

DEBATE

The regulation of non-international armed conflicts: Can a privilege of belligerency be envisioned in the law of non-international armed conflicts?

Claus Kreß and Frédéric Mégret

*The Debate section of the Review aims to contribute to reflection on contemporary questions of humanitarian law, policy or action. In this issue of the Review, we invited two experts in international humanitarian law (IHL) – **Claus Kreß** and **Frédéric Mégret** – to debate on how IHL applicable in non-international armed conflict (NIAC) should develop. In the two pieces that follow, Professor Kreß submits for debate a new norm of international law outlawing NIACs – a jus contra bellum internum – with a corresponding set of rules applicable in NIACs – a jus in bello internum. The jus in bello internum would give the “privilege of belligerency” – akin to combatants’ privilege in international armed conflicts – to non-State actors in NIACs, providing an incentive for them to comply with these new rules of civil war. Frédéric Mégret critically examines the proposed privilege of belligerency, pointing out its problematic aspects and positing that the creation of such a privilege is, in fact, not desirable.*

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Towards further developing the law of non-international armed conflict: a proposal for a *jus in bello interno* and a new *jus contra bellum internum*

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Abstract

Since 1945, most armed conflicts have occurred between States and rebels or between non-State armed groups within fragile or failed States. Currently, the tragedies in Iraq, Syria and the Ukraine teach us just another lesson that the civil war is one of the major evils of our time. In recognition of this fact, the law of non-international armed conflict, in particular since the first half of the 1990s, has undergone a stormy development. This has led to the remarkably far-reaching assimilation between that body of law and that of international armed conflict. This legal development is Janus-headed: on the one hand, it is characterized by the humanization of the law of non-international armed conflict, but on the other, rules on the conduct of hostilities have crystallized and their denomination as “humanitarian” is somewhat euphemistic. It appears worth asking whether the recent development of the law of non-international armed conflict should be complemented through a new international law against non-international armed conflict. The ongoing controversy in legal policy about a possible privilege of combatancy for non-State fighters should be discussed in such a new light.

Keywords: history, development of international law, international humanitarian law, non-international armed conflict, international armed conflict, customary law, assimilation, International Criminal Tribunal of the former Yugoslavia, international human rights law, conduct of hostilities, transnational armed conflict, aggression, combatant’s privilege, *jus contra bellum*.

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The humanization¹ of the law of non-international armed conflict

The devastating sight of the wounded soldiers lining the battlefield near the town of Solferino after the battle between the allied forces of Sardinia and France on the one side and those of Austria on the other awoke a powerful humanitarian impulse in the Geneva merchant Henry Dunant. In 1862, he lit a beacon with his *Souvenir de Solférino*.² Dunant passionately pleaded for the establishment of a voluntary aid society dedicated to the care of the wounded in times of war and for the protection of such an innovation through an agreement between States. Dunant's appeal was well received. Already in 1863, the (albeit slightly later named) International Committee of the Red Cross (ICRC) had been founded in Geneva, and only a year later States adopted the Geneva Convention on the Amelioration of the Condition of the Wounded in Armies in the Field.³ Despite the intermittent storms, a straight pathway leads from this first Geneva Convention to the international humanitarian law (IHL) of today. A central concern of IHL today is – as it was in the second half of the nineteenth century – to alleviate the suffering caused by armed conflict.⁴ However, at first the sole concern of States was the containment of international war; the regulation of the potentially no less harrowing *civil* war was to come later. Classic international law provided no protection of human rights in principle and up until the end of the Second World War, civil wars remained outside the reach of international law and thus within the *domaine réservé* of the State concerned.⁵

- 1 The term is of course borrowed from Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, 2000, p. 239. In this article, Meron describes how the law of war, “driven to a large extent by human rights and the principles of humanity ... has been changing and acquiring a more human face”, and he sets out “the inroads made on the dominant role of reciprocity; the fostering of accountability; and innovations in the formation, formulation, and interpretation of rules”.
- 2 Henry Dunant, *Un souvenir de Solférino*, Cassel, London, 1947.
- 3 Auswärtiges Amt, Deutsches Rotes Kreuz and Bundesministerium der Verteidigung (eds), *Dokumente zum Humanitären Völkerrecht (Documents on International Humanitarian Law)*, 2nd ed., Academia Verlag, Sankt Augustin, 2012, p. 13.
- 4 For an account of the historic development of IHL, see Mary Ellen O’Connell, “Historical Development and Legal Basis”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 1 ff.
- 5 In practice, this certainly did not mean a complete absence of regulation. Rather, the armed forces at times received internal instructions. For details, see Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, pp. 9–29. The Code drawn up by Francis Lieber, which Abraham Lincoln in 1863 made binding for the Union troops during the American Civil War and which the Confederate States would later accept, is the most famous example and has subsequently influenced the development of IHL in general. Moreover, it was possible under customary international law, as applicable at the time, to recognize rebels who had succeeded in establishing quasi-State structures in parts of the war-ridden territory as a belligerent party to a conflict. *Ibid.*, p. 9. As a result of such recognition, the laws of war became applicable to both sides. However, the question of the recognition of rebels as a belligerent party was often a matter of controversy, and States were reluctant to accept an obligation of recognition. For example, in the Spanish Civil War of the 1930s, the Spanish government refused to recognize its opponent as a belligerent. *Ibid.*, p. 17. On the significance of the Spanish Civil War for the subsequent development of the law of non-international armed conflict, see Antonio Cassese, “The Spanish Civil War and the Development of Customary Law Concerning Internal Conflicts”, in Antonio Cassese (ed.), *Current Problems of International Law: Essays on U.N. Law and*

In 1949, when the laws of war were under scrutiny following the catastrophe of the Second World War, the ICRC called for IHL to extend to civil war. Some States, including Great Britain and Burma, expressed concern and stressed the importance of national sovereignty.⁶ In the end, States agreed on the text of common Article 3, the “mini-convention” regulating civil war within the four major new Geneva Conventions (GCs) of 12 August 1949.⁷ The acceptance of this mini-convention marked the birth of a rudimentary international *jus in bello interno* (or in its technical legal expression, IHL of non-international armed conflict).⁸ Nearly three decades later, States would refuse another attempt to determinedly assimilate the IHL applicable in non-international armed conflict (NIAC) to that of international armed conflict (IAC). During the 1974–1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, which led to the adoption of two Additional Protocols (APs) to the GCs, States were divided over the classification of struggles for anti-colonial liberation. According to the classical perspective, national liberation wars were a specific form of civil war.⁹ The States which emerged from such conflicts and their supporters succeeded in “upgrading” the national liberation struggle (though under stringent conditions) to an IAC.¹⁰ Having reached this goal, the Non-Aligned States’ thirst for reform was essentially satisfied. Especially the newly independent States, the governments of which frequently faced internal tensions, did not take long to recognize the allure of protecting national sovereignty through international law. India

on the Law of Armed Conflict, Dott. A. Giuffrè Editore, Milan, 1975, pp. 287 ff. The protection of the individual through international law in civil wars thus remained precarious.

6 See S. Sivakumaran, above [note 5](#), p. 40, n. 77, 78.

7 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950). A. Amt, Deutsches R. Kreuz and B. Verteidigung, above [note 3](#), p. 167. For an early appraisal of the GCs, see, for example, Hersch Lauterpacht, “The Problem of the Revision of the Law of War”, *British Year Book of International Law*, Vol. 29, 1952, pp. 360 ff. Apart from common Art. 3, the GCs’ provisions had been confined to international armed conflict within the meaning of common Art. 2.

8 On the negotiations leading to this agreement, see S. Sivakumaran, above [note 5](#), pp. 40 ff; Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge, 2010, pp. 25 ff.; Lindsay Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, pp. 23 ff.

9 Antonio Cassese, “Wars of National Liberation and Humanitarian Law”, in Christophe Swinarski (ed.), *Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l’honneur de Jean Pictet*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1984, pp. 313 ff.

10 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I), Arts 1(4), 96; A. Amt, D. Rotes Kreuz and B. der Verteidigung, above [note 3](#), pp. 503, 509, 575. On the position of the non-aligned States, see Luigi Condorelli, “Pays Afro-Asiatiques”, in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1979, pp. 386 ff., and in particular, pp. 392 ff.

expressed this frankly at the conference: after the question of national liberation struggles had been settled, there was no need to extend international law's regulation of NIACs.¹¹ Despite such statements, Additional Protocol II on NIAC was eventually adopted.¹² Its content, however, remained of limited reach.

Nevertheless, the expansion of the law of NIAC came with great force. It did not take the ceremonial form of a diplomatic conclusion of a treaty; rather, it took place on the seemingly unobtrusive path of unwritten international law. Such customary international law must often be authoritatively identified, ideally by a competent international court, in order for its development to unfold reliably and effectively. The International Criminal Tribunal for the former Yugoslavia (ICTY), which was established by the United Nations (UN) Security Council in 1993 in light of the Balkan atrocities, would establish itself as the key institution to progressively determine the existence of customary international law relevant to NIAC. The election of Professor Antonio Cassese as judge at the ICTY would prove most conducive to this process. Not only was Cassese progressively minded in general, but he was also an academic supporter of the development of an international law applicable in civil wars.¹³ Cassese's moment had come when the first defendant, Duško Tadić, challenged the ICTY's jurisdiction to determine his criminal responsibility under international law in the internal Yugoslav conflict for want of a sufficiently developed NIAC law. In a groundbreaking decision on 2 October 1995, the professor of international law in judge's robes took a comprehensive look at the international practice regarding civil war since 1936, and with the ingenuity of a true master, he identified the overall tendency that parties to civil wars had over time moved towards accepting rules which were similar to those governing inter-State wars.

According to Cassese and his fellow judges, the distinction between sophisticated laws of war governing inter-State wars and the rudimentary rules governing NIACs "was clearly sovereignty-oriented",¹⁴ and "if international law ... must gradually turn to the protection of human beings", the said dichotomy "should gradually lose its weight".¹⁵ Clearly, the *Tadić* decision was animated by the spirit of Henry Dunant, and its key message quickly prevailed.¹⁶ In 2005, the ICRC lent its voice to the remarkable development which the customary international law of NIAC had undergone, in the organization's authoritative customary IHL study.¹⁷ The guardian of IHL confirmed the assimilation of the customary international law of NIAC to that of IAC.

11 S. Sivakumaran, above note 5, p. 50, n. 150.

12 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II).

13 See, most notably, his early contribution, A. Cassese, above note 5, pp. 287 ff., and in particular, pp. 315 ff.

14 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, 2 October 1995, para. 96.

15 *Ibid.*, para. 97.

16 Claus Krefß, "War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice", *Israel Yearbook on Human Rights*, Vol. 30, 2000, pp. 104–109.

17 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005. For a more reserved

This “*Tadić* dynamic” – the assimilation of the law of NIAC to that of IAC, with the goal of enhancing the former’s humanitarian protection – was in line with another major development in international law: the development of a customary international law set of minimum standards for the protection of human rights, in particular after the adoption in 1966 of the two International Covenants on human rights.¹⁸ It was not surprising that Cassese would build on the crystallization of international human rights law as nothing else made it clearer that international law had opened itself more directly to the concerns of the individual. Furthermore, after some initial uncertainty, it was increasingly recognized that international human rights law could be relied upon to enrich and strengthen the IHL of NIAC.¹⁹ The second report issued by the independent Israeli Turkel Commission in 2012 exemplified to what extent this could occur.²⁰ In complete accordance with the “*Tadić* dynamic”, the Commission reached the conclusion that a customary international law duty had come into existence, according to which the territorial State and the State of active nationality must investigate the credible allegation of a war crime committed in a NIAC.²¹ Furthermore, the Commission held that international human rights law could provide significant guidance in giving this duty to investigate meaningful content.²² To conclude, the humanization of the international law of NIAC has reached an advanced stage today.²³

The tension between the law of non-international armed conflict and international human rights law

This humanization is only one side of the coin, however. Taken as a whole, the legal evolution under consideration turns out to be of a profoundly ambivalent nature. The reason is that this evolution has long since spread into the realm of the conduct of hostilities, which forms an important part of the laws of war.²⁴

position on the status of customary law governing the law of NIAC, see Jean d’Aspremont and Jérôme de Hemptinne, *Droit international humanitaire*, Editions A. Pedone, Paris, 2012, pp. 25 ff.

