THIRD WORLD VIEW OF THE LAWS OF ARMED CONFLICT: AN INTRODUCTION

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The Third World perspective on International Law provides an alternate account of the origin, development, and impact of international law. Third World scholars have tried to argue that International Law is a product of the colonisation of a huge landmass, and it justifies the oppression and subjugation of the colonised peoples. A major segment of colonial international law comprises the laws of war or armed conflict. A Third World perspective to the laws of armed conflict seeks to investigate, among others, how the colonies were deliberately excluded from the making of the laws of war; how the law was not just discriminatory to the colonised peoples but hostile too; how the rules of war facilitated imperialism; how the law was primarily based on a Western view of armed conflicts, and how the concerns and lived experiences of the Third World were either ignored or barely addressed in the law.

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I. INTRODUCTION

The law of armed conflict or law of war or international humanitarian law is one of the constituents of international law. Its field of application is war. In relation to war, two questions are important from a legal standpoint: 'Why war happens

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and what happens in war'.[1] These questions are responded to by two components of international law respectively: *jus ad bellum* and *jus in bello*. The former relates to the right to wage war and seeks to determine the legality of the use of force.[2] The latter, however, is not concerned with the lawfulness of waging war; rather, it aims at regulating the hostile conduct of the parties at war. It constitutes the laws of armed conflict. Irrespective of the legality of an attack, the laws of armed conflict get triggered on the occurrence of an armed conflict, 'the determination of which depends solely on an assessment of the facts on the ground'.[3] The rules of armed conflict seek to control the violent actions and mitigate the effects of war. They do so by prohibiting certain means and methods of war and protecting from attack persons who do not,[4] or are unwilling,[5] or are unable[6] to participate in the hostilities.[7] The law, thus, aims at limiting the violence to the scale inevitable to achieve the ends of war and to weaken the military potential of the adversary.[8]

The codification[9] of the laws of armed conflict and the adoption of corresponding treaties[10] mainly started during the colonial era. However, the law

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[1] Geoffrey Best, *War & Law since 1945* (OUP 1994) 4.

[2] Charter of the United Nations (entered into force 24 October 1945) XV UNCIO 335 ('UN Charter'), arts 42, 51. See also Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008) ch 2, 3 (for more on jus ad bellum and jus in bello).

[3] International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (32nd International Conference of the Red Cross and Red Crescent, October 2015) 7.

[4] Such as civilians.

[5] For instance, a soldier who has surrendered.

[6] Such as, a soldier who is wounded or sick (*hors de combat*).

[7] Srinivas Burra, 'Collective Engagement and Selective Endorsement: India's Ambivalent Attitude Towards Laws of Armed Conflict' in Srinivas Burra and Rajesh R Babu (eds), *Locating India in the Contemporary International Legal Order* (Springer 2018) 52 (internal citations omitted).

[8] Marco Sassoli and Antonie A Bouvier, *How Does Law Protect in War?* (ICRC 2006) 81.

[9] Francis Lieber, *Instructions for the Government of Armies of the United States, in the Field* (New York, D van Nostrand 1863).

[10] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (signed 11 December 1868, entered into force upon signature) 138 CTS 297; Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) 187 CTS 429 ('Hague Convention II'), art 2; Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 ('Hague Convention IV'); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 ('Geneva Convention III'); Geneva Convention for the Amelioration of the Condition of

significantly developed after World War II with the adoption of the four Geneva Conventions[11] and their Additional Protocols.[12] The development of all these instruments, however, cannot be examined in isolation. It must be realised that they were actually a product of a particular historical setting. They reflect the specific political and economic environment, hierarchical power structures, and particular geographic location which moulded the form and content of these treaties. They were a result of exclusionary and unequal negotiations. They have a history, not just documented, but undocumented also, which has received scant attention. In this backdrop, Part II of the article seeks to investigate how the colonies were deliberately excluded from the making and application of the laws of war, and how the law was not just discriminatory to the colonised peoples but hostile too. Part III explains the way the rules of war were formulated and employed in order to facilitate imperialism. Part IV intends to demonstrate that the applicability criteria of the law reflected a Western view of armed conflicts. The position of guerrilla and freedom fighters in the laws of armed conflict is dealt with by Part V. Finally, Part VI attempts to underline that some of the rules and principles of the law are problematic and prejudicial to the interests of the Third World.

