civil war permitted to obtain some discursive gains compared to 1921 – the explicit reference to the status of POW for instance – the period was still deemed not opportune by many humanitarians to undertaking a definitive shift from the moral to the legal domain.

[396] 2nd Commission Minutes 1938 (first version) (n 339).
[397] Ibid.
[398] Ibid.
[399] Ibid (Intervention French delegate).
[400] BCICR, Turkish Red-Crescent, Sixteenth International Red Cross Conference, *Rôle et Action de la Croix-Rouge en Temps de Guerre Civile* (1938) 7.
[401] BCICR, *Sixteenth international Red Cross Conference: Report* (1938) Resolution XIV.
[402] Ibid.
[403] Ibid.

2. Between Humanitarian Advocacy and Demonisation: Humanitarians, Insurgents, and the Various Mobilisations of the Laws of War

The moralisation of the laws of war was rapidly seized by actors directly involved in civil wars. This section focuses on different forms that the mobilisation of the laws of war took during the Irish and Spanish civil wars, for these two conflicts provide good examples of how the language of the laws of war was used by members of the civil society and insurgents. On the one hand, the various statements analysed took the classical form of humanitarian advocacy and references to the laws of war were mostly directed at obtaining a more humane treatment for prisoners and denouncing their mistreatment. It mostly emanated from Irish women groups that saw in the 1921 Red Cross Conference, and more generally in international law, moral allies to their claims. On the other hand, the use of the vocabulary of the laws of war was instrumental for insurgents, mainly the Spanish Nationalists, in claiming a moral high ground vis-à-vis governmental forces. The aim was to delegitimise the legal government by accusing it of grossly violating the laws of war, while legitimising the insurgents by emphasising their self-proclaimed respect for the laws of war. However, it would be misleading to draw a sharp distinction between these two uses of the language of the laws of war for at least two reasons. One the one hand, humanitarian advocacy to obtain pragmatic results – such as humane detention condition – was not necessarily presented (and also received) as apolitical and disconnected from political struggle. On the other hand, the seemingly more political use of the language of the laws of war to delegitimise opponents was already a distinctive aspect of the laws of war, and thus difficultly reduceable to a mere instrumentalisation.

2.1. The Laws of War to the Rescue of IRA Prisoners

The Irish Civil War (June 1922-May 1923) was the first test for the Red Cross movement and the ICRC after the 1921 Conference. The conflict between the pro (the Irish provisional government then Irish Free State) and the anti (Irish Republican Army - IRA) treaty forces was rapidly linked to the recent adoption of the resolution XIV on civil war. The issue of the treatment of IRA prisoners in the hands of the Irish Free State became a central aspect of a wave of humanitarian protests built on the recent turn to civil wars within the Red Cross movement. Republican women played a leading role and not only tried to obtain the intervention of the ICRC, but also to reinforce their demands for the humane treatment of prisoners by harnessing their claims to the moral weight of the laws of war and international law.

Many telegrams and letters concerned with the fate of IRA prisoners were sent by various individuals and organisations to the ICRC. The purpose was to protest the execution of prisoners, but also to convince the ICRC to intervene. Some limited themselves to condemn the executions and urged the ICRC to intervene.[404] Others, especially Republican women, decided to denounce what they saw as violations of the 'rules [of] civil warfare'[405] and 'the Geneva Convention.'[406] Framing their protest within international legal parlance was contingent on the idea that international law could be a moral ally. Not only the actions of the Irish Free State were against common morality, but they were also against the specific morality borne by international law.

This resort to the vocabulary of the laws of war was a direct reaction to the recent development within the Red Cross movement. In a letter sent to the ICRC to obtain the status of POW for IRA's prisoners, the Women's International League for Peace and Freedom (at the demand of Irish women groups) justified their request by the fact that the 'ICRC ha[d] recently been dealing with the fate of prisoners taken during a civil war.'[407] It is not clear whether this assertion relates to specific ICRC actions in Russia or Upper-Silesia for instance, or to the 1921 Red Cross Conference. In any case, it was well perceived that framing humanitarian or political claims through the language developed by the laws of war and the Red Cross movement was timely.

Symptomatic of this endeavour was a letter of Kathleen Lynn, sent on behalf of the Women's Prisoners Defence Association of Ireland, to the ICRC: 'The Irish Provisional Government has violated all rules of international warfare,' and in doing so, has defied 'the laws of morality and humanity,' among which the sacred dimension of 'marriage laws' in Ireland.[408] International law was included in a broader moral universe and placed with other elements meant to gather moral support or to provoke moral condemnation. Appeal to 'article 10 of the Geneva Convention of 1921' was made to obtain the protection of 'the Irish prisoners of war.'[409] This reference to the *1921 Geneva Convention*, which never existed, was in fact a reference to the 10th Red Cross Conference of 1921 held in Geneva. In any case, international

[404] ACICR, *Telegram Kerney to ICRC* (28 November 1922) CR-22-84/51; ACICR, *Telegram King to ICRC* (28 November 1922) CR-22-84/52.
[405] ACICR, *Telegram Despard to ICRC* (28 November 1922) CR-22-84/61.
[406] ACICR, *Telegram Cardaillac to ICRC* (28 November 1922) CR-22-84/58; *Telegram Gartland to ICRC* (28 November 1922) CR-22-84/55; *Telegram Ricard to ICRC* (28 November 1922) CR-22-84/54; *Telegram Lynels to ICRC* (28 November 1922) CR-22-84/53; *Telegram De Guerrero to ICRC* (28 November 1922) CR-22(84)/50; *Telegram De Balaine to ICRC* (28 November 1922),CR-22-84/49.
[407] ACICR, *Letter Women's International League for Peace and Freedom to ICRC* (29 November 1922) CR-22-84/64.
[408] ACICR, *Letter Women Prisoners Defence Association of Ireland to ICRC* (1922) CR-22-84/75.
[409] Ibid.

law was brought aboard with resolution XIV on civil war, motivating the use of the language of the laws of war. From the perspective of legal technicality, the argumentation was of course clumsy: confusion between the Geneva Convention and the 1921 Geneva Conference (confusion already made in elsewhere hitherto[410]), mention of the 'rules of international warfare' and then a resolution on civil war etc.[411] Yet this eclectic collection of authoritative elements was of a practical nature. The pragmatic purpose was to secure an intervention and 'an investigation' of the ICRC to ensure that the Irish prisoners were treated humanely,[412] not to make a professional legal argument. Mention of POW's status or claims about the application of the laws of war during a civil war could therefore be formulated more easily without consideration for their legal and controversial consequences.

Articulating a humanitarian discourse based on morality instead of legality did not mean the same thing for the ICRC or Irish Republican women. The efforts undertaken by the Red Cross movement of finding a 'moral basis' for the regulation of civil wars had always been driven by the fear of creating 'legal controversies.'[413] This institutionally situated discourse, as discussed above, was still a cautious technical argumentation meant to not raise any legal controversies linked to questions of sovereignty. Alienating states on questions of sovereignty would inevitably threaten the Red Cross' claim of being an apolitical humanitarian movement. From the side of the Irish Republican Women, no attempt was made to make their humanitarianism apolitical. What they had done, instead, was to frame humanitarian advocacy in a way that put more weight from the side of the righteous party to the Irish Civil War. Denouncing what was seen as violations of international law or securing POW's status and ICRC's intervention went alongside the denunciation of the illegitimacy of the Irish Free State, which was presented as a mere proxy of the British.[414] As a result, Lady Aberdeen, a British philanthropist who seemed to be in the good graces of the ICRC,[415] thought that it was 'probable that the ladies in question' used their appeal to the ICRC 'to derive some advantage to use in political propaganda … rather than honestly attempting to encourage human condition.'[416] In that encounter between Irish Republican women and

[410] ACICR, Women Prisoners Defence Association, *Statement from the Women of Ireland to the Senate and Congress of the United States* (1922) CR-22-84/99; ACICR, L'Organisation Défensive des Femmes des Prisoniers Irlandais, *Déclaration des Femmes d'Irlande aux Délégués de la Conférence de la Paix de Lausanne* (1922) CR-22-84/74 [Women Prisoners Defence Association to Lausanne Peace Conference].
[411] Women Prisoners Defence Association of Ireland to ICRC (n 408).
[412] Ibid.
[413] ACICR, *Letter ICRC General-Director Chenevière to ICRC member Chaponnière-Chaix* (29 January 1923) CR-22-84/92.
[414] Women Prisoners Defence Association to US Senate and Congress (n 410); Women Prisoners Defence Association to Lausanne Peace Conference (n 410).
[415] Chenevière to Chaponnière-Chaix (n 413).
[416] ACICR, *Letter Lady Aberdeen to ICRC Member Chaponnière-Chaix* (22 January 1923), CR-22-84/96.

Lady Aberdeen, two visions of humanitarianism collided: one in which political preferences and humanitarian advocacy go hand in hand, and one in which the relationship between both must be hidden behind a veil of ostensible apoliticism.

Even though the president of the ICRC Gustave Ador thought that the protestations received were maybe exaggerations coming from 'some ladies with a sensitive heart,'[417] the pressure finally convinced the ICRC to intervene in order to clarify the situation of the prisoners in Ireland. This firstly led to a political controversy, the Irish authorities seeing in the ICRC call to draw inspiration from the laws of war and their spirit,[418] an unfriendly intervention in their domestic affairs.[419] The Irish Free State eventually agreed to let the ICRC delegate – Rodolphe A. Haccius – inspect some prisons and camps. But the government made sure to put in black and white that this decision was a pure matter of 'courtesy' and was neither deriving from the application of the 10th Red Cross Conference, nor supposed to set a precedent.[420] In the end, the report of the ICRC delegate concluded that the complaints received were partly 'groundless' and 'exaggerated.'[421] According to Haccius, these complaints, largely emanating from Irish women, were 'generalised in a inadmissible way,' which made him 'sceptical about the plaintiff's aim.'[422] These 'ladies with a sensitive heart' were thus implicitly accused of using the language of the laws of war for a political purpose and not for humanitarian reasons. The impossibility of visiting certain camps and prisons, and the ban on interviewing prisoners, did not prevent Haccius to confidently conclude that 'the treatment of prisoners [was] devoid of any spirit of hostility.'[423] It was finally added that even if 'the government denie[d] the prisoners POW status', they were nevertheless put 'effectively under the corresponding regime.'[424]

This assertion was, however, inconsistent with the execution of 83 IRA's prisoners during the Irish Civil War.[425] The main characteristic of the POW status, more than humane condition of detention, lays in the combatant privilege which exculpates POWs from judicial pursuit or execution for the mere participation to hostilities. As a matter of humanitarian prestige, the mere publication of a report was already a victory for the ICRC, even if the result was a whitewashing of the Irish Free State. Driven by the requirement to not 'create

[417] ACICR, *Extract from a letter of Gustave Ador* (22 December 1922) CR-22-84/72.
[418] Ador to Irish Government (n 379).
[419] Irish Government to Ador (n 380).
[420] ACICR, CICR, *Rapport Général de R. Haccius, Délégué en Irlande* (April 1923) CR-22-84/134.
[421] Ibid.
[422] Ibid.
[423] Ibid.
[424] Ibid.
[425] Seán Enright, *The Irish Civil War: Law, Execution and Atrocity* (Merrion Press, 2022).

embarrassment to the Government,'[426] the report was obviously criticised by the Irish Republicans,[427] but not assimilated to a political use of the humanitarian discourse.

2.2. Laws of War Language and Moral High-Ground

The political use of the laws of war was even more glaring – that is not to say more real – when insurgents resorted to international law. Through this strategy, insurgents tried to delegitimise their opponents and to present themselves as morally superior through a discourse emphasising a self-proclaimed respect for the laws of war. The general structure of the argument consisted in a dynamic of *accusation/valorisation/exoneration*: first, the enemy was accused of committing gross violations of the laws of war; in a second time, and unlike the enemy, insurgents were portrayed as duly followers of the laws of war; in a third time, potential future violations of the laws of war were justified by the enemy's alleged refusal to apply them. This strategy was (and still is) oriented toward a quest of legitimacy, which explains why traces of it can mainly be found in the rhetoric of insurgent groups during civil wars. The objective of legal governments was, on the contrary, to maintain rather than establish their legitimacy, thus requiring to play another part (see for instance Chapter 1 section 1.3). But through this strategy, insurgent groups were able to circumvent the 'legal inequality' existing between them and the legal government. Comparison between the contending parties – who respects the laws of war and who does not – was meant to put the two parties on the same footing and to project them into the same normative order. By changing the currency of legitimacy, insurgents were thus able to morally compete with governments, and to also claim that if not law, humanity or civilisation were on their side.

Like the Republican women, the IRA also accused the Irish Provisional Government troops 'to wage war without any consideration for the laws of war.'[428] But it is certainly during the Spanish Civil War that this type of accusation was the most systematically made. The Nationalists, especially through telegrams sent by the president of the *Junta de Defensa Nacional* Miguel Cabanellas, repeatedly accused the Spanish government of violating the laws of war. What is striking, however, is the *professional* way in which these telegrams addressed the alleged violations. The nationalists did not content themselves with accusing the Spanish government of violating 'international and humanitarian laws,'[429] 'international

[426] ACICR, *Letter ICRC Delegate in Ireland Haccius to ICRC* (19 April 1923) CR-22-84/119.
[427] ACICR, *Letter and its Annexe Kerney (Diplomatic and Consular Delegation of the Republic of Ireland) to ICRC* (12 July 1923) CR-2284/155.
[428] ACICR, *Mémoire du Gouvernmenet de la République Irlandaise au CICR* (13 March 1923) CR-22-84/104 [Republican's Memorandum to ICRC].
[429] ACICR, *Telegram Cabanellas to ICRC* (31 August 1936) CR-212-GEN-01/181.

conventions,'[430] or the Geneva Convention.[431] They also detailed, through the specific terminology of the laws of war, which specific violations allegedly took place. It was for instance supported that the 'open city of Burgos'[432] and its hospital, 'which was clearly displaying emblems of the Red Cross', was bombed.[433] The targeting of vehicles and buildings displaying the emblem of the Red Cross or protected persons such as wounded and children, was also mentioned several times.[434]

The aim was to go beyond mere protestations making vague and broad references to the laws of war and to frame the Nationalist rhetoric into a form that would reveal a mastery of the specific legal technicality of the laws of war. Considering that the Nationalists were members of the army in rebellion against their government, it is not surprising that they had a better knowledge of the laws of war lingo in comparison to some humanitarians – especially those not belonging to the Red Cross community. This display of knowledge was also instrumental in showing that this *competence* was actually deriving from their scrupulous respect for the laws of war. In their narrative, it is because they were scrupulous followers of the laws of war that Nationalists mastered the laws of war vocabulary and were able to condemn governmental violations. Even though it is well known that Nationalists committed countless atrocities,[435] the discursive strategy was to ostensibly emphasise a self-proclaimed humanitarian commitment. One of the most symptomatic examples can certainly be found in the agreement that the ICRC managed to obtain both from the Nationalists and the Spanish Government. As already mentioned, (section 2.2.2), this was a twin agreement including the same provisions for both parties. The main difference, however, lays in the fact the Nationalists took this opportunity to include in the agreement a profession of faith concerning their so-called commitment to the laws of war: '[*The Junta de Defensa Nacional*] declares its readiness to observe and respect, as it has always done and still does at all times, the Geneva Convention concerning the wounded, the sick and prisoners.'[436]

In that quest and competition for legitimacy, it was more than what the Spanish government could have done. To legitimise oneself so ostensibly through the laws of war would have

[430] ACICR, *Telegram Cabanellas to ICRC* (19 September 1936), CR-212-GEN-02/208.
[431] ACICR, *Telegram Cabanellas to ICRC* (23 September 1936), CR-212-GEN-02/(reference missing).
[432] The term 'open city' was a well-established concept in the field of the laws of war, especially in article 25 of the 1907 Hague Regulation which prohibits '[t]he attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.' Hague Regulations 1907 (n 204).
[433] Cabanellas to ICRC (31 August 1936) (n 429).
[434] Cabanellas to ICRC (19 September 1936) (n 430); ACICR, *Telegram Cabanellas to ICRC* (27 August 1936), CR-212-GEN-01/181.
[435] See Paul Preston, *The Spanish Holocaust: Inquisition and Extermination in Twentieth-Century Spain* (HarperPress 2013).
[436] ICRC, 330e circulaire (n 392).

meant for the government to implicitly recognise that the insurgents were no longer subject to criminal law. But the balance of power, increasingly in disfavour of the Spanish government, the vicious circle of reprisals and hostage executions, and international pressure, made it impossible for the government to avoid displaying a certain degree of commitment towards the laws of war. This precarious situation largely explained why the Spanish government agreed to sign with the ICRC an agreement similar to the one signed by the Nationalists. While the Spanish government was still claiming its legal superiority at the League of Nations, the situation of the war forced it to some pragmatic discursive concessions, and to publicise its commitment to partially apply the laws of war.

For a government facing a difficult military situation and seeking to bolster its wavering legitimacy, there was little to be gained by ostensibly emphasising respect for the laws of war. Unlike insurgent groups' use of the laws of war language to gain a moral high ground, governmental use was more akin to damage control. On the contrary, by demonstrating seriousness and humanitarian sensitivity through their self-proclaimed respect for the laws of war, insurgents presented themselves as a credible sovereign and as a more appropriate option than the government. During the Irish Civil War, the IRA even pushed the cursor further. As was the case with Irish Republican women, IRA mobilisation of the laws of war language was integrated to broader political claims regarding the Irish situation. And when the IRA claimed to have granted the 'enemy, as the British King's army, the benefit of the customs and laws of war,'[437] the aim was not only to claim moral superiority, but also legal superiority. Through this apparent magnanimity, the purpose was to reverse a situation whereby Republicans were seen as insurgents. By qualifying the Irish Provisional Government as being in 'open rebellion' against the Irish Republic, in 'the interest of the British King,'[438] and as mere British auxiliaries, the IRA was no more an insurrectional movement, but the legitimate authority fighting in an internationalised civil war.

Eventually, this combination of accusations and self-proclaimed respect for the laws of war sometimes culminated in the justification of future deviations from these same rules. The supposed lack of reciprocity between insurgents claiming to respect the laws of war, and a government accused of not doing so, was used as part of a syllogism to exonerate potential future violations: *A* is respecting the laws of war, B is not respecting the laws of war, hence *A* will cease to respect the laws of war. In the case of Ireland, this took the classical form of

[437] Republican's Memorandum to ICRC (n 428).
[438] ACICR, Letter Chief of Staff IRA Liam Lynch to 'President of the provisional parliament of southern Ireland' *in Mémoire du Gouvernmenet de la République Irlandaise au Comité International de la Croix Rouge* (13 March 1923) CR-22(84)/104.

a threat of reprisals should the government still be perceived by the insurgents as not complying with the laws of war: 'Unless your army complies with the rules of war in the future, we will take very severe measures to protect our forces.'[439] This was often a prerequisite of hostage-taking, which, it is true, was often considered by insurgents as an insurance policy for their members held prisoner.

A more radical expression, however, in which the dynamic of accusation, valorisation, and exoneration appeared in its more representative form, is to be found in a telegram sent by the Nationalists to the ICRC:

> This defence junta will maintain full legality, complying exactly with the laws and customs of war, and would have no difficulty in acceding to your noble telegram request. But in view of the enormity with which the Red Army is murdering defenceless men, women, and children, bombing open cities, destroying immense national art treasures, setting fire to and devastating temples, private and business buildings, and 1000 other atrocities impossible to describe, we cannot contemplate hostilities conducted in a humanitarian manner with such a horde.[440]

Again, compliance with the laws of war was hammered home and very precise alleged violations from the governmental forces, such as destruction of cultural property or bombing of open cities, were highlighted. But despite all their goodwill and seriousness, the Nationalists, so the argument goes, were unfortunately 'forced' to abandon their respect for the laws of war. If the Nationalists were to be accused of violations of the laws of war, the reason would therefore be external. The extent of their restraint and humanitarian sensibility was indeed beyond doubt, but against such a 'horde,' deviation from the laws of war was not only excusable, but necessary. It was a rhetoric which already had deep colonial roots (see Chapter 5), but which prospered in the ambient anticommunism.

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This use of the laws of war to pursue aims that are seen as political – in opposition to humanitarian – was not new. As shown by Chris af Jochnick and Roger Normand, 'belligerents consistently referred to the laws of war to justify their own conduct and condemn that of the enemy' during WWI.[441] Ultimately, it provides another example of the fact that, if the laws of war are indeed (among other things) a 'vocabulary of persuasion about legitimacy,' this is hardly a recent 'transformation.'[442] On the contrary, more than a

[439] Ibid.
[440] ACICR, *Telegram Cabanellas to ICRC* (8 August 1936) CR-212-GEN-01/20.
[441] Chris af Jochnick, Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv.Int'l L.J. 49, 77.
[442] Kennedy, Of War and Law (n 19) 141.

misuse or a recent shift, this is certainly a distinctive aspect of the discipline, which infused civil wars as rapidly as attempts were made to include them within the laws of war. And since the struggle over legitimacy is crucial in civil wars, the use of the laws of war as a 'vocabulary of persuasion' was even more pressing.

3. Anti-Communism as Humanitarianism?

The specific rhetoric deployed by the Nationalists was integrated within a broader discourse presenting the civil war in Spain as a civilisational war. For the eminent French international lawyer and far-right catholic Louis Le Fur, who was a fervent supporter of the Nationalists, the Spanish civil war was a 'race between Bolshevism and Christian civilisation,' and a 'struggle between Christian civilisation and the so-called civilisation of Soviet atheism.'[443] Given this narrative, telegrams from Nationalists to the ICRC mainly referred to the governmental forces as 'the Reds' or 'Red horde.'[444] Even the humanitarian community, that was allegedly 'not fanaticised by political passions,'[445] was not immune to these kinds of opposition and denomination. As noted by Daniel Palmieri, the parties were also commonly referred to by the ICRC as the *Reds* and the *Whites*.[446] This section will therefore focus on the deep anti-communist sentiment that led to frame the post-1918 period as an era of crisis, which prompted the turn to civil war within the Red Cross community. It will be defended that the humanitarian project on civil war is hardly detachable from the political contingencies of the interwar period, and that the discourse of the Red Cross not only accommodated the prevailing anti-communism of the time but was largely shaped by it.

3.1. Red Cross and Red Scare

It is hardly surprising that the prevailing anti-communist sentiment infused the discourse produced within the Red Cross during the inter-war period. If the situation partially changed

[443] Le Fur, La Guerre d'Espagne et le Droit (n 254) 8, 25. The fact that the Basque Country remained largely Republican, despite being rather attached to Catholicism, was an important source of incomprehension for Le Fur. This association of the Spanish Civil War to a civilizational war, to a crusade or to a new *reconquista* was central in the Nationalist's discourse. On that issue see Mercedes Peñalba-Sotorrío, 'From Civil Conflict to Crusade: Mobilisation and National Identity in the Spanish Civil War' (2021) 41 Intl.J. Military.Hist 277. Symptomatic examples of this discourse can especially be found in the Spanish Catholic propaganda in favour of the Nationalists. See for instance *Joint Letter of the Bishops of Spain to the Bishops of the Whole World Regarding the Conflict in Spain* (Catholic Truth Society 1937) and Enrique Pla y Deniel, *Las Dos Ciudades: Carta Pastoral que dirige a sus diocesanos el Obispo de Salamanca en 30 de septiembre de 1936* reproduced in Glicerio Sanchez Recio, *De las dos ciudades a la resurrección de España: Magisterio pastoral y pensamiento político de Enrique Pla y Deniel* (Biblioteca Virtual Miguel de Cervantes 2022) 107-129.
[444] Cabanellas to ICRC (8 August 1936) (n 440); (31 August 1936) (n 429); (19 September 1936) (n 430); (23 September 1936) (n 431).
[445] ACICR, *Letter Delegate Danish Red Cross in Kiev to ICRC* (15 January 1919) CR-22/2.
[446] Daniel Palmieri, 'Une Neutralité sous Influence ? Le CICR, Franco et les Victimes' (2009) 59 Revue Suisse d'Histoire 279, 283.

after 1945 due to the diplomatic influence of the USSR,[447] the 'bourgeois philanthropy' that represented the Red Cross[448] provided a fertile soil for the diffusion of anticommunism. Composed of a small number of individuals co-opted and coming from the Genevan and Swiss bourgeoisies, the ICRC was a 'small philanthropic corporation … united around the same political values, which [were] clearly on the right of the spectrum.'[449] At the start of the Spanish Civil War, around half of the members of the Committee were therefore 'avowed anti-communists,' some of them even being members of the *International Anticommunist Entente* (Entente Internationale Anticommuniste) at the same time.[450]

It would be an understatement to say that the 1917 Bolshevik revolution provoked a shock and a sentiment of urgency within the humanitarian community. Unlike in 1912 when discussions on civil war proved unfruitful, the 1921 Red Cross Conference was deemed to be a reaction to a radically new situation. In a letter sent to the Presidents of the (former) Russian Red Cross and the Soviet Red Cross, the President of the ICRC, Gustave Ador, argued that the discussion on civil war during the 1912 Conference 'could not have had all the scope and value that the events of recent years now conferred on it.'[451] For the Polish Red Cross, between 1863 and 1905 there were no civil wars in Europe – only mere 'pronunciamiento' in the Balkans and Portugal.[452] This completely false assertion – suffices to mention the Paris Commune (1871) or the Third Carlist War (1872-1876) – was meant to make the current historical sequence start with the 1905 Russian Revolution, considered to be the 'prelude to the [Russian] civil war.'[453] If the post-WWI period was undeniably marked by a greater number of civil wars, it is the Russian Civil War, by its particular nature, that provoked the decisive turn in the humanitarian discourse. Before the Russian Civil War, as the 1912 Red Cross Conference shows, solidarity, concern, and even sympathies for insurgents were not as strong as they became with the *whites* fighting the *reds*. Civil war was increasingly perceived as a Janus-faced situation: on the one hand, some insurgents were now potentially fighting against communist governments like in Russia; on the other hand,

[447] For the influence of the Soviet Union in the making of the 1949 Geneva Conventions see Boyd Van Dijk, '"The Great Humanitarian": The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949' (2019) 37 LHR 209.
[448] Jean-François Fayet, 'The Russian Red Cross in the Civil War' (2021) 9 Quaestio Rossica 188, 190.
[449] Palmieri, Neutralité (n 446) 292-283.
[450] Ibid 282-287. As noted by Palmieri, most of the external delegates were also chosen from the Swiss Army, a rather conservative institution whose political orientation was also clearly situated at the right of the political spectrum.
[451] ACICR, *Letter ICRC President to Czamanski* (28 October 1920) CR-76/205.
[452] It is not clear to which events these 'pronunciamientos' refer to, especially in the case of the Balkans. BCICR, Polish Red-Cross, Tenth International Red Cross Conference, *La Croix Rouge et la Guerre Civile* (1921) 6.
[453] Ibid.

there were still other civil wars which were not commanding much compassion for insurgents, especially in cases involving socialist or communist revolutionaries.

The Janus-faced dimension of civil war provoked visible unease during the 1921 Red Cross Conference. While discussing the reports on civil war submitted by different Red Cross societies, the rapporteur of the third commission, the Italian Tullio Rossi Doria, explained that unlike the other countries, Italy did not experience civil war 'due to the natural reaction of all of the people against the Bolsheviks' importation attempts.'[454] Put differently, fighting communism was only about maintaining or restoring the natural order, and certainly worth humanitarian dedication. But this new surge of solidarity in favour of certain insurgents also risked benefiting other insurgents, the bad ones. Discussing Draudt's criticism of Lodygensky's proposal to grant insurgents treatment similar to that of POWs (see section 2.2.1), the president of the ICRC Gustave Ador warned the other delegates about the shortcomings of such a decision:

> Mr Draudt's comments seem to me to be well-founded in many respects. I think the honourable author of the motion was primarily concerned about what is happening in Russia. But we cannot always draw conclusions from what is happening in Russia in order to apply measures that would not be appropriate in other countries. If a revolution occurs in other countries, if for example communist parties declare themselves against the government and seek to overthrow it, it is difficult to consider these revolutionaries, these rebels, as prisoners of war and to treat them with all the respect with which the Hague Convention surrounds the fate of prisoners.[455]

In other words, it was certainly desirable to consider extending humanitarian principles to the *Whites* of Russia, but care had to be taken not to extend them, at the same time, to the Communists, who were all around Europe threatening the established order. The cautious attitude adopted at the conference was therefore dictated not only by the fear of legitimising insurgents in general, but also by the fear of legitimising communist insurgents in particular. In response to this concern, the Ottoman Red Crescent suggested that a careful distinction was to be made between different types of civil war: 'it would not be fair to demand the application of the Geneva and Hague Conventions to all armed uprisings that occur on the territory of a state, some of which are not legitimised to some extent by national aspirations or high political ideals.'[456] And in the worldview of most of the actors of the Red Cross movement, a communist revolution was certainly not driven by 'high political ideals.'

[454] Minutes Plenary Sessions 1921 (n 352) 158.
[455] Minutes Commission Special Delegates 1921 (n 369) 66.
[456] Ottoman Red-Crescent, Report Civil War (n 341) 4.

3.2. Humanitarian Gatekeeping

Not driven by a noble cause, the revolutionaries of the moment, the Bolsheviks, were also not seen as ideal partners sharing and understanding the Red Cross values. The nationalisation of the assets of the Russian Red Cross in 1918 rapidly created tension and the ICRC denounced the 'unspeakable conduct of the Russian revolutionaries with regard to the Russian Red Cross Society.'[457] Eventually, the political controversies over the Russian Red Cross that ensued, before and during the 1921 Conference, proved crucial in the development of the Red Cross discourse on civil war. The exacerbation of anti-Bolshevik attitudes determined who could speak at the Conference and conditioned the kind of discursive practices that was allowed to emerge. In the Foucauldian sense, the humanitarian discourse became the object of a strict process of 'rarefaction…of the speaking subjects.'[458]

It is true that 'nothing was more alien to Bolshevik culture than the bourgeois philanthropy embodied by the Red Cross.'[459] But the opposite was also true, and it was difficult for the protestant and bourgeois institution[460] to imagine humanitarianism outside the philanthropic, charitable, and private perimeter. Equally difficult for the ICRC was to accept the potential death of the Russian Red Cross as they knew it, dominated by the aristocracy[461] and amongst the more powerful and active national societies.[462] As the civil war 'led to the formation of several bodies that were opposed to the Soviet government and that claimed the Russian Red Cross Society heritage,' the Soviet Red Cross was thus not recognised by the ICRC until the end of 1921.[463] While the Soviet Red Cross lack of independence from the Bolshevik government[464] and the closure of Russian borders to ICRC delegates[465] were two reasons given for the non-recognition, the 'ties of friendship that existed between the members of the [ICRC] and those of the former Russian Red Cross,' combined with the hope that the

[457] ICRC, 'Dissolution Violente du Comité Central de la Société Russe de la Croix-Rouge' (1918) IRRC 298, 298.
[458] Foucault, L'Ordre du Discours (n 56) 38-39.
[459] Fayet, The Russian Red Cross (n 448) 190.
[460] Daniel Palmieri, 'An Institution Standing the Test of Time? A Review of 150 Years of the History of the International Committee of the Red Cross' (2012) IRRC 1273, 1280.
[461] Jiří Toman, *La Russie et la Croix-Rouge (1917-1945) : La Croix-Rouge dans un État révolutionnaire et l'action du CICR en Russie après la Révolution d'Octobre 1917* (Institut Henry-Dunant 1997) 9.
[462] Jean-Francois Fayet & Peter Huber, 'La mission Wehrlin du CICR en Union soviétique (1920-1938)' (2003) IRRC 95, 110. Minutes Commission Special Delegates 1921 (n 369) 47 (intervention Ador).
[463] Fayet, The Russian Red Cross (n 448) 192.
[464] Polish Red Cross, Report Civil War 1921 (n 452) 7. Conversely, when the delegate of the ICRC in charge of the relations with the Soviet Red Cross, Edouard Frick, mentioned that the former Russian Red Cross was 'a bureaucratic organisation' 'monopolised by people close to the imperial family, he was immediately suspected of Bolshevik sympathies.' Fayet, The Russian Red Cross (n 448).
[465] Minutes Plenary Sessions 1921 (n 352) 115.

Bolshevik victory will be short-lived,[466] largely explained the reluctance of the ICRC to proceed swiftly.

This in-between situation culminated in an invitation to both the President of the Soviet Red Cross, Dr Zenovi Soloviev, and the President of the former Russian Red Cross, N. A. Czamanski.[467] The invitations, however, were addressed to the two Presidents in their personal capacities – not as representatives of the Russian Red Cross – and unlike regular delegates, Soloviev and Czamanski were supposed to only have a consultative voice.[468] This was a humiliation for the Soviet Red Cross and Soloviev rejected the invitation, not without addressing protests to the Conference via telegrams.[469] Pointing out past situations when the ICRC had showed more flexibility in terms of recognition, Soloviev went on to question the impartiality of the Committee and reproached it of reproducing the ostracization of the 'Red Russia' by the 'capitalist world.'[470] These protestations, however, did not trouble the delegates who dismissed them and confirmed that the ICRC had adopted the right attitude.[471] Contrastingly, the Conference took place in a friendly atmosphere vis-à-vis the representants of the former Russian Red Cross. Accordingly, when Czamanski asked that 'the institution … in Moscow, and which call[ed] itself the Russian Red Cross' should be 'officially called the Red Cross of the Soviets' as 'it offend[ed] the ears of the Russians themselves,' the request was met with applause.[472]

So it was no wonder that Czamanski and Lodygensky ended up being granted regular delegate status with a deliberative role.[473] A few months before the Soviet Red Cross was finally recognised as the official Russian Red Cross, the 1921 Conference, in a last attempt, empowered the former Russian Red Cross and put its representants on the same footing as every other delegates.[474] This situation amplified even more Lodygensky's proposals and influence, and enabled the success of a discourse built by someone who tirelessly tried to merge humanitarianism and anticommunism.

[466] Fayet & Huber, La mission Wehrlin (n 462) 98.
[467] ACICR, *Letter ICRC President to Czamanski/Soloviev* (28 October 1920) CR-76/205.
[468] Minutes Commission Special Delegates 1921 (n 369) 57.
[469] The Soviet Red Cross also received insurance from an ICRC collaborator, Edouard Frick, that a procedure of re-admission will not be necessary, a position that did not reflect the ICRC's. Jean-François Fayet, 'Le CICR et la Russie: un peu plus que de l'humanitaire' (2015) 1 Connexe: les espaces postcommunistes en question(s) 55, 59-60.
[470] *Telegram Soloviev to ICRC* reproduced in Minutes Plenary Sessions 1921 (n 352) 114.
[471] Ibid 114-117.
[472] Ibid 124.
[473] Minutes Commission Special Delegates 1921 (n 369) 46-47.
[474] Ibid 81.

3.3. Counterrevolutionary Humanitarianism: The Strange Apoliticism of Georges Lodygensky

This focus on the architect of the Red Cross turn to civil war does not intend to deny the humanitarian character of such discourse. The aim is not to distinguish between 'genuine' humanitarianism and pure partisanship, but rather to highlight how both have been merged in Lodygensky's intellectual production. His anti-bolshevism was so blatantly professed that it was turned into a corollary of his humanitarian advocacy and not seen as contradicting his claim of impartiality and apoliticism. And despite his lack of effort to hide his anticommunism, 'the ICRC endorsed his counterrevolutionary project.'[475]

As co-founder of the *International Anticommunist Entente* and as an author,[476] Lodygensky's anti-communist credentials are hardly disputable. But his anti-communism was more radical than many humanitarians' and not limited to anti-Bolshevik propaganda. The Soviet authorities became rapidly convinced that Lodygensky played a part in the assassination of Soviet diplomat Vatslav Vorovsky in 1923.[477] What ended up being known as the *Conradi Affair* – from the name of the murderer – turned not into the trial of the murderer and his accomplice, Arkady Polunin, but into the trial of communism.[478] Polunin, who was none other than Lodygensky's personal secretary in the former Russian Red Cross office in Geneva,[479] linked from the outset the architect of the Red Cross turn to civil war to the assassination of Vorovsky. An ancient officer in the White army of General Pyotr Wrangel, Polunin was covered by Lodygensky, who would later admit having destroyed evidence of correspondence between his secretary and the murderer.[480] Interviewed by the *Tribune de Genève* after the murder in May 1923, Lodygensky, in addition of admitting to have met the murderer for a medical consultation, whereas he was no more practising medicine,[481] gave a flavour of the kind of humanitarianism he was rooting for:

[475] van Dijk, Preparing for War (n 246) 104.
[476] Georges Lodygensky, *La Terreur Rouge* (Société Générale d'Imprimerie 1922); Georges Lodygensky, *Face au Communisme 1905-1950: Quand Genève était le Centre du Mouvement Anticommuniste Internationnal* (Slatkine 2009).
[477] See the various communications from Soviet officials portraying Lodygensky as an accomplice, reproduced in Antoine Fleur & Danièle Tosato-Rigo (ed), *Suisse-Russie. Schweiz-Russland Contacts et ruptures (1813–1955). Aufbau und Krisen der Beziehungen 1813–1955* (P. Haupt 1994) 366, 369.
[478] On the affair and the trial see Annetta Gattiker, *L'affaire Conradi* (H. Lang 1975).
[479] This was made public by Lodygensky himself. 'Après le drame de Lausanne : Arrestation d'un complice présumé de l'assassin de Vorowsky' *Tribune de Genève* (Geneva, 16 May 1923).
[480] Lodygensky, Face au Communisme (n 476) 208-209.
[481] See the footnote 100 written by the editors of his memoirs. Ibid 209.

> We work in Geneva [him and Polunin] for a humanitarian and philanthropic purpose and set aside politics. It goes without saying that we are convinced anti-Bolsheviks and that we have not cried at the announcement of Vorovsky's assassination.[482]

Decades later, Lodygensky would speak in his memoirs of Vorovsky's assassination as an 'execution' and boast about the fact that Soviet authorities were angered by 'its anti-communist though essentially humanitarian activities.'[483] It is against the backdrop of this indistinction of anti-Communism and humanitarianism that Lodygensky participated in shaping the discourse of moralisation of the laws of war. And the ICRC not only tolerated but also elevated to the level of institutional discourse the views of a rabid anti-communist.

In his writings for the ICRC or the International Review of the Red Cross (IRRC), his anti-bolshevism is also blatant, though the tone is largely less polemical in the published pieces. Always focusing on the exactions caused by the 'bloody Red Terror'[484] and 'the monstruous form it had taken,'[485] Lodygensky never explicitly denounced nor acknowledged the wrongdoings committed by other parties, especially the *White* armies. In an article published in January 1921 in the IRRC – less than three months before the Red Cross Conference – he made no secret of his bias in favour of the whites. Discussing the evacuation of Crimea by Wrangel's white army, he wrote: 'we foresaw the possibility of defeat; however, we were hoping to hold out in Crimea.'[486]

Lodygensky thus provided the ICRC with an account of the Russian Civil War mainly from the angle of the 'Red Terror', considered to be the sole cause of the catastrophic human toll in the former Russian Empire. Adopting a criminalising and religious tone, he for instance spoke of 'the bloody horror of the executioners' crimes'[487] and asked the 1921 Conference, in front of 'sufferings and crimes, [to] pronounce its judgment.'[488] Although Lodygensky's discourse was closer to that of a righter of wrongs than that of a person dedicated to 'purely humanitarian activities',[489] he nevertheless hammered home his impartiality in a disconcerting way. With a definite flexibility, he proved able to point out the impartiality

[482] Tribune de Genève, 16 May 1923 (n 479). As the Soviets observed, it was suspicious that Conradi, a resident of Zurich, would travel to Geneva for medical reason to consult someone who was practising medicine no more. Fleur, Tosato-Rigo, Suisse-Russie (n 477) 366.
[483] Lodygensky, Face au Communisme (n 476) 210.
[484] Lodygensky, Guerre Civile II (n 353) 657.
[485] Logydensky, Report to ICRC (n 345).
[486] Georges Lodygensky, 'L'Evacuation de la Crimée en Novembre 1920' (1921) IRRC 12, 12. The use of the French pronoun 'on' indicates that he included himself in the group that 'foresaw' and 'hoped.'
[487] Logydensky, Report to ICRC (n 345).
[488] Minutes Plenary Sessions 1921 (n 352) 162.
[489] ACICR, *Letter ICRC to unknown recipient* (request for assistance to facilitate the granting of a Swiss visa to Lodygensky) (20 May 1920) CR-22/25.

that required humanitarianism in time of civil war,[490] and, sometimes in the next few lines, to simultaneously speak of the 'atrocity of the Bolshevik terror regime'[491] or to even depict a Bolshevik judge as a 'faithless, lawless, cocainist and sadist man.'[492]

In light of his anti-bolshevism, Lodygensky's purpose was mainly to legitimise humanitarian intervention in Russia by actors not authorized by the Bolsheviks. During the 1921 Conference, while Draudt and Ador feared legitimising insurgents in general for the first one, and communist insurgents for the second, Lodygensky saw the problem differently. The most pressing issue was to circumvent Russia's sovereignty, that unfortunately, was now in the hands of the Bolsheviks. As mentioned earlier, if a resolution authorising intervention of foreign Red Cross societies was finally adopted, concerns 'about the consequences of a resolution aimed directly against Soviet Russia, which could later be turned on countries fighting the revolution,' led to make such intervention subject to governmental consent.[493] On the other hand, having adopted a more 'liberal' attitude vis-à-vis sovereignty, Lodygensky would continue to consider that 'due to the special character of the Bolshevik government,' intervention could still be possible without governmental authorisation in 'areas more or less remote from the centre.'[494] As he would later explained in 1922 when he made even clearer that his humanitarianism was linked to his anticommunism,[495] 'any political group which dares to use Bolshevik methods has no right to claim any place in the civilised world'[496] – hence making Bolshevik sovereignty fictional.

As illustrated by the decision to make Red-Cross intervention conditional on governmental consent, many other delegates at the 1921 Conference, though having sympathies for Lodygensky's anticommunist views, saw beyond the specific case of Russia, and also feared the possible backlash of Lodygensky's anti-Bolshevik approach. And when Jacques Chenevière, himself a convinced anti-communist,[497] reminded the delegates that the Russian Civil War could not constitute 'a basis for discussion for Red-Cross intervention in case of

[490] ACICR, *Report of Dr Lodygensky to the ICRC* (8 May 1920), CR-22-10; Lodygensky, Guerre Civile (n 341) 1166-1167; Lodygensky, Guerre Civile II (n 353) 662.
[491] Logydensky, Report to ICRC II (n 490).
[492] Logydensky, Report to ICRC (n 345).
[493] Fayet, The Russian Red Cross (n 448) 199.
[494] ACICR, *Letter Lodygensky to Chenevière* (5 May 1922) CR-22-10.
[495] Lodygensky, Terreur Rouge (n 476); Former Russian Red-Cross, *Données sur la Terreur en Russie présentées par le Comité central de l'ancienne Organisation de la Croix Rouge Russe au CICR* (Société Russe de la Croix-Rouge 1922). Though Lodygensky is not the nominal author of this report, the similarities with his book on the 'Red Terror' leave little doubt.
[496] Lodygensky, Terreur Rouge (n 476) 16. Under the umbrella of 'Bolshevik's methods,' he included the whole Third International.
[497] Palmieri, Neutralité (n 446) 284-285.

civil war'[498] since the government opposed it, Loydygensky showed his inability to escape the imperativeness of the Russian situation. Since they were 'dealing with Bolshevik revolutionaries and would unfortunately continue to deal with them in the future,' he argued that 'jailers' refusal was no reason for failing to contemplate Red-Cross' direct or indirect intervention.[499]

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Although the Conference tried to transform Lodygensky's proposals into something more 'universal' and less contingent on the Russian situation, the Red Cross turn to civil war remained in an uncomfortable situation vis-à-vis its anti-communist origins. In 1922, it was thus easy for the Soviet Red-Cross[500] to dismiss any application of the resolution XIV on the ground that it had been inspired 'by certain circles of counter-revolutionary émigrés grouped around the so-called old Russian Red Cross.'[501] The diffusion by the former Russian Red Cross and Lodygensky of a discourse that openly combined humanitarianism with advocacy of diplomatic and economic ruptures between the West and the Bolshevik government after the 1921 Conference never contradicted this genealogy.[502] But more than merely confirming the receptiveness of the humanitarian community vis-à-vis anticommunism, the turn to civil war in 1921 and the years that preceded confirmed that anticommunism was a triggering force that enabled this discursive leap.

4. Conclusion

Far from being avant-gardist, the Red Cross turn to civil war initiated in 1921, and prolonged during the Spanish Civil War, was all in all relatively modest. The energy dedicated by the ICRC to civil war, for instance, was minimal compared to the energy dedicated to interstate wars and the treatment of POWs.[503] Yet the Second World War and its aftermath would create a new sentiment of urgency which would eventually lead to more tangible results with the adoption of the Common Article 3 to the Geneva Conventions in 1949. Though 'nothing was inevitable about this outcome,'[504] there was then a stronger commitment within the Red

[498] BCICR, 'Procès-Verbaux de la 3ème Commission' in *Dixième Conférence internationale de la Croix-Rouge : Procès-Verbaux des Commissions* (1921) 24-25.
[499] Ibid 25-26.
[500] At this moment the Soviet Red Cross had been recognised as the Russian Red Cross.
[501] *Letter Soloviev to ICRC* quoted in Fayet & Huber, La mission Wehrlin (n 462) 106.
[502] Lodygensky, Terreur Rouge (n 476) 1; Former Russian Red-Cross, Report Terror (n 476) 1, 29.
[503] Henry Lovat, *Negotiating Civil War: The Politics of International Regime Design* (CUP 2020) 80.
[504] Van Dijk, Preparing for War (n 246) 100.

Cross movement to push for a *legal* inclusion of civil conflicts within the laws of war.[505] Partisan warfare had already pushed the ICRC during WWII to urge belligerent states to apply 'the fundamental principles of international law and of humanity' when fighting groups they did not recognise as 'belligerents' but as 'partisans.'[506] If the proposal was still largely controversial, especially for the British government, (provisional) governments in which partisans were now in power or about to be, such as France, Italy and Yugoslavia, logically expressed their support and made the prospect of codification more feasible.[507]

Discursively, the 1944 proposal was not a rupture compared to the attitude adopted during the interwar period. It was still marked by the separation of the laws of war into their legal and humanitarian bodies. But there was a stronger will to convert these modest provisions into positive law. When the President of the ICRC, Max Huber, opened the 1946 Preliminary Conference for the revision of the Geneva Conventions, he encouraged the delegates to be 'realistic,' i.e., to adopt positions likely to win the support of governments, in order to be translated into positive international law.[508] It was thus envisaged that in 'the case of armed conflict within the borders of a state, the Convention shall also be applied by each of the adverse parties, unless one of them announces expressly its intention to the contrary.'[509] The ICRC proposal was less ambitious and initially focused on the mere application of 'the principles of the Convention.'[510] While the reasonableness of the final proposal, aimed at winning governments support, laid in the reciprocity clause, its more ambitious component was the inclusion of a provision in the future convention which would extend its complete application to situation of civil war. Through this solution, it was hoped that the prospect of international scrutiny and condemnation would prevent states and insurgents groups from proclaiming their disregard for the laws of war.[511]

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[505] See for instance Marguerite Frick-Cramer, one of the drafters of the 1929 POWs convention, who advocated for a new convention which would apply to civil and partisan warfare. Margueritte Frick-Cramer, 'Contribution à l'élaboration d'une Convention sur les prisonniers, militaires ou civils, tombés au pouvoir de l'ennemi ou d'une autorité non reconnue par eux' (1946) IRRC 228, 246.

[506] *ICRC Memorandum to all belligerent States* (17 August 1944) quoted in Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949: Vol III Convention Relative to the Treatment of Prisoners of War* (ICRC 1960) 53.

[507] ICRC, 'Rapport sur l'activité du CICR en faveur des 'partisans' tombés aux mains de l'ennemi' (1946) IRRC 797, 799-800.

[508] Reproduced in 'Conference préliminaire des Sociétés nationales de la Croix-Rouge pour l'étude des Conventions et de divers problèmes ayant trait à la Croix-Rouge' (1946) IRRC 637, 641.

[509] BCICR, ICRC, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the study of the Conventions and of various Problems relative to the Red-Cross* (1947) 15.

[510] Ibid.

[511] Ibid. Jean Pictet, 'La Défense de la Personne Humaine dans le Droit Futur' (1947) IRRC 104, 112.

The 1947 Conference of Government experts was unsurprisingly more cautious and stepped back to a mere application of the Convention 'principles' conditioned by reciprocity.[512] Partially breaking away from the reciprocity clause[513], the 1948 Red-Cross Conference, more influenced by the League of Red Cross Societies' views than ICRC's, finally chose 'a return to *provisions* rather than *principles*:'[514]

> In all cases of armed conflict not of an international character which may occur in the territory of one or more of the High Contracting Parties, each of the adversaries shall be bound to implement the provisions of the present Convention. The Convention shall be applicable in these circumstances, whatever the legal status of the Parties to the conflict and without prejudice thereto.[515]

Calling for the application by analogy of the laws of war to civil conflicts, this draft formed the basis for discussion at the 1949 Diplomatic Conference.[516] However, nothing was granted, and Common Article 3 largely departed from this more ambitious draft. Recent contributions focusing on the 'contingency of the negotiations'[517] have well illustrated the tortuous path that led to Common Article 3 alongside all of the other alternative paths that have been envisaged and abandoned.[518] Yet there was little doubt that finding a 'moral basis' was no longer a sufficient option.