- 18 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See, e.g., Thomas Buergenthal, “Human Rights”, in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. 4, Oxford University Press, Oxford, 2012, pp. 1023 ff.
- 19 For a general analysis of the issue, see Robert Kolb, “Human Rights and Humanitarian Law”, in R. Wolfrum, above note 18, pp. 1040 ff.
- 20 Public Commission to Examine the Maritime Incident of 31 May 2010, *Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013.
- 21 *Ibid.*, p. 93.
- 22 *Ibid.*, pp. 114 ff.
- 23 For a comprehensive statement of the law, see S. Sivakumaran, above note 5, pp. 255–335; see also pp. 430 ff.
- 24 For a comprehensive statement of the law of non-international armed conflict governing the conduct of hostilities, see *ibid.*, pp. 336–429.

If one examines somewhat more closely the law on the conduct of hostilities in IAC,²⁵ key components of which have been codified in AP I, the term “international humanitarian law” reveals its somewhat euphemistic aspect. The law on the conduct of hostilities brings the ugly face of war to light, which is irreconcilable with the ideal of human rights. As a rule, the law on the conduct of hostilities in IAC permits the killing of enemy combatants throughout the conflict, and this regardless of whether the targeted combatant is about to launch an attack or not.²⁶ This permission does not respond to an immediate danger posed by an individual human being, but it reflects the target’s membership, as identified by his or her uniform, in a collectivity/group which is prepared to fight. In light of the ideal of human rights, it is even harder to digest that the law on the conduct of hostilities does not offer civilians full protection. According to the most basic legal principle, as codified in the first sentence of Article 51(2) of AP I, “[t]he civilian population as such, as well as individual civilians, shall not be the object of attack”. However, the attack on a military objective remains permissible even if, after having taken all due precautionary measures, a risk of collateral civilian damages persists under the circumstances. The customary law principle of *jus in bello* proportionality, as codified in Article 51(5)(b) of AP I, only prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.²⁷

Furthermore, the law regarding prisoners of war constitutes a double-edged legal institution. As humanitarian as the absolute ban on the torture of prisoners of war may be, it is just as obvious that the applicable legal framework allows for an extraordinarily robust preventive detention mechanism for individual members of a dangerous collectivity – the enemy armed forces. Such detention is not based on judicial decisions and is solely limited by the end of the conflict. Despite the siren call of the term “international humanitarian law”, this body of law recognizes the necessities of war to a considerable extent. As has been observed time and again, the law of IAC cannot be directed against the conduct of war as such. It has to accept the inconvenient truth that victory in a perfectly justified war of self-defence could often not be secured if the hostilities had to be conducted in accordance with the ideal of human rights. It is this state of utmost emergency that requires the law of IAC to embrace a permissive conduct of hostilities

25 For a monographic treatment, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed., Cambridge University Press, Cambridge, 2010, *passim*; for a more concise account, see Stefan Oeter, “Methods and Means of Combat”, in D. Fleck, above note 4, pp. 115 ff.

26 For the legal concept of combatant, see, for example, Knut Ipsen, “Combatants and Non-Combatants”, in D. Fleck, above note 4, pp. 85 ff.

27 S. Oeter, above note 25, pp. 196 ff.; for an intriguing recent analysis of “collateral civilian damages” in international law and ethics, see Reinhard Merkel, “Die ‘kollaterale’ Tötung von Zivilisten im Krieg: Rechtsethische Grundlagen und Grenzen einer prekären Erlaubnis des humanitären Völkerrechts”, *Juristen Zeitung*, Vol. 67, 2012, pp. 1137 ff.

paradigm, which severely cuts back the reach of the internationally guaranteed human rights to life and liberty.

The question of whether the law of NIAC also includes a legal framework for the conduct of hostilities has long remained without a clear answer.²⁸ Arguably, the absence of an internationally binding human rights standard until well into the second half of the twentieth century is one reason for this uncertainty. As long as States were not subject to international human rights obligations, their governments felt no urgent need to contemplate an international law applicable to the conduct of hostilities in NIACs. From the perspective of a government facing internal tensions with a potential for escalation, it must have been an attractive option to be in a position to reject any international scrutiny over how the conflict with the opposition was conducted by arguing that it remained within the *domaine réservé* of the State concerned. After the Second World War a similar calculus, as is well known, has repeatedly led States to deny the existence of a NIAC on their respective territories, contrary to the facts. The admission of a NIAC would not only have shown the serious challenge to their authority but would have also implied the recognition of the applicability of the international standards as formulated in common Article 3 of the GCs.

As David Kretzmer has set out in an illuminating analysis, the picture radically changed once internationally binding standards on human rights were developed.²⁹ Governments directly confronted by well-organized rebels had to realize that under the full restraining effect of the rights to life and liberty, victory in a civil war was just as uncertain as in a war of self-defence fought against the armed forces of an aggressor State. This truth also applied to external States coming to the assistance of a government under threat. Germany, for example, experienced this dilemma much sooner than its political establishment had hoped. The memory of the slow and painful German learning process of having unintentionally become a party to a NIAC still remains vivid.³⁰ While German politicians were still trying to quietly dispose of the sweet dream of a “soft” security assistance mission in Afghanistan, Colonel Klein’s order to attack in the Kunduz incident forced the German judiciary to accept the less fortunate reality on the ground.³¹ Since the attack in the Kunduz River valley met the criteria of

28 See S. Sivakumaran, above note 5, p. 336. In contrast, A. Cassese, above note 5, pp. 294 ff., has sought to demonstrate that – despite the non-recognition of belligerency – the conduct of hostilities by both parties to the Spanish Civil War in the 1930s was internationally scrutinized on the basis of legal principles akin to those under the laws of war applicable to inter-State war.

29 David Kretzmer, “Rethinking the Application of IHL in Non-International Armed Conflicts”, *Israel Law Review*, Vol. 42, 2009, pp. 8 ff.

30 “What Is This Thing Called War?”, *The Economist*, 22 April 2010, available at: www.economist.com/node/15954464/print?story_id=15954464.

31 In the early hours of 4 September 2009, Colonel Klein, who formed part of the German International Security Assistance Force contingent, acting under the mandate provided by the UN Security Council, ordered an air attack on two fuel tankers which had been hijacked by Taliban forces and had got stuck in a sandbank in the middle of the Kunduz River. According to the factual assessment made by the German Generalbundesanwalt beim Bundesgerichtshof, Colonel Klein intended to destroy the tankers (which he had reason to consider as posing a threat) and knew the attack would also hit a number of Taliban commanders present on site, but, erroneously, he did not expect civilian casualties to occur.

the crime of murder under Section 211 of the German Code of Criminal Law, and as the conduct could not be justified by reference to the law enforcement paradigm, Germany's federal public prosecutor resorted to the customary international law on the conduct of hostilities in NIAC in defence of the colonel.³²

In view of the civilian casualties, it is difficult to see the humanitarian impetus of Henry Dunant at work here. And yet on the basis of current international law of NIAC, the prosecutor's decision to resort to the customary law on the conduct of hostilities was essentially correct. Today, most States arguably share the view of the federal public prosecutor and recognize that in an age of the universal protection of human rights by international law, a special legal regime regarding the conduct of hostilities in NIAC is also needed. The International Court of Justice (ICJ) had accepted this in its 1996 Advisory Opinion on Nuclear Weapons, as it had determined that the law on the conduct of hostilities limits the effect of the right to life in *all* armed conflicts and therefore also in NIACs.³³ In 2009, the ICRC followed the same line. In its seminal *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, it spelled out key components of the law governing the conduct of hostilities in NIAC, powerfully endorsing the need for a special legal regime for NIAC similar to the corresponding body of law applicable in IAC.³⁴ Finally, in September 2013, Christof Heyns, in his capacity as UN Special Rapporteur on extrajudicial, summary or arbitrary executions, acknowledged the existence of a special international legal framework governing the conduct of hostilities in NIAC which limits the full effect of human rights.³⁵ Heyns' report, which circumspectly takes stock of the international law debate surrounding the use of drones in situations of armed conflict and beyond, is particularly significant in light of this UN Special Rapporteur's human rights mandate.

Generalbundesanwalt beim Bundesgerichtshof, *Ermittlungsverfahren gegen Oberst Klein und Hauptfeldwebel Wilhelm wegen des Verdachts einer Straftat nach dem VStGB und anderer Delikte*, 3 BJs 6/10-4, Offene Version des Vermerks vom 16 April 2010 zur Verfügung der Einstellung nach § 170 Abs. 2 Satz 1 StPO, pp. 13 ff.

32 *Ibid.*, pp. 41 ff.

33 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, para. 25.

34 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, May 2009.

35 Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/68/382, 13 September 2013, para. 52 ff. It should perhaps be noted that Heyns' report (as is true for international legal scholarship) does not fully clarify the legal position of State soldiers in NIACs in one respect which is important both in theory and in practice. While it is difficult to deny that State practice supports the view that the law of NIAC empowers the State party to go beyond the international human rights law constraints in fighting its adversary, it is less clear whether the individual soldier enjoys a targeting privilege directly under the law of NIAC or whether such a power can only flow from a piece of domestic legislation of the State concerned which, as it were, activates a non-international law of armed conflict paradigm; even Sandesh Sivakumaran avoids a decision on this legal issue in his monumental work. See S. Sivakumaran, above [note 5](#), p. 151.

A new international law *against* non-international armed conflict (*jus contra bellum internum*) complemented by a law of non-international armed conflict (*jus in bello interno*)?

Whatever the state of legal development in detail, it can no longer be denied that the international law of NIAC has undergone a noteworthy process of assimilation to the law governing IAC, especially with respect to the particularly sensitive area of the conduct of hostilities. This has reanimated the scholarly debate about the question of whether it is now overdue to grant non-State fighters a combatant privilege equivalent to that of soldiers on both sides of an IAC. As a result of such a change in the present law, those rebels who fight in conformity with the law of NIAC would not only (as is the case at present) avoid international criminal responsibility for a war crime committed in a NIAC, but could also (contrary to the existing law) go unpunished under the domestic law of the State concerned, say for rebellion or murder, because of their participation in the armed conflict. In one of his last publications, Antonio Cassese pleaded for such a legal reform in the case of a high-intensity NIAC and provided that the armed forces of the non-State party are sufficiently prepared to distinguish themselves from the civilian population.³⁶

The main argument in favour of the introduction of a combatant privilege for fighters of the non-State party to a NIAC is of a humanitarian nature. The argument runs as follows: what incentive is there for the non-State armed forces to obey the international humanitarian rules if they are doomed to face punishment at the end of the armed conflict unless they prevail militarily?³⁷ As reasonable as this question may be, States have not hesitated to respond: they may well appreciate the perspective of a better incentive for non-State armed forces to comply with IHL, but they insist on the need also to provide an effective incentive for a political opposition group not to take up arms and unleash a NIAC.³⁸ In light of the human suffering associated with such conflict, this response equally carries the utmost humanitarian weight. Can this impasse be overcome?

36 Antonio Cassese, “Should Rebels be Treated as Criminals? Some Modest Proposals for Rendering Internal Armed Conflicts Less Inhumane”, in Antonio Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, pp. 523 ff. For a passionate pleading for the same reform, see Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford, 2010, p. 168. More cautiously, but pointing in the same direction, S. Sivakumaran, above note 5, p. 520, suggests applying AP II, Art. 6(5)5 in a manner that tends to operate as a “functional equivalent” to a privilege of combatancy. For an earlier and yet more modest proposal in the same direction, see ICRC, Draft Additional Protocols to the Geneva Conventions of 12 August 1949: Commentary, ICRC, Geneva, 1973, as submitted by the ICRC in June 1973, Draft Protocol II, Art. 10(5), p. 141.

