

NINETEENTH ANNUAL GROTIUS LECTURE

The lecture began at 4:30 p.m., Wednesday, April 12, 2017, and was given by David Armitage, Lloyd C. Blankfein Professor of History at Harvard University; the discussant was Mary Dudziak, Asa Griggs Candler Professor of Law at Emory University School of Law.*

CIVIL WAR TIME: FROM GROTIUS TO THE GLOBAL WAR ON TERROR

By David Armitage[†]

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I. INTRODUCTION

I am deeply grateful to the American Society of International Law—especially to its president, Lucinda Law—and to the International Legal Studies Program at American University Washington College of Law—in particular, to the Dean of the College, Camille Nelson, and to its program director, David Hunter—for their generous invitation to deliver the nineteenth Annual Grotius Lecture. Grateful, but more than a little intimidated. Nobel laureates and heads of state, eminent judges and leading diplomats have given this distinguished lecture but never, I think, a humble historian. As Isaac Newton might have said were he in my shoes, if I can see far, it is because I stand on the shoulders of these giants.

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[†] Lloyd C. Blankfein Professor of History, Harvard University.

The theme of this year's Annual Meeting is "What International Law Values." I fear I am going to be rather perverse—but I hope not ungracious—in addressing a subject, civil war, that international law mostly did *not* value, at least until quite recently. As the early nineteenth-century Swiss theorist of war Antoine Henri Jomini admitted of civil conflicts, "To want to give maxims for these sorts of wars would be absurd." They were, he explained, more destructive and cruel than conventional wars of policy because more irrational and more ideological.¹ Such an attitude prevented the extension of the original Geneva Convention of 1864 to civil wars. One of the Convention's drafters, the Swiss jurist Gustave Moynier, noted dismissively in 1870, "it goes without saying international laws are not applicable to them."² As we shall see, it would be another eighty years, in the wake of the Second World War, before international law would "value" civil war, in the sense of taking it seriously enough to attempt to regulate it. Not for nothing did Michel Foucault once write of "the most disparaged of all wars: not Hobbes, not Clausewitz, not the class struggle—[but] civil war (*guerre civile*)."³

Civil war has long been a Cinderella subject, and not just for international law: there is no great treatise *On Civil War* to stand alongside Clausewitz's *On War* or Hannah Arendt's *On Revolution*, for instance. None of the great modern theorists of war, from Niccolò Machiavelli to Mao Zedong, addressed it systematically or at any appreciable length. Civil war barely registered in the era of what David Kennedy notoriously called "primitive" legal scholarship in the era before the presiding genius of this lecture, Hugo Grotius, wrote.⁴ It was also largely absent from the classic law of nations. Grotius himself was somewhat baffled and ambivalent on the topic and it was only in the second half of

¹ "Vouloir donner des maximes pour ces sortes de guerres serait absurde": Antoine Henri Jomini, *Précis de l'art de la guerre, ou Nouveau tableau analytique des principales combinaisons de la stratégie, de la grande tactique et de la politique militaire*, 2 vols. (Paris: Anselin, 1838), I, p. 85.

² "Nous ne parlons pas, cela va sans dire, des guerres civiles; les lois internationales ne leur sont pas applicables": Gustave Moynier, *Étude sur la Convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)* (Paris: Libraire de Joël Cherbuliez, 1870), p. 304.

³ "... la plus décriée des guerres: ni Hobbes, ni Clausewitz, ni lutte des classes, la guerre civile": Michel Foucault, letter of December 1972, in Foucault, *Dits et Écrits, 1954–1988*, ed. Daniel Defert and François Ewald, 4 vols. (Paris: Gallimard, 1994), I, p. 42.

⁴ David Kennedy, "Primitive Legal Scholarship," *Harvard International Law Journal* 1 (1987): 1–98.

the eighteenth century that civil war became an object of attention for international lawyers and students of the laws of war. It still faced stiff resistance, and even what we might call repression from legal consciousness. Only in the late twentieth century did international lawyers come to “value” civil war, if by that we mean to pay it sustained attention, to expand their horizons to encompass it, and to accord law normative force over its conduct.

II. CIVIL WAR AND THE PROBLEM OF TIME

My story, then, will concern a subject international law *devalued* and then *re-evaluated* across the four centuries since Grotius himself wrote in the early seventeenth century. I have tried to relate the history of civil war at greater length in my most recent book, *Civil Wars: A History in Ideas* (2017). There I treat debates over the meaning and application of civil war from ancient Rome to the present—from Sulla to Syria, if you will.⁵ To give more focus to what could be a much longer and more winding analytical argument, I concentrate here on what I have called “civil war time”.⁶ My title alludes to one of the pivotal books that inspired the ongoing dialogue between international history and legal history in recent years, Mary Dudziak’s germinal *War Time: An Idea, Its History, Its Consequences* (2012).⁷ My argument about the civil war time—about the expansiveness, the elasticity, and the seeming interminability of civil war—owes a great deal to the inspiration afforded by Dudziak’s work on law and temporality. It is accordingly a special honor, as well as a great pleasure, to have Prof. Dudziak as the distinguished discussant for my Grotius Lecture.