The expression 'Third World' mainly refers to States which do not fall into the groups of 'industrialised (First World) or communist/socialist (Second World) countries'.[13] It has been argued that the term 'Third World' was coined

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Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('Geneva Convention II').

[11] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 ('Geneva Convention I'); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 ('Geneva Convention II'); Geneva Convention III; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 ('Geneva Convention IV').

[12] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('Additional Protocol I'); Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ('Additional Protocol II'); Protocol (III) Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (adopted 8 December 2005, entered into force 14 January 2007) 261 UNTS 2404 ('Additional Protocol III').

[13] Srinivas Burra, 'Four Geneva Conventions of 1949: A Third World View' in Md. Jahid Hossain Bhuiyan, Borhan Uddin Khan (eds), *Revisiting the Geneva Conventions: 1949-2019* (Brill Nijhoff 2019) 191.

by the French demographer Alfred Sauvy.[14] While the mainstream accounts of international law in general overlook the impact of capitalism and colonisation on the origin and development of international law,[15] the Third World Approaches to International Law ('TWAIL') maintain that these two phenomena were central to the origin of international law and they also legitimised subjugation of the Third World.[16] TWAIL unveils the hierarchical nature of international law[17] and the exclusion of the Third World from its making. It offers an alternative account of the history of international law[18] by taking into consideration the lived experiences of colonialism[19] and challenging the claims of universality of international law.[20] In doing so, TWAIL employs multiple approaches, such as Marxist, critical, feminist, and post-colonial.[21] Using these tools, the author seeks to examine the laws of armed conflict from a Third World perspective.

II. HISTORICAL EXCLUSION OF THE THIRD WORLD

The historical exclusion of the Third World (former colonies) from the making of international treaties was mainly premised on cultural differences and power. These differences were introduced in the sixteenth century by a Spanish jurist, Francisco de Vitoria,[22] in order to justify entry into, and colonisation of the newly discovered territories of America. In this 'dynamic of difference',[23] the non-European world was seen as culturally inferior (barbarian), uncivilised[24] and less advanced as compared to European standards, and, therefore, lacking sovereignty.[25] Eventually, he also prescribed rules of war with the barbarians

[14] Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP 2005) 25.
[15] BS Chimni, 'The International Law of Jurisdiction: A TWAIL Perspective' (2022) 35 Leiden Journal of International Law 29, 30-31.
[16] Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 Chinese Journal of International Law 77, 80-84.
[17] Andrea Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (OUP 2016) 209.
[18] Antony Anghie, 'Rethinking International Law: A TWAIL Retrospective' (2023) 34 European Journal of International Law 7, 9.
[19] Anghie and Chimni (n 16), 78.
[20] Makau Mutua, 'What is TWAIL?' (2000) 94 American Society of International Law Proceedings 31.
[21] Anghie (n 18) 118-119.
[22] Fransico de Vitoria, *Francisco de Vitoria: Political Writings* (Anthony Pagden and Jeremy Lawrance eds, CUP 2010).
[23] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 37.
[24] RP Anand, *New States and International Law* (Hope India Publications 2008) 19.
[25] Anghie (n 23) 26-27.

justifying indiscriminate violence and enslavement of the aboriginals.[26] Subsequent to the Treaty of Westphalia (1648), the idea of sovereignty attained more prominence as an attribute of statehood.[27] After the Industrial Revolution in the 1770s, the advanced European nations colonised more and more territories of the Global South for raw material, markets and cheap labour.[28] They also formed a 'family of nations' because of sharing 'a common civilisation and a way of life'.[29] The idealised European standard of civilisation,[30] sovereignty,[31] and power[32] were identified as the main prerequisites for becoming a member of the family of nations. Accordingly, the so-called uncivilised and semi-civilised nations were not part of the family of nations.[33] They could neither participate in international law-making nor be the subjects of international law. Indeed, they were simply the objects of international law.[34] This segregation of colonies from the application of international law was less a result of express political approval by the colonisers and more of an outcome of inherent colonial prejudices.[35] Besides the colonial masters' creation of the 'family', the prominent nineteenth century European writers formulated prejudiced ideological foundations and vocabulary justifying domination of the uncivilised and their exclusion from the realm of international law.[36] Thus, for instance, Stuart Mill writes that applying the international law, as already applicable between civilised nations, to barbarians is a grave error.[37] Holland declares that no one outside the family of nations can be regarded as a 'wholly normal international person'.[38] Similarly, Wheaton states that the law of nations is that which is observed