[512] BCICR, ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (1947) 8.
[513] The draft *Wounded and Sick* and *Maritime* conventions did not contain any reciprocity clause while the draft *POWs* and *Civilians* conventions made the application 'subject to the adverse party likewise acting in obedience thereto.' BCICR, ICRC, Seventeenth International Red-Cross Conference, *Revised and New Draft Conventions for the Protection of War Victims* (1948) 10, 32, 51-52, 114.
[514] Lovat, Civil War (n 503) 94.
[515] Revised and New Draft Conventions for the Protection of War Victims (n 513) 10.
[516] Lovat, Civil War (n 503) 95.
[517] van Dijk, Preparing for War (n 246) 11.
[518] Ibid; Lovat, Civil War (n 503); Olivier Barsalou, 'Preparing for War: The USA and the Making of the 1949 Geneva Conventions on the Laws of War' (2017) 23 J.C.& S.L. 49; Giovanni Mantilla, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press 2020).

CHAPTER 3. LOCALISING CIVIL WARS: THE INSTITUTIONALISATION OF 'NON-INTERVENTION'

It is easy, and also tempting, to overlook the legal dimension of the Non-intervention Agreement (NIA) adopted by European powers during the Spanish Civil War. As the conflict can be seen as a prelude to WWII[519] and shaped the political identity of many Europeans, especially in becoming central in both fascist and anti-fascist mobilisation,[520] the international legal dimension of the NIA is often obstructed. The NIA was to prove fatal for the Spanish Republicans[521] and is generally, and rightly, associated with the French and British abandonment of the Spanish Republic and inaction in face of Italy and Germany bellicosity.[522] Because of its complicated legacy, the NIA was indeed an 'empty farce' which worked against the Spanish Republic and in favour of the Nationalist insurgents and their German and Italian allies.[523] For a contemporary such as David Lloyd George, the NIA was 'the greatest and the basest fraud and deception ever perpetrated by great nations upon a weak people.'[524] Reflecting on this assertion in 1939, the international jurist Norman J. Padelford wondered whether Lloyd George was right or whether the 'non-intervention' system was 'a significant experiment.'[525]

This chapter posits that the NIA was both: it was an 'empty farce,' but one with legal significance. For it was indeed a legal innovation, the 'non-intervention' system 'theoretical and practical significance …transcends the utter hypocrisy and cynicism with which it was implemented.'[526] Even the Spanish government, the first victim of the 'non-intervention' system, portrayed the NIA as a '*legal* monstrosity' which from a 'juridical point of view… represent[ed] an innovation in the traditional rules of international law.'[527] The Spanish government saw in the NIA a new approach which clearly departed from orthodox international law,[528] but not one which was 'a-legal' as supported by the French international

[519] As stressed by Enrique Moradiellos, '[i]n addition to being first and foremost a Spanish civil war, the war had also been a miniature European civil war… and a premonition of the war that was to break out in September 1939.' Enrique Moradiellos, *El Reñidero de Europa: Las Dimensiones Internacionales de la Guerra Civil Española* (Ediciones Península 2001).
[520] Traverso, A feu et à sang (n 232) 307.
[521] Enrique Moradiellos, 'The Origins of British Non-Intervention in the Spanish Civil War: Anglo-Spanish Relations in Early 1936' (1991) 21 European History Quarterly 339, 339.
[522] Hobsbawm, The Age of Extremes (n 165) 159.
[523] Paul Preston, *The Spanish Civil War: Reaction, Revolution and Revenge* (William Collins 2016) 128.
[524] The former British Prime Minister made this comment while commenting King's Speech at the House of Commons. HC Deb 28 October 1937, vol 328, col 311.
[525] Norman J. Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (Macmillan 1939) 119.
[526] Berman, Alliance and Localization (n 171) 468.
[527] *Records of the Sixth Plenary Meeting of the Assembly: Intervention of M. Álvarez del Vayo (Spain)* (25 September 1936) League of Nations Official Journal Spec Supp 155, 49.
[528] Note of the Spanish Government to the Powers Participating in the Non-Intervention Accord (15 September 1936) reproduced in Padelford, International Law and Diplomacy (n 525) 232.

jurist Charles Rousseau.[529] From a juridical perspective, Padelford thus affirmed 'that the Non-Intervention system constituted a departure from what has been thought to be 'normal practice in time of insurgency.'[530]

Once the system of 'non-intervention' ceases to be seen solely as the moral failure that it was, it can be conceptualised as a legal experiment that departed from the traditional approaches to civil war represented by *Rousseauism*, *governmentalism* and *humanitarianism*. (see Chapters 1 and 2). And if 'experiment narratives' in the history of international law tend to identify past and failed experiments to extract from them 'formative merit in the present,'[531] this chapter aims to dissociate legal innovation from any image that is necessarily positive or progressive. In this sense, the fact that the NIA set international law on an innovative course did not prevent it from being the vehicle for 'an institutionalised and mutually accepted farce.'[532]

Constructed in opposition to the logics of Rousseauism, governmentalism, and humanitarianism, the 'non-intervention' system was articulated around a discourse of *localisation*: to avoid any risk of 'contagion' or foreign involvement that would put European and international peace at risk, international law was to be instrumental in localising the Spanish civil war. *Localisation* and its institutionalisation obviously failed to neutralise political and ideological confrontations amongst European powers. It even became a forum for the constant frictions between the Soviet Union on the one side, and Germany and Italy one the other side. From another perspective, the NIA still permitted some of its participants to escape domestic and potentially dangerous debates by displacing the question of intervention or non-intervention towards the more technical and supposedly less passionate terrain of international law. This particular mobilisation of the NIA allows to reconsider the dominant narrative according to which localisation was a 'failure.'[533] Since this narrative implies that the success of this legal experiment is to be measured against the effectiveness of the NIA in easing tensions and avoiding foreign intervention in Spain, it overlooks how the mobilisation of this legal discourse was successful on other counts. But insofar as hypocrisy, bad faith, and pretence governed the discursive move that led

[529] Charles Rousseau, 'La Non-Intervention en Espagne' (1938) Revue de Rev.drt.intern.et leg.comp. 217, 237.
[530] Padelford, International Law and Diplomacy (n 525) 119.
[531] Jean d'Aspremont, 'The League of Nations and the Power of "Experiment Narratives" in International Institutional Law' (2020) 22 Int.C.L.Rev. 275, 281.
[532] Enrique Moradiellos, 'The Allies and the Spanish Civil War' in Sebastian Balfour & Paul Preston (eds) *Spain and the Great Powers in the Twentieth Century* (Routledge 1999) 115.
[533] Ignacio de la Rasilla del Moral, *In the Shadow of Vitoria: A History of International Law in Spain (1770-1953)* (Brill 2017) 226-227; Eliav Lieblich, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013) 121; Ann Van Wynen Thomas & A.J. Thomas Jr., 'Non-Intervention and the Spanish Civil War' (1967) A.S.I.L.Proc. 2, 5.

international law towards localisation, dissatisfaction inevitably arose and weakened this legal experiment. Localisation eventually became vulnerable to the return of Rousseauism, governmentalism, and humanitarianism, which, for the various participants in the NIA, remained available legal alternatives that proved better suited to their political position on the Spanish Civil War.

1. A 'Curious Form of Neutrality[534]': Justifying the Non-Intervention Agreement

The NIA, and the international legal machinery that was instituted in its wake, were grounded on a narrative of localisation. The idea of localisation was thus the official *raison d'être* of this legal experiment, justified by an alleged collective desire to maintain peace in Europe and to avoid a local conflict to degenerate into a global deflagration.[535] Articulated as a legal answer whose purpose was to isolate Spain, its violence and ideological confrontation from the rest of Europe, it was obviously a mere façade for many actors, most notably for Italy and Germany. But the discourse of localisation was nevertheless accompanied by the institutionalisation of this new form of 'non-intervention' through which Spain was virtually meant to become a hermetically sealed space within continental Europe via the elaboration of new international legal mechanisms. Its borders and coasts were to be closed and monitored by an *ad hoc* international organisation with the professed hope that 'the Spanish War would peter out for lack of arms and ammunition,'[536] volunteers, and external aid (see next section).

The NIA and its institutionalisation have not only been framed as 'localisation' retrospectively by current international jurists or historians.[537] Contemporary scholars and actors directly involved in the making of the NIA machinery were also quick to discuss it in

[534] League of Nations, *Verbatim Record of the Seventeenth Ordinary Session of the Assembly of the League of Nations*: *Intervention of M. Ossorio y Gallardo (Spain) at the Fourteenth Plenary Meeting* (3 October 1936) 3.
[535] Philip C. Jessup, 'The Spanish Rebellion and International Law' (1937) 15 Foreign Affairs 260, 268. French Premier Léon Blum, for instance, repeatedly justified 'non-intervention' as a way of avoiding the Spanish conflict 'from escalating into European unrest, and possibly a European war.' Léon Blum, 'Discussion de la Loi Interdisant le Départ des Volontaires (15 Janvier 1937 - Chambre)' in Léon Blum, *L'Exercice du Pouvoir* (Gallimard 1937) 202.
[536] Preston, The Spanish Civil War (n 523) 139.
[537] Berman, Alliance and Localization (n 171); De la Rasilla, In the Shadow of Vitoria (n 533) 226; Ann Van Wynen Thomas & A.J. Thomas Jr., 'International Legal Aspects of the Civil War in Spain, 1836-39' in Richard A. Falk (ed), *The International Law of Civil War* (John Hopkins Press 1971) 166; Preston, The Spanish Civil War (n 523) 139.

terms of 'localisation.'[538] Formalised through states declarations and exchanges of notes, the project of localising the Spanish Civil War originated in a French-British initiative:

> Deploring the tragic events of which Spain is the theatre; Resolved to abstain rigorously from all interference, direct or indirect, in the internal affairs of that country; Animated by the desire to avoid every complication which might prejudice maintenance of good relations between nations, declares the following:
> 1. The French Government, in so far as it is concerned, prohibits direct or indirect exportation, re-exportation and transit, to a destination in Spain, the Spanish possessions or the Spanish zone of Morocco, of all arms, munitions and materials of war as well as all aircraft, assembled or dismantled, and all vessels of war;
> 2. This prohibition applies to contracts in process of execution;
> 3. The French Government will keep the other governments participating in this entente informed of all measures taken by it to give effect to the present declarations.
> The French Government, in so far as it is concerned, will put this declaration into effect as soon as the Government of His Britannic Majesty, the German Government, the Italian Government, the Government of the U.S.S.R., and the Portuguese Government shall likewise have adhered to it.[539]

This joint initiative was followed by declarations from 25 other European states which endorsed the rationale behind the NIA.[540] Most notably, the Soviet Union, Germany, Italy, and Portugal agreed to be bound by such agreement. However, the German and Italian declarations did not include a preamble indicating that they would refrain from 'indirect' intervention, and Portugal could not agree to the NIA without embarking itself in an anti-communist crusade.[541] But as a matter of arithmetic, 27 states virtually agreed to 'localise' the Spanish conflict. And from the initial impulse which merely envisaged a collective embargo on war materials 'to a destination in Spain' to both parties, quickly followed the institutionalisation of the NIA and the imagination of other legal mechanisms (see next section).

The NIA was not formalised through a treaty and was an unusual international agreement, although it was understood to create legal obligations for its members in the sense that it imposed on each of them the obligation to transpose their collective and international

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[538] Joseph Barthélemy, 'Politique Intérieure et Droit International' (1937) 59 R.C.A.D.I 421, 438; Francis O. Wilcox, 'The Localization of the Spanish War' (1938) Am.Pol.Sc.R. 237; Padelford, International Law and Diplomacy (n 525) 120. At the House of Commons, the conservative MP Alan Lennox-Boyd justified the NIA as follows: 'We are agreed that we want to localise the Spanish war and accelerate its conclusion.' HC Deb 15 July 1937, vol 326, col 1616.

[539] 'Note addressed by the Minister of Foreign Affairs, M. Delbos, to Sir George Clerk, Ambassador of Great Britain at Paris' (15 August 1936) reproduced in Padelford, International Law and Diplomacy (n 525) 205-206. For the twin declaration from the British government see 'Declaration by the United Kingdom Government' (15 August 1936) reproduced in Ibid 206-207.

[540] See all the notes and declarations from the participating governments reproduced in Ibid 205-230.

[541] Ibid, 'Declaration by the U.S.S.R. Government' (23 August 1936) 228-229; 'Declaration by the German Government' (17 August 1936) 214-215; 'Declaration by Italian Government' (21 August 1936) 217-218; 'Reply of the Portuguese Government to the French Proposal of Non-Intervention in the Affairs of Spain' (date unkwon) 222-224; 'Declaration by the Portuguese Government' (21 August 1936) 224-226.

commitments into national legislation.[542] Despite this unusual form, states declared themselves bound by the agreement, even those who blatantly violated it.[543] As noted by Francis O. Wilcox in early 1938, 'no government… attempted to justify intervention on its part on the ground that the agreement was of an informal nature and therefore not binding.'[544] In his famous Luna-Park speech, the French Prime Minister Léon Blum even presented the NIA as an 'international convention.'[545] And when the *International Committee for the Application of the Agreement Regarding Non-Intervention in Spain* (the London Committee) was created as an international body to supervise the application and implementation of the agreement, participating states regularly recalled the rationale of the 'localisation' stance which underlined their collective decision to become bound by new international legal obligations. It was endlessly repeated that the NIA was meant 'to prevent the situation in Spain from becoming the cause of international complications' and to preserve peace in Europe.[546] For that purpose, the NIA was supposed to prevent the conflict from 'spreading out of the Spanish territory'[547] and the 'fire' from reaching the rest of Europe.[548] This narrative was professed even more ostensibly by states who supported Franco's war effort. The Italian government, for instance, and despite Mussolini's instructions 'to give to the Committee's activities a purely platonic character,'[549] claimed that its ambition was to progress 'towards a general *détente*.'[550] The Italian representative at the London Committee

[542] See the various notes and declarations from the 27 parties to the NIA reproduced in Ibid 205-230.
[543] The Portuguese reply to the French proposal, which among all the declarations is certainly the most ambiguous, is symptomatic. While Portugal would massively violate the NIA, it nevertheless expressed deep concern regarding compliance and fulfilment of the obligations contained in the accord. Reply of the Portuguese Government to the French Proposal (n 541) 222-224.
[544] Wilcox, The Localization of the Spanish War (n 538) 239.
[545] Léon Blum, 'Discours à Luna-Park sur les Evénements d'Espagne (6 Septembre 1936 - Paris)' in Léon Blum, *L'Exercice du Pouvoir* (Gallimard 1937) 181.
[546] The National Archives (Kew), *International Committee for the Application of the Agreement regarding Non-Intervention in Spain: Stenographic Notes of Proceedings, 1st to 30th Meetings, September 9 1936 to 20 April 1939* (Intervention Chairman Lord Plymouth, Press Communiqué 28 October 1936) 90, FO 849/1; (Statement by Count Grandi (Italy), Press Communiqué 12 November 1936) 149; (Resolution on the Work of the Committee, Press Communiqué 23 December 1936) 188; (Intervention of Count Grandi (Italy) 25th Meeting of 9 July 1937) 279; The National Archives (Kew), *International Committee for the Application of the Agreement regarding Non-Intervention in Spain: The Chairman's Sub-Committee, Originals* (Letter of the French Ambassador in England to Lord Plymouth, 17 November 1936) EAC/745.
[547] London Committee, Proceedings (n 546) (Intervention of Count Grandi (Italy) 25th Meeting of 9 July 1937) 276. This specific justification through the metaphor of the 'spreading' was widely used. Ibid (Intervention von Ribbentrop (Germany) 25th Meeting of 9 July 1937) 283; London Committee Proceedings (Intervention of the Secretary to the Committee F. Hemming at the 25th Meeting of 9 July 1937) 291; The National Archives (Kew), *International Committee for the Application of the Agreement regarding Non-Intervention in Spain: The Chairman's Sub-Committee, Official Record of Proceedings, 1st to 93rd Meetings, 15 September 1936 to 30 June 1938* (Intervention of the Chairman Lord Plymouth, Press Communiqué 7 May 1937) 162, FO 849/27.
[548] London Committee, Proceedings (n 546) (Intervention Raczynski (Poland) 25th Meeting of 9 July 1937) 288.
[549] Enrique Moradiellos, *Neutralidad Benévola: El Gobierno Británico y la Insurrección Militar Española de 1936* (Pentalfa 1990) 248.
[550] Italian Government, *Correspondence with the Italian Government regarding the Withdrawal of Foreign Volunteers from Spain, Reply of the Italian Government of October 9. 1937* (Cmd 5570, 1937) 5.

also urged the other representatives to adopt the same position as Italy with regard to Spain, which he laconically described: 'Hands off Spain. Spain must belong to the Spaniards.'[551]

Against a narrative rooted in an ostensible concern for the well-being of Spain and European peace, professed with utter hypocrisy, the efficiency and function of the NIA would later come to be measured by its ability to effectively 'isolate' and 'circumscribe'[552] the Spanish Civil War.[553] Many international jurists commenting on the NIA agreed without much discussion that a genuine desire to 'localise' the Spanish Civil War in order to maintain peace in Europe was the *raison d'être* of this new approach to the relationship between international law and civil war.[554] The Dutch international lawyer H.A. Helb even stated that 'Europe ha[d] succeeded in preventing the fire from spreading to the powder keg,' and that 'the formula that ha[d] surrounded Spain in this magic circle seems to be called non-intervention.'[555] On a theoretical dimension, the NIA thus consecrated what Nathaniel Berman has called a 'functionally agnostic attitude towards competing nationalisms:'[556]

> A novel international legal authority is required to conscript sovereigns into a system for collectively restraining sovereign actions, for checking their respective "temptations" to intervene in civil conflict, for preventing the "ideological mobilisation of Europe," for pacifying inter-sovereign suspicion. The "Non-Intervention" system sought to transmute the "temptation" to intervene into a desire to preserve the civilized non-intervenors from the "contagion" of bellicosity. This novel international legal authority would compel sovereigns to suspend their individual passions and adopt a functionally agnostic position about competing nationalisms; conversely, the temptations of nationalism, and the need to restrain them, would legitimate the invention of the novel international legal authority.[557]

But 'non-intervention' was obviously an improper way of describing this approach. 'Non-intervention,' in that case, was the complete opposite of passivity:

> This functional agnosticism would differ from a dispassionate detachment: it would mandate a moratorium on states' acting on any partisan views on the conflict they might hold, which they could continue to express diplomatically and otherwise; it would also permit the construction of a new international doctrinal and institutional

[551] London Committee, Proceedings (n 546) (Statement Count Grandi (Italy), Press Communiqué 12 November 1936) 278.
[552] London Committee, Proceedings (n 546) (Intervention Count Grandi (Italy) 25th Meeting) 278; (Intervention of A. Monteiro (Portugal) 25th Meeting of 9 July 1937) 280.
[553] For contributions measuring the success of the NIA against its proclaimed aims see for instance Eliav Lieblich, International Law and Civil Wars (n 533) 121; Ann Van Wynen Thomas & A.J. Thomas Jr., Non-Intervention and the Spanish Civil War (n 533) 5-6.
[554] See for instance Jessup, The Spanish Rebellion (n 535) 268-269; Wehberg, Guerre Civile (n 247) 79; Padelford, International Law and Diplomacy (n 525) 53.
[555] H.A. Helb, 'Les Pays-Bas et la Non-Intervention' (1938) Grotius: Annuaire Internationale 4, 4.
[556] Berman, Alliance and Localization (n 171) 461.
[557] Ibid 466-467.

> structure based on the affirmative exclusion of the parties whose conflict served as its occasion.[558]

The NIA was rather an active intervention into the Spanish Civil War.[559] It was, Francis O. Wilcox observed, a collective and 'controlled intervention.'[560] The key feature of the NIA was the collective denial of belligerent status, not only to the insurgents, but also to the established government.[561] In that sense, both Rousseauism and governmentalism were rejected: the legal superiority of the established government vis-à-vis insurgents or the potential state-like character of these latter were not considered legally relevant. Blum could thus keep asserting that there was only one legitimate government in Spain – the democratically elected *Frente Popular* [562] – and Germany and Italy could still recognise Franco's government[563] without having these 'diplomatic' declarations interfering with the theoretical foundation of localisation. Both parties were fictionally put on the same *a-legal* footing, the legitimate government being also denied the right of buying weapons. Lauterpacht summarised that the NIA obliged the parties 'to refrain from acts prohibited by international law (i.e. from supplying munitions to the insurgents) and to forgo what was hitherto a right enjoyed under international law (i.e. the right to supply munitions to the lawful government.)'[564] Anxious that the British government attitude should not be viewed as a departure from traditional international law, Lauterpacht chose to focus on the right to supply the lawful government instead of the lawful government right to buy weapons. By doing so, Lauterpacht could still argue that the British government was only using what was a discretionary right under traditional international law. Georges Scelle, on the contrary, saw in the NIA an 'unlawful intervention' as the embargo imposed on the lawful government

[558] Ibid 461.
[559] Ibid 451.
[560] Wilcox, The Localization of the Spanish War (n 538) 259.
[561] Padelford, International Law and Diplomacy (n 525) 23; Le Fur, La Guerre d'Espagne et le Droit (n 254) 52-53. This was also strongly reaffirmed in the Nyon Agreement dealing with the increase of attacks by (mostly Italian) submarines in the Mediterranean due to the Spanish conflict. If the Nyon Agreement was adopted outside the NIA, it was nevertheless part of the broader strategy of localisation. 'Whereas without in any wily admitting the right of either party to the conflict in Spain to exercise belligerent rights or to interfere with merchant ships on the high seas even if the laws of warfare at sea are observed…' The Nyon Agreement (adopted 14 September 1937, entered into force 14 September 1937) 181 LNTS 137.
[562] Blum, Discours Luna-Park (n 545) 178-179; Léon Blum, 'Réponses aux Interpellations sur la Politique Extérieure (5 Décembre 1936 - Chambre)' in Léon Blum, *L'Exercice du Pouvoir* (Gallimard 1937) 190-191.
[563] The Recognition of Franco's government on 18th November 1936 was not a mere *de facto* recognition but a *de jure* recognition of Franco's government as the legitimate Spanish Government. The recognition happened while the NIA was already in force.
[564] Lauterpacht, Recognition in International Law (n 254) 234.

was a denial of its competences conferred by international law – which included the right to buy weapons to supress an insurrection.[565]

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Common to Lauterpacht and Scelle, however, was a common refusal to consider that NIA's parties 'were in effect attempting to change general international law.'[566] As Blum made clear, the NIA was not deriving from the traditional rules of neutrality.[567] It was not neutrality for the simple reason that for third states to be neutral would have required recognising belligerents towards which acting as neutral.[568] And if this was neutrality, the NIA was indeed a novel and 'curious form of neutrality'[569] which was highly influenced by interwar discussions on collective security.[570] On the contrary, by using the 'fiction of non-belligerence,'[571] *localisation* required imagining international legal mechanisms to actively isolate the Spanish territory from what could fuel the conflict – weapons, ammunitions, foreign 'volunteers', foreign intervention. For Padelford, these specific attitudes towards civil war were 'the law accepted by the general body of states during the Spanish civil strife, as evidenced by public pronouncements and international practice.'[572] It was, in a sort, the crystallisation of a new customary international law of civil war. But this new international law, to be virtually articulated, required more than a mere collection of domestic legislations.[573] A new legal authority was needed to coordinate this new relationship between international law and civil war.

[565] Scelle, Guerre Civile Espagnole II (n 259) 227-228. Ellery C. Stowell was also of the opinion that third states were 'obligated to permit the titular Spanish Government to purchase supplies of arms and ammunition' as long as the insurgents were not recognised as belligerents. Ellery C. Stowell, 'Spain and the Nations' (1936) AJIL 675, 675.

[566] Thomas & Thomas, Civil War in Spain (n 537) 143. Lauterpacht and Scelle were, however, motivated by different considerations. While Lauterpacht wanted to show that British foreign policy was not carried out through an attempt to modify the traditional rules of international law, Scelle chose the terrain of positivism to assert that positive law was in favour of the Spanish Government, and that the NIA, which was clearly in disfavour of the governmental forces, was deprived of any legal significance according to positive law.

[567] Blum, Discours Luna-Park (n 545) 181.

[568] Yves Jemtel, *L'Assistance Hostile dans les Guerres Maritimes Modernes* (Pedone 1938) 201.

[569] League of Nations: Intervention of M. Ossorio y Gallardo (Spain) at the Fourteenth Plenary Meeting (n 534).

[570] Berman, Alliance and Localization (n 171) 464-465.

[571] Jemtel, L'Assistance Hostile (n 568).

[572] Padelford, International Law and Diplomacy (n 525) 23.

[573] For the various domestic legislations adopted by the parties to the NIA to comply with the obligation to establish an embargo on war materials (i.e. the first legal mechanism envisaged) see International Committee for the Application of the Agreement regarding Non-Intervention in Spain, *The legislative and other measures taken by the participating Governments: Report By Mr. Francis Hemming, Secretary to the Committee* (Cmd 5300, 1936).

2. The London Committee: The Institutional Life of the NIA and the Technical turn of the Localisation Discourse

Though Padelford supported the idea that the NIA and its institutionalisation constituted a legal experiment, he still expressed contradictory thoughts vis-à-vis the legal obligation it created. While discussing a resolution adopted by the London Committee which reaffirmed the obligations of the NIA parties,[574] he concluded that such a resolution 'can hardly be regarded as a legal obligation, inasmuch as the Committee was neither originally nor at any subsequent time authorized to create contractual international engagements for the states.'[575] The formalism of such an assertion can be explained by Padelford's inability or unwillingness to 'captur[e] the functional relationship between institutions and states.'[576] Such a 'move to institutions' was undertaken with more enthusiasm by Hans Wehberg, who portrayed the London Committee as an 'international organisation.'[577] Wehberg was specifically impressed by the institutional design of the Committee, and despite its flaws, saw in it a formative lesson for the future of international law in its relation to civil wars and collective security.[578] Wehberg embraced what would become international institutional law with the same enthusiasm that had characterised the reaction of some internationalists vis-à-vis the League of Nations involvement in Upper Silesia (see Chapter 4). On his end, Padelford remained attached to the traditional idea that international legal obligations and authority were solely deriving from treaties and customs.

Yet the functional relationship between the London Committee and the League of Nations clearly indicates that the NIA and its institutional machinery were fully integrated within the international institutional law of the interwar period. The League of Nations could have decided to intervene in the Spanish Civil War, especially when it became clear that it was no longer a civil war but a war of aggression triggered by the Italo-German intervention.[579] But when the Spanish government, for the first time in November 1936, asked the League to intervene on the basis of article 11,[580] the Council decided to refer the situation to the

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[574] International Committee for the Application of the Agreement regarding Non-Intervention in Spain, *Resolution Reaffirming and Extending the Non-Intervention Agreement, and Providing for the Withdrawal of Foreign Volunteers from Spain, for the Grant in Certain Circumstances of Belligerent Rights to the two Parties in Spain, and for the Observation of the Spanish Frontiers by Land and Sea*, *5 July 1938* (Cmd 5793, 1938) [Resolution Reaffirming and Extending the NIA].
[575] Padelford, International Law and Diplomacy (n 525) 105.
[576] David Kennedy, 'The Move to Institutions' (1987) 8 Cardozo L.Rev. 841, 843.
[577] Wehberg, Guerre Civile (n 247) 81.
[578] Ibid 82.
[579] See Chapter 1 section 1.3.
[580] *Ninety-Fifth (Extraordinary) Session of the Council: Annex 1628 Appeal by the Spanish Government* (27 November 1936) League of Nations Official Journal Vol 18 (1937) 35. The Spanish government made a second appeal on the basis of article 11 in May 1937, and a third one in August 1937. *Ninety-Seventh Session of the*

London Committee instead of engaging any mechanisms of collective security.[581] The Council merely and platonically reminded states 'to respect the territorial integrity of other states [and] to refrain from intervening in the internal affairs of another state.'[582] The only decision taken was to recommend the 'Members of the League represented at the London Committee to spare no pains to render the non-intervention undertakings as stringent as possible.'[583] In doing so, the League accredited the fact that the Committee was the international legal authority in regard to the Spanish Civil War, and that the localisation stance was the authoritative legal narrative through which the conflict should be framed.[584] At the same time, the League both 'abdicated'[585] and transferred its own competence, confining itself to a role of humanitarian advocacy and assistance, indicating at the same time how peripherical humanitarianism was in that case.[586]

It is thus in the context of a regional organisation – which if not an emanation of the League of Nations, was eventually empowered by it – that were imagined the legal mechanisms that would theoretically permit the localisation of the Spanish Civil War. However, the initial embargo on weapons, which was at the core of the NIA, was rapidly seen as insufficient. The Soviet Union was the first to consider the idea of a system of control in a technical sense. In a note submitted on 12 October 1936 to the Chairman of the Committee, Lord Plymouth, the Soviet representative formally accused Portugal of violating the NIA and of being a base for the massive supply of war materials towards the Nationalists.[587] Accordingly, what was crucial, the Soviet Union contended, was the 'immediate establishment of control over

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Council: Annex 1661 Appeal by the Spanish Government (19 May 1937) League of Nations Official Journal Vol 18 (1937) 572; *Ninety-Eighth and Ninety-Ninth Sessions of the Council: Annex 1674 Appeal by the Spanish Government* (21 August 1937) League of Nations Official Journal Vol 18 (1937) 1161-1163.

[581] *Ninety-Fifth (Extraordinary) Session of the Council: Resolution adopted by the Council on the Appeal of the Spanish Government* (12 December 1936) League of Nations Official Journal Vol 18 (1937) 18-19. After the second appeal of the Spanish Government, the Council reaffirmed what was decided in the first resolution. *Ninety-Seventh Session of the Council: Resolution adopted by the Council on the Appeal of the Spanish Government* (29 May 1937) League of Nations Official Journal Vol 18 (1937) 333-334. For the third appeal, since the Spanish Government was this time 'solely' focusing on the Italian naval aggression, the Council referred the situation to the Nyon agreement. *Ninety-Ninth Session of the Council: Resolution adopted by the Council on the Appeal of the Spanish Government* (5 October 1937) League of Nations Official Journal Vol 18 (1937) 944-945.

[582] Ibid 18.

[583] Ibid 19.

[584] The Council thus added that it viewed 'with sympathy the action which has just been taken on the international plane by the United Kingdom and France with a view to avoiding the dangers which the prolongation of the present state of affairs in Spain is causing to peace and to good understanding between nations.' In doing so, the League gave credit to the narrative that served as a rationale to the NIA, and gave to it another degree of legitimacy. Ibid.

[585] Scelle, La Guerre Civile Espagnole (n 254) 208.

[586] Ninety-Fifth (Extraordinary) Session of the Council: Resolution adopted by the Council on the Appeal of the Spanish Government (n 581) 19; Ninety-Seventh Session of the Council: Resolution adopted by the Council on the Appeal of the Spanish Government (n 581) 334.

[587] The National Archives (Kew), *International Committee for the Application of the Agreement regarding Non-Intervention in Spain: Memoranda* (M. Cahan to Lord Plymouth, 12 October 1936) EAC 742.

Portuguese ports' to prevent the NIA from being used 'as a cloak for the rebels against the legitimate government.'[588] In his answer, Lord Plymouth refused to call a meeting and preferred waiting for the reply of Portugal regarding previous allegations of violations.[589] In face of the Committee's immobilism, the Soviet representative sent another memorandum to Lord Plymouth stressing that the NIA had 'turn[ed] out to be an empty, torn scrap of paper' and that the Soviet Union had ceased to 'consider itself bound by the agreement… to any greater extent than any of the remaining participants.'[590] The Soviet allegations and warnings weakened the edifice of the well institutionalised hypocrisy of non-intervention, which in turn prompted the Committee to rapidly move towards the elaboration of technical answers pertaining to the formal extension and monitoring of the NIA.

Lord Plymouth eventually suggested the establishment of a system of control. While the debates remained acrimonious, participants agreed to partly displace the discussion on this more technical terrain. Italy, for instance, expressed its readiness to discuss a proposal for a system of control, while it precised that this was not due to the Soviet pressure and 'inadmissible attitude.'[591] On December 23rd the Committee adopted a resolution calling for the adoption and implementation of a 'scheme of supervision designed to secure the application' of the NIA.[592] The question of 'indirect intervention' and a plan to ban 'foreign volunteers' were simultaneously discussed in a report prepared by the Secretary to the Committee, Francis Hemming.[593] This refocusing of the debate on technical solutions culminated in the adoption by the parties of an agreement extending the NIA 'to cover recruitment in and transit through or departure from their respective countries of persons of non-Spanish nationality proposing to proceed to Spain or Spanish dependencies for the purpose of taking service in the …war.' The agreement also set the date of 7 March 1937 to bring into operation [a] scheme of supervision.'[594] Now entrusted with isolating Spain from a potential flow of weapons, ammunitions, and *foreign volunteers* coming from the outside, the Committee eventually adopted a resolution establishing – with much detail – a system of land observation of the Spanish frontiers, a system of observation of the Spanish ports,

[588] Ibid.
[589] Ibid (Lord Plymouth to M. Cahan, 14 October 1936).
[590] On the 15th of October 1936, 8 days before the note was sent, the first shipment of Soviet war supplies to the destination of the Spanish Republic arrived in Spain as Stalin became aware that the NIA 'was doing nothing to prevent German, Italian and Portuguese aid to Franco.' Preston, The Spanish Civil War (n 523) 150.
[591] London Committee, Proceedings (n 546) (Intervention Italian Representative, Press Communiqué 28 October 1936) 90.
[592] London Committee, Proceedings (n 546) (Press Communiqué 23 December 1936) 188.
[593] The plan recommended by the Secretary is close to a plan suggested by the Soviet-Union, which was annexed to the report, and also influenced by Italian propositions. London Committee, Chairman's Sub-Committee Originals (n 546) (Draft Report: the question of indirect intervention, 4 December 1936).
[594] 'Agreement to Prohibit the Departure of Volunteers for Spain adopted by the International Non-Intervention Committee' (16 February 1937) reproduced in Padelford, International Law and Diplomacy (n 525) 311.

and a system of naval observation of the Spanish coasts.[595] Unlike participants' *declarations* regarding the NIA or debates within the Committee, this text was not flavoured by the respective passions of competing European powers. The 'authorship' of this *Observation Scheme* was 'institutional and inscrutable.'[596]

The reading of the *Observation Scheme* does not evoke anything other than the sentiment that the non-intervention system was set like clockwork, with all the details, legal mechanisms and procedures provided for. An *International Board for Non-Intervention in Spain* was established 'to decide all questions relating to the administration of the scheme' and unnumerable positions and organs were created.[597] The observation of the Franco-Spanish and the Gibraltar-Spanish borders was entrusted to an 'international staff' assisted by a *Chief Administrator* and *Administrators*, all enjoying 'the immunities normally accorded to diplomatic officers.'[598] The system of observation of the ports, on its end, provided that 'ships having the right to fly the flags of the participating countries [and] proceeding to the ports of Spain' were to embark 'Observing Officers appointed by the International Committee whose duty [was] to observe the unloading of the ship in Spanish ports.'[599] To this end, the resolution designated *observation ports*, in which ships were to call depending on their port of origin, in order to take on board Observing Officers.[600] Finally, the system of naval control of the Spanish coasts was entrusted to the British, French, Italian, and German navies.[601] Spanish coasts were divided into 8 *Observation Zones,* each of them allocated to one of the *Naval Power*. If the vessels of the 4 Naval Powers were not granted a right to search, they were nevertheless entrusted with a right 'to stop, to board [ships] and to examine their certificates of registry and clearance documents, and to ascertain whether there [were] Observing Officers on board.'[602] The most infamous aspect of the resolution, however, was the division of the Mediterranean coast from the French border to the southeast of Spain in two zones, the northern part being allocated to Italy, the southern part to Germany.[603] In doing so, the resolution *legalised* the presence of the German

[595] International Committee for the Application of the Agreement regarding Non-Intervention in Spain, *Resolution adopted by the Committee relating to a Scheme of Observation of the Spanish Frontiers by Land and Sea, 8 March 1937* (Cmd 5399, 1937) [Observation Scheme].
[596] Jothie Rajah, *Discounting Life: Necropolitical Law, Culture, and the Long War on Terror* (CUP 2023) 44.
[597] Observation Scheme (n 595).
[598] Ibid 4-5. The observation of the border between Portugal and Spain was ensured by British officials attached to the British embassy as provided by a special agreement between the British and Portuguese governments recalled in the resolution.
[599] Ibid 6.
[600]The ports of The Downs or Dover (United-Kingdom), Cherbourg, Marseilles (France), Lisbon, Madeira (Portugal), Gibraltar and Palermo (Italy) were designated as the *Principal Observation Ports*. The other Observation Ports included the French Ports of Brest, Le Verdon, Sète, and Oran (French Algeria). Ibid 9-11.
[601] Ibid 13.
[602] Ibid 14-17.
[603] Ibid 13-14.

and Italian naval forces in the Mediterranean, and 'permitted both to intercept Russian supplies while ensuring free rein for their own attacks on the Levante coast.'[604] This allowed Germany and Italy to perform the fiction that they were not belligerents attacking Republican's positions, but *naval observers* acting on behalf of the London Committee, and as such, having the right to fly the *North Sea Fisheries Convention* flag.[605]

Like the rest of the resolution, the farcical part allocating the naval supervision of the Mediterranean coast to Germany and Italy is written in a very legal-technical form, freed from the respective *passions* of the participants. No political outrage or even analysis are meant to emerge from the reading of a provision merely allocating *Observation Zones* 'D' and 'E' to two states participating in the Naval Control.[606] More generally, the fiction of non-intervention never appeared so real with this complex institutional design. What was real, in this sense, was that international jurists such as Wehberg and Padelford were considering the 'details of institutional design on paper'[607] of an organisation like the London Committee a subject worthy of study within academia.[608] The degree of detail in the London Committee's institutional design was even a source of enthusiasm for Wehberg, unfortunately overshadowed by partisanship.[609] Padelford, who still believed that the situation would have been worse without the NIA and the London Committee, was, however, more ready than Wehberg to blame the tool:

> No one would deny that from all appearances the Powers composing the London Committee were more interested in spending almost endless periods of time in discussing technicalities and elaborate projects of observation than they were in actually stopping the intervention or penalizing those engaged in intervention. Furthermore, it cannot be gainsaid that in practice the accords operated in such a way as to weaken the established government and to confer advantages upon the insurgents.[610]

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The analysis of the discourse of localisation is thus neither limited to the mere study of the 'institutional design on paper' nor to an investigation as to whether the NIA and the London Committee actually fulfilled their proclaimed function of 'localising' the Spanish civil war. There is in fact a rationality in mobilising the language of international law to spend 'almost

[604] Preston, The Spanish Civil War (n 523) 160.
[605] Observation Scheme (n 595) 15.
[606] Ibid 13-14.
[607] Kennedy, The Move to Institutions (n 576) 843.
[608] Wehberg, Guerre Civile (n 247). Padelford, International Law and Diplomacy (n 525). See in particular the 67 pages chapter 'The International Non-Intervention System' and the numerous annexes related to the NIA and the London Committee.
[609] Wehberg, Guerre Civile (n 247).
[610] Padelford, International Law and Diplomacy in the Spanish Civil Strife (n 525) 120.

endless periods of time in discussing technicalities.' The need to focus on the role of international law in perpetuating 'the very problems that it officially claimed to alleviate'[611] conversely implies focusing on the problems that it did not officially claim to solve and for which it was nevertheless mobilised.

3. From Embodiment to Escape: International Law and Interwar Politics

Many elements can be invoked to explain why European powers decided to participate, either cynically or genuinely, in the NIA. Under the surface of the proclaimed desire of maintaining peace and easing tensions in Europe lie many considerations that one might call *realpolitik*. For Italy and Germany, the NIA provided a convenient cloak allowing them to claim their commitment to non-intervention while doing the opposite.[612] For the Soviet-Union, one of the aims was to maintain a cordial relationship with France and Great Britain.[613] The promotion of the NIA by the French *Front Populaire* government might well be explained by its anxiety vis-à-vis the opposition of the right and far-right regarding a possible intervention in favour of the Republicans and by the British pressure.[614] For Great Britain, promoting the NIA was a prolongation of the 'appeasement' policy and a tool to conceal implicit support for the Nationalists motivated by a deep anti-communist sentiment.[615] All these reasons do not easily partake of the 'cosmopolitan ethos'[616] associated with international law. It rather suggests that international law was meaningless and a mere and pale reflection of states egoistic interests.

From a purely formal and rhetorical point of view, however, the NIA succeeded in materialising a collective commitment to peace and non-intervention in lieu of a generalised and overtly public support to either party. With the Observation Scheme, the London Committee also succeeded in formally substituting legal technicalities for political struggles over the fate of Spain. The mobilisation of international law had therefore not made the political confrontation any less real, but at least less noisy. But the degree to which the NIA succeeded in neutralising overt manifestations of political disagreement and tension, and thus in providing a supposedly apolitical and technical response to the Spanish Civil War,

[611] Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 EJIL 7, 7.
[612] Preston, The Spanish Civil War (n 523) 152.
[613] Moradiellos, El Reñidero de Europa (n 519) 258.
[614] David Wingate Pike, *Les Français et la Guerre D'Espagne* (PUF 1975) 79-93.
[615] See for instance Douglas Little, 'Red Scare, 1936: Anti-Bolshevism and the Origins of British Non-Intervention in the Spanish Civil War' (1988) 23 J.Contemp.Hist. 291; Enrique Moradiellos, 'Appeasement and Non-intervention: British policy during the Spanish Civil War' in Peter Catterall & Kate Utting (eds) *Britain and the Threat to Stability in Europe, 1918-45* (Bloomsbury 2016) 94-104.
[616] Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Mod.L.Rev. 1.

varied. Two issues symptomatically exemplify this ambivalence: the debates between Germany, Italy and the Soviet Union at the London Committee, and Léon Blum's mobilisation of the NIA in the domestic context. On the one hand, the discourse produced within the London Committee was an embodiment of interwar politics as the Committee turned into a forum where the anti-Comintern agenda of Germany and Italy was hammered home, despite the attempts of the Soviet Union to escape this narrative. On the other hand, Blum's mobilisation of the NIA allowed him to substitute a discussion over international law and its interpretation for more heated debates – rendering the decision not to intervene in support of the Republicans more acceptable domestically.

3.1. Anti-Communism at the London Committee

The fact that the NIA and the localisation narrative became a pretext for diffusing a broader anti-Communist agenda cannot be dismissed as a mere deviation from the initial purpose. The idea of localisation shares similarities, both theoretical and discursive, with doctrines such as *cordon sanitaire* or cold war *containment* whose fundamental rationale was to prevent a communist *contagion.* The legal translation of what was presented as an attempt to prevent the Spanish Civil War from 'spreading' (see above) was therefore partly rooted in a medical metaphor that had largely infused anti-communist rhetoric since 1917 and then during the Cold War. In the cultural context of the interwar period, where every attempt at social reform was perceived as a new Bolshevik revolution in certain circles, the idea that the logic of localisation was also a reaction to a (imagined) communist contagion was easily embraceable.

This was reinforced by the fact that the NIA was perceived as a way out of ideological struggles.[617] For H.A. Smith, for instance, the NIA and its deviation from traditional rules of international law were a reaction to the fact that the Spanish Civil War was the product of the confrontation between communism and totalitarianism – two ideologies with hegemonic aspirations.[618] This caricatural vision, which was the fruit of the interwar zeitgeist, can still appear in recent international law scholarship on the NIA where the Spanish Civil War is also presented as an 'ideological clash both internally and internationally' between fascism and communism.[619] This account is wrong on many accounts, notably in reifying the narrative of fascist actors as well as assuming that it was a struggle between two 'extremes.' If Italy, Germany, and Spanish Nationalists can be loosely placed under the chapeau of

[617] See for instance Wehberg, Guerre Civile (n 247) 77; Wilcox, The Localization of the Spanish War (n 538) 260; Padelford, International Law and Diplomacy (n 525) 53.
[618] Smith, Spanish Civil War (n 253) 31.
[619] Lieblich, International Law and Civil Wars (n 533) 112.

fascism, the same cannot be said about the Spanish Republicans and communism. The *Frente Popular* was an alliance covering the whole spectrum of the left and mostly dominated by socialists and anarcho-syndicalists.[620] It is only when the survival of the Republic was exclusively contingent on Soviet support that the Communist Party (PCE) became the dominant force and emerged from its 'relative obscurity'.[621] In addition, the Soviet Union was far from promoting a global communist revolution – as was made clear by the 'Comintern's Popular Front strategy.'[622] This materialised in Spain with Moscow, mainly through the PCE, orienting the war effort to tame the revolution and to ensure that the 'Spanish Republic remained a bourgeois democratic parliamentary regime.'[623] Moreover, this reductive reading of the Spanish War also equates the fascist/anti-fascist dimension of the conflict to an opposition between fascism and communism, hence conflating anti-fascism with communism. Against this historical context, it is also wrong because the London Committee provided an institutional site where an anti-Communist rhetoric could be produced and tolerated, whereas the same cannot be said for a hypothetical communist or even anti-fascist rhetoric.

In the game of accusations/counter accusations that animated the London Committee, Italy and Germany always framed alleged Soviet violations as part of a broader world communist revolution. Italy thus became the ventriloquist of Franco and framed the Nationalist insurrection as a war in defence of civilisation against bolshevism: 'Christian Spain' was refusing 'to bend to the will of Moscow' and was resisting 'the greatest attempt ever made by Bolshevik Russia to export their creed' based on 'class hatred' and 'civil strife.'[624] Italy and Germany eventually held the localisation stance of the NIA as perfectly compatible with a commitment to prevent Spain from becoming communist. The Italian representative, after he assured that Italy's commitment to the NIA was total and motivated by an 'absolute respect of Spanish territorial integrity,' specified what localisation and non-intervention meant:

> It has been said that the integrity of Spain is a fundamental interest also for those countries which still continue to entertain most friendly relations with the Reds of Valencia. But what do these countries mean by Spanish integrity? If they mean an orderly, strong Spain, active, independent factor of policy and civilization in Europe,

[620] See for instance Gabriel Jackson, 'The Spanish Popular Front, 1934-7' (1970) 5 J.Contemp.Hist. 21.
[621] Preston, The Spanish Civil War (n 523) 244-246.
[622] Jonathan Haslam, *The Soviet Union and the Struggle for Collective Security in Europe, 1933-39* (Macmillan 1984) 52-59.
[623] Preston, The Spanish Civil War (n 523) 244.
[624] London Committee, Proceedings (n 546) (Intervention Count Grandi (Italy) 11th Meeting of 12 November 1936) 141.

> they mean what we mean, and they can count on our complete solidarity of this fundamental point. But if for an integral Spain they mean a week, broken down, semi anarchic Spain, a hot-bed of communist infection in the Mediterranean and in Europe, a mere pretext to other nations for new and more dangerous intervention, we cannot accept this interpretation.[625]

For Italy, anti-communism was flowing naturally from the NIA and its objective of localising the conflict and of preventing any 'spread'. Playing the same hypocritical game as the other participants, the Soviet representative nevertheless constantly refused to adopt such a narrative and play the token communist:

> The position in international affairs is not [a] division between communism and fascism, but between war and peace. There are the countries which glorify war and aggression and whose habit it is to mock the League of Nations. These countries are lined up on one side of the division. Then there are the countries which detest war, which desire peace, and which try to maintain peace on the basis of the Covenant of the League of Nations. These are lined on the other side.[626]

The Soviet position was integrated within the 'official' prevailing narrative supporting the *raison d'être* of the League of Nations and the NIA. Statements presenting Stalin's USSR as a democracy-loving regime were of course laughable, but at the same time consistent with the collective hypocrisy on which the NIA and the London Committee were based. In a sense, the Soviet posture at the London Committee succeeded in making less noisy ideological confrontations, be they real or fantasied, whereas Italy and Germany totally failed. The Soviet attitude towards Italy and Germany was still offensive but was mostly grounded on a dichotomy between war and peace. The German and Italian violations of the NIA were qualified as aggressions in the sense of the emerging *jus ad bellum* – Italy was for instance depicted as 'an aggressor and arch-violator of international treaties' – never as imperialist/capitalist/fascist attacks against a supposed communist and revolutionary Spain.[627]

But as Paul Preston recalls, '[u]nder the chairmanship of the conservative Lord Plymouth, the Committee consistently revealed a bias against the Soviet Union whilst always being extremely polite to the fascist powers.'[628] Italy and Germany could thus audaciously accuse the Soviet-Union of violating the NIA by means of anti-communist rhetoric under the benevolent eye of Lord Plymouth. And though the Soviet-Union would eventually support

[625] Ibid (Statement by Count Grandi (Italy), Press Communiqué 12 November 1936) 278.
[626] Ibid (Intervention J. Maisky (USSR) at the 11th Meeting of 12 November 1936) 141.
[627] Ibid 142.
[628] Preston, The Spanish Civil War (n 523) 159.

the Republicans, the Soviet representative rightly observed 'that the German and the Italian representatives should be the last people in the world to cast a stone.'[629] Yet they could count on Lord Plymouth, who was always keen to dismiss allegations of violation despite its government being aware of them.

3.2. International Law and the Neutralisation of Domestic Politics

Unlike Germany and Italy, French Prime Minister Léon Blum was not looking to increase the political temperature, either domestically or internationally. However, his decision to promote non-intervention when his initial decision was to help the Republicans solved one problem and created another. Firstly, it did not give the far right an excuse to react violently and it maintained a good relationship with Great Britain. But at the same time, it caused discontent on the left, as a *Popular Front* government was expected to help another one.[630] Both at the parliament and outside, Blum faced many actors from the left expecting some kind of socialist solidarity, who often denounced the NIA as a deviation from international law and as a 'one-way neutrality.'[631] Paradoxically, this is on the terrain of international law that Blum was able to partially escape the controversy surrounding the NIA.

