Introduction: International Humanitarian Law and Areas of Limited Statehood

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IHL needs to cover increasingly diverse forms of armed conflict. While its main structural features were conceived in the 19th and 20th century against the background of a predominant narrative of war conducted on a battlefield between armies and navies of sovereign States, the effectiveness of its legal rules has been constantly challenged by recurring changes in the conduct of warfare. During the last twenty-five years, the predominance of intra-State conflicts and the militarisation of terrorism has led to a focus on asymmetrical conflicts and NIACs. In recent years, challenges stem from the increasingly blurred lines between armed conflicts and more subversive forms of the use of force, as symbolised by the concept of 'hybrid warfare'. For maintaining its effectiveness, IHL needs to respond to changing social realities and thus accommodate new phenomena. Accordingly, changing conflict paradigms as well as the development of new technologies and corresponding strategies have tested the adaptability of existing rules and pushed for new rules, mostly laid down in treaty obligations.

However, since the adoption of the 1949 Geneva Conventions and the 1977 Additional Protocols, new treaties on the conduct of warfare have not been concluded. Instead, the international community has accommodated new phenomena through customary international law, interpretation and a focus on compliance. In particular, international tribunals have developed the rules of IHL in their jurisprudence and both the ICRC and the UN SC have focused on the enforcement of and compliance with IHL. Despite these efforts, including the establishment of the ICTY, the ICTR and the ICC, there is a widespread perception of a crisis of IHL. Some observers hold that its rules cannot sufficiently direct the behaviour of relevant actors.[1] In order to counter the perception of such a trend the ICRC has

1 Cf 'Report of the Secretary-General on the protection of civilians in armed conflict' UN Doc S/2017/414 (10 May 2017) 3, 7 et seq; Ian Clark et al, 'Crisis in the laws of war? Beyond compliance and effectiveness' (2017) European Journal of International Relations <http://journals.sagepub.com/doi/pdf/10.117

changed its publicity strategy and aims to shed more light on successful cases of compliance.[2] One may assume that this policy change reflects the understanding that the effectiveness and the legitimacy of norms are mutually reinforcing.[3] While emphasising that the rules of IHL are still effective might contribute to an increase in compliance, challenges to their legitimacy also need to be addressed in order to further compliance.[4]

The interplay between effectiveness and legitimacy as an important precondition for norm-compliance in IHL can be made explicit by focusing on the challenges which stem from areas of limited statehood. The present volume considers the impact such areas have on IHL and it inquires whether IHL can be adapted to meet challenges emerging from them in a way that is perceived as legitimate.

While the term 'areas of limited statehood' (A.) as such is only seldom used in legal discourse, areas of limited statehood have had a discernable impact on various developments that affect international law.[5] Regarding IHL, various challenges stem from the territorial State's limited capabilities and the need to compensate for them through other actors, in particular other States, international organisations and NGOs. Armed non-State actors' exercise of governance functions poses the most problems in this context (B.). How has IHL responded to these challenges so far? Or has a lack of responsiveness created legitimacy problems (C.)? These and other questions were probed by the contributions to this volume (D.). As a whole, the contributions reveal the dilemma that by trying to improve legitimacy and effectiveness for some actors, the same might be reduced for others.

7/1354066117714528> accessed 13 December 2017 (hereafter Clark et al, 'Crisis in the laws of war?').

2 For further reading, see Juliane Garcia Ravel, 'Changing the narrative on international humanitarian law' (*Humanitarian Law & Policy*, 24 November 2017) <http://blogs.icrc.org/law-and-policy/2017/11/24/changing-the-narrative-on-international-humanitarian-law/> accessed 13 December 2017.

3 Heike Krieger 'Governance by armed groups: Caught in the legitimacy trap?' in Cord Schmelzle and Eric Stollenwerk (eds), *Virtuous or Vicious Circle? Governance Effectiveness and Legitimacy in Areas of Limited Statehood, Special Issue* (under review).

4 Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (CUP 2015) (hereafter Krieger, *Inducing Compliance*).

5 For further reading, see Heike Krieger, 'International Legal Order' in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming) (hereafter Krieger, 'International Legal Order').

A. Areas of Limited Statehood[6]

Areas of limited statehood constitute those parts of a State in which the government lacks the capability to implement and enforce rules and decisions or in which they do not command a legitimate monopoly over the means of violence.[7] The term does not imply the extinction of a State (as a whole or in a certain area). The area still *de jure* belongs to the State, but its internal sovereignty there is *de facto* tenuous.

The term 'areas of limited statehood' describes an empirical phenomenon which has to be distinguished from normative concepts such as 'unwilling and unable' or 'failed' States.[8] These concepts are closely related to the phenomenon of securitisation and may thus be understood as tools of States of the Global North to push their specific interests in law-making processes, for instance in relation to re-interpretations of the right to self-defence. In contrast, the term 'areas of limited statehood' neither implies a normative judgment that a State has failed nor suggests that State failure would be the definite result of a process.[9] It is meant as a neutral analytical tool that avoids negative connotations and opens the door for an analysis from different perspectives. These can include the questions whether and to what extent the limitedness of statehood is compensated by other actors, what kind of governance they may perform, and how effective those governance functions are.[10] The term is also broader in the sense that only certain policy

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6 This part draws from Krieger, 'International Legal Order' (n 5).