37 A. Cassese, above note 36, p. 519; Nils Melzer, “Bolstering the Protection of Civilians in Armed Conflict”, in A. Cassese, above note 36, pp. 514–515; Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 26–27.

38 This point is fully appreciated by N. Melzer, above note 37, p. 516.

Outline of the two possible legal innovations

It is worthwhile looking at the law governing inter-State relations for a possible way out. Here a similar tension exists between the goal of preventing the illegal use of force in the first place and the need to provide humanitarian protection if this first goal has not been reached. There is reason to doubt that this tension can be completely dissolved, but current international peace and security law tries to moderate this tension in the following manner: it not only prohibits the use of force (save for a limited number of exceptions³⁹), but also criminalizes, though the crime of aggression, individual participation in serious instances of the illegal use of force.⁴⁰ Yet the threat of international punishment is confined to those “in a position effectively to exercise control over or to direct the political or military action of a State”.⁴¹ Within that legal system, the privilege of combatancy retains its potential also for the armed forces of the aggressor State to comply with IHL. As regards relations between States, international law therefore addresses the State leadership’s responsibility to prevent a war and, if such prevention fails, provides the armed forces with an incentive to wage war as humanely as possible.⁴²

This inter-State model suggests how the privilege of combatancy could be extended to rebels while maintaining a powerful normative barrier against their taking up arms in the first place. A reformed international law of NIAC could rest on two pillars, similar to those of its inter-State counterpart: it could embrace a privilege of combatancy in the *jus in bello interno* and at the same time prohibit any non-State organization from launching an armed attack against its government through a new *jus contra bellum internum*.⁴³ Within such a model, international law would no longer (save for the intervention by the UN Security Council) remain indifferent to the outburst of a NIAC, but would make the prevention of civil war its direct concern.⁴⁴ Within the reform model under

39 The right of self-defence, as recognized in Art. 51 of the UN Charter, and the use of force, as authorized by the UN Security Council under Chapter VII of the UN Charter, are two universally accepted exceptions.

40 The judgment of 1 October 1946 rendered by the International Military Tribunal of Nuremberg set the precedent for criminalizing under international law the waging of an aggressive war. For the judgment’s key passages and the subsequent international debate on this subject, see Stefan Barriga and Claus Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression*, Cambridge University Press, Cambridge, 2012, pp. 135 ff.

41 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183.9 (Rome Statute), Art.8(1) *bis* (as adopted 2010 in Kampala). On the leadership requirement, see Claus Kreß and Leonie von Holtzendorff, “The Kampala Compromise on the Crime of Aggression”, *Journal of International Criminal Justice*, Vol. 8, No. 5, 2010, p. 1189.

42 Claus Kreß, “Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus”, *European Journal of International Law*, Vol. 20, No. 4, 2009.

43 For an allusion to such a new international law on NIAC, see *ibid.*, pp. 1133–1136. For an earlier proposal pointing in the same direction, see N. Melzer, above note 37, pp. 515 ff. In Melzer’s proposal it is not entirely clear, however, whether the armed insurrection against the government shall be prohibited directly under international law under the threat of (international) punishment; *ibid.*, p. 517.

44 This essay is chiefly concerned with massive internal violence, but of course, careful consideration should also be given to the question of whether the new *jus contra bellum internum* should also cover the transnational non-State armed attack against a State. Such an armed attack is currently not covered by the Kampala definition of the crime of aggression as States, in line with existing customary international law, have refrained from including non-State acts of aggression in the new definition of

consideration, the State monopoly on the use of force would therefore not be weakened by the introduction of the privilege of combatancy in the law of NIAC; this monopoly would in fact be strengthened through the introduction of a ban on armed rebellion under international law.⁴⁵ The latter prohibition, however, would have to be confined to the leadership level of the rebels, in accordance with the definition of the crime of aggression.⁴⁶ In this way the incentive, provided for the individual rebel soldier through the new privilege of combatancy, to fight the NIAC in conformity with IHL could be maintained.⁴⁷

Whether a *jus contra bellum internum* could be upheld without exception is a most delicate question. It bears emphasizing that considering the human suffering in NIACs (and this includes above all the suffering of those *not* participating in the fighting), there are compelling reasons to prohibit not only regime change *by force* but also the taking up *of arms* against a government which does not act in full conformity with international human rights standards. But what if internal politics become cancerous and a government-orchestrated genocide or crime against humanity of murder or extermination is imminent? In light of such a scenario, there is a strong case for an (extremely limited) *jus ad bellum internum* – that is, a right of self-defence of the civilian population under lethal attack, “until the UN Security Council has taken the measures necessary to maintain international peace and security”.⁴⁸ As of yet, such a strictly circumscribed *jus ad*

the crime of aggression under international law. See C. Kreß and L. von Holtzendorff, above [note 41](#), p. 1190. There would be no need for a new *jus contra bellum internum* to extend to transnational non-State armed attacks if customary international law already contained a crime of international (non-State) *terrorism*. In his last important judicial pronouncement, Antonio Cassese (as the Presiding Judge and the Judge Rapporteur) and his colleagues in the Appeals Chamber of the Special Tribunal for Lebanon (STL) held that such a crime exists and covers leaders and low-level members of a terrorist group alike. STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration and Cumulative Charging*, Decision (Appeals Chamber), STL-11-01/I, 16 February 2011, para. 111. Under the *lex lata*, however, this judicial finding is open to very considerable question. For a powerful criticism, see, most importantly, Ben Saul, “Legislating from a Radical Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism”, *Leiden Journal of International Law*, Vol. 24, No. 3, 2011; the definition, as suggested by the Lebanon Tribunal, is dangerously broad if understood as a candidate for criminalization directly under international law. It must therefore be seriously doubted that the Lebanon Tribunal paved the way towards a satisfactory solution under international (criminal) law for transnational non-State violence.

45 A new *jus contra bellum internum*, as considered in the above text, would have to be asymmetric in nature, as it would be addressed to non-State actors only. In light of the State monopoly on the internal use of force, this asymmetry is without alternative; the international legal limits upon the *internal* use of force *by the State* would continue to flow from international human rights law and the threat of *international* punishment would continue to result, in cases of the most egregious abuses, in the resort to internal violence by State officials from the international criminalization of genocide and crimes against humanity.

46 Applying the logic underlying Rome Statute, Art. 25(3) *bis*, *mutatis mutandis*, low-level rebels would also not be responsible as aiders and abettors. See C. Kreß and L. von Holtzendorff, above [note 41](#), p. 1189.

47 Nils Melzer’s proposal in “Bolstering the Protection of Civilians in Armed Conflict”, above [note 37](#), p. 517, does not provide for a legal distinction between the leadership level and the lower-ranking rebel soldiers, and one wonders whether the effect he seeks to achieve through the introduction of a privilege of combatancy would not be too seriously weakened through the *jus contra bellum internum* as he conceives of it.

48 The classic debate about a right of a *colonialized* people of *forcible* external self-determination need not be pursued any further here. As far as the debate about a right of a people of *forcible* remedial secession

bellum internum has only received extremely limited scholarly attention.⁴⁹ The underlying problem has rather been debated from the perspective of an intervening foreign State. This has been done either by reference to the (subsidiary) international responsibility to protect or, more controversially, under the heading of a possible right of States to forcible humanitarian intervention.⁵⁰ This is not particularly satisfactory from the perspective of the law's internal consistency. At a stage of the development of international law where non-State actors are no longer necessarily relegated to being indirect beneficiaries of State rights, the justification for an exceptional right to use force in the case of an impending humanitarian catastrophe should be rooted in the individual right of self-defence of the civilian population under attack, and any right of a foreign State forcibly to come to the assistance of the targeted population should be conceived of as a form of *collective* self-defence to the benefit of the population concerned and derivative of the civilian population's right. In that context, it is extremely interesting to note that, in its declaration at the March 2013 Doha Summit, the Arab League explained the legality of supplying weapons to the Free Syrian Army on the basis of the right to self-defence of the Syrian people.⁵¹

In its essence, a fully symmetrical legal regime for NIAC was already known in the nineteenth century, but at this time it had to be activated by the recognition of belligerency, whose occurrence could never be taken for granted. A completely symmetrical law of NIAC would, however, have to be complemented by a new international law against civil war. By virtue of such a *jus contra bellum internum*, the prohibition on the use of force in international law would be extended to non-State organizations with a capacity to initiate massive violence. The new *jus contra bellum internum* could build on the now consolidated practice of the UN Security Council to consider a NIAC as a threat to

outside the colonial context is concerned, it is suggested that such no such right should be recognized that exceeds the extreme factual scenario as discussed in the above text. On the State practice on this point, see Claus Krefß, "Major Westphalian Shifts and Some Important Neo-Westphalian Hesitations in the State Practice on the International Law on the Use of Force", *Journal on the Use of Force and International Law*, Vol. 1, No. 1, 2014, pp. 28 ff.

49 But see Frédéric Mégret, "Civil Disobedience and International Law: Sketch for a Theoretical Argument", *Canadian Yearbook of International Law*, Vol. 46, 2010, identifying the case of an impending genocide as the core field of application of a *jus ad bellum internum*. In his most recent contribution to the topic, Mégret discusses the latter in conjunction with the idea of introducing a privilege of combatancy in the law of NIAC; instead of introducing such a privilege, Mégret suggests a decisive focus on the *ad bellum* side of the coin and argues in favour of a "right of the rebels to a *jus post bellum internum* amnesty" if (but only if) they have taken up arms under circumstances justifying a *jus ad bellum internum*. Frédéric Mégret, "Should Rebels be Amnestied?", in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford, 2014, pp. 538–539.

50 For an analysis of the pertinent State practice, see C. Krefß, above note 48, p. 20.

51 The relevant passage reads as follows: "while stressing on the right of each member state, in accordance with its wish, to provide all means of self-defense, including military support to back the steadfastness of the Syrian people and the free army". "24th Arab Summit Issues Doha Declaration", Arab League 24th Summit, 21–27 March 2013, available at: <http://arableaguesummit2013.qatarconferences.org/news/news-details-17.html>; on the ideas underpinning the declaration, see Niaz A. Shah, "The Use of Force under Islamic Law", *European Journal of International Law*, Vol. 24, 2013, p. 346.

international peace and security,⁵² and it would enrich international law through the introduction of a hitherto unknown discriminatory concept of civil war. It is therefore conceivable in theory to compose a new international law on NIAC, which would reach yet another stage of its development in Antonio Cassese's spirit and which would even extend slightly beyond Cassese's last word on the subject through the distinction between an *asymmetrical jus contra bellum internum* and a completely symmetrical *jus in bello interno*, mirroring to an extent the law governing the relations between States. But what about possible fundamental objections to such a new law, and if such objections could be addressed, what about the workability in practice of such a new law to the benefit of humanity?