⁵ David Armitage, *Civil Wars: A History in Ideas* (New York: Alfred A. Knopf, 2017), on which this lecture draws heavily.

⁶ For a rather different conception of “civil war time”—that is, of time during the US Civil War—see Cheryl A. Wells, *Civil War Time: Temporality and Identity in America, 1861–1865* (Athens, Ga.: University of Georgia Press, 2005).

⁷ Mary Dudziak, *War Time: An Idea, Its History, Its Consequences* (New York: Oxford University Press, 2012); see also Dudziak, “Law, War, and the History of Time,” *California Law Review* 98 (2010): 1669–1701; Dudziak, “War and Peace in Time and Space,” *Seattle Journal of Social Justice* 13 (2014–15): 381–97.

The standard view of the relationship between war and time is deceptively straightforward, as Dudziak has reminded us. There is a normal condition that we call peace, or the absence of war. A war is declared, marking the start of that exceptional condition we call “war time,” that “tract of time, wherein the Will to contend by Battell, is sufficiently known ... All other time is PEACE,” as Thomas Hobbes famously put it in his *Leviathan* (1651).⁸ Because war is directed towards an end—victory, a treaty, the resumption of peace—we can assume that war time will be finite. Dudziak has put this more crisply: “We tend to believe that there are two kinds of time, wartime and peacetime, and history consists in moving from one kind of time to the next. Built into the very essence of our idea of war-time is the assumption that war is temporary. The beginning of a war is the opening of an era that will, by definition, come to an end.”⁹ Dudziak dedicated her book to undoing that illusion, by showing just how difficult it has been to determine when wars—especially the United States’ modern wars, like the Second World War, the Cold War, and the Global War on Terror—actually did end or, in the case of the War on Terror, whether it would end or indeed ever *could* end. When war time ceases to be bounded it opens up the prospect of endless war, a “forever war” with no sign of victory and no hope of peace.¹⁰ As Hobbes might have said, the time of peace vanishes amid a “known disposition” to fight that never seems to go away.

Civil war, not even the US Civil War, was not among Dudziak’s examples in *War Time* but I want to extend her analysis to include it. Civil war—large-scale armed conflict among the members of a single political community—is even more slippery than other forms of war and it has more disturbing temporal implications than international armed conflict. There may be three reasons for the peculiar challenges civil war presents in this regard. First, it has rarely been clear when a civil war *begins*. Second, it has been equally uncertain until recently just when a civil war *ends*. And, third, because civil wars so often recur, the idea that they begin *or* end can be quite contentious, even dangerously fallacious. Far from being an outlier or anomaly, as almost have theorists of war and law

⁸ Thomas Hobbes, *Leviathan*, ed. Noel Malcolm, 3 vols. (Oxford: Oxford University Press, 2012), II, p. 192.

⁹ Dudziak, *War Time*, p. 5.

¹⁰ Compare Dexter Filkins, *The Forever War* (New York: Alfred A. Knopf, 2008); Mark Danner, *Spiral: Trapped in the Forever War* (New York: Simon & Schuster, 2016).

have deemed it to be, civil war exemplifies how to think about the relations among law, war and time. Because civil wars are never declared, they have uncertain beginnings. Even when they are formally terminated—by surrender, armistice, treaty or simply crushing military victory—they resonate in historical memory and keep conflict alive even after swords have been sheathed. And because they re-erupt so often, it is never clear that the conclusion of a civil war means it will in fact end.

How international law treats civil war can be a particularly revealing index of what it values, especially when beginnings and endings, civil peace and civil war time, have been at stake. For ours is now a world of civil war. After 1989, civil war gradually became the most widespread, the most destructive, and most characteristic form of organized human violence. If the three hundred years between 1648 and 1945 comprised an era of *inter*-state war, then the last sixty years appear to be an age of *intra*-state conflict. Indeed, the most striking change in patterns of conflict in that period has been the shift from war between states to war within states. Since the end of the Cold War, an average of twenty intra-state wars has been in progress at any one time: that is, about ten times the annual average for the decades between 1816 and 1989. The global estimate of battle-deaths in these wars since 1945 is roughly 25 million people: that is, about half the estimated direct casualties in the Second World War. Even that count does not include civilians, the wounded, or those who died from the knock-on effects of war, such as disease, malnutrition and displacement. Civil war is no respecter of borders. It turns countries inside out: think not just of the 500,000 Syrians killed since 2011, but also the more than half of that country's population civil war has uprooted internally and externally.¹¹ In the twenty-first century, almost all wars are now “civil” wars. In 2016, the last year for which figures have been calculated, there was only two interstate conflicts, between India and Pakistan and Eritrea and Ethiopia, each over border disputes: the latter lasted for only two days; all of the other fifty or so conflicts around the globe, from Afghanistan to Yemen, were internal conflicts. And these civil wars do not usually stay

¹¹ Ann Hironaka, *Neverending Wars: The International Community, Weak States, and the Perpetuation of Civil War* (Cambridge, Mass.: Harvard University Press, 2005); Stergios Skaperdas, et al., *The Costs of Violence* (Washington, D.C.: The World Bank, 2009); The World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington, D.C.: The World Bank, 2011).