In order to justify non-intervention, Blum presented international law both as a problem and a solution. Blum conceded that traditional rules of international law would have authorised France to help the legitimate government.[632] Thereby, he agreed with his communist allies who reproached him of not applying international law by denying the Spanish government the right to supply itself with arms.[633] But this 'right to assist the lawful government' enshrined in international law had a dark side:

> Let me tell you that, tomorrow, international law would allow any government that found this measure convenient to recognise the rebel junta in Burgos as a de facto government, and that on the basis of this de facto recognition, under international law, arms could be delivered to this rebel government as well as to the regular government.[634]

This short lecture on international law was addressed to 'comrades' of the Seine socialist federation, who, probably like Blum himself, were not well versed in doctrinal debates. Blum

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[629] London Committee, Proceedings (n 546) (Statement USSR Representative, Press Communiqué 28 October 1936) 123.
[630] The Communist Party supported an intervention, at least an indirect one, in favour of the Republicans. The Radical Party, the centre-left party of the coalition, was, however, radically opposed to an intervention.
[631] 'Rapport de Maurice Thorez à l'Assemblée des Communistes et Sympathisants des Usines Renault à Boulogne-sur-Seine, le 2 Septembre 1936' *L'Humanité* (Paris, 4 September 1936) 4.
[632] Blum, Réponses Politique Extérieure (n 545) 193.
[633] For instance, the Secretary General of the Communist party Maurice Thorez defended this position 4 days before Blum's speech. Maurice Thorez, L'Humanité (n 631).
[634] Blum, Discours Luna-Park (n 545) 179-180.

nevertheless gave credit to a specific and marginal interpretation of the belligerency recognition doctrine, defended for instance by the far-right catholic international jurist Louis le Fur (section 2.3 of chapter 1). Traditional international law was presented as unfit for the Spanish situation as it was not consecrating a 'combination' authorising to 'help some while not assisting others.'[635] A legal innovation like the NIA and its institutionalisation through the London Committee was, however, capable of avoiding a European confrontation over the fate of Spain. Blum even went as far as to suggest that the NIA and the beginning of the work of the Committee were the reason why a war did not break out.[636]

Although Blum was not an international jurist, his mobilisation of international law and his argument over the interpretation of the doctrine of recognition enabled the issue of non-intervention in Spain to be temporarily confined to a discourse of expertise. In other words, international law was more complicated than it looked. There was obviously some truth in claiming that international law was granting the Spanish Government the right to get weapons, but the devil was indeed in the details. What was missing from many criticisms was that international law was 'easy to twist.'[637] Fully aware of this indeterminacy, Blum could thus mobilise a more expert analysis of international law, which ultimately proved that only a legal innovation like the NIA could make possible a 'lowering of European temperature.'[638] And if the NIA and this novel orientation of international law did virtually nothing in that respect, they may have enabled Blum to lower the temperature within his fragile coalition.

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In seeing international law either as the enabler of colonialism and global injustice or as a tool of peace and progress, one might lose the rather modest and sometime disappointing wrongs or achievements that constitute the legacy of international law. That the international legal sphere could, as many other domains, became a terrain to diffuse anti-Communist rhetoric is neither extraordinary nor unique; that international law was mobilised more successfully for mundane domestic matters than for the major objectives it was intended to achieve could be just as frustrating. But the dissatisfaction one may feel with the past of the discipline probably reflects the speed with which the members of the NIA abandoned their efforts to firmly establish the discourse of localisation.

[635] Ibid 180-181.
[636] Blum, Réponses Politique Extérieure (n 545) 194.
[637] Blum, Discours Luna-Park (n 545) 180.
[638] Blum, Réponses Politique Extérieure (n 545) 194.

4. A Legal Experiment under Pressure: The Return of Traditional International Law

The willingness of the European powers to keep participating to the 'comedy of non-intervention'[639] was fragile. This lack of institutional support from the very actors who discursively set the localisation approach made this legal innovation vulnerable to the return of more traditional international legal discourses regarding civil war. Accordingly, humanitarianism was first mobilised to maintain the appearance of collective action towards Spain. But formal support for the localisation of the Spanish conflict at the London Committee rapidly vanished. Germany and Italy eventually ended up promoting the belligerency recognition doctrine while the Soviet Union reaffirmed its attachment to Rousseauism. The return of traditional international law was in both cases the sign of the return of a public expression of support in favour of one of the parties to the Spanish Civil War. In this resurgence, the belligerency recognition doctrine was the best legal argument in favour of the insurgents, while Rousseauism remained the best option for the lawful government. The doctrine of belligerency recognition finally ended up contaminating the whole project of localisation under the German and Italian pressure. But in lieu of consecrating a hybridisation between a traditional approach and a legal experiment, it merely indicated the abandonment of theoretical foundations of the idea of localisation.

4.1. Humanitarianism: Doing Nothing Differently

After the bombing of Guernica on 26 April 1937, it took Pablo Picasso 35 days to complete his eponymous painting. The London Committee, in its usual pace, took a little more time to offer the world its reaction to the international outrage provoked by the destruction of the Basque town by the Nazi air force. Its response took the form of an appeal to the two parties regarding the conduct of the conflict, whose scope would eventually become a source of debates.

The idea was first suggested by the British government who proposed to the Committee to 'address an appeal to both parties in Spain that they should agree to renounce entirely the use of bombing from the air in the present conflict.'[640] This return to humanitarianism was deemed to be perfectly coherent with the commitment to localising the Spanish civil war. For sure, the NIA's primary objective was not to humanise the Spanish Civil War. But as was made clear by Lord Plymouth, humanitarianism could theoretically and effortlessly be

[639] David Windgeate Pike, *France Divided: The French and the Civil War in Spain* (Sussex Academic Press 2011) 103.
[640] Chairman's Sub-Committee Proceedings (n 547) (Intervention of the Chairman Lord Plymouth, Press Communiqué 7 May 1937) 161.

considered as a natural by-product of the localisation stance: 'the Non-Intervention body should be an organ for international discussion, as the result of whose activities the Spanish conflict would be prevented from spreading outside the Spanish frontiers, and its dangers and horrors reduced to the lowest limits.'[641]

The London Committee, however, rapidly found itself drawn into debates that had already animated the Red Cross community (see Chapter 2). While some were looking to include clear provisions or prohibitions within the appeal, others rather advocated for resorting to mere humanitarian principles. The British initial proposal, in that regard, was dealing with a specific method of warfare and was pushing for its prohibition. The German representative, on its end, suggested that the appeal 'should be on a wider basis and should aim at doing what was possible to bring to an end all the inhumanities which had marked' the conflict.[642] Accordingly, the final resolution went quantitatively beyond the initial British proposal:

> Deeply impressed by the sufferings inflicted upon the people of Spain by the tragic events which have marked the present conflict, and actuated by the desire to bring relief to the families and homes of the Spanish people …
>
> [The Committee] appealed to the two parties in Spain at once to take every step necessary for the protection of non-combatants, whether men, woman or children come up from the dangers to which they are subject, and to put a stop to the summary or mass executions of individuals for political reasons.
>
> The international committee urge that hostages and prisoners of war held by either party should be treated in accordance with humanitarian principles, that for the future the system of hostages should be abandoned…
>
> Lastly come up the international committee urge that both sides should abstain from the destruction of all open towns and villages and other objectives of a non-military character, whether by bombardment from the air, or by land or sea, or by fire, mining, or any other means.
>
> The international committee for non-intervention in Spain earnestly hopes that the present appeal which they believe corresponds with the ideals and the honourable traditions which have ever animated the Spanish people in the course of its history will evoke a response from the two parties and will help to lessen the cruel sufferings inflicted upon the civil population during the present conflict.[643]

Nevertheless, the initial objective of obtaining a renouncement of the use of air bombing was attenuated and ultimately dissolved among other issues pertaining to summary or mass executions and hostages. The more concrete aspects of the appeal were also inundated with relatively meaningless humanitarian logorrhoea. This outcome had nevertheless been fought

[641] Ibid 162.
[642] Ibid.
[643] London Committee, Proceedings (n 546) (Press Communiqué 18 June 1936) 271-272.

by the Soviet representative who was advocating for a narrower appeal dealing with a clearly identified method of warfare:

> The present draft of the appeal is a complete departure from the original British suggestion, namely, an appeal for abandonment of air bombardment altogether, which dealt with very definite problem and was calculated, in the event of acceptance by both sides in Spain, to produce a definite result… [T]he original object of the British suggestion is completely obscured and replaced by generalities introduced at the insistence of certain representatives who seem unwilling to deal with definite objects likely to produce concrete results, and who prefer to talk about "humanising" the war in general, thereby side-tracking the immediate and pressing purpose of the original British suggestion.[644]

Beside Germany's denial of being involved in the bombing of Guernica,[645] the Soviet demand for more concreteness was met by a redoubling of good humanitarian intentions or pointless discussions as to whether terms such as 'chivalrous manner' should be integrated in the appeal.[646] This is in this atmosphere that the French representative proposed and succeeded in adding to the appeal a mention of the 'ideals and honourable traditions which have ever animated the Spanish people in the course or history.'[647] Ultimately, the form of humanitarianism based on the ritual incantation of humanitarian mantras clashed with the more practical approach of the Soviet representative: 'I regret that the clear-cut British proposal should have become submerged in this rather formless appeal we are now discussing. Whatever may be our estimate of the value of such appeals altogether, certainly the more precise they are the more likely they are to produce some practical result.'[648] In other words, the Soviet representative was of the opinion that '[i]n the chaos of war, it seems unlikely that anything other than a clear rule will function.'[649]

The brief return to humanitarianism did not fundamentally contradict the logic of localisation, and in the general economy of the London Committee, even provided a pretext for endless discussions. These discussions also exemplified the growing discursive mobilisation of traditional rules of international as a way to back one of the parties to the conflict. The mitigation and relegation of the initial proposal constituted a success for Germany as it maintained a status quo favourable to the insurgents who owed their military successes largely to the Nazi air force. On the contrary, the Soviet Union would have benefited from the initial proposal, which would have virtually rebalanced the military

[644] Ibid (Intervention S. B. Cahan (USSR) 21st Meeting) 246.
[645] Ibid (Intervention Dr. Woermann (Germany) 21st Meeting) 248.
[646] Ibid (Intervention J. W. Dulanty (Irish Free State) 23rd Meeting) 270.
[647] Ibid (Intervention C. Corbin (France) 21st Meeting) 248-249.
[648] Ibid (Intervention J. Maisky (USSR) 23rd Meeting) 271.
[649] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press 2004) ch *Humanitarianism and Force* 297.

situation if implemented. Humanitarianism was, however, still soluble within the rationale of localising the Spanish civil war. This opposition between states supporting the different parties to the conflict eventually took the form of a doctrinal competition between Rousseauism and governmentalism, which announced the demise of the discourse of localisation.

4.2. The Temptation of Rousseauism and Governmentalism

The NIA entered a profound crisis after the *Deutschland incident* in May 1937 when a German battleship, which was formally participating to the naval patrol established by the London Committee, was attacked by the Republican air force with Soviet bombers.[650] Germany and Italy used that pretext to withdraw from the naval patrol and create an institutional crisis within the London Committee. Great-Britain and France proposed to maintain the naval supervision and cover the zones formerly allocated to Italy and Germany. This was judged unacceptable by Italy and Germany who seized this opportunity to propose another plan. In this new plan, land control on the Portuguese and French borders was to remain effective, while the granting of belligerent rights to the two parties to the conflict was to replace naval supervision.[651]

This return to the more traditional doctrine of belligerency recognition was contradicting the very logic upon which the NIA and the localisation discourse were grounded. In neither recognising a legal status to the insurgents nor any legal superiority to the lawful government, the NIA had, for a short instant, constituted an abandonment of the 'old doctrines regarding internal armed conflict.'[652] Italy, however, contended that the doctrine of belligerency recognition was soluble within the whole discourse of localisation and that the naval supervision could be entrusted to the two parties to the conflict:

> [T]he Italian government would like to see the powers of the observers effectively increased… [I]n submitting the proposal for recognition of belligerent rights, Italy and Germany have borne in mind the possibility of strengthening not the land control, but the naval control command inasmuch as the idea of belligerence introduces a new and effective form of control on the sea by the naval units belonging to Salamanca and to Valencia.[653]

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[650] For an account of the incident alongside others, from a military perspective, see Willard C. Frank Jr., 'Misperception and Incidents at Sea: The "Deutschland" and "Leipzig" Crises, 1937' (1990) 43 Naval War Coll.Rev. 31.
[651] London Committee, Proceedings (n 546) (Intervention Count Grandi (Italy) 24th Meeting of 9 July 1937) 274-279.
[652] Lieblich, International Law and Civil Wars (n 533) 8.
[653] London Committee, Proceedings (n 546) (Intervention Count Grandi (Italy) 24th Meeting of 9 July 1937) 276.

Italy was of the opinion that the rationale of non-intervention was similar to the classic concept of neutrality and that the London Committee had ignored this fact for too long: 'The term neutral, which has been so frequently used in this committee, actually described the position of countries …towards two or more parties in a state of war. Without a recognition of a state of war, the word neutral is void of any meaning.'[654] In promoting this shift towards the belligerency recognition doctrine, Italy grounded its discourse on the functionalist canon of governmentalism (see chapter 1). The granting of belligerent rights to the two Spanish parties was presented as a mere recognition of a 'state of war' which had been 'juridically ignored' by the Committee.[655] Italy contended that the *Neuchatel criteria* – territorial control, exercise of governmental authority on the controlled territory, organised and military disciplined troops fighting in accordance with the laws of war (see chapter 1) – were met by the insurgents, which meant that they had to be granted belligerent status.[656] At the same time, magnanimous Germany and Italy were making a 'sacrifice' by granting belligerent rights to the legitimate government, as the Republican forces were not entitled to this status because of their alleged lack of respect for the laws of war.[657]

Italy's long exposition of the doctrine of belligerency recognition was impeccable and did not qualitatively differ from what was produced within academia. Yet the mobilisation of the governmentalist discourse was anything but an innocent doctrinal engagement. Governmentalism was indeed a better legal tool to further the legitimation of the Nationalists than was the discourse of localisation. The intervention of the Portuguese representative in support of the grant of belligerent rights is symptomatic of this attitude of coupling belligerency recognition with a moral legitimation of the insurgents:

> It is obvious that the national government of Spain fulfil all the necessary conditions for the recognition in question: they exercise sovereignty and are acclaimed at the legitimate government by the greater part of the population of Spain and of her colonies; they dominate the greater part of the national territory in the peninsula and whole of the national territory outside it; their administration functions normally, applying the law; they have an organised police; they possess armed strength in the air, on the sea, and on land, with the normal discipline of armies and fighting in accordance with the law of war. They Constitute a legitimate government; they are an organised political power; they exercise all sovereign rights.[658]

[654] Ibid 275.
[655] Ibid 277.
[656] Ibid 278.
[657] Ibid 276. The German representative also added that in granting belligerent rights, Germany made a great sacrifice as it would mean accepting to have their ships examined by the Republicans. Ibid (Intervention von Ribbentrop 24th Meeting) 286.
[658] Ibid (Intervention S. Monteiro (Portugal) 24th Meeting) 282.

The granting of belligerent rights was therefore consistent with the *de jure* recognition of the nationalist government by Germany, Italy and Portugal in 1936. This *de jure* recognition was retrospectively framed as a mere recognition of the party which was the more *functionally* akin to a state. And this was done with a professional mobilisation of the doctrine of belligerency recognition and as a mere exposure of the international legal orthodoxy.

The French representative, in a rare public display of lucidity, criticised the German-Italian plan and depicted it as a complete departure from the NIA and its logic of localisation. He first recalled that irrespective of which party was deemed legitimate in the eyes of the participants to the NIA, the foundation of non-intervention was based on the collective refusal to grant belligerent rights to both parties.[659] In addition, he held that the best way to ensure the localisation of the Spanish conflict was the combination of land and naval supervision upon which the *scheme of control* had been constructed.[660] The German-Italian plan was in that regard only ruining the system of control which was deemed vital for the effective localisation of the Spanish conflict.[661] The recognition of belligerent rights was also presented as a measure that would strengthen the Nationalists' existing naval dominance by enabling them to establish a blockade of the Mediterranean coast, while the rights deriving from such a recognition would be virtually meaningless on the Republican side considering their lack of naval strength.[662] And, perhaps more importantly, the rights associated with the grant of belligerent status (visit, search, seize etc) would create numerous tensions and would specifically harm French trade route with its colonies.[663] The French critique of the German-Italian plan was thus twofold: first, the belligerency recognition doctrine and the localisation doctrine are two different and competitive international legal approaches to civil war; second, the belligerency recognition doctrine might favour one party at the expanse of the other and constitute a threat to international and colonial trade.

The Soviet Union, like France, held that the land and naval control of Spain was 'the very basis on which the non-traditional system [of non-intervention] was built.'[664] But in face of the demise of this non-traditional system, the Soviet representative chose, like Italy, to become the voice of the international legal orthodoxy. Unsurprisingly, the Soviet interpretation of what constituted the international legal orthodoxy was not, as Italy

[659] Ibid (Intervention C. Corbin (France) 24th Meeting) 279.
[660] Ibid 280
[661] Ibid.
[662] Ibid.
[663] Ibid.
[664] Ibid (Intervention J. Maisky (USSR) at the 24th Meeting) 281-282.

contended, to be found in the belligerency recognition doctrine, but in a strict form of Rousseauism. The Soviet representative thus freed itself from the logic of localisation – which implied placing Republicans and Nationalists on the same *a-legal* footing – and presented the belligerency recognition doctrine as contrary to international law for placing both parties on the same *legal* footing:

> [T]o grant belligerent rights to general Franco, would mean putting the legitimate government of the Spanish Republic on the rebellious General who, in defiance of his oath, took up arms against his government on the same legal basis. Such an action would obviously be contrary to international law, to international custom and tradition, and consequently cannot be accepted…When…all members of the committee joined the non-intervention agreement, the actual position was that…there was a legitimate government of Spain, a member of the League of Nations, a government recognised by all states, and enjoying all the rights and privileges in accordance with international law; and, on the other end, there was the rebellious general Franco, who had no status whatever in international law.[665]

In recalling the legal asymmetry existing between the lawful government and the Nationalist insurgents, the Soviet representative assimilated the belligerency recognition to an 'act of intervention' which would 'completely upset the balance in general Franco's favour.'[666]

The British Government, in an attempt to accommodate Germany and Italy, proposed a plan which was located halfway between localisation and governmentalism. According to this plan, land control would be re-established and belligerent rights, under specific conditions, would be accorded to the two parties in Spain in lieu of the naval control.[667] In regard to contraband, the future belligerents would thus be under the obligation to adopt a contraband list similar to that adopted by the London Committee.[668] Various provisions were also included to limit the interreferences that the exercise of belligerent rights would cause to vessels flying the flag of any participant to the NIA.[669] The most striking aspect of the British plan, however, was to make the grant of belligerent rights contingent on the withdrawal of foreign volunteers. Accordingly, belligerent rights would become 'effective' only when the Committee would determine that such withdrawal was effective and satisfactory.[670] In doing so, the British plan constitutes a discursive hybridisation bringing together localisation and governmentalism. The apparent contradiction arising from this alliance was in fact resolved through the precedence that localisation was supposed to take over governmentalism. The

[665] Ibid 282.
[666] Ibid 282, 283.
[667] International Committee for the Application of the Agreement regarding Non-Intervention in Spain, *Proposal Submitted by the United-Kingdom Government*, *14 July 1937* (Cmd 5521, 1937).
[668] Ibid 4.
[669] Ibid 4-5.
[670] Ibid 6.

return to the traditional doctrine of belligerency recognition was indeed contingent to the fulfilment of one essential objective of the localisation stance, namely, to empty the Spanish territory of an element that was fuelling the conflict and threatening to spread it. At the same time though, the recognition of a legal status to the contending parties, and the need to obtain their accord and cooperation, was a clear departure from the attitude which had governed the establishment of the NIA and its implementation, whose logic had hitherto been to exclude the parties from the system.[671]

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Germany and Italy expressed their satisfaction towards a plan which was echoing the 'solution' – to a problem of their own making – that they had previously suggested.[672] The Soviet Union, on its end, maintained that recognising 'belligerent status to Franco would amount to a violation of international law and to an intervention in favour of the insurgents, and that the linking up of the withdrawal of foreign combatants with belligerent rights was …absolutely artificial.'[673] This legal artifice, however, did not suffice to overcome the growing divergences within the London Committee. The plan was eventually rejected (Portugal and Poland voted against, the Soviet Union abstained) and as such, was symptomatic of a legal experiment which proved unable to constitute a durable alternative to the traditional international legal discourses on civil war.

5. Conclusion

One of the last international initiatives directed towards localising the Spanish conflict was the Nyon Agreement of September 1937. Paradoxically, this agreement was also one of the few legal mechanisms envisaged during the 'effort' to localise the Spanish conflict which can neither be seen as a total renunciation vis-à-vis the Axis powers, nor as a measure favouring the Nationalists or doing virtually nothing. Therefore, the Nyon Agreement occupies a specific position in a period marked by the strategy of appeasement:

> There was one minor but significant exception to the inaction of the British and the French. In 1937, pirates in the form of unidentified Italian warships, began sinking British and French merchantmen entering Republican ports. To this, a direct attack and affront, France and Britain responded with firmness. A Conference was called

[671] Berman, Alliance and Localization (n 171) 467.
[672] London Committee, Proceedings (n 546) (Intervention Count Grandi (Italy) 26th Meeting of 4 November 1937) 323.
[673] Ibid (Intervention J. Maisky (USSR) 26th Meeting) 348.

> in September at Nyon, in Switzerland, and the law was laid down. The sinkings stopped abruptly. It was a most instructive incident, but no lessons were drawn.[674]

The law was indeed laid down, and the localisation stance retrieved its force outside the formal framework of the NIA. The two parties to the conflict were denied any belligerent status[675] and ultimately excluded from the protection of the Agreement.[676] As for the *supervision scheme*, the Mediterranean was divided into different zones where naval powers were to patrol in order to protect 'merchant ships not belonging to either of the conflicting Spanish parties.'[677] But unlike the *supervision scheme*, the Nyon Agreement was localisation with muscles. According to the Agreement, submarines committing acts of 'piracy' in attacking non-Spanish merchant ships were to be 'counter-attacked, and, if possible, destroyed.'[678] The discourse of localisation, farcically developed in London, found a more serious and firm expression in Nyon with the new perspective of protecting the sacrosanct trade from the contagion of the Spanish conflict. Ultimately, the Agreement constitutes one of the purest forms of localisation ever set (and implemented): a legal discourse on civil war in which only matter the interests of third states and where the contending parties can kill each other as long as those interests – however they are collectively formulated – are preserved.

[674] Laurence Lafore, *The End of Glory: An Interpretation of the Origins of World War II* (Lippincott Company 1970) 175.
[675] Nyon Agreement (n 561) preamble.
[676] Berman, Alliance and Localization (n 171) 467.
[677] Nyon Agreement (n 561) preamble.
[678] Ibid art II.

CHAPTER 4. SUPPRESSING CIVIL WARS: BETWEEN PREVENTION, SOLIDARITY AND LEGITIMISM

The London Committee was a kaleidoscope of the dominant international legal discourses on civil war available during the period that interests this thesis. While it was the institutional site where the discourse of localisation was mainly produced, the Committee remained a forum marked by the looming presence of the dominant discourses. As such, the legal and anomalous experiment of localisation was always either associated with or competed with traditional – and therefore *normal* – legal discourses on civil war, (i.e. Rousseauism, governmentalism and humanitarianism). This chapter addresses the only discursive piece missing from this kaleidoscope, and which in spite of the variety of its manifestations, can be grasped by the idea that international law could function and be mobilised to neither localising, humanising, accompanying nor ignoring civil wars, but to suppressing them. In continuity with the discourse of localisation, the different fragments of the discourse of suppression were also understood as collective international legal responses. It was assumed that the suppression of civil wars was a collective preoccupation which deserved to be addressed by a coherent international legal order. Nevertheless, it gave rise to various interpretations of the meaning that suppression could have, and to different methods for achieving it.

This chapter explores these different discursive fragments that attributed to international law an active role to play in the perspective of keeping civil war at bay. As for the analysis of the discourse of localisation, the scale is reduced to specific events or objects from which emerged and can be extracted a distinct discourse with its own coherence. The legal mechanisms put in place to resolve the crisis in Upper Silesia in the aftermath of WWI constitutes the first fragment. It shows how the discourse of suppression was associated with a belief that the risk of civil war could be averted by the pacifying nature of international law. The extension of international legality, both in terms of rights, institutions, mechanisms, solidarity, and limitation of state sovereignty, was thus deemed to offer a quasi-medical treatment to the disease of civil war. Another way of seeing solidarity as a reinforcement of state sovereignty, rather than the other way round, found its expression in the development of an international law of civil war in the Americas. Through various developments and mechanisms, international law was increasingly mobilised to enhance and assert the legitimacy of established governments against potential insurgent groups. Civil war was no more relegated towards an agnostic and a-legal sphere, but understood as a situation creating legal and solidaristic duties for the whole community of fellow sovereigns. Ultimately, these different trends tending towards the same end found a more systematic and profound

expression in the jurisprudence of Georges Scelle and Carl Schmitt. Although both names encourage dissociation rather than association, their writings constitute a unique attempt to make civil war a central instead of a peripheral object of the international legal order. And if Scelle and Schmitt adopted two opposite views on the virtue and relevance of state sovereignty, both nevertheless agreed that suppressing civil war was at the core of an international legal order whose function was to maintain a predetermined ideal and legitimate status quo.

1. Civil War as a Horizon: Self-Determination, Occupation and Transitory Regime in the Preventive Suppression of Civil War in Upper Silesia

The case of Upper-Silesia has been the object of Nathaniel Berman's attention in his broader project of mapping international law's relationship with nationalism during the interwar period.[679] This section, while owing a lot to Berman's treatment of the question, is more modest in its scope and focuses on the significance of Upper-Silesia for the narrower issue of the relationship between international law and civil war. It is argued that the discourse underlying the international legal response to the 1919-1921 uprisings, comprised within the broader Upper Silesian question which is not reducible to a question of civil war, was a combination which encompassed pre-conflict and post-conflict elements. The pre-conflict dimension consisted in conceiving self-determination by means of a plebiscite as a way of deciding the fate of a territory torn between competing nationalisms. This mediation of the 'alliance' between nationalism and international law[680] through the principle of self-determination was, at the same time, only seen as peacefully achievable if combined with an international administration and occupation of the region to prevent and possibly suppress a potential civil war. The post-conflict and post-partition dimension was, on the other hand, conceived as a temporary 'regime of convalescence'[681] aimed at implementing a legal machinery that would tackle the roots of the conflict and avoid a further descent into civil war. Paradoxically, the explicit mention of civil war is generally absent from the international legal discourse surrounding the Upper Silesian question. Thereby, it is not a discourse which classically 'reacts' to a situation of civil war, but one in which civil war occupies a central position as an ever-present horizon, and as something necessarily thinkable in terms of suppression by means of prevention and non-repetition.

[679] Berman, Modernism, Nationalism, and the Rhetoric of Reconstruction (n 171) 376-379; Berman, Alliance and Localization (n 171); Berman, But the Alternative is Despair (n 164) 1893-1898.
[680] Ibid.
[681] Georges Kaeckenbeeck, *The International Experiment of Upper Silesia: A Study in the working of the Upper Silesia Settlement 1922-1937* (OUP 1942) 23.

1.1. Controlled Self-Determination

When the first Silesian uprising broke out, the region of Upper-Silesia was already under the radar of international law as part of post WWI discussions on the rebirth of a Polish state. In his Fourteen Points, Woodrow Wilson made the Polish question a key element of the new principle of self-determination that was supposed to become a central element of a new international law.[682] Paradoxically, the three uprisings that took place in Upper Silesia between 1919 and 1922 were, to a certain extent, a consequence of international law's involvement in the region. The first draft of the Versailles Treaty had indeed allocated the whole area of Upper Silesia – industrious and rich in natural resources – to the new Polish state. But '[w]ith a huge coal producing district and related industries at stake, the economic prize for the new Poland and for Germany was enormous.'[683] With Germany still administrating the area and committed to retaining the territory, whereas Polish Silesians – still under German authority – wanted a speedy integration into Poland, the situation was troublesome.

As such, the Versailles treaty was simultaneously the text that triggered and offered to resolve the (latent) civil war in Upper Silesia. Germany reacted to the first draft by qualifying the cession of Upper Silesia to Poland as 'a quite unjustifiable inroad into the geographical and economic structure of the German Empire.'[684] Faced with Germany's refusal to sign the Versailles Treaty, the British government was eventually persuaded by the German solution to settle the Upper Silesia question by means of a plebiscite.[685] Such a solution, Lloyd George believed, would avoid placing 'Germans under Polish domination [which] would create a dangerous source of irritation and trouble.'[686] And if the rebirth of a Polish state was presented by Wilson himself as stemming from a new commitment to self-determination, a plebiscite was seen as its 'very application.'[687]

However, the final version of the Versailles Treaty, signed on 28 June 1919, did not limit itself to submitting the fate of Upper Silesia to a plebiscite. Insofar as the plebiscite was an option that, in theory, left war out of the equation as a way for the two national communities to achieve self-determination, it was at the same time considered insufficient to prevent a

[682] Wilson's thirteenth point provided that '[a]n independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations.'
[683] Peter Leśniewski, 'The 1919 Insurrection in Upper Silesia' (2021) 4 Civil Wars 22, 23.
[684] Quoted in Sarah Wambaugh, *Plebiscites since the World War* (Carnegie endowment for International Peace 1933) 213.
[685] Leśniewski, The 1919 Insurrection (n 683) 23.
[686] Arthur S. Link (ed), *The Deliberations of the Council of Four (March 24- June 28 1919) Notes of the Official Interpreter Paul Mantoux Vol.2* (Princeton University Press 1992) 256.
[687] Kaeckenbeeck, The International Experiment of Upper Silesia (n 681) 5.

looming civil war in Upper Silesia. It was thus provided that the 'plebiscite area [was to be] placed under the authority of an international Commission' and 'occupied by troops belonging to the Allied and Associated Powers.'[688] The Treaty operated a quasi-transfer of sovereignty since the Commission was meant to 'enjoy all the powers exercised by the German or the Prussian Government, except those of legislation or taxation.'[689] At the same time, 'Workmen's and Soldiers' councils' were to be 'dissolved' and 'all military and semi-military unions…disbanded.'[690] Since the latent civil war in Upper Silesia was a convergence of massive strikes led by Polish workers, nationalist aspirations, and renewed German military control and repression within the area, the Versailles Treaty constitutes an attempt to supress the elements allegedly capable of triggering an overt civil war. Sarah Wambaugh, who from 1918 onward became within the League of Nations 'an adviser on all matters pertaining to plebiscites' and a leading academic authority on the subject,[691] retrospectively and rightly identified – apart from the alcoholism she attributed to Upper Silesians – what dangers the Versailles Treaty tried to address: 'the presence of great numbers of young men of both sides, veterans of four years of war, still with arms in their hands and *without occupation*… was also a most important factor of disorder.'[692] In providing for the disarmament of the masses, whether workers, soldiers or veterans, and the occupation of the area by an international force represented by allied troops, the Versailles Treaty associated plebiscite and self-determination with active mechanisms of prevention and interposition in regard to a potential eruption of violence. But as an occupying force, the Allied troops who were to be sent to Upper Silesia were also subject to the traditional law of belligerent occupation, which empowered them to do more than simply prevent violence, i.e., to suppress civil war if it broke out.

The first Polish uprising finally broke out in August after the signature of the Versailles Treaty, but before its coming into force on 20 January 1920, and therefore, before the arrival of the allied troops and the Commission. Since the beginning of 1919, however, the German government had already imposed martial law to put an end to the massive strikes within the industrial districts.[693] And as Sarah Wambaugh observed, 'when it was known in Silesia that the fate of the territory was to be decided by a plebiscite…propaganda for Germany, heavily subsidized by German landowners and by the state, was being carried on freely by the

[688] Versailles Treaty (n 167) art 88 (annex).
[689] Ibid.
[690] Ibid.
[691] Dagmar Wernitznig, 'Contested Territories in the Short Twentieth Century: Sarah Wambaugh (1882–1955), Plebiscites, and Gender' (2022) 50 Nationalities Papers 983.
[692] Our emphasis. Wambaugh, Plebiscites (n 684) 219.
[693] Leśniewski, The 1919 Insurrection (n 683) 33.

Germans, while any attempt to do the same for the Polish cause was regarded as treason and ruthlessly punished.'[694] Ultimately, the August 1919 uprising was harshly repressed by the German government and the 'German military ascendancy in Upper Silesia continued until the arrival of allied troops in January 1920.'[695] But the presence of the allied troops did neither prevent the second uprising of August 1920 nor the third one between May and July 1921 that followed the plebiscite, and the well-known divergences or rumours emanating from the rivalry between the allies, especially between France and the United-Kingdom, certainly fuelled the tensions.[696]

This rivalry prevented the Commission from reaching an agreement over the interpretation of the results of the plebiscite. As noted by Pablo de Azcárate, who notably served as director of the Minorities Section of the League of Nations, the British government defended the unity of the territory of Upper Silesia, while France defended its partition.[697] Since a large majority of voters expressed the will to remain part of Germany (≅ 705.000 versus 480.000[698]), the British position assumed that Germany should retain the whole area. The Supreme Council of the Allied Powers eventually referred the situation to the Council of the League of Nations and charged the latter to interpret the results in the light of the Versailles Treaty and to fix a frontier line.[699]

1.2. A 'Legal Cure' for Upper Silesia

The Council of the League of Nations ultimately recommended the partition of Upper Silesia according to the 'geographical and economic conditions referred to in the treaty.'[700] The frontier line roughly left Germany with 68% of the territory and 53% of the population.[701] Although the new Polish state was allocated only a third of the territory with 47% of the population, the partition of the *industrial triangle* gave 'the greater part of [it], containing most of the Prussian state mines, to Poland.'[702] But beside agreeing on a frontier line, the League's recommendation took up the idea of the establishment of a post-partition 'transitory regime' that would 'ensure the continuity of the economic and social existence of Upper Silesia, and…reduce to a minimum the inconveniences of the period of

[694] Wambaugh, Plebiscites (n 684) 219.
[695] Leśniewski, The 1919 Insurrection (n 683) 45.
[696] See in general Peter Leśniewski, 'Three Insurrections: Upper Silesia 1919–21' in Peter D. Stachura (ed), *Poland between the Wars, 1918–1939* (Palgrave Macmillan 1998) 13-42.
[697] Pablo de Azcarate, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace 1945) 138.
[698] Frances Kellor and Antonia Hatvany, *Security against War* (Macmillan Co. 1924) 161.
[699] De Azcarate, League of Nations and National Minorities (n 697) 138.
[700] *Extraordinary Session, held at Geneva from August 29th to October 12th, to consider the question of Upper Silesia: Recommendation* (12 October 1921) League of Nations Official Journal Vol 2 (1921) 1220, 1224.
[701] Kellor and Hatvany, Security against War (n 698) 166.
[702] Ibid.

readjustment.[703] This transitory regime was to be established by 'means of arrangements effected under the form of a general Convention between Germany and Poland.'[704] This future convention would address issues such as industries and markets, currency, transport, energy supply, freedom of movement, private property, workers' rights, and the protection of minorities.[705] And to definitely ensure the civilising mission of law, the legal machinery thus instituted would be supervised by a Germano-Polish *Mixed Commission* with a president of a different nationality, while an *Arbitral Tribunal* would 'settle any private disputes which might be occasioned by the application' of the transitory regime.[706]

The 15 years transitory regime was finally laid out in the Convention Relating to Upper Silesia signed in Geneva the 15 May 1922 (Geneva Convention).[707] The Convention was a far-reaching, technical, and complex document as its 606 articles indicate. As Quincy Wright observed at the end of the transitory period, the provisions of the Convention 'concerned railways, water and electric power, monetary systems, postal services, customs regime, coal and mining products, movement between the zones, property rights, expropriations and minority rights' in addition of establishing the Upper Silesian mixed-commission, the arbitral tribunal, and a system of 'appeal to the League of Nations to assist in carrying out various provisions of [the] convention.'[708] Once again, the transitory regime for Upper Silesia was depicted as a legal experiment.[709] The scope and approach of the transitory regime made it an unprecedented attempt to embark international law towards a global resolution of a civil war. And although the Convention prohibited military transport and access to Upper Silesia for servicemen for the duration of their service,[710] the main narrative was not articulated around the disarmament of a society still largely in arms. Instead, the discourse surrounding the transitory regime was one focusing on the economic, social, and political roots of the Upper Silesian conflict, which, if properly addressed by international law, would prevent a further descent into civil war.

One year after the settlement, Léon Bourgeois praised the success of the work of League of Nations as peace was reigning in Upper Silesia while its economy was following its normal

[703] Extraordinary Session Upper Silesia (n 700) 1224.
[704] Ibid 1225.
[705] Ibid.
[706] Ibid.
[707] Convention Relating to Upper Silesia signed at Geneva, May 15, 1922, together with Interpretative Declaration, signed at Oppeln, June 3, 1922 (Germany-Poland) (adopted 15 May 1922, entered into force 4 July 1922) 9 LNTS 465 [Geneva Convention].
[708] Quincy Wright, 'The End of a Period of Transition' (1937) 31 AJIL 604, 605.
[709] Kaeckenbeeck, The International Experiment of Upper Silesia (n 681); De Azcarate, League of Nations and National Minorities (n 697) 160; Kellor and Hatvany, Security against War (n 698) 158.
[710] Geneva Convention arts 263 & 473.

course.[711] Bourgeois' emphasis on 'normality' is not as trivial as it might first appear. The very raison d'être of the transitory regime was precisely conceived within the discipline of international law as a mitigation of the abnormality that partition, in the context of the application of the principle of self-determination, had previously engendered. Pablo de Azcarate and Georges Kaeckenbeeck, for instance, both emphasised that the function of the transitory regime had been to prevent the 'evil consequences' – economic, social and political – 'which threatened to follow upon the dangerous operation of partition.'[712] For Kaeckenbeeck, one of the main architects of the Geneva Convention who then served as President of the Arbitral Tribunal for the whole duration of the transitory regime, 'economic prosperity and peace' were inextricably linked and likely to be ensured through 'guarantying a number of individual rights.'[713] These assumptions eventually led Kaeckenbeeck to deploy a medical narrative to justify the transitory regime and to present it as a 'regime of convalescence' and a 'legal cure' 'prescribed' by international law:

> [The Geneva convention] pursued the object of eliminating, by means of treaty provisions, supplemented by the activity of international organs, the chief inconveniences and dangers of a territorial division and session made under circumstances particularly difficult…It prescribed a regime of convalescence after the dangerous political operation of partition… But the regime intended as a cure was [a] legal one: it consisted of legal stipulations, extending to the most various domains of life, imposed as legally binding in the two countries, and in part administrated or sanctioned by international organs… The elimination of chaos and violence through legal order and legal process was its purpose. One of its notable achievements was to set definite limits to the freedom of national authorities and to put an efficient break on illegality and reprisals.[714]

According to Kaeckenbeeck, this quasi-medical treatment of the civil war disease that ravaged Upper Silesia between 1919 and 1921, and to which the region was not yet immune, was the result of a 'compromise between the demands of the international order' and state sovereignty.[715] Limiting what he called the 'freedom of national authorities' in order to bring to an end 'illegality and reprisals,' was thus both directed at taming the insurrectional potential of the civilian population and at limiting governmental authorities' repressive potential for the sake of peace. The underlying idea of such a discourse was that the benefit of economic prosperity and the well-being of individuals, that would result from the enjoyment of social and political rights, would supress any desire on the part of the

[711] Léon Bourgeois, L'*Oeuvre de la Société des Nations (1920-1923)* (Payot 1923) 266.
[712] Georges Kaeckenbeeck, 'Upper Silesia under the League of Nations' (1946) Ann.Am.Acad 129. The quote is from Kaeckenbeeck, but de Azcarate used the same expression of 'evil consequences' and expressed the same idea. De Azcarate, League of Nations and National Minorities (n 697) 138.
[713] Kaeckenbeeck, Upper Silesia League of Nations (n 712) 129.
[714] Kaeckenbeeck, The International Experiment of Upper Silesia (n 681) 23.
[715] Ibid.

population to resort to violence – either against one of the governmental authorities or against the other national community. Even for those left on the 'wrong' side of the border by the partition, the minority rights regime was supposed to ease the anxieties created by disappointed nationalist aspirations. At the same time, the expected frictions and conflicts that would inevitably arise from the transitory regime, especially as regards the Polish and German minorities in both parts of Upper Silesia, were to be mediated by two international organs. In doing so, the expected outcome was to limit unmediated disputes opposing individuals or private actors and the relevant governmental authority, but also between the Polish and German governments. For the likes of Kaeckenbeeck, as Berman puts it, '[n]ationalist disruption authoriz[ed] the departure from the state, the traditional defining object of international law, and [gave] rise to autonomous legal creativity.'[716]

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Ultimately, the legal discourse underpinning the settlement of the Upper Silesian question, which culminated in the Geneva Convention, was a statement of faith in the pacifying nature of law. Quite schematically, law and war are on a different plane. For Kaeckenbeeck, 'legal order and legal process' were antithetical to 'chaos and violence.'[717] For it was the mission of international law to suppress civil war, not merely through force, but above all by attacking the root cause of civil war in order to eliminate it from the horizon. The study of the Upper Silesia settlement was therefore to be measured both in 'terms of peace and human happiness.'[718] The satisfaction, enthusiasm, and hope that the settlement seemed to have brought to internationalists like Bourgeois, de Azcarate or Kaeckenbeeck[719] was also echoing a desire for an international order based on common interests and the work of a supranational organisation such as the League of Nations. Bourgeois, who subsumed such sensibility in the belief that it was on 'the law alone that the edifice of peace can be built,' thus found in the Allies' inability to settle the question of Upper Silesia, whereas the League of Nations succeeded, a proof of the effectiveness of the new international organisation.[720] But building common interest in the perspective of providing a collective legal response to the challenge of civil war did not necessarily lead to the same conclusion everywhere and for everyone. Nor that the kind of *solidarism* professed by Bourgeois,[721] which somehow

[716] Berman, Modernism, Nationalism, and the Rhetoric of Reconstruction (n 171) 377.
[717] Ibid.
[718] Ibid 6.
[719] Ibid 23-25; De Azcarate, League of Nations and National Minorities (n 697) 137; Bourgeois, L'Oeuvre (n 711) 266-268.
[720] Ibid 267.
[721] On Bourgeois' solidarism see Koskenniemi, Gentle Civilizer (n 13) 284-291.

found its expression in a 'supranational technocracy'[722] such as the one developed for Upper Silesia, was the only one available.

2. A *Jus a Bellum* for Civil War? Legitimism and Suppression in the Americas

For some actors from the Americas, solidarity was not understood as necessarily attached to a taming of state sovereignty. On the contrary, solidarity was anchored to the idea of a collective engagement to reinforce the resilience of established governments against the destabilising effects of civil wars. Through various fragments – mostly emanating from Latin-American states – appeared the discourse of a proto *jus ad bellum* for civil wars. The first and quickly abandoned fragment of this discourse focused on the idea of constitutional legitimacy to delegitimise civil wars, revolutions, military coups and other insurrections as tools for political and social change. In order to deprive of their fruits those who engage in such an enterprise, a collective commitment to maintain the legitimacy of *de jure* governments through the principle of non-recognition of governments coming to power by force was contemplated. This principle of constitutional legitimacy was implicitly maintained but disconnected from the principle of non-recognition in the broader Pan-American effort of codification of international law. Instead, it was supplanted by the imagination of mechanisms of interstate solidarity designed to support governments facing civil wars, and to suppress them. It ultimately paved the way for the idea that civil wars, like interstate wars, were to be potentially outlawed and understood as aggressions.

2.1. Regional Specificities, Universal Ambitions

The production of a distinctive legal discourse on civil war by Latin-American states and jurists in the post 1918 period took place in the context of a broader Pan-American effort already underway to codify international law. This effort 'to modernize the classical legal order inherited from the previous century' culminated in the 1933 Montevideo Convention on Rights and Duties of States[723] – a regional instrument which would eventually give international law its canonical definition of statehood. Such an ambition was not necessarily well received in Europe, for international jurists on the other side of the Atlantic were not always inclined to accept the idea of the semi-periphery 'as a distinctive realm of international legal practice.'[724] Discussing the rules and principles developed in Latin-America regarding the (non)recognition of *de facto* governments, the French internationalist

[722] Berman, But the Alternative is Despair (n 164) 1886.
[723] Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History: 1842-1833* (CUP 2014) 305.
[724] Ibid 30.

Ferdinand Larnaude was for instance quick to point out that there was 'no south-American international law, but a single international law.'[725] As Becker Lorca argues, the 'main representative' of this supposed 'threat' to the unity of international law, then as now, has probably been the Chilean international jurist and ICJ judge Alejandro Alvarez and his defence of 'the existence of a Latin American regional international law'.[726]

As early as 1916, Alvarez – who gained professional prestige both in Europe and in America[727] – advanced that the American continent not only had the right to defend its own regional law, but also had the 'obligation' to prepare the 'reconstruction' of international law.[728] This task, Alvarez argued, was bestowed on the American Continent by Europe's own inability to assume this role:

> While in Europe the greatest social cataclysm ever known in the history of mankind is unfolding, on the other hand on the American Continent, between all the States of which it is composed, there is a progressive trend towards perfect harmony and good understanding, the greatest, perhaps, in the history of peoples.[729]

This desirable outcome was the result of a Pan-American commitment to substituting the frantic development of alliances characterising European relations with that of 'common interests' through 'legal equality [and] solidarity.'[730] The only shadow in this idyllic picture was the conflict between the United States and Mexico[731] – which at the moment Alvarez was writing in 1916 was probably referring to the Columbus raid and the subsequent punitive expedition led by US troops in Mexico in pursuit of Pancho Villa. Yet this was not enough to derail the whole continent from its harmonious course, and Alvarez framed the conflict not as an interstate one, but as the result of Mexico's years-long inability to maintain order at the US frontier due to what he pudically called 'internal troubles' – i.e., the Mexican Revolution. But as far as internal conflicts were not approached by Alvarez with the catastrophism that characterised some European authors after 1918 (see Chapter 2), it nonetheless indicates that civil war and its disharmonious potential could become a central aspect of a Pan-American international law of solidarity.

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[725] Ferdinand Larnaude, 'Les Gouvernements de Fait' (1921) 28 RGDIP 457, 498.
[726] Becker Lorca, Mestizo International Law (n 723) 26. See more generally 24-36.
[727] On the professional and intellectual trajectories of Alvarez see Koskenniemi, Gentle Civilizer (n 13) 302-309; Arnulf Becker Lorca, 'Alejandro Alvarez Situated: Subaltern Modernities and Modernisms that Subvert' (2006) 19 LJIL 879.
[728] Alejandro Alvarez, *Le Droit International de l'Avenir* (Institut Americain de Droit International 1916) 5.
[729] Ibid 6.
[730] Ibid 8-9.
[731] Ibid 6.

2.2. Constitutional Legitimacy and Solidarity during Civil War

Legitimism refers to a French counter-revolutionary doctrine based on the idea that the only legitimate rulers can be kings 'whose inherited rights represented the application of Divine Law and historical continuity.'[732] At the interstate level, the Holy-Alliance established after the Revolutionary and Napoleonic wars had embodied such a doctrine with its commitment to maintaining established monarchies – based of the divine right of Kings – as the only legitimate political entities in Europe. Liberal and revolutionary movements aimed at establishing alternative forms of government were therefore meant to be suppressed through coordinated efforts – mainly between the Austrian, Prussian, and Russian Empires. But the deep grammar of legitimism could easily do away with its monarchical dimension, for it essentially derives from a historical trend that the French jurist Joseph Barthélemy – and future member of the Vichy Government – had called the solidarity of 'analogous political regimes.'[733]

In the aftermath of WWI, the American continent was certainly the region where the principle of 'solidarity of legitimate governments'[734] found its strongest expression. By 1918, however, the divine right of monarchs had long ceased to command such solidarity between states. A better currency was that of the constitutional legitimacy of established governments and the liberal-democratic form of government. And if an international jurist such as Thomas Baty could voice a largely diffused idea that 'constitutional legitimacy [was] a thing that international law [was] not concerned with,'[735] many in the Americas begged to differ. As early as 1907, Ecuador's Minister of Foreign Affairs, Carlos Tobar, set out the eponymous doctrine of non-recognition of governments coming to power by force.[736] The Tobar Doctrine was eventually made his own by Woodrow Wilson[737] after it had been previously codified in the 1907 General Treaty of Peace and Amity signed between Central American states.[738] The treaty was eventually denounced and efforts to codify this principle of non-recognition had to be renewed. It is thus in the 1923 Washington Treaty of Peace and Amity, signed under the tutelage of the United-States, that the principle acquired its most comprehensive expression:

[732] Roger Price, *The French Second Empire: An Anatomy of Political Power* (CUP 2001) 272.
[733] Barthélemy, Politique Intérieure (n 538) 448.
[734] Ibid 470.
[735] Thomas Baty, 'Can an Anarchy be a State' (1934) 28 AJIL 444, 446.
[736] John P. Grant & J. Craig Barker (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009).
[737] Larnaude, Gouvernements de Fait (n 725) 498.
[738] General Treaty of Peace and Amity between the Central American States of 20 December 1907 (adopted 20 December 1907) 206 C.T.S. 63.