[26] ibid 27.
[27] ibid 6.
[28] Edward Said, *Culture and Imperialism* (Vintage Books 1994) 8.
[29] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2004) 438.
[30] ibid.
[31] Anghie (n 23) 55.
[32] Anand (n 24) 48.
[33] ibid.
[34] ibid 25.
[35] Frédéric Mégret, 'From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'' in Anne Orford (ed), *International Law and its Others* (CUP 2006) 278.
[36] Said (n 28) 9; Mégret (n 35) 278-281; For the views of John Stuart Mill, TE Holland, and Westlake, see Anand (n 24) 22-23; For similar opinion of Wheaton, see Anghie (n 23) 53-54.
[37] Anand (n 24) 22.
[38] ibid.

between the most civilised nations.[39] Thus, the exclusion of the colonies was a result of collaborative efforts of colonial mindset.

The nineteenth century treaties related to the conduct of war gave a formal shape to the exclusion of the uncivilised. For instance, in the St. Petersburg Declaration, the ban on the use of a particular projectile during the war was seen by the parties as a mark of civilisation,[40] which was of course a Europe-centric conception. It also implied that civilisation had nothing to do with the uncivilised colonised peoples and, thus, sought to justify the exclusion of the Third World from participating in the negotiation of the Declaration at the International Military Commission. The substantive prohibition laid down by the Declaration was also meant to apply in case of war between 'civilised' States only.[41] The Declaration expressly stated its non-application in war with non-Contracting Parties.[42] Thus, the 'civilised' European States assumed for themselves the liberty to use any lethal weapon in case of war with colonies. This pattern of exclusion and impunity continued subsequently also. In relation to the rules of war, the Hague Conventions of 1899 and 1907 were quantitatively greater but narrower in scope. They reflected a unique, narrow-minded, and hostile idea of a civilisation, specific to the colonisers. For instance, the Hague Convention II (1899) provided:

> The provisions contained in the Regulations mentioned in Article I are only binding on the Contracting Powers, in case of war between two or more of them.
>
> These provisions shall cease to be binding from the time when, in a war between Contracting Powers, a non-Contracting Power joins one of the belligerents.[43]

These exclusionary practices cannot be seen in isolation as they had a far-reaching impact on the capitalist and imperialist ambitions of the settlers. Ostensibly, Europe and America were on a 'civilising mission'[44] in order to

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[39] Anghie (n 23) 53.

[40] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (signed 11 December 1868, entered into force upon signature) 138 CTS 297, Preamble.

[41] ibid.

[42] ibid.

[43] Hague Convention II, art 2. See also Hague Convention IV.

[44] According to Anghie, 'the civilizing mission asserts that we are civilised, enlightened, universal, peaceful; they are barbaric, violent, backward, and must be therefore pacified, developed, liberated, enlightened, transformed.' Antony Anghie, 'On Critique and the Other' in Anne Orford (ed), *International Law and Its Others* (CUP 2006) 394.

develop the Third World peoples; actually, however, the settlers were colonising and occupying the Global South as part of a mission in disguise, which was: gaining supremacy in the trade and colonial competition among them. This was possible through imperialism only.

III. FACILITATING IMPERIALISM

In the second half of the nineteenth century, the colonialist European nations had accumulated plenty of wealth by looting the colonies and selling in huge volumes the goods made up of their raw materials.[45] Gradually, capitalism in the Global North reached its highest stage,[46] that is imperialism,[47] which implies swallowing more colonies so that the excessive wealth accumulated with settlers can be exported to the colonies in order to establish industrial enterprises there also and make more profits.[48] Thus, trade rivalry and colonial competition among the colonisers fuelled the process of subjugation of the poor masses.

International law in general, and the treaties related to the conduct of war in particular did not create any obstacle in occupying foreign territories or in curbing ruthlessly armed rebellion by colonised peoples. The nineteenth century international law doctrines, such as sovereignty, recognition, protectorate[49] and unequal treaty[50] explained the discriminatory practices adopted by the Western nations towards the rest of the world. Thus, for instance, most of the Asian, African and Latin-American nations were kept away from the family of nations because they were treated as 'uncivilised'.[51] Moreover, because of the lack of membership in international civilised society, they were not considered

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[45] According to Frantz Fanon, the Europe prospered because of colonies and their wealth belongs to us also. See Frantz Fanon, *The Wretched of the Earth* (Penguin Books 1961) 76, 81.