“civil” for long. In 2016, eighteen of the world’s forty-seven internal conflicts were ‘internationalized’ civil wars: that is, conflicts that drew in forces from neighboring countries or intervention from outside powers.¹²

Temporality is crucial to the horror of contemporary civil wars. We now know that wars within states tend to last longer—some four times longer—than wars between them. And that problem only grew worse: in the second half of the twentieth century, civil wars generally lasted three times longer than they did in the first half of the century. Such conflicts are also much more prone to recur than any others: “the most likely legacy of a civil war is further civil war”. In fact, almost every civil war within the last decade was the resumption of an earlier conflict.¹³ The interminability of civil wars—the wounds they leave, the memories they scar, the spectre of recurrence they raise—is one of their most noticed features. “I question whether any serious civil war ever does end,” T. S. Eliot speculated in 1947.¹⁴ “All wars are bad,” agreed former French president Charles de Gaulle on a trip to Spain in 1970, “because they symbolize the breakdown of politics itself. But civil wars, in which there are brothers in both trenches, are unforgivable, because peace is not born when the war concludes.”¹⁵ The consequence was what one Spanish historian more recently called “a long uncivil peace” (*larga paz incivil*).¹⁶

¹² Marie Allanson, Erik Melander, and Lotta Themnér. “Organized Violence, 1989–2016.” *Journal of Peace Research* 54 (2017): 576; more generally, see Kristian Skrede Gleditsch, “Transnational Dimensions of Civil War,” *Journal of Peace Research* 44 (2007): 293–309; Jeffrey T. Checkel, ed., *Transnational Dynamics of Civil War* (Cambridge: Cambridge University Press, 2013).

¹³ Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (New York: HarperCollins, 2009), p. 139 (quoted); Paul Collier, Anke Hoeffler, and Måns Söderbom, “On the Duration of Civil War,” *Journal of Peace Research* 41 (2004): 253–73; James D. Fearon, “Why Do Some Civil Wars Last So Much Longer Than Others?,” *Journal of Peace Research* 41 (2004): 275–301; Barbara F. Walter, “Does Conflict Beget Conflict? Explaining Recurring Civil War,” *Journal of Peace Research* 41 (2004): 371–88; Hironaka, *Neverending Wars*, pp. 1, 50; World Bank, *World Development Report 2011*, p. 57 (quoted).

¹⁴ T. S. Eliot, *Milton: Annual Lecture on a Master Mind, Henrietta Hertz Trust of the British Academy 1947* (London: Geoffrey Cumberlege, 1947), p. 3.

¹⁵ “Todas las guerras son malas, porque simbolizan el fracaso de toda política. Pero las guerras civiles, en las que en ambas trincheras hay hermanos, son imperdonables, porque la paz no nace cuando la guerra termina”: Charles de Gaulle (1970), quoted in Gregorio Marañón Moya, “El general De Gaulle, en Toledo,” *El País*, August 8, 1981: 8.

¹⁶ Julián Casanova, “Presentación,” in Casanova, Francisco Espinosa Maestre, Conxita

III. CIVIL WAR TIME FROM ROME TO VATTEL

The open-endedness of civil war time is nothing new. The recursive, apparently never-ending nature of civil wars was familiar as far back as the Romans, who knew that civil wars came not singly but in battalions. They left wounds that would not heal, heirs who demanded vengeance, divisions that would split first the city of Rome and then the entire Roman Empire of the Mediterranean and beyond. They were wars without victories and brought only defeat; as such, they were “wars which would bring no triumphs”, struggles that did not end with the usual ceremonies for concluding formal conflict.¹⁷ Among the repeated legacies of the Roman heritage were two lessons about civil war time that would resonate down the centuries: first, that it was rarely clear when civil wars actually began and, second, it was abundantly clear that they might never end.

Baffled as they were by the recurrence of their civil wars, the Romans tried to work out just when (and why) they had begun and dug back ever deeper into the ethical history of their commonwealth, even as far back as the primal fratricide of Romulus and Remus, in search of what the historian Tacitus called the “trial runs for civil war”.¹⁸ They found so many antecedents, as well as so many instances, that they likened civil wars to natural phenomena like volcanoes that could fall dormant only to explode again without warning. “These sufferings await, again to be endured,” laments a character in the first-century poet Lucan’s account of the *Civil War* between Caesar and Pompey: “this will be the sequence / of the warfare, this will be the outcome fixed for civil strife.”¹⁹ In the

Mir, and Francisco Moreno Gómez, eds., *Morir, matar, sobrevivir: La violencia en la dictadura de Franco* (Barcelona: Critica, 2002), p. x.

¹⁷ Lucan, *Bellum Civile* (I, 12), in Lucan, *Civil War*, trans. Susan H. Braund (Oxford: Oxford University Press, 1992), p. 3; Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951*, ed. Eberhard Freiherr von Medem (Berlin: Duncker & Humblot, 1991), p. 42 (“Im Bürgerkrieg gibt es keinen Triumph ...”); though see now Carsten Hjort Lange, *Triumphs in the Age of Civil War: The Late Republic and the Adaptability of Triumphal Tradition* (London: Bloomsbury Publishing, 2016).