> Desiring to make secure in the Republics of Central America the benefits which are derived from the maintenance of free institutions and to contribute at the same time toward strengthening their stability and the prestige with which they should be surrounded, they declare that every act, disposition or measure which alters the constitutional organization in any of them is to be deemed a menace to the peace of said republics, whether it proceed from any public power or from the private citizens. Consequently, the governments of the contracting parties will not recognize any other government which may come into power in any of the five republics through a coup d'état or a revolution against a recognized government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country. And even in such a case they obligate themselves not to acknowledge the recognition if any of the persons elected as President, Vice-President or Chief of State designate should fall under any of the following heads:
>
> 1) If he should be the leader or one of the leaders of a coup d'état or revolution, or through blood relationship or marriage, be an ascendant or descendant or brother of such leader or leaders.
>
> 2) If he should have been a Secretary of State or should have held some high military command during the accomplishment of the coup d'état, the revolution, or while the election was being carried on, or if he should have held this office or command within the six months preceding the coup d'état, revolution, or the election.[739]

The principle of non-recognition thus expressed constitutes an almost chemically pure manifestation of the *Democratic Peace Theory* according to which democratic states do not fight each other.[740] At the same time, it illustrates the deep contradiction of the Wilsonian project, for the sacrosanct respect of the constitutional order might not always partake in a project aimed at promoting self-determination. Impregnated with Wilsonian 'idealism', the principle of non-recognition of government coming into power through force here assumes that states 'could in time be prepared to take part in a brotherhood of democratic nations which could bring peace to the world.'[741] The more vulgar version of it, however, is that revolutionary changes or deviations from the liberal-democratic system impossible to attain within existing constitutional designs should not even be contemplated. In other words, political aspirations that could not be materialised through the tools of liberal democracy are likely to be aspirations menacing the 'maintenance of free institutions' from which derives internal and external peace. Counter-intuitively, the treaty also provides for a total duty of non-intervention in case of civil war that excludes any form of intervention, even in favour of the lawful government.[742] But the paradox of the Washington treaty lays in the fact that

[739] General Treaty of Peace and Amity between the Central American States of 7 February 1923 (adopted 7 February 1923) (17 A.J.I.L. (Supp.) 117 (1923)) art 2 [Washington Treaty].
[740] This theory can be traced back to Immanuel Kant and his work on 'perpetual peace'. Immanuel Kant, 'Perpetual peace: a philosophical sketch' in Hans S. Reiss (ed), *Kant's Political Writings* (2nd edn, CUP 1991) 93-130.
[741] George W. Baker, 'Wilson's Use of the Non-Recognition Policy in Costa Rica' (1965) 22 The Americas 3, 3.
[742] Washington Treaty (n 739) art 4.

this consecration of non-intervention coexists with an equal consecration of intervention. Beside the warning that the treaty addresses to would-be revolutionaries, the principle of non-recognition is first and foremost the promise that any government coming to power after a revolution or a civil war would face consequences – i.e., diplomatic and economic isolation. Therefore, non-intervention in this context is as little about genuine non-intervention as was the NIA in the context of the Spanish Civil War (see previous chapter).

The more ambitious Pan-American project of codification, less dominated by US interests, arguably diverted from the direction taken in the Washington treaty. The issue of non-recognition was set aside to focus on the obligations of third states in the event of civil war taking place within another state of the American continent. Based on the project XI of the 1927 Rio International Commission of Jurists,[743] the Sixth International Conference of American States of Havana adopted in 1928 the Convention on Duties and Rights of States in the Event of Civil Strife (Havana Convention). Without going as far as creating an obligation to militarily support a government facing a civil war, the Convention is yet constructed around a system of solidarity aimed at supporting the suppression of civil wars by established governments:

> Article 1. The Contracting States bind themselves to observe the following rules with regard to civil strife in another one of them:
> First: To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for the purpose of starting or promoting civil strife.
> Second: To disarm and intern every rebel force crossing their boundaries, the expenses of internment to be borne by the State where public order may have been disturbed…
> Third: To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.
> Fourth: To prevent that within their jurisdiction there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favour of the rebellion.
> …Art. 3. The insurgent vessel, whether a warship or a merchantman, equipped by the rebels, which arrives at a foreign country or seeks refuge therein, shall be delivered by the Government of the latter to the constituted Government of the State in civil strife, and the members of the crew shall be considered as political refugees.[744]

If the explicit mention to constitutional legitimacy is absent from the 1928 Havana Convention, it is still a text driven by the idea of solidarity amongst constitutionally established governments. As far as many signatories were indeed governments that came

[743] International Commission of Jurists, *Sessions held at Rio de Janerio, Brazil, April 18th to May 20th, 1927: Projects to be submitted for the consideration of the sixth International Conference of American States* reproduced in (1928) AJIL.supp 234, 267.
[744] Convention on Duties and Rights of States in the Event of Civil Strife (adopted 20 February 1928, entered into force May 21 1929) 134 L.N.T.S. 45.

into power through force, the subsequent constitutional reorganisation of these states commanded a commitment towards status quo and political stability. And as in the 1923 Washington Treaty and NIA system during the Spanish Civil War, the principle of non-intervention that the Havana Convention seemingly consecrates is misleading. The varnish of non-intervention is in fact hiding deeply interventionist logics. But these interventionist elements are neither meant to destabilise foreign states nor operate regime change as it is often assumed to be the case when the question of intervention arises. It is an interventionism which is rather concerned with the ability of established governments to suppress civil wars when they occur. For that purpose, the Convention broadly imposes on third states the obligation not to let their territory to be used as a base for individuals or groups with hostile intent towards a state that might face a civil war. It translated into positive law the well-established idea amongst American jurists that states had the duty to 'prevent conspiracy against the internal order or security of another state on its territory.'[745] All the obligations imposed on third states undeniably translate a bias in favour of established governments, for disarming and interning rebels, establishing an embargo on weapons except those destined to the government, or delivering insurgent vessels to the government are measures likely to tip the balance in favour of governmental forces.

The Havana Convention is, however, a rather nuanced text. It relies on a cautious discourse which maintains the illusion of a balance between different demands. As such, it does not sink into an absolutist vision which would justify any repressive measures against insurgents. While the Convention provides for the delivering of insurgent vessels to the established government, it does not extend such a principle to the insurgents themselves, who were instead considered as 'political refugees.'[746] This humanitarian concession is also accompanied by another concession limiting the preferential treatment accorded to established governments regarding arms embargo. It is provided that such preferential treatment would cease in case of belligerency recognition with the application of the law of neutrality.[747] In doing so, the Havana Convention conceded that the solidarity of established governments had limitations. But at the same time, the absence of details regarding the application of the doctrine of belligerency recognition, combined with its very indeterminate

[745] Alejandro Alvarez, *La Codificación del Derecho Internacional. en América: Trabajos de la Tercera Comisión de la Asamblea de Jurisconsultos reunida en Santiago de Chile* (Imprenta Universitaria 1923) 134.
[746] Convention on Duties and Rights of States in the Event of Civil Strife (n 744) art 3.
[747] Ibid art 2.

nature (see Chapter 2), rendered this mitigation of the preferential treatment of established governments largely fictional.[748]

In supporting established governments, the discourse of legitimism shares obvious similarities with Rousseausim. But unlike the Washington Treaty and the Havana Convention, Rousseausim was based on a more agnostic and detached stance vis-à-vis civil war. By excluding civil war from the international legal sphere and framing it as a purely domestic affair and not as a war in the legal sense, Rousseauism obviously expressed a preference for established governments. But this preference was not conveyed by international law itself. For international law is irrelevant for civil wars, Rousseausim assumes that whatever a state might do to supress a civil war (even asking or receiving support from other states) derives from its sovereign right, not from international legal rules, principles, or competences. In contrast, the Washington Treaty and the Havana Convention assumed the interdependence of states and the omnipresent international dimension of any civil war. Emphasising state sovereignty alone without interstate solidarity was thus doomed to fail for the prospect of eliminating civil wars from the horizon. International law, as a way to coordinate such solidarity, could thus be mobilised to either discourage civil wars or provide states with the necessary means to supress such conflicts. Although not desirable, civil war was yet an international legal object. But as far as these two treaties obviously delegitimised civil wars, they did not push the logic of legitimism to its limits.

2.3. Towards Civil War as Aggression

The Spanish civil war provided the opportunity to give an international resonance to the Pan-American law of civil war. In his defence of the Spanish Republic, the Mexican representative at the League of Nations, Isidro Fabela, relied on the Havana Convention to assert Mexico's right to provide weapons to the *de jure* government.[749] Unlike the NIA that Mexico regularly criticised, the Havana Convention was held to provide 'clear legal guidance on how states should proceed in the context of civil wars.'[750] And even if Spain was not a party to the Havana Convention, Fabela made it a matter of coherence to apply it

[748] It should be noted that belligerency recognition does not appear in the *project XI* of the 1927 Rio International Commission of Jurists. Rio International Commission of Jurists (n??) 267. Moreover, it is only mentioned in the final version of the Convention for the specific matter of arms embargo. Even in the case of belligerency recognition, it thus remains unclear whether the other preferential measures accorded to the lawful government would still apply or if a complete neutrality should be applied.

[749] Isidro Fabela, 'Press Communiqué' reproduced in 'Le Mexique: unique Etat fidèle au Pacte et à la chose signée' *Journal des Nations* (Geneva, 20 April 1937) 1.

[750] Fabia Fernandes Carvalho Veçoso, 'Mexican Post-Revolutionary Foreign Policy and the Spanish Civil War Legal Struggles over Intervention at the League of Nations' in Kathryn Greenman, Anne Orford, Anna Saunders & Ntina Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (CUP 2021) 260.

in the context of the Mexican-Spanish relations.[751] For Fabela, it would indeed be strange for Mexico to pursue a different foreign policy towards Spain from that towards American states.[752] Like Alvarez, Fabela saw in the law developed by American states a mature version of international law capable of assuming a role surpassing its regional character.

Recalling the necessity of interstate solidarity in case of civil war was also a rejection of the NIA and its idea of localisation. For Fabela, it was the very absence of interstate solidarity with the established government, one of the cornerstones of the NIA, which explained the 'lamentable situation of Spain':

> [F]or the sole effect of the attempts to apply the so-called non-intervention policy, owing to the form they have taken and the time at which they were made, has been to deprive Spain of assistance which, under international law, the legitimate Government of that country was logically entitled to expect from States with which it has normal diplomatic relations.
> This lack of co-operation with the constitutional authorities of Spain is cruelly prolonging a fratricidal struggle, and, owing to the participation of foreign elements, the possibility that the conflict may lead to serious international complications is growing more imminent every day.[753]

But the context of the League of Nations provided the opportunity to test the idea that legitimism could go beyond merely discouraging civil wars and supporting established governments. The grammar of legitimism ultimately aimed at excluding civil war from the sphere of legitimate violence, and the more radical method to do so was to contemplate the prohibition of civil war by means of international law. In a period marked by the emergence of a *jus ad bellum*, collective security and the legal prohibition of interstate war, the idea of applying these notions to intrastate wars was not too remote. Using the vocabulary of the emerging *jus ad bellum*, Fabela thus suggested to extend the dichotomy between aggressors and victims to 'military rebellion' and not merely to interstate conflict:

> Mexico also considers that the neutrality advocated in regard to the Spanish conflict should be interpreted in accordance with the lofty principles of the League Covenant, and that the clear distinction made between a Government victim of aggression, to whom every material and moral assistance should be afforded, and aggressor groups, who should certainly not be granted facilities enabling them to continue the struggle with greater bloodshed, should be extended to cases of military rebellion such as that which has occurred in Spain.[754]

[751] Fabela, Press Communiqué (n 749).
[752] Ibid.
[753] *Situation in Spain: Letter, Dated March 29th, 1937, from the Mexican Government to the Secretary-General* (1937) League of Nations Official Journal 264.
[754] Ibid.

While it should be noted that Mexico supported the idea that the Spanish civil war was also an international war of aggression due to the German-Italian intervention, this passage nevertheless highlights the possibility of framing a civil war as an internal war of aggression. The underlying logic of such statement was to consider as potential aggressors not only states, but also non-state groups who would militarily defy a democratically elected government. As a consequence, Fabela's understanding of the relationship between international law and civil war was not only focusing on the right and ability of established governments to supress 'military rebellions,' but also on the duty of third states and the League of Nations to support this suppressive effort. In a sense, Fabela managed to translate the Pan-American conception of interstate solidarity in case of civil war into the vocabulary of the League of Nations.

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Outlawing civil war by means of international law was certainly a seductive idea. But Fabela's trial balloon was maybe too bold. In the context of the interwar period, prohibiting *coups d'état*, revolutions or insurrections was seen by some as unworkable considering the lack of organisation of the international order. The material situation was not favourable, and fora such as the League of Nations still imposed many constraints as regards what ideas could be formulated or even thought. Jurisprudence, less subject to constraints, eventually proved to be a more fruitful terrain for exploring the place of civil war in an ideal international legal order.

3. Civil War and International Legal Order: Legitimism and Suppression in the Jurisprudence of Georges Scelle and Carl Schmitt

Rare were the international jurists who developed a grand theory of international law in which civil war occupies a central position. This was not the case of George Scelle and Carl Schmitt who both insisted on the necessity for a coherent international legal order to help in suppressing civil wars. As leading international jurists, they each produced a jurisprudence representative of broader international legal sensibilities. Scelle's writings were amongst the most symptomatic illustrations of federalist doctrines, whereas Schmitt was one of the most ardent defenders of an international law consecrating the (European) state as the 'institution of institutions.'[755] Owing to these different inclinations, they both theorised their ideal

[755] Carl Schmitt, *On the Three Types of Juristic Thought* (Praeger Publishers 1934, 2004) 79.

relationship between international law and civil war by adopting diametrically opposed views on sovereignty and on the position of the state within the international order.

Quite schematically, tackling the evil of civil war in Scelle's theory required less state sovereignty than was then conceded. His federalist approach to international law assumed that a mature international society – the word society being important here – could not shy away from the question of civil war. And if the notion of legitimism was still pervading the whole discourse, it assumed a liberal-democratic dimension deemed to consecrate the very idea of progress. For state sovereignty was a problem, states were to be relegated as mere instruments. Insurrections as well as undemocratic abuses from governments would thus become the object of a supra-state jurisdictional decision aimed at guaranteeing the democratic course of the international society. Unsurprisingly, keeping civil war at bay or eventually supressing it required for Schmitt an opposite commitment of international law to upholding the supremacy of the state as the fundamental political entity. For civil war was the source of legitimacy of the state and the international legal order – in the sense of the historical overcoming of the European and confessional civil war – and an ever-present horizon legitimising the maintenance of the state-centric structure of international law. Consequently, any deviation from this structure would risk projecting the logics of civil war into the international legal order, which as a result, would eventually lead to an 'international civil war'. But unlike advocates of Rousseauism who solely believed in an agnostic indifference of international law towards the phenomenon of civil war, Schmitt's theory assumed a direct connection between the liquidation of civil war and the legitimacy of both the state and international law.

Schmitt was critical of Scelle's federalist and individualist doctrine and regularly discussed the work of the French internationalist. Scelle, on his end, more concentrated his effort against state sovereignty itself than against its more ardent defenders. But from this unrequited intellectual exchange emerged the exposure of two manifestations of the discourse of legitimism more similar than the biographies and political inclinations of their authors can indicate. Through a different conception of legitimacy, both works consecrated a conservative, if not reactionary, idea of international law as the guarantor of a certain status quo.

3.1. Liberal-Democratic Legitimism: Scelle's Federalism and Civil War

While discussing the idea of non-recognition as developed by American states, Hersch Lauterpacht noted in 1937 that even if outlawing civil wars was a desirable outcome, for it to be practicable would necessitate a deep reorganisation of the international order:

> The international society would be entitled to prevent revolutions by means of the measure of non-recognition if international law at the same time provided third States with the means of ensuring, through effective review by international courts and institutions, the due and fair administration of the law within each State. Actively championing stability without having the right and the obligation to ensure the domestic operation and development of the law can often result in helping to perpetuate injustice. Similarly, to penalise a revolution that has been provoked and perpetrated by disregard for the democratic principle is to assume the existence of a world in which this principle is part of international law and its fair application is ensured by international bodies… It is possible – as it is ultimately desirable – that in the future the international order will effectively prevent not only international wars, but also civil wars, by guaranteeing, revising and ensuring the application of individual rights within the independent and autonomous states that make up the world federation. In this case, it opens up the legal and moral right to suppress and punish revolutions as offences against the constitution of international society. But until this happens, international law must content itself with an entirely different function: that of ensuring continuity ... between the revolutionary order and the old order of things.[756]

The outlawry of interstate war in 1945 through the UN Charter did not dent Lauterpacht's conviction that the international order was not yet ready. In 1947, he still maintained that the doctrine of belligerency recognition was still necessary and that further steps were still needed to contemplate an international legal prohibition of civil war:

> If and when war is effectively renounced between states… recognition of the full belligerent status of the parties to civil wars will become incongruous anachronism. On the other hand, the elimination of civil war as an institution regulated by the law of Nations is conditioned by such a measure of international supervision over and of protection of constitutional systems of states, in pursuance of an effective international recognition of the fundamental rights of man, as seems remote at present… [Then] the present attitude of indifference of international law towards civil wars will be deprived of its moral and legal foundations. Civil war will become the object of international condemnation and suppression in the same way as war between state. The law relating to recognition belligerency will then become a subject of legal history.[757]

It is a statement that was intended to be both lucid and optimistic. While the current situation was not favourable enough, the recipe was nevertheless made available by Lauterpacht. Federalism, guarantee of individual rights and extension of the empire of liberal-democratic constitutionalism were thus the ingredients that would permit legitimism to not invariably transform itself into a reactionary doctrine. More importantly, suppressing civil wars through international mechanisms would merely be a legitimate restoration of the free play of democratic constitutions.

[756] Hersch Lauterpacht, 'Règles Générales du Droit de la Paix' (1937) 62 R.C.A.D.I 95, 267-268.
[757] Lauterpacht, Recognition in International Law (n 254) 254-255.

Lauterpacht's ideas were, in a sort, a miniature version of the federalism that Scelle developed in a more systematic manner. Like Lauterpacht, Scelle distanced himself from the law of civil war developed in the Americas. The principles of non-recognition of revolutionary governments and interstate solidarity were indeed flawed by their failure to recognise that some revolutions could be legitimate.[758] What was legitimate for a liberal mind like Scelle was the opposition to 'arbitrariness and tyranny.'[759] Thereby, it was 'impossible to prohibit insurrection without guaranteeing via supra-state institutions the free play of constitutions and the respect of popular sovereignty.'[760] By popular sovereignty, Scelle did not mean everything that a people can desire. As seen before, he showed no enthusiasm for the principle of self-determination which he saw as an example of unmediated and unconstrained popular sovereignty exercised through collective violence (see Chapter 2). For Scelle, popular sovereignty meant the will of the people filtered by the mechanisms of representative democracy. And in the absence of a 'public authority susceptible of deciding between the opposing claims of the insurgents and the legal government,' civil war was the logical outcome.[761] In that context, the prohibition of civil war, interstate solidarity or the principle of non-recognition were seen as a pale repetition of the Holy Alliance.[762] But against the 'legitimacy of the thrones' Scelle advocated the 'legitimacy of the constitutions.'[763] In the end, it was not the logic of the Holy Alliance that rebuked Scelle, but its ordering principles. He went as far as to suggest that the Holy Alliance was the 'closest official precedent to that of the League of Nations.'[764] Unlike the Holy Alliance, however, the League of Nations answered to an 'elevated, liberal and democratic ideal.'[765]

This was an indication that while the international society remained in a relative primitiveness, some signs were nevertheless pointing towards a more mature international order, thus rendering even less justifiable the non-prohibition of civil war. First of all, this was a 'curious contradiction' considering the prohibition of interstate war with the Kellog-Briand Pact.[766] Additionally, the embryonic federalist character of the League of Nation, which constituted a breakthrough, was still plagued by its inconsistency regarding civil wars. Scelle held that article 10 of the Leagues Covenant, in providing collective security

[758] Scelle, La Guerre Civile Espagnole (n 254) 267; Scelle, La Guerre Civile Espagnole II (n 259) 226.
[759] Ibid.
[760] Ibid 270.
[761] Ibid 267.
[762] Scelle, La Carence du Droit (n 222) 639.
[763] Ibid.
[764] Scelle, Droit des Gens (n 213) 247.
[765] Ibid.
[766] Scelle, La Carence du Droit (n 222) 638.

mechanisms in case of 'external aggression,' was 'implicitly tolerating internal war in neither guarantying governments against revolution nor secession.'[767] This blend of primitiveness and progress was the consequence of the lack of convergence between positive law and what Scelle called 'objective law.'[768] As Emmanuelle Jouanet observes, Scelle's concept of objective law makes him a jurist closer to natural law than he would have admitted.[769] For objective law was merely a different iteration of the traditional concept of *lex ferenda* and an expression of the law 'as it should be.' In Scelle's *sociological objectivism*,[770] however, objective law was deemed not polluted by any subjective ideas, biases or preferences that natural lawyers could use as guiding principles. Objective law was instead the scientific translation of the sociological reality of the international society.[771] As a keen observer of social reality and with the scientific authority of sociology, Scelle was able to distinguish between fictions that were legalised by positive law, and sociological facts that positive law failed to consider. Scelle's doctrine is in that regard a symptomatic example of Foucault's remark on a legal discourse that increasingly justified itself via scientific (i.e sociological, psychiatric, medical) knowledge, 'as if the word of law could no longer be authorised … except by a discourse of truth.'[772]

3.2. Sovereignty as Fiction, Federalism as Fact

The main fiction that remained consecrated by positive international law was the 'anti-legal concept of sovereignty.'[773] For Scelle, the state was not an immutable entity, but a mere 'administrative body designed to enable, facilitate and gradually extend individual international relations: family relations, intellectual, civil and commercial relations, etc.'[774] Yet this social reality of the phenomenon of 'internationality' – that is the intensification of international individual relations – remained insufficiently addressed by international law.[775] The international community was not a community of states, but a community of individuals in which the maintenance of the preponderance of states was incongruous.[776] This led Carl

[767] Ibid 639.
[768] As Koskenniemi observes, positive law was for Scelle 'a (more or less successful) translation of the objective laws of social solidarity.' Koskenniemi, Gentle Civilizer (n 13) 331.
[769] Emmanuelle Jouannet, 'Regards sur un siècle de doctrine française du droit international' (2000) A.F.D.I. 1, 17.
[770] For a more detailed account of Scelle's *objectivisme sociologique* see Olivier De Frouville, 'Une Conception Démocratique du Droit International' (2001) Eur.J.Soc.Sc. 101, 116-121.
[771] As Antonio Cassese noted, Scelle's 'large use of methods and concepts drawn from other disciplines,' especially sociology, cannot obviously 'be regarded as a merely scientific choice' but rather as 'a value choice based on dissatisfaction with the status quo.' Cassese, Remarks on Scelle (n 213) 215-216.
[772] Foucault, L'Ordre du Discours (n 56) 21.
[773] Scelle, La Guerre Civile Espagnole (n 254) 269.
[774] Georges Scelle, 'Essai de Systématique du Droit International' (1923) 30 RGDIP 116, 120-121.
[775] Scelle, La Guerre Civile Espagnole II (n 259) 200.
[776] Ibid.

Schmitt to observe that in Scelle's theory, 'the only subject of justice is the human individual [and] everything else is thrown out as unscientific.'[777] The community of individuals that Scelle held as a scientific fact had for corollary a 'continued extension of the phenomenon of intersocial solidarity, which in return implied 'the existence of a *legal and institutional hierarchy* [whose] ideal outcome would be universal federalism.'[778] Interstate solidarity was not eliminated, but rather subordinated to a federal decision instead of a sovereign one. However, this was not an expression of abstract idealism, as sociology was proof that federalism had been 'a constant law in the evolution of human societies.'[779]

Since states were (to be) mere organs whose aim was the coordination of these inter-individual relations within a (would-be) federative system, 'the general norm [would become] that of the legitimacy of intervention, whenever international public order is threatened or affected by the contingencies of the internal or external policy of one of the state constituencies.'[780] Intervention here refers to the competence that any federal authority might have over the different units forming a federation. Far from being political, an intervention would be a simple substitution of the law for politics and the passions that can find their paroxysmal expressions in a civil war. As Koskenniemi observes, in 'Scelle's utopia, the world is ruled by professional corporations: States – and indeed politics – have become extinct.'[781] It is true to the extent that the international public order advocated by Scelle was not anymore understood as a guarantee of the territorial integrity and sovereignty of states, but as a guarantee of individual rights.[782] However, Scelle's imaginary was rather classical and did not venture as far from the state as it might seem. His models of inspiration were federal states like the United-States and Switzerland,[783] and his political thought close to a vulgar form of so-called *Girondism* in which federalism constitutes the political form that best combines 'autonomy' and 'liberty'[784] – unlike the strong and centralised state (allegedly) advocated by *Jacobinism*.[785]

The passage from a national to an international federalism was supposed to bring about a cosmopolitan ethos dwelling from a natural inclination to interindividual solidarity. Scelle

[777] Carl Schmitt, *Writings on War* (Polity 2011) ch *The Turn to the Discriminating Concept of War (1937)* 39.
[778] Scelle, Droit des Gens (n 213) 188.
[779] Ibid.
[780] Scelle, La Guerre Civile Espagnole II (n 259) 200.
[781] Koskenniemi, Gentle Civilizer (n 13) 267.
[782] Scelle, Essai (n 774) 129.
[783] Scelle, La Guerre Civile Espagnole II (n 259) 226.
[784] Scelle, Droit des Gens (n 213) 188.
[785] On the commonplace associating Jacobinism with blind centralisation and Girondism with 'virtuous decentralisation,' which still animates the French political landscape, see Côme Simien, '*Jacobins, jacobinisme* ou les fausses évidences du passé révolutionnaire. Quelques considérations à l'usage d'aujourd'hui (I), Silomag, January 2021 n11.

was convinced that the League of Nations was instrumental in the diffusion of liberal democracy, even if the political realities of the post-war period made 'theoretical' some of the League's principles.[786] In that perspective, the League of Nations merely constituted an imperfect 'general effort of constructive federalism:'[787]

> The Pact of the League of Nations took a first step [in] giving the [League's] Assembly the power to assess the regularity of the investiture of rulers in States applying for admission to the League. The Assembly must ensure that the community in question 'governs itself freely' (art. 1), which obviously implies the constitutionalisation of power and not just its effectiveness. This also implies the existence of parliamentary control and its regular operation, and the sanction should be exclusion from the Society if conditions change once admission has been granted.[788]

It is probable that 'free government' was only deemed attainable through the tools of liberal democracy in Scelle's liberal mind. And even if the League of Nation commitment to liberal democracy was a progress, it was an incomplete one that failed short in consecrating a liberal-democratic global federation.

3.3. From Military Duel to Judicial Duel

A mature international federation was for Scelle a system that should resolve the question of civil war and the apparent aporia stemming from it. Put differently, how to escape the contradiction between the need for public order commanding the prevention and suppression of civil wars and the legitimacy of some civil wars constituting acts of resistance against tyranny or undemocratic rulers? In the global federation that Scelle dreamed of, intervention from supra-state organs and authorities meant evaluating the legality of the *law-preserving violence* of the established government against the legality of the *law-making violence*[789] of insurgent or revolutionary groups. And in both cases, the legality of violence was to be harnessed to a commitment to parliamentary democracy, either in its maintenance against undemocratic revolutionaries, or in its promotion against tyrannic and undemocratic rulers.

Federalism was the best way to do so, for it is the 'inter-social system' where '*administrative* control, *juridical* control and *sanctions* are best organised.'[790] From this perspective, a civil war was to be approached like any other dispute. A civil war was merely the primitive way

[786] Scelle, Droit des Gens (n 213) 119.
[787] Georges Scelle, 'Théorie et Pratique de la Fonction Exécutive en Droit International' (1936) 55 R.C.A.D.I 87, 101.
[788] Scelle, Droit des Gens (n 213) 119. The French version of the Pact best supports Scelle's assertion. The translation 'governs itself freely' is indeed closer to the original 'se gouverne librement' than the English version of the Pact which uses the formulae 'self-governing State, Dominion or Colony.'
[789] Benjamin, Critique of violence (n 269).
York, 1978).
[790] Ibid 219.

of deciding a 'judicial duel' when it comes 'to occupying government competencies.'[791] This means that a civil war, despite its primitiveness, was translatable in two legal claims on which a judicial authority could rule and whose decision would be enforced. The key mechanism would be to control the 'legitimacy of resistance to oppression.'[792] An insurrection that would not be found legitimate in that sense would become the object of a 'jurisdictional condemnation' enforced by an 'effective power of destitution of usurper rulers and annulation of their acts.'[793] In other words, a world police.

The Scellian utopia was inherently interventionist in the sense that a global federation would either entail a 'constant intervention in favour of parliamentarism, or an international control of the legitimacy of revolutionary action.'[794] No one, whether constitutional rulers, revolutionaries or any would-be rulers, was to be immune from administrative and judicial review. Every political aspiration was to be translated into a 'legal debate' resolved by a 'jurisdictional sentence.'[795] Thereby, self-determination could be reduced to a purely judicial question as to whether a group would be legally entitled to secede or gain autonomy. To answer such a question, self-determination claims would be measured against the established government records regarding respect of individual and minority rights, the proper functioning of parliamentary institutions and traditional ideas revolving around the concept of the rule of law. Self-determination was in no way to be understood in an 'abstract and absolute manner' as it would lead to 'anarchy and the crumbling of states into a dusting of small political organisations with no vitality and no future.'[796] Objective law, defined as the sociological truth of the course of history, would therefore not necessarily partake of the understanding that a community might have on its desired political organisation. If liberal democracy were to live up to its promises and function as it should on a global scale, revolution, secession or independence would not only be pointless, but also anti-social.

3.4. International Law and Normality: Schmitt's 'Principle of Legitimacy'

Schmitt was an attentive reader of Scelle and portrayed his work as 'the first completely thought out systematic of the individualistic, liberal-democratic ideology and its application to international law.'[797] If Scelle probably cared little about Schmitt's opinion, he would have agreed to this description. Yet when Schmitt presented the Holy Alliance as an

[791] Scelle, La Guerre Civile Espagnole (n 254) 271.
[792] Ibid.
[793] Ibid.
[794] Scelle, Droit des Gens (n 213) 119.
[795] Scelle, Essai (n 774) 121.
[796] Ibid.
[797]Schmitt, Discriminating Concept of War (n 777) 38.

uncomfortable precedent for the discipline of international law and its new commitment towards the League of Nations,[798] he hardly identified a ground-breaking genealogy since Scelle was not at all embarrassed by such a comparison. In doing so, however, he emphasised the need for a coherent international legal order to be anchored to a 'principle of legitimacy.' And while he went on to develop this idea, he also illustrated how his conception of international law was not different to that of Scelle at a structural level.

The main problem that Schmitt identified in the post-1918 international legal order was the elusive nature of the League of Nations. The organisation 'lacked any constructive idea, any community substance, and therefore also any political congruousness and any identity and continuity in the legal sense.'[799] Was it a genuine federation or a mere alliance whose only aim was to maintain the *status quo* of the Versailles Treaty?[800] For Schmitt, the League was a 'Janus-faced' organisation oscillating between 'imperialism' and 'solidarism' and which left 'voluntarily ambiguous its federal character.'[801] This led him to assert that the Genevan organisation 'could learn from the Holy Alliance that no covenant can exist without a principle of legitimacy.'[802] More in the context of his institutionalism and 'concrete order' thinking than his exceptionalist decisionism,[803] Schmitt warned against an abstract conception of international law:

> International law without a concept of legitimacy is no more than a vulnerable collection of historical precedents, moral formulae, standardised reproductions of treaty content, rules of diplomatic decorum and so on. Any scientific and systematic treatment of international law must take account of unconscious attempts to form a principle of legitimacy.[804]

To explain what a principle of legitimacy is, and what does it mean to (de)legitimise through legal means, Schmitt linked the notion of legitimacy to that of 'normality.'[805] Principles of legitimacy, such as the principles of nationality and the balance of power he used as

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[798] Carl Schmitt, *Deux textes de Carl Schmitt: La question clé de la société des nations, Le passage au concept de guerre discriminatoire* (Pedone 2009) ch *La Question Clé de la Société des Nations* 63-66. This is the French translation of *Die Kernfrage des Völkerbundes (The Core Question of the League of Nations)* published in 1926, which for reason of commodity, and in the absence of an English translation, has been used instead of the German version which was not immediately available. Unlike many other translations, this one has the advantage of being translated by an international lawyer (Robert Kolb).

[799] Carl Schmitt, *Positionen und Begriffe: im Kampf mit Weimar – Genf – Versailles 1923 – 1939* (Duncker & Humblot 2014) ch *Die Siebente Wandlung des Genfer Völkerbundes (1936): Eine völkerrechtliche Folge der Vernichtung Abessiniens* 240.

[800] Schmitt, La question clé (n 798) 32

[801] Ibid 72.

[802] Schmitt, Positionen und Begriffe (n 799) ch *Das Doppelgesicht des Genfer Völkerbundes (1926)* 48.

[803] See in general Mariano Croce & Andrea Salvatore, *Carl Schmitt's Institutional Theory: The Political Power of Normality* (CUP 2022).

[804] Schmitt, La question clé (n 798) 58.

[805] For an application of Schmitt's conception to a field of international law which is generally presented to be immune to considerations of legitimacy, see our attempt to apply it to IHL in Fuhrmann, Légitimités conflictuelles (n 22).

examples, 'aim for a certain state of affairs that they declare to be normatively ideal and, in that sense, normal.'[806] Such principles of legitimacy were understood as 'concrete principles enabling a judgement to be made as to whether an internal or international state of affairs is *normal* and what changes are permissible or necessary.'[807]

It is with this in mind that Schmitt conceived the relevance of the comparison between the League of Nations and the Holy Alliance. According to him, the latter was superior because its diplomats, unlike those of the post-1918 period, 'spoke of legitimacy and guaranteed not a mere fact, a merely actual political situation, but a state of affairs that was considered normal.'[808] The normality that the Holy Alliance tried to uphold was that of the 'monarchic legitimacy' which gave the basis 'to interfere in the constitutional affairs of the European states' and to go as far as to 'grant mandates to some of its members to suppress democratic revolutions.'[809]

For Schmitt, a new principle of legitimacy based on liberal democracy had come to represent a certain zeitgeist, albeit the League of Nations failed to materialise a clear and constant commitment towards it. To be clear, Schmitt was not disappointed by such an outcome and feared the consequences of the League of Nations succeeding in such endeavour. In that respect, an enthusiastic and soon-disappointed advocate of the League like Scelle and an opponent like Schmitt agreed on the League's failure. But the League did not fail in the sense of the Holy Alliance which lost against what Schmitt called the 'international democratic revolution.'[810] It failed at an even earlier stage due to its inability to express in an explicit and constant way what was its *raison d'être*. The main failure of the League was its unassumed federal character, which in return precluded it from explicitly striving for political homogeneity. Due to the coming and going of many members with too different domestic political systems and also too different cultural backgrounds, Schmitt presented the League as a 'hotel' rather than a 'federation'.[811] The Italian invasion and conquest of Ethiopia became the best example of the failure of the League as a federation supposed to provide a 'guarantee of existence on the basis of homogeneity.'[812] The main problem for Schmitt was obviously not the aggression and colonial conquest waged by Italy, but the fact that Ethiopia became a member of the League of Nations in the first place. In accepting Ethiopia in 1923, the League failed to maintain homogeneity amongst its members in terms

[806] Schmitt, La question clé (n 798) 59.
[807] Ibid 35.
[808] Schmitt, Positionen und Begriffe (n 799) ch *Der Status quo und der Friede (1925)* 45.
[809] Schmitt, La question clé (n 798) 63.
[810] Ibid 64.
[811] Schmitt, Die siebente Wandlung des Genfer Völkerbundes (n 799) 239.
[812] Ibid.

of domestic political systems and populations. Schmitt was of course supportive of the Italian justification which emphasised the 'backwardness' and 'uncivilised' nature of Ethiopia which precluded it from being a state and therefore a genuine member of the League of Nations.[813]

Even if he opposed the Italian aggression and recognised that Ethiopia was a League's member, Scelle suggested that its admission had been a mistake.[814] As discussed above, Scelle interpreted the admission process to the League as requiring from the candidate the 'constitutionalisation of power' and the proper functioning of parliamentary institutions instead of mere 'effectiveness' (see section 3.2). Scelle was thus animated by the same civilisational and racist criterion as many other jurists and was, like Schmitt, of the idea that Ethiopia's membership had hurt the liberal-democratic homogeneity that the League was supposed to consecrate. Schmitt was of course interested in liberal-democratic homogeneity only to point out the contradictions of the League of Nations. Yet the theories of Scelle and Schmitt both emphasised the importance of a principle of legitimacy as a mean to evaluate the current international legal order, either to imagine an ideal one or criticise the current one and its evolutions. But the liberal-democratic principle of legitimacy defended by Scelle was far from the one Schmitt was advocating for. He could not share Scelle's view of the state as 'an obsolete [and] virtually medieval matter,'[815] especially if civil war was to be a fundamental question that a coherent system of international law should address.

3.5. The State, The Jus Publicum Europaeum and the 'Liquidation of Civil War'

For Schmitt, the ideal was the historical. Yet Schmitt's histories, especially his history of international law – the co-called *Jus Publicum Europaeum* – are hardly convincing from the standpoint of historical accuracy.[816] This does not mean that every element in Schmitt's narrative of the development of international law is false or irrelevant. However, his history of international law and (civil) war is better off treated as mere jurisprudence than as legal history in its own right. The choice made here is to treat his history of international law, and

[813] Ibid 241; Schmitt, Der Reichsbegriff im Völkerrecht (n 820) 351.
[814] Georges Scelle, 'La Politique Française Extérieure et la SDN' (1935) Année Politique Française et Étrangère 257, 282.
[815] Schmitt, Discriminating Concept of War (n 777) 38.
[816] On the flaws of Schmitt's historical narrative on war, its regulation and international law see Benno Teschke, 'Carl Schmitt's Concepts of War: A Categorical Failure' in Jens Meierhenrich & Oliver Simons (eds) *The Oxford Handbook of Carl Schmitt* (OUP 2013) 367. However, when Teschke opposes that the attempt to humanise and 'codify war as a legal institution…was the distinct achievement' of liberal constitutional states in the 'late nineteenth century' rather than that of absolutist states as supported by Schmitt, he offers a disputable counter-narrative. Indeed, the fact that Tsarist Russia was one of the main actors in the codification of the laws of war from the 1868 St-Petersburg Conference to the 1899 and 1907 Hague Conferences casts doubt in the assertion that attempts to regulate war were mainly the result of 'liberal-constitutional states' efforts.

especially the *Nomos of the Earth*[817], as a normative rather than purely historical intervention. In that sense, there is no difference of purpose between the *Nomos of the Earth* and Scelle's *Précis de Droit des Gens*, for they both propose an ideal international legal order and a counter model against which current international law could be analysed. A true difference was that Scelle's utopia was yet to arrive, whereas Schmitt's one was (allegedly) on the verge of collapse.

It is a difficult task, and maybe an irrelevant one, to determine whether Schmitt believed its histories to be historically accurate. The same can be said of some of his concepts – no matter how heuristic they have proved to be – which might not have always been sociologically or historically serious, especially at the time Schmitt coined them.[818] His nostalgia vis-à-vis a golden past and his lamentation over the disappearance of the legacy of the *jus publicum europaeum* and the state must be equally approached with suspicion. Until at least 1937, he still affirmed that the international law based on the principles of the *jus publicum europaeum* had not yet succumbed to the blows of the new international law championed by Scelle and his coevals.[819] And since Schmitt could not stop extolling the virtues of the *jus publicum europaeum* and the state, even when he tried to nuance such a fascination in order to stay in the good graces of the Nazi apparatus,[820] there is reason to believe that Schmitt's use of history is not different from Scelle's use of sociology. They both resorted to interdisciplinarity to support the legitimacy and desirability of their doctrine of international law. History was thus a resource in which a narration (nearly a gospel) of an almost

[817] Schmitt, Nomos (n 188). As already mentioned, even if the *Nomos of the Earth* was published in 1950, it was written before 1949 and the adoption of the Geneva Conventions, hence the absence of discussion of this fundamental aspect. In his *Theory of the Partisan* published in 1963, Schmitt discussed the Geneva Conventions in detail.

[818] As noted by Benno Teschke, many take 'Schmitt's antiliberal historical counternarrative at face value, applying Schmittian categories of analysis to contemporary affairs without having sufficiently interrogated their intellectual provenances and plausibility.' Teschke, Schmitt's Concepts of War (n 816) 368.

[819] Schmitt, Discriminating Concept of War (n 777) 63. Speaking of the emergence of counter-models opposed to the so-called classical *jus publicum europaeum* in 1937, Schmitt did not believe 'that the demanded and monstruous turn has already occurred in reality.'

[820] Although Schmitt tried to nuance his inter-state vision of international law to accommodate the inter-racial National-Socialist approach, he could not conceive 'to simply turn the existing inter-state order into an inter-ethnic order.' On the contrary, he went on to defend the state as a desirable political unit against Rheinard Höhn and its anti-state theory. Schmitt, Positionen und Begriffe (n 799) ch *Der Reichsbegriff im Völkerrecht (1939)* 351. Although he joined the Nazi party and did everything to become the 'perfect Nazi', Schmitt remained a traditional intellectual which was overtaken by 'his right' by a new generation of more radical lawyers. Despite his blatant anti-Semitism, racism, colonialism and nationalism, Schmitt remained a conservative catholic intellectual whose attachment to the Roman Empire, the Catholic Church and the state precluded him from operating the complete biologisation of politics and law that National-Socialism implied. Johan Chaputot, *Libre d'Obéir: Le Management, du Nazisme à Aujourd'hui* (Gallimard 2020) 80-81; Johan Chapoutot, *La Loi du Sang: Penser et Agir en Nazi* (Gallimard 2014) 145-146, 391-396. However, as noted by Claudio Minca and Rory Rowan, 'even if [Schmitt] did not adopt the crude biological reductionism of the Party line, he was happy to single out the Jews as a separate 'racially alien' group' and wholeheartedly supported 'Nazi's genocidal imperial expansion.' Claudio Minca & Rory Rowan, *On Schmitt and Space* (Routledge 2015) 173.

personified *jus publicum europaeum* was provided, and from which could be extracted a glorious path from which it was dangerous to deviate. In that sense, Schmitt gave 'form, shape, direction, scope, content, character, and meaning to something called "international law" by choosing how to narrate the history of that object.'[821] And if the state and the *jus publicum europaeum* may have been objects of devotion for Schmitt, they were not understood and narrated as transhistorical objects. Their legitimacy was indeed grounded in both a historical moment and a historical process that Schmitt held to be inseparable from the question of civil war.

The first element fits with Schmitt's decisionism and focuses on 'the creational moment when the order is established.'[822] This order is that of 'an entire continent' turned into 'a legal community and a political entity of its own.'[823] This spatial European order made of states was bound together with a common (i.e., European) international law – the *jus publicum europaeum*. What gave the state and the *jus publicum europaeum* their legitimacy, and as such, their desirability, was the initial 'liquidation of civil war.'[824] The state was worthy of praise because, as a political entity, it 'consisted in the overcoming of religious civil wars, which became possible only in the 16th century, and the state achieved this task only by a neutralization.'[825] The Hobbesian claim underpinning this idea is that the 'history of the formation of the European state is a history of the neutralisation of confessional, social and other antagonisms within the state.'[826] In historical terms, Schmitt saw in 'the state of the sixteenth to eighteenth centuries' an institution oriented toward 'the issue [of] overcoming the pluralist chaos of the churches and estates.'[827] Scelle's attack on sovereignty was for this reason emblematic of the 'theoretical literature on the law of the state and international law that attempt[ed] to destroy the concept of sovereignty, and with it the traditional idea of the state as a unity transcending all social groups.'[828] Indeed, in Scelle's theory, it is not the state which establishes the new normality in overcoming civil war, but the jurisdictional act which settles the 'dispute' between the established government and insurgents as regards the allocation of governmental competences. The jurisdictional

[821] Orford, Politics of History (n 58) 256.
[822] Mariano Croce & Marco Goldoni, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Standford University Press 2020) 109.
[823] Croce and Salvatore, Schmitt's Institutional Theory (n 803) 129.
[824] Schmitt, Nomos (n 188) 142.
[825] Ibid 61.
[826] Schmitt, Positionen und Begriffe (n 799) ch *Neutralität und Neutralisierungen (1939)* 312.
[827] Carl Schmitt, 'State Ethics and the Pluralist State (1930)' in Arthur J. Jacobson & Bernhard Schlink (ed), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 300, 306.
[828] Ibid 300-301.

decision 'leads to the *res judicata*, that is, the immutability of the legal situations controlled by the jurisdictional agent' thus giving 'its stability to the legal order.'[829]

As a creational moment, the liquidation of civil war gave rise to a new normality, and with it, a new principle of legitimacy, which was both domestic and international: the maintenance of the pre-eminence of the state as the political organisation par excellence. The attention paid to the origin then required moving towards the question of how such an order was maintained and perpetuated. On the one hand, the state needed to perpetuate itself as a unity in neutralising all the centrifugal forces present on its territory; on the other hand, international law needed to support not only the legal superiority of the state, but its preponderance as the sole legitimate actor of the international legal order. In other words, as far as the liquidation of civil war brought to life a new order, its perpetuation and maintenance required a constant commitment to maintain civil war at bay:

> Thus arose the territorial order of the "state" - spatially self-contained, impermeable, unburdened with the problem of estate, ecclesiastical. and creedal civil wars. It became the representative of a new order in international law, whose spatial structure was determined by and referred to the state. Characteristically and specifically, the state's international law became inter-state law.[830]

International law was understood by Schmitt as an institution whose raison d'être was to guarantee the new normality defined in relation to the question of civil war. Thereby, the concept of war bore by such an institution was central for 'the history of international law is a history of the concept of war.'[831] In Schmitt's narrative, the emergence of the *jus publicum europaeum* had been anchored to a new and 'non-discriminatory concept of war.'[832] As already discussed as regards the exclusion of civil war from the definition of war 'in the legal sense' (see chapter 2, section 1), the concept of war newly established was based on 'the liquidation of civil war and on the bracketing of war' among equal sovereign states:

> War now became a "war in form" … [O]nly by limiting war to conflicts between territorially defined European states, could a conflict between these spatially defined units be conceived of as personae publicae [public persons] living on common European soil and belonging to the same European "family." Thus, it was possible for each side to recognize the other as justi hostes.[833]

International law's commitment to keep civil war at bay manifested itself through the fact that only states had the right to wage war (*jus belli*) and were entitled to the status of

[829] Scelle, Fonction Exécutive (n 787) 95. Scelle used the French expression 'la chose jugée' which is best captured in an anglophone context by the Latin locution used here.
[830] Schmitt, Nomos (n 188) 129.
[831] Schmitt, Discriminating Concept of War (n 777) 31.
[832] Schmitt, Nomos (n 188) 153.
[833] Ibid 142.

belligerent having similar rights, duties, privileges and status (*justi hostes*). Conversely, this monopolisation of war by states meant that 'robbers, pirates, and rebels' were neither to be treated as 'enemies' nor '*justi hostes',* but as 'objects to be rendered harmless and prosecuted as criminals.[834] In consecrating such a concept of war, international law participated in and supported states' efforts to keep civil war at bay. In rejecting civil wars towards the unpolitical sphere of criminality, the new international legal order broke with the medieval doctrines of just war:

> [T]he jurists of public law developed further the doctrines and concepts of the sovereign state. Thus they succeeded in purifying the doctrine of just war from the elements of civil war, insofar as they separated the question of iusta causa belli [the just cause of war] from that of iustus hostis [the just enemy] and restored awareness of the old distinction between enemy and criminal. That was their great achievement and became the core of a new international law: ius publicum Europaeum.[835]

In sailing away from the logic of the just war, which found its extreme incarnation in civil war in which every opponent considers the other to be 'absolutely and unconditionality wrong'[836], the *jus publicum europaeum* operated a 'domestication' of war.[837] The just cause ceased to be the yardstick of any right to wage war, and states were granted such a right on the very basis of the inherent legitimacy associated to their status.[838] On the contrary, whatever just cause a non-state entity might bring forward was no longer relevant: 'A non-public war is a non-state war. Not only was it illegitimate; it was no longer war in the sense of the new international law.'[839] Thereby, the humanisation of war that the *jus publicum europeaum* allegedly brought about was not applicable to civil wars, which unlike interstate wars, were not morally neutral. It does not mean that Schmitt's theory of the emergence and maintenance of the *jus publicum europaeum* is a story that advocates the most ruthless suppression of civil war possible. What it does say, however, is that the exclusion of civil war from the sphere of legitimate violence by international law operated a much-needed distinction: 'a new bracketing of European wars had been successful, because it again had become possible to realize the concept of a justus hostis, and to distinguish the enemy from a traitor and a criminal in international law. The recognized sovereign state also could remain a justus hostis in wars with other sovereign states, and war could be terminated with a peace

[834] Ibid 153.
[835] Carl Schmitt, *Ex Captivitate Salus: Experiences, 1945 - 47* (Telos 2017) 58. If it was first published in German in 1950, this was written, as indicated by the title, between 1945 and 1947.
[836] Ibid 47.
[837] Jean-François Kervégan, *Que Faire de Carl Schmitt?* (Gallimard 2011) 234.
[838] We developed elsewhere the idea that international humanitarian law is a legal regime which is animated by two contradictory concepts of legitimacy, one grounded in the 'legitimacy of the status,' another one grounded in the 'legitimacy of the cause.' Fuhrmann, Légitimités conflictuelles (n 22).
[839] Schmitt, Nomos (n 188) 158.

treaty.' [840] The distinction between external *enemies* and mere internal *criminals* was thus foundational in preventing 'military methods of annihilation.'[841] In Schmitt's *jus publicum europaeum*, the international legal order is 'made of equal sovereigns' who might well be *friends* or *enemies*, but who always remain 'equally legal partners in war.'[842] Annihilation was the realm of civil war, where its 'ghastly' and ruthless nature[843] renders the prospect of humanisation impossible since peace treaty and mutual respect, in the sense of understanding war as a 'duel,'[844] were ruled out as possibilities.

