

Volume 104 Number 920 + 921

International Review

of the Red Cross

Humanitarian debate: Law, policy, action



How International Humanitarian Law Develops



ICRC

International Review

of the Red Cross

Aim and scope

Established in 1869, the *International Review of the Red Cross* is a peer-reviewed journal published by the ICRC and Cambridge University Press. Its aim is to promote reflection on humanitarian law, policy and action in armed conflict and other situations of collective armed violence. A specialized journal in humanitarian law, it endeavours to promote knowledge, critical analysis and development of the law, and contribute to the prevention of violations of rules protecting fundamental rights and values. The *Review* offers a forum for discussion on contemporary humanitarian action as well as analysis of the causes and characteristics of conflicts so as to give a clearer insight into the humanitarian problems they generate. Finally, the *Review* informs its readership on questions pertaining to the International Red Cross and Red Crescent Movement and in particular on the activities and policies of the ICRC.

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The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and other situations of violence and to provide them with assistance. It directs and coordinates the international activities conducted by the International Red Cross and Red Crescent Movement in armed conflict and other situations of violence. It also endeavours to prevent suffering by promoting and strengthening international humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Movement.

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EDITORIAL

THE POWER OF ASKING “HOW” – A KEY TO UNDERSTANDING THE DEVELOPMENT OF IHL?

Bruno Demeyere, Editor-in-Chief, *International Review of the Red Cross*

Many enquiries and investigations begin with asking: Who? What? When? Where? and Why?: the “Five W’s”. However, failing to add “How?” to that list can neglect a powerful analytical tool – a door-opener for countless more technical and in-depth questions and queries.¹

Therefore, the questioning “how international humanitarian law (IHL) develops” sounds deceptively simple.

If asked to promptly answer, many readers of the *International Review of the Red Cross* would utter the following lines of thought: “it is developed by States as main actors, but there is also a role for the International Committee of the Red Cross as guardian of IHL”, followed by “one also needs to account for the fact that non-state armed groups are bound by rules they did not negotiate nor formally agree with, and for the fact that the international criminal tribunals have pushed certain interpretations of the law in a direction which has become authoritative”.

Some might say that IHL’s core rules are centuries old, reflective of various cultural and religious traditions before they were codified in their modern form. Others would evoke the well-known argument that “IHL is always one war behind reality”. In other words, most forms or causes of human suffering must first be experienced in real-world armed conflicts before States take regulatory action to prevent them from reproducing in the future.

Looking at the current political climate, assessing whether new IHL developments may be expected in the next few years, many will point to the difficulties within the traditional multilateral treaty-making system which may not be conducive to calls for new law. In particular, one often hears the fear expressed that, if one were to re-open IHL-treaties now, States would risk backtracking on their existing obligations.

In an attempt to make sense of these multi-layered answers, the *International Review of the Red Cross* is proud to present this foundational double-edition, which we hope will be of significant interest and of practical usefulness to each of our journal’s different audiences: practitioners, including decision-makers, analysts, academics, and students. Although, for analytical purposes, the edition’s twenty-six articles have been divided into “the past”, “the present” and “the future”, it is acknowledged that some articles may belong in more than one category.

Several articles looking at our era grapple with the diversification of instruments in which States include IHL rules. Virtually every textbook of public international law will have, among its opening chapters, one about the “sources” of international law, closely tied to the text of Article 38 of the Statute of the International Court of Justice.² IHL textbooks will duly follow this line by introducing the substance of the main IHL treaties, and by affirming the important complementary role of customary law for a broader understanding of this body of law.

And yet, anno 2022, anyone limiting their study of IHL to the rules of customary and treaty law would only be missing important parts of the overall landscape. Generally speaking, after the Second World War, there have been three distinct IHL treaty-making “waves”: (i) the four 1949 Geneva Conventions; (ii) the two 1977 Additional Protocols; and (iii) a number of treaties on specific topics, such as cultural property and treaties pertaining to the regulation or prohibition of certain weapons. Post-1977, it was particularly in the latter field that States maintained a healthy appetite for the negotiation of new treaties. Some of these enjoy near universal ratification, while others see a clear split between two distinct categories of States: the “have nots” of a particular type of weapon ratify *en masse*, whereas the few “haves” refuse to join.

In other areas of IHL, however, the negotiation of treaties in response to new and emerging humanitarian challenges has become the exception rather than the rule. Instead, IHL and its interpretation are increasingly developed in the form of informal standard-setting instruments, some of which could be described as “soft law”, such as political declarations, manuals, or documents. States themselves are often involved in these non-treaty efforts, sometimes even formally “signing” them – ironically, language straight from the Vienna Convention on the Law of Treaties.

In other instances, the lead in restating and interpreting customary and treaty IHL law is taken by mandated organizations such as the ICRC, or *de facto* even by informal groups of experts. While governments may task representatives with participating in such efforts in their personal capacity, or contribute to the drafting process through informal consultations (the “manual” approach, e.g. in the field of cyber warfare, among others), they almost always retain plausible deniability in terms of who said what, and who is bound by which rules.

In yet other instances States decide to go at it *solo* altogether, for example by issuing unilateral normative commitments on a particular IHL topic, for example as

1 G. J. Hart, “The Five W’s: An Old Tool for the New Task of Audience Analysis”, *Technical Communication*, Vol. 43, No. 2, 1996. The article is also available at: www.geoff-hart.com/resources/1995-1998/five-w.htm (internet references were accessed in October 2022).

2 “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” Statute of the International Court of Justice, Art. 38, available at: www.icj-cij.org/en/statute.

formulate as a unilaterally declared “policy”, embedded in that State’s military manual. When doing so, they conveniently sideline the usual need to reach an agreement with those that they may not fully agree with, including potential future enemies during an armed conflict.

What these non-treaty regulatory initiatives of the last decades have in common is that they virtually always state that (i) they are not meant to modify IHL rules, as found in existing treaty and customary law; and (ii) they are by no means to be considered binding.

“Soft law” and other non-binding norms are not unique to IHL, public international law or law in general. However, the jury is still out on whether the proliferation of non-binding norms as the go-to formula to address new IHL challenges is either positive or worrisome, or somewhere in the middle of both. For sure, in the current geopolitical and multilateral climate, international standard-setting through non-binding norms may be the best we can wish for. Nevertheless, for all the time and effort it might take to negotiate treaties and have them entered into force, the enormous added value of a legally binding normative order based on a declared consensus among States should not be lightly underestimated.

In my view, the trends of the last few decades may well have pushed the pendulum too far, and we are now at a point where we should all be seriously worried: when nothing is binding, when all is mere guidance or just an “opinion”, when all is conveniently just a “view” expressed by experts which do not formally represent States, who actually knows what the *binding* law is? Who knows where are the *actual* faultlines separating lawful from unlawful conduct in warfare? The foregoing is not to devalue the appeal of policy documents, or of policy change reflected in new non-treaty commitments. In some instances and for some purposes, the latter may work perfectly fine. Yet there are moments in the multilateral legal order when *clarity* is called for in order to know which rules are *binding* versus optional as a matter of existing law.

In the worst case, therefore, the international community may well be “sleep-walking” into a situation increasingly undermining the normative coherence and clarity of IHL. On some topics of IHL, clear rules have existed for decades despite normative interpretational challenges with some States diverging in terms of their interpretation. Yet on others, particularly for new challenges such as new technologies, or new patterns of battlefield behaviour, only “guidance” exists. With the noted exception of the field of weapons regulation, at present, States seem quite content to continue along this path – a path which arguably risks turning into a slippery slope as the present morphs into the future.

Ultimately, the risk is not necessarily one of a *normative void* in IHL. After all, the creation of some normative content has been welcomed by States. The real risk is one of *normative indeterminacy*: a flurry of rules has been created with States “somehow”, yet not formally, involved. Informal processes cannot produce formally binding rules. The rules such processes generate float around anyone’s normative assessment of whether conduct by Parties to an armed conflict is or is not lawful, yet ultimately they fail to provide us with a clear and authoritative answer.

Thanks to the support and advice of countless individuals, the *Review* team carefully curated this selection of articles on the past, present and future of “how IHL develops”. All contributing authors deserve our ultimate words of gratitude – for agreeing to reflect, collectively, on the trends through which IHL has been developing during the last few decades, and what the roadmap for the next few years might look like.

Last, but not least, in addition to our usual “selected articles”, this edition of the *Review* also contains, and starts with, a unique interview with former International Committee of the Red Cross President, Mr Peter Maurer – reflecting on the changes observed throughout his decade (2012–2022) at the helm of the organization.



Interview with Peter Maurer

President of the International Committee of the Red Cross (2012–2022)*

Peter Maurer served as President of the International Committee of the Red Cross (ICRC) from 2012 to 2022. During his time as President, Maurer prioritized strengthening humanitarian diplomacy, engaging States and other actors for the respect of international humanitarian law, and improving the humanitarian response through innovation and new partnerships. Meanwhile, he oversaw an historic budget increase and organizational expansion. Prior to his role at the ICRC, Mr Maurer served as Secretary of State for Foreign Affairs in Switzerland and headed the Swiss Department of Foreign Affairs. Earlier, Mr Maurer held various positions representing Switzerland at the United Nations (UN) in New York, including Ambassador and Permanent Representative of Switzerland to the UN, Chairman of the UN's Fifth Committee, and member of the UN Peacebuilding Commission. Mr Maurer had first joined the Swiss diplomatic service in 1987, through which he held various positions in Bern, Pretoria and New York. Maurer was born in Thun, Switzerland in 1956. He studied history and international law in Bern, where he also earned a doctorate.

Keywords: International Committee of the Red Cross (ICRC), international humanitarian law, mandate as President of the ICRC, armed conflict, humanitarian assistance, looking back and looking forward.

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* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the *International Review of the Red Cross*, and by Jillian Rafferty, Managing Editor of the *International Review of the Red Cross*, on 27 September 2022.

1. In the ten years of your mandate, what major geopolitical shifts have you observed, especially in the context of the features of armed conflict?

Although my mandate has lasted ten years, world history does not fit itself to the mandates of International Committee of the Red Cross (ICRC) presidents; rather, ICRC presidents are dropped into historical developments. With that in mind, I would like to enlarge the perspective beyond ten years and look at the trends as they have developed over the last three decades.

When the Cold War ended roughly thirty years ago, the world saw trends disrupted that had dominated international relations for decades. The post-Cold War period brought a surge of hope for a new multilateral order, which translated into some important consensus documents like the United Nations Agenda for Peace¹ and Millennium Development Goals.²

Then, with the attacks of 11 September 2001 (9/11), the world saw another major shift, with counterterrorism becoming the predominant template of international relations under the lead role of the United States. Armed conflicts around the world were seen first and foremost in the context of fighting terrorism.

My own arrival at the ICRC ten years ago largely coincided with the tail end of the Arab Spring. Armed conflict was spreading through the region and beyond, becoming more deeply entrenched. Syria became the emblematic example of long-term, deep-impact protracted conflict, a pattern spreading into other contexts like Yemen and Iraq, and re-igniting the Palestinian issue. Inevitably, these evolving armed conflicts affected and shaped humanitarian work around the world.

Looking at the ten years of my presidency, I see a few distinct trends characterizing armed conflict: global and regional power competitions unresolved; fragmentation and proliferation of actors; marginalization and stigmatization of populations in the aftermath of wars; reconstruction slow or non-existent. Not confined to loss of life or injury, protracted conflicts are damaging entire social systems, essential services and economies. Vicious cycles of violence lead to protracted conflicts. We continue working in Iraq after forty years, in Yemen for more than sixty years, and in Afghanistan in excess of thirty years. These decades of war and instability shatter nations: from the immediate impact of the hostilities to the decay of infrastructure and social systems.

The hybridization of battlefields is a direct consequence of the digital transformation of warfare. Battlefields expanded from the ground, air and sea into cyberspace and outer space, and weapons were modernized and digitally enhanced, so becoming more precise. Hybridization is a humanitarian win and at the same time dramatically more lethal – a real source of humanitarian concern.

Hybrid battlefields became more unstructured and fragmented. War increasingly moved into cities and other populated areas with massively

1 An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping: Report of the Secretary-General pursuant to the statement adopted by the Summit Meeting of the Security Council on 31 January 1992, UN Doc. A/47/277, 17 June 1992.

2 See United Nations, Millennium Development Goals, available at: www.un.org/millenniumgoals/ (all internet references were accessed in October 2022).

detrimental effects on people and systems. Wars were unfolding as multi-party armed conflicts, with multiple parties and combinations of local and international actors.

The unfortunate reality unfolding was that actors, weapons, battlefields and military strategies all pointed in the same direction: towards larger and more detrimental impacts of warfare on the civilian population.

The ICRC and most other humanitarian actors were challenged by these new realities: it had to update its understanding of the fundamental concepts that were underpinning international humanitarian law (IHL) and to ensure that they remained fit for purpose. Considering the massive impacts on civilians, key IHL concepts like distinction, proportionality and precaution needed to be sharpened and better understood. How could we interpret IHL in a way so that it could unfold its protective force in modern warfare?

Similar questions needed to be considered in the context of the digital transformation. We needed to develop a coherent understanding of core IHL concepts in the digital space. How do we apply IHL to a new and emerging class of weapons? How do we define an “attack” in the digital space? ICRC needed to step up its efforts to interpret and to help parties to armed conflict in their obligation to respect IHL. With new realities unfolding, we needed to question a long-held assumption that existing law was sufficient to address new challenges.

While most of the time, indeed, the law would offer guidance, better and sharper interpretative guidance was necessary, and work needed to be more systematically undertaken to identify true gaps in IHL’s normative system.

2. What have these changes meant for the ICRC’s work as a humanitarian organization and for the humanitarian sector more broadly? What opportunities do you see for the ICRC and its work – and what still worries you?

The ICRC’s work breaks down into three pillars: law, operations and policy–diplomacy. For each of these pillars, the transformations of recent years have brought different implications.

With regard to the law, we had to assess the issues that needed renewed clarification or commentaries and those that eventually needed more comprehensive overhauls and calls for international negotiations.

With regard to operational activities, we had to rapidly adapt to increasing and transforming humanitarian needs, which put pressure on the organization to develop our own response regarding protection and assistance and to adapt to a landscape of needs. Mental health, sexual violence and connectivity emerged as important demands from affected populations.

With conflict agendas more prominently occupying political agendas, our upstream policy and diplomacy efforts needed to be enlarged and deepened. Conflict realities needed to be framed and reframed in the light of operational experiences and of our reading of the law. Accordingly, the priority policy issues shifted over the decade. The protection of hospitals and medical installations, the special needs of particularly vulnerable groups like families of missing people,

victims of sexual violence or trauma-affected civilians, and the use of weapons in densely populated areas all became, more than ever before, priority areas of attention.

Over the course of my tenure as President, more issues found their way from field experience into international decision-making. I remember attending my first seminar of the Assembly of the ICRC in 2012 focusing on other situations of violence (OSVs) – or violence leading to humanitarian needs but not rising to the level of armed conflict. OSVs were traumatizing communities and were an area where ICRC could add value through applying its expertise in speaking and negotiating with arms bearers. Over the years this issue was joined by many other “new” issues where the ICRC previously had had limited engagement, including sexual violence, the climate crisis, mental health and civil–military dialogue. On my final trip as President to New York, the briefing file comprised twenty-five issues being discussed in multilateral fora.

Ultimately, pressure from conflict zones and affected populations have pushed the ICRC to continuously define its positions, concretize its legal reading and to launch a series of diplomatic initiatives bringing realities of armed conflict to political decision-making and public consciousness. In the course of such discussions, States and groups of States have championed such issues of concern and placed them on a more permanent basis on the international agenda.

While the ICRC continued to privilege bilateral and confidential dialogue with belligerents, we also articulated more often and more systematically recurring patterns of violations in more public space to bring them to the attention of high contracting parties collectively. The use of weapons, the protection of civilians, the conduct of hostilities, and the many sub-issues within each of these big themes and workstreams have sharpened our own thinking and ability to meet humanitarian needs.

What opportunities do I see? There are quite many. Firstly, with the ICRC’s unique mix of legal mandate, operational experience, and capacity to interact with parties to conflict, evidence-based policy-making is an important objective. Similar to our founding fathers, we had to become advocates with States, experts of law and experienced translators from battlefield realities.

It is gratifying when that opportunity and promise play out. For instance, by collecting evidence from the field, we brought attacks on healthcare onto the multilateral agenda and built momentum in the international community to address those attacks.³ The attacks themselves had terrible humanitarian consequences, and the ICRC was able to use its unique role as an opportunity to bring consensus forward and influence real changes. While even broad consensus would not stop such attacks, consensus over their illegality was an important milestone.

3 See ICRC, “New Global System to Monitor Attacks on Health Care”, 28 May 2018, available at: www.icrc.org/en/document/new-global-system-monitor-attacks-health-care; ICRC, “Health-Care Providers, Patients Suffer Thousands Of Attacks on Health-Care Services over the Past Five Years, ICRC Data Show”, 3 May 2021, available at: www.icrc.org/en/document/health-care-providers-patients-suffer-thousands-attacks-health-care-services-past-5-years.

Another example comes from recent efforts to regulate or constrain the conduct of hostilities in populated areas. As an institution, the ICRC brought to those discussions experience on the urbanization of armed conflict and the detrimental effects of urban warfare – and especially of using explosive weapons in such contexts.⁴ This allowed the ICRC to play a leading role in the redefinition of the use of explosive weapons in densely populated areas and to help steer international consensus towards a political declaration in this regard.

I also point to the digital transformation of warfare. While in kinetic warfare we focus on the respect for existing law, the digital world needed more careful thinking of extended interpretation and identification of legal gaps. In that context, I particularly welcomed the ICRC Legal Division’s suggestion to convene a Global Advisory Board on digital threats and challenges. It became obvious that there was more work to be done in considering the future of warfare and its legal impact. In my own view, I do not expect a future of war that exclusively takes place in cyberspace or outer space – at least not as a stand-alone form of armed conflict. However, I do anticipate a hybridization of warfare, in which kinetic, digital and cyber- and space-based warfare will interact with each other as overlapping layers of armed conflict. This will pose new challenges for the ICRC’s mandate as guardian and promoter of IHL.

Typically, lawyers look for clear and precise answers to important questions – and look to the law for unambiguous guidance. Lawyers’ work is often to bring clarity to a situation, in being able to clearly know and explain what is legal and illegal. In legal terms, hybrid warfare is challenging to conceptualize. Having multi-stakeholder expertise to navigate some of the challenging issues and to think creatively about future norms and laws seemed to me to be particularly important.

Finally, another challenge that the ICRC faces pertains to the increase in mis- and disinformation in today’s world, which has made problematic the sheer establishment of what constitutes “the truth”. As a first step, we must accept that mis- and disinformation are part of our reality, both in- and outside of war. These phenomena have permeated all aspects of society.

However, accepting the existence of mis- and disinformation by no means implies that we should not address the problem. While we need, as an organization, to find ways to protect ourselves from misinformation, we need at the same time to think about norms and principles to frame the phenomenon.

Mis- and disinformation are especially important because of the way the ICRC works. So much of our work goes together with a need to have a clear and reliable evidence base, and to draw from our own experience in developing that evidence base. The need for such evidence is reflected throughout our institutional strategies, and the ICRC has put measures in place to ensure that the

4 See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, Geneva, 2019, available at: www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts report. See “Interview with Eirini Giorgou”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

work we do is firmly based in evidence. However, mis- and disinformation attack the very evidence, no matter how well established it is. Part of managing that involves building the appropriate shields to protect against mis- and disinformation campaigns and to ensure that we can bring our evidence to bear on the discussions.

3. In your view, what were the ICRC's main institutional priorities when you started your mandate in 2012? How does that list compare to your list of priorities today, as your time as President comes to a close?

Looking at contexts, my primary concern relates to the longevity of crises, which has more than ever emerged as a key concern over the last decade – as observed in Afghanistan, Iraq, Yemen, the Horn of Africa and the Democratic Republic of Congo. The loops and re-loops of these crises have kept these contexts as top institutional priorities, while others, like Syria or the Sahel, were added to that list.

In terms of recurring themes, the list of priorities has been expanding. Most of the items on the list relate back to recurring patterns of disrespect of IHL, the protection of civilians first and foremost. After all, civilian victims represent the largest category of victims in most conflicts since the Second World War.

With a rapidly growing list of issues, the word “priorities” feels somewhat misplaced. It is obvious that patterns of disrespect and neglect over many issues represent an interrelated cluster of concern deserving attention of the ICRC and of the international community more broadly. What strikes me most is the attitude of transactionalism that is so common to belligerents – offering respect only in cases where the adversary is respecting the law, and of exceptionalism – legitimizing violations as measures in response to the exceptional cruelty of the adversary. In more than one context, the balance between military “necessity” and protection concerns has heavily tilted towards military logics, and norms have been implicitly downgraded to mere discretionary guidance.

Finally, with the longevity of crisis and an increasingly deep and systemic impact, sustainable funding of humanitarian work has been an increasing concern. Not only will we need to focus on shrinking the needs and improving behaviour but also to expand financial support beyond State contributions. The ICRC therefore has worked to tap into new sources of finance – development funds, climate adaptation funds, private investments and all kinds of blended financial instruments.

In this context I also should highlight the importance of building bridges to other societal agendas, aspirations and constituencies: humanitarian work as much as it has to be rooted in neutral and impartial action needs also to be connected to efforts for peace, human rights development and climate change. Such efforts have been wrongly misunderstood by some as efforts to transform the ICRC into a development, climate change or peace organization. This could not be further from the truth: such efforts are rather a recognition that “humanitarian action” can never be an objective in itself, but rather a method hopefully leading to, and contribution to a broader aspiration.

Anchoring humanitarian work in broader aspirations is critical and part of the genius of our founding fathers, who aspired to create peaceful societies. While remaining principled in our work, we also need to move and work pragmatically with those who have broader objectives. In times of scarce resources, expanding agendas and multiple overlaps of efforts, building on our role as neutral intermediary is at the same time a step to building conditions for more sustainable peace.

Humanitarianism cannot be treated as a stand-alone effort. We must better connect ourselves to other ambitions in society, while always keeping our own key priorities in mind. As mentioned, this is not a new concept but rather the revitalization of the original purpose of the very creation of the Red Cross. The founding fathers did not see humanitarianism as a stand-alone objective, but rather as a contribution to peace. I have tried to carry their legacy forward during my presidency.

4. This edition of the International Review of the Red Cross explores how IHL has developed in the past, and how it may continue to develop in the future. What, in your view, does the future development of IHL hold? How can we move this agenda forward in an innovative way?

The future will start from where we are and what we do, including maintaining the well-established efforts on training, advocacy and compliance, the continuation of our confidential dialogue with belligerents, as well as broader national and international accountability efforts.

Moreover, leveraging behavioural science in IHL compliance efforts will certainly become more important as we have seen recently when looking at what drives actors to respect or disrespect the law.

Also, focus on violations will have to be complemented by looking at positive examples of compliance. Collecting such examples and transforming them into lessons learned for militaries and armed actors more generally will become more important, with the negative news re-enforced by prevalent media dynamics.

5. We often talk about the Fundamental Principles of the humanitarian movement. How have those Principles guided you in your leadership of the ICRC? What are your thoughts on the Principles and their practical application?

The Fundamental Principles are exactly what their name suggests: principles. As such, they are here to guide us in our own actions, not to be implemented or applied as such. Very often, we discuss principles as if they were norms or rules, which is not quite accurate. Principles are not, in fact, norms. Norms dictate action. They tell us, in concrete terms, what to do. Principles, by contrast, provide guidance for action. They inform and help steer our choices and behaviour.

Principles are particularly important, because of the complexity of situations we are navigating. The Fundamental Principles therefore help the organization decide how to position itself and how to guide its action.

Over the past the Fundamental Principles were an uncontested part of my work. I never had a doubt on the relevance of the Principles, given the realities in which we found ourselves. Respecting the Principles has meant trying to let them guide us. Whenever I came across difficult decisions or thorny situations, I turned to the Principles – and I found them immensely helpful in thinking challenges through. In doing so, it has been important to recognize that the Principles are not reality but are guiding our action in a difficult and complex environment. The Principles do their part by helping us cope with that complexity.

I remember a particular situation early on during the conflict in Syria. I was told that, because of the principle of impartiality, we should not run a medical programme in the government-controlled part of Syria, as long as we could not run a parallel or equivalent medical programme in territory run by armed groups. To me, framing impartiality this way missed the point. Of course, we needed to deploy considerable efforts to establish parallel programmes on both sides of the conflict, which we did. But failing to save lives anywhere simply because you cannot save equivalent lives everywhere was an important lesson from applying the Fundamental Principle of impartiality.

6. Humanitarian activities are understandably subject to public scrutiny, with various constituencies – donors, media, affected communities, the public at large – having high expectations of humanitarian organizations. At the same time, our world is rife with mis- and disinformation. How can and does the ICRC navigate communicating its own work, and doing that work well in that environment?

There is no easy answer to this question. As we are encountering in the social media space, the interface of confidentiality and public communication is evolving with the challenges.

While we can certainly enhance our presence in social media by evidence-based communication and strengthen our protective shields against mis- and disinformation, it is important to think creatively about more adapted communication formats. Building trust with the public and the communities we serve will remain critical. The reality is that many people do not fall for the misinformation's traps. Though mis- and disinformation can make the world – and even the truth – feel quite murky, the public is critical and more resilient than one may think at first sight. With that resilience and clarity in mind, the ICRC must remember a key fact: our own work is our greatest tool in countering misinformation and in communicating our work and values. When we can demonstrate credible action that contradicts mis- and disinformation, and when the public experiences our work as countering that mis- and disinformation, we make headway.

Finally, we must remember that, while the modalities of misinformation have changed, this is neither a new nor a uniquely modern story. It has long been

said that in war, the first victim is truth. Mis- and disinformation are a continuation in the digital world of the displacement of the truth.

Experience shows us that good action which brings us close to communities, combined with diplomatic and policy explanations of our work, bring us a long way in countering mis- and disinformation.

7. The ICRC's mandate identifies the organization's core priority as "ensuring humanitarian protection and assistance for victims of armed conflict and other situations of violence". What trends have you observed in the ICRC's ability to deliver on protection, on one hand, and assistance, on the other?

While protection and assistance may represent different methods of humanitarian action, they go together. Focusing our efforts on the interaction of both approaches is critical as it is unsustainable to deliver humanitarian assistance without trying to shrink the need for that assistance and without trying to change the behaviours that created those needs to begin with.

Failing to link protection and assistance risks undermining the humanitarian sector overall. There is a real danger that the humanitarian sector could lose the positive attitude and goodwill of better-resourced societies if we are seen just throwing assistance at problems. We must demonstrate to our donors that their financial resources are used to help those in need – and central to that justification is that we are working actively with relevant parties to better comply with IHL's core principles and reduce the needs at the outset. When we can maintain a reasonable balance and linkage between the two approaches, we go a long way in maintaining goodwill toward both protection and assistance.

Another problem needs to be mentioned in that context: experience tells us that protection and assistance are linked on the ground. In the real world, calls for assistance never dominate calls for protection. Rather, affected populations are deeply concerned with both: they want to eat and to drink clean water, and they are at the same time concerned with the whereabouts of their loved ones. They are as much concerned with lack of inclusion and discrimination in their daily lives as they are with mere survival. Having one without the other, or one at the expense of the other, would simply be an inadequate humanitarian response. People have some needs that can be met via assistance work, and others that can only be responded to via engagement, dialogue and behaviour change.

8. We often hear that civic and humanitarian space is shrinking, which often takes the form of hesitation to welcome humanitarian actors and their work. Practically, how do you overcome this resistance?

For the ICRC, the protection of humanitarian space is largely in the hands of one key branch of the organization's work: frontline negotiation. It is through this work that we can protect and enlarge humanitarian space. To be sure, other elements of our work contribute to that protection, too. Diplomacy, for example, can help

confirm the importance of protecting humanitarian space in multilateral fora. Still, at the end of the day, humanitarian space is the result of practical arrangements made between belligerents and humanitarian frontline negotiators.

As an organization, it is critical that we are at the forefront of this effort to protect humanitarian space. Our work cannot exist without a robust – and robustly protected – humanitarian space, which in turn depends on practical arrangements, hammered out by skilled negotiators. As with all our work, we never sacrifice or negotiate on our core principles. Rather, we allow those principles to guide us toward the operating space to do our important work.

All of this relies on our “licence to operate”. The humanitarian space defines our ability to operate. We have a licence to operate when belligerents accept our work and priorities. And belligerents accept what we do, when we are able, at least in part, to consistently strike the right balance among our various priorities and respond to the convergent interests of belligerents themselves. Building this layered approach through negotiation is both a complex skill and a true art form.

Regarding frontline negotiations, the ICRC has two powerful traditions in our institutional genetics that drive this work. The first is our mandate as neutral intermediary, through which we carry out these negotiations. Being a recognized neutral intermediary is a powerful component of our institutional mandate. This gives us the legitimacy to make proposals on and negotiate for humanitarian spaces. In some ways, this is like how Article 99 of the United Nations Charter provides a mandate and operating parameters for the United Nations Secretary-General.

The second tradition is our awareness as an organization that frontline negotiation is a place of experience and of experimentation for negotiators, who themselves make up a community of practice and practitioners. In other words, frontline negotiations simply cannot be guided by the institutional centre alone. Rather, they must be driven largely by the negotiators themselves – and the negotiators, as a professional community adept in addressing these issues, are exactly to whom we should be turning to.

Institutionally, we can support the development of negotiating skills and we can develop and complement frontline negotiators with policy and diplomatic work at multiple levels; however, in essence, the humanitarian space is created at the frontline, and by the frontline negotiations, and not through resolutions in faraway international fora.

9. Looking back on your time as President, what achievements are you most proud of? And may we ask – what leaves you disappointed? What advice would you give to your successor?

Regarding our policy work, success means that we can get across to those in positions of power during crises and convince them to prioritize a humanitarian perspective. Overcoming blockages to access and moving away from unhelpful

behaviour are small successes when diplomatic conversations lead to meaningful behaviour change.

In legal work, a breakthrough toward broader consensus in an international negotiation, and changing internal laws and regulations to make them compatible with IHL are moments of satisfaction. Just this year (2022), we saw the conclusion of a political declaration on the use of explosive weapons in populated areas. Achieving a strong declaration after a decade of work and incremental progress is a success story in legal terms.

Operationally, success stories are reflected in impact on the ground. It can be incredibly tangible – and incredibly moving – to experience and be part of operational advances. For example, seeing a family reunification is a major and positive emotional moment – most of all for the family involved, of course, but also for humanitarian workers who strive to make these moments a reality. Bringing fresh water into a situation of dire need is, likewise, a positive moment. Every day, the ICRC is so privileged to produce these positive experiences that have a real and direct impact on people's lives – and we should be proud of that.

On a more frustrating side, I would focus on just one thing. As the organization has grown and continues to grow, we will face inevitable tensions between managing an increasingly large organization, on one hand, and understandable resistance to having our humanitarian work bogged down by bureaucracy, on the other hand. As a large organization with financial and human resources, supply-chain demands, and a need for adept management, we need to embrace accountability structures and bureaucratic organizational controls. These will prove increasingly central in maintaining old and attracting new donor support, as well. However, at the same time, these accountability structures and bureaucratic procedures can overshadow and overburden our colleagues, who want the needs on the ground to drive their work – rather than to be responding to management and bureaucratic needs. This can create understandable frustration and tension. Finding the right balance among these priorities is delicate and requires careful, fair-minded thinking.

In other words: we cannot manage an organization as big and productive as the ICRC without processes, controls and back-ups. At the same time, almost no one comes to work with the ICRC to manage processes, but rather to engage in vital humanitarian work. Balancing is the challenge moving forward.

10. As you hand over leadership of the organization 160 years after Henri Dunant's *A Memory of Solferino*⁵ was published, how does the current moment form part of the ICRC's long trajectory? Where does the organization go in the coming decade?

During this conversation, we have talked about risks and opportunities. The risks are many-fold. Every humanitarian and everyone in international and multilateral

5 Henri Dunant, *A Memory of Solferino*, Imprimerie Jules-Guillaume Fick, Geneva, 1862, available at: www.icrc.org/en/doc/assets/files/publications/icrc-002-0361.pdf.

institutions has, at least to some degree, a gloomy picture of today's risk landscape. I cannot imagine that we are about to see an easy exit from the basic modern trend of complex emergencies, massive fragilities, social tensions, violent conflict and humanitarian needs induced by these complexities. We will continue to see these developments in real time.

Despite those risks, we do have serious opportunities, hooks and entry points. We have discussed these opportunities – innovative approaches and technologies enhancing delivery and financing humanitarian action, enhancing negotiating skills for frontliners and many more. The big question for the future is whether the organization does sufficiently well in leveraging opportunities and trying to minimize risk.

I believe that we have made much progress in thinking creatively about the future, in preparing the ground for innovative practices and for efficient and effective humanitarianism.

My sense is, despite all the challenges, we have all the ingredients to remain a responder to these challenges. That is what counts. We cannot foresee the future, but we can be prepared to manage it well.



How international humanitarian law develops: Towards an ever-greater humanization? An interview with Theodor Meron

Oxford University and NYU (emeritus) and past Judge and President of UN War Crimes Tribunals*

Theodor Meron has been a Judge and, between March 2012 and January 2019, was the President of the International Residual Mechanism for Criminal Tribunals (the Mechanism). He was also a Judge of the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda from November 2011 until the closure of those tribunals. He served a total of four terms as President of the ICTY and three terms as President of the Mechanism. A leading scholar of international humanitarian law, human rights and international criminal law, Judge Meron is the author of thirteen books on international law and chivalry in Shakespeare and more than 100 articles, including some of the books and articles that helped build the legal foundations for the international criminal tribunals. His most recent book is Standing up for Justice (Oxford University Press, 2021).

* Interview conducted by Bruno Demeyere, Editor-in-Chief of the *Review*. Thanks to Ash Stanley-Ryan, Harriet Macey, Lea Redae and Meera Nayak for their research assistance in the preparation of this interview.

He is a member of the Institute of International Law and of the Council on Foreign Relations, a Fellow of the American Academy of Arts and Sciences, and the recipient of numerous awards, honours and medals, such as the Hudson Medal (American Society of International Law) and the Haskins Prize (American Council of Learned Societies). He is also an Officer of the French Legion of Honour, Grand Officer of the French National Order of Merit, Officer of the Order of Merit of Poland and Companion of the Order of St. Michael and St. George (United Kingdom). A past honorary President of the American Society of International Law and past Editor-in-Chief of the American Journal of International Law and Visiting Fellow of All Souls College, Oxford, he is Charles L. Denison Professor of Law Emeritus at NYU Law School and, since 2014, a Visiting Professor of Law at Oxford University. He is a Visiting Fellow at Mansfield College, an Academic Associate of the Bonavero Human Rights Institute and an Honorary Fellow at Trinity College.

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Introduction

In your 2000 article for the American Journal of International Law [AJIL] and your Hague Academy general course, you examined the humanization of international law in depth. What major institutional and normative developments have happened since then which you believe have influenced humanization of the law?

In the AJIL article, you discussed the importance of humanization as an all-of-society project – that is, not merely a task for lawyers, but one which must also be participated in by, for example, the media. How have non-legal actors participated in the project of humanization, and what effect do you believe their contributions have had?

And while we are on the topic of institutions, the International Committee of the Red Cross [ICRC] occupies a somewhat unique position as concerns international humanitarian law [IHL]. How do you believe the ICRC has contributed to the process of humanization since 2000?

I appreciate the opportunity to comment on the process of humanization of IHL and the role played by my 2000 AJIL article on “The Humanization of Humanitarian Law” and the 2006 general course edition at the Hague Academy on “The Humanization of International Law”.

Of course, these writings were just signposts in the process, in a continuum, in a work in progress which started earlier and, thankfully, is continuing. It is a process driven by human rights and the principles of humanity, the latter being the very heart of IHL.

In these writings and others,¹ I spoke of the changing character of the law of war and its acquiring of a more humane face, its evolution from an inter-State to an individual rights perspective, the decline of the principle of reciprocity and reprisals, the departure from *si omnes* [“or if other parties are not bound”] clauses, the redefinition of protected persons, the reinterpretation of Geneva Convention III [GC III] regarding repatriation of prisoners of war [PoWs] and their autonomy, the critical role of Geneva Convention IV [GC IV], the concepts of individual rights and their inalienability, crimes against humanity (which, in contrast to Nuremberg, no longer require a nexus with an armed conflict), common Article 3 and crimes against humanity’s reflection of fundamental human rights, the criminalization of violations of common Article 3, the humanizing influence of the Martens Clause (and its invocation of laws of humanity and public conscience as a standard for rules of behaviour, instead of leaving them to the discretion of a military commander when the law is silent), the role played by international criminal tribunals, and the convergence of protection under human rights and IHL.

I further noted the role of the Additional Protocols to the Geneva Conventions in the humanization of IHL. Additional Protocol I [AP I] made a major contribution to enhancing protections of civilians and civilian objects and in basically proscribing reprisals against civilians and civilian objects. AP I contains in its Article 75 an exceptionally broad list of humanitarian and human rights protections, including key norms of due process, and in Articles 76–78 it contains important protections for women and children.

Additional Protocol II [AP II] also makes important contributions to humanization in its chapter on humane treatment,² which includes, in Articles 4–6, vital protections including fundamental guarantees, protection of people in detention and penal prosecutions.

Together with the Martens Clause and its invocation of the laws of humanity and the dictates of public conscience, it is the human rights revolution and the Universal Declaration of Human Rights that explain the focus of the Geneva Conventions and their Additional Protocols on the rights of individuals and civilian populations. For instance, in contrast to the Hague Regulations and their limitations on the Occupying Power’s permissible activities, GC IV obligates Occupying Powers to assume a proactive responsibility for the welfare of the populations under their control.

While multiple factors pushed for the humanization of IHL, the critical trigger was the blurring of the distinction between international and non-international armed conflicts. The first prong of these changes occurred in 1995.

1 Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94, No. 2, 2000; Theodor Meron, “International Criminalization of Internal Atrocities”, *American Journal of International Law*, Vol. 89, No. 3, 1995; Theodor Meron, “International Law in the Age of Human Rights: General Course on Public International Law”, Hague Academy of International Law, 2003; Theodor Meron, “The Humanization of International Law”, Hague Academy of International Law General Course, 2006.

2 Part II of the Protocol.

That year, the International Criminal Tribunal for the former Yugoslavia [ICTY] Appeals Chamber in the *Tadić* interlocutory decision on jurisdiction, under the far-seeing presidency of Antonio Cassese, found that as a matter of international customary law, most of the IHL rules governing international armed conflicts applied also to non-international armed conflicts, and that some of these rules established not only responsibility of the States concerned but also individual criminal responsibility of perpetrators of violations.³

To be transferable to non-international armed conflicts, rules of IHL had to fulfil, as per *Tadić*, the following conditions: the violation must constitute infringement of IHL; it must be customary in nature; it must be serious; and it must entail individual criminal responsibility of the person breaching the rule.⁴

The decision confirmed that since the 1930s, rules have emerged in customary law to regulate armed conflicts, and that most rules applicable in international armed conflicts apply to non-international armed conflicts as well. A similar proposal by Norway, rejected by the Diplomatic Conference in 1977,⁵ was thus accepted by the international community when enunciated by a United Nations [UN] criminal tribunal.

A less visionary bench than Judge Cassese's would probably have considered the entire situation in the former Yugoslavia as an international armed conflict, enabling it to apply the totality of IHL. But that route would have deprived the Tribunal of the opportunity to affirm that serious violations of international law committed in internal wars are crimes under customary law, an affirmation that has proved to be of continued relevance since 2000.

My 1995 AJIL article on "The International Criminalization of Internal Atrocities" provided additional scholarly underpinning for these developments.⁶

The second prong of these developments was the publication in 2005 of the ICRC Customary Law Study.⁷ Almost all of its 161 rules apply to both international and non-international armed conflicts. They thus validate and lend the ICRC's authority to the *Tadić* decision. I had the privilege of serving on the steering committee of this project and of being one of its rapporteurs on practice.

Despite continuing disagreement on some aspects of the ICRC Customary Law Study project, it has become a baseline for discussion of customary law aspects of IHL. The project promotes the process of humanization of IHL in various ways, and in particular by the applicability of most of its rules, including command

3 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995.

4 *Ibid.*, paras 94–109.

5 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable to Armed Conflicts, Geneva 1974–1977*, Summary Record of the 56th Plenary Meeting, CCGH/SR/56, 8 June 1977, para. 63.

6 T. Meron, "International Criminalization of Internal Atrocities", above note 1.

7 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in October 2022). The Study is freely available online, and its sources are regularly updated in cooperation with the Lauterpacht Centre.

responsibility, to both international and non-international armed conflicts, as set out in Rule 99. The project is a unique study of State practice in humanitarian law, which is often difficult to ascertain because of security and operational confidentiality. It facilitates the identification of customary rules for governments, practitioners and tribunals, both international and national. It contributes to enhancing responsibility for violations – not only responsibility on the part of States, which has historically been a major aspect of IHL, but also the relatively new aspect of individual criminal responsibility. It has helped legitimize the transformation of a system of rules regulating the conduct of States into a system specific enough to govern criminal proceedings against individual perpetrators.

A study of such scope and universality on the restatement of IHL has never been undertaken before. Its volumes are a frequently cited and authoritative source of customary rules of IHL. The Study cites extensively the practice of international criminal tribunals, the venue of many of the principal normative developments taking place in IHL. Fortunately, this collection of IHL practice is continuing, although it is published only on the web and not in print.

Parallel developments have taken place in human rights practice and scholarship. In my 1986 book *Human Rights Law-Making in the United Nations*, I supported Thomas Buergenthal's 1981 argument that the International Covenant on Civil and Political Rights [ICCPR] applies, by virtue of its Article 2 (1), also outside the State Party's own territory whenever persons come under the jurisdiction of that State.⁸ I expressed this view also in my 1995 AJIL article on "Extraterritoriality of Human Rights Treaties".⁹ However, these scholarly opinions did not gain universal support, as some States still contest the extraterritorial application of the ICCPR.

In 2004, however, a crucial development occurred when the International Court of Justice [ICJ] issued its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.¹⁰ That Opinion confirmed that the obligations of a State party to the ICCPR applied extraterritorially to occupied territories and that human rights obligations applied also in situations of armed conflict. These developments in human rights law combined with the movement of IHL in the direction of intra-State or mixed international/internal conflicts. These developments have, of course, drawn IHL in the direction of human rights law and human rights law in the direction of IHL. In other words, as both systems were to apply in the same territorial space, each had to move towards the other, with a creative synergy between the two.

Of course, none of these developments would have taken place without the ICRC. Obviously, its role in all armed conflicts, its presence in the field, its appeals for additional agreements on humanitarian access and other enhancements of

8 Theodor Meron, *Human Rights Law-Making in the United Nations*, Oxford University Press, Oxford, 1986, p. 106.

9 Theodor Meron, "Extraterritoriality of Human Rights Treaties", *American Journal of International Law*, Vol. 98, No. 1, 1995.

10 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, No. 131, 9 July 2004.

humanitarian protection, its statements on the classification of conflicts, and its occasional statements on obligations of parties and compliance are continuing and essential. It is thanks to the authority of the ICRC, the respect afforded to it by all the parties, and its professionalism that its views are central to the conversation on every conflict, even when they are contested. Its humanitarian mission is of course imbued by the fundamental principles of humanity which are at the very core of its work.

For most observers, more below the radar is what the ICRC is doing normatively to advance the humanization of the IHL. It performed and continues to perform a “quasi-legislative” role in drafting the Geneva Conventions, their Additional Protocols, the Customary Law Study and the Commentaries on the Conventions and Protocols. This immense and unique task could not be done without the excellent in-house legal team of the ICRC and its considerable resources.

Of course, the ICRC has benefited from support by the UN and its specialized agencies, as well as civil society – including such organizations as Human Rights Watch, Amnesty International and the International Crisis Group. Beyond NGOs’ role, intellectual, academic, religious and community leaders also have an important part to play. They promote the principle of accountability and fight against unjustified amnesties, promote the role of human rights and thus the ongoing humanization of armed conflicts, and beyond that, advocate for human rights and IHL to work in tandem.

I have already spoken about the ICRC Customary Law Study. I will now turn to brief comments about the recent ICRC Commentaries on the Geneva Conventions and their Additional Protocols.

In normative terms, and also as commentaries on the *travaux préparatoires* of the Geneva Conventions, the relatively short Pictet Commentaries from the 1950s were invaluable for governments, the military, academics and NGOs. Given the passage of time and the growth of international practice, the new Commentaries, prepared under the leadership of Jean-Marie Henckaerts, attempt to cover the practice relevant to the application and interpretation of the Conventions and the Protocols since their adoption, while preserving elements of the original commentaries when still relevant. Given the many years of application of the Conventions and the Protocols since their adoption, it is not surprising that the new Commentaries are of unprecedented length and richness. Where relevant, they discuss human rights concerns, including issues such as detention, judicial guarantees and, in particular detail, humane treatment.

The Commentaries consider the relationship between IHL and international criminal law as well as the relationship between IHL and human rights law, including conventions on international criminal law and international human rights law [IHRL].¹¹ They frequently comment on the status of IHL rules as customary international law. They bring to the interested public information on recent developments in the law, including through the practice of

11 See particularly the discussion of common Article 3 in the Commentaries.

international courts and tribunals. The references to human rights law in the new ICRC Commentary on GC III are particularly interesting:

References to human rights instruments have also been included to provide practitioners with further information on a given topic, when such instruments contain useful clarification or guidance. This may be relevant for [the] Third Convention, which deals, among other things, with conditions of detention, treatment and judicial guarantees in criminal proceedings against prisoners of war, given that human rights law and standards on these issues have developed significantly since the adoption of the Conventions. References to human rights law and standards must nevertheless be read with due regard to the particular context and to the specificities of detention in armed conflict. This Commentary focuses on interpreting the provisions of the present Convention, and not those of human rights instruments.

When both the Third Convention and human rights law regulate a particular issue, a comparison between their provisions may reveal certain differences. In such cases, it is necessary to determine whether the difference amounts to an actual conflict between the norms in question. If there is no conflict, the Commentary has attempted to interpret the different norms with a view to harmonization. An example is the notion of humane treatment under humanitarian and human rights law.

In the event of a real conflict between the respective norms, resort must be had to a principle of conflict resolution such as *lex specialis derogat legi generali*, by which a more specific legal norm takes precedence over a more general one. The clearest example of such a conflict is the fact that humanitarian law provides for the internment of enemy personnel who qualify as prisoners of war under the Third Convention based solely on that status and without court review of the lawfulness of internment. On this particular point, humanitarian law differs fundamentally from international human rights law. In armed conflict, the specific regime for prisoners of war under humanitarian law takes precedence on this point.¹²

The Commentaries pay particular and salutary attention to the ongoing humanization of IHL. Let me give you one example, that of a decision rendered by the International Criminal Court [ICC] Pre-Trial Chamber II, in the decision on confirmation of charges in the 2014 trial of Bosco Ntaganda. The *Ntaganda* case discusses the rather controversial question of whether members of an armed force can be prosecuted for sexual or other abuses committed against members of the same force. In other words, is the concept of war crimes applicable for intra-force abuses, which was not the law in the past? The new ICRC Commentary on Geneva Convention I [GC I],¹³ relying on *Ntaganda*, holds that the fact that the

12 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), paras 102–104.

13 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), para. 547.

trial is undertaken for acts committed by the armed force's own parties should not be a ground for denying the victims the protection of common Article 3, viewed as a minimum standard in all armed conflicts and as a reflection of elementary considerations of humanity. This is a major departure from classic humanitarian law. This position was also taken in the 2009 *Katanga* decision concerning the use of child soldiers.

Did the UN contribute to the process of humanization of IHL?

The UN plays a principal role in promoting the humanization of IHL and in creating the salutary synergy between human rights and humanitarian law. Its most important contributions have been the treaties and declarations on human rights concluded under its auspices, as well as the increasing incorporation of both human rights and humanitarian law in its practice.

The relevant instruments include the Universal Declaration of Human Rights, the two Covenants on Human Rights and the Optional Protocols to those Covenants, treaties prohibiting racial and gender discrimination, the Convention against Torture, the Convention on the Rights of the Child, the Optional Protocol on the Involvement of Children in Armed Conflicts, the UN Convention on the Rights of Persons with Disabilities, the UN Convention on Disappearances, the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, the Basic Principles and Guidelines on the Rights to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law, and the Turku Declaration of Minimum Humanitarian Standards.

Many of these treaties have established treaty bodies – that is, committees of experts appointed to review and comment upon periodic reports from States, and, importantly, to adopt General Comments on the interpretation and application of the treaty concerned. Of particular relevance and normative authority to be referred to here are the General Comments made by the Human Rights Committee under the ICCPR.

Treaty bodies: The Human Rights Committee

The Human Rights Committee under the ICCPR has made important statements on IHL, especially constraining abuse of derogations in situations threatening the existence of a nation, on the applicability of human rights in tandem with IHL to occupied territories, confirming that the use of lethal force which is consistent with IHL is not arbitrary for human rights law either, and on the non-derogability of requirements of fair trials. While consistency with IHL theoretically also concerns *jus ad bellum*, it is primarily concerned with *jus in bello*. Let me give you some examples of such statements.

Human Rights Committee, General Comment No. 29, 2001, paras 3, 9, 11, 16:

Not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation, as required by article 4, paragraph 1. During armed conflict, whether international or non-international, rules of international humanitarian law become applicable and help, in addition to the provisions in article 4 and article 5, paragraph 1, of the Covenant, to prevent the abuse of a State's emergency powers. The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.

...

Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law.

...

... States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages, by imposing collective punishments, through arbitrary deprivations of liberty or by deviating from fundamental principles of fair trial, including the presumption of innocence.

...

... The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected. In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.

Human Rights Committee, *Concluding Observations: Israel*, 2003, para. 11:

[T]he applicability of the regime of international humanitarian law during an armed conflict does not preclude the application of the Covenant, including article 4 which covers situations of public emergency which threaten the life of the nation. Nor does the applicability of the regime of international humanitarian law preclude accountability of States parties under article 2, paragraph 1, of the Covenant for the actions of their authorities outside their

own territories, including in Occupied Territories. The Committee therefore reiterates that, in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law.

Human Rights Committee, General Comment No. 31, 2004, para. 11:

While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

Human Rights Committee, General Comment No. 36, 2018, para. 64:

Like the rest of the Covenant, article 6 continues to apply also in situations of armed conflict to which the rules of international humanitarian law are applicable, including to the conduct of hostilities. While rules of international humanitarian law may be relevant for the interpretation and application of article 6 when the situation calls for their application, both spheres of law are complementary, not mutually exclusive. Use of lethal force consistent with international humanitarian law and other applicable international law norms is, in general, not arbitrary. By contrast, practices inconsistent with international humanitarian law, entailing a risk to the lives of civilians and other persons protected by international humanitarian law, including the targeting of civilians, civilian objects and objects indispensable to the survival of the civilian population, indiscriminate attacks, failure to apply the principles of precaution and proportionality, and the use of human shields, would also violate article 6 of the Covenant.

Charter-based bodies: The Human Rights Council

A great number of Human Rights Council resolutions deal with situations of armed conflict. This is also true of one of the principal tools available to the Council, the Universal Periodic Review, under Council Resolution 5/1.

Importantly, Resolution 5/1 provides that given the complementary and mutually interrelated nature of IHRL and IHL, the Universal Periodic Review shall take into account applicable IHL.¹⁴

Special Rapporteurs make systematic references not only to human rights but also to IHL.

¹⁴ HRC Res. 5/1, "Institution-Building of the United Nations Human Rights Council", 18 June 2007, Annex I: Universal Periodic Review Mechanism, para. 2.

International commissions of inquiry, commissions on human rights, fact-finding missions and other investigations

According to the Human Rights Council,

United Nations mandated commissions of inquiry, fact-finding missions and investigations are increasingly being used to respond to situations of serious violations of international humanitarian law and international human rights law, whether protracted or resulting from sudden events, and to promote accountability for such violations and counter impunity. These international investigative bodies have been established by the Security Council, the General Assembly, the Human Rights Council, its predecessor, the Commission on Human Rights, the Secretary-General and the High Commissioner for Human Rights.¹⁵

Commission of Inquiry on Lebanon, 2006: HRC Res. S-2/1, 11 August 2006 (in UN Doc. A/61/53, pp. 108–110). The Human Rights Council decided to urgently establish and immediately dispatch a high-level commission of inquiry comprising eminent experts on human rights law and IHL, to investigate actions by Israel.

UN Fact-Finding Mission on the Gaza Conflict, 2009: HRC Res. S-9/1, 12 January 2009 (in UN Doc. A/64/53, pp. 153–156). The Human Rights Council decided to dispatch an urgent, independent international fact-finding mission, to be appointed by the president of the Council, to investigate all violations of IHRL and IHL by the Occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory.

Committee of Independent Experts to Monitor and Assess any Domestic, Legal or Other Proceedings Undertaken by both the Government of Israel and the Palestinian Side, 2010: HRC Res. 13/9, 25 March 2010 (in UN Doc. A/65/53, pp. 101–103), and HRC Res. 15/6, 29 September 2010 (in UN Doc. A/65/53/Add.1, pp. 24–27). The Human Rights Council decided, in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights law to monitor and assess any domestic, legal or other proceedings undertaken by both the government of Israel and the Palestinian side.

International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance to Gaza, 2010: HRC Res. 14/1, 2 June 2010 (in UN Doc. A/65/53, pp. 160–161). The Human Rights Council decided to dispatch an independent, international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law,

¹⁵ Human Rights Council, “International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and Other Investigations”, available at: www.ohchr.org/en/hr-bodies/hrc/co-is.

resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance to Gaza.

UN Independent Commission of Inquiry on the 2014 Gaza Conflict, 2014: HRC Res. S-21/1, 23 July 2014 (in UN Doc. A/69/53, pp. 224–227). The Human Rights Council decided to dispatch an independent, international commission of inquiry, to be appointed by the president of the Human Rights Council, to investigate all violations of IHL and IHRL in the Occupied Palestinian Territory.

Team of International Experts on the Situation in Kasai (Democratic Republic of the Congo), 2017: HRC Res. 35/33, 23 June 2017. The Human Rights Council requested the UN High Commissioner for Human Rights to dispatch a team of international experts to investigate alleged human rights violations and abuses, and violations of IHL, in the Kasai region.

UN Commission of Inquiry on the 2018 Protests in the Occupied Palestinian Territory, 2018: HRC Res. S-28/1, 18 May 2018. In this case, the Human Rights Council decided to dispatch an independent, international commission of inquiry, to be appointed by the president of the Human Rights Council, to investigate all alleged violations and abuses of IHL and IHRL in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018.

Office of the UN High Commissioner for Human Rights Investigation Mission to Libya, 2020: HRC Res. 43/39, 22 June 2020 (in UN Doc. A/75/53, pp. 133–139). In this case, the Human Rights Council requested the High Commissioner to immediately establish and dispatch a fact-finding mission to Libya to document alleged violations and abuses of IHRL and IHL by all parties in Libya since the beginning of 2016, and to preserve evidence with a view to ensuring that perpetrators of violations or abuses of IHRL and IHL are held accountable.

The constant reference to both humanitarian and human rights law in investigations of abuses by the Human Rights Council holds true also for investigative bodies established by other organs of the UN, such as the Secretary-General and the UN General Assembly.

Thus, the 2002 fact-finding mission to Côte d'Ivoire appointed by the Office of the UN High Commissioner for Human Rights [UN Human Rights] to compile information on the human rights and humanitarian situation in the country, upon the request of the UN Secretary-General, was requested to gather information regarding violations of human rights and IHL in Côte d'Ivoire. Similarly, the 2006 UN Assistance Mission in Afghanistan appointed by the Office of the UN High Commissioner for Refugees provided support to the Afghanistan Independent Human Rights Commission in documenting violations of human rights and IHL in Afghanistan between 1978 and 2001. UN Human Rights was to conduct a mapping of violations of human rights and humanitarian

law committed by all parties to the Afghan conflicts between 27 April 1978 and 2 December 2001.

A similar mandate was given by UN Human Rights for the Nepal conflict in 2006, to document and analyze the major categories of conflict-related violations of IHRL and IHL that allegedly took place in Nepal from February 1996 to 21 November 2006.

The UN Secretary-General

An example of the UN Secretary-General's contribution to the humanization of IHL and addressing IHL violations is the 2008 mapping exercise of the most serious violations of human rights and IHL committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003, established by the UN Secretary-General's report of 13 June 2006.¹⁶

Another example is the International Commission of Inquiry for Mali, established by the UN Secretary-General on 19 January 2018 in accordance with Article 46 of the June 2015 Agreement on Peace and Reconciliation in Mali to investigate allegations of abuses and serious violations of IHRL and IHL, including allegations of conflict-related sexual violence, committed throughout the territory of Mali between 1 January 2012 and the date of the establishment of the Commission.

The UN General Assembly

The 2016 International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, established by General Assembly Resolution 71/248 of 21 December 2016, is an important example of the UN General Assembly's contribution to the humanization of IHL. The Mechanism was established to collect, preserve and consolidate evidences of the most serious crimes under international law – in particular the crime of genocide, crimes against humanity and war crimes, as defined in relevant sources of international law – as well as violations of IHL and human rights violations and abuses.

The UN Security Council

Resolutions concerning specific conflicts, such as Security Council Resolution 2258 on Syria, refer to legal obligations of all parties under IHL and IHRL. So do Security Council thematic resolutions on protection of civilians, women, peace and security, children in armed conflicts and counterterrorism. Thus, for example, Security Council Resolution 2462 reaffirms that member States must ensure that any

¹⁶ *Twenty-First Report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo*, UN Doc. S/2006/390, 13 June 2006, para. 54.

measures taken to counter terrorism comply with all their obligations under international law, in particular IHRL, international refugee law and IHL. So does Security Council Resolution 2482.

International Commission of Inquiry on Darfur, 2004: UNSC Res. 1564, 18 September 2004. This commission was mandated to investigate reports of violations of IHL and human rights law in Darfur by all parties, to determine whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.

International Commission of Inquiry to Investigate Events in the Central African Republic since 1 January 2013: UNSC Res. 2127, 5 December 2013. This resolution requested the Secretary-General to establish an international commission of inquiry including experts in both IHL and human rights law to investigate reports of violations of IHL and IHRL and abuses of human rights in the Central African Republic by all parties since 1 January 2013.

International criminal courts

After nearly three decades, what would you say has been the cumulative effect of the ad hoc tribunals and the ICC on humanizing IHL? Have those institutions met the promise of protecting the individual as a subject of international law?

If the human rights revolution and the humanization of the law of war marked the first truly transformative moment in international law during my lifetime, the second such moment came with the creation some twenty-seven years ago of the ICTY, a court established by the UN Security Council to try individuals accused of serious violations of IHL in the conflicts in the Balkans. In the years following the establishment of the ICTY, several other international and hybrid (national–international) criminal courts and tribunals were created to try those accused of crimes during the 1994 Rwandan genocide, the Sierra Leone conflict and the Khmer Rouge regime in Cambodia, as well as the world’s first permanent international criminal court.

The second tidal shift in international law reflected in the establishment and work of these courts came not from an emphasis on the rights of individuals so much as from a growing focus on individual accountability. Indeed, while IHL developed initially as a means to regulate State-to-State behaviour, the creation of these courts and the application of the existing law to individuals reflects the increased (and highly sensible) recognition that it is the individuals – rather than abstract national entities – that make decisions in times of armed conflict as to which weapons may be used, what cities to target, and how to treat civilians, non-combatants and PoWs.

By holding people individually responsible for their acts, these courts will – or so it is hoped – influence how other individuals will act in the future. In the meantime, these courts have made vital contributions to the rule of law. Case after case, they have shown that no individual is above the law, regardless of rank

or stature, and have made plain that justice and accountability require rigorous adherence to fair trial guarantees and due process. Through their rulings, these courts have helped to enhance understanding of both IHL and international human rights law in myriad ways and to elucidate how these bodies of law could be respected and enforced, not simply in a few international courts but in national courtrooms around the world. This is true not only of war crimes but also of crimes against humanity and genocide, and, importantly, in the enforcement of the prohibitions on sexual assault and rape.

It is perhaps useful to ask why we need international criminal tribunals. After all, we did not have any after Nuremberg until the establishment of modern international criminal tribunals in the 1990s.

International criminal tribunals provide a forum for dealing with high-level war criminals. Setting these individuals free is untenable, and so is summary execution or perpetual imprisonment without trial. National prosecutions are a possibility, but standing alone, they present a danger of either pro-defendant or anti-defendant bias. The right mix and constructive synergy of national and international tribunals is the best formula.

One of the greatest contributions of international criminal tribunals has been the fleshing out of norms originally set out at a high level of generality and designed to govern the responsibility of States, not the individual criminal liability of the perpetrators. They have created models for national jurisdictions, such as in novel approaches to gender crimes.

IHL, as it existed in the early 1990s, was inadequate to deal with the challenges of trying atrocity crimes. Before the tribunals' establishment, many commentators believed that the Hague and Geneva Conventions and Additional Protocols constituted a corpus of international criminal law capable of being applied "as is" by courts. Instead, with the establishment of the tribunals, it took the development of rules of procedure and evidence and the vital judicial gloss provided by their jurisprudence to create a credible, viable body of international criminal law capable of being applied to individuals with the degree of specificity required by the principle of legality for criminal proceedings.

Thus, from being a law governing the responsibility of States, IHL has been applied by international criminal courts and tribunals in a multitude of cases pertaining to the criminal responsibility of individuals. Of course, in addition to rules of IHL governing substantive obligations, the statutes of international tribunals contain provisions of international criminal law, procedure and due process.

International criminal tribunals are unique in the sense that they are stand-alone courts, not supported by organs of the State such as ministries of justice, and have no police powers or other enforcement capability. They depend on the cooperation of States for enforcement and resources. Furthermore, they operate in a political environment of ongoing struggles among ethnic, national, and religious groups fighting for the legitimacy of their historical narratives, conflicting visions of rights and wrongs and competing claims of victimhood. For

international courts, this creates pressure for results desired by one party and rejected by the other.

The legitimacy of these courts can only be established and maintained by independence, impartiality and fairness. They must always remember that justice is not about achieving any particular outcome – it is about a principled and fair process that serves the rule of law.

Selective accountability is still a political reality in the international community, sheltered by the veto power of the permanent members of the UN Security Council. Selective accountability is anathema to the rule-of-law requirements of equality of enforcement and non-arbitrariness. These difficulties are compounded by the conflicting agendas of the different stakeholders involved. Here I will mention three such agendas.

Seeking truth – writing definitive histories of the conflict: while the quantum of evidence and the judgment itself often offer a detailed account of major atrocities, the core mandate of international criminal tribunals is to try individuals according to the law and the evidence, rather than produce a comprehensive historical record. Inquiries outside the judicial process, such as truth commissions, are freer from such constraints.

Peace and reconciliation: of course, fair legal proceedings have a beneficial effect on reconciliation and the restoration of peace, but if the goal of international justice is reconciliation, and if reconciliation weighs in favour of a particular outcome, be it conviction or acquittal, the conflict between that goal and the fair judicial process might be inevitable. Judges may therefore not follow any extraneous agenda, however desirable. Removal from the political scene of abusive actors, such as Karadžić or Charles Taylor, may of course help the process of peace and reconciliation.

Giving victims justice: naturally we sympathize with this goal, but again, the victims' purpose of punishment and retribution may clash with the requirements of fairness and the rule of law. The tribunals have demonstrated that fair international trials are possible, though they are typically long and expensive. They have elaborated norms on war crimes, crimes against humanity and genocide. They have established a corpus of rulings on procedure and evidence. They have enhanced principles of fairness and legality and have brought about a revival of humanitarian customary law. They have transformed norms originally established to govern the responsibility of States into norms governing the criminal liability of individuals. They have established that most norms governing international armed conflicts also apply to non-international armed conflicts. They have also triggered a rise in national prosecutions of atrocity crimes.

In terms of due process, as well as substantive humanitarian and criminal law, modern international courts and tribunals are light years ahead of the proceedings in Nuremberg.

IHL has the aspiration of protecting not only civilians, but also combatants. This is done by stating that the right of parties to a conflict to adopt means of injuring the enemy is not unlimited; by the general prohibition of employing

arms, projectiles and materials and methods of warfare of a nature to cause unnecessary suffering (Article 23(e) of the 1907 Hague Regulations) or superfluous injury (Article 35(2) of AP I); and by prohibiting specific weapons.

In 1993, when the ICTY was first established, the normative prohibitions against rape and crimes against humanity were quite weak, and their enforcement even more so. Could you discuss the radical changes in the law and the enforcement of these prohibitions in light of the jurisprudence of international criminal tribunals?

The most singular achievement of the ICTY and the International Criminal Tribunal for Rwanda [ICTR] has been their focus and success in prosecuting and elaborating the definition of the crime of rape. What a contrast with the Nuremberg and Tokyo trials! In the ICTY alone, eighty individuals, 49% of the 161 accused, had charges of sexual violence included in their indictments, and thirty-six were convicted for such crimes.

In 1993, still as an academic at New York University, I published a piece in the *AJIL* lamenting the state of the law on rape, a law which at that time did not even accept that rape in non-international armed conflicts constituted a war crime. Of course, rape is prohibited under Article 27 of GC IV but is not a grave breach of the Convention.

In 2002, I found myself serving as a member of the ICTY Appeals Bench in the seminal *Kunarac* case, where we determined that rape may constitute an act of torture and that there is no need to bring expert medical evidence regarding the level of mental or physical suffering experienced by the victim. We found the defendants guilty of rape as a war crime and guilty of sexual enslavement as a crime against humanity. We rejected the claim that rape could occur only when the victim showed continuous resistance and when physical force was used.¹⁷ We established that non-consent could be inferred from circumstantial evidence and that coercive circumstances negate the notion of consent.¹⁸

And, beyond the *Kunarac* case, to protect victims of rape in the course of a trial, we adopted rules of procedure, providing that prior sexual conduct by the victim shall not be admitted in evidence or as a defence. We have clarified the definitions of the crime, actively enforced the prohibitions, and affirmed that command responsibility applies to rape and other sexual crimes. This judicial policy has been applied by other tribunals as well – for example, by the Special Court for Sierra Leone in the *Taylor* case and by the ICC in the *Bemba* case. Additionally, in the *Akayesu* case at the ICTR, the Tribunal considered that rapes committed with the intent to destroy an ethnic group in whole or in part could constitute a genocidal act.¹⁹

17 See ICTY, *The Prosecutor v. Dragoljub Kunarac et al.*, Case Nos IT-96-23, IT-96-23/1-A, Judgment (Appeals Chamber), 12 June 2002, para. 128, available at: www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.

18 *Ibid.*, paras 125–133.

19 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (Trial Chamber I), 2 September 1998.

In the *Akayesu* case, the ICTR Appeals Chamber concluded also that the minimum protection provided for victims under common Article 3 necessarily implies the need for effective punishment of all persons who violate it, without distinction as to rank, categories of person or official status of the perpetrators.

It bears noting that while they are specifically mandated to apply IHL, in practice the *ad hoc* tribunals have also had recourse to human rights law with respect to the material elements of substantive crimes. This jurisprudential approach reflects the tremendous similarity between the normative content of common Article 3 and crimes against humanity, on the one hand, and norms of human rights, on the other. Importantly, these developments have enhanced the protective character of both IHL and human rights law, including by clarifying the scope of crimes such as persecution or enslavement as crimes against humanity. What is particularly important is that the concept of crimes against humanity is applicable in all situations ranging from peace to international armed conflicts. All that is required is that a widespread or systematic attack against a civilian population takes place. This means that such crimes can be prosecuted without requiring a prior classification of the situation.

I would suggest that, as a result of all of the contributions of international criminal law that I have outlined so far, there has been and will continue to be a slow but steady rise in some real elements of deterrence. In other words, we can expect that the greater the awareness of IHL and its parameters – and the greater the risk of prosecution and punishment run by those who contemplate violating IHL – the greater the likelihood that international criminal law will impact the behaviour of individuals, and in particular individuals in positions of power, thus helping to increase compliance with IHL.

While it is hard to point to individual cause-and-effect relationships between particular decisions of international criminal tribunals and subsequent compliance with the law of war, in recent years there has been an increased emphasis on a more careful distinction in targeting between civilians and combatants and on greater protection to civilian populations. Targeted sanctions on travel and confiscation of assets, and the possibility of arrest and prosecution in foreign travel under the principle of universality of jurisdiction, appear to be taken seriously by persons alleged to have perpetrated violations of IHL. Sadly, however, violations of IHL continue unabated, as in the ongoing war in Ukraine.

Could you discuss the role of common Article 3 and crimes against humanity in the ongoing humanization of IHL?

Until the creation of modern international war crimes tribunals, common Article 3 was regarded as establishing civil, not criminal, liability. This changed following the 1995 *Tadić* decision, which determined that violations of common Article 3 may result in individual criminal liability of the perpetrators. This decision gained further support from the ICRC Customary Law Study of 2005, and following the 1986 *Nicaragua* judgment of the ICJ, common Article 3 has been recognized not only as a minimum common yardstick for non-international armed conflicts but

also as a set of minimum norms for international armed conflicts. Furthermore, common Article 3 is regarded not only as customary law but also as part of the *jus scripta*, hard law which has been applied in scores of cases in international criminal tribunals to punish violators of its provisions.

Common Article 3 and crimes against humanity as stated in the statutes of international criminal tribunals are quintessential articulations of human rights, albeit in the IHL context.

I will turn now to additional aspects of common Article 3. First, let me note that the article does not in itself provide rules concerning the conduct of hostilities. However, many such rules are now applicable in non-international armed conflicts through customary law,²⁰ jurisprudence such as the *Tadić* interlocutory appeal on jurisdiction of 1995, statutes of international criminal tribunals, and treaties which make certain rules regarding prohibited weapons applicable to non-international armed conflicts. Protocol II to the 1954 Hague Convention on Cultural Property is also applicable to non-international armed conflicts. I note that the ICC adopted an amendment to the Rome Statute's Article 8(2)(e) adding prohibitions on the use in non-international armed conflicts of poison or poison weapons, asphyxiating gases and expanding bullets; the Rome Statute also includes several important provisions and amendments prohibiting certain weapons for all conflicts, including blinding laser weapons, and intentionally using starvation of civilians as a method of warfare.

An interesting question is whether common Article 3 protects members of the armed forces of a State from acts committed by members of the armed forces of the same State, rather than only by members of the armed forces of an adversary party. The position of the ICRC, as expressed in the new Commentary on GC III,²¹ favours such a broad applicability and focuses on the protective purpose of common Article 3. This is an important departure from classical IHL.

Crimes against humanity are defined in the statutes of international criminal tribunals. The most detailed definition is contained in Article 7(1) of the Rome Statute of the ICC, which further develops and fleshes out definitions of crimes against humanity, emphasizing their human rights dimension by eliminating the requirement that they be committed in armed conflict. The requirement that such acts "be committed as part of a widespread or systematic attack directed against any civilian population, with the knowledge of the attack", means, in effect, that they can be committed not only in situations of armed conflict, whether international or national, but even in situations of peace. Among the crimes listed in Article 7 are many classical violations of human rights: enslavement, deportation or forcible transfer of populations, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape (and other gender crimes), and persecution of an identifiable group on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law in connection with any crime within the jurisdiction of the ICC.

20 See the ICRC Customary Law Study, above note 7.

21 2020 Commentary on GC III, above note 12, paras 578–583.

Additional crimes listed in Article 7 are enforced disappearance of persons, apartheid, and other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or to mental and physical health. Usefully, Article 7(2) contains interpretations of the crimes listed in Article 7(1). Taken together, this list constitutes an important catalogue of mostly human rights norms.

Protected persons

How have the war crimes tribunals changed/departed from the definition of protected persons in Article 4 of GC IV? How have these changes contributed to the humanization of IHL?

Article 4 of GC IV, which addresses the protection of civilian persons in time of war, considers that the only persons protected by the Convention are “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. Thus, Article 4 requires that protected persons have a nationality different from that of the State in the hands of which they find themselves. While this requirement of different nationalities may have been adequate for classical inter-State wars, it cannot protect people in situations of fragmentation of States, or non-international armed conflicts, where the persons concerned still have the nationality of the captor State. This is a matter of major importance, because the status as protected persons is necessary for the application of the grave breaches provisions of the Conventions.²²

Already the Pictet Commentary on GC IV noted that “[t]he expression ‘in the hands of’ is used in an extremely general sense. ... [It] need not necessarily be understood in the physical sense; it simply means that the person is in territory which is under the control of the Power in question.”²³

Following this approach, the ICTY, in its *Rajić* review of the indictment decision, held that

although the residents of Stupni Do were not directly or physically “in the hands of” Croatia, they can be treated as being constructively “in the hands of” Croatia, a country of which they were not nationals. The Trial Chamber therefore finds that the civilian residents of the village of Stupni Do were – for the purposes of the grave breaches provisions of Geneva Convention IV – protected persons vis-à-vis the Bosnian Croats because the latter were controlled by Croatia.²⁴

22 GC IV, Art. 147.

23 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958 (1958 Commentary on GC IV), p. 47.

24 ICTY, *The Prosecutor v. Ivica Rajić aka Viktor Andrić*, Case No. IT-95-12, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Trial Chamber), 13 September 1996, para. 37.

In 1999, the Appeals Chamber in the *Tadić* judgment went further in broadening the interpretation of protected persons in a way which no longer required different nationalities. First, GC IV, the Appeals Chamber ruled, also intends to protect those civilians in occupied territory who, while having the nationality of the party to the conflict in whose hands they find themselves, are refugees escaping the captor country, and thus no longer owe allegiance to this party and no longer enjoy its diplomatic protection.²⁵ Accordingly, “when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of ‘protected persons’”. Thus, as in the case of refugees from Nazi Germany, already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. The lack of both allegiance and diplomatic protection by their State of nationality was more important than the formal link of nationality.²⁶ As stated by the ICTY:

This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention’s object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.²⁷

This approach was followed also by the *Blaškić* Trial Chamber in 2000, which explained that nationals of a co-belligerent or allied State, as long as they have the protection of their State, do not need protected status under GC IV.²⁸

In the *Prlić* Appeals Chamber judgment of 2017, the ICTY Appeals Chamber agreed with the Trial Chamber that Muslim members of Croatian forces detained by Croatian forces could not be PoWs under GC III, as they did not belong to Bosnian forces and thus did not belong to the armed forces of a party other than the detaining party, but they could nevertheless be considered protected persons under GC IV because they were in enemy hands – that is, in the hands of Croatian forces.²⁹

25 ICTY, *Tadić*, above note 3, para. 164.

26 *Ibid.*, para. 165.

27 *Ibid.*, para. 166.

28 ICTY, *The Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Decision (Trial Chamber), 3 March 2000, para. 144.

29 ICTY, *The Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74, Judgment (Appeals Chamber), 29 November 2017, para. 359.

Finally, I turn to the *Delalić* Trial Chamber decision of 1998. In this case, the Bosnian government detained Bosnian Serb men and women in the Čelebići prison camp. They were detained because of their Serb identity. The Chamber considered that they must be considered protected persons under GC IV because they were regarded by Bosnia as belonging to an opposing party in an armed conflict.³⁰

The Trial Chamber made a statement here reflecting the humanization of IHL:

This interpretation of the Convention is fully in accordance with the development of the human rights doctrine which has been increasing in force since the middle of this century. It would be incongruous with the whole concept of human rights, which protect individuals from the excesses of their own governments, to rigidly apply the nationality requirement of Article 4, that was apparently inserted to prevent interference in a State's relations with its own nationals. Furthermore, the nature of the international armed conflict in Bosnia and Herzegovina reflects the complexity of many modern conflicts and not, perhaps, the paradigm envisaged in 1949. In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken.³¹

These salutary interpretations of protected persons also informed other international criminal tribunals. In the *Katanga* decision on confirmation of charges, the ICC acknowledged that nationality is not the crucial test for determining whether an individual has protected status under GC IV. Citing *Tadić*, the *Katanga* Pre-Trial Chamber stated that the crucial test is that the victim belongs to an adversary party to the conflict to which they do not owe allegiance.³²

The importance of these developments is also reflected in the fact that the tribunals interpreted here a provision – Article 4 of GC IV – applicable to international armed conflicts to broaden the notion of protected persons for non-international armed conflicts and mixed conflicts, thus extending humanitarian protection. This was reasonable and necessary in light of the 1995 *Tadić* interlocutory decision on jurisdiction and because most of the armed conflicts in the former Yugoslavia involved both international and non-international aspects.

30 ICTY, *The Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21, Judgment (Trial Chamber), 16 November 1998, para. 266.

31 *Ibid.*

32 ICC, *The Prosecutor v. Germain Katanga and Matheiu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 30 September 2008, paras 289–293.

From State rights to individual rights

In your writings you have often focused on the move in IHL from the principle of reciprocity between States to respect for the rights of the individual person. Could you discuss this development by way of some examples?

Let me start from the *si omnes* clause, the general participation clause, now entirely obsolete. That clause provided that if one party to the conflict was not a party to a treaty, that treaty would not apply in relations between all parties. It was thus an extreme articulation of the principle of reciprocity. Its *locus classicus* was Article 2 of Hague Convention IV. Since not all of the belligerents in World War II were parties to the Hague Convention, the invocation of Article 2 by the defendants threatened the integrity of the Nuremberg proceedings. This result was avoided only by the Tribunal treating the principal provisions of the Convention as customary law. Although Article 2 is formally still in force, since most of the Convention is regarded as customary law, it is largely regarded as having fallen into desuetude.

In departing from reciprocity, both the 1929 PoW Convention and the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field provided that if one of the belligerents is not a party, the belligerents who are parties will be bound by these instruments. Moreover, common Article 2(3) to the Geneva Conventions provides that even if one of the belligerents is not a party, the party belligerents will be bound in relation to the non-party if the latter accepts the Convention for the specific conflict.

A particularly telling manifestation of the reciprocal character of the law of war is the concept of reprisals. The classical definition of reprisals is, of course, an act by one belligerent, otherwise in violation of the law of war, in response to an unlawful act of war by another belligerent, and carried out to compel that other belligerent to stop the unlawful acts of war and comply with its obligations. Because in practice reprisals were directed or extended to persons not responsible for the violations, they involved harm to innocent bystanders or at least guilt by association. Reprisals were thus a real anathema to the humanization of the law of war.

Yet from the 1929 PoW Convention, with its prohibition of reprisals against PoWs, the domain of legitimate reprisals has shrunk dramatically. The 1949 Geneva Conventions prohibit reprisals against persons protected by each of the four Conventions, collective punishment and terrorization of the civilian population in occupied territory, and the taking of hostages. The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict prohibits reprisals against cultural property. AP I prohibits reprisals against entire civilian populations, individual civilians and civilian objects, cultural objects, objects indispensable for the survival of the civilian population, the natural environment, and works and installations containing so-called

dangerous forces. Protocol II to the Convention on Conventional Weapons prohibits reprisals through the use of mines, booby traps and other devices. Conventions on chemical and bacteriological weapons contain absolute prohibitions and make no exception for reprisals.

Modern treaties have thus reduced legitimate reprisals to those against the armed forces of the enemy. Since attacks against enemy armed forces are not prohibited under the *jus in bello*, hardly any scope is left for the State to consider resort to legitimate reprisals. The international legal system has however failed to establish effective sanctions against States that violate or abuse the rules prohibiting reprisals against civilians, or that breach the principles of distinction and proportionality. Deterrence of unlawful reprisals has not proved adequate, so far. In this area, the practice of States and non-State actors falls far below the normative developments. Consider, for example, the constant tit-for-tat by both sides in the Palestine conflict. In the 1995 *Martić* case, the ICTY ruled, helpfully, that the prohibition of reprisals against civilians is an integral part of customary law and must be respected in all armed conflicts even when the other party engages in wrongful conduct.

Finally, I note that reprisals are defined in law as enforcement measures, in proportional reaction to previous violations by the adversary, and are intended to compel the adversary to desist from violations. Pure and simple acts of vengeance are always prohibited, though they are still resorted to in practice.

The influence of human rights on the prohibition of reprisals is clear. Indeed, reprisals always involve some measure of collective responsibility and are antithetical to the whole notion of individual responsibility that is so fundamental to human rights. The outlawing of reprisals is supported by the ICRC Customary Law Study, in Rules 146–148.

Although reciprocity still applies to the creation of obligations under the Geneva Conventions – for example, common Article 2(3) or Article 4(2) of GC IV – it does not permit termination of obligations on grounds of breach. The denunciation clauses of the Geneva Conventions – common Article 63/62/142/158 – provide that a denunciation cannot take effect until peace has been concluded and the release and repatriation of the persons protected by the Conventions have been completed.

A similar position is taken by Article 60(5) of the Vienna Convention on the Law of Treaties [VCLT], which is generally regarded as declaratory of customary law. This article, while permitting a party which is a victim of a breach of treaty to invoke the breach as a ground for terminating the treaty or suspending its operation, excludes from termination or suspension provisions in a treaty of humanitarian character relating to the protection of the human person, in particular those that prohibit any form of reprisals against persons protected by such treaties. A breach, and thus the principle of reciprocity, may therefore not be invoked to justify derogations from humanitarian law with regard to protected persons, especially civilians.

Common articles of the Geneva Conventions and crimes against humanity

Could you comment on the ongoing significance of common Articles 1, 3, 6/6/6/7 and 7/7/7/8 for the humanization of IHL?

I will discuss several of the common articles of the Geneva Conventions – that is, articles which, depending on changes resulting from the different subjects of the Conventions, appear in all of them, though not necessarily with the same numbering. These articles have made a great contribution to the development and the humanization of IHL as a whole, including the recognition of inalienable humanitarian rights which cannot be waived by individuals or States. These articles demonstrate the humanization of the law, a process driven by human rights and the principles of humanity, which are at the very heart of the Conventions, and especially of GC IV.

From an inter-State to an individual rights perspective: Reciprocity

The extent to which humanitarian law has already departed from its inter-State and reciprocal focus can be seen by starting our discussion from common Article 1.

Common Article 1 of the 1949 Geneva Conventions, which provides that “[t]he High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*” [emphasis added], epitomizes the denial of reciprocity. The Pictet Commentary on GC I emphasizes the unconditional and non-reciprocal character of the obligations: “A State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such.”³³ The phrase “in all circumstances” covers not only international armed conflicts as defined in common Article 2 but also non-international armed conflicts as per common Article 3. Because common Article 1 speaks of High Contracting Parties and not parties to the conflict, it does not, however, address non-State armed groups; the obligations of such groups are introduced in common Article 3.

The requirement to respect the Conventions in all circumstances suggests that a State party may not violate its obligations even when its adversary violates its obligations. The duty to ensure respect means that every State Party must do whatever is reasonable in its power to ensure that the provisions of the Conventions are respected universally. Every State party thus has obligations *erga omnes contractantes* vis-à-vis other parties to the Conventions.

Common Article 1, which the ICJ in its *Nicaragua* judgment of 1986 held to be declaratory of customary law, derives from the rejection of reciprocity and goes to

33 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 Commentary on GC I), pp. 28–29.

the heart of accountability for violations of IHL. The article may initially have been intended to address the obligation of a party to ensure that its entire civilian and military apparatus and all its organs, and perhaps its entire population, respect the Conventions, but it has subsequently been interpreted as providing standing for States party to the Conventions vis-à-vis violating States. Parties must therefore endeavour to bring a violating party back into compliance, thus promoting universal application.

The non-reciprocal and normative nature of the Conventions has been recognized by Article 60(5) of the VCLT, which excludes the termination or suspension of a treaty as a consequence of a material breach with regard to provisions relating to the protection of a human person contained in treaties of humanitarian character and in particular to provisions prohibiting reprisals.

The duty to ensure respect is a duty of due diligence to prevent and repress breaches by persons and organs over which a State Party has jurisdiction, as well as a duty of due diligence to ensure respect by other States Parties. This duty has both positive and negative dimensions. Going beyond the parameters of the principle of *pacta sunt servanda*, the positive obligation suggests that every State Party must do everything reasonably possible to prevent and bring violations to an end. The negative obligation means that a State Party may not aid or encourage violations by a State party to the conflict. Although the obligation to ensure respect by other contracting States is still controversial, it has been recognized by a convening of three conferences of States Parties to discuss the West Bank, by the Security Council in Resolution 681, by the ICJ in the *Nicaragua* case, the *Wall* Advisory Opinion and the *Armed Activities in the Congo* case, and in the practice of the ICRC.

There is a certain similarity between the goals of the common Article 1 and the goals of the responsibility to protect as recognized by the UN. But the responsibility to protect is still somewhat of a soft-law concept. In contrast, the duty to ensure respect under common Article 1 is based on universally accepted treaty and customary law and has a firmer basis for diplomatic and legal action against violating States.

To a large extent, the *erga omnes* interpretation of common Article 1 was triggered by the Pictet Commentaries of the 1950s and the supportive literature generated by them, as by Abi-Saab, Condorelli and Boissson de Chazournes. The exact scope of the rights of third parties under common Article 1 is still not entirely clear, however, as suggested by the continuing controversies regarding conferences of States Parties to discuss the occupied West Bank. Whether the parties must act jointly or may take individual measures with respect to a violating State is uncertain, as is the precise nature of the actions that may be taken.

The ICJ judgment in the *Barcelona Traction* case of 1970 made it clear that every State has a legal interest in the protection of human rights by other States. In my opinion, common Article 1 can be seen as the humanitarian law analogue to the human rights principle of *erga omnes*.

While even the early Geneva Conventions conferred protections on individuals, as well as on States, whether those protections belonged to the

contracting States or to the individuals themselves was unclear at best. The treatment to which those persons were entitled was not necessarily seen as creating a body of rights. The 1929 PoW Convention paved the way for the recognition of individual rights by using the term “right” in several provisions. It was not until the 1949 Conventions, however, that the existence of rights conferred on protected persons was affirmed through several key provisions. These provisions are of cardinal importance: they clarified that rights are granted to the protected persons themselves, and they introduced into IHL or the law of war the concept of an analogue to *jus cogens*, which is so central to human rights law. Thus, *jus cogens* in humanitarian law preceded by two decades the recognition of *jus cogens* in the VCLT.

According to common Article 6/6/6/7, agreements by which either States or the individuals themselves purport to restrict the rights of protected persons under the Conventions will have no effect. Common Article 6/6/6/7 reads in part:

No special agreement shall adversely affect the situation of the wounded and sick, of members of the medical personnel or of chaplains, as defined by the present Convention, *nor restrict the rights which it confers upon them.* [Emphasis added.]

Humanitarian law’s notion of *jus cogens* differs conceptually from that found in Article 53 of the VCLT. Like *jus cogens*, it is supposed to bring about the nullity of the proscribed agreements. Unlike *jus cogens*, however, it derives from explicit provisions in the Geneva Conventions, rather than from classical customary law. Of course, most provisions of the Geneva Conventions are declaratory of customary law, and some rise to the level of *jus cogens*.

Article 6/6/6/7 safeguards, as the minimum, protections stated in the Conventions and in the Protocols and prohibits any derogation from them.

The conclusion of special agreements has long been a tradition of IHL permitting the adaptation of the provisions of the Conventions to specific circumstances. Common Article 3, for example, encourages the parties to non-international armed conflicts to conclude special agreements bringing into effect additional provisions of the Conventions. Several such agreements were concluded in the conflicts in the former Yugoslavia. Special agreements under AP I are also covered by common Article 6/6/6/7.

I note that the agreements which are prohibited are those which adversely affect the rights which the Conventions confer on protected persons. In reality, it is not always easy to foresee whether an agreement would adversely affect or enhance the situation of protected persons. I draw attention to the new commentary on Geneva Convention III, paragraph 1163: “In practice, in its representations to the Parties, the ICRC will invoke special agreements that conform to humanitarian law and that enhance protection.”

Common Article 6/6/6/7 was adopted in reaction to agreements during World War II between belligerents, such as that between Germany and the Vichy government, which, under pressure by the former, deprived French PoWs of certain protections under the 1929 PoW Convention. States participating in the

1949 Conference resolved not to leave the product of their labour “at the mercy of modifications dictated by chance, events or under the pressure of wartime circumstances”.³⁴

A proposal at the Conference to replace the phrase “confers upon them” in common Article 6/6/6/7 with the phrase “stipulates on their behalf” was rejected and the wording proposed in the ICRC draft was maintained.

Common Article 7/7/7/8 further provides that protected persons “may in no circumstances renounce in part or in entirety *the rights secured to them* by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be” [emphasis added].

The Pictet Commentary on GC IV recognizes that:

In selecting [the term “confers”] the International Committee had doubtless been influenced by the concomitant trend of doctrine, which also led to the universal proclamation of Human Rights, to define in concrete terms a concept which was implicit in the earlier Conventions. But it had at the same time complied with the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions “a personal and intangible character allowing” the beneficiaries “to claim them irrespective of the attitude adopted by their home country”.³⁵

The Pictet Commentary on GC I states that the prohibition on renunciation of rights is absolute.³⁶ This prohibition was adopted in light of experience showing that persons may be pressured into making a particular choice, but that proving duress or pressure is difficult. Several provisions of the Geneva Conventions – Articles 5 and 27 of GC IV, for example – similarly use the language of “rights”, “privileges”, “entitlements” or “claims”. Neither States nor persons protected by the Geneva Conventions may waive such rights. Article 5 of GC III confers on persons who have committed belligerent acts and fallen into the hands of the enemy the protection of the Convention until such time as their status has been determined by a competent tribunal. Obviously, such persons thus have the right of access to a competent tribunal. Article 75 of AP I contains a broad catalogue of human rights to which individuals are entitled, even against their own State.

Article 7/7/7/8 clearly recognizes that the rights of protected persons are inalienable and that the protections are inviolable. A State is thus unable to deviate from its obligations under the Conventions by relying on the consent of the protected person. It recognizes that in circumstances of occupation or armed conflict, exercise of free choice by the protected person may be seriously undermined. During World War II pressure was put on some PoWs to abandon their PoW status and become civilians, and thus be deprived of access to and

34 *Ibid.*, p. 71.

35 1958 Commentary on GC IV, above note 23, p. 83.

36 1952 Commentary on GC I, above note 33, pp. 79–80.

protection of the ICRC. Difficulties in proving coercion explain the logic of making the prohibition on renunciation of rights absolute.

There is one exception to the prohibition on renunciation of rights by the protected person. In recognition of the principle of individual autonomy, international practice recognizes that the right of PoWs to be repatriated, stated in Article 118 of GC III, is subject to the individual decision of the POW. This is confirmed in the new Commentary on GC III.³⁷

The principle that States may, through treaties, grant individuals direct rights or impose direct obligations on them without a previous act of transformation of norms of international law into national law was recognized already by the Permanent Court of International Justice in its 1928 *Advisory Opinion concerning Jurisdiction of the Courts of Danzig*. Direct rights for individuals, and sometimes direct obligations, are now commonplace in human rights treaties and declarations. They are invoked and enforced by international bodies and, frequently, by national courts.

The law of war has always operated on the assumption that its rules bind not only States but also their nationals. Traditionally, violations of the laws and customs of war by soldiers could only be prosecuted by either their national State or the captor State. Increasingly, however, violations of the laws and customs of war, the crime of genocide and crimes against humanity have been recognized as justifying third-country prosecution under the principle of universality of jurisdiction and the penal provisions of the Geneva Conventions, and by international criminal tribunals. Under the Geneva Conventions, all Contracting Parties have the duty either to prosecute or to extradite persons alleged to have committed grave breaches or to have ordered that they be committed.

The creation of the two *ad hoc* international criminal tribunals for the former Yugoslavia and for Rwanda, and the adoption, in July 1998, of the Rome Statute of the ICC signal an important change in the status of individuals as subjects of international law. Violations of the law of war—and of certain fundamental human rights, including those protected by common Article 3 and by crimes against humanity—which could under some national laws be prosecuted before national courts can now be prosecuted directly before international tribunals without the interposition of national law. This is an important advance, especially given the high standards of due process applied by international courts. The Rome Statute provisions establishing crimes against humanity no longer require any nexus with an armed conflict. The jurisprudence of the ICTY recognizes that such a nexus is not required by customary law, even though it is required by its Statute. The norms protected are in fact indistinguishable from fundamental human rights. IHL/the law of war and its institutions have thus become central to the protection of human rights.

37 2020 Commentary on GC III, above note 12, paras 4467–4473.

Common Article 3 and crimes against humanity

The creation of the ICTY in 1993 and the ICTR in 1994, followed by the establishment of other international criminal courts and tribunals, as well as hybrid tribunals – including the world’s first permanent international criminal court – represents a tidal shift. This transformative moment comes from the increased recognition of the criminal responsibility of individual actors based upon norms of behaviour first developed principally for States.

This development led to the tendency to fill an important lacuna in the law through international criminal tribunals increasingly judging and punishing violations which constitute in effect, even if not in the nomenclature, violations of human rights, or in many cases, violations of both human rights and humanitarian law.

What truly sets modern international criminal courts apart from Nuremberg and from early efforts aimed at ensuring accountability is the degree to which these modern courts, while formally mandated to apply IHL, have tried gross violations of human rights. This is of great importance because regional human rights courts have exclusively civil competence.

While human rights law has provided a major due process dimension and an interpretative tool in areas of IHL inadequately addressed by treaty law, through trials of violations of common Article 3 and crimes against humanity in international criminal courts and tribunals, human rights have acquired a growing component of individual criminal liability. This has led to an increasing impact of international criminal courts and tribunals on human rights protections not only as a matter of principles of fairness, but also as a matter of substantive law.

While human rights treaties have traditionally protected individuals from abuse in times of peace, many of these protections may, alas, be derogated on the grounds of national emergency. What is more, these treaties often offer little protection against the acts of non-governmental actors, such as rebel groups during internal armed conflicts. At the same time, instruments governing IHL such as the Geneva Conventions, while non-derogable, have generally focused on international armed conflicts. Indeed, common Article 3 – a quintessential statement of human rights, albeit in the IHL context – is the sole article of the Conventions to apply to internal armed conflicts expressly, and its provisions are far more limited than those applicable to international armed conflicts. There were, thus, gaps both in the conventional protections applicable in internal armed conflicts and in the criminal enforcement of gross violations of human rights. I will return to these questions in the context of the Turku Declaration.

This situation has undergone a major change thanks in great part to the 1995 *Tadić* interlocutory decision on jurisdiction of the ICTY, where Judge Cassese and his bench made plain that customary international law rules governing internal armed conflicts have emerged over time and that many of the rules and principles governing international armed conflicts apply to internal armed conflicts as well. This decision stated, also, that those rules established

individual criminal responsibility of the perpetrators and not only the civil responsibility of the parties concerned. The decision gained further support from the ICRC Customary Law Study of 2005.

This is not the only way in which international criminal tribunals such as the ICTY have contributed to human rights law and protections. In construing the material elements of crimes under IHL, international criminal tribunals have also had recourse to human rights law and jurisprudence, thereby strengthening human rights law and opening new avenues for its penal enforcement.

The beginnings of these developments can be traced, first, to the drafting of crimes against humanity clauses in the Nuremberg Charter and, second, to the drafting of common Article 3. For the first time in an international treaty, humanitarian law projected into internal conflicts and articulated provisions containing human rights law. Common Article 3 proved critical for enabling international criminal tribunals to try and punish gross violations of IHRL.

This was certainly true of such proscriptions stated in common Article 3 as resort to mutilation, cruel treatment and torture, outrages upon personal dignity, humiliating and degrading treatment, and passing of sentences except by a regularly constituted court ensuring all judicial guarantees. At the very least such provisions could be regarded as having a dual character of both human rights and humanitarian norms.

This decision gained further support from the ICRC Customary Law Study of 2005. In the years that followed the ICTY has been at the forefront of articulating and applying these protections, thus helping to redress through customary law and case law the gaps between treaty-based human rights law and IHL.

In the *Semanza* case at the ICTR,³⁸ charges were pursued and entered on appeal based on such violations of common Article 3 as murder, cruel treatment, torture, mutilation and any form of corporal punishment.

With the growing criminalization of the violations of essentially human rights norms, the question arose in the context of the *ad hoc* tribunals of how to distinguish war crimes from purely domestic offences. The *Kunarac* appeal judgment of 2002 helpfully clarified that

[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. ... [T]he existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.

And of course, as the recent ICRC Commentary on the Geneva Conventions points out, alleged perpetrators of serious violations of common Article 3 can also be tried by the competent national courts, typically the courts of the State on whose territory the offences were committed. The commission of acts prohibited by common

38 ICTR, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (Trial Chamber III), 15 May 2003, para. 522.

Article 3 has been prosecuted multiple times in UN war crimes tribunals. Acts charged have included murder, mutilation, cruel and inhuman treatment, torture, hostage-taking, and outrages upon personal dignity. The proscription of such acts has been included in the statutes of the ICTY, ICTR, ICC and Special Court for Sierra Leone. Additional crimes applicable in non-international armed conflicts are listed in Article 8(2)(e) of the Rome Statute.

Importantly, the tribunals have confirmed the customary law status of common Article 3, and have agreed that the article states the minimum common yardstick applicable to both non-international and international armed conflicts.

The Rome Conference on the establishment of the ICC made the text of common Article 3 a part of the Rome Statute of the ICC, in its Article 8(2)(c). And of course, the ICJ, in the *Nicaragua* case of 1986, defined common Article 3 as a “reflection of elementary considerations of humanity” and a minimum standard applicable to both international and non-international armed conflicts. This statement can also be seen as a recognition of common Article 3 as customary international law.

The humanization of the law of war continued with the definition of crimes against humanity in the statutes of the ICTY and the ICTR and subsequently in the Rome Statute, the Mechanism for International Criminal Tribunals, and hybrid courts.

Of course, common Article 3 has been drafted at a high level of generality. Note, for instance, the proscription of violence to life and person. In applying common Article 3, the war crimes tribunals had to be careful not to transgress on the principle of legality. In the *Kunarac* judgment, the Trial Chamber noted the similarity between humanitarian law and human rights law in terms of goals, values and terminology, but underscored that these two bodies of law’s reliance on each other must be undertaken cautiously, given the crucial differences between them. The Trial Chamber noted, in particular, that the law applied by the tribunals constitutes a penal regime, concerned with individual criminal responsibility, whereas the international human rights regime is focused on the State, as both the guarantor and abuser of human rights protections.

In the *Čelebići* case the defence argued that to punish breaches of common Article 3 would violate the principle of legality in that it would amount to the creation of law, and would thus be clearly contrary to basic human rights.³⁹ The ICTY first considered whether common Article 3 was customary law applicable to international armed conflicts, and not just to non-international armed conflicts. The Appeals Chamber noted that common Article 3 reflects fundamental humanitarian principles which underlie IHL as a whole. Indeed, the norms in common Article 3 were customary even before being codified in the Geneva Conventions, as the most universally recognized humanitarian principles.⁴⁰ This conclusion is confirmed by a consideration of human rights

³⁹ See ICCPR, Art. 15.

⁴⁰ ICTY, *The Prosecutor v. Zejnir Delalić et al.*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, paras 141, 149–150.

law, which shares, with the Geneva Conventions, a common core of fundamental standards which are applicable at all times, in all circumstances and to all parties. The Appeals Chamber concluded that it would be legally and morally untenable to hold that common Article 3, which constitutes mandatory minimum rules, would not be applicable to international armed conflicts. Indeed, the ICJ's holding in the *Nicaragua* judgment that common Article 3 is a "minimum yardstick" makes this conclusion compelling.

The defence in *Čelebići* further argued that, by excluding the provisions of common Article 3 from the grave breaches system of the Geneva Conventions, the States Parties intended that individual violators would not face criminal sanctions. According to the defence, common Article 3 imposes duties on States and other parties to non-international armed conflicts, not individuals. The Appeals Chamber rejected that argument, holding that although not expressly provided in the Geneva Conventions, violations of common Article 3 undoubtedly entail individual criminal liability. The purpose of the principle of legality is to prevent the prosecution and punishment of individuals for acts which they reasonably believed to be lawful at the time of their commission.

As codified in Article 15 of the ICCPR, which protects individuals from being convicted for acts that did not constitute a criminal offence at the time they were committed, the principle of legality does not prevent the criminalization of acts that are criminal according to the general principles of law recognized by the community of nations. As the *Čelebići* Appeals Chamber noted, it is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to this standard. It would strain credulity to contend that the accused would not understand the criminal nature of these acts.

Not all of common Article 3 is regarded as suitable for criminal enforcement, however. The ICTY Trial Chamber held in the 2002 *Vasiljević* case that although common Article 3 mentions the term "violence to life and person" as a prohibited act, and although the Appeals Chamber had earlier held that customary international law imposed criminal liability for all serious violations of common Article 3, the Trial Chamber could not convict the accused of "violence to life and person" because this crime was not recognized or defined with sufficient clarity by customary international law. The Trial Chamber therefore acquitted the accused of that charge.

Much has been written on the legal situation arising when a foreign State controls a non-State armed group in its armed conflict against a State's armed forces, thus turning a non-international armed conflict into an international armed conflict. In the *Nicaragua* case, the ICJ found that complete dependence on an intervening State by a non-State armed group, or effective control of specific operations, was necessary for the internationalization of the conflict and for the attribution of responsibility to the foreign State.

In the *Tadić* judgment of 1999, the ICTY Appeals Chamber developed a softer criterion of overall control by the foreign State over the non-State armed group for purposes of the classification of the conflict. The ICRC has expressed a preference for the ICTY overall control test, as it was more protective. In 2007,

the conflict between the ICJ and the ICTY jurisprudence was largely resolved when in its 2007 *Genocide* judgment, the ICJ accepted the overall control test for classification of conflicts but maintained the effective control test for the attribution of responsibility to the intervening State. I note that international criminal tribunals do not normally address the question of attribution of civil responsibility to States for wrongful acts.

An important provision of common Article 3 states that the parties to the conflict should endeavour by means of special agreements to bring into force other provisions of the Geneva Conventions. A case in point would be to bring into force provisions providing for PoW protections. PoW protections are usually not applicable in situations of non-international armed conflict. Of course, such agreements can only be used to enhance, not to derogate from, protections already available under common Article 3.

The new relationship between human rights and humanitarian law has been recognized by the ICJ. In the *Nuclear Weapons* and *Wall* Advisory Opinions, the ICJ made it clear that human rights continued to apply in times of war, even outside of the national territory – subject to the possibility of lawful derogations and to the *lex specialis* status of IHL with regard to the right to life.

When the ICTY was established, the Secretary-General of the UN, Boutros Boutros-Ghali, stated that the ICTY must take international human rights into account: “It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.”⁴¹ The Secretary-General’s focus was on fair trial rights attached to the accused. Undoubtedly, IHRL has been a vital source of procedural protections recognized by the tribunals, but the tribunals have gone further. They have invoked human rights to define, elaborate and interpret substantive humanitarian law, and they have also tried and punished gross violations of human rights.

Crimes against humanity – especially persecution and inhumane treatment – are somewhat indeterminate, of course. They have been an important vehicle through which the tribunals have imported human rights law into their jurisdiction, but the very flexibility of the appellation “crimes against humanity” has forced the tribunals to analyze particular charges in some detail so as to guard against overbroad categorizations.

An example of how this different focus is pertinent is provided by the ICTY’s consideration of torture in the *Kunarac* case. The Convention against Torture provides that torture comprises four main elements – namely, the severity of the treatment, the deliberate nature of the act, the specific purpose of the act, and the requirement that the act is committed by or at the instigation of a public official. The *Kunarac* Trial Chamber reasoned that the public official requirement is a result of the context in which the Convention against Torture operates – at the inter-State level, with States as respondents – and is therefore

41 *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)*, UN Doc. S/25704, 3 May 1993, para. 106.

directed only to States' obligations. For the purposes of the ICTY in this case, however, the involvement of the State does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question.

On that basis, the Trial Chamber held that the presence of a State official or other authority is not necessary for the act to be regarded as torture as a matter of personal culpability of the perpetrator, but only as a matter of State responsibility. This development has strengthened the scope and value of the prohibition on torture.

The tribunals have also made immense contributions to strengthening the proscriptions of rape as war crimes, crimes against humanity and genocidal acts.

Persecution and other inhumane acts, which are listed as crimes against humanity, are often referred to as “residual” or “umbrella” crimes because they encompass a broad range of conduct. By turning to IHRL, the tribunals have been able to provide further precision to crimes against humanity. With respect to persecution, the ICTY Trial Chamber in *Kupreškić* held that persecution is the gross or blatant denial, on discriminatory grounds, of a fundamental right laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited as crimes against humanity. Of course, this definition necessarily implicates international human rights, in order to determine which rights are “fundamental”.

An act that does not constitute a crime in itself can constitute persecution due to the presence of a discriminatory element and the severity of the deprivation of fundamental rights. As the *Tadić* appeal judgment made clear, only the crime of persecution requires a discriminatory intent. Other crimes against humanity listed in Article 5 of the ICTY Statute do not have a discriminatory intent requirement.

In the *Blaškić* case of 2000, the ICTY Trial Chamber held that there was no doubt that causing serious bodily and mental harm may be characterized as persecution when members of a group are targeted because they belong to a specific community.

Other cases have also opened the door to using human rights law jurisprudence to address the scope of “persecution”. In the *Brđanin* case of 2007, the ICTY Appeals Chamber dismissed the argument that the denial of the rights to employment, freedom of movement, proper judicial process and proper medical care did not rise to the level of serious violations of IHL and therefore did not fall within the jurisdiction of the Tribunal. The Chamber noted that it was settled jurisprudence that the crime of persecution includes not only the acts enumerated in Article 5 of the ICTY Statute, or other articles of the Statute, but also acts that are not listed in the Statute altogether. Furthermore, acts underlying persecution need not even constitute crimes in international law – rather, the act must be of equal gravity to the crimes listed under Article 5, when considered in isolation or conjunction. Determining whether the acts *actually constitute* persecution is a fact-specific exercise.

In the *Simić* case of 2003, the ICTY Trial Chamber reviewed a number of acts alleged to amount to persecution. It reasoned that persecution could involve a number of discriminatory acts involving violations of political, social or economic

rights. For example, the Trial Chamber noted that the Nuremberg Tribunal found that the requirement that the members of a group mark themselves out by wearing a yellow star amounted to persecution.⁴²

Indeed, as the Trial Chamber in *Kupreškić* noted, although every crime against humanity can be described as a gross violation of human rights, “not every denial of a human right may constitute a crime against humanity”.⁴³ As such, the tribunals need to ensure not only that a right whose violation is the subject of criminal prosecution is truly fundamental and universally recognized, but also that any transgression constituted a violation of the law at the time of its commission.

