Revista da Faculdade de DIREITO da Universidade Federal de Uberlândia

International humanitarian law and the Western imperial project: from the "exclusionary naturalism" to the "humanistic compulsion" for the "legitimate fighting"[1]

Direito Internacional Humanitário e o projeto imperial Ocidental: do "naturalismo excludente à "compulsão humanística" para a "luta legítima"

Larissa Ramina[2]
Amr Hdiefa[3]

Abstract: The present work deals with International Humanitarian Law (IHL) in the context of the western imperialist project, unveiling the ideological basis of the creators of this law and its relationship with the referred project. In this field, it seeks to understand the paradox that allows IHL to maintain the same arguments over time to exclude a certain category of people from its scope of application, a category identified as "the other", the non-European or the non-Western, characterizing what is proposed to call as a "naturalism excluding". In this sense, IHL has been conducting a compulsive humanization process of war, here identified as a "humanistic compulsion", imposing the Western model of combat, or a "legitimate combat" and making it the standard for the inclusion of the "other" in its scope. Finally, it will be established general conclusions related to the consequences of this merger between the law and the imperialist project on the field within the so-called war against terrorism. The method used to investigate the topic of the research focuses on the review of some critical readings, from authors who are inserted in the critical approaches of international law.
Keywords: International humanitarian law. Western imperial project. War against terrorism.

Resumo: O presente trabalho trata do Direito Internacional Humanitário (DIH) no contexto do projeto imperialista ocidental, desvelando a base

[1] This article was translated by the 'AJESIR - Migration Law Clinic' of the Federal University of Uberlândia, Brazil, more specifically by the following B. A. in Law and International Relations candidates: Natália Ariele Inácio, Luiza Aparecida C. Ranuzzi, Daniel Urias Pereira, and Laura Mourão Nicoli. The article was then revised by professor Larissa Ramina.

[2] Professor of International Law at UFPR. PhD in International Law from the University of São Paulo (2006). LLM. in International Law by London Guildhall University (2000), revalidated at UFSC and USP. DSU in Public International Law by Université Panthéon-Assas Paris II (1997). Visiting Professor at Universidad Pablo de Olavide (Spain) since 2009. Visiting Researcher at SERPI de l'Institut de Recherche Juridique de la Sorbonne (IRJS) at Université Paris I Panthéon-Sorbonne (2015-2016). ORCID n. 0000-0003-3359-9358

[3] Master's in Human Rights and Democracy from the Federal University of Paraná, being a Capes Scholarship Fellow. Graduated in Law at the University of Damascus (2013) and in Journalism at the University of Damascus (2013). ORCID n. 0000-0002-4933-5624.

DOI: http://dx.doi.org/ 10.14393/RFADIR-v48n2a2020-56204

ideológica dos criadores desse direito e sua relação com o referido projeto. Nessa seara, busca compreender o paradoxo que permite ao DIH manter os mesmos argumentos ao longo do tempo para excluir de seu escopo de aplicação uma determinada categoria de pessoas, categoria identificada como "o outro", o não europeu ou o não ocidental, caracterizando o que se propõe denominar como um "naturalismo excludente". Nesse sentido, o DIH vem conduzindo um processo compulsivo de humanização da guerra, identificado aqui como uma "compulsão humanística", impondo o modelo ocidental de combate, ou o que se entenderia por "combate legítimo" e tornando-o um padrão para a inclusão do "outro" na sua aplicação. Por fim, serão avançadas considerações gerais relacionadas às consequências dessa fusão entre a lei e o projeto imperialista no campo da chamada guerra contra o terrorismo. O método utilizado para investigar o tema da pesquisa enfoca a revisão de algumas leituras críticas, a partir de autores que se inserem nas abordagens críticas do direito internacional.
Palavras-chave: Direito internacional humanitário. Projeto imperialista ocidental. Guerra contra o terrorismo.

1. Introduction: Illegal combatants, uncivilized people

The aim of this work can be situated within the efforts of deconstructing formal narratives and unearthing implicit conflicts and paradoxes in international law, particularly in International Humanitarian Law (IHL).

We could start supposing that IHL implies a strange paradox: it is assumed that it hides its racist past, which is due to the association of its founders with the Western imperial project. Therefore, it sought to get rid of the remnants of the European colonial phenomenon that has arisen in its context.