[46] Lenin calls imperialism as the highest stage of capitalism. See VI Lenin, *Imperialism, the Highest Stage of Capitalism* (Lawrence & Wishart 1988).

[47] In the words of Edward Said, 'imperialism means the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory; 'colonialism,' which is almost always a consequence of imperialism, is the implanting of settlements on distant territory. He further cites Michael Doyle who notes that, 'Empire is a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining an empire.'; See Said (n 28) 9.

[48] Anand (n 24) 27.

[49] For instance, conferment of protectorate over land of Congo, see Anand (n 24) 32; Protectorate of Tunisia, see Koskenniemi (n 29) 142. Often, the colonial protectorate system was used to veil de facto annexation, see Koskenniemi (n 29) 151, 273.

[50] Anand (n 24) 43.

[51] ibid 19-20.

sovereigns.[52] The criterion of civilisation was also used to justify non-recognition of colonies as States.[53] This also made the European Powers assume for themselves, ostensibly though, a duty to civilise the Global South. The duty, actually imperialism, was given a formal shape under the Covenant of the League of Nations in the name of the well-being and development of the mandated territories.[54]

On the other hand, the non-application of the Hague and other such Conventions to anti-colonial conflicts helped in smoothly colonising the dark and coloured peoples and maintaining control over them. Notably, most of the Latin American and Asian nations (except Turkey, China, Japan, Siam and Persia), and the whole of the African continent were not represented in the Hague Conferences of 1899 and 1907.[55] By prescribing the distinction of civilised-uncivilised and assuming themselves on a civilising mission, the colonisers set themselves free from any moral responsibility for committing inhuman acts on the Third World peoples. On the other side, they absolved themselves of any legal responsibility also for committing horrendous crimes on the natives by keeping the anti-colonial wars outside the scope of the Conventions regulating belligerent conduct. The (self-given) legal concession and moral justification ultimately led to the enhancement of the size of the colonial empire beyond three-fourth of the globe at the inception of World War I. Here are some statistics:

> Consider that in 1800 Western powers claimed 55 percent but actually held approximately 35 percent of the earth's surface, and that by 1878 the proportion was 67 percent, a rate of increase of 83,000 square miles per year. By 1914, the annual rate had risen to an astonishing 240,000 square miles, and Europe held a grand total of roughly 85 percent of the earth as colonies, protectorates, dependencies, dominions, and commonwealths. No other associated set of colonies in history was as large, none so totally dominated, none so unequal in power to the Western metropolis.[56]

[52] Anghie (n 23) 58.
[53] ibid 75; Koskenniemi (n 29) 71.
[54] Covenant of the League of Nations (adopted 28 April 1919, entered into force 10 January 1920) 225 CTS 195, art 22; Anghie (n 23) 158-159.
[55] Anand (n 24) 24.
[56] Said (n 28) 8.

Thus, the colonial exceptionalism from the laws of war not only facilitated the imperial expansion but also legitimised it on the premise that what is not prohibited is not unlawful.

IV. APPLICABILITY CRITERIA REFLECTING THE WESTERN VIEW OF ARMED CONFLICTS

The applicability criteria or the material field of the laws of armed conflict refers to the violent situations to which the law applies and regulates the conduct of military operations. Initially, the law applied to inter-State armed conflicts only. On the other side, there were some other hostile situations specific to the Third World, which were kept away from the scope of the law for a long time. The impact of colonial tendencies and Western domination on the drafting of material fields is discussed below.

A. Armed Freedom Struggles

Before World War II, the scope of the law was confined to inter-State wars only,[57] and anti-colonial wars and colonial occupation were beyond the regulation of the international laws of war. However, the holocaust of World War II had a severe impact on the need to reconsider the existing treaties on war and update them.[58] Based on the preparatory works,[59] the International Committee of the Red Cross ('ICRC') submitted the following proposal in respect of the scope of application of the draft Conventions:

> Beyond the stipulations to be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even should the state of war not be recognised by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even should the said occupation meet with no armed resistance.
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> …

[57] Hague Convention II, art 2; See also Hague Convention IV, art 2.

[58] Burra (n 13) 192.

[59] International Committee of the Red Cross, *Report on the Work of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems relative to the Red Cross* (Geneva 1946); International Committee of the Red Cross, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims* (Geneva 1947).