The Turku Declaration

In your article “The Humanization of Humanitarian Law”, you discuss the Minimum Humanitarian Standards (also known as Fundamental Standards of Humanity).⁴⁴ These standards were intended to fill any gaps not or poorly covered by IHL and IHRL. These standards, despite being read into the UN Doc. system as a record, encountered some resistance from both the ICRC and the UN Secretary-General, in 2000 and 2008 respectively. The Secretary-General, in a report to the Human Rights Council, instead referred to the 2005 ICRC Customary Law Study, the 2005 UN Reparation Principles and the 2006 Convention on Disappearances,⁴⁵ and suggested that there was no need for new standards. How do you reflect on the experience of the Turku Declaration in retrospect? Is the non-adoption of Fundamental Standards of Humanity a missed opportunity, or are the alternatives good substitutes?

It always seemed clear to me that repression of human dignity occurs in a continuum of situations of strife, from normality to full-blown international armed conflict, and that all these situations must be covered to provide protection to human beings.

The establishment of the ICRC group on internal strife was, in part, triggered by my advocacy for a declaration of minimum humanitarian standards. When I was first settling in at NYU in 1981, an invitation arrived to present a paper at a Red Cross conference in Hawaii on the relationship between human rights and humanitarian law. My work on the paper led me to believe that there was a gap in the protections offered by humanitarian and human rights law. In my paper in Hawaii and in follow-up papers for the AJIL and other journals, I

42 ICTY, *The Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Judgment (Trial Chamber II), 17 October 2003, para 57.

43 ICTY, *The Prosecutor v. Zoran Kupreškić et al.*, Case No. IT 95-16, Judgment (Trial Chamber), 14 January 2000, para. 618.

44 T. Meron, “The Humanization of Humanitarian Law”, above note 1, pp. 273–275.

45 *Fundamental Standards of Humanity: Report of the Secretary-General*, UN Doc. A/HRC/8/14, 3 June 2008, para. 39.

explained that the conventions on IHL protect victims of international wars but offer only very limited protection to victims of internal armed conflicts, disturbances or strife.

Moreover, disputes over the characterization of conflicts create opportunities for States to evade the law altogether. Human rights treaties protect individuals from abuses in times of peace, but important protections may be derogated from on grounds of national emergency. In some situations, non-governmental actors exercise control over people while denying that they are bound by international standards. Furthermore, most of the rules on permissible weapons and the conduct of hostilities were not considered applicable to non-international armed conflicts, and there was thus a significant gap between humanitarian and human rights instruments, to the detriment of victims. This was occasionally referred to in the literature as the “Meron gap”.

As a partial remedy, I proposed the adoption of a declaration of minimum humanitarian standards that would state norms capable of filling that gap for all situations of strife. I was grateful to Professor Oscar Schachter and Professor Louis Henkin, the editors of the *AJIL* at the time, for publishing the first of my articles on this subject, which challenged many received wisdoms. I pursued these ideas in my Hersch Lauterpacht Memorial Lectures on “Human Rights in Internal Strife” at the University of Cambridge.

One of the joys of academic law as a discipline is that it allows a give-and-take within the profession – the chance to use the law, which is naturally fluid, to overcome the stark barriers put up by the academic and organizational division of subjects. Fortunately, Alexandre Hay, the president of the ICRC at the time, expressed interest in my ideas and the first consultations of experts started, eventually resulting in the text of the so-called Turku Declaration of Minimum Humanitarian Standards of 1990, a document which has been quoted in ICTY decisions and in UN documents and studies. I thought that such a declaration could be useful in four areas where humanitarian norms and human rights are contested: where the threshold of applicability of IHL is disputed; where the State in question is not a party to the relevant treaty or declaration; where a derogation from specific standards is invoked; and where the actor is a non-governmental group.

The proposal encountered opposition, however. Some critics feared that a non-binding declaration would dilute existing legal obligations under the treaties in force; others felt that the declaration went too far in trying to impose additional commitments, albeit of a non-binding character. Eventually the project drifted into a deep coma.

Since then, however, the world seems to have moved in the direction envisaged by the project, not through law-making, but through the ICRC project on customary law, treaties and statutes and the jurisprudence of international criminal tribunals, and particularly the 1995 *Tadić* interlocutory decision on jurisdiction, which went beyond the previous rigid distinctions between the law applicable to internal and to international armed conflicts. My 1995 *AJIL* article on “International Criminalization of Internal Atrocities” has also helped to

stimulate interest in the subject. These developments led to a growing recognition that many rules of IHL previously applicable only to international wars apply to non-international armed conflicts as well. All of these factors contributed to expanding the applicability of protective norms to internal armed conflicts and strife. What happened was a kind of bottom-up transition from the field and practice to theory. The net result was that many customary and treaty rules formerly only applicable in international armed conflicts are now often regarded as non-derogable rules in non-international armed conflicts as well – conflicts which are especially frequent and bloody. So the need for something like the Turku Declaration is certainly less now than it was when I first started to promote the need for action. Moreover, quite a few recent treaties were made explicitly applicable to non-international armed conflicts, and at the same time, the Human Rights Committee made it more difficult to resort to excessive derogations.

Still, in some respects it may have been a missed opportunity. The Turku Declaration is a short, clear document stating human rights and humanitarian rights applicable in all situations, which could have been a useful tool in such long-lasting internal/international conflicts as that in Syria, or in Myanmar. Moreover, while many of the provisions of the Turku Declaration can now be addressed by customary law, others – for example, Article 5(3) of the Declaration, which states that “[w]eapons or methods prohibited in international armed conflicts must not be employed in any circumstances” – cannot. Given the lack of clarity as to the weapons or methods of warfare which may not be used in non-international armed conflicts, Article 5(3) would have provided the ICRC with an additional tool and argument.



Interview with Emily Crawford

Author of *Non-Binding Norms in International Humanitarian Law* (2021)*

Emily Crawford is an Associate Professor at the University of Sydney Law School, where she teaches and researches in international law, international humanitarian law and international criminal law. She has published widely in the field of international humanitarian law, including three monographs (The Treatment of Combatants and Insurgents under the Law of Armed Conflict (Oxford University Press, 2010), Identifying the Enemy: Civilian Participation in Hostilities (Oxford University Press, 2015) and Non-Binding Norms in International Humanitarian Law (Oxford University Press, 2021)), and a textbook (International Humanitarian Law (with Alison Pert, 2nd edition, Cambridge University Press, 2020)). She is an associate of the Sydney Centre for International Law, and a co-editor of the Journal of International Humanitarian Studies.

Keywords: International humanitarian law, non-binding norms, regulation of armed conflicts.

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Setting the scene: Understanding non-binding norms in international humanitarian law (IHL)

1. War has existed for far longer than efforts to regulate it. But the past 150+ years have seen meaningful and binding regulations at the multilateral, intra-State level, seeking to render war less cruel, for example by protecting those who are

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the *International Review of the Red Cross*.

not, or no longer, taking a direct part in hostilities. How do you see the role of non-binding norms in the regulation of armed conflicts?

Non-binding norms have a vital role to play in IHL because they offer the opportunity for all stakeholders – not just States – to actively engage in norm generation and norm implementation. Non-binding instruments also potentially have the scope to respond to new events and new developments in practice in a timelier manner than necessary for treaty-making or customary norm generation – a group of interested academics or practitioners or a small group of States can convene meetings over the course of a few years and produce a draft instrument, arguably more quickly than if such an instrument needed to go through, say, the International Law Commission (ILC) and then an international conference – we saw this with the Tallinn Manuals¹ and the International Committee of the Red Cross (ICRC) Direct Participation in Hostilities (DPH) Guidance.² An additional advantage is that once the document is released, it is effectively “done” – it does not have to be sent to an international conference for debate and potential amendment, dilution and/or reservation, and there is no need to wait for that treaty, as adopted, to finally come into force. So, there is a significant advantage in terms of responsiveness, timeliness and the unity of the instrument.

This is not to say that all non-binding instruments can be created so quickly or easily. Some non-binding instruments can take decades to come to fruition – like the ILC Articles on State Responsibility,³ for example. However, even the drafts of such non-binding instruments have value – each iteration can serve as something like an “early-warning system” if you will – alerting stakeholders at large that there is an area requiring further debate, whether that debate takes place in an expert group or in a forum like a United Nations committee or expert body. So, in the IHL realm, the ILC work on the protection of the environment in armed conflict, which was started in 2013, has, for the last ten years, really helped focus and crystallize debate and analysis on the question of how the natural environment is impacted by armed conflict and what should be done to remedy such impacts.

2. Article 38 of the Statute of the International Court of Justice (ICJ) is often presented as listing the sources of international law, or at least of what can be invoked as such in front of the Court. The two most prominent sources are, of course, treaty and customary international law. How do non-binding norms fit into this understanding of the sources of international law?

1 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, New York, 2013 (Tallinn 1.0); Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, New York, 2017 (Tallinn 2.0).

2 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

3 James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge, 2002.

The debate over whether Article 38 of the Statute of the ICJ⁴ is the final word on the sources of law is, I would wager, as old as the ICJ Statute itself. Open any textbook of international law and you will find Article 38 of the ICJ statute repeated as the “traditional” sources of international law – I am guilty of this myself! I think that, as lawyers, we like certainty and having a list of sources laid out for us to follow is almost reassuring. A black-letter positivist approach to international law would say that non-binding norms, by their very nature (and definition!), cannot be a source of law – that law, in order to be law, must have binding force – that, for instance, there must be compulsory enforcement mechanisms in place to address violations of the rules. However, scholars of international law know that these very rigid ideas of what makes law *law* do not easily fit the international law system and are actually reductive and unhelpful.

In any event, even if one does believe that law must be binding to be so-called, that does not actually reflect reality – as we have seen in practice in forums like the General Assembly, and in the work undertaken by the ILC, non-binding instruments can be hugely influential in shaping and guiding State and non-State behaviour – even to the point of become customary international law themselves (such as the Universal Declaration on Human Rights⁵). I think that it is possible (and worthwhile) to take a more nuanced approach to the sources of obligation under international law, rather than hewing to such a strict doctrinal approach. I do not want to veer too much into complex questions of the philosophy and theory of international law – that is an arena best left to experts in the field of which I am decidedly not! But I think that there is some value in treating such instruments as having some normative pull – that these documents are treated by their addressees as having *some* element of obligatory force. So, for example, non-State armed groups (NSAGs) who sign Geneva Call’s Deed of Commitment on anti-personnel landmines⁶ pledge to no longer use such weapons, and then actually engage in demining and destruction of stockpiles of anti-personnel landmines. This looks a lot like compliance with a legal norm even in the absence of a legal compulsion to comply.

3. What necessitated or led to the proliferation of non-binding norms in international law in general and IHL in particular, in the past few decades? Can you give us a few examples of such norms in IHL, not only from recent years but older as well?

Non-binding norms have actually always been part of the IHL landscape – you could make the case that *A Memory of Solferino*⁷ was the first non-binding

4 Statute of the International Court of Justice, Art. 38, available at: www.icj-cij.org/en/statute (all internet references were accessed in September 2022).

5 United Nations General Assembly, Universal Declaration of Human Rights, Paris, 10 December 1948, available at: www.un.org/en/about-us/universal-declaration-of-human-rights.

6 Geneva Call, Deed of Commitment Under Geneva Call for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action, available at: www.genevacall.org/wp-content/uploads/2020/09/DoC-Banning-anti-personnel-mines.pdf.

7 Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1939, 1959, available at: www.icrc.org/en/doc/assets/files/publications/icrc-002-0361.pdf.

document in IHL – a single short booklet by an interested private citizen was so compelling and persuasive that a group of like-minded private citizens and legal experts coalesced to advocate for the adoption of an international treaty to put into effect the elements called for in the book. In 1862, Dunant called for the creation of a neutral organization to care for the wounded armed forces in the field, and for the recognition of the neutrality of medical personnel – by 1864, the Geneva Convention⁸ was adopted to do just that. Quite the achievement.

Since then, States and non-State actors repeatedly engaged in non-binding norm generation – for example, the 1874 Brussels Declaration⁹ (though that was unintentional – the hope had been to adopt a binding instrument), the 1880 Oxford Manual on the Law of Armed Conflict,¹⁰ and the 1923 Hague Rules on Air Warfare.¹¹ However, the recent proliferation of instruments was really “kicked off” with the creation of the San Remo Manual on Naval Warfare in 1994.¹² In the years following the San Remo Manual, you start to see other manuals and documents emerge which cite the San Remo Manual as being a source of inspiration for their own instrument. Whether this is because of the success of the Manual in practice, or because of the ease of the expert process, is not stated, though.

From my research, the overarching motivation behind the creation of the “modern” non-binding instruments has been responding to the paucity of topic-specific instruments and rules at the specific time of the instrument’s creation. This usually takes one of two paths. Some non-binding instruments have been created in response to an existing or recent armed conflict where the law has been unclear or lacking – for example, the lack of treaty development of the law of naval warfare, and the events of the 1982 Falklands War had prompted academics and other practitioners to query whether new law was needed, which eventually lead to the San Remo process. Likewise, the widespread use of private military and security contractors in Iraq and Afghanistan in the conflicts of 2002 onwards prompted the process that led to the adoption of the Montreux Document on Private Military and Security Companies in 2008.¹³ However, other non-binding instruments have been more forward-looking – examining emergent trends in weaponeering, for example.

8 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864 (entered into force 22 August 1864).

9 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874 (entered into force 27 August 1874).

10 The Laws of War on Land. Oxford, 9 September 1880 (entered into force 9 September 1880).

11 The Hague Rules of Air Warfare. The Hague, December 1922–February 1923, available at: http://lawofwar.org/hague_rules_of_air_warfare.htm.

12 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994 (entered into force 12 June 1994) (San Remo Manual).

13 The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, Montreux, 17 September 2008, ICRC, Geneva, 2009.

Actors involved in the creation of non-binding norms

4. What is the role of non-governmental organizations (NGOs), international organizations, special rapporteurs or sui generis organizations (e.g. ICRC) in the development or legitimization of non-binding norms? How about the role of academic scholars? Is there a shift away from their role as guardians, protectors or promoters to international law-makers?

Non-State actors have really taken the driving role in the development and legitimization of non-binding instruments – nearly every major non-binding norm of the last thirty years has eventuated either at the initiative of or from the advocacy of a non-State actor – whether that be a group of experts, the ICRC, or some other civil society organization. I see this as civil society taking on the norm-generation role in *addition* to guardian and promoter. By finally “being in the room” where the rules are made (even the non-binding rules!) and having a role in shaping how the rules are explicated, civil society organizations and actors (like academics and non-State practitioners) who have made IHL their life are able to shape the debate, to ensure that the rules are not just about what is convenient for States.

The inclusion of non-State actors in this norm-generation process has led some commentators to reflect on whether this means IHL is moving from *lex lata* to *lex ferenda*. I do not see it as trading one form of law for another – international law treaties on the law of armed conflict are still being adopted after all (such as the nuclear weapons ban treaty¹⁴). Rather, I think the greater embrace of *lex ferenda*, alongside the well-established treaties of IHL, is a better reflection of the innate complexities of trying to regulate a situation that seems inherently resistant to regulation – massive organized armed violence. Nuance is often needed, and that is sometimes absent in black-letter law.

5. Has the proliferation of non-binding norms in IHL been helpful to strengthen inclusion of other non-State actors such as NSAGs, and business organizations as “participants in the practice and development of legal normative standards”¹⁵ as opposed to mere objects in the international legal process? How has this impacted the enforcement of IHL?

Absolutely – and this inclusion of other participants has, I believe, been for the better. Research (not just mine!) has shown that the more non-State stakeholders are engaged in the process of international norm-generation, the more likely it is that those norms are going to be respected by non-State parties (specifically in armed conflicts), which can have a flow-on effect to inducing State parties in armed conflicts to likewise comply with international norms. For example, the

¹⁴ Treaty on the Prohibition of Nuclear Weapons, New York, 7 July 2017 (entered into force 22 January 2021).

¹⁵ Emily Crawford, *Non-Binding Norms in International Humanitarian Law: Efficacy, Legitimacy, and Legality*, Oxford Academic, Oxford, 2021; online edition 20 January 2022, pp. 150, 158 and 173.

NGO Geneva Call has long engaged with armed non-State groups, in an effort to get such groups to commit to humanitarian norms such as non-use of anti-personnel mines. These commitments are publicly made through Geneva Call's "Deeds of Commitment" – documents that are essentially treaties for non-State actors, in which the NSAG publicly commits to abide by the terms of the Deed. There is compelling evidence to suggest that the signing of the anti-personnel landmine Deed of Commitment by the Sudan People's Liberation Movement/Army (SPLM/A) in October 2001 was pivotal in prompting Sudan to sign and ratify the Ottawa Convention¹⁶ in 2003.

In terms of improving enforcement, that remains a weak spot in some respects – most of the non-binding instruments do not have mechanisms for enforcing their terms, beyond just reporting obligations. However, I do not think this is a weakness just shared by the non-binding instruments – commentators in IHL have, for decades, noted that the weakness in IHL is not its rules, but that there are gaps in the implementation and enforcement of the rules. However, I think this is something endemic to international law generally, rather than non-binding IHL instruments *per se*.

6. What factors contribute to the success and immediate impact/use of non-binding norms? Does the status of the drafters of the non-binding instruments play a role in its acceptance and legitimacy (e.g. States, expert groups, NGOs, civil society, international organizations)? What role does representativeness and diversity (geographic, cognitive, etc.) play in the legitimacy and acceptance of non-binding norms?

The main factor that seemed to influence how quickly and/or completely an instrument began to have an impact was who was involved in its creation – this seemed to be the case even with instruments that at the time seemed a progressive development of the law, rather than a simple restatement. The ICRC, obviously, carries considerable imprimatur in the field, so it was not surprising that instruments that originated from the ICRC (even ones that were considered controversial for various reasons, like the DPH Guidance and the Customary IHL Study¹⁷) were fairly rapidly embraced by practitioners and State processes (such as courts), even if official State receptions were guarded. Likewise, any non-binding instrument that was either created by States (like the Montreux Document) or had considerable buy-in or consultation with States (like the San Remo Manual) were also (comparatively) rapidly embraced in practice.

Documents that came solely from small expert groups, especially where such expert groups were heavily drawn from Western European and Other Group (WEOG) nations, were less likely to have immediate impact. My research showed

16 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (entered into force 1 March 1999) ("Ottawa Treaty").

17 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

that a lack of diversity and representativeness amongst participants seemed to be a consistent marker in whether an instrument gained traction. For example, the San Remo Manual – which was the work of just a few experts – has not been taken up much in State practice; likewise, instruments like Tallinn 1.0 and the Air and Missile Warfare Manual¹⁸ had a notable lack of geographical diversity in their experts, and neither document seemed to make the kinds of inroads into State practice as one would have expected of the only instruments on their subject matter. What is notable is that in Tallinn 2.0, there is more of an effort made to increase the representativeness and diversity of the contributing experts, and there seems to be a concomitant increase in how Tallinn 2.0 is being treated by States, in comparison to 1.0.

This phenomenon is not unique to non-binding instruments obviously – debates regarding representation and diversity in international law-making have been a staple of the literature for decades, but it is worth noting that if non-binding instruments are conceived as a mechanism for norm-generation outside the confines of traditional international law, then perhaps they should not fall into the same patterns and repeat the same shortcomings of traditional international law-making.

Pros and cons of non-binding norms in IHL

7. Non-binding norms are, by intent and definition, non-binding in form and effect. However, recently States are endorsing and announcing their intention to “sign” or “endorse” these instruments, e.g. in the 2022 Explosive Weapons in Populated Areas Declaration¹⁹ and the Safe Schools Declaration.²⁰ How can we make sense of that? What is the importance of a flexible (or rigid) “agreed language” in non-binding norms, as opposed to in binding treaties?

It would be easy to dismiss such acts as performative but ultimately hollow State acts – after all, it looks like States are trying to “have it both ways” – to have a specific and tailored instrument that they can publicly laud and sign and espouse while making absolutely sure there is no way they can be held to account for failing to comply with those self-same lauded behaviours. However, it is easy to be cynical about international law and such cynicism does not help address the real problems that we are all committed to addressing. Also, it is possible that aspirational acts can galvanize behaviour within States and without to put effective mechanisms in place to regulate behaviour. Henry Dunant’s writing after Solferino was essentially an aspirational act, from which the entire protective

18 *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013.

19 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas, Geneva, 17 June 2022, available at: www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf.

20 Safe Schools Declaration, Oslo, Norway, May 2015.

regime of the ICRC and the Movement has sprung – a regime which has, since 1863, helped countless people in situations of war and public crisis. So, I do not think aspirational acts are inherently problematic.

In terms of the importance of the language of non-binding norms – I think the freedom inherent in the format allows for flexibility or rigidity as it suits the situation, but I do think some definitiveness of language is an option that more non-binding instruments should embrace. In this respect, I am prompted to think of Professor (as he was then) James Crawford's comments regarding the ILC articles on State responsibility, and whether they should be adopted as a binding treaty – he often remarked that to do so would be to open the articles to the necessary dilutions and reservations that would come in any process leading to binding treaty adoption, and that the articles were far more effective in their original form. Non-binding instruments and their creators should not be too concerned about always hewing to *lex lata* – some *lex ferenda* has its place.

8. What are the advantages and/or disadvantages of non-binding norms? Do non-binding norms erode the system developed as IHL? Do they risk pushing us back into a state of legal uncertainty, or even void, or do they add value to that system? Does the flexibility and interpretive scope of non-binding norms aid in ensuring respect of the minimum, fundamental standards stipulated to protect those affected by armed conflicts?

The obvious disadvantage of non-binding norms is that they are, obviously, not binding, and so no legal consequence follows from ignoring their existence. However, I do not consider this to be a fatal flaw, simply because most of the existing non-binding instruments are not new law at all, but merely statements of how existing IHL, in treaty and custom, applies to new situations such as cyber-warfare, or war in outer space. I do not believe that non-binding norms erode existing hard law systems – as I note in my book,²¹ States have long created and used non-binding instruments in several areas, including human rights, international environmental law and international economic law. There are 150 years of practice that show that non-binding documents can change the behaviour of States and non-State actors, can become customary law, and even spur the adoption of binding obligations in treaty form. So, I do not believe the embrace of the non-binding instrument is some kind of death knell for legal certainty. I believe non-binding documents can offer a dynamism, and flexibility, and responsiveness to emerging situations that allow for a rapidity of response that more traditional avenues of norm-generation lack – and my research shows that many of the “modern” non-binding instruments (post-San Remo) are being treated as legal or near-legal instruments by State organs such as courts.

21 E. Crawford, above note 15.

9. Does the increasing turn to non-binding norms that do not impose hard, enforceable obligations challenge the principles of individual or State accountability for violations of IHL?

As I mentioned earlier, enforcement and accountability in IHL has always been an issue, so the proliferation of non-binding norms does not necessarily add anything meaningful to the problem of enforcement in practice. However, there is a real risk that States will effectively abdicate their primary role as law-makers in international law because they can see that it is being done by other actors in the field, and with the additional benefit of the instruments resulting from that norm-generating having no consequence for their breach. However, I have always felt that the binding provisions of IHL – ones that do carry individual and State accountability – are sufficiently robust that they can be applied in nearly all new situations, even those where there may be a lack of specific treaty law on that same topic. So, any concerns about the legality of artificial intelligence, or fully autonomous weapons, or bio-medical enhancements and nano-weapons, can always be answered with, as a starting point, the principles of distinction, proportionality, military necessity, humanity, and prohibitions on causing unnecessary suffering and superfluous injury. The seventy-plus-year-old Geneva Conventions and the forty-five-year-old Additional Protocols may not mention thermobaric weapons or dense inert metal explosives, but they still apply, and provide a strong, actionable source of obligation that I think can easily exist alongside non-binding instruments of specificity.

Non-binding norms play an important supplementary and supporting role for existing binding norms. That is their *raison d'être* – to assist in the process of applying the existing law to a novel situation. For example, a commander, having to make a targeting decision about a civilian who may or may not be taking direct part in hostilities could look to the ICRC DPH Guidance for an idea of how to approach such a situation. As we know, the Additional Protocols clearly set out that civilians are not to be targeted unless DPH, and the Protocols do not define DPH – so the non-binding DPH Guidance assists in the applying of the binding rule of distinction. So, I do not believe that the turn to non-binding instruments undermines principles of individual or State accountability under IHL – on the contrary, I think they are an important mechanism that assists in ensuring compliance.

In conclusion

10. How do you see the future of non-binding norms in IHL? Do you have any final reflections for our readers?

As I mentioned earlier, non-binding instruments have been part of IHL since the first moves towards codification in the 1800s, so I think it is safe to say that they will remain part of IHL moving forward. However, I say this at a time when

some notable IHL non-binding norms have either been delayed or the processes surrounding them have reportedly hit an impasse – for example, it was intended for the Woomera Manual on the International Law of Military Space Operations²² to be published sometime in 2020–21 but this was of course delayed by the COVID pandemic. There has also been some commentary that the 2nd edition of the San Remo Manual, announced in 2020, has stalled, potentially indefinitely – though I have not been able to find confirmation of this, so we might be able to chalk that up to the academic rumour mill!

This is a crucial time of reflection in international law-making in IHL, where all interested parties can think about what we want and need the law to do, and draw on existing forums (such as the United Nations or ILC) as venues for their elaboration – whether in binding or non-binding form. We should think deeply about what works in the processes of enumerating IHL rules – whether binding or non-binding – and trust that this vital field of law, which has existed for 150 years, will continue to be a bulwark against brutality going forward, so long as we remain committed to the process of renewal and development.

22 See University of Adelaide, *The Woomera Manual on the International Law of Military Space Activities and Operations*, available at: <https://law.adelaide.edu.au/woomera/>.

Interview with Eirini Giorgou

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Keywords: explosive weapons, international humanitarian law (IHL), urban warfare, protection of civilians, political declaration, soft law.

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Earlier this year, the ICRC released a milestone report¹ on the use of explosive weapons with wide area effects in populated areas. Why is the ICRC concerned about this issue, and what does it aim to achieve with this report?

For well over a decade, the ICRC has observed that the use of heavy explosive weapons in urban and other populated areas is a recurring feature of contemporary armed conflicts, and a major cause of civilian harm. In addition, it has serious implications under international humanitarian law [IHL].

Such heavy explosive weapons include large air-dropped bombs, unguided artillery and mortars, missiles, rockets and some improvised explosive devices. Most of these weapons are neither designed nor adapted for use in populated areas. Their

* This interview was conducted by Jillian Rafferty, Managing Editor of the *Review*, in September 2022.

large explosive payloads and/or lack of accuracy and precision will typically produce what we call “wide area effects” or a “wide impact area” – namely, destructive effects caused directly by blast and fragmentation that go well beyond their target, and will impact, or put at risk of impact, entire areas. The use of these weapons in open battlefields does not tend to raise the same concerns, but when the military objective is located in cities or other populated areas, the risk that they will affect civilians and civilian objects is very high. In such circumstances, heavy explosive weapons are very likely to have indiscriminate effects and devastating consequences for the civilian population.

The civilian toll of bombing and shelling is unacceptable. There is an urgent need for States and all parties to armed conflict to review and adapt their military policy and practice, so as to ensure compliance with IHL and better protection of civilians. The ICRC, since 2011, and the entire International Red Cross and Red Crescent Movement [the Movement], since 2013,² have been calling on them to avoid, as a matter of policy, the use of explosive weapons with a wide impact area in populated areas – that is, to ensure that such weapons are not used in populated areas unless sufficient mitigation measures can be taken to limit their wide area effects and the consequent risk of civilian harm.

Our new report, entitled *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, explains why such an avoidance policy is necessary and what it entails, based on the ICRC’s front-line work and observation, and its technical and legal analysis.³ Crucially, the report provides detailed good practice recommendations for political authorities and armed forces of both States and non-State armed groups on measures they can and should take to operationalize such an “avoidance policy”.

The report aims at triggering the necessary shift in mindsets of policy-makers and commanders. Some militaries have already taken steps in this direction, and a multi-year diplomatic process⁴ aimed at preventing and reducing the humanitarian consequences of the use of such weapons recently concluded with the finalization of a political declaration on explosive weapons in populated areas.⁵ On 18 November 2022, States will be called upon to officially endorse and

1 ICRC, *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, Geneva, January 2022, available at: www.icrc.org/en/download/file/229018/ewipa_explosive_weapons_with_wide_area_effect_final.pdf (all internet references were accessed in September 2022).

2 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, pp. 40–42; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, pp. 47–53; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019, p. 13; Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 7 of the 2013 Council of Delegates, “Weapons and International Humanitarian Law”, CD/13/R7, 17–18 November 2013, para. 4.

3 ICRC, above note 1.

4 Department of Foreign Affairs of Ireland, “Protecting Civilians in Urban Warfare”, available at: www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/#main-content.

5 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas, 17 June 2022 (EWIPA Declaration),

begin implementing this declaration, by collectively and individually identifying measures and good practices for putting its commitments into effect. We had strongly welcomed the declaration and encouraged States to endorse it,⁶ and we hope that our report and recommendations will contribute to its implementation.

What are the main findings of the report?

The report demonstrates that, while civilian harm in urban warfare has many causes and compounding factors, a lot will come down to the choice and use of weapons and tactics by the parties to the conflict. Despite the lack of global, comprehensive and verifiable statistics that quantify civilian harm, case collection on the ground, combined with information collected from a variety of other sources and organizations, clearly points to a pattern of grave civilian harm when heavy explosive weapons are used in cities and other populated areas.

The ICRC has witnessed this grave pattern of harm in recent and ongoing armed conflicts in over fifteen contexts, including Afghanistan, Gaza, Iraq, Libya, Nagorno-Karabakh, the Philippines, Somalia, Sri Lanka, Syria, Ukraine and Yemen. This pattern of harm is outlined in detail in the report, including through a large number of illustrative cases.

When explosive weapons with a wide impact area are used in populated areas, the overwhelming majority of the casualties are civilians. Bombing and shelling wound and kill large numbers of people, and permanently disable many others, especially in areas where health-care services are inadequate or inaccessible; they also cause serious long-term psychological trauma, particularly among children. Civilian housing, critical civilian infrastructure, schools, cultural monuments and places of worship are reduced to rubble.

When critical infrastructure is damaged, services indispensable to the survival of the population – water, sanitation, electrical power, health care – are disrupted and may even collapse. Lack of essential services may lead to outbreaks of disease and even epidemics. The threat of bombing and shelling and the harsh conditions force many civilians to flee, triggering large-scale displacement. Displaced civilians, in particular women and children, are exposed to risks, including health risks and sexual violence. These “reverberating” effects are often long-lasting and can affect a much larger part of the civilian population than those in the attack’s immediate impact area.

The report provides an overview of the technical characteristics of the main weapons of concern which account for their wide area effects. It concludes that the wide area effects of many explosive weapons make them inappropriate for use in

available at: www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf.

6 ICRC, “Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas: Statement by the International Committee of the Red Cross Delivered by Laurent Gisel, Head of the Arms and Conduct of Hostilities Unit at the Legal Division on Friday, 17 June 2022”, Geneva, 21 June 2022, available at: www.icrc.org/en/document/political-declaration-on-explosive-weapons.

populated areas. While trained users can to some extent modify various factors in order to limit these effects and the area put at risk or impacted by the weapon, this will not always suffice to reduce the high risk of civilian harm.

The report also examines the implications under IHL of the use of heavy explosive weapons in populated areas. The analysis shows that it is very difficult to use explosive weapons with wide area effects in populated areas in conformity with key principles and rules of IHL, notably the prohibitions on indiscriminate and disproportionate attacks. It also confirms the lack of clarity on how States interpret and apply certain rules and concepts in relation to the use of heavy explosive weapons in populated areas.

A review of select military policy and practice reveals that, while specific urban warfare doctrine and training worldwide is very limited, there are examples of restrictions and limitations on the use of some heavy explosive weapons in populated areas. These examples show that it is possible to restrict heavy firepower in populated areas without hampering the success of the military mission and the safety of one's own and friendly forces, and that such restrictions can go a long way in preventing or at least reducing civilian harm. However, the devastating civilian harm documented in the report is proof that much more needs to be done in this respect, and soon, to prevent or at least mitigate this harm. The report concludes that a policy of avoidance with regard to the use of heavy explosive weapons in populated areas is necessary and possible, and provides many recommendations to this effect, as discussed in more detail below.

How does this report fit into the ICRC's broader work on the use of explosive weapons, and on protecting civilians more broadly?

For over a decade, the ICRC has been raising awareness over the devastating humanitarian consequences of the use of heavy explosive weapons in populated areas, bilaterally and in multilateral fora, including in the context of the Convention on Certain Conventional Weapons. To this end, in 2014 we launched a multidisciplinary initiative aimed at documenting the civilian harm caused by the use of heavy explosive weapons in populated areas; identifying weapons of concern based on their technical characteristics and effects; analyzing the legal implications of their use in populated areas under IHL; and compiling examples of past or current military policy and practice restricting such use.

Through expert meetings and various publications, we have sought to strengthen our understanding, and that of the international community, of the humanitarian, technical, legal and military-operational aspects related to the use of explosive weapons with a wide impact area in populated areas. In parallel, we have maintained regular dialogue with States and their armed forces, as well as some non-State armed groups, on measures and good practices for strengthening the protection of civilians, including by restricting or limiting the use of heavy explosive weapons in populated areas.

The ultimate objective of this work is to influence the behaviour of parties to armed conflict towards improved compliance with IHL and better protection of civilians and civilian objects when such weapons are used in populated areas. This ongoing work is carried out in a multidisciplinary manner at ICRC headquarters and in delegations throughout the world, as part of the ICRC's broader efforts to prevent and mitigate the humanitarian consequences of urban warfare.

This new report contains the ICRC's main observations and conclusions from years of work and analysis. It reaffirms the ICRC's call on all States and parties to armed conflict to avoid the use of heavy explosive weapons in populated areas. Its recommendations on how to implement such a policy of avoidance, which span the entire spectrum from doctrine and policies to training, planning and conduct of operations, are rooted in the ICRC's mandate to protect and assist victims of armed conflict, including by contributing to the clarification and progressive development of IHL.

In the view of the ICRC, an avoidance policy is necessary both to strengthen the protection of civilians and to enable compliance with IHL in particularly challenging environments, such as urban and other populated areas. Placing restrictions and limitations on the use of explosive weapons with wide area effects in populated areas is a humanitarian and often also a legal imperative. It significantly reduces the risk of civilian harm, as well as the risk of IHL violations, and thus contributes to better implementation of IHL.

Summer 2022 saw the conclusion of a years-long process to negotiate a political declaration that addresses the use of explosive weapons in populated areas. Why did States choose to use a political declaration to address this issue, and what was the ICRC's role in the process?

States have been discussing the content of a political declaration on explosive weapons in populated areas for a number of years, under the leadership of Austria and subsequently of Ireland. The political declaration format was deemed an appropriate response to the humanitarian concerns that the use of heavy explosive weapons in populated areas raise for a number of reasons.

First, from the outset there was general agreement that existing IHL rules on the conduct of hostilities already apply to the use of explosive weapons with wide area effects in populated areas, and that no new law could realistically be achieved at that stage. It was clear to the negotiating States, however, that urgent action, including through the adoption of policy commitments, was necessary both to ensure compliance with IHL when such weapons are used in populated areas and to better protect civilians against the harm they cause. Most States were of the view that achieving these two goals would require restricting or limiting the use of heavy explosive weapons in populated areas in military doctrine and practice.

The large variety of weapons of concern was another reason why addressing them through a political declaration instead of a treaty was deemed more

appropriate. “Explosive weapons with a wide impact area” encompass a large category of weapons that make up the bulk of most, if not all, States’ military arsenals today. In addition, the concept of wide area effects is not absolute, but can be understood in relation to the size of the target, which can vary with each attack. Whether an explosive weapon will have wide area effects or not will thus depend, at least to some extent, on the circumstances of the attack. A legally binding instrument imposing restrictions on use would need to be much broader in scope than existing weapons treaties, as it would apply to many different types of weapons. As treaties typically stipulate definitions of the weapons whose use they prohibit or regulate, such an instrument would likely also need to define explosive weapons with a wide impact area, which would have been by no means an easy task.

Lastly, the urgency of the matter argued in favour of a more flexible approach, such as typically characterizes the development of soft-law instruments. Consensus on the development of new IHL norms by means of treaties or other legal instruments has been elusive over the past years, and in any case often requires a lengthy process. States and other stakeholders were therefore aware that the prospects of achieving agreement on a legally binding instrument addressing such a broad category of weapons as explosive weapons with a wide impact area were low – let alone doing so in a timely manner.

In sum, there were serious doubts as to whether a treaty prohibiting or regulating the use of heavy explosive weapons in populated areas would have been a realistic or timely response to such a pressing issue. On the other hand, precedents such as that of the Safe Schools Declaration had demonstrated the utility and added value of politically binding instruments in generating action to change the status quo. For those reasons, civil society, as well as the ICRC, also strongly supported a soft-law approach.

The ICRC was actively involved in the diplomatic process to develop a political declaration from the outset. We provided legal and humanitarian expertise and conducted advocacy towards the adoption of a strong, meaningful text containing clear and unequivocal commitments capable of changing the status quo. Together with National Red Cross and Red Crescent Societies, we consistently urged States to keep the bar high and make ambitious political commitments, including a commitment to avoid the use of heavy explosive weapons in populated areas in line with the ICRC’s, the Movement’s and the United Nations [UN] Secretary-General’s long-standing calls. Many of the points we raised are reflected in the final text.

As noted above, the political declaration process is only one aspect of the ICRC’s work to strengthen the protection of civilians from the use of heavy explosive weapons in populated areas. The ICRC supports all efforts aimed at effectively addressing this problem, and continues to raise the issue of heavy explosive weapons in populated areas in all relevant fora as well as in its bilateral and confidential dialogue with States and other parties to armed conflicts.

What is the added value of the political declaration, given that IHL already regulates the use of explosive weapons in populated areas?

While there is no general prohibition under IHL against using heavy explosive weapons in populated areas, such use must comply with all the rules governing the conduct of hostilities, notably the prohibitions against indiscriminate and disproportionate attacks and the obligation to take all feasible precautions in attack. The fact that IHL regulates the use of explosive weapons in populated areas, however, by no means makes a political declaration on the matter redundant, as most negotiating States also underscored.

First, the political declaration adds value because the existence of relevant and applicable IHL does not automatically ensure that such law is actually properly interpreted and applied. As an example, under IHL's principles of proportionality and precautions in attack, parties to an armed conflict must consider the civilian harm – death or injury of civilians or damage to civilian objects – expected to result directly or indirectly from an attack. But it is not clear that these effects – especially the indirect effects – are adequately accounted for in practice. For instance, while the indirect or reverberating effects of heavy explosive weapons' use in populated areas are well documented and foreseeable, it is doubtful whether parties to armed conflicts appropriately factor them into their assessments of the lawfulness of such use. Policy and good practice, including through commitments undertaken by means of this political declaration, can enable parties to anticipate and prevent such foreseeable effects of their attacks through a series of measures taken at the strategic, operational and tactical levels, and thus ultimately to comply with the law.

Second, using heavy explosive weapons in populated areas in a manner that respects IHL is particularly challenging, even for parties to armed conflict determined to do so in good faith, as the recent ICRC report demonstrates. This objective difficulty makes the existence of measures, tools and processes to anticipate risk, identify risk factors and take mitigating measures to ensure compliance and to prevent or at least reduce civilian harm all the more important. The declaration can help States develop these tools.

Third, the extent of civilian harm caused by the use of heavy explosive weapons in populated areas raises serious questions about how parties to armed conflict interpret and apply the relevant key rules of IHL that aim to protect civilians. While respect for IHL is of paramount importance, there is often a lack of clarity, and sometimes even disagreement, on how States interpret and apply certain rules and concepts in relation to the use of heavy explosive weapons in populated areas. In agreeing to the text of the political declaration, States have reduced confusion and discrepancies in how they collectively expect IHL to be applied when using explosive weapons in populated areas.

Considering that every State involved in armed conflict over the last decade has claimed to have fully complied with IHL, simply reaffirming the obligation to do so is unlikely to change the situation in a meaningful manner. Instead, what is needed is concrete action to ensure that IHL is indeed fully complied with, and to

implement measures to strengthen the protection of civilians beyond the current situation and irrespective of legal assessments and interpretations that would tend to justify such unacceptably high civilian harm.

Ultimately, effectively protecting civilians from the devastating humanitarian consequences of the use of heavy explosive weapons in populated areas requires full compliance with IHL, but it may also require belligerents to do more than that. The political declaration responds to this need through a solid set of commitments to review and amend policies and practices as dictated by the multifold humanitarian, legal and operational challenges of modern urban and other populated battlefields.

The political declaration is meant to be the beginning, not the end, of efforts in this respect. Its significant added value lies in the fact that it puts in place a substantive and procedural framework for further action at both the international and domestic levels. More specifically, it provides guidance on measures that need to be taken by political authorities and armed forces, as well as a mechanism to identify such measures collectively through regular meetings and the exchange of good practices.

Could you give us an overview of the main elements of the political declaration? In concrete terms, what does it aim to achieve?

The Political Declaration on Protecting Civilians from the Humanitarian Consequences arising from the Use of Explosive Weapons in Populated Areas is the first instrument of its kind to acknowledge the problem of the human cost of these weapons and, on this basis, to commit States to review their military policy and practice in order to restrict or refrain from the use of explosive weapons in populated areas.

In its first preambular section, the declaration recognizes that the wide area effects of explosive weapons are a key factor increasing the risk of civilian harm, a point that the ICRC had been stressing since the beginning of the process. It places a strong emphasis on the devastating humanitarian consequences that these weapons cause when used in populated areas, and describes accurately and comprehensively the full spectrum of direct and indirect/reverberating effects of explosive weapons on civilians, including the impact on essential services, on mental health and on the environment. As such, it signals a shared recognition of the scope and gravity of the problem which will prove instrumental in taking further action.

This was a hard-won achievement that should not be underestimated. Throughout the negotiations, a number of States objected to, or attempted to weaken, the explicit correlation between the use of explosive weapons – and in particular those weapons whose technical characteristics give rise to wide area effects – and the risk and extent of civilian harm. Concerns were expressed that the declaration would unduly stigmatize a category of weapons, while the causes of civilian harm in armed conflict were manifold and complex. For the majority of States, however, it was a fact that certain explosive weapons, by virtue of their

explosive power, lack of accuracy, and/or multiple munitions fired simultaneously over a wide area, are more harmful for civilians when used in populated areas, and require specific policies to ensure they are used in conformity with IHL and in a manner that minimizes risks of civilian harm. This powerful statement signals a turning point and a shift in perspective: the identification of the problem and its causes opens the door for policy revisions and the implementation of good practices to effectively address it.

The second preambular section reaffirms key obligations under IHL and their relevance to the use of explosive weapons in populated areas. This section was the least controversial, a fact that represents a strong and welcome sign of consensus among States on the critical importance of respecting and ensuring respect for IHL in all circumstances, including when fighting in populated areas.

The preamble is followed by the declaration's "operative section", in which States articulate the actions they commit to taking. While not expressly calling for the avoidance policy that the ICRC had consistently called for, the final text does make a strong and clear statement that States need to change the way they plan and conduct hostilities in populated areas to protect civilians and civilian objects from harm. Crucially, the declaration stipulates a core commitment to "adopt and implement a range of policies and practices to help avoid civilian harm, including by *restricting or refraining* as appropriate from the use of explosive weapons in populated areas, when their use may be expected to cause harm to civilians or civilian objects".⁷ This commitment was a key point of discussion throughout the negotiations. The agreed wording opens the door for further work to identify the circumstances under which it would be appropriate to refrain from the use of explosive weapons, as opposed to restricting it, and good practices for doing so – work that will hopefully take place during the implementation phase.

There are several other positive elements which, if properly implemented, can make a significant contribution to alleviating civilian suffering. These include a number of important commitments that the ICRC had advocated for, such as taking into account the reasonably foreseeable indirect effects in the planning and execution of attacks. This commitment has tremendous practical significance and the potential to prevent or at least reduce civilian harm from attacks in many contexts, given the gravity of indirect (or reverberating) effects from the use of heavy explosive weapons in populated areas and the fact that most militaries appear to insufficiently consider these effects when planning and conducting military operations.

Another important commitment is on strengthening international cooperation and assistance in the context of partnered military operations in order to develop good policies and practices to enhance the protection of civilians, particularly with regard to the use of explosive weapons in populated areas. The ICRC has been promoting policy changes – irrespective of applicable legal obligations – on both these issues for a number of years, in the context of its work on urban services in protracted armed conflicts and on partnered military

7 EWIPA Declaration, above note 5, para. 3.3 (emphasis added).

operations and other support relationships (whose prevalence in armed conflicts has increased in recent times).

To ensure that its commitments are put into action, the declaration foresees a collaborative follow-up implementation process consisting in regular meetings of States with the participation of the ICRC, the UN and civil society, to review the implementation of the political declaration, identify any relevant additional measures that may need to be taken, and exchange and compile good policies and practices, including in relation to emerging concepts and terminology, most notably “reverberating effects”.

Overall, the political declaration represents a significant step towards better protection of civilians and respect for IHL. The ICRC warmly welcomed the final text and encouraged all States to endorse it.

In what ways can we expect the political declaration to influence State practice, and how can we expect States to meaningfully implement the commitments made?

The success of the political declaration will ultimately be determined by three factors: the number of States endorsing it, including States involved in or affected by military operations in urban and other populated areas; the strength of its commitments, not only on paper but how they are understood and interpreted by endorsing States; and the scope of its actual implementation, notably how it will influence the behaviour of parties to armed conflict using explosive weapons in populated areas.

As far as the first factor is concerned, early signs are rather positive. During the last round of consultations, the final text was supported by a large number of States across different regions, including military powers with significant experience in urban warfare. Many of these States expressed a clear intention to endorse the declaration and encouraged others to do so. As explained above, this outcome signals an important shift in the perspective of several key States towards recognizing the use of explosive weapons in populated areas as a major cause of civilian harm and committing to taking concrete action, including by restricting or limiting such use. As the example of other international instruments – whether legally binding or not – shows, support increases over time, as peer influence and the demonstrated impact of the instrument convince more and more States to come on board. There is no reason to doubt that this will be the case, too, with this political declaration.

A signing conference has been convened for 18 November 2022 to mark the adoption of the political declaration. Upon endorsing it, States will need to – collectively and individually – identify and put in place measures for implementing the political commitments made. As shown above, the political declaration provides for at least part of such discussions to be open, transparent and inclusive of all States that have endorsed it and their militaries, and accessible to international and civil society organizations, and humanitarian and other practitioners – all of which have relevant expertise and a legitimate interest in preventing and mitigating civilian harm.

The declaration contains a number of strong and ambitious commitments, and some States have already shared their understanding of several of them. Although these understandings vary somewhat, including on the extent of restrictions that the declaration is understood as imposing on the use of explosive weapons in populated areas, for the most part States underscored the importance of reviewing and adapting their policy and practice to ensure compliance with IHL and better protection of civilians.

The ultimate test for the political declaration will certainly be its implementation in practice. This would benefit significantly from the multilateral mechanism foreseen in the political declaration for jointly identifying and agreeing on measures and good practices for implementing the declaration's political commitments, but would ultimately come down to implementing such measures in the domestic context. Implementation will require:

- reflecting an acknowledgment of the problem posed by the use of heavy explosive weapons in populated areas, as well as the imperative of strengthening the protection of civilians against such use, in policy, doctrine and all aspects of military decision-making;
- integrating measures and good practices restricting the use of heavy explosive weapons in populated areas in military manuals, operational and tactical guidance, and rules of engagement, among other tools;
- training members of the armed forces to implement such measures in the conduct of hostilities; and
- ensuring that armed forces are equipped with weapons and other capabilities enabling them to fight in urban and other populated areas in a manner that ensures respect for IHL and better protection of civilians, or, ideally, avoiding fighting in such environments altogether.

Throughout the negotiations, many States recognized the importance of exchanging good practices to strengthen respect for IHL and the protection of civilians. This can and should be done on three levels: first, in the context of the follow-up to the political declaration, as explained above; second, in the context of partnered military operations, as foreseen in the declaration; and third, when providing support – whether in the form of weapons or otherwise – to a State or non-State party to an armed conflict. While the first two are explicitly provided for in the declaration itself, the third form of good practice exchange is not, although it can be read as being included in the corresponding commitment. Given the prevalence of support relationships in contemporary armed conflicts, and their impact on the outcome of such conflicts, the influence and leverage of the supporting party can be of paramount importance in promoting respect for IHL and strengthening the protection of civilians by the supported party.

The new ICRC report also aims to inform these discussions, and provides policy-makers and commanders with a large number of options and recommendations in terms of preventive and mitigation measures that can go a long way in strengthening respect for IHL and avoiding or reducing civilian harm. The detailed and practical recommendations for political authorities and

armed forces put forward in our report can serve as a tool for implementing the commitments undertaken by means of the political declaration, and as food for thought to trigger the identification of additional measures and good practices in this respect.

States endorsing the political declaration will greatly benefit from the exchange of lessons learned, good practices and know-how, thus increasing their capacity to adequately prepare their armed forces for fighting in populated areas in a manner that respects IHL and reduces risks for civilians. On a more general level, the promotion of internationally agreed policy standards of conduct will, down the line, have a positive impact on the behaviour of all parties to armed conflict, including non-State armed groups, given the commitment in the declaration to seek adherence to it by such groups, in addition to States. The universalization of the declaration can therefore help reduce the humanitarian consequences of urban warfare, as well as associated legal and operational challenges. Lastly, endorsing the declaration could be an important element in assessing whether or not States can be “vetted” in the context of partnered military operations and support relationships with other States that have endorsed it.

How does the political declaration fit into broader existing trends in the development of IHL?

Although soft-law instruments are not a new phenomenon, the past few decades have seen a proliferation of such instruments, in the field of IHL and beyond. The political declaration on explosive weapons in populated areas is a clear manifestation of this trend.

Soft-law instruments can take various forms, ranging from political declarations to guidelines, principles, voluntary norms of responsible behaviour, manuals or codes of conduct. While not legally binding, they can fill gaps in the existing legal framework, provide guidance when rules are insufficiently clear, and strengthen the implementation of IHL, including by setting out good practices for complying with its obligations. In doing so, these instruments sometimes go beyond existing law, in particular through the adoption of political commitments.

The reliance on soft-law instruments for addressing pressing humanitarian concerns has been largely the result of States’ reluctance to engage in the creation of new legal norms or the clarification of existing ones. As already explained, we have seen this in the case of explosive weapons in populated areas. Some States have strongly opposed the development of IHL in this area, arguing that the problem is due to lack of compliance with existing obligations, rather than the need for additional norms. This was one of the main reasons that led to the choice of a political declaration as the most appropriate instrument, at the time, to address concerns over the humanitarian consequences of the use of heavy explosive weapons in populated areas.

The same conviction – namely, that existing law is sufficient – led some States to object to the development of a political declaration on explosive weapons in populated areas, arguing that no new or additional policy measures are needed. However, decoupling the law from its implementation is not as easy as it may first seem. In many cases, more clarity on how States interpret and apply IHL rules is needed to determine whether the problem lies with compliance, with interpretation or, indeed, with the scope and content of the rules themselves. Notably, in the case of heavy explosive weapons’ use in populated areas, the grave pattern of civilian harm observed as a result indicates that, even in cases where such weapons are used seemingly, or purportedly, in conformity with IHL, the scale of civilian harm caused is often unacceptably high.

In the “modern IHL” era, policy and good practice have proved a pragmatic approach to strengthening the protection of civilians by bypassing disagreements on the interpretation or application of IHL. Policy – such as is stipulated in soft-law instruments – can be a very effective tool to achieve the object and purpose of IHL, as a substitute to norm development, provided it is not used to lower the bar from existing law, either deliberately or incidentally. As already explained, the main purpose of the political declaration on explosive weapons in populated areas is precisely to strengthen respect for IHL and the protection of civilians.

Indeed, when it comes to IHL, the boundaries between law and policy are not always clear-cut. Militaries often develop and adopt policies that are meant to implement the law and/or sometimes go beyond what is required by the law; and policy, when integrated into military instruments and tools such as directives or rules of engagement, of course becomes binding for its addressees. At the same time, States themselves are not always clear which specific requirements adopted in policy documents reflect, or give practical meaning to, legally binding obligations, and which ones are “mere” policy. This trend is equally reflected in the political declaration on explosive weapons in populated areas, where States undertake commitments as a matter of policy, with some stating that they view such commitments as binding legal obligations, others viewing them as policy measures supplementing IHL, and yet others considering that the commitments in the declaration do not go beyond what is already required under IHL.

Another trend reflected in the development of the political declaration is the plurality of actors involved in the law-making process. While States remain at the centre of law-making, there is no doubt that IHL as we know it today is the result of the influence of many actors beyond States: the ICRC, international and regional organizations, civil society, judges, academics and practitioners (including military experts), and to some degree also non-State armed groups. While the role of these actors has been critical in the development of numerous instruments, including humanitarian disarmament treaties, it is particularly prominent in the development of soft-law instruments such as political declarations. This plurality of actors, which has become a defining characteristic of contemporary law-making, has overall led to a strengthening of IHL. At the same time, it has generated some controversy as to whether IHL has developed or has been clarified – that is, whether new norms have been created or the

interpretation of existing ones has changed. The answer to this question, as well as the understanding of what such development consists in, often differs across the various actors.

The political declaration on explosive weapons in populated areas is a clear example of this. Its negotiation and content were largely influenced by the work and recommendations of the ICRC, the UN and civil society, who with their advocacy and contributions largely shaped the process and its outcome. In recognition of their role and expertise, as explained above, States agreed on a framework that ensures the participation of the ICRC and international and non-governmental organizations in the implementation of the declaration.

What does the new political declaration, in the context of other recent trends, indicate for IHL and its development in the future, regarding explosive weapons in populated areas as well as more broadly?

It may be tempting for some States, and in particular civil society organizations, to opt for flexible, soft-law processes when faced with a deadlock in traditional negotiating fora. International soft-law and policy instruments, and related measures, have considerable advantages. They can be put in place quickly and even unilaterally, without the requirement of lengthy negotiations and qualified majority support. However, the continued importance and potential of developing IHL through treaty-making must not be discarded.

Legally binding instruments such as treaties have clear benefits. The first and most obvious one is their legally binding nature, at both the international and domestic levels (as they are typically implemented by means of domestic law). They are negotiated with more minutia and thus are often more precise, including as regards definitions. Furthermore, treaties usually require a specific process and may put conditions on a State's ability to "opt out" or withdraw from them, which provides legal stability. Finally, they are often accompanied by some enforcement mechanism. Multilateral negotiations even have benefits irrespective of the quality of the outcome: trust, confidence-building, transparency, mutual understanding of positions, and ownership of the outcome.

Therefore, as argued elsewhere in this issue of the *Review*, "despite the well-established trend of proliferation of soft-law and other non-binding IHL instruments, treaties should not be discarded as a 'thing of the past'".⁸ Actually, a new, or amended, legally binding instrument on weapons has been adopted every five and a half years on average over the last four decades. The success story of the most recent one, the Treaty on the Prohibition of Nuclear Weapons, which entered into force in 2021 and has to date been ratified by sixty-eight States, shows that treaty-making is possible even when circumstances are far from conducive. In some cases, it is indeed the only effective pathway for IHL development.

⁸ See the article by Cordula Droegge and Eirini Giorgou in this issue of the *Review*.

However, the continued relevance, and at times indispensable role, of treaties does not mean that States' refusal to engage in treaty-making can halt IHL development in the broad sense of the term. While States will continue to play a crucial role in the "making and shaping" of IHL, the divide between treaty-making, as a traditionally State-dominated domain, and soft law, which often features strong engagement of actors other than States, appears to be closing. Treaties and soft law both have their place and are valuable instruments for the development of IHL, with different benefits and shortcomings. The choice of one versus the other will depend on a number of factors, including the urgency of addressing the particular humanitarian concern, the configuration of States' positions and their dynamics, the subject matter and history of relevant IHL development, and the actual or perceived gaps in the existing legal framework.

Based on all these criteria, the choice to work towards a political declaration on explosive weapons in populated areas over recent years seems to have been the correct one. However, the existence of a political declaration does not preclude future developments of IHL with respect to the use of explosive weapons in populated areas. At this stage, the ICRC is of the view that an approach based on preventive and mitigation measures aimed at giving effect to an avoidance policy would significantly help to address the humanitarian and legal concerns posed by the use of heavy explosive weapons in populated areas. Should such an approach prove insufficient, or should States not take the requisite measures to implement it, treaty-making should remain an option.

The view of the past in international humanitarian law (1860–2020)

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Abstract

This essay explores how the drafters of international humanitarian law (IHL) incorporated the past into their work between 1860 and 2020, and how they approached time, memory and history as indicators for this view of the past. Its sources consist of the complete series of general conventional and customary IHL instruments as well as the leading commentaries on them. For the IHL view of time, the impact of legal principles on the perception of time is scrutinized. Balancing nonretroactivity against customary international law and the humanity principle broadens the temporal scope towards the past, while balancing legal forgetting against imprescriptibility and State succession broadens it towards the future. For the IHL view of memory, dead persons and cultural heritage are seen as crucial vectors. Attention to the fate of the dead has been a constant hallmark of

* I am very grateful to Bruno Demeyere for providing encouragement and facilitating sources; to Daniel Palmieri, Meera Nayak, Ashley Stanley-Ryan and Jillian Rafferty for answering questions related to this research; to the two anonymous reviewers for their insightful comments; and to the copy editor, Kieran Macdonald.

IHL, while care for cultural heritage has an even longer pedigree. For the IHL view of history, the essay highlights that the International Committee of the Red Cross has consistently advocated State duties to the war dead and has organized an archival infrastructure to satisfy the need—later converted into a right—of families and society to search for the historical truth about them.

Furthermore, the responses of IHL drafters to five major historical challenges are examined. First, while in the realm of war crimes impunity prevailed for most of history, after World War II a system of war crimes trials was mounted, culminating in the International Criminal Court. Second, soul-searching about the atrocities of World War II, including the Holocaust, helped create Geneva Convention IV of 1949, which protects civilians in wartime. Third, the human rights idea was not fully embraced by IHL treaty drafters until 1968. Fourth, the IHL approach to civil wars was slow and incomplete, but its appearance in 1949 and coming of age in 1977 were breakthroughs nevertheless. Fifth, colonial conflicts were not recognized as international wars in 1949, when this could have had considerable impact, but only in 1977, when decolonization was largely over. In all cases, the responses to these historical challenges came after long delays. Clearly, the IHL view of the past has to be assessed on a transgenerational scale.

Keywords: amnesty, archives, civil war, colonialism, cultural heritage, customary international law, dead persons, history, Holocaust, human rights, IHL prehistory, imprescriptibility, impunity, intertemporal law, Martens Clause, memory, nonretroactivity, right to the truth, State succession, time.

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Even amidst fierce flames the Golden Lotus can be planted.

Wu Cheng'en, *The Journey to the West*, 1592 CE

Introduction

In October 1870, during the Franco-Prussian War, French Republican statesman and historian Adolphe Thiers embarked on a diplomatic tour of European capitals to seek military allies. Barely one month earlier, the Second French Empire had been defeated in the Battle of Sedan. In Vienna, Thiers met the world-famous German historian Leopold von Ranke and asked him: “Who are you actually fighting against?” Ranke replied: “Against Louis XIV”, bringing to mind the multiple wars unleashed by the French king against the German lands two centuries previously.¹ Memories of past wars linger on. They constitute a major factor to reckon with for anyone engaged in conflict resolution.

1 Curt von Tresckow, *Geschichte des deutsch-französischen Krieges 1870 und 1871*, Vol. 1, Leuckart, Leipzig, 1871, p. 181. The anecdote can also be found in A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with*

For centuries, one of the most vexing challenges of humanity had been to limit the violence generated in theatres of war by alleviating the suffering of victims and forging acceptable rules for warring parties with diametrically opposing interests. International humanitarian law (IHL) was one solution to this conundrum. The idea of IHL germinated slowly in the early modern period, but in the formative years between roughly 1860 and 1910 the idea of protecting the victims of conflict (known as “Geneva law”) was gradually separated from the regulation of the means and methods of war (known as “Hague law”).² This process was foremost the work of States, with their regulatory system of conferences and conventions, but often, dedicated individuals and non-State actors involved in the “peace through law” movement played prominent roles in it. The development of IHL was not inevitable, however, and it was often the unintended consequence of opposing State interests that neutralized each other. Remarkably, the term IHL itself did not originate until 1953,³ which in itself is a sign that peace brokers did not necessarily see themselves as operating under a monolithic IHL flag, and not necessarily for altruistic IHL purposes on top of their State’s interests (even if they often borrowed from IHL language to advance their point).

By and large, IHL history before the First Geneva Convention of 1864 is a black (or at least grey) hole. Pre-1864 history is replete with humanitarian initiatives, but many are not well known.⁴ Even leaving aside those initiatives that did not focus on mitigating warfare – the slavery abolition movement, for example – the history of pre-1864 humanitarianism is often neglected apart from some occasional philosophical musings about the bellicose nature of human beings or the ritual nod to the 1648 Peace of Westphalia. The history of IHL is cut into two, as it were: before and after Henry Dunant, the inspirator of the First Geneva Convention. Pre-1864 humanitarianism does not play any substantial role in most of today’s IHL works. Even commentators writing around 1870, such as Gustave Moynier and Carl Lueder, when referring to remoter times, preferred to emphasize the great strides made since 1864. Therefore, although it takes the long view, this study may be biased in that it prioritizes post-1864 humanitarian

Commentaries, Cambridge University Press, Cambridge, 1909, p. xiii. The full story is in Ranke’s *Tagebücher*.

- 2 See also Wylie Neville, “Muddied Waters: The Influence of the First Hague Conference on the Evolution of the Geneva Conventions of 1864 and 1906”, in Maartje Abbenhuis, Christopher Barber and Annalise Higgins (eds), *War, Peace and International Order? The Legacies of the Hague Conferences of 1899 and 1907*, Routledge, London, 2018, for a good overview of the Geneva–Hague rivalry.
- 3 A first mention was found in International Committee of the Red Cross (ICRC), *Report on the Work of the International Committee of the Red Cross (January 1 to December 31, 1952)*, Geneva, 1953, p. 67.
- 4 For sketches, see Michael Barnett, *Empire of Humanity: A History of Humanitarianism*, Cornell University Press, Ithaca, NY, and London, 2011, pp. 47–94; David Kennedy, *Of War and Law*, Princeton University Press, Princeton, NJ, and Oxford, 2006, pp. 46–98; Antoon De Baets, “Does Inhumanity Breed Humanity? Investigation of a Paradox”, *History and Theory*, Vol. 51, No. 3, 2012, pp. 456–458; Randall Lesaffer, “Peace through Law: The Hague Peace Conferences and the Rise of the *Ius Contra Bellum*”, in M. Abbenhuis, C. Barber and A. Higgins (eds), above note 2.

achievements. Under any long-term view of IHL, however, the adoption of the First Geneva Convention in 1864 constitutes a landmark moment.⁵

At the time when Thiers met Ranke, in 1870, developments in the IHL field showed the rhythm of a dancing procession. After the initial successes of 1864, the Franco-Prussian War cast a shadow over IHL proposals made at a conference in Brussels in 1874.⁶ Although these proposals were sensible, the Brussels conference failed. It would be another twenty-five years before the proposals were eventually integrated into new regulations at The Hague in 1899. The Hague Regulations – an integral part of the Hague Conventions – endure until today,⁷ making Brussels, in retrospect, probably the most successful failed conference ever. An impressive series of IHL customs and conventions has been accumulated since 1899, and many perspicacious commentaries have been published on all their aspects. If, therefore, we understand the history of IHL either as the development of IHL-related events or as the development of IHL-related concepts, we can say that many of its post-1864 aspects are well studied.

One intriguing exception, though, is the IHL view of the past. How did the IHL treaty drafters incorporate the dimension of the past into their prescriptions? The dimension of the past can be broken down into three indicators: time, memory and history. By analyzing these indicators, we can find out how the IHL treaty drafters perceived time (the IHL view of time), memory (the IHL view of memory) and history (the IHL view of history); discern patterns, if any, in the process; and then collate the results to gain insights into how the IHL treaty drafters integrated the dimension of the past into their works. The present article is an attempt to do this.

The core sources for this analysis consist of the complete series of *general* conventional and customary IHL instruments: the Geneva Conventions of 1864, 1906, 1929 and 1949, and the Additional Protocols of 1977 and 2005; the Hague Conventions and Regulations of 1899 and 1907; the 1998 Rome Statute of the International Criminal Court (ICC); and the 2005 International Committee of the Red Cross (ICRC) Customary Law Study identifying 161 rules of customary IHL.⁸ The leading commentaries on all these conventional and customary

5 For interesting discussions of IHL myths of origin, see Adam Roberts, “Foundational Myths in the Laws of War: The 1863 Lieber Code and the 1864 *Geneva Convention*”, *Melbourne Journal of International Law*, Vol. 20, No. 1, 2019; Randall Lesaffer, “The Temple of Peace: The Hague Peace Conferences, Andrew Carnegie and the Building of the Peace Palace (1898–1913)”, *Mededelingen van de Koninklijke Nederlandse Vereniging voor Internationaal Recht: Preadviezen*, Vol. 140, 2013. For an alternative view – locating the start of IHL in the 1970s, which in the present author’s view is profoundly ahistorical – see Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015.

6 Carl Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, Édouard Besold, Erlangen, 1876, p. 226; A. P. Higgins, above note 1, pp. 257–258.

7 Betsy Baker, “Hague Peace Conferences (1899 and 1907)”, *Max Planck Encyclopedia of Public International Law*, November 2009, para. 30.

8 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: www.icrc.org/customary-ihl (all internet references were accessed in March 2022). Recording custom, as in the ICRC Customary Law Study, has undeniable parallels with

instruments, written at the time of their adoption or later, served as supplementary sources.⁹

The IHL view of time

Time is the cornerstone of memory and history. In the IHL view of time, its scope can be contracted and expanded according to the diverging implications of fundamental legal principles, especially those applicable in criminal law.

The nonretroactivity principle and custom

The most important time constraint on IHL is a principle older than IHL: nonretroactivity. First mentioned in the 1789 Constitution of the United States¹⁰ and the 1789 Déclaration des Droits de l'Homme et du Citoyen,¹¹ it was conceptualized by Anselm von Feuerbach in 1801. Feuerbach coined the phrase under which the principle became famous: *nullum crimen, nulla poena sine praevia lege* (no crime, no penalty without previous law).¹² Nonretroactivity is a principle of general law, but from Feuerbach's formula we can infer that its most important application is in criminal law. That criminal aspect is probably the reason why we do not see any prominent appearance of the principle in IHL until 1945, when the punishment of war criminals was tackled in earnest with the establishment of the International Military Tribunal at Nuremberg. Indeed, this Tribunal was quickly accused of administering retroactive justice in trying the Nazi war criminals on the basis not only of existing crimes (war crimes) but also of new crimes (crimes against peace and crimes against humanity).¹³ The Tribunal's response to this accusation was double: in its charter it stated that it would punish crimes against humanity "whether or not [committed] in violation of the domestic law of the country where perpetrated", and in its judgment it argued that its charter was "the expression of international law existing at the time of its creation" and that "individuals ha[d] international duties which

recording oral tradition. See Jan Vansina, *Oral Tradition as History*, James Currey, London, 1985, pp. 29–31, 56–67.

9 For an overview of the sources, see Appendix 1.

10 Constitution of the United States, 1789, Art. 1, Section 9(3).

11 Déclaration des Droits de l'Homme et du Citoyen, 1789, Art. 8.

12 Aly Mokhtar, "Nullum Crimen, Nulla Poena sine Lege: Aspects and Prospects", *Statute Law Review*, Vol. 26, No. 1, 2005, p. 46. See also European Court of Human Rights, *Guide on Article 7 of the European Convention on Human Rights*, Strasbourg, 2019.

13 See in particular the Motion Adopted by All Defense Council (19 November 1945), *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, Vol. 1, Secretariat of the Tribunal, Nuremberg, 1947, pp. 168–170. Accusations of retroactivity were also levelled against trying Kaiser Wilhelm in 1919 (the trial never took place). See William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2020, p. 3; Kirsten Sellars, "Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference", in Morten Bergsmo, Cheah Wui Ling and Yi Ping (eds), *Historical Origins of International Criminal Law*, Vol. 1, Torkel Opsahl, Brussels, 2014, p. 547.

transcend[ed] the national obligations of obedience imposed by the individual state”.¹⁴ As to war crimes committed by the Nazi war criminals in particular, it further stipulated that “[t]he evidence relating to War Crimes has been overwhelming, in its volume and its detail. ... The truth remains that War Crimes were committed on a vast scale, never before seen in the history of war.”¹⁵ In other words, the Tribunal argued that by 1939 – the year in which its jurisdiction *ratione temporis* began¹⁶ – the 1907 Hague Conventions and the 1929 Geneva Conventions had been recognized by all civilized nations,¹⁷ meaning that they had acquired the status of customary international law applicable to all States, whether parties to the Hague and Geneva Conventions or not.¹⁸ The Tribunal thus argued that the Nazi crimes had breached already existing customary international law and that, therefore, it did not violate the nonretroactivity principle in dealing with the Nazi crimes.¹⁹ In other words, it appealed to “international custom”, one of the sources of international law recognized by the Permanent Court of International Justice (the world court from 1921 to 1946) and its successor, the International Court of Justice (ICJ).²⁰

14 *Trial of the Major War Criminals*, above note 13, pp. 218, 223. For a discussion, see *Question of the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity: Study Submitted by the Secretary-General*, UN Doc. E/CN.4/906, 15 February 1966, paras 122–126, stating in para. 125: “It is not very difficult to imagine how world public opinion would have reacted if after the Second World War, on the basis of the principle *nulla poena sine lege*, the serious crimes committed in connexion with the war or while it was in progress had been allowed to go unpunished.”

15 *Trial of the Major War Criminals*, above note 13, p. 226.

16 *Ibid.*, p. 254.

17 *Ibid.*, pp. 253–254. The Tribunal referred specifically to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (1907 HC IV), Arts 46, 50, 52, 56; and to the Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929 (1929 GC II), Arts 2–4, 46, 51.

18 Hans Kelsen, “The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals”, *Judge Advocate Journal*, Vol. 2, No. 3, 1945, p. 10; Hans Kelsen “Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?” *International Law Quarterly*, Vol. 1 No. 2, 1947, pp. 159–160; Karl Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 82; ICRC Customary Law Study, above note 8, Vol. 1, pp. xxxvii–xxxviii, 1, 572, Vol. 2, p. 3872.

19 Most legal scholars agree with this conclusion as far as war crimes are concerned. In applying a principle of individual criminal responsibility, however, the Nuremberg Tribunal had in effect created new law and deviated, in this respect, from the nonretroactivity principle. As Hans Kelsen and Gustav Radbruch, among others, have argued, the nonretroactivity principle is not absolute: it has to be balanced against the higher principle of justice, namely that morally abject acts have to be punished even when under domestic law they had not been punishable at the material time.

20 Statute for the Permanent Court of International Justice, Provided for by Article 14 of the Covenant of the League of Nations, 1921, Art. 38(2); Statute of the International Court of Justice, San Francisco, 26 June 1945, Art. 38(1)(b). For the principles of identifying custom, see UNGA Res. 73/203, “Identification of Customary International Law”, 11 January 2019, commenting, in Conclusion 8.2, on the duration of custom: “Provided that the practice is general, no particular duration is required.” However, see also International Law Commission, *Draft Conclusions on Identification of Customary International Law, with Commentaries*, UN Doc. A/73/10, 2018, Conclusion 8, comment 9 and fn. 19, observing that there is no such thing as “instant custom.” The two-way traffic between custom and convention should be noted: customary law can become conventional law and vice versa. Also, customary international law should not be confused with customary domestic law based on traditional values: their relationship is complicated. See United Nations (UN) Human Rights Council, *Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN Doc. A/HRC/22/71, 6 December 2012, para. 36.

The Tribunal's argument became known as the "Nuremberg clause". It was reaffirmed by the United Nations (UN) General Assembly in 1946²¹ and repeated in the Universal Declaration of Human Rights in 1948.²² In 1950, the International Law Commission reformulated the argument as a principle: "The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law."²³ The nonretroactivity and Nuremberg principles would later be integrated together into the 1966 International Covenant on Civil and Political Rights (with a non-derogable status),²⁴ the 1977 Additional Protocols,²⁵ and the 1998 Rome Statute of the ICC (Rome Statute).²⁶

By definition, the nonretroactivity principle restricts the scope of time.²⁷ For the Nuremberg Tribunal, the jurisdiction *ratione temporis* stretched back to 1939 (six years before its establishment); for the ICC, the jurisdiction is prospective, not retrospective.²⁸ However, the reference to customary international law endowed the time-constraining nonretroactivity principle with unexpected breadth. The applicability of the Hague and Geneva Conventions as customary international law in 1939 meant a *de facto* temporal scope of at least

21 UNGA Res. 95(I), "Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal", 11 December 1946.

22 Universal Declaration of Human Rights, UNGA Res. 217(III) A, 10 December 1948, Art. 11(2). See also Johannes Morsink, *The Universal Declaration of Human Rights: Origin, Drafting and Intent*, University of Pennsylvania Press, Philadelphia, PA, 1999, pp. 52–58.

23 International Law Commission, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries", *Yearbook of the International Law Commission*, Vol. 2, 1950, Principle 2, pp. 374–375.

24 International Covenant on Civil and Political Rights, UNGA Res. 2200 A (XXI), 16 December 1966, Arts 15, 4(2).

25 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 75; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 6. See also Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 2013, pp. 746–747. The 1949 Geneva Conventions III and IV also incorporated nonretroactivity into their sections on penal sanctions: see Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (1949 GC III), Art. 99; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (1949 GC IV), Arts 65, 67.

26 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (Rome Statute), Arts 11, 22–24. Article 11 is the *ratione temporis* provision of the ICC, an application of the nonretroactivity principle.

27 See, more generally, Harriet Moynihan, "Regulating the Past: The European Court of Human Rights' Approach to the Investigation of Historical Deaths under Article 2 ECHR", *British Yearbook of International Law*, Oxford University Press, Oxford, 2017; William Schabas, "Time, Justice, and Human Rights: Statutory Limitation on the Right to Truth?", in Nanci Adler (ed.), *Understanding the Age of Transitional Justice: Crimes, Courts, Commissions, and Chronicling*, Rutgers University Press, New Brunswick, NJ, 2018, pp. 37–55.

28 In addition, a State Party may declare, for a period of seven years after the entry into force of the Rome Statute, that it does not accept ICC jurisdiction for war crimes. See Rome Statute, above note 26, Art. 124.

four decades (namely from 1899 to 1939).²⁹ In this context, it is also noteworthy that after 1949, most provisions of the Geneva Conventions have gradually been considered as customary IHL themselves.³⁰ What custom does is shift the critical starting date of temporal jurisdiction backwards.

The humanity principle and the Martens Clause

Another principle that helped expand the temporal scope of IHL towards the past was the principle of humanity. This principle was formulated most famously in the so-called Martens Clause, which in its original wording in the preamble of Hague Convention II on the Laws and Customs of War on Land of 1899 read:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.³¹

This residual clause – originally not an expression of lofty ideals but the solution to a pressing problem³² – regulated all the problems that Hague Convention II did not

29 Forsythe’s thesis that the Nuremberg trials had little effect on IHL development is untenable. See David Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, p. 243.

30 Among many sources, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (2016 Commentary on GC I), pp. 12, 17; ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020 (2020 Commentary on GC III), pp. 2–3.

31 Convention (II) with respect to the Laws and Customs of War on Land, The Hague, 29 July 1899 (1899 HC II), preamble recital 9. See also 2016 Commentary on GC I, above note 30, pp. 1186–1187. A prefiguration of the Martens Clause can be found in the preamble of the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 29 November–11 December 1868: “[A]n International Military Commission assembled at St. Petersburg ... having by common agreement fixed the technical limits at which the necessities of war ought to yield to the requirements of humanity, ...”. The one-page declaration also mentions “the laws of humanity” twice. See A. P. Higgins, above note 1, pp. 5–7, for text and comment. See also Gustave Moynier, *Étude sur la convention de Genève pour l’amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Librairie Joël Cherbuliez, Paris, 1870, pp. 319, 333; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva 1987, p. 400; ICRC Customary Law Study, above note 8, Vol. 1, p. 241. For a still earlier similar formulation, see Tratado de Armisticio between Spain and Colombia, 1820, Art. 14, as cited in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, pp. 180, 317 (“las prácticas más liberales, sabias y humanas de las naciones civilizadas”).

32 The clause was originally formulated to address the controversial right to massive armed popular resistance in (mostly small) countries that were invaded and occupied, and the status and treatment of civilians captured during such resistance. Actually, the Martens Clause should be renamed the Lambermont Clause, after its original author, the Belgian diplomat Auguste Lambermont. See Thomas Graditzky, “Bref retour sur l’origine de la clause de Martens: Une contribution belge méconnue (ou: ‘Ceci n’est pas la clause de Martens’)”, in Julia Grignon (ed.), *Hommage à Jean Pictet*, Schulthess and Yvon Blais, Zürich and Cowansville, 2016.

foresee. In metaphysical language reminiscent of natural law, it attempted to bridge morality and law by promoting the triad of custom (“usages”), humanity and conscience as a compass for all conduct in armed conflict not explicitly covered in the Convention. The clause was repeated with minor variations in scores of IHL instruments³³ and recognized as part of customary international law by the ICJ.³⁴ Vividly invoking custom, the Martens Clause became one itself.

Reasoning by analogy and the principle of continuing breaches

Other tools with the potential to expand the temporal scope backwards – the method of analogy and the concept of continuing breaches – were not taken up in IHL. The Rome Statute stipulates that definitions of crimes must be strictly construed and prohibits extending them by analogy.³⁵ This prohibition, however, refers to analogy as a tool of law-making, not as a tool of interpretation. As tools of law-making – for example, by creatively widening the list of war crimes – analogies are detrimental to fair trial rights. As tools of interpretation, however, analogies between cases often endow investigations with a historical dimension that provides relevant context. Obviously, when analogies are invoked, the presumed precedents should be selected and used with methodological delicacy.³⁶

The notion of continuing breaches – breaches of obligations enduring over time – was first introduced by Heinrich Triepel in 1899. A continuing breach is a breach which started before the critical moment that temporal jurisdiction comes into effect but continues after that critical moment. Phenomena such as enforced disappearances, confiscation of property, sexual slavery, conscription of children, forcible population transfer, unlawful occupation, and maintenance of colonial domination by force extend over time and are seen as continuing breaches.³⁷ This frequently discussed notion is underexplored in IHL, and it was not taken up in

33 1907 HC IV, above note 17, preamble recital 8; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (1949 GC I), Art. 63; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (1949 GC II), Art. 62; 1949 GC III, above note 25, Art. 142; 1949 GC IV, above note 25, Art. 158; AP I, above note 25, Art. 1(2); AP II, above note 25, preamble recital 4. See also Rome Statute, above note 26, preamble recital 2.

34 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, paras 78–79, 84, 87. See also Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 625; 2016 Commentary on GC I, above note 30, p. 1186; K. Dörmann, above note 18, p. 168. The Statutes of the Permanent Court of International Justice and the ICJ echo the Martens Clause because in Article 38 both state that “the general principles of law recognized by civilized nations” are sources of international law.

35 Rome Statute, above note 26, Art. 22(2). See also Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl, Brussels, 2017, pp. 255–256.

36 M. Klamberg, above note 35, p. 256; W. Schabas, above note 13, pp. 215–216. See also Cass Sunstein, *Legal Reasoning and Political Conflict*, Oxford University Press, Oxford, 2014, pp. 62–100 (“Analogical Reasoning”).

37 See also European Court of Human Rights, *Rohlena v. The Czech Republic*, Appl. No. 59552/08, Judgment (Grand Chamber), 27 January 2015, paras 28–37, 57–64; Mathias Neuner, “The Notion of Continuous or Continuing Crimes in International Criminal Law”, in Morten Bergsmo, Wolfgang Kaleck and Kyaw Yin

the Rome Statute, although it has been used by the UN Human Rights Committee³⁸ and the UN Working Group on Enforced or Involuntary Disappearances,³⁹ among others, and proposed in the 1991 Draft Articles on Responsibility of States for Internationally Wrongful Acts⁴⁰ and the 2005 UN Reparation Principles.⁴¹ It could also become part of a future Convention on Responsibility of States for Internationally Wrongful Acts.⁴²

Imprescriptibility versus legal forgetting

In some circumstances, the temporal scope can also be expanded towards the future. In law, the finality principle reigns: *interest rei publicae ut finis litium sit* (it is in the public interest that lawsuits should end).⁴³ This principle imposes time limits (statutes of limitations) on the prosecution of crimes. After World War II it gradually dawned, however, that atrocity crimes (an umbrella term for genocide, crimes against humanity and war crimes) should be exempt from the principle – not only because these crimes complicated and thus extended the duration of investigations, but also because they constituted such an affront to humanity that taking responsibility for them was inescapable, however long after the fact.⁴⁴ Nevertheless, the history of the idea of imprescriptibility – the waiving of time bars – is long and twisted. This is partly due to a curious legal reasoning: the logic is that where international criminal law does *not* mention any time bars for prosecution, imprescriptibility applies; only explicit mention of time bars is interpreted as a rejection of imprescriptibility.⁴⁵ This oddity may partly explain why the Geneva Conventions of 1949 remained silent about the lifting of time

Hlaing (eds), *Colonial Wrongs and Access to International Law*, Torkel Opsahl, Brussels, 2020. See also M. Klamberg, above note 35, pp. 167, 173, 259; W. Schabas, above note 13, pp. 62–63.

- 38 Antoon De Baets, “The United Nations Human Rights Committee’s View of the Past”, in Uladzislau Belavusau and Aleksandra Gliszczyńska-Grabias (eds), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge, 2017, pp. 33, 46.
- 39 “General Comment on Enforced Disappearance as a Continuous Crime”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011.
- 40 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 2001, Arts 14–15, pp. 59–64; UNGA Res. 56/83, “Responsibility of States for Internationally Wrongful Acts”, 28 January 2002.
- 41 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UNGA Res. 60/147, 16 December 2005, Principle 22(a).
- 42 See UNGA Res. 74/180, “Responsibility of States for Internationally Wrongful Acts”, 27 December 2019, para. 9.
- 43 Rosalyn Higgins, “Time and the Law: International Perspectives on an Old Problem”, *International and Comparative Law Quarterly*, Vol. 46, No. 3, 1997, pp. 511–515.
- 44 *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/HRC/30/42, 7 September 2015, para. 48.
- 45 See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, UNGA Res. 2391 (XXIII), 26 November 1968 (Convention on Non-Applicability), preamble recital 3: “Noting that none of the solemn declarations, instruments or conventions relating to the prosecution and punishment of war crimes and crimes against humanity made provision for a period of limitation.” The UN Secretary-General had defended this principle in 1966: see *Question of the Non-Applicability*, above note 14, paras 121–160, especially paras 129–140 (mentioning the silence in the Geneva Conventions of 1949 in para. 138). See also Natan Lerner, “The Convention on the

bars for war crimes, although by then it had become quite clear that the search for and prosecution of World War II criminals would continue for many years:⁴⁶ the silence about time bars in the Geneva Conventions was later interpreted as support for the imprescriptibility of war crimes. Nevertheless, the UN convention that explicitly blocked the pending prescription, after twenty-five years, of World War II crimes by declaring atrocity crimes imprescriptible in 1968 had less effect than expected.⁴⁷ In the end, resistance to the idea slowly waned and the imprescriptibility provision in the Rome Statute was adopted in 1998 without major problems.⁴⁸ The provision fits the ICC philosophy of working “for the sake of present and future generations” well.⁴⁹ Most legal scholars have since accepted imprescriptibility as a rule of customary international law.⁵⁰

In tandem with the imprescriptibility discussion came the troubling problem of forgetting the past under international law: under which conditions could past crimes be legally forgotten through amnesties? It would be decades before this tough question was tentatively regulated in Additional Protocol II (AP II) of 1977, which requires authorities “to grant the broadest possible amnesty to persons who have participated in the armed conflict”.⁵¹ It was logical to think that if atrocity crimes violated a *jus cogens* norm (a non-derogable and preemptory norm)—namely the humanity principle—the prosecution of these crimes was a *jus cogens* norm as well.⁵² The practice, however, was different: the urge to reconcile and forget was often more powerful than the urge to prosecute, especially in situations where massive violence had left the hands of

Non-Applicability of Statutory Limitations to War Crimes”, *Israel Law Review*, Vol. 4, No. 4, 1969, pp. 520–522.

- 46 See also Christine Van den Wyngaert and John Dugard, “Non-Applicability of Statute[s] of Limitations”, in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1, Oxford University Press, Oxford, 2002, p. 877; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 981.
- 47 Convention on Non-Applicability, above note 45. The Convention was approved by fifty-eight votes against seven, with thirty-seven abstentions and twenty-five absentees. See also C. Van den Wyngaert, above note 46, pp. 875, 887. Another reason for the relative lack of success of the Convention lay in its Article 1, which stipulated that no time bars should apply for gross crimes “irrespective of the date of their commission”. Many thought that this violated the nonretroactivity principle. A final reason was the special mention of apartheid as a crime against humanity.
- 48 “List of Customary Rules of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005, Rule 160; C. Van den Wyngaert, above note 46, p. 887; M. Klamberg, above note 35, p. 311.
- 49 Rome Statute, above note 26, preamble recital 9.
- 50 *Ibid.*, Art. 29. See also ICRC Customary Law Study, above note 8, Vol. 1, p. 616.
- 51 AP II, above note 25, Art. 6. The original proposal came from the United States; the article was adopted by consensus. In explaining its vote, the Soviet Union stated, however, that the provision could not be construed so as to enable perpetrators of atrocity crimes to evade punishment. See ICRC Customary Law Study, above note 8, Vol. 1, p. 612.
- 52 “List of Customary Rules”, above note 48, Rule 159. See also AP I, above note 25, Art. 75. For the definition of *jus cogens*, see Vienna Convention on the Law of Treaties (VCLT), 23 May 1969, Art. 53 (“a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted”). For a list of extant or emerging *jus cogens* obligations, see “Jus Cogens”, in Francesco Forrest Martin *et al.*, *International Human Rights and Humanitarian Law: Treaties, Cases and Analysis*, Cambridge University Press, Cambridge, 2006, pp. 34–36; for the notion of derivative *jus cogens* obligations (having *jus cogens* status because of their necessity in ensuring the protection of other *jus cogens* norms), see *ibid.*, pp. 36–39.

many dirty.⁵³ Behind this tension between principle and practice lay the deeper ambition to balance two basic values: peace and justice. After armed conflicts, the need for peace required broad amnesties but the need for justice made exemptions for atrocity crimes imperative. The Rome Statute, which is silent about amnesties,⁵⁴ did not tackle the issue, and this debate is still not settled. Amid ever stronger campaigns to combat impunity, legal forgetting remains a rock. The equilibrium is fragile.

State succession

Another mechanism for enlarging the temporal scope is State succession. In the law of treaties, new States are not bound by treaties of their predecessors because they experience a fundamental change in circumstances (a doctrine known as *rebus sic stantibus*).⁵⁵ There is, however, near-consensus that when new States are established, the rule of continuity with the predecessor State still applies with respect to one particular type of obligations: the humanitarian and human rights of citizens.⁵⁶ The UN Human Rights Committee has explained the fundamental reason for this continuity:

[T]he rights enshrined in the [International Covenant on Civil and Political Rights] belong to the people living in the territory of the State party. ... [O]nce the people are accorded the protection of the rights under the Covenant, such protection devolves with territory and continues to belong to them, notwithstanding change in government of the State party, including dismemberment in more than one State or State succession.⁵⁷

Like imprescriptibility, State succession stretches the temporal scope of IHL provisions into the future.

Looking at the entire panorama, then, we can conclude that the applicability of IHL is extended towards the past by means of the customary

53 Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties*, Geneva, 2009, p. 43; International Law Commission, *Third Report on Crimes against Humanity by Sean D. Murphy, Special Rapporteur*, UN Doc. A/CN.4/704, 23 January 2017, paras 285–297; Pierre Hazan, *Amnesty: A Blessing in Disguise? Making Good Use of an Important Mechanism in Peace Processes*, Centre for Humanitarian Dialogue, Geneva, 2020, pp. 8–10.

54 Article 16 of the Rome Statute is a provision to defer investigation or prosecution; Article 53(2) is a provision not to initiate prosecution when it is “not in the interests of justice”.

55 VCLT, above note 52, Art. 62.

56 *Ibid.*, Arts 38, 43, 73; Vienna Convention on Succession of States in respect of Treaties, 23 August 1978, preamble recital 6, Art. 5; Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press, Oxford, 2011, pp. 1648–1649; Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, Oxford University Press, Oxford, 2013, pp. 908–909; Antônio Augusto Cançado Trindade, “Basic Considerations of Humanity in Relation to State Succession”, in *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff, Leiden, 2013; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 164–166.

57 Human Rights Committee, “General Comment No. 26 (61) on Issues Relating to the Continuity of Obligations to the International Covenant on Civil and Political Rights”, UN Doc. CCPR/C/21/Rev.1/Add.8/Rev.1, 8 December 1997, para. 4.

strand of nonretroactivity and the humanity principle as embodied in the Martens Clause. It is also extended towards the future by means of the State succession principle in IHL matters and the imprescriptibility principle in criminal matters, although a countertrend of legal forgetting under the guise of amnesties curbs this expansive tendency. On balance, IHL's time regime is an ingenious mixture of immediacy and *longue durée*. Its broad horizons constitute the background for discussing the IHL views of memory and history.

The IHL view of memory

The painful absences created by death and destruction in war trigger the memories of survivors. Indeed, those fallen in war are located at the intersection of present and past: persons who have died continue to exist substantially (as remains), genetically (as offspring), materially (as legacy) and biographically (as life stories).⁵⁸ The destruction of their tangible and intangible creations – their heritage – reminds the living of their ancestors. In other words, dead persons and cultural heritage constitute important portals to memory and therefore inform the IHL view of memory.

A recent ICC policy paper clarified this intense connection between dead persons and cultural heritage as vehicles of memory. Many memorials for the dead are historical monuments in themselves, and many rituals for the dead are part of the intangible heritage of a community. The paper also explained that the impossibility of accessing sacred sites, performing traditional burial rituals or celebrating traditional holidays, and the elimination of persons who transmit culture (leaders, the elderly, women) or receive it (children), both undermine the mechanisms for coping with severe trauma and often constitute evidence of atrocity crimes.⁵⁹

Dead persons and gravesites as portals to memory

The Geneva Convention of 1864 did not pay attention to the war dead, but this would soon change. Deeply affected by the battlefield scenes of the 1866 Austro-Prussian war, the German physician Julius Naundorff wrote about “the hyenas of the battlefield” who pillaged dead bodies.⁶⁰ In 1867–68, conferences in Paris and Geneva studying the gaps in the 1864 Convention expressed wishes (*voeux*) to protect the dead against desecration and pillage, to bury them in conformity with sanitary prescriptions, to identify them and to notify other countries by

58 See Antoon De Baets, “The Posthumous Dignity of Dead Persons”, in Roberto Parra and Douglas Ubelaker (eds), *Anthropology of Violent Death: Theoretical Foundations for Forensic Humanitarian Action*, Wiley, Hoboken, NJ, 2022 (forthcoming), Chap. 1.

59 ICC, “Policy on Cultural Heritage”, The Hague, 2021, paras 70–74, 79, 87.

60 G. Moynier, above note 31, p. 273. See also C. Lueder, above note 6, pp. 267, 333.

exchanging death lists.⁶¹ This early sensitivity to the dead was dominated by fear: fear of burying the living and fear that unattended corpses would endanger public health.⁶²

The idea of codifying treatment of the war dead was taken up again in the Hague Conventions, which made compulsory some regulations about death certificates, last wills and burial of war prisoners.⁶³ The 1906 Geneva Convention translated the wishes of 1867–68, including the need to clarify the whereabouts of the dead, into binding provisions.⁶⁴ The duties flowing from these provisions were seen as duties of conduct, not of result.⁶⁵ The 1929 Conventions expanded upon them with a crucial new duty: the duty to search for the dead. At the same time, identification requirements and disposal practices were tightened and became duties to honourably bury the dead and to respect and mark their graves, including for exhumation purposes.⁶⁶ Thus, the notion of respect for the dead, itself stretching back into the mists of time, received solid codification in IHL in 1929.⁶⁷

After World War II, IHL prescriptions about the dead would multiply and become more systematic. The 2005 ICRC Customary Law Study summed up this post-war system elaborated in the 1949 Geneva Conventions and perfected in their 1977 Additional Protocols: search for and collection of the dead, protection and respectful treatment of the dead, return of the remains and personal effects of the dead upon request, respectful individual disposal of the dead, respect for and maintenance of graves, and accounting for the dead through their identification prior to and after disposal and through marking and accessing graves.⁶⁸ These prescriptions now form an uncontested part of customary IHL.

61 See also First International Conference of the Red Cross, *Vœux de la Conférence Internationale*, Paris, 1867, Art. 8; *Protocole de la Conférence internationale réunie à Genève en octobre 1868*, Fick, Geneva, 1868, pp. 18–19, 26–27. Discussion in G. Moynier, above note 31, pp. 271–285; C. Lueder, above note 6, pp. 269–273.

62 G. Moynier, above note 31, p. 279; C. Lueder, above note 6, pp. 269, 272; Paul des Gouttes, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les armées en campagne du 27 juillet 1929: Commentaire*, ICRC, Geneva, 1930, p. 33. ICRC forensic expert and present UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Morris Tidball-Binz has called the association of cadavers with epidemics a myth: see his “Managing the Dead in Catastrophes: Guiding Principles and Practical Recommendations for First Responders”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 426–427, 439–441.

63 1899 HC II, above note 31, Arts 14, 19; 1907 HC IV, above note 17, Arts 14, 19.

64 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906, Arts 3–4; see also Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, Arts 16–17. See further A. P. Higgins, above note 1, pp. 37, 382; Louis Renault, “La Conférence de revision de la Convention de Genève”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 148, 1906, pp. 234–235, 241–242.

65 See, for example, 2016 Commentary on GC I, above note 30, p. 572.

66 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929 (1929 GC I), Arts 3–4; 1929 GC II, above note 17, Arts 41, 76; 1949 GC IV, above note 25, Art. 16; AP I, above note 25, Arts 17, 19, 61. See also P. des Gouttes, above note 62, pp. 26–35.

67 Welmoet Wels, *Dead Body Management in Armed Conflict: Paradoxes in Trying to Do Justice to the Dead*, Jongbloed, The Hague and Leiden, 2016, pp. 5–6.

68 ICRC Customary Law Study, above note 8, Vol. 1, pp. 406–427, Vol. 2, 2655–2774 (Rules 112–117), based on 1949 GC I, above note 33, Arts 15–17; 1949 GC II, above note 33, Arts 18–21; 1949 GC III, above note

Mutilating dead bodies was seen as an offence from relatively early on. It was treated as a war crime at the US General Military Government Court in Dachau in 1947.⁶⁹ The idea that mutilating the war dead was a serious IHL breach which could be subsumed under the provision of “outrages upon personal dignity” prohibited under Article 3 common to the four 1949 Geneva Conventions matured slowly into treaty and custom. It was clearly expressed for the first time in the *Elements of Crimes* of the ICC in 2002.⁷⁰

The influence of World War II, and particularly the Holocaust, can be noticed in two aspects. Whereas in the 1929 Conventions cremation was a disposal option equivalent to burial, this changed completely under the influence of the discovery of the Nazi death camps, with their crematoria. Although still permitted, cremation had to meet stricter conditions in the 1949 Conventions because it was irreversible, prevented identification and effaced traces of crimes: it could be carried out only for imperative reasons of hygiene, for a wish expressed in a will or for religious motives, and the reason had to be stated on the death certificate.⁷¹ Similarly, mass disposal was rejected in 1949 unless absolutely unavoidable because it conflicted with the principle of respect for the dead and made identification, grave visits by families and exhumation for reasons of overriding public necessity (i.e., for public health, investigative, reburial or return purposes) exceedingly difficult.⁷² We can conclude that sustained attention to the dead has been a constant hallmark of IHL since at least 1929.

The principle of intertemporal law

It is unclear, however, how long IHL duties to the dead last. Searching for, identifying and protecting the war dead are open-ended tasks that continue to be performed in peacetime. Similarly, the maintenance of, and access to, gravesites may last quasi-indefinitely, and the duty to exhume and criminally investigate

25, Arts 120–121; 1949 GC IV, above note 25, Arts 129–131; AP I, above note 25, Arts 17, 32–34; AP II, above note 25, Art. 8; Rome Statute, above note 26, Art. 93.

69 “Case No. 82: Trial of Max Schmid—United States General Military Government Court at Dachau, Germany, 19th May, 1947”, in *Law Reports of Trials of War Criminals*, Vol. 13, United Nations War Crimes Commission, London, 1949, pp. 151–152. Not only is the Schmid trial briefly analyzed in this reference, but so are four similar cases of Japanese perpetrators.

70 Finalized draft text of the *Elements of Crimes*, adopted by the 23rd meeting of the Preparatory Commission for the International Criminal Court, New York, 30 June 2000, *Report of the Preparatory Commission for the International Criminal Court*, UN Doc. PCNICC/2000/INF/3/Add.2, Addendum, 6 July 2000, as adopted by the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, 3–10 September 2002, *Official Records*, UN Doc. ICC-ASP/1/3, 25 September 2002, and ICC-ASP/1/3/Corr.1, 31 October 2002 (*Elements of Crimes*), Arts 8(2)(b)(xxi), 8(2)(c)(iv), Element 1 (fn. 49 and 57 respectively). See also 2016 Commentary on GC I, above note 30, pp. 210, 227, 541.

71 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 178–179; 2016 Commentary on GC I, above note 30, pp. 583–584, 587, 589, 595–596.

72 J. Pictet, above note 71, p. 177; 2016 Commentary on GC I, above note 30, p. 587; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 286; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 370, 378. Sea burial is also discouraged: ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Cambridge University Press, Cambridge, 2017, pp. 643–644.

deaths or return remains may come up decades after an armed conflict has ended.⁷³

When the need arises to solve disputes about the exhumation of human remains, the removal of a war cemetery or the transfer of a war memorial, the question is which IHL norms must be followed: those in vigour at the time of the victim's interment, the cemetery's construction or the memorial's creation, or those at the time of the disputes. Anna Petrig has suggested invoking the principle of intertemporal law to solve this problem.⁷⁴ This principle was developed in 1928 by Swiss arbitrator (and later ICRC president) Max Huber at the Permanent Court of Arbitration. He wrote:

[A] juridical fact must be appreciated in the light of the law contemporary with it and not of the law in force at the time when a dispute in regard to it arises or falls to be settled. ... As regards the question of which different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.⁷⁵

Bearing in mind the nonretroactivity requirement, this means that the law contemporaneous with the facts must prevail. But what are the facts? Applied to our problem, the principle has to factor in that remains, gravesites or memorials are “facts” that have not ceased to exist but persist over time. Their “continuing manifestation” imposes the use of IHL as evolved at the time of the dispute.⁷⁶ We notice that whereas the idea of continuity is not applied to IHL breaches (see above), it is quietly introduced here through the intertemporal principle as applied to “persistent facts”.

Cultural heritage as a portal to memory

Sites of cultural heritage – including gravesites and memorials for the war dead⁷⁷ – are sites of memory. From this perspective, the Hague Conventions of 1899 and 1907 were the first

73 1949 GC I, above note 33, Art. 15; AP I, above note 25, Art. 34.

74 Anna Petrig, “The War Dead and Their Gravesites”, *International Review of the Red Cross*, Vol. 91, No. 874, 2009, pp. 365–368.

75 Permanent Court of Arbitration, *Island of Palmas Case (Netherlands, United States)*, 1928, in *Reports of International Arbitral Awards*, Vol. 2, UN, New York, 2006, p. 845. For an analysis of the delicate balance between stability and change required in applying the doctrine of intertemporal law, see T. O. Elias, “The Doctrine of Intertemporal Law”, *American Journal of International Law*, Vol. 74, No. 2, 1980. For a brilliant interpretation of the doctrine with the help of John McTaggart's philosophy of time, see Steven Wheatley, “Revisiting the Doctrine of Intertemporal Law”, *Oxford Journal of Legal Studies*, Vol. 41, No. 2, 2021. The case discussed was the 2019 ICJ Advisory Opinion on the Chagos Archipelago.

76 For possible complications, however, see M. Bothe, K. Partsch and W. Solf, above note 25, pp. 194–195; International Law Commission, above note 40, pp. 54, 57–59, 63–64.

77 See also UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005, Principle 3: “A people's knowledge of the history of its oppression is part of its heritage”.

IHL instruments to tackle the problem of how to reconcile, in times of war, military necessity with respect for historical monuments and places of worship and works of art. They used a legal fiction and categorized all monuments as private property even when State-owned. The Hague Regulations then prohibited the confiscation of private property. Seizure of, destruction of, and intentional damage to historical monuments would be made the subject of proceedings unless the monuments were used for military purposes.⁷⁸ The 1949 Geneva Conventions did not refine these views, but the neglect was temporary as a specialized convention, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, was concluded in 1954. It aimed at shielding a subset of the objects protected by the Hague Conventions: cultural property. The new convention defined “cultural property” as “movable or immovable property of great importance to the cultural heritage of every people” and grouped monuments, archaeological sites, museums, archives and libraries under the concept. On top of this, the 1977 Additional Protocols aimed at protecting a subset of this subset – cultural property which “constitute[s] the cultural or spiritual heritage of peoples”. In this way, the provisions of 1907, 1954 and 1977 formed a pyramid of protective layers for heritage, with the latter two shielding unique and transcending categories of heritage of humanity by prohibiting acts of hostility against them as well as their use in support of military efforts or as objects of reprisal.⁷⁹

The States that ratified the 1998 Rome Statute made it clear in its preamble that they were “conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”.⁸⁰ The Statute criminalized IHL violations against cultural heritage in two ways: indirectly, by defining the persecution of groups on cultural grounds as a crime against humanity,⁸¹ and directly, by labelling intentional attacks against historical monuments and other heritage during armed conflicts as war crimes unless imperatively required by military necessity and regardless of whether the attack results in actual damage.⁸² The 2005 ICRC Customary Law Study maintained that the protection of historical monuments and broader classes of cultural heritage in wartime had been part of customary law since 1899 (and even decades earlier).⁸³ In short, we see that in

78 1899 HC II, above note 31, Art. 56; 1907 HC IV, above note 17, Art. 56.

79 1899 HC II, above note 31, Arts 27, 46, 56; 1907 HC IV, above note 17, Arts 27, 46, 56; Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907, Art. 5; 1929 GC II, above note 17, Arts 34, 77; AP I, above note 25, Arts 38, 52–53, 85; AP II, above note 25, Art. 16; Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, Art. 1. See also A. P. Higgins, above note 1, p. 270; J. Pictet, above note 34, p. 615; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 1528; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 639–649, 1465–1469; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 371–376, 789–792.

80 Rome Statute, above note 26, preamble recital 1.

81 *Ibid.*, Arts 7(1)(h), 7(2)(g).

82 See *ibid.*, Arts 8(2)(b)(ix) and 8(2)(e)(iv), and the corresponding Elements in *Elements of Crimes*, above note 70.

83 “List of Customary Rules”, above note 48, Rules 38–41, 147. See also K. Dörmann, above note 18, pp. 215–218; M. Klamburg, above note 35, pp. 89–90, 130; ICRC Customary Law Study, above note 8, Vol. 1, pp. 127–138.

IHL, codification awareness of cultural heritage has an even longer pedigree than awareness of respect for the dead. The IHL view of memory is strongly embedded in the IHL provisions about dead persons and cultural heritage.

The IHL view of history

The view that dead persons, including their resting places and legacies, are portals to memory has an epistemological complement that makes dead persons also portals to history. The IHL view of history deals with *facts* about dead persons – especially war victims – and with the right of families and society at large to know them. The reconstruction of life and family stories, often consisting of only the barest of these facts about the circumstances in which war victims died, is a crucial first step in the search for broader historical truth and understanding.

The right to the truth, archives and families

From early on, the IHL treaty drafters tried to solve three problems that were preconditions for collecting facts about war victims in order to write their life stories: how to prevent war prisoners and war dead from going missing in the turmoil of war; how to repatriate last wills, money, articles of sentimental value and other possessions found on the dead; and how to address the need of families to obtain corroborated information about the whereabouts of the dead in their own as well as enemy countries. Dealing with these issues, which today are grouped together under a “right to the truth”, required the setting up of a documentary infrastructure in often chaotic circumstances. The ICRC quickly perceived this enormous need for collecting and exchanging data and objects while simultaneously protecting them against abuse.

As early as 1870, during the Franco-Prussian War, the ICRC established an information bureau for war prisoners (known since under various names, including the International Prisoners of War Agency from 1914 and the Central Tracing Agency from 1960). Over the years, and especially during the World Wars, data on many millions of war prisoners and war dead were collected and exchanged – an invaluable service, as war-torn countries always struggle with disorganized bureaucracies and scattered archives. Following the idea of establishing inquiry offices set out in the Hague Conventions of 1899 and 1907, the 1929 Geneva Conventions imposed the establishment of a Central Agency of Information regarding Prisoners of War and of official national information bureaus and grave registration services in conflict-ridden countries. From World War I, ICRC delegates also began tracing people in the field by visiting camps and prisons. The Central Agency of Information regarding Prisoners of War was also active in World War II and scores of post-war conflicts and disasters.⁸⁴

84 1899 HC II, above note 31, Art. 14; 1907 HC IV, above note 19, Art. 14; 1929 GC I, above note 66, Art. 4; 1929 GC II, above note 17, Arts 77–80; 1949 GC I, above note 33, Arts 16–17; 1949 GC III, above note 25,

The unusual documentary awareness of the ICRC is also demonstrated by the archives that it has kept since its foundation in 1863, and by its journal, the *International Review of the Red Cross*, which still exists after more than 150 years.⁸⁵ All this time, the ICRC has had to carefully balance the transparency needed to research data with the privacy of the victims and the confidentiality of its missions.⁸⁶ The archives of the International Prisoners of War Agency from 1914 to 1923 became part of UNESCO's Memory of the World Register in 2007. Data collection on prisoners in World War II was started in 1943 under the aegis of the Allied authorities and from 1948 found a home in the International Tracing Service established in Bad Arolsen under the auspices of successively the International Refugee Organization (1948–51), the Allied High Commission for Occupied Germany (1951–55), the ICRC (1955–2012) and an International Commission (2013–present). This work became part of UNESCO's Memory of the World Register in 2013 and was renamed the Arolsen Archives – International Center on Nazi Persecution in 2019. This data collection on Nazi concentration and death camps between 1933 and 1945 is unparalleled. Between 1983 and 2006, however, the archive was criticized for its isolation and poor accessibility. It took time to restore the balance of competing interests.⁸⁷

From this thumbnail sketch we can see that, although the right to the truth as a concept was only fully developed during the 1990s, its constituent elements – identification of victims, repatriation of objects, and recognition of the need of families to obtain information about victims – were prime IHL concerns from the beginning. In moving passages, commentators Gustave Moynier (in 1870), Carl Lueder (in 1876) and Paul des Gouttes (in 1930) conjured up an image of families torn for years or even decades by the moral anguish of ignorance and uncertainty, begging for crumbs of information, struggling to receive due benefits and estates, and, in the end, longing to start a mourning process.⁸⁸ Later commentators made similar remarks.⁸⁹ The need of families in particular was recognized in the Hague Regulations from 1899 and in the Geneva Conventions from 1929.⁹⁰

Arts 77, 120, 122–123; 1949 GC IV, above note 25, Arts 113, 137, 140; AP I, above note 25, Arts 33, 78; “List of Customary Rules”, above note 48, Rule 123. See also A. P. Higgins, above note 1, p. 43; P. des Gouttes, above note 62, pp. 31, 35; J. Pictet, above note 71, pp. 167–168; 2016 Commentary on GC I, above note 30, p. 568; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, pp. 581–584; 2020 Commentary on GC III, above note 30, pp. 17, 19, 1744–1765, especially 1748 (para. 4812); Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 858.