But it is known today, after more than a century, that it contributed to the exclusion of a group of individuals for the same reasons and arguments that it excluded the uncivilized people: on the basis that they were previous to the application's scope regarding to the laws of war.

How this paradox can be understood? How should be determined its causes and mechanisms? Which mechanics and methods used by the law of war (the law of armed conflict), or IHL should be used to carry out the process of exclusion and inclusion in the application of its provisions? Then why is it

excluded and includes both?

Despite the multiplicity and diversity of the previous questions, there is a hidden link between all of them that contributes to find an answer, which is the inability of this law to liberate from the Western imperialist project. Latter it created a natural tendency for exclusion due to its realism in dealing with the phenomenon of war. It is a phenomenon that makes it impossible for any imperialist project to abandon, and because of its establishment of the concept of "the other", non-Western and uncivilized, which could be any person who exists or imagined the imperial legal system, aims to keep it outside the application's scope of the provisions about international law.

Just like general International Law, IHL has historically justified and legitimated the oppression of non-European peoples through the concept of the "civilizing mission", which operates by characterizing those peoples as the "other", that is, the barbaric, the backward, the violent, the non-white, the non-occidental. Those "others" are the ones needing to be civilized, or the proper source of all violence, and the ones who must be suppressed by an even more intense violence, administered legitimately by the colonial power "because it is inflicted in self-defense, or because it is humanitarian in character and indeed seeks to save the non-European peoples from themselves" (ANGHIE; CHIMNI, 2003).

In order to be able to control the wars of the imperial powers in regard to "the other" or "non-civilized", it was necessary to include it within the provisions of the law of war expecting it would respond to a specific normative model in combat. It has been done by transforming or changing "the other" by the imposition of a "forced humanization", through a "humanist compulsion" aiming at integrating it into the Western imperialism model regarding to armed conflicts, that is, the "legitimate fighting". If the humanization process of non-Western people is completed, it becomes protected by the law of war and becomes able to adopt the protection contained therein. And if it does not respond to this "normative humanism" and refuses to adopt Western

stereotypes in the fighting, it is seen as an outsider, a villain and uncivilized person (which applies to “unlawful combatants”), and these people or groups are no longer entitled to the protection established under IHL.

2. Colonial tendencies of the founders

It is not easy to separate man from his temporal, intellectual and social context, knowing that legal institutions and philosophical theories are not born out of nothing and are not an effect of improvisation and spontaneity. This applies perfectly to the first generation of the founders of IHL, who lived in the second half of the nineteenth century. They viewed themselves and their work as part of the “European civilizing mission”, and established a lecture based on racial inequality between humans.

Looking at the biography of Henry Dunant, who is, according to the literature of Western law, the founder of IHL, it is possible to realize that he was a colonizer in his early years. This is proven by Ellen Hart (E. HART, 1953), which was devoted to the biography and study of Dunant’s life. In addition, she mentioned in it the connection of Dunant himself with colonial projects that took place in Algeria, such as the exploration of mines and forests. Dunant also proposed a project for the international community for “the revival of the East”, as he described the idea of a "new crusade" in favor of civilization. Its main goal was to build a harbor in Haifa, a train line in Jerusalem, and a commercial bank in Constantinople. Moreover, when he became aware of the dead and wounded in the Battle of Solferino, he was on his way to meet Napoleon III in order to obtain concessions in Algeria (DUNANT, 1866)

The reference to aspects related to Dunant's association with the colonial idea is not intended to diminish him or his role in creating IHL and the International Committee of the Red Cross (ICRC). It is also not the intention to undermine the theory of IHL, but rather to investigate it in order

to explain the current predicament of this law, and to indicate that – exactly like other branches of law - it is still framed by the idea of "the other".

Not only Dunant, but the Belgian jurist Gustave Monnet, for example, was also supportive of colonial activities in the Congo. Note that he was a representative of the International Committee of the Red Cross at the Hague Conference. (BURELOUP, 2005)

Strangely, Russian diplomat Friedrich Martens also attended the Hague Conference of 1899, and won the Nobel Prize. He was credited with the creation of the Martens clause, as he was considered one of the greatest advocates of the principle of humanity. In addition, he was a professor at the most imperial faculties of law and was affiliated with the University of St. Petersburg, despite being racist, clear and tolerant of the colonial phenomenon. His intellectual attachment to such ideology was evident in a study published (in French) by him, in 1879, in the Journal of International Law and Comparative Legislation, entitled "Russia and England in Central Asia" (DE MARTENS, 1879).