> In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status.[60]

The proposal was shared in the seventeenth Red Cross Conference in Stockholm (1948). The last paragraph was certainly a radical move considering the existing global material realities and, therefore, unacceptable[61] to the advanced countries. Express mention of categories, like 'civil war, colonial conflicts and wars of religion' and their proposed regulation by international law would have been a severe blow to imperialism. Therefore, at the insistence of colonial States, such as Britain and France, the ICRC agreed to drop the expression 'especially cases of civil war, colonial conflicts, or wars of religion' from the fourth paragraph.[62] The revised draft was tabled by the ICRC for negotiations at the Diplomatic Conference, 1949.[63] Despite the deletion of the specific reference to colonial conflicts from the proposal, the delegations of Mexico[64] and Soviet bloc[65] repeatedly underscored the horrific nature of anti-colonial wars and insisted on the need to include them within the purview of non-international armed conflicts. However, they did not find much favour, and the negotiations mainly focused on the threshold of civil wars and a number of rules applicable to non-international armed conflicts.[66] Thus, the efforts to extend the laws of armed conflicts to colonial conflicts could not materialise in 1949 and the same were not included expressly in the description of international[67] or non-international[68] armed conflicts. This is despite the fact

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[60] ICRC, *Revised and New Draft Conventions for the Protection of War Victims* (XXVIIth International Red Cross Conference, Stockholm 1948) 5, 52.

[61] Boyd van Dijk, 'Internationalizing Colonial War: On the Unintended Consequences of the Interventions of the International Committee of the Red Cross in South-East Asia, 1945–1949' (2021) 250(1) Past & Present 243.

[62] Burra (n 58) 203.

[63] *Final Record of the Diplomatic Conference of Geneva of 1949* (Library of Congress 1949) vol I, 47, 61, 73.

[64] ibid vol II, s B, 333.

[65] ibid vol II, s B, 325-326, 334.

[66] See also Kailash Jeenger, *International Humanitarian Law: A Humanitarian Critique* (Springer forthcoming) ch 8.

[67] Geneva Convention I, art 2.

[68] ibid, art 3.

that many colonies were still struggling to gain independence from the colonial rule.

However, in the 1950s and 1960s, the newly independent States emerged impressively and used various international stages[69] in order to emphasise the international legal regulation of wars of national liberation consistent with the respect for human rights in every situation of armed conflict. The growing sentiment reflected in the United Nations resolutions[70] and also influenced the negotiating space at the Diplomatic Conference (1974-1977) which was held to consider the Draft Protocols additional to the 1949 Geneva Conventions. Ultimately, the former colonies succeeded in including wars of national liberation within the scope of international armed conflict in Additional Protocol I.[71] By this time, however, a major portion of the decolonisation process had already been over, and the new provision remained merely a formal victory for the Third World.

It, thus, demonstrates how imperialist tendencies determined the material scope of the law of armed conflict and also how the colonial States continued to remain free from any legal obligation towards colonies. It explains that the political and economic motives actually decide the limits of humanitarianism. Although, the Third World had the occasion to celebrate, however, the occasion came at the convenience of the powerful.

B. Colonial Occupation

The question of international legal regulation of colonial occupation arises because the Geneva Conventions[72] apply to belligerent occupation also. Belligerent occupation means placing the enemy territory under one's own temporary control and authority consequent upon invasion or military defeat of the adversary. It is an intermediate stage before the final outcome of armed

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[69] See Eleanor Davey, 'Decolonizing the Geneva Conventions' in A Dirk Moses, Marco Duranti and Ronald Burke (eds), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* (CUP 2020) 379-380.

[70] UNGA Res 2444 (XXIII) (19 December 1968) UN Doc A/RES/2444 (emphasised on application of humanitarian law in all armed conflicts); Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes, UNGA Res 3103 (XXVII) (12 December 1973) (stated that wars of national liberation are international armed conflicts); 'Final Act of the International Conference on Human Rights' (13 May 1968) UN Doc A/CONF.32/41(stressed on respect for the humanitarian law in all types of armed conflicts).

[71] Additional Protocol I, art 1(4).

[72] Geneva Convention I, art 2(2).

conflict. Burra explains[73] in detail the exclusion of colonial occupation from the Hague and four Geneva Conventions from the TWAIL perspective. For this purpose, he employs the colonial conceptual framework wherein colonies were declared to be uncivilised and therefore lacking sovereignty. On the other hand, European nations were treated as civilised and sovereign. The situation of belligerent occupation could result from a war between States only. Colonies lacked sovereignty and were not States under colonial international law. Therefore, violent encounters between a European State and a colony did not amount to armed conflict within the meaning of the Conventions and, thus, consequent occupation and control over the colony did not amount to belligerent occupation.[74] This again shows that under the colonial international law, the vows to protect the interests of humanity were selective and the idea of humanity was meant for the people of colonial States only. As a result of the colonial occupation in huge proportion, the colonisers were successful in retaining their control over huge colonies and exploiting their resources in order to aggrandise their own wealth.