85 A complete overview is available at: <https://international-review.icrc.org/latest-reviews>.

86 ICRC, *Rules Governing Access to the Archives of the International Committee of the Red Cross*, Geneva, 2017, Art. 5. See also 2020 Commentary on GC III, above note 30, pp. 21–22.

87 Available at: <https://arolsen-archives.org/en>. See also Henning Borggräfe, Christian Höschler and Isabel Panek (eds), *A Paper Monument: The History of the Arolsen Archives – Catalogue of the Permanent Exhibition*, Arolsen Archives, Bad Arolsen, 2019, pp. 8–18. For the role of the ICRC, see *ibid.*, pp. 17–19, 171–183, 203.

88 G. Moynier, above note 31, p. 280; C. Lueder, above note 6, p. 270; P. des Gouttes, above note 62, p. 31.

89 J. Pictet, above note 71, p. 164; 2016 Commentary on GC I, above note 30, pp. 552, 564, 579, 586; 2020 Commentary on GC III, above note 30, pp. 1658, 1668; J. Pictet, above note 34, p. 505.

90 1899 HC II, above note 31, Art. 46; 1907 HC IV, above note 17, Art. 46; 1929 GC II, above note 17, Arts 8, 36, 77. See also 1949 GC IV, above note 25, Arts 27, 116.

It is hard to explain why it took half a century – until the preparatory talks for Additional Protocol I (AP I) – before a discussion was started about whether this *need* of families was actually a *right*. This author’s thesis, which might be called the conceptual salience thesis, is that the common traits of three distinct phenomena – the dead, the missing and the disappeared – only became apparent in the mid-1970s. Whereas IHL had paid sustained attention to the dead from virtually the beginning and had begun codifying its principles from 1906, it long treated missing persons – who could be dead or alive – as a loose category. In 1870, Moynier touched upon the phenomenon of missing persons, but by linking them to the dead: some of these *disparus* of the battlefield, he wrote, were deserters, but most were soldiers, hastily buried without identification.⁹¹ And in 1930, while evoking the image of the unknown soldier, des Gouttes also recalled the fate of missing persons.⁹² But while the need to clarify the whereabouts of the dead had explicitly emerged in the 1906 Geneva Convention, as we saw, Geneva Convention IV of 1949 only stipulated the facilitation of enquiries made by members of dispersed families seeking to renew contact with each other.⁹³ A codification of missing persons similar to the 1906 one did not appear until 1977. Article 33 of AP I is devoted to “Missing Persons”. It was widely seen as filling a gap.⁹⁴

In contrast to the dead and the missing, the disappeared refer to only one specific criminal subset of the missing: those who went missing after unacknowledged abduction. The practice of enforced disappearances was discussed at the Nuremberg Tribunal in 1945–46, under the counts of war crimes and crimes against humanity. This happened mainly in the context of the 1941 *Nacht und Nebel Erlass* (Night and Fog Decree), which had prescribed either the execution or the disappearance in complete secrecy of those who resisted Nazism, with the express intent to intimidate their families and others. The Nuremberg judges noted that this decree was a terror technique which violated the family rights protected in the Hague Regulations.⁹⁵ From 1966, disappearances also emerged as a large-scale practice in Guatemala, as they did shortly after elsewhere in Latin America.⁹⁶ However, we have to wait until a resolution of the UN General Assembly in 1978 for a conceptualization of the phenomenon. This resolution on disappearances – which, curiously, does not mention the broader category of the missing at all – refers to previous ICRC experience: the general provision on the missing in AP I may have spurred more specific thinking on disappearances eighteen months later.⁹⁷

Whatever the validity of the conceptual salience thesis, AP I includes a section entitled “Missing and Dead Persons”, the opening article of which –

91 G. Moynier, above note 31, p. 280. See also C. Lueder, above note 6, p. 238.

92 P. des Gouttes, above note 62, pp. 28–31, also xvii–xviii (Max Huber).

93 1949 GC IV, above note 25, Art. 26.

94 M. Bothe, K. Partsch and W. Solf, above note 25, p. 194.

95 *Trial of the Major War Criminals*, above note 13, pp. 44, 232–233, 266, 290. See also Brian Finucane, “Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War”, *Yale Journal of International Law*, Vol. 35, No. 1, 2010, pp. 175–186.

96 Amnesty International USA, “Disappearances”: *A Workbook*, New York, 1981, pp. 1–2, 21–23.

97 UNGA Res. 33/173, “Disappeared Persons”, 20 December 1978, para. 3.

Article 32 – formulates the “general principle” that activities for missing and dead persons should be “prompted mainly by the *right* of families to know the fate of their relatives”.⁹⁸ Although discussions about this principle went back to resolutions adopted by the International Conference of the Red Cross in 1973 and the UN General Assembly in 1974,⁹⁹ these early resolutions had not spoken about a “right” of families. Commentator Yves Sandoz recalled that the drafters of AP I adopted the term “right” “after careful reflection and ... in full consciousness”, emphasizing that it was not a right of governments, but a right of families.¹⁰⁰

Therefore, Article 32 of AP I, with its *right* of families, was revolutionary for two reasons: it constituted the real birth of the right to know, or as it is now called, the right to the truth; and, by using a rights vocabulary, it connected IHL to human rights.¹⁰¹ Once seen as a right, and not merely a need, and as a right of families and not of governments, the principle opened up three new perspectives: families could make claims regarding investigation and reparation, governments had duties to respond to these claims, and violations of the right of families to know the truth were forms of inhuman treatment separate from, and additional to, violations of the rights of the missing themselves.¹⁰² Following this trend, the Rome Statute two decades later paid attention to the safety and psychological well-being of families of crime victims¹⁰³ and emphasized that enforced disappearances were crimes against humanity.¹⁰⁴

Over time, it also became clear that the right to know, although a strong procedural right, was not absolute in two respects. First, while providing strong impetus to governments to investigate specific cases, individual families could not *force* governments to take particular actions.¹⁰⁵ Second, the right had to be balanced against all governmental duties, including duties to gather forensic evidence for criminal investigations into violent deaths, which could hinder rather than help communications with families.¹⁰⁶

In sum, the ICRC has consistently advocated for State duties to the war dead from the beginning, organizing large-scale data collection and analysis in

98 AP I, above note 25, Arts 32, 90 (emphasis added). See also AP II, above note 25, Art. 8; “List of Customary Rules”, above note 48, Rules 105, 117, 125. See also Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 343–347; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 276.

99 UNGA Res. 3220(XXIX), “Assistance and Co-operation in Accounting for Persons Who Are Missing or Dead in Armed Conflicts”, 6 November 1974.

100 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 345. According to the *travaux préparatoires*, the date of birth is 1 June 1976.

101 See also Antoon De Baets, *Responsible History*, Berghahn, New York and Oxford, 2009, pp. 157–165; A. De Baets, above note 38, pp. 40–43.

102 On the other hand, the concept of “a family” was deliberately not defined. See Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 346, 375.

103 Rome Statute, above note 26, Arts 68(5), 84(1), 87(4).

104 *Ibid.*, Arts 7(1)(i), 7(2)(i). See also “List of Customary Rules”, above note 48, Rule 98.

105 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 346; M. Bothe, K. Partsch and W. Solf, above note 25, p. 196.

106 Rome Statute, above note 26, Art. 93(1)(g); “List of Customary Rules”, above note 48, Rules 158, 161; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 278–284; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 346–347.

the process. This investigative work was a necessary, but not sufficient, condition for addressing the need of families to write the life stories of the war dead and for the broader right to search for the historical truth. Following the logic of its own thought, by converting this need to a right, the ICRC became a pioneer, from the mid-1970s, in developing the right to the truth. On a side note, the problem of the denial of war crimes—a pervasive abuse of history—and the powerful role of the right to the truth in countering it were never systematically raised within IHL.

IHL breaches, impunity and repression

The IHL treaty drafters did not reason in the abstract – they reacted to the problems of their time. In order to see how they mobilized the past in these reactions, we must therefore also examine how they responded to major historical challenges. Five of these challenges are singled out here. These are, in chronological order: IHL breaches, the Holocaust, human rights, domestic conflicts and colonialism. The intention of these five exercises is not to write a complete history of IHL but rather to evaluate whether, how and how quickly the IHL community responded to these challenges and whether those reactions have resulted in continuity or change.

The first historical challenge was the problem of the paper tiger: how to respond credibly to breaches of IHL. Within the present analysis, this question will only be examined at the level of international accountability. An 1872 proposal by Red Cross co-founder Gustave Moynier to establish an international criminal court failed.¹⁰⁷ The Hague Conventions of 1899 and 1907 attempted to peacefully settle disputes, including disputes about breaches, through good offices, mediation, inquiries and arbitration, but not through prosecution. The drafters of these conventions reasoned in terms of State responsibility, not individual responsibility.¹⁰⁸ This changed after World War I, when the 1919 Versailles Treaty, in a section on penalties inspired by the Hague Regulations, stipulated that nationals of the defeated countries who had committed “acts in violation of the laws and customs of war” would be punished.¹⁰⁹ Although the term “war

107 See P. des Gouttes, above note 62, p. 212; Christopher Hall, “The First Proposal for a Permanent International Criminal Court”, *International Review of the Red Cross*, Vol. 38, No. 322, 1998. In 1870 Moynier had still pleaded against adjudication of IHL violations: see G. Moynier, above note 31, p. 299.

108 Hague Convention (I) of 1899 and Hague Convention (I) of 1907 are conventions for the peaceful settlement of international disputes. See also 1907 HC IV, above note 17, Art. 3; A. P. Higgins, above note 1, pp. 44, 53. The 1906 Geneva Convention did contain a provision on repression of abuses (Art. 28), but it only addressed individual acts of robbery and ill-treatment of the sick and wounded in times of war and usurpations of military insignia. The first 1929 Geneva Convention (Arts 29–30) called upon States to introduce legislation for the repression in time of war of any act contrary to the Convention, to institute on request enquiries concerning violations, and, if corroborated, to repress those violations.

109 Treaty of Versailles, 28 June 1919, Arts 227–230. Article 227, though, charged Kaiser Wilhelm II with the “supreme offence against international morality and the sanctity of treaties”. In this, the Treaty of Versailles followed the recommendations of the *Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 29 March 1919, reproduced in *American Journal of International Law*, Vol. 14, No. 1–2, 1920, citing “the laws of humanity” on many occasions.

crime” did not literally appear in this treaty – and would not appear in any conventional IHL instrument until sixty years later¹¹⁰ – the year 1919 can be considered the birth date of the notion of war crimes. However, the attempts to punish individual perpetrators largely failed at the time.¹¹¹

Nuremberg, discussed above, changed this. Following Nuremberg, a system of individual criminal responsibility, with penal sanctions for abuses and breaches, was incorporated – albeit reluctantly – in the 1949 Geneva Conventions and their 1977 Additional Protocols.¹¹² War crimes for which individuals could be held liable regardless of their official capacity were codified in the statutes of a chain of international criminal tribunals, from Yugoslavia and Rwanda to the ICC in 1998.¹¹³ Thus, while impunity prevailed for most of history, after World War II a system of war crimes trials was set up and then gradually perfected. As Horace said: “Raro antecedentem scelestum deseruit pede poena claudo” (Rarely does punishment, even at a slow pace, fail to overtake the criminal in his flight). But the pace was slow indeed, taking from 1872 to 1998 – more than a century.

IHL and the Holocaust

The Holocaust posed an unprecedented challenge to the IHL treaty drafters. This can be illustrated by the conduct of the ICRC between roughly 1942 and 1995. Notwithstanding – or perhaps because of – the fact that during World War II the German Red Cross operated under Nazi control and that its leadership even participated actively in crimes against the Jews,¹¹⁴ the ICRC had become aware of the large-scale persecution inflicted on Jews by the summer of 1942. It considered launching a general public appeal to denounce these gross violations, among others, and it prepared a draft for such an appeal, with four central points of concern: aerial bombing raids; blockades; deportation, hostage-taking and massacres of civilians; and the fate of war prisoners not protected by the 1929 Geneva Convention.¹¹⁵ On 14 October 1942, however, the ICRC decided against the launch of the appeal, believing that it would be unable to stop the atrocities.

110 A first literal mention of the expression “war crimes” was found in the First Draft Convention Adopted in Monaco (Sanitary Cities and Localities), 27 July 1934, Additional Art. The term is also mentioned in the Charter of the International Military Tribunal for Germany, Annexed to the London Agreement, London, 8 August 1945, Article 6(b), but not in the Geneva Conventions of 1929 or 1949. It appears in AP I, above note 25, Arts 75, 85; Rome Statute, above note 26, Art. 8; “List of Customary Rules”, above note 48, Rules 151–153, 156–161.

111 W. Schabas, above note 13, pp. 3–4, 117.

112 1949 GC I, above note 33, Arts 49–54; 1949 GC II, above note 33, Arts 50–53; 1949 GC III, above note 25, Arts 129–131; 1949 GC IV, above note 25, Arts 146–148; AP I, above note 25, Art. 85–91; AP II, above note 25, Art. 6. See also 1929 GC I, above note 66, Arts 28–30. For the reluctance, see M. Bothe, K. Partsch and W. Solf, above note 25, p. 577; A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 616–620.

113 Rome Statute, above note 26, Art. 8. See also “List of Customary Rules”, above note 48, Rules 158–161.

114 See website of the Dutch Red Cross, available at: www.drk.de/das-drk/geschichte/das-drk-von-den-anfaengen-bis-heute/?page=1940-2112. See also A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 616; D. Forsythe, above note 29, pp. 44–50.

115 François Bugnion, “Dialogue with the Past: The ICRC and the Nazi Death Camps”, 5 November 2002, available at: www.icrc.org/en/doc/resources/documents/misc/6ayg86.htm.

Its subsequent confidential diplomatic approaches to Reich authorities and further activities in individual countries were still impressive – it was awarded the 1944 Nobel Peace Prize for such efforts – but on the whole the conduct of the ICRC was a *moral* failure. This general feeling led to a lingering crisis of conscience within the organization for the decades to come.

The first post-war reaction manifested itself in a determination to adapt the instruments of IHL. The large-scale suffering of civilians under foreign occupation in World War II – apart from atrocity crimes, this also included the other points of the 1942 appeal – spurred the drafters of IHL treaties to redouble their efforts. The missed opportunities of the past and the atrocities of World War II forced a revision of the two 1929 Geneva Conventions and haunted the drafters of the new Geneva Conventions in 1949.¹¹⁶

In order to understand this, we need to go back to 1919. If anything, World War I had shown that civilians lacked protection in wartime; provisions in the Hague Regulations to that effect had proved insufficient.¹¹⁷ Therefore, as early as 1921, the ICRC proposed to prepare a convention for civilians. The initiative was rejected, however, because some government representatives feared that it could weaken the hard-won peace and general optimism following the Great War. The ICRC nevertheless continued studying the issues and prepared a draft, which was ready in 1934. In the end, a diplomatic conference, convened in 1939 to adopt this so-called “Tokyo draft” in early 1940, could not take place, as World War II had broken out. The belligerent States refused to bring the Tokyo draft into force but nevertheless agreed to apply the 1929 provisions for war prisoners to civilians at risk of internment for being in enemy territory when hostilities opened. This helped some 160,000 civilians in internment camps but left millions of others without protection against deportation and internment during the war. The frustration that efforts initiated in 1921 had had so few tangible results and the inability to stop the wartime atrocities, which prominently included the genocidal frenzy of the Holocaust, led to a vigorous drive “to bridge this tragic gap”¹¹⁸ and extend IHL protection to civilians in a separate convention. This became Geneva Convention IV of 1949.¹¹⁹

This resounding success did not dissipate the awareness of failure or the silence about the Holocaust in the *International Review of the Red Cross*,¹²⁰ nor the criticism of third parties. In 1975, the ICRC reissued a 1946 report about its work for civilian detainees in German concentration camps, “by way of reply to the many questions from governments, National Red Cross Societies, associations

116 Édouard Chapuisat, “The Activity of the International Committee of the Red Cross during the War, 1939–1945”, Nobel Lecture, 1944, available at: www.nobelprize.org/prizes/peace/1944/red-cross/lecture; J. Pictet, above note 71, p. 14; 2020 Commentary on GC III, above note 30, p. 2.

117 1907 HC IV, above note 17, Arts 42–56.

118 Léopold Boissier, “Some Aspects of the Mission of the International Committee of the Red Cross”, Nobel Lecture, 1963, available at: www.nobelprize.org/prizes/peace/1963/red-cross/lecture.

119 For the whole story, see J. Pictet, above note 34, pp. 3–11.

120 “A Brief History of the International Review of the Red Cross”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 30. The Jewish victims were briefly discussed in four reports about ICRC activities in World War II published in 1947 (one report) and 1948 (three reports).

and individual inquirers”.¹²¹ A few years later, in 1979,¹²² it eventually decided that more decisive action was needed: it opened its archives and commissioned an independent external study about its response to the Holocaust to historian Jean-Claude Favez, who published his book in 1988.¹²³ Although the initial reaction to this book by then ICRC president Cornelio Sommaruga was very defensive,¹²⁴ the silence was broken and a debate opened. It took another seven years until Sommaruga, on the fiftieth anniversary of the liberation of Auschwitz in 1995, declared in Krakow that “Auschwitz ... represents the greatest failure in the history of the ICRC, aggravated by its lack of decisiveness in taking steps to aid the victims of persecution”.¹²⁵ Since 1995, the ICRC has reiterated this view, including in statements by the incumbent ICRC president, historian Peter Maurer.¹²⁶ The history of the ICRC’s reaction to the Holocaust tragedy reveals that processes of dealing with a difficult war past affect not only States but also international organizations, that these processes can be postponed, and that when confronted at last, they take much time to address.

IHL and human rights

Initially, IHL circles greeted the Universal Declaration of Human Rights of December 1948 with curiosity but without noticeable enthusiasm.¹²⁷ There were several reasons for this.¹²⁸ First, the genealogies of IHL and human rights differed: *sensu largo*, IHL went back to antiquity, human rights “only” to the Enlightenment; *sensu stricto*, IHL was born in 1864 and human rights in 1948. Second, their traditions diverged: IHL proceeded by discretion, human rights by

121 ICRC, *The Work of the ICRC for Civilian Detainees in German Concentration Camps from 1939 to 1945*, Geneva, 1975 (first published 1946).

122 Jacques Meurant, “Review and Analysis of Two Recent Works: The International Committee of the Red Cross – Nazi Persecutions and the Concentration Camps”, *International Review of the Red Cross*, Vol. 29, No. 271, 1989, pp. 375–376. It is unclear whether the ICRC Assembly of July 1979 had particular time-bound reasons to approve the Holocaust study, but the moment incidentally coincides with the trend of increasing Holocaust awareness following the 1978 television series *Holocaust*.

123 Jean-Claude Favez, with Geneviève Billeter, *Une Mission impossible? Le CICR, les déportations et les camps de concentration nazis*, Payot, Lausanne, 1988 (English translation 1999).

124 Cornelio Sommaruga, “Annex: The ICRC’s Point of View”, in J. Meurant, above note 122, pp. 394–397.

125 Quote in “Fiftieth Anniversary of the Liberation of Auschwitz Concentration Camp”, *International Review of the Red Cross*, Vol. 35, No. 304, 1995, pp. 109–110. Quote also in ICRC, “Commemorating the Liberation of Auschwitz”, statement, 27 January 2005, available at: www.icrc.org/en/doc/resources/documents/statement/68zeb2.htm. See also Cornelio Sommaruga, “Press Conference Given by the President of the ICRC (Geneva, 30 May 1995)”, *International Review of the Red Cross*, Vol. 35, No. 306, 1995.

126 Among others, see Peter Maurer, “Remembering the Shoah: The ICRC and the International Community’s Efforts in Responding to Genocide”, 28 April 2015, available at: www.icrc.org/en/document/remembering-shoah-icrc-and-international-communities-efforts-responding-genocide-and.

127 For the first IHL reports about the Universal Declaration, see the contributions by Claude Pilloud and Jean-Georges Lossier in *International Review of the Red Cross*, Vol. 31, No. 364, 1949, pp. 252–264.

128 See Robert Kolb, “The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions”, *International Review of the Red Cross*, Vol. 38, No. 324, 1998; Sergey Sayapin, “The International Committee of the Red Cross and International Human Rights Law”, *Human Rights Law Review*, Vol. 9, No. 1, 2009.

revendication, and in addition, IHL regulators saw human rights as a political idea at odds with IHL's professed neutrality. Third, conventions (such as the Geneva Conventions) had more force than declarations (such as the Universal Declaration). Although many predicted the historic character of the Universal Declaration, nobody foresaw its future as an exceptional instrument with the status of customary international law.¹²⁹ Fourth, IHL and human rights spoke different languages. The Universal Declaration contained only one oblique reference to armed conflict when in its preamble it mentioned the “barbarous acts which have outraged the conscience of mankind” and “tyranny and oppression”.¹³⁰ Conversely, the 1949 Geneva Conventions – adopted eight months after the Universal Declaration – did not contain a single reference to human rights: proposals for a preamble which included such a reference did not reach unanimity and were dropped.¹³¹ Finally, there was a basic antagonism between international human rights law, which prohibits the use of force, and IHL, which establishes rules for situations which according to human rights should not exist.¹³²

Even the 1977 Additional Protocols still reflected the laborious relationship between IHL and human rights. AP I's preamble mentioned the UN, but the notion of human rights was conspicuously absent (although it was acknowledged at the beginning of the section on the treatment of persons in the power of belligerent States).¹³³ In contrast, AP II's preamble ceded a place of honour to the concept. The official appearance of human rights in the Additional Protocols was the first significant result of the slow rapprochement between IHL and international human rights law that had started in earnest in 1968, when the International Conference on Human Rights in Tehran instructed the UN Secretary-General to prepare reports about respect for human rights in armed conflicts. This initiative, though, came from the side of human rights, not from IHL.¹³⁴

The relatively minor role of human rights in AP I, which is dedicated to international armed conflicts, and its prominent role in AP II, which is dedicated to domestic conflicts, was no coincidence. The Uppsala Conflict Data Program shows why. Its database of armed conflicts between 1946 and 2020 reveals that inter-State and intra-State conflicts were on a par until about 1955, but after that

129 See William Schabas (ed.), *The Universal Declaration of Human Rights: The Travaux Préparatoires*, Cambridge University Press, Cambridge, 2013, pp. cxix–cxxxiii; and, particularly, Jaime Oraá Oraá, “The Universal Declaration of Human Rights”, in Felipe Gómez Isa and Koen De Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao, 2006, pp. 117–132.

130 The 1929 Geneva Conventions were not mentioned during the *travaux préparatoires* of the Universal Declaration.

131 See J. Pictet, above note 71, pp. 20–22; 2016 Commentary on GC I, above note 30, pp. 29, 139; J. Pictet, above note 84, pp. 14–16; J. Pictet, above note 34, pp. 12–14.

132 M. Bothe, K. Partsch and W. Solf, above note 25, p. 30.

133 AP I, above note 25, Art. 72. See also M. Bothe, K. Partsch and W. Solf, above note 25, pp. 729–730. It is also recalled that Article 32 spoke about a right of families to know the fate of their relatives.

134 *Final Act of the International Conference on Human Rights (Tehran)*, UN Doc. A/CONF.32/41, 22 April–13 May 1968, Proclamation, para. 10, and Resolutions, Part 23; Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 31, pp. 1326–1327; Theodor Meron, “The Humanization of Humanitarian Law”, *American Journal of International Law*, Vol. 94 No. 2, 2000.

date intra-State conflicts (including internationalized intra-State conflicts) massively outnumbered inter-State conflicts.¹³⁵ Despite this predominance, the only IHL norms governing intra-State conflicts were those found in common Article 3 and additionally, from 1977, those in the modest second Additional Protocol. To close any gaps left by the IHL drafters in AP II, therefore, an appeal to apply human rights guarantees in domestic conflicts was indispensable. Conversely, international human rights bodies increasingly admonished States to apply IHL in armed conflict in order to reduce human rights violations.¹³⁶ The rapprochement between the two types of law was crowned with success when both received pride of place in the 1998 Rome Statute. Together, they occupied the entire field.

An initiative launched in 1990 to draft Fundamental Standards of Humanity intended to fill any remaining gaps in IHL and human rights foundered in 2008.¹³⁷ The view of the ICRC, expressed during this debate, was against such new standards.¹³⁸ It is increasingly recognized that international human rights law applies in all circumstances, meaning that it operates simultaneously with IHL in armed conflicts and beyond these also provides protection during riots, rebellions and times of peace.¹³⁹ In sum, the relationship between IHL and human rights was a rather chilly one in the first twenty years – until 1968 – but from then onwards they were increasingly seen as complementary.

IHL and civil war

In IHL's first decades, its norms regulated international wars, not internal armed conflicts. Before 1949, proposals to also monitor domestic conflicts failed because State-centred thinking dominated. The recognition of internal conflicts as being worthy of humanitarian codification was seen as a major attack on the Westphalian system that since 1648 had sanctioned State sovereignty as its prime principle. Proponents of the view that civil wars, despite the multiple difficulties in regulating them, also needed at least some IHL guarantees recalled in vain that one of the most influential early IHL instruments, the 1863 Lieber Code, had been drafted precisely to discipline the conduct of soldiers of the Union during the American Civil War (1860–65).¹⁴⁰ In a similar vein, early modest proposals

135 Uppsala Conflict Data Program, "UCDP Charts, Graphs and Maps", available at: <https://ucdp.uu.se/downloads/charts>.

136 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 720.

137 T. Meron, above note 134, pp. 273–275. See also Declaration of Minimum Humanitarian Standards, UN Doc. E/CN.4/Sub.2/1991/55, 12 August 1991; *Fundamental Standards of Humanity: Report of the Secretary-General*, UN Doc. A/HRC/8/14, 3 June 2008, paras 38–39; "The Paris Minimum Standards of Human Rights Norms in a State of Emergency", *American Journal of International Law*, Vol. 79, No. 4, 1985.

138 "Fundamental Standards of Humanity: 56th Annual Session of the UN Commission on Human Rights, Agenda Item 17: Statement by the International Committee of the Red Cross", 14 April 2000, available at: www.icrc.org/en/doc/resources/documents/statement/57jqcv.htm.

139 ICJ, *Nuclear Weapons*, above note 34, para. 25. See also A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, pp. 728–735.

140 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 1341. For more on the role of the Lieber Code, see A. Roberts, above note 5.

from the United States and Cuba to explore the role of the Red Cross during civil wars or insurrections, when submitted to a Red Cross Conference in 1912, were discussed only in a procedural sense but not put to the vote.¹⁴¹ Resolutions adopted by Red Cross Conferences in 1921 and 1938, however, had some effect: they induced the parties in ongoing civil wars in Upper Silesia and Spain to respect IHL rules.¹⁴² Over the decades, literally every term in the heated discussions addressing domestic conflicts proved explosive: the conflict's name (civil war, rebellion or riot), the conflict's motives (liberation or subversion), the conflict's combatants (belligerents, rebels or bandits) and the name of the breaches during the conflict (atrocities crimes or disturbances of public order).

The diplomats preparing the 1949 Geneva Conventions rejected an ICRC proposal (written with the experiences of the Spanish and Greek civil wars in mind) to make the Conventions applicable to all types of armed conflict, whether international or internal.¹⁴³ After the dramatic events of World War II, however, they were open, although hesitantly, to incorporate a single provision to regulate the humane treatment of those involved in what they termed “conflicts not of an international character”. They refused, nevertheless, to accept a proposal to add to the term three examples between parentheses (“cases of civil war, colonial conflicts or wars of religion”) on the grounds that examples would weaken the provision.¹⁴⁴ Even stripped of examples, the approved text – which would become common Article 3 – was revolutionary. For the first time, domestic conflicts came within the purview of IHL norms.

In its turn, common Article 3 would become a launch pad for an IHL instrument on non-international armed conflicts, AP II, in 1977. Although the ambitions of AP II were dramatically downsized in the last stages of the preparatory conference on the initiative of Pakistan,¹⁴⁵ it signified a victory of sorts after sixty-five years of attempts. But as internal conflicts had become the dominant form of warfare since 1955, common Article 3 came just in time,¹⁴⁶ whereas AP II arrived late. In retrospect, the IHL approach to civil wars was slow, and its codification showed many lacunae. Even so, its breakthrough in 1949 and its modest coming of age in 1977 were more than worth the midwifery.

141 “Commission chargée de préciser les fonctions de la Croix Rouge en cas de guerre civile”, in *Neuvième conférence internationale de la Croix-Rouge tenue à Washington du 7 au 17 mai 1912: Compte-rendu*, American Red Cross, Washington, 1913, pp. 23, 39–40, 45–49, 60–61, 85, 197, 199–208. The Tenth Red Cross Conference of 1921 also discussed the issue.

142 J. Pictet, above note 71, pp. 39–40; 2016 Commentary on GC I, above note 30, pp. 134–135.

143 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 41; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 37–38.

144 J. Pictet, above note 71, p. 42; 2016 Commentary on GC I, above note 30, pp. 135–138, 163, 169; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 2: *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 23; J. Pictet, above note 84, p. 31; J. Pictet, above note 34, pp. 30–31; Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 46.

145 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, pp. 1335–1336; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 7, 12, 695–696.

146 See also Peter Maurer, “Changing World, Unchanged Protection? Seventy Years of the Geneva Conventions”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 399.

IHL and colonialism

The belated recognition of colonial conflicts as IHL objects constitutes one of the tragic moments in the history of IHL (and of humanity at large). State sovereignty threw a veil of silence over these conflicts, despite the fact that the principle of self-determination had been proclaimed in the American and French Revolutions in the late eighteenth century, that it had almost been incorporated into the Covenant of the League of Nations at the instigation of American president (and historian) Woodrow Wilson,¹⁴⁷ and that the UN Charter eventually recognized the principle of (but not the right to) self-determination in 1945.¹⁴⁸ In this context, it is noteworthy that the Allies had agreed in 1945 to prosecute Nazi crimes committed against Germans within the borders of Germany as “crimes against humanity” on condition only that a nexus existed between these crimes and the other crimes of the Nuremberg statute—crimes against peace or war crimes. In so doing, they cleverly avoided any application of the notion of crimes against humanity to their own conduct against their minorities or in their colonies.¹⁴⁹ And when the diplomats drafted common Article 3 on non-international conflicts in 1949, they had successfully countered, as we saw, a proposal to insert “cases of civil war, colonial conflicts or wars of religion” into the provision on the pretext that examples would weaken it.

Portugal’s attitude was typical. This country entered a reservation to common Article 3 in 1949 (and stuck to it until 1961). In this reservation, it argued that there was no accepted definition of “conflicts not of an international character”; that when the term meant “civil wars”, there was no criterion to define the moment when an armed rebellion transformed into a civil war; and that it “reserve[d] the right not to apply the provisions of Article 3, in so far as they may be contrary to ... Portuguese law, *in all territories subject to her sovereignty in any part of the world*”.¹⁵⁰ Portugal’s arguments singled out “civil wars” in its reservation regarding non-international conflicts, but there was little risk of civil war in Salazar’s dictatorship. What it really wanted to exclude from the protection of common Article 3 were conflicts in its huge colonial empire. While other colonial powers did not make similar reservations, they reasoned in much the same way.¹⁵¹

The discussions of the 1949 Geneva Conventions among the 63 participating States, only three of them from Africa (Ethiopia, Liberia and Egypt),¹⁵² revealed that colonial powers saw the inclusion of colonial wars into the class of non-international wars, let alone the class of international wars, as outright blasphemy. In retrospect—but only in retrospect—this view was

147 Y. Sandoz, C. Swinarski and B. Zimmerman (eds), above note 31, p. 42.

148 Charter of the United Nations, San Francisco, 26 June 1945, Arts 1(2), 55.

149 W. Schabas, above note 13, p. 102.

150 2016 Commentary on GC I, above note 30, p. 127 (emphasis added).

151 This colonial mode of thought is also visible in the 1948 Genocide Convention because its Article XII does not impose an extension of the Convention to non-self-governing territories.

152 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 679.

outdated. Indeed, the self-determination principle gained strength as it was incorporated into a spate of resolutions adopted by the UN General Assembly between 1952 and 1970, two of which were declarations—the 1960 Declaration on the Granting of Independence of Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. The right to self-determination was also incorporated into the two UN Human Rights Covenants of 1966 as their common Article 1. All this demonstrates that self-determination crystallized as a right and a norm of customary international law during the 1960s.¹⁵³

The 1970 Declaration was decisive: it stated that “[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it”.¹⁵⁴ It meant that colonies and non-self-governing territories were in fact proto-States with a status distinct from the metropolis and that, therefore, the conflict between the principles of territorial integrity and self-determination could be solved. In the preparatory meetings for the 1977 Additional Protocols, then, a majority saw the struggles of peoples against colonial domination, alien occupation and racist regimes in the exercise of their right of self-determination as armed conflicts of an international, not an internal, character. Their views prevailed and became part of Article 1 of AP I.¹⁵⁵ This provision was largely the work of the new States from the South, which had increasingly cooperated since the 1955 Bandung Conference. They were supported by the socialist States.

The tragedy is that the 1977 provision on anti-colonial struggles would have made a substantial difference in 1949, when decolonization conflicts were in full swing, but meant little in 1977, when the decolonization process was largely over.¹⁵⁶ The opinion of legal scholar Frits Kalshoven that the 1977 provision was applicable only to the peoples of Southern Africa and Palestine was not far from the truth.¹⁵⁷ Two tragic paradoxes were at work here. The first is that even in 1977, the characterization of anti-colonial struggles as international armed conflicts would never have been adopted if the majority of colonies had not meanwhile become independent, largely between 1945 and 1965, and recognized as States in the first place. It took the voice of *former* colonies to force a change in the perception of colonial wars. The second paradox is that once they had won this cherished prize, many States of the South lost their interest in transforming common Article 3 into a strong second Additional Protocol, fearing in fact that it would undermine their stability.¹⁵⁸ This opened the way to the dramatic downsizing of AP II.

153 S. Wheatley, above note 75, pp. 499, 504–507.

154 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV), 24 October 1970, Annex, Principle 5.6.

155 AP I, above note 25, Art. 1. See also Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 31, pp. 41–47, 54, 1319; M. Bothe, K. Partsch and W. Solf, above note 25, pp. 2, 8, 37–40, 47–49, especially p. 47.

156 A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31, p. 43.

157 M. Bothe, K. Partsch and W. Solf, above note 25, p. 50.

158 *Ibid.*, pp. 7–8, 693–694.

Conclusions

An analysis of the IHL view of the past can be undermined by bias. Knowledge of the outcome of events may warp judgement about what people knew at the material moment of their conduct (the hindsight bias).¹⁵⁹ The past can be interpreted as a series of events propelled by an abstract protagonist called IHL (the agency bias), or it can be presented as a development ineluctably leading to the present triumphant situation (the teleological bias), and recent concepts and values can be impermissibly transferred to the past (the anachronistic fallacy).¹⁶⁰ An additional danger of historical interpretation lies in the prevention paradox: if IHL is effective, it prevents suffering, but if suffering decreases, how can one prove that this was the result of IHL in the first place? Positive IHL results are often untraceable, with the risk of skewing the balance towards the negative. But absence of evidence is not evidence of absence.¹⁶¹ With all these caveats in mind, a few defining trends in the IHL view of the past can be identified.

In order to reconstruct the IHL view of time, this essay scrutinized the impact of legal principles on time perception. Balancing nonretroactivity against customary international law and against the humanity principle broadened the temporal scope towards the past, while balancing legal forgetting against imprescriptibility and State succession broadened the scope towards the future. As a result, the IHL view of time was characterized as an amalgam of immediacy and *longue durée*. Above all, the breadth of IHL's temporal scope hinges on the interpretation of what constitutes customary international law.

In searching for the IHL view of memory, dead persons and cultural heritage were singled out as the two principal vectors of memory. Sustained attention to the dead has been a constant hallmark of IHL, while awareness of the value of cultural heritage has an even longer pedigree than awareness of respect for the dead. On the whole, the IHL view of memory greatly facilitates remembrance.

The IHL view of history deals with facts about dead persons. The ICRC's unusual archival awareness, its early and consistent development of a data infrastructure, its long-standing insistence on State duties to the dead and – later – the missing, and, finally, the conversion in 1977 of the *need* of families to write the life stories of their beloved war dead into a *right*, made the ICRC a pioneer in developing the right to the truth – a major key to the past and a powerful weapon in preventing the denial of past crimes.

159 There is, however, also the benefit of hindsight when it comes to determining which law is applicable at which time. See S. Wheatley, above note 75, pp. 486, 503, 505–506, 508–509.

160 Evidently, many concepts and values can legitimately be transferred to the past.

161 For overviews of what have been called “international law’s method wars”, see Andrew Fitzmaurice, “Context in the History of International Law”, *Journal of the History of International Law*, Vol. 20, No. 1, 2018; Ann Orford, *International Law and the Politics of History*, Cambridge University Press, Cambridge, 2021; Natasha Wheatley, “Law and the Time of Angels: International Law’s Method Wars and the Affective Life of Disciplines”, *History and Theory*, Vol. 60, No. 2, 2021.

Finally, the search for the responses by the IHL drafters to five historical challenges, and the mobilization of the past in formulating them, was revealing. First, while in the realm of war crimes impunity rather than accountability prevailed for most of history, after World War II a system of war crimes trials was mounted and then culminated, with a delay of four decades, in the ICC approach. Second, soul-searching about World War II atrocities, including the Holocaust, helped create a long-awaited convention, in 1949, to protect civilians in wartime. But the slow and painful recognition by the ICRC of its moral failure to respond to the Holocaust demonstrates how difficult the duty of responsibly handling a war past can be even for organizations that themselves constantly remind States to fulfil this very duty. Third, the human rights idea, revived in 1945 after a long period of subliminal existence, was only fully embraced by the IHL treaty drafters after two decades, when a rapprochement increasingly demonstrated the beneficial complementarity of IHL and international human rights law. Fourth, the IHL response to proliferating domestic conflicts was slow and full of lacunae; even so, its appearance in the 1949 Geneva Conventions as common Article 3 – rightly called a “convention in miniature” – was memorable. Its coming of age in 1977 as a modest second Additional Protocol constituted a breakthrough. In retrospect, the drastic downsizing of the 1977 draft into that modest Protocol was a missed opportunity, although it may have been the lesser evil at the time. Fifth, colonial conflicts were not recognized as international wars in 1949, when this could have had considerable potential and impact; this happened only in 1977, when the decolonization process was largely over. The 1949 Geneva Conventions missed the historic opportunity to intervene in the self-determination struggles that raged at the time. In this regard, the IHL drafters’ lack of initiative did not differ markedly from the views prevalent at the UN and elsewhere. Even in 1977 the recognition of colonial conflicts as international wars was mainly the paradoxical result of pressure by the new States themselves. In all five cases, the responses to these historical challenges came after long delays. Clearly, the IHL view of the past has to be assessed on a transgenerational scale.

Until 1945, if not until the 1960s, IHL treaties and customs bore the stamp of eurocentrism (although often posing as universalism).¹⁶² When new States conquered the international stage after 1945, significant levels of universality were gradually reached. Every State in the world eventually ratified the four Geneva Conventions, and no State has ever denounced them. In addition, these Conventions are now recognized as customary international law.¹⁶³ This latent universalism – formal, recent and imperfect as it may be – is unprecedented, and

162 For examples of eurocentrism, see G. Moynier, above note 31, p. 335; L. Renault, above note 64, p. 231; 2016 Commentary on GC I, above note 30, p. 134; B. Baker, above note 7, para. 11; “A Brief History of the International Review of the Red Cross”, *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 26. For an incisive critique, see Frédéric Mégret, “The Universality of the Geneva Conventions”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 31.

163 2016 Commentary on GC I, above note 30, pp. 12, 17; 2020 Commentary on GC III, above note 30, pp. 2–3.

if globalization and its crises show that we are so often dancing on the edge of a volcano, it has come none too soon. What Lord Acton observed in 1910 about the 1789 Déclaration des Droits de l'Homme et du Citoyen may then perhaps also have some validity for the instruments of IHL: "And yet this single page of print, which outweighs libraries, ... is stronger than all the armies of Napoleon."¹⁶⁴

Appendix 1: Sources

Corpus of conventional and customary instruments

(Chronologically, abbreviated titles)

1. The 1864 Geneva Convention.
2. The 1899 second Hague Convention, including the Hague Regulations.
3. The 1906 Geneva Convention.
4. The 1907 fourth, ninth and tenth Hague Conventions, including the Hague Regulations in the fourth Convention.
5. The 1929 Geneva Conventions.
6. The 1949 Geneva Conventions.
7. The 1977 and 2015 Additional Protocols to the Geneva Conventions.
8. The 1998 Rome Statute of the International Criminal Court.
9. The 2002 *Elements of Crimes* of the International Criminal Court.
10. "List of Customary Rules of International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 857, 2005.

Commentaries on the conventional and customary instruments

(Same order as corpus)

- 1a. Gustave Moynier, *Étude sur la convention de Genève pour l'amélioration du sort des militaires blessés dans les armées en campagne (1864 et 1868)*, Librairie Joël Chérbuliez, Paris, 1870.
- 1b. Carl Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, Édouard Besold, Erlangen, 1876.
2. A. Pearce Higgins, *The Hague Peace Conferences and Other International Conferences Concerning the Laws and Usages of War: Texts of Conventions with Commentaries*, Cambridge University Press, Cambridge, 1909.
3. Louis Renault, "La Conférence de revision de la Convention de Genève", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 148, 1906.
4. See under 2.

¹⁶⁴ John Dalberg (Lord Acton), *Lectures on the French Revolution*, ed. John Figgis and Reginald Laurence, Liberty Fund, Indianapolis, IN, 2000 (first published 1910), available at: <https://oll.libertyfund.org/titles/acton-lectures-on-the-french-revolution-lf-ed>.

- 5a. Paul des Gouttes, *La Convention de Genève pour l'amélioration du sort des blessés et des malades dans les armées en campagne du 27 juillet 1929: Commentaire*, ICRC, Geneva, 1930.
- 5b. Georges Werner, "Rapport présenté à la Conférence diplomatique au nom de la II^{me} Commission, chargée de l'élaboration du Code des Prisonniers de guerre", *Revue Internationale de la Croix-Rouge*, Vol. 11, No. 127, 1929.
- 6a. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952.
- 6b. ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016.
- 6c. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 2: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960.
- 6d. ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed. Geneva, 2017.
- 6e. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 3: Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960.
- 6f. ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020.
- 6g. Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949, Vol. 4: Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958.
- 6h. Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015.
- 7a. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva 1987.
- 7b. Michael Bothe, Karl Partsch and Waldemar Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 2013.
- 7c. Jean-François Quéguiner, "Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)", *International Review of the Red Cross*, Vol. 89, No. 865, 2007.
- 8a. Karl Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003.
- 8b. Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl, Brussels, 2017.
- 8c. William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2020.
9. See under 8.

10. Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, and Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, available at: www.icrc.org/customary-ihl.

Appendix 2: Methodology

For this study, the IHL view of the past, itself a *dimension* of IHL, was broken down into three *indicators* (time, memory, history). Indicator reconstruction occurred using the following keywords searches in the sources:

- For *time*: amnesty; anachronism; analogy; ancestor; century; continuing; custom; desuetude; duration; foresight; generation; hereditary; hindsight; immemorial; imprescriptibility; lapse of time; laws of humanity; Martens Clause; nonrecurrence; nonrepetition; nonretroactivity; Nuremberg; obsolescence; outdated; precedent; prescription; public conscience; *ratione temporis*; retrospective; statute of limitation; temporal; time bar; times; tradition; updated; usage.
- For *memory*: ashes; bereavement; burial; cemetery; commemoration; cremation; cultural property; the dead; death; deceased; decedent; dignity; exhumation; forgetting; funeral; grave; grief; heirs; heritage; human remains; last will; legacy; memorial; memory; monument; mourn; museum; outrage; remembrance; remember; remind; rites; statue; testament; testate; tribute.
- For *history*: archaeology; archive; civil war; colonialism, disappearance; forensic; Great War, historian; history; Holocaust; the missing; Nobel; search; transition; truth; Versailles; World War.

With these keywords (including their variants and French versions), relevant preamble parts, articles and rules were located in the conventional and customary instruments listed in Appendix 1. Some obvious but general keywords were excluded because they yielded too many hits (e.g., “past”, “time”) or had a double meaning (e.g., “will”). In a next step, the commentaries on these conventional and customary instruments (also listed in Appendix 1) were similarly searched. In addition, all general sections of the commentaries were consulted for context. The *travaux préparatoires* of conventional instruments were searched only sporadically. However, most commentaries provide summaries of key passages of these preparatory works.

What is IHL history now?

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Abstract

Over the last few decades, an extraordinary amount has changed in our understanding of the history of international humanitarian law (IHL). This article addresses the latest findings in this new historiography, placing contemporary IHL issues in a broader historical context and sharing the author's own experiences as a researcher exploring the discipline's practice from a historical perspective. Ultimately, he makes a passionate case for history – by showing why this discipline has a lot to offer for practitioners of international law.

Keywords: Geneva Conventions, International Committee of the Red Cross, international humanitarian law, history, archives.

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Introduction

Over the last few decades, an extraordinary amount has changed in our understanding of the history of international humanitarian law (IHL). Until the 1990s, many historical accounts took at face value the recollections and reflections of Western IHL protagonists, such as the drafters of the 1949 Geneva Conventions.¹ In so doing, they tended to depict the discipline's historical trajectory as gradually bending the arc of global justice in the direction of more humane warfare. More recently, however, scholars using historical approaches have challenged this narrative.² Responding to calls for new research based on archival materials, the renewed analysis of secondary sources, and more

innovative research methods, they have developed cutting-edge approaches to studying IHL history.

Recent years have seen a renaissance in IHL historiography, brought on by the emergence of a new generation of Third World and critical legal scholars, the renewed US interest in studying IHL since the events of 11 September 2001 (9/11), the “historicizing moment” in international law, as well as the opening of new archives, principally those of the International Committee of the Red Cross (ICRC) covering the period up until the mid-1970s. In addition to scrutinizing IHL’s self-indulgent historical narratives, contemporary critical legal scholars have invested much of their effort in developing new methodologies and collecting different sources through which to reimagine the past and future of IHL.³ These remarkable changes have given rise to a much more subtle understanding of how the Hague and Geneva Conventions were made;⁴ the role played by Third World actors in this process;⁵ how ideas about punishment and humanity reshaped the discipline from the First World War onwards;⁶ why African national liberation movements promoted ideas of self-determination through the humanization of warfare;⁷ the extent to which the Great Powers were willing to tolerate these efforts; and how ideas of sovereignty, humanity and rights have been radically transformed since the 1990s.

After doing years of archival research exploring the history of the 1949 Conventions and discussing my findings with practitioners from across the world, I often have the feeling that the two worlds of academia and IHL practice are still not well-enough connected, leading to various misunderstandings and missed opportunities for demonstrating why IHL history matters. This article tries to overcome some of these problems by addressing the latest findings in the

- 1 One important exception is Geoffrey Best’s path-breaking book from 1980. Geoffrey Best, *Humanity in Warfare: Modern History of the International Law of Armed Conflicts*, Columbia University Press, New York, 1980.
- 2 Good examples of this new approach are Giovanni Mantilla, “The Origins and Evolution of the 1949 Geneva Conventions and the 1977 Additional Protocols”, in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford, 2017; James Crossland, *War, Law and Humanity: The Campaign to Control Warfare, 1853–1914*, Bloomsbury Academic, London, 2018; and Anna Chotzen, “Beyond Bounds: Morocco’s Rif War and the Limits of International Law”, *Humanity*, Vol. 5, No. 1, 2014.
- 3 Frédéric Mégret, “From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s ‘Other’”, in Anne Orford (ed.), *International Law and its Others*, Cambridge University Press, Cambridge, 2006; and Jennifer Pitts, “The Critical History of International Law”, *Political Theory*, Vol. 43, No. 4, 2015.
- 4 Maartje Abbenhuis, *The Hague Conferences and International Politics, 1898–1915*, Bloomsbury Academic, London, 2018.
- 5 Amanda Alexander, “International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I”, *Melbourne Journal of International Law*, Vol. 17, No. 1, 2016.
- 6 Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950*, Oxford University Press, Oxford, 2014.
- 7 Eleanor Davey, “Decolonizing the Geneva Conventions: National Liberation and the Development of Humanitarian Law”, in A. Dirk Moses, Marco Duranti and Roland Burke (eds), *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, Cambridge University Press, Cambridge, 2020. See also Adom Getachew, *Worldmaking After Empire: The Rise and Fall of Self-Determination*, Princeton University Press, Princeton, NJ, 2019.

historiography of IHL, placing contemporary IHL issues in a broader historical context, sharing my own experiences as a researcher exploring the discipline's practice from a historical perspective, and showing why history has a lot to offer for practitioners.

Overcoming disciplinary boundaries and recognizing IHL's historical mechanisms have the potential to enrich contemporary discussions of a broad range of issues relating to the practice of restraint in warfare—from treaty-making and compliance, through inclusion and diversity, to even contemporary issues such as cyber-warfare. This article ranges across a broad temporal scope, extending from pre-modern debates regarding humanity in warfare to recent discussions about the Conventions' future. The first part addresses some of the larger methodological questions in IHL history, from problems relating to the archive to difficulties in historical interpretation. To situate these specific issues in relation to a broader discussion of IHL, the second section surveys the most recent findings in the discipline's history, which can inform and assist practitioners in imagining a more humane future.

The IHL archive – and its problems

The most recent push towards a more historical understanding of IHL has been facilitated by some of the extraordinary changes in archival accessibility. Since the 1990s, a significant proportion of crucially important archival materials regarding IHL's history has become available to both academics and practitioners.⁸

This new body of archival materials includes a wide range of new sources: the African Union's repository, with its unique documentation of pan-African visions of humanitarian law; the Israeli National Archives, with their digitalized collection of materials relating to Zionist visions and practices of belligerent occupation; the Mayibuye Archive at the University of Western Cape, which contains the personal papers of legal actors of the African National Congress (ANC) and other anti-apartheid groups; as well as the famous ICRC Archives, featuring an impressive collection of IHL materials reflecting on the period preceding the Additional Protocols' adoption in 1977.

On the one hand, this growing collection of IHL primary sources provides historians and other researchers with plenty of opportunities to explore the discipline's past from different perspectives as a way of reinvigorating its future. They can now digitally access ICRC films and countless newspapers to write a more culturally attuned history, inspired by the Annales School, of the usages of international law in wartime,⁹ read the memoirs of anti-colonial IHL thinkers

8 Matt Craven, "Introduction: International Law and its Histories", in Matt Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law*, Leiden, Brill Nijhoff, 2006, p. 4.

9 Nicoletta F. Gullace, "Sexual Violence and Family Honor: British Propaganda and International Law During the First World War", *The American Historical Review*, Vol. 102, No. 3, 1997.

such as the Algerian Mohammed Bedjaoui,¹⁰ as well as the speeches delivered in the 1960s and 1970s by those same actors, through which they can counter the Eurocentrism of the established literature. On the other hand, each of these newly available sources raises different questions about how IHL collections have been assembled and organized, to whom they are addressed, and why certain archival materials have survived into the present whereas most others have not.

Why have IHL archivists made some sources available and kept others isolated from external researchers? What accounts for the fact that the archives of many international courts—which play a central role in creating IHL jurisprudence—are entirely closed off?¹¹ How does that shape our grasp of IHL history? To what extent have the archivists from these and other international institutions, which are often based in expensive cities, such as Geneva, The Hague and New York, tried to accommodate those researchers with scarce resources—while ensuring that the data of witnesses and survivors remain sufficiently protected? How do these limitations affect the study of IHL history? And how might massive digitalization programmes such as the League of Nations Archives Project address these structural problems in IHL’s research communities?¹²

Before any of these questions can be answered, it is important to realize that archives are always fragmentary, whether or not they relate to IHL. They can never provide conclusive answers to all of the questions that we might have. Let me give an example from my own experience. In researching the history of the 1949 Conventions, I visited the Swiss Federal Archives in Bern, which house the official records of the diplomatic conference(s) at which the Conventions were formulated. I hoped to find the voting records of the adoption of Article 3 common to the four Geneva Conventions (common Article 3; CA3), which today forms a vital legal bulwark in situations of “non-international armed conflict” (NIAC). The voting records, I thought, might prove useful in reconstructing the process by which this provision was drafted, and how we should understand its core principles in light of contemporary concerns.

Unfortunately, however, the Federal Archives did not have the copies of every single voting round that took place at the conference, including that which led to the adoption of CA3. The fact that powerful State drafters had deliberately prevented the outside world from knowing about the exact voting record of this provision’s adoption by pushing for a secret ballot made reconstructing this history even more difficult.¹³ I was left with no other choice than to look

10 Mohammed Bedjaoui, *Une révolution algérienne à hauteur d’homme*, Riveneuve, Paris, 2018.

11 For a discussion of the archival politics of the International Criminal Tribunals for Rwanda, see Henry Alexander Redwood, *The Archival Politics of International Courts*, Cambridge University Press, Cambridge, 2021. See also Barrie Sander, *Doing Justice to History: Confronting the Past in International Criminal Courts*, Oxford University Press, Oxford, 2021.

12 The ICRC Assembly also adopted in 2020 a plan to make the organization’s archives more accessible through “becoming digital by design”. The ICRC Library also has an impressive digital collection of the drafting history of the Conventions and Protocols. “The Strategy for Archives, Records and Library Collections, 2019–2023”, ICRC Library, Geneva.

13 Boyd van Dijk, *Preparing for War: The Making of the Geneva Conventions*, Oxford University Press, Oxford, 2022.

elsewhere for answers about CA3's hidden drafting history. In the years before the pandemic, I had the unique privilege of being able to visit different archives across several continents. This allowed me to collect the copies of the final reports produced by influential States' delegations, including those from the United States, Australia, Canada, Great Britain and Ukraine, one of the Soviet Union's central allies at this conference.

These materials provided a unique—though highly Western or Eurocentric—perspective on IHL history. Among other things, they shared information about their government's various instructions, voting estimations, sense of the drafting process, personal anecdotes, outlines, minutes of cabinet meetings, short drafting summaries, and assessments of foreign delegation members. I could use these reports to reconstruct important parts of the drafting process, for they allowed me to recover the instructions given to influential delegations and read their versions of the unfolding process of CA3's adoption. These materials enabled me to confirm, for instance, that important States such as Canada continued resisting the adoption of CA3 until the very last stage of these negotiations, which finished in August 1949 with the article's adoption.¹⁴

Although they are extremely rich, none of these final reports provided an immediate answer to the question of how the Great Powers had voted during the process of adopting CA3. For instance, the leader of the British delegation Robert Craigie, in his report on the 1949 diplomatic conference, admitted that he had preferred a far more restrictive proposal than CA3's final text. What is more, he revealed that during the negotiations he had pushed for a secret ballot in a stealthy bid to convince hesitant allies to support him in his resistance to CA3 without having to suffer immediate public relations' damage. Given that the secret ballot was accepted, it is unclear which of the Great Powers supported CA3's final text and whether any abstained (one vote) or rejected the proposal (twelve votes) in August 1949. Indeed, the report casts doubt on whether Craigie's delegation finally voted in favour of the article.¹⁵

The example of CA3's highly contingent drafting process shows not just that archival collections are always incomplete, but also that the most important reflections of a historical event are never written down, and that IHL lawmaking is a profoundly political process.¹⁶ In addition to these points, it also demonstrates that archival materials can never be entirely relied upon when analysing the history of CA3, or that of any other IHL phenomena. The State delegations' reports of the 1949 conference were intended to deceive us, featuring a great deal of self-congratulation as well as a lack of honest self-reflection about the drafters' own shortcomings. They often amplified their accomplishments and

14 *Ibid.*

15 *Ibid.*

16 Helen M. Kinsella and Giovanni Mantilla, "Contestation before Compliance: History, Politics, and Power in International Humanitarian Law", *International Studies Quarterly*, Vol. 64, No. 3, 2020, pp. 654–5.

spoke in condescending terms about their enemies, all in the interest of trying to meet their superiors' expectations of the conference.

The so-called *travaux préparatoires* are another example of an unreliable primary source for analysing IHL history in general and the making of the Conventions in particular. What is striking about these documents, which allegedly provide a direct insight into the meetings that facilitated the treaties' adoption, is their historical imprecision. Although they are often used by academics and practitioners to trace the discourses and ideas behind the formulation of the Conventions in order to get a grasp of contemporary legal phenomena, the *travaux* are often not *verbatim* records of the drafting process. In reality, they are usually mere summaries of the drafting debates and, as such, provide neither reliable information about what was actually said nor detailed insights into drafters' specific goals.¹⁷

This does not mean that the *travaux* are completely useless for analysing the manufacture of the Conventions, however tempting it might be to throw them into the dustbin of history. For example, the *travaux* can act as a useful first step into the unknown world that is IHL's drafting history. Indeed, these records reveal important facts, such as the names of the protagonists, their affiliations, dates of crucial meetings, and information about when drafters went public with their proposals. The *travaux* also help identify crucial moments at which those protagonists decided to reverse the codification's drafting direction. If we recognize the *travaux*'s limitations as a source for analysing IHL history and seek additional archival sources from places beyond Geneva, The Hague and New York, then in the future we will be able to use them far more effectively to explore the discipline's past from a wide range of perspectives.

As we seek to expand and diversify the collection of IHL primary sources at our disposal, in thinking critically about the law's practice, we should not forget to ask ourselves what has been lost in the process of organizing these inventories. For instance, why do we have such a rich understanding of the history of IHL violations but know shockingly little about its long record of compliance?¹⁸ Why is there an abundance of IHL scholarship addressing the First World War and a dearth of studies analysing twentieth-century wars of decolonization?¹⁹ And why do some international organizations such as the ICRC devote significant resources to making their archival collections more accessible whereas others (e.g. the International Association of Democratic Lawyers) keep them virtually unattainable?

17 Nathan A. Kurz, "'Hide a Fact Rather Than State It': The Holocaust, the 1940s Human Rights Surge, and the Cosmopolitan Imperative of International Law", *Journal of Genocide Research*, Vol. 23, No. 1, 2021.

18 Another important study reflecting on the history of IHL compliance during the First World War is Isabel V. Hull, *A Scrap of Paper: Breaking and Making International Law During the Great War*, Cornell University Press, Ithaca, NY, 2014.

19 One historian who is trying to overcome this juxtaposition is Kimberly Lowe. Kimberly Lowe, "The Red Cross and the Laws of War, 1863–1949: International Rights Activism Before Human Rights", in Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights*, Routledge, New York, 2020. Another notable exception is Raphaëlle Branche, "Entre droit humanitaire et intérêts politiques : les missions algériennes du CICR", *Revue historique*, 1999.

Some of these questions can be answered by pointing towards the dramatic impact of institutional codes of confidentiality on archival materials' accessibility. In many cases, actors have reclassified or destroyed archival records that concern sensitive parts of a given institution's history. Even the ICRC archives, which are credited as being among the most accessible IHL archives, are not entirely unproblematic in this regard. Think of not just the temporal limitations of the archives reaching until the mid-1970s, but also how the papers of Jean Pictet, one of the most important ICRC legal experts in history and a former historian of the Native American Wars, remain largely classified.²⁰

Still, State archives arguably present IHL researchers with greater difficulties. A recent example from the United Kingdom is a case in point. Several years ago, sustained legal efforts forced the British government to release a tranche of secret files once thought lost. The collection featured a great deal of sensitive materials involving the country's atrocious track record in colonial Kenya, for instance.²¹ They revealed the structural use of Britain's violent methods, such as torture and other major violations of CA3,²² to suppress the Mau Mau uprising in the 1950s, as well as how the government tried to cover this up by destroying materials and keeping the surviving documents stored in an unknown facility.²³

Using these colonial archives of IHL history raises troubling questions. I know from experience how difficult it can be to access these records; why some former colonial powers are trying to make this even more troublesome; the challenges, often linguistic and resource-based, that historians face in trying to move beyond these colonial archives; and why studying the questions of race and exclusion remains of crucial importance for understanding IHL history.²⁴

When I say that I draw from personal experience, I mean that using archival materials to write a more global history of the Geneva Conventions for the period after 1949 (as I am) is a recipe for methodological disaster – and even more so following the pandemic's outbreak. It demands that I learn new languages, engage with historiographies that are completely foreign to me, venture into new theoretical fields of study, deal with political resistance from State and non-State actors, spend extended periods of time on writing tiring grant proposals, and at times work under precarious labour conditions. But the problem that I have faced most often is that the archives of States, foreign ministries, courts and non-governmental organizations, in trying to police their most sensitive files regarding war and peace, frequently curtail researchers' access to their materials. Examples include the ICRC's decision to keep its records

20 The restrictive role of Pictet's family archives is arguably even more important in this context.

21 For a broader context of the insurgency, see Huw Bennett, *Fighting the Mau Mau, The British Army and Counter-Insurgency in the Kenya Emergency*, Cambridge University Press, Cambridge, 2012.

22 David M. Anderson, "British Abuse and Torture in Kenya's Counter-Insurgency, 1952–1960", *Small Wars and Insurgencies*, Vol. 23, No. 4–5, 2012.

23 Holly Wallis, "British Colonial Files Released Following Legal Challenge", *BBC News*, 18 April 2012, available at: <https://www.bbc.com/news/uk-17734735> (all internet references were accessed in April 2022).

24 James Thuo Gathii, "Studying Race in International Law Scholarship Using a Social Science Approach", *Chicago Journal of International Law*, Vol. 22, No. 1, 2021.

relating to the Holocaust closed until the 1990s,²⁵ as well as the disappearance of sensitive files regarding IHL violations in post-colonial archives.

This lack of institutional accessibility has serious implications for how we understand and practise IHL history today. We cannot rely exclusively on the historical perspectives captured in the *travaux* or documents that provide retrospective views of the past. Rather, we need to push for greater transparency on the part of institutions and supplement the *travaux* with other (archival) materials. International lawyers, military officers, rebel groups, humanitarians and numerous other IHL advocates left behind a vast quantity of unexplored sources in private archives or outside their institutions. Of particular value here are the personal papers of the drafters involved in the making of the Protocols and those legal advisers who shaped the character of Cold War proxy wars and wars of decolonization in the decades after 1949. From diaries to autobiographies, many of these private collections of former IHL protagonists have been loaned or given to university libraries and national archives. Some are still kept by their authors themselves, as are the personal papers of José Oscar Monteiro, a former Mozambican guerrilla and drafter of the Protocols, or members of their extended family.²⁶

These private materials are unique in that they shed new light on well-known historical subjects, such as the process of preparing the delegations of national liberation movements for the drafting of the Protocols in the 1970s. Some of these materials can provide far more penetrating insights into the history of IHL than the *travaux*. I noticed this while I was going through the files of East German legal advisors who participated in formulating the Protocols. In the Politisches Archiv des Auswärtigen Amts, based in Berlin, I found a legal diary from an East German drafter in which he had written down a set of detailed comments about his experiences as a socialist delegate in Geneva. This personal document provided unique details relating to his perceptions and ideas, his expectations of other delegations and their actions, and so on. It also allowed me to take a look from behind the iron curtain to discover how socialist drafting parties (such as the East German State to which this document's author belonged) experienced the process of drafting the Protocols. This is crucial, for the literature in this research area still lacks such perspectives of non-liberal and/or non-Western actors.

In some ways, primary sources such as this legal diary have the potential to show “how things actually were”, to paraphrase Leopold von Ranke's famous phrase. They also reveal a more human face of a discipline of international law that is best known for its love of abstract abbreviations such as NIAC or LOAC. By showing what went on behind the scenes, these primary sources allow us to see the past differently. Exploring such sources can also help us determine the

25 Before the ICRC archives opened up, most scholars were forced to use only publicly available sources (e.g. the *Revue*, secondary sources, non-ICRC archives, etc.) in order to reconstruct the ICRC's history, or that of the Geneva Conventions. One example is Dieter Riesenberger, *Für Humanität in Krieg und Frieden. Das Internationale Rote Kreuz, 1863–1977*, Vandenhoeck & Ruprecht, Göttingen, 1992, pp. 214–18.

26 Personal papers of José Oscar Monteiro, Maputo, Mozambique.

extent to which the *travaux* reflect these insights, whether they have been corrupted or not, if their authenticity should be questioned, and so on. Addressing these questions can bring us closer to knowing which of the available tellings of IHL history is the most reliable one.²⁷

That, at least, is the aspiration of historicist IHL. In reality, the imperatives to be “true to our sources” and recapture the “authenticity” of the historical moment in which they were born ultimately represent a dead end. Methodologically, these tasks are impossible to fulfill. Since we are unable to escape the privilege of hindsight, we cannot know what our historical actors precisely thought at the time. Nor can we claim that our sources need to “speak for themselves”: these materials always require historical interpretation. We are expected to separate relevant from irrelevant facts and cannot hide from the reality of incomplete sources that are scattered across various archives.

This means that scholars have to accept that archives can be read in various ways, that there is not one “true” way of seeing things, and that we return to particular historical episodes for all-too contemporary reasons. It also suggests that historians cannot remove their personality from their research – which is not necessarily a bad thing. Although I am sometimes frustrated by the lack of scholarly interest into the riches of IHL archives, I am the first to admit that knowledge about the past can be acquired just as much by reinterpreting old sources as by discovering new ones. Indeed, we should be careful not to create major hierarchies or boundaries between scholars excavating the archives and those focusing exclusively on existing materials, much of which was uncovered years ago.

Relying on techniques from other fields of study and lowering disciplinary bridges have always been a major strength of IHL scholarship. Over the years it has benefitted greatly from insights gleaned and knowledge produced in disciplines other than history, from anthropology,²⁸ through “third-generation international relations”,²⁹ to political geography.³⁰ These different disciplines have raised new kinds of questions about IHL’s history and offered historians plenty of hypotheses to test in refining our understanding of this topic.³¹

What distinguishes historians most from scholars working in other disciplines is their ability to place their subjects in the relevant contexts.³² As

27 N. A. Kurz, above note 17.

28 Helen M. Kinsella, *The Image Before the Weapon: A Critical History of the Distinction Between Combatant and Civilian*, Cornell University Press, Ithaca, NY, 2011.

29 H. M. Kinsella and G. Mantilla, above note 16, p. 650.

30 Craig Jones, *The War Lawyers: The United States, Israel, and Juridical Warfare*, Oxford University Press, Oxford, 2020.

31 One example is Mantilla’s study of social pressuring mechanisms in the history of IHL’s making. Giovanni Mantilla, *Lawmaking Under Pressure: International Humanitarian Law and Internal Armed Conflict*, Cornell University Press, Ithaca, NY, 2020.

32 For a broader discussion of the recent method wars in international legal scholarship, see Natasha Wheatley, “Law and the Time of Angels: International Law’s Method Wars and the Affective Life of Disciplines”, *History & Theory*, Vol. 60, No. 2, 2021; Anne Orford, “On International Legal Method”, *London Review of International Law*, Vol. 1, No. 1, 2013; and Anne Orford, “International Law and the Limits of History”, in Wouter Werner, Marieke de Hoon and Alexis Galán (eds), *The Law of International Lawyers: Reading Martti Koskenniemi*, Cambridge University Press, Cambridge, 2017.

such, they have endowed the study of IHL with a much greater sense “of being grounded and located in time”, to paraphrase Naz Modirzadeh, and “a feeling that one ought to be cautious about becoming overly panicked about the notion that new (...) threats require new (...) approaches to international law”.³³ By reconnecting the discipline of IHL with the contexts and ideas that anticipated it, researchers are both better preparing practitioners and researchers for the future as well as giving them a fuller understanding of former legal practices.³⁴ They have offered us more subtle insights into why the use of particular weapons and military tactics has gradually declined whereas the use of others has persisted or re-emerged,³⁵ and why Great Powers sign up to IHL treaties despite the apparent restrictions that they place on their conduct of warfare.³⁶

This should not induce nostalgia for some golden age of IHL. Rather, we can use historical contexts as a lens through which to recognize the facts and tendencies that can make wars less destructive and save the lives of civilians, as well as the conditions under which these mechanisms can fall apart, and why they have done so at various points in time. Instead of seeing the past as an escape from contemporary reality, we should consider it as a prelude to the present and scrutinize the dominant collective memories of this history. For instance, some present-day commentators champion the Civilian Convention of 1949 as the product of a post-war utopian liberal moment,³⁷ hoping to replicate this outcome into the post-Trumpian present while facing the challenges of cyber-warfare. However, we must never ignore the Convention’s deliberate silence on the threats of indiscriminate bombing and hunger blockade.³⁸

If nostalgic visions eulogize IHL’s past, progressive counter-narratives of the discipline’s historical trajectory often portray it as one of gradually developing from a horrific past to a more enlightened future of humane warfare. Writers in this vein have all too often regarded IHL history as a process of learning, from which more humane conceptions of warfare continue to emerge as time goes on. Their eulogist histories have turned the foundational stories of Solferino and the Geneva Conventions into the discipline’s defining myths in an attempt to provide a veneer of legitimacy for Western (i.e. Swiss) self-images and interests.³⁹

33 Naz K. Modirzadeh, “Cut These Words: Passion and International Law of War Scholarship”, *Harvard International Law Journal*, Vol. 61, No. 1, 2020, p. 48.

34 See Brian Drohan, *Brutality in an Age of Human Rights, Activism and Counterinsurgency at the End of the British Empire*, Cornell University Press, Ithaca, NY, 2017.

35 Nina Tannenwald, “The Nuclear Taboo: The United States and the Normative Basis of Nuclear Non-Use”, *International Organization*, Vol. 53, No. 3, 1999; and Richard M. Price, *The Chemical Weapons Taboo*, Cornell University Press, Ithaca, NY, 1997.

36 Giovanni Mantilla, “Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict”, *International Organization*, Vol. 72, No. 2, 2018.

37 See Brad Smith, “Transcript of Keynote Address at the RSA Conference 2017: The Need for a Digital Geneva Convention”, *Microsoft On the Issues*, 14 February 2017, available at: <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>.

38 Boyd van Dijk, “Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions”, *American Journal of International Law*, Vol. 112, No. 4, 2018, pp. 553–6.

39 For a discussion of the debate around the question whether IHL restricts or legitimizes violence, see the classic Chris af Jochnick and Roger Normand, “The Legitimation of Violence: A Critical History of the Laws of War”, *Harvard International Law Journal*, Vol. 35, No. 1, 1994.

Historians have recently challenged these one-dimensional popular memories of IHL's past and questioned some of the foundational premises on which they rest. At the same time, they have developed new narratives in response. These new interpretations are often grounded in empirical sources, based on different theoretical assumptions, and inspired by comparative approaches to international law. Among other things, they show the extent to which sovereign concerns have shaped IHL's outlook, how readings of IHL's past have been promoted or erased for political and racialized ends,⁴⁰ and that it is a mistake to assume that this history was mainly guided by the forces of humanity. This scholarship shows that, in reality, advocates of the discipline have always played an important role in the formation of nation-States and their mythologizing narratives of themselves.⁴¹ Indeed, the codification of humanitarian law was informed by ideas of nationality, race, religion and gender to a much more significant extent than has been often assumed in retrospect – especially in contemporary commemorative rituals of IHL.

New histories of IHL

Recent scholarly interventions have radically altered our understanding of IHL history. Historical researchers are now writing about almost every conceivable aspect of IHL history while relying on insights and methodologies from disciplines other than history. Under the influence of Third World approaches to international law (TWAIL),⁴² they are exploring the roles played by hierarchy and race in the development of IHL; under the tutelage of constructivist international relations theory, they are investigating the significance of moral norms and social mechanisms in this history;⁴³ through the lens of gender studies, they are transforming our understanding of IHL's attitudes towards the genders in wartime;⁴⁴ and under the influence of memory studies and oral history, they are fundamentally changing how the discipline visualizes its past.

Five important tendencies in this new scholarship of IHL history stand out. The first, and the most influential one in recent years, is the deconstruction and reimagination of IHL history, that is, attempts to transform its orientation radically such that the field no longer reproduces imperial domination, breaks with racialized approaches to humanizing warfare, and puts the interests of civilians and peace first.⁴⁵ These studies show in detail how mechanisms of

40 For a discussion of the erasure of IHL history and the Vietnam War, see N. K. Modirzadeh, above note 33.

41 Eyal Benvenisti and Doreen Lustig, "Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874", *European Journal of International Law*, Vol. 31, No. 1, 2020.

42 Antony Anghie, "TWAIL: Past and Future", *International Community Law Review*, Vol. 10, No. 4, 2008.

43 Janina Dill, *Legitimate Targets? Social Construction, International Law and US Bombing*, Cambridge University Press, Cambridge, 2014; and Christian Reus-Smit, "Reading History Through Constructivist Eyes", *Millennium: Journal of International Studies*, Vol. 37, No. 2, 2008, pp. 397–8.

44 H. M. Kinsella, above note 28.

45 Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, New York, 2020; and A. Dirk Moses, *The Problems of Genocide: Permanent Security and the*

empire, race and militarism are shaping contemporary battlefield ethics at the expense of civilians, and what role power has played in the making and practice of humanitarian law.⁴⁶ In sharing these insights, they are forcing us to think about why IHL too often takes the side of aerial warfare instead of protecting civilians against its brutal effects, and whether it is truly willing to act as an effective deterrent in the struggle against the violence of seemingly endless wars.

Building upon this critical line of thought, the second trend in this new IHL scholarship is a greater emphasis on the role of marginalized and racialized groups on and around the battlefield – under the banner of history from below. Most IHL studies still concentrate heavily on the role of “great white men” in shaping the efforts to humanize warfare, thereby excluding countless women and other marginalized groups from canonical accounts. In seeking to correct this oversight, feminist international law has tried to recover the practices and ideas of those women who shaped the discipline’s history in remarkable ways.⁴⁷ Examples include women such as Marguerite Frick-Cramer, one of the first female drafters of the Conventions and the first woman to sit on the ICRC Committee; and Amrit Kaur, the Indian minister who was the first woman to chair a global Red Cross conference. Recent scholarly attempts to restore women’s agency in international law and present new micro-histories of IHL aim to make our analysis of the past more inclusive, if not transformative, than received accounts.⁴⁸

In addition to giving women a greater voice in international law, feminist interventions into the field also seek to radically alter its progressivist understanding of itself, in parallel with the previous trends described here.⁴⁹ To this end, scholars have presented a range of different perspectives on gender and sexuality, which is reshaping the very foundations of the discipline.⁵⁰ For instance, they have questioned archaic views concerning women’s honour and notions of modesty that have often prevailed in IHL, as encapsulated in the Conventions’ provisions.⁵¹ Indeed, archconservative agendas, including attempts

Language of Transgression, Cambridge University Press, Cambridge, 2021. For a broader discussion of how war entered the human rights field, see Linde Lindkvist, “When the War Came: The Child Rights Convention and the Conflation of Human Rights and the Laws of War”, in Jean Quataert and Lora Wildenthal (eds), *The Routledge History of Human Rights*, Routledge, New York, 2020.

46 A. Dirk Moses, “Empire, Resistance, and Security: International Law and the Transformative Occupation of Palestine”, *Humanity*, Vol. 8, No. 2, 2017.

47 See Immi Tallgren, *Portraits of Women in International Law: New Names and Forgotten Faces?*, Oxford University Press, Oxford, forthcoming.

48 Hilary Charlesworth, “The Women Question in International Law”, *Asian Journal of International Law*, Vol. 1, No. 1, 2011.

49 For one example, see Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations*, University of Pennsylvania Press, Philadelphia, PA, 2013.

50 Important examples of this shift are: Laura Sjoberg, “Gendered Realities of the Immunity Principle: Why Gender Analysis Needs Feminism”, *International Studies Quarterly*, Vol. 50, No. 4, 2006; and Christine Chinkin, “Rape and Sexual Abuse of Women in International Law”, *European Journal of International Law*, Vol. 5, No. 3, 1994. For a critical practitioners’ account of this shift, see Helen Durham, “Women, Armed Conflict and International Law”, *International Review of the Red Cross*, No. 84, No. 847, 2002.

51 See also Helen M. Kinsella, “Securing the Civilian: Sex and Gender in the Laws of War”, in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance*, Cambridge University Press, Cambridge, 2004; and Karen Engle, “Judging Sex in War”, *Michigan Law Review*, Vol. 106, No. 6, 2008.

to police women's sexuality and reproductive rights, have shaped and pre-configured the foundations of these treaties, with crucial implications for how we understand these key issues today.⁵²

The third trend shaping contemporary IHL studies is their increasing focus on contingency and rescuing lost pasts – the interruptions, disruptions and detours of history, so as to reimagine the discipline's future.⁵³ Along these lines, I have recently co-written a new history of starvation as a weapon of (in-)humane war, in collaboration with another historian.⁵⁴ We asked whether contemporary crimes of starvation could have been avoided or rendered less destructive if the drafters of humanitarian law had strictly outlawed this weapon when they were finalizing the Civilian Convention's text in 1949 – and during various other crucial historical junctures. What might have transpired, we wondered, if advocates of a strict prohibition in that period had been willing to push the powerful Anglo-American powers further to end inhumanity on the seas?⁵⁵ Would this have simply endangered the Conventions' future or might it actually have led to a legal breakthrough, stigmatizing one of the most pervasive forms of inhumanity in wartime?

Again, there are no easy answers to these questions, but it is clear that an effort to prohibit hunger blockades would have created significant controversy had it been raised in such terms at the 1949 diplomatic conference. It might well have elicited reservations on the part of resistant delegations forming the Anglo-American counter-block. Still, it is equally likely that a codified prohibition of starvation blockades would have set a useful precedent, which could be used to further erode the weapon's legitimacy in future armed conflicts. In this scenario, an emphasis on contingency alerts us to different historical possibilities, bringing together different legal alternatives in an effort to address pressing moral needs today.

At the same time, we should be careful not to overestimate the potential impact of these contingent approaches to IHL history. For example, it is hard to imagine that a prohibition of blockades in 1949 would have dramatically altered the course of the Cold War, leading combatants involved in proxy wars and wars of secession to refrain from starvation policies altogether. There is little reason to believe that States or rebel groups would have immediately relinquished this weapon if Geneva had outlawed it or that they would find no other international legal means to justify its use in war- or peacetime. In making this observation, I do not mean to claim that IHL cannot make an impact on the conduct of warfare (in-)directly or that the urgency of military necessity always means that law gets

52 See Boyd van Dijk, "Gendering the Geneva Conventions", *Human Rights Quarterly*, Vol. 44, No. 2, 2022.

53 One example of such an attempt to rescue lost pasts is Katharine Fortin, "Complementarity Between the ICRC and the United Nations and International Humanitarian Law and International Human Rights Law, 1948–1968", *International Review of the Red Cross*, Vol. 94, No. 888, 2012.

54 Nicholas Mulder and Boyd van Dijk, "Why Did Starvation Not Become the Paradigmatic War Crime in International Law?", in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories*, Oxford University Press, Oxford, 2021.

55 For descriptions of nineteenth-century blockade and privateering, see Jan Martin Lemnitzer, *Power, Law and the End of Privateering*, Palgrave Macmillan, Basingstoke, 2014.

trumped in wartime. Instead, it suggests that attempts to save lost pasts or rescue IHL contingencies from oblivion, despite yielding many fruitful insights into the discipline's past, will only ever have limited effects, for we will never know what actually would have happened had Geneva drafted differently.

The fourth trend shaping contemporary IHL studies is the increasing recognition of socialist and/or anti-colonial contributions to its historical development.⁵⁶ From the Peruvian international lawyer Alonso Gurmendi, the Australian scholars Eleanor Davey and Jessica Whyte, to the Indian scholar of Third World humanitarian law Srinivas Burra, researchers from across the Global South and beyond are doing groundbreaking work in reshaping the field's outlook by shedding light on how Asian, Latin American and Black actors have shaped the formation of IHL. This new scholarship, which diverges from existing work by radically challenging Eurocentric and racialized understandings of IHL, accommodates more voices and different ideas in the unfolding of international legal history.⁵⁷ This is all the more important because of the impact of Third World actors in reimagining the discipline's recent past.⁵⁸ Indeed, especially from the 1950s onwards, the Global South has played a central role in reshaping the practice and codification of IHL.⁵⁹

The scholars who have participated in this strand of the literature have raised fundamental questions about IHL's canon and statues – which herald figures such as the ICRC founding member Gustave Moynier despite his involvement in Leopold II's brutal regime in Congo.⁶⁰ Up to now, most IHL studies have taken the perspectives that centred Western international legal action as their analytical starting points for exploring the discipline's history: the role of socialist, anti-colonial and post-colonial actors has often figured only marginally in such analyses. This needs to change. We cannot overcome the field's structural problems – from racial hierarchies, through compliance failures, to exclusion – merely by addressing their symptoms. Replacing the names of Western legal experts with others from the Global South or substituting a new canon for the old one will not resolve the field's enduring problems.

Addressing IHL's legacies of empire and racial exclusion is far from easy and requires a different way of doing history.⁶¹ It demands that we identify with

56 E. Davey, above note 7, p. 381.

57 Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, Cambridge University Press, Cambridge, 2011.

58 See also Andrew Thompson, "Restoring Hope Where All Hope Was Lost': Nelson Mandela, the ICRC and the Protection of Political Detainees in Apartheid South Africa", *International Review of the Red Cross*, Vol. 98, No. 903, 2016, pp. 812–13.

59 See also Srinivas Burra, "Was There the Third World in Geneva in 1949?", *EJIL Talk! – Blog of the European Journal of International Law*, 26 September 2019, available at: <https://www.ejiltalk.org/was-there-the-third-world-in-geneva-in-1949/>.

60 One of the most powerful examples is: Jessica Whyte, "The 'Dangerous Concept of the Just War': Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions", *Humanity*, Vol. 9, No. 3, 2018.

61 See Fabian Klose, "The Colonial Testing Ground, The International Committee of the Red Cross and the Violent End of Empire", *Humanity*, Vol. 2, No. 1, 2011; and Will Smiley, "Lawless Wars of Empire? The International Law of War in the Philippines, 1898–1903", *Law and History Review*, Vol. 36, No. 3, 2018;

actors from beyond the metropole and learn from them, explore their ideas differently, engage with scholars and journals from the Global South, uncover the field's deeper origins, search for new materials, and read sources against the grain.⁶² IHL historians' task is to broaden the scope of their analysis such as to encompass not just Western advocates and critics but subaltern IHL experts too—from the legal advisor of the South West Africa People's Organization Kader Asmal, through the North Vietnamese critics of the Geneva Conventions, to the Indian and Nigerian advocates of humanitarian law's provisions with regard to blockade. The latter's place needs to be much more central to narratives of humane warfare in the twentieth century.⁶³ There are many, many good reasons why the history of IHL beyond Europe and North America is worth analysing. What is more, the increasing availability of new archival materials presents a historic opportunity to reimagine this past.

This lesson is equally applicable to analyses that concentrate on reconstructing the intellectual history of IHL—and this is the fifth major trend.⁶⁴ This historiography often revolves around the usual Western suspects such as Grotius, Vattel, Lieber and others whose intellectual contributions to the field have been described as establishing its conceptual framework. Today, however, most scholars of international law emphasize the need to understand these doctrinal thinkers in their relevant contexts. Research in this vein has shown how their ideas were profoundly shaped by exclusionary processes such as settler colonialism and slavery, and why these elements ought not to be qualified as excusable mistakes.⁶⁵

Analysing IHL intellectual history raises numerous important questions. This is hardly surprising, for IHL concepts are always products of history: whereas some lose their importance over time, others acquire a new meaning as the field is reinvigorated. But how then can we reconstruct the precise meaning of IHL terms such as “non-international armed conflict” and “international

and Petra Groen, “Colonial Warfare and Military Ethics in the Netherlands East Indies, 1816–1941”, *Journal of Genocide Research*, Vol. 14. No. 3–4, 2012.

62 One inspiring example of this type of work is Cindy Ewing, “The Colombo Powers: Creating Diplomacy in the Third World and Launching Afro-Asia at Bandung”, *Cold War History*, Vol. 19, No. 1, 2019.

63 Two good examples of this new type of analysis are Umut Özsü, “Determining New Selves: Mohammed Bedjaoui on Algeria, Western Sahara, and Post-Classical International Law”, in Jochen von Bernstorff and Philipp Dann (eds), *The Battle for International Law: South–North Perspectives on the Decolonization Era*, Oxford University Press, Oxford, 2019; and Emma Stone Mackinnon, “Contingencies of Context: Contested Legacies of the Algerian Revolution in the 1977 Additional Protocols to the Geneva Conventions”, in Ingo Venzke and Kevin Jon Heller (eds), *Contingency and the Course of International Law: On the Possibility of Different Legal Histories*, Oxford University Press, Oxford, 2021.

64 One successful example is Kerstin von Lingen, “Legal Flows: Contributions of Exiled Lawyers to the Concept of ‘Crimes Against Humanity’ During the Second World War”, *Modern Intellectual History*, Vol. 17, No. 2, 2020.

65 Pablo Kalmanovitz, *The Laws of War in International Thought*, Oxford University Press, Oxford, 2020; Lauren Benton and Richard Ross, *Legal Pluralism and Empires, 1500–1850*, New York University Press, New York, 2013; Helen Kinsella, “Francis Lieber and Native American Wars”, forthcoming; and Jennifer Pitts, *Boundaries of the International: Law and Empire*, Harvard University Press, Cambridge, MA, 2018.

humanitarian law” itself,⁶⁶ for that matter? How do we know which interpretation of these concepts should be considered the most accurate? How do we convey this knowledge to IHL practitioners without committing the sin of anachronism?⁶⁷ And what are the benefits and risks of imposing labels on formative IHL thinkers to whom they would have had little meaning?

One example is Jean Pictet’s incredibly influential Commentary project from the 1950s, which sought to provide an intellectual reconstruction of the process of drafting the Conventions. This document has had a tremendous impact on our understanding of the law’s making, for instance by trying to trace the construction of every single one of the treaties’ provisions. It is astonishing, however, how many readers of Pictet’s Commentary have been unable to fully grasp that this text should be considered as just one account, written by a team of former drafters, with their own particular objectives. As a consequence, this Commentary project – with its continuing emphasis on the law’s inclusiveness on behalf of victims of war and its heavy reliance on European legal history for tracing IHL customs – has made it far more difficult for practitioners to recognize the law’s exclusionary mechanisms. This is important, for these mechanisms continue to affect their work, despite revisions of the Protocols in the 1970s.⁶⁸

Attempts to rewrite intellectual history go to the heart of IHL studies. On the one hand, this strand of analysis shows what IHL history can offer those concerned to recover untapped legal potentials in the Conventions’ past. Scholars have pointed, for instance, at the resources latent in the provisions of the Civilian Convention, from the rights it confers on so-called “unlawful combatants” to principles promoting anti-torture norms. Ultimately, these sorts of insights can help practitioners achieve more progressive legal outcomes and incorporate historical knowledge into their daily practices. On the other hand – and this points to the limitations of using IHL history to reinvigorate contemporary lawyering – why should a lawyer care if the original intention behind a provision is at odds with the more humane one that they have seen accepted in court, for instance, potentially leading to the punishment of a notorious war criminal?

If the original intention of the treaties’ drafters plays only a “subordinate role” in how we interpret them,⁶⁹ why then does IHL history matter?, they might wonder.

66 Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015.

67 H. M. Kinsella and G. Mantilla, above note 16, p. 651; and A. Alexander, *ibid.*

68 See B. van Dijk, above note 13.

69 At least according to Article 32 of the 1969 Vienna Convention. See also David J. Bederman, “Foreign Office International Legal History”, *Public Law & Legal Theory Research Paper Series*, Research Paper No. 05-24, 2004, p. 6.

Conclusion

From this perspective, it is tempting to ignore IHL history altogether. Why bother with inconvenient historical facts or insights if we can achieve a more humane future now?

Although I have struggled with this question for some time, my experience as a historian of international (humanitarian) law suggests to me that the opposition between academic legal history and the imperatives of contemporary legal practice is often false. Returning to the past is always a worthwhile process, especially given the political if not popular purchase of historical knowledge – witness the success of John Fabian Witt’s epic *Lincoln’s Code*.⁷⁰ Hiding from uncomfortable facts or difficult stories is never wise, whether for an international lawyer or a humanitarian in the field.

Ignoring the past will hamper lawyers’ and practitioners’ ability to develop the skills necessary for executing their work effectively, seeing what they do in a wider context, recognizing what is at stake in their own time, recovering lost institutional memory, tracing hidden legal potentials, coming to terms with the dark pages of IHL history, and producing new insights to help them generate more progressive outcomes. In my view, practising IHL entails being – at the very least – informed, acting responsibly, thinking critically about oneself, and putting contemporary practices in a broader perspective. All of these essential competencies are difficult to nurture and implement without the use of history. Every practitioner must have a sense of the past if they are to acquire necessary skills and insights for the pursuit of a more humane future.

Historians hardly enhance their popularity by debunking or questioning existing interpretations of the discipline’s past.⁷¹ At the same time, this should not lead us to become complacent or respond defensively when we are confronted with criticisms. Indeed, historians have been notoriously weak at predicting future events and we need to realize that history is not always the best guide to the present. There are many ways of navigating the past, drawing creative energy from history, solving historical conundrums and charting the trajectories of IHL’s past. Studying history allows for a wide range of interpretations: these branching roads, which lead toward both IHL’s past and its future, represent diverse possibilities, which few could have imagined beforehand and many should see as a major source of inspiration for creating emancipatory outcomes.

70 John Fabian Witt, *Lincoln’s Code: The Laws of War in American History*, Free Press, New York, 2012.

71 S. Moyn, above note 45.

Changing the narrative: A Tool on African Traditions and the Preservation of Humanity during War

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Abstract

In an effort towards better explaining the authority of international humanitarian law (IHL) on the African continent, the Regional Delegation of the International Committee of the Red Cross (ICRC) in Pretoria recently examined the relationship between African traditional customs and modern-day principles of IHL. Evidence of a clear correlation would illustrate a respect for the law of war on the African continent. The outcome of the research conducted by the ICRC was the creation of the “Tool on African Traditions and the Preservation of Humanity during War”, which illustrates eleven African traditions and the related principles of contemporary IHL. The Tool is a living project, which will continue to be updated,

and which is presented in various formats that can be used for both pedagogical and operational outreach.

Keywords: international humanitarian law, law of armed conflict, Africa, African values and traditions in war, humanity.



Introduction

War and mankind are inextricably linked. From ancient wars to the conflicts that we bear witness to today, in some form or another conflict has always existed and continues to exist to date. Indeed, in 2020 the International Committee of the Red Cross (ICRC) estimates that 100 armed conflicts were being fought worldwide.¹ Alongside the ever-present existence of conflicts globally, however, is the underlying, unwavering principle of humanity, which dictates that whilst the objective of war may subjectively require taking a life in order to achieve a military aim or objective, humanity calls for limits to prevent the inherent devastating effects of conflict. This balance is essentially the foundation of international humanitarian law (IHL), which seeks to protect persons and property affected by armed conflict, as well as to restrict the right of parties to a conflict to use the means and methods of warfare of their choice. While IHL governs modern warfare, the principles that inspired its provisions were also present on the battlefields of yesteryear.

The Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005 are a set of instruments that forms the core of IHL. That the Geneva Conventions of 1949 carry the title of the most ratified treaties worldwide highlights both the relevance of IHL as well as the universality of the principles that it encompasses and espouses. In considering the origins of IHL the story begins before the codification of the law, and elements of modern-day IHL can be found in religions and cultures from east to west and north to south. This leads to the conclusion that not only are the principles of IHL universal due to the ratification rate of the Geneva Conventions, but also because its provisions reflect those principles contained in traditions, practices and values throughout the world.

An intrinsic role of the ICRC is the promotion and strengthening of IHL. Whilst this work takes place globally, the ICRC has a large presence and determined focus on the promotion of IHL on the African continent, where the organization has borne witness to the devastating effects of conflicts, including protracted conflicts, both past and present. It is clear to the ICRC that the single most important challenge to IHL lies in generating greater respect for this body of law.² During

1 See ICRC, *ICRC Annual Report 2020: Facts and Figures*, available at: https://library.icrc.org/library/docs/DOC/WEB_020.pdf (all internet references were accessed in January 2022).

2 See the ICRC report on IHL and the challenges of contemporary armed conflicts: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in*

the course of the ICRC's activities in the dissemination and implementation of IHL in Africa, it became clear that there was a need to re-evaluate the methods and narrative used in the promotion of the authority of IHL on the continent. In Africa, whilst many countries see the value and importance of IHL, the authors assert that these countries do not necessarily have a sense of ownership over this body of law, be it in the form of treaty IHL or customary IHL, and as a consequence do not always actively participate in its implementation and development. With this in mind, the ICRC undertook to examine the relationship between Africa and IHL, as reflected in traditional customs, with the aim of contributing towards a means of better explaining the authority of IHL on the African continent. Evidence of a clear relationship would illustrate a respect for the law of war and thereby would be relevant for government and local authorities, weapons bearers, civil society and academics on the continent – all audiences with whom the ICRC often engages on the promotion and implementation of the law.

The outcome of the research conducted by the ICRC was the creation of the “Tool on African Traditions and the Preservation of Humanity during War” (the Tool), which was launched in May 2021.³ The Tool illustrates how a collection of African traditions correlate with modern-day principles of IHL, presented in various formats that can be used for both pedagogical and operational outreach. This contribution seeks to outline the motivation and findings of the research, as well as to present the Tool and its utility moving forward.

Motivation for the research

A critique often opined is that international law and, in this case, specifically IHL, is based on Western philosophies.⁴ While there are a number of arguments to support this view,⁵ one could also argue that given the universal nature of the principles enshrined in the Geneva Conventions, this body of law encompasses ideals from

Armed Conflict on the 70th Anniversary of the Geneva Conventions, 22 November 2019, available at: <https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>.

- 3 ICRC, “African Values in War: A Tool on Traditional Customs and IHL”, available at: <https://www.icrc.org/en/document/african-customs-tool-traditional-customs-and-ihl>. The Tool is a living project, and the ongoing research aims to continue to extend to include additional traditions from all over the African continent.
- 4 Mutoy Mubiala, “International Humanitarian Law in the African Context”, in Monica Kathina Juma and Astri Suhrke (eds), *Eroding Local Capacity: International Humanitarian Action in Africa*, Nordiska Afrikainstitutet, Uppsala, 2002, p. 48.
- 5 To illustrate, all of the twelve countries that signed the 1864 Geneva Convention at the conclusion of its negotiation were European. See ICRC, *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. Geneva, 22 August 1864, available at: <https://ihl-databases.icrc.org/ihl/INTRO/120>. At the negotiation of the 1949 Geneva Conventions, only Egypt and Ethiopia participated from the African continent. See *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. 1, 1949, pp. 158–70. For a more in-depth discussion, see Gus Waschefort, “Africa and International Humanitarian Law: The More Things Change, the More They Stay the Same”, *International Review of the Red Cross*, Vol. 98, No. 902, 2016. This article does not explore these criticisms in greater detail, but the reader can find more on the subject in writings by Mutoy Mubiala and Gus Waschefort.

traditions and customs which transcend borders. Perhaps a more nuanced understanding of the development of IHL lies somewhere in between, at least from an African perspective.

Reflecting on the negotiations of the Geneva Conventions and the lack of a strong African participation in these negotiations, a certain lack of African ownership over this important body of law is understandable. Moreover, as the status of African States in the international legal order changed alongside the development of the 1977 Additional Protocols, many African States who had not benefitted from the protections under IHL during the fight for independence were now obligated to adhere to the same rules.⁶ The hesitation of African States to accept laws seen as having a Western origin – which indeed may not have benefitted them at the time they most needed their protection – helps provide a deeper understanding as to why there may be a lack of ownership over IHL.⁷

This is not to say that African States are not convinced of the importance and relevance of IHL to the continent. Indeed, in recent years African States have played a significant role in the development of IHL and in some areas have been instrumental in the codification of this body of law. There is much evidence to support this assertion. According to Mabeza, the level of African State support can be gauged from a number of indicators, including the following: the rate of ratification by African States of instruments of IHL as well as the numerous decisions and Resolutions passed within the African Union (AU) system related to IHL; the development of the 2009 AU Convention on the Protection and Assistance of Internally Displaced Persons in Africa (the first binding regional instrument in the world to regulate the treatment of internally displaced persons); the fact that African States were instrumental in advancing the drafting and adoption of the Treaty on the Prohibition of Nuclear Weapons, as the first international instrument to ban nuclear weapons (when it came to its adoption, in July 2017, forty-two African States voted in favour); the existence in thirty-one of fifty-four African States of national IHL committees to follow the promotion and implementation of IHL at the domestic level and to provide a platform for broad government engagement on a variety of issues related to the domestication of IHL; the regular gathering of a number of African governments at regional IHL seminars across the continent hosted by the ICRC together with partner governments and institutions, in which States have the opportunity to report on developments in the field of IHL at their national level and receive updates on the recent developments in IHL; and finally, the fact that African voices and perspectives on various IHL themes are increasingly being promoted at the

6 G. Waschefort, *ibid.*, pp. 602–3.

7 See, in particular, Yollande Diallo, “Humanitarian Law and Traditional African Law”, *International Review of the Red Cross*, Vol. 16, No. 179, 1976; Emmanuel G. Bello, *African Customary Humanitarian Law*, Oyez Publishing, London, 1980; Emmanuel G. Bello, “A Proposal for the Dissemination of International Humanitarian Law in Africa Pursuant to the 1977 Protocols Additional to the Geneva Conventions of 1949”, *Revue de Droit Pénal Militaire et de Droit de la Guerre*, Vol. 23, Nos 1–4, 1984; Vangah Francis Wodie, “Africa and Humanitarian Law”, *International Review of the Red Cross*, Vol. 26, No. 254, 1986; M. Mubiala, above note 4; G. Waschefort, above note 5.

regional and global levels, for example through publication of articles by African authors in the *International Review of the Red Cross*.⁸

And yet, despite the above, beyond the contemporary development of IHL treaty law and the valuable role that Africa has played, hesitation persists on the ownership of IHL in Africa. For example, while numerous African States participate in regional and global meetings on IHL, they rarely play significant roles in the development of IHL. Indeed, Waschefort argues that African voices are not often at the centre of IHL discussions on a global level.⁹ This is not to suggest that IHL is always violated on the African continent; on the contrary, there are many instances where IHL is respected in Africa.¹⁰ Still, questions as to the reason for a perceived lack of ownership continue to arise. While Mutoy suggests it may be because the law is ineffective in Africa, an argument that persists today, Waschefort argues that it is due to a lack of motivation.¹¹ After years of experience working to promote and advance IHL in Africa, it appears to the authors that one contributing factor is a sense of competing priorities across the continent, together with a lack of resources, both financial and human. Indeed, in the authors' experience, there are many individuals across the continent who are passionate about IHL and knowledgeable concerning its provisions and relevance. Many of them are supported by government policies and approaches that are favourable towards the implementation of IHL at the national level. However, their work is delayed, and sometimes overridden, by work focusing on poverty eradication, development and issues such as trade. Another, and for this contribution most important, factor to the lack of ownership of IHL in Africa may be, according to the authors, due to a sense that IHL is too far removed, too foreign, to truly belong to the continent. While the Tool does not aim to address the challenges of competing priorities for African governments, it does hope to address this above-mentioned gap that exists.

Therefore, as a means of better explaining the authority of IHL, the ICRC undertook to examine the historical relationship between Africa and IHL as reflected in traditional customs. The aim of the research was to highlight that the concept of rules regulating behaviour in conflict is neither new nor Western and could in fact be drawn from examples in the traditions and cultures on the continent. The objective for the ICRC is that the resulting research will contribute to current debates on the relevance of IHL to Africa and thereby increase the understanding and acceptance of IHL rules on the African continent.¹² This approach of increasing the understanding and relevance of the law, by promoting

8 Sarah Mabeza, "Christof as Pan-African Humanitarian Lawyer", in Frans Viljoen, Charles Fombad, Dire Tladi, Ann Skelton and Magnus Killander (eds), *A Life Interrupted: Essays in Honour of the Lives and Legacies of Christof Heyns*, Pretoria University Press, Pretoria, 2022, p. 398.

9 G. Waschefort, above note 5, pp. 602–17.

10 See, for example, ICRC, "Sudan, Release of Child Soldiers", 19 April 2022, available at: <https://ihl-in-action.icrc.org/case-study/sudan-release-child-soldiers>. For further examples from Africa, see ICRC, "Africa", available at: <https://ihl-in-action.icrc.org/country/africa>.

11 M. Mubiala, above note 4, p. 37.

12 Interview with Tamalin Bolus, Legal Advisor, Pretoria Delegation, ICRC, 12 August 2021, Pretoria, South Africa.

the law and the values underpinning it and linking this with local norms and values, is by no means a new one. As early as 1976 the ICRC undertook a mission in West Africa to establish the similarities and differences which might exist between African traditions and the basic principles of humanitarian law as expressed in the Geneva Conventions.¹³ From this research it was apparent that there were many correlations between West African customs and the rules regulating behaviour in conflict that are contained in the Geneva Conventions. Similar research was also undertaken in Somalia in 1998, resulting in a fascinating publication which highlighted Somali society's own version of a Geneva Convention.¹⁴ Additional research conducted in 2009 by the ICRC investigated the traditional warfare practices in the Pacific and possible similarities with contemporary principles of humanitarian law. The aim of this research was not to change established IHL legal norms but to go beyond the legal documents and put IHL in the "minds and souls" of the people of the Pacific.¹⁵ More recently, significant research has been made in the correlations between IHL and religion.¹⁶ It aims to highlight the rules regulating behaviour contained in religious writings and highlight the similarities that exist with contemporary IHL. All of the above-mentioned research shares a common objective with the Tool in that it seeks to highlight that rules or codes regulating behaviour during conflict existed before the modern codification of IHL. This demonstrates that IHL is not something new, but something that builds upon existing rules in religion and custom.

Findings of the research

From the desk research conducted it became evident that established norms that regulated the conduct of hostilities existed in many African tribes and cultures. In addition, it became clear that these norms or practices had broad connections with the general rules of modern-day IHL. This could be due to the fact that both IHL as well as African traditions have a basis in humanity – the principle of humanity underlies the body of IHL, and the principle of Ubuntu, which focuses on solidarity and interdependence, underlies African traditions.¹⁷ This broad link identified by the research between African practices and IHL rules applicable today clarifies and confirms that the rules contained in modern IHL are not foreign concepts in Africa. The research demonstrates a non-exhaustive list of

13 Y. Diallo, above note 7.

14 Musa Yusuf Hussein, Mohammed Abdilaani Riraash and Ibrahim Haji M. Wa'ais, *Spared from the Spear. Traditional Somali Behaviour in Warfare*, ICRC, Nairobi, 1998.

15 ICRC, *Under the Protection of the Palm, Wars of Dignity in the Pacific*, Suva, Fiji, 2009, pp. 4–5, available at: <https://www.icrc.org/en/doc/assets/files/other/wars-of-dignity-pacific-2009.pdf>.

16 See, in particular, ICRC, "Experts' Workshop on IHL and Islamic Law in Contemporary Armed Conflicts", 23 March 2021, available at: <https://www.icrc.org/en/document/experts-workshop-ihl-islamic-law>; and ICRC, "Reducing Suffering During Armed Conflict: The Interface Between Buddhism and IHL", 25 February 2019, available at: <https://www.icrc.org/en/document/reducing-suffering-during-conflict-interface-between-buddhism-and-international>.

17 M. Mubiala, above note 4, pp. 37–9; G. Waschefort, above note 5, p. 597.

eleven instances in which African traditional customs correlate with international legal obligations under IHL:

- (1) The Tallensi tribe, in the area covered by modern-day Ghana, considered attacking, looting and pillaging of civilian property a violation of their dignity and a dishonourable act to be avoided; and the traditional rule which regulated the behaviour of the Kamajors of Sierra Leone in warfare included the prohibition on looting villages. These customs reflect the modern-day principle of IHL which states that pillage is prohibited. This principle can be found in Article 33(2) of the Fourth Geneva Convention, Article 4(2)(g) of the Second Additional Protocol and in Rule 52 of the ICRC's Customary IHL Database.¹⁸
- (2) In the Oronn district in the area covered by modern-day Nigeria, when one town decided to go to war against another, two men were sent to lay a plantain leaf upon the road entering the town, signalling an official declaration of war and warning civilians of impending hostilities. Similarly, when the Ashanti tribe in Ghana was faced with battle, a royal drum was beaten to signal the upcoming battle and to call the warriors whilst warning civilians of upcoming danger. This practice reflects the modern-day principle of IHL which states that effective advanced warning of attacks which may affect the civilian population shall be given, unless circumstances do not permit. This principle can be found in Article 57(2)(c) of the First Additional Protocol and in Rule 20 of the ICRC's Customary IHL Database.¹⁹
- (3) In the area covered by modern-day Somalia it was strictly forbidden to desecrate the bodies of the enemy dead or take their possessions for personal gain. This tradition reflects the modern-day principles of IHL which state that each party to the armed conflict must take all possible measures to prevent the dead from being despoiled, and that mutilation of dead bodies is to be prohibited. This principle can be found in a number of IHL provisions, especially Article 15(1) of the First Geneva Convention, Article 18(1) of the Second Geneva Convention, Article 16(2) of the Fourth Geneva Convention, Article 34(1) of the First Additional Protocol, Article 8 of the Second Additional Protocol and in Rule 113 of the ICRC's Customary Law Database.²⁰

18 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

19 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978).

