

THE BATTLE OVER THE LAWS OF WAR: CLASSIFICATION OF TRANSNATIONAL CONFLICTS

This article focuses on the way in which the classification of transnational conflicts, namely conflicts between states and extraterritorial non-state armed groups, as either international armed conflicts (IACs) or non-international armed conflicts (NIACs), has been used as a strategic tool in the general ideological struggle over the regulation of warfare. It exposes the politics of a clash between two competing normative regimes that are hidden beneath the formalistic interpretation of treaty articles.

Transnational conflicts between states and non-state armed groups complicate the ability to effectively regulate warfare. IACs, which have traditionally been regarded as conflicts between two or more states, are significantly regulated by IHL. In contrast, due to asymmetries in power and status, states were reluctant to regulate in the same way NIACs, which were traditionally regarded as internal armed conflicts, between states and rebel forces. As a result, the norms of NIAC were biased towards state interests.

When attempts to change the treaty norms of NIAC failed, there was a need to take a different path. Ostensibly, this path was fairly clear: interpretation could be used to narrow the gap between the law of IAC and the law of NIAC. One way of achieving this goal was to widen the definition of IAC to include asymmetrical conflicts which were previously deemed outside its scope of application. However, this was not the only available solution to the problem. This paper describes the classification debate relating to two situations – the conflict in the former Yugoslavia and transnational conflicts – and argues for the existence of two competing responses to the deficiencies of the law of NIAC. Both of these situations did not fit the classical attributes of internal armed conflicts: the conflict in

the former Yugoslavia involved states and internal armed groups with strong relationships to foreign states, while the transnational conflicts involve states and non-state armed groups operating within the territory of foreign states.

While the conflict in the former Yugoslavia was widely classified as an IAC, transnational armed conflicts have been widely classified as NIACs. If this were a matter of simple interpretation there would be no real puzzle, and indeed, many scholars treat the classification of transnational conflicts as the inevitable result of the interpretive exercise. However, the article demonstrates that in both situations the alternative classification as NIAC or IAC is a possible interpretation. The paper argues that these interpretive approaches reflect a battle over the role of IHL in the regulation of asymmetrical armed conflicts. Whereas the interpretive approach to the events in the former Yugoslavia, which I call the 'inclusive approach', envisioned the implementation of IHL norms pertaining to IACs as a desirable goal, the interpretive position regarding the classification of transnational conflicts, which I call the 'exclusive approach', sees the more protective International Human Rights Law (IHRL) as the ideal normative regime. Through minimizing the role of IHL in transnational conflicts the exclusive approach opens the door for IHRL to regulate these conflicts.