A "realizable utopia"?⁵³

The idea of achieving full symmetry in the law of NIAC gives reason to pause and to have a fresh look at the legitimacy of the privilege of combatancy in the law of IAC in the first place. In this respect, the starting point is to recognize that, in the age of a prohibition of force in international relations, the legitimacy of a permission to use lethal force for the individual soldier of the *aggressor* State must be open to question. A couple of years ago, Jeff McMahan subjected the privilege of combatancy for the "unjust warrior"⁵⁴ to an elaborate criticism in terms of moral philosophy. He argues that neither the idea of a mutually valid consent,⁵⁵ nor a general presumption in favour of an unavoidable error of law, nor the reliance upon an allegedly binding superior order to wage war given by the leadership of the aggressor State, constitutes a good reason to justify such a privilege.⁵⁶ It is important to note McMahan's argument because it carries even more weight with respect to a non-State "unjust warrior" in a NIAC. Yet, McMahan has explicitly refused (while adding the caveat "at present") to argue for an asymmetrical construction of the law of IAC as a consequence of his moral argument. In that context, he refers *inter alia* to the incentive which flows from their privilege of combatancy for "unjust warriors" to comply with the law of armed conflict.⁵⁷ In a recently published, thoughtfully written book chapter, Frédéric Mégret takes a different position and questions the symmetrical privilege of combatancy in the law of

52 For this consolidated practice, see ICTY, *The Prosecutor v Duško Tadić*, above note 14, para. 30.

53 This expression alludes to the title of the book edited by A. Cassese, above note 36.

54 Meaning a soldier fighting for the aggressor State.

55 The idea that participation in hostilities implies consent to being targeted by the other side.

56 Jeff McMahan, *Killing in War*, Oxford University Press, Oxford, 2009, pp. 38 ff.

57 *Ibid.*, pp. 190–191: "Unjust combatants who feared punishment at the end of the war might be more reluctant to surrender, preferring to continue to fight with a low probability of victory than to surrender with a high probability of being punished ... And they might also reason that if they face mass punishment in the event of defeat, they have little to lose from abandoning all restraint in the effort to win. They might reason, for example, that if they are defeated, and if the prosecutors are unlikely to have knowledge of their individual acts, each might have nothing to lose, but perhaps something to gain, from the commission of war crimes or atrocities that would increase their chance of victory and thus of immunity to punishment." For a similar line of reasoning, see Nigel Biggar, *In Defence of War*, Oxford University Press, Oxford, 2013, p. 196.

IAC. This position is (among other things) based on the disbelief that the privilege of combatancy in fact works as an incentive for compliance. Mégret denounces the widely held opposite view as being based upon no more than the unreflected psychological assumptions of laypersons.⁵⁸ These doubts deserve to be treated seriously, and they call for another round of reflection on the incentive for compliance potential of a privilege of combatancy for the “unjust warrior” with respect to both the current law of IAC and a possible future law of NIAC. Thought should also be given to the feasibility of an empirical study on the subject. As regards the law of NIAC, which is at the heart of this essay, one thing is clear: the introduction of a privilege of combatancy for non-State fighters in a NIAC imperatively requires the realistic prospect of thereby significantly improving compliance with IHL by the non-State party to the conflict.

The impossibility of justifying such a prospect would, however, not render the debate about a new *jus contra bellum internum* moot. It is true that the idea of such a new law has been presented here as a complement to a fully symmetrical *jus in bello interno*. But it bears emphasizing that a new *jus contra bellum internum* (including an exceptional *jus ad bellum internum* in case of an impending humanitarian catastrophe) should be a matter for debate in any event. In other words, a move towards complete symmetry in the law of NIAC is dependent on the introduction of a new *jus contra bellum internum*, but this statement does not necessarily hold true the other way round.

The idea of a new *jus contra bellum internum* also gives rise to important questions. First of all, careful thought must be given to the question of whether it is possible to formulate a new international prohibition (under the threat of international punishment) as well as a limited exception therefrom, which is both satisfactory in substance and sufficiently precise.⁵⁹ Confirmation is also needed on whether a non-State party leadership level can be identified in most instances of an emerging NIAC so that the new international rule could indeed work as the intended legal barrier against the unleashing of a civil war. Furthermore, the workability in practice of the new legal regime under consideration would be exposed to serious doubt if the outbreak of a NIAC was generally preceded by an escalation dynamic that could not be disentangled with sufficient clarity to reliably attribute responsibility. Sadly, the situation of Syria (since 2012) provides us with a fresh example of such dynamics. Yet another challenge results from the fact that there are national constitutions which provide for a right to armed resistance under certain conditions.⁶⁰ There would thus be a need to bring both levels of legal regulation in harmony with each other. Finally, there can be no doubt that the introduction of a *jus contra bellum internum* would constitute an

58 F. Mégret, above note 49, pp. 538–539.

59 For the question of whether or not to include transnational non-State violence, see above note 44. Furthermore, in order to duly respect the domestic sphere of jurisdiction, the scope of application of the new international rule would have to be properly confined to *intensive* non-State violence reaching the threshold of NIAC.

60 For one example, see the German Constitution, *Grundgesetz für die Bundesrepublik Deutschland*, Art. 20(4).

ambitious legal reform. One wonders whether it is a bridge too far for international law, at least for the time being.

In view of all these important and as of yet barely discussed questions, the reform model for an international law *on* NIAC is *not* here presented for immediate adoption. Instead, the model is submitted in a scholarly spirit for debate as to whether it could be seen as a “realizable utopia” in the sense of the late Antonio Cassese. It would be a multifaceted and challenging debate, but as civil wars are one of the main evils of our time, an improved, if modest, contribution by international law to deal with that evil at its roots would therefore justify the most demanding intellectual effort.

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Response to Claus Kreß: Leveraging the privilege of belligerency in non-international armed conflict towards respect for the *jus in bello*

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Abstract

In this response to Claus Kreß’s piece, I focus particularly on the suggestion of granting a privilege of belligerency to non-State armed groups in non-international armed conflict. I take issue with the idea that the privilege of belligerency is an inherently humanitarian issue, and note its deeply problematic aspects from the point of view of both the idea of human rights and the jus ad bellum. I also argue that it is unclear how the privilege of belligerency would incentivize rebels to better comply with international humanitarian law. At the very least, I suggest that the granting of a privilege of belligerency to non-State armed groups should be conditional upon good humanitarian performance.

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Introduction

Claus Kress has written a spirited evaluation of the legal regime of non-international armed conflicts (NIACs), in which he also makes some very notable suggestions, particularly that the privilege of belligerency (POB) be extended to non-State armed groups in NIACs, and that an internal *jus contra bellum* be developed. In this sympathetic but somewhat sceptical response to his argument, I want to underline the points on which I agree and disagree. The NIAC regime has by and large been a regime by default, one constructed in the shadow of the regime applicable to international armed conflict (IAC). It is one marked, among other things, by very specifically sovereign fears that may have little to do with first principles, and which have traditionally oriented it in a conservative and timid direction.

We clearly live in an age where it is becoming increasingly necessary to conceive of a sounder regime for NIAC. In addition, it may well be that the limitations of the laws of war are linked not only to a series of functional and policy obstacles, but also to what one might call failures of the legal imagination. In this respect, I salute in passing Kress's willingness as a lawyer to draw on normative theory that is produced outside the legal realm, for only by going beyond a strictly positivist register can one avoid the sort of circularities that all too often have characterized reasoning about the regulation of conflict. I also believe a discussion of the POB in all its forms, as one of the great under-debated structuring assumptions of international humanitarian law (IHL), is long overdue.⁶¹

At the same time, in contributing to this important intellectual discussion, I believe my esteemed colleague attempts to hit too many birds with one stone and may, as a result, hit the wrong bird or not hit the right bird hard enough. In this response to Kress's article, I first outline my principal points of agreement with him. I then argue that his proposal for a POB in NIAC does not flow from his diagnosis and is, in fact, more problematic than appears, from the point of view of his own, peace-oriented agenda. Finally, I suggest that we need to think more precisely about the role that the POB may have in fostering better compliance with the *jus in bello*. I argue in particular that obtaining a POB should be explicitly conditional upon a certain satisfactory level of compliance with the laws of war. In saying this, I speak from the point of view of an international law sensibility (shared broadly, I think, by Kress) which is interested in the broad view of the regulation of armed conflict—including the way in which different regimes that purport to regulate violence interact and create trade-offs, and not simply devoted in abstract to the pursuit of the humanitarian project at the exclusion of all else.

61 Work of this sort, at the intersection of law and moral theory, has started emerging. However, its focus seems to be more on IAC than NIAC. Richard V. Meyer, "The Privilege of Belligerency and Formal Declarations of War", in Claire Finkelstein, Jens David Ohlin and Andrew Altman (eds), *Targeted Killings: Law and Morality in an Asymmetrical World*, Oxford University Press, New York, 2012, pp. 183–220.

Points of agreement: The basic diagnosis

In his piece, Kreß seems to express three central concerns. I will briefly address them in their own right to emphasize how much I share each taken independently. First, Kreß argues that there is a problem with the asymmetry of the humanitarian regimes of IAC and NIAC; second, he draws attention to a trend that seems to be occurring simultaneously and pulling in the opposite direction – the danger of over-application of the laws of war; and third, he suggests that we need to consider the possibility of a domestic *jus contra bellum*.

The hard-to-defend asymmetry of the humanitarian regimes of international and non-international armed conflicts

To begin with, that more could be done to improve compliance with the humanitarian regime of NIAC is fairly evident. In terms of humanitarian policy, finding ways to incentivize both States (repressing non-State armed groups with a vengeance because they feel it is their sovereign prerogative to do so) and non-State armed groups (unsocialized in the ways and values of international law) to respect certain humanitarian limitations has become a sort of Holy Grail of international humanitarianism. A distinct and influential strand of humanitarian thought has for quite some time argued for an upgrading of the regime applicable to NIAC by reference to that of IAC. Kreß's analysis in this respect lies firmly within the current progressist canon that sees the need to develop the law relating to the conduct of hostilities in NIACs.

Many of the arguments for assimilating the regimes of IAC and NIAC are compelling morally if not always strictly in positive law. In many respects, the regime of IAC is more comprehensive and thoroughly protective than that existing in NIAC. It is often argued that limitations of the humanitarian regime in NIAC derive from sovereign concerns that have more to do with protecting a *domaine réservé* than creating the best of humanitarian worlds. What difference should it make, after all (except for sovereignty-obsessed States whose motivations we have increased reason to be wary of), whether as a victim of war one is situated in an IAC or a NIAC? Is not a lot of energy wasted in arcane issues of conflict classification⁶² that could be usefully redirected to more productive pursuits? Auspiciously, then, many international lawyers would argue that, as a result of what Kreß refers to as the “*Tadić* dynamic”, the laws of war in the last twenty years have moved towards a greater humanization, taking their cue from international human rights law.⁶³ It is only a small step from there to

62 James G. Stewart, “Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict”, *International Review of the Red Cross*, Vol.85, No. 850, June 2003, pp. 313–350.

63 Theodore Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000, pp. 239–278.

effectively argue for a “unified” law of war that would apply equally regardless of the conflicts,⁶⁴ and the trend towards convergence at times seems unstoppable.⁶⁵

The danger of over-application of the laws of war

In addition to this proactive commitment to the development of the law, Kreß is also wary of something that almost goes in the opposite direction, namely the risk of what one might call the “over-application” of the laws of war. This may be counter-intuitive since we are used to States seeking to deny the application of the laws of war, but evidently the opposite is also true. It is perhaps the natural tendency of any body of law to seek to apply to an ever-increasing range of situations, spurred by good intentions and fear of a legal void. That may be particularly the case when that body of law is associated with humanitarian virtues. *A fortiori*, if this expansion is backed by powerful and well-organized institutional agendas, the case for it may be overwhelming.

However, as Kreß notes in one of the most clear-sighted passages in his article, there is also a danger of displacement of other bodies of law where arguably they should remain applicable or continue to be controlling in the background. In particular, a comprehensive application of a conduct of hostilities regime in NIAC might be said to objectively displace the ordinary application of human rights. In IAC, that departure from ordinary expectations about core rights (to life, to physical integrity) is perhaps less intensely felt because of the highly anomalous status of the international system normatively, and the way structured assumptions about war have led us to a state of permanently degraded expectations about what can be achieved. The problem is that protection is relative: what is most humanitarian (in the laws of war sense) is not necessarily what is most protective. The regime of IAC may be more protective than (i) nothing and (ii) the regime of NIAC, but it is certainly not as protective as normally applicable human rights standards. The issue of what exactly is being displaced should therefore be front and centre of any attempt to import a legal regime originally designed to address very different kinds of situations.

In this respect, I would add a further point to signify my profound agreement with Kreß on this issue. The humanitarianism inherent to non-international violence starts from fundamentally different premises than the humanitarianism inherent to inter-State violence. With regard to the latter, the starting point, as exemplified perhaps a little stereotypically by the founding myth of Solferino, is a situation in which almost no rules prevail in the waging of violence. Humanitarianism, then, is a significant victory over barbarism.