20 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention (II)

- (4) Maasai warriors in East Africa wore distinctive armbands to distinguish themselves from the civilian population. This reflects the modern-day principle of IHL which states that in order to promote the protection of the civilian population from the effects of hostilities, combatants are urged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. This principle can be found in Article 44(3) of the First Additional Protocol (sentence 1) and in Rule 106 of the ICRC's Customary IHL Database (sentence 1).
- (5) Tribes in West Africa covered by modern-day Senegal, Togo and Ghana only fought outside the village to protect the women, children and elderly, or these protected civilians were relocated to a safe area during the fighting. This reflects the principles of IHL whereby parties to a conflict may establish hospital, safety and neutralized zones to shelter the wounded, the sick and civilians from the effects of hostilities. This principle can be found in Article 23 of the First Geneva Convention, Articles 14 and 15 of the Fourth Geneva Convention and in Rule 35 of the ICRC's Customary IHL Database.
- (6) In the area covered by modern-day Somalia, it was believed that any act of war that was characterized by excessiveness and brutality would bring divine retribution upon the perpetrator and his offspring. This tradition reflects the fundamental principle of proportionality, which is intrinsic to modern-day IHL. This principle is found in Article 51(5)(b) of the First Additional Protocol and in Rule 14 of the ICRC's Customary IHL Database.
- (7) Nuer tribesmen in the area covered by modern-day South Sudan did not attack women, children or the elderly when engaging in hostilities with one another. Similarly, the Fulani tribe believed that attacking women, children and the elderly would bring shame upon the tribe. This is a reflection of the modern-day IHL rule which protects persons not taking a direct part in hostilities from attack. This principle can be found in Article 51(3) of the First Additional Protocol, Article 13(3) of the Second Additional Protocol and in Rule 6 of the ICRC's Customary IHL Database.
- (8) Tribes in the Sahel region made messengers carry a distinctive emblem, such as an official baton, or don face paint which exempted them from fighting and protected them from attacks. Masai Mara warriors that survived attacks held a specific type of grass, the *Nyaregeta*, in their right hand until a treaty of friendship was signed. This correlates with the modern-day IHL rule which protects *parlementaires* from attack. This principle can be found in Rules 58, 67 and 69 of the ICRC's Customary IHL Database.
- (9) In the area covered by modern-day Somalia, the maxim "A well may be dug by one man, but it is not used by him alone", and the custom that destroying the plains used for cattle grazing or the poisoning of wells needed for survival

was strongly disapproved of, together reflect the modern-day rule of IHL which protects objects indispensable to the survival of the civilian population. This principle can be found in Article 54(2) of the First Additional Protocol, Article 14 of the Second Additional Protocol and in Rules 54 and 72 of the ICRC's Customary IHL Database.

- (10) When Fulani warriors in West Africa captured wounded prisoners of the opposition, they were turned over to the women to treat and care for them, and they were treated with respect and dignity. In Somalia, if an injured enemy warrior was captured, he would be brought back to the village and cared for, and once healed he had the option to return to his village or assimilate into his new home. These traditions reflect the rules of IHL which protect wounded and sick persons taking part in hostilities. Relevant provisions can be found in Article 3 common to the four Geneva Conventions, Articles 12, 15 and 18 of the First Geneva Convention, Articles 12 and 18 of the Second Geneva Convention, Article 16 of the Fourth Geneva Convention, Articles 10 and 17(2) of the First Additional Protocol, Articles 7, 8 and 18(1) of the Second Additional Protocol and in Rules 109 and 110 of the ICRC's Customary IHL Database.
- (11) Warriors from the Fulani tribe in West Africa were prohibited from desecrating the place of rest of the deceased or places of worship. This correlates with the rules of IHL which protect institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science. Relevant provisions can be found in Article 17 of the First Geneva Convention, Article 120 of the Third Geneva Convention, Article 130 of the Fourth Geneva Convention, Articles 34 and 53 of the First Additional Protocol, Article 16 of the Second Additional Protocol and in Rules 38, 40 and 115 of the ICRC's Customary IHL Database.²¹

While the above certainly does to some extent clarify and confirm that the rules contained in modern-day IHL are not foreign concepts in Africa, a number of caveats to the findings of the research must be noted. Firstly, findings should not be directly matched with their correlating IHL norms. In drawing connections between traditional practices and contemporary IHL, inconsistencies may be found. Technically, there are numerous distinguishing features between the examples of African traditional customs and the IHL norms presented. This includes the fact that the traditional customs come from mostly non-international armed conflict contexts, while some of the rules listed are applicable to international armed conflicts.²² Caution must therefore be taken not to overstate the correlations between the traditional customs and contemporary rules of IHL. Secondly, it would be remiss to ignore the fact that there were also practices in Africa that were the antithesis to the principles protected by the Geneva

21 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950).

22 However, many of the principles of IHL mentioned in the Tool also apply in non-international armed conflicts through customary IHL.

Conventions.²³ Some authors suggest merely overlooking these inconsistencies,²⁴ whilst others suggest that these instances rather represent violations of the specific code of conduct in that culture and as such should not be seen as undermining IHL.²⁵ Either way, and whatever the reason for these inconsistencies, one should be cognizant of the fact that the objective of this research is only to present those practices that support the provisions of IHL as we know it today, given the aim of the Tool which is to advance the respect of IHL on the continent. Thirdly, it is possible that this Tool may be more relevant for non-State armed actors in Africa rather than African States, given both that non-State armed actors are not parties to IHL treaties, whereas the ratification by the authorities of various IHL treaties should demonstrate an already existing willingness to comply with the obligations contained in those treaties, as well as the fact that non-State armed actors are active at the community level and may be more likely to be influenced by traditional norms.²⁶ A recent mapping exercise by Geneva Call in Mali confirms the relevance of such research to non-State armed actors as it suggests “that relying on local traditions and principles, including religious values, might have wider resonance with the local armed non-State actors and thus could enhance IHL compliance”.²⁷ And finally, there are a number of practical gaps in the research that must be noted: as written resources are not always available, there is a question about the reliability of oral sources and also where to find them; the current examples only reference a small number of African regions, and this should be expanded on in future research efforts in order to ensure proper regional representation; and it is important that the readers of the research guard against generalizations, as there are fifty-four States in Africa, with even more traditions and cultures within those States.

Creation of the Tool

A recent ICRC study published in *The Roots of Restraint in War* sets out to identify the various sources of influence on the behaviour of those bearing arms in different types of armed forces and armed groups. One of the major findings of this study provides evidence for the fact that whilst the role of law is vital in setting standards, encouraging individuals to internalize the values that the law represents through socialization is a more durable way of promoting restraint.²⁸

23 M. Y. Hussein, M. A. Riraash and I. H. M. Wa’ais, above note 14, pp. 43–5. It is not the aim of this article to address this in detail.

24 Karolina Aksamitowska, “Traditional Approaches to the Law of Armed Conflict: Disseminating IHL Through the Receptor Approach”, *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 1, 2020.

25 M. Y. Hussein, M. A. Riraash and I. H. M. Wa’ais, above note 14, pp. 9–10.

26 K. Aksamitowska, above note 24, p. 16.

27 K. Aksamitowska, above note 24, p. 29; Moussa Touré and Giuliano Vascotto, “Sources de droit et normes socioculturelles au Mali, creusets pour la protection des civils”, Geneva Call, June 2019, available at: <https://www.genevacall.org/wp-content/uploads/2020/03/Rapport-Mali-3.pdf>.

28 ICRC, *The Roots of Restraint in War*, 12 June 2020, p. 9, available at: <https://www.icrc.org/en/publication/4352-roots-restraint-war>. This was included in the major findings of the ICRC study which, based on two

Thus, the research conducted by the ICRC into correlations between African traditions and modern-day IHL could not stay written in internal reports – in order to encourage Africans to take more ownership over IHL, the findings of the research needed to be translated into a practical, easily accessible and user-friendly Tool. This would support the development of a humanitarian culture in Africa, whereby Africans are convinced that despite the “formal imported character” of IHL, the rules of this body of law are similar to African traditions and are therefore relevant and applicable.²⁹ The Tool, created as a result of the above-mentioned research, aims to contribute to this objective – that by highlighting the importance of African values in warfare, these principles would be internalized and contribute to the promotion of restraint in current warfare. It is for this reason that the notion of “value” is specifically highlighted in the title of the Tool.

As the research provided some clarity into the norms of traditional African customs in war, it became important to conceptualize a means of showing the link between culture and law that would effectively contribute to current debates on relevance of IHL to Africa and would ultimately increase understanding and acceptance of IHL rules on the African continent. The outcome was the production of the Tool, a resource with which to engage various audiences on the relationship between Africa and IHL. The Tool consists of eleven cards, highlighting firstly the traditional custom in question, secondly some of the African tribes or cultures that have a history of practising that traditional custom, and thirdly the related rule under modern-day IHL. The cards are available in various formats, including as playing cards, which can easily be shared with armed actors manning checkpoints, for example. They are also available as postcards, which are useful in a pedagogical context, and finally in a poster format, so they can be incorporated in relevant advocacy and awareness campaigns. The Tool has also been adapted into additional formats which aim to add value in operational settings – these include a short video that can be used on social and traditional media but also shown by humanitarian actors to armed actors on a mobile device, as well as the inclusion of the Tool in a recently produced ICRC notebook for armed actors in the field. Additionally, the Tool has been translated into French and Portuguese, with the intention to translate into further African languages in the future. To date, various ICRC dissemination sessions to academics and authorities have used the Tool, including in Nigeria, Kenya and South Africa. The posters have in addition been used in photo exhibits in South Africa, and the playing cards are currently being distributed to armed actors in Africa.

The main objective of the Tool is to start a discussion and encourage further discourse, with the aim of gathering a plethora of examples from across the continent that can harness and highlight the universal principles that underlie

years of research by a group of distinguished scholars, sets out to identify the various sources of influence on the behaviour of those bearing arms in different types of armed forces and armed groups.

²⁹ M. Mubiala, above note 4, p. 58.

IHL. The Tool by no means reflects a different set of IHL norms to be respected. It is clear that contemporary IHL, both treaty and customary, is the definitive set of rules applicable today. Indeed, the objective is that by providing these examples and exploring the development of IHL on the Africa continent, the Tool will rather illustrate how IHL is relevant, and perhaps garner greater respect for the law, thereby contributing towards the reduction of suffering during times of armed conflict, which remains the ICRC's ultimate goal.

Conclusion

The research conducted contributes to a demonstration of a clear correlation between IHL and a number of African practices and norms, and the ICRC therefore hopes that it has produced a useful and helpful Tool. It must, however, be noted that there are a number of questions related to the research that remain unanswered, and that will be addressed as the research continues. In the way forward the ICRC aims to strengthen and expand the research in order to ensure that the Tool is as well researched and geographically representative as possible. Some of these questions are as follows:

- Is merely demonstrating the links between culture and law a sufficient basis for generating increased respect for the law? Does knowledge of such traditional norms actually contribute towards achieving the objectives of IHL? Do respect and implementation of IHL rules depend on such a clear correlation between the applicable rule and local customs?
- Will the outcomes of this research actually contribute to mainstreaming IHL in Africa?
- What do these examples illustrate on how wars were fought in pre-colonial Africa? Is there a link with how Africa engages in IHL today?

And yet, despite these unanswered questions, there is still a clear sense that the Tool has the potential to make a difference; that it will remind Africans of the value of Ubuntu, and of the importance for Africa of the sense of humanity that underlies all traditions, customs and religions. As Africans, we must remember that this sense of humanity is one of our permanent values, and we must ensure that the rules and norms of the past that contribute to respect for IHL are not forgotten.³⁰ The ICRC's Tool on African Traditions and the Preservation of Humanity during War aims to contribute to this ambition.

30 Y. Diallo, above note 7, p. 63.

The 1871 Mexican Criminal Code as the missing piece in the history of criminalizing violations of the laws of war

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Abstract

Little is known about how international humanitarian law has developed around the world, other than in Europe and the USA. However, it is a topic worth researching, as it may reveal new connections, causalities and the previously unknown origins of legal institutions. Mexico is a good example of how the rules of war developed differently in different countries, since – as early as 1871 – it incorporated the law of war in its domestic criminal law. This article will explore how the idea of criminalizing violations of the laws of war flourished in nineteenth-century Mexico. A combination of factors including foreign interventions, civil wars, the liberal convictions of the drafters of the Mexican Criminal Code and their will to achieve the rank of “civilized nations” led to the creation of the crime “violations of the duties of humanity”. This development was a milestone in the history of pursuing

* The author would like to thank Bruno Demeyere and Jillian Margulies Rafferty for their encouragement and invaluable feedback, and the anonymous peer reviewers for their feedback and comments.

individual criminal responsibility for violations of the laws of war and, therefore, is a missing piece in its history.

Keywords: war crimes, violations of the laws of war, humanity, criminalization, history of international humanitarian law, civilized nations, combatant immunity, non-regular armies, rebellion.

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Introduction

Histories of international humanitarian law (IHL)¹ have concentrated on Europe and the USA. While this is not a phenomenon unique to IHL, it is worth researching how IHL has developed in other parts of the world, not only as an un-Eurocentric endeavour, but also as a way of finding new relationships, casual connections and entanglements between core IHL and “semi-peripheral States”.² These relationships could reveal new characteristics in the dynamics of IHL concerning the production and exchange of legal knowledge and, most importantly, how each State’s particular position on the international stage could have moulded the way they applied, interpreted and produced norms of the law of war.³

- 1 As Amanda Alexander has rightly pointed out, the term “international humanitarian law” was first used in 1956 by the International Committee of the Red Cross (ICRC) at the New Delhi Conference and then propagated by Jean Pictet during the 1960s. As a result, for the lawmaker of the nineteenth century the common term would have been the “laws of war” and for the Spanish-speaking countries: “*derecho de guerra*” and “*derecho de gentes*”. See Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015, pp. 116–17.
- 2 In this article, the terminology used by Arnulf Becker Lorca in his book *Mestizo International Law* is applied. For Becker Lorca, “semi-peripheral” States were those recognized as sovereign by the nineteenth-century great powers (core States), without, however, fully belonging to the circle. According to Becker Lorca, semi-peripheral States used international law as a strategy and as a counter-hegemonic tool. See Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933*, Cambridge University Press, Cambridge, 2014. Jochen von Bernstorff points out that the terminology regarding “peripheral, semi-peripheral and core States” is taken from Immanuel Wallerstein’s world-systems analysis. See Jochen von Bernstorff, “Arnulf Becker Lorca. *Mestizo International Law: A Global Intellectual History 1842–1933*”, *European Journal of International Law*, Vol. 27, No. 4, November 2016, p. 1174.
- 3 A recent blog post by Alonso Gurmendi on the Treaty on the Regularisation of War (Treaty of Trujillo) from 1820 between Greater Colombia and the kingdom of Spain, along with the article from 2019 by Marcela Giraldo Muñoz and Jose Serralvo on the novelties of the Colombian case, show that regulating warfare varied across the Latin American space and through the nineteenth century. In 1820 the Treaty of Trujillo was signed. Later in 1863, Colombia incorporated in its Constitution the “Laws of Nations ... which shall govern in particular cases of civil war”. Further in time, Mexico regulated the conduct of war by criminalizing violations of the laws of war in 1871. Interestingly enough, these particularities emerged from common ground: popular sovereignty. That said, it might be worth considering that the regulation of warfare in nineteenth-century Latin America constitutes a different strand in the history of the laws of war. On the Treaty on the Regularisation of War between Greater Colombia and the Kingdom of Spain, see Alonso Gurmendi, “Latin Lieber: Uncovering the History of the Treaty on the Regularisation of War”, *Opinio Juris*, 10 June 2022, available at: <http://opiniojuris.org/2022/06/10/latin-lieber-uncovering-the-history-of-the-treaty-on-the-regularisation-of-war/> (all internet references

In this article, the case of Mexico will be presented, as an example of how the context and conditions of the nineteenth century paved the way for a truly different path of codifying and enforcing the law of war. The contribution of the Mexican Criminal Code (MCC) to IHL is of great importance, as it widens the historical record of the discipline. It proves that original legal thinking towards systemizing, codifying and, with it, universalizing the laws of war not only emerged from Western countries but also from newly independent ones, like Mexico. The MCC of 1871 incorporated the laws of war, taking its form in Article 1139 as “violations of the duties of humanity”. The crime was directly rooted in international law and punished acts against prisoners, the wounded, hostages of war and field hospitals. In 1871, with domestic law setting out criminal sanctions for violations of the law of war, a giant leap was taken. This is especially so, if we take into consideration that, at the time, the tendency to codify the laws of war was already in place, but had not quite reached the objectives it aimed for.⁴ Unlike the established narrative of “humanizing” the laws of war, the Mexican case shows that there were other purposes at play in the second half of the nineteenth century. That is, by criminalizing violations of the laws of war, the Mexican lawmakers did not pursue a “humanitarian” goal in the sense that they did not have the intention of imposing their civilisatory values on others, but rather they aimed to be treated as equals amongst the “league of civilized nations”. The Mexican lawmakers intended to limit the actions of the great powers by using and incorporating in domestic law the language of powerful States, such as “the laws of war”, “humanity” and “civilization”. As it was the case with the trial against Maximilian of Habsburg in 1864, the new Republic of Mexico proved that violations of the law of nations were committed by the very nations who were their apologists. Additionally, a main feature of the Latin American republics was popular sovereignty.⁵ The Mexican lawmakers extended popular sovereignty to the laws of war and, with it, acts of war were no longer acts of State, and as a result accountability would follow.

Surprisingly, the case of the MCC has not yet been meaningfully explored. Among other reasons, this could be due to the cultural background of the principal figures that promoted the regulation and humanization of warfare in the second half of the nineteenth century. Firstly, if we take a look at the biographies of the main

were accessed in July 2022); also see Marcela Giraldo Muñoz and Jose Serralvo, “International Humanitarian Law in Colombia: Going a Step Beyond”, *International Review of the Red Cross*, Vol. 101, No. 912, 2019.

- 4 See Daniel Marc Segesser, “‘Unlawful Warfare is Uncivilised’: The International Debate on the Punishment of War Crimes, 1872–1918”, *European Review of History*, Vol. 14, No. 2, 2007. See also Eyal Benvenisti and Doreen Lustig, “Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874”, *European Journal of International Law*, Vol. 31, No. 1, 2020. As for the failure of banning war completely, see Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, New York, 2021.
- 5 A very interesting work written by historian James E. Sanders explains how republican Latin Americans of the nineteenth century saw themselves as agents of modernity, since they were not monarchies; they were secular and universalist. A valuable insight of the work is that there were also sectors in Europe and the USA that saw republicanism in Latin America as the future of Europe. See James E. Sanders, *The Vanguard of the Atlantic World. Creating Modernity, Nation and Democracy in Nineteenth-Century Latin America*, Duke University Press, Durham and London, 2014.

protagonists – Caspar Bluntschly (Swiss national and philo-Prussian), Francis Lieber (born in Prussia who migrated to the USA) and finally Friedrich Martens (Russian jurist at the service of the Russian Empire) – they could not be further away from the new republics liberated from Iberian colonial rule. Secondly, these same publicists had a particular view of how war was to be conducted and this excluded the participation of civilians, as war was, in their view, only conducted by States.⁶ In contrast, Mexican officials encouraged the population to defend their independency from the American and later French invasion; even the constitution of 1857 made it a duty of every Mexican citizen to defend the State’s independency, territory, rights and interests.⁷ So, even if the major promoters of “humanized” warfare knew about developments of international and criminal law in the newly independent States of Latin America, they would not take them to account as these developments contradicted their views of “civilized war” and emerged from lesser “civilized States”.⁸ Finally, the nineteenth century was full of dramatic changes, not only in the legal field but also technologically and culturally. Maybe even Mexicans lost track of their own novel legal production, as they entered a new form of government in the last quarter of the nineteenth century – from republicanism to dictatorship under Porfirio Díaz (1876–1911).

So how did the Mexican drafters take the giant step of punishing violations of the laws of war not only in international armed conflicts but also in internal ones? In order to find out, this article explores different historical sources and reviews two events that serve as genealogy to the crime “violations of the duties of humanity”. These events are the Mexican–American war⁹ and the French Intervention. The review of these two conflicts provides unique angles on how “peripheral States” like Mexico dealt with the question of intervention by Western powers and serve as historical background to the already established narratives. For example, the

6 For a systemized classification of the traditions in the laws of war, see Karma Nabulsi, *Traditions of War: Occupation, Resistance and the Law*, Oxford University Press, Oxford, 1999.

7 See *Constitución Federal de los Estados Unidos Mexicanos*, 1857, Art. 31, available at: <http://www.ordenjuridico.gob.mx/Constitucion/1857.pdf>.

8 The author Karma Nabulsi illustrates with many examples how figures like Francis Lieber were convinced of their “white European superiority”. An example is a Francis Lieber quote referring to the Mexicans as “degenerates”; see K. Nabulsi, above note 6, p. 165. Regarding the representation of “barbarism” in the visual arts, Rhonda Adato gives an account of how the execution of Maximilian of Habsburg was portrayed by royalist French photographers. She also gives a good example of how Mexicans were portrayed by these photographers, like one photograph of Desirée Charnay from 1880, presenting two Mayan Indians in front of a bare wall, with nothing but their underclothing. See Rhonda R. Adato, “Modernity, Photography, and History Painting in Manet’s *Execution of Maximilian*”, *Berkeley Undergraduate Journal*, Vol. 23, No. 1, 2010.

9 In this specific case, the subjective appreciation of an armed conflict to which Kolb refers could not be more illustrative. For Americans, the conflict is called the “Mexican–American war”, while for the Mexicans it is called the “American Intervention” (*intervención norteamericana*). See Robert Kolb, “The Main Epochs of Modern International Humanitarian Law since 1864 and their Related Dominant Legal Constructions”, in Kjetil Mujezinović Larsen, Camilla Guldahl Cooper and Gro Nystuen (eds), *Searching for a “Principle of Humanity” in International Humanitarian Law*, Cambridge University Press, Cambridge, 2013, pp. 31–4.

experience the Americans had with Mexican guerrilla warfare shaped the contents of General Orders No. 100 (the Lieber Code),¹⁰ a code that later served as a blueprint for the Prussians to disqualify French guerrillas during the Franco-Prussian war (1870–1871). Interestingly enough, the French also fought Mexican guerrilla warfare during the French Intervention (1861–1867).¹¹ Surely, these experiences echoed in the European discussions of regulating warfare. After all, Geoffrey Best has already shown how the military had direct influence in counselling the representatives of the States, when deliberating how to limit war.¹²

Followed by the historical review, the notion of “duties of humanity” in Article 1139 of the MCC will be analysed. In order to find a genealogy of the concept, historical sources such as the “explanatory memorandum” of the MCC, and the doctrinal work of Andrés Bello will also be reviewed. As this paper focuses on Article 1139 of the MCC, the definition of the crime – as rooted in international law – will be presented, as well as its implications, such as transforming “humanity” into a legal category and individual criminal responsibility. As the MCC regulated other fields of interest to IHL such as superior orders, combatant immunity and extraterritoriality, these will be analysed in detail.

A brief consideration will also be made of the debates on humanizing warfare and how Article 1139 of the MCC fits into this framework, although, as we will see, the Mexican lawmakers approached it differently compared with their European counterparts. In addition, a short comparison between the dispositions concerning the laws of war in the MCC and General Orders No. 100 (hereinafter, the Lieber Code) will be made. This might be unorthodox as the Lieber Code is not a criminal code but “military orders” that regulate the conduct of soldiers. The comparison is, however, justified by the fact that the Lieber Code has been referred to as the first attempt to codify the rules of war, to “humanize” them and, ultimately, criminalize some of them. As we will see, confronting the MCC with the Lieber Code will challenge this assumption. The comparison is also a useful tool to see how law evolves differently depending on each State’s context. Most of all, it shows how each State had particular problems and interests during this process and how this is reflected in their own set of norms.

The article will conclude with some remarks on how the Mexican case offers a unique angle in the development of IHL domestically, internationally and, most importantly, how it contributed to the systematization of the laws of warfare by being, in 1871, the only country to adopt an individual criminal responsibility model, similar to what we define today as a “war crime”. Finally, it

10 John Fabian Witt has already explained in detail how the Mexican–American war, and especially the experience the Americans had with Mexican guerrilla warfare, shaped the contents of General Orders No. 100 (the Lieber Code). See John Fabian Witt, *The Laws of War in American History—Lincoln’s Code*, Free Press, New York, 2012, pp. 118–30.

11 For a contemporary account on French “anti-guerrilla” tactics in Mexico, see E. Lefèvre, *Documentos oficiales recogidos en la secretaría privada de Maximiliano*: Vol. 1, *Historia de la intervención francesa en Méjico*, Brussels and London, 1869, pp. 419–33.

12 Geoffrey Best, *Humanity in Warfare: Modern History of the International Law of Armed Conflicts*, Weidenfeld and Nicholson, London, 1980, pp. 128–215 and 141–3.

will be revealed how the MCC of 1871 is the missing piece in the history of criminalizing violations of the laws of war.

Historical overview to the 1871 MCC

Nineteenth-century Mexico was characterized by being overwhelmed by civil wars and interventions. The independence war (1810–1821) and then the American Intervention (1846–1848)¹³ were followed by internal battles between conservatives and reformists (*Guerra de Reforma*, 1858–1861) and, finally, the second French Intervention (1861–1867). The continuous internal conflict for power between the *liberales* and the *conservadores* ended with the liberal victory (1861). Once peace was established, the building of the justice system started.¹⁴

A central piece of the project of the liberal movement (also known as the “Reforma” movement) was the creation of laws. The liberal leader of the newly established government was Benito Juárez, born in Oaxaca to Zapotec parents and anti-imperialist *par excellence*, who had fought the war against the French during the already mentioned second French Intervention. Juárez was also a secularist and, like most of the liberals of the time, convinced of the power of the law. This conviction was also influenced by practical reasons. Juárez reckoned that the rule of law would provide the new Republic with legitimacy against foreign powers. In 1861 and 1862, when Spain and France deployed forces in Mexico, he stressed – in two separate letters to the nation – how foreign powers had referred to the “new Mexican nation” as backward and uncultivated.¹⁵ For this reason, he encouraged all to abide by the law and further guaranteed that, in the case of war, the law of nations would be respected by the army and the authorities of the Republic.¹⁶

As we can see from the previous account, law and compliance with the law were central to the liberals. Most of all, the law was understood as a means to show “civilisatory” progress and with it be part of the group of civilized nations. The 1871 MCC was drafted within this understanding of the law. In addition, what the

13 Liliana Obregón, “Between Civilisation and Barbarism: Creole Interventions in International Law”, *Third World Quarterly*, Vol. 27, No. 5, 2006, pp. 816–17.

14 See Elisa Speckman Guerra, “Los jueces, el honor y la muerte. Un análisis de la justicia (ciudad de México, 1871–1931)”, *Historia Mexicana*, Vol. 55, No. 4, 2006.

15 From the letters, it can be inferred that it was central to rebuke the allegations of not being civilized as these worked as a basis in the reparations claims made by foreign nationals against the government of Mexico. See *Manifiesto a la Nación del Presidente Benito Juárez*, 18 December 1861, in D. José M. Vigil, *México á través de los siglos: Vol. V, La Reforma*, Ballester y Compañía, Mexico; Espasa y Compañía, Barcelona, 1882, pp. 490–1.

16 “Una vez rotas las hostilidades, todos los extranjeros pacíficos residentes en el país quedarán bajo el amparo y protección de las leyes, y el gobierno excita á los mexicanos á que dispensen á todos ellos, y aun á los mismos franceses, la hospitalidad, y consideraciones que siempre encontraron en México, seguros de que la autoridad obrará con energía contra los que á esas consideraciones correspondan con deslealtad, ayudando al invasor. En la guerra se observarán las reglas del derecho de gentes por el ejército y por las autoridades de la República.” See *Manifiesto del Presidente Benito Juárez*, 12 April 1862, in D. J. M. Vigil, above note 15, pp. 523–4.

historical account reveals to us is that the series of events that took place from 1810 to 1871 drove the Mexican drafters to elaborate radical solutions concerning the conduct of war, both internal and between States. As we will see, the issues that the drafters wanted to tackle were: foreign intervention, conducting war with foreign powers and making foreign powers comply with international and domestic law. Under Juárez's leadership, the new Mexican Republic began its process of building a legal code. Part and parcel to that project was the development of the MCC – the very subject of this paper. In this section it will be discussed how various historical factors influenced the development of the MCC as the Republic took shape.

Influence of the Mexican–American war in the conception of Article 1139 of the MCC

More than two decades before the MCC was drafted, Mexico was embroiled in the Mexican–American war (1846–1848). During the war, Mexican authorities faced some practical problems that could have led to the creation of the crime “violations of the duties of humanity” and to the provision concerning extraterritorial jurisdiction. These practical problems concerned are: (a) the treatment by American forces of civilians, military, church members, property and non-regular armies; (b) the application of General Scott's Order No. 20 to Mexican nationals. In the following lines these two elements will be explored briefly.

Correspondence between the warring parties during that period sheds some light on how Mexican authorities dealt with the conduct of the American Army and how this further echoed in the drafting of the MCC. As early as 1847, in their correspondence with their adversaries, the Mexican authorities invoked the conduct of war “... according to the law of nations”.¹⁷ They also stressed that, if Americans would continue to devastate and attack civilians, the Mexican Army would have no other option but to conduct war the same way. However, they always underlined that the Mexican nation was in favour of behaving as a civilized nation.¹⁸

As the above correspondence claimed, the US Army had a problem with the conduct of their volunteers with respect to the Mexican population. The volunteers were undisciplined and had been known to have attacked civilians and church property.¹⁹

17 “Ignacio de Mora y Villamil, general en jefe del Ejército del Norte, le dice a Zachary Taylor, general del Ejército Norteamericano que responda si quiere hacer guerra con arreglo al derecho de gentes o conforme lo hacen lo salvajes”, in *Archivo digital de documentos sobre la guerra de Texas, 1835 y la guerra Mexico-Estados Unidos, 1846-1848*, Disc 1, 001-150, Item 1. University of Texas Rio Grande Valley Special Collections and Archives Digital Collections, pp. 128–31, available at: https://archives.lib.utrgv.edu/repositories/6/archival_objects/14234.

18 *Ibid.* The notice made by the Mexican general to his counterpart is pretty much in line with what Andres Bello argued in his treaty in 1844. Bello suggested that if an “enemy general” commits “acts of atrocity”, he shall be notified that if he does not abide with the “law of nations”, his army would be treated the same way. See Andrés Bello, *Principios de Derechos de gentes*, Nueva edición revista y corregida, Librería de la Señora viuda de Calleja e hijos, Madrid and Lima, 1844, p. 189.

In order to mitigate the situation, General Winfield Scott enacted a law in Tamaulipas: General Order No. 20 (1847).²⁰ This order punished crimes such as murder, rape, assault and robbery. The general order also established a “humanitarian interest” in punishing the crimes severely, with “military commissions” created by the law. It also had the objective of controlling the actions of the non-regular Mexican armies, understood as those not belonging to the professional army.²¹ It is known from different sources that Mexicans fought the American Intervention through a guerrilla war. Guerrilla formation was supported by the Mexican government and forces were under the command of professional generals or organized as local militias.²² That the involvement of civilians was also encouraged by the Mexican government is understandable if taken into account that the country was heavily indebted and did not have the resources to pay a large professional army, uniforms and, most of all, equip them with the latest weaponry.²³ As such, General Order No. 20 was addressed to Mexicans who committed crimes against US citizens or US property and was also addressed to US forces who committed crimes against Mexican nationals.²⁴ The jurisdiction established by General Order No. 20 could be held as an antecedent to the “passive personality principle”, where States assert jurisdiction over an act committed by an individual outside of its territory because the victim is a national of that State. In addition, it punished conduct that was not ordered by a superior, meaning that the immunity of acts of war was retained.²⁵

- 19 Stephen A. Carney, *The U.S. Army Campaigns of the Mexican War*, U.S. Army Center of Military History, undated, p. 40. Regarding excesses by the regular army, the “Interventions Museum” (*Museo de las Intervenciones*) in Mexico City has a very interesting undated lithography on display in the room dedicated to the American Intervention, with the title: “The whipping given by the Americans” (*Los azotes dados por los Americanos*). It depicts an American soldier whipping a man hung in a cross surrounded by a battalion of American soldiers in a big public square.
- 20 Winfield Scott, *Cuartel General del Ejercito, Ordenes generales numero 20, Tampico, Mexico, 19 de febrero 1847*, Imprenta de la calle de la Carniceria, Tampico, 1847.
- 21 According to Witt non-regular Mexican armies were problematic; see J. F. Witt, above note 10, p. 119. Also see *ibid.*, Art. 9. The problematic nature of guerrilla forces is understandable as they had not been professionally trained and their actions were unforeseeable. However, as Karma Nabulsi argues, disqualifying the involvement of civilians in warfare particularly when fighting against an occupation or invasion has been a constant in what she calls the “martial” and “Grotian” traditions of war. See K. Nabulsi, above note 6, pp. 80–176.
- 22 See María del Pilar Iracheta Cenecorta, “Guerrillas durante la intervención norteamericana, 1846–1848”, *Boletín del Archivo General del Estado de México*, No. 3, 1979, pp. 22–3; Miguel Ángel González-Quiroga and César Morado Macías, *Nuevo León ocupado. Aspectos de la guerra México-Estados Unidos*, Gobierno del Estado de Nuevo León-Fondo Editorial, Monterrey, 2006, pp. 5–11.
- 23 Ulyses Grant who was a US president (1869–1877), and who fought in the Mexican–American war and the American civil war, recalled in his memoirs: “My pity was aroused by the sight of the Mexican garrison of Monterey marching out of town as prisoners, and no doubt the same feeling was experienced by most of our army who witnessed it. Many of the prisoners were cavalry, armed with lances, and mounted on miserable little half-starved horses that did not look as if they could carry their riders out of town. The men looked in but little better condition. I thought how little interest the men before me had in the results of the war, and how little knowledge they had of ‘what it was all about.’” See Ulyses S. Grant, *Personal Memoires of U. S. Grant*, Vol. I, Charles L. Webster & Company, New York, 1885, pp. 117–18.
- 24 W. Scott, above note 20, Art. 9.
- 25 On the immunity that acts of war enjoyed since they were committed as acts of State, see Oona A. Hathaway, Paul Strauch, Beatrice Walton and Zoe Weinberg, “What is a War Crime?”, *Yale Journal of International Law*, Vol. 44, 2019, pp. 6–13.

The law was also published in Spanish and probably had some influence on how, twenty years later, the drafters of the 1871 MCC conceived of war and its conduct. This was especially so regarding the jurisdictional problem, since it surely diminished Mexican sovereignty if a foreign power was to prosecute nationals within Mexican territory. Finally, one could presuppose that the experience with the American Army somehow pushed the Mexican liberal jurists to look for solutions that could protect them against the excesses of foreign armies.

The French Intervention

In this section, it will be explored how the French Intervention also served as a formative experience that fed the contents of the MCC. Most of all, as it was also the case during the Mexican–American war, the Mexican Republic faced a war against a strong power. As such, the independence and integrity of the Mexican Republic was endangered, and the civilians experienced first-hand the effects of war. As such, these experiences surely made patent the need to limit excesses from the counterpart in war and, most of all, guarantee through law a right to self-defence when being invaded.

The intense interaction of the Mexican officials with their French and English counterparts, during the so-called “second French Intervention”, surely served as inspiration for the later development of the MCC. First and foremost, Mexican officials witnessed how, for the French, there was no legal ground to act according to the laws of war, as for France it was a “war of barbarism *versus* civilization”, and France was accomplishing a “civilizing” mission in Mexico. As a result, Mexican lawyers strived for a legal framework valid for everyone, not just the “civilized”, by which foreigners and nationals should comply to the same set of rules if war occurred in national territory. As we will see in the following sections, this was done in the most liberal sense, since through the provisions of the MCC, the drafters achieved that, if violations occurred, the responsible had to be put before trial with the guarantee of procedural rights.

A great example of how the conduct of warfare related to civilization²⁶ or to barbarism is a note written by French Marshall Bazaine, in which he refers to the war between France and Mexico as a “war of barbarism *versus* civilization”.²⁷ As a result, Marshall Bazaine concluded that no quarter should be given to the enemy and that both parties should kill and let be killed. He also adds that all enemies were outlaws and would be executed by imperial decree.²⁸

26 On the meanings of the term “civilization”, see Gustavo Gozzi, *Rights and Civilizations: A History and Philosophy of International Law*, Cambridge University Press, Cambridge, 2019, pp. 123–5.

27 Note no. 7729, written by Mariscal Comandante Bazaine, 11 October 1865, in D. J. M. Vigil, above note 15, p. 728. David Pendas also illustrates the case of the Europeans justifying themselves for behaving like barbarians in the colonies. See David O. Pendas, “‘The Magical Scent of the Savage’: Colonial Violence, the Crisis of Civilization, and the Origins of the Legalist Paradigm of War”, *Boston College International and Comparative Law Review*, Vol. 30, No. 1, 2007, pp. 45–50.

28 See Bazaine, *ibid.* The decree Bazaine referred to was issued by Maximilian of Habsburg in 1865. See “Ley para castigar las bandas armadas y guerrilleros”, 3 de octubre de 1865, Boletín de leyes del Imperio Mexicano, Primera parte, tomo segundo, Imprenta de Andrade y Escalante, México, 1866.

The incursion of the French Army was followed by the reign of Archduke Maximilian of Habsburg. After Napoleon III's troop withdrawal and failure to consolidate his reign, Maximilian of Habsburg was captured and imprisoned in 1867. Instead of being summarily executed, he was tried according to the due process guarantees established in the 1857 Mexican Constitution.²⁹ Relevant is the fact that he was accused on the grounds of a martial law that criminalized acts against the independence and safety of the Republic and, most importantly, against the law of nations.³⁰ Interestingly enough, charge no. 7 of his accusation consisted of two acts: (a) issuing a "barbaric" law and with it breaching the "laws of war"; and (b) ordering executions on grounds of this law and with it also violating the laws of war.³¹ The law issued by Maximilian consisted of enabling the execution within twenty-four hours of members of regular and irregular forces of the Republican Army, as well as all those who accompanied them and aided them. Additionally, he was charged of conducting war without the formalities imposed by civilized nations.³² In his allegations, the prosecutor, basing his arguments with citations of Vattel, concluded that capital punishment could not be dispensed with, since those who committed serious offences against the law of war (*faltas graves contra el derecho de guerra*) do not enjoy this privilege.³³ Important here to note is how a "peripheral State", such as Mexico, used Vattel's doctrine to legitimate the execution of Maximilian of Habsburg. Overall, it could be said that the trial was a good attempt towards the enforcement of international law. As such, the objectives were twofold: (a) they

29 See John W. Foster, "Maximilian and His Mexican Empire", *Records of the Columbia Historical Society, Washington, D.C.*, Vol. 14, 1911, pp. 198–203. For a critical account of the trial, see Konrad Ratz, *Das Militärgerichtsverfahren gegen Maximilian von Mexiko*, Verlag Enzenhofer, Hardegg, 1985. Also see *Constitución Federal de los Estados Unidos Mexicanos*, 1857, above note 7, Arts 20–4.

30 *Ley para castigar los delitos contra la Nación, el orden, la paz pública y las garantías individuales*, 25 January 1862, published in edict of 6 February 1862, available at: <https://www.memoriapoliticademexico.org/Textos/4IntFrancesa/1862CDN.html>.

31 Interestingly enough, Maximilian's defence argued that Marshall Bazaine had actually drafted the law and, therefore, the defendant should be excused of responsibility: "Las exigencias especiales de su posición le impusieron a veces, bien a su pesar, la triste necesidad de hacer algunas concesiones a la autoridad francesa, y una de ellas fue la expedición de la ley de 3 de octubre de 1865, en la que hay algunos artículos redactados por el mismo mariscal Bazaine, y la que se dictó en virtud de informes ministrados por los mismos franceses, de que el señor Juárez había abandonado el país. Pero una vez admitida la buena fe, y esta se ha demostrado antes, con que el señor archiduque se creía legítimamente soberano de México, no podía imputársele a crimen que tomase aquellas providencias dirigidas a defender su gobierno contra los adversarios políticos que lo combatían con las armas." See the original document in Jorge Mario Magallón Ibarra, *Proceso y Ejecución vs. Fernando Maximiliano de Habsburgo*, Universidad Nacional Autónoma de México, Mexico City, 2005, p. 552.

32 "Alegato no. 26 del Fiscal Manuel Aspiroz: Con dicho ejército continuó durante el tiempo de su dominación, la guerra que los franceses habían comenzado contra la República. Esta guerra continuó haciéndose de la misma manera que había comenzado, sin las formalidades del derecho que observan las naciones civilizadas, siendo de considerarse que Maximiliano era el agresor", in J. M. M. Ibarra, above note 31, p. 564.

33 "Alegato no. 63: Finalmente, la consideración de prisioneros de guerra que podrían alegar los procesados, para que no les sea aplicable la pena capital, tiene por excepción el caso de que los prisioneros sean responsables de alguna falta grave contra el derecho de guerra o de algún delito especial que merezca tal pena, como ya en otra parte lo hemos visto (Wattel, *Derecho de gentes*, libro 3o., capítulo 8, párrafos 141, 142 y 143)", in J. M. M. Ibarra, above note 31, p. 577.

could show the European powers that they were civilized enough to apply the law; and (b) they were willing to enforce the laws of war through a legal procedure – excluding reprisals or blunt execution for that matter.

The example of the trial of Maximilian of Habsburg shows clearly how criminalizing violations of the laws of war was not something that happened in a vacuum, but was a result of the experiences of conducting warfare with foreign powers. As such, the trial was a formative experience that paved the path to criminalize violations of the laws of war. In 1871, the drafters already knew what it was like to try someone for violating international law and they probably had this experience in mind when incorporating the “duties of humanity” in the criminal code. Finally, it was also a highly symbolic experience, as “humanity” was materialized in the act of providing Maximilian a legal trial instead of plainly executing him on the spot.

Finally, the French Intervention illustrates how asymmetrical the application of the laws of war was. It is also plausible that due to this reason, Mexican lawmakers understood the urgency of incorporating and enforcing the laws of war. A contemporary account of the French “counter-guerrilla tactic” brings this to the point. Eugene Lefèvre, a French journalist, who in 1869 wrote a book on the French Intervention, noted: “... if the Prussians were to invade Alsace and Lorraine, according to what has been said by the defenders of all the atrocities committed in Mexico, ... the Prussians would have the right to shoot and hang the peasants who would rise up against them with old rifles and gibbets as the right of war would only apply with respect to the regular forces!”³⁴

Violations of the duties of humanity in the 1871 MCC

In the following section the crime “violations of the duties of humanity” will be analysed in depth. The drafting history will shed some light on how the idea of criminalizing violations of the laws of war evolved and what were the main objectives of the drafters. The definition of the crime will dwell on the *actus reus*, as well as the scope of protection. Finally, other regulations of the MCC that relate to the crime “violations of the duties of humanity” will be analysed. These are: combatant immunity, superior orders and extraterritorial jurisdiction.

The drafting of the Code

The MCC took ten years to draft and, as this section will show, the provisions concerned with the regulation of warfare, especially Article 1139 of the MCC, pursued very specific aims. Overall, we will see how the drafters mastered the art of using law as a device to solve, at least formally, urgent problems and needs of the newly established Mexican Republic.

³⁴ See E. Lefèvre, above note 11, p. 428.

The drafting of the MCC began in 1862 and was interrupted by the second French Intervention (1862–1867). The MCC was commissioned by the “Reforma” leader Benito Juárez to a group of notable jurists of the time. The project was commanded by Antonio Martínez de Castro who also belonged to a community of jurists that believed in the power of law to assure equal treatment and to erase distinctions between class or race.³⁵ Let us also not forget that Benito Juárez was born to indigenous parents, so it is very probable that his emancipation ideas and motivations were driven by this background.

Exactly in the year that the draft was commissioned, President Benito Juárez issued the “Law to punish crimes against the nation, order, public peace and individual guarantees” (*Ley para castigar los delitos contra la nación, el orden, la paz pública y las garantías individuales*).³⁶ This law defined several acts as “crimes against the laws of nations”, such as piracy, the slave trade, slavery and attempts against the life of foreign ministers. However, no mention is made of the crime “violations of the duties of humanity” – a crime defined in the MCC just nine years later. It can be assumed that the experience of Mexican liberals fighting against the French Intervention, along with their exposure to European ideas like the codification of the laws of war,³⁷ led them to incorporate them in the MCC (at the standard available in 1871). Overall, the Mexican achievement can be understood better when the difficulty of achieving a consensus in Europe regarding the criminalization of the violations of the laws of war at the time is considered.³⁸

Even though little is known about the explicit intentions of the drafters in criminalizing violations of the laws of war, some conclusions can be drawn from the “explanatory memorandum” (*exposición de motivos*). Penned by Martínez de Castro to justify the Code and its provisions,³⁹ it is an important document to understand the influences and intentions behind the norms of the MCC. Martínez de Castro underlines in the “explanatory

35 According to Robert Buffington, Martínez de Castro’s criminological approach that endeavoured to erase distinctions between class or race through law was very liberal. However, Buffington explains that the egalitarian paradigm of crime and punishment was followed by a new generation of lawyers under Porfirio Díaz’s rule who were in favour of a “biologist” approach. See Robert M. Buffington, *Criminal and Citizen in Modern Mexico*, University of Nebraska Press, Lincoln, Nebraska, 2000, pp. 31–3. Timo Schaefer also remarks on the turn that liberalism took in Mexico during the last quarter of the nineteenth century. See Timo H. Schaefer, *Liberalism as Utopia: The Rise and Fall of Legal Rule in Post-Colonial Mexico, 1820–1900*, Cambridge University Press, Cambridge, 2017, pp. 1–7.

36 See *Ley para castigar los delitos contra la nación*, above note 30.

37 For the account of Latin Americans interacting in different international law congresses since 1826, see Jorge L. Esquirol, “Latin America”, in Bardo Fassbender, Anne Peters, Simone Peter and Daniel Högger (eds), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012, pp. 560–2.

38 The following works give full detail of this account: Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht?*, Verlag Ferdinand Schöningh, Leiden, the Netherlands, 2010; Kirstin von Lingen, “Crimes against Humanity”: *Eine Ideengeschichte der Zivilisierung von Kriegsgewalt 1864–1945*, Verlag Ferdinand Schöningh, Leiden, the Netherlands, 2018; and Pablo Kalmanovitz, *The Laws of War in International Thought*, Oxford University Press, Oxford, 2021.

39 See Antonio Martínez de Castro, “Explanatory Memorandum”, in *Código Penal para el Distrito Federal y Territorio de la Baja California sobre delitos del fueron común y para toda la República Mexicana sobre delitos contra la federación*, Librería de Donato Miramontes, Chihuahua, 1883, pp. 7–8.

memorandum” the importance of achieving the rank of “civilized nations”,⁴⁰ through a Code that, in his view, would instill confidence among the population.⁴¹ Although there are no explicit references as to why the drafters decided to enforce the laws of war through criminal law, some conjectures can be made. As stated before, the “Reforma” movement pursued the ideal of erasing all differences of class and race through law. It can be interpreted that, in their view, international law offered a path *vis-à-vis* their European and North American counterparts.

As to the emancipatory goals of the MCC, Martínez de Castro stated that the new nation needed laws adequate to its republican character, as opposed to the monarchies in Europe. Regarding international law and the conduct of war, the memorandum just states that the violation of international law was very common and, therefore, required enforcement. Finally, Martínez de Castro stressed that the means to achieve the longed-for peace wished by the Mexican nation was through a modern criminal code. For Martínez de Castro the construction of a modern criminal code was a work in progress, as there was still much to learn from the “civilized nations”. However contradictory, these assumptions might be trapped in the dilemma between being emancipated from the European powers and at the same time longing to be like them. The explanatory memorandum delivers the message that they wanted to achieve peace through law. In this sense, for the drafters the MCC represented a manifestation of their willingness to abide by international law and at the same time claim from the European powers adherence to it, specifically to the laws of war within the national boundaries. This was extremely important as this could be used as an argument against the payment of claims. It also was a way in which Mexicans could uphold the same treatment from the USA and Europe as they upheld international law principles among themselves.

To enforce the laws of war through criminal law was a remarkable innovation. It is easier to understand these developments in nineteenth-century Mexico if we imagine the project of Mexico being a blank canvas as a sovereign State, while Europe was more like an already rendered painting. That is to say, the ground was fertile for innovation, the building of a brand-new State meant the construction of legal categories, and so, the Mexican drafters created the crime *violaciones a los deberes de humanidad* (Art. 1139 MCC), which the drafters classified under the category “crimes against the law of nations”. This category enclosed four other crimes, namely: piracy, violations of immunity to diplomats, slavery and the slave trade. Since criminal law was also then considered the *ultima ratio*, it can be concluded that for the Mexican drafters, the legal interests that were protected through the crimes of: (a) violations of the

40 See A. Martínez de Castro, *ibid.*, p. 70. As for newly independent Latin-American nations that were in the odd position of defending themselves from European powers and, at the same time, aspiring to be like them, see Liliana Obregón, “Regionalism Constructed Short History of ‘Latin American International Law’”, *European Society of International Law (ESIL) Conference Paper Series*, No. 5/2012, 2012; and A. Becker Lorca, above note 2.

41 See A. Martínez de Castro, above note 39, pp. 8–9.

duties of humanity, (b) piracy, (c) violations of immunity to diplomats, (d) slavery and (e) slave trade were the most valuable for the “civilized nations”.

Definition of the crime: Violations of the duties of humanity (Art. 1139 MCC)

The crime “violations of the duties of humanity” was a huge innovation, as it established individual criminal responsibility for violations of the laws of war as early as 1871. At the time, Europe was immersed in the idea that acts of war were acts of State and, as such, individuals could not be held responsible for their State’s actions. The Oxford Manual of 1880 tried to push States to incorporate criminal sanctions for violations of the laws of war; however, the Manual had no binding effect. This section will present the wording and the general features of the crime.

In his explanatory memorandum, Martínez de Castro described that, of the twenty-something codes and projects that were examined, only the Spanish Code and the Portuguese project contained any “crimes against the law of nations”.⁴² The projects examined were somehow insufficient, as Martínez de Castro stressed that some development was needed concerning piracy, slave trade and “duties to humanity”, and added that the drafting commission dealt with these crimes, as their perpetration was very common.⁴³

The wording of the crime can be seen in Table 1.

Article 1139 of the Criminal Code of 1871 does not define what amounts to duties of humanity, but it does set the frame of protected persons and objects during wartime as including: prisoners of war, hostages, the wounded (without specifying whether civilian or not) and field hospitals. Important to note is that individual criminal responsibility is not based on the status of belligerents (e.g. with punishment just for being a member of an irregular army), but based on acts. As we can see, the scope of protected persons and objects scarcely deviates from the ones established in the Geneva Conventions of 1949.

As the 1871 provision makes no difference between the wounded, then it could even be argued that the MCC also protected wounded civilians during armed conflict. Additionally, the punishment is addressed to anyone that violates the duties of humanity, independent of whether the infractor is a member of a regular or irregular army. There is also no punishment for being a member of an irregular army compared with, for example, the Lieber Code, which punishes

42 A. Martínez de Castro, above note 39, pp. 67–8.

43 “Delitos contra el Derecho de gentes. De los veintitantos códigos y proyectos que hemos examinado, solo el Código español y el proyecto de Portugal hablan de unos cuantos delitos contra el derecho de gentes; y á nosotros nos ha parecido que no estaría de mas hacer otro tanto, fijando los preceptos mas seguros y que están admitidos como incontestables, sobre la piratería, sobre la violación de los archivos, de la correspondencia y de cualquiera otra inmunidad diplomática real ó personal de un soberano extranjero ó de los representantes de otra nación, de un parlamentario ó de la que da un salvoconducto; sobre el tráfico de esclavos; y sobre la violación de los deberes de humanidad en prisioneros, rehenes, heridos ú hospitales. La comisión se ocupó de estos delitos, por ser muy común su perpetración, y no hizo lo mismo respecto de otros, por ser menos frecuentes, y porque para tratar de todos sería necesario formar un código aparte.” See A. Martínez de Castro, above note 39, p. 67–8.

Table 1. *The crime: “Offences against the law of nations“ - “Violation of the duties to humanity”*

Título Decimoquinto	Title Fifteen
<p>Delitos contra el derecho de gentes Capítulo IV. Violación de los deberes de humanidad en prisioneros, rehenes, heridos y hospitales.</p>	<p>Offences against the law of nations Chapter IV. Violation of the duties of humanity towards prisoners, hostages, the wounded and hospitals.</p>
<p>Art. 1139 – El que violare los deberes de humanidad en los prisioneros y rehenes de guerra, en los heridos, o en los hospitales de sangre, será castigado por ese solo hecho, con seis años de prisión.</p>	<p>Art. 1139 – Whoever violates the duties of humanity towards prisoners and hostages of war, the wounded, or field hospitals, shall be punished for this fact alone, with six years of imprisonment.</p>
<p>Si la violación se hiciera atentando contra la vida de dichas personas, o ejecutando algún otro acto que constituya por sí un delito diverso, se observará lo prevenido en los artículos 195 y 196 (concurso de delitos).</p>	<p>If the violation is committed by making an attempt on the life of such persons, or by performing any other act which constitutes in itself a different offence, the provisions of Articles 195 and 196 (cumulative charges) shall be observed.</p>

with death “war rebels” (Art. 85). The idea of protecting the members of all kinds of armies is coherent with the recognition of combatant immunity given by the MCC which will be explored in the sections below.

Nevertheless, one could wonder why the explicit mention of civilians was spared from this rule. The explanatory memorandum does not elucidate any further. However, if we follow the evolution of Mexican domestic law – the Law of 1862 – and the developments in the international arena, it can be deduced that the drafters of 1871 followed the standard given by the Geneva Convention of 1864. Robert Kolb and Geoffrey Best offer an explanation as to why civilians were not considered subjects of protection. The reasons behind the absence of civilians in the Geneva Convention of 1864 is that they were not considered to be party to a war.⁴⁴ Civilians were to remain at their homes and not engage in combat; therefore, they did not need protection in the way that the wounded, the sick or shipwrecked did. Further, war was considered to be a matter of the military.⁴⁵

44 See Robert Kolb, “The Protection of the Individual in Times of War and Peace”, in B. Fassbender, A. Peters, S. Peter and D. Högger (eds), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012, p. 324.

45 See G. Best, above note 12, pp. 179–85. Benvenisti and Lustig also argue that civilians were kept away from the regulation of war as States pretended to exclude civilian armies. See E. Benvenisti and D. Lustig, above note 4, pp. 28–9.

Finally, the concept of “prisoners of war” was broader than it is today, as the status of combatant was given not only to combatants but to a full array of actors that performed a public function.⁴⁶

Main features of Article 1139 of the MCC

Article 1139 of the MCC – “violations of the duties of humanity” – can be classified as a crime in its own right, since its second paragraph foresees criminal responsibility for all other conduct committed jointly or, if as a result of the “violation” the life of the victim was threatened. Thus, any nuisance (*molestía*) committed against prisoners of war, hostages or the wounded would be punished with six years’ imprisonment. The criminalization of acts against prisoners of war truly “humanized” the conduct of war, especially if we take into account that the Lieber Code permitted retaliation against prisoners of war.⁴⁷

If, however, the nuisance (*molestía*) produced a harm of any of the legal interests protected by the MCC, a separate punishment would be applicable and the accused would be subject to accumulative charges (*concurso de delitos*). This open clause gives room to punish all kinds of conduct committed against prisoners of war, hostages or the wounded. Most importantly, through this legal technique the drafters achieved what Bluntschli years later (1895) would advocate, i.e. that the right to liberty, honour and individual security should be unalienable and protected, even in times of war.⁴⁸ Through Article 1139, the MCC was also guaranteeing *vis-à-vis* foreign powers the protection of legal interests even during a war.

Another interesting trait is that the provision is not only applicable during hostilities. For practical reasons, this could be useful during an armistice, since after the conclusion of hostilities abuses to the wounded in war could also occur – as was the case after the signing of the armistice of the Mexican–American war.⁴⁹

Without a doubt, the most interesting feature is that by transforming violations of the laws of war into crimes, individuals would be accountable before Mexican law, and those protected by the norm (prisoners, hostages or the injured) could also theoretically file an accusation.⁵⁰

46 See R. Kolb, above note 9, p. 39; G. Best, above note 12, pp. 154–7.

47 See General Orders No. 100: The Lieber Code instructions for the government of armies of the USA in the field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863, Art. 59 (the Lieber Code). See also Patryk I. Labuda, “The Lieber Code, Retaliation and the Origins of International Criminal Law”, in Morten Bergsmo *et al.* (eds), *Historical Origins of International Criminal Law: Volume 3*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 305–6.

48 See P. Kalmanovitz, above note 38, p. 139.

49 See, in this regard, the interesting account of Jose María Roa Bárcena about the conclusion of hostilities during the Mexican–American war. See José María Roa Bárcena, *Recuerdos de la invasión norteamericana, 1846–1848: por un joven de entonces*, Librería madrileña de Juan Buxó, Mexico, 1883, pp. 611–15.

50 This right was also given by the law of 1862, as Mexican citizens were given the right to file an accusation before military authorities if, for example, they were held hostage or their property was seized. See *Ley para castigar los delitos contra la nación*, above note 30, Art. 5.

Finally, it can also be argued that, even though the MCC does not refer explicitly to these violations as “war crimes”, they can technically be considered as such. At this point, it is worth pointing out that, in Daniel Marc Segesser’s view, the first person to coin the term “war crime” was Johann Caspar Bluntschli in 1872.⁵¹ Jessica Laird and John Fabian Witt, by contrast, deem that it was Francis Lieber who came up with the phrase in 1865.⁵² Regardless of who used the term first, Article 1139 of the MCC is, in fact, a war crime, as it punishes under domestic criminal law conduct considered violations of the laws of war under the standard applicable in the year 1871.

Additional MCC provisions of relevance to Article 1139

Article 1139 of the MCC should also be read in relation to the rules regarding combatant immunity, superior orders and extraterritorial jurisdiction. Overall, it can be said that the MCC built a system to regulate armed conflict through a criminal enforcement model. That is, the drafters could have opted for incorporating the available usages and customs of war of the “civilized nations” in the Mexican Constitution – as Colombia did in Article 91 of the 1863 Constitution.⁵³ However, they chose to incorporate it in the Criminal Code. If these provisions are read altogether, it can be concluded that the drafters did not differentiate between internal and international armed conflict. As it will be further discussed, this allowed the combatants of civil war to also gain protection under the MCC. As for those who executed the punishable acts, they were also to be held responsible along with their superiors. As will be discussed below, the conditions for superior orders as defence are quite similar to Article 33 of the Rome Statute. Finally, the MCC adopted what today is known as the “passive personality principle”, which triggers the Mexican jurisdiction, when Mexican nationals are injured by a foreign national in foreign territory. As for why extraterritorial jurisdiction was adopted, it can be interpreted that, in the case of an international conflict, the Mexican drafters wanted to ensure that national armies were also protected abroad. As we will see, this provision was radical for its time as it was applicable to the commission of all crimes, not just “crimes against the law of nations”.

51 D. M. Segesser, above note 38, pp. 50–1.

52 Jessica Laird and John Fabian Witt, “Inventing the War Crime: An Internal Theory”, *Virginia Journal of International Law*, Vol. 59, No. 3, 2019, pp. 44–5.

53 Article 91 – *El Derecho de Gentes hace parte de la legislación nacional. Sus disposiciones regirán especialmente en los casos de guerra civil. En consecuencia, puede ponerse término a ésta por medio de tratados entre beligerantes, quienes deberán respetar las prácticas humanitarias de las naciones cristianas y civilizadas.* Also see Iván Daniel Otero, “La aplicación del artículo 91 de la Constitución de Rionegro. Una herramienta constitucional para la solución de los conflictos armados”, *Revista Derecho del Estado*, No. 4, Bogota, 2015, available at: http://www.scielo.org.co/scielo.php?script=sci_arttext&pid=S0122-98932015000100010&lng=en&nrm=iso.

Table 2. *Combatant immunity*

Article 1113 MCC

Los rebeldes no serán responsables de las muertes ni de las lesiones inferidas en el acto de un combate; pero de todo homicidio que se cometa, y de toda lesión que se cause fuera de la lucha, serán responsables tanto el que mande ejecutar el delito, como el que lo permita y los que inmediatamente lo ejecuten.

Rebels shall not be responsible for deaths or injuries inflicted in the act of combat; but for every murder committed, and for every injury inflicted out of the fight, he who commands the commission of the crime, and he who permits it, and those who immediately execute it, shall be responsible.

Combatant immunity

As was previously discussed, Article 1139 of the MCC makes no distinction between international or non-international armed conflicts. However, as it is classified under “violations of the law of nations” it can be concluded that it referred to acts of war between States. In the year of 1871, war was still considered as an act between States. The drafters of the MCC reckoned, however, that nationals also could resort to arms in the case they wished to change the government, abolish or reform the Constitution or even to impede the election of Supreme Court judges. According to the MCC, the aforementioned were the motives to rebellion. Articles 1095–122 regulate rebellion and they sketch the scope of allowed conduct during combat.

From Table 2, we can see that Article 1113 of the MCC grants combatant immunity to all those who rebel. As to who is considered a rebel, Article 1095 of the MCC draws the hypotheses of rebellion and defines as rebels all those who rise up publicly and in open hostility. Among the hypotheses of rebellion enumerated by Article 1095 of the MCC are: to vary the form of government of the Nation, to abolish or reform its political Constitution, or to remove from office the President of the Republic. Granting combatant immunity to the rebels meant that all actions committed during combat were unpunishable. This immunity ceased after combat. It is not clear, however, if the immunity was activated only in the beginning of each combat or during the whole rebellion. However, if we look at the hypotheses of rebellion it is clear that the acts are not spontaneous, but the expression of some plan or resolution; therefore, it is plausible to conclude that “combatant immunity” applied for the whole rebellion. After conducting hostilities, rebels would be punished for all acts outside of combat as well as for the act of rebelling. The punishment for rebelling was proportionate to the rank the rebel had. For example, the chief command was punished with six years and the corporal with one year of imprisonment. Interestingly enough, within the article that grants combatant immunity, a “mini system” of individual responsibility can be found, establishing command responsibility and excluding superior orders as defence. The provision

orders that those responsible would be: (a) those who order the crime; (b) those who allow the commission of the crime; and (c) those who execute the crime.

Since Article 13 of the 1857 Mexican Constitution prohibited the death penalty for political crimes; rebels were spared from this penalty. However, if rebels killed prisoners of war, they would then be punished with the death penalty as the act was equivalent to aggravated homicide (this is another expression of how, in the understanding of the MCC drafters, violations of the laws of war were grave offences to the law of nations).

In the explanatory memorandum, Martínez de Castro explains that a rebel could not be treated as an ordinary criminal, as the acts could be driven by “political fanaticism”.⁵⁴ He also adds that as rebels were not common criminals, they would enjoy the privilege of having a separate cell from the majority of the prisoners. This benefit in treatment could be attributed to the fact that rebels were seen as heroic in the republican sense. Finally, the Constitution of 1857 which was republican in its ideals established in its Article 39 that “the people have at all times the inalienable right to alter or modify their form of government”.

It could be said that, by granting combatant immunity to rebels, the drafters of the MCC achieved a sort of regulation of non-international armed conflict that surely resembles some of the features of Additional Protocol II of the Geneva Conventions. In overall terms, as Article 1139 construes a system of responsibility in which all “violations to humanity” which constitute crimes under the MCC are punished, it can be said that the MCC broadly protects civilians and property. It also grants humane treatment to rebels as they were given the right to participate in hostilities and in the case of a prosecution, it would be according to due process guarantees. In addition, the death penalty was barred for political prisoners.

As the crime “violations of the duties of humanity” makes no distinction between international and internal armed conflicts, it can be concluded that the said provision can also be interpreted as an obligation to the military in the case of rebellion, while the prohibitions within the crime of rebellion were addressed to civilians who took up arms. Evidently this system also offered an innovative solution towards the numerous claims of damage to alien property during wars, since it guaranteed to foreign governments that, in the case of rebellion, damages to property would be criminally punished.⁵⁵

It should also be recalled that granting combatant immunity also relates to the early Latin American tradition of recognizing belligerency in the context of independence wars.⁵⁶

54 A. Martínez de Castro, above note 39, pp. 66–7.

55 Regarding injuries done by rebels to foreign nationals, see Kathryn Greenman, “Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels”, *Leiden Journal of International Law*, Vol. 31, No. 3, 2018.

56 See J. L. Esquirol, above note 37, pp. 554–7.

Superior orders

As already drawn in the previous section, the crime of rebellion set up a system of criminal responsibility where the superior and the subordinate were responsible as perpetrators for crimes committed outside hostilities. It should, however, not be forgotten that this provision was addressed to civilians that rebelled. On the other hand, as “violations of the duties of humanity” were classified under violations of the law of nations, it can be interpreted that they were primarily addressed to military forces, foreign or national. Maybe that is the reason the drafters did not include expressly command responsibility.

Regarding superior orders, it is telling that a nineteenth-century code already banned the application of the *respondeat superior* principle as a defence, especially since it was widely applied by States in the mid-nineteenth century. Major discussions of its abrogation followed until 1943 when allied powers sought to prosecute German war criminals.⁵⁷

As an example, the British War Office abrogated the superior orders defence in April 1944.⁵⁸ In this vein, the Nuremberg tribunal interpreted that “... among the criminal law of most nations it was not the existence of the order that mitigates punishment but whether moral choice was in fact possible”.⁵⁹ Finally, the expedition of the Rome Statute ended with the debate of superior orders as defence.

Going back to the MCC, the drafters of the code considered that in order to exclude criminal responsibility on the grounds of obeying superior orders, it was important to distinguish the cases when obedience was legitimate and obligatory.⁶⁰ Article 34, paragraph XV, of the MCC established that obeying superior orders is an excuse if: (a) the person did not know the order was unlawful; and (b) the conduct was not manifestly unlawful (see Table 3). The reasons expressed by Martínez de Castro were quite innovative, as he explained that excluding criminal responsibility for the subordinate who obeys an order “... is to regard the agent as a real automaton. It enables many crimes, for in knowing that anyone who obeys is not responsible, it allows the subordinate to commit the wildest crimes as mere and vile instruments of their leaders, being also assured of impunity.”⁶¹ The idea of

57 For an extensive review on the *respondeat superior* principle as a defence in international criminal law, see Matthew Lippman, “Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War”, *Penn State Law Review*, Vol. 15, No. 1, pp. 4–58.

58 *Ibid.*, p. 15.

59 R. Kolb, above note 9, p. 29.

60 A. Martínez de Castro, above note 39, p. 13.

61 “... En algunos códigos se pone la obediencia pasiva como circunstancia excluyente, sin distinción ninguna; pero esto es considerar al agente como un verdadero autómatas y dar ocasión á muchos crímenes; porque sabiendo que el que obedece es irresponsable, se prestarían los inferiores a cometer los mayores atentados, como viles instrumentos de sus jefes, seguros de la impunidad.” See A. Martínez de Castro, above note 39, pp. 13–14. In contrast, Lassa Oppenheim explains in the 1912 edition of his treaty that armed forces that commit violations of the rules of warfare cannot be punished as war criminals by the enemy. However, if the violation had been ordered by the commander, then he could be punished as a war criminal. See L. Oppenheim, “Violations of Rules Regarding Warfare”, in Oppenheim, *International Law: A Treatise*, Vol. II: *War and Neutrality*, 2nd ed., Longmans, Green and Co., London, New York, Bombay and Calcutta, 1912, § 253.

Table 3. *Circumstances precluding criminal liability*

<p>Circunstancias que excluyen la responsabilidad criminal Art. 34 (XV) ... Obedecer a un superior legítimo en el orden jerárquico, aun cuando su mandato constituya un delito, si esta circunstancia no es notoria ni se prueba que el acusado la conocía.</p>	<p>Circumstances precluding criminal liability Art. 34 (XV) ... Obeying a lawful superior in the hierarchical order, even if his command constitutes an offence, if this circumstance is not obvious and it is not proved that the accused knew about it.</p>
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Martínez de Castro is in line with what much later, in 1961 the District Court of Jerusalem in the Eichmann case argued against – the superior order excuse, which the Court called “blind obedience”.⁶² In a broader interpretation and related to the “automaton” notion, a connection can also be found between Martínez de Castro’s dismissal of superior orders and the International Military Tribunal (IMT), in the sense that the acts of individuals cannot be shielded or excused as being acts of States, since they are committed by individuals.⁶³ With this rule, the MCC farewellled the sovereignty principle related to the notion that war was only conducted by States and that war criminals were un-prosecutable. It is fair to say that European nations hung on to this principle until 1945.⁶⁴

Extraterritorial jurisdiction

Article 186 of the MCC (see Table 4) provided the jurisdiction for prosecution of crimes committed against Mexican nationals by foreigners in Mexican and foreign territories. In a sense, this extraterritorial principle resembles the idea of General Winfield Scott, since with his General Order No. 20 he provided for prosecution of Mexican nationals for infringements against American persons or property.

Most criminal codes of the nineteenth century accepted only territorial jurisdiction as valid for the prosecution of crimes. Jurisdiction based on the passive personality principle was not spared from debate. In 1886 an American with the name Cutting printed a libel in the USA against a Mexican citizen. As soon as Cutting was on Mexican soil, he was arrested for prosecution as, according to Article 186 of the MCC, foreigners outside Mexican territory that

62 Avner W. Less, *Schuldig. Das Urteil gegen Adolf Eichmann*, Athenäum Verlag, Frankfurt, 1987, paras 216 and 228.

63 See IMT, *France et al. v. Göring et al.*, Judgment and Sentence, 1 October 1946, 22 IMT 411, p. 466.

64 D. M. Segesser, above note 38, pp. 408–16; D. O. Pendas, above note 27, pp. 35–7 and 40–2; Kerstin von Lingen, “Legal Flows: Contributions of Exiled Lawyers to the Concept of ‘Crimes Against Humanity’ During the Second World War”, *Modern Intellectual History*, Vol. 17, No. 2, 2020, pp. 519–24; see also United Nations War Crimes Commission, *1948 History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, pp. 39–40, available at: <http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf>.

committed crimes under the MCC were also punishable. The USA claimed an attack on its sovereignty and ordered the release of Cutting. Lassa Oppenheim refers in the second edition of his treaty that the USA even demanded that Article 186 of the MCC be altered.⁶⁵ However, Mexicans refused to comply. Oppenheim added in 1912 that the practice was not settled if States could extend their jurisdiction for acts of foreigners committed in foreign territories. In a sense, however, the provision of the MCC stands for what Argentinian jurist Calvo argued as a condition against intervention, being the equality of States. As such, aliens in Mexican territory and abroad would be subject to local laws and institutions in the case of harming a Mexican national. In this vein Article 186 of the MCC could also be read as an indirect message to foreign powers, since several causes for their reparations claims were the harm done to their nationals on Mexican soil. In a sense, the MCC was offering an alternative model of criminal punishment instead of claims and intervention.

Finally, in the hypothetical case of Mexico being at war with a foreign power, it could exercise its jurisdiction if violations of the duties of humanity were committed against Mexican nationals. The legitimacy of Mexican jurisdiction in the prosecution of war crimes then became based on international law, as it was enforcing the law of nations. After decades of suffering from civil and foreign wars, this was a crucial move, as it protected the country's own nationals against excesses committed by foreign armies. Additionally, it also guaranteed that nationals of other States would be protected against violations of international law.⁶⁶ This is especially important for two reasons: on the one hand States could claim reparations for harm done to its nationals during riots or civil war and, on the other, it had already been the case that in 1862 France, Britain and Spain agreed to take military action in order to “ensure protection of the person and the property of their subjects”.⁶⁷ In this sense, the drafters of the MCC achieved protection of alien individuals and property through criminal law. It is also plausible that they thought of criminal punishment

65 See L. Oppenheim, “Criminal Jurisdiction of Foreigners in Foreign States”, in Oppenheim, *International Law: A Treatise*, Vol. I: *Peace*, 2nd ed., Longmans, Green and Co., London, New York, Bombay and Calcutta, 1912, § 147, pp. 204–5. Albéric Rolin also referred to the *Cutting* case in 1888 and he noted that the Criminal Code of Italy resembled the scope of Article 186 of the MCC; however, it was a mitigated version since the Italian disposition was only applicable for serious crimes (*crimes et délits graves*). See M. Albéric Rolin, “L’Affaire Cutting. Conflit entre les États-Unis de L’Amérique Du Nord et le Mexique en 1886”, *Revue de Droit International et de Legislation Comparée*, Vol. XX, 1888, available at: <https://gallica.bnf.fr/ark:/12148/bpt6k5748370z/f564.item>.

66 Given the experience Mexico had with allegations made by Spain and France of not complying with the law of nations, it can be inferred that it was a priority to demonstrate the contrary. The following statement made by President Juárez in the year 1861 supports this hypothesis: “... Informes exagerados y siniestros de los enemigos de México, nos han presentado al mundo como incultos y degradados. Defendámonos de la guerra á que se nos provoca, observando estrictamente las leyes y usos establecidos en beneficio de la humanidad. Que el enemigo indefenso, á quien hemos dado generosa hospitalidad, viva tranquilo y seguro bajo la protección de nuestras leyes. Así rechazaremos las calumnias de nuestros enemigos, y probaremos que somos dignos de la libertad é independencia que nos legaron nuestros padres.” *Manifiesto a la Nación del Presidente Benito Juárez*, 18 December 1861, in D. J. M. Vigil, above note 15, pp. 490–1.

67 See Kathryn Greenman, “The History and Legacy of State Responsibility for Rebels, 1839–1930”, PhD Thesis, Universiteit van Amsterdam, Amsterdam Center for International Law, 2019, pp. 43–54.

Table 4. *Extraterritorial jurisdiction*

Art. 186.—Los delitos cometidos en territorio extranjero por un mexicano contra mexicanos ó contra extranjeros, ó por un extranjero contra mexicanos, podrán ser castigados en la República y con arreglo á sus leyes, si concurren los requisitos siguientes:

I. Que el acusado esté en la República, ya sea porque haya venido espontáneamente, ó ya porque se haya obtenido su extradición.

II. Que si el ofendido fuere extranjero, haya queja de parte legítima.

III. Que el reo no haya sido juzgado definitivamente en el país en que delinquirió, ó que si lo fué, no haya sido absuelto, amnistiado ó indultado.

IV. Que la infracción de que se le acuse tenga el carácter de delito en el país en que se ejecutó y en la República.

V. Que con arreglo á las leyes de ésta merezca una pena más grave que la de arresto mayor.

Art. 186.—Crimes committed in foreign territory by a Mexican against Mexicans or foreigners, or by a foreigner against Mexicans, may be punished in the Republic and in accordance with its laws, if the following requirements are met:

I. That the accused is in the Republic, either because he has come here spontaneously or because his extradition has been obtained.

II. If the offended party is a foreigner, there must be a complaint from a legitimate party.

III. The offender has not been finally tried in the country in which he committed the offence, or if he has been, he has not been acquitted, amnestied or pardoned.

IV. The offence of which he is accused has the character of a crime in the country in which it was committed and in the Republic.

V. In accordance with the laws of the Republic, he deserves a more serious penalty than that of major detention.

as an alternative to the payment of reparations. In any case, they guaranteed foreign powers that in the case violations of international law occurred, for example to the laws of war, the responsible would be criminally punished.

Effects of criminalizing violations of the laws of war

“Duties of humanity” as a legal category

An important effect of Article 1139 of the MCC is that it transforms the notion of “duties of humanity” into a legal category. It is, however, intriguing to know where

this term originated and in which respects it differed from the European stance. The fact that the term “humanity” was used as a way of denoting certain conducts during warfare can be found in the various official documents and correspondence during the French Intervention (1862–1867) and during the civil war between *liberales* and *conservadores* (1857–1860).⁶⁸ A note written by the Mexican Ministry of War addressed to national rebels of the State of Puebla following a capitulation of the year 1856 states, in its last paragraph, that the “duties of humanity” have been accomplished and followed by respecting the rules of capitulation and by commuting the prisoners’ death penalty.⁶⁹ In another document from 1862, General Zaragoza, a member of the liberal army, also refers to the “duties of humanity” having been accomplished by allowing all wounded French soldiers to recover from their injuries in a hospital safeguarded by the Mexican Army.⁷⁰ These two documents indicate that the term “duties of humanity” was already circulating during the civil war and French Intervention and was used in the context of warfare regarding the treatment of combatants.

From a doctrinal standpoint, the Latin American tradition of invoking humanitarian values can also be traced to Andrés Bello’s work.⁷¹ In his treaty on the Law of Nations, the term “humanity” has even different usages, for example, as a way of referring to European nations,⁷² and as a quality (“humanely”).⁷³ He also calls the violation of the promise of a prisoner of war not to escape or to resort to arms, as such an act provokes more calamities in war, a “crime against humanity”.⁷⁴ Furthermore, by reading Andrés Bello, it is clear that humanity is also a property that is characteristic of the “civilized nations”, as he relates inhuman acts to those committed by barbarians or “*los naturales*”.⁷⁵

So, according to early-nineteenth-century scholars like Bello, humanity was a quality among civilized nations – i.e. those who knew and obeyed the law – and, at the same time, this quality imposed duties.⁷⁶ In this context, “the duties of humanity” in Article 1139 of the MCC can be interpreted as those “imposed” by

68 A collection of all these documents and correspondence can be found in D. J. M. Vigil, above note 15. On President Juárez also publicly invoking “humanity”, see above note 66.

69 *Comunicación del Ministerio de Guerra y Marina*, 6 December 1856, in D. J. M. Vigil, above note 15, pp. 203–4.

70 Letter from General Zaragoza to the French Marshall Jurien, 18 April 1862, in D. J. M. Vigil, above note 15, p. 526.

71 A. Bello, above note 18. On Andrés Bello’s work as part of a “creole legal consciousness”, see L. Obregón, above note 40, pp. 7–8. Also see Liliana Obregón, “Construyendo la región americana: Andrés Bello y el derecho internacional”, in Beatriz González-Stephan and Juan Poblete (eds), *Andrés Bello y los estudios latinoamericanos*, Serie Críticas, Universidad de Pittsburgh: Instituto Internacional, de Literatura Iberoamericana, Pittsburgh, PA, 2009.

72 A. Bello, above note 18, p. 183.

73 *Ibid.*, p. 87.

74 *Ibid.*, p. 192.

75 *Ibid.*, p. 88.

76 In the sense of “humanity” as a categorical imperative or as a moral notion, see Kerstin von Lingen, “Fulfilling the Martens Clause: Debating ‘Crimes against Humanity’, 1899–1945”, in Fabian Klose and Mirjam Thulin (eds), *Humanity – a History of European Concepts in Practice*, Vandenhoeck & Ruprecht, Göttingen, 2015. As for obeying the law as intrinsic to civilized nations, see Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Hersch Lauterpacht Memorial Lectures, Cambridge University Press, Cambridge, 2001, pp. 101–10.

humanity (civilized countries), which require certain conduct, such as refraining from attacking those already engaged in war along with institutions that help diminish the calamities of war, such as field hospitals. By adopting these duties as their own and incorporating them in the Criminal Code, the drafters carried out what Becker Lorca describes as an appropriation of international law by a semi-peripheral State. Each of these appropriations produced different outcomes depending on the context.⁷⁷ In this case, the appropriation of the civilized usages of war was codified and transformed into crimes.

Finally, by incorporating the notion of humanity in the Criminal Code, the notion becomes universal, whereas under the European conception, humanity was an exclusive category⁷⁸ and, as such, only the members of the civilized world could benefit from humane treatment during war.⁷⁹ The universalist approach can be presupposed by the liberal affiliation of the drafters, as they believed all men to be equal before the law,⁸⁰ with “duties of humanity” to be granted for all and for protection by criminal law, just as life or property, for that matter.⁸¹

Individual criminal responsibility

Making individuals criminally responsible for violations of the laws of war offered a substitute for other enforcement measures that were in force at least until the last quarter of the nineteenth century. These measures were: retaliation, reprisals and outlawry.⁸² Compared to retaliation and reprisals, criminal sanctions had a humane character, since they were not collective punishments, but specifically targeted ones.⁸³ Retaliation and reprisals, by contrast, were not only suffered by armies but also by populations.⁸⁴ In a sense, the whole population of an enemy State held a collective responsibility in war.⁸⁵ Retaliation was seen as a justified

77 A. Becker Lorca, above note 2.

78 Fabian Klose and Mirjam Thulin, “Introduction: European Concepts and Practices of Humanity in Historical Perspective”, in F. Klose and M. Thulin, above note 76, pp. 17–18. Also see Kerstin von Lingen, “Menschenrechte strafrechtlich schützen – eine historische Genese des Konzepts von ‘Crimes against Humanity’”, in *Menschenrechte – für wen?*, Studium Generale, Universität Heidelberg, Heidelberg, 2019, p. 55.

79 R. Kolb, above note 9, p. 35. On the standard of civilization in the context of Latin American countries, see A. Becker Lorca, above note 2, pp. 62–7.

80 A good account of how liberal ideas became utopian in nineteenth-century Mexico can be found in T. H. Schaefer, above note 35.

81 Under the 1857 Mexican Constitution, rights are granted to all individuals and not only to Mexicans. For example, Articles 4 and 10 of the Constitution employ the phrase “every man”.

82 See G. Best, above note 12, p. 168.

83 Geoffrey Best gives some examples of reprisals between 1808 and 1871; see G. Best, above note 12, p. 168. Also on the matter of retaliation as a collective punishment, see the account of J. Laird and J. F. Witt, above note 52, pp. 13–16.

84 Segesser argues that the reprisals suffered by the French population during the Franco-Prussian war motivated French jurists to seek the criminal prosecution of such acts. See D. M. Segesser, above note 38, pp. 87–8.

85 See Rotem Giladi, “A Different Sense of Humanity: Occupation in Francis Lieber’s Code”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 108.

response to an enemy's unjustifiable attack, usually consisting of the same or harsher treatment to the enemy's army and civilians.⁸⁶

In the case of outlawry, those who disobeyed the laws of war were stripped of their rights, they were put outside the law and could be executed.⁸⁷ The fact that Article 1139 of the MCC replaced these enforcement methods signified a giant leap, since retaliation and outlawry depended on the subjective perception of the counterpart and, as a party to the conflict, it lacked impartiality.⁸⁸

Regarding the principle of necessity, individual criminal responsibility limits this principle through the notion of "duties of humanity". As a result, it is possible to say that Article 1139 of the MCC prioritizes humanity over necessity.⁸⁹

The adoption of individual criminal responsibility by the Mexican drafters is fairly logical if we recall the liberal ideals that they represented. In this sense, the conduct of warfare would follow the liberal paradigm that individuals are free and should be responsible for their actions, and this responsibility had to be proven at trial. At this point, it is worth recalling that by 1871, the laws of war were understood as a body of law only applicable to States. As such, Article 8 of the Geneva Convention of 1864 left it to governments to instruct their militaries to implement the content of the Convention.⁹⁰

According to Ronen Steinberg, "individual responsibility" was a creation of the French Revolution, defined as "... a legal obligation to answer for one's actions".⁹¹ After transferring sovereignty from the king to the nation, individual accountability was made possible and it was democratized. This change allowed, for example, the trial against Louis XVI. In this regard, a continuity can be identified within the MCC and the French Revolution,⁹² as it shifted the paradigm that acts of war were acts of State and, therefore, unprosecutable.

By criminalizing conduct that was considered exceeding the limits of necessity test during war, the drafters also solved the dilemma later faced at the Nuremberg Trials, which raised the questions of the principle of legality. By implementing international law through domestic law, the Mexican drafters were guaranteeing that if prosecution followed, the group of "civilized nations" would recognize the validity and legality of such an act. If members of a foreign power's army violated the laws of war, they would be prosecuted and punished under criminal law. The legitimacy of this action was derived from "crimes against the law of nations". By choosing the individual accountability model, Mexican authorities guaranteed third parties that

86 See G. Best, above note 12, p. 348, note 77. On how reprisals and retaliation were discussed in the US context, see J. F. Witt, above note 10, pp. 128–32.

87 See P. I. Labuda, above note 47, p. 307.

88 On the subjective trigger for the applicability of the law of war, see R. Kolb, above note 9, pp. 31–4.

89 On the discussions of how to limit the principle of necessity, see G. Best, above note 12, pp. 172–9.

90 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864, entered into force 22 June 1865 (Geneva Convention 1864), Art. 8.

91 See Ronen Steinberg, "Transitional Justice in the Age of the French Revolution", *International Journal of Transitional Justice*, Vol. 7, No. 2, 2013, p. 270.

92 In comparison, according to Timo Schaefer, in Europe the trajectory of the French Revolution was interrupted and, until the First World War, dominated aristocratic interests and mentalities. See T. H. Schaefer, above note 35, pp. 1–3.

the laws of war would be abided by and that, most importantly, the members of an enemy's army could be held accountable under Mexican law. As we have seen above, prosecuting violations of the law of nations was not entirely new for liberals, as they had already taken this course of action against Archduke Maximilian.

The MCC within the framework of nineteenth-century efforts to regulate warfare

Historians Geoffrey Best and Daniel Marc Segesser have rightly pointed out that even though a doctrine of war can be traced from the sixteenth century onwards, it was in the late Enlightenment period when it became clear that definitions in written law had to be made for the sake of relations between States.⁹³ In this sense, the rationalization tendencies evolved from the Enlightenment and influenced the humanitarian approach of warfare.⁹⁴ The notion that war had to have limitations through law – with the principle of “humanity” as the centrepiece to achieving this goal – gained more and more acceptance after the second half of the nineteenth century. This reckoning met with the codification spirit of the nineteenth century, in which law aspired to have a scientific character in order to end arbitrariness and uncertainties.⁹⁵ In summary, efforts to regulate warfare met with the spirit of codification.

In parallel with the regulation of warfare, the humanizing movement emerged, as represented by Herny Dunant, Gustave Moynier and Guillaume Henri-Dufour. Much has been written about the works of these jurists,⁹⁶ and their achievements (or failures) are crystallized in the Geneva Convention of 1864 and the St Petersburg Declaration of 1868. At this point, it is fair to say that the project of codifying the laws of war by nineteenth-century humanists met with the goals of Mexican liberals to erase uncertainties through legal categories, being applied to individuals equally.⁹⁷ Further, the achievements of the Mexican drafters on the criminalization of the violations of the laws of war were in tune with Gustave Moynier's project.⁹⁸ Even though motivated by different factors, both group of jurists (the European humanists and the Mexican liberals) strived for the codification of the laws of war and their enforcement through criminal law. The available findings do not offer any evidence if the group of international European lawyers like Moynier or Bluntschli knew about the developments of the MCC. Retrospectively, the Mexican Code was in fact the materialization of what they aimed for: codification and punishment. In this regard, in order to broaden

93 G. Best, above note 12, pp. 131–67; D. M. Segesser, above note 38, p. 25.

94 See P. Kalmanovitz, above note 38, pp. 127–51.

95 See R. Kolb, above note 9, pp. 28–9.

96 See M. Koskenniemi, above note 76; D. M. Segesser, above note 38; G. Best, above note 12.

97 See T. H. Schaefer, above note 35.

98 See Daniel Marc Segesser, “Forgotten, but Nevertheless Relevant! Gustave Moynier's Attempts to Punish Violations of the Laws of War 1870–1916”, in Mats Deland, Mark Klamberg and Pål Wrangé (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives*, 1st ed., Routledge, London, 2018.

the historization of IHL, it would be worth enquiring if there was any exchange of ideas and achievements in the development of the laws of war between Europe and Latin America. However, as already mentioned in the introduction of this article, it might be the case that these novel developments were disregarded for being a product of a not “fully civilized nation”.

Notwithstanding the efforts of, for example, Gustave Moynier, the path for a new consensus to be reached among European powers was not an easy one and the efficiency of a code to limit war was seen with scepticism.⁹⁹ Witt argues that the Lieber Code offered an alternative to the impasse. It was neither openly pacifist nor openly militaristic and, most of all, it offered solutions to practical problems, such as the treatment of guerrilla warfare.¹⁰⁰ According to Kolb, it was due to the predominance of municipal law over international law during the nineteenth century that domestic codes took the lead in regulating warfare.¹⁰¹ The most prominent example here was the Lieber Code,¹⁰² which established the “principle of humanity” as a restriction to warfare.¹⁰³ The Lieber Code inspired other European codes, with countries such as France (1877) and Serbia (1878) also issuing military manuals.¹⁰⁴ In parallel with these developments, the Institute of International Law at Oxford drafted a Manual in 1880¹⁰⁵ that was intended to serve as a framework for national legislation and included penal sanctions, albeit rather broadly.¹⁰⁶

Within this framework, it is also worth recalling that as early as 1844, Andrés Bello, in his *Principios de Derecho de Gentes*, made an effort to systematize the conduct of war as a legal doctrine. He divided the conduct of hostilities into two major groups: those against persons and those against the objects of the enemy. Most importantly, as Bello stresses in the introduction of his work, his objective was to make available for the new independent nations the laws and doctrine of the law of nations, especially since, for some works, there was no translation available.¹⁰⁷

Considering the doctrinal development in Europe and in Latin America, it can be concluded that the creation of the crime “violations of the duties of humanity” was influenced by a broad framework. It is also fair to say that the Mexican example of criminalizing violations of the laws of war proves that the ideas of “humanizing” and regulating warfare were not only circulating in Europe or the USA. In this regard, Colombia is also a very good example.¹⁰⁸ The

99 G. Best, above note 12, pp. 145–6.

100 J. F. Witt, above note 10, pp. 340–5.

101 R. Kolb, above note 9, pp. 25–9.

102 As an overall argument, see Richard Baxter, “The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100”, *International Review of the Red Cross*, Vol. 3, No. 25, 1963.

103 See Lieber Code, Art. 4.

104 On the early prevention and punishment of war crimes, see Hugh H. L. Bellot, “War Crimes: Their Prevention and Punishment”, *Problems of the War*, Vol. 2, 1916.

105 See *The Laws of War on Land*, manual published by the Institute of International Law (Oxford Manual), adopted by the Institute of International Law at Oxford, 9 September 1880.

106 See Oxford Manual, *ibid.*, Arts 84–6.

107 A. Bello, above note 18, pp. VIII and XIX.

108 For a detailed account of the history and development of IHL in Colombia, see Alejandro Valencia, *La humanización de la guerra: Derecho internacional humanitario y conflicto armado en Colombia*, Ediciones Uniandes y Tercer Mundo Editores, Bogotá, 1992, pp. 126–38, 144–6 and 168–82.

Colombian Military Code of 1881 did not criminalize violations of the laws of war, but it did develop a set of rules regarding the conduct of warfare based on international law.¹⁰⁹ So, in a sense, regulating warfare was not just an important matter for Europeans, but also for the nascent Latin American countries, and this is only logical if read within the context of the violence suffered during the wars of independence, intervention and civil war. Finally, if – as Becker Lorca argues – semi-peripheral States used international law as a strategy to gain recognition of the core States, then it should not be a surprise that States like Mexico actually applied international law and, with it, the laws of war.

The Lieber Code and the MCC as two sides of the same coin

In this section the MCC will be compared against the Lieber Code. While each law is of a different nature – the former a criminal code, the latter a set of military orders – both incorporate the laws of war. The comparison is useful as it will reveal each State’s concerns and how they codified the laws of war to pursue and defend their interests, while also solving various problems.¹¹⁰ Most of all, the comparison reveals the position held by each nation: the USA as the invading and Mexico the invaded State. Common to both regulations is that the interests pursued were a result of the experiences that Mexico and the USA shared, such as the Mexican–American war. That is why the main argument is that the two laws are different sides of the same coin.

In particular, we will see how the dispositions regarding occupation reveal that the USA saw itself as an “occupier”, whereas Mexico pursued the objective of defending itself from occupation or, at the very best, gaining some juridical advantage and protection in the case it suffered occupation. At the time, there was no law of occupation; thus, we see the subjectivity in which the laws of war developed and were applied.¹¹¹

There are at least three features by which the Lieber Code and the MCC differ substantially: the applicability of domestic law in the case of an occupation; the severity of punishments; and the granting of combatant immunity to rebels.

Domestic law and occupation

Rotem Giladi and Karma Nabulsi have already argued that the main objective of the Lieber Code regarding occupation was to maintain the occupants’ authority and order.¹¹² According to Articles 1–3, the occupying army would proclaim martial

109 See *Código militar expedido por el Congreso de los Estados Unidos de Colombia*, Imprenta a cargo de T. Uribe Zapata, Bogotá, 1881, Arts 1035–271. Even the Geneva Convention of 1864 is inserted in Article 1134.

110 As in the case of the jurisdictional obstacles posed by the US Constitution. For an in-depth account, see J. Laird and J. F. Witt, above note 52.

111 R. Kolb, above note 9, pp. 31–4.

112 See R. Giladi, above note 85; K. Nabulsi, above note 6, pp. 158–63.

law and with it the suspension of the military authority, and civil and criminal law of the occupied country. Additionally, Article 41 foresees that “all municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field”. In sum, what the Lieber Code aimed for was the imposition of the occupants’ law. Nonetheless, Article 40 recognizes that the only authoritative rule between hostile armies is the law of nature and nations.¹¹³ In this line of thinking, the dispositions of the MCC would put the Lieber Code into a predicament as it incorporated the law of nations in the Criminal Code. With it, the law of nations was turned into a legal interest to protect and would have to be complied with by occupants and occupiers.¹¹⁴ It seems that Francis Lieber did not foresee the possibility that a nation incorporate international law as domestic law and, with it, exercise some sort of defence against the occupier. Finally, as the MCC provides jurisdiction for “crimes against the duties of humanity”, which are classified under violations of the laws of nations, an American citizen could not contend the jurisdiction.¹¹⁵

Severity of punishments

The Lieber Code encompasses a set of rules which limits warfare and adopts the position that unnecessary destruction should be avoided.¹¹⁶ It was not intended to be a criminal code, as for Francis Lieber the laws of war were not penal law.¹¹⁷ However, in some cases, the code allows violations of the laws of war to be either “rigorously”, “severely” or “highly” punishable as criminal offences.¹¹⁸ In other cases, it directly establishes the death penalty, with no mention of a trial or martial court.¹¹⁹ The severity of punishments contrasts with the invocation made of humanitarian values.¹²⁰ For example, violence against persons, robbery or pillage are punished with the death penalty, and a culprit could even be lawfully killed on the spot.¹²¹ A prisoner of war who escapes could be killed in his

113 Also, Article 3 of the Lieber Code, stipulates that “... Martial Law in a hostile country consists in the suspension by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule...”. However, Article 96 allows in the case of a citizen that commits treason against his country to be dealt with according to the law of the traitor.

114 Providing jurisdiction for the investigation and prosecution of war crimes committed by the State nationals or by armed forces in their territory is now considered an obligation under customary law. See ICRC, “Practice Relating to Rule 158. Prosecution of War Crimes, Customary IHL Database”, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule158.

115 In practice, Mexican authorities have resorted to Article 186 of the MCC in 1886 and 1940 against American nationals and the USA has refused to recognize the extraterritorial principle. However, the charges have not been for violations of the laws of war. For the stance of the US Department of State, see Christopher L. Blakesley, “United States Jurisdiction Over Extraterritorial Crime”, *Journal of Criminal Law and Criminology*, Vol. 73, 1982, pp. 1116–17, note 16.

116 Lieber Code, Arts 21–30.

117 See J. Laird and J. F. Witt, above note 52, p. 48; J. F. Witt, above note 10, pp. 341–3.

118 Lieber Code, Art. 37 (rigorously punished); Art. 44 (severe punishment); Art. 86 (highly punishable).

119 Lieber Code, Arts 12 and 13.

120 The aspect of the “draconian punishment” is also remarked by K. von Lingen, above note 38, pp. 68–9.

121 Some articles of the Lieber Code that punish with the death penalty: 44, 66, 71, 83, 89–92, 95 and 97.

flight.¹²² In this regard, it is possible that the MCC diverged from this model of killing belligerents or those who violated the laws of war on the spot, due to the experiences of the Maximilian Empire. As mentioned in the sections above, in 1865 a law was issued by Maximilian of Habsburg which stipulated capital punishment within twenty-four hours for all those who resisted the imperial government.¹²³

Finally, the Lieber Code does not systematize cases in which an offender would suffer a summary execution or the benefit of a trial, whether under martial court or a military commission.¹²⁴ In this regard, the sanctions of the MCC are more humane, as potential punishments can be foreseen by the offender at trial.

Rebellion

The Lieber Code makes a distinction between rebels in a civil war¹²⁵ and rebels within an occupied territory who raise arms against the occupying army.¹²⁶ Of relevance are the dispositions concerning rebels of the occupied territory. As a reminder, these dispositions were probably written in view of the American experience during the Mexican–American war and their experience with guerrilla warfare. Therefore, it is understandable that the Lieber Code bans resistance to the invader in the form of *levée en masse*,¹²⁷ collaboration¹²⁸ or rising against the occupying army. Furthermore, the Code demands submission to the occupant, classifying enemy non-combatants as “disloyal”, with the term “loyal citizen” reserved for those who do not take up arms and give aid to the occupier.¹²⁹ In contrast, the MCC has no criminal provisions in the case of invading a country; instead it punishes those who aid a foreign power to invade.¹³⁰ The detailed criminal provision in the case of aiding a foreign invader¹³¹ attests to the specific problems that the drafters wanted to tackle.¹³²

The contents of the Lieber Code and the MCC regarding occupation (*invasión*) clearly reveal that they are different sides of the same coin. While the Lieber Code prohibits resisting the invader, the MCC prohibits collaboration with

122 Lieber Code, Art. 77.

123 See “Ley para castigar las bandas armadas y guerrilleros”, above note 28, Arts 1–2. This law also led to the execution of prominent leaders of the time as a biographical book dedicated to the “Martyrs of Uruapan” recalls. See Melchor Ocampo Manzo, *Homenaje de Admiración y Testimonio de Respeto del Gobernador del Estado a los Mártires de Uruapan*, Imprenta de la Escuela de Artes, Morelia, 1893, available at: http://cdigital.dgb.uanl.mx/la/1080013187/1080013187_01.pdf.

124 Lieber Code, Arts 12 and 13.

125 Lieber Code, Arts 149–51.

126 Lieber Code, Art. 85.

127 Lieber Code, Art. 51.

128 Lieber Code, Arts 92 and 95.

129 Lieber Code, Art. 155. On this matter, see R. Giladi, above note 85, pp. 110–12.

130 MCC, Arts 1071–5 and 1080.

131 Especially the correlation of military rank and punishment. For example, a Mexican general that aided a foreign invader would be punished with the death penalty, whereas land soldiers would be punished with two years’ imprisonment. See MCC, Art. 1080.

132 See, for example, Article 1093 of the MCC, under which foreign nationals residing in Mexico who aided the invader enjoyed a reduction of the penalty.

the invader.¹³³ It can be concluded that, in the form of rules (Mexican and American), we can observe the discussions around invasion and occupation. On the one hand, the Lieber Code represents what Geoffrey Best denominates “the arch occupier” position and, on the other, the MCC represents the position of the occupied. It is also a reflection of the subjective approaches determined by each party and its position in power. Terminologically, the Lieber Code refers to “occupation”, while the Mexican code uses the word “invasion”.

As a final remark, the comparison between the MCC and the Lieber Code delivers an interesting ideological representation, since both parties saw themselves as representatives of different traditions: the former a Hispanic American Catholic project, while the latter was an Anglo Protestant project.

This point was reinforced by Francis Lieber’s German cultural background, as opposed to the Liberal reformists, who saw themselves as ideological descendants of the French Revolution.¹³⁴

The differences between the Lieber Code and the MCC also reveal the interests behind the regulation of warfare and the possible outcomes they wanted to avoid, should a similar conflict happen again.

Conclusion

From the previous account, it can be concluded that the creation of the crime “violations of the duties of humanity” did not happen *ex nihilo*, but was the result of a combination of factors, including: (a) the experience of combatting civil wars and foreign interventions; (b) the liberal conviction of the drafters; (c) their interplay with the US and European powers; and (d) their exposure to European ideas involving the humanization of war.

From the sources consulted, it is also clear that as early as the Mexican–American war, Mexican authorities were well versed in the contents of the laws of war and used them as a recourse against their foreign counterparts during war. The Mexican experience of foreign intervention and civil war probably led to the creation of the “Law against the Independence of the Nation” issued in 1862, which punished those who disobeyed the law of nations. This law was not as specific as the MCC would later be, but it certainly shows the intention of the liberal government to incorporate the customs and usages of war in domestic law. Maximilian of Habsburg was tried for waging war against the usages of civilized nations and even Emmerich de Vattel was cited in order to justify his sentence. After analysing this chapter of Mexican history, it is clearer that making

133 See Articles 1071–80 of the MCC. Also see the account of Geoffrey Best, regarding the discussions around the obligations of the occupied, which can be summarized as the occupier’s position that absolute docility and positive assistance (as in the Lieber Code) was expected from the occupied populations. See G. Best, above note 12, pp. 180–5.

134 Notwithstanding their disappointment produced by the French Intervention. See Nicole Giron, “Ignacio A. Altamirano y la Revolución Francesa: una recuperación liberal”, in S. Alberro, A. Chávez and E. Trabulse (eds), *La revolución francesa en México*, El Colegio de Mexico, Mexico City, 1992, pp. 201–14.

individuals criminally responsible for violations of the law of nations (under which the law of war was classified) could be then attributed to the experience of trying Maximilian of Habsburg. Additionally, the high exposure to armed conflicts could have posed questions such as the protection of belligerents and the need of criminalization, as opposed to retaliation.

The drafters of the 1871 MCC transformed the laws of war into penal law. In this sense, the codification movement converged with the aims to codify international law¹³⁵ and, more importantly, with the efforts to regulate the conduction of warfare; however, the Mexicans adopted a universalist approach.¹³⁶ If the new nation State was able to draft a criminal code and criminalize certain conduct, it meant it was a sovereign State, with codification considered a part of the civilization process.¹³⁷ In this regard, adopting individual criminal responsibility was certainly a strategic choice and, in a way, a device to ensure emancipation and recognition as a member of the “civilized nations”.¹³⁸ This proved to be crucial as the conduct of warfare from the European counterpart depended on this standard. As we recall, the justification from the French to retaliate in excess was openly due to the “uncivilized” character of the Mexican combatants.¹³⁹

In nineteenth-century terms, it could also be argued that civilized combat belonged to a civilized nation, and by drafting Article 1139 of the MCC it was enforced through criminal law. In this sense, the Mexican legislator entered into what David Pendas called the “legalist paradigm of war”. For Pendas, the “legalist paradigm of war” has two central aspects: it asserts the possibility of State criminality and individual responsibility by not excluding individual actors for their responsibility in State-sponsored crimes.¹⁴⁰

The story of Article 1139 of the MCC proves that the “war crime” was not an invention of one country, but rather a phenomenon that developed differently, depending on the geographical and political context. It can also be argued that, even though the MCC does not refer explicitly to these violations as “war crimes”, technically they are, since Article 1139 punishes conduct considered violations of the laws of war within the standard available in the year 1871 under domestic criminal law.

In the overall framework of the development of IHL, it can be concluded that Article 1139 of the MCC contributed to its development by: (a) transforming

135 Eliana Augusti, “Peace by Code. Milestones and Crossroads in the Codification of International Law”, in Thomas Hippler and Miloš Vec (eds), *The Codification of International Law in Paradoxes of Peace in Nineteenth Century Europe*, Oxford University Press, Oxford, 2015, pp. 37–61.

136 See D. M. Segesser, above note 38; K. von Linggen, above note 38. This is also linked to the development of weaponry and the damage inflicted. On the legalist paradigm, see D. O. Pendas, above note 27.

137 See G. Gozzi, above note 26, pp. 123–5.

138 In this regard, the Mexican case is a good example of the appropriation of classic legal thought by the non-Western States in order to obtain recognition, as A. Becker Lorca argues, above note 2, pp. 65–72.

139 In a letter from 1862, French commissioners argued that the murdering of French soldiers by their Mexican counterparts proved that the Mexican government was unwilling and unable to follow obligations common to “civilized nations”. See *Nota de abril de 1862 por parte los comisionarios franceses*, in D. J. M. Vigil, above note 15, pp. 525–6.

140 D. O. Pendas, above note 27, p. 30.

into written law the consensus of not causing unnecessary harm to certain actors and objects during war; (b) contributing to the uniformity and universality of customary international law; (c) unifying and systematizing the laws of war as a part of the law of nations, and with it contributing to the developing doctrine of international law;¹⁴¹ (d) defining the subjects and objects of protection during warfare; (e) enforcing the rules by criminalizing them; (f) elevating humanity as a legal interest to protect; (g) resolving a jurisdictional problem in the case Mexico was again at war with a Western power, or in the event it was invaded.

Further research is needed to explore the exchange of juridical knowledge between the emerging Latin American countries of the nineteenth century and Europe.¹⁴² Additionally, the Mexican case might just be an example of a wider pattern in the Latin American region that needs to be explored. Most importantly, it shows how criminalizing violations of the laws of war as early as 1871 was a novel intent to remediate through law the asymmetries of conducting warfare against powerful States. So, maybe with the Mexican case we could begin to draw an arc between 1871 and 1977 when anti-colonial struggle tried to make its way through the signing of the Geneva Additional Protocols I and II.¹⁴³ These historical legal findings might be of great interest for the history of international law, IHL and international criminal law.

As a final remark, getting to know in detail the provisions of 1871 and the motivations and historical considerations behind them gives a striking contrast to the stagnation that incorporation and implementation of IHL has suffered in Mexico during the twentieth and twenty-first centuries. This is evident most of all with the crime “violations of the duties of humanity”, which is still in force in Article 149 of the current Mexican Federal Criminal Code.¹⁴⁴ As such, the historical framework is a good starting point when searching for a legal definition to the situation of continued violence in Mexico today.

141 See Miloš Vec, “From the Congress of Vienna to the Paris Peace Treaties of 1919”, in B. Fassbender, A. Peters, S. Peter and D. Högger (eds), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012.

142 It might be worth noting that the MCC of 1871 was translated to German and published in 1894 as part of a “foreign criminal codes” collection edited by the journal *Zeitschrift für die gesamte Strafrechtswissenschaft*. See *Das Mexikanische Strafgesetzbuch: vom 7. Dezember 1871, gültig für den Bundesdistrikt und das Territorium Niederkalifornien bezüglich der gemeinen Vergehen und für die ganze Republik bezüglich der Vergehen gegen den Bund*, Guttentag Verlag, Berlin, 1894.

143 See Boyd van Dijk, *Preparing for War: The Making of the 1949 Geneva Conventions*, Oxford University Press, Oxford, 2022, pp. 99–146; and Amanda Alexander, “International Humanitarian Law, Postcolonialism and the 1977 Geneva Protocol I”, *Melbourne Journal of International Law*, Vol. 17, No. 1, 2016.

144 See Código Penal Federal, Nuevo Código Publicado en el Diario Oficial de la Federación el 14 de agosto de 1931, available at: http://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf.