7 Tanja Börzel, Thomas Risse and Anke Draude, 'Governance in Areas of Limited Statehood: Conceptual Clarifications and Major Contributions of the Handbook' in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming) (hereafter Börzel, Risse and Draude, 'Governance in Areas of limited Statehood').

8 Ibid.

9 Note that also e.g. Görlitzer Park in Berlin Kreuzberg can be qualified as an area of limited Statehood, see Börzel, Risse and Draude, 'Governance in Areas of limited Statehood'.

10 Cf Klaus Schlichte, 'A Historical Sociological Perspective on Statehood' in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming); Andrew Brandel and Shalini Randeria, 'Anthropological Perspectives on the Limits of the State' in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming).

areas or parts of one or more States might be affected.[11] Another advantage is that the limitedness of statehood is empirically measurable according to certain factors, including administrative capacity and monopoly of force.[12] While the term 'areas of limited statehood', which was conceived by political scientists in the Collaborative Research Centre 700 'Governance in areas of limited Statehood', has so far only seldom been used in legal discourse, it is by now gradually adopted because of its more neutral connotations.[13]

B. Legal Issues when other Actors Step in

Areas of limited statehood generally are not simply ungoverned.[14] Other actors regularly step in to perform government functions: other States, international organisations and non-State actors, including non-State armed groups and NGOs, have the potential to, and do, exercise effective and long-term regulatory power in such areas.[15] This has raised questions concerning the international legal obligations of non-State actors, international organisations and of States acting extraterritorially. The relevance of non-State practice and the possibility of a change in the structure of the law-making process that weakens or even undermines the primacy of State consent as the traditional foundation of positive international law-making, in order to improve the law's legitimacy towards non-State actors, has also become a contentious issue.

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11 Thomas Risse and Ursula Lehmkuhl, 'Governance in Areas of Limited Statehood – New Modes of Governance?', Research Program of the Collaborative Research Center (SFB) 700 (Berlin 2006) 9.

12 Eric Stollenwerk, 'Measuring Governance and Limited Statehood' in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming).

13 See e.g. Leuven Centre for Global Governance Studies of KU Leuven, in particular the research projects on 'human rights, democracy and rule of law', 'peace and security', and 'non-state actors' <https://ghum.kuleuven.be/ggs> accessed 13 December 2017.

14 This part draws from Krieger, 'International Legal Order' (n 5).

15 Cf various chapters in in Tanja Börzel, Thomas Risse and Anke Draude (eds), The Oxford Handbook of Governance and Limited Statehood (OUP 2018, forthcoming), e.g. Markus Lederer, 'External State Actors'; Benedetta Berti, 'Violent and Criminal Non-State Actors'; Marianne Beisheim, Annekathrin Ellersiek, and Jasmin Lorch, 'INGOs and Multi-Stakeholder Partnerships'.

I. Other States and International Organisations

With third States and international organisations, difficulties arise in the classification of armed conflicts and the determination of the applicable human rights standards. These uncertainties endanger these actors' compliance and, more generally, the relevance of the law to the situation on the ground in areas of limited statehood, and thus its effectiveness

1) Fluidity of armed conflicts

The interventions of third States in internal armed conflicts in areas of limited statehood triggered a debate concerning the classification of those armed conflicts, which directly relates to IHL's effectiveness in these conflicts. Since the law of IAC provides a framework of detailed treaty rules as well as widely accepted customary law rules, it is *prima facie* better suited to effectively govern the conduct of States. In contrast, the law of NIAC only consists of a few treaty rules and the customary law status of several rules is contested. Intervening States will have fewer legal standards to guide their conduct if the conflict is classified as non-international. Thus, IHL becomes potentially less effective due to a lack of legal certainty which regime applies.

The debate around these so-called 'internationalised' NIACs focuses on two issues. On the one hand, it concerns the relation between the intervening State and the territorial State. On the other hand, it deals with the relation between the intervening State and the non-State armed group(s).