In this sense, Martens pointed out that both Russia and England had to be convinced of the fact that the most distinguishing feature of civilization was "a spirit of cooperation between them, in order to achieve a noble goal which is their control over the Asian people". (DE MARTENS,1879). He added that this goal represented a duty imposed on these two countries for the good of the barbaric and semi-savagery nations that lived in that part of the world. In addition, Martens blessed Leopold III's occupation of the Congo. Even worse, he considered that the only argument that could have made colonialism blameworthy was that the white people did not have sufficient immunity against malaria.

Furthermore, the participating delegations of the 1899 and 1907 Hague Conferences included many people with colonial backgrounds and tendencies, among whom there were officers and military personnel who had participated in colonial wars. It is known that they influenced the provisions

that were codified and adopted in those two conferences.

In addition to these colonial roots of the founders, the process of excluding non-European peoples from the scope of application of the laws of war was also the result of the contradictions and oppositions that prevailed over the colonial ideology. Several opposing categories followed this phenomenon, such as global/ethnic, humanity/exploitation, among other similar dualities. In this sense, it is important to understand the process of excluding non-European peoples, or, in other words, the "others", as a product of the contradictions that characterized the imperial phenomenon, in addition to be a direct result of colonialism.

3. The natural tendency to exclude “the other” in international humanitarian law

International humanitarian law, as some scholars indicate, has a natural tendency to exclude the “other” from its scope, a phenomenon known as “the natural tendency of exclusion”. (MEGRET, 2002) It is a subjective tendency found in the laws of war and IHL by virtue of its nature and definition, since this law is realistic in relation to the phenomenon of war. It does not seek to eliminate this occurrence or prohibit it and remove it from the circle of law, but rather to deal with it as a fait accompli without addressing its legitimacy, in order to alleviate its problems and effects, submitting it to its rules and to various principles for human purposes.

In other words, IHL recognizes war as a fait accompli, and does not concern itself with addressing its legitimacy, but deals with it as it exists, seeking to alleviate its effects and reduce its misfortunes and tragedies. In this concept and vision, it offers great and real benefits, in addition to making important quantitative and qualitative leaps in this context. However, in return, it assumes our prior knowledge of the combatant, even though he does not intend to determine what it is.

A combatant is not a natural or sensory phenomenon present in front of us in nature, so that it can be known. The issue of identifying a non-combatant is not governed by the laws of nature or by the sensory knowledge of the outside world, but by the social, normative or basic form within the community. Although IHL guides us on how to deal with a combatant and clarifies the rules and criteria for our relationship with him, it does not provide us with a sufficient image or concept of him: what is a fighter? Who is he? Moreover, what is it?

IHL is sufficient to define the categories of people who are entitled to participate in combats and hostilities. It may be logical, at this stage of the analysis, to mention that the distinction, previously known in the law of war, between "civilized" and "non-civilized", abolished in contemporary IHL, returned and reintroduced itself within this scope of law.

Due to the lack of a clear and precise identification of the combatant, there is a very visible recycling process, which was followed by the gradual codification of IHL. This process went through a series of concepts, being a question of how it can be treated, "primitive" or "uncivilized", as well as what a combatant is, and ending with the implicit response to that essence of someone who is not primitive, and has become the outcome related to the other, in all the concepts and expressions that indicate it.

Necessarily, the definition of a combatant has two dimensions: one is inclusive and the other is excluding. This also confirms the excluding nature inherent in IHL. In fact, these two dimensions result from the fact that the idea of inclusion itself and its definition through controls and criteria will inevitably be exclusionary to those who do not apply to these controls. Consequently, IHL will not have any meaningful baseline if it is applied to any form of violence that emanates from an actor.