64 Emily Crawford, “Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts”, *Leiden Journal of International Law*, Vol. 20, No. 2, 2007, pp. 441–465.

65 Michel Veuthey, “The Need for a Universal Humanitarian Order”, *Foresight*, Vol. 7, No. 1, 2005, pp. 26–46; Marco Sassoli, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 26–27.

Domestically, however, the situation is quite different. Indeed, the starting point is one that is ideally characterized by the pursuit of human rights. Humanitarianism, therefore, does not intervene in a void but rather displaces a thick pre-existing network of obligations, duties and norms. It significantly downgrades our ordinary expectations of justice. Understanding this asymmetry between the humanitarian projects in IAC and NIAC is crucial. Hence the international humanitarian solicitude, however well-intentioned, is one that the human rights community may understandably be wary of in principle.⁶⁶ In practice, for example, whilst we should rightly be wary of States who refuse to acknowledge armed conflicts on their territory, we may also have reason to find problematic States who too readily find conflicts occurring there.

Now it might of course be argued that the applicability of the laws of war is better than nothing and may introduce a modicum of restraint in a context that is fast spiralling out of control. That may be a price worth paying for pragmatic reasons (an issue further addressed in the final section). A time of “armed conflict” may not be the time to be picky about rights, and one should seek to save what can still be saved in deeply compromised moral circumstances. This is the characteristic, almost foundational motive of the humanitarian project in IAC as well as in NIAC: humanitarianism is preferable to unrestrained violence if violence is inevitable. But we should also always keep in mind that even “humanized” laws of war may be little consolation for a broader flight from rights. The irruption of the laws of war in the domestic context interferes with a relationship structured around radically different assumptions. It displaces dearly held ideals about the sanctity of human life. We should at least recognize that concession to humanitarianism for what it is, namely a deep bowing to the inevitability and to a degree the legitimacy of war as an institutional practice in international society.⁶⁷ Whether that is a move we are ready to make as confidently in NIAC as in IAC is the real normative question. It is thus very much to Professor Kreß’s merit to have raised it.

The need for a domestic *jus contra bellum*

Finally, in addition to an amplified humanitarian regime, one of the more intriguing points suggested by Kreß is that a form of non-international *jus contra bellum* should be developed. There is no doubt that this is quite a striking and radical suggestion, and one which is bound to be very sensitive with States who

66 In practice international human rights lawyers have tended to pragmatically abdicate the human rights high ground to endorse the notion that the laws of war are the *lex specialis*, thus powerfully reinscribing the violence of the inter-State system within human rights. This is not to say that this fundamental concession does not create the occasional pang of unease. See in particular William Schabas, “Freedom from Fear and the Human Right to Peace”, in David Keane and Yvonne McDermott (eds), *The Challenge of Human Rights: Past, Present and Future*, Edward Elgar, Cheltenham, 2012, pp. 36–51.

67 Frédéric Mégret, “Who’s In and Who’s Out? A propos de la protection internationale du monopole de l’exercice de la violence légitime et quelques autres attributs des monstres froids”, *Revue Québécoise de Droit International*, 2011.

traditionally have considered that the repression of violent challenges to their power is in principle (means aside, and even then, grudgingly) entirely within their sovereign prerogative. That is of course because behind any *jus contra bellum* is an implicit claim of *jus ad bellum*, one that could operate to the benefit of the State (say, in the pursuit of its legitimate maintenance) but also to the benefit of non-State armed groups. Very briefly, I broadly concur with three types of arguments made by Kreß for internationalizing the question of the legal use of force domestically.

First, NIACs represent today the vast majority of armed conflicts, and they have significant transnational and international consequences (regional destabilization, refugee flows, escalation to inter-State conflict). In other words, sovereigns and non-State actors can hardly claim that they can keep domestic violence within their borders, and the international community is within its rights when it seeks to scrutinize the conditions under which violence is triggered. Such an argument has already been invoked quite successfully in the context of constructing a humanitarian regime for NIAC. Second, as international law becomes normatively denser and more hierarchical, it simply cannot be expected to blandly accept that the protection of sovereignty through repression of non-State violence is always its *ipso facto* right. If nothing else, there are extreme cases – for example, that of an ongoing genocidal campaign – where it is inconceivable that international law would stand on the side of the sovereign oppressor, denying the would-be victims the right to protect themselves.⁶⁸ Third, in effect there is a long tradition of international legal thinking and practice that has foregrounded the existence of legitimate practices of violence in fighting tyranny, radical oppression and criminality. This tradition has re-emerged more strongly in recent decades as part of an increasingly influential discourse of human rights. International law is, in other words, not starting from nothing, and there is merit in seeing a discussion about domestic *ad bellum* as a form of continuation of long-existing debates rather than a sudden proposed innovation.⁶⁹

In concluding this first section, I would like to point out that it is not clear which of Kreß's three concerns, outlined above, is foremost in his mind. Kreß's article opens with an emphatic evocation of the humanitarian project and is, after all, published as part of a special issue on the scope of the law in armed conflict in the *International Review of the Red Cross*. The shadow of Cassese looms large in the article and orients it towards the humanitarian dimension of NIAC. However, towards the end, the article becomes much more interested in the *jus contra bellum* issue, almost as if such a bold move as the conferral of a POB needed to be compensated by something that would reassure States. Both concerns, however, might be in tension with the risk of overextension of the laws

68 Frédéric Mégret, "Not 'Lambs to the Slaughter': A Program for Resistance to Genocidal Law", in René Provost and Payam Akhavan (eds), *Confronting Genocide*, Springer, New York, 2011, pp. 195–237.

69 Frédéric Mégret, "Le droit international peut-il être un droit de résistance? Dix conditions pour un renouveau de l'ambition normative internationale", *Etudes Internationales*, Vol. 39, No. 1, 2008, pp. 39–62.

of war. This is why the connection between these concerns needs to be the object of further investigation.

The point of disagreement: The problematic character of a conferral of the privilege of belligerency in non-international armed conflict

It is with this in mind, and having underlined my broad agreement with the basic diagnosis, that I find Professor Kreß's joining of voices with those who argue that a POB status should be granted to combatants in NIACs⁷⁰ not entirely convincing in its current form. To be clear, my concern here will not be with whether this is a politically realistic or legally grounded proposal, but whether it is a normatively and ethically sound one. Since we are, after all, talking *de lege lata*, then we should be all the more at liberty to invoke all relevant normative considerations. There may be some tension, in particular, between the goal of humanizing war on the one hand and the project of simultaneously granting a POB and reinforcing the *jus contra bellum* on the other. In fact, I will argue that the main policy proposal of Kreß's article does not follow from its premises: granting a POB status would do little to remedy the problematic humanitarian situation in NIACs. I take issue with the contention that the great move of convergence between IAC and NIAC needs to be perfected by remedying the anomaly that the POB exists in the former but not the latter. In fact, recognition of the POB may further entrench domestically some of the most exorbitant and problematic features of the laws of war, notably by making the ordinarily morally abhorrent and criminal (e.g., murder) fully legal. In doing so, it arguably risks falling prey to the very danger of an excessive import of features of IACs into NIACs that Kreß rightly denounces.

In the urge to humanize NIACs, one can identify a tendency to underestimate the significant normative differences between IACs and NIACs. What I think is needed, as a result, is to better characterize the legal status of the POB and understand how it might unfold differently in NIAC as opposed to IAC. Its existence in the latter but absence in the former is perhaps one of the most striking and defining differences between the two regimes. Where everything else seems to be a matter of degree (there are rather more humanitarian protections in IAC than in NIAC), this is a difference of *nature*, one that grants unique juridical protection to combatants aligned with States in IAC, but that is strikingly absent in NIAC.

The typical explanation as to why this distinction exists is that NIACs occur domestically and States are naturally more concerned with what happens within their sovereign province, and so do not want to risk legitimizing non-State armed groups even indirectly. However, I want to argue that there are deep normative

⁷⁰ These are clearly in the minority, but they have produced impressive normative tracts in support of their proposition. See E. Crawford, above [note 36](#), pp. 153–169 (“Achieving a Universal Combatant Status”).

reasons for being wary of the POB in NIAC that have little to do with State cynicism. The question then should be, what is the precise legal and moral nature of the POB and what might its broad introduction into NIAC portend? The POB is often seen as an essential, inseparable and defining element of the regime of IACs and, as a consequence, an integral part of its claim to offer greater humanitarian protection. I contend, however, that the POB has relatively little to do with humanitarianism in the first place, is not logically tied to increased humanitarian protection (at least in the form in which it is typically recognized) and, ultimately, is at least theoretically severable from any humanitarian regime. Moreover, if we are serious about the application of POB in NIAC, we should envisage how it should apply to *State armed forces* as well.⁷¹

The privilege of belligerency is not in itself humanitarian progress

A certain confusion is created by the fact that the POB is largely contained in laws of war instruments.⁷² However, there are practical and political reasons why this may be so which do not necessarily lead to an inference that it is an *intrinsically humanitarian* issue. In fact, the POB's presence in humanitarian law instruments appears to be largely accidental. Even though it may be a political condition of feasibility of the humanitarian project, that does not *in itself* make it a humanitarian provision. Rather, if anything the POB pertains to a sort of *proto jus ad bellum*, somewhere in a grey area between the *jus ad bellum* and the *jus in bello*, which identifies who, *a priori*, ought to be considered a privileged combatant for the purposes of the laws of war, and therefore who can be considered as a (relatively) legitimate participant in the particular form of violence internationally known as "war".⁷³ Its Statism (State troops almost always benefit from it, where non-State armed groups only do so under strict conditions) is not accidental but very much a recognition that sovereigns are clearly the historically preferred participants in armed conflict.⁷⁴

Let us first consider the juridical significance of the POB in and of itself (not in some broader, instrumental sense). The POB effectively functions as an immunity from prosecution – or even a permission – for what might otherwise be considered a criminal act (killing and wounding other human beings, provided they are

71 This may seem a moot question given the assumption that only States have the ability to prosecute and most likely will not, but of course (i) it is conceivable that non-State armed groups would want to prosecute State agents for their participation in a counter-insurgency campaign, or (ii) that a successor government or (iii) some emanation of the international community would want to do this.

72 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Lands, 18 October 1907, 187 CTS 227, 1 Bevans 631 (entered into force 26 January 1910), Art. 1 (Annex); GC III, Art. 4; AP I, Art. 43.

73 Frédéric Mégrét, "*Jus In Bello as Jus Ad Bellum*", *American Society of International Law Proceedings*, Vol.100, pp.121–123.

74 Incidentally, many of the "just war" arguments for the POB in IAC have less to do with the *jus in bello* than with concerns about fairness for individual soldiers who were asked to sacrifice themselves for their State and to respect the national collective will, as well as the mutual consent to killing as between members of State forces. In other words, they are very much imbricated in the normative fabric of Statehood and its particular exigencies.

combatants). This much at least should be clear, therefore: the POB is not *per se* a form of humanitarian protection, except in the twisted sense that it protects combatants who kill other combatants.⁷⁵ It is generous towards the very act of war, but it does exactly the opposite of what humanitarianism normally does and is about: limiting violence. It may be that it is part of a broader, realistic trade-off that makes the humanitarian project more palatable to States (by saying “we recognize your unique privilege to kill combatants to encourage you not to kill non-combatants”), but that is not the same thing as saying that it is in itself humanitarian.

In fact, one could argue that the fairly wanton killing of combatants is the one irreducible non-humanitarian blind spot of humanitarianism, the bare definition of war that the laws of war have never dared to challenge. It is true that prisoner-of-war status—which is the logical consequence, if one has been captured, flowing from the POB—is humanitarian at least in the sense that it proposes that the wounded or those who have surrendered should not simply be killed (which might otherwise make sense in war). However, this limited humanitarian protection could still be obtained without the conferral of a POB. Indeed, wounded or surrendered combatants could be entitled to certain forms of safe detention and yet be prosecuted for having killed other combatants.⁷⁶ At any rate, the idea that combatants can kill each other legally is an abnormal exception to the notion present in most legal systems that one cannot consent to one’s own death at the hands of others. Rather than *limiting* war, the POB makes the very practice of war, understood as a legalized activity, possible.