In cases in which the territorial State consented to the use of force of another State against a non-State armed group in its own territory, it is widely agreed that there exists a NIAC between the extraterritorially acting State and the non-State armed group. Thus, only the law of NIAC is applicable to this situation. In case of a lack of consent by the territorial State, however, it is highly controversial whether in addition to the NIAC between the intervening State and the non-State armed group(s) there exists a parallel IAC between the territorial State and the intervening State. In this case then also the law of IAC would apply between the territorial State and the extraterritorially acting State, i.e. the conduct of the extraterritorially acting State could underlie the law of IAC, too. This debate gained much attention after the US-led coalition and Turkey *inter alia* started to carry out air-strikes against ISIS and other Islamic terrorist groups in Syria and to

support other non-State armed groups fighting ISIS in the absence of Syria's consent.[16]

While some emphasise that the extraterritorial use of force affects the local population and the territorial State's infrastructure to argue for the existence of a parallel IAC,[17] others mention the lack of practicality of the application of the rules of IAC.[18]

In addition, the debate concerning the extent of control that a State must have over a non-State armed group to render a NIAC between the non-State armed group and the territorial State into an IAC between the intervening State and the territorial State is still ongoing with no end in sight.[19] Whereas the ICJ upholds its more restrictive effective control test,[20] the ICTY follows its broader overall control test.[21]

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16 See the various blog-posts on this issue eg Adil Ahmad Haque, 'The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)' (*EJIL Talk!*, 8 April 2016) <https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/> accessed 17 November 2017; Ryan Goodman, 'Is the United States Already in an "International Armed Conflict" with Syria?' (*Just Security*, 11 October 2016) <https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/> accessed 17 November 2017; Ryan Goodman, 'International Armed Conflict in Syria and the (Lack of) Official Immunity for War Crimes' (*Just Security*, 18 October 2016) <https://www.justsecurity.org/33670/international-armed-conflict-syria-lack-of-official-immunity-war-crimes/> accessed 17 November 2017.

17 Tristan Ferraro and Lindsey Cameron, 'Article 2: Application of the Convention' in ICRC (ed), Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (2nd edn, CUP 2016) paras 257 et seq (hereafter Ferraro and Cameron, 'Article 2').

18 For further reading, see Terry D. Gill, 'Classifying the Conflict in Syria' (2016) 92 ILS 353; Claus Kreß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 JCSL 245, 255 et seq.

19 Ferraro and Cameron, 'Article 2' (n 17) paras 265 et seq.

20 Application of the Convention on the Prevention and Punishment of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43, paras 392–393; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Judgment) [1986] ICJ Rep 14, para 115.

21 *Prosecutor v Tadic* (Judgment) IT-94-1-A (15 July 1999) paras 120 et seq.

2) Human rights in areas of limited statehood

The lack of legal certainty surrounding the question if and to what extent IHRL applies to State and non-State actors is exacerbated by all actors' potential incapacity to fully comply with their legal obligations. In areas of limited statehood, the States concerned are often incapable to protect (certain) human rights, in particular in unstable security situations. If other States, international organisations or non-State actors step in and take over government functions, the question arises by which (international) legal obligations other than IHL they are bound, and how those obligations interplay with IHL obligations. In that manner, legal uncertainty and factual obstacles to compliance challenge the legitimacy, and in turn the effectivity, of international law in areas of limited statehood.

In the last 15 years, extensive debates on the extraterritorial application of intervening States' human rights obligations have been held.[22] Starting with the *Bankovic* decision,[23] the ECtHR has, in a long line of jurisprudence, developed criteria to establish the extraterritorial application of the ECHR.[24] The approach basically still focuses on the question of how to define the degree of control which a State must exercise abroad so as to justify the application of the international or regional human rights obligations it has contracted.[25] While the extraterritorial application of human rights may in principle arise for all State activities in an

22 UN HRC, 'Concluding observations on the fourth periodic report of the United States of America' (23 April 2014) UN Doc CCPR/C/USA/CO/4; Marco Milanovic, 'Harold Koh's Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties' (*EJIL: Talk*, 7 March 2014) referring to Harold H. Koh, US Department of State, 'Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights' (19 October 2010) <https://www.justsecurity.org/wp-content/up-loads/2014/03/state-department-iccpr-memo.pdf> accessed 19 October 2017.

23 *Bankovic and others v Belgium and others* [GC], App no 52207/99, 12 December 2001, paras 54 et seq.

24 See in particular, summarizing the case law, *Al-Skeini and others v the United Kingdom* [GC], App no 55721/07, 7 July 2011, paras 130-142 (hereafter: *Al-Skeini*). For further reading see Marco Milanovic, *Extraterritorial Application of Human Rights Treaties* (OUP 2011).

25 *Al-Skeini*; see also: Christoph Grabenwarter, *European Convention on Human Rights* (Beck et al 2014), Article 1, paras 13-17; Heike Krieger, 'Die Verantwortlichkeit Deutschlands nach der EMRK für seine Streitkräfte im Auslandseinsatz' (2002) 62 ZaöRV 669.

interconnected and globalised world, most decisions concerned military missions in areas of limited statehood, either in a state of armed conflict, situations of occupation, or other activities involving the deployment of military forces, such as in counter-piracy operations.[26]

This extension of human rights treaties has forced States to adapt their extraterritorial conduct to human rights standards. Furthermore, it has raised questions concerning the relationship of IHRL to other law regimes, in particular IHL,[27] and even the very foundations of international law.[28] The discussions on the legality of detention in NIACs[29] or the legality of targeted killings[30] including drone strikes[31] demonstrate the depth of these questions.