Humanitarian bullets and man-killers: Revisiting the history of arms regulation in the late nineteenth century

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Abstract

In 1899, the delegates at the first Hague Peace Conference outlawed the use of expanding bullets in warfare. Also known as “dum-dum” bullets, their prohibition was largely the product of a media spectacle that evolved around their use in British colonial warfare, a spectacle that focused particularly on the ghastly nature of the wounds these bullets inflicted. This article revisits the “dum-dum” controversy of the 1890s as it played out in the Anglo-European public sphere. It argues, firstly, that there was nothing all that innovative about employing the

* With special thanks to Reuben Bull, Laura Thomas, Omar Mohamed, Gordon Morrell, Tom Gregory and our anonymous peer reviewers for their various contributions. This article contextualizes the historical development of ideas and practices of violence in the nineteenth and early twentieth centuries; in places, it reproduces primary source evidence, both visual and textual, of a confronting and offensive nature.

principle of expansion in rifle ammunition. Secondly, it shows that controversies around bullets and their wounds had existed since the invention of industrially produced military rifles – and soft-lead ammunition – in the 1850s. In 1868, the St Petersburg Declaration outlawed the use of exploding projectiles for many of the same reasons for which expanding ammunition would also be banned in 1899. The article also shows that many of the ideas mobilized in the early 1890s to promote a new range of cordite-powered full-metal-jacket bullets because of the supposedly “clean” and “humanitarian” wounds that they inflicted offer an important context in which to read and explain the prohibition of “man-slaying” expanding ammunition. Above all, the article highlights how powerful racist thinking and imperial imperatives were to the framers of the laws of war at the turn of the twentieth century.

Keywords: small arms ammunition, dum-dum bullets, St Petersburg Convention of 1868, 1899 Hague Conventions, expanding ammunition, international law of war, armaments regulation, colonial warfare.

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In 1899, the delegates gathered at the Hague Peace Conference adopted a peculiarly specific declaration. Its signatories agreed to “abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.¹ The British military manufactured these modified Mark II bullets at its Dum Dum Arsenal, situated on the outskirts of Calcutta (Kolkata), starting in 1895, and utilized them on India’s Northwest Frontier as well as in the Sudan in 1898. At the massacre at Omdurman that year, British soldiers shooting filed-down Mark II bullets (see Figure 1) wreaked havoc on their Mahdist enemies.² As their battle reports noted, these “dum-dum bullets” inflicted the most horrendous wounds, the “terrible severity” of which caused tens of thousands of casualties. Even two days after the event, severely wounded men were left to die untended at the scene of battle.³ It was not the neglect of the wounded at Omdurman that caused controversy in the Anglo-European media in 1898, however, but rather the graphic nature (see Figure 2) of the dum-dum bullets’ wounding power.⁴ British medical officers related how these wounds were “large, jagged and torn”, with “great damage done

- 1 Declaration (IV, 3) concerning Expanding Bullets, The Hague, 29 July 1899, available at: <https://tinyurl.com/ymp4f7y6> (all internet references were accessed in July 2022).
- 2 John Meredith, *Omdurman Diaries 1898: Eyewitness Accounts of the Legendary Campaign*, Leo Cooper, London, 1998, pp. 25, 33–34; Michelle Gordon, *Extreme Violence and the “British Way”: Colonial Warfare in Perak, Sierra Leone and Sudan*, Bloomsbury, London, 2021, p. 159.
- 3 Major H. B. Mathias [?], “Report on the Wounds Caused by the New Projectile, Used in the Lee Metford Rifle by the British Division at the Battle of Omdurman”, 24 November 1898, Appendix to Surgeon General W. Taylor, “Notes on the Effects of the Dum Dum Bullet at Khartoum”, 10 December 1898, in War Office, “General and Warlike Stores: Ammunition (Code 45(C)): Reports on Effects of Dum-Dum Bullets Used at Khartoum and Omdurman”, WO 32/7056, National Archives, London. See also M. Gordon, above note 2, p. 138.
- 4 The *Bulletin International des Sociétés de la Croix-Rouge* even considered killing “fanatical” Mahdi wounded to be acceptable: “Les blessés de la bataille d’Omdurman”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 117, 1899.



DRAWN BY WAL PAGET

The men of the Royal Warwickshire Regiment are here shown altering the service bullet to the Dum-Dum pattern. This is done by filing a portion off the end. After a little practice the men become very proficient at the work. A number of "filers" are shown seated on the ground, with their legs under an inverted railway rail raised about eighteen inches from the ground on stones. Behind them are a certain proportion of "packers." The latter unpack the boxes of standard ammunition, which are brought to them by carriers.

FROM A SKETCH BY MAJOR G. W. COCKREYN

In front of the "filers" sit the "packers," who, as the altered ammunition is passed to them, after it has been gauged by an officer, replace the cartridges in their packages and refill the empty boxes. In this way, eight boxes (4,500 rounds) can be altered and repacked in two hours and a half, if filers to twenty "filers" are employed, or roughly, about sixty cartridges a minute.

MAKING DUM-DUM BULLETS AT DAMARLI, NEAR BERBER

Figure 1. In the weeks leading up to the Battle of Omdurman in 1898, British soldiers filed down hundreds of thousands of Mark II bullets, turning them into expanding dum-dums. Source: Walter Paget, "Making Dum-Dum Bullets at Damarli, Near Berber", *Graphic* (London), 23 April 1898, p. 500.

to the surrounding parts", while "long bones were found to be extensively shattered, and joints completely disorganised". As Britain's surgeon general explained it at the time, "there is no doubt about the stopping power of this bullet".⁵ In expanding and fragmenting on impact, the modified Mark II served to kill.

This article offers a history of the controversy that developed around the use of expanding ammunitions in the 1890s, leading to their prohibition in 1899. At one level, the article reinforces the existing historiography which shows that the Hague Declaration was a product of a media spectacle that revolved around Britain's deployment of dum-dum bullets. As such, the diplomats at The Hague needed a disarmament "success" story to feed to the global media, and banning dum-dum bullets seemed an easy fit.⁶ Yet, at another level, the article shows that

5 W. Taylor, above note 3. For more on the violence of the Battle of Omdurman, see Michelle Gordon, "Viewing Violence in the British Empire: Images of Atrocity from the Battle of Omdurman 1898", *Journal of Perpetrator Research*, Vol. 2, No. 2, 2019.

6 For more on The Hague's media spectacle, see Maartje Abbenhuis, *The Hague Conferences in International Politics 1898–1915*, Bloomsbury, London, 2018.

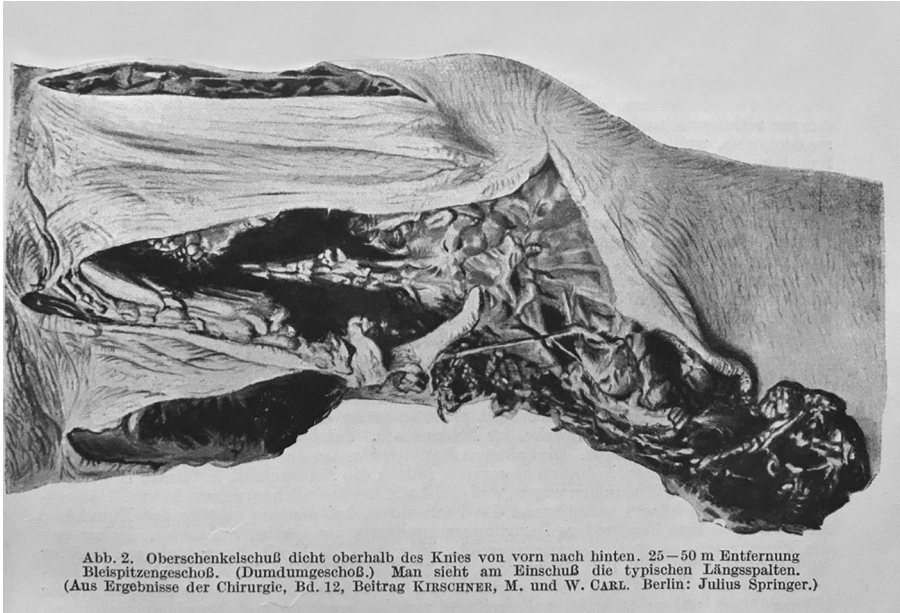


Figure 2. An artistic rendering of a leg wound caused by an expanding bullet (*dumdumgeschoss*). Source: M. Kirschner and W. Carl, “Über Dum-Dum-Verletzungen”, *Ergebnisse der Chirurgie und Orthopädie*, Vol. 12, 1920, p. 653.

Britain’s employment of expanding bullets in the 1890s was not a particularly new or innovative military development. Rather, their adoption signalled a return to earlier rifle patterns – particularly the expanding and hollow-nosed rifle bullets of the 1860s and 1870s. This brought with it a return to the controversies and debates that existed around the use of such ammunition since the signing of the St Petersburg Declaration of 1868. In this sense, the prohibition on expanding bullets in 1899 is anomalous: why regulate this technology now and not earlier? The answer lies, we argue, in the fact that the invention of smokeless gunpowder (in the late 1880s) allowed for the development of full-metal-jacket ammunition like the Mark II, a bullet which did not expand on contact with human skin. These smaller, sleeker, non-expansive bullets were thought to create “cleaner”, less deadly and, thus, more “humanitarian” wounds. Since an alternative to soft-lead ammunition now existed, it opened up the possibility of regulating expansive bullets and their wounds in the laws of war. It also reignited debates about the degrees of violence a soldier could legitimately unleash from their small arms.

Importantly, in all these discussions, the perceived needs of imperial warfare and colonial policing repeatedly reared their ugly heads, for if a “humanitarian” bullet did not kill a “fanatic” or “savage” enemy easily, then for many Anglo-European commentators at the time, expanding bullets and their ghastly wounds were a military necessity. Across the nineteenth century, a key part of the disputes around the use of small arms ammunition focused on

distinguishing among potential enemies. Who should be protected from excessive harm? Who falls outside the terms of the laws of war and might be legitimately targeted by such violence?⁷ In this way, the dum-dum controversy of the 1890s reveals as much about the racial and imperial prerogatives embedded in the laws of war as it does about the limits of military and State violence which Anglo-Europeans were willing to accept as legitimate in different scenarios.⁸ Above all, the dum-dum spectacle exposes the complex moral interplay at work in the Anglo-European public sphere at the turn of the twentieth century, in which contemporaries questioned the “just” limits of a military force’s “right to kill” and its humanitarian obligation to regulate its violence in proscribed ways.

At The Hague in 1899, the proponents of prohibiting expanding bullets emphatically argued that such projectiles were superfluous to military need, as they did more than merely “stop” an enemy from attacking.⁹ Recent improvements in bullet propulsion and design, including the introduction of smokeless gunpowder (cordite) and steel-encased projectiles, enabled the adoption of what they considered to be less deadly rifle ammunitions which, they argued, did the work of “stopping” an enemy just as well. From this perspective, the point of war was to wound an enemy soldier sufficiently to place them *hors de combat* (outside of combat) but not so much as to cause their death. The general ambition was that with excellent medical care, a wounded soldier might make a full recovery and live a full life. According to this interpretation, dum-dum bullets created excessive wounds that either ended a victim’s life or guaranteed their long-term suffering. Those who advocated for banning expanding bullets mobilized evidence from medical reports alongside experiments undertaken on animals and human cadavers to argue that the terms of the St Petersburg Declaration of 1868 should apply.¹⁰ That treaty ruled that armaments which “uselessly aggravate the sufferings of disabled men or render their death inevitable” should be excised from war.¹¹

The British delegation at The Hague challenged these claims head-on and argued that the dum-dum bullet was an essential weapon in colonial contexts, and that the bullet’s wounds were not wantonly cruel. Sir John Ardagh explained that the Mark II bullet, a steel-clad cordite-propelled projectile which did not expand

7 For more on this idea, see Joanna Bourke, “Dum-Dum Bullets: Constructing and Deconstructing ‘the Human’”, in Jonathan Obert, Andrew Poe and Austin Sarat (eds), *The Lives of Guns*, Oxford University Press, Oxford, 2019.

8 Cf. Kim Wagner, “Savage Warfare: Violence and the Rule of Colonial Difference in Early British Counterinsurgency”, *History Workshop Journal*, Vol. 85, 2018; J. Bourke, above note 7. See also M. Kirschner and W. Carl, “Über Dum-Dum-Verletzungen”, *Ergebnisse der Chirurgie und Orthopädie*, Vol. 12, 1920, p. 631.

9 M. Abbenhuis, above note 6, pp. 84–85.

10 P. von Bruns, “Inhumane Kriegsgeschosse”, *Archiv für klinische Chirurgie*, Vol. 57, 1898, pp. 602–607; “Special Correspondence”, *British Medical Journal*, 23 April 1898, pp. 1108–1109; P. von Bruns, *Über die Wirkung der neuesten englischen Armeegeschosse*, Tübingen, 1899; “Nouveau projectile Anglais”, *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 30, No. 120, 1899. See also above note 3.

11 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, St Petersburg, 29 November/11 December 1868 (Explosive Projectiles Declaration), available at: <https://tinyurl.com/fszpsvw3>.

on impact, was introduced in 1892 but subsequently proved incapable of “stopping” a “rush of fanatics” or a cavalry charge in actual battle.¹² In other words, the Mark II did not wound horses or determined foes enough. Therefore, the dum-dum adaptation was a necessary military innovation to suppress anti-imperial resistance. At any rate, as Ardagh also made clear, the wounds caused by dum-dum bullets were no worse than those created by the expanding ammunition of older military rifles like the Snider-Enfield (adopted in 1866) or Martini-Henry (adopted in 1871), both of which remained in use in many parts of the world. Ardagh further underlined that soldiers must have confidence in their weapons and that, in imperial settings especially, British troops did not trust that the Mark II disabled their enemies effectively. He also implied that the call to proscribe dum-dums was little more than an opportunistic witch hunt orchestrated by Britain’s rivals. After all, the injunction only targeted this particular British military invention, and not those of any other country.¹³ No other government was contemplating the adoption of expanding ammunition for the new cordite-powered military rifles.¹⁴

In the end, only the US and Portuguese delegations accepted the legitimacy of Ardagh’s arguments: the former refused to ratify the declaration, while the latter abstained from voting on it.¹⁵ Even though the Hague Declaration of 1899 was not binding on Britain, the political implications of the dum-dum prohibition weighed so heavily on the British government that it recalled all expanding bullets from South Africa on the eve of the second Anglo-Boer War (1899–1902) and, subsequently, refused to employ them in China during the Boxer Rebellion (1900) as well. In light of this British compliance, some commentators reflected that the dum-dum declaration was The Hague’s crowning achievement. From this perspective, as Major W. D. Thomson of the 1st Bengal Lancers explained in 1901, the prohibition was a “good example of the progressive spirit of humanity”.¹⁶

The long-term consequences of the 1899 Hague Declaration were certainly significant. Even today, expanding ammunitions are invoked as harbingers of excessive military harm.¹⁷ We tend to describe all types of expanding ammunition, regardless of their technical differences, as “dum-dums”, and inflect

12 Sir John Ardagh, “Memorandum Respecting Expanding Bullets”, 16 June 1899, in Public Record Office, “Major General Sir John Charles Ardagh: Papers: Peace Conference at The Hague May–July 1899”, PRO 30/40/15, National Archives, London.

13 *Ibid.* Cf. J. Bourke, above note 7, pp. 122–133; M. Abbenhuis, above note 6, p. 108.

14 War Office to Acting Attorney General, 27 August 1896, in War Office, “General and Warlike Stores: Ammunition (Code 45(C)): Experiments with Cup-Headed and Tweedie Bullets: Declaration Renouncing Use of Explosive Bullets under 400 Grammes Weight, St Petersburg, Russia, 1868”, WO 32/7053, National Archives, London.

15 Scott Andrew Keefer, “Building the Palace of Peace: The Hague Conference of 1899 and Arms Control in the Progressive Era”, *Journal of the History of International Law*, Vol. 8, No. 1, 2006, p. 13.

16 W. D. Thomson, “Some Notes on the Peace Convention at The Hague in May 1899, with Its Resultant Effect on the ‘Custom of War’”, *Journal of the Military Services Institution of the United States*, Vol. 28, May 1901, pp. 408–409. See also M. Abbenhuis, above note 6, p. 111.

17 Cf. “Defense Loads of Choice: The Word from the Street” *Gun Digest* (US), 25 March 2013, p. 19; Robin Coupland and Dominique Loye, “The 1899 Hague Declaration concerning Expanding Bullets: A Treaty Effective for More than 100 Years Faces Complex Contemporary Issues”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003, pp. 135, 138–139.

our language around their use with moralistic and derisory overtones. As Joanna Bourke so evocatively contends, “[t]he onomatopoeic nature of the word dum-dum still evokes energy, military prowess and prestige (for its proponents), and racism, cowardice, and cruelty (for opponents)”.¹⁸ Just as importantly, the 1899 dum-dum declaration is considered foundational to international humanitarian law, affirming the principle that the weapons used in lawful wars must avert unnecessary suffering and prevent superfluous injury.¹⁹ In so many ways, dum-dum bullets continue to infuse how we evaluate the “just” limits of military violence in modern international life.

Yet many histories of The Hague’s dum-dum prohibition, much like those of the St Petersburg Declaration of 1868, are mired in inaccuracy, and particularly so when they skirt around the development, production and specificities of the technology in question.²⁰ Standard accounts of the 1899 Hague Declaration tend to describe the expanding effect of dum-dum bullets as an innovation of the moment, invented by Captain Neville Bertie-Clay and the British Ordnance Department in India in response to the noted deficiencies in the Mark II bullet’s ability to wound Britain’s imperial enemies sufficiently.²¹ In reality, the British Ordnance Department experimented with a range of expanding ammunitions from 1895 on. It adopted not only Bertie-Clay’s bullet in India in 1895 but also a new cup-nosed expanding bullet, the Mark IV (see Figure 3), as its standard-issue service ammunition in 1897. Similarly, many histories of the St Petersburg Declaration either suggest that exploding bullets were a Russian discovery made in 1863 or that they were an untried military experiment whose potential frightened the authorities.²² In reality, all European armies experimented with exploding and fulminating projectiles in the 1860s.²³ One historian even goes so far as to claim that before dum-dums were invented, European armies only ever used bullets with “sufficient stopping power to disable or render their victim *hors de combat*”, which is absurd given the noted “man-stopping” powers of soft-lead ammunition.²⁴ All of these assertions oversimplify the contexts in which rifle bullets were developed, employed and debated from the 1850s.

18 J. Bourke, above note 7, p. 122.

19 Robin Coupland, *The StRUS Project: Towards a Determination of which Weapons Cause “Superfluous Injury or Unnecessary Suffering”*, ICRC, Geneva, 1997. Cf. Raphael Schäfer, “The 150th Anniversary of the St Petersburg Declaration: Introductory Reflections on a Janus-Faced Document”, *Journal of the History of International Law*, Vol. 20, No. 4, 2018.

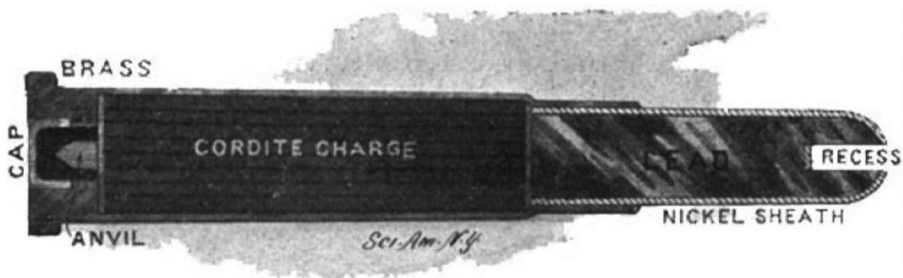
20 One notable exception is the work of Scott Andrew Keefer. Maartje Abbenhuis’s previous work on the history of dum-dums and the Hague Conferences is certainly fuzzy on these technicalities; see M. Abbenhuis, above note 6, p. 109.

21 Cf. Edward M. Spiers, “The Use of Dum-Dum Bullets in Colonial Warfare”, *Journal of Imperial and Commonwealth History*, Vol. 4, No. 1, 1975, p. 4; J. Bourke, above note 7, pp. 123, 125, 129.

22 Emily Crawford, “The Enduring Legacy of the St Petersburg Declaration: Distinction, Military Necessity and the Prohibition of Causing Unnecessary Suffering and Superfluous Injury in IHL”, *Journal of the History of International Law*, Vol. 20, No. 4, 2018, p. 547; Robert Kolb and Momchil Milanov, “The 1868 St Petersburg Declaration on Explosive Projectiles: A Reappraisal”, *Journal of the History of International Law*, Vol. 20, No. 4, 2018, p. 517.

23 For more, see notes 43–50 below.

24 E. M. Spiers, above note 21, p. 3.



THE ENGLISH DUM-DUM BULLET.

Figure 3. *Scientific American's* rendering of Britain's Mark IV .303-inch calibre service bullet, which the journal misidentified as a dum-dum in 1899. The hollow point (or cup nose) of the Mark IV ensured that it mushroomed on impact, causing significant wounds. The accompanying article explained that while this kind of ammunition might be "doomed for modern warfare", these bullets were nevertheless essential for dealing with "savage tribes" who required more wounding than "civilized" European soldiers. Source: "The English Mark IV Cordite Ammunition", *Scientific American*, Vol. 81, No. 8, 1899, p. 122.

In contrast, this article demonstrates that there was nothing all that new or particularly innovative about expanding ammunition, or the discourses that evolved around its use. Before the invention of cordite in the 1880s, in fact, most rifle bullets were made of soft lead, which expanded, fragmented or deformed on impact, causing terrible wounds and often leading to death. Anyone who hunted with rifles understood these principles of wounding very well, as did most soldiers. The article also demonstrates that at least at the outset, the return to expanding ammunition by the British aimed at making essential improvements to what they considered a faulty military technology (the Mark II .303-inch calibre bullet).²⁵ The new expanding versions of the .303 ammunition were also intended for use against all enemies, and not only colonial or non-European ones. The Mark IV and Mark V .303-inch rifle bullets that were introduced in 1897 and 1899 respectively had hollow points, which expanded and wounded much like the dum-dum did.²⁶ Both ammunitions were manufactured at the Woolwich Ordnance Factory and in associated factories across the British Empire.²⁷ The

25 Cf. Huw Bennett, Michael Finch, Andrei Mamolea and David Morgan-Owen, "Studying Mars and Clio: Or How Not to Write About the Ethics of Military Conduct and Military History", *History Workshop Journal*, Vol. 88, No. 1, 2019.

26 See also E. M. Spiers, above note 21; Scott Andrew Keefer, "'Explosive Missals': International Law, Technology and Security in Nineteenth-Century Disarmament Conferences", *War in History*, Vol. 21, No. 4, 2014.

27 The Colonial Ammunition Company in Auckland, New Zealand, started manufacturing Mark IV bullets in the middle of 1898: Under-Secretary of Defence J. F. Grey to Colonial Ammunition Company, 12 January 1899, and Arthur Douglas, Defence Minister Report, 11 January 1899, both in Army Department, "Inward Letters and Registered Files", AAYS Item # R24395688, New Zealand National Archives. For information on the Colonial Ammunition Company's cartridges, see Barry W. Garcia, *Whitney's Heritage: A Study of Cartridges Manufactured by the Colonial Ammunition Company in New Zealand*, Hawera, 1991, pp. 16–19.

Ordnance Department did not, in fact, stop manufacturing or issuing these expanding bullets to troops until the invention of a new bullet – the Mark VI – in 1906.²⁸ Even Bertie-Clay’s dum-dum cartridges continued to be produced and used in India after 1899.²⁹ In other words, for the British military authorities in the 1890s, the killing power of expanding bullets was a military necessity in all settings and against all enemies. It took the 1899 Hague prohibition for the British to alter these practices, and even then they did so reluctantly and haphazardly.

This article charts the industrial development of rifle ammunition from the 1850s through to the early 1900s. It focuses on the British Empire particularly and shows how each technological evolution inspired a wide-ranging engagement on its costs and benefits in the Anglo-European media, and especially among lawyers, doctors, military personnel, hunters and politicians. Given that the rifle was an essential military tool but also a vital tool for civilian use, be it for hunting, sport or self-defence, and had been for decades, very few of the ideas presented in the arguments for and against the adoption of dum-dum bullets in the late 1890s were, in fact, all that new. In that sense, this article asserts that while the 1899 dum-dum prohibition may have been a product of a media spectacle, it was also the outcome of decades of public fascination with technological change, rifles and their bullets, and the “just” limits of State and non-State violence.

The industrial development of rifle ammunition

Before the rifle came the musket. Most muskets required the user to ram gunpowder and a projectile into the bore of the gun before igniting the powder that set the bullet in motion – a time-intensive task for which a soldier had to be standing fully upright, exposed to an enemy’s shot.³⁰ A musket’s range was a few hundred yards at best. Rifled muskets, however, became effective military weapons after the invention of paper- or cloth-encased cartridges filled with gunpowder and a conoidal projectile that expanded on propulsion. As it expanded, the bullet gripped the rifled grooves in the gun’s barrel and was propelled forward with greater speed, range and accuracy than the smooth-bored musket could offer.³¹

28 Confidential Cabinet Paper, 8 December 1899, in “MS Joseph Chamberlain Papers Relating to Africa”, JC12/3/1-62, in *Nineteenth Century Collections Online*, available at: www.gale.com/intl/primary-sources/nineteenth-century-collections-online. See also Scott Andrew Keefer, *The Law of Nations and Britain’s Quest for Naval Security: International Law and Arms Control 1898–1914*, Palgrave Macmillan, Houndsmills, 2016, p. 193.

29 S. R. H. Knox, War Office Announcement, 3 March 1900, in War Office, “General and Warlike Stores: Ammunition (Code 45(C)): Future Pattern of Ammunition to be Used in .303 LM Rifle. Future Stocks to Be Held. Military Authorities at Home or Abroad to Use Discretion as to Use”, WO 32/7058, National Archives, London (WO 32/7058).

30 Berkeley R. Lewis, *Small Arms and Ammunition in the United States Service (with 52 Plates)*, Smithsonian Institute, Washington, DC, 1956, p. 167.

31 *Ibid.*, pp. 116–117; Donald Featherston, *Weapons and Equipment of the Victorian Soldier*, Blandford Press, Poole, 1978, pp. 18, 20.

From the 1850s on, breech-loading rifles loaded with cartridges from the side of the gun began to replace smooth-bore muskets. The adoption of industrially manufactured metallic cartridges (as opposed to weather-affected paper or cloth ones) enabled users to reload their breech-loaders while lying down. Alongside massively increasing their rate of fire from sheltered positions, soldiers wielding these guns could strike targets hundreds or, when they were well trained, thousands of metres away.³² The rifle and its metal cartridges thus presented a revolution in military tactics and ensured that by the 1870s, infantry soldiers had become “more than ever the arm of service upon which all the hard fighting devolves, which inflicts and receives the greatest damage, and to which all other parts of the army are merely subsidiary”.³³ By the early 1890s, military surgeons noted that 80% of battlefield wounds were caused by small arms ammunition.³⁴ The rifle and its bullets were formidable products of the age of industrialization.

The first effective rifle bullets – such as the Minié projectile – were made from soft lead. What expanded on propulsion to grip the rifled barrel also expanded at the point of termination on hitting a target.³⁵ In other words, most rifle bullets were expanding ones until the invention of steel-cased bullets in the late 1880s. As a medical treatise published in 1916 explained, these soft-lead bullets “caused enormous destruction of tissue and as the arms from which they were propelled became more and more perfect, the severity of the wounds increased markedly”.³⁶ It is no wonder that some experts still describe the Minié bullet as the “angel of death”.³⁷ Many of these soft-lead bullets were made even more expansive when hollowed out – Captain Edward Mounier Boxer’s standard-issue ammunition for the British Snider-Enfield rifle (see Figure 4) had a hollow nose, for example. This hollowing aided projection and accuracy in flight, tightening the bullet’s centrifugal force and expanding its striking range.³⁸ The hollow-point also caused awful wounds: as Vivian Dering Majendie and Charles

32 B. R. Lewis, above note 30, p. 119; David Harsanyi, *First Freedom: A Ride Through America’s Enduring History with the Gun*, Threshold Editions, New York, 2018, p. 115; Charles B. Norton, *American Inventions and Improvements in Breech-Loading Arms, Heavy Ordnance, Machine Guns, Magazine Arms, Fixed Ammunition, Pistols, Projectiles, Explosives and Other Munitions of War, including a Chapter on Sporting Arms*, Chapin & Gould, London, 1880, pp. 295–296.

33 As quoted in Bruce W. Menning, *Bayonets before Bullets: The Imperial Russian Army*, Indiana University Press, Bloomington, IN, 1992, p. 51.

34 “Weapons and Wounds in Future Wars”, *British Medical Journal*, 16 January 1892, p. 132. Rapid-firing machine guns, like the Maxim and Gatling, increased the casualty rate. They tended to use the same ammunition as rifles.

35 Øyvind Flatnes, *From Musket to Metallic Cartridge: A Practical History of Black Powder Firearms*, Crowood Press, Wiltshire, 2013, p. 90; D. Harsanyi, above note 32, p. 117.

36 Louis A. la Garde, *Gunshot Injuries: How They Are Inflicted, Their Complications and Treatment*, 2nd ed., William Wood, New York, 1916, p. 35.

37 Chris Kyle with William Doyle, *American Gun: A History of the US in Ten Firearms*, William Morrow, New York, 2013, p. 34.

38 Vivian Dering Majendie and Charles Orde Browne, *Military Breech-Loading Rifles: The Snider, the Martini-Henry and Boxer Ammunition*, Arms and Armour Press, London, 1973 (first published 1870), p. 67.

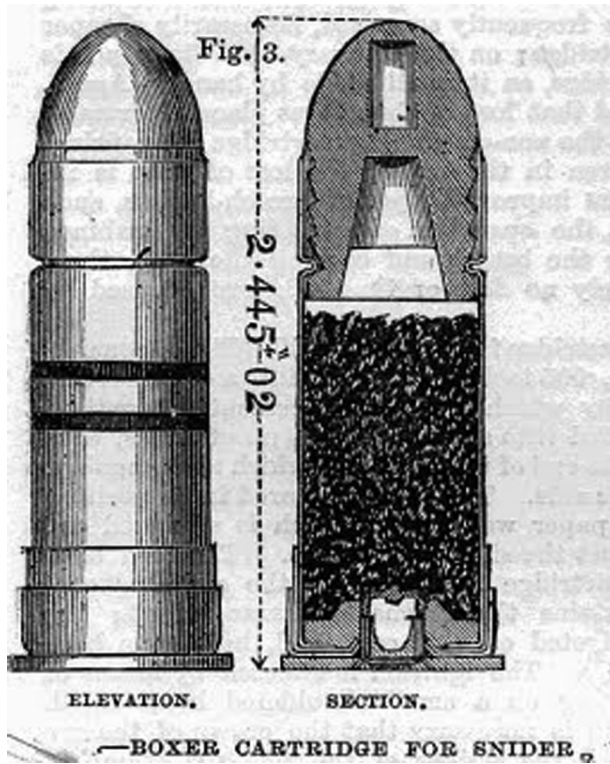


Figure 4. An 1872 rendering of the Boxer cartridge for the British Snider-Enfield rifle, with its hollow-tip nose that was known to cause massive expansion and fragmentation when it hit a target. Source: “Weapons of War V: Breech-Loading Small Arms”, in *Cassell’s Technical Educator: An Encyclopaedia of Technical Education*, Vol. 1, Cassell, London, 1884, p. 272.

Orde Browne’s 1870 treatise on breech-loaders explained, the Boxer cartridge was a “man-stopper that smashed bone and cartilage and left wicked wounds”.³⁹

Military doctors in the 1850s and 1860s certainly noted the wounding power of soft-lead ammunition.⁴⁰ Henry Dunant’s celebrated account of the battle of Solferino in 1859, for example, discussed cylindrical bullets that “shatter bones into a thousand pieces”, causing wounds that “are always very serious. Shell splinters and conical bullets also cause agonizingly painful fractures, and often frightful internal injuries.”⁴¹ Yet few of these commentators sought to curtail the use of these conoidal bullets; this was because there was no ready

39 D. Featherston, above note 31, p. 25.

40 See, for example, “Medical and Surgical History of the British Army in Turkey and Crimea during the Russian War”, Command Papers, CH Microfiche No. 63.326-339, in *UK Parliamentary Papers*, 1857–1858, p. 859.

41 Henry Dunant, *A Memory of Solferino*, Cassell, London, 1947 (first published 1862), p. 22.

alternative to the rifle as an effective infantry weapon,⁴² and for the rifle to work best – at least until the cordite innovations of the 1880s – it required a soft-lead bullet that could grip the gun’s barrel grooves.

The St Petersburg Declaration of 1868

The St Petersburg Declaration of 1868 is particularly important because it constrained the wounding impact of rifle bullets by prohibiting the insertion of explosive or incendiary powders into the projectile’s cavity. By the late 1860s, an array of exploding bullets existed, most of which were developed by enthusiastic inventors, hunters and weapons manufacturers.⁴³ As early as the 1820s, Captain John Norton invented an exploding bullet that was set off by an external fuse, which he enthusiastically showed off alongside an array of other inventions at public fairs held across England.⁴⁴ In the late 1850s, the British officer John Jacobs (of Jacobabad fame) outfitted his South Asian mercenaries with exploding rifle shells, which were privately manufactured for him in Britain by George Daw.⁴⁵ During the US Civil War (1862–65), both armies experimented with exploding ammunition as well, including what were known as Gardner shells.⁴⁶ British ordnance factories manufactured exploding bullets for their Metford guns in 1863, while their Russian counterparts designed their own version of the ammunition that same year.⁴⁷ The celebrated French hunter Eugène Pertuiset collaborated with the industrialist Leopold Bernard Devisme to produce a range of exploding bullets in the 1860s as well.⁴⁸ Meanwhile, Major Fosbery trialled his own version of an exploding bullet in India to help British troops set artillery ranges in the mountains.⁴⁹ By 1868, then, most European armies had some form of exploding ammunition in production for their military-issue rifles.⁵⁰

42 Cf. Russell Gilmore, “‘The New Courage’: Rifles and Soldier Individualism 1896–1918”, *Military Affairs*, Vol. 40, No. 3, 1976.

43 For 1850s versions: “Resources of Modern Warfare: Shells, Fuses and Enfield Cartridges”, *Dublin University Magazine*, Vol. 53, June 1859.

44 “War Instruments”, *Illustrated London News*, 2 April 1858.

45 *The Field*, Vol. 9, No. 223, April 1857, p. 230; George H. Daw, *Gun Patents 1864*, Kingsmead Reprints, Trowbridge, 1973; D. Featherston, above note 31, p. 16; Garry James, “General Jacob’s Exotic Rifle”, 2008, available at: www.myjacobfamily.com/articleskennethjacob/generaljacobarticle.htm.

46 Robert V. Bruce, *Lincoln and the Tools of War*, Papamoa Press, San Francisco, CA, 2017, pp. 194–195; Berkeley R. Lewis, “Explosive Bullets”, *Ordnance*, Vol. 38, No. 204, 1954, p. 947; B. R. Lewis, above note 30, pp. 126–128.

47 Ian Skennerton (ed.), *List of Changes in British War Material in Relation to Edged Weapons, Firearms and Associated Ammunitions and Accoutrements*, Vol. 1, Margate, 1980, p. 28; “Mémoire sur la suppression de l’emploi des balles explosives en temps de guerre”, Appendix 1, 1868, in Foreign Office, “Commission Militaire Internationale, Protocole no. 1, 1868”, FO 83/316, National Archives, London (FO 83/316).

48 “The Explosive Bullet: A Fearful Instrument of Warfare”, *Chicago Tribune*, 22 July 1870, p. 1.

49 “Marksman”, *The Times*, 12 December 1868, p. 9; G.V. Fosbery, “Explosive Bullets and their Application to Military Purposes”, *Royal United Services Institution Journal*, Vol. 12, No. 48, 1868.

50 J. R. Cameron, “Incendiary, Tracer and Explosive Bullets”, *Journal of the Royal Army Medical Corps*, Vol. 79, No. 6, 1942, pp. 269–270; Russia Circular St Petersburg 1868, Appendix 1, in FO 83/316, above note 47.

These military elites were also planning on the long-term strategic use of these exploding bullets. Evidence provided by experts at the British Special Committee on Breech-Loading Rifles, which met in 1868, certainly understood their tactical effectiveness. In response to the question, “Is it your opinion that the [exploding rifle] shell has no disadvantage whatever?”, Sir Henry St John Halford, a colonel in the Leicester Volunteers and renowned rifleman, answered:

[I]t has none whatsoever. I have a very strong feeling about the shell. I am almost certain that the French will have these shells at once, and I believe that no troops can stand against them: the moral effect produced is, I am told, fearful.⁵¹

The Dutch military, for its part, both adopted the Daw-design bullets in 1867 and trialled Pertuiset’s bullets in 1866.⁵² Media attention and sensationalism followed these bullets’ use, in part because other forms of explosive weaponry also made headline news, including the Orsini bomb, a home-made exploding device invented to assassinate Emperor Napoleon III in 1858 that killed several innocent bystanders instead.⁵³

When the governments at St Petersburg agreed to suspend the military use of “explosive projectiles under 400 grammes in weight” in 1868, they did so mobilizing very strong legal language, namely:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.⁵⁴

While the language was assertive in its humanitarian intent, the reasons for the adoption of the St Petersburg prohibition were layered with military pragmatism.⁵⁵ It is certainly true that a new set of longer-range, faster and more accurate rifle bullets (all expanding, some hollow-nosed) had recently been

51 Henry Charles Fletcher, *Special Committee on Breech-Loading Rifles: Together with Minutes of Evidence etc. etc.*, in House of Commons, *UK Parliamentary Papers*, Vol. 12, No. 1, 1868.

52 J. A. van den Bosch, “Afdeeling XVI”, *Militaire Spectator*, 1 February 1867, p. 79; Paul van ‘t Veer (ed.), A. W. P. Weitzel: *Maar Majesteit! Koning Willem III en Zijn Tijd*, Arbeiderspers, Amsterdam, 2008, pp. 28–29.

53 James Crossland, “Radical Warfare’s First ‘Superweapon’: The Fears, Perceptions and Realities of the Orsini Bomb, 1858–1896”, *Terrorism and Political Violence*, 2021, available at: <https://tinyurl.com/4xbyhat8>. See also “Foreign Intelligence”, *Sunday Times*, 6 March 1859.

54 Explosive Projectiles Declaration, above note 11.

55 Cf. S. A. Keefer, above note 28, p. 40.

invented, including the Boxer cartridge.⁵⁶ This ammunition was easier to use than the exploding projectile, even if the latter had its uses for blowing up ammunition dumps or setting artillery gauges. Still, the St Petersburg Declaration was also adopted out of fear that the nature of warfare would change too much if governments allowed their citizen-soldiers to be exploded by the rifle fire of their enemies.⁵⁷ As a result, it was the “needlessness” of the exploding bullets in causing disproportional wounds that caught the media’s attention.

Much of the English-language newspaper commentary on the St Petersburg Declaration in 1868 engaged at some level with the idea that “nothing but the strongest necessity” can justify a highly violent act.⁵⁸ As an example, in response to the St Petersburg negotiations of 1868, the *The Times* reported on the employment of Major Fosbery’s exploding bullets during the Umbeyla (Ambela) campaign of 1863. The report explained that while the bullets certainly helped to set effective artillery ranges, they could also hit humans. The resulting wounds were so dreadful that the Pathan sent an emissary across the front line to request that the British troops halt their use. A letter to the editor published in *The Times* described these wounds as follows:

In one instance the bullet had entered at the back of the neck and then exploding had entirely blown away the face; and in another, where the ball had struck just over the heart the effect was even more terrible to witness. In such cases an ordinary bullet would have caused death equally well, ... but where a limb or other part of the body, where an ordinary wound would not prove vital, was struck it was, of course, worse for the victim as he could hardly survive the shock to the system, and the advantage to us was *nil*, as in 99 cases out of 100, a simple bullet would have placed him *hors de combat* just as well. It therefore appears that, as a means of destruction, explosive bullets only cause unnecessary mutilation and suffering.⁵⁹

For the author of this letter at least, these wounds were severe enough to prohibit the ammunition’s use in any military setting, colonial or otherwise.

Other commentators were less concerned about the wounding power of the exploding projectiles. They argued that the stronger the weapon, the less likely an enemy would be to engage in war, and that given that all war is horror, restricting the use of a particular weapon on the grounds of the horror it caused was nonsensical. The *Pall Mall Gazette* published a lengthy editorial in June 1868 along these lines. It argued that since a hollow-nosed bullet was as destructive as any exploding bullet, if they were going to ban one on the basis of cruelty, they

56 For specifications of British versions of Boxer and Snider-Enfield bullets, see I. Skennerton (ed.), above note 47, esp. pp. 39–65. See also Ian Beckett, “Retrospective Icon: The Martini-Henry”, in Karen Jones, Giacomo Macola and David Welch (eds), *A Cultural History of Firearms in the Age of Empire*, Ashgate, Farnham, 2013, p. 240.

57 Cf. S. A. Keefer, above note 26, pp. 445–446.

58 Henry Wheaton, *Elements of International Law*, 1st ed., 1866, p. 343.

59 “Marksman”, *The Times*, 12 December 1868, p. 9. See also H. C. Fletcher, above note 51, p. 22; “Imperial Parliament”, *Trewman’s Exeter Flying Post*, 16 December 1868, p. 7; G. V. Fosbery, above note 49.

should also ban the other. At any rate, so the editorial continued, setting a sustainable standard for humanizing warfare was nigh impossible because “war is in itself such great cruelty”.⁶⁰ A popular British sports and hunting magazine, the *Field*, concurred, although it also acknowledged that “needless cruelty” should be removed from warfare as in hunting.⁶¹

Given that most contemporaries understood that warfare already involved rules and restraints, the St Petersburg Declaration was not all that innovative – to condemn exploding bullets was no different from condemning the killing of civilians or the employment of poisonous weapons in time of war.⁶² As the Earl of Malmesbury explained in the House of Lords, the explosive bullet was a “diabolical invention” whose use was comparable to these other uncivilized practices.⁶³ The *Sheffield Daily Telegraph* also observed that “to insist on [missiles] which mangle and shatter after they have disabled their victim is simply a superfluity of barbarity worthy only of wild Indians”.⁶⁴ Excessive injury and suffering in time of war was entirely avoidable and, thus, implementing effective bans like this one differentiated “civilized” warriors and nations from “uncivilized” ones.

The racist precepts of these British discourses on acceptable wartime violence are vitally important, not least because the adoption of the St Petersburg Declaration was made binding only on its signatories. If they wished to, the signatory powers could use exploding bullets whenever their enemy was not European “like them”, had not signed up to the decree, or had employed the technology first.⁶⁵ Any army could use the ammunition with impunity against colonial enemies or in a police action against a non-State actor. As the *Illustrated London News* exalted in December 1868, these “explosive missiles” are “still available for the conversion of Arabs, Maoris [*sic*], and red Indians. Rose water for our civilised enemies, oil of vitriol for the others.”⁶⁶ In this sense, “humanitarian” rules like the St Petersburg Declaration only underlined that in international law, some bodies were considered more woundable than others.⁶⁷ Still in keeping with the spirit of the *The Times*’ editorial regarding the 1863 Ambela campaign, any use of illegal technology also invited public questioning and debate. The racial and imperial frameworks in which international law

60 “Cruelty in War”, *Pall Mall Gazette*, 17 June 1868, pp. 1–2. See also “Shell Bullets”, *Pall Mall Gazette*, 28 October 1868; “Explosive Bullets”, *Leeds Mercury*, 19 December 1868.

61 “On the Use and Abuse of Shells in War and Sport”, *The Field*, 31 October 1868, p. 347.

62 Catherine Jefferson, “Origins of the Norm against Chemical Weapons”, *International Affairs*, Vol. 90, No. 3, 2014, pp. 647–648.

63 Earl of Malmesbury in House of Lords, *UK Parliamentary Papers*, 23 July 1868. With thanks to Reuben Bull.

64 “News”, *Sheffield Daily Telegraph*, 12 December 1868, p. 6.

65 S. A. Keefer, above note 28, p. 42.

66 “Nothing in the Papers”, *Illustrated London News*, 5 December 1868, p. 19.

67 Cf. Clapperton Chakanetsa Mavhunga, “Vermin Beings: On Pestiferous Animals and Human Game”, *Social Text*, Vol. 29, No. 1, 2011; J. Bourke, above note 7. On the racialized hierarchies of suffering and pain, see Joanna Bourke, *The Story of Pain: From Prayer to Painkillers*, Oxford University Press, Oxford, 2014, pp. 193, 230; Anupama Rao and Steven Pierce, “Discipline and the Other Body: Humanitarianism, Violence, and the Colonial Exception”, in Anupama Rao and Steven Pierce (eds.), *Discipline and the Other Body: Correction, Corporeality, Colonialism*, Duke University Press, Durham, NC, 2006, pp. 4–5.

operated during the nineteenth century were contested, including among the imperialists themselves.

Civilian uses of the rifle and its ammunition

Of course, the rifle was more than a tool of war. It also served many civilian functions, including as a tool for hunting, sport, farming, self-defence, crime and policing. By the 1870s, rifles and their varied ammunitions were highly sought-after commodities traded in enormous quantities (both openly and clandestinely). Exploding and expanding ammunitions were prodigiously marketed to consumers by the many private companies that manufactured them. Promoted with evocative names like the “Savage”, “Express” or “Tweedie” bullet, advertisements, sports catalogues and newspaper editorials lauded the excellence of these “man-stopping” projectiles for downing any soft-skinned animal, be it a deer, tiger, bear, whale or, for that matter, human being.⁶⁸

When hunting, of course, it ideally takes one shot to kill – and the bigger the wound, the faster the result. Most Anglo-European hunters agreed that an animal ought not to suffer needlessly;⁶⁹ hunting bullets, therefore, ought to cause maximum damage and kill their targets quickly. In a military engagement between “civilized” opponents, however, the opposite was said to be true.⁷⁰ Thus, the very bullets that some commentators wished to extricate from military settings for their ability to wound and kill were consumed in vast quantities on the civilian market. In fact, Pertuiset’s exploding bullets gained notoriety in the 1860s in part because of the inventor’s lion-hunting prowess and his well-advertised hunting trips that allowed the wealthy to try out his explosive invention on large game in exotic environments.⁷¹ The painter Édouard Manet immortalized Pertuiset in 1881 in an iconic painting, his double-barrelled hunting gun at the ready, kneeling in front of a downed lion.⁷²

Medical conceptualizations of legitimate rifle wounds

A significant amount of nineteenth-century commentary on rifle bullets and their wounds was also written by medical professionals, who augmented their medical

68 See, for example, W. H. Tisdall Ltd, *Guns, Ammunition, Winter Sports Goods Catalogue*, Christchurch, Wellington, April 1910, in “Ephemera of Octavo Size Relating to Guns, Rifles, Shooting and Ammunition 1900–1910”, Eph-A-GUN-1900/1910, esp. p. 26, Alexander Turnbull Library (ATL), Wellington, New Zealand; Smokeless Powder and Ammunition Co. London, May 1900 price list, in Eph-A-GUN-1900s, esp. p. 30, ATL, Wellington, New Zealand; “Bad News for Whales”, *Illustrated Times* (London), 20 June 1857.

69 Shaun Kingsley Malamey, “Defining the True Hunter: Big Game Hunting, Moral Distinction and Virtuosity in French Colonial Indochina”, *Comparative Studies in Society and History*, Vol. 62, No. 3, 2020, p. 665. For an example, see “A New Form of Mushroom Bullet”, *Scientific American*, 11 May 1907, p. 395.

70 Clinton T. Dent, “A Lecture on Small-Bore Rifle Bullet Wounds and the ‘Humanity’ of the Present War”, *British Medical Journal*, 19 May 1900, p. 1212.

71 These were advertised as far away as the Dutch East Indies: *Java-Bode*, 19 October 1867, p. 2.

72 Édouard Manet, *Portrait of Monsier Pertuiset the Lion Hunter*, 1881, São Paulo Museum of Art, Brazil.

notes from battlefield surgeries with photographs of wounds and experiments on cadavers, as well as accounts of their own hunting experiences and rifle-shooting competition results.⁷³ In so doing, they passed judgement not only on the nature of wartime wounds and how best to treat them, but also on what levels of violence ought to be allowed within the laws of war. Their medical assessments were steeped in imperial and racial prejudices. Thus, while these doctors uniformly asserted that their primary duty was to extend the lives of soldiers and to minimize suffering,⁷⁴ they also differentiated European soldiers, whom they considered uniformly worthy of such care, from non-European troops, whom many (though by no means all) of them considered less worthy of it.⁷⁵

After 1868, the terms of the St Petersburg Declaration also informed much of these individuals' medical commentary. During the Franco-Prussian War, for example, after both belligerents accused their enemy of the "uncivilized" practice of employing exploding bullets, these medical experts readily weighed in.⁷⁶ They analyzed battlefield wounds and recovered spent ammunition. They found little evidence to prove that either France or Germany actually used weapons that fit the St Petersburg definition of an exploding bullet (that is, ammunition "of a weight less than 400 grammes which is either explosive or charged with fulminating or inflammable substances").⁷⁷ What they did uncover was that many of the wounds created by standard rifle bullets were as destructive as any exploding bullet; subsequent experiments conducted on animals bore out these claims.⁷⁸ These findings resulted in various calls to proscribe expansive soft-lead bullets as well as other kinds of excessively destructive weapons, including torpedoes, in the lead-up to the Brussels Convention of 1874.⁷⁹ After all, these weapons also caused superfluous wounds and unnecessary suffering. In these

73 Cf. Nisha Shah, "Gunning for War: Infantry Rifles and the Calibration of Lethal Force", *Critical Studies on Security*, Vol. 5, No. 1, 2017; Niko Rohé, "European Medical Experts in Wars of 'Others': The Greco-Turkish War of 1897", *European Review of History*, Vol. 26, No. 2, 2019; Nick Maiden, "Historical Overview of Wound Ballistics Research", *Forensic Science Medical Pathology*, Vol. 5, No. 2, 2009; Nicholas Senn, "The Modern Treatment of Gunshot Wounds in Military Practice", *Military Surgeon*, August 1898; Gwilym G. Davis, "The Effects of Small Calibre Bullets as Used in Military Arms", *Annals of Surgery*, Vol. 25, No. 1, 1897.

74 Thomas Longmore, *Gunshot Injuries: Their History, Characteristic Features, Complications and General Treatment*, Longmans, London, 1877.

75 G. G. Davis, above note 73.

76 See, for example, "The Question of the Employment of Explosive Bullets in the Franco-German War", *British Medical Journal*, 11 March 1871, p. 257; "Latest Telegraphic News: The Civil War in France", *Observer* (London), 30 April 1871, p. 6.

77 Explosive Projectiles Declaration, above note 11.

78 "De la gravité des blessures produites par les projectiles de plomb mou", *Bulletin International des Sociétés de Croix-Rouge*, Vol. 5, No. 20, 1874; "The Action of Modern Bullets on the Animal Body", *British Medical Journal*, 9 May 1874, p. 617.

79 Prince Gortchakow to Count Brunnow, 17 April 1874, in *Miscellaneous No. 1 (1874): Correspondence Respecting the Proposed Conference at Brussels on the Rules of Military Warfare. Presented to both Houses of Parliament by Command of her Majesty 1874*, Harrison and Sons, London, 1874, p. 12. See also S. A. Keefer, above note 28, p. 50; *Revue de Droit International et de Legislation Comparée*, 1875, pp. 527–529.

ways, medical expertise and scientific experimentation matched with legal norms to affirm the limits of the laws of war.⁸⁰

That this commentary also considered the use of exploding bullets in imperial and racial terms is most obvious from an 1870 *Manchester Guardian* editorial that compared the French conscription of Algerian troops to the use of exploding ammunition thusly: “between a Turco and an explosive bullet there appears to us to be small room for choice; and of the two the last is probably the least barbarous”.⁸¹ Still, by the time of the first Anglo-Boer War (1876–77), claims that the Transvaal had stocks of explosive bullets on hand led the British secretary of State for the colonies to demand that “recourse will not be had to so barbarous a method of prosecuting the war”; the use of explosive bullets was “a practice so atrocious in itself, ... condemned by all civilized nations, and is likely even to lead to horrible retaliation by the natives”.⁸² Media reports on the Russo-Turkish War of 1877 focused on similar narratives differentiating the employment of “barbarous” rifle ammunition from “civilized” wounding practices.⁸³ All these reports highlight that well before dum-dum bullets became controversial in the 1890s, Anglo-Europeans debated, questioned, moralized and racialized the wounding power of small arms ammunition.

Humanitarian bullets and the dum-dum regression

The most important change affecting rifle technology between the 1870s and the 1890s was the introduction of cordite, a smokeless gunpowder that enabled the adoption of smaller-calibre, sleeker bullets encased in hardened non-expanding metals. This new ammunition increased the speed, range and accuracy of rifles; it was also lighter, so it could be carried by soldiers in greater amounts and loaded more easily into repeating weapons like the Maxim and Gatling machine guns. The British version of this new ammunition was the Mark II .303-inch cartridge, which the British forces introduced for their Lee-Metford rifles in 1892. Other versions included Germany’s Mauser and the Austrian Männlicher bullet.

From the outset, military surgeons were keen to assess how these smaller bullets would alter wartime medical practices. Using experiments on animals and cadavers, examples from battlefield surgeries and a degree of conjecture, they argued that at long ranges, the wounds from this new ammunition were more easily treatable than those caused by the larger-calibre bullets used in the older

80 N. Shah, above note 73; Cédric Cotter and Ellen Policinski, “A History of Violence: The Development of International Humanitarian Law Reflected in the *International Review of the Red Cross*”, *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 1, 2020. See also “Effets des balles de fusil modernes”, *Bulletin International des Sociétés de Croix-Rouge*, Vol. 16, No. 64, 1885.

81 “Summary of News: Foreign”, *Manchester Guardian*, 24 August 1870.

82 Earl of Carnarvon to Governor Sir H. Barkly, 30 September 1876, in House of Lords, *UK Parliamentary Papers*, 1876. With thanks to Reuben Bull.

83 “What is an Explosive Bullet? How They Are Made – the Disadvantages of Using Them”, *New York Times*, 12 November 1877, p. 2.

rifles.⁸⁴ The solid bullets made cleaner, less ragged wounds than the older expanding ones. Thus, as long as a wounded soldier could reach a surgeon quickly, their lives could more easily be saved. While they were cautiously optimistic about the potential of the new “humanitarian” bullets to save lives,⁸⁵ some of the surgeons also remarked that military hospitals would need to be moved further away from the battlefield in order to stay out of the bullets’ range. They further urged that all soldiers be given first-aid training so that any wounded could reach the hospital before their “clean” wounds bled out.⁸⁶ The most thoughtful surgical analysts, however, urged another note of caution, namely that at short ranges, there was very little that distinguished the wounding power of this cordite ammunition from any previous rifle cartridge.⁸⁷ This last point was generally lost on the reading public, however, who were more interested in the “humanitarian” claims associated with these bullets.

The British military authorities certainly regretted the adoption of these “clean” bullets in 1892. Their experiences with Mark IIs at Chitral and Malakand were highly discouraging, in large part because the bullets did not kill enough of the enemy. As one British newspaper reported it, the bullets “cause very little pain to those who are struck by them”,⁸⁸ and that was a problem when facing a “rush of fanatics” who would not hesitate to kill a European soldier by the most brutal means if given half a chance.⁸⁹ Sensational stories of a man in Chitral who was struck five times by Mark II bullets but then walked home to heal made headline news around the Empire, and continued to be a recurring trope in

84 “Weapons and Wounds”, above note 34, p. 132; “The Wounds Inflicted by the Lee-Metford Rifle”, *British Medical Journal*, 14 October 1893, pp. 852–853; “Among the Wounded in Manchuria”, *British Medical Journal*, 13 April 1895, p. 823; G. G. Davis, above note 73, p. 50.

85 Ken Daimaru, “Entre blessures de guerre et guerre des blessures: La ‘balle humanitaire’ en débat en Europe et au Japon 1890–1905”, *Le Mouvement Sociale*, No. 257, 2016, pp. 93, 96–98; Theodore James, “Gunshot Wounds of the South African War”, *Suid-Afrika Mediese Tydskrif*, 9 October 1971, p. 1093; C. T. Dent, above note 70, p. 1209; “Experiments at Spandau on 2 April 1892, to Illustrate the Penetration of the ’71-’84 11 mm. (0.433 inch), and ’88 Pattern, 8 mm (0.315 inch) German Rifles”, DMO/10/10, TS British Library, Ministry of Defense Maps, in *Nineteenth Century Collections Online*; Henri Charles-Lavauzell, *Les balles humanitaires et leurs blessures: Mode d’action des projectiles à chemise métalliques dures*, Paris, 1899; Patrick Greiffenstein and Don K. Nakayama, “Kocher and the Humanitarian Origin of Wound Ballistics”, *American College of Surgeons Poster Competition*, American College of Surgeons, 2017, p. 61, available at: www.facs.org/-/media/files/archives/shg-poster/2017/09_kocher_wound_ballistics.ashx; Susanne Kuss, *German Colonial Wars and the Context of Military Violence*, Harvard University Press, Cambridge, MA, and London, 2017, p. 112.

86 “Surgeon-General Dr von Bardeleben on the New Rifle Projectiles”, *British Medical Journal*, 21 May 1892, p. 1103; “Weapons and Wounds”, above note 34, p. 132; “The Wounds Produced by the Männlicher Bullet”, *British Medical Journal*, 20 January 1894, pp. 152–153.

87 “Surgeon-General Dr von Bardeleben”, p. 1103; “The Surgical Effects of Rifle Bullets”, *British Medical Journal*, 13 April 1895, p. 827; C. T. Dent, above note 70, p. 1211; Vincent J. Cirillo, *Bullets and Bacilli: The Spanish-American War and Military Medicine*, Rutgers University Press, New Brunswick, NJ, 1999, p. 49. Cf. Paul Joseph Dougherty and M. A. J. Herbert Collins, “Wound Ballistics: Minié vs. Full-Metal Jacketed Bullets—a Comparison of Civil War and Spanish-American War Firearms”, *Military Medicine*, Vol. 174, No. 4, 2009; L. A. la Garde, above note 36, p. 42.

88 *Ellesmere Guardian*, 2 October 1897, p. 3.

89 For more on the racialization of non-Europeans and justification of violence in Anglo-European law, see Elizabeth Kolsky, “The Colonial Rule of Law and the Legal Regime of Exception: Frontier ‘Fanaticism’ and State Violence in British India”, *American Historical Review*, Vol. 120, No. 4, 2015, esp. pp. 1221–1224.

justifying British soldiers' use of the dum-dum.⁹⁰ Medical officers further noted that indigenous healing techniques handled the Mark II wounds so well that the injured recovered within weeks.⁹¹ One doctor even exclaimed that

there can be little doubt that from a humanitarian point of view the Lee Metford rifle is a perfect weapon. The bullet obviously inflicts very little damage on soft tissues and on bones its action is apparently not very severe I infer that the Lee-Metford rifle is an excellent weapon in every respect but one, that is, *will it stop a rush?*⁹²

Similarly, during the Jameson raid conducted by the British against white Afrikaners in the Transvaal in 1895, troops used both the Martini-Henry rifle with its soft-lead bullets and the Lee-Metford gun shooting Mark IIs. The medical officers in attendance subsequently reported that the Mark II ammunition created wounds that were “much cleaner and healed more quickly than those produced by other methods”. In contrast, the Martini-Henry wounds were “larger, jagged, slow-healing”. They concluded that “the general consensus of opinion among those who saw the effects of the fighting in South Africa, is that the Lee Metford rifle or carbine is inferior to the Martini as a ‘man-slaying’ weapon”.⁹³ If “man-slaying” was needed, the Mark II would not deliver.

In so many ways, then, the dum-dum represented a return to earlier (more expansive) formats of rifle bullets – those which were more likely to guarantee a deadly result. And for some medical experts, at least, the shift back was essential. The US surgeon major-general John B. Hamilton, for example, felt compelled to defend the dum-dum bullet in a revealing commentary published in the *British Medical Journal* in 1898. Hamilton's lengthy article argued that the dum-dum bullet was less destructive than the Snider-Enfield cartridge (first used in the 1860s), whose “‘smashing’ powers were so great that it was adopted for sporting purposes”. He went on to explain that on “soft-bodied animals, such as tigers and panthers, its effects were wonderful, the biggest tiger often dropping dead to a single shot when well placed”. Hamilton further noted that while explosive bullets were made illegal in military settings in 1868, he nevertheless enjoyed their “most deadly” effects on game: “I shot a great deal of heavy game with it in India, and never lost an animal I knew I had struck.” Accordingly, since “savages” were “like the tiger” and less “susceptible to injury” than “civilised” men, and since they “will go on fighting even when desperately wounded”, Hamilton had no problems with Europeans using “man-stopping” bullets in warfare conducted

90 J. B. Hamilton, “The Evolution of the Dum-Dum Bullet”, *British Medical Journal*, 14 May 1898, p. 1251; *Auckland Star*, 20 July 1898, p. 3.

91 “Trials with the .303-inch Lee-Metford Bullet”, from the Superintendent of Small Arms Factory Dum Dum to Inspector-Gen. Ordnance, Bengal Command, 3 September 1895, in *East India (Military Bullet) Reports on the Effect of Military Bullet Now in Use in India*, HMSO, London, 1899, p. 17.

92 Jay Gould, “Observations on the Action of the Lee Metford Bullet on Bone and Soft Tissues in the Human Body: Made during the Chitral Expedition”, *British Medical Journal*, 20 July 1895, pp. 129–130 (emphasis added).

93 “The Lee Metford Rifle”, *British Medical Journal*, 4 April 1896, p. 865.

against those whom he considered less-than-human enemies.⁹⁴ A kill placed any man *hors de combat* too.

For the British Ordnance Department, the limitations of the Mark II, which wounded but failed to easily kill the enemy, needed rectification. Ordnance staff conducted experiments with .303-inch ammunition both in Britain at Hythe, Woolwich and Dungeness and at the Dum Dum Arsenal in India, where Bertie-Clay was given the honour of producing the moulds for what was identified as Mark II* ammunition.⁹⁵ As some commentators complained with vitriol, there was very little new about Bertie-Clay's dum-dum design. They had certainly been hunting with such bullets for years!⁹⁶

The Mark II* dum-dum bullet and the newly designed Mark IV and Mark V expanding bullets were highly effective at “stopping” their victims, so much so that when Pathan troops captured stocks of dum-dums at the Battle of Tirah, they used them with equally deadly effect on British troops.⁹⁷ It is highly significant, then, that the Ordnance Department adopted the Mark IV ammunition for all service rifles late in 1897.⁹⁸ The British aimed to employ these bullets against all their enemies, be they colonial or European.

But when the media furore around dum-dum bullets broke soon after, this universally destructive ambition left the British government facing a political quagmire. Editorials across the Anglo-European world lambasted the “regressive” British for their uncivilized adoption of this military technology. Even a highly conservative military commentator in the Netherlands considered dum-dum wounds “horrifying” (*gruwelijk*) and used the most lurid description to make a case for their prohibition: “skin, soft tissues and bones were rent asunder across an extensive area, shredded and splintered, while whole pieces were lacerated off, so that limbs were often only connected together by strips of skin or singular tendons”. The author hoped that the Hague Conference would resolve that this “most inhumane bullet” should never be used in European warfare. “Civilized” men, in his opinion, deserved to be kept alive and not suffering from needlessly cruel wounds.⁹⁹

Before the Hague Conference, Britain's official response to these critiques was to stress that its expanding ammunitions were not exploding bullets (and so the terms of the St Petersburg Declaration did not apply) and, furthermore, that they were no more destructive than existing rifle rounds. English commentators

94 J. B. Hamilton, above note 90, p. 1251.

95 *Report of the Small-Arms Penetration Committee 1893 and 1894*, War Office, London, 1894, and *Department Committee on Small Arms: Various Reports*, HMSO, London, 1900, p. 39, both in Ordnance Department, *Small Arms Penetration Committee: Report*, Supp. 5, No. 919, National Archives, London; *East India (Military Bullet) Reports*, above note 91, p. 8.

96 “The Dum-Dum Bullet”, *Friend of India* (Calcutta), 3 February 1898, p. 20.

97 T. R. Moreman, *The Army in India and the Development of Frontier Warfare 1849–1947*, Palgrave Macmillan, Houndsmills, 1998, p. 79.

98 *War in South Africa: Military Preparations: Report of the Royal (Elgin) Commission*, Cd. 1789-92 IOR/PARL/21318, Part 1, 1903, p. 86, in *Nineteenth Century Collections Online*.

99 “Engels Vernuft en Geweerprojectielen”, *Militaire Spectator*, No. 68, 1899, p. 526.

tended to find these rationales more convincing than foreign ones.¹⁰⁰ By and large, outside Britain, the only rationale deemed appropriate for employing expanding bullets was a racist one. *Scientific American* certainly minced few words on the matter in August 1899: “When dealing with a fanatic like the Soudanese, a war of extermination must be carried on, and the Dum-dum bullet seems to be the most effective [weapon].”¹⁰¹ The *Wichita Daily Eagle* promoted a similar message a year earlier:

Dum-dum bullets are especially designed for the use against savages. ... In civilized warfare all that is desired is to put a man out of the game by disabling him, which one ordinary bullet will accomplish, but the superior endurance of the savage has necessitated the use of a projectile that will kill him. In other words, he has to be dum-dummed.¹⁰²

It is important to stress that after the signing of the Hague Conventions in August 1899, dum-dums and other expanding bullets were more roundly (although by no means universally) criticized, including in Britain and the United States. While there were commentators who continued to argue for the necessity of employing expanding bullets in imperial settings, in general, the Hague law ensured that most contemporaries publicly acknowledged “dum-dumming” as an abhorrent act regardless of who was being targeted or who was doing the shooting. Even the previously pro-dum-dum *Daily Mail* turned into a critic of the ammunition after 1899.¹⁰³

The fact that the British military authorities continued not only to use but also to produce expanding bullets after 1899 is, therefore, telling. They did not much care for this Hague regulation. At any rate, since Britain did not sign up to the Hague Declaration until 1907, its military leadership did not feel compelled to adhere to the Declaration’s terms. Yet they also acknowledged that the political fallout around the use of expanding bullets required careful stage-managing in the public sphere. Hence, the British government recalled all Mark IVs from South Africa, and demanded that British troops only employ the defective Mark II bullets.¹⁰⁴ Britain’s ordnance factories reverted to manufacturing Mark IIs for the duration of the Anglo-Boer War.

In the meantime, the Army Board, Admiralty and Ordnance Department debated with the Cabinet about what ammunition to stock in future. The military preferred the newly designed hollow-nosed Mark V. The Cabinet implemented a compromise: for the foreseeable future, the military would employ both Mark V

100 See, for example, M. C. O’Connell, *Report on Effect of Military Bullet in Use in India*, House of Commons, CH Microfiche 105.573, in *UK Parliamentary Papers*, Vol. 65, 1899; “Wounds by Small Projectiles”, *Hospital* (London), 21 May 1898, p. 29; Alex Ogston, “The Effects of the Dum-Dum Bullet from a Surgical Point of View”, *British Medical Journal*, 28 May 1898, p. 1425; J. B. Hamilton, “The Dum-Dum Bullet”, *British Medical Journal*, 11 June 1898, p. 1559; Alex Ogston, “The Peace Conference and the Dum-Dum Bullet”, *British Medical Journal*, 29 July 1899, pp. 278–281.

101 “The English Mark IV Cordite Ammunition”, *Scientific American*, Vol. 81, No. 8, 1899, p. 122.

102 *Wichita Daily Eagle*, 16 July 1898, p. 4.

103 M. Abbenhuis, above note 6, pp. 109–111.

104 *War in South Africa*, above note 98, pp. 63, 87.

and Mark II bullets.¹⁰⁵ The Mark II would be “used wherever there is no risk of attack from savages”, although in an emergency any available ammunition (expanding or not) would do.¹⁰⁶ India could keep manufacturing and employing dum-dum bullets,¹⁰⁷ for as a War Office memorandum on the subject acknowledged in December 1899, in the wake of The Hague, “it is better to have Mark II for civilised and some form of expanding bullet for savage warfare than to make Mark V the universal pattern”.¹⁰⁸ To further hide its use of expanding bullets, in all settings, the government employed euphemistic terms like “ordinary” or “standard-issue” ammunition in its public documents,¹⁰⁹ as these politicians certainly wished to avoid another public relations crisis.¹¹⁰

Conclusion

The prohibition of expanding bullets at The Hague in 1899 was easily achieved. It also offered an expedient “success” story for conference organizers to promote, which was particularly important given that most of the other arms control negotiations at The Hague firstly stalled and then failed.¹¹¹ At any rate, as many of the delegates thought, given that expanding bullets were only employed by the British, the British would bear the brunt of their prohibition. In this they were proven quite wrong, for much like the St Petersburg Declaration of 1868, The Hague’s dum-dum prohibition solidified the expectation that certain forms of military harm should be proscribed, particularly when less deadly or destructive alternatives were available. That norm infiltrated the global media sphere in the aftermath of the 1899 Hague Conference and continues to have enormous relevance in international humanitarian law and how we perceive the limits of warfare and State violence today.

There is no doubt that The Hague’s dum-dum prohibition forced the British State to carefully manage the propaganda around its use of expanding rifle ammunition after 1899 in imperial and non-imperial settings. In managing these public relations campaigns, it was not alone. Most of the wars of the early

105 Confidential Cabinet Paper, 8 December 1899, in “MS Joseph Chamberlain Papers Relating to Africa JC12/3/1-62”, in *Nineteenth Century Collections Online*.

106 Colonial Office Minutes, 29 March 1900, in War Office, “General and Warlike Stores: Ammunition (Code 45(C)): Future Pattern of Ammunition to be Used in .303 LM Rifle. Future Stocks to Be Held. Military Authorities at Home or Abroad to Use Discretion as to Use”, WO 32/7059, National Archives, London; Defence Committee, Memorandum, 19 January 1900, in Public Record Office, “Major General Sir John Charles Ardagh: Papers: Peace Conference at The Hague May–July 1899”, PRO 30/40/14, National Archives, London (PRO 30/40/14).

107 S.R.H. Knox, War Office Announcement, 3 March 1900, in WO 32/7058, above note 29.

108 Minute by Mr Wyndham, 1 December 1899, in “MS Joseph Chamberlain Papers Relating to Africa JC12/3/1-62”, in *Nineteenth Century Collections Online*. See also Minute by Secretary of State for War for Cabinet, 8 December 1899, in PRO 30/40/14, above note 106.

109 Director Inspector General of Ordnance, 3 March 1900, in WO 32/7058, above note 29.

110 For more, see Maartje Abbenhuis, “The Dum-Dum Controversy: Rifle Ammunition in British Politics at the Turn of the Twentieth Century”, forthcoming, 2023.

111 Cf. S. A. Keefer, above note 15.

twentieth century, including the First World War, were beset with dubious claims and counter-claims of illegal dum-dum use. Still, it is also true that some of the worst instances of State violence committed during the twentieth century, much like those of the nineteenth, involved expanding ammunitions. It is important to recognize that these acts were not only committed by the British.¹¹² Expanding bullets remain in use today, including in police actions; you can buy blue-nosed expanding bullets in any hunting shop. It is also true that turning a full-metal-jacket bullet into an expanding one is rather simple: all that is needed is to file away its tip or insert cross-cuts.¹¹³

Whenever they are used, however, expanding bullets occasion controversy, in part because of the existence of the Hague law but also because they do enormous harm – they are “man-slayers”, after all. And perhaps that is the dum-dum’s most enduring legacy: the trope of the “barbarous dum-dum” is more evocative than effective in restraining the hounds of war and State violence.

112 There is definitely more work needed on the actual use of expanding ammunition in military and non-military settings after 1899.

113 Cf L. J. Ramsey, “Bullet Wounds and X-Rays in Britain’s Little Wars”, *Journal of the Society of Army Historical Research*, Vol. 60, No. 242, 1982, p. 93.

The origins, causes and enduring significance of the Martens Clause: A view from Russia

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Abstract

The Martens Clause owes its name to the diplomat and jurist Fyodor Fyodorovich Martens, a representative of the Russian Empire at the First Hague Conference in 1899. Drafted and proposed by Martens during the negotiations, yet as a spontaneous compromise, the Clause has been included in the preamble of the Hague Convention with Respect to the Laws and Customs of War on Land and is still considered an important principle of international humanitarian law today. This article traces the biography and academic path of F. F. Martens and explores the enduring significance of the Martens Clause.

Keywords: international humanitarian law, laws of armed conflict, Martens Clause, F. F. Martens, humanization of warfare, protection of civilians, protection of combatants, First Hague Conference, Hague Convention II, principles of international law.

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Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection

* This article was originally written in Russian. Unless otherwise stated, all citations refer to the Russian version of the cited work. All quotations are the *Review's* own translation.

and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

Hague Convention (II) with Respect to the Laws and Customs of War on Land¹

The above paragraph was drawn up by Fyodor Fyodorovich Martens² – one of the official representatives of Russia at the First Hague International Peace Conference of 1899 – during the elaboration and negotiation of the text of the Hague Convention with Respect to the Laws and Customs of War on Land. The clause has gone down in history and is known in international law as the Martens Declaration, Martens Reservation or, more usually, Martens Clause. It is quite unique, in the field of international law, for a treaty provision to bear the name of the legal scholar who proposed it; privileges of this kind are normally reserved for natural scientists, for their major discoveries and undertakings.

The Martens Clause has become a central principle of contemporary international military and humanitarian law, and continues to play a key role in ensuring the ongoing humanization of warfare. Its humanistic essence and purpose stem from the fact that it regulates military situations occurring in the course of hostilities between conflicting parties that are not covered by existing international and national legal standards. All of this further reaffirms Martens' special role in the development of international humanitarian law (IHL) – that is, international law applied to protect human rights in time of war.

It is an interesting and paradoxical fact that the more time has passed since the Martens Clause was drafted, and the more new IHL rules have been adopted regulating more and more facets of the protection of victims of armed conflict, the more often we turn to the provisions of this more than century-old declaration. It can indeed be said that truly great and significant things become more visible when seen from a greater distance, including across time.

A retrospective analysis of the place and role of the Russian professor, diplomat and international arbitrator in the emergence and development of IHL in the nineteenth century leads us to conclude that the name Martens rightfully ranks alongside those of the outstanding humanists of the day, who paved the way for the broad humanization of the means and methods of warfare through international law. These include the Swiss social activist Henry Dunant, who was behind the establishment in 1863 of the International Committee for the Relief of

1 Hague Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, preamble, para. 9 (in English).

2 Fyodor Fyodorovich Martens (1845–1909), as he was and is known in Russia, or Friedrich Fromhold Martens, as he was named at birth, or Friedrich von Martens (in English and German) or Frédéric de Martens (in Spanish and French), as he was and is known outside Russia, was a professor of St Petersburg University, world-renowned academic, international lawyer, diplomat, legal adviser and international arbitrator, corresponding member of the Russian Academy of Sciences and honorary member of several foreign universities and scientific societies, and the most famous Russian international lawyer worldwide.

the Wounded (the forerunner of the International Committee of the Red Cross) and the adoption in 1864 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field; and the American jurist Francis Lieber, who in 1863 compiled the *Instructions for the Government of the Armies of the United States in the Field*, the first ever set of domestic rules for the conduct of armed forces in warfare – the so-called Lieber Code. Martens has gone down in history not just as an outstanding academic, advocate of the universal theory of international law, world-renowned diplomat and international arbitrator, but also as a prominent theoretician and practitioner, whose work helped lay the scholarly groundwork for and secure the formal embodiment of the general principles of IHL.

Martens' humanistic international legal views were formed at a moment in history when serious changes were germinating with regard to the theory and practice of the "law of war". During the almost unceasing wars of the nineteenth century, gross and massive violations of the established customs and laws of war and the use of increasingly sophisticated means of warfare had led to a manifold increase in the toll of victims and destruction, and were sharply at odds with the general process of the humanization of social relations under way everywhere. Public attitudes to war were gradually changing. From the enthusiastic exaltation of war and military prowess and the perception of war as "the exercise of the natural right of the strong over the weak", unfettered by any restrictions or laws (Baruch Spinoza), society was moving to an understanding of war as an unnatural state, a fateful evil, "the most terrible scourge that violates the laws of humanity" (Immanuel Kant), which must be combated. The broad spread of enlightened and humanistic ideas, the emergence across Europe and North America of Friends of Peace and Red Cross societies, which waged "war on war" and demanded the humane treatment of its victims, and the content of pacifist publicistic and academic literature could not fail to affect State governments and the conduct of belligerents.

These changes coincided with the coming of age of the young Martens, who began to study law at St Petersburg University in 1863. Naturally, such developments awakened great interest in and influenced the views of this gifted and inquisitive student. It was also during Martens' student years that two very important international conferences took place, which laid the basis for the legal and treaty framework of international military and humanitarian law.

Thus, the Geneva International Conference, held on the proposal of Switzerland, adopted the aforementioned First Geneva Convention in 1864. For the first time in history, a multilateral treaty set forth unified rules for the protection of enemy wounded and sick and medical facilities and personnel. Four years later, in 1868, an international military conference was held in St Petersburg on the initiative of Russia. On 11 December (29 November, according to the old Russian calendar), the conference adopted the Declaration to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, which was signed by most States of the day. In this international treaty, the States finally recognized that "the progress of civilization should have the effect of alleviating as much as

possible the calamities of war”, and therefore the “only legitimate object” of war was not the wholesale extermination and plundering of the enemy, but solely “to weaken the military forces of the enemy”. The Declaration also proclaimed that “this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable”.

Given the atmosphere of heightened public concern about the problems of “war and peace”, the scholarly interest in military-humanitarian issues awakened in the recent law graduate Martens is quite understandable. Having stayed on at the university’s Department of International Law “to prepare for a professorship”, in 1867 Martens turned his attention to a very important, but barely explored, question – that of the inviolability of private property in wartime. He laboriously collected and summarized from English, Italian, German, French and medieval Latin sources a vast amount of factual, statutory and doctrinal material, and one year later (in December 1868, just as the above-mentioned St Petersburg conference was taking place), he submitted to the Law Faculty his master’s thesis *On the Law of Private Property in Time of War*. He successfully defended this thesis on 5 October 1869 and was awarded a master’s degree in international law by the Faculty Council. The thesis presented by Martens was such a serious study, both in terms of its relevance and its scholarly depth, that it was published as a separate book by decision of the university’s Faculty of Law.³

Martens’ work *On the Law of Private Property in Time of War* was the first specific Russian academic study dedicated to the problems of international military and humanitarian law. In all objectivity, it must be acknowledged that the depth, scope, erudition and diligence of the young researcher are striking. Having recognized the insufficient research into the problems of “war and law” in Russian legal literature of the time, Martens collected, systematized, analyzed and, with the publication of his book, brought into domestic academic circulation a huge quantity of factual and doctrinal material that he had discovered in multilingual academic publications by foreign scholars. Nor did the author restrict himself to a formal investigation of the announced topic alone. Considering the multifaceted nature of the very problem of protecting private property during war, he examined many aspects of the whole system of the “law of war” as a collection of legal standards regulating war.

The opinions and positions of both Martens himself and the foreign scholars quoted by him in his thesis are of undoubted academic value in providing a clearer picture of the starting point from which Martens’ humanistic worldview grew 150 years ago – and which led him, with time, to become one of the founders of IHL and, among other things, the author of the famous Martens Clause. It is clear from the book’s opening pages that the then still very young academic (it is hard to refer to a 22- to 23-year-old as an “expert”), defying prevailing academic tradition and authority, took a radically different stance and clearly and precisely defined his views on the very complex and controversial

3 Fyodor Fyodorovich Martens, *On the Law of Private Property in Time of War*, V. Golovin, St Petersburg, 1869.

issues of the day regarding the relationship between the categories of “law and strength”, “war and law”, “war and peace” and “authority and the individual” – views from which he (most significantly) did not waver throughout his entire professional life.

Martens firmly opposed the prevailing concepts of the day regarding the dominance of might over right. Such ideas, he believed, were unworthy of human beings and pernicious for international relations. Martens was a humanist, and he laid out a logical basis for his humanist international legal views. He believed that all manifestations of social life – whether within or between States, whether based on brute force or on law – were not externally imposed but were rooted in human nature itself. All human beings were driven by the pursuit of “self-determination and self-purpose” and “communion with others”. (Here, Martens had already laid the foundation for his well-known original theory of international communication, which later formed the basis of his entire theory of international law.) But “since everyone, naturally, pursues his own individual goals, it is clear that confrontations must occur between people living in community”.⁴ To resolve “the misunderstandings and confrontations that arise”, human beings should rely not on force but on the law:

The law determines relations between individuals, protects both the weak against the strong and the interests of the community when personal interests seek their subjugation. It follows from this that the law is the *sine qua non* of all development and progress, because only through the law can there be a free and multilateral exchange of human relations.⁵

Based on the above, Martens drew the following significant conclusion: “International law is also founded on human nature and has exerted its influence ever since peoples recognized the need for international relations, when hostile isolationism disappeared and international life started to demand recognition and definition.” Here, too, he strongly opposed the then prevailing religious justification of the nature and essence of international law, including the right of war:

It seems to us erroneous ... to seek to elevate faith and the spirit of Christianity as the sole source of international law, to explain by them alone all progress to alleviate the calamities of war and develop related law. Religion is, by essence, immutable, and does not and cannot brook any kind of self-transformation without denying itself. We therefore see that writers on international law who base their ideas solely on the spirit of Christianity, on divine and natural law, go so far as to deprive the human enemy of all rights and leave him fully in the hands of the enraged enemy. ... The belligerent is told he has an inalienable right to harm his opponent by all possible means, for example, to

4 *Ibid.*, p. 2.

5 *Ibid.*, p. 3.

kill his defenceless subjects, rob them, take them captive, dishonour them, etc., and then he begs for mercy, indulgence and compassion.⁶

Martens argued that the development of humanity and international law was founded not on religion but on the objective historical process of the continuous progression of society:

If we take a brief look at the history of the development of international life, we cannot fail to see how international law is gradually changing, how the scourge of war is being alleviated and the benefits of peaceful coexistence among peoples are increasing. ... [W]e understand international life as being in constant progression, and the aggregate of the conditions of its development determines the international law of the given age; so a change in the conditions of international life inevitably requires a change in existing law.⁷

Here he drew the following very important conclusion regarding the topic under study:

From this point of view, the development of the *idea of humanity* [emphasis added] is nothing other than a stage in the development of the law; that is, much of what could previously have been *requested* in the name of humanity or universal human relations must, at another time and under different conditions of life, be *demanded* in fulfilment of the law.⁸

And that moment had come, Martens was convinced.

After examining the causes of interpersonal and international confrontations and finding them to be rooted in the very nature of human beings, society and the State, Martens considered the causes of conflict between States in particular:

The State, like a private person, may violate the rights to honour, self-preservation, independence, etc. of another State and not fulfil the positive and negative obligations assumed in the treaties concluded. There is no such thing as an international tribunal for resolving the resulting misunderstandings and disputes. Therefore, States must fall back on the right and possibility to obtain satisfaction by their own means, to restore the violated right and to establish peace. But if international justice, formally speaking, is now still at the same stage of development as civil (criminal) justice was in the Middle Ages, when the rule of force prevailed, does it really follow from this that the State is not bound by any precepts of law and justice?

Martens responded to his own question by noting that “States are conscious of the need to accord their conduct with the eternal laws of truth and justice” and to strive to resolve their conflicts by peaceful and lawful means.⁹

6 *Ibid.*, p. 6.

7 *Ibid.*, p. 7.

8 *Ibid.*, p. 7.

9 *Ibid.*, p. 20.

In speaking out against the senseless cruelty of war and advocating for the need for belligerents to respect established international rules, Martens voiced his belief in the triumph of the law. “No matter what political considerations statesmen and politicians may advance, no matter how fiercely patriotic publicists may rise up against the law ..., we have no doubt at all but that the legal consciousness of civilized nations shall soon prevail.”¹⁰

On the Law of Private Property in Time of War has lost none of its relevance today, and is still used by academics and practitioners alike. Although it was published by a 23-year-old student based on his master’s thesis, for over 150 years the world’s most venerable scholars have repeatedly referred to it as the work by “Professor Martens”. The book received recognition and the highest appreciation at the time of its appearance, and continues to do so in modern legal literature. In a very comprehensive study of international legal literature in the nineteenth century, the 1882 *Handbook for the Study of the History and System of International Law*, the renowned international legal scholar Professor Vsevolod Pievich Danevskiy devoted five pages to an analysis of Martens’ book, which “first and foremost deserves serious attention and is, in many respects, worthy of the highest approval”.¹¹ Danevskiy gave it the kind of appraisal to which any academic would aspire:

Martens’ monograph is, in our opinion, the most talented Russian work and is extraordinarily rich in historical and legal information. It is a real pleasure to read and should be a reference book for anyone studying international law, especially military law, in Russia.¹²

Almost one century later, the leading scholar of international legal literature in Russia, Professor Vladimir Emmanuilovich Grabar, assessing the state of pre-revolutionary studies of the problem of the legal status of enemy subjects and private property in war, noted that “one of the best works on this issue, not only in Russian but also in world literature, is the one by *Professor F. F. Martens*”.¹³

Martens’ book is optimistic and imbued with faith in the triumph of the law. He concluded his study with the following words: “We know of no force that could successfully resist the progressive movement of life or fail to fulfil the *inexorable* precepts of the law”.¹⁴

However, the Franco-Prussian War of 1870–71, which broke out soon after, showed that belligerents continued to inflict cruelty on one another that was not justified by military necessity. Martens, who had been sent abroad by the university, as a postgraduate member of the Department of International Law, to attend lectures at the universities of Vienna, Leipzig and Heidelberg, involuntarily

10 *Ibid.*, p. 453.

11 Vsevolod Pievich Danevskiy, *Handbook for the Study of the History and System of International Law*, A. N. Gusev, Kharkov, 1882.

12 *Ibid.*, p. 237.

13 Vladimir Emmanuilovich Grabar, *Materials on the History of International Legal Literature in Russia (1647–1917)*, USSR Academy of Sciences, Moscow, 1958, p. 440 (emphasis added).

14 F. F. Martens, above note 3, p. 453 (emphasis added).

found himself near the scene of the fighting, and collected extensive investigative material on the war. Later, in the preface to the French edition of his book on the Brussels Conference of 1874 and the Hague Conference of 1899, *Peace and War*, he recalled:

During the 1870–1871 war, being close to the theatre of war, I collected from the newspapers of all countries and through personal interaction all the information I could about violations of the laws and usages of war. Already then I had reached the conclusion that it was essential that governments themselves determine these laws and usages in order to prevent endless recriminations and ruthless reprisals.¹⁵

The evidence obtained of the senseless atrocities of war and the very important conclusion reached by Martens – about the need to render the conduct of belligerent States more humane and to establish a more precise, formal international legal mechanism regulating war and limiting the means and methods of warfare – all played an important role in Martens’ subsequent academic, pedagogical and diplomatic activities, and were constantly at the centre of his attention.

It is noteworthy that, after being recalled prematurely from a foreign assignment to take over the chair of international law from his teacher, Professor Ignatiy Iakinovich Ivanovskiy, Martens departed from the existing tradition whereby new lecturers usually dedicated their first lecture to their predecessor and started teaching the course where their predecessor had left off.

The young associate professor (now aged 25) chose as his topic “The tasks of contemporary international law” and began his first public lecture to the students of the faculty on 28 January 1871 with the following significant words:

Gracious Sirs! It is not without some confusion that I begin, at the present time, to teach the science of international law. When two of Europe’s most civilized nations are locked in a terrible war, when the fruit of centuries of peaceful labour and competition in the fields of trade and industry are perishing in the vortex of popular passions aroused to the greatest obduracy, when, lastly, the universally recognized principles of international law are frequently trampled under foot – then it seems that many ideas about the peaceful and progressive development of peoples must collapse before these manifestations of the opposite order of things.¹⁶

After this introduction, however, the entire content and zeal of Martens’ lecture were imbued with an optimistic spirit, with faith in the reason of mankind and its humanistic essence, and in the great potentialities of the theory and practice of

15 Fyodor Fyodorovich Martens, *La paix et la guerre: La Conférence de Bruxelles, 1874, droits et devoirs des belligérants (leur application pendant la guerre d’Orient 1874–1878), la Conférence de La Haye, 1899*, translated from Russian into French by M. le comte N. de Sancé, A. Rousseau, Paris, 1901, p. viii.

16 Fyodor Fyodorovich Martens, “The Tasks of Contemporary International Law”, inaugural lecture delivered on 28 January 1871 at St Petersburg University, *Journal of the Ministry of Public Education*, No. 6, 1871, p. 251.

international law. After critically analyzing the condition of inter-State relations and the level of compliance by States with the rules of international law in times of both peace and war, Martens sharply condemned war as a barbaric means of settling international disputes, which should not triumph over peaceful, legal methods. He proclaimed:

No, brute force shall never triumph definitively over law; never shall the pitiful theory of *faits accomplis* stifle in us the sense of truth and justice. ... This is why, with unshakable faith in the progressive development of international life and humanity, and in the deep conviction that the idea of development is the highest principle of life and law, I embark on teaching the science of international law.¹⁷

With these elevated and humane feelings of “truth and justice”, with his expression of “unshakable faith” and “deep conviction” in progress, development and the rule of law, Martens proceeded not only to teach international law, but also to further both its study and its practical development. His underlying humanistic positions, both with regard to his overall world view and international law, as outlined in his first academic work *On the Law of Private Property in Time of War*, proved objectively and historically so correct, and theoretically and practically so fruitful, that they received not only wide acclaim in academic literature but also (and even more importantly) endorsement by the entire further course of the humanization of international relations and the emergence and development of IHL. They were further developed by Martens in his subsequent academic work¹⁸ and diplomatic activity.

Employed concurrently by the Russian Ministry of Foreign Affairs in the position of collegiate secretary, Martens, still affected by the brutality of the Franco-Prussian War (as he himself acknowledged in the above-mentioned preface to the French edition of *Peace and War*), soon submitted to the minister of foreign affairs, Alexander Mikhailovich Gorchakov, and the minister of war, Dmitry Alekseyevich Milyutin, his first (and highly successful!) foreign policy proposal, regarding the holding of an international conference to adopt a convention on the laws and customs of war. In a letter to Milyutin dated 25 April 1872, Martens, after analyzing the Franco-Prussian War, concluded that its excessive brutality had stemmed in large part from existing differences between the belligerents “in the understanding of their obligations and in the interpretation of international military laws and established customs”. Further, Martens posed the following fundamentally important question:

Is it not essential, for a more lawful conduct of war and the establishment of a beneficial peace, that States determine precisely those military laws and usages that they intend to observe in time of war? In other words: is it not possible to codify the universally recognized military laws and usages ...? I dare to think

¹⁷ *Ibid.*, p. 268.

¹⁸ See, for example, Fyodor Fyodorovich Martens, *The Contemporary International Law of Civilized Nations*, Vol. 2, USSR Ministry of Railways, St Petersburg, 1883, Section 4.

that the codification of military laws and usages is not only possible but necessary, if it is desirable that war, that inevitable evil, be placed within precisely defined boundaries, and that the rights and obligations of belligerent forces, with respect both to each other and unarmed private individuals, be clarified in a comprehensive manner.¹⁹

Martens not only made the above proposal, but he also drew up and presented a draft international convention on the laws and customs of war. This draft, after review by a commission headed by Minister of War Milyutin (with Martens' very active participation), was circulated by order of Emperor Alexander II of Russia, with a note by the Ministry of Foreign Affairs, to other States for consultation. After receiving a favourable response from the States, Russia set about convening the international Brussels Conference on the codification of the laws and customs of war in 1874. (Significantly, the Russian delegation included the 29-year-old Professor Martens, then still little known in Russia or the wider world; this was the first time in Russian diplomatic practice that a scholar in international law was involved in the work of an international conference.)

Russia submitted the aforementioned draft convention, drawn up based on Martens' proposals, to the conference participants.²⁰ The text aimed at formally limiting the means and methods of warfare, alleviating the suffering of the civilian population and reducing the destruction caused by military action. Pursuant to the draft, belligerents were obliged strictly to observe the existing laws and customs of war and, in a very important innovation, to apply them not only to armies but also to militias and volunteer corps ("partisans"). To this end, they should fulfil the following conditions: (1) they should be commanded by a person responsible for his subordinates; (2) they should have a distinctive emblem clearly visible to the enemy; (3) they should carry arms openly; and (4) they should conduct their actions in accordance with the laws and customs of war.²¹ (These conditions were reproduced almost word for word in the Hague Conventions of 1899 and 1907, still in force today.)

The draft also stipulated that belligerents did not enjoy an unlimited right to choose their means of warfare. It prohibited the following: the use of poison and poisoned arms as well as arms, projectiles and material of a nature to cause unnecessary suffering; the seizure and destruction of enemy property without military necessity; and the improper use of the enemy's flags, military ensigns and uniform. In sieges and bombardments, the draft set forth that all necessary steps should be taken to spare, as far as possible, historical monuments and buildings devoted to science, art and charity, and not to damage hospitals with wounded. The pillaging of a town or place, even when taken by assault, was

19 Letter by Fyodor Fyodorovich Martens to Minister of War Dmitry Alekseyevich Milyutin, 25 April 1872, Russian State Library, Manuscript Department, collection 169, carton 38, storage unit 2, sheets 1–2.

20 Fyodor Fyodorovich Martens, "Draft International Convention on the Laws and Customs of War", in *The Eastern War and the Brussels Conference 1874–1878*, USSR Ministry of Railways, St Petersburg, 1879, Annex 1.

21 *Ibid.*, pp. 4–5.

prohibited. The draft convention included provisions on spies, parlementaires, capitulations and armistices. Special attention was paid to regulating the conduct of military authorities in occupied enemy territory; in such territory, the Occupying Power was obliged to re-establish and ensure, as far as possible, public order, while respecting the laws in force in the country. Belligerents were duty-bound to respect family honours and rights, individual lives, private property and religious convictions. Rules were foreseen for the collection of taxes, other tolls, contributions and requisitions in kind in the occupied territories. The legal status of prisoners of war was regulated in detail, including their conditions of internment and labour, food, liberty on parole and the creation of information bureaus relative to prisoners of war. It was laid down that prisoners of war were subject to the laws and other regulations in force in the army of the State into whose hands they had fallen. Prisoners of war were to be treated “humanely”.

To Martens’ great disappointment, however, “given the complete discord that emerged during the discussions”, the State delegations participating in the Brussels Conference did not support the idea of adopting a legally binding convention based on the proposed draft, but merely adopted a political declaration.²² At that time, States, which had an unlimited right to war, could not yet accept the very idea of limiting warfare by any kind of international legal rules.

On reading the draft convention, one is struck by the high degree of humanism and brilliant foresight of its authors, primarily Martens. The text already contained detailed provisions that were later embodied (with the same wording) in the 1899 Convention on the Laws and Customs of War on Land and in subsequent twentieth-century conventions: the Hague Convention of 1907, the Geneva Conventions of 1949 and the Additional Protocols of 1977, which now form the core of international humanitarian and military law.

The failure to secure the adoption of a convention did not deter Martens, but rather spurred him to defend his humanistic ideas with renewed vigour. The provisions set forth in his draft soon received deep and detailed academic substantiation in his seminal work on the Russo-Turkish War, *The Eastern War and the Brussels Conference 1874–1878*. In this book Martens made, in his own words, “a first attempt to present the history of [the Russo-Turkish War] from the perspective of the observance of the usages and laws of war, as proclaimed at the Brussels Conference and commonly recognized by civilized nations at war”.²³ This was the first such comprehensive and in-depth study of the customs and laws of war in Russian literature. The limited scope of the current article does not permit us to delve in detail into the content of this work, but a glance at the chapter titles gives a clear picture of the range of topics covered: “War and Right”, “War and Law”, “The Brussels Conference of 1874”, “From Peace to War”, “Russia and Turkey as Belligerent Powers”, “The Russian Army in a

22 Fyodor Fyodorovich Martens, “The Hague Peace Conference. A Cultural and Historical Sketch”, *The European Herald*, St Petersburg, No. 3, 1900, p. 16.

23 Fyodor Fyodorovich Martens, *The Eastern War and the Brussels Conference 1874–1878*, USSR Ministry of Railways, St Petersburg, 1879, p. 3.

Hostile Land”, “The Russian Army on the Battlefield”, “On Wounded and Sick Soldiers and Prisoners of War” and “On Relations between Belligerent States and Neutral Powers”.

Martens continued to develop his ideas on the humanization of warfare and the protection of its victims in subsequent years. Thus, in 1881 he gave a lecture entitled “On the Need to Define International Rules of War” at the Russian Technical Society, which caused heated debate, including on the lawfulness or unlawfulness of partisan warfare in occupied territory.²⁴

His unshakable faith in the triumph of reason and the rule of law, his belief in the necessity and possibility of codifying the customs and laws of war, his in-depth scholarly study of the problems of humanitarian law and his productive humanistic initiatives and their active defence, which brought him worldwide fame and respect, all spurred Martens to come forward with a new proposal. Nearly a quarter of a century after the failure of the Brussels Conference, Martens, now a world-renowned international legal scholar, diplomat and international arbitrator, and a permanent member of the Council of the Ministry of Foreign Affairs of the Russian Empire, again put forward an initiative by Russia to convene a new international conference devoted to limiting the means and methods of warfare, and prepared a draft programme for the proposed conference.

Russia’s note to foreign States proposing the holding of such a conference met with support. The scourge of endless wars, the ever-growing burden of the arms race, the expanding peace movement and the active work of the International Red Cross and Red Crescent Movement prompted the States to agree to the conference.

As is well known, the First Peace Conference, convened on Russia’s initiative, was held in The Hague from 18 May to 29 July 1899. Martens was elected chairman of the second commission, tasked with drawing up a convention on the laws and customs of war on land. To his great satisfaction, the commission based its deliberations on his draft convention on the laws and customs of war, which had been rejected by the Brussels Conference in 1874.

It was during the work of the 1899 Hague Conference that Martens’ proposal, which has become forever associated with his name and has gone down in history as the Martens Clause, came into being. After weeks of exhausting wrangling and debate, the delegates finally managed to agree on the wording of each of the fifty-six articles of the Convention. But before the final vote, the Belgian delegate, Édouard Descamps, suddenly spoke up and, on behalf of Europe’s smaller States, insisted that amendments be made to the agreed text giving the population of (fully or partially) occupied States the right to armed resistance against occupying forces. In the course of the ceaseless wars, smaller nations had constantly been the victims. However, the delegations of the major European powers, which were constantly at war with each other, strongly opposed such a modification, arguing that recognition of the right of the population to resist would legalize acts of perfidy, treachery and brutality against

24 Fyodor Fyodorovich Martens, “On the Need to Define International Rules of War”, lecture at the meeting of the Russian Technical Society, 25 April 1881, in *Notes of the Russian Technical Society*, Vol. 4, 1881.

the members of invading or occupying enemy forces. The delegations of the smaller nations thereupon declared that they did not accept the draft and that, if their demand were not heeded, they would leave the Conference. There was a real risk that the fine balance between the demands of war and the protection of the belligerents and the civilian population, so painstakingly achieved in the articles of the Convention, would be destroyed, and thus would the Conference fail and, indeed, Martens' entire dream collapse.

Martens had one night to find a way out of this unexpected deadlock. And, indeed, "von Martens' genius" (to quote the patriarch of humanitarian law, eminent Swiss lawyer Jean Pictet²⁵) came up with a brilliant solution to save the Convention. The following morning, on the opening of the meeting, he proposed it to the delegates.

In order not to make any changes to the hard-won text of the Convention and to avoid a new vote on its articles, Martens proposed inserting in the text of the preamble to the Convention a clause stating that in all specific military situations that were not reflected or regulated in international treaties, all belligerents should still act humanely, in accordance with the laws of humanity. All the delegations welcomed this proposal with enthusiasm and voted unanimously to adopt the entire text of the Convention. With this, Martens noted, "the question of humanism and law, raised by Russia in 1874 and which had lain dormant until 1899, was finally resolved".²⁶

The wording of the clause was fully preserved in the revised Convention on the Laws and Customs of War on Land adopted on 18 October 1907 at the Second Hague Peace Conference, in which Martens also took part. This Convention is still in force today and constitutes one of the basic legal and regulatory foundations of IHL, applicable in times of armed conflict. Martens' proposal, which was incorporated into the preamble of the 1899 Convention, later became known as the Martens Clause or Martens Declaration in academic literature.

Thus, at the Hague Peace Conferences of 1899 and 1907, Martens was able to realize his humanistic ideas: as one of the most energetic participants in these conferences, he secured the inclusion in the 1899 and 1907 Conventions of all the main provisions of the draft text, drawn up on his initiative and with his active participation for the 1874 Brussels Conference. The Hague Conventions, according to the figurative appraisal by the Russian professor Vladimir Vasilevich Pustogarov, "are a memorial to the outstanding Russian jurist F. F. Martens, a memorial all the more remarkable because they continue to serve people today".²⁷

The Martens Clause has gained broad international recognition and has entered international law as a separate provision in a range of instruments, sometimes with editorial adjustments or with evolved content widening the scope of its protection. Differences in wording and normative status are present in the

25 Jean Pictet, *Development and Principles of International Humanitarian Law*, ICRC, Moscow, 1994, p. 78.

26 F. F. Martens, above note 22, p. 18.

27 Vladimir Vasilevich Pustogarov, *Fyodor Fyodorovich Martens – Lawyer, Diplomat*, International Relations, Moscow, 1999, p. 268.

Geneva Conventions and their Additional Protocols. Thus, in Additional Protocol I (AP I) of 1977, the Martens Clause is rendered as follows:

In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

A number of points are noteworthy here. Firstly, AP I provides not only for cases that are not covered by itself, but also for those not covered by “other international agreements”. Secondly, the original expression “civilized nations” has been dropped, as it is clearly outdated. For the same reason, modern legal terms are used: “authority” instead of “empire”, “combatants” instead of “belligerents”, “principles of humanity” instead of “laws of humanity”, and the more precise term “civilians” rather than “population”. Thirdly, and perhaps even more importantly, the Martens Clause has been moved from the traditional preambles of earlier instruments to the main body of AP I, becoming part of Article 1 (“General Principles and Scope of Application”), which undoubtedly strengthens its legal status. Thus, in Article 1, the Martens Clause is effectively enshrined as one of the regulatory legal principles of IHL.

Additional Protocol II, meanwhile, retains a traditional approach. The Martens Clause is included in the preamble, but with slightly modified content: “... in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”. As we can see, the source of customs has been excluded from the Clause, and “population and belligerents” has been replaced by the more general term “human person”, which does not limit the subjects of protection.

States continue to include the Martens Clause in the international humanitarian treaties they conclude. Thus, the preamble to the 1980 Convention on the Prohibition of Certain Conventional Weapons reiterates almost entirely the text of the Clause from AP I, with the only – very positive – addition being that the civilian population and combatants henceforth “shall at all times” remain under the protection of international law. The International Court of Justice also referred to the Martens Clause in its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,²⁸ confirming its legal importance, effectiveness and applicability.

All this attests to Martens’ high level of professional intuition and outstanding foresight. Having started to fight, over 150 years ago, for the adoption of international legal rules to limit the scourge of war, he achieved the adoption of the above-mentioned 1899 Convention based on the draft he had produced, and wrote a “saving” clause, seemingly intended only for the Convention in question, but which proved so successful that it ultimately received

28 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, UN Doc. A/51/218, 19 July 1996, available in English at: www.icj-cij.org/public/files/case-related/95/095-19960708-ADV-01-00-EN.pdf.

his name. The Martens Clause outlived its author, safely passing through the twentieth and into the twenty-first century, where it continues today to fulfil its noble mission of protecting the victims of war in different unforeseen situations.

In spite of this, though, academic recognition of and interest in the Clause were a long time in coming. In his scholarly writings, Martens himself did not focus his or his readers' attention on the proposal he had made to the Convention or on the role of this provision in humanizing the means and methods of war. He also ignored the question in his renowned work *The Contemporary International Law of Civilized Nations*, the fifth edition of which was published in 1905 – that is, well after the First Hague Conference of 1899.

For many years the Martens Clause also received little scholarly attention in Russian legal literature, but interest in the Clause and its significance for IHL has intensified in Russia over the last quarter of a century. Specialized publications have appeared on the problem of the humanization of armed conflict which examine, among other things, the Martens Clause, and dissertations are written on the subject. It should be noted that the Moscow delegation of the International Committee of the Red Cross (ICRC) has played a significant role in boosting interest in this field within the academic community of the post-Soviet area. Its active organizational and publishing work aimed at spreading knowledge of IHL has prompted an increasing number of both faculty and students to focus on the problem of the humanization of armed conflict.

A huge positive role in this process is also played by the International Academic and Practical Martens Readings Conference, which has taken place regularly over the past twenty years, traditionally organized by the ICRC, the Russian Association of International Law and St Petersburg State University, and held at the university's Faculty of Law. A question frequently discussed at these sessions is the scope and application of the Martens Clause in the changing conditions of modern armed conflicts. The outcomes of these deliberations are then often taken up in Russian and foreign academic publications.

So, how should the provisions of the Martens Clause be viewed and treated from today's perspective? On the one hand, there is nothing extraordinary about the provisions of the Martens Clause. It is a well-known fact that no convention, law, order or other regulatory act can cover the entire range of possible life situations, and there always are and will be some unregulated social "gaps" that lie outside the defined framework. This is typical of all regulatory and legal systems. On the other hand, with regard to armed conflicts and IHL, the lack of specific rules for specific situations often gives rise to numerous unwarranted disasters and atrocities. Therefore, for the international community and international law, as for the millions of actual and potential victims of armed conflict, the Martens Clause is of the utmost importance.

However, as is often the case with jurisprudence in relation to seemingly straightforward provisions, there is disagreement over the understanding and application of the Martens Clause. For example, there is controversy as to whether the provisions of the Clause belong to positive international treaty law or are a rule of customary international law. Yet, if one considers that no

international treaty can foresee all possible situations of armed conflict, and that the general rules of IHL are *erga omnes* in the modern world, then undoubtedly the Clause must fulfil its protective function precisely as a treaty-based rule for the parties to humanitarian conventions, and as a rule of customary law applicable to those parties to armed conflicts that, for one reason or another, have not signed up to the conventions. The inclusion of the Martens Clause in the main body of AP I means that it can be interpreted as a treaty-based *jus cogens* rule of IHL, but on the understanding that, in the absence of a positive treaty-based norm applicable to a given situation, the Clause must be invoked.