All of this illustrates that international law was neither supposed to be passive nor agnostic towards civil war in Schmitt's theory. On the contrary, the explicit exclusion of civil war from the realm of legitimate violence constituted a clear manifestation of the development of 'a positive jus publicum europaeum that would give [the state] a juridical advantage by stabilizing a favourable status quo.'[845] In presenting his history of international law in these terms, Schmitt tried to offer a narrative highlighting 'that the state should be an entity with no normative rivals.'[846] At the domestic level, it meant that the state was 'the one that establishes what is worth fighting for and thus what conflicts possess a political character' in a situation of 'social pluralism.'[847] As Anne Orford puts it, the state is for Schmitt the institution 'capable of creating the normal situation out of that potential for civil war'[848] that social pluralism harbours. At the international level, however, it meant that its only rivals could be fellow states which were not [claiming to be] more legitimate, just or righteous: there was a distinction between a 'domestically neutralized and pacified civil society [and] an international sphere of interstate rivalries.'[849]

This also illustrates Schmitt's quest for homogeneity in a world he knew was marked by pluralism.[850] The most important aspect of this requirement of homogeneity was, of course, the colonial and civilisational dimension of the *jus publicum europaeum* and the clear demarcation between a European space where war is humanised through common rules, and a colonial space opened to colonial conquest and imperial rivalries where these rules do not apply (this aspect is discussed in more detail in Chapter 5). But within the European spatial

[840] Ibid 148.
[841] Ibid 142.
[842] Ibid.
[843] Schmitt, Ex Captivitate Salus (n 835) 47.
[844] Schmitt, Nomos (n 188) 142.
[845] Ibid 133.
[846] Croce and Goldoni, Legacy of Pluralism (n 822) 119.
[847] Ibid.
[848] Orford, International Authority (n 127) 128.
[849] Teschke, Schmitt's Concepts of War (n 816) 373.
[850] Schmitt, State Ethics (n 827) 300-312.

order, the plurality of states that Schmitt embraced was not a plurality of political forms, for the state form was to be 'the same for all members of the community of international law.'[851] Schmitt's idea of an order with analogous political entities – not analogous political regimes as for Scelle – was not premised on the attainment of peace, but promised limited and humanised wars, in the same way of a 'duel' where 'two honourable men demanding satisfaction stand against one another, even if these two men are perhaps of very different physical strength.'[852] And this was achievable only as long as 'war [remained] a relationship from order to order and not from order to disorder,' for this 'relationship of order to disorder is *civil war*.'[853]

3.6. A Fragile Edifice: International Law and the Civil War Paradigm

The function of international law was to maintain the pre-eminence of the state both in terms of legitimacy and legal superiority. This implied a daily work of legal reproduction whereby international law was mobilised to maintain a status quo favourable to the state. It was certainly not the function of international law in the Schmittian theory 'to negate the state as the highest comprehensive unity [and] its ethical claim to be a different and higher sort of social relation than any of the many other associations in which people live.'[854] Nor would it have been a consistent attitude for international law to hazard into extending rights, duties, privileges or status to other actors than states. For this reason, it was only at the cost of an astute flexibility that the well-established doctrine of recognition of insurgents as belligerents could be incorporated in the *jus publicum europaeum*. But even a great deal of contortion proved the doctrine to be quite resistant to any straightforward integration within Schmitt's international law theory.

At first, the *Nomos of the Earth* seems to accommodate the functionalist and governmentalist character (see Chapter 2, section 2) of the doctrine of belligerency recognition. Vattel, one of the champions who made possible the emergence of the *jus publicum europaeum*, is even praised for his early articulation of the doctrine whereby the inter-state and state-centric structure of international law is preserved. Since this recognition was destined to 'rebels [who] succeeded in establishing their rule over a certain territory and in creating an organization similar to a state,' it remained subsumable in the Schmittian conception of

[851] Carl Schmitt, *Writings on War* (Polity 2011) ch *The Großraum Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law (1939–1941)* 105.
[852] Ibid.
[853] Schmitt, Der Reichsbegriff im Völkerrecht (n 820) 349. Also, Schmitt, Großraum (n 851) 105; Schmitt, Neutralität und Neutralisierungen (n 826) 323.
[854] Schmitt, State Ethics (n 827) 301.

international law.[855] This was reinforced by the fact 'that this recognition of belligerency [was] conceived of as a declaration of neutrality by the recognizing government, whereby this third party would remain impartial with respect to both sides in the civil war, including judgment with respect to justa causa.'[856] The story would have been different if rebels were not organised as a would-be state but would rather consist in organisations like churches, mercantile companies or any entity not motivated by the conquest and exercise of state power.

On closer inspection, however, Schmitt expressed a deep unease with the doctrine. Schmitt could not ignore that the recognition of rebels as belligerents 'meant an extraordinarily significant and fundamental upgrading of their status' whereas 'it meant a downgrading and a serious intervention' for the legal government.[857] The doctrine was in essence constitutive of a transformation of a civil war into a 'non-discriminatory interstate …war' by the will of a third-state materialised through its act of recognition: 'What appeared, both internally and externally, to one side to be rebels, treason, felony, and criminality, and to the other side to be prosecution of crimes, administration of justice, and police action, now became for the recognizing state a *bellum justum*.'[858] The consequence of putting the state and rebels on the same legal footing was that the 'legality and legitimacy of a justa causa, which is most essential to a government endangered by rebels …became as juridically insignificant as the illegality of the criminal rebels.'[859] In other words, the *normal* course of international law, as a work of legal reproduction of a favourable status quo for the state, was troubled. The normal situation, whence the state had the sovereign and undisputed prerogative to identify the internal enemy in order to fulfil its role of conserving the unity and neutralisation within its territory, thus gave way to a scenario in which international law allows rebels to be elevated to the rank of 'normative rivals' of the state.

The neutrality upon which was premised the doctrine, whereby recognising states were supposed to act as neutrals like in interstate wars, was deemed largely fictional and the 'juridical question of recognition of rebels anything but a purely factual or declarative matter.'[860] A recognising state was not a mere neutral, but an interventionist state, which by its recognition of 'the *bellum justum* of the insurgents' would inflict 'a serious injury and injustice to the legal government with respect to all legal questions.'[861] On this assumption,

[855] Schmitt, Nomos (n 188) 167.
[856] Ibid.
[857] Ibid 299.
[858] Ibid.
[859] Ibid 299-300.
[860] Ibid 303.
[861] Ibid.

Schmitt went on to consider that recognising insurgents as belligerents would 'always [be] consistent with intervention' and 'an exception to the recognized interstate procedure.'[862] Put differently, the functionalist and governmentalist twist on the basis of which the doctrine of belligerency recognition found wide support within the discipline of international law was already too much a concession for Schmitt. His scepticism was also seemingly extended to the legal character of the doctrine. Thus, albeit Schmitt spoke of the belligerency recognition as a 'legal institution' which had been 'in force' on several occasions – notably during the Greek (1821) and Italian (1859) wars of independence against the Ottoman Empire and the Austrian Empire respectively –, he was quick to demote the doctrine as a mere 'expression of European Great Power politics vis-à-vis weaker European states.'[863] In such a way, Schmitt was able to relegate the belligerency recognition doctrine either as an anomaly or an occasional and minor adjustment in the spatial organisation of the European order. After all, Schmitt's theory was one in which small states – in the sense of being militarily vulnerable – and weak states – those unable to maintain their monopoly over the political domestically[864] – were more than often mere adjustment variables.

But his critique of the doctrine was far more profound in a situation whereby a 'Great Power' recognition was no longer directed *against* a weak state, but *against* another 'Great Power.' The exception to the 'interstate procedure' seemed to have been acceptable for Schmitt only as long as it remained directed against 'weak states' with none or limited entropic effects on the broader international legal order. This was a different story in case of a civil war involving a powerful state. Schmitt's apparent belittlement of the importance of the Greek and Italian wars of independence thus translated the idea that civil wars taking place in relatively peripheral states had no major potential of disorder for the European order as a whole. What prompted Schmitt to dramatize his approach, however, was the precedent of

[862] Ibid.

[863] Ibid 300. Schmitt mentioned that in 1821 the Ottoman Empire was not yet 'a recognised member of the European order of international law,' albeit European's attitude towards the 'declining' Empire constituted a precedent for its application during civil wars of a more European character.

[864] As a liberal authoritarian, Schmitt developed a conception of the 'strong state' associated to an artificial distinction between the economic and political spheres which was obviously based on a contradiction. As Schmitt made it clear to German business leaders in an infamous speech, he was only concerned about the ability of the state to overcome certain social interests. Neutralising unions or more broadly the working-class was therefore an important endeavour that the state was supposed to undertake. However, Schmitt saw no inconvenient in the capitalist class merging its own interests with that of the state, yet a true decline of the state's monopoly over the political that never prompted Schmitt to voice his concern. See in general Carl Schmitt, 'Carl Schmitt, Strong State and Sound Economy: An Address to Business Leaders (1932)' in Renato Cristi, *Carl Schmitt and Authoritarian Liberalism: Strong State, Free Economy* (University of Wales Press 1998) 212-233. In addition, this attitude contradicts Schmitt's own definition of the political, which according to him, does not have a predetermined substance but only consists in intensity of an association or dissociation of human beings whose motives can be … economic.' Carl Schmitt, *The Concept of the Political* (University of Chicago Press 2007, 1932) 38. On Schmitt and authoritarian liberalism see the precious critique provided by in Hermann Heller, 'Authoritarian Liberalism? – 1933' (2015) 21 ELJ 21, 295.

the recognition of the insurgents as belligerents by the British government during the American Civil War.[865] Arguably, the danger that Schmitt associated with the recognition of insurgents as belligerents gained its full meaning in such a situation where the potential for global disorder was deemed greater. The mobilisation of an interventionist tool such as the recognition of insurgents as belligerents amongst powerful states, like Great Britain in its relationship with the U.S., amplified the far from symbolic consequences of such endeavour:

> Any recognition that a Great Power gives to another state's insurgents intensifies, in a very effective way, the moral, juridical, propagandistic, and military fighting potential of these insurgents, traitors, and saboteurs.[866]

More generally, the problem posed for Schmitt by the doctrine of the recognition of belligerency was emblematic of the way in which he saw the legacy of the *jus publicum europaeum* as strong and durable, yet fragile and vulnerable in face of the permanent threat of a return to the logic of civil war. As already mentioned, Schmitt believed at least until 1937 that the traditional legal design that the *jus publicum europaeum* had embodied resisted what he would later call the 'changing structure of international law.'[867] However, since the late nineteenth century, repeated attempts had been made to weaken the inter-state structure of international law inherited from the *jus publicum europaeum*. And if the doctrine of the recognition of insurgents as belligerents was one early attempt, that is mostly the post-1918 attempts that triggered Schmitt's obsession with the advent of an 'international civil war.'[868]

This notion of international civil war (or world civil war) allowed Schmitt to bring together different legal concepts and developments that, according to him, were all participating in a common effort of transformation of 'the non-discriminatory state war … into an international civil war.'[869] The criminalisation of Germany with the Versailles Treaty – 'the so-called War Guilt Article'[870] –, the principle of self-determination or the outlawry of war were all elements deemed to allow the paradigm of civil to make its return. A new concept of war started to emerge out of these concepts, in which 'the punitive treatment of the enemies' became central.[871] These punitive logics were the quintessence of civil war, a type

[865] Schmitt, Nomos (n 188) 303.
[866] Ibid.
[867] Carl Schmitt, 'The Changing Structure of International Law – 1943' (2016) 20 J.Cultural Research 310.
[868] If the notion became even more central and fashionable during the cold war and in his writing on the concept of *partisan,* the notion was already fundamental during the interwar period. See for instance Schmitt, Positionen und Begriffe (n 799) ch *Völkerrechtliche Neutralität und völkische Totalität (1938)* 296; Schmitt, Discriminating Concept of War (n 777) 31, 44, 48; Schmitt, Structure of International Law (n 867) 322; Schmitt, Ex Captivitate Salus (n 835) 17.
[869] Schmitt, Völkerrechtliche Neutralität und völkische Totalität (n 868).
[870] Carl Schmitt, *Writings on War* (Polity 2011) ch 'The International Crime of the War of Aggression and the Principle "Nullum crimen, nulla poena sine lege" (1945)' 136.
[871] Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International* Law (Polity 2007) 142.

of conflict in which opponents do not belong to the same normative universe, and where they can only be wrongdoers – a conflict in which 'enmity becomes so absolute that even the age-old sacral distinction between enemy and criminal dissolves in the paroxysm of self-righteousness.'[872] The prohibition of war, and more importantly the emergence of the category of war of aggression, had therefore domestic implications which went beyond a mere transformation of 'war into an 'execution' of international law' against aggressors.[873] Associated with the ambient 'individualism' championed by the likes of Scelle and Wehberg, the outlawry of war was rather a tool whose potential for stirring civil wars was alarming:

> This individualism reaches its zenith in claiming that a legal right to resistance is granted to every individual, national citizens included, to resist internal decrees that violate international law. Here, for a moment, the deeper meaning of this new international law becomes visible: that of the metamorphosis of the state war into civil war. Every individual who receives the order to mobilize in a war not allowed by international law should have the right to regard this order as null and, in a totally regulated procedure, demand the annulment of the mobilization order.[874]

The generalisation of the principle of self-determination 'to all collective groups' with an associated right to secession was deemed to result in the same deprivation of the state pre-eminence whereby 'rulers of a state no longer [had] the right to maintain the unity of their state with authority.'[875] In other words, the state was put in concurrence with 'normative rivals' and was no longer immune to being reduced to a mere criminal deserving punishment. The universe of clear distinctions inherited from the *jus publicum europaeum* and which permitted the transmission of a humanised and bracketed concept of war was fading away to the profit of a world in which rebels and 'all collective groups' could be elevated as legitimate subjects of international law, whereas a head of state like the Kaiser could be reduced to a mere criminal.

At the end, Schmitt's civil war became a paradigm and was no longer referring to the material situation of an 'armed combat within an organized unit.'[876] The move from the domestic to the global scale resulted in a metaphorization of civil war whereby it became more of a spectrum than a concrete state of affairs. The concept of global civil war, which would unsurprisingly become fashionable during the cold war and the era of decolonisation, was arguably a paranoiac concept according to which any alleged deviation from the logics

[872] Schmitt, Ex Captivitate Salus (n 835) 48.
[873] Schmitt, Discriminating Concept of War (n 777) 48.
[874] Ibid 44.
[875] Ibid 45.
[876] Schmitt, Concept of the Political (n 864) 32.

inherited from the *jus publicum europaeum* was deemed to bring the international order closer to a global civil war.

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As Schmitt rightly observed, war had 'no place in Scelle's system; within Scelle's type of international law, war has, in the deepest sense of the word, become "inconceivable." For a conflict is either justice – and hence not a war – or injustice, in which case it is a mere crime.'[877] This section has shown that this is far from saying that civil war had no place in the legal discourse produced by Scelle. Like Schmitt, Scelle tried to provide the recipe that would allow international law to conjure the potential for disorder that civil war represents. Both approaches were structured around the idea that international law was to be the guarantor of a given *normality*, however that normality is defined.

What appears to be an additional common thread in both the Scellian and Schmittian theories is the role attributed to international jurists. While the state, federalism or liberal democracy seem to be endowed with almost magical capacities, it is the figure of the international jurist who is the discreet hero of Scelle's and Schmitt's respective narratives. Scelle's jurists – first and foremost himself – are those scientific observers of the social reality who, equipped of their sociological knowledge, are able to translate the objective laws of society into proposals to reform an inadequate positive law.[878] On the other hand, Schmitt's jurists belong to history and are those 'jurists of public law' – Ayala, Hobbes, Pufendorf, Vattel etc – 'who developed further the doctrines and concepts of the sovereign state [and] succeeded in purifying the doctrine of just war from the elements of civil war.'[879] Self-aggrandizement was not absent either, for it was the role of contemporary jurists – especially the one presenting himself as the spiritual brother of Bodin and Hobbes and 'last knowing representative of jus publicum Europaeum[880] – to remain faithful to the jurisprudence of the representants of the *jus publicum europaeum*.

4. Conclusion

Making civil war an international legal object understood as something requiring suppression, if not eradication, was nothing but an evident assumption to make. Or more precisely, it was not an evident idea to formulate within the context of the broader

[877] Schmitt, Discriminating Concept of War (n 777) 48.
[878] Scelle, Droit des Gens (n 213) 188.
[879] Schmitt, Ex Captivitate Salus (n 835) 58.
[880] Ibid 43, 60.

international legal discourse. Decades if not centuries of efforts spent in asserting the separation of municipal law from international law rendered difficult the elaboration of such a legal discourse. The proactive nature of the suppressive act constituted a bold discursive move compared to the discourses analysed in the previous chapters. While Rousseauism confined civil war in a place of international legal irrelevance, governmentalism, humanitarianism and localisation satisfied themselves with a mere accommodation of civil wars through legal means. But as Schmitt made it clear, the strict distinction between the domestic and international spheres was in itself an operation of international law. That is why Schmitt's theory goes beyond Rousseauism in that it is assumed that confining civil war and insurgents to irrelevance, in the sense of depriving them of any legal identity, was in itself a work of legal categorisation.

Through certain elements provided or supported by international law – be it international bureaucracy, federalism, interstate solidarity, individual and collective rights, state sovereignty – it was asserted that providing half-measures or no measure at all was unsustainable in a coherent international legal order. It remains unclear if and how these specific historical manifestations of a discourse of suppression left traces in the contemporary international legal order. The possibility of characterising a civil war as a 'threat to the peace' under the UN Charter,[881] and the uncountable times civil wars made their way to the Security Council, however, indicate that the commitment of the international order to suppress civil wars has taken firm roots within the discipline of international law.

This chapter and the previous one have shown that traditional international legal discourses on civil wars were no longer equipped to keep within their discursive structures the projects that many within the discipline of international law wanted to pursue regarding civil war. In that regard, this chapter has demonstrated that the different manifestations of the discourse of suppression were marked by relative novelty. If a resurgence of a secularised version of legitimism was not a novelty in an absolute sense, it was yet a clear deviation from the dominant legal discourses inherited from the late nineteenth century. Even Carl Schmitt's defence of a conservative if not reactionary vision of the state and the international legal order was innovative in its narration. But while the logics of the late nineteenth century were partially losing their hold on the object of civil war, the situation was more equivocal for the object of colonial war.

[881] UN Charter (n 121) art 39.

CHAPTER 5. COLONIAL WARS AS CIVILISATION: EXCEPTION, CONDITIONAL INCLUSION, AND RACIAL IMAGINERY

This chapter focuses on the dominant international legal discourse regarding colonial wars produced between 1918 and 1949. It posits that colonial wars had not been the object of the same discursive innovations and revaluations that had characterised the question of the relationship between civil wars and international law. Given that civil war was largely perceived as a European, Western or Latin-American experience, the international legal mechanisms of exclusion inherited from the nineteenth century proved more insurmountable in the case of colonial wars. The traditional discourse of civilisation continued to permeate the whole discursive production within the discipline of international law. The dichotomy between civilised and uncivilised communities and polities, in more or less explicit forms, maintained its influence on how were formulated the legal arguments supporting the inclusion or exclusion of colonial wars from the realm of international law. Colonial war was a sharp manifestation of the 'conundrum between exclusion and conditional inclusion' upon which the 'standard of civilisation' was founded.[882]

The more traditional and/or crude legal arguments maintaining colonial wars outside the sphere of international law thus cohabited with more mitigated manifestations of the civilised/uncivilised dichotomy. In both cases, however, the period between 1918 and 1949 did not bring about 'the disappearance of race – and its related concepts of 'civilized'/'uncivilized' – as a term which [was] central to the self-definition of the discipline.'[883] This chapter first focuses on the more traditional exclusionary international legal arguments on the matter, which from racial and crude arguments to formalist ones, reproduced the nineteenth century attitudes vis-à-vis colonial wars. But as became more and more evident with the Protectorate and the Mandate systems, 'racialized hierarchies persist[ed] and [were increasingly] furthered by ostensibly neutral international law and institutions.'[884] The more inclusive aspects of the discourse of civilisation regarding colonial wars kept offering limited prospects of emancipation for the colonised. When the interests and voices of the communities deemed to be on the wrong side of the barrier of civilisation were taken into account, the groups and peoples concerned were still projected onto a normative universe where they were structurally disadvantaged. Eventually, some events saw the more primitive and racial expressions of the discourse of civilisation regarding colonial wars being pushed to their paroxysmal logics. This highlighted the 'elusiveness' of

[882] Tzouvala, Capitalism as Civilisation (n 18) 2.
[883] Makau Mutua and Antony Anghie, 'What Is TWAIL?' (2000) A.S.I.L.Proc. 31, 39.
[884] Ibid.

the colonial war category,[885] which, in the context of international law, and instead of merely referring to a material situation, also constitutes a pattern of legal argumentation in which operates the exclusion of racialised and colonised groups and individuals.

In 1918, and despite growing anticolonial aspirations, the idea of the civilising mission of the West was not unorthodox. Jules Ferry's infamous speech of 1885 stating that 'the superior races ha[d] a right in relation to the inferior races' and 'a duty to civilise' them was not a scandalous artefact of a liquidated past.[886] Kipling's 'White Man's Burden,' after almost two decades, was also of a radical contemporaneity.[887] These ideas even found a paradigmatic translation in the Mandate system of the League of Nations, where the 'white man's burden' and 'duty' to civilise 'less advanced' peoples found an institutional basis. Thereby, the break that constitutes 1918 in the history of international law had induced more continuities than discontinuities regarding the relationship between colonial wars and international law. And despite few interstices that allowed international law to simultaneously be 'the justification and the critique of hegemonic interests,'[888] international law remained a 'discourse of domination and subordination, not resistance and liberation'[889] for the (would-be) colonised involved in or victims of colonial wars.

Given its eurocentrism, no colonial wars captured the imaginary of the discipline of international law as much as conflicts like the Russian or Spanish civil wars did. The affair of colonial warfare was an imperial routine that was neither perceived as a break after 1918 nor as the advent of a new era of conflicts (see Chapter 2). In that context, amongst the unnumerable anti colonial struggles and colonial repressions, some conflicts like the Rif War and the Syrian Revolts constitute symptomatic examples of the mobilisation of the discourse of civilisation. Owing to the involvement of various (institutional) actors and the specific territorial arrangement of Mandatory Syria and Morocco, these conflicts captured more than other conflicts the specificity of the discourse of civilisation during the period that interests this thesis.

[885] Giladi, Colonial War (n 32) 849.
[886] Jules Ferry, 'Les fondements de la politique coloniale (28 juillet 1885)' (Assemblée Nationale) <https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/jules-ferry-28-juillet-1885> accessed 1 April 2025.
[887] Rudyard Kipling, 'The White Man's Burden (1899)' (1998) Peace Review 311.
[888] Martti Koskenniemi, 'Histories of International law: Dealing with Eurocentrism' (2011) 19 Rechtsgeschichte 152, 163.
[889] Mutua, TWAIL (n 883) 31.

1. Colonial Wars in the Legal No Man's Land: Necessity, Race, and Legal Formalism

This section focuses on the persistence after 1918 of the most traditional forms of exclusion of colonial wars and (would-be) colonised people from the realm of international law. Even though international law's relationship with colonialism underwent major changes after WWI,[890] many actors were not yet ready to reconsider the various manifestations of the civilised/uncivilised dichotomy. While the period was marked by an undeniable refining of this 'dynamic of difference,'[891] the tools of exclusion forged during the nineteenth century were still in circulation. In the reeditions of Oppenheim's textbook, it was for instance defended that it was 'discretion, and not International Law, according to which the members of the Family of Nations deal' with non-European polities or people.[892]

While he famously argued for the application of the laws of war in the context of the Great Syrian Revolt against France in 1926, Quincy Wright posed a question that gradually came to the fore with more insistence after 1918: 'Does international law require the application of laws of war to people of a different civilization?'[893] Wright was of the opinion that, at least for the Syrians placed under the French mandate, a positive answer was to be given (see section 2). But the new principle of self-determination and the Wilsonian re-examination of overt colonialism were not enough to shake the confidence that many had placed in the traditional exclusionary function of international law.

Ranging from forms of racial anthropology turned into legal reasoning to seemingly detached formalist arguments, the various expressions of the traditional exclusion of colonial wars infused the whole discipline of international law. International jurists, colonial officials and humanitarians alike participated in keeping alive the idea that colonial war did not belong to the international legal sphere. Whether it was framed as a matter of necessity, discretion or positive international legal obligations, the exclusion of colonised insurgents and revolutionaries from the emancipatory potential of international law remained imbued with the standard of civilisation.

1.1. Self-Determination in the Shadow of Colonialism

The principle of the right to self-determination, as discussed in chapter 1, was received with mixed feelings – even vis-à-vis intra-European nationalist aspirations. In his crusade against

[890] Berman, The Appeals of the Orient (n 11) 197.
[891] Anghie, Imperialism (n 4) 4.
[892] Lassa Oppenheim, *International Law: A Treatise, Vol I Peace* (4th edn edited by Arnold McNair, Longmans, Green and Co. 1929) 42.
[893] Quincy Wright, 'The Bombardment of Damascus' (1926) 20 AJIL 263, 266.

self-determination, the French leading internationalist, Antoine Pillet, saw in the emerging principle the right for colonies 'to break ties with the metropole in defiance of all justice.'[894] Was it the case, he further asked, that 'the colonies have an absolute right to self-determination?'[895] In his typically bitter tone, Pillet affirmed that 'Hindus thought so' and that the emerging international law was 'proving them right.'[896] Such a turn of events, Pillet added, was 'very contrary to our traditions' and heralded 'grave consequences.'[897] In that context, Pillet's traditions probably referred to the standard of civilisation as a foundational feature of international law. And if Pillet was thinking in Eurocentric terms, the more inclusive international law promised by the League of Nations did not necessarily prompt an abandonment of the standard of civilisation in its more exclusionary form. Syed Ameer Ali, an Indian jurist who played a prominent role during the British Raj, well summarized how the standard of civilisation could be internalised by elites from colonial territories traditionally held to belong to the 'uncivilised' or 'semi-civilised' spheres. To the question of 'whether the door [of the League of Nations] should be opened to the Islamic States,' Ameer Ali defended both the civilisational value of Islam and the exclusionary function of the standard of civilisation:

> I submit that a League of Nations without the participation of all the civilised nations of the world would be an absurd idea; it would be no League of Nations. I submit that a League of Nations predicates the conception that all civilised nations who have a past, who have the power of doing good and who have under their charge populations capable of development and civilisation and who are not on the same level as the Papuans or the Negroes, should have an equal place in the Temple of Peace.[898]

Opening the door to 'Islamic states' and then closing it again was a rhetoric that hardly challenged the colonial character of international law. Racial stereotypes against Melanesians and black Africans were still turned into legal arguments aimed to preclude their inclusion in the international law of 'civilised nations.' Jan Smuts, who inspired the League of Nations mandate system, shared the same view. Campaigning for the annexation of the territories of German South West Africa and the German Pacific by the British Dominions of South-Africa, Australia and New-Zealand, Smuts limited the reach of self-determination to European communities and those previously ruled by the Ottoman Empire: 'the German colonies in the Pacific and Africa are inhabited by barbarians, who not only

[894] Pillet, La Guerre et le Droit (n 224) 112.
[895] Ibid.
[896] Ibid.
[897] Ibid
[898] Syed Ameer Ali, 'Islam in the League of Nations' (1919) 5 Transactions of the Grotius Society 126, 135-136.

cannot possibly govern themselves, but to whom it would be impracticable to apply any ideas of political self-determination in the European sense.'[899] This would find a translation in the division of mandates into classes A, B and C in the League of Nations Covenant,[900] largely in line with the imperial agenda of Smut and the British Dominions.

Adding to the confusion, the French internationalist Émile Giraud posited that the right to self-determination and colonialism were not antithetical. There was in fact no risk of violating the right to self-determination in 'extra-European territories inhabited by uncivilised populations [where] the conqueror is not faced with nations and national consciences.'[901] Proving how alive the *terra nullus* doctrine was, Giraud argued that 'states of advanced civilisation will occupy these territories by virtue of an inescapable law which urges them to expand and establish themselves wherever untapped wealth not likely to be exploited by indigenous populations is available to them.'[902] Colonialism was not only an option but a necessity and the condition for the principle of the right to self-determination to flourish. Giraud's colonialism was framed within a 'gentle civilizing'[903] ethos which, unlike Pillet, could easily be associated to vague concessions to the principle of self-determination. In undertaking their *civilising mission*, colonisers would therefore lead many 'malleable' colonised peoples, like in the French colonies of 'Senegal and Congo,' to embrace the cause of the colonial power and become loyal and devoted subjects.[904] In colonies where contacts with more 'civilised' nations was thought to likely lead to the emergence of a genuine national sentiment, as was the case in Egypt, 'the duty of the colonising state was to withdraw' and to grant to 'indigenous people' their right to self-determination.[905] Put differently, the new principle of self-determination would certainly lead to the creation of new independent nations in the colonial world, but there were probably enough 'malleable peoples' to permit empires to thrive.

1.2. Colonial Wars as Necessity, Arbitrariness as Prevention

The necessity of colonialism found another expression in Carl Schmitt's *jus publicum europaeum*. In the guise of detached and nostalgic history, Schmitt remained an apologist of a European-centric and colonial international law. In his lamentation over the plight of the *jus publicum europaeum*, Schmitt saw with a certain bitterness the erosion of the 'distinction

[899] J.C. Smuts, *The League of Nations: a practical suggestion* (Hodder and Stoughton 1918) 15.
[900] Covenant League of Nations (n 167) art 22.
[901] Giraud, Droit des Nationalités (n 229) 42.
[902] Ibid.
[903] Koskenniemi, Gentle Civilizer (n 13) 5.
[904] Giraud, Droit des Nationalités (n 229) 42-43.
[905] Ibid.

between civilized, half-civilized (barbaric), and wild peoples (savages), so significant for traditional European international law.'[906] In fact, this distinction was the very basis of Schmitt's spatialised international law which, according to him, had made it possible to 'humanise' war: the limitation of war on the European soil was consubstantial to the opening of the rest of the world to colonial conquest.[907] Eventually, after the last significant European land grabbing (nomos) – that Schmitt situated during the Berlin Conference – this specific international legal order started to collapse, partly due to the inclusion of non-European states.[908]

Schmitt's colonial sensibility was never half-formulated, and unlike some of his fellow international jurists, was not rooted in civilising justifications. There was no such thing as a 'white man's burden' to educate the uncivilised masses in Schmitt's writings. He was remarkably candid about the necessary character of colonialism and colonial wars in the international legal order: the creation of a colonial 'sphere outside the law and open to the use of force…, [t]he designation of a conflict zone outside Europe,' is what permitted the 'bracketing of European wars.'[909] The successful legal regulation and limitation of interstate wars was thus contingent upon the externalisation of violence towards an *outside* where discretion was the rule, and where the unleashing of unlimited and unconstrained violence was always a possibility. The excess of violence that the European order contained could not therefore be limited simply by moral restraint and had to be poured into the colonial world.

Insofar as international law could simultaneously humanise war in Europe and construct a colonial war free of all legal constraints in the colonial world, Schmitt, in a similar spirit, defended that a democracy 'can exclude part of those governed without ceasing to be a democracy.'[910] Democracies, he explained, left for centuries 'completely or partially without rights' those designated either as 'barbarians, uncivilized…or even slaves.'[911] From a postcolonial and unapologetic vantage point, Schmitt's ideas become what Achille Mbembe has called the two bodies of democracies: the 'solar body' – the pacification of social relations in the domestic sphere – on the one hand, and the 'nocturnal body' – the externalisation of violence in the colonial world – on the other hand.[912] And if 'the colonial

[906] Schmitt, Nomos (n 188) 234.
[907] Ibid 140-141.
[908] Ibid 214-215.
[909] Ibid 97-98.
[910] Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press 1988, 1923) ch *Preface to the Second (1926): On the Contradiction between Parliamentarism and Democracy*, 9-10.
[911] Ibid.
[912] Mbembe, Politiques de l'inimitié (n 53) 29-41.

system and slave system thus represent democracy's bitter sediment,'[913] colonial wars were still thought to stand in a somewhat similar position in international law after 1918.

Transposed to the level of military literature, this conception of the relationship between international law and colonial wars essentially meant that military officers were those who would decide the degree of violence that was to be used against (would-be) colonised people. Symptomatic of this view was the British Manual of Military Law:

> It must be 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 war with uncivilized States and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case.[914]

In concrete terms, all of this does not mean that extreme brutality was necessarily the rule, nor that the worst kind of violence was encouraged. Discretion was to be the currency of colonial wars; drawing inspiration from the laws of war was as much an option as waging war in the more inhuman way. The same universe was also invoked in the first two pages of the U.S. military manual on the *rules of land warfare* when it is repeated three times that the laws of war apply to 'civilized nations.'[915]

However, that extreme brutality was the right course of action was likely to be implied by whatever colonial, racial, or orientalist tropes the civilised/uncivilised dichotomy would echo for those mobilising it. From the relatively euphemising notions of civilised and uncivilised could easily derive amateur anthropological assessments about a given group or people. The most radical – that is overtly racist – example of such discursive practice can certainly be found in Elbidge Colby's infamous article published in the *American Journal of International Law* and titled 'How to Fight Savage Tribes.'[916] It was an answer to Quincy Wright's article which supported the application of the laws of war in the conflicts opposing France and Syrian insurgents in Mandatory Syria. More generally, Colby's scholarship was driven by the ambition to remind 'the publicists of the printed books' that 'we should recognize as international law only whatever is in real life practicable and applicable and useful and reasonable.'[917] And since 'international law [was] largely based on custom' and that 'prevalent custom [was] more likely to evidence the real change than are formal

[913] Ibid 37.
[914] British Manual of Military Law, 1929 (n 202) 272.
[915] War Department, *Basic Field Manual, Volume VII, Military Law: Part Two, Rules of Land Warfare* (United-States Government Printing Office 1934) 1-2.
[916] Elbridge Colby, 'How to Fight Savage Tribes' (1927) 21 AJIL 279.
[917] Elbridge Colby, 'Aerial Law and War Targets' (1925) 19 AJIL 702, 715.

documents', he was, as a Captain and military lawyer, probably more qualified than the likes of Quincy Wright.[918]

Imbued with sufficiency vis-à-vis the legal academia, Colby's article is best described as an anthology of how cultural, racial, colonial, or orientalist prejudices can be turned into legal arguments. In a nutshell, the main idea was that 'uncivilised' people only knew primitive ways of fighting and that distinction between combatants and civilians, as well as sense of restraint, could not be expected in colonial wars.[919] The point was not that people deemed 'uncivilised' would only ignore the laws of war, but that they could not even understand them due to their inherent anthropological or racial inability.[920] 'Against such', Colby concluded, it was 'not only perfectly proper, [but] necessary … to take rigorous measures.'[921] When appropriate, observing 'the decencies of international law' was of course valuable, though mainly because of 'internal necessity for military discipline.'[922] In the absence of any prospect of reciprocity, however, showing too much restraint would inevitably turn to the disadvantage of 'advanced nations of western culture.'[923]

Needless to say that Colby's views on the inability of certain communities to observe and understand the laws of war had no empirical value and never went beyond the stage of assumption. But in 1926, anthropology was still a discipline that had long been associated with European imperialism and colonialism.[924] In an international law where the civilised/non-civilised dichotomy was omnipresent, amateur anthropological assessment could thus quickly become legal arguments. Therefore, one would already be unwise to apply the most basic distinction between civilians and combatants at the core of the laws of war: 'among savages, war includes everyone. There is no distinction between combatants and non-combatants. Whole tribes go on campaign. This is the primitive method of applying armed force.'[925] Put differently, the non-application of the laws of war to colonised or would-be colonised people was, in a sense, a preventive measure made necessary by the 'nature' of the adversary and its alleged way of fighting. In an address to the Grotious Society, Colonel H. de Watteville developed a similar argument regarding the law of occupation: 'The characteristics of the native population must also be held to contribute to the severity or the mildness of the invader's treatment of conquered country. A hardy or primitive society is

[918] Ibid 712.
[919] Colby, Savage Tribes (n 916).
[920] Ibid.
[921] Ibid 286.
[922] Ibid 286-287.
[923] Ibid.
[924] Edward Said, *Culture and Imperialism* (Vintage 1993), 152.
[925] Colby, Savage Tribes (n 916) 281.

more likely to resist the intruding government than an orderly city-bred population. An instinct for pillage may also incite the former people to brigandage.'[926] Some acts, warned H. de Watteville, like the genocide perpetrated by Germany against the Hereros and the Namas, were so cruel that they could unfortunately 'attract the attention of civilisation as a whole.'[927] But true to his principles, he maintained that there was no need 'to diverge into questions involving considerations of humanity as opposed to those of military necessity in savage warfare.'[928]

It would be misleading to think that these kinds of ideas were the prerogative only of rather boorish military jurists. Fully committed to the civilised/uncivilised dichotomy, Winston Churchill indicated in 1919 that he was 'strongly in favour of using poisoned gas against uncivilised tribes.'[929] In the midst of the Rif war in 1925, Spanish King Alfonso XIII displayed a similar fascination for poisonous gas and the same disregard for the application of the laws of war in the colonial context: 'We must reduce Abd el-Krim at all costs …by resorting to the most violent means and without troubling ourselves with vain humanitarian considerations … with the help of the most toxic gas against the tribes at the heart of the Rif.'[930] In other words, some were not ready to let international law interfere with imperial necessities on battlefield and elsewhere.

1.3. From Exception to International Treaties: Excluding through Domestic and International Laws

The mechanisms through which colonial wars were kept outside the realm of international law, Frédéric Mégret notes, consisted in a combination where 'the more formal ideas (absence of treaty ratification) were in fact backed by a certain world vision (the opposition between 'civilization' and 'non-civilization') which was itself rooted in a certain anthropology (the savage as incapable of respecting the laws of war).'[931] But one did not necessarily have to display the crudest racial, colonial or orientalist prejudices in order to reach the same legal conclusion as Colby on the inapplicability of international law and the laws of war during colonial wars. The civilised/non-civilised pairing was already a more euphemistic dichotomy than other oppositions such as, for example, that between 'inferior and superior races.' What this means is that supporting the exclusionary legal effect that the

[926] H. de Watteville, 'The Military Administration of Occupied Territory in Time of War' (1921) 7 Transactions of the Grotius Society 133, 140.
[927] Ibid 142.
[928] Ibid.
[929] Quoted in R. M. Douglas, 'Did Britain Use Chemical Weapons in Mandatory Iraq?' (2009) 81 J.Mod.Hist. 859, 861.
[930] Quoted in Anna Chotzen, 'Beyond Bounds: Morocco's Rif War and the Limits of International Law' (2014) 5 Humanity 33, 42.
[931] Mégret, From savages (n 4) 284.

standard of civilisation was meant to achieve was not contingent upon the diffusion of an explicit and fierce racial imaginary. Whatever worldview was ultimately laying behind the exclusion of colonial wars from international law was often kept half-formulated or unformulated. Euphemism, invocation of domestic law, lack of legal subjectivity or other technicalities that the legal form allowed to mobilise, were amongst the various strategies used to maintain colonial wars at distance from international law.

A good illustration of these discursive practices can be found in the context of the Syrian Revolts against France in Mandatory Syria (1922-1927) and the Rif War (1921-1927) that opposed the Republic of the Rif, led by Muḥammad bin ‘Abd al-Karim al-Khattabi (improperly known as Abd el-Krim), to France and Spain who had both established a protectorate over Morocco. Formally, Syria and Morocco were not colonies, and France and Spain were either a Mandatory power or ‘protector’ states. In the general economy of post-WWI colonialism, these two specific international statuses – the mandate and the protectorate – constituted a manifestation of what Mohammed Bedjaoui has called the ‘alibis and camouflage devices’ that international law has constantly displayed throughout its history.[932] Within this genealogy, the Mandate and the Protectorate embody the negation of their complete or partial colonial nature by means of ostensible concern for the colonised. In the context of these territorial arrangements, discursive manifestations of the standard of civilisation with a glaring colonial flavour were often avoided.

1.3.1. Colonialism without Colonies: Protectorates and Mandates

The Protectorate was a legal device through which colonial powers relied on the fiction that ‘sovereignty was properly located in the native ruler.’[933] The official line, Cait Storr explains, was that ‘[c]olonial protectorates were established by treaty and were therefore logically reliant on the sovereign capacity of Indigenous peoples.’[934] In practice, however, colonial powers ‘assumed almost total external and internal jurisdictional authority, whether explicitly agreed or not.’[935] The aim was to maintain the illusion that a protectorate was not the result of a colonial conquest or a capitulation to a stronger state, but rather a simple devolution of power enshrined in an (unequal) treaty. As Antony Anghie has shown, ‘[t]he distinction between internal and external sovereignty, that protectorates technically established was [nevertheless] porous.’[936] Hypocrisy set aside, the classical definition was

[932] Mohammed Bedjaoui, *Pour un nouvel ordre économique international* (UNESCO 1979) 57.
[933] Anghie, Imperialism (n 4) 88.
[934] Cait Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (CUP 2020) 65.
[935] Ibid.
[936] Anghie, Imperialism (n 4) 87.

that a weaker state, while retaining 'freedom of action to almost any extent' in its internal affairs, would transfer its competences over external affairs to a stronger state.[937] This view was yet gradually abandoned as a vestige of the Law of Nations, a bygone era when protectorates were regulating relations 'between states of the same culture and geographically close.'[938] In the post 1918 period, this compassionate conception of the protectorate – assuming it had ever been undertaken with a genuine concern for a 'weak' state – no longer had any descriptive value. In his 1926 study on international law and territorial acquisition, M.F Lindley candidly explained:

> The protectorates of the older type were usually exercised over a State in an advanced stage of development, and were not in general intended to be a step in the process of absorption. The more modern protectorates have been established over political societies of very varied degrees of advancement, and they have been usually intended or destined to result in the incorporation of the protected region into the dominions of the protecting Power, or, at all events, in an increasing control by that of the internal affairs of the protected country. The sovereignty is to be acquired piecemeal, the external sovereignty first. This is generally patent but the use of the term 'protectorate,' which still is consistent with the retention of a considerable amount of internal sovereignty by the protected ruler, is calculated to render the first step in the process more palatable to the inhabitants of the territory that is being acquired or controlled, and less obnoxious to opponents of colonial expansion in the acquiring State.[939]

Far from being antithetical, modernity and colonialism go hand in hand in Lindley's appraisal of the proliferation of 'modern protectorates': the protectorate is not a deviation from colonialism, merely a more intelligent way of doing it. In the words of a lawyer with less affinities with colonial expansion like Alpheus Henry Snow, the conclusion was similar: 'these "protectorates" were legally nothing more than colonies in which the native organization was temporarily utilized as a mean of administration until the growth of a body of colonists and the development of ways of communication made possible the direct administration of the aborigines by the colonizing State.'[940]

The concern for 'weaker' states that was found in the protectorate regime acquired an even more ostensible expression in the Mandate system of the League of Nations. This was particularly palpable for the class A mandates which included what would become Mandatory Syria:

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[937] M. F. Lindley, *Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans Green and Co 1926) 181-182.
[938] Scelle, Droit des Gens (n 213) 167.
[939] Lindley, Acquisition and Government (n 937) 182.
[940] Alpheus Henry Snow, *The Question of Aborigines in the Law and Practice of Nations* (Putnam and Sons 1919) 87.

> Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory. The wishes of these communities must be a principal consideration in the selection of the Mandatory.[941]

For Georges Scelle, this arrangement was nothing less than a 'public service.'[942] Since colonialism was a natural and immutable process, Scelle also portrayed protectorates as a 'guardianship system' establishing a new relationship of 'solidarity.'[943] Against this backdrop, he was naturally even more enthusiast about the League of Nations' mandates, even though he conceded that class B and C mandates were to a large extent similar to 'direct colonisation.'[944] All this was a matter of degree, however, and Scelle never denied that the mandate system as a whole was also part of the 'colonial phenomenon.'[945] For a lawyer steeped in the French colonial tradition, the mandate system was the true incarnation of the *civilising mission*: 'the aim of the international mandate is to put an end to the abuses of the colonial system: a civilising and humanitarian goal.'[946] In Scelle's world, colonisation was 'a method of administration of backward territories'[947] and was not destined to disappear. He was thus confident that 'the supranational organisation of colonisation' was a logical outcome of 'legal evolution.'[948]

In his 1930 monograph, Quincy Wright presented the mandate system as a compromise which emerged out of the post-war attitudes vis-à-vis the territorial possessions of the defeated empires and which oscillated between 'annexation, internationalization, independence, and restoration.'[949] The mandate system was therefore 'a halfway house between colonization and self-determination.'[950] As the ICJ would later describe it, the mandate system enshrined two fundamental principles: 'the principle of non-annexation and the principle that the well-being and development of … peoples [not yet able to assume a full measure of self-government] form a 'sacred trust of civilization.'[951] While the 'sacred trust of civilisation' encompassed the idea of a progressive 'transference of sovereignty to

[941] Covenant League of Nations (n 167) art 22.
[942] Scelle, Droit des Gens (n 213) 145.
[943] Colonisation as a whole was also depicted as a form of solidarity. Ibid 160.
[944] Ibid 171.
[945] The section on the Mandate System is included in a chapter titled 'The Colonial Phenomenon'. Ibid 169-186.
[946] Ibid 170.
[947] Koskenniemi, Gentle Civilizer (n 13) 334.
[948] Scelle, Droit des Gens (n 213) 185.
[949] Quincy Wright, *Mandates Under the League of Nations* (University of Chicago Press, 1930) 29.
[950] Berman, Alliance and Localization (n 171) 478.
[951] *International Status of South West Africa* (Advisory Opinion) [1950] ICJ Rep 128, 131.

non-European peoples,' it also created 'new systems of subordination and control administered by international institutions.'[952] And such administration was entrusted to colonial powers. As a result, the promise of self-government and independence made to (potential) future independent nations went hand in hand with the promise to maintain colonial structures, particularly economic ones, long after the termination of the mandates.[953]

In is against this backdrop, wherein the sovereignty of colonial powers could not be mobilised as easily as in the metropolitan territory or in 'proper' colonies, that the Syrian Revolts and Rif War took place. Yet sovereignty was not absent, and Mandatory Syria and Morocco were not qualified as *terra nullius*. Sovereignty was in fact formally located in the mandated communities of Syria and in the Moroccan Sultan, but the colonial powers were those who ruled and had authority.

1.3.2. Euphemism and Domestic Law Imaginary in Mandatory Syria

Euphemising colonial violence was a central aspect of colonialism. Colonial repression and conquest were often associated with semantic fields that did not primarily evoke military or warlike images. In the context of France's colonial expansion, it was for instance common to portray military colonial conquests as an enterprise destined to 'assert French presence' in a given territory.[954] When it came to (re)asserting colonial authority, massacres and atrocities were sometimes narrated or ordered using vocabulary that did not indicate such a degree of violence.[955] All it took was a suggestion, and the habitus of colonial officials often transformed seemingly benign words into unspeakable violence. As a consequence, the term *war*, with the legal imaginary that it might easily suggest, was often avoided. The main objective was to use a vocabulary that would confine colonial wars to a subject that would remain the prerogative of the colonial powers concerned. This was interiorised not only by colonial officials, but also by humanitarians who routinely presented colonial conflicts as mere *troubles* or *events*.[956] The temptation to do so was arguably even greater when more serious calls to apply international law to colonial conflicts started to become more pressing after 1918.

[952] Anghie, Imperialism (n 4) 179.
[953] Ibid 192-193.
[954] Sylvain Venayre, *Une guerre au loin: Annam, 1883* (La Découverte 2016) 77.
[955] See for instance J. P. Daughton's article which shows that images of toughness, severity or even 'physical constraint' were enough to suggest high level of violence. J. P. Daughton, 'The "Pacha Affair" Reconsidered: Violence and Colonial Rule in Interwar French Equatorial Africa' (2019) 91 J.Mod.Hist. 493.
[956] Conflicts such as the Syrian revolts or the Indochina War were presented as 'events' or 'troubles' in the International Review of the Red Cross. See for instance Georges Burnier, 'Les secours en Syrie' (1926) IRRC 94, 94; 'Activité du Comité international de la Croix-Rouge en Indochine' (1947) IRRC 813, 813-814.

In a report submitted to the League of Nations in 1926, for instance, France portrayed certain fights against Syrian revolutionaries as 'cleaning' operations and the civilians not accused of supporting the insurgents as the 'sane part of the population.'[957] The invocation of hygienic and medical imaginaries was not only echoing the domestic universe taken in its political or legal sense, but also in the sense of what one can do in its household. From such domestic imaginary easily derived descriptions with evident legal implications. Throughout the many revolts directed against France, Syrian insurgents were thus portrayed by colonial officials as 'bandits'[958] who committed acts of 'rebellion'[959] and 'banditry' deprived of any political character.[960] Bombing villages with aircraft,[961] even Damascus when the Great Syrian Revolt started in 1925,[962] and killing dozens of people in the process, could thus be framed as 'maintenance of order.'[963] No discussion of any kind concerning the application of the laws of war or any rule of international law was necessary. If law were to be brought in the discussion at all, it would be strictly limited to the domestic law domain and criminal law.