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26 Eg *Loizidou v Turkey*, App no 15318/89, 23 March 1995; *Markovic and others v Italy*, App no 1298/03, 14 December 2006; *Medvedyev and Others v France*, App no 3394/03, 29 March 2010; *Al-Skeini and Others v the United Kingdom*, App no 55721/07, 7 July 2011; *Pisari v the Republic of Moldova and Russia*, App no 42139/12, 21 April 2015.

27 Heike Krieger, 'A Conflict of Norms: The Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) Journal of Conflict and Security Law 265, reprinted in: Robert Cryer and Christian Henderson (eds), *Law on the Use of Force and Armed Conflict, Cheltenham*, vol. III (Edward Elgar Publishing 2007).

28 Katja Schöberl and Linus Mührel, 'Sunken Vessel or Blooming Flower? Lotus, Permissions and Restrictions within International Humanitarian Law' in this volume 59 (hereafter Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?'); Manuel Brunner, 'Security Detention by the Armed Forces of a State in Situations of Non-International Armed Conflict: The Search for a Legal Basis' in this volume 89 (hereafter Brunner, 'Security Detention by the Armed Forces of a State in Situations of NIAC').

29 Ibid; Vincent Widdig, 'Detention by Organised Armed Groups in Non-International Armed Conflicts: the Role of Non-State Actors in a State Centred International Legal System' in this volume 124 (hereafter Widdig, 'Detention by Organised Armed Groups in Non-International Armed Conflicts'); Pia Hesse, 'Comment: neither Sunken Vessel nor Blooming Flower! The Lotus Principle and International Humanitarian Law' in this volume 80 (hereafter Hesse, 'Neither Sunken Vessel nor Blooming Flower!'); Anton O. Petrov, 'Comment: Detention in Non-International Armed Conflict by States – Just a Matter of Perspective on Areas of Limited Statehood?' in this volume 118 (hereafter Petrov, 'Detention in Non-International Armed Conflict by States').

30 Luise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?' (2006) 88 IRRC 881.

31 Christof Heyns, Dapo Akande, Lawrence Hill-Cawthorne and Thompson Chengeta, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 ICLQ 791.

More profoundly, while the extraterritorial application of human rights may contribute to the effectiveness of IHRL, it also calls into question the legitimacy of human rights law and its judicial institutions. The extraterritorial application of human rights challenges the whole concept that human rights are primarily meant to regulate the relationship between a State and the persons on its territory. As governance becomes disconnected from the territorially based political community, so do human rights. This, in turn, casts doubt on how regional human rights law can be transferred to certain situations, particularly armed conflicts, in which the State exercises governance in the territory of another State. As a result, human rights obligations need to be applied very flexibly to a very specific context, and the basic indeterminacy of human rights law is exacerbated.[32] Moreover, it is argued that the disconnect of human rights from the territorial political sovereign, and therefore from a specific national political discourse, does not improve the situation in areas of limited statehood.[33] In fact, the extraterritorial application of human rights in areas of limited statehood may affect the societies in which the (human rights) courts are based to a much greater extent than the people subject to an extraterritorial exercise of jurisdiction.

II. Armed Non-State Actors

Regarding non-State actors taking over government functions in areas of limited statehood, the questions arise under which conditions these actors are bound by international legal obligations and whether these obligations may effectively govern non-State actors' conduct. Up until now, international law has addressed these issues mainly in the context of obligations of armed groups in NIACs under IHL in general.[34] But, in its

32 Nehal Bhuta, 'The Frontiers of Extraterritoriality – Human Rights Law as Global Law' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016) 17.

33 Ibid, 17 et seq.

34 For discussions on obligations under IHRL, see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2010); Sandesh Sivakumaran, *The Law of Non-international Armed Conflict* (OUP 2012) (hereafter Sivakumaran, *The Law of NIAC*); Sassoli and Shany, 'Should the Obligations of States and Armed Groups under International Humanitarian Law Really Be Equal?' (2012) 93 IRRC 425; Daragh Murray, *Human Rights Obligations of Non-state Armed Groups* (Hart Publishing 2016).

purpose to establish and effectively enforce binding rules that strike an appropriate balance between military necessity and humanity, IHL is even more directly challenged in areas of limited statehood. The example of the terrorist organisation ISIS has given renewed emphasis to the fact that armed non-State actors exist which totally reject international legal obligations.[35]

However, not only the rejection of international legal obligations, total or in part, i.e. deliberate non-compliance, challenges IHL in areas of limited statehood.[36] The limited capability of some non-State armed groups to comply with certain IHL rules casts doubt on the 'governance'-function of IHL in such areas and may thwart the humanitarian purpose of IHL.[37] For example, non-State armed groups might not be able to detain enemy fighters either on a factual level or legally, as well as in a manner that meets basic rule-of-law requirements.[38] As a consequence, the non-State armed group might be left with no option but to either release or to kill the enemy fighter. Since the release of a fighter would contradict the military advantage of the armed group and is therefore unrealistic, the killing of the fighter, while constituting a war crime (cf Art. 8 (2) (e) (x) Rome Statute), might seem to be an option for the group.[39] This example of detention in NIACs demonstrates that IHL's failure to address a phenomenon that is *de facto* part of areas of limited statehood may lead to non-compliance even if non-compliance is repressively sanctioned.