¹⁸ Tacitus, *Histories* (2. 38), in Tacitus, *Histories, Books I–III*, trans. Clifford H. Moore (Cambridge, Mass.: Harvard University Press, 1925), p. 223 (“... temptamenta civilium bellorum”).

¹⁹ Lucan, *Bellum Civile* (I, 223–24), in Lucan, *Civil War*, trans. Braund, p. 27.

terms later laid down by Thomas Hobbes, for well over a century Rome found itself in the midst of civil war time, in which the will to contend by battle was sufficiently known to be repeatedly feared and when peace would be no more than a vain hope or an illusion. In the meantime, the Romans were condemned to “tread on fire / smouldering under ashes,” as the poet Horace put it.²⁰

At least until the nineteenth century, and the great historical watershed marked by the US Civil War, western observers saw civil wars in this Roman manner as cumulative historical phenomena. Their sequential recurrence gave shape to the past, and projected the likelihood of further internal conflict in future. The European inheritors of Rome’s traditions would see their own internal troubles as the culmination, or repetition, of a cycle of similar wars that followed the pattern of the Roman civil wars and that had played out across Europe since the fall of the Roman Empire.²¹ England alone had been through the Barons’ Wars of the thirteenth century, the Wars of the Roses in the fifteenth century and then the civil wars of the mid-seventeenth century. Italy had had its civil wars in the fifteenth century, followed by the French Wars of Religion and the Dutch Revolt against the Spanish Monarchy in the late sixteenth century, a conflict of which Grotius himself, in a history of the revolt published posthumously in 1657 thought there “wanteth [not] Reason why it may not be termed a Civil War.”²²

Grotius was the first theorist of the law of nations—the early modern discourse that preceded what came to be called international law—to grapple with the meaning of civil war, though he did so only briefly and inconclusively. He defined war generally as an “[a]rmed execution against an armed adversary” and across his major works he wrestled with the question of what kinds of war could be just. In his earliest reflections on the subject in 1604, he distinguished between public and private wars—public, which were executed by the public will, or the legitimate authority in a state; private, if waged

²⁰ Horace, *Odes*, 2. 1, in Horace, *The Complete Odes and Epodes*, trans. David West (Oxford: Oxford University Press, 1997), p. 56.

²¹ Paul Seaward, “Clarendon, Tacitism, and the Civil Wars of Europe,” in Paulina Kewes, ed., *The Uses of History in Early Modern England* (San Marino, CA: The Huntington Library, 2006), pp. 285–306.

²² Hugo Grotius, *De Rebus Belgicis, or, The Annals and History of the Low-Country-warrs* (London: Henry Twyford and Robert Paulet, 1665), p. 1.

by other than that public will. Only once he had established that distinction did he go on to describe civil war as that kind of public war waged “against a part of the same state”.²³ When Grotius returned to the question of civil war in his juridical masterpiece, *De Jure Belli ac Pacis* (1625), he added the category of “mixed war” to his typology—that is, a war fought on one side by the legitimate authority, on the other by “mere private Persons”.²⁴ Yet he firmly opposed private war even against a usurper at the cost of engaging a “Country in dangerous Troubles and bloody Wars” and quoted Roman sources in support of his position: “*A Civil War is worse than the necessity of submitting to an unlawful Government. ... Any Peace is preferable to a Civil War.*”²⁵ Conservative arguments like this later earned Grotius the contempt of Jean-Jacques Rousseau, who saw him as little more than a defender of tyranny and slavery.²⁶

It can hardly be said that Grotius took civil war very seriously, or that he tried to explain it rigorously within the context of his broader conceptions of war and peace. In this reluctance to *value* civil war, he was typical of more than a century of reflection within the tradition of the law of nations. Indeed, it would not be until the middle of the eighteenth century that any thinker within that tradition would take civil war seriously. It is only in the 1750s, that we find a turning point in considerations of civil war and of the transformations—from war to peace, from criminality to belligerency, from domestic peace time to civil war time—in the work of the now mostly forgotten Swiss jurist, Emer de Vattel.²⁷ Vattel would set the terms of debate on civil war, and civil war time, for at least a century after the publication of his work. His book would be an invaluable vademecum during later revolutionary moments, from the meetings of the Continental

²³ Hugo Grotius, *Commentary on the Law of Prize and Booty* (1604), ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006), p. 50 (“... aut civile in partem eiusdem reipublicae: aut externum, in alius, cuius species est quod sociali dicitur”).

²⁴ Hugo Grotius, *The Rights of War and Peace* (1625), ed. Richard Tuck, 3 vols. (Indianapolis: Liberty Fund, 2005), I, p. 240 (I. iii. 1).

²⁵ Grotius, *Rights of War and Peace*, ed. Tuck, I, p. 381 (I. iv. 19. 1), quoting Plutarch’s *Life of Brutus* and Cicero’s *Second Philippic*.