C. Civil Wars

Besides wars of national liberation, the post-World War II era witnessed interesting deliberations on the international platform in respect of internal or civil wars. These events portray the approach adopted particularly by post-colonial (or newly independent) States towards internal conflicts which is also a subject matter of analysis by TWAIL scholars. During the negotiation of the draft Geneva Conventions in 1949, a group of Asiatic nations led by Burma was not in favour of applying the Conventions to civil wars. The Burmese delegate suspected that the recognition of non-international armed conflicts would benefit 'those who desire loot, pillage, political power by undemocratic means, or those foreign ideologies seeking their own advancement by inciting the population of another country'.[75] The delegate further stated that these observations were based on their 'bitter experience of insurgencies'.[76] Hidden in these submissions was also a colonial mindset to suppress resistance movements freely. However, in order to negate any such allegations in future, the delegate

[73] Burra (n 13) 194-200.
[74] ibid 195-196.
[75] *Final Record of the Diplomatic Conference of Geneva of 1949* (Library of Congress 1949) vol II, s B, 329.
[76] ibid vol II, s B, 330.

made a 'terribly naïve and insincere'[77] submission that 'no Government of an independent country can, or will ever, be inhuman or cruel in its actions towards its own nationals'.[78] This argument is far-away from the realities of internal strife, past, present, and future, irrespective of geographic location.

Another sight of interesting arguments in respect of the regulation of civil wars was the Diplomatic Conference, 1974-1977. In the Conference, a separate Draft Protocol was being debated in respect of non-international armed conflicts. During the negotiations, India, a post-colonial State, contextualised the Common Article 3 in the background of colonial conflicts.[79] India understood that Article 3 was originally meant to cover wars of national liberation.[80] This is mainly because the Stockholm Draft introduced a legal category of 'armed conflict not of an international character, which, though, included not only colonial conflicts, but also civil wars and wars of religion'.[81] It is important to note here that the scope of humanitarian protection afforded by the Common Article 3 is narrower than that provided by the Additional Protocol II. The Indian delegate stated that:

> […] the Indian delegation was glad that the Conference had accepted the status of liberation movements in Article l, paragraph 4 of Protocol I. The Indian delegation therefore believed that common Article 3 reflected the historical situation as it had then existed and was no longer applicable to present circumstances. Consequently, Draft Protocol II, which was supposed to be based on common Article 3, was pointless.[82]

This understanding was developed and shared despite the fact that in 1949, the debate with respect to non-international armed conflict revolved around the scale of civil war, State-like features of insurgent groups, recognition of belligerency and combatant privileges of insurgents.[83] The abrupt deletion of the

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[77] Noam Zamir, *Classification of Conflicts in International Humanitarian Law: The Legal Impact of Foreign Intervention in Civil Wars* (Edward Elgar 2017) 34.

[78] *Final Record of the Diplomatic Conference of Geneva of 1949* (Library of Congress 1949) vol II, s B, 329.

[79] Burra (n 13) 204.

[80] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol VII, 202-204.

[81] ICRC, *Revised and New Draft Conventions for the Protection of War Victims* (XXVIIth International Red Cross Conference, Stockholm, 1948) 5, 52.

[82] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol XIV, 204.

[83] Jeenger (n 66).

term 'colonial conflicts' from the draft was also ignored by the delegate.[84] Notably, India is not a party to the Protocol II which contains extensive rules of regulating the conduct of armed operations in non-international armed conflicts.[85]