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35 Annyssa Bellal, 'Beyond the Pale? Engaging the Islamic State on International Humanitarian Law' (2015) YbIHL 18, 123.

36 For further reading, see Reed M. Wood, 'Understanding strategic motives for violence against civilians during civil conflict' in Krieger, *Inducing Compliance* (n 4) 13; Zachariah Mampilly, 'Insurgent governance in the Democratic Republic of the Congo' in Krieger, *Inducing Compliance* (n 4) 44.

37 For a different perspective, see e.g. Jan Willms, 'Courts of armed groups – a tool for inducing higher compliance with international humanitarian law?' in Krieger, *Inducing Compliance* (n 4) 149.

38 Widdig, 'Detention by Organised Armed Groups in Non-International Armed Conflicts' (n 29); Marco Sassòli, 'The Convergence of the International Humanitarian Law of Non-International and International Armed Conflicts - The Dark Side of a Good Idea' in Giovanni Biaggini, Oliver Diggelmann and Christine Kaufmann (eds), *Polis und Kosmopolis - Festschrift für Daniel Thürer* (Dike/Nomos 2015) 679, 682 et seq (hereafter Sassòli, 'The Dark Side of a Good Idea').

39 Sassòli, 'The Dark Side of a Good Idea' (n 38) 683 et seq.

The increase in NIACs after 1990 has caused numerous legal debates on how to best deal with armed groups and make IHL more effective. Continuing efforts exist to fill legal gaps in the applicable law of NIAC, e.g. the Customary International Humanitarian Law Study of the ICRC,[40] other expert studies and the work of the NGO Geneva Call, which convinces non-state armed groups to sign so-called Deeds of Commitment, aiming to enhance substantive standards in NIACs.[41] These efforts have raised questions on whether and to what extent this approach by NGOs on the one side, and the practice of non-State armed groups on the other side should be included in the law-making processes.

While some aspects of these questions are still controversially debated (e.g. the relevance of agreements between the parties to a NIAC under CA 3 (3),[42] other attempts, such as the inclusion of the practice of non-State actors – *inter alia* in areas of limited statehood – in the formation of customary law, have been entirely rejected by States and forums representing a State-centric positivist approach.[43] States have become aware of a looming shift in power to non-State actors and are now seeking to minimise these actors' influence in international law-making and development. Reactions of that kind can, for example, be observed in international conferences where States emphasise that the respective process is 'State-driven'.[44] The ILC in its recent works on the Identification

40 Jean-Marie Henckaerts and Luise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) (hereafter Henckaerts and Doswald-Beck, *Customary IHL*

41 For further reading, see Sivakumaran, *The Law of NIAC* (n 34); Sandesh Sivakumaran, 'Implementing humanitarian norms through non-State armed groups' in Krieger, *Inducing Compliance* (n 4) 125; Heike Krieger, 'Conclusion: where States fail, non-State actors rise? Inducing compliance with international humanitarian law in areas of limited statehood' in Krieger, *Inducing Compliance* (n 4) 504.

42 Lars Müller, 'Comment: Detention by Armed Groups' in this volume 163 (hereafter Müller, 'Detention by Armed Groups').

43 See eg the reaction to the methodology underlying the *Customary International Humanitarian Law Study* of the ICRC (n 40) XLI by the US government, John B. Bellinger and William J. Haynes, 'A US government response to the International Committee of the Red Cross study *Customary International Humanitarian Law*' (2007) 89 IRRC 443, 444 et seq.

44 Eg Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent (2016) 97 IRRC 1393 stating '1. … *recalls* the guiding principles of the consultation process: the State-driven and consensus-based character of the process and the need for the consultations to be based on applicable principles

of Customary International Law or Subsequent Agreements and Subsequent Practice also rejects the relevance of non-State actors' conduct in law-making and development.[45]

The maintenance of the State consent-based law paradigm may go at the expense of legitimacy of and consequently also compliance with IHL and international law in general by non-State armed groups. On the other hand, the dangers of giving non-State armed groups a role in the law-making process should not be underestimated either. Many of these groups have a proven track record of gross violations of the laws of war, and their preferences for the development of IHL might not emphasise the protection of the individual nor respect for the rule of law at all. Non-State actors might also overemphasise their limited capabilities to comply with IHL.