²⁶ Jean-Jacques Rousseau, *The Social Contract* (1762), in Rousseau, *The Social Contract and Other Later Political Writings*, ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), pp. 42–43, 44–45.

²⁷ On Vattel’s doctrine of civil war, see Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security* (Leiden: Martinus Nijhoff, 2013), pp. 209–13, 216–20.

Congress to draft the US Declaration of Independence in 1776, through the Latin American and Greek independence movements, as well as the most globally influential handbook of the law of nations well into the nineteenth century.²⁸

Vattel drew the lines among different species of war quite differently from Grotius, to whom he nonetheless acknowledged major debts in his hugely influential compendium of the law of nations, the *Droit des Gens* (1758). Vattel disagreed with Grotius that there could be any such thing as a private war and he confined the exercise of war to states alone. This was, in his definition, “[p]ublic war ... which takes place between nations or sovereigns and which is carried on in the name of the public power, and by its order.”²⁹ On the face of it, Vattel’s definition of war would seem to exclude any chance that rebels against a sovereign or “public power” could legitimately be recognized as belligerents rather than rebels. His crucial innovation was to argue that they could. With that move, he opened the way both to the application of the laws of war to civil conflicts and to a radically new conception of civil war—and of civil war time.

Vattel argued in terms drawn from John Locke that, “Every citizen should ... patiently endure evils which are not insupportable” unless they are denied justice, in which case resistance might be justified “if the evils be intolerable, and the oppression great and manifest.”³⁰ But what if the sovereign’s demands become intolerable and their own people rise up in arms against them? Then, Vattel stated in a groundbreaking definition, we have a case of civil war: “When a party is formed in a state, who no longer obey the sovereign, and are possessed of sufficient strength to oppose him,—or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms, this is called *civil war*.” This could be distinguished from a rebellion by the fact the insurgents have justice on their side: if the cause of opposition is just, then the sovereign

²⁸ David Armitage, *The Declaration of Independence: A Global History* (Cambridge, Mass.: Harvard University Press, 2007), pp. 40–41; Elisabetta Fiocchi Malaspina, *L’eterno ritorno del Droit des gens di Emer de Vattel (secc. XVIII–XIX). L’impatto sulla cultura giuridica in prospettiva globale* (Frankfurt am Main: Max Planck Institute for European Legal History, 2017).

²⁹ Emer de Vattel, *The Law of Nations* (1758), ed. Béla Kapossy and Richard Whatmore (Indianapolis: Liberty Fund, 2008), pp. 105, 469 (I. 4. 51; III. 1. 1–2).

³⁰ Vattel, *The Law of Nations*, ed. Kapossy and Whatmore, pp. 641, 642 (III. 18. 287, 290).

(or divided authority in a republic) must wage war against the opposition: “Custom appropriates the term of ‘civil war’ to every war between the members of one and the same political society.”³¹

Vattel’s conception of civil war time marked the ontological shift that took place when the relations between ruler and ruled were transformed into tyranny and oppression and thus into legitimate resistance and a case of just war. The precise moment of passage from one state to another might be impossible to pinpoint: certainly, it would not be revealed by any formal declaration of hostilities from one side or the other. The presence of civil war would be recognizable in retrospect but only from that later vantage point: Vattel knew, as did others in the natural law tradition, that there was no clear threshold, no signal or symbol, that heralded the beginning of civil war time, whether with a formal declaration or manifesto as in contemporary interstate conflict.³²

Nonetheless, Vattel continued, the sides in a civil war may recognize each other as parts of “the same political society” at the point they have splintered into separate and hostile factions, as “it produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge,” and who become “two separate bodies, two distinct societies.” It followed that, if the two independent bodies were equivalent to two nations, the law of nations should regulate their contentions. Sovereigns should, therefore, treat their rebellious subjects according to the law of war if they have just cause and have raised arms. By this point, the unitary nation or state has already ceased to exist. The conflict has become “a public war between two nations.” It no longer fell under internal domestic law: civil war time had begun, even if the precise moment of the transition remained elusive.³³

IV. THE US CIVIL WAR AND THE PROBLEM OF TIME

I turn now to perhaps the most important debate over civil war—and civil war time—before the late twentieth century, during the conflict we now know as the US Civil

³¹ Vattel, *The Law of Nations*, ed. Kapossy and Whatmore, pp. 644–45 (III. 18. 292).

³² On declarations of war in interstate conflict, see Vattel, *The Law of Nations*, ed. Kapossy and Whatmore, pp. 500–08 (III. 4. 51–68).

³³ Vattel, *The Law of Nations*, ed. Kapossy and Whatmore, p. 645 (III. 18. 293).

War of 1861–65, in which Vattel played a posthumous role. Within a few weeks of the bombardment of Fort Sumter on April 12, 1861, all sides—Northern and Southern, American and foreign—had recognized the existence of a war within the borders of the United States.³⁴ The question of just what kind of conflict this was, and hence what rules should apply to its conduct, remained controversial. In the eyes of supporters of the Confederacy, President Lincoln had already pre-judged the issue when in April 1861 he had ordered ports from Chesapeake Bay to the mouth of the Rio Grande to be blockaded on the grounds that the states of the Confederacy had raised “an insurrection against the Government of the United States.” This meant, among other things, that Union forces could capture neutral ships attempting to supply the Confederate states on the grounds they were illegally supplying an enemy in time of war.³⁵ In February 1863, the Supreme Court heard the four cases collectively known as the Prize Cases, appealed from courts in Boston, New York, and Key West that questioned his decision.