For IHL to be “meaningful normative activity” according to the contemporary social theory, it is inevitable that it will govern only specific forms of violence. This means that it will not apply to all actors who produce

violence, but only to some of them (DE ZAYAS, 2005). IHL, like language, must help us to recognize war when we see it, and to transform the perception of the anarchy of violence into a clear legal concept. In identifying perpetrators or legitimate producers of fighting and violence, IHL will promote a specific concept of legitimate fighting.

It is known that this concept of legitimate fighting was formulated by IHL in accordance with the language of the nineteenth century and with the legal situation that prevailed at the time. Because of that, this law became the result of specific circumstances, which contributed to express the concept of which could be called "legitimate fighting" and to formulate it in the manner defined in contemporary IHL.

This sort of “exclusionary naturalism” that characterizes IHL is thus due to its concept of war and its idea of a combatant. In addition to these two factors, another important factor is that this law did not aim to criminalize the fact that the state is the primary actor in the international community, and in the production of violence within it. Its provisions clearly indicated a bias towards the state's monopoly on the legitimate use of the force at the international level. The concept of IHL on the state was affected by the prevailing legal concepts at its establishment, and only European countries exercised it at that time, as civilized countries capable and able to respect it and apply it.

It is thus discerned that the law of war in the nineteenth century must be seen as part of the process of organizing war at the time, a process that prompted the international community at the time to assert that only states and their regular armed forces could engage in international violence. This position was natural in relation to the increase and the intensity of colonial resistance in the colonies, from South Africa to Cuba. As a result, the distinctive nature of contemporary IHL is that it is part of the process of perpetuating and consolidating the world of nations, and no other entities. Consequently, states became the only actors allowed, de jure and de facto, to

use force, and their armed forces were the only ones to enjoy the description of a combatant, even if they violated the laws of war. It is not a requirement, in accordance with the Geneva Conventions, for members of the regular armed forces to be considered combatants in order to respect the laws and customs of war.

Another round-up process was attached to the recycling process, which came in response to new changes and data within the European continent, and which would have included irregular armed groups within the scope of IHL. These are conditions stipulated in Article (4) of the Third Geneva Convention regarding the treatment of prisoners of war. It was assumed that they were not realized by primitive or uncivilized populations. This assumption was, of course, prior to the conclusion of the Third Geneva Convention, which was affected by the conditions specified in this regard[4].

[4] Article 4 of the Third Geneva Convention. A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labor units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions of international law. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. B. The following shall likewise be treated as prisoners of war under the present Convention: (1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they

Whoever enjoys these conditions and the frameworks established by the law of war is considered as a legitimate combatant, who deserves the protection stipulated therein if he leaves the battle for one of the legally known reasons. In order for a combatant to be considered legitimate, he must prove that he is capable and determined to wage war, and to manage the fighting according to the shapes and lines drawn by the West for that, which forms the actual basis for establishing the legal conditions for considering members of irregular armed groups as legitimate combatants.

With regard to the condition concerning the existence of a leader of these groups or a person responsible for his subordinates, it is a condition that reflects the reality of European or Western coexistence. A feature of the contemporary Western armed forces is the hierarchy and functional hierarchy within them. As for the condition related to the existence of a specific emblem that can be distinguished from a distance, that is displayed in a visible manner. It is a condition that refers to the phenomenon of European's uniforms, which has become an expression of national identity and of the national spirit of Western peoples since the Renaissance, according to some scientific opinions. (PFANNER, 2004)

This idea was put forward effectively during discussions and preparations for the First Geneva Protocol, when a large number of participating delegations expressed that the condition of the emblem that

---

fail to comply with a summons made to them with a view to internment. (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties. C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

distinguishes the combatant would give preference or privilege to the Western armed forces. In this sense, third world countries were able to obtain the possibility of mitigating the severity of this requirement in situations of armed conflict in which the combatant cannot distinguish himself as desired[5].

As for the requirement that irregular armed groups conduct their war or hostile operations in accordance with the laws and customs of war, it is a condition that raises many questions, and they are worth researching. It has become entrenched in the mind that reciprocity is no longer a general principle governing the application of contemporary IHL between the parties to an armed conflict. The legal status of the regular armed forces of states is not affected by any breach on its part by the laws and customs of war, and international agreements remain in effect.

As for irregular armed groups, their legal status recognized under the

[5] Article 44/3 of the First Geneva Additional Protocol 1977. 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, 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 while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c). 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences, he has committed 5. Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention. 7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict. 8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.