The privilege of belligerency is problematic from the point of view of human rights

In addition to not being intrinsically humanitarian, the POB is arguably one of the crucial ways in which the ordinary promise of human rights is downgraded under the banner of humanitarianism. Internationally, this is perhaps less evident because of the paucity of States’ extra-territorial legal obligations and the broad positive-law deferral to the laws of war as the *lex specialis*.⁷⁷ The POB has become such an assumed part of the laws of war that lawyers typically do not question the legality

75 The resistance of many international humanitarian lawyers to the suggestion that “unprivileged” participation in hostilities is a war crime but is better treated as a violation of domestic law suggests that the POB is indeed not fully central to the humanitarian project. On this topic, see Nathaniel Berman, “Privileging Combat? Contemporary Conflict and the Legal Construction of War”, *Columbia Journal of Transnational Law*, Vol. 43, No. 1, 2004, pp. 1–71.

76 Michael H. Hoffman, “Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law”, *Case Western Reserve Journal of International Law*, Vol. 34, 2002, p. 227; Derek Jinks, “The Declining Significance of POW Status”, *Harvard Journal of International Law*, Vol. 45, No. 2, 2004, pp. 367–442; E. Crawford, above [note 36](#), Chapters 3 and 4.

77 This is an aspect that has only begun to be an object of critique by a very few international lawyers. William A. Schabas, “Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus Ad Bellum*”, *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 592–613.

of killing other combatants – surely this must be the incompressible minimum on which the very existence of the laws of war depends. Nonetheless, from a rights perspective informed by moral and cosmopolitan thinking (as opposed to positive international human rights law), the POB still means that individuals can kill or be killed as part of the mere existence of an objective state of affairs between sovereigns – an “armed conflict” – at the expense of the maximization of their rights. Specifically: (i) enemy combatants fighting a war of self-defence can be legally killed, which is a hard-to-justify encroachment on their right to life;⁷⁸ and (ii) combatants ordered to engage in a war of aggression can essentially be sacrificed by their own State for an illegal end, again in violation of their right to life.⁷⁹

In domestic contexts, this downgrading of the ordinary promise of human rights through the granting of a POB would be even more evident because, as has been pointed out, the starting point is the applicability of internationally protected human rights. The downgrading would manifest itself in the simultaneous undermining of the existing framework of domestic, particularly criminal law, and of human rights. When it comes to domestic law (whose protections are indispensable to human rights), the POB undermines the idea that killing or wounding others without legitimate and legal authority or permission (e.g., individual self-defence) is, straightforwardly, a criminal act (in addition to being in contradiction to the State’s monopoly on the legitimate use of violence). It thus dramatically weakens the rights of those who are targeted in armed conflict, whose expectation that their right to life will be upheld in all but the most exceptional circumstances now gives way to a situation in which they can be killed legally.

Where killing State agents lawfully exercising their authority is normally considered one of the gravest crimes, it would suddenly leave such agents legally defenceless against attacks. This exemption to the most cherished domestic laws, then, would be a boon to rebels, suddenly normalizing the completely illegal into a mere act of war. Perhaps more importantly, when it comes to human rights law, the POB is particularly relieving of obligations that would normally apply to *State* agents. In cases where a State’s forces would normally be liable for human rights violations for killing individuals (except in narrow circumstances such as during an arrest, while keeping order, or self-defence), they could now avail

78 Normally, a limitation on the right to life in international human rights law must be justified on narrow grounds (self-defence, arrest). Although international human rights law typically defers to the laws of war as the *lex specialis* when it comes to war, one might argue that killing as part of a war of aggression would be hard to justify.

79 In just war theory, this is what is sometimes referred to as the “internal *jus in bello*”, namely the extent of obligations that the State owes to its own soldiers. There is an argument that this moral idea might be translated into legal human rights obligations. Frédéric Mégret, “The Specific Evil of Aggression”, in Claus Kreß and Stefan Barriga (eds), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2015, forthcoming. Current work on the “human rights of soldiers” is also in this vein. Solon Solomon, “Targeted Killings and the Soldiers’ Right to Life”, *International Law Students Association Journal of International & Comparative Law*, Vol. 14, No. 1, 2007, pp. 99–120; Gabriella Blum, “The Dispensable Lives of Soldiers”, *Journal of Legal Analysis*, Vol. 2, No. 1, March 2010, pp. 115–170.

themselves of the considerable violence implicit in the laws of war to kill those who would henceforth be considered as combatants. A POB for State troops in NIACs is a formidable licence to kill.

The privilege of belligerency is problematic in terms of *jus contra bellum*

Kreß distinguishes the issue of granting a POB in NIAC from that of developing a domestic *jus contra bellum* and presents these as largely irreducible issues. The reinforcement of the domestic *jus contra bellum* is offered up as a sort of *quid pro quo* for having introduced a POB in NIAC. What this seems to acknowledge yet simultaneously neglects, however, is the considerable objective role that the POB would have in legitimizing resort to force in the first place. It is as if Kreß's *jus in bello* proposal has simultaneously and discreetly undermined his own *jus contra bellum* commitment. One cannot help getting the impression, in other words, that the proposal to grant a POB to actors involved in NIACs removes one of the clearest disincentives for resorting – including illegally – to the use of armed force domestically in the first place. Whilst the concern with granting a POB to non-State armed groups is one that Kreß associates with traditional States, it is also crucially important to note that the goal of deterring an illegal rebellion or, for that matter, an illegal war by a State against its population should rank as a major human rights concern in its own right.⁸⁰

Again, I will turn in the next section to the ways in which the POB is nonetheless often understood as part of a broader system of trade-offs which characterizes the laws of war, so that even its unsavoury aspects are considered redeemable. For the time being, let us note that the POB in IAC not only protects soldiers engaged in war in general, but also specifically protects soldiers involved in illegal wars from what might otherwise be the consequences of such participation. That this is essentially a sunk cost of doing international warfare does not relieve us from highlighting it for what it is, especially at the moment of extending it to another, very different type of warfare. The POB effectively concedes the existence of a broad, unconditional right to kill combatants, even for individuals who clearly know that they are engaging in actions that are illegal – even criminal – in the first place. It thus removes what might have been a particularly strong safeguard against aggression, namely the sure knowledge that one cannot kill combatants when one is knowingly engaging in a war of aggression.

Of course, this result is powerfully reinforced by the fact that the international criminal law of aggression has itself conceded that only senior commanders can be liable for the crime.⁸¹ Low-ranking officers and soldiers (in practice, the vast majority of the military) who implement orders to carry out an aggression fall outside the penal reach of the *jus ad bellum*. It is thus logical

80 Kjell Anderson, “The Universality of War: ‘Jus Ad Bellum’ and the Right to Peace in Non-International Armed Conflict”, in D. Keane and Y. McDermott (eds), above note 66, pp. 52–73.

81 Kevin Jon Heller, “Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression”, *European Journal of International Law*, Vol. 18, No. 3, June 2007, pp. 477–497.

that they are given the protective cover of the *jus in bello* (it would be paradoxical, of course, if the *jus ad bellum* let them off the hook but the *jus in bello* did not). It is perhaps no surprise as a result that individual soldiers do not feel particularly compelled to challenge the violations of the *jus ad bellum* that they are ordered to take part in, given how the *jus ad bellum* and *jus in bello* conspire to fashion them into largely irresponsible actors. Still, even allowing for that specific limitation, the POB also applies to those commanders located at the top of the chain of command who may be held liable for the crime of aggression, but would nonetheless not be liable for killing the combatants they knew they had no *ad bellum* right to kill in the first place. The point here is not as such to criticize this facet of the regulation of IAC that is often seen as unassailable even by the majority of moral theorists writing about the topic⁸² (I will return briefly to this issue in the conclusion). Rather, it seeks to warn about what is exactly proposed to be imported in NIACs.

Indeed, there is no reason to think that these very significant concerns with the POB would be redeemed in NIAC; quite the contrary. Inserting a POB in NIAC may import precisely one of the most problematic features of the regulatory apparatus of IAC. Even though a POB would presumably not prejudge the *ad bellum* legality of the rebels' acts, it would at least provide them with a significant legal cover regardless of that legality. Rebels might not have a just or legal cause, but they would nonetheless be recognized as being a relatively legitimate actor for the purposes of engaging in war. No longer risking prosecutions for the mere fact of attacking State troops, they would find themselves significantly empowered, and a very big step would be taken in the direction of at least partly protecting unjust or illegal rebellions. For the State, such a formal and automatic recognition of a POB to rebels might be exactly the sort of danger of overextension of the laws of war against which Kreß seeks to guard us: one that would deprive the State of its full ability to maintain public order and discourage sedition, in the name of prioritizing a humanitarian objective above all else. It would also incidentally mean that non-State armed groups would have an objective interest in bringing their campaign to the level of an armed conflict so as to benefit from the POB and, as a consequence, launder their individual behaviour. Needless to say, this is a morally and legally paradoxical outcome.

Here it may be worth bringing attention to a specificity of NIACs when it comes to the *ad bellum* that cautions against any broad introduction of the POB. One of the typical arguments for denying that individual soldiers can engage in aggression (and therefore ought to normally benefit from a POB in IAC) is that it may be hard for them to know that the war they are asked to fight is, indeed, an aggression. Whatever the merits of this argument in IAC, it should be noted that it is particularly weak in the context of NIAC. The argument that individual rebels "could not know" whether an attack on the State was legal or not is clearly

82 Michael Walzer, *Just And Unjust Wars: A Moral Argument With Historical Illustrations*, 4th ed., Basic Books, New York, 2006; J. McMahan, above note 56.

less well taken than its international variant: individual rebels are not members of stable and institutionalized military structures (“private armies”) waiting to be given orders, and who can therefore be forgiven for going with their leaders’ choices. Rather, they are typically cause-oriented participants in armed conflicts that they chose, and should thus less easily be able to claim innocence from such choices.

Moreover, the international confirmation of a broad POB for *State* troops in NIACs, regardless of the legality of their campaign, would launder behaviour that might be deeply problematic from the point of view of the *jus contra bellum* and even human rights. Imagine for example that the State is fighting against a non-State actor that is an emanation of a civilian population trying to protect itself from genocide: would it make sense, legally or morally, to consider that the POB always applies to State troops effectively helping a project of annihilation of a people? Kreß’s indication for a more humanitarian regime of NIACs, therefore, may come at the cost of being less humanitarian vis-à-vis fundamentally unjust forms of repression. Non-State aggressors would, for most purposes, be treated in the same way as non-State self-defenders. The POB (at least in the dominant form in which it is conceptualized) is a great humanitarian equalizer, precisely where the *jus contra bellum* seeks to draw stark differences.

The incentive question: Might the privilege of belligerency nonetheless orient parties towards greater humanitarian compliance?

I have thus highlighted the net costs of the POB – a not intrinsically humanitarian provision – in terms of two bodies of law (human rights and the *jus contra bellum*) that we also evidently have reason to care about as broadly minded international lawyers. Now it may be that this is simply, as is generally held in IACs, a further price to pay for the greater humanitarian regulation of armed conflicts. After all, humanitarianism is about reducing expectations and making tragic compromises, about the specificity of war as a moral universe, and ultimately a normative choice to foreground the protection of certain categories of persons in the midst of violence rather than harnessing all energies to the more ambitious, but elusive, goals of preventing war altogether or protecting everyone’s rights. Still, it is to the pertinence of such claims in relation to the granting of a POB that I turn in this section in more detail.⁸³

We should at the very least be clear about what it is we are regularizing and how it is objectively in tension with (even though not entirely destructive of) the goal of firming up an otherwise fragile and barely nascent *jus contra bellum* in domestic

83 And indeed it might also be that some self-styled international humanitarian lawyers would not care much for what happens at the level of the *jus ad bellum* and would promote the humanitarian case at all costs, but apart from the fact that this author does not think this would be particularly cogent or intelligent, it is certainly not Kreß’s own position.

settings (let alone protecting rights in an ambitious fashion). Moreover, whereas the POB appears, for better or for worse, to be deeply embedded in our understanding of IACs and thus something we may simply have to live with, the same can hardly be said of NIACs, where the long-standing legal consensus among States suggests that such a privilege does not exist as a rule and is not something that ought to be introduced. This does not necessarily mean that a POB should not be granted in NIACs, but that there are very significant costs to granting it broadly and automatically. Given the importance of these costs, the benefits should be relatively clear and correspondingly significant. The risk otherwise is that one would grant a POB but not get much in exchange.