There are also differences in the perception and interpretation of the Martens Clause in the legal doctrine and practice of large, developed countries and smaller ones, and it is not easy to strike the right balance between the categories of “security requirements”, “military necessity” and “humanity”.

All of this is of particular importance in today’s world. Recent scientific and technical advances have led to the widespread use by States of information and telecommunications technology for military purposes, including the creation of cyber troops and the waging of cyber sabotage, cyber operations and cyber attacks on enemy targets, which inevitably cause increased destruction and intensify the suffering of their victims. In recent years, various means of information warfare have been actively used, ranging from media warfare to direct cyber attacks on the computer networks of enemy States. Information wars are increasingly becoming a new digital channel for transmitting aggression, and global information technology and social media are becoming a new kind of weapon.

In recent years, the modern world has faced a new global threat to all mankind – the COVID-19 pandemic, the danger of the spread of which increases significantly during military conflicts. This requires urgent discussion between scientists and practitioners of emerging military epidemiological situations in order to develop proposals for taking the necessary legal measures to address the situation. In this regard, it is worth welcoming the prompt appearance of a thorough scientific study on this issue by Patrick Leisure.²⁹ Leisure’s article comprehensively analyzes various approaches to dealing with the issue in order to contribute, as the author writes, to achieving the main goals of IHL – ensuring respect for the principles of humanity during armed conflicts, limiting unnecessary harm and suffering, and mitigating the devastating consequences of such conflicts, which are complicated by the pandemic.

Obviously, IHL is unable to regulate promptly all newly emerging military situations involving the use of information and telecommunications technologies or epidemiological threats. In the absence of clear international treaty norms governing the use of new technologies in the conduct of military operations and information wars and prohibiting their use in armed conflicts, the question arises as to whether it is possible and necessary to apply the Martens Clause to unregulated situations of

29 Patrick Leisure, “The Martens Clause, Global Pandemics, and the Law of Armed Conflict”. *Harvard International Law Journal*, Vol. 62, No. 2, 2021.

modern armed conflict. And here too, one must conclude, it is important for all parties to armed and associated conflicts that arise to be guided by the provisions of the Martens Clause.

That being said, the situation is complicated by the fact that the various actions enumerated above are often committed outside armed conflicts and do not fall formally and legally within the concept of armed aggression, although their consequences can seriously threaten the political independence, and sometimes the territorial integrity, of States.

All of this requires an in-depth legal analysis and should be the subject of a special group discussion. This was highlighted at the 14th International Academic and Practical Martens Readings Conference, held on 27 May 2021 at the Faculty of Law of St Petersburg University, which reaffirmed the need for a special consideration of the issue at the next conference.

Thus, to sum up, Martens' academic ideas and vision, his practical proposals and the unique clause he formulated, and to which the global academic community gave his name, are reflected in current IHL treaties – which is unequivocal recognition of the outstanding contribution of the Russian scholar and diplomat to humanizing the means and methods of warfare. Through his academic and diplomatic work, and his participation as a permanent delegate of Russia in all conferences of the Red Cross, Martens strove tirelessly to bring about the acceptance and consolidation of humane rules of warfare, earning for this the unofficial but honorary titles of the “soul of the Hague Peace Conferences” and “judge of the Christian world”, and going down in history as the author of a widely known, internationally acknowledged and noble legal principle that bears his name. With further adjustments and refinements to its content, the Martens Clause will continue to serve the protection of human rights in times of armed conflict and struggle, alas, for many years to come.

Religion and international humanitarian law

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Andrew Bartles-Smith manages the ICRC's Global Affairs Unit in Asia. He has many years of experience engaging with religious circles and non-State armed groups in the region, and has pioneered ICRC efforts to promote research and debate on IHL and religious teachings. He currently leads ICRC projects on Buddhism and IHL, and Hinduism and IHL, and recently established the ICRC's *Religion and Humanitarian Principles* website with Daniel Ratheiser and other colleagues, available at: <https://blogs.icrc.org/religion-humanitarianprinciples/>. Email: abartlessmith@gmail.com.

Abstract

This article explores the interface between religion and international humanitarian law (IHL), and the degree to which they might complement and reinforce each other. It examines some of the challenges inherent in regulating armed conflict and the understandable limitations of IHL in this respect, and argues that re-engagement with IHL's religious roots can help to alleviate them. Engagement with religious circles mobilizes the vast resources of religions to increase knowledge of IHL and corresponding religious norms, thereby enhancing their legitimacy across religious and cultural divides. This is most effective when comparative study of IHL and religious teachings stimulates mutual learning and debate, in which both correspondences and differences are embraced. In the absence of a strong legal enforcement regime, religions can reinforce military ethics by tapping deeply into the identities, motivations and moral values of many belligerents, and possess

* I would like to thank Bruno Demeyere, the Review's Editor-in-Chief, for encouraging me to write this article, and Dr Noel Maurer Trew and the Review's peer reviewers for their helpful input and comments. I would also like to thank Professor Kate Crosby, Irénée Herbet, Daniel Ratheiser and Lauren Armstrong for reviewing earlier drafts, and Peter Evans for a helpful conversation about military culture.

powerful means to socialize the rules of war and improve voluntary compliance. Introspective religious practices encourage the moral self-reflection that is most effective at internalizing norms in this respect, as well as providing belligerents with the spiritual and psychological support needed to bolster their resilience and enable them to perform with precision and restraint.

Keywords: IHL, ICRC, humanitarianism, international law, religion, morals, moral psychology, military ethics, military training, warrior codes, compliance, armed groups, clergy, chaplains.

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Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

The Lieber Code¹

In view of all this, why could not advantage be taken ... to solve a question of such immense and worldwide importance, both from the humane and Christian standpoint?

Henry Dunant²

Introduction

Nowhere are the limitations of the law more apparent than in the arena of war, and the implementation and enforcement of international humanitarian law (IHL) in anarchic and politically contested conflict zones is a perennial challenge. While the modern edifice of IHL is a remarkable achievement, and probably the most effective means so far developed to regulate armed conflict, it nevertheless has understandable limitations. The will and capacity of belligerents to follow IHL rules in the extreme circumstances of armed conflict are often severely compromised.³ Inevitably, IHL is also largely dependent on the States who are party to its treaties, and tends to privilege their interests over non-State actors who are not. Though great strides have been made to disseminate IHL in recent years, it is still relatively little known or understood in societies at large, and across cultural and religious divides. This affects how it is perceived, and therefore its legitimacy in many contexts.⁴

- 1 US Department of War, *Instructions for the Government of Armies of the United States in the Field*, General Order No. 100, 24 April 1863 (Lieber Code), Art. 15.
- 2 Henry Dunant, *A Memory of Solferino*, International Committee of the Red Cross (ICRC), Geneva, 1986, p. 116.
- 3 Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims", *International Review of the Red Cross*, Vol. 91, No. 874, 2009, p. 280; Marco Sassòli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges", *Yearbook of International Humanitarian Law*, Vol. 10, 2007, p. 46.
- 4 M. Sassòli, above note 3, p. 47; Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium", *American Journal of International Law*, Vol. 100, No. 1, 2006.

This article will argue that the interface between religion and IHL is considerable, and that these limitations can be alleviated, and adherence to common humanitarian norms improved, by more energetic engagement with religious circles, thereby reconnecting IHL to its religious roots. Religions laid many of the foundations of IHL, and still possess the influence and moral authority to back it up.⁵ The immense resources of religions are thereby mobilized to complement and reinforce IHL, and to regulate armed conflict on their own terms. Whereas a positive law perspective is vital to maintain consistency and preserve the logic of the law against competing requirements, it can sometimes tend to detach IHL from its moral and ethical underpinnings, thereby increasing its dependence on the State. It should ideally therefore be balanced by natural and customary law perspectives that connect IHL to sources of religious and moral authority beyond it. Crucially, religion taps deeply into the identities, motivations, emotions and moral psychology of many belligerents – the roots of their behaviour – helping them to internalize rules where enforcement falls short.

The States party to the Geneva Conventions and the components of the International Red Cross and Red Crescent Movement would appear to endorse this approach, at least in principle. The IHL Resolution at the 33rd International Conference of the Red Cross and Red Crescent, in 2019, stressed “the basic value of respect for human dignity in times of armed conflict, which is not only enshrined in IHL but also in the rules and principles of different faiths and traditions, as well as military ethics”, and recognized “the importance of dialogue among relevant actors and ongoing efforts in this respect”.⁶

Compliance with IHL is often largely dependent on factors outside of it, and it is the interplay between IHL and diverse practical, strategic, socio-political, normative and psychological considerations at both group and individual level that determines its effectiveness.⁷ Possible avenues to improve compliance extend from military training into the domains of politics, education, psychology, science and the arts. They range from embedding IHL norms and creating the political will for States and non-State armed groups to implement IHL, through to influencing the motivations of individual combatants and boosting their psychological resilience.⁸ Religious circles cover most of these bases, and have the clout and resources, moreover, to make a significant impact.

Broadening the perspectives of belligerents is vital in this respect. Overemphasis on narrowly defined military objectives at the expense of humanitarian considerations and a truly strategic vision is counterproductive, and can be the difference between hollow short-term military success and ultimate

5 Michael Bryant, *A World History of War Crimes: From Antiquity to the Present*, 2nd ed., Bloomsbury, London, 2021 (Kindle ed.).

6 International Conference of the Red Cross and Red Crescent, *Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law*, 2019, preambular para. 13, available at: www.icrc.org/en/document/bringing-ihl-home-guidelines-national-implementation-international-humanitarian-law (all internet references were accessed in May 2022).

7 M. Sassòli, above note 3, p. 73.

8 *Ibid.*, p. 52.

political victory.⁹ Normative elements dictate the field of what is politically acceptable within any particular context, and are, therefore, a key component of strategy.¹⁰ This is why even sober realists like Kautilya and Machiavelli understood the strategic importance of religion, and could also be advocates of restraint.¹¹ Indeed, the religious environment is often as important as factors such as the physical geography of the area concerned. Religious or sacred authority, rituals, time and space still profoundly shape the nature of armed conflicts and how they are fought, and true situational awareness requires comprehension of both the internal and external environments of the belligerents, and how these influence their behaviour.¹²

The first and second sections of this article explore the interconnections between religion, IHL and human psychology, and highlight the continued relevance of religion for the regulation of armed conflict today. The third and fourth sections then examine how aspects of religion might compensate for weak IHL enforcement in order to improve compliance with IHL or corresponding norms. The fifth and sixth sections explore the potential of religion to enhance military ethics and other dimensions of military training that promote restraint and bolster the resilience of combatants. Finally, the last three sections consider how religious actors and resources can contribute to more effective embedding of IHL and corresponding religious norms across cultural and religious divides, also drawing on the experiences of the International Committee of the Red Cross (ICRC).

Background

Most people in the world are religious, and religions have traditionally embodied the essence of entire cultures and civilizations, reaching into every aspect of human life. Of the 8 billion people in the world, around 84% identified with a religious group in 2015.¹³ 31% of these were Christian, 24% Muslim, 15% Hindu and 7% Buddhist, with many more adhering to personal religious beliefs.¹⁴ In two thirds of the countries of the world, over 95% of the population were religious in 2013, and religion is therefore particularly relevant to conflicts that might afflict them.¹⁵ Far

9 David Whetham, "The Just War Tradition: A Pragmatic Compromise", in David Whetham (ed.), *Ethics, Law and Military Operations*, Palgrave Macmillan, Basingstoke, 2011, p. 85.

10 Karin M. Fierke, "Constructivism", in Tim Dunne, Milja Kurki and Steve Smith (eds), *International Relations Theories*, Oxford University Press, Oxford, 2013.

11 M. Bryant, above note 5, p. 319; D. Whetham, above note 9, p. 67; David J. Lonsdale, "A View from Realism", in D. Whetham (ed.), above note 9, p. 39.

12 Ron E. Hassner, *Religion on the Battlefield*, Cornell University Press, Ithaca, NY, 2016, pp. 8, 11.

13 Conrad Hackett and David McClendon, "Christians Remain World's Largest Religious Group, But They Are Declining in Europe", Pew Research Center, 5 April 2017, available at: www.pewresearch.org/fact-tank/2017/04/05/christians-remain-worlds-largest-religious-group-but-they-are-declining-in-europe/.

14 *Ibid.*

15 Institute for Economics and Peace, *Five Key Questions Answered on the Link Between Peace and Religion: A Global Statistical Analysis on the Empirical Link Between Peace and Religion*, Sydney, 2015, p. 3, available at: www.economicsandpeace.org/wp-content/uploads/2015/06/Peace-and-Religion-Report.pdf.

from bowing to the forces of modernization, religion has been incentivized by them, and expanded rapidly into the vacuum left by the fall of communism. While there has been a decline in religiosity in predominantly higher-income countries over the past decade, the percentage of religious people as a share of the world's population is predicted to keep on rising.¹⁶ Most belligerents are therefore religious, and religion is on the front line of many armed conflicts today, including interconnected global insurgencies in which secularism itself comes under attack.¹⁷

Religion becomes even more important to people in times of crisis and insecurity, often helping them to cope with the stress, uncertainty and lack of control.¹⁸ Even those who are ordinarily sceptical can find themselves turning to religion and belief as other institutions and sources of support fail them, and to reconcile themselves with the possibility of their own death.¹⁹ Religion is therefore especially important for many of those who experience armed conflict, and the aphorism “There are no atheists in foxholes” reflects the reality that combatants often appeal to a higher power when under extreme threat.²⁰

Though it is often presumed that the religiosity and ritual of medieval warfare are a thing of the past, religion is still everywhere in the battlespace, and many belligerents are animated by similar chivalric or warrior ideals.²¹ Troops frequently described seeing visions of angels and saints in the trenches during World War I, and General Patton instructed his troops to pray fervently for the rain to stop in northern France during World War II.²² In many contexts, prayers, benedictions, fasting, absolutions and other religious rituals are as important to belligerents now as they have ever been. Combatants continue to pray to God (or gods) to protect them during the fighting, and some sacrifice themselves in their name. A study of religion in the US military revealed that, at moments of crisis, troops want simply to know that God is with them, or as one soldier in Iraq put it, “I wanna’ know that Jesus is in my Humvee.”²³

16 Even in Europe there are signs that religious visibility is increasing; see Ronald F. Inglehart, *Religion’s Sudden Decline: What’s Causing It, and What Comes Next?*, Oxford University Press, Oxford, 2020, pp. 1, 78, 81, 82; Ronald F. Inglehart, Jon Miller, Michael Dennis, Stephanie Jwo and Gergely Rosta, “Religion’s Sudden Decline, Revisited”, *Center for Political Studies Blog*, 26 February 2021, available at: <https://cps.isr.umich.edu/news/religions-sudden-decline-revisited/>; Pew Research Center, *The World’s Changing Religious Landscape*, 5 April 2017, available at: www.pewresearch.org/religion/2017/04/05/the-changing-global-religious-landscape/; Titus Hjelm, “Understanding the New Visibility of Religion”, *Journal of Religion in Europe*, Vol. 7, No. 3–4, 2014; C. Hackett and D. McClendon, above note 13.

17 Mark Juergensmeyer, Margo Kitts and Michael Jerryson, “Introduction: The Enduring Relationship of Religion and Violence”, in Mark Juergensmeyer, Margo Kitts and Michael Jerryson (eds), *Violence and the World’s Religious Traditions*, Oxford University Press, Oxford, 2017, p. 6 (Kindle ed.).

18 Gladys Ganiel, Heidemarie Winkel and Christophe Monnot, *Religion in Times of Crisis*, Brill, Leiden, 2014; Dominic Johnson, *God Is Watching You: How the Fear of God Makes Us Human*, Oxford University Press, New York, 2016, p. 108 (Kindle ed.).

19 D. Johnson, above note 18, p. 107.

20 Stefan Lunze, “Serving God and Caesar: Religious Personnel and Their Protection in Armed Conflict”, *International Review of the Red Cross*, Vol. 86, No. 853, 2004, p. 69.

21 R. E. Hassner, above note 12, p. 113.

22 The rain stopped – a modern-day miracle. See R. E. Hassner, above note 12, p. 110.

23 Stephen Mansfield, *Faith of the American Soldier*, Frontline Publishers, Lake Mary, FL, 2005, pp. 61–62, quoted in R. E. Hassner, above note 12, p. 122.

War is one of humanity's oldest and most enduring institutions, and the genealogy of IHL can be traced back thousands of years in provisions to limit its suffering.²⁴ IHL's closest ancestor is the Christian just war tradition, whose *jus ad bellum* and *jus in bello* architecture and core criteria are now embodied respectively in the UN Charter and IHL.²⁵ Inaugurated by St Augustine of Hippo (353–430) to reconcile early Christian pacifism with the Roman Empire's prerogative to wage war, it was elaborated by St Thomas Aquinas (1225–74) and a long line of Christian theologians over the centuries.²⁶ But just war and IHL principles of distinction and proportionality can be found in many religions and cultures, together with provisions to care for the wounded, prisoners and other victims of armed conflict.²⁷ The Christian tradition was fed by ancient Greek and Roman ideas, and informed by Jewish and Islamic scholarship. Indeed, rules of war in Islamic international law (*siyar*) were in advance of the West in many respects, and Mohammad Al-Shaybani's eighth-century treatise *Al-Siyar Al-Kabir* compares in complexity to the work of much later European writers.²⁸ Ancient Indian and Chinese traditions were particularly highly developed, and included a number of rules more humane than those found in modern IHL, challenging ideas of what is permissible in war even today.²⁹ The ethics of countless other warrior traditions, from Homeric heroes to Pacific Islanders, incorporate religious ideas, and the Christian faith of Henry Dunant and his collaborators was a motivating force behind their inauguration of IHL and establishment of the ICRC.³⁰ IHL has therefore been deeply influenced by religion, whose conceptions of morality are very much part of its DNA.³¹ Many policy-makers, military personnel and non-State armed group members who must apply IHL are animated by religion to this day.³²

24 David Whetham, "Ethics, Law and Conflict", in D. Whetham (ed.), above note 9, p. 10.

25 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, Geneva, 2016, p. 27.

26 M. Bryant, above note 5, p. 88.

27 *Ibid.*; Jonathan Fox and Shmuel Sandler, *Bringing Religion into International Relations*, Palgrave Macmillan, New York, 2004, p. 167.

28 David B. Burrell, "Thomas Aquinas and Islam", *Modern Theology*, Vol. 20, No. 1, 2004; Khaled Ramadan Bashir, *Islamic International Law: Historical Foundations and Al-Shaybani's Siyar*, Edward Elgar, Cheltenham, 2018.

29 See, for example, L. R. Penna, "Written and Customary Provisions Relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in Ancient India", *International Review of the Red Cross*, Vol. 29, No. 271, 1989; Andrew Bartles-Smith *et al.*, "Reducing Suffering during Conflict: The Interface between Buddhism and International Humanitarian Law", *Contemporary Buddhism*, Vol. 21, No. 1–2, 2021; G. I. A. D. Draper, "The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare", *International Review of the Red Cross*, Vol. 35, No. 305, 1995.

30 See ICRC, *Under the Protection of the Palm: Wars of Dignity in the Pacific*, 2009, available at: www.icrc.org/en/doc/resources/documents/publication/pwars-of-dignity-pacific.htm; Cédric Cotter, "The Religious Convictions of Henri Dunant, Founder of the ICRC", *Religion and Humanitarian Principles Blog*, 11 August 2021, available at: <https://blogs.icrc.org/religion-humanitarianprinciples/the-religious-convictions-of-henri-dunant-founder-of-the-icrc/>.

31 J. Fox and S. Sandler, above note 27, p. 54.

32 *Ibid.*, p. 163.

Important considerations relevant to IHL and religion

IHL as a secular Western institution?

Despite this legacy, IHL is a secular body of law. Some experts are therefore hesitant to engage in comparative studies on IHL and religion for fear of muddying the waters or jeopardizing the neutrality of IHL or the ICRC. Having shed the religious trappings of the just war tradition, and having secularized religious norms now embodied in hard-fought IHL treaties, there is understandable apprehension about re-engaging with religion.³³ This is particularly the case where some religious teachings are not in conformity with IHL, or are regarded as non-rational or otherwise problematic.

But IHL implementation is not secured by retreating from the field of debate or shying away from other cultures. Given that law, religion and culture still interpenetrate in all but the most secular contexts, IHL frequently requires some degree of religious or cultural validation if it is to gain real traction in societies at large, and across religious and cultural divides. Interchange and debate are crucial for the development and propagation of the law, and while religions can sometimes pose challenges to IHL, they also offer a wealth of opportunities to support and promote it. Neglecting to take advantage of this religious inheritance, and the fact that the essence of IHL was pioneered by religious leaders and scholars in all cultures, cuts IHL off from the religious and ethical ideas from which it was distilled, and which might continue to nourish and feed it. Decontextualized universalism can be bland and self-defeating, and is a missed opportunity to enhance the legitimacy of IHL with many groups.³⁴

However universal its content, IHL is nonetheless, by design, an essentially Western institution, and engagement with non-Western traditions can help counter perceptions among some that it is “Western rules” or an outside imposition.³⁵ Religious resources and institutions can help to situate IHL with respect to local normative systems, thereby making it morally relevant to the context and enhancing rather than compromising its universal appeal. While care has to be taken that IHL does not give legitimacy to harmful practices, the consequences of failing to engage with religious circles, potentially sidelining IHL or making it irrelevant, should also be considered. Ignoring important religious stakeholders can sometimes show a lack of respect for the culture, and this can translate into indifference or opposition to IHL.

33 Such apprehension about engaging with religion is not confined to IHL, but is seen in international law more broadly. See, for example, David Kennedy, “Images of Religion in International Legal History”, in Mark W. Janis and Caroline Evans (eds), *Religion and International Law*, Martinus Nijhoff, The Hague, 1999.

34 René Provost, “The International Committee of the Red Widget? The Diversity Debate and International Humanitarian Law”, *Israel Law Review*, Vol. 40, No. 2, 2007, p. 39.

35 Salvatore Caserta, “Western Centricism, Contemporary International Law, and International Courts”, *Leiden Journal of International Law*, Vol. 34, No. 2, 2021; Brian-Vincent Ikejiaku, “International Law is Western Made Global Law: The Perception of Third-World Category”, *African Journal of Legal Studies*, Vol. 6, No. 2–3, 2014.

Secularism also has many meanings, encompassing world views whose impartiality can be challenged. “Soft” pluralist forms of secularism are generally tolerant of religion, embodying equal treatment for all regardless of belief and facilitating open debate between diverse religious, philosophical and scientific perspectives.³⁶ “Harder” forms of secularism are closer to atheism and can be antagonistic towards any expression of religion at all.³⁷ Indeed, some regard secularism as an anti-religious Western ideology, while others believe that it nevertheless bears the imprint of the Christian culture from which it emerged.³⁸ Secularism is not therefore necessarily unbiased, or perceived as such, and IHL must be amenable to both religious and non-religious perspectives.

While in recent years humanitarians have shown renewed appreciation for the importance of engaging with religious circles, the functional secularism of some organizations has tended to marginalize religion, often in the mistaken belief that neutrality necessitates keeping a distance from religious stakeholders.³⁹ Indeed, the idea of “neutrality” is associated with passivity or detachment in a way that “impartiality” is not, and can sometimes foster an aloofness which is inconducive to effective humanitarian action.⁴⁰

Of course, there are questions as to the degree to which the domains of law and religion can be compared at all, and how they are demarcated or defined. Comparing IHL with such an all-encompassing phenomenon as “religion” therefore risks overgeneralization, and is not to compare like with like. Accordingly, this article can only highlight a few intersections of particular relevance. In some respects, even the term “religion” itself is a modern Western construct, since it defines religion as something separate from the rest of human life, when historically, and still in many contexts, the two are deeply intertwined.⁴¹ Concepts of religion, law and culture are often still inseparable, and care must be taken not to view them through a distorting Western lens.⁴² In some cultures, for example, there is not even a word for religion, since there is nothing to define it against.⁴³

36 Barry A. Kosmin, “The Vitality of Soft Secularism in the United States and the Challenge Posed by the Growth of the Nones”, in Jacques Berlinerblau, Sarah Fainberg and Aurora Nou (eds), *Secularism on the Edge: Rethinking Church-State Relations in the United States, France, and Israel*, Palgrave Macmillan, New York, 2014.

37 *Ibid.*

38 Reut Yael Paz, “Religion, Secularism, and International Law”, in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016.

39 Alistair Ager and Joey Ager, “Why Humanitarianism Doesn’t Get Religion... and Why It Needs To”, in *Faith, Secularism, and Humanitarian Engagement: Finding the Place of Religion in the Support of Displaced Communities*, Palgrave Pivot, New York, 2015.

40 Dominick Donald, “Neutral Is Not Impartial: The Confusing Legacy of Traditional Peace Operations Thinking”, *Armed Forces & Society*, Vol. 29, No. 3, 2003, pp. 416–417.

41 Winnifred Fallers Sullivan and Robert A. Yelle, “Law and Religion: An Overview”, *Encyclopedia.com*, 2005; W. L. King, “Religion (First Edition)”, in Mircea Eliade (ed.), *The Encyclopedia of Religion*, Vol. 12, Macmillan, New York, 1987, p. 282.

42 *Ibid.*

43 Brent Nongbri, *Before Religion: A History of a Modern Concept*, Yale University Press, New Haven, CT, 2013.

Some religions are also more legalistic in nature than others. While Abrahamic religions, for example, tend to prioritize the laying down of rules to be obeyed, Buddhism is primarily an ethical system concerned with addressing the psychological roots of behaviour.⁴⁴ Each religion therefore has its own take on IHL and the regulation of armed conflict, revealing how IHL might be variously received and interpreted in different contexts. Indeed, it is this religious and cultural diversity that makes comparison with IHL so enriching.

IHL as a universal moral code?

At one level, law and religion express a moral consensus about what is right and wrong within a society, and are influenced by the particular environments and cultures in which they develop. But while there are important differences between the Judeo-Christian, Islamic, Indian, Chinese, African and Meso-American traditions, for example, laws of war that limit violence nevertheless exhibit striking similarities across religions and cultures.⁴⁵ Modern IHL therefore represents an unusual degree of cross-cultural consensus, embodying many rules that are close to being axiomatic universal norms. IHL rules are remarkably accommodating to other cultures, and the rich legacy of restraint in many non-Western traditions is increasingly being explored.⁴⁶

Though there has certainly been some degree of cross-pollination, and common structural factors in all wars naturally lead to similar solutions, these similarities are also a function of our shared moral psychology and the biological bases of our thoughts and emotions.⁴⁷ Recent findings in psychology and neuroscience suggest that the laws of war, particularly those concerning the protection of non-combatants, mirror universal moral sentiments.⁴⁸ Indeed, the core assumption of natural law theory is that we share a moral conscience that transcends cultures and informs the content of international law.⁴⁹ Research confirms, moreover, that morals are more powerful than law in influencing behaviour, and that people are more motivated to adhere to the law if it resonates with their identities and moral values.⁵⁰ Religion deeply informs both of these, and has powerful means to improve compliance with IHL and equivalent religious norms.⁵¹

44 Rebecca Redwood French, “What Is Buddhist Law: Opening Ideas”, *Buffalo Law Review*, Vol. 63, No. 4, 2015; Damien Keown, *Buddhist Ethics: A Very Short Introduction*, Oxford University Press, Oxford, 2005 (Kindle ed.).

45 M. Bryant, above note 5.

46 Examples of this work over many years, including groundbreaking articles from the *Review*, are showcased on the ICRC’s *Religion and Humanitarian Principles Blog*, available at: <https://blogs.icrc.org/religion-humanitarianprinciples/>.

47 Richard Wrangham, *The Goodness Paradox: How Evolution Made Us Both More and Less Violent*, Profile Books, London, 2019.

48 David Traven, *Law and Sentiment in International Politics: Ethics, Emotions, and the Evolution of the Laws of War*, Cambridge University Press, Cambridge and New York, 2021, p. 5.

49 *Ibid.*, pp. 17, 266.

50 Alan Page Fiske and Tage Shakti Rai, *Virtuous Violence: Hurting and Killing to Create, Sustain, End, and Honor Social Relationships*, Cambridge University Press, Cambridge, 2014.

IHL's natural and customary law dimensions still preserve much of this religious legacy and arguably confer on it the character of a moral system in some respects – a “law of humanity” which can mitigate the power of States.⁵² Customary IHL extends the reach of core IHL principles beyond the lacunae of treaty law and embodies peremptory *jus cogens* norms that are somewhat akin to a moral code.⁵³ Concepts of chivalry and humanism are therefore integral to IHL, whose norms can be applied as both moral and legal requirements.⁵⁴ The Martens Clause, which first appeared in the preamble to the 1899 Hague Convention II, states:

Until a more complete code of the laws of war is issued ..., populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.⁵⁵

The Martens Clause thus provides a thin but crucially important thread linking the positive norms of IHL to natural law, and to the morals and inner life of belligerents.⁵⁶ While the law is necessary, it is not always sufficient for changing behaviour on the battlefield, and there seems to be little reason to underplay the moral force of IHL provisions if belligerents will be more likely to comply with them. This powerful moral quality also appeals to religious actors.⁵⁷

Some IHL rules, particularly those related to proportionality, are open to subjective interpretation, and also therefore entail a degree of moral deliberation.⁵⁸ Interpretations of IHL that are overly permissive or restrictive with regard to the use of force have sometimes tended to undermine it, and the role that religion can play in interrogating the conscience of decision-makers is clearly relevant, and overlaps with the field of military ethics.⁵⁹ Walzer argues with

51 Sam A. Hardy, Amber R. C. Nadal and Seth J. Schwartz, “The Integration of Personal Identity, Religious Identity, and Moral Identity in Emerging Adulthood”, *Identity*, Vol. 17, No. 2, 2017; Pamela Ebstyn King, “Religion and Identity: The Role of Ideological, Social, and Spiritual Contexts”, in James L. Furrow and Linda M. Wagener (eds), *Beyond the Self*, Routledge, London, 2019; A. Michael Maclean, Lawrence J. Walker and M. Kyle Matsuba, “Transcendence and the Moral Self: Identity Integration, Religion, and Moral Life”, *Journal for the Scientific Study of Religion*, Vol. 43, No. 3, 2004.

52 Hilly Moodrick-Even Khen, “Aidōs and Dikē in International Humanitarian Law: Is IHL a Legal or a Moral System?”, *The Monist*, Vol. 99, No. 1, 2016.

53 *Jus cogens* means “compelling law” and describes peremptory norms or fundamental principles of international law from which no derogation is permitted. *Ibid.*; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005.

54 H. Moodrick-Even Khen, above note 52, p. 34.

55 N. Melzer, above note 25, pp. 24–25.

56 Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict”, *International Review of the Red Cross*, Vol. 37, No. 317, 1997, available at: www.icrc.org/en/doc/resources/documents/article/other/57jnhy.htm.

57 Dale Stephens, “Behaviour in War: The Place of Law, Moral Inquiry and Self-identity”, *International Review of the Red Cross*, Vol. 96, No. 895–896, 2014.

58 H. Moodrick-Even Khen, above note 52, p. 36; Laurent Gisel, *The Principle of Proportionality in the Rules Governing the Conduct of Hostilities under International Humanitarian Law*, International Expert Meeting, Quebec, 22–23 June 2016, p. 23.

regard to just war theory, for example, that simply not to intend the death of civilians is insufficient, and that collateral damage (the principle of double effect) is justified only when there is a double intention not just to accept the likelihood or possibility of collateral damage but to actively minimize it as far as possible.⁶⁰ “What we look for in such cases is some sign of a positive commitment to save civilian lives. Not merely to apply the proportionality rule and kill no more civilians than is militarily necessary.”⁶¹

Religion in war: Problem or solution?

Religion is commonly regarded as a driver or exacerbator of, rather than a solution to, armed conflict, and has often been instrumentalized to that effect. Most major religious traditions include ideas of sacrifice and cosmic war of good against evil that can be used to justify acts of real war, and history is replete with holy wars, whether in the service of States or to overthrow them.⁶² Some religious texts can be interpreted to discriminate against people on religious grounds, and to reinforce group identities to the exclusion of others. Non-believers have been stripped of religious protections and subjected to unlimited violence, and religion has frequently incentivized victimization rather than restraint.⁶³ In recent years religious extremism has been associated with terrorist violence, and it has long endorsed interpretations of religion in which messianic or apocalyptic ideas justify mass murder.⁶⁴ Richard Dawkins remarks of religion, “What a weapon! Religious faith deserves a chapter for itself in the annals of war technology”, and Samuel Huntington argued presciently in his *Clash of Civilizations* thesis that with the demise of communism, wars would again be fought primarily along the fault lines of religious and cultural identity.⁶⁵ Indeed, the few mentions of religion in the Geneva Conventions refer to how their provisions should be applied without “any adverse distinction based [on] religion”, among other criteria.⁶⁶

But religion is just one of many contributing factors to armed conflict, and while it is frequently an organizing principle, it is less often the dominant impelling

59 N. Melzer, above note 25, p. 9.

60 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 5th ed., Basic Books, New York, 1997, p. 156 (Kindle ed.); see also Ian Henderson and Kate Reece, “Proportionality under International Humanitarian Law: The Reasonable Military Commander Standard and Reverberating Effects”, *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2018.

61 M. Walzer, above note 60; see also D. Traven, above note 48, pp. 5–6. Traven argues that IHL needs to be improved to compensate for traits of our moral psychology which assign disproportionately greater moral relevance to intentional as opposed to “unintentional” killing of civilians. Walzer’s call for a positive commitment to save civilian lives rather than devaluing them as “collateral damage” is therefore even more important.

62 M. Juergensmeyer, M. Kitts and M. Jerryson, above note 17.

63 *Ibid.*; Jenni Mitchell, *Rethinking Rebel Violence: The Incentives for Victimisation and Restraint in Modern Warfare*, Routledge, London, forthcoming.

64 M. Bryant, above note 5, p. 305.

65 Richard Dawkins, *The Selfish Gene*, Oxford University Press, Oxford, 1989, p. 331; Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, 1996.

66 See, for example, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 27.

force.⁶⁷ Statistically speaking, factors such as corruption, political terror, gender relations, economic inequality and political instability play a greater role in contributing to conflict, and religion has only limited explanatory power in this respect.⁶⁸ Many contemporary studies tend to fixate upon only a few religious indicators – often religious identity – as a cause of war, rather than studying how the full panoply of religious practice and experience affects war’s conduct.⁶⁹ Indeed, religion has long played a key role in reducing and regulating armed conflict, disseminating and institutionalizing the humanitarian norms upon which the instruments of international law are built. While religion is prone to instrumentalization and has often been used to facilitate conflict, or as a vehicle for the exclusion or oppression of other groups, its inclusive aspects have promulgated the universal humanitarian principles that have sought to prevent war and minimize the suffering that it causes.⁷⁰ Most religions are pluralistic, contain a spectrum of opinion, and are a ferment of dialogue and debate with which the humanitarian community should engage.

Whether expressed in religious, ethnic, nationalist or indeed scientific registers, the root causes of conflict are functions of our individual and group psychology, and religion can both inhibit and provoke violence depending on the situation.⁷¹

Though attention often focuses on IHL violations carried out in the name of religion, the good that it can do during armed conflict is frequently underplayed. While the term “humanitarian” as it is now commonly understood emerged only in the nineteenth century, the altruism it describes has a long religious lineage.⁷² Charity is a core component of the world’s major religions, and humanitarian values genuinely matter in religious circles, which have been engaged in charitable and humanitarian action for hundreds, if not thousands, of years.⁷³ In all significant respects, religious actors invented humanitarian action, and they have contributed to the establishment of secular organizations like the ICRC.

Faith-based organizations often still outstrip other humanitarian actors in the sheer scope and volume of their activities, whether at international or grassroots level. They are among the first and most effective organizations to deploy to conflict and emergency situations, and new religious charities are emerging all the time, many at the forefront of humanitarian innovation and entrepreneurship. In this

67 Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion*, Vintage Books, New York, 2012, p. 312.

68 Institute for Economics and Peace, above note 15. For a very brief insight into how gender issues can be a causal factor in conflict, see Jenny Birchall, “Gender as a Causal Factor in Conflict”, *K4D*, 28 February 2019, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/549_Gender_as_A_Causal_Factor_in_Conflict.pdf

69 R. E. Hassner, above note 12, p. 4.

70 Mashood A. Baderin, “Religion and International Law: Friends or Foes?”, SOAS School of Law Research Paper Series No.4, 2010, p. 649.

71 R. E. Hassner, above note 12.

72 Katherine Davies, *Continuity, Change and Contest: Meanings of ‘Humanitarian’ from the ‘Religion of Humanity’ to the Kosovo War*, Humanitarian Policy Group Working Paper, August 2012.

73 The Order of Malta, for example, has been engaged in humanitarian relief for over 900 years. See: www.orderofmalta.int/sovereign-order-of-malta/.

respect they represent both the past and future of humanitarian action, as well as being among the most important custodians of the humanitarian spirit and principles upon which humanitarian law and action have been built. While the proselytizing work of some faith-based organizations can do damage to other cultures, many are more respectful of local communities than organizations that have a secular agenda or believe that the “humanitarian imperative” gives them license to override local sensitivities.⁷⁴

Religion and the psychology of armed conflict

A propensity towards supernatural and religious thinking appears to be psychologically – indeed, biologically – hardwired. Humans are predisposed, for example, to perceive mind–body dualism and supernatural agency, as well as to believe in a just world.⁷⁵ Some cognitive scientists regard religion as a highly effective evolutionary adaptation, enabling large-scale cooperation in complex societies, not least to engage in war.⁷⁶

Psychological research indicates that most violence is morally motivated to regulate social relationships, and deep-seated motivations for unity, status, equality and proportionality underlie most moral behaviour.⁷⁷ These predispose people to form groups on the slightest pretext, and to favour the in-group, due to intuitive zero-sum rivalries for resources with other groups.⁷⁸ People fight, if necessary, to achieve belonging and status, both within their group and with respect to other groups.⁷⁹ Though the motivations of belligerents are of course complex, and many might be driven, for example, by more mercenary or monetary incentives, at a psychological level most armed conflicts can largely be attributed to the desire to belong to a group, and to moralistic sensitivity to the group’s status and to perceived injustice or offence.⁸⁰

According to the virtuous violence theory of Alan Page Fiske and Tage Shakti Rai, “[w]hatever its origin, group conflict does not produce violence without a consensus among the in-group, or at least its leaders, that another group has done something wrong and harmful, something dangerous”, leading to moral outrage.⁸¹ One particularly strong moral motivator is the desire for vengeance, to “put the other group in its place” or “teach it a lesson”.⁸² Atrocities

74 See, for example, ICRC, *Regional Conference on Humanitarian Access and Negotiation in Asia*, 2018, available at: <https://blogs.icrc.org/religion-humanitarianprinciples/asia-regional-conference-on-humanitarian-negotiation-and-access/>; Nicholas Onuf, “Humanitarian Intervention: The Early Years”, *Florida Journal of International Law*, Vol. 16, No. 4, 2004; Hugo Slim, “Claiming a Humanitarian Imperative: NGOs and the Cultivation of Humanitarian Duty”, *Refugee Survey Quarterly*, Vol. 21, No. 3, 2002.

75 D. Johnson, above note 18, pp. 98–137.

76 R. Wrangham, above note 47; D. Johnson, above note 18, p. 170.

77 A. P. Fiske and T. S. Rai, above note 50, pp. 13, 18.

78 Pascal Boyer, *Minds Makes Societies*, Yale University Press, New Haven, CT, 2018, loc. 673, 696 (Kindle ed.).

79 Mike Martin, *Why We Fight*, Oxford University Press, Oxford, 2018, p. 1.

80 Mary Kaldor, “In Defence of New Wars”, *Stability: International Journal of Security and Development*, Vol. 2, No. 1, 2013.

81 A. P. Fiske and T. S. Rai, above note 50, p. 208.

such as genocide and ethnic cleansing are committed where in-group and out-group identities are so circumscribed that the out-group is seen as a threat to the purity of the in-group, and is dehumanized and regarded as a “filthy infestation”.⁸³ Therefore, far from killing because of a disintegration of morals, groups kill because it feels morally right, when the out-group is deemed guilty of a moral transgression.⁸⁴ Indeed, the very concept of just war is predicated on the need to redress injustice.

Religion has traditionally provided the moral framework that binds large groups or moral communities together, enabling them to cooperate with one another beyond the ties of kinship.⁸⁵ Religion also deeply informs ethnicity and nationalism, which perform a similar role.⁸⁶ Durkheim described religion as a “unified system of beliefs and practices relative to sacred things ... which unite into one single moral community ... all who adhere to them”.⁸⁷ Jonathan Haidt’s definition of a moral system gives a fuller idea of religion’s scope and relevance: “interlocking sets of values, virtues, norms, practices, identities, institutions, technologies, and evolved psychological mechanisms that work together to suppress or regulate self-interest and make cooperative societies possible”.⁸⁸

Religions both express and modify human groupism and morally motivated violence. Many religions have pioneered the expansion of in-groups or moral communities beyond the confines of ethnicity, or have rejected groups to embrace universalism, sometimes beyond the confines of humanity itself.⁸⁹ Since religions regulate the moral conduct of the group, they have also prevented, channelled and controlled expressions of morally motivated group violence, thereby regulating the conduct of war.

Traditionally, both religion and law have connected moral judgement to moral rules, assuming that so far as rules are mentally recalled and thought to apply to a particular situation, they will have a causal effect on moral or legal judgement and behaviour.⁹⁰ In recent years, this idea has been challenged in particular by Haidt’s social intuitionist model, which suggests that most moral judgement is unconscious and intuitive, and that conscious moral reasoning is largely employed *post hoc* to justify judgements already made.⁹¹ The important role that emotions play in cognition and moral judgment has also become clear.⁹²

82 *Ibid.*

83 *Ibid.*, p. 210

84 *Ibid.*, pp. i, 95–96; Richard Ned Lebow, *Why Nations Fight: Past and Future Motives for War*, Cambridge University Press, Cambridge, 2010.

85 D. Johnson, above note 18.

86 Anthony Smith, “Ethnic Election and National Destiny: Some Religious Origins of Nationalist Ideals”, *Nations and Nationalism*, Vol. 5, No. 3, 1999; J. Haidt, above note 67.

87 J. Fox and S. Sandler, above note 27, p. 57.

88 J. Haidt, above note 67, p. 314

89 The common sentience of Buddhism, for example. See A. Bartles-Smith *et al.*, above note 29.

90 Ron Mallon and Shaun S. Nichols, “Rules”, in John M. Doris *et al.*, *The Moral Psychology Handbook*, Oxford University Press, Oxford, 2010, pp. 297–298.

91 *Ibid.*, p. 299; J. Haidt, above note 67, p. 367.

92 R. Mallon and S. S. Nichols, above note 90, p. 318.

In fact, it appears that both rules and moral intuitions are important, and that quick (intuitive) and slow (reasoned or rational) moral judgements work together in a dual process of conscious and unconscious moral behaviour.⁹³ As this process becomes overburdened or exhausted, however, subconscious moral intuitions tend to take over.⁹⁴ Such is the case during the extreme circumstances of armed conflict, when fatigue, high stress and strong emotions can impair or overload the cognitive and affective faculties, and instincts can tend to override reason.⁹⁵ Rules therefore remain important, but belligerents' ability to adhere to them can be compromised.⁹⁶

Religions have long probed deeply into the underlying emotions and motivations of those involved in armed conflict, and modern psychological and neuroscience research validates many of their insights. Indeed, both religion and psychology share a healthy appreciation for the limits of our human faculties, and of the assumption that we are always rational actors. Their awareness of the cognitive and emotional impairment caused by stress and trauma, and the solutions they have found to cope with them, are highly relevant to the conduct of war, and can bolster the resilience, moral fortitude and performance of combatants, better enabling them to act with precision and restraint.

Religious underpinnings of international law

Comparing religion with law interrogates the very nature of law itself and its relationship to the State and the individual, which can be understood and approached in different ways. Whereas legal positivism regards the existence and content of the law as dependent on social facts, and not necessarily on the law's merits or demerits, other philosophies and religions regard law as law only so far as it maps onto ethics and morality, or some conception of natural or divine law.⁹⁷

Law and religion have long been deeply interconnected, and the underpinnings of most modern legal systems can be traced back to religious and transcendental ideas – specifically, in the case of Western law, to those of the Roman Empire and Catholic Church.⁹⁸ Indeed, Christianity was used as an explicit justification and basis for Western law until recently.⁹⁹

The relationship between religion and law in the West, and in much of the rest of the world, has nevertheless been characterized by increasing separation and

93 *Ibid.*, p. 301.

94 *Ibid.*

95 Elizabeth A. Stanley, "Cultivating the Mind of a Warrior", *Inquiring Mind*, Vol. 30, No. 2, 2014, available at: www.inquiringmind.com/article/3001_16_stanley-cultivating-the-mind-of-a-warrior/.

96 R. Mallon and S. S. Nichols, above note 90.

97 Michael Sevel and Brian Leiter "Legal Positivism", *Oxford Bibliographies*, 10 May 2010, available at: <https://tinyurl.com/vexmhv3>; Christopher P. M. Waters, "War Law and Its Intersections", in D. Whetham (ed.), above note 9, p. 90.

98 M. Bryant, above note 5, pp. 48, 256; Elizabeth Heger Boyle and John W. Meyer, "Modern Law as a Secularized and Global Model: Implications for the Sociology of Law", *Soziale Welt*, Vol. 49, No. 3, 1998, p. 214.

99 D. Johnson, above note 18, p. 188.

secularization, as nation-States have curtailed the power of religion and accrued power to themselves. This process accelerated in Europe in the wake of the Reformation and the Peace of Westphalia, before Western law was propagated around the world as an adjunct to colonialism, Western hegemony, and latterly globalization.¹⁰⁰

But though the framing of the law has been secularized, religious concepts and principles remain, translated into the language of rationality and universalism.¹⁰¹ Natural law – variously considered to be conferred by God, nature or reason – was central to this transition.¹⁰² Like religion, it continues to provide a source of overriding moral authority independent of the State, and is therefore a vital bridge between religion and international law. Where State authority is strong, as in some authoritarian regimes, natural and religious law resources might sometimes present the only significant challenge to it. Where State authority is absent, weak or disputed, as in the relatively anarchic realms of international relations and armed conflict, natural and religious law resources become even more important, due to the limited effectiveness of positive (State) law enforcement.

To whatever degree conceptions of divine or natural law are considered to apply universally in theory, or to an ever-wider circle of human beings in practice, they have been the impetus behind the pretensions to universality of international law and many of the world's major religions. Both have provided a degree of supra-State authority to regulate inter-State relations, not least with regard to the conduct of war. It is for this reason that they have frequently been the foundation and driving force for the development of IHL in particular.

Even in Western-style legal systems, much of the paraphernalia of religion survives.¹⁰³ Religion is still called upon to secure oaths and affirmations in court, just as it has long played an important role in sanctifying treaties.¹⁰⁴ Locke did not believe that society could function without religion, since “[p]romises, covenants, and oaths, which are the bonds of human society, can have no hold upon an atheist”.¹⁰⁵ Indeed, religious injunctions to abide by treaties are still an important factor in persuading religiously motivated armed groups to respect IHL treaties to this day.¹⁰⁶

Like other laws, most laws of war were not invented wholesale but rather were created to codify established ideas and practice, and were religious rules and customs long before they were put into writing.¹⁰⁷ While a number of religious

100 E. H. Boyle and J. W. Meyer, above note 98.

101 *Ibid.*, pp. 214, 216.

102 *Ibid.*

103 *Ibid.*, p. 215.

104 D. Johnson, above note 18, p. 178.

105 John A. Locke, *A Letter Concerning Toleration and Other Writings*, Liberty Fund, 2010, pp. 52–53, available at: <https://oll.libertyfund.org/title/goldie-a-letter-concerning-toleration-and-other-writings>.

106 The duty to honour treaties is enshrined, for example, in Islamic law, and is an important factor in the endorsement of IHL by some Muslim non-State armed groups.

107 Stephen C. Neff, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, p. 29.

legal systems, including Islamic law, Hindu law and the canon law of the Catholic Church, are still extant, much of this inheritance is enshrined in customary IHL, which preserves the legacy of religiously motivated restraint in war across diverse cultures. For all the importance of statutory or treaty law, customary law is often equally binding, and while some cultures might not have a legal system in the modern Western sense, it would be wrong to assume that customary laws are necessarily weak or are not complied with.¹⁰⁸

So far as customary IHL incorporates universal principles or cross-cultural convergence over particular practices, it also establishes common principles to which all parties to conflict should adhere. The Roman concept of *ius gentium* (“law of nations”), based according to Marcus Tullius Cicero (106–43 BCE) on “the customs of our ancestors” and “common consent of men”, was of fundamental importance in this regard. It inspired the law of nations as it re-emerged in seventeenth-century Europe, embodying international customary norms against the unlawful use of force, genocide and slavery that have since achieved peremptory norm status.¹⁰⁹

Religion to compensate for lack of State will and capacity

International law is largely reliant on the will and capacity of States, and consensus between them, for its implementation and enforcement. In situations of armed conflict, even this limited State capacity and propensity to uphold the law is eroded.¹¹⁰ Wars often cause government to break down entirely, or take place in deprived or relatively ungoverned peripheries, leaving the population to the mercy of militaries and non-State armed groups that can act with impunity. Often the State might be a relatively new colonial or post-colonial construction whose borders have been arbitrarily drawn across ethno-religious lines, the very reason for conflict in the first place. The stakes in war are very high for States – as Sun Tzu puts it, “the province of life and death; the road to survival or ruin” – and depending on the character of the conflict, there might be few incentives to follow the rules during such existential crises.¹¹¹ Though IHL is often implemented and complied with, it is frequently therefore thwarted in precisely the armed conflict situations where it is supposed to apply, when States and non-State armed groups are either unwilling or unable to abide by its provisions.¹¹²

While IHL applies, to some degree, to all parties to armed conflict, it is predominantly by and for the States that are party to its treaties, and non-State actors have been largely excluded from its formulation.¹¹³ Though most

108 M. Bryant, above note 5, p. 47.

109 H. Moodrick-Even Khen, above note 52; S. C. Neff, above note 107, p. 85; Cicero, Part. Or. 37.130.

110 M. Sassòli, above note 3, p. 56.

111 D. J. Lonsdale, above note 11, p. 32.

112 For examples of this, see the ICRC’s *IHL in Action* website, available at: <https://ihl-in-action.icrc.org/>.

113 M. Sassòli, above note 3, p. 63.

contemporary armed conflicts are non-international in character, IHL is far more developed with regard to the regulation of international armed conflict between nation-States than it is to internal armed conflicts within them, when States have little incentive to grant rebel or opposition groups any legitimacy.¹¹⁴

Rules applicable to non-international armed conflict are relatively thin, the most important of them being encapsulated in a single article, Article 3 common to the four Geneva Conventions, and Additional Protocol II, which has not been universally ratified.¹¹⁵ While these instruments enshrine basic protections for the lives and dignity of non-combatants, non-State armed group members do not enjoy the same protections as State armed forces personnel, despite the fact that non-State groups make up more than half of all parties to armed conflict.¹¹⁶ This understandable State bias exacerbates the asymmetric nature of most internal armed conflicts (in which advanced State militaries are often pitted against poorly resourced guerrillas), potentially undermining reciprocal respect for IHL.¹¹⁷

Customary IHL and the Martens Clause compensate for the lack of provisions for non-international armed conflicts and non-State armed groups in treaty law.¹¹⁸ In doing so they often draw upon the “laws of humanity”, including the legacy of religious and just war principles with wider applicability than the treaty law that States have actually agreed to.¹¹⁹

Where the State is weak or lacks reach, or law enforcement mechanisms break down, religious institutions upon which communities and parties to conflict depend are often still functioning, and vast networks of churches, mosques, temples, schools, hospitals and charitable institutions extend even into the remotest, most war-torn peripheries. Indeed, religions still dominate in many societies affected by armed conflict, and are crucial to maintaining some vestige of moral and social order. Failure to engage with them in such contexts is impractical, and can hamstring efforts to reassert common humanitarian norms.

Religious courts and village councils often remain functioning when higher-maintenance law courts become unviable. While there are question marks with regard to the quality of justice that some informal mechanisms provide – which can be undermined by lack of procedural rigour, susceptibility to corruption and patriarchal discrimination against women, for example – there is often no practicable alternative in the absence of strong State authority.¹²⁰ Many traditional institutions are also better adapted to the particular context, and include restorative justice mechanisms which can be implemented when retributive justice is unattainable.¹²¹ Attempts to superimpose outside legal

114 *Ibid.*

115 N. Melzer, above note 25, p. 53.

116 M. Sassòli, above note 3, p. 48.

117 *Ibid.*

118 *Ibid.*, pp. 49–50; N. Melzer, above note 25, pp. 24–25.

119 However, if there is State practice and *opinio juris* which contradicts “the legacy of religious and just war principles”, the relevant customary norm is what the former say, rather than the latter. States are still in the driver’s seat. Customary law is not a tool for non-State entities to legislate without State consent.

120 Michael Newman, *Transitional Justice: Contending with the Past*, Polity Press, Cambridge, 2019 (Kindle ed.).

121 *Ibid.*

enforcement mechanisms in such an environment can be clumsy or may be resisted altogether, and more traction can sometimes be gained by collaborating with religious and other non-State institutions that have greater influence over parties to conflict and their communities. Where religious institutions are more powerful than State bodies, or are aligned with them, debate on correspondences between religion and IHL might more intelligently focus on bolstering religious laws of armed conflict by comparison with IHL, rather than the other way around, so long as those norms uphold or exceed IHL rules.

The proximity of religious institutions to affected communities, and the fact that they are among the world's most prominent non-State actors, means that they are also well positioned to influence non-State armed groups.¹²² This is particularly the case when non-State armed groups and their followers identify or align themselves with a religion, and are therefore bound at least to some degree by its norms. For some groups of an ethno-nationalist persuasion, commitment to abide by IHL can help them to achieve popularity and a degree of international legitimacy, marking them out for membership of the community of nation-States.¹²³ For those groups and communities of a more religious character, however, whether nationalists or adherents of more global religious ideologies, the correspondence of IHL with their religious teachings is a *sine qua non* for their acceptance of it, and engagement with religious leaders and teachings is therefore essential. Religious rules and sanctions mechanisms are often incorporated into their doctrines and codes of conduct.¹²⁴ Indeed, religion is often one of the core motivations of non-State armed groups, informing both how they fight and what they are fighting for.

Religion to Improve IHL Enforcement and Compliance

Improving the regulation of armed conflict therefore requires reinforcing legal debate on the content of IHL with a closer examination of factors other than State power that might improve compliance with it.¹²⁵ Compliance with the law is generally approached from two perspectives: instrumental and normative. Instrumental means are concerned with immediate incentives of punishment and reward, such that law enforcement has a deterrent effect. Normative means are concerned with what people regard as moral or “the right thing to do”, and focus on generating voluntary compliance by socializing norms so that they become internalized and part of the population's moral identity.

122 Ioana Cismas and Ezequiel Heffes, “Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance”, *Yearbook of International Humanitarian Law*, Vol. 22, 2019.

123 This is often expressed by signing Geneva Call's Deeds of Commitment, for example.

124 See, for example, Muhammad Munir, “The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011.

125 D. Johnson, above note 18; M. Sassòli, above note 3.

A combination of these approaches is required for maximum effectiveness. The ICRC's 2018 *Roots of Restraint in War* study confirmed that while instrumental means remain important, humanitarian norms are better complied with the more they are internalized by combatants and resonate with their identities and moral values; this replicated the results of similar research in other fields of law.¹²⁶ The study highlighted, furthermore, the importance of informal means of socialization such as peer pressure and religious or community influence, particularly for less structured armed groups which are more embedded in the community. Whereas the ICRC understandably prioritizes military or armed group hierarchies and the integration of IHL into training, doctrine and sanctions mechanisms, the *Roots of Restraint* study went some way towards validating a more expansive and informal approach. This includes the ICRC's burgeoning engagement with religious circles, the effectiveness of which has been empirically manifest for many years.¹²⁷

Though religions often tend to get bracketed with normative means to promote compliance, they also frequently possess instrumental means to enforce religious law, sometimes meting out exemplary punishment. Religious and customary laws are often incorporated into State legal systems, and autonomous religious legal systems are often still binding on religious adherents and the groups they control or are associated with. Though following rules might sometimes consist only in instrumental cost-benefit calculations, religious rules often carry greater weight for religious adherents, who are strongly motivated to comply. Worldly enforcement of religious rules is backed up, moreover, by the threat of divine or supra-human punishment in this world or the next, whether by gods, supernatural entities or the workings of the cosmic or natural order.¹²⁸ For many religious adherents, divine monitoring and enforcement of rules is therefore omnipresent and inescapable, and many combatants continue to be haunted by the crimes they have committed in war long after the fighting has stopped.¹²⁹

Religious institutions also play a major role in education and the socialization of religious rules and principles from an early age, including those of relevance to the regulation of war. IHL can be integrated or attached to many of these educational programmes.¹³⁰ Insofar as religious actors and educational institutions also participate in interpreting IHL or researching correspondences between IHL and religious teachings, as is the case with a number of ICRC projects, this helps to better embed and acculturate IHL by situating it in relation to religious normative systems with which most people are more familiar.¹³¹ Religious organizations run many educational institutions relevant for teaching

126 Fiona Terry and Brian McQuinn, *The Roots of Restraint in War*, ICRC, Geneva, 2018; see also Oliver Kaplan, "Nudging Armed Groups: How Civilians Transmit Norms of Protection", *Stability: International Journal of Security and Development*, Vol. 2, No. 3, 2013.

127 See the ICRC's *Religion and Humanitarian Principles Blog*, above note 46.

128 D. Johnson, above note 18.

129 *Ibid.*

130 See the ICRC's *Religion and Humanitarian Principles Blog*, above note 46.

131 Harold Hongju Koh, "Internalization through Socialization", *Duke Law Journal*, Vol. 54, No. 4, 2005.

and research, including schools, universities, *madrassas*, monasteries and think tanks, and secular universities contain departments of both law and religious studies.

Religious or cultural norms relevant to the regulation of armed conflict are generally therefore more deeply internalized and rooted in the individual's religious and personal convictions than corresponding IHL rules, and can enhance their legitimacy and moral force, such that combatants become more self-regulating.¹³² This self-regulation is proven to be most powerful when it comes about as a result of precisely the kind of religious or moral self-reflection that religion encourages, such that moral behaviour becomes part of the adherent's self-identity.¹³³ Religion influences, furthermore, the interconnected reasons why people fight and how they conduct themselves against the enemy, and might also therefore have greater leverage in terms of changing behaviour. This internalization of rules and capacity for ethical thinking are particularly important when IHL rules must be interpreted and applied in highly complex armed conflict scenarios, all while coping with the raw emotions and mentally debilitating stress and fatigue engendered by war.¹³⁴

The internalization of good conduct is at the core of many religions, which teach that the intention behind an action is at least as important as the action itself. The conscience and inner life of individuals are therefore of central importance, as illustrated by introspective practices such as meditation, prayer and confession. For St Augustine, it was the intention behind killing in war, and whether or not it is motivated by love or charity in defence of the innocent, which determined whether it was sinful or not.¹³⁵ Similarly, Aquinas made right intention one of the key criteria of just war.¹³⁶ He assumed that if the intention of belligerents was correct, then good conduct would automatically follow, but if their intention was wrong, then no rules would adequately restrain their conduct.¹³⁷ This explains the lack of detailed rules on the conduct of hostilities (*jus in bello*) in his just war theory, since he regarded intention as the prime determinant of moral behaviour. A similar emphasis on intention rather than explicit rules of conduct can be found in many other religious and philosophical traditions, and is a central concern of ethics.¹³⁸

As a secular legal regime, IHL has inevitably gone the other way, developing detailed rules on the conduct of hostilities while underplaying the intention behind them. In the absence of reliable enforcement mechanisms, however, intention has even greater bearing on whether or not IHL rules are followed, suggesting that re-engagement of IHL with its religious origins might facilitate its implementation. Consideration of intent (*mens rea*) is not entirely absent from IHL, since it has a

132 Margaret Levi, Audrey Sacks and Tom Tyler, "Conceptualizing Legitimacy, Measuring Legitimizing Beliefs", *American Behavioral Scientist*, Vol. 53, No. 3, 2009.

133 Ted van Baarda, "The Ethical Challenges of a Complex Security Environment", in D. Whetham (ed.), above note 9, p. 164.

134 R. E. Hassner, above note 12.

135 D. Whetham, above note 9, p. 71.

136 *Ibid.*, p. 72.

137 *Ibid.*

138 For example, *cetanā* in Buddhism and *niyyah* in Islam.

direct bearing on whether belligerents choose to follow IHL's rules, and must be proven after the fact to prosecute perpetrators of war crimes. Moreover, while IHL does not necessarily comment on how intention supports compliance, this does not mean that there is a vacuum, since military ethics brings intention back into play.

Religion and Military ethics

Military discipline is undoubtedly paramount in order to ensure as far as possible that fighters follow IHL rules in the extreme circumstances of war, and the importance of integrating IHL into military doctrine, training and sanctions mechanisms has long been recognized. Care must be taken, however, that discipline does not promote an unthinking obedience and conformity that curtails the capacity for ethical reflection.¹³⁹ Even when IHL is clear in theory, it is quite another thing to apply it in practice to particular armed conflict situations. Indeed, war confronts soldiers with severe ethical dilemmas not generally confronted in peacetime, not least whether or not to kill some innocents in order to save others. Training that fails to factor in such ethical dilemmas and battlefield constraints will be of limited effectiveness.¹⁴⁰

Despite the moral precariousness of war, the teaching of military ethics today is often underdeveloped even in advanced militaries, and many have little or no capacity to teach it at all.¹⁴¹ Moreover, higher-ranking officers generally receive disproportionately more training in ethics than lower-ranking personnel, even though the latter are more commonly on the front line of military engagements, and often face the severest ethical challenges.¹⁴² Most militaries employ a mixed bag of approaches to military ethics, so that it is not always clear what they are trying to achieve, and some ethics training is more of a box-ticking exercise than a means to inspire.¹⁴³

A functional, rules-based approach predominates, the purpose of which is ultimately to improve military efficiency within the bounds of the law.¹⁴⁴ This generally involves the inculcation of IHL rules and military virtues, such as the "Values and Standards" of the British military, with the emphasis on promoting professional behaviour rather than ethics *per se*.¹⁴⁵ Aspirational military ethics

139 T. van Baarda, above note 133, p. 166.

140 C. P. M. Waters, above note 97, p. 91; Martin L. Cook and Henrik Syse, "What Should We Mean by 'Military Ethics'?", *Journal of Military Ethics*, Vol. 9, No. 2, 2010, p. 120.

141 Gwilym Williams, "Seeing Through the Fog of War: The Need for Professional Military Ethics Education", *Strife*, 24 September 2015.

142 Jessica Wolfendale, "What Is the Point of Teaching Ethics in the Military?", in Paul Robinson, Nigel De Lee and Don Carrick (eds), *Ethics Education in the Military*, Ashgate, Abingdon, 2008.

143 M. L. Cook and H. Syse, above note 140; J. Wolfendale, above note 142, p. 162.

144 J. Wolfendale, above note 142.

145 *Ibid.*, p. 164; M. L. Cook and H. Syse, above note 140. The Values of the British Army are courage, discipline, respect for others, integrity, loyalty and selfless commitment. Its Standards are lawfulness, acceptable behaviour and professionalism. See British Army, "A Soldier's Values and Standards", available at: www.army.mod.uk/who-we-are/our-people/a-soldiers-values-and-standards/.

training to develop combatants' capacity for moral autonomy and deliberation, making them better people as well as better combatants, is less frequent and usually the preserve of the officer class.¹⁴⁶ Most combatants are not therefore encouraged to consider the ethical rationale behind military virtues, or to properly rehearse, in advance of hostilities, how to put those values into practice, though strides are increasingly being made in this direction.¹⁴⁷

There is therefore a pressing need to strengthen or reinvigorate cultures of military ethics that embody the highest humanitarian and chivalric ideals and put the dignity and protection of non-combatants over force protection, particularly in unconventional wars fought among the people.¹⁴⁸ While IHL tells belligerents whether or not an action is legally permitted, ethics engage the intention and conscience or inner life of combatants, and are often influenced by religious ideas. Military ethics have historically been deeply informed by religion, including highly aspirational just war, holy war, pacifist and warrior traditions. Christianity informed both the theory and practice of medieval chivalry, for example, just as Buddhism contributed to the development of the martial arts.¹⁴⁹

Many religious and military virtues overlap.¹⁵⁰ While courage, loyalty and discipline – also admired religious qualities – remain important, modern armed forces are increasingly conscious of the fact that these traditional military virtues are not necessarily well adapted to contemporary wars, particularly to unconventional armed conflicts in which the crucial battle is over hearts and minds. Military effectiveness in such contexts depends upon being a sympathetic person as much as an effective fighter, and some militaries have therefore expanded the list to include virtues such as compassion, wisdom, patience, temperance and humility.¹⁵¹

Aside from the Christian influence on codes of chivalry and the just war tradition, Western military ethics is heavily influenced by ancient Greek precedents. The Aristotelean emphasis on character formation and the cultivation of individual virtue in the sense of functional excellence is regarded as particularly suited to military life.¹⁵² Otherwise, the rich legacy of restraint in many non-Western traditions has yet to be fully explored, and can provide fresh perspectives on what is expected of combatants.

Buddhist-inspired martial arts traditions are a case in point. Both a meditation technique and a means to protect, they enabled practitioners to

146 J. Wolfendale, above note 142.

147 See, for example, the military ethics playing cards and mobile phone application developed by King's College London, available at: <https://militaryethics.uk/en/playing-cards/military>; G. Williams, above note 141.

148 T. van Baarda, above note 133, p. 163.

149 Peter A. Lorge, *Chinese Martial Arts: From Antiquity to the Twenty-First Century*, Cambridge University Press, New York, 2011.

150 Shannon E. French, *The Code of the Warrior: Exploring Warrior Values Past and Present*, Rowman & Littlefield, Lanham, MD, 2017.

151 Peter Olsthoorn, "Military Virtues and Moral Relativism", in Michael Skerker, David Whetham and Don Carrick (eds), *Military Virtues*, Howgate Publishing, Havant, 2019, p. 45 (Kindle ed.).

152 Martin L. Cook, "Military Virtues", in M. Skerker, D. Whetham and D. Carrick (eds), above note 151, p. 2.

control their emotions, using only as much force as was absolutely necessary to overcome an opponent.¹⁵³ The conduct of war was thus intimately tied up with the practice of religion, and given the centrality of non-harming to Buddhism, the use of force was meant to be restrained to the maximum degree, with an emphasis on extreme self-sacrifice in the service of others. The Shaolin monastery, for example, became a centre of military training and innovation, while Zen Buddhism in Japan came to be known as the “religion of the warrior”.¹⁵⁴ In Buddhism, ethics are inseparable from its psychological insights and mindfulness technologies, since it understands that without proper training to enhance both psychological and physical self-control, practitioners will be under-equipped to act with restraint. This is highly relevant, of course, to military training, and martial arts have also been proven, for example, to reduce aggression in the young.¹⁵⁵ Though the degree to which Buddhist combatants actually put these martial arts ideas into practice during armed conflict is questionable, much can still surely be learned from this rich legacy.

Religion also therefore serves an important functional purpose in military ethics, and introspective religious resources such as prayer and meditation have long been utilized to enhance restraint and self-control in combatants. Indeed, mastering one’s base impulses is a central feature of many religions, and is of critical importance to military conduct.

The degree to which religion can be integrated into military ethics training depends, of course, on the context. In pluralistic societies, soldiers from different backgrounds must converge on secularized virtues to which they can all commit, just as the doctrine of religious restraint constrains religious arguments in the legislative sphere.¹⁵⁶ But this does not preclude military personnel from being motivated by their personal religious beliefs. Rather than purging religion from the military curriculum, military personnel are perhaps best exposed to a variety of religiously inspired military traditions, thereby promoting understanding and respect for other cultures, including the value systems of potential adversaries.

In mono-religious militaries and non-State armed groups, the teachings of the fighters’ religion in relation to the conduct of war are even more important, and can be integrated where appropriate into military and IHL training. Indeed, many armed groups include religious scholars among their leaders and combatants, some of whom also play a crucial role in drafting their codes of conduct.¹⁵⁷

153 A. Bartles-Smith *et al.*, above note 29; Peter. A. Lorge, *Chinese Martial Arts: From Antiquity to the Twenty-First Century*, Cambridge University Press, Cambridge, 2012.

154 *Ibid.*

155 Anna Harwood, Michal Lavidor and Yuri Rassovsky “Reducing Aggression with Martial Arts: A Meta-Analysis of Child and Youth Studies”, *Aggression and Violent Behavior*, Vol. 34, 2017.

156 Christopher J. Eberle and Rick Rubel, “Religious Conviction in the Profession of Arms”, *Journal of Military Ethics*, Vol. 11, No. 3, 2012.

157 For example, the Bangsamoro Islamic Armed Forces, the armed wing of the Moro Islamic Liberation Front in the Philippines, has an Islamic Call and Guidance department which oversees religious leaders in its ranks in order to provide Islamic guidance to all of its commands. See United Nations and Moro Islamic Liberation Front, *Children in Armed Conflict: Philippines: Action Plan on the Recruitment and Use of Children in Armed Conflict*, 2017, pp. 3–4.

Military religiosity and the warrior ethos

Military training also has an hortatory quality to galvanize combatants to uphold the highest military and patriotic ideals, and even secular militaries promote forms of religiosity that tap into the motivations of combatants at a deeper level than rational analysis.¹⁵⁸ In many militaries these revolve around a warrior ethos that binds combatants into a sacred covenant to fight and die for one another, and for the country or cause for which they serve, and that must necessarily inspire them to override their natural instinct for self-preservation.¹⁵⁹ The US Army has distilled the essence of its own warrior ethos into the following succinct formulation, which includes the famous injunction never to leave a comrade behind. All soldiers must internalize this during their basic training:¹⁶⁰

I will always place the mission first.
I will never accept defeat.
I will never quit.
I will never leave a fallen comrade.¹⁶¹

Military recruits take oaths upon enlistment, often containing appeals to divine authority.¹⁶² Basic training (boot camp) and further specialized training puts them through intense rites of passage – appropriately called “Hell Week” for the US Navy SEALs – which deconstruct their civilian identities and re-socialize them into the very different values of military life.¹⁶³ This includes, of course, the capacity to kill when required, and the subordination of their will to strict military discipline.

Parallel to professional rules and standards, recruits are indoctrinated by more informal means. Most military services and units have their own subcultures, elements of which might have a greater hold on combatants than more formal rules.¹⁶⁴ These often incorporate initiation rites and other rituals intended to foster conformity and an intense sense of belonging to the unit, and sometimes feature brutal and humiliating hazing rituals which might be informally tolerated by the hierarchy even when officially banned.¹⁶⁵

158 M. L. Cook and H. Syse, above note 140, p. 121.

159 Herbert Raymond McMaster, “Preserving the Warrior Ethos”, Hudson Institute, 1 November 2021, available at: www.hudson.org/research/17361-preserving-the-warrior-ethos.

160 *Ibid.*

161 US Army, “Warrior Ethos”, available at: www.army.mil/values/warrior.html. This website also includes pages on the US Army’s Values and the creeds, songs and oaths of its various services.

162 Such is the case even in some secular countries; in the US and British militaries, for example. See US Army, “Oath of Enlistment”, available at: www.army.mil/values/oath.html; British Army, “Oath of Allegiance – Christian Version”, available at: <https://tinyurl.com/ytp2bjrs>.

163 See, for example, “Hell Week”, Navyseals.com, available at: <https://navyseals.com/nsw/hell-week-0/>.

164 Scott A Fischer, *Army and Air Force Subcultures Effects on Joint Operations*. Army War College, Carlisle Barracks, Pennsylvania, PA, 2006.

165 Jonathan S. Landay, “Hazing Rituals in Military Are Common – and Abusive”, *Christian Science Monitor*, 11 February 1997, available at: www.csmonitor.com/1997/0211/0211197.us.us.4.html; Kirsten M. Keller et al., *Hazing in the US Armed Forces: Recommendations for Hazing Prevention Policy and Practice*, RAND Corporation, 2015.

Quasi-religious warrior codes or “creeds” are an integral part of US military identity, for example, and are memorized and chanted by unit members.¹⁶⁶ Though they vary across the different services, and include the famous Ranger and Rifleman’s Creeds, all stress the virtues of bravery, honour, esprit de corps, loyalty and self-sacrifice, thereby reinforcing military comradeship and cohesion.

These creeds contain powerful and inspiring language likely to have a stronger impact on combatants’ behaviour than many more formal rules. The iconic Rifleman’s Creed, for example, which has guided US Marine Corps weapons training for over seventy years, anthropomorphizes the Marine’s rifle to striking psychological and practical effect:¹⁶⁷

My rifle is human, even as I, because it is my life. Thus, I will learn it as a brother. I will learn its weaknesses, its strength, its parts, its accessories, its sights and its barrel. I will ever guard it ... as I will ever guard my legs, my arms, my eyes and my heart against damage. ... We will become part of each other. We will.

Before God, I swear this creed. My rifle and myself are the defenders of my country. We are the masters of our enemy. We are the saviors of my life.¹⁶⁸

Interestingly, none of these creeds contain any explicit reference to rules of restraint. The accompanying US Army Soldier’s Code and US Army Values do refer to the need to treat others with dignity and respect, to act honourably, and to do what is right legally and morally, but protection of civilians, for example, is not explicitly mentioned.¹⁶⁹ IHL provisions are, of course, incorporated into the US Army’s ten Soldier’s Rules, the US military’s Code of Conduct and many other aspects of US military training.¹⁷⁰

Nevertheless, in many militaries there does sometimes appear to be a tension or disconnect between aspects of training which inculcate a warrior mentality, and those which teach IHL rules.¹⁷¹ Though the power of warrior

166 I use the US military as an example because its rules and values are so transparent and accessible. See US Army, “The Army Values”, available at: www.army.mil/values/index.html. See also Association of the United States Army, “The Code of Conduct”, available at: www.ausa.org/code-conduct; Mick Howard, “A Military Tradition Institutionalized: Rhetorical Personification and Anthropomorphism in ‘The Rifleman’s Creed’”, *Journal of Military Experience*, Vol. 3, No. 2, 2013, pp. 121–122.

167 M. Howard, above note 166; see also “The Rifleman’s Creed”, *YouTube*, available at: www.youtube.com/watch?v=M11XkE6KBro.

168 “Setting the Tone for Each Service: Learning the Military Creeds”, *Military.com*, available at: www.military.com/join-armed-forces/military-creeds.html.

169 See the US Army, above note 166. For the US Army Soldier’s Code, see: www.uvu.edu/rotc/resources/soldiers-creed.html.

170 Chris Jenks, “The Efficacy of the U.S. Army’s Law of War Training Program”, *Articles of War*, 14 October 2020, available at: <https://lieber.westpoint.edu/efficacy-u-s-armys-law-of-war-training-program/>. Note that the “Soldier’s Rules” are less visible than the US Army Values and various creeds on the Internet. Interestingly, the US Military’s Code of Conduct invokes IHL provisions (specifically Article 17 of Geneva Convention III) for the benefit of US military personnel should they become prisoners of war, but not necessarily for anyone else: “Should I become a prisoner of war, I am required to give name, rank, service number, and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies.” See Association of the United States Army, above note 166.

171 *Ibid.* See also above note 166.

codes to motivate combatants lies in their simplicity, they have often traditionally been informed by religious teachings that emphasize restraint. There would therefore appear to be scope to incorporate more explicit IHL norms into warrior codes, and to translate them into language that is more motivational. The Round Table Oath from Thomas Malory's 1485 *Morte d'Arthur*, for example, explicitly states that knights should be merciful, "and always to do ladies, damosels, and gentlewomen and widows succour [and] strengthen them in their rights".¹⁷² Admittedly, this appears in a work of fiction, and was not necessarily reflective of contemporary practice.¹⁷³ Nevertheless, given the prevalence of conflict-related sexual violence and rape culture (of which men and boys can also be victims) in some militaries, the integration of similarly explicit prohibitions into their warrior ethos would perhaps not be amiss.¹⁷⁴

Warrior codes are supplemented by regimental mottos, songs, war cries and insignia which often have religious symbolism or content.¹⁷⁵ Weapons systems are still often named using religious terminology, and war cries of various regiments in the Indian military, for example, include exhortations to various Hindu gods, just as the Islamic *Takbir* – "Allāhu 'akbar", meaning "God is the greatest" – is commonly employed by Muslim fighters.¹⁷⁶ Religious symbolism among armed forces is on the rise in many contexts, as the consecration of the new Russian Orthodox Cathedral of the Armed Forces in 2020 illustrates.¹⁷⁷

Most militaries also encourage the honouring of former heroes or exemplars. Future officers at Westpoint Military Academy in the United States are enjoined to remember the "Long Gray Line" of former cadets, including great US generals of the past, while British Marines treasure the memory of those who have received the prestigious Victoria Cross, often when laying down their lives for their comrades.¹⁷⁸ Of course, this is problematic when war criminals are heroized, as is still the case for figures such as Ratko Mladić in the former Yugoslavia.¹⁷⁹ Religiously inspired war epics such as the Indian *Mahābhārata*

172 Felicia Ackerman French, "Never to Do Outrageousness nor Murder...": The Code of the Warrior in the World of Malory's *Morte d'Arthur*, in S. E. French, above note 150, p. 120.

173 Malory was himself a warrior, but he wrote *Le Morte d'Arthur* in prison and was hardly a model of good behaviour. Indeed, according to Shippey, he must be "the least politically correct author still commonly read". Malory was himself charged with rape, though the details of the case are unclear. See Catherine Batt, "Malory and Rape", *Arthuriana*, Vol. 7, No. 3, 1997, p. 79.

174 Contemporary warrior codes should also be vetted so as not to perpetuate unhelpful gender stereotypes. Women, Peace, and Security and feminist scholars have also critiqued aspects of IHL in this respect. See, for example, Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the "Principle of Distinction"*, 1st ed., Routledge, Abingdon, 2018.

175 R. E. Hassner, above note 12.

176 Walter A. Dorn and Richard Rose, "Hindu References in the Indian Military: Weapons, War Cries and Insignia (Tables for Primary and Preliminary Research)", unpublished draft for ICRC, 1 December 2021.

177 Shaun Walker, "Angels and Artillery: A Cathedral to Russia's New National Identity", *The Guardian*, 20 October 2020, available at: www.theguardian.com/world/2020/oct/20/orthodox-cathedral-of-the-armed-force-russian-national-identity-military-disneyland.

178 S. E. French, above note 150, p. 19.

179 Bruno Waterfield, "War Criminals Are Heroes in Balkans, Says UN Prosecutor", *The Times*, 6 June 2021, available at: www.thetimes.co.uk/article/war-criminals-are-treated-as-heroes-by-genocide-deniers-in-the-balkans-zkd5sjdpz.

(c. 400 BCE–300 CE) are at the core of many religions and cultures, and their heroes provide military role models that are more real for many of today’s combatants than their own flesh-and-blood contemporaries.¹⁸⁰ Historical accounts also contain inspiring religious role models; the fact, for example, that the Prophet Muhammad successfully commanded armies is of central importance to the Muslim conduct of war.

Many military experts, such General H. R. McMaster of the United States, maintain that a warrior ethos is “foundational to norms involving professional ethics, discipline, and discrimination in the use of force, [and is] essential to making war less inhumane”.¹⁸¹ Others regard it as a dangerous relic, or expression of toxic masculinity, which does more to undermine discipline and morale than reinforce it.¹⁸² Research shows that military personnel fight mainly for their comrades and to preserve their honour and that of their unit¹⁸³ – but this close-knit comradeship is often inconducive to empathy for outsiders, and consequently to restraint in the use of force against them. A downside to more informal cohesion dynamics is that they can degenerate into deviant behaviour, including complicity in IHL violations and in covering them up.¹⁸⁴ Combatants brutalized or degraded during training by hazing rituals that verge on torture are more likely to treat adversaries and civilian populations in a similar way.¹⁸⁵ Just as powerful religious resources can be channelled to either promote or override restraint, a warrior ethos can have both a positive and negative impact on adherence to IHL depending on its content and application.

Military ethics and warrior codes that emphasize restraint can help give nobility to a profession that would otherwise degenerate into senseless slaughter, acting, in the words of Shannon French, as “moral and psychological armor that protects the warrior from becoming a monster in his or her own eyes”.¹⁸⁶ The obverse of honour is of course shame, which is often a far more powerful deterrent to immoral acts than any sanctions mechanism since it impinges on the

180 S. E. French, above note 150, p. 254.

181 H. R. McMaster, above note 159.

182 Ryan Noordally, “On the Toxicity of the ‘Warrior’ Ethos”, *Wavell Room*, 28 April 2020, available at: <https://wavellroom.com/2020/04/28/on-the-toxicity-of-the-warrior-ethos/>; Gilbert Holleufer, “Heroic Memory and Contemporary War”, *International Review of the Red Cross*, Vol. 101, No. 910, 2019.

183 Christopher Hamner, “Why Do Soldiers Fight?”, *Historically Speaking*, Vol. 13, No. 1, 2012; H. R. McMaster, above note 159.

184 The *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report* into unlawful conduct by Australian Special Forces in Afghanistan graphically illustrates these dynamics, and the dangers of units operating in an environment detached from proper military oversight and societal norms. Part 3 (p. 325 onwards) on “Strategic, Operational, Organisational and Cultural Issues” is particularly relevant. See *Inspector-General of the Australian Defence Force Afghanistan Inquiry Report*, 2020 (Brereton Report), available at: <https://afghanistandinquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

185 Such was the case in the German and Imperial Japanese Armies during World War II. The brutality of the Russian military in Syria and Ukraine has also been partly attributed to the prevalence of *dedovshchina*, or hazing, in its ranks. See Bret Devereaux, “What Makes Armies Commit Atrocities?”, *Foreign Policy*, 6 April 2022, available at: <https://foreignpolicy.com/2022/04/06/russia-ukraine-atrocities-war-crimes/>; “Russia Leaves a Trail of Atrocities in Ukraine”, *Financial Times*, 5 April 2022, available at: <https://tinyurl.com/4fmh97py>.

186 S. E. French, above note 150, pp. 8, 12.

combatants' sense of moral self-worth, and is often alluded to in various military codes. Like IHL rules which uphold human dignity, restraint as self-protection is an important religious idea that helps to safeguard the well-being of combatants themselves.

Military ethics beyond the military

Conflict situations tend to reinforce the importance of group membership on individual behaviour and exacerbate dehumanizing rhetoric towards outsiders.¹⁸⁷ Military training and warrior codes can furthermore tend to detach military and armed group personnel from societal norms, loosening the restraints that would otherwise guide them in civilian life. The vital importance of loyalty and comradeship, since combatants depend on one another for their lives, means that armed actors often bond so tightly with comrades in their respective combat units that they risk losing their sense of community with other people.¹⁸⁸ Most militaries encourage the dangerous idea that fighters are a class apart, by dint of the sacrifices that they are prepared to make and the trauma they might experience. While it has been argued that this separation might help them to behave in a more detached and therefore professional manner, and this might perhaps be of some utility in more conventional military activity, it is likely to be a disadvantage in the non-conventional wars which predominate today, in which social skills and an ability to relate to people are at least as important as skill in killing.¹⁸⁹ Indeed, IHL violations are more likely to occur where unhealthy dynamics within close-knit combat units are shielded from the scrutiny of the population at large.¹⁹⁰

The behaviour of combatants hinges largely on their identity and moral values, and how they define themselves in relation to their adversaries, comrades and societies. Combatants have multiple identities, whether as military professionals, warriors or members of social, ethnic, national or political groups, and as far as possible these identities can be engaged to undergird an attitude of restraint. Though military training is vital, the behaviour of combatants is also influenced by their communities, and the religious identity of combatants is particularly salient, embodying moral values that are a potent motivational force.¹⁹¹ This is particularly important in armed forces or non-State armed groups where training in IHL and military ethics is absent or inadequate, or where conscripts or volunteers are mobilized to fight at short notice. Greater reliance must therefore be placed on religious or cultural values which are already

187 Emanuele Castano, Bernhard Leidner and Patrycja Slawuta, "Social Identification Processes, Group Dynamics and the Behaviour of Combatants", *International Review of the Red Cross*, Vol. 90, No. 870, 2008.

188 *Ibid.*

189 Shannon E. French and Anthony I. Jack, "Dehumanizing the Enemy: The Intersection of Neuroethics and Bioethics", in David Whetham and Bradley J. Strawser (eds), *Responsibilities to Protect: Perspectives in Theory and Practice*, Brill Nijhoff, Leiden, 2015. See also the Brereton Report, above note 184.

190 F. Terry and B. McQuinn, above note 126.

191 O. Kaplan, above note 126.

socialized, and religious and community leaders have played a significant role in moderating the behaviour of combatants in this respect.¹⁹²

Military chaplains and clergy

Military commanders have long appreciated the force-multiplying potential of religion to reinforce discipline and morale. The vital role of clergy and military chaplains in providing moral guidance and spiritual support to combatants, especially for their mental health, is therefore well understood.¹⁹³ The Duke of Wellington remarked, for example, that chaplains were important “not only from the desire ... of religious instruction, but from the knowledge that [they are] the greatest support and aid to discipline and order”.¹⁹⁴

IHL provisions for the protection of religious personnel reflect this, and respect for the clergy was enshrined in the first Geneva Convention of 1864. In the book that inspired it, *A Memory of Solferino*, Henry Dunant mentions the work of Napoleon’s chaplain, the Abbé Laine, at the battle of Solferino in 1859. Laine “went from one field hospital to the next bringing consolation and empathy to the dying”.¹⁹⁵

Crucially, clergy also administer the funerals and last rites of combatants and provide them with absolution, as well as providing a link and support to family members. Religion is central to the way that death is handled even in secular societies, and enables comrades, family members and communities to come to terms with it. Religion can also help reconcile people to following the rules of war, even when they allow the killing of loved ones, and often has a crucial bearing on future conduct against the enemy and the possibility of unlawful reprisals. Of course, some clergy have used religion to weaponize victimhood and encourage or instigate atrocities, but this is all the more reason why religious circles must be engaged.

Though military chaplains sometimes instruct soldiers on military ethics and IHL, they have been less willing to break rank and report atrocities committed by units they accompany, and clergy outside the military are generally more outspoken.¹⁹⁶ Some have therefore accused military chaplains of acting more like indoctrination agents than true clergy, suggesting that militaries might consider recruiting and supporting chaplains who are more forthright in upholding religious and IHL principles.¹⁹⁷ At a recent course for Catholic military chaplains at the Vatican, Pope Francis exhorted them to do just that.¹⁹⁸

192 F. Terry and B. McQuinn, above note 126.

193 R. E. Hassner’s *Religion on the Battlefield*, above note 12, contains numerous examples from modern wars. 194 *Ibid.*, p. 108.

195 H. Dunant, above note 2, p. 31.

196 R. E. Hassner, above note 12, pp. 87–88, 94, 98.

197 *Ibid.*, p. 98.

198 See this address by Pope Francis to military chaplains: “Audience with the Participants in the Fifth International Course of Formation of Catholic Military Chaplains on International Humanitarian Law”, Holy See Press Office, 2019, available at: <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2019/10/31/191031a.html>.

Religion to bolster the resilience of combatants

The extreme conditions produced by armed conflict test the character, morale and resilience of belligerents to the limit, impairing their cognitive and emotional capacities and tending to obfuscate or override calls for humanity and restraint.¹⁹⁹ The “fog of war”, an uncertainty and confusion in the battlespace that impairs situational awareness, can hamper combatants’ ability to distinguish between legal and illegal targets. This is exacerbated by fatigue, stress, intense peer pressure, and strong emotions such as fear, anger, hatred, grief and euphoria, which erode morale and military discipline and compromise combatants’ ability to make proper judgements in the complex, fast-moving and morally precarious situations where they need it most.²⁰⁰

Much of military training also runs counter to restraint, tending to brutalize or dehumanize soldiers and override their natural predispositions not to kill except in self-defence, and producing an inuredness to killing that is easily misdirected in the heat of battle.²⁰¹ The clash between the very different values that soldiers are expected to comply with in the military and those that govern civilian life means that many fail to cope with their reintegration into society once the fighting is over.

Apart from physical death and injury, increasing attention is now being paid to the mental trauma that combatants experience. In recent years, research in the United States in particular has examined the phenomenon of moral injury in combat veterans, a constellation of shame- and guilt-based disturbances caused when they perpetrate, fail to prevent or witness events which transgress deeply held moral values, the symptoms of which range from social isolation through to depression, post-traumatic stress disorder (PTSD) and suicide.²⁰² Research by Shay and Grossman has shown that combatants who held the enemy in respect, not least due to the latter’s courage and fighting prowess, suffered fewer psychological problems when they returned home than those who dehumanized or disparaged the enemy.²⁰³ Honouring the enemy, as in religiously inspired warrior codes, is thus an important step in recovering from combat PTSD.²⁰⁴

Insufficient attention has been paid to supporting combatants and bolstering their psychological resilience in this regard, thereby boosting their ability to fight with the requisite self-control and restraint. Many religious practices such as meditation, prayers, blessings and benedictions are proven to

199 T. van Baarda, above note 33, pp. 156–157.

200 *Ibid.*

201 David Livingstone Smith, *Less Than Human: Why We Demean, Enslave, and Exterminate Others*, St Martin’s Press, New York, 2011; S. E. French and A. I. Jack, above note 189; Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Open Road Media, New York, 2014.

202 Sheila Frankfurt and Patricia Frazier “A Review of Research on Moral Injury in Combat Veterans”, *Military Psychology*, Vol. 28, No. 5, 2016; Hannah C. Hamrick, Michelle L. Kelley and Adrian J. Bravo, “Morally Injurious Events, Moral Injury, and Suicidality among Recent-Era Veterans: The Moderating Effects of Rumination and Mindfulness”, *Military Behavioral Health*, Vol. 8, No. 1, 2020, p. 109.

203 S. E. French, above note 150, pp. 6–7.

204 Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character*, Simon & Schuster, New York, 2010, p. 115.

help relieve stress and manage trauma, and their repetitive and contemplative nature appear to be important in this respect.²⁰⁵ The only systematic survey of prayer in the military conducted in World War II found that 70–83% of soldiers were “helped a lot” by it.²⁰⁶ More recent research with US troops has shown, for example, that Buddhist-inspired mindfulness therapies can reduce stress and enhance soldiers’ resilience, situational awareness and working memory, better enabling them to perform calmly and effectively under pressure and to adhere to norms of restraint.²⁰⁷ Preliminary mental health research supports the link between religiosity or spirituality and resilience, particularly with regard to coping with shock and trauma, resulting in lower probability of depression, anxiety, and abuse of alcohol and drugs.²⁰⁸ Among Sri Lankan Buddhist veterans with combat trauma, for example, a belief in reincarnation acted as a buffer to prevent further traumatization.²⁰⁹

Disseminating knowledge of IHL and corresponding religious norms

IHL cannot be followed if it is not known or understood, and a lack of knowledge also affects how it is perceived, and therefore its legitimacy and acceptance. Though much effort has been made to ensure that States integrate IHL into their national legislation and training for their lawyers and armed forces, knowledge and understanding of IHL outside a narrow band of government, military, legal, academic, humanitarian and non-State armed groups is still limited. While commendable efforts have been made to disseminate knowledge of IHL to a wider audience in recent years, many important constituencies have yet to be brought on board. More clearly needs to be done to engage not just those directly concerned with IHL, but the constituencies on which they depend and to which they are more or less accountable.²¹⁰

This is not to say that the fundamental humanitarian norms contained in IHL are not well known and accepted, since they are embodied in religions and cultures around the world; rather, it is to note that most people do not know what IHL is, or that it codifies these norms. Wherever this gap is not bridged, and IHL is not seen to correspond or resonate with people’s own value systems, its acceptance and legitimacy will be thin. The ICRC *People on War* study in 2016 surveyed 17,000 people in sixteen countries affected by armed conflict, as

205 R. E. Hassner, above note 12, p. 125.

206 *Ibid.*, p. 119.

207 Claire Braboszcz, Stéphanie Hahusseau and Arnaud Delorme, “Meditation and Neuroscience: From Basic Research to Clinical Practice”, in Roland A. Carstedt (ed.), *Integrative Clinical Psychology, Psychiatry and Behavioral Medicine: Perspectives, Practices and Research*, Springer, New York, 2010; Amishi P. Jha *et al.*, “Minds ‘at Attention’: Mindfulness Training Curbs Attentional Lapses in Military Cohorts”, *PLoS One*, Vol. 10, No. 2, 2015.

208 R. E. Hassner, above note 12, p. 124.

209 *Ibid.*, p. 125.

210 O. Kaplan, above note 126.

well as the five permanent UN Security Council (P5) countries and Switzerland, to assess how attitudes to IHL have changed over the past two decades. While over two thirds of those surveyed still believed that the law mattered, the effectiveness of IHL was increasingly being questioned. People were more tolerant towards the use of torture on enemy combatants, and those living in P5 countries had become more resigned to civilian deaths in war.²¹¹ Respondents also believed that, after military leaders and fellow combatants, religious and community leaders were more important in influencing the behaviour of combatants than the threat of punishment by national or international courts.²¹²

Engagement with religious circles leverages the vast followings and political, governmental, educational, legal, humanitarian and business resources of the world's religious traditions. These include some of the world's largest and most powerful organizations, and are among the few actors capable of holding States and non-State armed groups to account. While a minority of religious leaders might exacerbate conflict between communities, most embody the religious values and humanitarian concerns of their respective religions, and are genuinely interested in and supportive of IHL. This is no surprise given the proximity and deep commitment of religious circles to affected communities, and their long involvement in charitable and humanitarian action. Humanitarian values really matter to them and are embedded in religious teachings.

While engagement with religious circles is an important dimension of the humanitarian localization agenda, according to which local communities are more empowered to initiate and direct humanitarian activities, religious circles are also characterized by their ability to straddle national borders and have long been at the forefront of globalization. Indeed, they include some of the world's oldest international organizations, such as the Buddhist Sangha, which can trace its history back 2,500 years.²¹³ Religious leaders are still among the world's most frequent travellers, with congregations that extend across the globe, and religious diaspora communities are often highly relevant to humanitarian action, particularly with regard to engaging with non-State opposition groups.

Given the nature of their work and the respect in which they are held, religious organizations are frequently better networked and more knowledgeable about their respective contexts than other actors, and are exceptionally well placed to navigate armed conflict situations, influence those involved and mobilize communities. Indeed, religious actors are often well connected to all sides in a particular conflict, and can promote adherence to IHL and corresponding religious norms.²¹⁴ Where, as is often the case, religious organizations have political influence or are part of governments, opposition

211 ICRC, *People on War: Perspectives From 16 Countries*, Geneva, 2016, available at: www.icrc.org/en/document/people-on-war

212 *Ibid.*

213 Kulatissa Nanda Jayatilleke, "The Principles of International Law in Buddhist Doctrine", *Académie de Droit International: Recueil des cours*, Vol. 120, 1967.

214 This is borne out by long ICRC experience in the field, and the frequent role of religious leaders as mediators.

groups or international bodies, they can also help to lobby for better integration of IHL principles into those actors' respective legal regimes.

Religious institutions are popular and effective communicators, and are therefore ideal mediums for disseminating, translating and contextualizing IHL messages into languages and idioms that people can understand. Indeed, norms must be expressed in the language and culture of those for whom they are relevant if they are to resonate. Religious organizations also possess arrays of multimedia communication channels, many of which broadcast across the globe.

Comparing IHL and religious resources

However, the power of religion is not fully exerted if it is engaged only to promote IHL or otherwise facilitate the agendas of humanitarian organizations. Moreover, if religious organizations perceive themselves to be instrumentalized, then enthusiasm will be low and engagement might also backfire. Advocates of IHL must therefore have a sincere desire to learn about religion in order to properly enlist their support. This works both ways, of course, since religious leaders must have an interest in learning about IHL to achieve mutual dialogue built on trust.

One of the best ways to disseminate IHL is by comparing it with the religious normative systems that inform most peoples' lives and are far older, more extensive and more deeply entrenched across the world. Insofar as IHL and religious teachings or practices converge or otherwise endorse one another, the legitimacy of IHL and the relevance of corresponding religious teachings will be reinforced, helping to regenerate rather than displace traditional cultures. Exploration of religious resources can furnish insights on how to develop or better implement IHL rules, while IHL can demonstrate how religious resources might be repurposed to regulate contemporary armed conflicts.

Such two-way debate is more effective at embedding key concepts and ideas than decontextualized IHL training and promotion, or cherry-picking from religious texts in order to obtain endorsement for IHL. Research has demonstrated that individuals are more likely to converge upon impartial norms when they are able to empathize with the perspectives of others and engage in explicit moral reasoning and argument in support of their respective positions, ideally by meeting face to face.²¹⁵ Whether common sense or something approximating to Habermasian practical discourse, such fora help to dissolve mutual misconceptions and develop significant convergence around common norms, without alienating and drowning out divergent voices.²¹⁶ Multi-sectoral debate on correspondences between IHL and religious principles is particularly fruitful, bringing together religious leaders, military or armed group personnel,

215 David Traven, "Moral Cognition and the Law and Ethics of Armed Conflict", *International Studies Review*, Vol. 17, No. 4, 2015.

216 *Ibid.*

legal experts, academics and humanitarians who might otherwise confine themselves to their respective spheres, and whose thinking might therefore be rather one-dimensional.²¹⁷ This helps not just to build consensus around common humanitarian norms, but also to develop collaboration on how to put them into practice.

While convergence on some core principles, such as protecting civilians, is clearly important, the differences between IHL and various aspects of religion are as enlightening as the similarities, generating mutually beneficial dialogue which is far more effective at promoting genuine ethical reflection than superficial consensus in which difficult issues are not even raised. Discussion of more intractable problems undoubtedly benefits from the injection of diverse religious, philosophical and cultural perspectives, not least on how IHL might be enhanced. Indeed, debate is the goal as much as the means of this process, since IHL and religious ideas must be challenged and critiqued in order to be properly understood, and to bring contentious or unexplored issues out into the open. Where the resources within religions to regulate armed conflict have not been highlighted or explored, comparison with IHL helps moreover to revivify them and bring them to the fore. Comparative work on religion and IHL has highlighted some religious teachings that were not common knowledge before and has contributed to the excavation of otherwise neglected texts, thereby reinvigorating the study of religious regulation of war.²¹⁸ Expectations on both sides must of course be managed, since this is a long process. Religious leaders should not feel pressured to make changes based on recommendations from IHL scholars or practitioners, just as religious leaders should not expect IHL experts to promote their particular interpretations in international fora.

Engagement with religion to counter real or perceived Western bias

Insofar as religion embodies traditional ideas and cultures, this enables it to help legitimize and socialize IHL across cultural divides, while injecting fresh perspectives to counter its Western framing.²¹⁹ This is not to suggest that Western nations are not sometimes the worst IHL offenders, or that other cultures do not have their own norms that are often more effective, but that knowledge of IHL as an institution is not always effectively communicated to them.

217 See, for example, ICRC, above note 74; ICRC, “Sri Lanka, Global Conference on the Interface between Buddhism and IHL”, 13 September 2019, available at: www.icrc.org/en/document/sri-lanka-global-conference-interface-between-buddhism-and-ihl.

218 See, for example, A. Bartles-Smith *et al.*, above note 29.

219 See, for example, this interview with religious scholars who have worked with the ICRC: ICRC, “Swiss Radio Broadcast: ‘Le CICR à l’écoute des religions’”, *Religion and Humanitarian Principles Blog*, 17 May 2021, available at: <https://blogs.icrc.org/religion-humanitarianprinciples/french-swiss-radio-broadcast-le-cicr-a-l-ecoute-des-religions/>.

Religious groups are prominent among many non-Western and non-State actors who resist rules which they perceive to embody secular or Western values.²²⁰ Aspects of the human rights agenda are often a particular bugbear – indeed, the very concept of individual rights, as opposed to duties, is itself contested, since many fear that unbridled Western influence might undermine the traditional social order.²²¹ Given the bitter legacy of colonialism, which displaced or degraded many traditional value systems, and continuing concerns about the impact of globalization, these values are often associated with Western hegemony, and some groups see themselves as part of a global confrontation or rebellion against the secular State.²²² So far as these perceptions and concerns are not addressed, effective engagement will not be possible, and international law’s legitimacy with a broad swathe of non-Western and non-State actors will be undermined. While there are legitimate concerns that engagement with religions might sometimes reinforce patriarchies which discriminate against women, homosexuals and other groups, or other manifestations of bigotry and intolerance, disengagement is not an option if these issues are also to be effectively addressed.²²³ Religions are not generally monoliths, moreover, and they often contain within themselves the resources to address these issues and to adapt.

IHL is nevertheless distinct from human rights, and its genealogy includes many religious antecedents. Primarily framed as a set of duties rather than individual rights, it is generally more palatable to even very conservative religious constituencies, and the vast majority of religious leaders are prepared to endorse it once its content is explained, due to its compatibility with their own religious teachings.²²⁴

Conclusion

Religions possess remarkable resources both to broaden and deepen knowledge, understanding and acceptance of IHL across religious and cultural divides, and to imbue it with moral force. The scale of the challenge means that the regulation of armed conflict should not be left entirely to the States and non-State armed groups who are bound by this body of law. IHL will have limited traction if it is reduced solely to an instrument of State, or to a code of conduct for State militaries or non-State armed groups that are sometimes laws unto themselves.

220 See, for example, James V. Spickard, “Human Rights, Religious Conflict, and Globalisation: Ultimate Values in a New World Order”, *International Journal on Multicultural Studies*, Vol. 1, No. 1, 1999; William A Stahl, “Religious Opposition to Globalization”, in Peter Beyer and Lori G. Beaman (eds), *Religion, Globalization, and Culture*, Brill, Leiden, 2007.

221 This is a frequent concern of many religious scholars and others with whom the ICRC engages.

222 Helen M. Kinsella and Giovanni Mantilla, “Contestation before Compliance: History, Politics, and Power in International Humanitarian Law”, *International Studies Quarterly*, Vol. 64, No. 3, 2020.

223 I. Cismas and E. Heffes, above note 122.

224 ICRC engagement with religious circles has been characterized by the remarkable energy and enthusiasm with which religious circles have engaged. With regard to acceptance of basic IHL norms, the so-called Islamic State group has so far been a notable exception in rejecting them.

Instead, all people need to feel that they have investment in it, so that it is seen to serve humanity in all its religious and cultural diversity. Religions possess particularly important resources to influence belligerents, modify their behaviour and hold them to account, and are an effective shortcut to improving knowledge and endorsement of IHL in societies at large. Often they have the power to keep States and armed groups in check to some degree, not least when these actors seek to instrumentalize religion for their own ends.

Of course, religions also have the potential to undermine adherence to IHL or humanitarian norms, and engagement with religious circles is not equally appropriate or effective in every context. Given the pluralistic nature of religion, each religion contains an array of resources that are more or less adapted to particular situations, and actors who are more or less eager to engage with humanitarians and explore correspondences with IHL. Given their powerful motivational quality, religions can also trigger strong emotions that have to be negotiated with care.

The institutions that underpin the international order are likely to come under increasing pressure in the years to come, as rising non-Western powers seek to stamp their own mark on them and a backlash to globalization threatens to erode the consensus behind international law worldwide. The rich legacy of restraint in all religions and cultures must therefore be embraced, both to legitimize IHL and to inspire its further development.²²⁵

225 A. Bartles-Smith *et al.*, above note 29, p. 4.

Charting Hinduism's rules of armed conflict: Indian sacred texts and international humanitarian law

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Abstract

What does Hinduism have to say about the rules of armed conflict? How might Hinduism enrich the modern global discourse on international humanitarian law (IHL)? What convergences might be found, and what areas of divergence? This paper examines and contextualizes the rules of armed conflict advocated in classical Hindu texts, especially in the epic Mahābhārata, where important norms of Hinduism are established. It also examines the other major epic, the Rāmāyaṇa, and the Dharmaśāstras (Law Codes), as well as the Arthaśāstra, which takes an alternative (realpolitik) approach. This paper focuses on conduct during armed conflict (jus in bello), now synonymous for many with IHL, rather than considerations leading up to war (jus ad bellum). The paper seeks to illuminate

* This work was funded by the International Committee of the Red Cross (ICRC). The authors thank the ICRC's Head of the Global Affairs Department in Asia, Andrew Bartles-Smith, and Daniel Ratheiser for administering the funding, for excellent coordination and for very useful feedback. Expert insights were also kindly provided by Dr Noel Maurer Trew of the International Law Department, British Red Cross, and Ted Ulrich of St Thomas University. Excellent research assistance was provided by Valters Negribs, Purushottam Pratik and Heeral Kahlon. Any errors in the text remain the authors' alone.

both convergences and divergences with IHL and highlight particular Hindu approaches on the righteous (dharmic) application of violence. Like IHL, classical Hinduism values (1) proportionality of force during armed engagement; (2) the minimization of human suffering during combat; (3) care for survivors of war; (4) immunity towards non-combatants, especially civilians; and (5) balancing military necessity with humanity. With respect to divergences, classical Hinduism extols non-violence in ways that critique even the warrior's duty to engage in righteous war (dharma yuddha). In contrast to IHL, the Hindu epics have some different limitations; for instance, they limit the right to combat to a particular caste, the kṣatriyas, though this concept could be modernized to mean uniformed personnel of the State. The epics also disavow certain practices that are legal under IHL, such as ambushes and surprise attacks against legitimate targets. The Hindu proportionality provision goes beyond IHL by prescribing that only warriors of the same type should fight. With its many deeply ethical considerations, Hinduism enriches modern IHL through its heightened emphasis on fair and humane conduct in battle and its call towards compassion on behalf of both combatants and non-combatants.

Keywords: code of conduct, combat, *dharma yuddha*, Hinduism, international humanitarian law, *jus in bello*.

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Setting the “Hindu” stage

Key to understanding Hinduism is knowing that “Hinduism” is not a religion in the traditional Western sense of the word. Hinduism is not even an indigenous Indian word, nor does it have a corollary in any Indian vernacular. The term was coined in early nineteenth-century colonial India by the British to label and demarcate one set of religious traditions of India as distinct from the Abrahamic religions (i.e., Christianity, Islam and Judaism) and other forms of Indic worship (e.g., Jainism and Sikhism, which are closely linked as dharmic religions). The term “Hindu” was an innovation on the ancient Sanskrit term “Sindhu”, which was a Persian term for those who lived beyond the Indus river, a river referred to in ancient Sanskrit texts. The term “Hinduism” refers to a civilizational ecosystem of culture, thought and practice indigenous to large parts of what is now called South Asia and also practised in other parts of the world.