Examining the question of the inclusion/exclusion of non-State actors from a more abstract angle, an opening of the law-making process towards non-State actors as well as a denial of participation may challenge international law fundamentally. Both approaches may question the simplicity, precision, universality and impartiality of international law. While the exclusion of non-State actors ignores reality, an inclusion of non-State actors may lead to a stand-still of the law-making process due to the difficulties of determining and identifying e.g. the relevant actors and their practice. Both approaches may challenge the legitimacy and the governance function of international law in general and IHL in particular.[46]

This volume, *inter alia*, further discusses the efforts to include non-State actors in the law-making process for specific topics and elaborates on further approaches that seek to accommodate non-State armed groups in the

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of international law … 2. *recommends* the continuation of an inclusive, State-driven intergovernmental process based on the principle of consensus after the 32nd International Conference …'.

45 ILC, 'Second report on identification of customary international law by Special Rapporteur Michael Wood' (22 May 2014) UN Doc 1/CN.4/672, para 45; ILC, 'Third report on identification of customary international law by Special Rapporteur Michael Wood' (27 March 2015) UN Doc A/CN.4/682, para 79; ILC, 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties: Text of the draft conclusions provisionally adopted by the Drafting Committee on first reading' (6 June 2016) UN Doc A/CN.4/L.874, Draft conclusion 5(2); ILC, 'Report on the work of the sixty-eighth session (2016)' UN Doc A/71/10, Chapter VI, 233, paras 9 et seq.

46 For further reading, see eg Joost Pauwelyn, 'Is it International Law Or Not, And Does It Even Matter?' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 125.

international legal system, in order to improve the law's legitimacy and effectiveness.

C. International Humanitarian Law's Lack of Responsiveness

Ignoring changes that exist on an empirical level could also be an option for IHL. While this may preserve the integrity of the law, it would probably lead to negative consequences for its legitimacy, effectiveness, and thus the functioning of the international legal system as a whole in areas of limited statehood.[47]

In IHL, empirical phenomena have traditionally been ignored when attempts to regulate NIACs were made. The drafting history of CA 3[48] and AP II,[49] as well as the brevity of and the high threshold for AP II to apply,[50] demonstrate the general unwillingness of States to regulate internal armed conflicts by international law. Attempts by the ICRC to attach some legal importance to these conflicts prior to the 1949 Geneva Conventions were entirely rejected.[51]

A more recent example is the outcome of the 32nd International Conference of the Red Cross and Red Crescent Movement with regard to the ICRC proposals on the strengthening of compliance with IHL[52] and the

47 Heike Krieger and Georg Nolte, 'The International Rule of Law – Rise or Decline? Points of Departure' (2016) 1 KFG Working Paper, 15 et seq <http://www.kfg-intlaw.de/PDF-ftp-Ordner/KFG%20Working%20Paper%20No.%201.pdf> accessed 16 October 2017.

48 For further reading, see Jean S. Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary*, vol. I (ICRC 1952), 38 et seq (hereafter Pictet, *Commentary*); David A. Elder, 'The Historical Background of Common Article 3 of The Geneva Convention of 1949' (1979) 11 Case W. R. JIL 37.

49 Michael Bothe, Karl J. Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff Publishers 2013) 693 et seq; David P. Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 AJIL 273.

50 Cf Art. 1 AP II.

51 Pictet, *Commentary* (n 43) 39-41.

52 ICRC, 'No agreement by States on mechanism to strengthen compliance with rules of war' (10 December 2015) <https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war> accessed 16 October 2017; Resolution 2 of the 32nd International Conference of the Red Cross and Red Crescent (2016) 97 IRRC 1393.

dealing with detentions in NIACs.[53] It exemplifies that the international community finds it difficult to agree on how to effectively address these new phenomena. The already softened ICRC proposals, elaborated previously in years of expert meetings under the participation of States, were rejected and the process was adjourned. Academic proposals to incentivise armed non-State actors to comply with IHL by granting them combatant immunity or amnesties have likewise not attracted much support.[54]

On the other hand, Art. 17 (1) (a) ICC-Statute,[55] can be understood as a response to the challenges of investigating and prosecuting genocide, war crimes and crimes against humanity committed in areas of limited statehood. According to this article, a case before the ICC is admissible if the State having jurisdiction over it is 'unwilling or unable genuinely to carry out the investigation or prosecution'.

In sum, areas of limited statehood create a dilemma for the legitimacy and effectiveness of IHL. They pose difficulties for the application and implementation of IHL on many different levels. But while taking into account the factual particularities of these areas might render the law more legitimate and thus effective for some actors, it might simultaneously imperil its legitimacy for others. Accommodating non-State actors in the law-making process might improve the law's legitimacy for them, but it would simultaneously jeopardise its legitimacy among States. Considering actors' capabilities in the application of rules might improve compliance in the short run, but might also water down legal stadards for all actors and make the law generally less legitimate.

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53 Resolution 1 of the 32nd International Conference of the Red Cross and Red Crescent (2016) 97 IRRC 1390.