V. STATUS OF GUERILLA AND FREEDOM FIGHTERS

Yet another form of neglect of the concerns of the Third World in the laws of armed conflict relates to combatant privilege and the status of prisoner-of-war in respect of guerrilla and freedom fighters. Under the Hague Conventions, in order to be considered a combatant, a fighter has to satisfy the following four conditions: acting under a responsible command, having a distinctive emblem, carrying arms openly, and respecting the laws of war.[86] Non-observance of these conditions would disentitle a combatant to the status of prisoner-of-war and render them liable under domestic criminal law. The Hague approach was followed in the Geneva Conventions (1949) with an extension that the four conditions may also apply to members of organised resistance movements.[87] These rules certainly reflect a Eurocentric vision of armed conflicts and disciplined and organised combatants. This approach ignored the lived experiences of the Third World who used to conduct violent operations against colonial masters through guerrilla and loosely organised freedom fighters. These fighters could not afford to adhere to these conditions of well-ordered combatants. Secrecy of operations, the need to conceal identity, and unpredictability of attack were the essential and inevitable guerrilla techniques because of the lack of advanced military equipment. In such a situation, the imposition of standards that suit the powerful countries and jeopardise the weak, was certainly unfair and one-sided. It deprived them of the status of prisoner-of-war. Moreover, the application of the Common Article 3 to guerrilla warfare by freedom movements was also not certain. The result was the torture and execution of hundreds of freedom fighters during anti-colonial wars. Such a piece of drafting, thus, underlines the consequences of the insignificant presence of the Third World during the negotiations of 1949 Geneva Conventions. The dominating Western States found it convenient to make the law reflect their experiences and address their concerns.

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[84] Burra (n 13) 205.

[85] Additional Protocol I.

[86] Hague Convention II, art 1. See also Hague Convention IV.

[87] Geneva Convention III, art 4(2).

In the 1970s, the ICRC had the occasion to revisit and update the existing Conventions, however, it adopted the usual approach in its draft proposals. Draft Protocol I proposed disciplined army-like conditions with respect to the combatant status for all fighters.[88] In the Diplomatic Conference, the Third World countries expressed their discontent with the draft on the ground that the proposal ignored the realities of anti-colonial and anti-racist armed operations. They argued that ill-equipped freedom fighters engaging with powerful States cannot be expected to wear distinctive emblems and respect the rules of war as it will render them easily targetable and weaken their position on the battlefield.[89] In the end, these concerns of the Third World were accommodated by inserting the following exception for those fighters who cannot differentiate themselves:

> Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly, (a) during each military engagement, and (b) during such time as he is visible to the adversary …[90]

It must be noted, however, that the above concession becomes applicable only when an authority representing a people and engaging in a war against colonial domination or racist regimes undertakes to apply the 1949 Geneva Conventions and Protocol I by depositing a unilateral declaration to this effect under Article 96(3) of the Protocol.

VI. 'HUMANITARIAN' PRINCIPLES AND THIRD WORLD

The framework of the laws of armed conflict is said to be based on some basic principles: military necessity, distinction, proportionality and humanity. The principle of military necessity is a product of colonial origin.[91] It continues to be a significant doctrine of the law. It helps justify military conduct of different proportions. Although, the principle of military necessity itself is problematic in several ways, and belligerents invoke it during hostilities as per their

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[88] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol I, pt 3, 13-14.

[89] ibid vol XIV, 466.

[90] Additional Protocol I, art 44(3)(a).

[91] See eg Francis Lieber, Instructions for the Government of Armies of the United States, in the Field (New York, D van Nostrand, 1863) art 14; Hague Convention II, arts 15, 23(g); Hague Convention IV.

convenience, its invocation by mighty States often aggravates the vulnerability of poor States. The powerful countries are, often, in a better position to employ the principle during armed conflicts and justify their intense military operations, causing death and destruction in usually a weak country. The Gulf War (1990) is an appropriate example in this context.[92] Thus, the principle ignores the inherent subjectivity, the lack of parameters measuring necessity and its probable adverse impact on the Third World.

The principle of military necessity does not compromise with military goals. It shapes the language of other principles, such as distinction and proportionality, and related rules. Distinction requires an attacker to distinguish between members of armed forces and civilians, and between military objectives and civilian objects.[93] The principle thus presupposes that every belligerent possesses the necessary advanced equipment in order to identify a target from remote locations also. However, it ignores the fact that many Third World countries are poor and militarily ill-equipped. They have not been able to raise their economic condition after colonial exploitation. On the other hand, the principle suits well the advanced mighty colonial States who attained prosperity through the loot of Third World resources and cheap labour.[94] The formulation of such a rule speaks about whose voice matters during the negotiation of a treaty and whose concerns take a backseat.