The word “Indian” in this paper refers to this very same “civilizational India” that far surpasses the temporal and geographical boundaries of the modern nation State of the same name.¹ India remains a cultural ecosystem, the

¹ Analogues to this distinction include civilizational “Egypt” versus Egypt the modern nation State, and likewise, the ancient notion of Israel, which far transcends its nation-State namesake.

religious aspects of which we consider primarily Hindu. Hinduism is not one body of thought and beliefs but a complex network of traditions. Therefore, the common description of Hinduism as a religion without a founder or central canon is inapt, though it is often used to contrast Hinduism to Judaism, Christianity and Islam, among “world religions”. There are a number of Indian religious, philosophical and spiritual traditions that have founders and central texts, but all would consider themselves applications within the civilizational ecosystem we label as Hinduism. Beyond species or genus, Hinduism refers to the religious “jungle” we find in India. And yet, far from being complete chaos, there are discernable patterns, principles and relationships in Hinduism.

Given the vast spans of time and religious change being referred to, “Hinduism” must be viewed as an umbrella term denoting multiple traditions. While the textual tradition of the Purāṇas (compendia of mythological lore and popular teachings) is considered relatively late (circa 500 CE), authored after the Sanskrit epics (circa 400 BCE–400 CE) and long after the appearance of the Rig Veda (circa 1500 BCE), they were nevertheless authored some fifteen centuries ago. This relatively late Purāṇic tradition is therefore approximately the age of Islam, while most of Hinduism originates from far earlier.

The ancient Sanskrit texts – narrative/story texts in particular – continue to play a crucial role in articulating and perpetuating Hindu values and beliefs. It is therefore inapt to conclude that “most Hindus base their practice on the lives and teaching of medieval and modern saints, rather than on the ancient texts themselves”.² The Sanskrit epics, in particular, are invoked at every turn throughout the Hindu world as scriptural sources and exemplars for Hindu life. As such, this is where we find the most cogent and influential articulations of Hindu codes, including the rules of engagement for combat that will be considered in this paper.

The paper thoroughly reviews Indian attitudes towards combat in the sacred Hindu texts. It compares these rules of armed conflict to international humanitarian law (IHL) in order to elucidate both the similarities and the differences between them. While the convergence is remarkable, the differences are, in places, also significant. These rules must also be viewed within the larger debate within Hinduism on violence and non-violence.

Syncretic soil and (non-)violence

The Hindu soil is a syncretic one, to which traditions have been grafted over the ages – yet it is watered by the wellspring of ideologies in the Sanskrit epics. Thinkers and reformers will innovate religious beliefs and practices, but they will almost always invoke tradition and the epics while doing so. Even new religious ideas are usually folded into long-standing religious traditions. Far from being monolithic, Hindu religious traditions are varied and textured. Hinduism thrives

2 Valerie Morkevicius, “Hindu Perspectives on War”, in Howard M. Hensel (ed.), *The Prism of Just War*, Routledge, London and New York, 2010, p. 170.

on the syncretic spirit, and multiple waves of religious traditions have been grafted onto what we think of as Hinduism.

The Sanskrit epic tradition marks a very important project reconciling two conflicting religious traditions – Vedic and ascetic – and forms the bedrock of current Hindu ideals. Yet crucial to understanding the Hindu approach to armed conflict is the fact that these two ancient traditions have diametrically opposing attitudes towards violence. The Vedic religion is the oldest surviving strata of Indian traditions, and stands in stark contrast to the ascetic tradition. The Vedic tradition comes from the ancient Aryans from whom we get the Sanskrit language, the most ancient member of the Indo-European language group. To this day, Sanskrit is the sacred tongue of Indian traditions, used for ritual utterance, philosophy and narrative. Sanskrit brings with it an air of culture and religious orthodoxy. The most ancient surviving religious texts in the world are the Vedas, the Sanskrit hymns intoned by the ancient Aryan priests into the ritual fire. The Rig Veda is the most ancient part of this compilation, conservatively dated to circa 1500 BCE. The Vedic tradition is very much alive to this day, and is a cornerstone of Hindu practice. The Vedic fire sacrifice at the centre of ancient Aryan religion is a religious strand that is widely observed today in the Hindu world.

Vedic ideals

The Vedic hymns are addressed to a pantheon of Vedic gods, primarily Indra, the thunderbolt-wielding king of the gods (cf. Zeus, Jupiter, and Odin); Agni, the fire god; and Soma, the god of the inebriating sacrificial brew and plant, with the brew being given the same name. Vedic religion is world-affirming and seeks progeny, prosperity in the world and heaven in the afterlife. The Vedas are the most authoritative texts since they are considered unauthored, divinely inspired, revealed to the ancient seer-hymnists. As might be expected from a nomadic people invoking a thunderbolt-wielding sky god, Vedic religion places great emphasis on masculinity, virility and martial prowess. Scott Dunbar writes:

India's written record of warfare began during the Vedic period (1700–600 B.C.E.), when regular clashes between peoples called *Aryans* (meaning “Noble Ones”) and *Dasyus* (Dark-skinned ones) characterized ancient Indian society. The Aryans were hunter-warrior tribes who rose to social-political prominence in northern India around 1700 B.C.E. They were renowned for being proficient in the art of war. Indeed, an ethos of combat was at the very heart of their social fabric.³

3 Scott Dunbar, “Classical Hindu Views of ‘Righteous Warfare’ (Dharma Yuddha) in Light of Michael Walzer’s Just War Theory”, PhD thesis, University of Saskatchewan, July 2011, p. 168, available at: <https://harvest.usask.ca/handle/10388/ETD-2011-07-28> (all internet references were accessed in August 2022).

Whether the Aryan invasion theory is valid or not,⁴ Jarrod Whitaker shows that many ancient Vedic hymns are imbued with Aryan militancy, especially those referring to the exploits of Indra and his conquest of the demon Vṛtra.⁵ For instance, the Rig Veda permits the use of poisoned weapons and advocates the conquest of all corners of the world.

A crucial element of Vedic culture was the division of society into four broad classes, or castes. The *brahmins* were the priest-scholars at the apex of society, while the next rung down was occupied by *kṣatriyas*, warrior-administrators entrusted with social governance. Heaven was the reward for warriors who died in battle. There was a fundamental complementarity between the secular power of the ruler and the sacred power of the *brahmin*: the first needed to be consecrated by the second, the second protected by the first. But above and beyond the work of warriors, we see virile imagery at play in the Vedic literature, where celestial battles are glorified, weapons divinized and incantations deployed in battle, all linked to Hindu mythology. Perhaps the clearest exemplification of this correlation is the sacred horse sacrifice said to be performed by the *brahmins* in order to consecrate royal power. In the Vedic period, it appears that very few limitations on warfare were adopted by the Aryan tribes which expanded into the Indian subcontinent, but a chivalric code began to emerge in the post-Vedic period as the Indo-Aryans tribal warlords fought among themselves for dominion. In the post-Vedic age, marked by the rise of armies and States, sophisticated legal codes emerge. The martial, world-affirming Vedic ethos represents one of two significant contributors to classical Hinduism, as enshrined in the Mahābhārata (explored later).

Ascetic ideals

The second strand of Indian religion is the more far-reaching philosophically. In the centuries leading up to the time of the Buddha, there were great religious changes sweeping across the subcontinent: those of the renouncer traditions. These traditions may well be much more ancient, but it is in around 500 BCE that we see them take hold within Brahmanical Sanskrit traditions. Starting around 800 BCE we see the emergence of the first Upanishads, texts prioritizing social renunciation, chastity, non-violence and philosophical speculation. We find in these texts critiques of the caste system, sacrificial violence and the Vedic rituals themselves. Instead, they advocated studying in seclusion with a wise teacher who had divine knowledge, and it is from this tradition that we have the philosophy of karma, rebirth and the pursuit of liberation – the Upanishads make almost no mention of armed force. So divergent was this wave of religion that it resulted in traditions that broke away from the Vedic priesthood and the Sanskrit language.

4 There is much debate about the origins of the Aryans. For a good overview, see Edwin Bryant and Laurie Patton (eds), *The Indo-Aryan Controversy: Evidence and Inference in Indian History*, Routledge, New York, 2005.

5 Jarrod L. Whitaker, *Strong Arms and Drinking Strength: Masculinity, Violence, and the Body in Ancient India*, Oxford University Press, New York, 2011.

Two such traditions survive to this day: Buddhism and Jainism.⁶ Furthermore, the spiritual insights of the cyclical worldview established by these wisdom traditions remain to this day the dominant perspective throughout the Hindu jungle, forming the basis of classical Hinduism. The Sanskrit epics were authored in large part to perpetuate Brahminism by folding in and domesticating ascetic ideals, lest it be replaced by Buddhist and Jain traditions. This campaign contributed to Buddhism's drastic reduction in India, though it thrived in Sri Lanka, Tibet and elsewhere.

Epic synthesis

The third stratum of Indian religions, the Epic period, is crucial in that it forms the very platform of classical Hinduism whereby Vedic and ascetic ideals were integrated into a shared social platform. This period is marked by the development of the Sanskrit epics, especially the Mahābhārata (400 BCE–400 CE), which exhibits a “conspicuous attempt on the part of *bhrāhmaṇas* [*brahmīns*] to synthesize diverse religious systems”.⁷ The Mahābhārata is an elaborate, massive, rich work spanning eighteen volumes and some 80,000 Sanskrit verses. It is a conscious conference of sorts of the various religious strands known to the Brahmanical world, and an attempt to systematize and bring them into conversation. Perhaps its most important function, apropos the theme at hand, is the legitimization of the violence required for warfare and the welfare of society. In its deliberations about *dharma* – what is righteous, virtuous, moral, ethical – it integrates two disparate strands: the *dharma* of remaining in the world, and the ascetic ideal of non-violence. As such, the Mahābhārata weaves a prevalent social and moral platform of Hinduism, a bipedal, ambivalent attitude which one can think of as the “dharmic double helix”. While strands of the envisioned helix never touch, and are ever at odds, they nevertheless contribute to a shared structure. This tension – particularly towards uses of violence – is very much at the centre of the Hindu worldview, informing the approaches taken by modern Hindu thinkers such as Gandhi and his opposing interlocutors. While violence and non-violence (*hiṃsā* and *ahiṃsā*) are religiously sanctioned as two types of *dharma*, another approach within the Hindu universe is considered adharmic: the cut-throat approach adopted by the secular strategist Kauṭilya (discussed below in

6 Buddhism was disseminated in middle Indo-Aryan dialects called Prakrit, and it was not until probably the first century of the Common Era (five hundred years after the death of the Buddha) that Sanskrit was adopted by Buddhist thinkers, since it remained the prime philosophical and scholastic medium of ancient India. A similar process occurred with Jainism, but we do not see Jain works appear in Sanskrit until circa 500 CE. Moreover, while the Upanishads, Buddhism and Jainism emerge from the same renouncer religion which revolutionized the Vedic world, the Upanishadic texts were canonized as part of the orthodox (*āstika*) Vedic corpus, whereas Jainism and Buddhism were considered heterodox (*nāstika*) schools of thought denouncing Vedic Brahmanism.

7 Govind Prasad Upadhyay, *Brāhmaṇas in Ancient India: A Study of the Role of the Brāhmaṇa from c. 200 B.C. to c. 500 A.D.*, Munshiram Manoharlal, New Delhi, 1979, p. 37, cited in Arti Dhand, *Woman as Fire, Woman as Sage: Sexual Ideology in the Mahābhārata*, State University of New York Press, Albany, NY, 2008, p. 24.

the section on the Arthaśāstra). While the Sanskrit epics advance ancient India's vision of righteous warfare (*dharma yuddha*), Kauṭilya advances ancient India's vision of treacherous warfare (*kūṭa yuddha*).

One of the most intriguing and lasting innovations of the Mahābhārata is its synthesis of two overarching types of *dharma* – duty and virtue – thereby integrating the Vedic and ascetic ideals. The *mokṣadharmā* section of the Śāntiparvan (the twelfth and largest of the epic's eighteen volumes) declares that religious activities (*dharma*s) are of two essential types: *pravṛtti dharma* (the world-affirming duties of “active life”) and *nivṛtti dharma* (the world-eschewing duties of “retired life”). These two broad religious codes attract different sorts of aspirants, as they are oriented towards different goals. The most salient feature for the discussion at hand is that these two strands of *dharma* offer opposing views on the use of violent force.⁸

The term *pravṛtti* connotes an active interest in worldly affairs. This brand of religiosity is a direct evolutive of Vedic ideals. It represents the religious impulse of the vast majority of society, as it is oriented towards worldly aims. It is staunchly situated within societal and familial life. This is the *dharma* of domesticity, as it were, which the Dharmasāstras (discussed below) prescribe in great detail. This is the *dharma* that pertains to one's caste, gender and stage of life. Attempts have also been made to universalize this branch of *dharma*. The Mahābhārata, for example, lists the following qualities as universal values: freedom from anger, truthful speech, agreeableness, forgiveness, fathering children, purity, conflict-avoidance, integrity, and support of one's dependents (Mahābhārata (MBh) 12.60.7–8). However, these characteristics depend on one's station in life, one's life stage, and one's gender and caste. *Pravṛtti dharma* is largely social ethics, addressed primarily to twice-born (upper three castes) male householders. The goals of this strand of religion are narrow, pertaining to the trajectory of one's personal, earthly existence. One follows these goals until one is reborn ready for the ultimate religious path, the supreme *dharma* geared towards permanent release from cycles of rebirth: *nivṛtti dharma*. The fruits of *pravṛtti dharma* are temporary, thus that *dharma* itself is referred to as rebirth-oriented.

Nivṛtti dharma, on the other hand, is aimed at the soul's liberation from the cycle of birth, death and rebirth that characterizes the Hindu world. In order for one to pursue one's spiritual salvation, one needs to eschew the world and steer clear of its material trappings. Those who are trapped in the cycle of rebirth suffer perennially due to their ignorance of what lies beyond mundane awareness, but only the extraordinary, exceptional, tenacious few are equipped to walk the razor's edge that is the path of *nivṛtti*, a path demanding self-discipline in earnest

8 A. Walter Dorn, Raj Balkaran, Seth Feldman and Stephen Gucciardi, *The Justifications for War and Peace in World Religions, Part II: Extracts, Summaries and Comparisons of Scriptures of Religions of Indic Origin (Buddhism, Hinduism, Jainism and Sikhism)*, Contract Report 2010-034, Defence Research and Development Canada, 2010, available at: www.walterdorn.net/pdf/ForceInWorldReligions-Scriptures_PartII_IndicReligions_Dorn-Balkaran-Feldman-Gucciardi_DRDC-Report_AsPublished_CR-2010-34_12Jan2011.pdf.

pursuit of the blissful release of cyclical existence in the world. Adherents to the *nivṛtti* path renounce bodily and emotional comforts for the sake of arduous self-purification, yet this sort of rigorous asceticism exhibits great empathy and compassion for the suffering of others (MBh 12.231.21, 12.321.23, 12.286.28). *Nivṛtti* is therefore a path committed to *ahiṃsā*, non-violence towards all. It calls the aspirant towards peacefulness, tranquillity, patience and equanimity. Such a sagacious practitioner becomes the refuge of all creatures.

The tension between these world-affirming and world-denying strands of *dharma* is tacitly reconciled through the use of life stages, where one can enjoy worldly pursuits earlier in life, and renounce the world in later life. Yet, irrespective of where one is in one's life journey, one is called to revere the *nivṛttic* precept of non-violence as a categorical ideal. Still, regulated violence is sanctioned for the welfare of the society – i.e., for certain types of warfare, disciplining wrongdoers, protection of others, self-defence etc. And even if violence is sanctioned for righteous warfare (*dharma yuddha*), it must be undertaken only once all other means of conflict resolution have been explored. These include conciliation (attempting to compromise using pacifying language, *sāma*), dissension (attempting to create division in the enemy camp, *bheda*), and gift-giving or bribery (*dāna*). Once these have been exhausted, the only option left is force (*daṇḍa*, punishment). Yet one is called to engage in such combat with a poised mind, bereft of anger, malice, hatred, wrath, vengeance. Additionally, ethical conduct is called for in a similar manner to IHL. In the words of L. R. Penna, Hindu epic literature is “of considerable importance for humanitarian law because the references to the precepts of war, the means of warfare, and the treatment of combatants and non-combatants bear a startling resemblance to the modern concepts enunciated in the Geneva Conventions and their Additional Protocols”.⁹ Such a chivalrous code is spelled out in detail in the supremely important epic, the Mahābhārata.

The Mahābhārata: Combat ethics in India's great epic

The Mahābhārata is a vast Sanskrit epic, widely read, recited and recounted across the Hindu world. Its most popular component, particularly among Western audiences, is the Bhagavad Gītā (discussed below), which is often treated as a separate, stand-alone scripture. While this very famous sliver of the Mahābhārata contains 700 verses over eighteen chapters, the epic from which it hails contains some 80,000 verses (i.e., over 100 times longer) spanning eighteen volumes, each subdivided into several chapters and cantos.

While the Mahābhārata consists of a complex array of subplots (developed over the centuries), its primary plot pertains to a dynastic squabble surrounding

9 Lakshmikanth R. Penna, “Written and Customary Provisions relating to the Conduct of Hostilities and Treatment of Victims of Armed Conflicts in ancient India”, *International Review of the Red Cross*, Vol. 29, No. 271, 1989, p. 336.

legitimacy of succession to the throne of Hastinapur. The Pāṇḍava faction consists of the rightful rulers, but their cousins the Kauravas refuse to give up the usurped throne. Books 1 to 5 (titled “The Beginning”, “The Assembly Hall”, “The Forest”, “The Virāṭa” and “The Effort” respectively) concern events leading up to the great war of Kurukṣetra (pertaining mostly to *jus ad bellum*). Books 6 to 10 (“Bhīṣma”, “Droṇa”, “Karna” and “Śalya”, named after admired Kaurava warriors, and “Sleep”) concern the war itself, while Books 11 to 18 (“Women”, “Peace”, “Instruction”, “Horse Sacrifice”, “Hermitage”, “Clubs”, “Great Journey” and “Ascent”) concern the aftermath thereof.

Book 5 (the Book of the Effort) is most pertinent to *jus ad bellum* concerns as it emphasizes the attempt to avoid war. The heroes and advisers of the Mahābhārata unquestionably favour peace over war. Therefore, this book details the exhaustive attempts on behalf of the heroes to seek reconciliation and avert bloodshed. This is a crucial component of the epic, which retains an ethos valorizing non-violence as of supreme moral significance, yet concedes that in certain circumstances war is the only resort in defence of *dharma*. As part of the efforts exerted to avert bloodshed, the final of several messengers is Kṛṣṇa himself, who successively applies the four diplomatic tactics (*upāya*, literally “means”) recognized by classical Hindu texts (e.g., Manu 7.109): *sāma* (conciliation); *dāna* (gift or bribery); *bheda* (subversion of allies); and *danḍa* (punishment). Rosen elaborates:

In the Indic tradition, the just war doctrine is reminiscent of the Caturōpāyas, “the four means”, which include three methods of diplomacy that attempt to avoid war (the fourth and final alternative). If one observes the first three of these tactics and cannot find a peaceful solution, then war becomes inevitable and may even be deemed righteous (*dharmayuddha*). ... A righteous war, by this definition, is not necessarily religious but is based on principles of justice and self-defense, and is always engaged in as a last resort.¹⁰

It is clear that peace is of great value in the tradition, and ironically, is much praised throughout the Mahābhārata – but inevitably, upon exhaustion of all available recourses to resolve the conflict peacefully, the war ensues as a last resort.

More to the focus of this present study, what does the great epic have to say about the ethics of combat once it has been decided that war must ensue? Right before the great war begins, the vying factions state the rules of engagement to which they are both expected to adhere throughout the conflict (MBh 6.1.26–33). These rules represent the established norms accepted in the epic, both in its discursive and its narrative segments. The primary preoccupation of these rules is ensuring a fair fight between duelling opponents. Nick Allen summarizes the rules as follows:

10 Steven Rosen, *Holy War: Violence and the Bhagavad Gita*, Indic Heritage Series, Deepak Heritage Books, Hampton, VA, 2002.

Ideally, then, one member of the warrior estate fights another member of the same estate using similar equipment and techniques – a chariot warrior versus a chariot warrior, and if one fighter uses deceit, so should the other. In general, one should not fight people who are at a disadvantage – those whose accoutrements are or have become deficient, who lack or have lost their armour or chariot, whose weapons are broken, whose bowstring is cut, nor those who are unprepared or unaware of their danger, whose chariot is unyoked, who are asleep, having a meal or grieving, nor those who have laid down their weapons, are retreating, weak, wounded, exhausted or terrified or have left the ranks, nor those who have surrendered, or are doing so, or are suppliants, nor those already engaged in a duel with someone else.¹¹

Beyond the fairness dimension, the present study not only looks at the rules laid out at this pivotal juncture just prior to the commencement of armed conflict, but surveys the entire epic for passages pertaining to the detailed rules of armed conflict. This study, therefore, constitutes a comprehensive account of the cases of combat ethics in the Sanskrit epics. The entire Sanskrit critical edition of the Mahābhārata is examined, with a comparison to IHL.¹²

Fair fight

Below are key passages illuminating the ethics of combat prescribed in the epic. The most substantive of these occurs, ironically, after the war, in the Book of Peace (*Śānti Parvan*), when the venerable grandfather Bhīṣma elucidates the finer points of virtue while laying on a deathbed of arrows, awaiting an auspicious moment to leave his body. He counsels that one ought not to engage an unarmed warrior,¹³ and specifically that one should not attack one who is wounded, nor one whose sword is broken, whose bowstring has been cut, or whose horse or chariot have been compromised in some manner. Armies should only engage armies, and chariot warriors should only engage other chariot warriors (MBh 12.96.1–13).¹⁴ This parallels IHL's prohibitions on attacking non-combatants, including combatants *hors de combat* ("out of action"). However, fighting an unarmed opponent is lawful under IHL, unless that opponent has surrendered. Moreover, IHL is not nearly as concerned with a "fair fight" since unequal fights may still be lawful – for example, a fighter jet can attack a sniper position. IHL is concerned primarily with limiting human suffering, and not so much with establishing a level playing field.

11 Nick Allen, "Just War in the Mahabharata", in Richard Sorabji and David Rodin (eds), *The Ethics of War: Shared Problems in Different Traditions*, Ashgate, Burlington, VT, 2006, p. 139.

12 Vishnu Sitaram Sukthankar *et al.*, *The Mahābhārata: For the First Time Critically Edited*, 19 vols, Bhandarkar Oriental Research Institute, Poona, 1933–66. The critical edition is available online at the Göttingen Register of Electronic Texts in Indian Languages at: <http://gretil.sub.uni-goettingen.de/gretil.html>.

13 James L. Fitzgerald (ed. and trans.), *The Mahābhārata: Volume 11: The Book of the Women; Volume 12: The Book of Peace, Part One*, Vol. 7, University of Chicago Press, Chicago, IL, 2004, p. 411.

14 *Ibid.*, p. 411.

While the Mahābhārata contains a great deal of instruction, as with Bhīṣma's words of wisdom above, one must note that the epic encodes prescription within its narrative plots and characterization. It often places sage insights in the mouths of characters in the midst of battle. This is not mere speculative philosophy; these insights provide rules that compare and contrast with IHL. The injunctions prescribed by Bhīṣma are reiterated by another epic hero, the mighty Bhīṣma, as follows:

It does not please me to fight against a man who has laid down his weapons, who has fallen, or whose armour and standard are lost; a man who flees, a fearful man, or one who has surrendered; a woman, a man with a woman's name, a cripple [disabled person], or the father of a single son; or a childless man, or a deformed man. [MBh 6.103.72–73]¹⁵

While IHL provides protection to surrendering combatants, it does not provide this kind of protection against attack to a soldier who has fallen or is disabled, or whose equipment has malfunctioned. The Mahābhārata's injunction for a fighter to be matched with a similarly equipped opponent is again emphatically voiced by the Kaurava leader Duryodhana mid-conflict in one scene:

You Parthas still all have your friends, as well as your chariots and animals. I am alone and wretched and have no chariot or animals. How can a man, who is alone and on foot, wage war if he has no weapons and is surrounded by many troops who are equipped with arms and chariots? You should fight me one against one, Yudhishtira. For it is not right for one man to fight many heroes in battle – especially if he is armorless, exhausted, and fallen on misfortune, and if his limbs are severely mangled and his troops and animals fatigued.¹⁶

Moreover, it is a question not just of being matched at the onset of combat, but of remaining matched throughout. Take, for example, the following insistence that one must cease engagement while one's opponent (Karna in this case) repairs a chariot wheel:

Forbear for a moment, O Pāṇḍava! You can see that fate has caused my wheel to sink up to the axle; abandon your intention to act as only a coward would do, son of Kuntī! One whose ... weapons are lost or broken – no hero strikes at such a man on the battlefield, O Arjuna, nor does any prince do so to serve a king. And you are a hero, son of Kuntī; therefore forbear for a moment while I raise this wheel out of the earth! You should not slay me, O wealth-winner, for you are mounted on a chariot and I am standing unready on the ground. [MBh 8.66.60–64]¹⁷

15 John D. Smith (ed. and trans.), *The Mahābhārata*, Penguin Classics, London, 2009, p. 402.

16 Justin Meiland (trans.), *Mahābhārata: Book 9: Śalya, Volume 1*, 1st ed., Clay Sanskrit Library, New York University Press, New York, 2005.

17 J. D. Smith (ed. and trans.), above note 15, pp. 521–522.

Similarly, one should even cease combat when one's opponent loses his footing, as happened to Kṛpa when he faced Arjuna:

All the horses, hit with the sharp shafts like flaming serpents, reared up violently, so that Kṛpa lost his balance. When the scion of Kuru [Arjuna] saw that Gautama [Kṛpa] had lost his footing, the killer of enemy heroes refrained from striking him in order to preserve the other's dignity. [MBh 4.52.9–10]¹⁸

Without question, the epic advocated equal footing for combatants. Consider the case of Abhimanyu, the son of Arjuna, who was encircled and slain by six Kaurava warriors while he fought alone:

Celestial beings cried out when they saw that hero fall, like the moon falling from the sky: "This single warrior lies here slain by six great Dhārtarāṣṭra chariot-fighters led by Droṇa and Karṇa. This is not *dharma*, we maintain!" [MBh 7.48.21]¹⁹

Similarly, when Arjuna severs his opponent Bhūriśravas' arm in a surprise attack, Bhūriśravas admonishes him thus:

You know your *dharma* better than anyone else in this world, so how did you strike a warrior who was not engaged in combat with you? The wise do not strike at a warrior who is distracted or frightened, chariotless or pleading, or one who is overcome by misfortune; such a base deed would be practiced only by the wicked. [MBh 7.117.62–7.118.15]²⁰

Arjuna counters with a similar allegation of wrongdoing:

[W]hat righteous man would applaud the killing of Abhimanyu [son of Arjuna], a child, disarmed, chariotless and without armour? [MBh 7.118.22–26]²¹

Sleeping warriors

One of the most (purposefully) disturbing elements of the epic takes place in Book 10, known as the *Sauptika Parvan*, the Book of Sleep. It depicts tragic events at the end of the epic war wherein the character Aśvatthāman mercilessly avenges his father Droṇa's death by slaughtering Dhṛṣṭadyumna and other warriors, in their sleep – plus the Pāṇḍava's children (of varying ages), having mistaken them for their fathers. This slaughter of sleeping warriors and children is one of the most egregious violations of the epic's warrior code. The book reveals insight into the code, most of which is articulated by Kṛpa, who counsels

18 J. A. B. van Buitenen (ed. and trans.), *The Mahābhārata: Book 4: The Book of Virāṭa; Book 5: The Book of The Effort*, Vol. 3, University of Chicago Press, Chicago, IL, 1978, p. 103.

19 J. D. Smith (ed. and trans.), above note 15, pp. 428–429.

20 *Ibid.*, pp. 447–448.

21 *Ibid.*, pp. 448–449.

Aśvatthāman to wait until the morning, and not kill his enemy in their sleep. His warning is as follows:

In this world, slaughter of the sleeping
Is not respected as conforming to dharma.
The same applies to those whose arms have been laid down,
To those whose fighting chariots have been unyoked,
To those who have declared their allegiance,
To refugees, and to those with disheveled hair [one in flight],
To those, as well, whose chariots have been destroyed....
The wicked man who seeks to harm them in that state,
Without a doubt, would dive into a raftless,
Fathomless, shoreless hell. [MBh 10.5.9–12]²²

Aśvatthāman, in his own defence, lists the various breaches of conduct made by the Pāṇḍavas.²³ These Pāṇḍava breaches are made to show that one cannot always maintain the pristine standards laid out in the epic (discussed below), but equally, that transgressions of combat ethics are problematic, even when undertaken by its heroes. Aśvatthāman calls them out as follows:

My father, who had laid aside his sword, was felled by Dhṛṣṭadyumna.
And the great warrior Karṇa, when his chariot's wheel
Was stuck, and he was motionless in supreme
Distress was killed by [Arjuna's] Gāṇḍīva bow.
In this same way, Bhīṣma, Śāmtanu's son, unarmed,
His sword laid down on Śikhaṇḍin's account,
Was killed by Arjuna.
So too the great archer Bhūriśravas,
While fasting to death on the field of battle,
Was felled by Yuyudhāna though kings cried out.
And Duryodhana, confronted in battle
By Bhīma with a mace, was unlawfully felled. [MBh 10.5.17–21]²⁴

Despite his attempts at self-justification, it is clear that the epic finds this massacre of the sleeping to be atrocious, and well beyond the boundaries of accepted combat ethics:

Who that considers himself a Kṣatriya would slay men who were sleeping as if already dead? Son of Hṛdika, the Yādavas could never pardon what you did. [MBh 16.4.17]²⁵

22 W. J. Johnson (trans.), *The Sauptikaparvan of the Mahābhārata: The Massacre at Night*, Oxford University Press, Oxford and New York, 1998, p. 22.

23 In the West, this would be called a *tu quoque* (“you too”) argument. The use of this argument by war crimes defendants has been expressly rejected by international courts, though they may have some power in public opinion. See, for example, Katerina Borrelli, “Between Show-Trials and Utopia: A Study of the Tu Quoque Defence”, *Leiden Journal of International Law*, Vol. 32, No. 2, 2019.

24 W. J. Johnson (trans.), above note 22, p. 22.

25 J. D. Smith (ed. and trans.), above note 15, p. 760.

Now the three mighty chariot-fighters, having completed that most evil massacre of the Pāṇḍavas, all congratulated one another. [MBh 10.8.148]²⁶

By contrast, IHL does not prohibit killing those who are sleeping, though targeting civilians (including children) is a crime. However, IHL and international criminal law do allow for mistakes on the part of combatants – for example, if they did not know they were killing civilians and did not intend to do so.

Deceit and manipulation

The Mahābhārata considers deceitful and manipulative tactics to be beneath respectable engagement in armed conflict:

Dhrishtadyumna will witness the extremely terrible consequences of that. He has performed an extremely ignoble deed and so has the liar Pandava [Yudhiṣṭhira]. They resorted to deception against the preceptor [Droṇa], when he had cast aside his weapons. That is the reason the earth will drink Dharmaraja's [Yudhiṣṭhira's] blood today.²⁷

My father [Droṇa] was brought down by inferior ones after he had cast aside his weapons. A wicked act has been committed by those who should have upheld the standard of dharma. Dharma's son [Yudhiṣṭhira] acted ignobly and cruelly.²⁸

In Yudhiṣṭhira's case, he conveyed during the battle information that he knew to be false to the warrior Droṇa: that Droṇa's son, Aśvatthāman, was dead, though under his breath Yudhiṣṭhira then whispered, "Aśvatthāman the elephant" (a creature that had been deliberately killed to enable the deception). Since this caused Droṇa to give up his weapons (and he was immediately attacked), it is a case of perfidy. The act was condemned in the epic, despite being carried out by one of its most virtuous characters.

Under IHL, ruses of war (intended to confuse the enemy) are permitted, but perfidy is not, perfidy being defined as "[a]cts inviting the confidence of an adversary to lead him to believe he is entitled to, or is obliged to grant, protection under the rules of international humanitarian law ... with intent to betray that confidence".²⁹ For instance, perfidious acts would include faking injury, sickness or surrender in order to attack an enemy; using certain protective emblems (such as the red cross or red crescent) to benefit from IHL

²⁶ *Ibid.*, p. 574.

²⁷ Bibek Debroy (trans.), *The Mahabharata*, 10 vols, Penguin Books, Gurgaon, 2015. Dharmaraja is the God of death and justice.

²⁸ *Ibid.*

²⁹ ICRC, "Perfidy", *ICRC Casebook*, available at: <https://casebook.icrc.org/glossary/perfidy>; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 57, 65, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

protections; or using enemy uniforms in order to shield, favour, protect or impede military operations. Perfidy or treachery would be against the rules in the Indian epic, though, as in IHL, ruses would be permitted (and we shall give examples of this below).

Respecting the fallen

The Mahābhārata advocates respect for one's opponents, especially when fallen:

O king, the righteous-minded Somaka leaders were not happy to see joyful Bhīma mean-mindedly placing his foot on the head of the Kuru king, Yudhiṣṭhira lord of *dharma* spoke to the wolf-belly as he boasted and danced about after striking down your son: “Do not trample his head with your foot, do not let your great *dharma* fail! He is a king and a kinsman, and he lies fallen; sinless Bhīma, it is not right for you to behave thus. He is destroyed; his ministers and brothers and sons are all slain; no one survives to perform his funeral offerings; he is our brother. It is not right for you to behave thus. People used to call you ‘Righteous Bhīma’ – so why, Bhīma, are you trampling the king?” [MBh 9.58.13–17]³⁰

IHL has a similar provision on respect for dead bodies.³¹

Hitting below the belt

In the Mahābhārata, Kṛṣṇa's brother, Balarāma, clearly states that one should never hit below the belt or navel:

A curse upon you, Bhīma, a curse upon you for striking a warrior of blameless valour below the navel! What the wolf-belly has done is something never before seen in a battle with clubs: the learned texts are clear that no blow should be struck below the navel, but Bhīma, this unlearned fool, acts however he wishes! [MBh 9.59.5–7]³²

While IHL has a general principle against causing “unnecessary suffering”, there is no specific prohibition against hitting another warrior below the belt. In sports, of course, such rules do exist.

Treacherous weapons/weapons of mass destruction

Like in IHL, weapons causing unnecessary suffering were prohibited in the ancient Indian scriptures.³³ The Mahābhārata counsels against the use of unnecessarily cruel weapons, including poisoned arrows among many others:

30 J. D. Smith (ed. and trans.), above note 15, p. 553.

31 ICRC Customary Law Study, above note 29, Rule 113.

32 J. D. Smith (ed. and trans.), above note 15, p. 544.

33 V. S. Mani, “International Humanitarian Law: An Indo-Asian Perspective”, *International Review of the Red Cross*, Vol. 83, No. 841, 2001, p. 63.

They employed no form of warfare contrary to *dharma* or to the rules of weaponry: no barbed arrows or reed-arrows, no poison-smearred arrows or poison-injecting arrows, no needle-arrows or monkey-arrows, no arrows of cow-bone or elephant-bone, no double-arrows or infected arrows, no crooked-flying arrows. The weapons they all used were straight and pure, for all desired to gain the world of heaven, and glory too, through fair fight. [MBh 7.164.8–13]³⁴

In the epic, some of the heroes have access to divine weapons of mass destruction, which are prohibited at every turn:

But it is not proper to kill ordinary men in battle with divine weapons: we shall fight the enemies honourably. [MBh 5.195.15]³⁵

Arjuna, Arjuna, do not employ the divine weapons! They are never to be used on an unfit target, Bhārata, nor should one use them ever on a fit target, when not pressed; for in the use of these weapons lies very great evil, joy of the Kurus! If you guard them as you have learned, Dhanamjaya, these mighty weapons shall doubtless bring happiness, but if not so guarded they will lead to the destruction of the universe. [MBh 3.172.18-21]³⁶

However, Pārtha, you must never let it loose at any man in wanton violence, for if it hits a person of insufficient power, it might burn down the entire world. [MBh 3.41.15]³⁷

My son, you must never launch this weapon,
Even when in battle mortal danger threatens,
And above all never against human beings. [MBh 10.12.8]³⁸

Similarly, IHL bans or greatly restricts the use of weapons of mass destruction, in part because of the indiscriminate and widespread suffering they inflict.

Immunity from attack

There are a number of actors in the Mahābhārata who do not qualify as proper combatants in war. Nick Allen lists these as follows:

women and children, the aged (once), brahmans and ascetics, those from whom one has received food, drivers, transporters, drummers, conch players, foragers, camp-followers, doormen, menials or servants in charge of menials, artisans

34 J. D. Smith (ed. and trans.), above note 15, p. 472.

35 J. A. B. van Buitenen (ed. and trans.), above note 18, p. 530.

36 J. A. B. van Buitenen (ed. and trans.), *The Mahābhārata: Book 2: The Book of the Assembly Hall; Book 3: The Book of the Forest*, Vol. 2, University of Chicago Press, Chicago, IL, 1975, pp. 553–554.

37 *Ibid.*, p. 303.

38 W. J. Johnson (trans.), above note 22, p. 64.

such as miners, those who are beginning a sacrifice, seeking Deliverance (*mokṣa*) or undertaking a religiously motivated fast to death (*prayā*).³⁹

Presented below are direct passages from the epic pertaining to those deemed to be excluded from engagement in armed conflict, and therefore immune to attack:

The wealth-winner is a supporter of Brahmins and a speaker of truth; self-controlled and compassionate to all, he would not slay a sleeping or distracted man, or one who had laid down his weapons and sued for peace, or one fleeing with dishevelled hair. This dreadful thing is done to us by cruel Rākṣasas. [MBh 10.8.118–119]⁴⁰

No one born in the lineage of Vṛṣṇi ever forsakes his given word or kills a fallen foe or one who surrenders. No one kills a woman, a child, or old man, one unseated from his chariot, one gone to pieces, or one whose sword and weapons are broken. [MBh 3.19.13–14]⁴¹

Strict, honest, law-abiding people have always instructed us in the world not to raise weapons against women, cows, brahmins, him whose food one has eaten, and him who seeks mercy with you. [MBh 2.38.13–14]⁴²

IHL provides immunity to civilians and surrendering combatants and those *hors de combat*, though not to combatants whose weapons are merely broken (e.g., a jammed rifle). IHL provides protection to “religious personnel”, which could be considered equivalent to *brahmins* and ascetics in Indian terms.⁴³ IHL also provides protection to civilian property.

Women

I shall *not* kill a woman, or one who was a woman before. [MBh 5.169.19]⁴⁴

Those wise in the Law declare in the decisions on the Law that women may not be killed. [MBh 1.146.29]⁴⁵

Even in anger, tigerlike Bhīma, never kill a woman! Preserve the Law, Pāṇḍava, before you preserve your life. You have killed the mighty rākṣasa who came

39 N. Allen, above note 11, p. 139.

40 J. D. Smith (ed. and trans.), above note 15, pp. 572–573.

41 J. A. B. van Buitenen (ed. and trans.), above note 36, p. 259.

42 *Ibid.*

43 ICRC Customary Law Study, above note 29, Rule 27.

44 J. A. B. van Buitenen (ed. and trans.), above note 18, p. 493. The mighty warrior Bhīṣma refuses to shoot arrows at Arjuna because the latter is standing behind Śikhaṇḍin, whom Bhīṣma recognizes as a reincarnation of a woman. Respectful treatment of women is emphasized across the Mahābhārata. When women’s rights and dignity are disrespected, as in the case of the attempted disrobing (a form of sexual violence) of the Pāṇḍava’s wife, Draupadī, there is enormous criticism and shame. Indeed, this is one of the causes of the war.

45 J. A. B. van Buitenen (ed. and trans.), *The Mahābhārata: Book 1: The Book of the Beginning*, Vol. 1, University of Chicago Press, Chicago, IL, 1973, p. 306.

intending to kill us. But what could his sister do to us, even if she were angry? [MBh 1.143.2–3]⁴⁶

In the modern era, women who serve in the armed forces may be targeted and the targeting protections are exactly the same for non-combatant women as for non-combatant men. IHL does, however, have some extra protections for women who are captured, as well as for civilian women who find themselves in the power of a party to the conflict.

Envoys

“Listen to what I have determined is my important task: I shall take captive Janārdana, who is the last resort of the Pāṇḍavas. With him in fetters, the Vṛṣṇis, the earth, and the Pāṇḍavas will submit to me. Tomorrow morning he will be here. Tell me sir, by what means Janārdana can be prevented from finding out, so that no harm comes to us.” *Vaiśampāyana said*: When Dhṛtarāṣṭra and his councillors heard these dreadful words of threat to Kṛṣṇa, they were hurt and perturbed. Dhṛtarāṣṭra told Duryodhana: “If you are the protector of your subjects, don’t talk like that! This is not the sempiternal Law! Hṛṣikeśa is an envoy and our dear friend. He means no harm to the Kauraveyas, so how does he deserve being held?” [MBh 5.86.13–18]⁴⁷

In IHL, envoys (called parlementaires) must also be afforded protection.⁴⁸

Summary

According to the Mahābhārata, one must not engage in combat against the following people:

- *brahmins*;
- children;
- the aged;
- the disabled;
- the grieving;
- the mentally ill;
- the weary;
- those drinking or eating;
- those support workers in army camps;
- those walking along a road;
- those who are sleeping;
- those who surrender; or
- women.

46 *Ibid.*

47 J. A. B. van Buitenen (ed. and trans.), above note 18, p. 366.

48 ICRC Customary Law Study, above note 29, Rules 66–68.

When one engages in combat, one must not

- attack one's opponent without warning;
- engage in deceit or trickery;
- engage someone whose armour is broken;
- engage someone of inferior status;
- engage someone at a strategic disadvantage;
- fight during the night;
- fight with one unclad under a coat of mail; or
- hit below the belt.

Through severe limitations, India's great epic both legitimizes and regulates armed conflict. But violence – even when wholly sanctioned – always provokes moral anxiety in the Indic world. This is owing to the exaltation of *ahimsā* (non-violence) as a paramount virtue. The most famous component of the Mahābhārata, the Bhagavad Gītā, unfolds in response to this very apprehension towards even sanctioned violence. The Bhagavad Gītā is a conversation between the great Mahābhārata hero Arjuna and his cousin/charioteer Kṛṣṇa, who reveals himself as divinity incarnated. Their epic conversation takes place on the battlefield right before the start of the great war. At first, Arjuna takes stock of the enemy forces, populated by members of his own family, and loses his will to fight. In an effort to quell the hero's unbecoming despondency at that crucial hour, Kṛṣṇa takes him through a discussion of various branches of Indian philosophy.

The Bhagavad Gītā

The Bhagavad Gītā is one of the most widely referenced and most revered scriptures in Hinduism. It is the 700-verse dialogue between a reluctant warrior, Arjuna, and his charioteer Kṛṣṇa (pronounced and often written as Krishna), who is revealed to be an *avatāra*, a direct incarnation of the god Viṣṇu. The Bhagavad Gītā (or Gītā, for short) is commonly read as an independent text, but it is in actuality a segment of Book 6 of the Mahābhārata.⁴⁹

In the Gītā, Kṛṣṇa calls Arjuna to engage his violent duty throughout, but owing to the dual legacy contributing to Hinduism's dharmic double helix, Kṛṣṇa also calls Arjuna to engage the sagacious qualities of *nivṛtti* religion in his inner life, while engaging his social duties in the outer world. He calls Arjuna not to inaction, nor to unbridled action, but to detached action:

Therefore, without attachment, always do whatever action has to be done; for it is through acting without attachment that a man attains the highest. ... Partha, as for me there is nothing whatever that has to be done in the three worlds; there is nothing unaccomplished to be accomplished. Yet I still engage in action. [Bhagavad Gītā (BhG) 3.19–22]⁵⁰

49 See, for instance, Robert N. Minor (ed.), *Modern Indian Interpreters of the Bhagavad Gita*, SUNY Religious Studies, State University of New York Press, Albany, NY, 1986, p. 3.

50 W. J. Johnson (trans.), *The Bhagavad Gītā*, Oxford University Press, New York, 1994, p. 16.

So, Great Arm, having learned what is higher than the intelligence, and having strengthened yourself through the self, kill that enemy in the shape of desire, so difficult to pin down. [BhG 3.43]⁵¹

Like all classical Hindu texts, in tandem with an endorsement of restricted force, the Gītā endorses non-violence:

Lack of pride, lack of deceit, nonviolence... this, it is declared, constitutes knowledge; anything opposed to this is ignorance. [BhG 13.7–11]⁵²

In other places as well, the Gītā advocates non-violence by citing it as a virtue or including it among a list of virtues.⁵³ Yet overall, the text serves as a running call to action for Arjuna to pick up his bow and fight. The Gītā, without question, advocates the righteous use of force. Kṛṣṇa deploys the following arguments towards this end:

1. social criticisms of Arjuna's reluctance to fight (e.g., cowardice);
2. Arjuna's caste duty as a warrior;
3. superiority of action over inaction;
4. virtue of disinterested action;
5. nature of the *guṇas* (dispassion versus passion versus inertia);
6. human agency nullified by divine agency;
7. indestructibility of the soul;
8. non-violence as a general (but not absolute) virtue.⁵⁴

Since the Gītā is about reasons to go to war (*jus ad bellum*) and not about the code of conduct during war (*jus in bello* or IHL), it is not reviewed in detail here. But it has often been used at the tactical level by fighters to justify the application of armed force against opposing forces – the situation in which Arjuna finds himself. Unsurprisingly, the Gītā has been the object of immense referencing, interpretation, commentary, veneration and some critique over the centuries, including by prominent Indian thinkers from Shankara (788–820 CE) to twentieth-century Hindu leaders such as Sri Aurobindo, Gandhi and Tilak. The Gītā has garnered a great deal of interest in the West as well, referenced by scholars such as Emerson, Thoreau, Einstein and Huxley, and has been invoked through the ages for a variety of military, social and spiritual goals.⁵⁵ The ways it can be interpreted are many, from the practical to the metaphorical to the spiritual; still, given its emphasis on the justifications to go to war and not on the manner of fighting war, its provisions are not reviewed in depth here. Instead, we review another epic that provides abundant insights into Hinduism's *jus in bello*, as well as its *jus ad bellum* rules.

51 *Ibid.*, p. 18.

52 *Ibid.*, p. 57.

53 BhG 10.5, 10.45, 13.8–12, 16.1–3, 17.14.

54 A. W. Dorn *et al.*, above note 8, pp. 46–55.

55 A passage from the Gītā (11:32) was even quoted by Robert Oppenheimer, the chief atomic scientist of the Manhattan Project, after he witnessed the first nuclear explosion.

The Rāmāyaṇa: Violence and non-violence in India's second epic

While the Mahābhārata is very much the bedrock of classical Hindu ideals, the second Sanskrit epic, the Rāmāyaṇa, goes a long way towards crystallizing and advancing the ethos established in the Mahābhārata. The Rāmāyaṇa, or “story of Rāma”, is one of the most widely engaged narratives across the Indic world, and into Southeast Asia. Conscious about crafting ideals, the epic presents its protagonist, the noble prince Rāma, as the ideal man and the most valiant warrior bar none. Like his heroic counterparts in the Mahābhārata, however, Rāma's actions are called into question. Both epics preserve the *nivṛtti-pravṛtti* tension comprising the dharmic double helix at the heart of the Hindu world. The authors of the present paper have already shown, through an exhaustive survey of the Rāmāyaṇa, that each of the standard *jus ad bellum* criteria proper to just war theory are amply articulated in the ancient Indian epic's plot, characterization and instruction.⁵⁶ The present paper emphasizes the Rāmāyaṇa's commentary on combat ethics, highlights of which follow.

Like the Mahābhārata, the Rāmāyaṇa prescribes engaging those in combat who are on an equal footing and proscribes unfair combat:

For whoever kills anyone who is drunk or heedless or asleep or without weapons or, like you, completely stupefied by passion is regarded in this world as the murderer of an unborn child. [Rāmāyaṇa (Rām) 4.11.34]⁵⁷

Meanwhile, wise and powerful Hanūmān, now recovered and eager for battle, saw that Rāvaṇa, the lord of the *rākṣasas*, was engaged in battle with Nīla. Angrily he said, “It is not appropriate to attack someone who is locked in battle with another.” [Rām 6.47.69–70]⁵⁸

As for what you accomplished in battle on that other occasion by making yourself invisible, that is the way of thieves. It is not to be followed by heroes. [Rām 6.75.12]⁵⁹

Then the gods, *gandharvas*, and *dānavas* declared, “This combat between Rāma, who is standing on the ground, and the *rākṣasa*, mounted in his chariot, is not fair.” [Rām 6.90.4]⁶⁰

56 Raj Balkaran and A. Walter Dorn, “Violence in the ‘Vālmiki Rāmāyaṇa’: Just War Criteria in an Ancient Indian Epic”, *Journal of the American Academy of Religion*, Vol. 80, No. 3, 2012.

57 Rosalind Lefebvre (trans.), *The Rāmāyaṇa of Vālmiki: An Epic of Ancient India. Volume IV: Kiṣkindhākāṇḍa*, ed. Robert P. Goldman, Princeton University Press, Princeton, NJ, 2005, p. 76.

58 Barend A. van Nooten (trans.), *The Rāmāyaṇa of Vālmiki: An Epic of Ancient India. Volume VI: Yuddhakāṇḍa*, ed. Robert P. Goldman, Princeton University Press, Princeton, NJ, 2009, p. 256.

59 *Ibid.*, p. 372.

60 *Ibid.*, p. 420.

It is only out of fear of incurring censure that I have not killed you thus far, hero. For you must be exhausted after performing this feat. Once you are rested, you shall witness my strength. [Rām 6.63.44]⁶¹

The Rāmāyaṇa also advocates refraining from engaging certain types of people:

Those seeking refuge

For the sake of compassion, scorcher of your foes, one ought never slay a poor wretch who has come for refuge, begging for protection with his hands cupped in reverence, even should he be one's enemy. Even at the cost of his own life, a magnanimous person should save an enemy who has come for refuge from his enemies, whether he be abject or arrogant. Should one fail to offer this protection to the best of one's ability and the limits of one's strength, whether through fear, confusion, or greed, that would be a sin condemned by all the world. ... Thus, it is a serious transgression to fail to protect those who come seeking shelter, for it blocks the path to heaven, destroys one's reputation, and undermines one's strength and valor. [Rām 6.12.11–18]⁶²

Emissaries

Whether he is good or evil, he has been sent by others. Expressing the intentions of others, entirely under their control, a messenger never deserves death. [Rām 5.50.11]⁶³

The execution of an emissary is not sanctioned in the treatises on kingship, *rākṣasa*. An emissary bearing a beneficial message must convey it accurately. O you whose valor is unequalled, even when an emissary has committed some grave offense, then, according to the treatises, only disfigurement is sanctioned, never execution. [Rām 5.56.126–127]⁶⁴

Women

Nor, best of men, should you be soft-hearted about killing a woman. A king's son must act for the welfare of the four great social orders. [Rām 1.24.15]⁶⁵

61 *Ibid.*, p. 340.

62 *Ibid.*, p. 149.

63 Sally J. Sutherland Goldman (trans.), *The Rāmāyaṇa of Vālmiki: An Epic of Ancient India. Volume V: Sundarakāṇḍa*, ed. Robert P. Goldman, Princeton University Press, Princeton, NJ, 2005, p. 253.

64 *Ibid.*, p. 274.

65 Robert P. Goldman (ed. and trans.), *The Rāmāyaṇa of Vālmiki: An Epic of Ancient India, Volume I: Balakāṇḍa*, Princeton University Press, Princeton, NJ, 1985, p. 173. The verse actually suggests that killing a woman can be justified if a greater good results, but it implies that the act of killing a woman is itself a sin.

I alone just barely escaped from the great and celebrated Rāma: Although he treated me with contempt, he shrank from killing a woman. [Rām 3.32.11]⁶⁶

Children and the aged

Once you have slaughtered the male population of Laṅkā with your waves of arrows, sparing only the children and the aged, and have slain your enemy Rāvaṇa, you shall surely recover Sitā. [Rām 6.40.57]⁶⁷

Weapons of mass destruction

Beyond fair footing and exemptions for combat engagement, the Rāmāyaṇa, like the Mahābhārata, cautions against the use of weapons which, though effective, would cause too much devastation to possibly justify:

Then, in a towering rage, Lakṣmaṇa said these words to his brother: “I shall use the divine weapon-spell of Brahmā in order to exterminate all the *rākṣasas*.” But Rāma said this in reply to Lakṣmaṇa of auspicious marks: “You must not slaughter all the *rākṣasas* of the earth on account of a single one. A foe who does not resist, is in hiding, cups his hands in supplication, approaches seeking refuge, is fleeing, or is caught off guard – you must not slay any of these.” [Rām 6.67.36–38]⁶⁸

While the Rāmāyaṇa unquestionably sanctions ethical combat – and goes a long way towards establishing the ethics thereof – the text also exhibits a pervasive discomfort with violence of any kind, and a correlate valorization of non-violence. Rāma himself goes so far as to say that he rejects the warrior code “where unrighteous and righteous go hand in hand, a code that only debased, vicious, covetous and evil men observe” (Rām 2.101.20).⁶⁹ This occurs when he insists on accepting forest exile on the day of his would-be coronation. One of the most telling expressions of this tension is voiced by Sitā, who cautions her husband Rāma about the use of weapons in the forest among the pacifist ascetics, declaring: “Mighty kshatriyas, finding themselves in the forests inhabited by men who practice self-restraint, need bows only for protecting those in distress.”⁷⁰

The kings of the Sanskrit epics, Mahābhārata and Rāmāyaṇa included, endure imposed forest exile so as to converse with ascetics. The king is the paragon of *pravṛtti dharma* (world-engagement), while the ascetic is the face of *nivṛtti dharma* (world-denial). The narrative trope of exiled kings engaging forest

66 Sheldon Pollock (trans.), *The Rāmāyaṇa of Vālmiki: An Epic of Ancient India. Volume III: Aranyakāṇḍa*, ed. Robert P. Goldman, Princeton University Press, Princeton, NJ, 1991, p. 154.

67 B. A. van Nooten (trans.), above note 58, p. 230.

68 *Ibid.*, p. 351.

69 Sheldon Pollock (trans.), *The Rāmāyaṇa of Vālmiki: An Epic of Ancient India. Volume II: Ayodhyākāṇḍa*, ed. Robert P. Goldman, Princeton University Press, Princeton, NJ, 1986, p. 557.

70 S. Pollock (trans.), above note 66, pp. 100–101.

ascetics therefore cleverly weaves the opposing dharmic elements (like a double helix), pointing to the antithesis at play between ascetics and kings. Sītā notes: “How incongruous they are, weapons and the forest, the kshatriya order and the practice of asceticism – it is all so at odds”;⁷¹ she even goes so far as to say: “Wicked thoughts, my noble husband, can come from handling weapons.”⁷² She encourages Rāma to refrain from engaging the warrior code until he returns to the city, and to instead engage the sagacious ethos of non-violent restraint while in the forest (Rām 3.8.10-29).⁷³

One of the most contentious scenes in the Vālmīki Rāmāyaṇa revolves around this very tension between socially sanctioned violence and the moral imperative of non-violence. In the scene, Rāma transgresses the warrior's code, killing an opponent while in hiding (i.e., waiting in ambush). While ambushes, and ruses of war, are permitted by IHL, they are prohibited by the ancient Indian warrior code. This is a severe transgression for one so noble as Rāma, a paragon of human virtue. Rāma's opponent in this instance is the monkey-man Sugrīva. Note that the monkey people are not mere animals: far from it, they possess speech, a reasoning mind, and a sophisticated anthropomorphic society complete with stringent rules of ethical combat mirroring those of human society. Rāma regards them as proxies for human warriors, forming an alliance with one faction of the monkey people in order to gain their support to rescue his abducted wife Sītā. When Rāma shoots from hiding, his target, Sugrīva, explicitly asks how one such as Rāma, who is virtuous, reputable and of exalted lineage, could possibly attack someone who was already engaged in battle with another, describing such an act as that of a “vicious evildoer” (Rām 4.17.12–21).⁷⁴ Rāma sophisticatedly defends himself by invoking his right to punish citizens who transgress. He also invokes his right to hunt, since this particular opponent is another of the monkey-men of the forest. Rāma's defence is a flaccid one, however. It is deployed by the epic's author so as to posit a parallel between the warrior and the wanton hunter, the latter of which is the face of vice in Indic culture.⁷⁵ The Rāmāyaṇa, like the Mahābhārata, thereby brilliantly encodes the ambivalence between legitimized violence and staunch non-violence at the heart of the Hindu world.

To resolve this tension between violence and non-violence (non-harm), both Hinduism and IHL find a common solution: placing restrictions on the means and methods of warfare. Like the epics, IHL offers protections to children and the aged, and to those who have surrendered or are seeking refuge.⁷⁶ It also protects parlementaires, and prohibits or greatly restricts the use of weapons of mass destruction.

However, there are many differences between the Rāmāyaṇa's rules and those of IHL. The latter permits targeting women if they are combatants, though

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 R. Lefeber (trans.), above note 57, pp. 88–89.

75 Raj Balkaran, “The Sarus' Sorrow: Voicing Nonviolence in the Vālmīki Rāmāyaṇa”, *Journal of Vaishnava Studies*, Vol. 26, No. 2, 2018.

76 ICRC Customary Law Study, above note 29, Rule 131.

it provides such women with extra protections if they become *hors de combat*. IHL also allows targeting combatants while they are already engaged in fighting with others, or from a place of hiding. IHL does not place persons *hors de combat* if they drink alcohol, unless they are so inebriated that they cannot function at all as a combatant. And it is not necessary under IHL to wait for a fatigued enemy to catch their breath in a fight – but someone who is completely exhausted might be considered *hors de combat* because of sickness, in which case they might be protected under IHL. Unlike the Rāmāyaṇa’s prohibition on “making yourself invisible”, camouflage and ruses of war are permitted under IHL.

Hinduism offers other sacred texts aside from the epics. Some are not story-based, and some provide, like IHL, explicit lists of rules for acts that are permitted and prohibited in armed conflict.

The Dharmaśāstras: The law codes of ancient India

The Dharmaśāstras are a vast group of texts dealing with law and proper action – i.e., *dharma*. They seem to have been written in order to codify behaviour, though they were never to be read by the common person; they are clearly the domain of administrators and priests. Hundreds of these texts were once in existence, but most of them have been lost to history.

The Dharma Sūtras are the earliest of the Dharmaśāstras (third–first century BCE), created by members of a specific lineage of *brahmins*. They share content in common. Popular surviving works include the Āpastamba, Baudhāyana and Vaikhānasa Dharma Sūtras. These works cover social dictates, and as such, the Indian king – the centre of society in this era – is much discussed. The texts offer a peephole into times past, and into values very much alive today.

Some telling passages about combat ethics – entirely consistent with the material in the epics – can be found:

There is no higher duty for men of the military caste, than to risk their life in battle. Those who have been killed in protecting a cow [a sacred animal for Hindus], or a Brāhmana, or a king, or a friend, or their own property, or their own wedded wife, or their own life, go to heaven. [Viṣṇu Smṛti 3.44–45]⁷⁷

He commits no sin if he kills someone in battle, except the following: those who have lost their horses, charioteers, or arms; those who join their hand in supplication or have dishevelled hair; those who are fleeing or hunkering down; those who have climbed on to a ledge or a tree; messengers; and those who say they are cows or Brahmins. [Gautama Dharmasūtra 10.17–18]⁷⁸

The king should not turn back in battle or strike with barbed or poisoned weapons. He should not engage in battle people who are afraid, intoxicated,

77 Julius Jolly (trans.), *The Institutes of Vishnu*, Clarendon Press, Oxford, 1880, p.18.

78 Patrick Olivelle (trans.), *Dharmaśāstras: The Law Codes of Ancient India*, Oxford University Press, Oxford, 1999, p. 94.

mad, or delirious, or who have lost their armour; as also women, children, old people, and Brahmins, unless they are trying to kill him. [Baudhāyana Dharmasūtra 1.18.9–12]⁷⁹

In war, people should conduct themselves according to the strategies taught by those proficient in such matters. Āryas condemn the killing of those who have thrown down their weapons, who have dishevelled hair, who fold their hands in supplication, or who are fleeing. [Āpastamba Dharmasūtra 2.10.10–11]⁸⁰

By contrast in the last instance, protection under IHL requires more than merely the throwing down of one's weapons. Surrendering combatants typically need to raise their hands in supplication, wave a white flag or otherwise communicate (e.g., by radio) a clear intention to surrender.

Still, there are many similarities between the Dharmasāstras' rules and those of IHL. The non-use of barbed weapons finds parallels in the IHL prohibitions on hollow-point and exploding bullets, and in the central IHL principle of not causing unnecessary suffering.⁸¹ The non-use of poisoned weapons finds an exact parallel in IHL.⁸²

The Dharmasāstras list an interesting exception to the non-killing of civilians that is not highlighted in the epics: “unless they are trying to kill him” (Baudhāyana Dharmasūtra 1.18.12, cited above). Similarly in IHL, if an otherwise protected person directly participates in hostilities, they lose their protection under IHL and may be targeted.

The most widely known Dharmasāstra text is the Manu Smṛti, or Laws of Manu (officially called the Mānava Dharma Śāstra (Dharma Text of Manu)), dated anywhere from 200 BCE to 200 CE. As Wendy Doniger writes, this text discusses “the social obligations and duties of various castes and of individuals in different stages of life; the proper way for a righteous king to rule, and to punish transgressors in his kingdom[:] ... cosmogony, karma, and rebirth”.⁸³ The epic sentiments on combat rules are very much echoed in the Laws of Manu:

When he is engaged in battle, he must never slay his enemies with weapons that are treacherous, barbed, or laced with poison, or whose tips are ablaze with fire. He must never slay ... an effeminate man, a man with joined palms, a man with loose hair, a seated man, a man declaring “I am yours,” [a] sleeping man, a man without his armor, a naked man, a man without his weapons, a non-fighting spectator, a man engaging someone else, [a] man with damaged weapons, a man in distress, a badly wounded man, a frightened man, or a man who has turned tail – recalling the Law followed by good people. When a man is killed in battle by the enemy as he turns tail frightened, he takes upon

79 *Ibid.*, p. 159.

80 *Ibid.*, p. 53.

81 ICRC Customary Law Study, above note 29, Rules 77, 78 and 70 respectively.

82 *Ibid.*, Rule 72, and also the Chemical Weapons Convention.

83 Wendy Doniger and Brian K. Smith (trans.), *The Laws of Manu: With an Introduction and Notes*, Penguin Books, Harmondsworth and New York, 1991, p. xvii.

himself all the evil deeds committed by his master; while any good deeds that a man killed as he turns tail has stored up for the hereafter, all of that his master takes from him.⁸⁴

While IHL permits engagement with a combatant already engaged with another, the prohibition on engaging those who are badly wounded directly parallels Geneva Convention I.⁸⁵ Also, IHL includes a rule prohibiting the use of incendiary weapons against combatants.⁸⁶ Note that, contributing to the argument made in this paper, the Dharmaśāstras also include valorization of non-violence in tandem with establishing norms for combat:

A man who refrains from causing injury to living beings goes to heaven.
[Vasiṣṭha Dharmasūtra 29.3]⁸⁷

Neither the Sanskrit epics nor the Dharmaśāstras can get around the divergent structure of righteousness in the Indic context that sanctions violence while also rebuking it. However, one Hindu text discounts non-violence almost entirely.

The Arthaśāstra: India's realpolitik approach

As in all civilizations, India was not without pragmatists in the enterprise of war, foremost of which was Kauṭilya, who is traditionally considered to be the author of the Arthaśāstra. Unlike the Indian epics, the Arthaśāstra is a secular text, not a sacred one. It does not advance the cause of *dharma*, righteousness, but rather justifies *adharmā* (non-*dharma*) for the sake of achieving pragmatic, ambitious, worldly goals. Kauṭilya was likely the *guru* (mentor) of King Chandragupta (322–293 BCE) and possibly his prime minister. Chandragupta was king of Magadha and founder of the great Maurya Empire, with its capital Pāṭaliputra (modern Patna, south Bihar). He was the grandfather of Emperor Aśoka, who greatly expanded the Maurya Empire before converting to Buddhism. While the Sanskrit epics lay the foundation for “righteous wars” (*dharma yuddha*) – that is, wars fought to protect the sacred and social order – Kauṭilya's Arthaśāstra advocates *kūṭa yuddha* – that is, warfare entailing the use of trickery, deceit and cunning for personal gain. He was perhaps the most important individual thinker on the messy pragmatics of statecraft in India. His ideas held great influence on the subcontinent and into Southeast Asia.

Kauṭilya espoused a cynical view of politics and the human condition that provides a sharp contrast to the chivalrous vision espoused in India's great epics. The tension between these two traditions is aptly described by Torkel Brekke as

84 Patrick Olivelle (ed. and trans.), *Manu's Code of Law: A Critical Edition and Translation of the Mānava-Dharmaśāstra*, Oxford University Press, New York, 2005, p. 159.

85 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950).

86 ICRC Customary Law Study, above note 29, Rule 85.

87 P. Olivelle (trans.), above note 78, p. 324.

“a tension within the Hindu tradition between heroism and prudence, between the tradition that sees war as a royal duty according to *dharma* and the tradition that sees war as a means to the ends of security and prosperity”.⁸⁸ While the cultural ethos crystallized in the Mahābhārata emphasises *dharma* (duty, virtue), Kauṭilya's tradition prioritizes *artha*⁸⁹ (aim, advantage, gain) irrespective of *dharma*. As Brekke sums up the contrast between the epics and the Arthaśāstra, “one has a deontological ethical theory, whereas the other has a consequentialist theory; one sees war as an end, the other sees war as a means; ... one expresses devotion to God where the other objectifies religion”.⁹⁰

Kauṭilya's Arthaśāstra, for example, advocates engaging in combat even in sacred spaces where individuals are engaged in veneration:

During a pilgrimage for worshipping a divinity, there are numerous places that (the enemy) will visit to pay homage according to his devotion. At those places, he should employ trickery on him. [Arthaśāstra (Arth) 12.5.1–2]⁹¹

Kauṭilya has no qualms about the use of powerful spiritual weapons:

With secret measures accompanied by ritual formulae and medicines and those produced by magical means, he should annihilate his enemies and protect his own people. [Arth 14.3.88]⁹²

Yet, given the value system laid down in classical Hinduism, we see hints of nobility even in this unabashedly cut-throat work:

This Law laid down in the Triple Veda is of benefit because it enunciates the Laws specific to the four social classes and the four orders of life. [Arth 1.3.4] ... That of a Kṣatriya consists of studying, offering sacrifices, giving gifts, obtaining a livelihood through the use of weapons, and protecting creatures. [Arth 1.3.6] ... Non-injury, truthfulness, purification, lack of malice, compassion, and forbearance – these are common to all. [Arth 1.3.13]⁹³

Despite its advocacy of ambush tactics, the Arthaśāstra nevertheless concedes:

War at a pre-announced time and place, however, is the most righteous. [Arth 10.3.26]⁹⁴

By contrast, IHL permits surprise attacks, as long as they steer clear of protected persons and places. IHL also encourages advanced warning for attacks that affect

88 Torkel Brekke, “Between Prudence and Heroism”, in Torkel Brekke (ed.), *The Ethics of War in Asian Civilizations*, Routledge, London, 2006, pp. 137–138.

89 In its earliest iterations, *artha* means aim or purpose. Over the course of its usage, it has come to also connote advantage, gain, material security and wealth.

90 *Ibid.*

91 Patrick Olivelle (trans.), *King, Governance, and Law in Ancient India: Kauṭilya's Arthaśāstra*, Oxford University Press, New York, 2013, p. 401.

92 *Ibid.*, p. 433.

93 *Ibid.*, p.68.

94 *Ibid.*, p. 378.

civilians⁹⁵ and demands warnings for attacks against civilian medical units.⁹⁶ Religious and cultural properties are also protected from attack, though they can become legitimate targets if they are found to be used for military purposes – worship not being one of those purposes.⁹⁷

Overall, the Arthaśāstra stands in stark contrast to the humanitarian and compassionate imperatives behind IHL and the epics. The Arthaśāstra is very much aware of the combat ethics that it flouts at every turn; as such, it is properly regarded as a pragmatic manual of cynical, realist rules, rather than the source of pan-Indic values that the Indian epics provide.

Analysis

While it is undeniable that the Mahābhārata advances parameters for combat ethics that parallel modern IHL, it is vital to understand Indic standards on their own terms. Hindu rules of armed conflict emerged from the religious and statecraft works of ancient India, and are therefore grounded in a cultural ethos very different from that which spawned classical Western just war theory (*jus ad bellum* and *jus in bello*). Impartially studying the values and ideologies of ancient India not only affords a greater appreciation for the combat ethics valorized in India (to this day), but may well empower Indian traditions to enrich the modern global discourse on IHL.

With its core provisions contained in the Geneva Conventions of 1949 and their Additional Protocols, IHL seeks to mitigate the horrors of war by limiting the harmful effects of armed conflict, especially on civilians. It prohibits, for example, targeting civilians in armed conflicts, chemical warfare, torture, and rape as a means of warfare. The purpose of this body of law is a humane one, aimed at minimizing human suffering.

The dharmic traditions have much to add to the conversation on IHL. The religions of India are united in viewing the human condition as one in which individuals are made to endure the suffering they inflict on others, owing to karmic theory (discussed below). Like IHL, the Hindu provisions aim to minimize suffering. India has produced a heightened humanitarian ethos that holds compassion to be of paramount significance, even for combatants. It also embraces a deep sense of fair play. As such, the Mahābhārata explicitly prohibits armed engagement with priests, the aged, the disabled, women, children, the mentally ill, support workers, the grieving and the weary. Furthermore, when engaging qualified combatants, the epic prohibits the use of deceit, trickery, unfair strategic advantage and certain weapons like world-destroying missiles.

95 ICRC Customary Law Study, above note 29, Rule 20.

96 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 13.

97 ICRC Customary Law Study, above note 29, Rule 38.

Parties are called to treat prisoners of war with compassion, minimizing their suffering.

Because Hinduism is a religion which deals with the afterlife, it takes an approach that goes beyond earthly law and IHL. Indic traditions posit endless cycles of creation, destruction and re-creation. The dharmic traditions – Hinduism, Buddhism, Jainism and Sikhism – all subscribe to the notion of reincarnation, that each human has had multiple lives prior to the one he or she is currently living, and that the vast majority of humans will need a great many more future incarnations before they attain enlightenment (self-realization) and the release (*mokṣa*, or freedom) from the cycle of rebirth that comes with it. This world view will have profound implications for how one views just combat and the reasons for respecting the rules of armed conflict. Penalties for breaches might come in this life or in a future life.⁹⁸

A linked aspect of Indic tradition is the notion of fate, and the connection to the principle of *karma*. According to Hinduism, no one comes to a situation without being connected to previous deeds, including from past lives. Karmic theory is rich and complex, encompassing both sides of the Western “free will versus fate” philosophical debate. One’s fated circumstances constitute the portion of one’s amassed *karma* (*saṃcita karma*) which is ripening in this life (*prārabdha karma*); yet one has the power to freely act (*kriyamāṇa karma*), creating new karmic consequences to be ripened in the future (*āgami karma*). In short, the results of one’s *karma* which one must experience at any given time are delivered by destiny, and yet one is always free to respond to one’s *karma*. These four types of *karma* are propelled by a metaphysical action-reaction mechanism also known as *karma*. And so, the merits of one’s actions – in the context of armed conflict and inflicting harm on others or doing good to them – are of crucial significance to Hinduism as one will necessarily be made to experience the consequences of those actions down the road, whether in this life or a subsequent one. This would include, in particular, the actions of mortal combat.

The ancient Vedic world view of going to heaven after a single life on earth is subsumed into the ascetic world view entailing the principle of *karma* delivering one the result of one’s meritorious and unmeritorious actions. And this world view has greatly coloured, and problematized, even violence that is justified. As Jeffery Long writes:

On the one hand, the necessity for violence to defend the just rule of a kingdom is not denied. But on the other hand, the law of karma cannot be denied either. The final chapter of the *Mahābhārata* is revealing here. The heroes of the epic end up reborn in hell, while the villains enjoy themselves in heaven. This is not, however, a permanent denouement. We are informed that all the characters’ karma, good and bad, must be resolved. The heroes therefore suffer the effects of their violent deeds – represented by their rebirth in hell. But they

98 Bimal N. Patel, “India”, in Bardo Fassbender *et al.*, (eds), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012, p. 514.

will eventually have paid the price for these actions, and will be reborn in heaven to experience the rewards of their just rule. The villain is also not wholly evil. Having ruled the kingdom well during his appointed time, he is reborn in heaven. But this will be followed by a span in hell: the price of his evil deeds. A king must engage in violence as part of his duty for the protection of the social order. But the harm done by this violence is not thereby expunged. For this reason, the Dharma Śāstras say that, for all its worldly benefits, a rebirth as a warrior is unfortunate.⁹⁹

Afterlife considerations are important for Hindu warriors, as for any religious persons, since their behaviour in armed conflict may be affected by what they believe comes thereafter. The anticipated rewards and punishments to be meted out after death, whether they be immediate or eventual, will influence compliance with the religious prescriptions and prohibitions on the use of deadly force. The soldier in the Indic context understands themselves to be bound by *karma* to endure at a later time whatever undue suffering they have inflicted, including in combat.¹⁰⁰ Hence, a supremely humane ethos and ultimately just universe undergirds Hindu rules of armed conflict. By contrast, IHL relies on a system of human justice, relying on courts (and courts martial) to address violations of the rules of armed conflict.

Another very important religious aspect is the role of divinity on earth. For instance, one of the most important characters in the Mahābhārata, if not in Hinduism overall, is Kṛṣṇa, an *avatāra*, or incarnation of the divine in flesh, as it were. As previously noted, Kṛṣṇa is the cousin of the epic heroes and serves as the charioteer of the great archer Arjuna. It is their battlefield conversation which constitutes almost the entirety of the Bhagavad Gītā. While Kṛṣṇa is shown to be an incarnation of the god Viṣṇu on earth, this identity is concealed for the vast majority of the epic, where he appears to function as a regular human being and is regarded as such by almost all the other epic characters. Indeed, Kṛṣṇa behaves in all too human fashion in most of the Mahābhārata, and his less scrupulous actions, including his code of conduct during war, are hotly critiqued throughout the epic. He is not infallible, and if he is omnipotent, he curtails this power throughout the epic, relying on human agency to win the war. And so, notions of “Holy War” from this angle are an imposition on the Hindu norms of war. Rather, one is best served by acknowledging the role of the *avatāra*, the divine descended into flesh to live as a human being, with all of the failings that come with assuming a human form. Moreover, this very commingling of human and divine aspect within the *avatāra* are analogous to higher and lower selves commingled in each human being. When thinking of an avatar “god” in Hinduism, it is important not to project Abrahamic or secular presumptions.

Most importantly for this study, Kṛṣṇa advocates on many occasions that warriors violate well-established rules of armed conflict. As in so many Hindu

99 Jeffery D. Long, “Religion and Violence in Hindu Traditions”, in Andrew R. Murphy (ed.), *The Blackwell Companion to Religion and Violence*, John Wiley & Sons, Malden, MA, 2011, p. 204.

100 *Ibid.*

stories, such as the Purāṇas, the evil (adharmic) forces are more powerful (like the vastly larger army of the Kauravas in the Mahābhārata) but the gods resort to cunning and trickery to win over the demons (*asuras*). In this case, Kṛṣṇa urges war (after his valiant but failed efforts at mediation). Kṛṣṇa is prepared to break his vow of not participating directly in combat in order to kill Bhīṣma, but is restrained by Arjuna. He then tells Arjuna how to defeat Bhīṣma by shooting from behind a woman (from a previous incarnation). Also, in the final fight he indicates to Bhīma that he should hit his opponent Duryodhana below the hip. So does Kṛṣṇa's example reinforce or weaken the rules? Perhaps he is playing by a higher set of rules, to which most humans cannot aspire – thus, his violations are divine exceptions.

The Mahābhārata blurs the boundaries between human and divine agency at every turn. In one of the most intriguing passages on this tension in the Gītā, Kṛṣṇa reveals his divine form to Arjuna and indicates that it is ultimately his own divine agency that is operative at all times:

I am time run on, destroyer of the universe, risen here to annihilate worlds. Regardless of you, all these warriors, stationed in opposing ranks, shall cease to exist. Therefore go to it, grasp fame! And having conquered your enemies, enjoy a thriving kingship. They have already been hewn down by me: Savyasachin, simply be the instrument. Kill Drona, kill Bhishma, kill Jayadratha and Karna, and the other warrior heroes as well: they are killed by me. Don't waver – you must fight! In battle you shall overcome your enemies. [BhG 11.32–34]¹⁰¹

Yet this blurred boundary between the divine and human agency of Kṛṣṇa need not be vexing. Indian traditions incorporate more of a “dial” consciousness than a “switch” consciousness: they do not ultimately take a position as to whether all is divine or human agency, but rather oscillate between the two as if to suggest a paradoxical coexistence of both orders of reality. The boundaries are blurred in a meaningful and sophisticated manner. As Nick Allen writes:

First, I would now separate off the fatalistic/deterministic dimension: the difficulty of harmonising it with the free-will agency of humans and gods is an enduring philosophical problem, and rather than blaming the epic for not providing a solution, I respect it for including the problem. Second, what I took to be incoherence between the human and divine aspects of the story now seems to me to be recognition of a profound and genuine tension or polarity in the human condition, albeit one that might nowadays be expressed in different language and with different emphases.¹⁰²

Understanding the Indic view of humanity necessitates understanding that the divine is at the heart of every human being. The Indian vision of spiritual striving entails realizing the indwelling divine presence as the essence of human selfhood.

101 W. J. Johnson (trans.), above note 50, p. 51.

102 N. Allen, above note 11, p. 146.

This is the crux of why Indian religion so emphasizes a human vision of armed conflict: humanism is tantamount to piety when the divine lives within all humans.

In most schools of Hinduism, the ultimate goal is realizing one's innate divinity. And so, the virtue of compassion towards other beings is of great significance in the Indian consciousness. When classical Hindu texts counsel that a warrior should not engage in combat with, for example, the aged, the mentally ill or the grieving, is that strictly because of the pragmatic disadvantage which these individuals have? That is, is this insistence merely to enforce the "fair fight" directive? Or is it perhaps in light of the innate compassion that arises in the presence of the vulnerable, at least for decent people? Bhīṣma, lying on his bed of arrows, counsels that a combatant should not use tactics which cause undue suffering such as poisoned or barbed arrows, nor should anyone be abused or tortured in any way. Moreover, one needs to have compassion for, and therefore not engage, the exhausted, the terrified, the defenceless, the weeping, the compromised, the ill, those seeking refuge, the young, the aged (MBh 12.97.1–14).¹⁰³

The virtue of compassion plays a significant role in Indian religions, even in the midst of warfare. We know this through passages such as the following concerning the siege of Kṛṣṇa's capital city, Dvārakā, after the Kurukṣetra war: "[The army settled in], avoiding only burning grounds, sanctuaries of Gods, anthills, and burial mounds" (MBh 3.17.3).¹⁰⁴ The army exhibits respect for the sacred, for the dead, and even for ants. This behaviour far surpasses deliberations on fighting fairly. It bespeaks, perhaps with some literary flair, an acknowledgement of the sacrality of all life. Compassion among warriors is explicitly extolled in the Mahābhārata: "For he who spares the life of an enemy, defeated by strength and unconscious, when he pleads for mercy, what beautiful gifts does he not deserve?" (MBh 1.158.39)¹⁰⁵

A warrior does not refrain from fighting with the disempowered strictly because of the personal dishonour that may come from taking unfair advantage over another: he also does so compelled by compassion for their suffering. The former motivation may be to prevent the tarnishing of one's reputation as a warrior. This motivation is external to oneself, dependent upon one's social status and one's own sense of self-importance. This is distinct from the latter reason, being intrinsically moved by compassion, which has to do with the cultivation of one's own spiritual self. One acts by compassion irrespective of the opinion of others.

Despite justifying and legitimizing the use of violent force for the sake of social welfare, classical Hindu texts adhere in tandem to the virtue of non-violence. This is also seen *post bellum*. India's great epic counsels that prisoners of war be treated humanely, as in IHL.¹⁰⁶ An effective way of corroborating this Hindu ethos is by examining how the warriors behave after the Mahābhārata war is won:

103 J. L. Fitzgerald (ed. and trans.), above note 13, p. 412.

104 J. A. B. van Buitenen (ed. and trans.), above note 36, p. 256.

105 J. A. B. van Buitenen (ed. and trans.), above note 45, p. 322.

106 Surya P. Subedi, "The Concept in Hinduism of 'Just War'", *Journal of Conflict & Security Law*, Vol. 8, No. 2, 2003, p. 356.

The Kaurava king honored all the women there whose men had been slain, or whose sons had been killed, and he compassionately extended his protection to them. Kindness was most important to the king – the lord favored those in distress, the blind, and the wretched with housing, clothes, and food. [MBh 12.42.10–11]¹⁰⁷

After the victory, he should pay homage to gods and righteous Brahmins; grant exemptions; and issue proclamations of amnesty. [Manu 7.201]¹⁰⁸

After vanquishing the Kurus in battle, the bull-eyed hero herded back the vast wealth of Virāṭa. When the sons of Dhṛṭarāṣṭra had all been crushed and gone, many soldiers of the Kurus came out of the dense woods; with their heart trembling from fear they appeared from hither and yon. They were seen to stand there with disheveled hair and folded hands, plagued with hunger, thirst, and fatigue in an alien land, and out of their wits. They bowed and in confusion said to the Pārtha, “What should we do?” *Arjuna said*: Go safely, be blessed. Have no fear at all. I have no wish to slaughter the miserable, I want to assure you. [MBh 4.62.1–5]¹⁰⁹

Not only were the women of fallen soldiers cared for, the fallen were given proper burials out of respect:

“Heir of Bharata,” said Dhṛṭarāṣṭra [father of the defeated Kauravas], “some of these men have people to care for them, while others do not; I trust that all their bodies will be burnt in the proper manner? Some have no one to perform the rites for them, others have not installed the sacred fires in their homes. They are so many: for whom should we perform the rituals, son? Eagles and vultures are dragging them to and fro, but through the rituals these men will attain the heavenly realms, Yudhiṣṭhira.”

When wise Yudhiṣṭhira, Kuntī’s son, heard these words, he gave orders “Gentlemen, have the rites for the departed performed for all these men: let no one’s body perish as if not cared for.” [MBh 11.26.21–26]¹¹⁰

There are direct similarities between the above passages and the rules from the ICRC Customary Law Study pertaining to “Treatment of the Dead”, “Disposal of the Dead”, “Return of the Remains and Personal Effects of the Dead” and “Accounting for the Dead”.¹¹¹

While there are many principles in common between the Hindu epics and IHL, there are some points of divergence, as might be expected between traditions

107 J. L. Fitzgerald (ed. and trans.), above note 13, p. 261.

108 P. Olivelle (ed. and trans.), above note 84, p. 164. This directly parallels Rule 159 of the ICRC Customary Law Study, above note 29, on “Amnesty”.

109 J. A. B. van Buitenen (ed. and trans.), above note 36, p. 119.

110 J. D. Smith (ed. and trans.), above note 15, p. 593.

111 ICRC Customary Law Study, above note 29, Rules 113–116.

that were created centuries apart. For instance, classical Hinduism strongly limits the right to combat in war to a particular caste, the *kṣatriya*, but this concept can be transferred to the modern era by taking this to mean uniformed military personnel of the State. As with almost all ancient empires, war in Hinduism was the domain of male combatants; women were excluded. Modern wars, on the other hand, allow women the right to serve as soldiers and combatants. Classical Hinduism disavows ambushes and surprise attacks, while modern IHL permits such attacks, provided they are on legitimate military targets and meet other criteria. Proportionality in Hinduism goes beyond IHL in several ways, including by prescribing equality of arms – i.e., only warriors of the same type should engage in combat. Some textual passages also add impractical constraints, such as not fighting someone who has dishevelled hair, someone who is fearful (including someone who is fearful in a battle), a man with a woman's name, the father of a single son, or a childless man (MBh 6.103.72–73). These ultra-humane constraints may not have been considered as strict rules; rather, they bespeak the elevated humanitarian impulse in the Indic context discussed above, stemming from a uniquely Indic cosmology, soteriology, warrior ethos, and divine vision of human personhood. Finally, while both Hinduism and IHL are normative frameworks, the latter has the status of international law, to which parties to armed conflict are legally bound to comply. Given the large overlap between IHL and Hindu teachings and rules, the latter can certainly contribute to IHL compliance, which is generally less restrictive, though much more rigorously codified through treaties.

Conclusion

The present paper has carefully reviewed the Sanskrit verses of key classical Hindu texts. Foremost of these is the Mahābhārata, India's great epic (in literary tradition and in popular view), which coconsciously legitimizes and regulates the use of violent force while still preserving non-violence as a significant moral virtue. Along with the Rāmāyaṇa, the Mahābhārata enshrines Hindu values and what Hindus believe in, particularly with respect to the use of force and the moral imperative of non-violence. These values strongly influence thought and actions pertaining to armed conflict. The epic very consciously syncretizes and integrates views on violence so as to solidify the dominant ethical paradigms of the Hindu world, paradigms internalized and invoked to this day. The present study demonstrates the following strong convergences between classical Hinduism and IHL with regard to the conduct of armed conflict:

- minimization of human suffering;
- proportionality in the use of force;
- protection of non-combatants;
- restrictions on many weapons systems;
- special care for survivors of war;

- special protections for civilian women, children, the aged, parlementaires, religious personnel and displaced persons.

The Mahābhārata demonstrates through stories the particularities unique to the Indic context, most notably the call for compassion on behalf of combatants, and a heightened emphasis on humane and fair conduct in battle. This corroborates Sinha's assertion that "in terms of the ideals of humanitarianism of ancient India the laws of war were more progressive" than the modern ones.¹¹²

Righteous war is informed in the Indian context by a particular vision of the righteous warrior, one who is able to fulfil his violent social duty while maintaining a non-violent, compassionate attitude. The quintessence of this noble warrior is communicated to the great archer Arjuna by Kṛṣṇa in the Gītā on the cusp of the dreadful war: beyond intellectualism and idealism, this philosophy is meant to help warriors like Arjuna navigate the horrors of war. How is Arjuna to do so? Indeed, what is his specific duty (*dharma*) at the hour of war? It is noteworthy that the very emphasis on duty (versus rights) inherent to Indian traditions renders Hinduism a natural conversation partner in discourse on IHL. The warrior's duty in this context is not only a socio-political one, but also a spiritual and humanitarian one. The rich and ancient discussion of combat ethics in Indian traditions therefore serves not only to invite Hinduism into the modern global conversation on IHL, but to greatly enrich that conversation, raising the humanitarian bar in both war and peace.

112 Manoj Kumar Sinha. "Hinduism and International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 858, 2005, p. 293, available at: www.icrc.org/en/doc/assets/files/other/irrc_858_sinha.pdf.

How international humanitarian law develops

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Abstract

This article takes a critical look at the development of international humanitarian law (IHL), from its early codification in the Hague and Geneva Conventions to the present day. It examines why and how IHL develops – through treaty, custom, interpretation and soft-law instruments, as well as the influence of jurisprudence and other branches of law. In doing so, it highlights some of the distinctive elements of IHL that set it apart from other bodies of law and explains how these elements influence IHL development. Turning to the present, it addresses some of the key arguments commonly heard against attempting any further development of IHL, by answering the following three key questions: Does IHL need to develop further? If so, how can this be achieved? And what are the prospects for such development in the near future? In answering these questions, the article argues that IHL will continue to develop in many ways, and that while the current environment does not appear propitious for new legally binding norms of IHL, they continue to be both necessary and possible.

Keywords: International humanitarian law, development of law, treaties, customs, soft law, interpretations.



Introduction

Fifty years later, Jean Pictet would remember that at the beginning of 1945, he asked the then president of the International Committee of the Red Cross (ICRC), Max Huber, to revive the idea of reinforcing the Geneva Conventions, to stop civilians being attacked: “‘Yes, do,’ he said, ‘but I warn you it won’t work.’ I told him, ‘thank you, I accept, but it will work.’”¹

It is often said that to come to the agreement over the four Geneva Conventions in 1949, as the Cold War had already become entrenched, as Western allies dropped supplies over Berlin blockaded by the Soviet Union, was nothing short of a miracle.

How, and why, does international humanitarian law (IHL) develop? And why does it matter? These are not only matters for legal historians. Knowledge and understanding of the law require a good grasp of its historic development. Insight into how and why IHL develops can give valuable answers to contemporary problems, such as unclear interpretation of IHL provisions or ways to address pressing humanitarian concerns arising from the effects of armed conflict on civilians and other protected persons and objects.

The Oxford Language Dictionary defines development as “the process of developing or being developed” and as “an event constituting a new stage in a changing situation”. It further defines developing as “growing or causing to grow and become more mature, advanced, or elaborate”.²

IHL development thus refers to the creation of new treaty or customary norms as well as changes in the scope of existing norms, including by means of clarification and interpretation.

A methodological analysis of the historical evolution of IHL can provide useful tools for anticipating further developments in the short- and mid-term. It can also assist in answering the much-asked question about the need for new law that arises in light of the evolution of warfare.

As part of the body of international law, IHL aims to protect persons who are not or no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.³ The object and purpose⁴ of IHL are to protect those affected by armed conflict, including by imposing limits on how belligerents use force.

1 *The Guardian*, “The Man Who Wrote the Rules of War”, 12 August 1999, available at: www.theguardian.com/theguardian/1999/aug/12/features11.g2 (all internet references were accessed in October 2022).

2 *Oxford Learner’s Dictionaries*, Oxford University Press, Oxford, 2022, available at: www.oxfordlearnersdictionaries.com/.

3 ICRC, “War and International Humanitarian Law”, 29 October 2010, available at: www.icrc.org/eng/war-and-law/overview-war-and-law.htm.

4 On the concept of “object and purpose”, see, for example, ICRC, *Commentary of 2020 on Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Introduction*, paras 87, 88 and 91, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1B9A4ABF10E7EAD2C1258585004E7F19>.

In order to achieve its object and purpose, IHL has to evolve in tandem with the reality of warfare, including the evolution of military technologies and tactics; changes in the environment, such as the world's ever-increasing urbanization; and developments in other bodies of law, for example, international human rights law. Developments in IHL are further triggered or influenced by an evolving understanding of cross-cutting principles and concepts, such as the importance and different facets of the notion of gender. Courts and tribunals, both international and domestic, have in turn shaped the interpretation and implementation of IHL, and have often played an important role in introducing or reflecting such external developments.

The first part of this article examines the process of evolution of IHL from its early stages of codification to the present day – a history that has by no means been smooth, and that has been shaped by a variety of stakeholders. It identifies some of the elements, dynamics and trends that characterize IHL's development. It outlines the interplay of its main sources – treaty and custom – and also looks at judicial decisions, interpretation and “soft law”. “Soft law” consists of a plethora of non-binding instruments – from political declarations and guidelines to compilations of good practices and interpretive guidance – that contribute to clarify the meaning of the law or facilitate its implementation. The second part of the article then analyses the plurality of actors engaged in the making of IHL, including the unsettled role of non-State armed groups (NSAGs). It further outlines the challenges of contemporary treaty-making and addresses the issue of law *versus* policy, which occupies much of the contemporary debate in multilateral fora where potential developments of IHL are discussed. Lastly, it offers some thoughts on the prospects of future IHL development and on next steps in addressing a number of contemporary issues that remain open and are cause for humanitarian concern.

The complex interplay of sources in the development of IHL

Any reflection on the development of IHL is closely linked to the development of its sources. In line with Article 38 of the Statute of the International Court of Justice (ICJ), these are international conventions; international custom; the general principles of law recognized by civilized nations; and as subsidiary means for the determination of rules of law, judicial decisions and the teachings of the most highly qualified publicists of the various nations.⁵ However, through the years, novel “sources” have played an increasingly significant role in the development of IHL, notably “soft-law” instruments that have taken many shapes and

5 For an overview of the sources of IHL, see Jean-Marie Henckaerts, “History and Sources”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, pp. 1–2; Emily Crawford, *Non-Binding Norms in International Humanitarian Law*, Oxford University Press, Oxford, 2022. While a primary source of IHL, general principles will not be addressed in this article.

forms.⁶ IHL as we know it today is a result of the interplay of many processes, actors and factors throughout time. Indeed,

international lawmaking is interactional in nature. The sources of international law themselves illustrate this point. Treaties may become custom; custom may be codified in a treaty; and a judicial decision may identify a customary rule or interpret a treaty provision. The actors involved in the making and shaping of international law must also engage in a highly interactional collaboration.⁷

This interplay is examined in the following.

Development through treaties

A look at the development of IHL treaties through the years highlights several interesting features. First, with some exceptions, IHL treaties are perhaps the clearest illustration of how IHL has developed in response to the evolving nature of wars and weapons. As is often said, many of them respond to the last war and the horrors witnessed therein. Linked to that, while these treaties are always the result of a compromise between strong military and strategic State interests, beyond reflecting these interests, they are also characterized by elements of strong normative and humanitarian considerations, elements of “common good”.

Chronology

A chronological review of key IHL instruments reveals much about how and why IHL develops through treaties. The brief historical overview provided below, albeit by no means exhaustive, allows us to identify a number of elements that are characteristic of this pathway of IHL development.

While elements of the “laws and customs of war” can be traced back to ancient times, their codification in the shape that we still know today only began in the 19th century.⁸

In 1864 the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted.⁹ The Convention largely owes its existence to Henry Dunant and his book *A Memory of Solferino*, where he proposed the adoption of a treaty giving protection on the battlefield to the wounded and to anyone who endeavoured to come to their assistance. Despite

6 See Paul Tavernier, “L’évolution du droit international humanitaire au XXI^{ème} siècle : une nécessité?”, in *The International Legal Order: Current Needs and Possible Responses. Essays in Honour of Djamchid Momtaz*, Brill Nijhoff, Leiden and Boston, MA, 2017, p. 734.

7 Sandesh Sivakumaran, “Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law”, *Columbia Journal of Transnational Law*, Vol. 55, No. 2, 2017, pp. 392–3.

8 For a historical overview of IHL’s early stages, see Geoffrey Best, *War and Law Since 1945*, Clarendon, Oxford, 1994, pp. 14–34. See also John Fabian Witt, *Lincoln’s Code: The Laws of War in American History*, Free Press, New York, 2012.

9 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 (entered into force 22 June 1865).

containing a mere ten articles, the Convention marked a turning point in the laws and customs of war.¹⁰

The Declaration of Saint Petersburg (1868) was the first formal agreement prohibiting the use of certain weapons in armed conflict. It prohibited the use of bullets which exploded on contact with soft substances such as human tissue, before these bullets were even used on the battlefield, on the basis of humanitarian considerations.¹¹ While formally a declaration, it has the force of law: it confirms the customary rule according to which the use of weapons of a nature to cause unnecessary suffering is prohibited, a rule subsequently laid down in Article 23(e) of the Hague Regulations on land warfare of 1899 and 1907. Despite its very limited membership (only nineteen States are party to it), the Declaration is considered to have laid the foundations of modern conduct of hostilities law, including the key concept of military necessity.¹² It is a characteristic example of the power of treaties to shape IHL beyond their contracting parties. Like the first Geneva Convention, it is also an example of how States' military interest and realpolitik on the one hand, and concerns for humanity on the other, both flow into the making of IHL treaties.¹³

The 1899 and 1907 Hague Conventions on War on Land and their annexed Regulations are considered further milestones in the development of norms on the conduct of hostilities.¹⁴ In 1946, the Nuremberg International Military Tribunal stated with regard to the Hague Convention on land warfare of 1907:

The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption ... but by 1939 these rules ... were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war.¹⁵

- 10 François Bugnion, "The International Committee of the Red Cross and the Development of International Humanitarian Law", *Chicago Journal of International Law*, Vol. 5, No. 1, 2004, p. 193. The Convention of 1864 was replaced by the Geneva Conventions of 1906, 1929 and ultimately 1949 on the same subject; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906 (entered into force 9 August 1907); Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.
- 11 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November/11 December 1868 (entered into force 11 December 1868); Robert Kolb and Momchil Milanov, "The 1868 St Petersburg Declaration on Explosive Projectiles: A Reappraisal", *Journal of the History of International Law*, Vol. 20, No. 4, 2018, p. 517. The declaration was based on reciprocity, so (intentionally) not applicable to "colonial warfare"; see R. Kolb and M. Milanov, *ibid.*, p. 520.
- 12 Hans-Peter Gasser, "A Look at the Declaration of St. Petersburg of 1868", *International Review of the Red Cross*, No. 297, 1993.
- 13 Michael Riepl, *Russian Contributions to International Humanitarian Law*, Nomos, Baden-Baden, 2022, pp. 33–41.
- 14 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (entered into force 4 September 1900); Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 (entered into force 26 January 1910). See Geoffrey Best, "Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After", *International Affairs*, Vol. 75, No. 3, 1999.
- 15 "International Military Tribunal (Nuremberg), Judgment and Sentences", *American Journal of International Law*, Vol. 41, No. 1, 1947, pp. 248–9. Many of the rules codified in this convention were

The carnage of the First World War with its eight to nine million prisoners of war, chemical warfare and great suffering of civilian populations led the ICRC to demand additional protections through IHL: conventions to protect prisoners of war and civilians, and a ban on chemical weapons.¹⁶ The First World War had shown clearly that the few provisions protecting civilians contained in the Hague Regulations were insufficient in view of the dangers originating from air warfare and of the problems relating to the treatment of civilians in enemy territory and in occupied territories, and that additional rules were needed.

The 1925 Geneva Protocol prohibiting the use of chemical and biological weapons in war¹⁷ and the 1929 Convention relative to the Treatment of Prisoners of War¹⁸ represented a significant step forward in the development of IHL. Both instruments are characteristic of how the international community reacts to past wars, but also of how the suffering of their own servicemen prompted States to seek better protection. The plight of civilians still remained secondary and was not addressed.

The International Conferences of the Red Cross of the 1920s took the first steps towards laying down supplementary rules in this respect; however, the political situation was not yet conducive to an outcome. The events of the Second World War showed the disastrous consequences of the absence of a convention stipulating obligations regarding the protection of civilians in wartime.

The ICRC's efforts finally came to fruition in 1949, when the four Geneva Conventions¹⁹ were adopted, marking a pivotal moment in the development of IHL. As in 1929, the negotiation and adoption of the Geneva Conventions reveals important elements of IHL development, which will be examined in the following

later codified and expanded on in the two Additional Protocols to the Geneva Conventions of 1977: Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I); Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II).

- 16 Daniel Palmieri, "The International Committee of the Red Cross in the First World War", ICRC, 10 September 2014, available at: www.icrc.org/en/document/international-committee-red-cross-first-world-war-0.
- 17 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925 (entered into force 8 February 1928). The protocol was adopted in the aftermath of the First World War, which saw the widespread use of poison gas despite a prohibition already included in the 1899 Hague Convention. As a result of its adoption, civilians and combatants were largely spared this horrific fate during the Second World War.
- 18 Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929. The Convention was adopted to overcome lacunae and imprecisions in existent protections of prisoners of war contained in the Hague Regulations of 1899 and 1907.
- 19 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

section.²⁰ In the decades that followed, the world witnessed an increase in the number of non-international armed conflicts (NIACs) and wars of national liberation. The 1949 Geneva Conventions undoubtedly marked significant progress in the development of IHL. However, important gaps remained, in particular as regards the protection of civilians against the effects of hostilities. The rules pertaining to the latter, largely stipulated or codified in the Hague Regulations, had not undergone any significant revision since 1907. The ICRC set about the task of filling this gap immediately, picking up from its first endeavours in the 1920s, submitting draft rules upon draft rules over the years.²¹ In 1977, after many efforts by the ICRC but also other actors, States finally adopted two Additional Protocols,²² which strengthen the protection of victims of international armed conflicts (IACs) (Additional Protocol I; AP I) and NIACs (Additional Protocol II; AP II) and place limits on the way that wars are fought.

The 1977 Additional Protocols introduced fairly bold innovations.²³ AP II, in particular, was the first-ever international treaty devoted exclusively to situations of NIACs. Despite its rather restricted field (from the forty-seven articles originally proposed by the ICRC, only twenty-eight were eventually adopted) and high threshold of application, it represents considerable progress. Quite remarkably, almost all the provisions of both Protocols were adopted by consensus. In fact, of the 150 articles on matters of substance contained in the two Protocols, only fourteen required a formal vote.

Weapons law has been a particularly prolific area of IHL. Following the early instruments mentioned above, a series of conventions prohibiting or restricting the use of certain means and methods of warfare was concluded

- 20 On the drafting history of the four Geneva Conventions, see, among others, G. Best, above note 8, pp. 80–179; Robert Heintsch, “The International Committee of the Red Cross and the Geneva Conventions of 1949”, in Robin Geiß, Andreas Zimmermann and Stefanie Haumer (eds), *Humanizing the Laws of War: The Red Cross and the Development of International Humanitarian Law*, Cambridge University Press, Cambridge, 2017, p. 27; Jean S. Pictet, “The New Conventions for the Protection of War Victims”, *American Journal of International Law*, Vol. 45, No. 3, 1951, pp. 464 ff; Giovanni Mantilla, “The Origins and Evolution of the 1945 Geneva Conventions and the 1977 Additional Protocols”, in Matthew Evangelista and Nina Tannenwald (eds), *Do the Geneva Conventions Matter?*, Oxford University Press, Oxford, 2017, pp. 38–49.
- 21 Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, 19th Conference of the Red Cross, 1957; in 1965, the 20th and 21st International Conferences of the Red Cross urged the ICRC to pursue the development of IHL in this regard; the ICRC prepared drafts of two Protocols which served as a basis for discussion in the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, which met in Geneva in four sessions, between 1974 and 1977, with the participation of over 120 States, as well as national liberation movements, international organizations and civil society.
- 22 For an account of the period between 1949 and the 1977 Additional Protocols, the efforts by the ICRC, and also the role played by other actors that finally triggered the political will to negotiate the Protocols, see G. Mantilla, above note 20, pp. 52 ff; Michael Bothe, “The International Committee of the Red Cross and the Additional Protocols of 1977”, in R. Geiß, A. Zimmermann and S. Haumer (eds), above note 20, p. 57; George H. Aldrich, “Some Reflections on the Origins of the 1977 Geneva Protocols”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984; François Bugnion, “Adoption of the Additional Protocols of 8 June 1977: A Milestone in the Development of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 99, No. 2, 2017, pp. 787–90.
- 23 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. xxxiv.

throughout the 20th and in the early 21st centuries. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction²⁴ was adopted in 1972, followed by the framework Convention Prohibiting Certain Conventional Weapons (CCW) (1980)²⁵ and its five protocols,²⁶ the Convention prohibiting Chemical Weapons (1993),²⁷ the Anti-Personnel Mine Ban Convention (APMBC) (1997),²⁸ the Convention on Cluster Munitions (CCM) (2008)²⁹ and the Treaty on the Prohibition of Nuclear Weapons (TPNW) (2017).³⁰

What these instruments have, for the most part, in common is that they were developed as a response to the suffering caused by different means and methods of warfare, with the aim of preventing such suffering from occurring again.³¹ It is worth examining some of them in more detail. The Geneva Conventions, their Additional Protocols and the CCW are addressed below. The APMBC, the CCM and the TPNW, which constitute a newer “generation” of disarmament instruments, characteristic of the dynamics of the modern era of IHL development, are examined later on in the article.

How treaties develop

Like many international law treaties, but perhaps more so with the core IHL treaties, i.e. the Geneva Conventions of 1949 and the Additional Protocols of 1977, their adoption can appear almost miraculous given the time when they were negotiated and the prevailing tensions in international relations, their subject matter (regulating war) and the detail of their provisions.

There are several explanations for this. One of them highlights the social pressure derived from the moral force of the argument in favour of protecting victims of war, and the opprobrium attached to opposing it. While certain States

24 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington 10 April 1972 (entered into force 26 March 1975).

25 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980 (entered into force 2 December 1983).

26 Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980 (entered into force 2 December 1983); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) (entered into force 3 December 1998); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980 (entered into force 2 December 1983); Protocol on Blinding Laser Weapons (Protocol IV), 13 October 1995 (entered into force 30 July 1998); Protocol on Explosive Remnants of War (Protocol V), 28 November 2003 (entered into force 12 November 2006).

27 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Paris, 13 January 1993 (entered into force 29 April 1997).

28 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (entered into force 1 March 1999).

29 Convention on Cluster Munitions, 30 May 2008 (entered into force 1 August 2010).

30 Treaty on the Prohibition of Nuclear Weapons, 7 July 2017 (entered into force 22 January 2021).

31 Emily Crawford, “Non-Binding Norms in the Law of Armed Conflict”, *Articles of War*, 3 February 2022, available at: <https://lieber.westpoint.edu/non-binding-norms-law-of-armed-conflict/>.

might have preferred not to have these treaties, or to absolutely avoid certain obligations in the treaties, they nonetheless felt compelled to take part in the negotiations and not to be seen as opposing them.³² As a consequence, while not “blocking” the treaties, they negotiated the texts down in order to weaken obligations. Similarly, IHL treaties contain a number of indeterminate and imprecise notions that reflect choices by States on the types of conflicts that will be regulated, which types of combatants will be protected and privileged or not, which type or amount of violence is legitimate or not³³ – and these choices evolved and changed over time, especially between 1949 and 1977. Despite these compromises, each of these instruments strengthened, beyond any doubt, the protection of people affected by armed conflict.³⁴

For instance, a factor noted to have contributed to the adoption of the Additional Protocols was social pressure exerted by “Developing World” and Socialist States, spearheaded by the then USSR.³⁵ Against the backdrop of the Cold War and the wars of decolonization, which saw grave atrocities against civilians, a coalition formed by such States systematically pushed for revisions in IHL, generating pressure that significantly impacted the drafting and negotiation of the Additional Protocols. This pressure led previously conservative States such as the United States and United Kingdom, who were opposed to any development of IHL as regards the protection of civilians, to gradually adopt a more flexible and compromising approach and ultimately agree on moving IHL significantly forward.³⁶

Beyond the social pressure, it is fair to say that more than most other branches of law (and similarly to international human rights law), IHL and its development through negotiation are characterized not only by a transactional or tit-for-tat element – though that plays an important part – but also by common normative positions. One might even say that they are largely guided by shared interests, the achievement of a “common good”. It has often been described how strong this element was after the Second World War in the negotiation of the 1949 Geneva Conventions:³⁷ “Something of the world’s disgust at the violence and cruelty of the war that had just ended was reflected in the fact that by 31

32 Giovanni Mantilla, “Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict”, *International Organization*, Vol. 72, No. 2, 2018, pp. 319 and 323; Boyd van Dijk, *Preparing for War, The Making of the Geneva Conventions*, Oxford University Press, Oxford, 2022, describes the watering down of provisions and exclusion of certain war-time acts, such as the protection of political prisoners, starvation or the use of nuclear weapons.