The plaintiffs argued that the blockade, and the subsequent use of prize law to distribute the proceeds from four captured ships, applied the laws of war to a situation in which no war had been declared, and hence such laws could not operate. The main question before the Court was, therefore, whether there was indeed a state of war which would justify the President’s deployment of the laws of war. Justice Robert Grier, writing for the majority in March 1863, was persuaded by the government’s lawyers that there was indeed a war in progress. The absence of a declaration of war prevent the government from treating its adversaries as belligerents: “a civil war always begins by insurrection against the lawful authority of the Government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on.” The President was therefore bound to face this conflict “in the shape it presented itself, without waiting for Congress to baptize it with a name,” Grier declared, giving one of the clearest statements up to that point of the sheer difficulty—indeed, near impossibility—of stating when a civil war, let

³⁴ Quincy Wright, “The American Civil War (1861–65),” in Richard A. Falk, ed., *The International Law of Civil War* (Baltimore: The Johns Hopkins Press, 1971), p. 43.

³⁵ Stephen C. Neff, *Justice in Blue and Gray: A Legal History of the Civil War* (Cambridge, Mass.: Harvard University Press, 2010), pp. 32–34.

alone *the* Civil War, had been initiated when it could never be “solemnly declared”.³⁶ Behind Grier’s judgment lay Vattel’s epoch-making definition of civil war. Vattel had offered a factual account in *The Law of Nations* of when a civil war had broken out, and when all sides could recognize that two warring nations had emerged within the same territory. The existence of a war would be clear to all: by the “number, power, and organization” of those who prosecuted it. The applicable rules were those of the law of nations, including the laws of war.³⁷

The question in 1861 and later, was whether a rebellion or a civil war was taking place within the territory of the United States, and when exactly (if at all) there had been a shift from one state to the other, from domestic jurisdiction in peacetime to the sphere of the law of nations in civil war time. This collision of perspectives was a problem not only for politicians but even more acutely for military commanders, especially on the Union side. Under what rules of engagement would the Union Army treat the rebels? Did the laws of war apply, and would bringing them to bear imply that the conflict was, indeed, one between the forces of separate states? And why might it matter if this was not an international war but a civil war? Another of Lincoln’s advisors, the Maryland anti-secessionist and pamphleteer, Anna Ella Carroll (1815–94), answered such questions defiantly in 1861 also with support from Vattel: “this is a civil war; and, therefore, the Government may employ all the Constitutional powers at its command for the subjugation of the insurrectionary forces in the field. But while it is enabled to employ all the powers, it is obliged to observe at the same time, all the established usages of war. For the same enlightened maxims of prudence and humanity are as obviously applicable to a civil war as to any other.”³⁸

³⁶ The Prize Cases, 67 U. S. 635 (1863); Brian McGinty, *Lincoln and the Court* (Cambridge, Mass.: Harvard University Press, 2008), pp. 118–43; Thomas H. Lee and Michael D. Ramsey, “The Story of the *Prize Cases*: Executive Action and Judicial Review in Wartime,” in Christopher H. Schroeder and Curtis A. Bradley, eds., *Presidential Power Stories* (New York: Foundation Press, 2009), pp. 53–92; Neff, *Justice in Blue and Gray*, pp. 20–29.

³⁷ The Prize Cases, 67 U. S. 635 (1863), citing Vattel, *The Law of Nations*, III. 18. 293.

³⁸ Anna Ella Carroll, *The War Powers of the General Government* (Washington, D.C.: Henry Polkinhorn, 1861), pp. 7–8, citing Vattel, *The Law of Nations*, III. 18. 293.

It was on this basis that the first codification of the laws of land war was undertaken during the conflict by the Prussian-American lawyer, Francis Lieber. At the heart of Lieber's thought was a deep ambivalence during the conflict about whether or not to think of civil war as war at all. He believed a civil war could have the features of both a "true war" and a domestic police action against insurrection, but not every insurgent could be punished as if they were regular criminals: "It is a question of *expediency*, and not of law or morality."³⁹ How to overcome the double nature of civil war presented a dilemma Lieber could not then resolve and this uncertainty would bedevil his later attempts to define the boundary between civil war and rebellion in the Lieber Code.⁴⁰

When in 1863 Lieber came to define civil war in the body of his Code, he still could not distinguish between the two forms of internal violence. "Civil war," the Code stated, "is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government." Rebellion, however, was "applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it and set up a government of their own."⁴¹

By Lieber's second definition, the US Civil War was *not* a civil war at all: it was in fact a rebellion. This accorded with the wording of the Constitution, which provided for the means to "suppress Insurrections" and permitted the suspension of habeas corpus "in Cases of Rebellion," as Lincoln had done, with Lieber's advice and support, in 1861.⁴² Lincoln himself referred to the conflict as a "rebellion" six times more often than he called it a "civil war," making a mockery of Lieber's anxious efforts at precision in

³⁹ Francis Lieber, "Laws and Usages of War" (1861–62), Lieber MSS, The John Hopkins University, Box 2, item 17.