54 See eg the rejection by the Diplomatic Conference of the proposals made by the ICRC regarding restrictions of the prosecution of those who participated in NIACs in Art. 10 of Draft Protocol II, Draft Additional Protocols to the Geneva Conventions of August 12, 1949, ICRC (June 1973). For a further reading, see Ives Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) 4397; Jann K. Kleffner, 'From "Belligerents" to "Fighters" and Civilians Directly Participating in Hostilities' (2007) 54 Netherlands International Law Review 315, 322 et seq; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1 Journal of International Humanitarian Legal Studies 5.

55 2187 UNTS 3.

In how far can and should the law draw consequences from the challenges posed by areas of limited statehood, in order to remain relevant to the situation on the ground? At what point is it necessary to draw a line that sets standards which may remain counterfactual in the foreseeable future? Whether adaptations are necessary – and can be brought about lawfully without actually endangering IHL's overall legitimacy and effectiveness –[56] is explored from various perspectives in the contributions to this volume.

D. About this Volume

This volume further examines the implications of areas of limited statehood for IHL and inquires whether and to what extent the existing norms of IHL are capable of regulating today's armed conflicts in such areas. Can the law be interpreted in a way that is perceived by relevant actors to be legitimate, hence inspiring compliance,[57] and in how far does the law needs to adapt?

To appropriately answer these fundamental questions, the first chapter of this volume deals with the fundamentals of IHL, and examines its history and nature to lay the groundwork for the further debate. Against this theoretical background, the following two chapters focus on concrete and pressing challenges for IHL in areas of limited statehood, namely the legal basis for detention by States as well as non-State actors, and the protection of foreign investment.

Different from *Grewe's* political history (*Ereignisgeschichte*), which divides international law into different epochs, each ending with a peace treaty,[58] *Raphael Schäfer* argues that it is worthwhile to apply a different approach to the history of international law. Instead of focusing on the development of international law in its entirety, he examines the connecting (i.e. comparable) elements throughout the centuries, beyond any alleged epochal boundaries. International law is simply too old for the assumption that a problem is completely new and was never seen before. From this history-of-ideas approach, *Raphael Schäfer* analyses the history of IHL,

56 For a further reading on the interplay of effectiveness, legitimacy and compliance in IHL, see Clark et al, 'Crisis in the laws of war?' (n 1).

57 For a further reading on compliance with IHL, see the various perspectives in Krieger, *Inducing Compliance* (n 4).

58 Wilhelm G. Grewe, *Epochen der Völkerrechtsgeschichte* (Nomos 1984).

particularly how non-State actors were (legally) treated in the past and how today's discourse can be informed by previous ones.[59]

Whereas in current debates on the legal basis for detention in NIACs it is commonly argued that legal orders cannot be treated in isolation and that the focus must be laid on the interplay between the different branches of international law as well as domestic law, *Katja Schöberl* and *Linus Mührel* reason that analysing the relationship between legal regimes should not occur at the expense of studying each field on its own terms. After all, resolving potential conflicts between different legal regimes primarily depends on their respective contents. Therefore, *Katja Schöberl* and *Linus Mührel* inquire whether the norms of IHL were designed to be permissive or restrictive and how this understanding evolved over time. They discuss the relevance of the *Lotus*-principle for modern-day IHL and expose the influence general public international law's conception of 'implied' authority may have on IHL in case an explicit legal basis is missing.[60]

Pia Hesse, in her comment, enriches the theoretical discussion by broadening the perspective to the creation and development of norms in international law. *Pia Hesse* critically reviews the *Lotus*-case of the Permanent Court of International Justice and today's predominant reading of the decision, i.e. the *Lotus*-principle.[61]

The controversial debate on the legal basis for detention in NIACs gained ever more pace after States increasingly engaged in extraterritorial military action in areas of limited statehood and with the development of the extraterritorial application of human rights by the ECtHR.

Manuel Brunner takes up this debate and, in a first step, along with the recent *Serdar Mohammed v Ministry of Defense* case series before British courts,[62] scrutinises the different law regimes applicable in areas of limited statehoods regarding restrictions and potential legal bases for security detentions by States' armed forces. He not only examines IHL and IHRL, but also domestic legal frameworks in States with longstanding NIACs, like Sri Lanka and Nepal, and discusses the interplay between these regimes.

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59 Raphael Schäfer, 'A History of Division(s): A Critical Assessment of the Law of Non-International Armed Conflict' in this volume 43.

60 Schöberl and Mührel, 'Sunken Vessel or Blooming Flower?' (n 28).

61 Hesse, 'Neither Sunken Vessel nor Blooming Flower' (n 29).

62 *Serdar Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB); [2014] CN 1019; *Serdar Mohammed v Ministry of Defence* [2015] EWCA Civ 843; [2015] WLR (D) 354 [30]; and *Serdar Mohammed v Ministry of Defence* [2017] UKSC 2.