Geneva Conventions is conditional on their respect for the laws and customs of war. Upon closer examination and scrutiny of this condition, it becomes evident that it represents an incorporation and dedication to what was worked on before the codification of contemporary IHL regarding primitive or non-civilized peoples, whereby states in both cases (the case of non-respect for armed irregular groups by the laws and customs of war, and the condition of non-civilized peoples in conventional law of war) is not obligated to apply the provisions of IHL unless informal armed groups or uncivilized peoples build their will and capacity to reciprocate.

It follows from all this that contemporary IHL is still governed to this day by imperialist concerns and concepts that prevailed in the nineteenth century, and its sole purpose was to exclude "the other" and to exclude it from the scope of law enforcement. Here, we have the right to ask a legitimate question: do the Geneva Conventions not involve a bias for Western visions and concepts, a dedication to a stereotype or a specific Western model for fighting and the idea of a combatant?

The elite affirms that contemporary IHL does not exclude "the other" or non-western peoples from its general origin, but in return it seeks to impose a specific pattern or model that the "other" must adopt in order to be eligible to law enforcement. Whereas, the complete coincidence between the "other" and the model that contemporary IHL seeks to impose is the only hypothesis that leads to the inclusion of the provisions of law. If "the other" does not comply with this model or the Western style of fighting, IHL will not accept it as a major player in the war game.

The basic condition for the application of IHL to disputers, especially to the "others", is the representation of the Western image of combatants and war; and its adoption of the Western format in its management, which has been already named as "inferior clones or dumb copies of the original"

(MUTUA, 2001)[6]. Otherwise, it would be subject to exclusion thanks to the mechanisms of exclusion and immunization that have been incorporated into the structure and system of IHL, through the gradual process of codification of its rules and provisions.

The process of stereotyping or modeling "the other" is actually carried out through forced humanization of war, practiced by IHL on it, to become acceptable and eligible for the application of the law. There is a process of transforming or changing "the other" by framing his management of war by imposing the Western model of fighting and its war-related methods, tools, and standards, and all of this is done through the compulsive humanization of war.

4. Changing the "other" and "the compulsory humanization of war"

Perhaps someone said or wondered: *are the conditions that contemporary IHL requires irregular armed groups to meet for their members to enjoy the status of combatants' good ones*? However, on the other hand, *is it not necessary for us to understand the reality of these legal conditions and regulations on the basis that they reinforce a specific model of violence and exclude any other model of fighting*? Then, it is not true to say that the fulfillment of these conditions is not possible except by adopting a specific pattern or pre-determined model for fighting?

The introduction of specific combatants into the space of IHL and the inclusion of its provisions, or their exclusion from it, is, in fact, the fruit of a

[6] "Second "the SVS (savages-victims-saviors) metaphor and narrative rejects the cross-contamination of cultures and instead promotes a Eurocentric ideal" that is "the metaphor is premised on the transformation by Western cultures of non-Western cultures into a Eurocentric prototype and not the fashioning of a multicultural mosaic. The SVS metaphor results in an "othering" process that imagines the creation of inferior clones in effect dumb copies of the original." For example, Western political democracy is in effect an organic element of human rights from which "savage" cultures and peoples are far allowing the creation of victims".

larger and wider process of exclusion of other models of combat and a conduct of war that does not conform to the Western model or model of combat. For this reason, it's not an exaggeration to conclude that the laws of war and contemporary IHL in general, in their current state, are related to an expansionist and imperialist Western project, and they express it. IHL in its current state is a strange paradox, which, although it is aimed at organizing fighting, controlling violence and its effects, it turns out to produce its own violence.

It is a paradox that has arisen because of the exclusion and inclusion of mechanisms that this law implies, which are related to a Western imperialist project aimed at changing "the other" and imposing a Western combat style on it. From a historical point of view, at least, IHL can be seen as a tool – or a sort of "humanistic compulsion" for non-European peoples within the international community. These peoples are obliged, under this law, to launch wars and conduct their combat operations in accordance with Western concepts, frameworks and standards. There is a process of recruitment to Western military ethics. There is a kind of "othering process" according to the Western model of fighting and engaging in violence, which will ultimately lead to the strengthening of Western domination of the world (MEGRET, 2002).