One symptomatic example can be found in the decree 'concerning the maintenance of public order and security of the territory' signed in early January 1925 by the new High Commissioner Maurice Sarrail.[964] Months before the Great Syrian Revolt had initiated, a complete state of exception was instituted, giving almost free reign to military and police forces. The legal arsenal that the High Commissioner built for himself was nothing less than the legalisation of arbitrary measures meant to crush any opposition – peaceful or not – to the French rule in Syria. In charge of interpreting the vague of notion of 'breach of the peace' (trouble à l'ordre public), the High Commissioner could virtually exert full authority upon the military and civil branches:[965]

> The High Commissioner may, in the event of grave troubles or if external circumstances make it necessary, invest the military authority over all or part of the territory with all or some of the jurisdictional and police powers normally exercised by the civil authority, and also grant it the exercise of the following powers:
>
> 1- the right to search people's homes day and night.

[957] Centre des archives diplomatiques de Nantes (hereinafter CADN), *Rapport à la SDN sur la situation de la Syrie et du Liban (année 1926)*, Mandat Syrie-Liban/830.
[958] CADN, *Méfaits des Bandits*, Mandat Syrie-Liban/2389.
[959] CADN, *Telegram Délégué to Haut-Commissaire* (21 July 1922), Mandat Syrie-Liban/982.
[960] Ibid, *État du Djebel Druze: Rapport annuel 1926*.
[961] Ibid, *Letter Goudot to Ministère de la Guerre* (July 1922).
[962] Wright, Bombardment of Damascus (n 893).
[963] Letter Goudot to Ministère de la Guerre (n 961); CADN, *Letter Goudot to Ministère de la Guerre* (27 July 1922), Mandat Syrie-Liban/982.
[964] CADN, *Arrêté concernant le maintien de l'ordre public et la sécurité du territoire* (10 January 1925), Mandat Syrie-Liban/830.
[965] The police forces were meant to pass under the command of military authorities. Ibid art 2.

2- the right to remove suspects.
3- the right to order the surrender of weapons and ammunition and to search for and remove them.
4- the right to prohibit publications and meetings deemed likely to incite or maintain disorder.[966]

Combined with permissive rules of engagement left to the discretion of the High Commissioner or the Officers in charge,[967] the decree was totally coherent with large-scale counter-insurgency operations, including the bombardment of Damascus a few months later, which were ultimately framed as 'disorders…successively and rapidly repressed.'[968] Moreover, no indication of any sort could suggest that Syria was anything but another colony within the French empire. Nothing in the decree alludes to a hypothetical safeguard that the League of Nations would place between the mandatory authorities and the would-be independent mandated populations. Even if a Mandate was limited in time, it was still to be governed the colonial way.

1.3.3. Exclusion through Formalism during the Rif War

The colonial practice of projecting colonial affairs into the domestic sphere was not always sufficient and was, in the end, better suited for conflicts taking place in colonies forming an integral part of the colonising state territory. The argument used in the context of civil wars, whereby insurgents were denied legal personality for not representing a sovereign state (see Chapter 1 section 1), was easily replicable in this case. An imperial version of this argument can still be found in a 1922 discussion at the House of Common on the Rif war. While the Spanish forces were trying to recover the territories they had lost in the previous year after having suffered a major military defeat at the Battle of Annual (22 July 1921), the liberal MP Joseph Kenworthy asked the British Government:

> on what grounds the Foreign Office have refused to receive the official delegation from the Government of the Riff now in London, with the purpose of requesting recognition from His Majesty's Government, in view of the fact that the greater part of the Riff has never been under Spanish control and cannot therefore be considered to be in revolt; whether the Spanish Government are negotiating for the purchase of aeroplanes in the United Kingdom for the purpose of extending the present bombing operations against defenceless villages, normal military operations having proved incapable of overcoming the Riff; whether His Majesty's Government can do anything to mediate in this method of warfare; and whether the British representative on the Council of the League of Nations has been instructed to raise this question, with a view to mediation through the League? [969]

[966] Ibid art 3.
[967] Ibid art 5.
[968] League of Nations, Permanent Mandates Commission, Minutes of the 7th session (declaration of Robert de Caix) 81.
[969] HC Deb 4 August 1922, vol 157, col 1885.

In such a brief intervention, Kenworthy alluded to 3 burning issues of great international legal relevance: recognition of non-European states/governments, the application of the laws of war by colonial forces against non-Europeans, and the competence of the League of Nations in colonial affairs. The liberal views of Kenworthy on the imperial question were eventually met with an unequivocal reassertion of the domestic nature of colonial wars. In his response, the Conservative Leader of the House, Austen Chamberlain, did not embarrass himself with the specific status of Morocco and solely recalled that the Rif War was an internal affair of the Spanish Empire:

> The Riff tribes now engaged in fighting Spanish forces in districts which His Majesty's Government have recognised as forming a Spanish sphere of influence in Morocco must be regarded by His Majesty's Government as rebels against a friendly Power, and consequently His Majesty's Government must refuse to recognise or have any dealings with the emissaries of the Riff tribes now in London. I am not aware whether the Spanish Government are now negotiating with private English manufacturers for the purchase of aeroplanes. For the reasons explained in the first part of my answer, His Majesty's Government do not see their way to intervene, either through the League of Nations or otherwise.[970]

In this statement, Spain is considered to be a sovereign while is implied that any steps towards recognising the Government of the Rif would be an unfriendly decision towards another state. Yet, additional legal artifices were often needed in situations where the magic formula of state sovereignty was not seen as the best argument available. An examination of certain legal arguments mobilised during the Rif war offers a helpful reference point to illustrate the more formal manifestations of the standard of civilisation in *informal* colonies.

Although the Rif war did not attract the attention of international law journals,[971] the topic was regularly discussed in France in the *Cahiers des droits de l'Homme*, the official journal of the Human Rights League (Ligue des Droits de l'Homme). With contributors ranging from the far-left to the centre-left holding a variety of views on colonialism, the argument that the Rif war should be excluded from the realm of international law inevitably resurfaced. Stripped to its basics, the exclusion relied on the formalist idea sustained by the Protectorate regime: sovereignty in Morocco was in the hand of the Moroccan Sultan. Georges Scelle, who was consulted regarding the competence of the League of Nations, was quick to explain that 'the Rif, the Riffians, [and] Abd-El-Krim ha[d] no degree of international personality.'[972] Pushing the formalist fiction even further, he added that the Rif war was not even a 'dispute between protectors and protected, but between the Sultan of Morocco, a

[970] Ibid.
[971] Berman, The Appeals of the Orient (n 11) 202.
[972] Georges Scelle, 'Le Maroc et la SDN: Rapport de M. Georges Scelle' (1925) n 21 Les Cahiers des Droits de l'Homme 480, 496.

feudal suzerain, and vassals in state of rebellion or dissidence.'[973] In Scelle's assessment, the very real colonial forces of France and Spain become almost invisible, while the puppet sovereign represented by the Sultan takes centre stage. The formalist fantasy behind Scelle's argument is that the French and Spanish forces functionally represented the sovereign and reasserted his authority. In this setting, not only was the League of Nations incompetent, but there was not even a war in the legal sense of the term.[974]

The standard of civilisation, though unformulated, still informed Scelle's formalism. A decade later, when he would become vocal regarding the Spanish civil war, he adopted a radically different reading. Even if he was a supporter of the Spanish government, as a rigorous positivist he discussed the recognition of the insurgents as belligerents and the application of international law to the Spanish civil war.[975] Recognising a 'state of war' in that context was not categorically rejected nor was an intervention of the League of Nations in 'internal affairs.'[976] Of course, the argumentative pirouette would have been for Scelle to oppose the fact that Morocco was not a member of the League of Nations and that the Rif War could not be reduced to a French or Spanish internal affair to justify the intervention of the organisation. More difficult would have been to justify the absence of discussion on the belligerent status of the Riffian troops. Their high degree of organisation and effective occupation of the Rif, which largely explains their initial military successes, are proof that a legal discussion on the recognition of belligerency was at least necessary for a jurist committed to offer rigorous positivist analyses. If Morocco was sufficiently an international legal subject to conclude treaties of 'protection' with France and Spain, the doctrine of belligerency recognition was probably applicable in its territory as well.

Koskenniemi has rightly observed that 'Scelle had little tolerance for claims of self-determination by colonized people,'[977] which inevitably tainted his positivism. It comes as no surprise that the members of the Human Rights League who shared the same disdain for the self-determination of the Riffians, and who viewed colonialism with benevolence, mobilised the same formalist argument. For Émile Kahn, a member of the League's central committee, and Paul Painlevé, the Prime Minister (April-November 1925) at the head of the *Cartel of the Left*, one of whose speeches had been reproduced, the central issue was that of the 'respect of treaties.' Kahn's intervention was in fact a response to an article of Élie Reynier, the communist president of a local section of the Human Rights League with strong

[973] Ibid.
[974] Ibid.
[975] Scelle, La Guerre Civile Espagnole (n 254) 274-276.
[976] Ibid 274; Scelle, La Guerre Civile Espagnole II (n 259) 198.
[977] Koskenniemi, Gentle Civilizer (n 13) 334. For Scelle's view on self-determination, see Chapter 1.

anticolonial positions. The article was a frontal attack against the official view regarding al-Khattabi that Reynier recalled with irony several times: 'legally, he does not exist.'[978] Pointing out that protectorate treaties were nothing more than 'treaties of oppression, conquest and rapine,' Reynier argued that the Rif War entrenched 'the lie of international treaties': 'the Sultan is a zero, his sovereignty is a fiction and a lie.'[979] As a representant of the colonial fringe of the Socialist Party, Kahn did not take kindly to Reynier's call for a 'trial of colonialism' and what he saw as Bolshevist propaganda.[980] But above all, it was Reynier's disregard for 'international treaties' which was scandalous: 'good or bad' these treaties created a status for Morocco and were 'recognised by all states.'[981]

Anxious to defend his government's action in the Rif and to avoid international scrutiny, Painlevé abstained from frontally rejecting the competence of the League of Nations. The 'basis of the League', he claimed, was 'the respect of treaties.'[982] It would only be bad faith to assume that France, in the Rif, was using the rights acquired through protectorate treaties to 'mistreat a weak population with no means of resistance.'[983] The proof was that France had brought 'civilisation' and pacified regions that had previously been plagued by endemic violence and insecurity.[984] France was pacifying Morocco once again after 'mountain tribes…that had been in constant rebellion for centuries', decided to attack the French zone after having inflicted severe military defeats to the Spanish troops.[985] And although the Riffians were the 'aggressor', France and Spain were generous enough to consider making peace with al-Khattabi and granting the complete autonomy of Riffian's tribes … *within the framework of the existing treaties*, that is in exchange for recognition of the Sultan's authority.'[986] An independent Rif was, however, inconceivable, as it would be nothing more than a constant threat to peace in the Mediterranean and to French's interests in the region.[987]

With its imaginary of 'sphere of influence', the Protectorate constituted an international law mechanism that imperial powers were keen to mobilise. Disregard for the emerging international law of self-determination was thus not equivalent to a disregard for international law tout court. The acquired rights of protectorate treaties were surely opposable and ultimately superior to the new and vague notion of self-determination. During

[978] Élie Reynier, 'Au Maroc: contre la guerre' (1925) n 20 Les Cahiers des Droits de l'Homme 457, 461
[979] Ibid 462.
[980] Émile Kahn, 'Quelques observations' (1925) n 20 Les Cahiers des Droits de l'Homme 457, 467.
[981] Ibid.
[982] Paul Painlevé, 'Pour la paix' (1925) n 20 Les Cahiers des Droits de l'Homme 457, 469.
[983] Ibid.
[984] Ibid 470.
[985] Ibid.
[986] Ibid. Our emphasis.
[987] Ibid.

the French-Spanish negotiations on the peace proposal made to al-Khattabi, the French minister of foreign affairs, Aristide Briand, implicitly summarised this hierarchical relation:

> We have never ceased to recognise the legitimacy of their desire for autonomy, provided that they do not encroach on the rights of civilisation and accept the decisions of international treaties that are perfectly compatible with their aspirations for free administration of their lands and tribes.[988]

In other words, self-determination was acceptable as long as it involved limited aspirations which would not have a decisive impact on imperial structures. As it was made clear by the French ambassador in Spain in 1924, before France got involved in the conflict, a Riffian victory and an independent Rif were unthinkable: 'it would become the refuge of all our enemies, a base of operations against our Morocco, a point of support for the still restless tribes of our colonial empire.'[989] Self-determination, according to this logic, could not be destructive of the old international law and was to be interpreted in the light of the existing legal arrangements which would take precedence. However, that is independence and not autonomy that animated al-Khattabi and those who fought for the Republic of the Rif.

To convince al-Khattabi that self-determination was rather located in limited autonomy than in independence and armed struggle, Briand was ready to make semantic concessions. He felt that writing in black and white in the peace proposal that the autonomy offered to al-Khattabi was conditional on recognition of the 'sovereignty of the Sultan' risked scuppering the negotiations.[990] Unlike the initial draft, Briand preconised the more elusive formula 'within the framework of the existing treaties.'[991] It is unclear whether Briand believed that such an artifice would convince al-Khattabi. The final text was still a reassertion of the Protectorate regime with a simple promise of future negotiations concerning the degree of autonomy of certain territories.[992] It made no difference that the final text was amended according to Briand's suggestion as it was rejected by al-Khattabi. It was arrogant and condescending to imagine in the first place that a semantic trick would potentially make al-Khattabi forget about the hypocrisy of the protectorate and the empty sovereignty of the Sultan. The very act of fighting the French and Spanish 'protectors' implied that self-determination, if it was to be exercised at all by the Riffians, necessitated the liquidation of the protectorate regime.

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[988] CADN, *Telegram Briand to Spanish government* (9 July 1925), Protectorat Maroc/244.
[989] CADN, *Letter Fontenay to Minister of Foreign Affairs* (25 March 1924), Protectorat Maroc/243, 4.
[990] Telegram Briand to Spanish government (n 988).
[991] Ibid.
[992] CADN, *French-Spanish agreement on peace conditions signed 11 July 1925* (13 July 1925), Protectorat Maroc/244. A general amnesty and the release of all prisoners were included as well.

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As illustrated by Reyner's critique, this hypocritical formalism did not go unchallenged in the colonial metropole either. The fact that Reyner was a communist was of course not a coincidence. Amongst the *Conditions of Admission to the Communist International* (the Twenty-one Conditions) was a commitment in favour of the self-determination of people living under colonial domination.[993] This sparked a greater anticolonial activism amongst European communists and communist parties, which in the case of the Rif war, saw the French Communist Party leading 'a direct action campaign against the war.'[994] When the war broke out between France and the Republic of the Rif, the communist MP Jacques Doriot[995] defended al-Khattabi's cause in the parliament and the self-determination of the Riffians: 'I declare, on behalf of my party, that we, who recognise the right to insurrection to Parisian workers, we also recognise to indigenous the right to rise up against colonisers.'[996] Not without contradictions,[997] the communist mobilisation against the war well explains the variety of views on the conflict in *Les Cahiers des Droits de l'Homme*. In a journal where contributors were loosely unified by a common commitment to promote human rights (les droits de l'homme) and almost always situated on the left of the political spectrum, the formalist and colonial legal arguments of Painlevé, Kahn and Scelle thus cohabited with anticolonial and anti-formalist arguments; the contradictions and different views on colonialism between the different parties and sensibilities of the left were replicated at the level of international law.

The historian Henri Sée, one of the founders of the Human Rights League, noted the fallacy of making al-Khattabi recognise the sovereignty of someone who was not an 'independent prince.'[998] France, on the other hand, was 'sovereign' in its allocated area, despite legal appearances to the contrary.[999] For Sée, it was time to put an end to the comedy whereby the Sultan was supposed to exist as the sovereign to the Riffians, whereas in the eyes of the League of Nations, neither the Sultan nor the Riffians existed, and the protectorates of the League's members did not fall within the organisation's remit.[1000] Like Reynier who

[993] Communist International, 'The Twenty-one Points – Conditions of Admission to the Communist International' (Second Cominterm congress 1920) condition 8.
[994] David H. Slavin, 'The French Left and the Rif war, 1924-25: Racism and the Limits of Internationalism' (1991) 26 J.Contemp.Hist. 5, 5.
[995] He would eventually be excluded from the party and become a genuine fascist and one of the leading figures of the French collaboration with Nazism.
[996] Quoted in Gilles Manceron, *Marianne et les colonies: Une introduction à l'histoire coloniale de la France* (La Découverte 2003) 254.
[997] See in general Slavin, The French Left (n 994).
[998] Henri Sée, 'Les fictions diplomatiques' (1925) n 20 Les Cahiers des Droits de l'Homme 457, 468.
[999] Ibid.
[1000] Ibid 469.

promoted a true right to self-determination,[1001] Sée defended the independence of the Rif and further denounced the destructive control exercised by colonial powers in the League of Nations.[1002] For these critics of French imperialism, any commitment to the principle of the right to self-determination would entail a critical assessment of the colonial continuities of the new international legal order. Put differently, a blissful admiration for an international order suddenly turned into something emancipatory with the League of Nations and its new commitment to uphold peace would be nothing short of an imposture.

Genuine anticolonial inclinations could difficultly be based on a platonic engagement with self-determination. The standard of civilisation discourse, on its end, could easily oscillate between explicit and implicit manifestations of the civilisational divide. Due to its versatility, the standard of civilisation was still infusing the international legal discourse enough to allow a wide range of discursive practices aimed at excluding colonial wars from the (perceived) emancipatory avenues of international law. Whether from the perspective of racial dichotomies or domestic and formalist legal arguments, the aim was to keep colonial wars and colonised insurgents and revolutionaries out of the realm of international law. These different legal arguments in turn produced results that often overlapped: lack of legal personality, inapplicability of the laws of war, avoidance of international legal scrutiny, lack of competence of the League of Nations.

This section has shown that these tools of exclusion were structured around opposites which more or less explicitly translated the civilised/uncivilised dichotomy. The most blatant manifestation of the standard of civilisation in colonial wars was certainly the opposition between troops belonging to 'civilised' nations and 'uncivilised' fighters deemed unable to apply the laws of war. But even when communities deemed semi-civilised or uncivilised were not portrayed as racially or anthropologically unable to benefit from the rights, duties and statuses of international law, the rights of the colonisers were still interpreted as trumping those of the colonised: the authority of the treaties versus the right to self-determination of the communities inhabiting protectorates; the authority of the mandatory powers versus the essentially empty sovereignty under tutelage of the mandated populations. However, there was still hope that the colonised could have a voice in the post-1918 international legal order.

[1001] Reynier, Au Maroc (n 978) 462.
[1002] Sée, Les fictions diplomatiques (n 998) 69.

2. From Rejection to Proportionality: Challenging the Civilisational Divide as a Dead-End

This section interrogates to what extent the colonised succeeded in becoming speaking subjects within international law in the context of colonial wars, and how their interests were addressed within the post-1918 international legal order. Put differently, did the creation of the League of Nations and the promises of self-determination weaken the standard of civilisation and lead to a genuine inclusive turn of international law both regarding the voices and interests of the colonised. Through the example of the Rif war and the work of the Permanent Mandate Commission of the League of Nations, it is posited that the discourse of civilisation proved its robustness and had only become more refined.

By focusing on the attempts to internationalise the Rif war through an intervention of the League of Nations and the ICRC, it is first argued that the Riffians and some of their (circumstantial) allies were able and allowed to deploy their own interpretation of international law only to be confronted to a routine of rejection. Fluency in the language of international law, and even in the language of the standard of civilisation, was not enough and only produced new discursive strategies of rejection. In the case of the Mandate system, the ostensible commitment to the well-being of the mandated populations embodied in the 'sacred trust of civilisation' rendered more difficult the dismissal of the demands and complaints of the mandated populations. Mandatory Powers attitude in time of armed repression was scrutinized, and it was expected that vague ideas of necessity, proportionality, and reasonableness would govern military operations aimed at restoring law and order. This prompted Mandatory Powers to narrate their armed repression as perfectly compliant with international law and the work of civilisation; it led to no genuine accountability nor to the development of clear rules or limits to be imposed to mandatory powers. Rather, it permitted the discourse of civilisation to be refined and to lean towards its more inclusive pole, albeit without producing concrete emancipatory effects for the mandated populations.

2.1. Dashing Hopes: the Rif War and the Non-Intervention of the League of Nations and the ICRC

The arguments according to which the Rif war was beyond the purview of international law, or only relevant for it within the framework of the protectorate treaties, were frontally attacked by the Republic of the Rif and al-Khattabi. In 1922, the Riffian leader published an open letter 'To the Civilised Nations' asking them to live up to their proclaimed standards:

> It is now high time that Europe, who, in this twentieth century claims that she stands to uphold the standard of civilisation and to uplift humanity, should carry this noble

> principle from the domain of precept into that of practice and should stand up in defence of the aggrieved against the aggressor, and for the vindication against the strong, of the rights of the weak.[1003]

In what follows, al-Khattabi went on to describe the very uncivilised way in which Spain was fulfilling the mission it had 'been entrusted by Europe' to undertake as regards the 'reformation and civilisation in [the Rif].'[1004] But instead of rejecting the standards proclaimed by Europe – the 'Rif does not object to modern civilisation' the text emphasised – al-Khattabi feigned naiveté while exposing the hypocrisy behind Europe's claim to embody civilisation:

> [S]imply because they go by the name of Europeans, [the Spanish] claim to be civilised, while as a matter of fact, far from being reformers or protectors, they are only blind conquerors…Is it any racial or national prejudice that makes [Europe] close the doors of her political circles against those who are suffering from the Spaniards?[1005]

This was of course rhetorical, and al-Khattabi was probably not trying to convince imperial powers that they had weaponized the concept of civilisation for too long. In highlighting the hypocrisy of a concept of civilisation erecting 'unsurpassable barriers against non-Western communities acquiring equal rights and obligations under international law,'[1006] he at least managed to attract the sympathy of certain anticolonial, humanitarian and pacifist circles.

The anti-imperial tone of al-Khattabi's open letter was therefore deployed within the canons of the discourse of civilisation. While the Rif wished to be independent, it was at the same time keen to ensure 'mutual commercial relations with Europe' and establish a 'local government … to protect her own rights and those of foreigners.'[1007] Al-Khattabi did not oppose the European state model and rather echoed some aspects of the definition of sovereignty that Max Huber would develop a few years later in the context of the Island of Palmas case[1008]. Similarly, in July 1923, the Republic of the Rif published its 'Declaration of State and Proclamation to all Nations.' In this document, the Riffian government did not claim unconditional inclusion within the international community. Instead, it posited that the Republic of the Rif met all the criteria necessary to be part of the club of 'civilised states.'

[1003] League of Nations' Archives [Hereinafter LoN Archives], *To the Civilised Nations* (1922) R591/11/23217/12861.
[1004] Ibid.
[1005] Ibid.
[1006] Tzouvala, Capitalism as Civilisation (n 18) 2.
[1007] Al-Khattabi, To the Civilised Nations (n 1003). In a telegram sent to the League by the 'Riff Delegation', it was also emphasised that the Riffian government was 'the only stable government that can guarantee the rights of foreigners in the whole district.' LoN Archives, *Telegram Riff Delegation to The Secretary General of the League of Nations* (6 September 1922) R591/11/23217/12861.
[1008] Al-Khattabi, To the Civilised Nations (n 1003).

Alluding to the effective control of the territory of the Rif by the Riffians that followed major military victories against Spain, the text argued in favour of the recognition of the Riffian government:

> The Riff has always led an independent life and has possessed since the 10th June, 1920, a modern Republic Government, with which Spain has treated as equal to equal (e.g., the affair of the prisoners of war, 1921) … The Republic of the Rif wants to institute the rule of the open door to all industrial and commercial foreigners, even of Spanish nationality, who wish to come to work in the country without war like intent… She asks all countries to establish Consular and Diplomatic Services at Ajdir, Capital of the Riff, where the foreign representatives will find all facilities to exercise their duties.[1009]

The Riffian government gave guarantees to the West that it was willing to create a modern state based on the European model and that it was ready to undertake capitalist transformation. Al-Khattabi showed a good understanding of the logic of conditional inclusion that permeated the whole discourse of civilisation and cleverly anchored the Rif's claim for independence to it. It was a plea which, for various individuals and groups, convincingly lifted or attenuated the obstacles precluding the involvement of international actors like the League of Nations and the ICRC in the Rif war. But if civilisation was indeed about capitalism and modernisation following western precepts,[1010] it was also about race and the preservation of colonial structures.

2.1.1. The League of Nations as a 'Bureaucracy of Rejection': Taking 'Civilisation' Seriously

The Rif War 'showed the new expectations which the League of Nations had helped to inspire …in the 1920s.'[1011] This prompted many groups and individuals from all around the world to directly request the League to intervene in the Rif War. Motivated by various and sometime overlapping considerations like anticolonial, pacificist, pan-Islamic, or humanitarian concerns, these actors believed that the League had a decisive part to play in the war. The Genevan organisation was seen as the embodiment of a new international legal order whose new leitmotiv was, or at least should be, a combination of self-determination, peace, and humanitarianism – thus opening new avenues for contesting imperial rule and imperial brutality. Yet the League's answer to these requests of intervention reproduced the

[1009] Lon Archives, *Government of the Riff Republic: Declaration of State and Proclamation to all Nations* (1 July 1923) R591/11/30635/12861. This already appeared in a letter sent to the League of Nations which emphasised the Riffian government wish to guarantee and promote international trade and to protect foreigners. Lon Archives, *Letter Government of the Republic of the Rif to the Council of the League of Nations* (6 September 1922) R591/11/23217/12861.
[1010] Tzouvala, Capitalism as Civilisation (n 18).
[1011] Pablo La Porte, ''Rien à ajouter'*:* The League of Nations and the Rif War (1921-1926)' (2011) 41 European History Quarterly 66, 70.

'bureaucracy of rejection'[1012] that the colonised were regularly confronted with whenever they asked anything of their colonial rulers. The League's dismissal therefore perpetuated the pre-1918 'imperial indifference'[1013] of the international legal discourse regarding colonial wars. But it also shows how some anticolonial activists and advocates of the colonised discursively invested the new international institution and proposed their own interpretation of international law and the new international legal order.

Of the many letters and telegrams sent to the League regarding the Rif war, almost all of them explicitly requested the organisation to get involved. Some individuals encouraged the League to promote negotiations between the parties and to work towards an 'armistice' and a settlement of the conflicts to which all parties should abide.[1014] A certain M. Hawtein even suggested an innovative solution showing some sort of knowledge of the international legal landscape:

> I take the liberty of suggesting … that article 17 of the Covenant of the League of Nations should be applied to Spain and Morocco; that the International Police Force proposed by the Act of Algeciras for the occupation of Tangier should be recruited by the Council of the League, and should be charged with the duty of supervising Red Cross work in Morocco, also the trade in Arms and Ammunition and seeing that the Moors have just treatment under the tutelage of a Mandatory acting on behalf of the League of Nations.[1015]

In mentioning Article 17, the author of the letter referred to disputes between members and non-members of the League over which its jurisdiction could be exercised at the invitation of the Council.[1016] In a mix of humanitarianism, pacificism and civilising mission, he imagined a legal hybridisation between the provisions of the Act of Algeciras on the mixed police in the international zone of Tangier and the role of the League of Nations in the maintenance of peace and management of non-self-governing territories.

The League's secretariat also received several addresses emanating from the *Khilafat Movement*, a pan-Islamic as well as nationalist Indian movement.[1017] The League was not only asked to intervene, but it was also urged not to betray its proclaimed commitment to

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[1012] See Julia Stephens, 'A Bureaucracy of Rejection: Petitioning and the impoverished paternalism of the British-Indian Raj' (2019) 53 Mod.Asian Stud. 177. For a mobilisation of the idea of 'bureaucracy of rejection' in the context of Algeria see Emmanuel Blanchard, *Des colonisés ingouvernables: Adresses d'Algériens aux autorités françaises (Akbou, Paris, 1919-1940)* (Presses de Science Po 2024) 117.
[1013] Stephens, A Bureaucracy of Rejection (n 1012).
[1014] LoN Archives, *Letter Jermain Chandler to Secretary General League of Nations* (6 November 1925) R591/11/41612/12861; *Letter Alfred Kennion to Secretary General League of Nations* (7 October 1925); *Telegram Association Argentine to President Assembly League of Nations* (14 September 1925).
[1015] LoN Archives, *Letter M. Hawtein to League of Nations Office* (26 August 1921) R591/11/15316/12861.
[1016] Covenant League of Nations (n 167) art 17.
[1017] See M. Naeem. Qureshi, 'The Indian Khilafat Movement (1918-1924)' (1978) 12 J.Asian Hist. 152.

uphold civilisation. The Central Khilafat Committee thus asked the League whether it 'intended to be [a] combination of powers of Christian Europe to divide eastern lands or [the] guardian of liberty and protector [of] small nations.'[1018] A commitment to the latter, the telegram concluded, would require the League to put an end to the French-Spanish 'unrighteous aggression' in the Rif and to 'halt these enemies of international peace and human freedom.'[1019] A similar view was defended by a certain Maubi Abduljabbar, who saw in a potential intervention of the League in favour of the Riffian's 'struggle for independence' a justification of the 'existence [of the League] as protector' of the weak.[1020] One of the leaders of the Khilafat Movement, Shaukat Ali, further expressed his disappointment vis-à-vis 'the surprising non-interference' of the League which was nothing less than an 'acquiescence' of the French-Spanish's usurpation of the Rif 'independence.'[1021] Failure or unwillingness to act on the League's part, Shaukat Ali warned, would ultimately convince Indian Muslims of the 'hollowness [of] high sounding principles [of] liberty [and] self-determination preached by European Nations.'[1022] Put differently, rather than denying that international law and civilisation were intertwined, these authors called upon the League to live up to the standards that commanded its creation. Civilisation could not continue to be the magic formulae aimed at perpetuating and euphemising an imperial international legal order. They required the inclusion of the Rif within the community of nations and for the Republic of the Rif to be considered as an autonomous subject of international law enjoying its rights, duties, status, and privileges.

These letters were duly read and processed by the Political Section of the League and its director Paul Mantoux. But rather than being a new receptacle for the voices of the colonised and their allies bypassing traditional imperial channels of communication, the League's bureaucracy reproduced what was common within empires. As shown by Emmanuel Blanchard in the context of Algeria, colonial authorities often responded to petitions, addresses, or demands with 'dilatory answers.'[1023] The aim was to avoid responding to the claims of the colonised on the merits and to 'multiply declarations of jurisdictional incompetence'; at the same time, no indication and support were given regarding the adequate procedure for routing the addresses to the competent authority.[1024]

[1018] LoN Archives, *Telegram Central Khilafa Committee to President League of Nations* (26 September 1925) R591/11/41612/12861.
[1019] Ibid.
[1020] Ibid, *Telegram Maubi Abduljabbar to League of Nations* (26 September 1925).
[1021] Ibid, *Telegram Shaukat Ali to President League of Nations* (18 September 1925).
[1022] Ibid.
[1023] Blanchard, Des colonisés ingouvernables (n 1012) 117, 149, 288.
[1024] Ibid 149.

The League of Nations proceeded in a somewhat similar manner when requested to intervene in the Rif War. These demands always met the implacable rules of procedure of the Genevan organisation that Mantoux politely explained in his answers: 'the question is outside the League's competence,' 'the matter … could not be dealt with unless put forward by a recognised Government.'[1025] The ready-made answer that Mantoux often used to not engage with the substance of the requests explained:

> The provisions of the Covenant concerning the settlement of disputes apply solely to disputes between States, the status of which has been generally recognised. They may be either Members or non-Members of the League. At the same time, any question concerning the maintenance of peace, or the good relations between nations, can only be brought to the notice of the Assembly, or of the Council, of the League of Nations through the initiative and on the responsibility of one of the States Members of the League.[1026]

At first glance, the answer seems to be educative and not merely dismissive. However, this was a quite liberal simplification of the rules of procedures of the Assembly and the Council of the League. They both provided that the League's Secretary-General, 'with the approval of the President of the Council,' was in charge of establishing the agenda of the sessions.[1027] One member of the Political Section thus noted that Mantoux's answer went 'further in definiteness than the … rules of procedure' which provided that 'a question [could] be put on the agenda of the Council on the authority of the Secretary-General after consulting the President of the Council.'[1028] More anxious with distorting the rules of procedure than with silencing those who had placed their hopes in the League, he suggested to merely acknowledge the demands to avoid providing partially false justifications.[1029] Paul Mantoux and the director of the Legal Section disagreed and preferred indicating that the hands of the League of Nations were completely tied.[1030] In face of increasing demands, the Council of the League finally adopted a similar restrictive attitude and reasserted that demands or petitions were to be addressed to member states directly.[1031]

In the end, it was not enough for the Riffians and their advocates to formulate their demands within the structures of the discourse of civilisation. Even if most of them showed a mastery of the canons of the discourse of civilisation, they faced institutional resistance. Arguing about self-determination, recognition, or criteria of statehood in a convincing way was

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[1025] Ibid.
[1026] LoN Archives, *Commentaires. Minutes* (1925) R591/11/41612/12861.
[1027] League of Nations, *Rules of Procedure of the Assembly* (LoN 1923) rule 4.
[1028] LoN Archives, *Political Section: Notes Captain Walters* (16 May 1924) R591/11/35911/12861.
[1029] Ibid.
[1030] Ibid; Ibid, *Letter Director Legal Section Dr van Hamel to Captain Walters* (27 May 1924).
[1031] *Transmission of Documents received from international Associations* (10 October 1923) League of Nations Official Journal Vol 5 (1924) 329. .

insufficient to overcome imperial necessities. The League's answer, on its end, was once again ostensibly rooted in formalist and procedural arguments which did not allude to the civilised/uncivilised dichotomy in any explicit way. The result was nevertheless to oppose the interests of the colonised with insurmountable barriers precluding their full inclusion within the club of 'civilised nations.'

2.1.2. Colonial Humanitarianism: The Return to Belligerents

The difficulty to make the Rif War a subject worthy of international legal concern had repercussions in the humanitarian sphere as well. The ICRC is for instance well known for having failed to secure an intervention during the conflict. Despite timid projects or protests and requests received from various humanitarian organisations and Red Cross national societies – either regarding medical aid, assistance to prisoners or complaints about the use of asphyxiating gas by Spain[1032] – the Committee remained apathic.[1033] That is not to say that the ICRC was against intervening: it was rather too late and too little.[1034] In stark contrast with the activism of the Committee in the midst of the Russian Civil War, this attitude was largely explained by the fact that many humanitarians, more than the ICRC itself, were still committed to the exclusionary dimension of the discourse of civilisation. Therefore, the move from belligerents to victims that had discursively marked the Red Cross turn to civil wars in 1921 (see chapter 2) never really happened in the context of the Rif War. Georges Lodygensky, the architect of the Red Cross turn to civil war, was keen to only expand the application of the 'humanitarian principles' of the laws of war to armed conflicts taking place in 'civilised states.'[1035] The fate of the victims of the Rif War was still largely contingent upon a system based on the belligerent quality of the parties to the conflict. In addition, the lack of requests for intervention from the Spanish and French Red Cross societies, combined with the absence of Riffian organisation, constituted an obstacle to the application of the resolution on civil war adopted in 1921 (see chapter 2).

Due to the role accorded to national societies in the 1921 resolution on civil war, the Spanish Red Cross was the primary correspondent of the ICRC. As a consequence, the Spanish Red

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[1032] ACICR, *Letter British Red Crescent Society to ICRC's President* (10 January 1925) CR138/59; ACICR, *Letter (copy) Near and Middle East Association* (12 December 1924) CR138; ACICR, *ICRC Aide-Mémoire sur la Question du Maroc* (3 May 1926) CR138/194. In this last document the Committee indicated that Dutch and Swedish Red Cross societies as well as the Turkish Red Crescent requested an intervention.

[1033] On the (in)action of the Committee see for instance Pablo La Porte, 'Humanitarian assistance during the Rif War (Morocco, 1921–6): the International Committee of the Red Cross and 'an unfortunate affair'' (2016) 89 Historical Research 114; Chotzen, Beyond Bounds (n 930); Pascal Daudin, 'The Rif War: A forgotten war?' (2023) IRRC 914.

[1034] Daudin, The Rif War (n 1033) 932.

[1035] BCICR, 'Procès-verbaux de la commission spéciale des délégués' in *Dixième Conférence internationale de la Croix-Rouge tenue à Genève du 30 au 7 avril 1921 : compte rendu* (1921) 66.

Cross was instrumental in the production of an authoritative narrative on the Rif war. Unsurprisingly, the rhetoric of the so-called humanitarian entity mimicked that of the Spanish government: the Riffians were denied the quality of belligerents and were presented as rebels within the framework of 'the international treaties' on the status of Morocco.[1036] Although Spain suffered crushing military defeats, the war in the Rif was once again qualified as a 'police operation.'[1037] There was no mention whatsoever in the various statements of the Spanish Red Cross which indicated that the laws of war were applied or applicable, nor that any inspiration were drawn from them. Even elusive mentions to humanitarian aid were formulated in a discriminatory way: 'The Spanish government is entrusted by an international mandate… to bring the benefit of civilisation to the North of Morocco and is ready to provide the possible assistance and care to *all Riffians in a legal situation vis-à-vis their government*.'[1038] This statement could not be further removed from the dominant humanitarian discourse on civil war that emerged after 1918 and which posited the transcendental application of the humanitarian principles of the laws of war (see chapter 2).

On the more humanitarian side of humanitarianism, the advocates of an ICRC mission in the Rif were not all united around a common rejection of the exclusionary dimension of the discourse of civilisation. The British Red Crescent Society, for instance, condemned the use of poisoned gas by Spain – the Spanish Red Cross denied, on behalf of its government, such use when asked by the ICRC[1039] – and defended the 'universal application' of their prohibition: '[A]lthough Spain was not a party to the Treaty [of] Washington, the principle of humanity embodied in it, is, we conceive, of universal application.'[1040] The British Red Crescent was perfectly in line with the humanitarian discourse on civil war that was developed within the Red community whose logics was extended to the context of a colonial war. The example of the Near and Middle East Association offers a more ambiguous case of humanitarian advocacy in favour of the Riffians. While the organisation pressed for sending medical aid to the Riffians, it also displayed the common colonial trope of opposing the civilised way of war of the West as opposed to the alleged primitive way of fighting of colonised communities:

[1036] ACICR, *Letter Spanish Red Cross to ICRC's Vice-President* (1 August 1924) CR138/4; ACICR, *Letter Spanish Red Cross to ICRC's General Delegate (R. Schlemmer)* (10 November 1924) CR138; ACICR, *Letter Spanish Red Cross to ICRC's General Delegate (R. Schlemmer)* (27 January 1925) CR138/59.
[1037] As reported in ACICR, *Letter ICRC General Delegate Schlemmer to Dr Fay* (6 August 1925) CR138/103.
[1038] Our emphasis. Spanish Red Cross to ICRC's Delegate (R. Schlemmer) (10 November 1924) (n 1036).
[1039] ACICR, *Letter Spanish Red Cross to ICRC's General Delegate (R. Schlemmer)* (14 February 1925) CR138/69.
[1040] British Red Crescent Society to ICRC's President (10 January 1925) (n 1032).

> The Spaniards … are not making extensive use of asphyxiating gas nor it is their habit to bomb women and children. The shelling of villages is inevitable in the existing military situation as no distinction is possible between the fighting army and the civil population.[1041]

In the same way military lawyers excused the non-application of the principle of distinction as a preventive measure (see section 1), the Near and Middle East Association justified past and future Spanish atrocities against the Riffian civilians. In other words, Riffians needed medicines and medical aid not because of the Spanish violence, but due to their backwardness.

The involvement of France in the conflict did not alter the narrative deployed by the Spanish Red Cross. The French government repeated to the ICRC that 'Abd El Krim [was] not a belligerent' and that this state of affair, combined with other strategic considerations, made France unwilling to authorise an ICRC mission.[1042] Some in the ICRC made genuine efforts to convince the colonial powers to adopt a more liberal position. Raymond Schlemmer, who was appointed 'to monitor the situation in the Rif',[1043] tried for instance to convince the Spanish authorities, in the perspective of applying the 1921 resolution on civil war, that the Rif was a case similar to the 'troubles' in Upper-Silesia where the ICRC intervened.[1044] Beyond his genuine efforts and retrospective bitterness regarding the ICRC non-intervention,[1045] Schlemmer nevertheless accepted as convincing the Spanish justifications for refusing an intervention. As the ICRC's general delegate on the question of the Rif, he considered as 'very good reasons' the arguments that Spanish Red Cross mobilised:

i- The ICRC could intervene internationally only at the request of Spanish mandatory authorities.
ii- The ICRC could intervene extra-nationally under the pretext of civil war only at the request of the parties: the Maghzen [the Sultan of Morocco] or Abd-el-Krim, who asked for nothing.
iii- It would be a political fault …to give the impression that the rebels are a national entity.[1046]

The ICRC never tried to counter some of these claims, especially those that denied the possibility for the Riffians to attain the status of belligerent or *de facto* government. This situation created a conundrum where the ICRC kept repeating that they had been waiting for

[1041] Near and Middle East Association (12 December 1924) (n 1032).
[1042] ACICR, *Letter French General Consulate of Geneva to ICRC's President* (26 October 1925) CR138.
[1043] La Porte, Humanitarian assistance (n 1033) 123.
[1044] ACICR, *Schlemmer's report on journey in Spain* (10 November 1924) CR138/36.
[1045] ACICR, *Schlemmer's notes* (date unknown, probably late 1926) CR138.
[1046] ACICR, *Letter Schlemmer to L.B Golden, President of Save the Children Fund* (22 November 1924) CR138/35.

one of the belligerents to request an intervention,[1047] whereas it was at the same time implicitly accepted that one party to the conflict could not achieve this quality. When al-Khattabi finally requested such intervention through the Swedish Red Cross in the final stage of the war in 1926, the ICRC saw in it an action hindering its diplomatic efforts.[1048] Al-Khattabi's request sparked a violent reaction from the French Red Cross,[1049] which explains why the ICRC deemed the Riffian initiative 'untimely.'[1050]

In the end, the French Red Cross opposed any intervention on the basis of the 1921 resolution, because the situation in the Rif was not a 'civil war' between 'inhabitants of diverse provinces of Morocco.'[1051] It was a combat between 'the two protector powers of the Sharifian Empire'[1052] and an undefined entity. Neither an international war nor a civil war, the conflict in the Rif was a colonial war in the deepest sense of the term: a situation where the full force of the law is applied only to exclude the colonised.

2.2. Civilisation and Armed Repression in Mandated Territories

Unlike the Rif War, the conflicts that broke out in mandated territories had an intrinsic international legal relevance and could not be disregarded by the League of Nations. Arnulf Becker Lorca well explains that:

> Arguing that armed repression in a protectorate was beyond the competence of international law, was probably a plausible though conservative argument to make in the interwar period, but arguing that armed repression in a mandate was beyond the competence of international law, was unsustainable. For the mandate system was not just a regime established by the League, but a regime in which the mandatory power acted 'in behalf of the League', and in which the League retained wide powers to advise, cooperate, censure and supervise the mandate.[1053]

This time, protests and petitions had not the only effect of pointing out the uncivilised way of administrating and fighting of Westerners. Mandatory powers were also forced by the Permanent Commission of Mandates (PMC) to justify their repressive measures. The administration of the mandated territories and the methods employed by Mandatory powers were scrutinised, discussed, and eventually criticised. There was no question, however, that colonial military repression remained a prerogative of mandatory powers. And if the PMC arguably failed to protect mandated populations form the harshness of armed repression, it

[1047] ACICR, *Letter ICRC's Vice-President Boissier to Turkish Red Crescent's Vice-President Akil Moukhtar* (14 February 1925) CR138/70; *Letter ICRC General Delegate Schlemmer to Dr Fay* (6 August 1925) (n 1037).
[1048] ICRC Aide-Mémoire sur la Question du Maroc (3 May 1926) (n 1032).
[1049] ACICR, *Letter French Red Cross' President to ICRC's President Ador* (17 May 1926) CR138/167.
[1050] ICRC Aide-Mémoire sur la Question du Maroc (3 May 1926) (n 1032).
[1051] French Red Cross' President to ICRC's President Ador (17 May 1926) (n 1049).
[1052] Ibid.
[1053] Becker Lorca, Mestizo International Law (n 723) 292.

made sure that Mandatory powers would justify and frame their military tactics as a compatible manifestation of the 'sacred trust of civilisation.'

Two situations brought before the PMC illustrated this new monitoring of colonial policies. The first one was the so-called Bondelswarts rebellion (1922) in the South West Africa mandate (Namibia), the second one the Great Syrian Revolt (1925-1927) in mandatory Syria. In both cases, South-Africa and France were suspected to have used disproportionate violence. In addition to several protests emanating from various organisations,[1054] it is the intervention of the representative of Haiti, Louis-Dantès Bellegarde, that prompted the PMC to discuss the Bondelswarts affair: 'Although there was no act of rebellion and no attempts against life, an expedition was undertaken with all the materials of modern warfare…The natives who were practically unarmed were massacred…in the name of the League of Nations and under its protection is an abominable outrage which we cannot suffer.'[1055] Even more outrage came out regarding the French repression of the Great Syrian Revolt that started in the Jabal Druze, which eventually prompted the PMC to hold an extraordinary session in Rome on the matter (16 February to 6 March 1926).[1056] It is probably the bombing of Damascus which convinced many in the West that France might have gone too far, although 'this was due less to disgust at the needless killing of Syrian civilians than to outrage that the resident community of diplomats had not been warned to evacuate the city prior to its bombardment.'[1057]

2.2.1. The Bondelswarts Affair: Aeroplanes and Maintenance of Law and Order

As the representative of one of the few black independent states, Bellegarde brought to the global stage an affair that would have probably escaped the attention and interest of other member-states. This international pressure pushed the South-African government to appoint a 'Special Commission' to investigate the matter.[1058] The report of the Commission submitted to the South African parliament was eventually discussed at the 3rd session of the PMC held in 1923, 'set[ting] up a precedent regarding supervision of mandate rule by the PMC when the mandatory power had been embroiled in the violent repression of native populations.'[1059]

[1054] For instance, LoN archives, *Letter Anti-Slavery and Aborigines Protection Society to League of Nations* (23 July 1923) R10/1/25963/1347. For more correspondence, see the whole dossier.
[1055] LoN archives, *Records of the Third Assembly, Vol I* (1922) 76.
[1056] For instance, LoN archives, *Telegram Sixth Palestine-Arab Congress to League of Nations* (20 May 1926) R28/1/51551/4284.
[1057] Daniel Neep, *Occupying Syria under the French Mandate: Insurgency, Space and State Formation* (CUP 2014) 37.
[1058] Records of the Third Assembly (n 1055) 39.
[1059] Becker Lorca, Mestizo International Law (n 723) 256.

Without denying the right of South-Africa to suppress a rebellion (if one accepts that it was a rebellion and not a punitive expedition), the Commission of inquiry recognised that the mandatory authorities might have lacked tact in its administration. The enforcement of new policies and laws upon a native community living in dire poverty – especially a high tax on hunting dogs – was seen as one of the causes that led to the military confrontation.[1060] The conclusions of the inquiry, however, were not supported by the three members of the commission. Both the majority (Alex W. Robert and C.T. Loram) and the minority (General Lemmer) adopted a rhetoric rooted in the idea of white supremacy. While they assumed that 'much of the sad plight of the Natives [was] due to their ignorance,' Robert and Loram considered that various elements were out of their control; as a 'sacred trust to the Mandatory State', the 'whole native problem' thus required more than mere brutality.[1061] They were especially unconvinced that the necessity to restore order commanded the bombing of the Bondelswarts with aeroplanes. The commission concluded that aerial force should have been used as a tool of persuasion before being eventually used to suppress the rebellion:

> [S]ome warning should have been given to the Bondelzwarts…of the intention of the Administration to use aeroplanes, and should have been accompanied by a formal demand for surrender. Such a warning would have enabled a separation in the fighting men from the women and children to be effectively made, and might have brought about the surrender of the Native forces.[1062]

Although no explicit reference to the laws of war was made, the Commission indicated that the distinction between combatants and civilians, as well as the need to only use the amount of force which is necessary to defeat the enemy, were applicable to mandatory authorities in the context of armed repression. On the side of the minority, Lemmer was of the opinion that the method used to repress the Bondelswarts had not been excessive.[1063] As a matter of civilisational evaluation, Lemmer portrayed the Bondelswarts as a backward population anthropologically incapable to meet the European standards of progress, whereas Robert and Loran, despite showing similar prejudices, advocated for a less repressive approach.[1064]

The discussions at the PMC followed a somewhat similar line of development. Two members of the PMC (M. van Rees and Sir Frederick Lugard) had been mandated to draw a

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[1060] LoN archives, *Commission appointed to enquire into the Rebellion of the Bondelzwarts* (1923) R10/1/28258/1347, 30.
[1061] Ibid 30-33.
[1062] Ibid 32
[1063] Ibid
[1064] Lemmer archetypically described the Bondelswarts as 'an unreliable labourer … probably worth only the small wages he earns…temperamentally lazy and lacking the stimuli to improve their position.' Although Robert and Loram agreed that the Bondelswarts made 'no attempts at advancement,' they thought that South-Africa had the duty to provide educational, industrial and agricultural 'instruction' to avoid a further regression. Ibid 30, 32.

list of question, one of them framing the question of the armed repression within the boundaries of the principle of military necessity:

> If a revolt occurred, it was evident that the re-establishment of order demanded a suppression of that revolt in the common interest. If, however, that suppression was carried out in a manner as harsh as it appeared in the case under discussion, the government could only escape responsibility if it were clearly proved that measures of suppression of a less drastic nature were impossible, either from a military point of view, or from the point of view of its internal policy.[1065]

The South-African representative rejected on behalf of his government the findings of the majority of the Commission of enquiry and defended the manner in which was carried out the armed repression against the Bondelswarts.[1066] When asked by one of the members of the PMC whether aeroplanes were used 'with a view to intimidating the natives rather than actually in order to bomb them,' Major Herbst, who had been appointed by Jan Smuts to be auditioned, confirmed that the objective was 'to bomb them and induce surrender' to avoid a potential 'guerrilla warfare.'[1067] Using the example of the British Mandate in Mesopotamia (Iraq), he further argued that aerial force was a 'legitimate weapon' to maintain order in Mandated Territories in face of the economic cost of keeping infantry forces over vast territories.[1068]

In the report submitted to the Council of the League of Nations, the majority of the members of the PMC reasserted that it was within the competences of the Mandatory Power to suppress unrest and to 'prevent the spread of disaffection' through military means.[1069] Although it was suggested during the discussions that 'the repression…had been carried out with excessive severity,'[1070] the report did not venture to assess whether the armed repression was 'conducted with needless severity or not.'[1071] More as a potential guideline for future operations in Mandated territories than as a critic of South-Africa's actions, the report acknowledged that the PMC discussed the idea of a 'preliminary demonstration of the destructive power of aeroplane bombs' as an alternative to their actual use.[1072] Even if the report pointed out several deficiencies in the administration of the Mandated territory, the conclusions did not establish clear limits regarding the use of force of the Mandatory Powers. For one member of the PMC, whose view was highlighted in the final report, the

[1065] LoN archives, *Minutes 3rd session Permanent Mandate Commission* (1923) R43/1/29735/16466, 68.
[1066] Ibid 113-114.
[1067] Ibid 117.
[1068] Ibid 123.
[1069] LoN Archives, *PMC: Report on the Bondelswarts Rebellion* (14 August 1923) R10/1/30247/1347, 5.
[1070] Minutes 3rd session PMC (n 1065) 136.
[1071] PMC: Report on the Bondelswarts Rebellion (n 1069) 5
[1072] Ibid.