⁴⁰ On the Lieber Code, see especially John Fabian Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012); Paul Finkelman, "Francis Lieber and the Modern Law of War," *University of Chicago Law Review* 80 (2013): 2071–132.

⁴¹ [Francis Lieber,] *Instructions for the Government of Armies of the United States in the Field* (New York: D. Van Nostrand, 1863), p. 34.

⁴² U. S. Constitution, article I, secs. 8–9.

distinguishing civil war from rebellion and insurrection.⁴³ But the conflict did not come to an end with the surrender at Appomattox on Palm Sunday, April 9, 1865. By some accounts the war was not concluded until 1870, as Republicans declared that “wartime continued” through Reconstruction.⁴⁴ The ongoing contentions over the Confederate battle flag suggest that the embers of that civil war time may not yet be over: as the Vietnamese author Viet Thanh Nguyen has recently written, “All wars are fought twice, the first time on the battlefield, the second time in memory.” “And yet all wars,” he continues, “have murky beginning and inconclusive endings, oftentimes continuing a preceding war and foreshadowing a later one.”⁴⁵ That is especially true, I believe, of *civil* wars.

V. CIVIL WAR TIME SINCE 1949

Although the Lieber Code proved to be germinal for the later Hague and Geneva Conventions, in 1863 it represented an outlier as both international lawyers and students of war adamantly *devalued* civil war throughout the nineteenth century. They would not re-evaluate civil war for another eighty years, in the aftermath of the Second World War with the revision of the Geneva Conventions in 1949. The most pressing issue on the minds of many delegates at the Diplomatic Conference was how to extend the protections guaranteed to recognized combatants in conventional international warfare to “the victims of conflicts not of an international character.” The result of their deliberations was Common Article 3, which finally applied to what was then precisely termed “armed

⁴³ In volumes 4–8 of *The Collected Works of Abraham Lincoln*, ed. Roy P. Basler, 11 vols. (New Brunswick, NJ: Rutgers University Press, 1953–55), covering the period 1861–65, “rebellion” appears 340 times, “civil war” 64 times: <http://quod.lib.umich.edu/l/lincoln/>.

⁴⁴ Paul A. Cimballa and Randall M. Miller, eds., *The Great Task Remaining Before Us: Reconstruction as America’s Continuing Civil War* (New York: Fordham University Press, 2010); Elizabeth R. Varon, *Appomattox: Victory, Defeat, and Freedom at the End of the Civil War* (New York: Oxford University Press, 2014); Gregory Downs, *After Appomattox: Military Occupation and the Ends of War* (Cambridge, Mass.: Harvard University Press, 2015).

⁴⁵ Viet Thanh Nguyen, *Nothing Ever Dies: Vietnam and the Memory of War* (Cambridge, Mass.: Harvard University Press, 2016), pp. 4, 5.

conflict not of an international character” (later compressed to “non-international armed conflict” or, even more succinctly, “NIAC”).⁴⁶

It was not until 1977 that Additional Protocol II to the Geneva Conventions expanded the range of protections and prohibitions relevant to civil wars and remains in force today as the major component of humanitarian law relevant to such struggles.⁴⁷ The application of those protections depends on the judgment that a conflict ‘not of an international character’ is in progress. If the conflict is held to be “international”—that is, between two independent sovereign communities—then the full force of the Geneva Conventions applies. If it is ‘non-international’ then it will be covered by Common Article 3 and Additional Protocol II.⁴⁸ But if the violence has not been deemed a conflict of either kind—perhaps because it is a riot or an insurgency—it remains within the scope of the domestic jurisdiction of the state concerned and hence subject to police action. In these cases, a great deal hangs on the determination of whether or not a conflict is “not of an international character” and whether or not a community has entered civil war time.

To see why this determination of the passage from insurgency or rebellion to civil war might matter, let us recall the case of Syria in 2011–12. Ordinary Syrians knew very well throughout 2011 and the first half of 2012 that what they were experiencing amid contention with the regime of Bashar al-Assad was civil war. Outside Syria, interested parties across the globe debating whether or not Syria has descended into civil war. The Syrian regime saw only rebellion. The opposition said they were engaged in resistance.

⁴⁶ Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, *Final Record of the Diplomatic Conference of Geneva of 1949*, 3 vols. (Berne: Federal Political Department, [1949]), IIB, pp. 325, 11; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012), pp. 30–31, 40.

⁴⁷ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press, 2002), pp. 89–132; Sivakumaran, *The Law of Non-International Armed Conflict*, pp. 49–92, 182–92.

⁴⁸ Anthony Cullen, *The Concept of Non-international Armed Conflict in International Humanitarian Law* (Cambridge, 2010); Eric David, “Internal (Non-International) Armed Conflict,” in Andrew Clapham and Paola Gaeta, eds., *The Oxford Handbook of International Law in Armed Conflict* (Oxford: Oxford University Press, 2014), pp. 353–62.