On the other hand, one should think seriously whether the partial success achieved by the third world countries in 1977 through the First Additional Protocol of Geneva Conventions - which acknowledge, to some extent, that rebel groups, in some cases, may not need to distinguish themselves according to what was established in the text of Article (44/3) - represents a fundamental change from the bond of IHL with the Western model of combat and the conduct of war, especially because the text of the aforementioned article still includes the obligation of the fighters to distinguish themselves by openly carrying weapons during any armed conflict or when carrying out military actions in preparation for an attack.

There is no doubt that IHL has achieved many accomplishments and benefits, but its global expansion and the legal organizations that it brought about in the management of wars and armed conflicts were culturally violent, and it was expressed as a result of Western imperial and military phenomena (MEGRET, 2002). The provisions of this law has pushed third world countries or non-Western countries to build their armed forces on the basis of an underlying legal maneuver inherent in the structure of IHL, and thus no person can deny the contribution of this law as one of the main ideological forces that led to the legitimization of this "othering process".

It becomes clear that IHL aims at distinguishing who can kill in a legal way from who is not allowed to do so, or who can be killed from who have the privilege to be legally protected. (KENNEDY, 2006).

War, in most societies, is not a specialized activity practiced by a certain professional group, that is, the war is not a profession carried out by a particular group for the benefit of those who enjoy sovereignty, whether those are kings, rulers, states, or others.

The requirements of IHL are conditions that aim to strengthen hierarchy, to distinguish the own belligerent and the ability to respect the laws and customs of war only as an attempt to keep track of the idea of a modern army governed by the number and skill of the soldiers. The measurement of its dimension and its equipment will ultimately guarantee that states – especially the countries that fall under the category of "the other" – a source of stability, and, in addition, they will not cause risks that are not studied or expected by Westerners. The creation of peculiar, known and specific forces facilitates the task of Western imperialist states in dealing with them, also minimizing the risks that the presence of unidentified, indiscriminate and unlimited armed forces in third world countries may pose to it.

The most important of all, that is, the process of exporting the laws of war outside Western countries and imposing these rules in the context of the

"global coercive humanization" process, has led to the creation of a global form of interstate violence, based on its regular armies. In other words, Western imperialism has been sought to impose its style and combat models on the "other", and it has legalized violence globally through regular armies, or armed groups known and defined by them, and the similarity of armies in many aspects. In this sense, we can understand IHL in its current constitution as an attempt to respond to a primarily Western problem, which includes philosophical, legal and religious dimensions.

The emergence of the idea of the war in the Western legacy was the result of medieval divine theories and theories which could be distinguished between prohibited private violence and permissible or fair public violence ("just war"). The war has been linked to the country since the advent of this, which is the product of purely intellectual, social and political Western. War has become the recognized pattern of the state of violence that may be practiced in foreign relations. Political sociology has provided us with adequate ways and means to understand and analyze how the state monopolizes legitimate international violence, and how the law is harnessed to serve and regulate the practice of such violence at the public sphere and in the face of "the other".

In regard to the role of international law in general, and IHL in particular, it is to provide the appropriate ground for imposing the concepts and standards of fighting management and the external violence of the state, which prevailed in the Western mind over the whole world, and around which international law is an imperial concept that is originated from a cultural, social, temporal and spatial context to global legal standards and norms.

The conversion process was done through Western mechanisms, namely: diplomatic conferences; adoption of complex international treaties; and a number of international organizations are empowered to work to enforce these rules and put them into practice. In this way, the law intersected with Western imperialism, and the peculiar thing is that

defensive imperialism again resorted to exploiting the exclusionary potential inherent in contemporary IHL in order to deprive "the other", or the villain, the terrorist and the "barbarian" enemy, from the protection of this law. So, it relied on the law provisions concerning the conditions and criteria for defining the character of a legitimate combatant. Since the illegitimate is not worthy from its point of view to respect this law, it follows that this imperialism is not legally obligated to respect it when facing it.

The result is that the first generation of specialists working in IHL contributed to the formulation of Western concepts and standards, which came out in response to Western problems. Its legal formulation used a global language instead a local or regional one, so the law of European military relations became a locus for the process of integration within the international legal system and dressed in universal clothing.