Moreover, it should be clear, based on the previous section, that the net costs of the POB can no longer be easily outweighed by a reflex appeal to some inherent humanitarian benefit. The question, then, is whether the deeply problematic character of the POB from the point of view of both human rights and the *jus ad bellum* might nonetheless be rescued if its conferral were to help obtain some indirect, yet major, humanitarian benefits. Kreß is, in fact, keenly aware of this issue and stresses that “the introduction of a privilege of combatancy for non-State fighters in a NIAC imperatively requires the realistic prospect of significantly improving compliance with IHL by the non-State party to the conflict”.⁸⁴ Indeed, he insists that “[t]he main argument in favour of the introduction of a combatant privilege for fighters of the non-State party to a NIAC is of a humanitarian nature”.⁸⁵ It is to this central question that I now turn.

The privilege of belligerency in international armed conflict was never particularly thought of as an incentive for humanitarian compliance

One might formulate the fundamental humanitarian reason for having a privilege of belligerency in the following manner: (i) we recognize that the POB is not in itself a humanitarian feature of the laws of war, but (ii) its conferral is part of a humanitarian “grand bargain” in which a limited type of combatant activity is defined as legal (killing combatants) in exchange for many other activities being defined as illegal (killing non-combatants). However, there are two ways of assessing this grand bargain as it is understood at least in IAC. The first one suggests that at a very general level States, as international law’s principal norm bearers, would not accept the very idea of the laws of war if they did not grant State combatants a POB in NIACs. Even if this were true, it is also true that States are unlikely to see any problem with rebels not being granted the POB. In addition to this general sense, in NIAC the concession of a POB is typically proposed as more *directly and tactically* a factor in respect for the laws of war. Indeed, this idea that the POB is an incentive (and its absence a disincentive) is

84 See Claus Kreß, “Towards Further Developing the Law of Non-International Armed Conflict: A Proposal for a *Jus in Bello Interno* and a New *Jus Contra Bellum Internum*”, in this issue of the *Review*.

85 *Ibid.*

very prominent in the discourse and constitutes one of its most unquestioned assumptions.⁸⁶

I believe, however, that there are many reasons to take this assumption as a descriptive statement with a salutary pinch of salt. Since Kreß is gracious enough to point to some of my own inchoate attempts at grappling with the question,⁸⁷ this may be an opportunity to further scrutinize humanitarian assumptions about the uses of the POB. Indeed, too much is at stake to loosely assume that these, which are often heavily indebted to an international model of armed conflict, hold true always, often, or ever. The view is premised on the quite widespread but in my opinion wrong view that the POB in IAC (from which most lawyers take their cue) was itself historically part of the humanization of IAC. But there is no sign in the negotiations of the Geneva Conventions that the POB was to be granted as a form of incentive for troops to comply with the laws of war. In other words, it is not the case that the parties to the Geneva negotiations were initially reluctant to recognize a privilege of combatancy for those involved in an armed conflict but were nonetheless swayed to do so by its humanitarian promise. Rather, they cast the privilege of combatancy as one of the founding, unquestionable and axiomatic starting points of the laws of war, for reasons that were themselves antecedent to and distinct from the humanitarian project, and to which I have already alluded. It is probably only later that, as a key feature of the regime of IAC, it became casually assumed that it must surely be central to the Geneva Conventions' humanitarian promise.

The problem is that had the recognition of a POB really been granted as a way of humanizing war, *it should have been granted conditionally*. In light of the fact that it is given “for free”, as it were, to State forces, it is hard to accept that it is really an incentive as opposed to simply a privilege that flows from the identity of certain actors (i.e., States) in war. If something is granted *ab initio* based on (sovereign) status and cannot be lost even if abused (and this is certainly the case for State actors, who always retain it, regardless of how many civilians they massacre), it can hardly be said that its granting is part of doing everything possible to ensure that actors restrain from acting badly. In other words, if there was really a *quid pro quo* between humanitarian obligations and the privilege of combatancy, then obviously one should not be allowed to have the benefits of the latter without any of the constraints of the former. Conversely, a *quid pro quo* would mean that the

86 S. Sivakumaran, above [note 5](#), pp. 71, 514, 515, 58 and 548 (deploring the lack of incentive for rebel groups as a result of not benefiting from the POB). One assumption may be that recognizing non-State participants in a NIAC as combatants would help targeting decisions and thus respect for the distinction principle. However, as I think is correctly identified by Corn and Jenks, the recognition that certain groups are legitimate targets because they are effectively in combat does not logically entail that their combatancy should be privileged. Geoffrey Corn and Chris Jenks, “Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts”, *University of Pennsylvania Journal of International Law*, Vol. 33, No. 2, 2011, pp. 328–330. Also, in the context of IACs, see R. V. Meyer, above [note 61](#) (“In asymmetric war, the non-state actor, having no possibility of obtaining privileged belligerency, has no incentive to distinguish himself from the civilian population even if and when he engages in hostilities”).

87 F. Mégret, “Should Rebels Be Amnestied?”, above [note 49](#), pp. 519–541.

POB could be withdrawn from those having committed grave offences. Instead of being an incentive to comply with the laws of war, the automatic conferral of the POB is in that respect a disincentive, or at least not as much of an incentive as it could be.

During the negotiations of Additional Protocol II to the Geneva Conventions, a proposal was made to grant non-State armed groups a POB. Although such a proposal probably had loose humanitarian underpinnings (but may have also been linked to the need to achieve peace in NIACs, as is the requirement for amnesties), the arguments against it failed to take its humanitarian rationale seriously. At no time then or since has this been identified as a particularly problematic feature of Additional Protocol II and its ability to deliver on its humanitarian promise. Rather, the automaticity of the POB with regard to State troops and its exclusion when it comes to non-State armed groups reflects a much more conventional bias in favour of States' monopoly on the legitimate use of force.

The claim that the privilege of belligerency is a key to better compliance is less clear-cut than is often thought

Even though it was not specifically thought of as incentivizing compliance, the POB might have that effect more or less fortuitously. General wisdom, for example, seems to suggest that not granting the POB provides the parties to an armed conflict with a pretext for not respecting the laws of war. How this may disincentivize belligerents is never clearly spelled out in the literature. Before cautioning against any facile mechanistic assumptions in that area, it may be helpful to briefly sum up what seems to be the dominant consensus. The reasoning goes as follows: warriors involved in IAC can at least – for a range of reasons linked to the history of war and statehood – get away with killing other soldiers: in fact, theoretically, this is primarily what they are asked to do. They do not risk automatic prosecution and infamy for doing what is after all the core of their activity. There is thus a sort of rough *quid pro quo* involved: we will pursue you if you kill non-combatants, but (regardless of whether you are on the good side of the *jus ad bellum* or if you respect the *jus in bello*) we will never bother you for targeting combatants. If that realistic and tragic agreement were to be compromised, according to the dominant view, then “all bets would be off the table”. No longer capable of being even partly legally redeemable, combatants would descend into a further spiral of violence.

A similar argument is often made in NIAC. In this case, the idea is that failure to dignify non-State armed groups as combatants means that they are not socialized into international law – that they essentially get all of the obligations and none of the privileges of being in war. We ask them to honour humanitarian obligations but, at the same time, we tend to treat them as criminals if they are caught by the State. This is unfair and unproductive. There is a certain intuitive appeal to the idea of a normative system's success depending on a level of fairness towards its potential subjects. As a result, one strong argument for

granting a POB to all in any armed conflict is symmetry. The idea is that the laws of war cannot function without symmetrical applicability (consider, for example, the traditionally rigid separation between the *jus ad bellum* and the *jus in bello*) and that this would be mortally wounded by the idea that only one side would have a POB – in other words, that the other side would objectively be under a much higher burden of obligation. The destruction of the equality of parties will, in a sense, shatter their sense of obligation in war. In particular, non-State armed groups who think that State forces are benefiting from the POB whilst they are being denied it might give up entirely on respecting their humanitarian obligations.

There are several issues with this theory as an explanation of what is problematic with the regulation of NIAC. First, it seems too dramatic; clearly, it is typically not thought to be the case when it comes to NIAC, where non-State armed groups have long been incited to comply with the laws of war with no prospect of recognition of a POB. In fact, there are many reasons to question whether symmetry of obligations and the equality of parties are as central to compliance with the laws of war as is ordinarily assumed, even in IAC. The conceptual emphasis of the laws of war themselves over the last decades has been on the non-synallagmatic character of humanitarian obligations as exemplified in the desuetude of such practices as reprisals. It is bizarre, in a context where the fundamental element of non-reciprocity at the level of principles is consistently emphasized, to seek to make symmetry the central plank of a policy proposal focused on implementation. If anything, non-State armed groups' desire to comply with the laws of war is less likely to be incited by the blanket grant of the POB than by State troops themselves complying with the laws of war in the conduct of hostilities and in relation to protected persons (including rebels when they qualify).

Second, whether a non-State armed group in a NIAC decides to engage in a policy of war crimes or not seems to depend on a whole series of complex psychological, social and political factors (values, goals, publicity, reputation, “lawfare”, etc). In other words, if a non-State armed group is determined to kill civilians and is taking the risk, for example, of vulnerability to international prosecutions, then I find eminently implausible the notion that it would not do so on the basis that it might also be prosecuted for the (presumably relatively more benign) crime of attacking combatants. Inciting actors not to commit a particular genus of crimes by giving them immunity to commit another genus hardly seems a straightforward gamble. Certainly, the idea that non-State armed groups who have not received the POB would “slam the door on international law” and consider that, having nothing to lose since they will also be prosecuted for killing combatants, they might as well violate the rights of non-combatants sounds improbable, at least without much more empirical evidence.⁸⁸ Simply because one risks being prosecuted for attacking State forces does not mean that

88 In fact what evidence we have already suggests otherwise. See Olivier Bangenter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 353–384.

one will then necessarily and wantonly *also*, out of normative spite as it were, target civilians.⁸⁹

It may be that non-State armed groups feel they are outsiders when it comes to the international game, but aside from the fact that some may relish this status, it might precisely bring them to seek to compete with the humanitarian performance of States. There are many examples of parties to an armed conflict honouring their obligations even when faced with an enemy that does not at all, or even vis-à-vis an enemy that is not bound by the same obligations. A situation in which the POB is not by and large on the table has not prevented many notable and novel initiatives to implicate non-State armed groups in the implementation of the laws of war, to which they have shown themselves to be sensitive. If we allow for the possibility that asymmetrical compliance is actually sustainable, it is only a small step to conceiving of asymmetrical obligations as also being sustainable.⁹⁰ In effect, IACs have already become more like NIACs in that they have often proceeded along asymmetrical normative lines. At any rate, one rarely hears from non-State armed groups that the POB would significantly enhance their humanitarian performance; one is more likely to hear that it would be a deserved recognition of the legitimacy of their cause.

For the privilege of belligerency to have a real impact, it should be conditional

To be clear, my concern is not with the possibility that the POB might be extended under some circumstances, but that it might be granted broadly and *ex ante* to non-State actors in all NIACs. Even though Krefß does not dwell on this point, central to his suggestion seems to be an almost automatic granting of the POB. This is implicit in the fact that he takes his cue from IAC, where the POB is automatically granted when it comes to State armed forces. At any rate, if there is to be an element of conditionality, it is not spelled out with any precision.