And powers like Russia and the United States held the threat of civil war over each other's head as they jostled over intervention and non-intervention.⁴⁹

It took the International Committee of the Red Cross until July 2012—more than a year into the conflict, and after as many as 17,000 people may have already perished—to confirm that what was taking place in Syria was, in fact, an “armed conflict not of an international character”.⁵⁰ Only when it had made that determination would it be possible for the relevant parties to be covered by the relevant provisions of the Geneva Conventions.⁵¹ The reluctance to call the conflict a civil war has become typical of international organizations in the twenty-first century because so much—politically, militarily, legally, and ethically—now hangs on the use or withholding of the term. A set of legal protocols designed to humanize the conduct of civil war—to bring to bear humanitarian constraints on its practice, and to minimize some of the terrible human cost of civil conflict—served only to constrain international actors in their attitudes towards Syria.

Expanding regulation of non-international armed conflict by international humanitarian law has had the perverse effect of making it harder for international organisations to apply that body of law, even as rebels and insurgents have tried increasingly to conform their combat to its constraints. In the decades since the Second World War, interstate wars have vanished almost to invisibility in part because of the reluctance of states to call their wars “wars”, and to give them definite beginnings and

⁴⁹ Erica Chenoweth, “The Syrian Conflict Is Already a Civil War,” *The American Prospect*, January 15, 2012: <http://prospect.org/article/syrian-conflict-already-civil-war>; Dan Murphy, “Why It’s Time to Call Syria a Civil War,” *The Christian Science Monitor*, June 5, 2012: <http://www.csmonitor.com/World/Backchannels/2012/0605/Why-it-s-time-to-call-Syria-a-civil-war>.

⁵⁰ “Syria Crisis: Death Toll Tops 17,000, Says Opposition Group,” *The Huffington Post*, July 9, 2012: http://www.huffingtonpost.com/2012/07/09/syria-crisis-death-toll-17000_n_1658708.html; “Syria in Civil War, Red Cross Says,” *BBC News, Middle East*, July 15, 2012: <http://www.bbc.com/news/world-middle-east-18849362>.

⁵¹ “Internal Conflicts or Other Situations of Violence—What is the Difference for Victims?,” International Committee of the Red Cross, Resource Centre, December 12, 2012: <http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>.

endings with the traditional ceremonies of declaring war and concluding peace treaties.⁵² One reason for the elasticity of international conflict is precisely this lack of identifiable markers for its inception and conclusion, as Mary has mapped them in her book.

Non-international armed conflicts are just as indefinite in their origins, but one paradox of the increasing penetration of international humanitarian law into such conflicts has been a marked increase in the number of them that have been terminated by treaties: in recent years, more than 40% of civil wars have been concluded with a treaty (compared to none in the immediate aftermath of the Second World War). Counter-intuitively, then, civil war time is becoming more clearly defined, at least in the ending of conflicts like the Colombian Civil War, even as interstate warfare has become more expansive and open-ended in both directions.⁵³

And yet, even as civil wars are increasingly coming to have more determinate endings, their beginnings remain obscure. Civil war time—that tract of time, as Hobbes might have said, wherein the will to contend by battle is sufficiently known—can never be so readily identified. There is often a battle of words before there is a struggle with swords or their modern equivalents. As Hobbes noted in his history of the English civil wars, when the English Parliament raised an army in June 1642, “Hitherto (*though it were a Warre before*), yet there was no bloodshed; they shot at one another with nothing but paper.”⁵⁴ There is never a formal signal for the passage from civil peace to civil war: as Justice Grier remarked, “A civil war is never solemnly declared; it becomes such by its accidents.” The boundaries of civil war time have always been blurred in this manner.

Contemporaries could only see in retrospect just when the “Warre before” might be said to have begun, when the divisions had opened, the sides formed, and the contentions that would lead to open violence had their beginnings. With this in mind, we might be more vigilant about the deepening partisanship in our own politics, the

⁵² Tanisha M. Fazal, “Why States No Longer Declare War,” *Security Studies* 21 (2012): 311–44; Fazal, “The Demise of Peace Treaties in Interstate War,” *International Organization* 67 (2013): 695–724.

⁵³ Tanisha M. Fazal, “Wars of Law: Unintended Consequences in the Regulation of Armed Conflict” (manuscript, June 2016). I am very grateful to Prof. Fazal for sharing this manuscript with me in advance of publication.

⁵⁴ Thomas Hobbes, *Behemoth*, ed. Paul Seaward (Oxford: Oxford University Press, 2010), pp. 251–52 (my emphasis).

seemingly unbridgeable gap of civility and comprehension between opposing sides, and the violent language used by some of our politicians. We might also pay more attention to the metaphorical language of civil war that seems increasingly prevalent to describe political differences within and between political parties, in the United States as across Europe and Latin America. When politics becomes civil war by other means, we may already have entered civil war time. Ours is therefore a particularly urgent moment to focus on just what we value—what we share in common, what binds us together, what fundamental principles underpin our disagreements—both nationally and internationally.