It is notable that the wording of IHL, its transformations, integrations, exclusions and inclusions that have come to fruition, have become an assistant to the new imperialism. The imperialism adopts a purely combat rhetoric in the name of self-defense, providing it with whatever mechanisms and legal tools in order to facilitate its mission in the wars against the "other" or the "terrorist", remaining valid to emphasize that there is no difference between the both. The legitimate violence administered in self-defense, therefore, seeks to save the non-European peoples from themselves (ANGHIE; CHMINI, 2003).

5. Final Remarks

The process of building and excluding the "other" in the context of IHL has become a remarkable phenomenon today. In spite of the important and pivotal role, this law actually plays in order to protect the victims of wars and armed conflicts, it is still subject to interpretations, abnormal and unacceptable applications, including what happened in Palestine, Iraq, Syria,

Yemen, Libya, Guantanamo, Abo Gharib, Alhol[7] and others. In none of these cases these interpretations and practices could be viewed as mere violations of the provisions of the law, as this is a simplification and a reduction of the truth of the matter, in addition to that it would not help us to understand the phenomenon and to correct it properly. That is why it becomes logical to say: these interpretations are part of the natural tendency of exclusion in IHL, or of the "exclusionary naturalism".

The question that specialists and thinkers must research now should be: how has IHL turned into a means in order to consolidate exactly what it ostensibly sought to eradicate and eliminate? And why was that? In other words, researchers and scholars should look carefully at the following issue: how has this law become a mediator between the parties and the colonial struggle, so that it enshrines the same imperialist visions and aspirations against the colonial or uncivilized peoples? Could we free it from this partiality?

IHL implies a number of normative values and normative social influences, which are legally and expressly conveyed in the conditions that must be achieved by countless individuals from the regular armed forces in order to be considered as combatants, including the responsibility of the leader and the combatant's judgment and its perception of himself. These are creditable values if they are transmitted impartially. However, when a structural system is made formally and essentially from a specific social and regional context, its transfer to others and distinct social backgrounds will make the transmittance an anomaly, or socially meaningless, in its new context. This process that aims to change the other to make it more "human" or more "western" is what we propose to call "humanistic compulsion".

[7] It is one of the Syrian refugee camps located on the southern outskirts of the city of Al-Hol in the province of Hasaka in northern Syria, near the Syrian-Iraqi border, and includes people displaced from the lands occupied by the Islamic State (ISIS). It is controlled by the US-backed Syrian Democratic Forces, which has turned it into a detention center for thousands of ISIS families.

In fact, taking into account the ongoing creation of legal organizations intending to manage war regulations which are incompatible with the social context in third world countries, this remark – about the transfer of an unsuitable IHL and the laws of war – has been proven to be true. This deficiency has, over the time, caused the current laws of war to become inadequate to control armed conflicts and exert war management, the main reason for existence of the IHL.

This is funny, since IHL itself contributed to the inability of the third world countries and their peoples respect the laws of war and its restrictions on the means of warfare, considering the fact that these laws force these countries to adopt legal arrangements which are not, at all, compatible with their social and regional structures. As a result, they are unable to observe the laws of war. Therefore, this has led IHL to exclude them from its scope of application.

In addition, it is the source of some inquiries: which is the legal device so fundamental in the structure of IHL that brings on this setting? Which are those mechanisms that provide inclusion and exclusion at the same time? It all happens due to the exploit of the law by Western imperialism, from its establishment until today, to achieve its expansionist goals, in the name of "globalization", "universalization" and "humanization", based on the assumption that the "other" – that is, the different –is primitive.

On this subject, while it was induced that the savagery of non-European people was the main factor behind the incorporation of the "other" in IHL, it was also the excuse behind the foundation of what we might call "self-civilization"; it is the measure that the West took on account of considering itself civilized and the others, barbaric. In other words, it is the mechanism of describing the West itself as a civilized region, a process that the West launched by itself, without any other participation.

Despite the descriptions of urbanization and civilization that the West spreads, as saying that its wars are just civilized as itself, many

anthropological historical studies have proven that this portrayal is not accurate. Studies have shown that the wars which Westerners used to describe as "primitive" wars were not as fierce as the wars of Western and European countries.