Given the doubts I have voiced that the granting of a POB is in itself rich with humanitarian promise, how could it be used as a lever to actually increase compliance? Simply because it has not been very effectively used in this way does not, assuredly, mean that it could not be reinvented as a more potent element of

89 Incidentally, it is also unclear if the POB in IAC contributed to significantly reducing violations of the laws of war. Imagine that Wehrmacht soldiers in 1944 had had some inkling that as a result of being systematic violators of the *jus in bello* (killing non-combatants), they would now *also* become prosecutable for killing enemy combatants. Surely, it is a little implausible to think that this would have led them to commit even more violations of the laws of war – after all, the starting point is that the POB in this scenario would be withdrawn because of what was a dismal failure to comply with IHL in the first place. It is not particularly realistic to think that soldiers already engaged in atrocities for their own powerfully vicious reasons would be swayed by the prospect of even further prosecutions. If anything, one could argue that the automatic and non-reversible grant of a privilege of combatancy reinforces soldiers in the arrogant belief that they are above all “warriors”, even when arguably they no longer behave as such in any significant sense of the term.

90 René Provost, “The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, pp. 437–442.

the policy mix that goes into obtaining compliance with the laws of war. Put simply, the problem is that the grant of the POB is either too narrow or too broad. On the one hand, it is currently too narrow because it is not granted to any non-State armed group, notwithstanding that there may be good reason to grant it to some. This means that effectively, a non-State armed group which wages a campaign that reaches a certain critical intensity against the State “creates” an armed conflict, which then empowers the State to deal with it through relatively more ruthless methods than would be available under human rights law. Simultaneously, however, the non-State armed group does not gain much, except a range of international humanitarian obligations that constrain its actions without any obvious added benefit. “Virtuous” rebel movements may have their own reasons for being so, but they are not particularly rewarded compared to those who make a profession of violating the laws of war. On the other hand, the granting of the POB it is too broad because it is implicitly always granted to State armed forces, whether in IAC or NIAC. As for non-State armed groups, according to Kreß’s proposal the POB should be granted broadly to rebel movements regardless of whether they are systematic violators of the laws of war or responsible actors.

The incentive implicit in a broad grant of the POB in NIAC is one that would encourage non-State armed groups (and perhaps even the State) to bring violence to a certain critical level of intensity. By the time an armed conflict is recognized to exist, their actions would cease to be criminal and would be covered by the POB. If that were all there was to this particular calculation, it could create a perverse incentive. Violent actors would be encouraged to go beyond skirmishes and the odd armed attack to a full-blown military campaign. The more systematic violence would be legal, whereas the most benign would remain strictly sanctioned under domestic law. It is unclear in this context who the laws of war would reward, except perhaps that they would bow to the power of certain actors to create mischief on a “humanitarian” scale. This is, needless to say, not very appealing. If such a radical shift in the granting of the POB to non-State armed actors is to occur (and this is what is at stake), it should depend on something other than the fortune of arms.

Remedying one problem by creating another (i.e., from over-narrowness to over-breadth in granting the POB) is not the right solution. The problem, I believe, lies with the idea that the POB is in itself a *cause* of greater humanitarian compliance. I suggest that we must more clearly inverse the assumption and consider that the POB should be a *consequence* of a certain high level of compliance. This implies that, rather than broadly granting a POB to non-State armed groups in armed conflicts on *a priori* humanitarian grounds, we should make the grant of the privilege *conditional* upon a recognized humanitarian performance. The privilege would be something that is earned rather than simply granted *ab initio* once a non-State armed group has effectively created the fait accompli of a NIAC. Perhaps more crucially, it is something that could be lost (in contrast to State armed forces, who retain the POB regardless of compliance with IHL) if it became evident that a group which had once been granted the privilege had significantly failed to honour the obligations that come with it.

Now, it is true that Additional Protocol II already defines its material field of application as those conflicts confronting a Contracting Party's armed forces "and dissident armed forces or other organized armed groups which ... exercise such control over a part of its territory *as to enable them to ... implement this Protocol*".⁹¹ In other words, the ability to implement the Additional Protocol is a condition of there being a conflict in the first place. Yet this ability is not the same thing as actual performance and points merely towards a broad capability approach. It does not give us a strong indication of sustained commitment to the laws of war. Here, a conditional POB could be envisaged as a considerable leverage in ensuring respect for IHL. An appropriate formula would have to be found to describe the expected level of compliance with the laws of war of rebels, but the threshold could be set quite high and go beyond capability to include elements of a sustained record. In such a situation, the State would be (relatively) empowered by the emergence of an armed conflict, but so would the responsible non-State armed group. For some of those who have decided to engage in an armed conflict, holding out a *promise* of a POB could act as a significant incentive to bring their game up to international standards.

Concretely, it may be that rather than granting a POB *ex ante* or at least in the midst of a conflict, the better policy option would be to grant amnesties retrospectively to those groups that have broadly satisfied humanitarian exigencies over the course of a conflict.⁹² This would be a specifically humanitarian-compliance oriented use of amnesties, whereas their grant is traditionally invoked in the context of peacebuilding and transitional justice.⁹³ This would mean that the incentive would continue to operate on a consistent basis throughout an armed conflict and would thus consistently put rebels "on notice" that their acts may have consequences, and that a certain belligerent respectability is what is ultimately at stake. Even though a State might be reluctant to give amnesty to individuals for taking up arms against it, at least it might be forced to grudgingly recognize a particular rebel group as having behaved responsibly from a combatancy point of view. And the idea of an amnesty based on humanitarian performance would at least preserve the idea that for members of non-State armed groups to kill State combatants is *excusable* under certain circumstances, yet not strictly permissible.

Conclusion: Possible further steps

There are probably deeper reasons, beyond the creation of a system of incentives, as to why a performance-conditional rather than an automatic-status conferral of the POB to non-State armed groups can be particularly compelling in NIAC. This is linked to the untried and unsocialized character of non-State armed groups in

91 AP II, Art. 1(1).

92 An amnesty is of course legally not the same thing since it merely absolves behaviour *a posteriori*, but it comes quite close functionally, especially if there is a legitimate expectation of it being given *ex ante*.

93 F. Mégret, above [note 49](#).

war. One may think that it is excessive for States' forces to always have a POB (even when their humanitarian performance is dismal), but, at least, the State may lay claim to certain *a priori* arguments about its performance in conflict: (i) it is formally bound by international humanitarian legal instruments, and with that comes a certain enforcement machinery; (ii) it will be internationally liable if it fails to comply with these instruments, thus providing it an incentive to comply; and (iii) it has the machinery to enforce humanitarian obligations, including a judicial and a military discipline system, and so on. Conversely, any emerging non-State armed group is at the outset untested as a violence entrepreneur, may not be strictly legally bound, will not have been socialized in the laws of war, will lack the time to train personnel, and may suffer from a range of logistical limitations which make it harder to enforce certain humanitarian provisions. Hence, we may have particular reasons to be wary of a broad granting of the POB to non-State armed actors and, conversely, a motivation for granting it to those who have shown themselves capable of transcending their inherent limitations.

At a deeper level, international law has an interest in distinguishing between genuine belligerents and terrorist movements in a context where it is not immediately clear which category an armed group falls in. A conditional POB would therefore mark the official entry of some violent actors into the fold of international law, and would help keep out those who have no intention of conforming to it. The argument here might be that some non-State armed groups who have systematically violated IHL, particularly in relation to civilians, are no longer engaging in *war* in any meaningful sense of the term as much as in a campaign of terrorism or crimes against humanity. There is therefore no reason why they should continue to avail themselves of privileges that were conceived with quite a different activity in mind. The privilege of combatancy should be reserved for *bona fide* combatants, not violence entrepreneurs who happen to wear military fatigues but who cannot, and have never intended to, be understood as actual warriors.

Is a conditional POB realistic, particularly with change-wary States? Probably marginally more than an automatic recognition of a POB for non-State actors in NIAC, since it at least promises something in exchange. Recent voices in this debate have made the case that some form of implicit POB has in fact often historically been granted to members of rebel groups who have typically been prosecuted for treason, but not for actual murder against State combatants they may have targeted. It may be, then, that international practice is already more subtle than is often understood.⁹⁴ This trend is particularly visible in NIACs which have become quasi-international because of the sustained and territorialized divisions they have created.⁹⁵ Nonetheless, obtaining States'

94 Jens David Ohlin, "Guest Post: Henderson & Cavanagh on Self-Defense & The Privilege of Combatancy", *Opinio Juris*, 8 July 2014, available at: <http://opiniojuris.org/2014/07/08/guest-post-henderson-cavanagh-self-defense-privilege-combatancy/>; Rymn J. Parsons, "Combatant Immunity in Non-International Armed Conflict, Past and Future", *Homeland & National Security Law Journal*, Vol. 1, No. 1, 2013, pp. 1–54.

95 S. Sivakumaran, above note 5, pp.515–517.

recognition of an obligation to grant a POB beyond such admittedly special cases is likely to be an uphill struggle. I hope, at least, to have provided a more solid rationale for giving *ex post* amnesties to rebels who have exhibited a high regard for the laws of war. And the present argument, whilst taking seriously the suggestion that there is a specific and irreducible morality to war,⁹⁶ argues that we should not jump to the conclusion that NIACs manifest this “war” ethos in quite the same way.

Having said that, I would like to suggest two points which cannot be fully covered in this article: the first unorthodox, the other almost heretical. First, if States continue to insist that humanitarian regulation is perfectly possible without granting a POB to rebels (a point I broadly agree with, even though I have suggested ways in which humanitarian compliance might be *improved* under certain limited conditions through a conditional POB), the time may come to critically reassess the sacrosanct character of the POB *even when it comes to State troops in IAC*. If what I have argued in relation to NIAC has a sliver of a chance of working or is at least considered ethically sound, there is no reason in principle why it should not be considered internationally, aside from the all too obvious political difficulties. For example, in a case where State troops become systematically predatory on the civilian population and terroristic in their methods, a stage may be reached where the issue of loss of POB should at least be contemplated. This would imply a greater propensity by the international legal regime to disaggregate the conferral of the POB *on the basis of humanitarian performance (respecting/not respecting the laws of war) rather than status (State/non-State)*. It would be quite an ironic reversal of Professor Kreß’s own suggestion, which is to bring the regime of IAC to NIAC; but it would, arguably, be more consonant with humanitarian objectives than the contemporary international laws of war’s fixation with the State.⁹⁷

Finally, with regard to NIAC, some thought should go into the possibility that the POB, in addition to (or more problematically alternatively to) being conditional upon respect for the *jus in bello*, should be conditional upon respect of the internal *jus contra bellum* that Kreß promotes. Given what I have argued about the POB belonging more to a *proto-ad bellum* logic and the relatively greater onus on domestic non-State armed groups as political agents, it is important to figure out whether the non-State armed groups are engaging in internationally lawful action when taking up arms. A true *jus contra bellum* push would sanction those non-State armed groups who clearly have no legitimate authority to launch armed action against the State (or recompense those that did). Although I have argued that a conditional POB could improve respect for

96 R. V. Meyer, above [note 61](#).

97 Frédéric Mégret, “L’étatisme spécifique du droit international”, *Revue Québécoise de Droit International*, Vol. 24, No. 1, 2011, pp. 105–129. Surely, States have not made the case in the twentieth century that they are such formidable respecters of the laws of war that they should always as a matter of principle be considered worthy of the POB. One might argue that there should be a presumption that State actors enjoy a POB and yet still concede that a presumption is not the same thing as an ironclad privilege that is entirely inelastic to actual humanitarian performance in the field.

IHL, it should also be clear that failure to grant a POB to non-State armed groups engaged in internationally illegal violence would not in and of itself spell the end of efforts to bind non-State armed groups to IHL. The more or less significant humanitarian benefits of a POB, at any rate, should be weighed against the need to pre-empt illegal rebellion and also, perhaps, illegal repression by the State.