One of the concomitant rules of the principle of distinction declares that civilians directly participating in hostilities are not entitled to protection,[95] but it provides no guidelines as to what direct participation in hostilities means. Involvement of civilians in hostilities is a typical experience of the Third World. It can be realised in the increasing number of asymmetrical warfare in the recent past occurring mainly in Africa and the Middle East. Organised and loosely organised armed groups are active participants in these conflicts. The ICRC has come up with its own interpretation of the notion of direct participation in

[92] Roger Normand and Chris af Jochnick, 'The Legitimation of Violence: Critical Analysis of the Gulf War' (1994) 35(2) Harvard International Law Journal 387.
[93] Additional Protocol I, art 48.
[94] Fanon (n 35) 76, 81.
[95] Additional Protocol I, art 51(3); Additional Protocol II, art 13(3).

hostilities,[96] however, it is not authoritative and remains highly disputed.[97] Thus, a huge concern of the Third World remains unaddressed in the Protocol.

Next is the principle of proportionality. Driven by military necessity, it permits incidental civilian loss in certain conditions. It says that where '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', such an attack is prohibited.[98] Thus, the principle requires an assessment and estimation of probable military gain and civilian loss beforehand without providing any parameters and precise guidelines for this purpose. It expects an attacker to foresee the two components, calculate the probable outcome and weigh them in order to decide whether to launch the attack or not. Subjectivity and military necessity are most likely to affect the judgment. During the drafting of the provision, many delegates including those from the Third World objected to the vague wording of the provision and requested to amend it, however, the dominant countries did not allow it to happen and supported the draft.[99]

In the absence of any yardstick of assessment in the proportionality provision, the calculation is bound to be subjective. Therefore, the value attributed to human life by a military commander from the Third World and from an advanced European State may be different. From a Third World perspective, it must be argued that given the historically continuing inferior status (from barbarian, uncivilised and savage to poor and backward) and the

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[96] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

[97] See Bill Boothby, "And for Such Time as': The Time Dimension to Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics 741; WH Parks, 'Part IX of the ICRC 'Direct Participation in Hostilities' Study: No Mandate, No Expertise, and Legally Incorrect' (2010) 42 New York University Journal of International Law and Politics 769; Michael N Schmitt, 'Deconstructing Direct Participation in Hostilities: The Constitutive Elements' (2010) 42 New York University Journal of International Law and Politics 697; Kenneth Watkin, 'Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in the Hostilities' Interpretive Guidance' (2010) 42 New York University Journal of International Law and Politics 641. For a reply to these critics, see Nils Melzer, 'Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC'S Interpretive Guidance on the Notion of Direct Participation in Hostilities' (2010) 42 New York University Journal of International Law and Politics 831.

[98] Additional Protocol I, arts 51(4), 51(5)(b), 57(2)(a)(iii) and 57(2)(b).

[99] *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Geneva (1974-1977)* (Library of Congress 1978) vol IV, 164-165; see also Jeenger (n 66), ch 13.

merciless infliction of brutalities on the peoples of the Third World, arguably a military commander from a former colonialist State might find the incidental deaths of numerous civilians of a Third World country insignificant as compared to the military advantage. Although, such an attack may be held unlawful by a tribunal because an attacker is expected to act like a 'reasonable commander',[100] however, the possibility of such a subjective assessment reemphasises the concerns raised by the Third World countries in the Diplomatic Conference.

Proportionality assessment also requires advanced tools equipped with latest technology and linked with satellites in order to collect sophisticated information in respect of the target, so that a precise assessment of a target can be made. Many Third World countries suffering from the exploitative colonial trauma and armed foreign interventions post-independence lack the necessary infrastructure and, therefore, may not be able to make the proportionality calculations as expected. It reflects the domination of powerful voices in the negotiation process and inherent weakness and bias in the principle of proportionality and associated rules.

VII. CONCLUSION: MAKING OUR SKIES CLEARER

The historical overview of the colonial era reveals that the laws of armed conflict are an outcome of colonisation of the Third World. Specifically, the arms race, trade and colonial competition created an environment fertile for the development of the laws of war. However, the law excluded the Third World from its ambit and facilitated the oppression of the Third World. The developments in the law after World War II are also Eurocentric in nature as they are largely based on a European-imagination of war wherein wars are primarily inter-State and the combatants are well-organised. The laws of armed conflict ignore the lived experiences of the Third World peoples in matters such as the combatant status of freedom and guerrilla fighters and scope of direct participation in hostilities. The imprecise terms of the rules and principles of distinction and proportionality are advantageous to powerful countries, and often put the weak countries at risk. Overall, the laws of armed conflict preserve the essential structures of power.

[100] Ian Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff Publishers 2009) 73.