Manuel Brunner completes his analysis by pointing out the potential and weaknesses of each regime and asks whether and to what extent Security Council resolutions or Rules of Engagement could provide authorisations for security detentions by States' armed forces.[63]

In his comment, *Anton O. Petrov* supplements *Manuel Brunner's* analysis of the relationship of the different legal regimes on a meta-level. He traces the historical development of human rights law and IHL and, thus, sheds light on the clash of the underlying values of the different regimes. *Anton O. Petrov* illustrates the problem of legal uncertainty in areas of limited statehood with a view to the question which nation's life must be threatened to allow for a derogation under the derogation clauses of human rights treaties.[64]

Since non-State armed groups are major actors in areas of limited statehood, but their activities are only cursorily covered by IHL, *Vincent Widdig* reviews how and to what extent non-State armed groups might be bound *de lege lata* to IHL and human rights within the context of detention in order to gain some legal clarity. Subsequently, he addresses the questions of whether the existing regime of IHL is (still) capable of regulating non-State armed groups conduct, whether there can be a discussion outside of CA 3 GC and AP II, and how non-State armed groups' conduct may affect treaty or customary IHL. Finally, *Vincent Widdig* argues that, when talking about applicable international law, the role of domestic law within the debate over the conduct of non-State armed groups should not be forgotten. The application of domestic law in the respective State in which the conflict occurs might already be a sufficient tool to legally bind non-State armed groups to a certain legal standard.[65]

In his comment to *Vincent Widdig's* analysis, *Lars Müller* examines agreements made between the parties to a NIAC and what they provide, for example for detention. He argues that IHL effectively accepts attempts by non-State armed groups within areas of limited statehood to adjust the existing rules to the specific conflict and to expand the protection provided by these rules and, thus, already allows non-State armed groups to influence the law as it applies to their specific context. Moreover, *Lars Müller* highlights the benefits of such agreements for areas of limited statehood, as

63 Brunner, 'Security Detention by the Armed Forces of a State in Situations of NIAC' (n 28).

64 Petrov, 'Detention in Non-International Armed Conflict by States' (n 29)

65 Widdig, 'Detention by Organised Armed Groups' (n 29).

they can raise awareness for IHL, allow to translate the law into the specific context and provide a higher degree of legitimacy.[66]

The protection of foreign investments in areas of limited statehood has still not gained much attention within the international academic legal discourse, although it challenges the application and interaction of the pertinent fields of law and has caused the initiation of several legal procedures. Especially the growing number of pending arbitrations against States for compensation for losses sustained by foreign investors in armed conflicts in areas of limited statehood demonstrates the need to readdress the question of which legal regimes apply to protect foreign investments in such situations and to what extent they might coincide.

To adequately respond to these questions, *Ira Ryk-Lakhman Aharonovich* clarifies the prerequisites for the classification of commercial objects under both IIL and, based on the principle of distinction in Art. 48 AP I, IHL, which differentiates between protected civilian objects and permissible military targets. She further elaborates on under which conditions foreign investments may be classified as dual-use targets and revenue-generating targets. Finally, *Ira Ryk-Lakhman Aharonovich* examines the consequences of the classification of foreign investments as civilian objects under IHL and points out specific norm conflicts between IHL and IIL to be further dealt with.[67]

With regard to the protection of foreign investment, *Charlotte Lülf* demonstrates that challenges for IHL in areas of limited statehood occur not only in situations of NIACs, but also in IACs and in times of occupation, i.e. a situation in which the sovereign State has lost control over its own territory and hence can no longer guarantee treaty performance and perform protective functions. She hypothesises that, although IHL governs conduct during times of occupation, investment law provides more specialised norms for the matter at hand. Based on contemporary examples of occupation, such as in Ukraine or Iraq, *Charlotte Lülf* analyses the protection of foreign investment during times of occupation under IHL before turning to the specific regime of bilateral investment treaties, their

66 Müller, 'Detention by Armed Groups' (n 42).

67 Ira Ryk-Lakhman Aharonovich, 'Foreign Investments as Non-Human Targets' in this volume 171.

applicability during armed conflict and their interaction with the law of occupation.[68]

This volume provides some observations of and ideas for the formation and development of IHL in response to the challenges of areas of limited statehood. It shows possible ways to react to an empirical phenomenon, which probably was not considered during the genesis of most of the today's applicable treaties to such areas of limited statehood. Furthermore, this volume critically discusses recent case law, such as the *Serdar Mohammed v Ministry of Defence* case series before British Courts, as well as influential case law from the past, such as the *Lotus*-decision, and gives recommendations on how to understand the interplay of different law regimes including IHL, IIL, IHRL and domestic law in areas of limited statehood.

As for the long term, it is still too soon to finally conclude whether the implications on the development of international law as observed in this volume will prove to be true and how IHL as well as the other law regimes concerned will (in an interplay) respond to the challenges caused by areas of limited statehood. By contrast, however, what may be finally concluded from the perspective of this volume is that IHL is not rigid and unreasonable, but legitimate and adaptable to the challenges in areas of limited statehood.

68 Charlotte Lülf, 'The Protection of (Foreign) Investment during Belligerent Occupation – Considerations on International Humanitarian and International Investment Law' in this volume 194.