Among the most important researches in this field, Lawrence Keeley's studies confirmed the misleading portray of the savagery of "primitive people" wars regarding the wars of "civilized peoples" and their humanity. He has affirmed that their wars were proven, historically and anthropologically, to be not conducted by legal and humanitarian values (KEELEY, 1996). Even if the wars of those described as the primitives were more violent and cruel, they were less destructive than the wars of those who are considered civilized (KEELEY, 1996).

The reason is clear and obvious: peoples described as primitive had weakness military, scientific and technical capabilities, and, because of this deficit, they lacked logistical formation and counted with several struggles in their countries. This resulted in their inability of possessing a destructive military force, as powerful as it was engineered in the Western countries. Either way, regardless of the accuracy of the affirmation concerning the apparent savagery and inhumanity of the wars among non-civilized or underdeveloped peoples, the statement claiming that wars of civilized peoples were subjected to law and to human values is doubtful, if not nonsense.

One of the best evidences of the cruelties and atrocities caused in the so-called civilized peoples wars is the outcomes of Second World War. In addition, a mentioned example is the war of the United States against terrorism, and the devastating and inhuman consequences it has caused in Afghanistan, Iraq, Syria, Libya, Yemen and possibly in other countries in the future. Also, the ongoing war Israel is waging against Palestine and the Palestinians, including continuing violations of international obligations arisen from IHL in a brutal and unprecedented manner. The same observation applies to the wars that Israel launched in the summer of 2006

against Lebanon; in the winter of 2009 and in 2014 against Gaza; and its attacks on Syria with more than 300 air strikes during the 9-year war in Syria.

In the end, it is relevant to point out that the Western model based on centralized and industrialized violence is widespread all over the world and has led the world to a merciless violence that has never been experienced throughout its entire human history.

Furthermore, the rationalization of this Western model through IHL has contributed to the increasing struggle of the "other" to behave in accordance to this system, or to which is considered as a "legitimate fighting". The most dangerous repercussion is the characterization of the "other" as the opposite image of the portrait advocated by the IHL, being pictured as a war criminal, the "terrorist" or the "unlawful combatant". This set the stage for the exclusion of the "other" from the scope of application of this law complex.

References

ANGHIE, Antony; BHUPINDER S., Chimni. Third World Approaches to International Law and Individual Repsonsibility in Internal Conflicts. **Chinese Journal of International Law**, v. 2, n. 1, 2003.

ANGHIE, Antony; KOSKENNIEMI, Martti; ORFORD, Anne. **Imperialismo Y Derecho Internacional.** Bogotá: Siglo del Hombre Editores, Universidad de los Andes, Pontificia Universidad Javeriana, 2016, 232 pp.

BURELOUP, Véronique harouel. **Traité de droit humanitaire**, Paris: PUF, 2005, 123p.

DE MARTENS, Friedrich. La Russie et l'Anglettere dans l'Asie centrale. **Revue du droit international et legislation comparé**. Paris, v.11, p.233 *et seq.*, 1989.

DE ZAYAS, A. Human rights and indefinite detention. **International Review of the Red Cross**, v. 87, pp. 15-38, 2005.

DUNANT, Henry. **Pour la rénovation de l'Orient**. Paris: Société Internationale Universelle, 1866.

HART, E. **Man born to live: Live and work of Henry Dunant, founder of the red crus**. London: Gollancz; First Edition 1953.

KEELEY, Lawrence. **War before civilization: the myth the peaceful savage**. New York: 1996.

KENNEDY, David. **Of War and Law.** Princeton: Princeton University Press, 2006.

MEGRET, Frederic. **War? Legal semantics and the more to violence**. London: Oxford University Press, vol.13, 2002.

MUTUA, Makau. Savages Victims and Saviors. The Metaphor of Human Rights. **Harvard International Law Journal.** Cambridge, v. 42, n. 1, pp. 201-245, 2001.

PFANNER, T. Military uniforms and the law of war. **Revue Internationale De La Croix-Rouge/International Review of the Red Cross.** Geneva, v. 86, pp. 853 *et seq*, 2004. DOI: 10.1017/S1560775500180113

Artigo recebido em: 20/07/2020.
Aceito para publicação em: 03/09/2020.