Bondelswarts affair was all in all a banal situation: 'rebellion and its suppression are unfortunately not uncommon incidents of colonial administration.'[1073] The Bondelswarts, the argument goes, made 'themselves outlaws' which in turn commanded a legitimate suppression; there was no proof that the repression was carried out with 'excessive and needless severity;' even if the Bondelswarts had 'reasons for discontent,' their rebellion was unjustifiable.[1074]

A more critical stance was eventually taken by the Chairman of the PMC (1921-1937), Alberto Theodoli.[1075] In his statement annexed to the report, he stressed that the 'sacred trust of civilisation' required putting the 'interests of the natives' before those of the 'whites.'[1076] South-Africa, he argued, was primarily 'concerned with maintaining its own authority in defence of the interests of the [white] minority' and pursued 'a policy of force rather than of persuasion.'[1077] This was not compatible with the spirit of the Mandate system which Theodoli strongly disassociated from that of the colonial system.[1078] Furthering the interests of the 'colonists' at the expanse of the 'natives' had to make way to 'an administrative practice calculated to lessen the racial prejudice.'[1079] In response, the South African representative defended the idea that armed repression, even with bomber aircrafts, was the way civilisation was supposed to be instilled in populations deemed backward:

> [T]he maintenance of law and order is an essential preliminary to the inculcation of the principles of civilisation…To persons who have had no experience in dealing with the barbarian races of the world, it may seem unnecessary to establish and maintain law and order. Those, however, who have such experience know that these principles are essential to any success in the uplifting of the native races. Unless law and order be established and maintained, the presence of the white man himself in these countries is impossible, and the outbreak among these unfortunate people and their rebellion afford an illustration of the revolt, perhaps natural revolt, of the barbarian against the imposition of restrictions which interfere with the wildlife to which he has been accustomed… For upwards of two centuries the South African people have been brought into close contact with the native races, and it is only just to claim for them that they have not shirked the white man's burden.[1080]

Put differently, the Mandatory Power pitted the civilising violence of armed repression against the natural inclination of the mandated populations to an almost animal-like,

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[1073] Ibid 3.
[1074] Ibid.
[1075] For an overview of the ambivalent attitude of Theodoli at the PMC and its role in the promotion of the imperial agenda of fascist Italy see Elisabetta Tollardo, 'International Experts or Fascist Envoys? Alberto Theodoli and Pietro Stoppani at the League of Nations' (2017) New Global Studies 283, 288-298.
[1076] PMC: Report on the Bondelswarts Rebellion (n 1069) 7.
[1077] Ibid.
[1078] Ibid
[1079] Ibid
[1080] LoN archives, *PMC: Comments of the accredited representative of the Union of South-Africa on the Commission's report on the Bondelzwarts Rebellion* (23 August 1923) C.550.1923.VI.

purposeless violence. This was no punitive violence – this was within the province of the bad and liquidated German colonialism in the region – but educational violence, a true manifestation of the 'sacred trust of civilisation.'

2.2.2. The Great Syrian Revolt: Civilisation, Reasonableness and Proportionality

The Great Syrian Revolt and the bombardment of Damascus were not international legal events only because of the involvement of the PMC. Unlike most colonial wars, it also saw one of the leading international law journals, the American Journal of International Law, publishing an article of Quincy Wright on the conflict. In the article, Wright sided with the arguments supported by many Syrians according to which the laws of war were applicable in the conflict opposing France and the insurgents, and that such laws prohibited 'the bombardment of undefended towns.'[1081] Many considerations motivated Wright's argument, none of them being a total rejection of the fact that the Syrians were 'less advanced' than the French.[1082] Wright's argument was mostly justified by the ambivalence pertaining to the classical ways of excluding colonised people, namely the absence of treaty ratification and the 'civilized/uncivilized dichotomy': Mandatory Syria was a class A mandate whose population was deemed to have 'reached a stage of development where their existence as independent nations can be provisionally recognized'; in addition, Syria had previously been part of the Ottoman Empire, which was a party to the relevant treaties.[1083]

This combination weakened Wright's confidence in the merits of excluding (certain) colonised people from the laws of war on the only basis of belonging to 'a different civilisation.'[1084] Since the revolt in Syria reached the level of a 'war in the material sense,' Wright did not see anything precluding the application of the laws of war to the insurrection in Syria as to any other instances of civil war.[1085] Unlike Scelle who was only ready to discuss the issue of belligerency recognition in Europe, Wright did not see why it would be impossible to recognise a state of civil war in the context of a mandated territory. And even if France was willing to qualify the situation as 'mob violence, brigandage or banditry, it would appear that the burning of villages and bombardment of Damascus was in excess of any police requirements.'[1086] At minima, Wright's article translated a growing idea that if

[1081] Wright, Bombardment of Damascus (n 893) 265.
[1082] Ibid 263.
[1083] Ibid 268, 270.
[1084] Ibid 267
[1085] Ibid 270-275.
[1086] Ibid 270.

not the laws of war, it was at least expected that some sort of civilising self-control and proportionate repression should govern the administration of mandated territories.

This idea of proportionality, which was already present in the treatment of the Bondelswarts affair, would become central in the analysis of the French armed repression. The French government maintained for the whole duration of the Great Syrian Revolt that they did not have to give justifications to the League of Nations regarding the necessity of the 'attacks and bombardments of villages.'[1087] However, France deployed a justificatory narrative which, stripped to its basics, can be found in a letter from the French Commandant of the Levant's troops to the French High-Commissioner for the Mandate for Syria and the Lebanon reproducing a report sent to the PMC: 'Savagely attacked, our troops have only sought to maintain order by means consistent with international law.'[1088]

In its various reports and 'inquiries' sent to the PMC for the 1926 extraordinary session and for subsequent sessions, the French authorities denied that atrocities had been committed.[1089] When some excesses were recognised, they were either attributed to 'Senegalese elements'[1090] and Armenian auxiliaries,[1091] or minimised as minor molestations not requiring medical examination.[1092] And even when it was half-heartedly admitted that overzealous French officials had, with good intentions, created discontent amongst the mandated population, most of the petitions and critics addressing the excesses of the French repression were met by a demonstration of indignation.[1093] In a report submitted to the PMC in 1927, the French administration kept presenting itself as the victim of calumnious accusations: 'the more scrupulous commandment, the more committed to observe the international laws of war and the principles of humanity could not expect an equitable judgment' from 'extremist and xenophobic Syrian circles.'[1094] In the end, France adjoined to its detailed denial of the accusations of atrocities a similarly detailed account of the countless atrocities it attributed to the Syrian insurgents.[1095] According to the French narrative, the Great Syrian Revolt was

[1087] CADN, *Letter Minister of Foreign Affairs to High-Commissioner in Beirut* (2 April 1926) Mandat Syrie-Liban/2390.
[1088] CADN, *Letter General Gamelin to High-Commissioner* (May 1926) Mandat Syrie-Liban/2389.
[1089] LoN archives, *Rapport d'Enquête du Colonel Reynal, en retraite, chargé de mission sur les faits dénoncées à la Société des Nations* (1926) R28/1/55043/4284, 39-40.
[1090] Ibid.
[1091] LoN archives, *Report of General Gamelin: Les accusations portées contre le commandement français* (1926) R28/1/55043/4284, 18. Gamelin for instance suggested that some atrocities attributed to Armenian auxiliaries derived from the 'tendency of all indigenous to act through reprisals.' But the reprisals were, he argued, a reaction to initial atrocities committed by Syrian insurgents.
[1092] Report Reynal (n 1089) 40.
[1093] Gamelin to High-Commissioner (n 1088). Gamelin used formulae like 'dare we believe' or 'can we admit' before precising mentioning many accusations made against France.
[1094] Rapport à la SDN sur l'année 1926 (n 957) 48.
[1095] LoN archives, *Bureau du Haut-Commissariat : Les crimes commis par les insurgés* (1926) R28/1/55043/4284.

indeed a story of atrocities: one in which the mandatory Power was a scrupulous follower of the laws of war and capable of restraint in face of the savagery of the insurgents.

The PMC members generally agreed to the idea that the causes of the Great Syrian Revolt were partly to be found in the administration of the too zealous Captain Carbillet in the Jabal Druze. The French representative, Robert de Caix, explained that Carbillet's desire 'to make too rapid progress' in the Jabal Druze 'had possibly given rise to discontent.'[1096] Caix further framed the role of the Mandatory Powers as one implying to make a choice 'between a policy of progress, which was contrary to the views of certain persons, and the policy of stagnation, which was contrary to the ideas of Europeans and the feeling of responsibility which they necessarily had in a country like Syria.' [1097] In a typical association of France with progress, Caix implicitly excused Carbillet's excesses by an almost natural French impulse to be on the side of progress. In face of Caix's argument vis-à-vis the difficulty of finding a middle course between progress and stagnation, one of the most influential members of PMC, the Swiss William Rappard, summarised the general attitude of the PMC towards the administration of mandated territories: '[t]he policy which the [PMC] ought to recommend was neither revolutionary nor one of immobility, but a progressive educational policy.'[1098]

The discourse produced within the PMC demonstrates a certain anxiety about a potential devaluation of the concept of civilisation. Many members of the PMC were especially suspicious of methods of administration which could weaken the legitimacy of Western states to educate 'less advanced' populations for lack of tact. The same applied to the question of armed repression. Once again, the members of the PMC unambiguously reasserted that the Mandatory Powers not only had the right, but also the duty to supress unrest. Theodoli, the Chairman of the PMC, recalled 'that repression must always be severe in the case of a rebellion.'[1099] Another member, Alfredo Augusto Freire de Andrade, joined Theodoli in confirming that it was 'the duty of the mandatory Power to suppress this rebellion as quickly as possible.'[1100] But both agreed that it was the role of the PMC to determine whether the French repression was excessive.[1101]

[1096] LoN archives, *Minutes 8th session (extraordinary) Permanent Mandate Commission* (1926) R27/1/49667/4284, 126.
[1097] Ibid.
[1098] Ibid 130.
[1099] Ibid 147.
[1100] Ibid 148.
[1101] Ibid 147-148.

Caix agreed to such framing and ultimately presented the repression of the revolts as 'a question of proportion.'[1102] From the Bondelswarts affair to the Syrian revolts, Becker Lorca notes, the PMC deployed 'an incipient test of proportionality and reasonableness … to assess the mandatory power's responsibility' regarding armed repression.[1103] But rather than effectively protecting mandated populations, the mechanisms of self-evaluation of the PMC merely drove mandatory powers to refine their rhetoric and to frame their most brutal operations as reasonable and proportional. Bombing insurgents, villages, or densely populated urban areas with aeroplanes was again presented as lawful and legitimate, not only as a method of warfare, but first and foremost as a legitimate and lawful method for maintaining law and order. Caix, in a typical imperial rhetoric, relativised the use of aerial bombardment by recalling the PMC how unexceptional and routine had this method become amongst imperial powers.[1104] But more importantly, this 'was not a particularly barbarous method of repression, as the people could almost always hear the aeroplanes coming and had time to take shelter; further, the bomb-throwing was extremely inaccurate.'[1105] For this very reason, the bombardment of villages, with the implicit disregard for the principle of distinction it implies, was deemed reasonable when the civilians allegedly 'consented to receive' or 'collaborated' with insurgents.[1106] In the modern language of IHL, Caix defended the idea that the presumption of civilian status[1107] in cases of doubt was irrelevant: '[i]t must not be believed, in fact, that the villages were always the victims of the bands.'[1108]

Becker Lorca has pointed out that the Bondelswarts affair and the Syrian uprisings led to a discursive move from civilisation to proportionality.[1109] This evolution, he contends, did not bring about a more advantageous legal landscape for the mandated populations: 'making use of relatively indeterminate standards, powerful actors were left with ample room for choosing between multiple potential outcomes.'[1110] But it might be the case that the move from civilisation to proportionality was not a move at all. It rather followed a circular trajectory in which the measurement of reasonableness and proportionality remained contingent upon a civilisational assessment. This is through this lens that the efforts made by France to systematically portray the Druzes – the Great Syrian Revolt started in the Jabal Druze – and all Syrian insurgents as barbaric must be read. In a report submitted to the PMC,

[1102] Ibid 131.
[1103] Becker Lorca, Mestizo International Law (n 723) 302.
[1104] 8th session PMC (n 1096) 148.
[1105] Ibid.
[1106] Ibid.
[1107] See articles 50 and 52 of AP1 (n 25).
[1108] 8th session PMC (n 1096) 148.
[1109] Becker Lorca, Mestizo International Law (n 723) 299-304.
[1110] Ibid 302.

the Druses were presented as having a long history of rebellion and an almost cultural inclination to wage war in an inhumane way. Through the example of past rebellions against the Ottomans, the report claimed that the 'Druze method did not change since then': 'merciless warfare, finishing off the wounded [and] mutilating corpses' was the Druze's way of war.[1111] And because of the 'Rebels' attitude,' the Ottomans had been forced to resort to more violent means of repressions.[1112]

Of course, the French repression was presented as incomparable to that of the Ottomans.[1113] An equivalence between both would have gone against the very idea of placing the former territories of the Ottoman Empire under the tutelage of mandatory powers. Insofar as the 'psychology of the Druze race' explained the harshness of the Ottoman's repression, France, on its end, succeeded in keeping 'the attitude of a civilised nation … proud of its reputation of humanity.'[1114] The argument, however, rapidly slid from the 'psychology of the Druze race' to a general description of all Rebels. Druzes or not, they were all 'animated by the same thinking: 'any uninjured or wounded man falling into their hands [was to be] immediately stabbed and bludgeoned.'[1115] Comparatively, the French methods of repression that could seem disproportionate for some Westerners was meant to appear more humane and less barbaric than the methods allegedly used by the insurgents. In the end, aerial bombardments and destructions of villages were not proportional methods in themselves. They were proportional in comparison to the barbarity of the insurgents, and adequate means of repression to pacify inherently violent populations. In that case, proportionality was subordinated to a preliminary assessment of the nature of the colonised and their supposed way of fighting, which, influenced by cultural, racial and orientalist prejudices, justified an extensive reading of ideas like proportionality and reasonableness.

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In the end, violence and armed repression were not meant to disappear from the repertoire of civilisation. But what did it mean to bombard Damascus, villages, civilians and native communities in the name of civilisation? The discourse produced in the context of the PMC was a manifestation of a progressive shift from 'punitive' to 'civilising' violence.'[1116] Far from being illegitimate, armed repression had a central role to play in the 'inculcation of the

[1111] Report Gamelin (n 1091) 2.
[1112] Ibid 3.
[1113] Ibid.
[1114] Gamelin to High-Commissioner (n 1088).
[1115] Report Gamelin (n 1091) 4.
[1116] Neep, Occupying Syria (n 1057) 40-45.

principles of civilisation.'[1117] And even if the repression and the method were indeed punitive, the PMC proved to be receptive to severe methods for only as long as they were ostensibly justified as necessary to restore law and order.

In this new setting, civilisation did not suddenly become irrelevant. The fact that mandated populations were depicted as 'less advanced' than their mandatory powers was no more a justification to frame violence as a mere punishment. It was unquestionable, however, that armed repression was part of the civilising arsenal of mandatory powers. As noted by Daniel Neep, France's 'use of spectacular punitive violence [in Mandatory Syria] was not a display of sovereign power, but a modern governmental strategy that interpellated the Syrian population to assume a subject position that was docile and pacified.'[1118] This was arguably what PMC members expected as answers when they questioned the methods used by South-Africa and France: that armed repression was not wanton violence but aimed to 'transform indigenous society to render it more easily governable, more smooth-running and essentially more modern.'[1119]

3. Colonial War as a Pattern of Legal Argumentation

The experience of the PMC and its attempt to transform and frame colonial armed repression into a reasonable and proportional procedure of governance was not indicative of a general refinement of the discourse of civilisation. The crudest manifestations of the civilised/uncivilised dichotomy did not suddenly make way to an ostensible and paternalist commitment to the well-being of the colonised. They remained available interpretative tools, especially to contest the inclusion within the 'Family of Nations' of certain communities and individuals.

3.1. 'Coloured troops:' Racial Prejudices as Legal Arguments

The 'category' of so-called *coloured, savage, uncivilized* or *barbarous troops* occupies a specific place in the colonial history of international law and the laws of war. In a nutshell, the category emanates from a doctrine according to which it was prohibited for 'civilized' states to use *coloured*, *exotic*, *savage, barbarous* or *uncivilized* colonial troops in conflict between themselves. For these troops were deemed 'incapable of control in their primitive ferocity.'[1120] In other words, the doctrine proceeded in importing the exclusionary legal

[1117] Comments Union of South-Africa on the report on the Bondelzwarts Rebellion (n 1080).
[1118] Neep, Occupying Syria (n 1057) 3.
[1119] Ibid 20.
[1120] Edmunds, The Laws of War (n 150) 340.

arguments deployed in the context of colonial wars to the heart of imperial and Western armed forces.

3.1.1. Between Racist and Positivist Commitments

In 1918, the category and its associated doctrine were hardly a legal innovation.[1121] The question of the (il)legality of the use of 'coloured' troops on the European soil had even been a raised during WWI, with Germany protesting against the French and British resort to colonial troops. This practice was described by the German war propaganda as 'contrary to international law.'[1122]And once again, the targeted groups and individuals were deemed incapable of restraint and associated with all sort of unspeakable acts.[1123]

WWI arguably gave a new momentum to the doctrine, which remained discussed after 1918. With various degrees of agreement, the international jurists who examined the doctrine always approached it with a scholarly benevolence: the doctrine was never rejected as lacking any legal basis or as mere racist ramblings.[1124] Even Quincy Wright, in his article defending the application of the laws of war to the Syrian insurgents and people of a 'different civilization,' stressed that 'modern international law does not approve the use of 'savage tribes or barbarous race' in civilized warfare... on the theory that such troops will not observe the law of war themselves'[1125] The prohibition of the use of such troops, however, was a shaky argument to make from the positivist perspective. It did not appear in any convention, and the massive use of colonial troops by the two main colonial empires of the period rendered the customary nature of such a prohibition complicated to prove. This is why the analysis of the doctrine, and international jurists' engagement with it, matters. It does not only highlight an unpleasant aspect of the history of the discipline, but also show how racial and colonial biases are perpetuated within international law. More precisely, it illustrates how these biases can be associated to legal effects even in the absence of a straightforwardly racist and colonialist positive law.

However, merging positivism and racism was not an insurmountable task for many international jurists. One of the more symptomatic and successful attempts to do so is to be

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[1121] Percy Bordwell, *The Law of War between Belligerents: A History and Commentary* (Callaghan 1908) 232; Antoine Pillet, *Les Lois Actuelles de la Guerre* (Rousseau 1898); Charles Galloni d'Istria, *Les Droit des Gens dans la Guerre d'Afrique Australe* (Kreis 1903) 80-81; US War Departement, *Rules of Land Warfare* (Government Printing Office 1914) art 41.
[1122] Germany, *Employment, contrary to International Law, of Colored Troops upon the European Arena of War by England and France*, trans (UK Foreign Office 1915).
[1123] Germany, Colored Troops (n 1122).
[1124] See for instance A. Mérignhac and E. Lémonon, *Le Droit des Gens et la Guerre de 1914-1918, Tome I* (Sirey 1921); Edmunds, The Laws of War (n 150).
[1125] Wright, Bombardment of Damascus (n 893) 267.

find in Oppenheim's handling of the question, which even after 1918, kept being included in the successive reeditions of his textbook. Faced with a question that brought into conflict racist and positivist commitments, Oppenheim's argument overcame this apparent obstacle – paradoxically – with an impeccable positivist legal argumentation:

> [A]ll writers on international law agree, in wars between themselves, the members of the Family of Nations should not make use of barbarous forces – i.e. troops consisting of individuals belonging to savage tribes and barbarous races. But it can hardly be maintained that a rule of this kind has customarily grown up in practice, nor has it been stipulated by treaties, and the Hague Regulations overlook this point. It is therefore difficult to say whether such fighters, if employed in a war between members of the Family of Nations, would enjoy the privileges due to members of armed forces generally. I see no reason why they should not, *provided they would or could comply with the laws and usages of war prevalent according to International Law*. *But the very fact that they are barbarians makes it probable that they could or would not do so;* it would then be unreasonable to grant them the privileges generally due to members of armed forces, and it would be necessary *to treat them according to discretion*.[1126]

Oppenheim thus resorted to the 1907 Hague Regulations – which imposed on armed forces to comply with the laws of war to be qualified as such[1127] – to associate legal effects to a category that did not exist in positive law. This allowed Oppenheim, almost as an aside, to bring the discussion back to the supposed anthropological 'inability' or 'unwillingness' of some people to apply the laws of war, the same argument that the likes of Colby Elbridge used in justifying the non-application of the laws of war during colonial wars (see section 1). Oppenheim's argument not only took for granted that some people, as a matter of inherent deficiency, would automatically violate the laws of war. It also suggested that in the case the prohibition was not respected in a conflict taking place on the territory of a 'civilised' state, 'coloured' soldiers were to be treated 'according to discretion.'[1128]

James W. Garner, in an effort to disarm potential positivist counterarguments, developed a similar argument and minimised the absence of conventional rules:

> [The] prohibition of the employment of savage troops…ha[d] so long been a recognized rule of civilized warfare that it ha[d] never been deemed necessary to affirm it in express terms in the international conventions…[P]ublicists and statesmen of all countries have condemned the use of troops of an inferior civilization, whose savage instincts and manner of life make it improbable that they will observe the rules of civilized warfare.'[1129]

[1126] Oppenheim, International Law 1921 (n 196) 108 (emphasis added).
[1127] Ibid.
[1128] Ibid.
[1129] James W. Garner, *International Law and the World War: Vol I* (Longman, Green and Co 1920) 294.

It was therefore possible to maintain the exclusion of certain racialised people from the rights, duties, privileges, and status of the laws of war, even if the argument of the limited geographical scope of the laws of war had become inoperative. It must be noted, however, than Oppenheim's argument was more cautious than Garner's. Anxious that the practice of the British empire would not go against international law, Oppenheim still considered that the 'enrolling of coloured individuals …and the employment of regiments consisting of disciplined coloured soldiers' was lawful.[1130] The notion of discipline is important in that case as it did not weaken the anthropological exclusionary argument. It merely indicated that the only way for certain people to apply the laws of war was to be found in their total subjugation to an imperial authority and hierarchy.

The justification of the imperial practice of using colonial troops, especially by the British and French empires, was ultimately based on the same premises. The two arguments, regardless of their stance vis-à-vis the prohibition or lawfulness of the employment of 'coloured troops,' rested on the assumption that colonised people were anthropologically incapable of applying the laws of war by themselves; the justification of the use of colonial troops merely recognised the ability of imperial powers to discipline them enough. The doctrine of the prohibition of 'coloured' troops thus reflects the doctrines of 'martial races' and 'races guerrières.' Based on a similar evaluation of supposed cultural or biological predispositions, these military doctrines aimed at evaluating and distinguishing the various populations of the British and French empires on the basis of their alleged martial (in)aptitude and (un)suitability.[1131]

3.1.2. The Colonial Contradictions of the Category of 'Coloured Troops'

The discussions on the French repression of the Syrian uprisings at the PMC epitomised this image of the 'coloured' soldier as both an imperial tool and an object of rejection and fantasies. Following the complaints of certain Syrian petitioners regarding the presence of Black soldiers among the Mandatory forces, the French representative, Robert de Caix, was questioned on the number of Black soldiers, their behaviour and their role.[1132] Faced with a specific insistence on Black soldiers, Caix clarified that the 'Senegalese…were in the minority, since the great majority of the troops sent to Syria were tirailleurs …from Algeria

[1130] Oppenheim, International Law 1921 (n 196) 108. The same argument can thus be found in the British Manual of Military Law (n 202) 279.
[1131] See especially Stéphanie Soubrier, *Races guerrières: Enquête sur une catégorie impériale, 1850-1918* (CNRS 2023); Heather Streets, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857–1914* (Manchester University Press 2017); Joe Lunn 'Les Races Guerrières': Racial Preconceptions in the French Military about West African Soldiers during the First World War' (1999) 34 J.Contemp.Hist. 517.
[1132] 8th session PMC (n 1096) 150-151.

and Tunisia.'[1133] And when asked whether Black soldiers 'were less disciplined than other troops,' Caix answered in reminding the PMC that the 'backwardness' of certain colonial subjects was not necessarily a source of danger, but rather a helpful tool of colonial governance: 'The Senegalese were extremely well disciplined, perhaps even more so than Algerians. The Algerians were very good soldiers, but they were certainly not any more under the control of their chiefs than the Senegalese, who had a rather simpler and more docile mentality.'[1134]

According to Caix's statement, not only were the black soldiers better adapted to the Syrian climate than the white soldiers, but they were also good soldiers whose 'simple mentality' taught them to be disciplined rather than quick to violate the laws of war.[1135] For the agents of an imperial power like France, the racial prejudices against certain racialised people could not lead to supporting the idea that the use of 'coloured' troops was unlawful. But in the context of the PMC, it was necessary to demonstrate that their use was not hindering the 'sacred trust of civilisation' undertaken by the Mandatory power:

> As to the use of black troops, it was clear that the black troops of Western Africa were less civilised than the Syrians…It was obvious that Senegalese soldiers had not been sent into Syria in order to contribute to the spread of civilisation. As, however, they had nothing to do with the government of the country, they could not injure the work of education of the mandatory Power. They were used merely for a necessary work of repression, and war was not, whether one kind of troops was employed or another, an educational operation. It should be added that the employment of any troops whatsoever under the control of their officers would not have occasioned either more or less depredation than the coloured troops. The idea, therefore, must be excluded that the collaboration of coloured troops had rendered the repression more brutal and increased the responsibility of the mandatory Power. Moreover, it had not been proved that the Senegalese troops had committed any atrocities.[1136]

Although it was doubtful in the context of the PMC to assume that armed repression had no educational virtues (see section 2.2), the argument deployed by Caix indicates that the primitiveness which was associated with the black soldiers could easily be seen as an opportunity rather than a threat. The French member of the PMC, well aware of the great role that colonial troops had played in the last world war in Europe and elsewhere, went on to defend the use of black soldiers in a statement that set aside racial prejudice:

> The black troops were regular troops of the Republic. They were well disciplined and well officered. They had given proof of their quality not only in Syria but on the battlefields of France and the East … In France there were black troops in certain

[1133] Ibid 151.
[1134] Ibid.
[1135] Ibid 150-153.
[1136] Ibid 153.

> cities of the south, and they behaved very well [like] in the Rhineland in spite of the odious calumnies which were brought against them. He did not believe that …the use of black troops could be retained as an argument in order to show that the repression had been more cruel and more pitiless than it should have been.[1137]

This was, however, not enough to dispel the doubts that some members of the PMC had expressed vis-à-vis the use of black African soldiers for the purpose of armed repression in a Class A mandate. For Rappard, 'it was easy to understand that for Syrians, who aspired to independence and in whose eyes the presence of France was justified by the fact that they were not yet capable of directing their own affairs, the presence of troops coming from regions still less developed, for the maintenance of order, was profoundly irritating and humiliating…[T]heir use might have created and encouraged a sentiment of humiliation among the Syrians.'[1138]

This ultimately highlighted the contradiction at the heart of the colonial project, which simultaneously necessitated the racial prejudice to justify colonialisation, as well as the massive resort to indigenous troops for the conquest and occupation of colonial territories.[1139] But when European empires, out of necessity or as a matter of comparative advantage, started to increase their resort to colonial troops, either on the European soil or in mandated territories, legal doctrines such as that of 'coloured' troops' became one of the many manifestations of a renewed colonial anxiety. That is what the French member of the PMC alluded to when he mentioned the French occupation of the Rhineland, which saw the 'use of indigenous troops' in that context becoming the object of a 'world-wide propaganda about the 'Black Horror on the Rhine''.[1140] The expression finds its origin in a pamphlet written by E. D. Morel[1141] and which played a decisive role in the diffusion of broader propaganda that had 'routinely portrayed 40,000 black savages roaming the Rhineland at will, raping the women, infecting the population, and polluting the blood.'[1142] And even though international law is not explicitly invoked, the legal category of 'coloured troops' loomed at the background of this moral panic: from a breach of international law during WWI, the use of 'coloured troops' became a 'breach of international morality.'[1143]

[1137] Ibid 154.
[1138] Ibid.
[1139] On the use of colonial troops as the main force in the context of the French conquest and occupation of Sahelian territories see for instance Camille Lefebvre, *Des pays au crépuscule: Le moment de l'occupation coloniale (Sahara-Sahel)* (Fayard 2021).
[1140] Sally Marks, Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience' (1983) 13 Europ.Stud.Rev. 297, 297.
[1141] E. D. Morel, *The Horror on the Rhine* (8th edn, April 1921).
[1142] Marks, Black Watch (n 1040). For an analysis for the perspective of international law see Giladi, Colonial War (n 32).
[1143] Morel, Horror on the Rhine (n 1141).

In the end, the legal arguments constitutive of the doctrine of the 'coloured troops' also illustrate the 'elusiveness' of the colonial war as a legal category that Rotem Giladi has pointed out.[1144] '[W]hat makes war colonial,' he observes, varies as elements such as 'geography…patterns of political subordination…enemy's otherness' can be invoked.[1145] The decisive element is not fixed and can easily be embodied by geography, race, religion or any other identity transformed into a perilous alterity.[1146] The colonial war category, within the context of international law, cannot be confined to arguments made in relation to situations taking place in territories deemed colonial. Rather than merely referring to a material situation, the colonial war category more decisively alludes to a pattern of legal argumentation in which the exclusion of racialised and colonised groups and individuals can be materialised. Of course, the military confrontation between colonial powers and (would-be) colonised people in the colonial world – the colonial war in the material sense – remained the privileged context for the deployment of such racial legal arguments. But racialised people who formally belonged, in one way or another, to the 'Family of Nations,' were yet to be harboured from the exclusionary logics of international law.

3.2. Epilogue: Ethiopia, French Black POWs, and the Racialisation of the Law in Wars between Members of the 'Family of Nations'

International law remained predominantly colonial and exclusionary after 1918. Nevertheless, it is not aberrant to stress that racialised soldiers belonging to the armed forces of a colonial power benefitted from the protection of the laws of war. From the point of view of the two largest colonial empires at the time, this was arguably a matter of common sense, since the Hague regulations were concerned only with discipline and compliance with the laws of war, not with race. The same inclusive argument could be made, and was made, regarding the protection against colonial conquest of members of the League of Nations which, prior to their admission, had not enjoyed the status of 'civilised Nations.'

When Italy invaded Ethiopia in 1935, the country was one of the only three Black independent states in existence'[1147] and a member of the League of Nations. This led the vast majority of international jurists to qualify the situation as an unlawful aggression.[1148] The incapacity of the League of Nations to protect one of its members, Rose Parfitt notes, is often presented, as 'a textbook example of what happens when 'good' international law allows

[1144] Giladi, Colonial War (n 32) 849.
[1145] Ibid.
[1146] Ibid.
[1147] Parfitt, International Legal Reproduction (n 174) 61.
[1148] See for instance Charles Rousseau, 'Le Conflit Italo-Ethiopien' (1936) 43 RGDIP 546.

itself to be tragically overcome by 'bad 'power politics.'[1149] But as she explains, the case of Ethiopia rather emphasises the 'alarming possibility that the annexation was just as 'legal' as it was 'illegal.''[1150] The legal arguments that Italy mobilised to justify its colonial conquest were indeed perfectly soluble within the discourse of civilisation, which it has been shown, was more than alive:

> The admission of Ethiopia to the League was a political act based on the belief that, through participation in the system of international co-operation represented by the League, Ethiopia could be led to make by herself the efforts necessary to approach, even though only gradually, the level of civilisation of the other peoples belonging to the international community. The idea that the League is in itself a system that promotes the progress of the nations belonging to it is not in accordance with historical facts, except on the essential condition that the countries entering the League are capable of guiding themselves towards civilisation. The position in this respect is not the same for all peoples. The League has to remember what the facts of history are and how they vary Ethiopia has shown that she does not possess the qualifications necessary to enable her to obtain, through participation in the League, the impulse required to raise herself by voluntary efforts to the level of the other civilised nations… Ethiopia has openly placed herself outside the Covenant of the League and has rendered herself unworthy of the trust placed in her when she was admitted to membership. Italy rising up against such an intolerable situation, is defending her security her rights and her dignity. She is also defending the prestige and good name of the League of Nations.[1151]

Due to its alleged civilisational deficiencies, Italy made the point that Ethiopia 'had not met the conditions attached to its membership of the League and therefore was no longer entitled to the protections either of the Covenant or of international law more generally.'[1152] As previously discussed, Italy's justification was embraced by Carl Schmitt, whereas Georges Scelle, despite recognising the aggression, considered that the inclusion of Ethiopia in the League had been a mistake (Chapter 4, section 3.4). During the hostilities, however, Italy did not argue that the laws of war were inapplicable. But like in every situation of colonial war, the indiscriminate violence that Italy unleashed was justified as a consequence of the enemy's failure to 'respect the basic principle of distinction due to an intrinsic tendency towards perfidy and indistinction.'[1153]

Despite the discipline's receptiveness to the exclusionary legal arguments concerning the Italian aggression, it was arguably more common for international jurists not to give in immediately to the racist siren calls. Thus, when Charles Rousseau, in a sincere positivist

[1149] Parfitt, International Legal Reproduction (n 174) 369-370.
[1150] Ibid.
[1151] Situation in Ethiopia. Memorandum by the Italian Government (4 September 1935) 16 League of Nations Official Journal, 1355, 1416.
[1152] Parfitt, International Legal Reproduction (n 174) 64.
[1153] Nicola Perugini and Neve Gordon, 'Between Sovereignty and Race: The Bombardment of Hospitals in the Italo-Ethiopian War and the Colonial Imprint of International Law' 8 State Crime Journal 104, 121.

effort, explained that the Ethiopian armed forces were entitled to the status of 'regular combatants' as provided by the laws of war, he was not expressing a particularly unorthodox legal opinion: given that Ethiopian troops had met the criteria of organisation and hierarchy, Rousseau saw no reason to discuss a supposedly anthropological or cultural inability of the Ethiopian to satisfy the requirements of the laws of war. [1154] But if it was possible (and probable) for international jurists to set aside racial prejudices when formulating legal opinion concerning states or communities whose belonging to the 'Family of Nations' was contested, the opposite was also true.

The fact that a category such as that of 'coloured' troops remained discussed within the discipline proves that the ostensible neutrality of the positive rules regarding race was not sufficient. Therefore, when Germany massacred thousands of Black POWs belonging to the French Army between May and June 1940, is that really the case that German troops acted 'illegally'?[1155] Given Germany's long engagement with the doctrine of 'coloured troops,' it might be the case that Germany treated Black POWs following Oppenheim's guidance: 'according to discretion.'[1156] That is not to say that the doctrine animated those who committed these acts. But it indicates that such crimes do possess a legal rationality and that they did not constitute a sudden disregard for international law. The massacres rather ought to be inscribed in a broader colonial genealogy of international law, in which colonial and racial legal interpretations were hardly marginal, nor seen as lacking legal validity.

Of course, the Black soldiers belonging to the French army were formally entitled to the status of POW as provided by the 1929 Geneva Convention, to which both France and Germany were parties.[1157] What this chapter has tried to show so far, however, is that 'international law's intellectual culture'[1158] is not limited to positive rules. In that sense, even ostensibly neutral rules were left to the interpretation of the 'interpretative community'[1159] of international law which was still plagued by colonial and racial reasoning. From a legal-historical point of view, the massacres of Black POWs could thus be seen either as a complete violation of international law, or as a particularity radical outcome of a broader

[1154] Rousseau, Le Conflit Italo-Ethiopien (n 1148).
[1155] Raffael Scheck, *Hitler's African Victims: The German Army Massacres of Black French Soldiers in 1940* (CUP 2006) 58, 67. Scheck's estimation is that at least 3 000 Black POWs were executed. Scheck's book offers not only a detailed inquiry into the massacres of Black POWs by Germany in 1940, but also explores Germany's long prejudice against Black combatants.
[1156] Oppenheim, International Law 1921 (n 196)108.
[1157] GC 1929 (n 144).
[1158] Rasulov, Inner Life of International Law (n 74) 664.
[1159] Orford, Politics of History (n 58)

attitude within the discipline to recognise as 'disciplinarily valid' [1160] a wide range of exclusionary legal arguments based on race.

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The non-application of the 1929 Geneva Convention to Black POWs was obviously a radical interpretation of international law. But according to the racial legal arguments analysed in this section, the question was not whether captured black combatants should be treated in accordance with the 1929 Geneva Convention, but whether their racial 'predispositions' entitled them to the status of POW in the first place. And if race was not a relevant factor of the POW's status in the convention, race was not absent either: 'Belligerents shall as far as possible avoid bringing together in the same camp prisoners of different races or nationalities.'[1161] In encouraging a segregation based on race, the convention rendered easier the importation of a racial and exclusionary universe.

However, this section has shown that such references to race in positive law were not the necessary condition for the viability of racial legal doctrines. Moreover, the vision of 'the savage … incapable of respecting the laws of war'[1162] was an a-geographical argument which was not limited to the colonial territories. The colonial war category is populated by repulsive figures around which are articulated exclusionary legal arguments. Shifting from the 'savage' and the 'coloured' soldier belonging to a Western army to today's 'terrorists' and so-called 'unlawful combatants,' the colonial war category has never ceased to impose its presence as a pattern of legal argumentation.

4. Conclusion

'Whereas German troops, with some notable exceptions, treated white French and British POWs according to the Geneva Conventions on Prisoners of War,' Raffael Scheck argues that 'they dealt with the black Africans in a way that anticipated the horrors of the racialized warfare associated with the later German campaigns in the Balkans and the Soviet Union.'[1163] In other words, the massacres of Black POWs annunciated the importation on the Eastern-Front, on the territories of states belonging to the 'Family of Nations', of the colonial war methods.

[1160] Rasulov, Inner Life of International Law (n 74) 664.
[1161] GC 1929 (n 144) art 9.
[1162] Mégret, From savages (n 4) 284.
[1163] Scheck, Hitler's African Victims (n 1155) 3.

In the infamous *Commissar Order* issued before the invasion of the Soviet Union, the German High Command (OKW) deployed a rhetoric which annunciated the importation in Eastern Europe of legal arguments generally used in the context of colonial wars:

> In the fight against Bolshevism, we cannot expect the enemy to behave in accordance with the principles of humanity or international law. In particular, hateful, cruel and inhuman treatment of our prisoners is to be expected from the political commissars… In this battle, sparing these elements and showing them consideration under international law is wrong. They are a danger to our own security and to the rapid pacification of the conquered territories…The originators of barbaric Asian fighting methods are the political commissars. They must therefore be dealt with immediately and without further ado with all severity…Therefore, if they are seized in battle or resistance, they are to be killed immediately…These commissars are not recognised as soldiers; the protection afforded to prisoners of war under international law does not apply to them. They are to be executed after they have been separated.[1164]

The German justifications for disregarding international law mirror those that justified the non-application of the laws of war to 'uncivilised' people on the assumption that the enemy would and could not apply international law. The non-application of the laws of war was again framed as a matter of prevention and necessity. In this case, the figure of the political commissar embodied the 'barbaric Asian fighting methods' as well as the intrinsically hostile ideology of Bolshevism. In another order, the logics was extended to all Soviet soldiers:

> Bolshevism is the mortal enemy of National Socialist Germany. For the first time, the German soldier faces an opponent who is not only trained as a soldier but also politically in the sense of Bolshevism, which destroys nations. The fight against National Socialism has become second nature to him. He waged it with every means at his disposal: sabotage, subversive propaganda, arson, murder. As a result, the Bolshevik soldier has lost any claim to treatment as an honourable soldier and in accordance with the Geneva Convention.[1165]

More than 3 million Soviet POWs eventually died between 1941 and 1945, most of them 'as a result of deliberate policies of neglect, undernourishment, and starvation.'[1166] The Nazi invasion and occupation of Eastern Europe (Poland, Soviet Union, Balkans) was not of the same nature than the war in the West. It was a colonial war which was conceived and justified as similar to the colonial expansion of other European Powers overseas.[1167] This was a

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[1164] OKW, 'Richtlinien für die Behandlung politischer Kommissare' (6 June 1941). < https://www.1000dokumente.de/Dokumente/Richtlinien_für_die_Behandlung_politischer_Kommissare_(Kommissarbefehl)> accessed 3 April 2025.

[1165] OKW, 'Anordnungen des Oberkommandos der Wehrmacht für die Behandlung sowjetischer Kriegsgefangener' (8 September 1941) < https://www.1000dokumente.de/Dokumente/Anordnungen_des_Oberkommandos_der_Wehrmacht_für_die_Behandlung_sowjetischer_Kriegsgefangener> accessed 3 April 2025.

[1166] Alex J. Kay, 'The Extermination of Red Army Soldiers in German Captivity, 1941–1945: Causes, Patterns, Dimensions' (2024) 37 Journal of Slavic Military Studies 80, 102.

[1167] Chapoutot, La Loi du Sang (n 820) 397-434.

project of settler-colonialism (Lebensraum) whose realisation was seen as necessitating the complete destruction of whole populations.[1168] The Third Reich thus pushed to its paroxysmal logics the colonial ideas and methods that Europe used to apply in the colonial world.[1169] But this time, it was in Europe that territories formally belonging to members of the 'Family of Nations' were described as populated by inferior races (Jews, Slavs, Caucasians, Uzbeks, Kazakhs etc.) There were neither combatants nor civilians, only various uncivilised and racially inferior communities and individuals who were to be subjected to genocide, starvation, forced labour and complete destruction.

The new international legal order inaugurated by the creation of the League of Nations and the Wilsonian spirit that underpinned it are often considered to have disappeared in the fury of the racial and genocidal war waged by Nazi Germany. But for the colonial world, the new international legal order had already reproduced 'the old imperial logic of international relations, which abridged or entirely obliterated the sovereignty of most non-European peoples.'[1170] The refusal of most Western powers to support a provision on racial equality in the Covenant of the League of Nations[1171] was probably an early sign of that colonial continuity. The study of the international legal discourse on colonial war after 1918 has thus shown that the transformation of international law during this period did not structurally affect the position of subalternity in which colonised and racialised individuals and groups were confined. The discourse of civilisation, within which were articulated the legal arguments on colonial war, remained predominantly exclusionary and failed short in fulfilling its promises of (conditional) inclusiveness. It even proved vulnerable to the crudest forms of racial prejudices to the point that it became conceivable to import colonial legal arguments in conflicts taking place in Europe.

The post-1945 international legal order broke more radically its association with overt racial categories and vocabularies than the post-1918 order. Symptomatic of this would be the work of the UNESCO, which from its first *Statement on race* in 1950, would provide a scientific refutation of the racial theories that Nazism had brought to a climax.[1172] In the case of colonial wars, the experience of partisan warfare during WWII in Europe, especially

[1168] Ibid.
[1169] As early as 1950, Aimé Césaire argued that what was reproached to Hitler had not been the 'humiliation of the man himself' but the application to Europe of colonial methods generally reserved to the indigenous populations of Algeria, India, and Africa. Aimé Césaire, *Discours sur le Colonialisme* (Présence Africaine 1950, 2004) 14.
[1170] Manela, Wilsonian Moment (n 215) 5.
[1171] Ian Clark, *International Legitimacy and World Society* (OUP 2007) 83-106.
[1172] UNESCO, *Four statements on the race question* (UNESCO 1969). It is in this context that Claude Lévi-Strauss wrote, at the demand of the organisation his famous *Race and History*. Claude Lévi-Strauss, *Race et Histoire* (UNESCO 1952).

the one 'that developed in occupied Eastern Europe [and which] stood in the continuity of colonial wars,'[1173] probably motivated the inclusion of civil and colonial wars within the common legal category of NIAC in 1949. As Boyd Van Dijk puts it, the adoption of common article 3 of the 1949 Geneva Conventions constituted a 'shift away from exclusive understandings of belligerency and toward connecting the European dimensions of warfare with those of the colonies.'[1174] However, the Third World would quickly use its right 'to speak the law'[1175] to depart from this idea in order to enshrine in international law the distinct nature of colonial wars.

[1173] Moses, Empire, Colony, Genocide (n 54) 51.
[1174] van Dijk, Preparing for War (n 246) 142.
[1175] Pahuja, Decolonising International Law (n 11) 154.

CONCLUSION

In 1949, civil and colonial wars became non-international armed conflicts (NIACs) with the adoption of the Geneva Conventions. For the first time in history, a multilateral treaty imposed limitations on states and granted protections to insurgents fighting their government or colonial ruler.[1176] By focusing on the various legal discursive practices on civil and colonial wars between 1918 and 1949, this thesis has demonstrated that this integration within a common legal category in 1949 constitutes a historical anomaly. The efforts of the Third World in the era of formal decolonisation to legitimise wars of national liberation and to distinguish them from other conflicts, both in terms of the law on the use of force and the law of armed conflict,[1177] confirms the anomalous character of the undifferentiation of civil and colonial wars.

For a long time, as this thesis has shown, efforts were made to keep civil and colonial wars separated. This colonial attitude shifted with the rise of the Third World. During the negotiations of article 1(4) of the First Additional Protocol to the Geneva Conventions, the commitment of 'the little syndicate' of Western States[1178] to maintain civil and colonial wars within the same legal category became the marker of imperial interests. That is because, after a long history which kept colonial wars away from the most protective dimensions of international law, Third World lawyers were now trying to distinguish colonial wars from civil wars. The aim was to legitimise the resort to force of national liberation movements and to extend to their members the status of POW and other combatant privileges. Most Western arguments against the elevation of wars of national liberation to the rank of international-armed conflict affirmed, in return, that the anticolonial character of some conflicts – a jus ad bellum concern the argument went – was not the *legal* criterion justifying the application of a different legal regime to that of civil wars.[1179] For instance, Antonio Cassese, who was the representative of Italy, argued that wars of national liberation, 'judged objectively,' belonged to the category of internal conflicts in the same way as civil wars.[1180]

[1176] GCI (n 8) art 3.

[1177] Declaration on the Granting of Independence to Colonial Countries and Peoples, 1960 (n 124); Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 1965 (n 124); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, 1970 (n 124); Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, 1973 (n 124); AP1 (n 25) art 1(4). On these efforts of the Third World and its accomplishment at the UNGA as well as during the negotiations of the Additional Protocols to the Geneva convention see Jochen von Bernstorff, 'The Battle for the Recognition of Wars of National Liberation' in Jochen von Bernstorff and Philipp Dann (ed) *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019) Fuhrmann, Légitimités Conflictuelles (n 22).

[1178] Mohammed Bedjaoui, 'Non-alignement et droit international' (1977) 151 R.C.A.D.I. 337, 375.

[1179] See Fuhrmann, Légitimités conflictuelles (n 22) 57-61.

[1180] Italie, *Actes de la Conférence Diplomatique sur la réaffirmation et le développement du Droit International Humanitaire Applicable dans les conflits armés*, (1978) Vol VIII/CDDH/I/SR.3 para 37.

Georges Abi-Saab, one of the architects of article 1(4) and the representative of Egypt, ironically wondered whether ignoring the distinctiveness of one of the most widespread types of conflict of the post-1945 period was really about objectivity.[1181]

There was nothing inevitable of course behind either view. There is no self-evident overwhelming logic, either as a matter of law or legal history that required these types of conflicts to be legally addressed in a specific way. In focusing on various discursive practices articulating the relation between international law and civil and colonial wars, this thesis aims not only to question the usual assumption about how international law ought to approach civil and colonial wars. It also aims to be a history of international law tout court, which through specific objects, says things about the past, present and future of the discipline as a whole.

Chapter 1 has thus shown that *Rousseauism* and *governmentalism* were two discourses inseparable from the canons of state-centrism, whose influence spanned beyond the limited issue of civil and colonial wars. Even within their own internal contradictions, these two discourses remained united by a commitment towards the idea that the state was the sole legitimate and desirable political unit of the international order, an idea that still infuses many aspects of the contemporary international legal discourse. By focusing on the humanitarian discourse which divided the laws of war between their *legal* and *moral* bodies in order to regulate civil wars, chapter 2 has demonstrated how new and innovative discursive practices could arise in the face of an inhospitable positive law. It has also been shown that the perception of living in an unprecedented crisis may prompt a professional community to develop new ways of thinking about international law and revaluate existing argumentative practices. This historical incursion into the making of the humanitarian discourse applied to the laws of war has not portrayed international lawyers as neutral observers of the social reality à la Georges Scelle. It has rather highlighted how the political culture of a given interpretative community – in this case the centrality of anticommunism for the Red Cross community – can drive the shift from a legal interpretation to another.

Chapters 3 and 4 have analysed approaches to the relation between civil wars and international law that ventured into the realm of collective security. From the vantage point of the collective regulation of civil wars, these two chapters questioned and scrutinised the appeal of collective security, which, at least since the creation of the League of Nations, has underpinned the cosmopolitan ethos of the vast majority of international lawyers. The so-

[1181] Georges Abi-Saab,'Wars of National Liberation in the Geneva Conventions and Protocols' (1979) R.C.A.D.I 353, 380.

called ‘non-intervention system’ and its underlying discourse of *localisation*, developed in the context of the Spanish Civil War, were thus as much a legal innovation as they were a reactionary project subordinated to the interests and will of powerful states. Through an ostensibly neutral international legal language which put the insurgents and the established government on the same *a-legal* footing in order to ‘localise’ the Spanish Civil War, the discourse of *localisation* eventually failed in providing European powers a legal and technical escape out of the politics on the interwar period. The various manifestations of the discourse of *suppression*, that chapter 4 grappled with, were also an illustration of the shortcomings of collective security mechanisms. From the naïve belief in the pacifying nature of law to the reactionary outcomes that can ensue, the analysis of the idea that international law was to be mobilised to avoid and suppress civil wars also supported the argument according to which legal innovation is neither necessarily positive nor emancipatory.

Finally, from the perspective of colonial wars, chapter 5 interrogated the emancipatory potential of the indeterminate language of international law which started to suggest that there was hope for the colonised after 1918. The persistence of the most exclusionary dimensions of the discourse of *civilisation* provided an early example of the difficulty to find emancipatory avenues when ambiguous and indeterminate principles like ‘sacred trust of civilisation’ and ‘self-determination’ are mobilised in an international legal order structurally disadvantaging a particular class of actors. As in many contemporaneous instances, the way in which the relation between international law and colonial wars was articulated illustrates the collision between emerging and seemingly emancipatory principles, and the heavy and often oppressive already-established (argumentative) structures. It confirms, once more, the constant refinement of the ‘dynamic of difference’ at the core of international law.[1182]

In the end, the five chapters of this thesis have illustrated the openness of international law to more or less inspired and inspiring new ideas and ways of thinking, and their cohabitation with more traditional reasonings. But the vast majority of the legal arguments deployed between 1918 and 1949 on the issue of civil and colonial wars were neither primarily concerned with, nor meant to benefit the victims and less powerful actors involved in these conflicts. The history of the legal discourses on civil and colonial wars thus constitutes a specific angle through which one can study the duality between the openness of international law and its work of reproduction of inherited, and sometime oppressive, structures. To a

[1182] Anghie, Imperialism (n 4) 3-5.

certain extent, then one might say this thesis was a history of international law that explored both its indeterminacy and the structural biases that populate it.

The concept of structural bias, as developed by Koskenniemi, was intended to explain the paradoxical stability and predictability of many aspects of international law despite its radical indeterminacy. Schematically, while the language of international law is indeed indeterminate, institutional practices, driven by structural biases, are not, thus ensuring a certain interpretative or argumentative unity within a given professional community.[1183] In investigating this dialectic between the reproduction of structures and the apparent openness of the language of international law, this thesis has ultimately shed light on the paradox noted by Rose Parfitt of an indeterminate law, which allows hegemonic and counter-hegemonic arguments to play (relatively) freely, but which, at the same time, always seems to harm certain communities.[1184]

It can reasonably be inferred that international law failed to provide a favourable terrain for emancipatory projects regarding civil and colonial wars from 1918 to 1949. At the same time, the few decades that followed saw Third World states and lawyers furthering an ambitious emancipatory agenda through the language of international law. Despite the ultimate failure of the Third World to revolutionise international law and to shake its capitalist and imperialist foundations,[1185] this experience has shown a difficult yet possible compatibility between international law and emancipation. This is why critical legal history remains a Janus-faced enterprise, simultaneously animated by a commitment to bring to light 'legal history's horrors' and a prudent belief 'in law's ever-present emancipatory potential.'[1186] Against any association of the discipline of international law with an innate avant-gardist ethos, legal history is an intellectual project that highlights the role of international jurists in either 'helping' or 'hindering' the realisation of a less unequal international order.[1187]

[1183] Koskenniemi, The Politics of International Law – 20 Years Later (n 611) 9-12.
[1184] Parfitt, International Legal Reproduction (n 174) 21.
[1185] See in general Özsu, Completing Humanity (n 239).
[1186] Nathaniel Berman, 'In the Wake of Empire' (1999) 14 Am.U.Int'l L.Rev. 1521, 1524.
[1187] Bedjaoui, NIEO (n 932) 252.

BIBLIOGRAPHY

Archival Material (1918-1949)

Archives du Comité Internationale de la Croix-Rouge (ICRC Archives) [ACICR]
- Guerre Civile Irlande
- Guerres Civiles
- International Red-Cross Conferences 1921, 1938
- Rapport Lodygensky
- Rifains
- Secours aux Victimes de Luttes Civiles

Bibliothèque du Comité Internationale de la Croix Rouge (ICRC Library) [BCICR]
- International Red-Cross Conferences 1921, 1938, 1948
- Preliminary Conference 1947

Centre des Archives diplomatiques de Nantes (French Diplomatic Archives of Nantes) [CADN]
- Protectorat Maroc
- Mandat Syrie-Liban

League of Nations
- League of Nations Official Journal
- League of Nations Archives [LoN Archives]
  - Assembly
  - Council
  - Permanent Mandate Commission
  - Secretariat

Parliament of the United Kingdom
- Hansard: House of Commons
- Parliamentary Papers (University of Glasgow Library)

The National Archives (Kew Gardens)
- International Committee for the Application of the Agreement regarding Non-Intervention in Spain

Articles, Monographs, Courses, and Other Documents (1918-1949)

'Activité du Comité international de la Croix-Rouge en Indochine' (1947) IRRC 813

'Après le drame de Lausanne : Arrestation d'un complice présumé de l'assassin de Vorowsky' *Tribune de Genève* (Geneva, 16 May 1923)

'Rapport de Maurice Thorez à l'Assemblée des Communistes et Sympathisants des Usines Renault à Boulogne-sur-Seine, le 2 Septembre 1936' *L'Humanité* (Paris, 4 September 1936)

Aigler R, 'The League of Nations and the Laws of War' (1920-1921) BYIL 109

Alvarez A, *La Codificación del Derecho Internacional. en América: Trabajos de la Tercera Comisión de la Asamblea de Jurisconsultos reunida en Santiago de Chile* (Imprenta Universitaria 1923)

Ameer Ali S, 'Islam in the League of Nations' (1919) 5 Transactions of the Grotius Society 126

Audinet E, 'Des Restrictions apportées aux Droits Patrimoniaux des Sujets Ennemis dans la Guerre 1914-1918' (1920) 27 RGDIP 289

Barthélemy J, 'Politique Intérieure et Droit International' (1937) 59 R.C.A.D.I 421

Baty T, 'So-Called "De Facto" Recognition' (1922) 31 Y.L.J. 469
'Can an Anarchy be a State' (1934) 28 AJIL 444

Blum L, *L'Exercice du Pouvoir* (Gallimard 1937)

Bourgeois L, *L'Oeuvre de la Société des Nations (1920-1923)* (Payot 1923)

Brierly J, *The Law of Nations: An Introduction to the International Law of Peace* (Clarendon Press 1928)

Burnier G, 'Les secours en Syrie' (1926) IRRC 94

Cassin R, 'Le Droit International et la Non-Immixtion dans les Guerres Civiles' (1936) n27 Les Cahiers des Droits de l'Homme

Colby E, 'Aerial Law and War Targets' (1925) 19 AJIL 702
'How to Fight Savage Tribes' (1927) 21 AJIL 279

Communist International, 'The Twenty-one Points – Conditions of Admission to the Communist International' (Second Cominterm congress 1920) condition 8.

de Azcarate P, *League of Nations and National Minorities: An Experiment* (Carnegie Endowment for International Peace 1945)

de Watteville H, 'The Military Administration of Occupied Territory in Time of War' (1921) 7 Transactions of the Grotius Society 133

Eagleton C, 'Faut-il Proscrire seulement les Guerres d'Agression ou toutes les Guerres ?' (1932) RGDIP 498.

Edmunds S, 'The Laws of War: Their Rise in the Nineteenth Century and Their Collapse in the Twentieth' (1929) Va.L.Rev. 321

Erich R, 'La Naissance et la Reconnaissance des États' (1926) 13 R.C.A.D.I 427

Fabela I, 'Press Communiqué' reproduced in 'Le Mexique: unique Etat fidèle au Pacte et à la chose signée' *Journal des Nations* (Geneva, 20 April 1937)

Fauchille P, *Traité de Droit International Public: Paix* (Rousseau 1922)

Fenwick G, ‘Can Civil Wars be Brought under Control of International Law’ (1938) 32 AJIL 538

Former Russian Red-Cross, *Données sur la Terreur en Russie présentées par le Comité central de l’ancienne Organisation de la Croix Rouge Russe au CICR* (Société Russe de la Croix-Rouge 1922)

Frick-Cramer M, ‘Contribution à l'élaboration d'une Convention sur les prisonniers, militaires ou civils, tombés au pouvoir de l'ennemi ou d'une autorité non reconnue par eux’ (1946) IRRC 228

Garner J, *International Law and the World War: Vol I* (Longman, Green and Co 1920)
‘La Reconstitution du Droit International’ (1921) RGDIP 413
‘Les Lois de la Guerre. Leur Valeur. Leur Avenir’ (1936) Rev.drt.intern.et leg.comp. 96

Genet R, ‘The Charge of Piracy in the Spanish Civil War’ (1938) 32 AJIL 253
Principes de Droit des Gens (LGDJ 1944)

Giraud E, ‘Le Droit des Nationalités : sa Valeur, son Implication’ (1924) 31 RGDIP 17

Grafton Wilson G, *Handbook of International Law* (3rd edition, West Publishing Co 1939)
‘The Guerrilla and the Lawful Combatant’ (1943) 37 AJIL 494

Helb H, ‘Les Pays-Bas et la Non-Intervention’ (1938) Grotius: Annuaire Internationale 4

Heller H, ‘Authoritarian Liberalism? – 1933’ (2015) 21 ELJ 21

ICRC Memorandum to all belligerent States (17 August 1944) quoted in Jean Pictet (ed), *Commentary on the Geneva Conventions of 12 August 1949: Vol III Convention Relative to the Treatment of Prisoners of War* (ICRC 1960) 53.

ICRC, ‘Dissolution Violente du Comité Central de la Société Russe de la Croix-Rouge’ (1918)
IRRC 298
‘Rapport sur l'activité du CICR en faveur des ‘partisans’ tombés aux mains de l'ennemi’ (1946) IRRC 797

International Commission of Jurists, *Sessions held at Rio de Janerio, Brazil, April 18th to May 20th, 1927: Projects to be submitted for the consideration of the sixth International Conference of American States* reproduced in (1928) AJIL.supp 234

Jemtel Y, *L'Assistance Hostile dans les Guerres Maritimes Modernes* (Pedone 1938)

Jessup P, ‘The Spanish Rebellion and International Law’ (1937) 15 Foreign Affairs 260

Kaeckenbeeck G, *The International Experiment of Upper Silesia: A Study in the working of the Upper Silesia Settlement 1922-1937* (OUP 1942)
‘Upper Silesia under the League of Nations’ (1946) Ann.Am.Acad 129

Kahn E, ‘Quelques observations’ (1925) n 20 Les Cahiers des Droits de l’Homme 457

Kellor F, Hatvany A, *Security against War* (Macmillan Co. 1924)

Kelsen H, 'Théorie générale du droit international public' (1932) 42 R.C.A.D.I 117
'Recognition in International Law: Theoretical Observations' (1941) 35 AJIL 605

Kunz J, 'Plus de Lois de la Guerre ?' (1934) RGDIP 22

Larnaude F, 'Les Gouvernements de Fait' (1921) 28 RGDIP 457

Lauterpacht H, 'Revolutionary Propaganda by Governments' (1927) 13 Transactions of the Grotius Society 143
'Insurrection et Piraterie' (1939) 46 RGDIP 513
'Recognition of Insurgents as a De Facto Government' (1939) 3 Mod.L.R. 1
'Règles Générales du Droit de la Paix' (1937) 62 R.C.A.D.I 95
Recognition in International Law (CUP 1947)

Lawrence T.J, *Principles of International Law* (7th edition revised by Percy H. Winfield, D.C. Heath & Co 1923)

Le Fur L, *La Guerre d'Espagne et le Droit* (Les Éditions Internationales 1938)
Précis de Droit International Public (Dalloz 1939) 367

Lindley M, *Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans Green and Co 1926)

Lodygensky G, 'La Croix Rouge et la Guerre Civile (2e article) – En Russie de 1919 à 1920' (1919) IRRC 654
'La Croix Rouge et la Guerre Civile' (1919) IRRC 1159
'L'Evacuation de la Crimée en Novembre 1920' (1921) IRRC 12
La Terreur Rouge (Société Générale d'Imprimerie 1922)

Marshall Brown P, 'Self-Determination in Central Europe' (1920) 14 AJIL 235
'The Aaland Islands Question' (1921) 15 AJIL 268.

McNair A, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) Transactions of the Grotius Society 29
'The Law relating to the Civil War in Spain' (1937) 53 L.Q.Rev. 471
Legal Effects of War (CUP 1944)

Mérignhac A, Lémonon E, *Le Droit des Gens et la Guerre de 1914-1918, Tome* I (Sirey 1921)

Morel E, *The Horror on the Rhine* (8th edn, April 1921)

Morgenthau H, 'Positivism, Functionalism, and International Law' (1940) AJIL 260

Nielsen F, 'Insurgency and Maritime Law' (1937) ASIL.Proceedings 144

O'Rourke V, 'Recognition of Belligerency and the Spanish War' (1937) 31 AJIL 398

Oppenheim L, *International Law: A Treatise, Vol I Peace* (3rd edn edited by R. Roxburgh, Longmans, Green and Co. 1920)

International Law: A Treatise, Vol II War and Neutrality (3rd edn edited by Ronald F. Roxburgh, Longmans, Green and Co. 1921)
International Law: A Treatise, Vol I Peace (4th edn edited by Arnold McNair,Longmans, Green and Co. 1929)

Padelford N, 'International Law and Insurgency' (1937) 37 Die Friedens-Warte 191
'Shipping during the Spanish Civil War' (1938) 32 AJIL 264
International Law and Diplomacy in the Spanish Civil Strife (Macmillan 1939)

Painlevé P, 'Pour la paix' (1925) n 20 Les Cahiers des Droits de l'Homme 457

Pallieri B, 'Quelques Aspects Juridiques de la Non-Intervention en Espagne' (1937) 18 Rev.drt.intern.et leg.comp. 285

Pictet J, 'La Défense de la Personne Humaine dans le Droit Futur' (1947) IRRC 104

Pillet A, *La Guerre et le Droit* (Uystpruyst-Dieudonné 1922)

Reynier E, 'Au Maroc: contre la guerre' (1925) n 20 Les Cahiers des Droits de l'Homme

Rolin A, 'Les Fossoyeurs du Droit de la Guerre' (1919) RGDIP 129
Le Droit Moderne de la Guerre I (Dewit 1920)

Romano S, *Corso di Diritto Internazionale* (4th edn, Cedam 1939)

Ross A, *A Textbook of International Law* (Green and Com 1947)

Rousseau C, 'Le Conflit Italo-Ethiopien' (1936) 43 RGDIP 546
'La Non-Intervention en Espagne' (1938) Revue de Rev.drt.intern.et leg.comp. 217

Scelle G, 'Essai de Systématique du Droit International' (1923) 30 RGDIP 116
'Le Maroc et la SDN: Rapport de M. Georges Scelle' (1925) n 21 Les Cahiers des Droits de l'Homme
Précis de Droit des Gens : Principes et Systématique (Editions Sirey 1932)
'La Politique Française Extérieure et la SDN' (1935) Année Politique Française et Étrangère 257
'Théorie et Pratique de la Fonction Exécutive en Droit International' (1936) 55 R.C.A.D.I 87
'La Carence du Droit' (1936) n27 Les Cahiers des droits de l'Homme
'La Reconnaissance des Insurgés et la Guerre Espagnole' (1937) 37 Die Friedens-Warte 65
'La Guerre Civile Espagnole et le Droit des Gens' (1938) 45 RGDIP 265
'La Guerre Civile Espagnole et le Droit des Gens: Chapitre II' (1939) 46 RGDIP 197
Droit International Public (Domat-Montchrestien 1944)

Schmitt C, *Positionen und Begriffe: im Kampf mit Weimar – Genf – Versailles 1923 – 1939* (Duncker & Humblot 2014)
'State Ethics and the Pluralist State (1930)' in Arthur J. Jacobson & Bernhard Schlink (ed), *Weimar: A Jurisprudence of Crisis* (University of California Press 2000) 300
The Concept of the Political (University of Chicago Press 2007, 1932)
On the Three Types of Juristic Thought (Praeger Publishers 1934, 2004) 79
'The Changing Structure of International Law – 1943' (2016) 20 J.Cultural Research 310

Ex Captivitate Salus: Experiences, 1945 - 47 (Telos 2017)
The Nomos of the earth in the International Law of the Jus Publicum Europaeum (Telos Press 2006, 1950).
Deux textes de Carl Schmitt: La question clé de la société des nations, Le passage au concept de guerre discriminatoire (Pedone 2009)
Writings on War (Polity 2011)

Sée H, 'Les fictions diplomatiques' (1925) n 20 Les Cahiers des Droits de l'Homme

Shaw L, 'Civilisation and Law: America' (1920) Transactions of the Grotius Society 17

Singer B, *International Law* (T.H Flood and Co Company 1918)

Smith H, 'Some Problems of the Spanish Civil War' (1937) BYIL 18

Smuts J, *The League of Nations: a practical suggestion* (Hodder and Stoughton 1918)

Snow A, *The Question of Aborigines in the Law and Practice of Nations* (Putnam and Sons 1919)

Spanish Government, 'Texte Intégral de la Réponse du Gouvernment Espagnol au Plan de Retrait des Étrangers d'Espagne' *Journal des Nations* (Geneva, 3 August 1938)

Stowell E, 'Spain and the Nations' (1936) AJIL 675

Struppe K, *Éléments du droit international public universel, européen et américain* (Editions Internationales 1930).

Trotsky L, *History of the Russian Revolution* (Penguin 1932)

Wambaugh S, *Plebiscites since the World War* (Carnegie endowment for International Peace 1933)

War Department, *Basic Field Manual, Volume VII, Military Law: Part Two, Rules of Land Warfare* (United-States Government Printing Office 1934)

War Office, *Manual of Military Law* (His Majesty's Stationary Office 1929)

Wehberg H, 'La contribution des conférences de la paix de la Haye au progrès du droit international' (1931) 37 R.C.A.D.I. 527
'La guerre civile et le droit international' (1938) 63 R.C.A.D.I. 1

Wilcox F, 'The Localization of the Spanish War' (1938) Am.Pol.Sc.R. 237

Woolsey T, 'Self-Determination' (1919) 13 AJIL 302

Wright Q, 'Changes in the Conception of War' (1924) 18 AJIL 755.
'The Bombardment of Damascus' (1926) 20 AJIL 263
Mandates Under the League of Nations (University of Chicago Press, 1930)
'When Does War Exist?' (1932) 26 AJIL 362
'The End of a Period of Transition' (1937) 31 AJIL 604
'The Present Status of Neutrality' (1940) AJIL 391

Legal Instruments (1918-1949)

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 304

Convention on Duties and Rights of States in the Event of Civil Strife (adopted 20 February 1928, entered into force May 21 1929) 134 L.N.T.S. 45

Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19

Convention Relating to Upper Silesia signed at Geneva, May 15, 1922, together with Interpretative Declaration, signed at Oppeln, June 3, 1922 (Germany-Poland) (adopted 15 May 1922, entered into force 4 July 1922) 9 LNTS 465

Convention relative to the Treatment of Prisoners of War (adopted 27 July 1929, entered into force 19 June 1931) 118 LNTS 344

Draft Protocol for the Pacific Settlement of International Disputes (1924) League of Nations General Assembly Docs Annexe II 135

General Treaty for Renunciation of War as an Instrument of National Policy (adopted 27 August 1928, entered into force 25 July 1929) 94 LNTS 57

General Treaty of Peace and Amity between the Central American States of 7 February 1923 (adopted 7 February 1923) (17 A.J.I.L. (Supp.) 117 (1923))

Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare (adopted 17 June 1925, entered into force 9 May 1926) 94 LNTS 65

The Nyon Agreement (adopted 14 September 1937, entered into force 14 September 1937) 181 LNTS 137

Treaty of Mutual Guarantee, done at Locarno, October 16, 1925, Final Protocol of the Locarno Conference of the same Date and Collective Note to Germany dated London, December 1, 1925, regarding Article 16 of the Covenant of the League of Nations (adopted 16 October 1925, entered into force 14 September 1926) 54 LNTS 289

Treaty of Peace between the Allied and Associated Powers and Germany (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 188

Treaty relating to the Use of Submarines and Noxious Gases in Warfare (adopted 6 February 1922, not entered into force)

Articles, Chapters and Monographs

Abi-Saab G,'Wars of National Liberation in the Geneva Conventions and Protocols' (1979)

R.C.A.D.I 353

Abi-Saab R, *Droit Humanitaire et Conflits Internes: Origines et* évolution de la réglementation internationale (Pedone 1986)

Actes de la Conférence Diplomatique sur la réaffirmation et le développement du Droit International Humanitaire Applicable dans les conflits armés, (1978) Vol VIII/CDDH/I/SR.3

Agamben G, *Stasis: Civil War as a Political Paradigm* (Stanford University Press 2015)

Alvarez A, Le Droit International de l'Avenir (Institut Americain de Droit International 1916)

Anderson P, 'The Force of the Anomaly' (2012) London Review of Books

Anghie A, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) Harv.Int'l L.J. 1
'The War on Terror and Iraq in Historical Perspective' (2005) Osgoode Hall L.J. 45
Imperialism, Sovereignty and the Making of International Law (CUP 2005)

Armitage D*, Civil Wars: A History in Ideas* (Yale University Press 2017)

Bachelard G, *Le Rationalisme Appliqué* (PUF 1949)

Baker G, 'Wilson's use of the non-Recognition Policy in Costa Rica' (1965) 22 Americas 3.

Barsalou O, 'Preparing for War: The USA and the Making of the 1949 Geneva Conventions on the Laws of War' (2017) 23 J.C.& S.L. 49

Barthes R, *Leçon* (Seuil 1978)

Becker Lorca A, 'Alejandro Alvarez Situated: Subaltern Modernities and Modernisms that Subvert' (2006) 19 LJIL 879.
Mestizo International Law: A Global Intellectual History: 1842-1833 (CUP 2014)

Bedjaoui M, *Law and the Algerian Revolution* (International Association of Democratic Lawyers 1961)
'Non-alignement et droit international' (1977) 151 R.C.A.D.I. 337
Pour un nouvel ordre économique international (UNESCO 1979)

Benjamin W, 'Critique of violence' in *Reflections: Essays, Aphorisms, Autobiographical writings* (New-York, 1978)

Benvenisti E, Lustig D, 'Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874' (2020) EJIL 127

Benvenisti E, *The International Law of Occupation* (OUP 2012)

Berman N, 'Modernism, Nationalism, and the Rhetoric of Reconstruction' (1992) Yale J.L.&Human. 351
'But the Alternative Is Despair": European Nationalism and the Modernist Renewal of International Law' (1993) Harv.L.Rev. 1792

‘Between Alliance and Localization: Nationalism and the New Oscillationism’ (1994) N.Y.U.J.Int'l.L.& Pol. 449
‘In the Wake of Empire’ (1999) 14 Am.U.Int'l L.Rev. 1521
‘Privileging Combat? Contemporary Conflict and the Legal Construction of War’ (2004) Colum.J.Transnat'l L. 1
‘The Appeals of the Orient: Colonized Desire and the War of the Rif’ in Karen Knop (ed) *Gender and Human Rights* (OUP 2004)
Passion and Ambivalence: Colonialism, Nationalism, and International Law (Brill 2012)

Bernard Bourdin, ‘Le droit de guerre juste: Histoire et retour d’un concept après la Première guerre mondiale’ (2017) Recherche de Science Religieuse 541

Blanchard E, Des colonisés ingouvernables: Adresses d’Algériens aux autorités françaises (Akbou, Paris, 1919-1940) (Presses de Science Po 2024)

Bordwell P, *The Law of War between Belligerents: A History and Commentary* (Callaghan 1908) 232

Braudel F, ‘Histoire et Sciences sociales: La longue durée’ (1958) Annales. Economies, sociétés, civilisations 725
La Méditerranée et le Monde Méditerranéen à l'Epoque de Philippe II (Armand Collin 1990)

Cassese A, ‘Remarks on Scelle's Theory of “Role Splitting” (dédoublement fonctionnel) in International Law’ (1990) 1

Césaire A, *Discours sur le Colonialisme* (Présence Africaine 1950, 2004)

Chapoutot J, *La Loi du Sang: Penser et Agir en Nazi* (Gallimard 2014)
Le Meurtre de Weimar (PUF 2015)
Libre d’Obéir: Le Management, du Nazisme à Aujourd'hui (Gallimard 2020)

Charlesworth H, ‘Feminist Methods in International Law’ (1999) AJIL 379

Chotzen A, ‘Beyond Bounds: Morocco's Rif War and the Limits of International Law’ (2014)5 Humanity 33

Clark I, *International Legitimacy and World Society* (OUP 2007)

Clastres P, *Archéologie de la Violence: La Guerre dans les Sociétés Primitives* (Éditions de l’Aube 2004, 1977)

Conrad J, *Heart of Darkness* (OUP, 1899, 2008)

Crawford E, ‘The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity, and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL’ (2018) JHIL 544

Croce M, Goldoni M, *The Legacy of Pluralism: The Continental Jurisprudence of Santi Romano, Carl Schmitt, and Costantino Mortati* (Standford University Press 2020)

Croce M, Salvatore A, *Carl Schmitt’s Institutional Theory: The Political Power of Normality*

(CUP 2022)

d'Aspremont J, *International Law as a Belief System* (CUP 2017)
'The League of Nations and the Power of "Experiment Narratives" in International Institutional Law' (2020) 22 Int.C.L.Rev. 275
'The Roles of Legitimacy in International Legal Discourses: Legitimizing Law vs Legalizing Legitimacy' in Krieger, Püschmann (eds) *Law-Making and Legitimacy in International Humanitarian Law* (Elgar 2021)

Daudin P, 'The Rif War: A forgotten war?' (2023) IRRC 914

Daughton J, 'The "Pacha Affair" Reconsidered: Violence and Colonial Rule in Interwar French Equatorial Africa' (2019) 91 J.Mod.Hist. 493.

De Frouville O, 'Une Conception Démocratique du Droit International' (2001) Eur.J.Soc.Sc. 101

de la Rasilla I, *In the Shadow of Vitoria: A History of International Law in Spain (1770 1953)* (Brill 2017)

De Lattre M, *La Ferveur et le Sacrifice: Indochine 1951* (Plon 1988)

de Vries J, 'Playing with Scales: The Global and the Micro, the Macro and the Nano' (2019) Past & Present 23

Desautels-Stein J, 'Structuralist Legal Histories' (2015) L.& Contemp.Prob. 37
'A Context for Legal History, or, This is not your Father's Contextualism' (2016) Am.J.Legal Hist. 29

Douglas R, 'Did Britain Use Chemical Weapons in Mandatory Iraq?' (2009) 81 J.Mod.Hist. 859, 861.

Dudziak M, 'Making Law, Making War, Making America' in Grossberg, Tomlins (ed) *The Cambridge History of Law in America* (CUP 2008)

Enright S, *The Irish Civil War: Law, Execution and Atrocity* (Merrion Press, 2022)

Fakhri M, *Sugar and the Making of International Trade Law* (OUP 2014)

Fayet J.F, 'Le CICR et la Russie : un peu plus que de l'humanitaire' (2015) 1 Connexe: les espaces postcommunistes en question(s) 55
'The Russian Red Cross in the Civil War' (2021) 9 Quaestio Rossica 188

Fayet J.F, Huber P, 'La mission Wehrlin du CICR en Union soviétique (1920-1938)' (2003) IRRC 95

Fernandes Carvalho Veçoso F, 'Mexican Post-Revolutionary Foreign Policy and the Spanish Civil War Legal Struggles over Intervention at the League of Nations' in Greenman, Orford, Saunders, Tzouvala (eds), *Revolutions in International Law: The Legacies of 1917* (CUP 2021)

Fleur A, Tosato-Rigo D (ed), *Suisse-Russie. Schweiz-Russland Contacts et ruptures (1813 1955). Aufbau und Krisen der Beziehungen 1813–1955* (P. Haupt 1994) 366

Flynn T, 'Foucault's mapping of history' in Gary Gutting (ed) *The Cambridge Companion to Foucault* (CUP 2005)

Foucault M, *Histoire de la folie à l'âge classique* (Gallimard 1961)
Naissance de la Clinique (PUF 1963)
Les Mots et les Choses : Une Archéologie des Sciences Humaines (Gallimard 1966)
L'Archéologie du Savoir (Gallimard 1969)
L'Ordre du Discours (Gallimard 1971)
'Nietzsche, la Généalogie, l'Histoire' in Suzanne Bachelard and others (ed) *Hommage à Jean Hyppolite* (PUF 1971)
Dits et Écrits 1954-1988 : Tome I 1954-1969 (Gallimard 1994)
Dits et Écrits 1954-1988 : Tome II 1970-1975 (Gallimard 1994)
La Société Punitive: Cours au Collège de France 1971-1973 (Seuil 2023)

Frank Jr., 'Misperception and Incidents at Sea: The "Deutschland" and "Leipzig" Crises, 1937' (1990) 43 Naval War Coll.Rev. 31

Fuhrmann R, 'Légitimités conflictuelles: le droit international humanitaire entre légitimité du statut et légitimité de la cause' (2024) Can.Y.B.Int.L 37
'Les Temps du Droit International: Temporalité et Histoire Critique' (2024) Cah.de Droit 559

Galloni d'Istria C, *Les Droit des Gens dans la Guerre d'Afrique Australe* (Kreis 1903)

Germany, *Employment, contrary to International Law, of Colored Troops upon the European Arena of War by England and France*, trans (UK Foreign Office 1915)

Giladi R, 'The Jus ad Bellum/Jus in Bello Distinction and the Law of Occupation' (2008) Is.L.R. 246
The Phoenix of Colonial War: Race, the Laws of War, and the 'Horror on the Rhine'' (2017) LJIL 847

Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Routledge 1980)
'Microhistory: Two or Three Things That I Know about It' (1993) Critical Inquiry 10
The Enigma of Piero: Piero Della Francesca (Verso 2002)
'Some Queries Addressed to Myself' (2013) Cyber R. Modern Historiography 90

Goldmann M, 'The ambiguity of colonial international law: Three approaches to the Namibian Genocide' (2024) LJIL 580

Gordon R, 'Historicism in Legal Scholarship' (1981) Yale L.J. 1017
'Critical Legal Histories' (1984) Stan.L.Rev. 57

Grant J, Barker C (eds), *Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009)

Greenman K, 'Common Article at 70: Reappraising Revolution and Civil War in International Law' (2020) 21 MJIL 1
State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution (CUP 2021)

Haslam J, *The Soviet Union and the Struggle for Collective Security in Europe, 1933-39* (Macmillan 1984)

Hill-Cawthorne L, 'Rights under International Humanitarian Law' (2017) 28 EJIL 1187

Hobbes T, *Leviathan: The Matter, Forme, and Power of a Common-Wealth Ecclesiastical and Civil* (Floating Press 2009, 1651)

Hobsbawm E, *The Age of Empire 1875-1914* (Vintage Books 1989)
The Age of Extremes: The Short Twentieth Century, 1914-1991 (Vintage Books 1994)

Hohfeld W, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 Y.L.J. 16

Institut de Droit International, 'Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection' (Session de Neuchâtel, 8 September 1900)

Jackson G, 'The Spanish Popular Front, 1934-7' (1970) 5 J.Contemp.Hist. 21

Jochnick C, Normand R, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv.Int'l L.J. 49

Jouannet E, 'Regards sur un siècle de doctrine française du droit international' (2000) AFDI 1

Kant I, 'Perpetual peace: a philosophical sketch' in Hans S. Reiss (ed), *Kant's Political Writings* (2nd edn, CUP 1991)

Kaspi A, 'La mission du général de Lattre aux Etats-Unis, 13-25 septembre 1951' (1992) Revue française d'histoire d'outre-mer, 213.

Kay A, 'The Extermination of Red Army Soldiers in German Captivity, 1941–1945: Causes, Patterns, Dimensions' (2024) 37 Journal of Slavic Military Studies 80

Keefer S, ''Explosive Missals': International Law, Technology, and Security in Nineteenth Century Disarmament Conferences' (2014) 445

Kennedy D, 'The Move to Institutions' (1987) 8 Cardozo L.Rev. 841
'Tom Franck and the Manhattan School' (2003) N.Y.U.J.Int'l Law & Pol. 397
The Dark Sides of Virtue: Reassessing International Humanitarianism (Princeton University Press 2004)
Of War and Law (Princeton University Press 2006)
A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy (Princeton University Press 2016)

Kennedy D, Koskenniemi M, *Of Law and the World: Critical Conversations on Power, History, and Political Economy* (Harvard University Press 2023)

Kennedy Duncan, *The Rise and Fall of Classical Legal Thought* (first published 1975, Beard Books 2006) ch *Thirty Years Later*

Kervégan J.F, *Que Faire de Carl Schmitt?* (Gallimard 2011)

Kinsella H, 'Settler Empire and the United States: Francis Lieber on the Laws of War' (2023) Am.Pol.Sc.R. 629

Kipling R, 'The White Man's Burden (1899)' (1998) Peace Review 311

Koskenniemi M, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001)
From Apology to Utopia: The Structure of International Legal Argument (CUP 2006)
'The Fate of Public International Law: Between Technique and Politics' (2007) 70 Mod.L.Rev. 1
'The Politics of International Law – 20 Years Later' (2009) 20 EJIL 7
'What Use of Sovereignty Today?' (2011) 1 AsianJIL. 61

La Porte P, ''Rien à ajouter': The League of Nations and the Rif War (1921-1926)' (2011) 41
European History Quarterly 66
'Humanitarian assistance during the Rif War (Morocco, 1921–6): the International Committee of the Red Cross and 'an unfortunate affair'' (2016) 89 Historical Research
114

Lafore L, The End of Glory: An Interpretation of the Origins of World War II (Lippincott Company 1970)

Leśniewski P, 'Three Insurrections: Upper Silesia 1919–21' in Peter D. Stachura (ed), *Polandbetween the Wars, 1918–1939* (Palgrave Macmillan 1998)
'The 1919 Insurrection in Upper Silesia' (2021) 4 Civil Wars 22

Levi G, *Inheriting Power: The Story of an Exorcist* (University of Chicago Press 1988)
'On Microhistory' in Peter Burke (ed) *New Perspectives on Historical Writing* (Pennsylvania State University Press 2001)

Lévi-Strauss C, *Race et Histoire* (UNESCO 1952)

Lieblich E, *International Law and Civil Wars: Intervention and Consent* (Routledge 2013)

Link A (ed), *The Deliberations of the Council of Four (March 24- June 28 1919) Notes of the Official Interpreter Paul Mantoux Vol.2* (Princeton University Press 1992)

Little D, 'Red Scare, 1936: Anti-Bolshevism and the Origins of British Non-Intervention in the Spanish Civil War' (1988) 23 J.Contemp.Hist. 291

Lodygensky G, *Face au Communisme 1905-1950: Quand Genève était le Centre du Mouvement Anticommuniste Internationnal* (Slatkine 2009).

Lorimer J, *The Institutes of International Law: A Treatise of the Principles of Jurisprudence as Determined by Nature* (T&T Clark 1872)

Lorite Escorihuela A, 'Alf Ross: Towards a Realist Critique and Reconstruction of

International Law' (2003) 14 EJIL 703
'Cultural Relativism the American Way: The Nationalist School of International Law in the United States' (2005) Global Jurist Frontiers 1
'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011) Mich.St.Int'l L.R 299
'Global Animal Law, Pain, and Death: An International Law for the Dominion' in Vincent Chapaux, Frédéric Mégret & Usha Natarajan (ed) *The Routledge Handbook of International Law and Anthropocentrism* (Routledge 2023)

Lovat H, *Negotiating Civil War: The Politics of International Regime Design* (CUP 2020)

Lowe K, 'The Red Cross and the Laws of War, 1863-1949: International Rights Activism before Human Rights' in Jean H. Quataert and Lora Wildenthal (ed) *The Routledge History of Human Rights* (Routledge 2020)

Lunn J, 'Les Races Guerrières': Racial Preconceptions in the French Military about West African Soldiers during the First World War' (1999) 34 J.Contemp.Hist. 517

Macherey P, *Pour une Théorie de la Production Littéraire* (Maspero 1966)

Mälksoo L, 'The Legacy of FF Martens and the Shadow of Colonialism' (2022) Chinese JIL 55

Manceron G, Marianne et les colonies: Une introduction à l'histoire coloniale de la France (La Découverte 2003)

Manela E, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (OUP 2007)

Mantilla G, *Lawmaking under Pressure: International Humanitarian Law and Internal Armed Conflict* (Cornell University Press 2020)

Marks Susan, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 LJIL 339

Marks Sally, Black Watch on the Rhine: A Study in Propaganda, Prejudice and Prurience' (1983) 13 Europ.Stud.Rev. 297

Mbembe A, 'Necropolotics' (2003) Public Culture 11
Politiques de l'Inimitié (La Découverte 2016)

Mégret F, 'From'savages' to 'unlawful combatants': a postcolonial look at international humanitarian law's other' in Anne Orford (ed) *International Law and its Others* (CUP 2006) 265-317
'L'Étatisme Spécifique du Droit International' (2011) 24 RQDI 105

Minca C, Rowan R, *On Schmitt and Space* (Routledge 2015)

Moradiellos E, *Neutralidad Benévola: El Gobierno Británico y la Insurrección Militar Española de 1936* (Pentalfa 1990)
'The Origins of British Non-Intervention in the Spanish Civil War: Anglo-Spanish Relations in Early 1936' (1991) 21 European History Quarterly 339

'The Allies and the Spanish Civil War' in Sebastian Balfour & Paul Preston (eds) *Spain and the Great Powers in the Twentieth Century* (Routledge 1999)
El Reñidero de Europa: Las Dimensiones Internacionales de la Guerra Civil Española (Ediciones Península 2001).
'Appeasement and Non-intervention: British policy during the Spanish Civil War' in Catterall, Utting (eds) *Britain and the Threat to Stability in Europe, 1918-45* (Bloomsbury 2016)

Moses D, 'Empire, Colony, Genocide: Keywords and the Philosophy of History' in Moses (ed) *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History* (Berghahn Books 2008)

Mosse G, *Fallen Soldiers: Reshaping the Memory of the World Wars* (OUP 1991)

Moyn S, *Humane: How the United States Abandoned Peace and Reinvented War* (Farrar, Straus and Giroux 2021)

Mutua M, Anghie A, 'What Is TWAIL?' (2000) A.S.I.L.Proc. 31

Neep D, *Occupying Syria under the French Mandate: Insurgency, Space and State Formation* (CUP 2014)

Neff S, *War and the Law of Nations: A General History* (CUP 2005)

Oppenheim L, *International Law: A Treatise* (Longmans, Green, and Co.1906)

Orford A, *International Authority and the Responsibility to Protect* (CUP 2011)
International Law and the Politics of History (CUP 2021)

Özsu U, *Completing Humanity: The International Law of Decolonization, 1960–82* (CUP 2023)

Pahuja S, *Decolonising International Law Development, Economic Growth and the Politics of Universality* (CUP 2011)

Palmieri D, 'Une Neutralité sous Influence ? Le CICR, Franco et les Victimes' (2009) 59 Revue Suisse d'Histoire 279
'An Institution Standing the Test of Time? A Review of 150 Years of the History of the International Committee of the Red Cross' (2012) IRRC 1273.

Parfitt R, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP 2019)

Peñalba-Sotorrío M, 'From Civil Conflict to Crusade: Mobilisation and National Identity in the Spanish Civil War' (2021) 41 Intl.J. Military.Hist 277

Perugini N, Gordon N, 'Between Sovereignty and Race: The Bombardment of Hospitals in the Italo-Ethiopian War and the Colonial Imprint of International Law' 8 State Crime Journal 104

Pierre Bourdieu, 'La force du droit : Éléments pour une sociologie du champ juridique' (1986) Actes de la Recherche en Sciences Sociales 3.

Pillet A, *Les Lois Actuelles de la Guerre* (Rousseau 1898)

Preston P, *The Spanish Holocaust: Inquisition and Extermination in Twentieth-Century Spain* (HarperPress 2013)
The Spanish Civil War: Reaction, Revolution and Revenge (William Collins 2016)

Price R, *The French Second Empire: An Anatomy of Political Power* (CUP 2001)

Qureshi M, 'The Indian Khilafat Movement (1918-1924)' (1978) 12 J.Asian Hist. 152

Rajah J, *Discounting Life: Necropolitical Law, Culture, and the Long War on Terror* (CUP 2023)

Rasulov A, 'From Apology to Utopia and the Inner Life of International Law' (2016) LJIL
'The Discipline as a Field of Struggle: The Politics and the Economy of Knowledge Production in International Law' in Bianchi, Hirsch (eds) *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP 2021)

Rougier A, *Les Guerres Civiles Et Le Droit Des Gens* (L. Larose 1903)

Rousseau J.J, *Du Contrat Social* (LGF 2011)
Principe du droit de la guerre (Vrin 2014).

Sahlins M, *Islands of History* (University of Chicago Press 1985)

Said E, *Culture and Imperialism* (Vintage 1993)

Sassòli M, Bouvier A, Quintin A, *How does Law Protect in War? Volume I Outline of International Humanitarian Law* (3rd edn, ICRC 2012)

Scheck R, *Hitler's African Victims: The German Army Massacres of Black French Soldiers in 1940* (CUP 2006)

Schmitt C, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* (Telos 2007, 1963).

Sewell W, 'Historical Events as Transformations of Structures: Inventing Revolution at the Bastille' (1996) Theory and Society 841

Simpson G, Law, *War and Crime: War Crimes Trials and the Reinvention of International Law* (Polity 2007)

Skinner Q, 'Meaning and understanding in the history of ideas' (1969) History & Theory 3.

Slavin D, 'The French Left and the Rif war, 1924-25: Racism and the Limits of Internationalism' (1991) 26 J.Contemp.Hist. 5

Smiley W, 'Lawless Wars of Empire? The International Law of War in the Philippines, 1898 1903' (2018) LHR 511

Soubrier S, *Races guerrières: Enquête sur une catégorie impériale, 1850-1918* (CNRS 2023)

Stephens J, ‘A Bureaucracy of Rejection: Petitioning and the impoverished paternalism of the British-Indian Raj’ (2019) 53 Mod.Asian Stud. 177

Storr C, International Status in the Shadow of Empire: Nauru and the Histories of International Law (CUP 2020)

Streets H, *Martial Races: The Military, Race and Masculinity in British Imperial Culture, 1857–1914* (Manchester University Press 2017)

Szabla C, ‘Civilising Violence: International Law and Colonial War in the British Empire, 1850–1900’ (2023) JHIL 70

Teschke B, ‘Carl Schmitt’s Concepts of War: A Categorical Failure’ in Meierhenrich, Simons (eds) *The Oxford Handbook of Carl Schmitt* (OUP 2013)

Thénault S, *Algérie : des « événements » à la guerre Idées reçues sur la guerre d'indépendance algérienne* (Le Cavalier Bleu 2012)

Thomas A, Thomas Jr., ‘Non-Intervention and the Spanish Civil War’ (1967) ASIL.Proc. 2 ‘International Legal Aspects of the Civil War in Spain, 1836-39’ in Richard A. Falk (ed), *The International Law of Civil War* (John Hopkins Press 1971)

Tollardo E, ‘International Experts or Fascist Envoys? Alberto Theodoli and Pietro Stoppani at the League of Nations’ (2017) New Global Studies 283

Toman J, *La Russie et la Croix-Rouge (1917-1945) : La Croix-Rouge dans un État révolutionnaire et l’action du CICR en Russie après la Révolution d’Octobre 1917* (Institut Henry-Dunant 1997)

Traverso E, *À Feu et à Sang: De la Guerre Civile Européenne 1914-1945* (Stock 2007)

Tzouvala N, *Capitalism as Civilisation:* A History of International Law (CUP 2020)

UNESCO, *Four statements on the race question* (UNESCO 1969)

Van Dijk B, ‘“The Great Humanitarian”: The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949’ (2019) 37 LHR 209
Preparing for War: The Making of the Geneva Conventions (OUP 2022)

Venayre S, *Une guerre au loin: Annam, 1883* (La Découverte 2016)

von Bernstorff J, ‘The Battle for the Recognition of Wars of National Liberation’ in von Bernstorff, Dann (ed) *The Battle for International Law: South-North Perspectives on the Decolonization Era* (OUP 2019)

von Martens G, *Nouveau Recueil Général des Traités, Conventions et autres Transactions Remarquables, Vol 18* (Librairie de Dieterich, 1873)

Weber M, *The Vocation Lectures* (Hackett Publishing Company (2004) 1919)

Wernitznig D, ‘Contested Territories in the Short Twentieth Century: Sarah Wambaugh (1882-1955), Plebiscites, and Gender’ (2022) 50 Nationalities Papers 983

Windgeate Pike D, *Les Français et la Guerre D'Espagne* (PUF 1975)
France Divided: The French and the Civil War in Spain (Sussex Academic Press 2011)

Legal Instruments

'Instructions for the Government of Armies of the United States in the Field (Lieber Code) (24 April 1863)' reproduced in Dietrich Schindler & Jirí Toman., *The Laws of Armed Conflicts*, Martinus Nijhoff 1988)

Charter of the United Nations (24 October 1945) 1 UNTS XVI

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907) (2 A.J.I.L. (Supp.) 90 (1904))

Convention with Respect to the Laws and Customs of War on Land, 29 July 1899, Treaty Series 403

General Act of the Berlin West Africa Conference (26 February 1885).

General Treaty of Peace and Amity between the Central American States of 20 December 1907 (adopted 20 December 1907) 206 C.T.S. 63.

Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609

Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (8 Jun 1977) 1125 UNTS 3

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3

US War Departement, *Rules of Land Warfare* (Government Printing Office 1914)

Cases

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment) [2005] ICJ Rep 168

International Status of South West Africa (Advisory Opinion) [1950] ICJ Rep 128

Island of Palmas Case (Netherland v. USA) Award (1928) PCA Rep 829, 846.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136

Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226

UN Documents

Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes, UNGA Res 3103 (XXVIII) (12 Dec 1973).

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 Oct 1970)

Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 Dec 1960)

Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 2105 (XX) (20 Dec 1965)

Report of the Secretary-General, 'Implementing the responsibility to protect' (2009) UN Doc A/63/677.

UNSC Res 84 (7 July 1950) UN Doc S/RES/84.

Websites and Blogs

Jules Ferry, 'Les fondements de la politique coloniale (28 juillet 1885)' (Assemblée Nationale) <https://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands discours-parlementaires/jules-ferry-28-juillet-1885> accessed 1 April 2025.

OKW, 'Anordnungen des Oberkommandos der Wehrmacht für die Behandlung sowjetischer Kriegsgefangener' (8 September 1941) < https://www.1000dokumente.de/Dokumente/Anordnungen_des_Oberkommandos_der_Wehrmacht_für_die_Behandlung_sowjetischer_Kriegsgefangener> accessed 3 April 2025.

OKW, 'Richtlinien für die Behandlung politischer Kommissare' (6 June 1941). < https://www.1000dokumente.de/Dokumente/Richtlinien_für_die_Behandlung_politischer_Kommissare_(Kommissarbefehl)> accessed 3 April 2025.

Sheila Paylan, 'The Dangerous Ramifications of Recognizing the End of Nagorno-Karabakh' (*Opinio Juris*, 21 March 2024) <https://opiniojuris.org/2024/03/21/the-dangerous-ramifications-of-recognizing-the-end-of-nagorno-karabakh/> accessed 10 January 2025.