33 Helen M. Kinsella and Giovanni Mantilla, “Contestation before Compliance: History, Politics, and Power in International Humanitarian Law”, *International Studies Quarterly*, Vol. 64, No. 3, 2020.

34 On a historical account of the making of the four Geneva Conventions from a UK perspective, see also Geoffrey Best, “Making the Geneva Conventions of 1949: The View From Whitehall”, in C. Swinarski (ed.), above note 22, pp. 67–77.

35 For a detailed analysis, see Giovanni Mantilla, “Social Pressure and the Making of Wartime Civilian Protection Rules”, *European Journal of International Relations*, Vol. 26, No. 2, 2020; as well as Henry Lovat, *Negotiating Civil War. The Politics of International Regime Design*, Cambridge University Press, Cambridge, 2020.

36 H. Lovat, *ibid.*, p. 20.

37 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 4: *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva, 1958, p. 38.

December 1949, fifty-five states had signed the four Geneva Conventions.”³⁸ Thus, IHL treaties come about as a result of a humanitarian imperative: a need to protect specific categories of people or to restrict certain means and methods of warfare, and the perception of a gap in international law. The moral imperative to regulate the behaviour of belligerents or the weapons used has always played an important role, and acted as a convincing factor for adopting new rules, or at least as a factor for not opposing them openly.

This belief in a common good, the achievement of which is in the interest of all negotiating States, is essential in the development of norms whose enforcement relies largely on the good faith of contracting parties. Indeed, the very object and purpose of IHL and its humanitarian character mean that putting limits to the violence of armed conflict is a common interest shared by negotiating States, and that the normative component is stronger in IHL than in many other branches of law. Trust generally follows the perception of shared understandings, in particular on what is considered right or wrong. In negotiations, such common understandings of right and wrong are built, not least among individuals involved in the negotiations whose agency and role cannot be overstated.³⁹ In other words, while diplomatic negotiations of IHL norms among States are always influenced by national interest, military and security considerations, and many other “non-humanitarian” considerations, elements of “common good” and trust in the power of norms also play a role.⁴⁰

Another crucial factor which contributed to successful negotiations in the case of the 1949 Geneva Conventions and their Additional Protocols, and ultimately to the acceptance of the norms developed or codified therein, was the role of the ICRC, and the broader Red Cross and Red Crescent Movement, as a driving force behind these instruments. Despite the occasional concerns about the perceived increasingly political role of the ICRC and the National Red Cross and Red Crescent Societies,⁴¹ both enjoyed a high level of trust among many States as impartial actors motivated only by humanitarian considerations.

Beyond States, the ICRC and National Red Cross and Red Crescent Societies have been instrumental in the development of IHL. The ICRC proposed the draft for the first Geneva Convention of 1864 and all subsequent Geneva Conventions and their Protocols. It has also contributed significantly to the development of weapons law. This role is recognized in the Geneva Conventions and in the Statutes of the International Red Cross and Red Crescent Movement, which entrust it, among others, with the task of preparing the development of

38 Caroline Moorehead, *Dunant's Dream, War Switzerland and the History of the Red Cross*, Caroll & Graf, New York, 1998, p. 557.

39 Elvira Rosert, presentation in “Negotiation as a Means of Building Trust: The Example of IHL Development”, session organized by the ICRC in the context of the Centre of Competence on Humanitarian Negotiation World Summit, 1 July 2021.

40 *Ibid.* For a more detailed analysis of theories on why States adhere to international law in general, and IHL in particular, see Giovanni Mantilla, “Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Geneva Conventions”, *European Journal of International Law*, Vol. 28, No. 2, 2017.

41 G. Best, above note 34, pp. 68–71.

IHL.⁴² Furthermore, the resolutions of the International Conference of the Red Cross and Red Crescent have traditionally triggered IHL development.

The willingness to come to an agreement among negotiators is, to a certain degree, a function of the frequency and intensity of interaction among them. Treaty negotiations, usually taking place in several rounds over several years, provide both. This is even more so when negotiations take place in an institutionalized setting where participants meet regularly to discuss different issues. In such cases, the trust gained in previous processes may spill over to others.⁴³ Unlike weapons treaties, however, the Geneva Conventions and their Additional Protocols are characterized by the absence of a permanent forum where States can review the implementation of these instruments, identify the existence of gaps and decide on the development of the law.

The CCW, a framework (or “umbrella”) convention complemented by – so far – five protocols, provides for an institutionalized setting for States Parties to meet regularly. As its preamble mentions, it provides the general framework in order “to continue the codification and progressive development of the rules of international law applicable in armed conflict” through protocols. It contains three original protocols of 1980, on the use of any weapons the primary effect of which is to injure by fragments that in the human body escape detection by X-ray; restricting the use of mines, booby-traps and similar devices; and restricting the use of incendiary weapons, i.e. weapons that use fire as their means of injury or destruction. A 1995 protocol prohibits blinding laser weapons, and a 2003 protocol seeks to minimize the risks and effects of explosive remnants of war after the end of hostilities.

The example of the CCW is illustrative of two interesting aspects of IHL development through treaties: the pre-emptive development of norms, in anticipation of humanitarian consequences likely to occur in the future, and protocols to existing instruments as a means for further development of the law.

42 Article (2)(g) of the Statutes of the International Red Cross and Red Crescent Movement adopted by the 25th International Conference in 1986. For the role of the ICRC and the Movement in the development of IHL, see in particular R. Geiß, A. Zimmermann and S. Haumer (eds), above note 20; F. Bugnion, above note 10, pp. 193 ff; Knut Dörmann, “The Role of Nonstate Entities in Developing and Promoting International Humanitarian Law”, *Vanderbilt Journal of Transnational Law*, Vol. 51, 2018; Knut Dörmann and Louis Maresca, “The International Committee of the Red Cross and its Contribution to the Development of International Humanitarian Law in Specialized Instruments”, *Chicago Journal of International Law*, Vol. 5, No. 1, 2004, pp. 221–4; Jean-Philippe Lavoyer and Louis Maresca, “The Role of the ICRC in the Development of International Humanitarian Law”, *International Negotiation*, Vol. 4, No. 3, 1999, pp. 503–4; Gabriel Pablo Valladares, “El Comité internacional de la Cruz Roja (CICR) y su contribución a los últimos desarrollos del derecho internacional humanitario”, *Anuário brasileiro de direito internacional*, Vol. 2, No. 13, 2012; Yves Sandoz, “The International Committee of the Red Cross as Guardian of International Humanitarian Law”, *Yugoslav Review of International Law*, 1996, available at: www.icrc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm; Hans-Peter Gasser, “International Committee of the Red Cross (ICRC)”, *Max Planck Encyclopedia of Public International Law*, June 2016, para. 28, available at: <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e310?rsk=1RM8pW&result=1&prd=MPIL>; David P. Forsythe and Barbara Ann J. Rieffer-Flanagan, *The International Committee of the Red Cross: A Neutral Humanitarian Actor*, 2nd ed., Routledge, London and New York, 2016, pp. 38–53.

43 E. Rosert, above note 39.

CCW Protocol IV is an example of an IHL treaty aimed at preventing humanitarian consequences before they occur. It prohibits the use in armed conflict of blinding laser weapons. The protocol was negotiated and adopted before such weapons were ever employed in armed conflict, as a response to technological developments that raised concerns and posed a real risk that such weapons would be used. At the time of writing this article (2022), ongoing discussions on prohibiting and regulating autonomous weapon systems turn around similar issues. In both cases, the central question is whether existing IHL rules and principles are sufficient to effectively protect those affected by such weapons. A negative answer prompted States to negotiate new legally binding rules to address the grave humanitarian concerns associated with blinding laser weapons. Similarly, many States, as well as the ICRC,⁴⁴ are calling for new law to prohibit or regulate autonomous weapon systems.

IHL development does not stop with the adoption of a treaty. When the need for further developments arose, in order not to jeopardize the *acquis* of existing law, States often used the technique of adding protocols to existing treaties. The CCW is of course not the only example of this technique. The same was done with the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005,⁴⁵ and with the Hague Convention for the Protection of Cultural Property of 1954, which was supplemented by two protocols: the First Protocol of 1954⁴⁶ which aims to prevent the exportation of cultural property from occupied territory and to provide for restitution of illegally exported objects, and the Second Protocol of 1999⁴⁷ which seeks to strengthen the Convention through preparatory and precautionary measures, establishes a regime of enhanced protection, and outlines criminal responsibility.

The technique of adding protocols to an existing instrument offers an additional avenue for developing the law, as well as some flexibility to States, which remain bound by the original convention while considering whether or not to join the protocols. At the same time, it can lead to an imbalance within a treaty regime, whenever there is a significant difference in membership between the framework convention and its protocols, or between different protocols.

Moreover, with each negotiation of an additional protocol that builds upon a principal treaty, there is a certain risk of regression, in particular as regards transposing agreed language from the principal instrument into the subsequent one. Once such language is placed on the negotiation table, the risk of it being

44 ICRC, “Peter Maurer: ‘We Must Decide What Role we Want Human Beings to Play in Life-and-Death Decisions During Armed Conflicts’”, 12 May 2021, available at: www.icrc.org/en/document/peter-maurer-role-autonomous-weapons-armed-conflict.

45 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005 (entered into force 14 January 2007) (AP III). AP III designated the red crystal as a protective emblem equivalent to the red cross and the red crescent.

46 Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954 (entered into force 7 August 1956).

47 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999 (entered into force 9 March 2004).

weakened or altogether rejected cannot fully be avoided. In other words, the “development” of IHL is not necessarily linear, and it contains a risk of moving backward.

As previously mentioned, treaty-making is typically a response to gaps in the existing legal framework. However, the question of whether existing rules are sufficient or not cannot always be answered simply, especially as the framework of IHL rules becomes denser. There might be very clear gaps, but there might also be disagreement on whether the rules are sufficient. In other cases, rules might be clearly sufficient, but States may nevertheless want to reaffirm or make them explicit for certain situations or for certain weapons. All these factors continue to influence discussions on the development of IHL, as we will see later.

Development through custom

Another pathway for the development of IHL, that has been alternating with treaties,⁴⁸ is customary international law:

By nature, customary international law is unwritten. The “discovery” or “identification” of customary law happens usually through judicial decisions or legal writings. States may also declare which parts of IHL they consider customary, but such statements are not binding on other states.⁴⁹

The establishment of a customary international law norm requires two elements: State practice and *opinio juris*. As these elements evolve, so, too, does IHL. Different developments can take place in this respect. For one, an IHL norm stipulated by treaty and binding upon States party to that treaty can, in time, acquire customary status. Indeed, while customary law can be established without the pre-existence of a treaty, treaties can constitute an element of *opinio juris*. And the other way around: a customary IHL rule can be codified in a treaty. There is a certain fluidity between crystallization and codification of customary international law.⁵⁰ Lastly, the content of a customary norm may change over time, provided State practice and *opinio juris* change accordingly.⁵¹

48 P. Tavernier, above note 6, p. 734.

49 J.-M. Henckaerts, above note 5, p. 17.

50 S. Sivakumaran, above note 7, p. 361.

51 International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, para. 83; ICTY, *Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo and Zejnib Delalić*, Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998 (*Čelebići case*), para. 202; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), “Introduction”, in *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005, pp. xliv and xlviii–li, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_in; Jean-Marie Henckaerts, “Study on Customary International Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict”, *International Review of the Red Cross*, Vol. 87, No. 857, 2005, p. 180; Tullio Treves, “Customary International Law”, in *Max Planck Encyclopedia of Public International Law*, November 2006, paras 3, 9, 38 and 85, available at: <https://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e1393?rskey=IR8g8G&result=1&prd=OPIL>; Robert Heinsch, “Methodological Challenges in Ascertaining Customary International Humanitarian Law: Can Customary International Law Respond to Changing Circumstances in Warfare?”, in Heike Krieger and Jonas Püschmann (eds), *Law-Making and*

While State practice is a prerequisite for the creation of customary norms, the identification of such norms is often done by other actors than States. As has been observed,

it is relatively rare for a State to identify the existence of a customary norm outside its pleadings in a particular case. In contrast, it is far more common for an international court, tribunal, or the ILC [International Law Commission] to determine the existence of a customary norm.⁵²

In 1995, the ICRC was mandated by States to carry out a Study on Customary IHL rules, which shall be discussed later.⁵³

AP I to the Geneva Conventions is a good example of the interplay between treaty and customary law in IHL. As we saw earlier, the Protocol was the product of lengthy and difficult negotiations. Its sometimes vague and ambiguous language was the resulting compromise in strenuous attempts to reconcile diverging or conflicting understandings and interpretations of key concepts such as “military necessity” and “proportionality” and positions on a number of issues. Ultimately, some of the agreed provisions introduced new prohibitions and obligations, markedly changing the law in this respect, while others codified what was considered to be existing principles and rules of IHL under customary international law.

However, the question of what exactly constituted the codification of existing custom, and what were novel obligations, was an object of considerable controversy. Initially, some commentators, in particular, went as far as to question the force of AP I as a legally binding instrument, and these persistent objections provided an argument against the customary nature of some of its provisions.⁵⁴

Yet, approaching the beginning of the 21st century, this situation had completely changed. Two factors played a major role in the growing acceptance of AP I as both codifying existing customary law and creating new law: the establishment of the International Tribunals for the former Yugoslavia and Rwanda, and the engagement of a new generation of practitioners and academics with a strong humanitarian background and interest.⁵⁵ As a result, by the

Legitimacy in International Humanitarian Law, Edward Elgar Publishing, Cheltenham and Northampton, MA, 2021.

52 S. Sivakumaran, above note 7, p. 360.

53 Recommendation II of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995, endorsed by Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent in 1995; see ICRC, “International Humanitarian Law: From Law to Action Report on the Follow-up to the International Conference for the Protection of War Victims”, available at: www.icrc.org/en/doc/resources/documents/resolution/26-international-conference-resolution-1-1995.htm.

54 Amanda Alexander, “A Short History of International Humanitarian Law”, *European Journal of International Law*, Vol. 26, No. 1, 2015, p. 128; Remarks of Lieutenant Professor William V. O’Brien in Martin P. Dupuis, John Q. Heywood and Michèle Y. F. Sarko, “The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions”, *American University International Law Review*, Vol. 2, No. 2, 1987, p. 511; Michael J. Matheson, “Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 422 (as cited by A. Alexander, *ibid.*).

55 A. Alexander, above note 54, pp. 130–1.

beginning of the 21st century it was generally accepted that many of the provisions of AP I reflected customary international law.⁵⁶

The law regulating NIAC is another example of the development of IHL beyond treaties. In this respect, the gap left in the treaty codification has been considerably reduced through other treaties and jurisprudence, much of which, though not all, is now accepted as customary law.

As is well known, there is only one article in the 400 or so articles contained in the Geneva Conventions that regulates NIACs, namely Article 3 common to the four Geneva Conventions. The ICRC sought to promote a much more comprehensive codification of the law of NIAC with a second additional protocol in 1977. However, during the negotiations this ambition met with resistance by States that had just experienced NIACs or were concerned that situations in their territory might be considered as NIAC. It was also resisted by colonial States, as well as by newly independent States seeking to protect their sovereignty against secession and rebellion and whose main aim was to ensure that fights against colonial domination, occupation and racist regimes were recognized as IAC.⁵⁷ The result was a mere twenty-eight articles in AP II (as opposed to 102 in AP I).

This wide gap between the regimes of IAC and NIAC has gradually been closed, even if not entirely.

First, a number of subsequent treaties cover both IAC and NIAC. While the CCW and its original three protocols were limited to IAC, Protocol II on mines, booby-traps and other devices was amended already in 1996 to apply to NIAC as well, and the Convention itself was subsequently revised and its scope of application, as well as that of its protocols, extended to NIAC. Its 2003 Protocol V on Explosive Remnants of War explicitly stipulates obligations on all parties to armed conflict, i.e. whether State or non-State.⁵⁸

Newer IHL treaties apply equally to both types of conflict. This is the case with the 1997 APMBC, the 1998 Rome Statute of the International Criminal Court (ICC) (even if it differentiates between crimes committed in IAC and NIAC⁵⁹), the 1999 Second Protocol to the Hague Convention for the protection of cultural property, and the 2008 CCM. The amendments to the ICC Statute of 2010,⁶⁰ 2017⁶¹ and 2019⁶² go in the same direction, as they gradually extended the list of war crimes to NIACs.

56 The fact that the majority of the Protocol's provisions have corresponding customary rules is demonstrated by the ICRC's Customary IHL Study. The Study was commissioned by the 26th International Conference of the Red Cross and Red Crescent, which mandated the ICRC to prepare a report on customary rules of IHL applicable in IACs and NIACs; see J.-M. Henckaerts, above note 5, p. 17.

57 Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, The Hague, 1982, pp. 8–10; G. Mantilla, above note 20, pp. 64–5; Y. Sandoz, C. Swinarski and B. Zimmermann (eds), above note 23, pp. 1335–6; G. Best, above note 8, pp. 343–7; G. Mantilla, above note 32, pp. 321 ff; H. Lovat, above note 35, pp. 147–58.

58 Protocol on Explosive Remnants of War, above note 26, in particular, Arts 3, 4 and 6.

59 Rome Statute of the ICC, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), Art. 8.

60 ICC-ASP/9/Res.5, 10 December 2010.

61 ICC-ASP/16/Res.4, 14 December 2017.

62 ICC-ASP/18/Res.5, 6 December 2019.

Second, jurisprudence played a crucial role in the convergence of IAC and NIAC law as regards individual criminal responsibility, in particular the jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR). More generally, international courts and tribunals have been instrumental in the development of IHL.⁶³

A characteristic example is the jurisprudence of the ICTY and ICTR on war crimes in IAC and NIAC. In the *Tadić* case, the ICTY Appeals Chamber interpreted the ICTY statute as granting the tribunal jurisdiction not only on grave breaches committed in the context of IACs, but also on other violations of IHL, including potential war crimes committed in NIAC.⁶⁴ This interpretation allowed the ICTY to elaborate on the customary law principles applicable in NIAC as well as on individual criminal responsibility for violations of these principles.⁶⁵ The establishment of the applicability in customary international law of the principle of individual criminal responsibility for serious violations of IHL in NIAC was a crucial stepping stone in the evolution of IHL.⁶⁶ The ICTR in its very first judgment, *Akayesu*, confirmed the *Tadić* conclusion that the violation of IHL rules applicable in NIAC entails the individual criminal responsibility of the perpetrator.

The case law of the ICTY and ICTR is illustrative of the content of customary law in the area of war crimes in NIAC, and it largely influenced the positions of States during the negotiations of the Rome Statute of the ICC, as to

63 On the ICTY and ICTR, see Robert Heinsch, “Judicial ‘Lawmaking’ in the Jurisprudence of the ICTY and ICTR in Relation to Protecting Civilians From Mass Violence: How Can Judge-Made Law be Brought into Coherence with the Doctrine of the Formal Sources of International Law?”, in Philipp Ambach, Frédéric Bostedt, Grant Dawson and Steve Kostas (eds), *The Protection of Non-Combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-Conflict Society: Essays in Honour of the Life and Work of Joakim Dungal*, Brill Nijhoff, Leiden and Boston, MA, 2015. On other international and regional judicial bodies and IHL, see, e.g., Juana María Ibáñez Rivas, “El derecho internacional humanitario en la jurisprudencia de la Corte Interamericana de Derechos Humanos”, *Revista Derecho del Estado*, Vol. 36, 2016; Linos-Alexandre Sicilianos, “L’articulation entre droit international humanitaire et droits de l’homme dans la jurisprudence de la Cour européenne des droits de l’homme”, *Revue suisse de droit international et de droit européen*, Vol. 27, No. 1, 2017; Olivier de Frouville and Olivia Martelly, “La juridictionnalisation du droit des conflits armés : les tribunaux internationaux mixtes”, in Vincent Chetail (ed.), *Permanence et mutation du droit des conflits armés*, Bruylant, Brussels, 2013; Vincent Chetail, “The Contribution of the International Court of Justice to International Humanitarian Law”, *International Review of the Red Cross*, No. 850, 2003; Christopher Greenwood, “The International Court of Justice and International Humanitarian Law”, in *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma*, Brill/Nijhoff, Leiden/Boston, 2015; Shane Darcy, “A Subtle yet Significant Influence: Judicial Decisions and the Development of International Humanitarian Law”, in H. Krieger and J. Püschmann (eds), above note 51; Jérôme de Hemptinne, “L’évolution des fonctions du juge pénal international et le développement du droit international humanitaire”, in Nico Krisch, Mario Prost and Anne van Aaken (eds), *European Society of International Law Conference Paper Series No. 10/2013*; Robert Cryer, “The Relationship of International Humanitarian Law and War Crimes: International Criminal Tribunals and their Statutes”, in Caroline Harvey, James Summers and Nigel D. White (eds), *Contemporary Challenges to the Laws of War: Essays in Honour of Professor Peter Rowe*, Cambridge University Press, Cambridge, 2014.

64 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, para. 142.

65 Eve La Haye, *War Crimes in Internal Armed Conflicts*, Cambridge University Press, Cambridge, 2008, p. 136.

66 *Ibid.*

whether serious violations of IHL amount to war crimes in NIAC and as to which serious violations amount to war crimes in customary law and should therefore be included in the Statute.⁶⁷ As a result, there is today significant overlap between conduct criminalized in IAC and NIAC, even if some differences remain between the two.

At the same time, the case law of these tribunals and their interpretation of the rules of IHL influenced the understanding of the content of IHL rules, not only those protecting civilians and persons *hors de combat*, but also the rules on the conduct of hostilities. One example is the articulation between the prohibition against indiscriminate attacks and the prohibition against direct attacks against civilians. In this respect, the ICTY systematically inferred from the use of inherently (or otherwise) indiscriminate weapons the intent to target civilians, thus in practice equating attacks using a means or method which cannot be directed against a specific military objective with attacks directly targeting civilians.⁶⁸

The ICRC Study on Customary IHL, published in 2005, took cognizance of these developments and of evolved State practice and showed the increasing convergence between the rules in IAC and NIAC. Of the 161 rules that the study identifies, twelve are identified as applying only to IAC, mainly relating to prisoners of war and to situations of occupation. Still, some differences and nuances continue to exist in the 146 remaining rules. First, eight were found to be only “arguably” customary in NIAC; second, some rules are slightly differently worded for NIAC; and third, some rules applicable in NIAC were only found to be binding on States. While the ICRC’s Study is not without criticism,⁶⁹ it has also received praise for its contribution to the difficult task of determining customary IHL rules⁷⁰ and has been cited in several national and international courts and tribunals, as well as in military manuals.⁷¹

67 *Ibid.*, p. 174.

68 See, characteristically, ICTY, *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment on Appeal (Appeal Chamber), 12 November 2009, para. 53.

69 Daniel Bethlehem, “The Methodological Framework of the Study”, in Elizabeth Wilmschurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007, pp. 10–14; Marco Sassòli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 17 and 21; John B. Bellinger, III and William J. Haynes II, “A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 444–8; Dieter Fleck, “Die IKRK-Gewohnheitsrechtsstudie: Polarisierend oder konsensbildend?”, *Humanitäres Völkerrecht: Informationsschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 22, No. 3, 2009.

70 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 104; Aharon Barak, “International Humanitarian Law and the Israeli Supreme Court”, *Israel Law Review*, Vol. 47, No. 2, 2014, p. 184; Marko Milanovic and Sandesh Sivakumaran, “Assessing the Authority of the ICRC Customary IHL Study”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

71 ICTY, *The Prosecutor v. Ljube Boskoski and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 205; European Court of Human Rights, *Hannan v. Germany*, Application No. 4871/16, Judgment (Grand Chamber), paras 80, 81 and 83; US Court of Military Commission Review, *United States of America v. Ali Hamza Ahmad Suliman Al Bahlul*, Case No. 820

In other words, despite some remaining fundamental differences, the considerable dichotomy between IAC and NIAC that existed in treaty law has been considerably reduced through the development of NIAC law. It is probably the most visible way in which IHL has developed through a combination of new sectorial treaties, jurisprudence, State practice and custom.

Development through interpretation

While treaty and custom are common pathways for the creation of new IHL norms, development can also take place in the context of existing rules, by means of interpretation. Indeed, as has been noted, “[t]he role of interpretation in the making and shaping of international law is significant, as the law develops incrementally through interpretation and the line between development through interpretation and creation of new law is a fine one.”⁷² A variety of actors perform interpretive functions. Some of these are in fact mandated by States to interpret the law.⁷³ The role of the ILC is well recognized in this respect.⁷⁴ The interpretation of customary and treaty norms of IHL by judiciary bodies, both international and domestic, in particular, has shaped the understanding of those norms remarkably, and at times also expanded their scope of application.⁷⁵

The rules of treaty interpretation are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Quite a bit of attention has recently been given to the role of subsequent practice in treaty interpretation.⁷⁶ The

F. Supp. 2d 1141 (M.C. 2011), No. CMCR 09-001, Judgment, 9 September 2011, available at: www.courtlistener.com/opinion/2143196/united-states-v-al-bahlul/; New Zealand Defence Force, *Manual of Armed Forces Law*, Vol. 4: *Law of Armed Conflict*, DM 69, 2nd ed., 2019, p. 3–16, para. 3.4.7 and subsequent references on various rules, available at: www.onlinelibrary.iihl.org/wp-content/uploads/2021/05/NZ-Manual-Law-of-Armed-Conflict.pdf; República de Colombia, Comando General de las Fuerzas Militares, *Operational Law Manual for the Armed Forces (Manual de derecho operacional par las fuerzas militares)*, MM.FF. 3-41, 2nd ed., 2015, multiple references; German Federal Ministry of Defence, *Law of Armed Conflict: Manual*, Joint Service Regulation (ZDv) 15/2, May 2013, p. 19, available at: www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf; Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, 2016, p. 118 and subsequent references, available at: www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf; Belgium, *Manuel de droit operationnel*, 2016, p. 107 and subsequent references.

72 S. Sivakumaran, above note 7, p. 347.

73 *Ibid.*, p. 362.

74 Danae Azaria, “Codification by Interpretation: The International Law Commission as an Interpreter of International Law”, *European Journal of International Law*, Vol. 31, 2020; for an illustration of the diverging views within the Commission over interpretation, codification and progressive development, see *Report of the International Law Commission on the Work of its Sixty-Ninth Session* (1 May–2 June and 3 July–4 August 2017), para. 134, available at: <https://legal.un.org/ilc/reports/2017/english/chp7.pdf>.

75 On the role of the judiciary in driving change in international law, see also Nico Krisch, “The Dynamics of International Law Redux”, *Current Legal Problems*, Vol. 74, No. 1, 2021, pp. 20–21; “Interview with Ted Meron, Judge, International Residual Mechanism for Criminal Tribunals”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

76 ILC, reports of the Special Rapporteur (2013–2018): ILC, Report of the International Law Commission, UN Doc. A/68/10, 2013, Chapter IV, paras 29–39; ILC, Report of the International Law Commission, UN Doc. A/69/10, 2014, Chapter VII, paras 66–76; ILC, Report of the International Law Commission, UN Doc. A/70/10, 2015, Chapter VIII, paras 118–29; ILC, Report of the International Law Commission, UN Doc. A/

purpose in the following paragraphs is not to give a comprehensive overview of the various methods of interpretation in the development of IHL, but rather to give a very brief outline, if somewhat impressionistic, on how interpretation has contributed to the development of IHL over time. The example of NIAC law above showed the influence of international courts on the development of IHL. The interplay between State practice, interpretation and custom⁷⁷ can also be particularly dynamic through the role of domestic courts and their judges in the development of IHL.⁷⁸ As has been noted, “domestic courts play a dual role. They are part of the State for the purposes of State practice but they are also neutral lawmakers in the sense that their judgments constitute a subsidiary means for determining the law.”⁷⁹

While the primary function of courts is to apply the law, in doing so they have a spectrum of options, some of which may result in normative development through interpretation.

In their interpretation and application of IHL, domestic judges may rely on the case law of international courts and tribunals, judgments from other jurisdictions dealing with similar legal questions, academic writings, and reports produced by international and non-governmental organizations, including the United Nations (UN) and the ICRC.⁸⁰ There is thus a strong interplay between national and international courts, academics, international organizations, civil society, and, of course, State practice itself which may or may not align with the views taken by domestic judges.

Overall, and especially on the law of NIAC, interpretation by domestic courts has over time contributed to extend the protection provided by treaty law. At times, courts have interpreted the law differently, or even in outright contradiction, to their State’s national position. In doing so, they have assumed a role which has been called utopian, but which over time can influence the position of the government concerned.⁸¹

71/10, 2016, Chapter VI, paras 64–76; ILC, Fifth Report on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties by Georg Nolte, Special Rapporteur, UN Doc. A/CN.4/715, 28 February 2018; Emily Crawford, “Interpreting the Geneva Conventions: Subsequent Practice Instead of Treaty Amendments? A Case Study of ‘Non-International Armed Conflicts’ Under Common Article 3”, in H. Krieger and J. Püschmann (eds), above note 51; Jean-Marie Henckaerts and Elvina Pothelet, “The Interpretation of IHL Treaties: Subsequent Practice and Other Salient Issues”, in H. Krieger and J. Püschmann (eds), above note 51; Irina Buga, *Modification of Treaties by Subsequent Practice*, Oxford University Press, Oxford, 2018; Georg Nolte (ed.), *Treaties and Subsequent Practice*, Oxford University Press, Oxford, 2013; Benedict Abrahamson Chigara, “Treaty-Text Loyalists’ Burden with Subsequent State Practice”, *Netherlands International Law Review*, Vol. 68, 2021; Julian Arato, “Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences”, *ILLJ Emerging Scholars Papers*, 2011; Abassali Kadkhodaei and Ehsan Shahsavari, “The Role of Subsequent Practice in the Interpretation of Constituent Treaties of International Organizations”, *Public Law Studies Quarterly*, Vol. 52, No. 1, 2022.

77 For further discussion on the interplay between treaty, interpretation and custom, see E. Crawford, above note 76.

78 Laurie R. Blank, “Understanding When and How Domestic Courts Apply IHL”, *Case Western Reserve Journal of International Law*, Vol. 44, No. 1, 2011.

79 S. Sivakumaran, above note 7, p. 384.

80 Sharon Weill, “Building Respect for IHL Through National Courts”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 875.

81 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, pp. 157 ff.

However, as with treaties, development through interpretation is not a linear process. There are also instances of courts providing a distorted interpretation of the law in order to justify unlawful State action;⁸² or they can contribute to an interpretation of the law which over time renders acceptable practices which had previously not been considered lawful. There are several examples of national courts interpreting and applying IHL with an effect detrimental to the legal protection of persons affected by armed conflict. The Israeli Supreme Court, for instance, which has had numerous opportunities to contribute to the development of the law of belligerent occupation, has incurred much criticism for unduly limiting the protective scope of IHL.⁸³ Amongst its many cases, the 2006 *Targeted Killings* case is a much-discussed example, considered by many to have interpreted the concept of direct participation in hostilities in an overly expansive manner,⁸⁴ and to have had an influence far beyond national borders.⁸⁵

The decisions by international and national courts are of course subject to debate and criticism,⁸⁶ and whether they influence the interpretation of IHL depends on uptake by the international community. However, through their influence on State positions and the “dialogue” between different national and international courts, they undeniably contribute to the shaping of IHL over time.

The development of IHL through interpretation by courts and other actors – and the influence of such interpretation on the understanding of treaties and custom – does not occur in a vacuum. IHL is not a self-contained regime. Developments in other branches of law can therefore have an important effect on the interpretation of IHL norms. Human rights law, in particular, has significantly influenced the interpretation of IHL, especially in more recent decades. This is well documented⁸⁷ and will not be the subject of detailed

82 Eyal Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford, 2012, pp. 320–8.

83 David Kretzmer, “The Law of Belligerent Occupation in the Supreme Court of Israel”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 236; David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Oxford University Press, Oxford, 2021, pp. 490–4.

84 Craig Jones, *The War Lawyers: The United States, Israel, and Juridical Warfare*, Oxford University Press, Oxford, 2020, p. 182; Hilly Moodrick-Even Khen, “Can We Now Tell What ‘Direct Participation in Hostilities’ Is?”, *Israel Law Review*, Vol. 40, No. 1, 2007, pp. 233–6; Kristen E. Eichensehr, “On Target? The Israeli Supreme Court and the Expansion of Targeted Killings”, *Yale Law Journal*, Vol. 116, No. 8, 2007. The various reactions to the judgment are also discussed in D. Kretzmer and Y. Ronen, above note 83, p. 476.

85 Ashley Deeks, “Domestic Humanitarian Law: Developing the Law of War in Domestic Courts”, in Derek Jinks, Jackson N. Maogoto and Solon Solomon (eds), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, Asser Press, The Hague, 2014, p. 147; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, “Study on targeted killings”, UN Doc. A/HRC/14/24/Add.6, 28 May 2010, paras 1, 7 and 12; C. Jones, above note 84, pp. 5–6 and 11.

86 See, e.g., A. Barak, above note 70, p. 187. For an example of misapplication of IHL, see Chintan Chandrachud, “International Humanitarian Law in Indian Courts: Application, Misapplication and Non-Application”, in D. Jinks et al. (eds), above note 85, p. 405.

87 Gloria Gaggioli, *L’Influence mutuelle entre les droits de l’homme et le droit international humanitaire à la lumière du droit à la vie*, Editions A. Pedone, Paris, 2013, p. 529; Gerd Oberleitner, “The Development of

description here. There are many examples of human rights law's influence on IHL. For instance, the way the duty to investigate IHL violations is understood today has been shaped to a large degree by human rights jurisprudence.⁸⁸

Similarly, interpretation evolves in time with contemporary sensitivities, social norms and understandings, and this too contributes to the development of IHL. One example of this is the way that IHL rules concerning women are understood today.⁸⁹ In a nutshell, IHL rules prohibit discrimination in the treatment of women, including by requiring that due regard be given to their sex and their honour be protected.⁹⁰ These rules have been criticized for conceptualizing women in a reductive manner, focusing on their sexual and reproductive roles; for conceptualizing rape as an inevitable by-product of war, rather than a grave breach requiring criminal sanction; and for ignoring issues of structural discrimination or so-called “private sphere” harms that characterize much of the experiences of women and girls in armed conflict.⁹¹

IHL by Human Rights Bodies”, in Ezequiel Heffes, Marcos D. Kotlik and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors: Debates, Law And Practice*, Asser Press, The Hague, 2020, pp. 298 ff; Lawrence Hill-Cawthorne, “Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict”, *International and Comparative Law Quarterly*, Vol. 64, No. 2, 2015, pp. 304 ff; David Weissbrodt, Joseph C. Hansen and Nathaniel H. Nesbitt, “The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law”, *Harvard Human Rights Journal*, Vol. 24, No. 1, 2011, pp. 127 and 139–40; Edoardo Greppi, “Diritto internazionale umanitario dei conflitti armati e diritti umani: profili di una convergenza”, *La Comunità Internazionale*, Vol. LI, No. 3, 1996; Robert Kolb, “‘Condotta e utilità’ e ‘mantenimento dell’ordine’: Due concetti chiave nella definizione dei rapporti tra diritto internazionale umanitario e diritti umani”, in Adriana Di Stefano (ed.), *La tutela dei diritti umani e il diritto internazionale*, Editoriale Scientifica, Naples, 2012; D. Kretzmer and Y. Ronen, above note 83, pp. 86–9; Hans-Joachim Heintze, “Theorien zum Verhältnis von Menschenrechten und humanitärem Völkerrecht”, *Humanitäres Völkerrecht: Informationschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 24, No. 1, 2011; Damien Scalia and Marie-Laurence Hebert-Dolbec, “The Intricate Relationship Between International Human Rights Law and International Humanitarian Law in the European Court for Human Rights Case Law: An Analysis of the Specific Case of Detention in Non-International Armed Conflicts”, in Drazan Djukic and Niccolò Pons (eds), *The Companion to International Humanitarian Law*, Brill Nijhoff, Leiden, 2018, pp. 118–22.

88 Noam Lubell, Jelena Pejic and Claire Simmons, *Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice*, ICRC and Geneva Academy, September 2019, paras 18 and 34, available at: www.icrc.org/en/document/guidelines-investigating-violations-ihl-law-policy-and-good-practice; Cordula Droege, “Elective Affinities? Human Rights and Humanitarian Law”, *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 540 ff; Michelle Lesh, “A Critical Discussion of the Second Turkel Report and How it Engages with Duty To Investigate Under International Law”, *Yearbook of International Humanitarian Law*, Vol. 16, 2013.

89 ICRC, *Commentary on the Third Geneva Convention: Convention (III) on Prisoners of War*, 2020, para. 1761.

90 See GC I, Art. 12 and GC II, Art. 12 (“Women shall be treated with all consideration due to their sex.”); GC III, Art. 14 (“Women shall be treated with all the regard due to their sex.”); GC IV, Art. 27 (“Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”).

91 Judith Gardam, “A Feminist Analysis of Certain Aspects of International Humanitarian Law”, *Australian Year Book of International Law*, Vol. 12, 1992, pp. 266 and 277; Judith Gardam and Hilary Charlesworth, “Protection of Women in Armed Conflict”, *Human Rights Quarterly*, Vol. 22, No. 1, 2000, pp. 149 ff; Catherine O’Rourke, *Women’s Rights in Armed Conflict under International Law*, Cambridge University Press, Cambridge, 2020, pp. 36–43; Orly Maya Stern, *Gender, Conflict and International Humanitarian Law: A Critique of the “Principle of Distinction”*, Routledge Studies in Humanitarian Action, Routledge, Abingdon, 2019, pp. 100 and 103.

While the treaty text of IHL is hard to change, developments since the adoption of the Geneva Conventions have been significant. International criminal tribunals have clarified gendered crimes, advocacy and scholarship have documented gendered experiences of armed conflict, and the ICRC is working to change sexist interpretations, including in the interpretations reflected in its updated Commentaries to the Geneva Conventions.⁹² As a result of these developments, it is now unquestionable that the requirements of non-adverse distinction based on sex set down in IHL treaties require substantive – not formal – equality. It is further clear that sexual violence is prohibited not by requirements related to gendered notions of honour, but by prohibitions of violence to person, and that it is prohibited against everyone regardless of gender. Lastly, significant progress has been made in understanding the gendered implications of the application of IHL rules beyond those protecting pregnant women and mothers.⁹³

Another example of evolutive interpretation combined with the interplay between IHL and human rights law is the contemporary understanding of the experiences and the rights of persons with disabilities.⁹⁴ This has considerably evolved since the drafting of the Geneva Conventions, and has been shaped by developments in human rights law, especially the 2006 Convention on the Rights of Persons with Disabilities (CRPD). In particular, the language of the Geneva Conventions and AP I still conceives of disability as a medical and charity issue, whereas today disability is understood based on the social and human rights models underlying the CRPD as the interaction between a person’s impairment (including physical, mental, intellectual or sensory impairments) and a variety of barriers that prevent his/her full and effective participation in society on an equal basis with others.⁹⁵ The difference is not merely semantic. For instance, in cases where persons with disabilities are in the power of a party to a conflict, this conceptualization of disability permits an interpretation of the prohibition of non-adverse distinction that requires substantive equality and positive measures of accessibility and reasonable accommodation to achieve it. Thus, the interpretation of IHL has developed over time towards a more inclusive understanding of the rights and agency of persons with disability, and an obligation of non-adverse distinction that requires substantive equality and positive measures to achieve it.⁹⁶

92 C. O’Rourke, above note 91.

93 ICRC, above note 89, paras 587, 613 and 1761.

94 For more on this topic, see Janet E. Lord, “Persons with Disabilities in International Humanitarian Law – Paternalism, Protectionism or Rights?”, in Michael Gill and Cathy J. Schlund-Vials (eds), *Disability, Human Rights and the Limits of Humanitarianism*, Routledge, London and New York, 2016.

95 ICRC, 2016 Commentary on GC I, commentary on common Article 3, para. 553. Both the 2016 Commentary, as well as the original ICRC 1952 Commentary on GC I, are available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>. For a description of the concepts of “disability” and “persons with disabilities” in the CRPD, see Convention on the Rights of Persons with Disabilities, New York, 13 December 2006 (entered into force on 3 May 2008), Preambular para. (e) and Art. 1(2).

96 Alice Priddy, *Disability and Armed Conflict*, Academy Briefing No. 14, The Geneva Academy of International Humanitarian Law and Human Rights, Geneva, April 2019, available at: www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactif.pdf; ICRC, *How Law*

In sum, interpretation is undoubtedly an important way in which IHL develops. As all international law, it is a living instrument. Unlike national legislation, international treaties are not easily adopted or amended, and so their understanding – and that of customary law in parallel – is shaped over time by their application and interpretation in the practice of States, their armed forces, their courts, and other actors.

Development through soft-law instruments

Another interesting contribution to the development of IHL has been made through “soft-law instruments”. Soft law is not mentioned among the sources cited in Article 38 of the ICJ Statute. It is not binding, yet it has a certain undefined normative role to play.

Next to the traditional sources of IHL – treaty and custom – the past few decades have seen a proliferation of such soft-law and interpretive instruments, both in IHL and in international law more broadly.⁹⁷ These soft-law instruments have various forms and objectives and can influence later developments of treaty or custom. They range from commitments contained in instruments such as political declarations, to principles, codes of conduct or manuals. Some soft-law instruments can be adopted by States in various forms, while others are stand-alone commitments or principles that do not ask States to sign on.⁹⁸

In general, soft-law instruments are aimed at filling gaps in the law, providing solutions in the absence of clear law, strengthening its implementation, interpreting existing legal norms or extrapolating practical measures required to comply with existing obligations.⁹⁹ None of these instruments is legally binding *per se*, and the degree to which they impact the development of IHL differs depending on the level of endorsement by States and/or prominent academics and practitioners and the type and authority of stakeholders involved in their development.¹⁰⁰ State endorsement, in turn, can lead to State practice, for instance in military manuals or “on the battlefield”.

The Oxford Manual on Laws of War on Land of 1880 is an early example of a soft-law instrument, drafted by Gustave Moynier and unanimously adopted by the

Protects Persons with Disabilities in Armed Conflict, 13 December 2017, available at: www.icrc.org/en/document/how-law-protects-persons-disabilities-armed-conflict; Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/76/146, 19 July 2021; Report of the Special Rapporteur on the Rights of Persons with Disabilities, Gerard Quinn, UN Doc. A/77/203, 20 July 2022.

97 José Luis Rodríguez-Villasante y Prieto, “Introducción a un ‘soft law’ humanitario: Principales aportaciones de los manuales doctrinales internacionales y otros documentos institucionales y académicos al derecho internacional humanitario”, *Revista española de derecho militar*, Vol. 108, 2017; P. Tavernier, above note 6, pp. 738–41.

98 S. Sivakumaran, above note 7, pp. 358, 360–1 and 391. See also “Interview with Eirini Giorgou, Legal Adviser, ICRC Arms and Conduct of Hostilities Unit”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

99 See P. Tavernier, above note 6, p. 738; Wouter G. Werner, “The Law at Hand: Paratext in Manuals on International Humanitarian Law”, in H. Krieger and J. Püschmann (eds), above note 51.

100 See S. Sivakumaran, above note 7, p. 366.

International Law Institute.¹⁰¹ The Manual was developed as a substitute for a treaty, an outcome considered by the Institute at the time as “premature or at least very difficult to obtain”. Its aim was to codify “certain principles of justice which guide the public conscience, which are manifested even by general customs”, to serve as a basis for national legislation.¹⁰² Though itself non-legally binding, the Oxford Manual made a significant contribution to the development of IHL, reflected in subsequent key instruments such as the Hague Conventions of 1899 and 1907, the Geneva Convention of 1929, the four Geneva Conventions of 1949, as well as the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflict.

Similarly, the 1923 Hague Rules on Air Warfare were adopted by an international committee of jurists from five States in the aftermath of the First World War, but never achieved the status of an actual treaty (in conformity with the commission’s mandate, which was to clarify the questions raised and not to adopt an international treaty). Nevertheless, they did have some degree of influence on legal and military thinking, as well as – partly – on some orders issued by the armed forces of some of the military powers involved in the Second World War. It has been even submitted that the Hague Rules “played a decisive part in the emergence of binding customary international law”, reflected today in AP I rules on indiscriminate attacks.¹⁰³

An example of a soft-law instrument that came about as an expert product is the San Remo Manual on Naval Warfare.¹⁰⁴ Drafted by experts on naval warfare, including State experts, this manual has been widely relied upon and used as a reference in national legislation and military manuals. As a result, it is considered the “most recent restatement” of the law of naval warfare, with most of its rules being reflective of customary international law.¹⁰⁵

Some soft-law instruments have been adopted by the UN General Assembly, such as the UN Principles on the Right to a Remedy and Reparation,¹⁰⁶ while others, like the Guiding Principles on Internal Displacement,¹⁰⁷ have not. The latter example shows that adoption is not a prerequisite for the relevance of such instruments. Despite not adopting them, the

101 *The Laws of War on Land*, Oxford, 9 September 1880 (Oxford Manual).

102 *Ibid.*, Preface. See also E. Crawford, above note 31.

103 Heinz Marcus Hanke, “The 1923 Hague Rules of Air Warfare: A Contribution to the Development of International Law Protecting Civilians From Air Attack”, *International Review of the Red Cross*, Vol. 33, No. 292, 1993, pp. 36 and 39.

104 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994.

105 Wolff Heintschel von Heinegg, “Current State of the Law of Naval Warfare: A Fresh Look at the *San Remo Manual*”, *International Law Studies*, Vol. 82, pp. 270 and 288; see also Louise Doswald-Beck, “The San Remo Manual on International Law Applicable to Armed Conflicts at Sea”, *American Journal of International Law*, Vol. 89, No. 1, 1995, p. 193; William H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, p. 313.

106 UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN Doc. A/RES/60/147, 16 December 2005.

107 UN Office for the Coordination of Humanitarian Affairs, *Guiding Principles on Internal Displacement*, 2nd ed., 2004, available at: www.internal-displacement.org/publications/ocha-guiding-principles-on-internal-displacement.

UN General Assembly has recognized the Principles as an important international framework for the protection of internally displaced persons and encouraged all relevant actors to use them when confronted with situations of internal displacement. They were, in particular, an important source of inspiration for the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.¹⁰⁸ Today, the Principles on Internal Displacement are used as a “universal” reference instrument.

More recently, just as with treaties, some States have come together to agree on principles or political declarations in the hope of universalizing them by gathering a wider number of supporting States in the future, as is the case for the Montreux Document on Private Military and Security Companies.¹⁰⁹ Other instruments have been limited to a certain number of States or experts from a geographic region, such as the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations¹¹⁰ and the Tallinn Manual on the International Law Applicable to Cyber Operations.¹¹¹ A number of these soft-law documents have been drafted through processes led by civil society, with or without the involvement of States.¹¹² These set out existing law and suggest good practices for implementing it, sometimes going beyond existing legal obligations.¹¹³ An example of such a document is the Safe Schools Declaration and its 2014 Guidelines.¹¹⁴ Such approaches based on policy and good practice constitute a pragmatic response to humanitarian concerns when faced with the reluctance of States to engage in lawmaking clarification processes, as well as where diverging views on the interpretation or application of the law block other pathways for IHL development (see the “How treaties develop” section). Similarly, a diplomatic process with the participation of over seventy States, international organizations and civil society recently concluded with the elaboration of a political declaration on explosive weapons in populated areas, aimed at committing States to take action to strengthen the protection of civilians

108 Global Protection Cluster, *Fact Sheet on the Guiding Principles on Internal Displacement*, available at: www.globalprotectioncluster.org/gp20/fact-sheet-on-the-guiding-principles-on-internal-displacement/; African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009 (entered into force 6 December 2012).

109 Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, UN Doc. A/63/467–S/2008/636, 17 September 2008.

110 See International Institute of Humanitarian Law, *The Copenhagen Process on The Handling of Detainees In International Military Operations: Principles And Guidelines*, available at: <https://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.

111 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017.

112 See P. Tavernier, above note 6, p. 740.

113 E. Crawford, above note 31. See also Martin Zwanenburg, “Keeping Camouflage out of the Classroom: The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict”, *Journal of Conflict and Security Law*, Vol. 26, No. 2, 2021.

114 Global Coalition to Protect Education from Attack (GCPEA), *Safe Schools Declaration and Guidelines on Military Use*, available at: <https://ssd.protectingeducation.org/safe-schools-declaration-and-guidelines-on-military-use/>.

from the use of explosive weapons in populated areas, and to facilitate respect for IHL.

The influence of such documents should not be underestimated. As has been noted,

they can focus the attention of the armed forces on particular issues, and can provide clarity and guidance for refining military manuals or elaborating military doctrine and policies: to states when adopting legislation; and to courts, quasi-judicial bodies and intergovernmental organizations.¹¹⁵

Statements or reports by “recognized authorities in a private capacity without a clear affiliation to or mandate from states or international organizations” have also contributed to the development of IHL, “through the production of technical manuals, standards, and regulations – responding to new demands not (yet) addressed through other pathways – but in other cases such as the ICRC, private authority can also weigh heavily in lasting change of established rules.”¹¹⁶

In a number of the soft-law instruments examined above, the influence of academics is prominent. The role of academics in IHL development comes as no surprise if one considers that international law has always been the subject of analysis and development by highly qualified publicists such as Grotius, Vattel, Oppenheim or Lauterpacht, and that such scholarship may even constitute a source of IHL according to Article 38 of the ICJ Statute. Even when falling short of being considered as a source of IHL, academics often have a significant influence over States’ positions on and interpretations of the law, as well as on States’ positions in the context of negotiations on new IHL norms.¹¹⁷ Lastly, as part of the “community of international lawyers”, they can play a role in shaping the development of IHL by either accepting or rejecting soft-law instruments or specific interpretations of the law, thus influencing their weight in normative development.¹¹⁸

Old challenges, new dynamics

The outline of the historical evolution of IHL through various sources, earlier in the paper, provides some insight into what lies ahead for this body of law. The sources, factors and trends that have shaped the development of IHL during the past 160 years or so are expected to keep playing an important role, as IHL continues

115 Emanuela-Chiara Gillard, “Seventy Years of the Geneva Conventions: What of the Future?”, *Chatham House*, 24 March 2020, p. 12, available at: www.chathamhouse.org/2020/03/seventy-years-geneva-conventions. See also Robin Geiss and Anni Pues, “International Manuals in International Humanitarian Law: A Rejoinder to Wouter G. Werner”, in H. Krieger and J. Püschmann (eds), above note 51.

116 N. Krisch, above note 75, p. 21.

117 A form of informal lawmaking in which governments closely rely on academics is described in David Hughes and Yahli Shereshevsky, “State–Academic Law Making”, *Harvard International Law Journal*, Vol. 64, 2022, forthcoming.

118 S. Sivakumaran, above note 7, pp. 387–91.

evolving. While some of the old challenges – inherent in lawmaking and international relations – will probably persist, the dynamics and interplay between the various actors involved appear to be shifting. Against this backdrop, questions, tensions and risks related to development *versus* no development will inevitably arise.

Plurality of actors and contestation over the development of IHL

As described above, the interaction and convergence of many sources has led to the development and densification of IHL. A multitude of actors, far beyond State governments, have contributed to this development. While this has overall strengthened IHL over time, development is not a uniform concept, nor is it always linear. At times, it is the result of more or less subtle changes taking place in different quarters and driven by different actors, which may or may not move in the same direction. It has been observed that particular areas of international law (whether thematic, regional or institutional) have developed their own, particular structures of change.¹¹⁹ In addition, the perception of whether international law, and IHL more specifically, has developed or not, and the understanding of what such development consists of, may differ across a variety of actors – States, international organizations, civil society organizations and academics.

In that sense, agreement on development of IHL is the subject of every-day contestation and is in flux. As has been noted, “change may consist in a full shift of an accepted understanding of the law, but it may also consist in more subtle shifts in the burden of argument, or a greater scope of acceptable contestation within legal discourse”.¹²⁰

While States undoubtedly remain at the centre of international lawmaking, in particular as regards the traditional pathways of IHL development (treaty and custom), there is equally no doubt that IHL as we know it today is the result of the influence of many actors beyond States: the ICRC, international and regional organizations, civil society, judges, academics and practitioners, and, to some degree, also NSAGs.¹²¹ Moreover, even States themselves are entities comprising various actors, including the judiciary and the military, including military lawyers in particular. Effective protection of civilians and other persons affected by armed conflict has benefitted greatly from the involvement of all of these actors and

119 N. Krisch, above note 75, p. 19.

120 *Ibid.*, p. 11.

121 See, e.g., S. Sivakumaran, above note 7, on the role of so-called “state-empowered entities” and of the “community of international lawyers” in the development of the law; María Teresa Comellas Aguirrezábal, “La contribución del Consejo de Seguridad de las Naciones Unidas a la aplicación y al desarrollo normativo del derecho internacional humanitario”, *Revista española de derecho militar*, Vol. 85, 2005; Paul Tavernier, “La contribution du Conseil de Sécurité des Nations Unies à l’élaboration des normes du droit international humanitaire : quelques observations”, in Stéphane Doumbé-Billé and Jean-Marc Thouvenin (eds), *Mélanges en l’honneur du Professeur Habib Slim : Ombres et lumières du droit international*, A. Pedone, Paris, 2016; Yahli Shereshevsky, “Back in the Game: International Humanitarian Lawmaking by States”, *Berkeley Journal of International Law*, Vol. 37, No. 1, 2019.

stakeholders in the development of the law. The role of two of them specifically – the military and NSAGs – is addressed briefly in the following.

The multitude of actors is a defining characteristic of contemporary lawmaking, but this does not mean it is entirely a modern phenomenon. Already in the 19th century, States were far from being the only influence on the development of the law. It has been argued that the flurry of codification of the laws and customs of war which took place in the late 19th and early 20th centuries can be explained not so much by the desire of States to strengthen the protection of victims of armed conflict, but rather by their interest in establishing a “monopoly” in this area, notably by the exclusion of “civil society” both from lawmaking and from war-fighting.¹²² This monopoly was challenged by growing awareness and pressure from civil society, as evidenced by the impact of Henry Dunant’s *A Memory of Solferino*.¹²³ As has been observed,

pressure from civil society may have urged governments to participate in the codification of the laws of war, but the signing of the 1864 Geneva Convention would be the last occasion during the 19th century on which civil society activists would be permitted to set the agenda and initiate codification. From the St Petersburg Declaration onward, governments would pre-empt civil society initiatives and exclude their members from participation in the drafting processes.¹²⁴

In subsequent years, in cooperation with States or in opposition to them, civil society actors – lawyers, academics and practitioners – consistently advocated an interpretation and application of IHL compatible with humanitarian values. In doing so, they continued to challenge the attempts of States to monopolize the development of IHL, both in terms of process and outcome.¹²⁵

The contestation over the State monopoly, not only over treaty-making but also the interpretation of IHL, continues today.¹²⁶ It is reinforced by voices coming from some States and military experts strongly questioning the legitimacy of non-military experts to have a say on IHL.¹²⁷ Indeed, the role of the military in

122 Eyal Benvenisti and Doreen Lustig, “Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874”, *European Journal of International Law*, Vol. 31, No. 1, 2020, p. 129.

123 *Ibid.*, pp. 139–40.

124 *Ibid.*, p. 141.

125 *Ibid.*, p. 169.

126 Heike Krieger and Jonas Püschmann, “A Legitimacy Crisis of International Humanitarian Law?”, in H. Krieger and J. Püschmann (eds), above note 51; William H. Boothby, “Direct Participation in Hostilities – A Discussion of the ICRC Interpretive Guidance”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010, pp. 144–5; Anton O. Petrov, *Experts Laws of War: Restating and Making Law in Expert Processes*, Edward Elgar Publishing, Cheltenham and Northampton, MA, 2020, pp. 20–1; Iain Scobbie, “The Approach to Customary International Law in the Study”, in E. Wilmschurst and S. Breau (eds), above note 69, pp. 16–21; D. Bethlehem, above note 69, p. 4; J. Bellinger and W. J. Haynes, above note 69; Charles Pedes and Peter Hayden, “The Eighteenth Gap: Preserving the Commander’s Legal Maneuver Space on ‘Battlefield Next’”, *Military Review*, March–April, 2021, pp. 7–8, available at: www.armyupress.army.mil/Portals/7/military-review/Archives/English/MA-21/Pede-The-18th-Gap-3.pdf.

127 C. Pedes and P. Hayden, *ibid.*; Paul Ney, “Remarks at the Israel Defense Forces 3rd International Conference on the Law of Armed Conflict”, *Just Security*, 28 May 2019, available at: www.justsecurity.org.

the development of IHL is evident, if one considers its roots in the laws and customs of war. These were initially and to a large extent derived from the behaviour of belligerents on the battlefield or were developed precisely in response to such behaviour. Since its early stages of codification, military experts influenced the development of IHL norms as part of States' delegations to negotiating conferences. Subsequently, military lawyers and commanders produced prolific writings on the interpretation of treaty and customary rules, largely shaping the understanding and national positions of States in this respect. As the drafters of military manuals, rules of engagement and other instruments of military doctrine, they further influence the interpretation and very implementation of IHL, and as such can even contribute to the development, crystallization or identification of customary law (of which the content of military manuals is a prime indication).¹²⁸ The heavy footprint of the military is a characteristic element of IHL, distinguishing it from other branches of international law.

However, it is clear today that if IHL is to realistically address the experience and limit the suffering of all those affected by armed conflict, a wide range of expertise and experiences should contribute to its interpretation and development.¹²⁹ Evidence collated by scholars, civil society organizations and others on the human cost of armed conflict has an important role to play. The ICRC, international organizations and other bodies, and civil society have a – longer or shorter – history of contributing to, and indeed at times triggering or even spearheading, the development of IHL through the negotiation of treaties and other legally binding instruments.¹³⁰ Indeed, “international humanitarian law is not a code managed and shaped by states alone. It [...] is a broader practice, which can comprehend contributions by conventional and unconventional participants.”¹³¹ Thus, while States continue to play a crucial role in the “making and shaping” of IHL,¹³² the divide between treaty-making as a State-dominated domain and soft law as mostly driven by actors other than States appears to be closing.

org/64313/remarks-by-defense-dept-general-counsel-paul-c-ney-jr-on-the-law-of-war/; Thomas Ayres, “The Use of Explosives in Cities: A Grim but Lawful Reality of War”, *Joint Force Quarterly*, Vol. 87, 2017, p. 26; Y. Shereshevsky, above note 121, describes the move by States to take back control over lawmaking in opposition to non-State actors, including through “unilateral” initiatives.

128 Michael N. Schmitt, “Normative Architecture and Applied International Humanitarian Law”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

129 O. M. Stern, above note 91, p. 86; E. Crawford, above note 31; Hilary Charlesworth, Christine Chinkin and Shelley Wright, “Feminist Approaches to International Law”, *American Journal of International Law*, Vol. 85, No. 4, 1991, pp. 616 and 621 ff; Jasminka Kalajdic, “Rape, Representation, and Rights: Permeating International Law with the Voices of Women”, *Queen's Law Journal*, Vol. 21, No. 2, 1996, pp. 474 and 491; A. Priddy, above note 96, pp. 11–17; J. E. Lord, above note 94; see also Bhupinder S. Chimni, “Third World Approaches to International Law: A Manifesto”, *International Community Law Review*, Vol. 8, 2006, pp. 3 ff.

130 See F. Bugnion, above note 10; Claude Emanuelli, *International Humanitarian Law*, Bruylant, Brussels, 2009; A. Alexander, above note 54; K. Dörmann and L. Maresca, above note 42; and Kathleen Lawand and Isabel Robinson, “Development of Treaties Limiting or Prohibiting the Use of Certain Weapons: The Role of the International Committee of the Red Cross”, in R. Geiß, A. Zimmermann and S. Haumer (eds), above note 20.

131 A. Alexander, above note 54, p. 136; see also Ezequiel Heffes and Marcos D. Kotlik, “How Focusing on Non-State Actors Can Change the IHL Narrative”, *OpinioJuris*, 3 November 2020, available at: <https://opiniojuris.org/2020/11/03/how-focusing-on-non-state-actors-can-change-the-ihl-narrative/>.

Despite the plurality of actors, there is still a long way to go to achieve diversity and inclusion in the development of IHL, more specifically as regards gender, disability and geographic representation.¹³³ When it comes to treaty-making, for one, IHL, and in particular the field of disarmament (as weapons treaties are called in diplomatic parlance), remains male-dominated.¹³⁴ Statistics in this regard are striking: a study analysing patterns of State participation at a selection of disarmament and non-proliferation fora in the period from 2015 to 2018 concluded that, while the participation of women in international disarmament diplomacy has steadily increased over the past decades, the share of women remains far from the 50% parity mark, which means there is still much ground to be covered to achieve gender balance.¹³⁵ The average share of women per delegation during the observed period was a mere 30%.¹³⁶ This shows that much more needs to be done to ensure equal representation of women in disarmament negotiations, and consequently in IHL development.

The participation of persons with disabilities in the negotiation and subsequent “life-cycle” of IHL or IHL-related instruments also lags far behind.¹³⁷ Despite the absence of consolidated quantitative data, a variety of sources confirms that the voices of people with disabilities and organizations of persons with disabilities are not sufficiently heard. For one, the Charter on Inclusion of Persons with Disabilities in Humanitarian Action adopted at the World Humanitarian Summit in 2016 explicitly recognizes that “persons with disabilities and their representative organizations have untapped capacity and are not sufficiently consulted nor actively involved in decision-making processes concerning their lives”.¹³⁸ The International Red Cross and Red Crescent Movement itself has recognized the need to do more as regards the participation of persons with disabilities, including in the International Red Cross and Red Crescent Conferences.¹³⁹

132 S. Sivakumaran, above note 7, p. 393.

133 See Louise Arimatsu, “Transformative Disarmament: Crafting a Roadmap for Peace”, *International Law Studies*, Vol. 97, 2021; Federica du Pasquier, “Gender Diversity Dynamics in Humanitarian Negotiations: The International Committee of the Red Cross as a Case Study on the Frontlines of Armed Conflict”, *Harvard Humanitarian Initiative*, Humanitarian Negotiation Working Paper Series No. 1, November 2016, available at: https://hhi.harvard.edu/files/humanitarianinitiative/files/atha_gender_diversity_dynamics_in_humanitarian_negotiations.pdf?m=1610041180.

134 See Renata Dalaqua, Kjølv Egeland and Torbjørn G. Hugo, *Still Behind the Curve: Gender Balance in Arms Control, Non-Proliferation and Disarmament Diplomacy*, UNIDIR, 2019, available at: <https://unidir.org/sites/default/files/2019-10/Still%20behind%20the%20curve.pdf>.

135 Norwegian People’s Aid, *Patterns of Participation in Multilateral Disarmament Forums*, 2020, p. 8, available at: www.npaid.org/publications/patterns-of-participation-in-multilateral-disarmament-forums.

136 *Ibid.*, p. 9.

137 On international criminal law specifically, see William I. Pons, Janet E. Lord and Michael Ashley Stein, “Disability, Human Rights Violations, and Crimes Against Humanity”, *American Journal of International Law*, Vol. 116, No. 1, 2022.

138 UN, Charter on Inclusion of Persons with Disabilities in Humanitarian Action, 2016, available at: <http://humanitariananddisabilitycharter.org/>.

139 ICRC and International Federation of Red Cross and Red Crescent Societies, “Inclusion of Persons with Disabilities in Humanitarian and Development Action”, pledge adopted at the 33rd International Conference, 2019, available at: <https://rcrcconference.org/pledge/inclusion-of-persons-with-disabilities-in-humanitarian-and-development-action/>; Council of Delegates of the International Red Cross and Red Crescent Movement, “Promoting Disability Inclusion in the International Red Cross and Red

As regards soft law, concerns have been expressed that the relatively small number of experts involved in the processes leading to the elaboration of such instruments “might mean that only a limited number of perspectives are represented—especially if the experts represent only select legal, geographical, social–cultural, or political backgrounds”.¹⁴⁰ Lack of inclusivity in this respect risks resulting in some form or degree of bias, with a negative impact on the acceptance of the soft-law instrument’s legitimacy, authority or even value.

The role of non-State armed groups

The role of NSAGs is a characteristic element of contemporary armed conflicts, as the vast majority of conflicts around the world are non-international in character. It is today widely accepted that NSAGs are bound by IHL as applicable to NIAC, whether customary or treaty based. Some treaties, such as, for example, CCW Protocol V on Explosive Remnants of War, even expressly state that they apply to all parties to an armed conflict (i.e. both State and non-State). However, NSAGs are not involved in the development of IHL by means of treaty or custom: they do not participate in treaty negotiations or become party to such instruments, and their practice does not constitute “State practice” constituent of customary law.¹⁴¹

Nevertheless, some submit that, with their activities, such actors “have consistently and conspicuously affected the evolution of IHL for a long time”,¹⁴² in particular through the conclusion of special agreements among parties to the conflict on the application of IHL or through the adoption of action plans with the UN.¹⁴³ Similarly, there are signs that the practice of NSAGs is, if not accepted on a formal normative level by States, at least accepted for practical reasons in many respects.¹⁴⁴ In that way, the contribution of NSAGs to the interpretation of the rules through practice might be more substantial than meets the eye.

There are increasing voices and ideas for the participation of NSAGs in the development of IHL norms.¹⁴⁵ Such calls are not unprecedented, considering the

Crescent Movement”, Resolution, Sydney, Australia, 17–18 November 2018, available at: www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-r9-people-with-disabilities-adopted-eng.pdf.

140 E. Crawford, above note 31; for similar criticism voiced with regard to expert manuals, see A. O. Petrov, above note 126, p. 227.

141 See E.-C. Gillard, above note 115, p. 14; for the ILC draft conclusions on the identification of customary international law, see ILC, Report of the International Law Commission on the Work of its Sixty-Eighth Session, UN Doc. A/71/10, 2016, Conclusion 4(3) and para. 8 commentary to Conclusion 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/184/25/PDF/G1618425.pdf?OpenElement>.

142 E. Heffes and M. Kotlik, above note 131.

143 *Ibid*; Ezequiel Heffes, “Hacia un mayor respeto del derecho internacional humanitario: utilidad, contenido y regulación de los acuerdos especiales en conflictos armados no internacionales”, *Anuario Iberoamericano de Derecho Internacional Humanitario*, Vol. 1, 2020.

144 See the recent study by René Provost, *Rebel Courts: The Administration of Justice by Armed Insurgents*, Oxford University Press, New York, 2021, pp. 433–44, which shows that States have pragmatically accepted the administration of justice by NSAGs to a greater degree than may appear at first sight.

ICTY's consideration of the practice of armed groups in its *Tadić* decision.¹⁴⁶ Furthermore, organizations such as Geneva Call have since contributed to making the views and actions of many NSAGs more accessible.¹⁴⁷ According to some, this should lead the way to the practice and *opinio juris* of NSAGs being considered in the same way as that of States.¹⁴⁸ Others consider that NSAGs should be given a more limited role in the creation or modification of customary norms, with the contribution of States weighing more heavily.¹⁴⁹ Such participation would arguably give NSAGs a sense of ownership over the rules they are bound by, thereby hopefully improving their compliance with them. In light of persistent difficulties in formally acknowledging a role for NSAGs in the development of customary IHL,¹⁵⁰ several scholars concede that for the time being it is more realistic to consider their views and practices informally in the development and interpretation of customary IHL rules.¹⁵¹ Still, as far as treaty-making is concerned, there is no sign that States are willing to give up their monopoly on the development of the law.¹⁵²

Challenges of contemporary treaty-making

The progressive codification of IHL over the last century and a half, which continues to this day, means that this part of international law is highly codified. This codification has not been without its difficulties, and, at the time of writing, faces challenges.

145 M. Sassòli, above note 69, pp. 20–2; Annyssa Bellal and Ezequiel Heffes, “‘Yes, I Do’: Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent”, *Human Rights and International Legal Discourse*, Vol. 12, No. 1, 2018, pp. 126–7; Katharine Fortin, *The Accountability of Armed Groups Under Human Rights Law*, Oxford University Press, Oxford, 2017, p. 327; S. Sivakumaran, above note 70, p. 565; O. M. Stern, above note 91, p. 226; Katharine Fortin, “How to Cope with Diversity While Preserving Unity in Customary International Law? Some Insights From International Humanitarian Law”, *Journal of Conflict and Security Law*, Vol. 23, No. 3, 2018; Hyeran Jo, “Law-Making Participation by Non-State Armed Groups: The Prerequisite of Laws Legitimacy?”, in H. Krieger and J. Püschmann (eds), above note 51; Lizaveta Tarasevich, “Participation of Non-State Armed Groups in the Formation of Customary International Humanitarian Law: Arising Challenges and Possible Solutions”, *Humanitäres Völkerrecht: Informationsschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 3, No. 1–2, 2020.

146 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision (Appeals Chamber), 2 October 1995, paras 102–8.

147 K. Fortin, “How to Cope with Diversity”, above note 145, p. 349; Ezequiel Heffes, “Non-State Actors Engaging Non-State Actors: The Experience of Geneva Call in NIACs”, in E. Heffes, M. D. Kotlik and M. J. Ventura (eds), above note 87.

148 M. Sassòli, above note 69, p. 21; A. Bellal and E. Heffes, above note 145, p. 126; Marco Sassòli, “How Will International Humanitarian Law Develop in the Future?”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

149 Anthea Roberts and Sandesh Sivakumaran, “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law”, *Yale Journal of International Law*, Vol. 37, No. 1, 2012, pp. 141–51.

150 See, for instance, K. Fortin, “How to Cope with Diversity”, above note 145, pp. 350–4.

151 M. Sassòli, above note 69, p. 21; A. Bellal and E. Heffes, above note 145, p. 126; K. Fortin, above note 145, pp. 356–7.

152 Though Sivakumaran, for instance, has called for a new type of instrument binding armed groups “in all situations”, which could be drafted by States and NSAGs together; S. Sivakumaran, above note 70, p. 565.

As is generally the case with every branch of law, be it domestic or international, questions of “how” and “why” IHL develops are closely intertwined. This means that the reasons that prompt legal developments determine, or at the very least influence, to a significant degree the manner – methodologically speaking – in which such developments take place. And the other way around: the pathways by which IHL develops (State practice and *opinio juris*, treaty negotiations, soft-law instruments) have a considerable impact on the outcome, i.e. the rules and principles themselves, and their object and purpose.

A typical example is the impact of consensus on the content of agreed norms. Consensus is meant to augment the chances of subsequent adherence to the instrument. However, when international instruments are negotiated and adopted by consensus, the need to reach general agreement often leads to multiple concessions and sometimes a “lowest common denominator” approach, inevitably limiting the scope or strength of the negotiated rules or impacting on their clarity (resulting in what is commonly known as “constructive ambiguity”).

Garnering the support of a majority of States, let alone consensus, becomes more challenging as the number of States increases. Sixteen States were present at the 1864 diplomatic conference that led to the adoption of the first Geneva Convention; by 1949, their number had increased to sixty-three; between 106 and 126 States took part in the four-year diplomatic conference that led to the adoption – remarkably by consensus – of the 1977 Additional Protocols. The Rome Statute was adopted on 17 July 1998 by a vote of 120 to seven, with twenty-one countries abstaining.

The CCW, for example, though not bound to do so, operates by consensus. It currently has 125 States Parties and four signatories. While States have agreed to five protocols in the framework of the Convention, the last of these was adopted in 2003.

Where a rule or practice of consensus applies, the “protocol technique” can be used to stall, or control, the development of IHL. Such was the case of the failed negotiation of a protocol on cluster munitions in the context of the CCW. The negotiation of such a protocol was supported and promoted by a number of States that opposed a prohibition on cluster munitions. They endeavoured to prevent it by negotiating a protocol to the CCW, knowing that, due to the practice of consensus, the outcome would be a watered-down text imposing mild restrictions. The effort did not prove successful, however, and the CCM was eventually adopted outside of the CCW framework.

The past two decades saw the advent and consolidation of a new category of multilateral instruments regulating weapons, often referred to as “humanitarian disarmament”. Humanitarian disarmament was largely the result of the influence of IHL and international human rights law, enhanced in part by the active involvement of civil society in the crafting and negotiation of those instruments.¹⁵³ In parallel, the continued “humanization” of international law led

153 K. Lawand and I. Robinson, above note 130, pp. 158 and 179–80.

to increased attention on the individual (both as a victim and as a perpetrator) rather than the State (as carrier of rights and obligations). As a result, in recent disarmament instruments we find elaborate provisions on victim assistance, which are missing in older conventions such as those prohibiting biological or chemical weapons.

Characteristically, these modern IHL instruments (such as the CCM or the APMBC) are often called “hybrid” instruments. The term hints, notably, at their compound nature, which encompasses traditional disarmament elements (e.g. stockpile destruction) and IHL-derived aspects (prohibitions on use based on IHL principles, coupled with human-centric elements such as victim assistance obligations).

These new-generation IHL instruments have in common that they were concluded through processes that were launched in response to States’ failure to achieve consensus in traditional, established negotiating fora, and outside of the latter.

Following the failure of the First CCW Review Conference to adopt far-reaching prohibitions or restrictions on anti-personnel mines, the so-called “Ottawa Process” was launched.¹⁵⁴ At the Oslo Diplomatic Conference on a Total Global Ban on Anti-Personnel Mines, eighty-nine States adopted the APMBC on 18 September 1997. The Convention has today 164 States Parties. Its effects have gone beyond the States Parties, however, and it can be attributed to the Convention that the development, production, sale and use of landmines have diminished substantially. Since its adoption, the Convention has helped to reduce annual civilian casualties by 90%, with a positive knock-on effect on development and human security. The new use of anti-personnel mines, even by States not party to the APMBC, is now a rare anomaly, the legal trade in and production of anti-personnel mines have virtually disappeared, and more than fifty-five million stockpiled mines have been destroyed.¹⁵⁵

Similarly, after seeing that there would be no agreement in the framework of the CCW on cluster munitions, Norway launched the “Oslo Process” in February 2007. As a result, 107 States adopted the CCM on 30 May 2008 in Dublin. Today, 110 States are party to the Convention. Like the APMBC, the CCM has had a tangible effect on reducing the production, sale and use of cluster munitions beyond its States Parties.

The TPNW was adopted in 2017 and entered into force in 2021 despite strong objections and criticism by nuclear-armed States and those under the nuclear umbrella. The TPNW created a new legally binding rule of IHL prohibiting, among other things, the use and threat of use of nuclear weapons. Although this rule is only binding on the States party to the TPNW, the universal

154 For a comprehensive history, see Louis Maresca and Stuart Maslen, *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955–1956*, Cambridge University Press, Cambridge, 2000.

155 Helen Durham and Eirini Giorgou, “International Humanitarian Law and the Universality of the Geneva Conventions”, in V. Buonomo, D. Fernandez Puyana, M. Levrak, C. M. Marengi and S. Saldi (eds), *Enhancing Multilateralism and Peace*, Lateran University Press, Rome, 2022, forthcoming.

applicability of a norm should not be confused with its legal validity and force. It remains to be seen whether this new treaty-based norm eventually contributes to the emergence of a customary rule prohibiting the use of nuclear weapons, despite persistent objection by some States.

Compliance v. development and law v. policy

Beyond weapons treaties and international criminal law, other areas of IHL have seen very little to no development by either treaty or custom since 1977.¹⁵⁶ The emergence of customary law norms takes time, making the slow pace of development by means of custom unsurprising. However, this scarcity of new IHL treaties in fields other than weapons and international criminal law is striking and merits closer examination.

IHL treaties are concluded through multilateral negotiations, and negotiations take trust, transparency and, in the case of IHL, belief in a “common good”. These are to a large extent lacking in the current geopolitical environment, where dynamics and tensions between States, in particular major military powers, are not conducive to treaty-making that would lead to further restrictions in conduct during armed conflict. In addition, the proliferation of IHL soft law has triggered resistance on the part of some States, who tend to assert the lawmaking privilege and authority associated with statehood to the exclusion of all other actors. This resistance has, in turn, fuelled efforts to develop the law or strengthen protections for people and objects in armed conflict by means other than treaties, in the expectation that processes leading to non-legally binding outcomes would have higher chances of success.

States’ reluctance to develop IHL by means of creating new norms or expanding the interpretation of existing ones – ranging from skepticism to downright vehement objection – is typically expressed through arguments asserting that no new law is needed, but rather better compliance with existing law suffices. On its face, this argument is a perfectly reasonable one. However, decoupling the law from its implementation is not as easy as it may first seem.

Where do shortcomings in the norms themselves stop, and gaps in implementation begin? If the law is deemed adequate in scope and content, but it is not complied with by parties to an armed conflict, there are several things that such non-compliance may hide. There is intentional non-compliance, of course, out of disregard for the law or other reasons. But non-compliance can also be the result of an erroneous interpretation of the law by a State – at least in the eyes of other States or observers – or an inability to comply with its obligations. These in turn raise further questions as to the adequacy of the law if it leaves a large

¹⁵⁶ See, for instance, the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, above note 47; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000 (entered into force 12 February 2002); and AP III to the Geneva Conventions.

margin of discretion in interpretation; or its effectiveness if it simply cannot be complied with by some parties.

In many cases, more clarity on how States interpret and apply IHL rules is needed to determine whether the problem lies with compliance or with interpretation or, indeed, with the scope and content of the rules themselves.¹⁵⁷

States' reluctance to develop IHL by means of interpretation is equally prominent. A number of States regularly reaffirm that the content of their military manuals constitutes policy and does not reflect or reiterate the law. While the difference between law and policy is clear as regards their legally binding nature, the boundaries between the two are not always as clear-cut. Indeed, militaries often implement the law by means of policy, and such policy, when integrated into military instruments and tools such as Directives or Rules of Engagement, is of course binding for its addressees.

At the same time, States are not always clear as regards what they consider to be legally binding obligations and what "mere" policy. The main problem in this respect arises when States formulate policy that essentially reiterates existing legal obligations, thereby "downgrading" them to a non-legally binding status. Policy can be a very effective tool to achieve the object and purpose of IHL; consider, for example, the moratorium on the use of anti-personnel landmines imposed by some States despite not being party to the APMBC. Thus, policy can serve as a substitute to norm development, provided that it is not used to deliberately or incidentally undermine existing law. Policy can also be a precursor to the development of legal rules, although this is not always necessarily the case.

Measures taken as a matter of policy have certain advantages, notably in that they can be put in place quickly and unilaterally, without the requirement of lengthy negotiations and broad agreement. On the downside, they can just as quickly and unilaterally be revoked, whereas withdrawal from treaty obligations is much lengthier, and withdrawal from customary or *jus cogens* norms is impossible (although States at times engage in contrary practice).

Ultimately, policy can facilitate compliance with IHL, provided it does not undermine it. How, then, to determine when there is a need for development of new IHL rules *versus* a need for strengthening compliance with existing ones? We submit that the two are not mutually exclusive alternatives.

Prospects for further IHL development

Does IHL need to develop further, and, if so, how? Considering IHL's main objective is to protect persons from the suffering caused by armed conflict, the question whether IHL will develop and indeed whether it should develop depends largely

¹⁵⁷ See ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Report submitted to the 32nd International Conference of the Red Cross and Red Crescent, 8–10 December 2015, p. 53, available at: www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

on whether important protection gaps remain or appear with new realities of conflict.

Gaps in IHL have been identified by many commentators, including on NIAC law, obligations of NSAGs, the protection of women, the protection of children, the protection of the environment, weapons issues, or regulation in the digital field.¹⁵⁸ In 2011, the ICRC submitted a report to the International Conference of the Red Cross and Red Crescent in which it suggested a number of areas in which IHL should be strengthened, such as reparations for victims of IHL violations, the protection of the environment, detention in NIAC and international compliance mechanisms.¹⁵⁹ After consultations with States, some of these were the subject of an intergovernmental process within the framework of

158 S. Sivakumaran, above note 70, pp. 513 ff; Laura Inigo Alvarez, *Towards a Regime of Responsibility of Armed Groups in International Law*, Intersentia, Cambridge, 2020, p. 158; Gordon Brown and Shaheed Fatima, “Need for Change to Protect Children in Armed Conflict”, *Just Security*, 2 November 2018, available at: www.justsecurity.org/61335/gordon-brown-shaheed-fatima-change-protect-children-armed-conflict/; Ruth Abril Stoffels, “Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps”, *International Review of the Red Cross*, Vol. 86, No. 855, 2004, p. 520; Michael Bothe, Carl Bruch, Jordan Diamond and David Jensen, “International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, pp. 575 ff; Eric Prokosch, “The Development of the Convention on Conventional Weapons 1971–2003”, Article 36, Guest Research Briefing, November 2021, pp. 8–9, available at: https://article36.org/wp-content/uploads/2021/12/The-Development-of-the-CCW.pdf?mc_phishing_protection_id=28048-c7anv7f0s0v91iu3cerg, on the unfinished agenda of the CCW; Brad Smith, “The Need for a Digital Geneva Convention”, 14 February 2017, available at: <https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>; O. M. Stern, above note 91. Robert Heinsch, “Der Wandel des Kriegsbegriffs: Brauchen wir eine Revision des humanitären Völkerrechts?”, *Humanitäres Völkerrecht: Informationsschriften, Journal of International Law of Peace and Armed Conflict*, Vol. 23, No. 3, 2010; P. Tavernier, above note 6, pp. 741–7; Karine Bannelier-Christakis, “Is the Principle of Distinction Still Relevant in Cyberwarfare?”, in Nicholas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace*, Edward Elgar Publishing, Cheltenham and Northampton, MA, 2015; Giacomo Biggio, “International Humanitarian Law and the Protection of the Civilian Population in Cyberspace: Towards a Human Dignity-Oriented Interpretation of the Notion of Cyber Attack Under Article 49 of Additional Protocol I”, *Military Law and Law of War Review*, Vol. 59, No. 1, 2021; Matilda Arvidsson, “Targeting, Gender, and International Posthumanitarian Law and Practice: Framing the Question of the Human in International Humanitarian Law”, *Australian Feminist Law Journal*, Vol. 44, No. 1, 2018; Judith Gardam, “The Silences in the Rules that Regulate Women During Times of Armed Conflict”, in Fionnuala Ní Aoláin, Naomi Cahn, Dina Francesca Haynes and Nahla Valji (eds), *The Oxford Handbook of Gender and Conflict*, Oxford University Press, Oxford, 2018; Ezequiel Heffes, “The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules”, *Goettingen Journal of International Law*, Vol. 8, No. 1, 2017; Kubo Macak, “A Needle in a Haystack? Locating the Legal Basis for Detention in Non-International Armed Conflict”, *Israel Yearbook on Human Rights*, Vol. 45, 2015; Gregory Rose, “Management of Detention of Non-State Actors Engaged in Hostilities: Recommendations for Future Law”, in Gregory Rose and Bruce Oswald, *Detention of Non-State Actors Engaged In Hostilities: The Future Law*, Brill Nijhoff, Leiden and Boston, 2016; Sandesh Sivakumaran, “Re-Envisaging the International Law of Internal Armed Conflict”, *European Journal of International Law*, Vol. 22, No. 1, 2011.

159 ICRC, *Strengthening Legal Protection for Victims of Armed Conflicts*, Report submitted to the 31st International Conference of the Red Cross and Red Crescent, 28 November–1 December 2011, available at: www.icrc.org/en/doc/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf. The areas identified were: the protection of persons deprived of liberty in NIAC; the protection of the natural environment; the protection of internally displaced persons; and international mechanisms to monitor compliance with international humanitarian law and reparation for victims of violations.

the International Red Cross and Red Crescent Conference. However, there was eventually insufficient consensus to agree to further developments.¹⁶⁰

To be sure, the main challenge to IHL is not its lacunae, but rather lack of compliance. As said above, it is a densely codified body of law in terms of treaties and customary law, and human rights law has brought additional protection.

Nonetheless, it is fair to say that the development of the law – national, international, or indeed IHL – can and will never stop. Old lacunae have never been filled, especially on the law of NIAC, and new ones will arise. Today, just as the world is facing a digital revolution, so will digital means and methods of warfare be deployed on the battlefield. Existing rules of IHL were drafted without any anticipation of these technologies. They will therefore evolve by interpretation, and application to new technologies, as indeed anticipated in Article 36 of AP I. However, controversies and uncertainty over interpretations are already apparent, such as on IHL rules applicable to cyber operations in armed conflict or to autonomous weapons systems. The call by many States, civil society organizations and the scientific community for a new treaty on autonomous weapons systems is becoming more urgent.¹⁶¹

If IHL is to continue being a relevant body of law with an effective capacity to limit the choices of means and methods of warfare in order to protect combatants and civilians, there is no doubt that it needs to evolve to address and, if possible, anticipate developments in warfare (including advances in technology and its military applications) as well as in other branches of law. Therefore, IHL will inevitably continue to develop. How it will do so, however, is far from clear.

In light of the current international climate, some have recommended that “future endeavours should focus on clarifying existing law rather than attempt to develop it, and on promoting compliance”.¹⁶² Indeed, many commentators are

160 See ICRC, Strengthening International Humanitarian Law Project, available at: www.icrc.org/en/war-and-law/strengthening-ihl; Tilman Rodenhäuser, “Strengthening IHL Protecting Persons Deprived of Their Liberty: Main Aspects of the Consultations and Discussions Since 2011”, *International Review of the Red Cross*, Vol. 98, No. 903, 2016; Jelena Pejic, “Strengthening Compliance with IHL: The ICRC–Swiss Initiative”, *International Review of the Red Cross*, Vol. 98, No. 1, 2016.

161 Phil Twyford, “Government Commits to International Effort to Ban and Regulate Killer Robots”, New Zealand Government Press Release, 30 November 2021, available at: www.beehive.govt.nz/release/government-commits-international-effort-ban-and-regulate-killer-robots; UN Secretary-General, “Secretary-General’s Message to the Sixth Review Conference of High Contracting Parties to the Convention on Certain Conventional Weapons”, 13 December 2021, available at: www.un.org/sg/en/content/sg/statement/2021-12-13/secretary-generals-message-the-sixth-review-conference-of-high-contracting-parties-the-convention-certain-conventional-weapons-scroll-down-for-french-version; Human Rights Watch, “Stopping Killer Robots: Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control”, 10 August 2020, available at: www.hrw.org/report/2020/08/10/stopping-killer-robots/country-positions-banning-fully-autonomous-weapons-and; Janos Kramar, “Autonomous Weapons Open Letter: AI & Robotics Researchers”, Future of Life Institute, 9 February 2016, available at: <https://futureoflife.org/2016/02/09/open-letter-autonomous-weapons-ai-robotics/?cn-reloaded=1>, announced at the International Joint Conference on Artificial Intelligence on 28 July 2015; Frank Sauer, “Autonomy in Weapons Systems: Playing Catch Up with Technology”, *Humanitarian Law & Policy*, 29 September 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/09/29/autonomous-weapons-systems-technology/>; ICRC, “ICRC Position on Autonomous Weapon Systems”, 12 May 2021, available at: www.icrc.org/en/document/icrc-position-autonomous-weapon-systems.

162 E.-C. Gillard, above note 115, p. 10.

wary of embarking on formal development processes, for two main reasons, as they see it. One is simply that the law is broad enough to accommodate evolving interpretations, so that there is no substantial need to amend it. Another is that even if IHL is insufficient to deal with certain important issues arising in conflicts, the current political climate holds no promise to amend it formally or to amend it in a way that will be more progressive. The feminist debate on IHL illustrates this:

Although most feminist scholars working in this area agree that there are problems with this body of law, not all agree that it merits amendment. A debate exists amongst feminist scholars about whether the provisions of IHL are inadequate – needing to be reconceptualised and revised (the “revisionist school”) – or whether there are in fact sufficient protections for women in the law, with the main problems resulting from the lack of adherence and enforcement (the “enforcement school”).¹⁶³

Of course, embarking in a norm-creating exercise in the face of strong reluctance or even downright opposition by influential States is not always a wise course of action. In addition, as described above, the formal treaty route contains the risk of regression. The backlash and sometimes even roll-back against developments of IHL must be seen in the wider context of a backlash against international law more generally.¹⁶⁴

[...] Even those [feminist scholars] who support the revisionist approach are aware of the dangers of reopening discussions on IHL’s texts. Legal amendment brings the risk of new law that is worse from a gender and protection perspective, a danger feminist lawyers are acutely aware of.¹⁶⁵

Nevertheless, recent developments, most notably the adoption and entry into force of the TPNW, have shown that successful outcomes even in such circumstances are possible.

As mentioned above, States’ resistance to the development of IHL and the multiplication of soft-law and interpretive processes and outcomes are mutually

163 O. M. Stern, above note 91, p. 225.

164 Susan Marks, “Backlash: The Undeclared War against Human Rights”, *European Human Rights Law Review*, Vol. 4, 2014; Martti Koskeniemi, “International Law and the Backlash Against Globalization”, Lecture at IHEID (Graduate Institute of International and Development Studies), 3 March 2020; Human Rights Council, Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice, UN Doc. A/HRC/38/46, 14 May 2018, para. 14; Australian National University, “Navigating the Backlash against Global Law and Institutions”, available at: <https://law.anu.edu.au/navigating-backlash-against-global-law-and-institutions>; Jeremy Farrall, Jolyon Ford and Imogen Saunders, “The Backlash against International Law: Australian Perspectives”, *Australian Year Book of International Law Online*, Vol. 38, No. 1, 2020; Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, “Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts”, *International Journal of Law in Context*, Vol. 14, 2018; Karen J. Alter, “The Contested Authority and Legitimacy of International Law: The State Strikes Back”, iCourts Working Paper Series No. 134, 2018, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3204382; Frederick V. Perry, “The Assault on International Law: Populism and Entropy on the March”, *Syracuse Journal of International Law and Commerce*, Vol. 46, No. 1, 2018.

165 O. M. Stern, above note 91, p. 225.

reinforcing trends. It is perhaps tempting for some States, and in particular civil society organizations, to opt for such more flexible processes in order to escape the deadlock in traditional negotiating fora, where chances of progress are admittedly weak. Soft-law instruments, such as political declarations or the Montreux Document, offer considerable benefits: a comparatively speedy conclusion, usually a more like-minded base of negotiators, and more room for progressive content, given their non-legally binding nature and the absence of the cumbersome consensus rule. Documents such as the Tallinn and San Remo Manuals have the added benefit of not going through any multilateral negotiating process among States, which arguably ensures substantive accuracy of an outcome not subject to concessions, trade-offs or constructive ambiguity. The same is true for interpretive guidance and various academic instruments.¹⁶⁶ These processes do not create law *per se*, but can significantly influence its interpretation and/or its implementation, and thereby contribute to its constant development.

At the same time, the continued importance and potential of treaty-making in IHL development should by no means be disregarded. For one, multilateral negotiations have benefits, irrespective of the outcome. Trust, confidence-building, transparency, inclusivity, mutual understanding of positions and ownership of the outcome are some of the “by-products” of negotiations, if properly conducted. The end result, namely the treaty or convention, has clear benefits as well. The rules stipulated by such instruments are unequivocally of a legally binding nature. What is more, treaties and conventions are characterized by durability: as said above, it is much more difficult for a State to “opt out” of a treaty, i.e. to withdraw from it, than to disengage from a political instrument. Lastly, while not the case for the Geneva Conventions and their Protocols, legally binding instruments, and in particular weapons treaties, are often accompanied by an international monitoring mechanism, including regular meetings of States Parties.

The issue is of course far more complex, but suffice it to say here that, despite the well-established trend of proliferation of soft-law and other non-binding IHL instruments, treaties should not be discarded as a “thing of the past”. The success story of the TPNW shows that treaty-making is possible even in less than auspicious circumstances and that in some cases it is indeed the only effective pathway for IHL development.

Treaties and soft law both have their place and are valuable instruments for the development of IHL, with different benefits and shortcomings. The choice of one *versus* the other (insofar as it can be called a choice) will depend on a number of factors, including the urgency of addressing the humanitarian concern, the configuration of States’ positions and their dynamics, the subject matter and history of relevant IHL development, and the perceived gaps in the existing legal framework.

At the time of writing (2022), consensus among States appears elusive on issues of IHL, leading to a dilemma. As a body of law that should be conceived as universal, embodying universal values and, importantly, applicable in armed

166 See E. Crawford, above note 31.

conflicts whenever and between whomever they occur, consensus among all States should remain a desirable objective for its development. At the same time, some urgent issues of contemporary armed conflicts call for new agreements, and if the existing uncertainties in the treaty law cannot be filled by agreement on interpretation or custom, there is a risk of leaving these issues unaddressed.

When faced with the need to develop IHL, States and other “norm entrepreneurs”¹⁶⁷ must ask themselves how it can be achieved. Commentators have identified a number of factors that lead to negotiations, or to agreement among States. These include the preferences of great powers that shape the design of the legal regime; cost–benefit calculations, such as gaining reputation and legitimacy *versus* political and security costs or limitations on governments’ freedom of action; moral authority and expertise of governments or non-State actors in eliciting support for regulation; the *Zeitgeist* of negotiations; the strength of strong and coherent arguments based on a premise of widely shared principles and values; the type of governmental regime such as democratic or liberal political regimes;¹⁶⁸ social pressure and avoidance of social opprobrium.¹⁶⁹

However, while all these factors play a role, no clear pattern or one-size-fits-all formula can really be drawn from past negotiations,¹⁷⁰ and the question remains for practitioners and “norm entrepreneurs” to think about how best to convince States to agree to the development of IHL, and in fact how to create the conditions that will lead to consensus or the widest possible support for such development.

Conclusion

Formally, IHL, similar to all international law, relies on the consent of States. It is States that must agree to treaties and to custom. However, like all international law, IHL develops in more complex and subtle ways than its formal structure may lead to us believe. The influence of jurisprudence, political statements, State practice and soft-law instruments does converge towards norms that are widely recognized as customary. Even if they are not, in the absence of answers in the applicable legal framework, States will use certain norms “as a matter of policy” or gradually even as a matter of law.

It is only in this way that one can explain the phenomenal transformation that IHL has undergone over the past forty-five years since the adoption of the 1977 Protocols. The significant development of IHL from its inception to the present day has rendered it literally unrecognizable. Since the 1990s, the density and sophistication of research, writing, State engagement and international

167 A term coined by Cass Sunstein, “Social Norms and Social Roles”, *Columbia Law Review*, Vol. 96, No. 4, 1996. See also Paul B. Stephan, “The Crisis in International Law and the Path Forward for International Humanitarian Law”, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

168 H. Lovat, above note 35.

169 G. Mantilla, above note 32, p. 323.

170 See, e.g., E. Prokosch, above note 158, p. 7, on the varying role of evidence in treaty negotiations.

jurisprudence on IHL have created a broad convergence of views among States on a much wider range of norms than those codified in the Geneva Conventions and their Additional Protocols. At the same time, the latter remain the core of IHL, despite its expansion and evolution.

It is also true, however, that the complex and intertwined manner in which IHL has evolved, and which in part has led to a certain loss of State control over its development, combined with a lack of international mechanisms with a mandate to take binding decisions on the law, has also led, as said above, to constant controversy, and therefore a certain amount of uncertainty and even backlash among States on what the law actually is. Looking ahead, a balance needs to be found between the urgency to address some developments in warfare, and the interest to see IHL develop as a body of law that still garners the widest possible support and respect.

Development of the law is not linear and there are risks of new treaties, in particular, proving regressive.¹⁷¹ The question is, however, whether there is ever a good moment in time, or rather if such a moment is worth waiting for. Looking at the treaty-making described above, for instance the ICRC's efforts from the 1920s to 1977 to protect civilians from the effects of hostilities, and all other efforts to strengthen legal protection in armed conflict, is it not rather always time to start working on "realizing Utopia"?¹⁷²

171 S. Sivakumaran, above note 70, p. 565.

172 Antonio Cassese (ed.), *Realizing Utopia, The Future of International Law*, Oxford University Press, Oxford, 2012, p. 525.

The International Court of Justice and the development of international humanitarian law

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Abstract

Both in its advisory and contentious jurisdiction, the International Court of Justice has made considerable contributions to the evolution and interpretation of international humanitarian law (IHL). The judgments and advisory opinions of the Court in various cases have also developed the regulation of armed conflicts by showing the interplay of other bodies of international law and have shaped the development of non-binding IHL norms. The purpose of this short article is to consider the role of the International Court of Justice in the development of IHL.

Keywords: International humanitarian law, International Court of Justice, jurisdiction, law of occupation, *Corfu Channel* case, *Wall Opinion*, *Nuclear Weapons Opinion*, *Nicaragua* case, *Democratic Republic of the Congo v. Uganda*.

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Introduction¹

In considering the role of the International Court of Justice (ICJ or the “Court”) in the development of international humanitarian law (IHL), it is necessary to remember that courts have until recently played a relatively minor role in the

development of IHL. After the war crimes trials which followed the Second World War, there was very little in the way of jurisprudence from national courts² and almost none from international courts and tribunals until the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) began their work in the 1990s. Instead, the focus was on the development of treaty law, with the four Geneva Conventions, the two 1977 Protocols and specialist agreements such as the 1980 Conventional Weapons Convention. Customary IHL remained important, especially with regard to occupied territory, but its development owed more to military manuals and other aspects of State practice than to the analysis of those developments by courts.

That picture changed with the arrival of the international criminal tribunals, in particular the ICTY and the ICTR, and, later, the International Criminal Court (ICC). Many of their judgments, especially those of the ICTY, have been of enormous value in their methodical treatment of both customary and treaty-based IHL. By contrast, the work of the ICJ on this aspect of international law is seldom studied. The number of cases which have come before the Court that raise issues of IHL has been relatively small and, at least in its earlier judgments, the ICJ had not entered into the details of IHL. Nevertheless, a study of the ICJ's jurisprudence on IHL shows it to have been more important than is generally realized.

The jurisdiction of the ICJ

To understand the contribution which the ICJ has made to the development of IHL, it is necessary to consider the two, quite different, types of jurisdiction which its Statute confers upon the Court.³

- 1 For a more detailed treatment of the subject, see Claus Kress, "The ICJ and International Humanitarian Law", in Christian J. Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice*, Oxford University Press, Oxford, 2013, p. 263; Christopher Greenwood, "The International Court of Justice and International Humanitarian Law", in Charles Chernor Jalloh and Olufemi Elias (eds), *Shielding Humanity: Essays in International Law in Honour of Judge Abdul G. Koroma*, Brill, Leiden, 2015; Abdelwahab Biad, *La Cour internationale de Justice et le droit international humanitaire : Une lex specialis revisitée par le juge*, Emile Bruylant, Brussels, 2011; Luigi Condorelli, "Le droit international humanitaire, ou de l'exploitation par la Cour d'une terra à peu près incognita pour elle", in Laurence Boisson de Chazournes and Philippe Sands, *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999; Fabián Raimondo, *Corte internacional de Justicia, derecho internacional humanitario y crimen internacional de genocidio*, Del Puerto, Buenos Aires, 2005; and Talis Prado Pinto Junior and Arthur Roberto Capella Giannattasio, "O direito internacional humanitário nos pareceres consultivos da Corte Internacional de Justiça: Uma conjugação de perspectivas utópicas e apoloéticas", *Revista de Direito Internacional*, Vol. 18, No. 2, 2021.
- 2 For more elaborated assessment, see Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014.
- 3 The Statute of the International Court of Justice (the Statute), which was signed at the same time as the Charter of the United Nations in 1945, is annexed to the Charter. Article 93 of the Charter provides that all States Members of the United Nations are automatically parties to the Statute. See Charter of the United Nations, available at: <https://www.icj-cij.org/en/charter-of-the-united-nations> (all internet references were accessed in October 2022).

The contentious jurisdiction of the Court is limited to cases between States.⁴ In contrast, therefore, to the cases that come before the ICC or an international criminal tribunal, the focus of an IHL case before the ICJ is not whether a particular individual has committed genocide, a war crime or crime against humanity, but whether one of the States party to the case has incurred international responsibility for a breach of international law, including IHL. That allows the ICJ to better step back from the details of specific incidents and examine patterns of conduct. It is particularly evident in its judgments in the case between the Democratic Republic of the Congo (DRC) and Uganda pertaining to the law of occupation.⁵ In addition, while the judgments of the ICTR and ICTY are necessarily confined to the particular conflicts which led to their establishment and the ICC has so far dealt with cases from one part of the world, the ICJ has been able to range more widely, as the review of its case law in the next two parts of this article will demonstrate.

An important limit to the contentious jurisdiction is that it depends on both Parties to a case having consented to the jurisdiction of the Court.⁶ That consent does not have to be given in relation to the specific dispute; a clause in a bilateral or multilateral treaty which provides that the Court shall have jurisdiction over disputes concerning the “interpretation or application” of that treaty is sufficient.⁷ Such a clause appears in many treaties but it covers only disputes relating to the interpretation or application of that treaty and cannot provide a basis for jurisdiction over disputes falling outside the scope of the treaty. That has seriously limited the ability of the Court to rule on issues of IHL, because none of the IHL treaties contains a clause conferring jurisdiction on the ICJ. It was for that reason that the Court’s two judgments relating to the conflicts in the former Yugoslavia⁸ contain no ruling on whether there had been violations of the Geneva Conventions or Protocols and are confined to the question of

4 Statute, Art. 34.

5 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment on the Merits, 19 December 2005, *ICJ Reports 2005*, p. 168 (*DRC v. Uganda (Merits)*); Judgment on Reparations, 9 February 2022 (*DRC v. Uganda (Reparations)*).

6 Statute, Art. 36.

7 Article 36(2) of the Statute, the so-called “Optional Clause” also provides for a State to opt in to a system whereby each accepts the jurisdiction of the ICJ with regard to disputes between itself and another State which has also made a declaration under the Optional Clause. It was on this basis that the Court had jurisdiction in the *DRC v. Uganda* case, where both States had made declarations. By contrast, it lacked jurisdiction in the parallel case brought by Uganda against Rwanda, because Rwanda had made no Optional Clause declaration and the Court held that there was no other treaty in force between the two States which could have afforded jurisdiction. *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Judgment of 3 February 2006, *ICJ Reports 2006*, p. 6. At the time of writing, seventy-three States, out of a total of 193, had made Optional Clause declarations. ICJ, “Declarations Recognizing the Jurisdiction of the Court as Compulsory”, available at: <https://icj-cij.org/en/declarations>.

8 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, *ICJ Reports 2007*, p. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, *ICJ Reports 2015*, p. 3.

whether there had been a breach of the Genocide Convention, as that was the only relevant treaty to contain (Article IX) an ICJ jurisdiction clause.

The Court also possesses an advisory jurisdiction which permits it to “give an advisory opinion on any legal question” if it is requested to do so by the United Nations General Assembly, the Security Council or any other organ of the United Nations or specialized agency authorized by the General Assembly to make such a request.⁹ As will be seen, two opinions of the ICJ – on nuclear weapons¹⁰ and the construction of a wall in the Palestinian occupied territories¹¹ – are an important contribution to our understanding of IHL. The advisory jurisdiction is not subject to the limitations considered above but it has its own problems. In particular, the need for a general opinion on a question such as the legality of using nuclear weapons may lead the Court to gloss over the fact that different States are subject to different legal regimes (depending, for example, on whether or not they are party to the Additional Protocols), while difficulties may also arise from the absence of clear evidence regarding matters of fact.

The case law of the ICJ on IHL

For the first forty years of its existence, i.e. up to 1996, the Court said very little about IHL. That comparative silence reflected the nature of the cases referred to it during that period. There was a brief reference to the “elementary considerations of humanity, even more exacting in peace than in war” in the *Corfu Channel* case¹² but the facts of that case hardly gave the Court the opportunity to say much about IHL.

It had a rather greater opportunity in the *Nicaragua* case in 1986, which concerned support by the United States for the “*contra*” rebels in Nicaragua.¹³ While the main focus of that case was on the compatibility of the United States’ action with the customary international law regarding recourse to force,¹⁴ Nicaragua also made allegations about the mining of Nicaraguan ports and the commission of atrocities by the US-sponsored “*contra*” rebels. Nicaragua did not, however, allege that it was engaged in an armed conflict and did not accuse the United States of violations of IHL as such.¹⁵ The Court nevertheless held that:

The conflict between the *contras*’ forces and those of the Government of Nicaragua is an armed conflict which is “not of an international character”.

9 Statute, Chapter IV, Art. 65.

10 *Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly)*, ICJ Reports 1996, p. 226 (*Nuclear Weapons Opinion*).

11 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004, p. 136 (*Wall Opinion*).

12 *Corfu Channel* case (*United Kingdom v. Albania*), Judgment of April 9th, 1949, ICJ Reports 1949, p. 22.

13 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, ICJ Reports 1986, p. 3 (*Nicaragua case*).

14 The Court was unable to apply the relevant provisions of the United Nations Charter for jurisdictional reasons; see *Nicaragua* case, pp. 92–7.

15 *Nicaragua* case, p. 112, para. 216.

The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.¹⁶

By implication, the Court thus found that there were two separate armed conflicts – one of an international and the other of an internal character – existing in parallel, a conclusion which would have important ramifications a decade later in the early jurisprudence of the ICTY. Nevertheless, the Court avoided the need to explore the resulting differences between the substantive humanitarian law applicable to the international conflict and that applicable to the internal conflict by characterizing the provisions of Article 3 common to the four Geneva Conventions (which apply to conflicts “not of an international character occurring in the territory of one of the High Contracting Parties”) as “a minimum yardstick” applicable to any armed conflict, whether international or non-international in character.¹⁷ Referring back to the *Corfu Channel* case, the Court also found that those provisions “reflect what the Court in 1949 called ‘elementary considerations of humanity’”.¹⁸ Far more significant for the development of IHL is what the Court said in three later cases.

The Nuclear Weapons Opinion

The first one of interest is the *Nuclear Weapons Opinion* of 1996.¹⁹ The General Assembly asked the Court to give an opinion on the question whether “the threat or use of nuclear weapons [is] in any circumstances permitted under international law”.²⁰ For the first time, therefore, the Court was confronted with a case in which IHL occupied the central position.²¹ Three points stand out in the Court’s analysis.

First, the Court rejected the argument that there had emerged a specific rule of IHL prohibiting all use of nuclear weapons.²² No such prohibition could be deduced from treaties which restricted particular activities concerned with nuclear weapons, such as the ban on atmospheric nuclear tests or the creation of zones in which States agreed not to deploy nuclear weapons.²³ The Court also rejected the theory that nuclear weapons were somehow included within the prohibitions of poisons and chemical weapons. Although this theory had been

16 *Ibid.*, p. 114, para. 219.

17 *Ibid.*, p. 114, para. 218. Neither Nicaragua nor the United States were parties to the Additional Protocols to the 1949 Geneva Conventions.

18 *Nicaragua* case, p. 112, para. 215.

19 The present author was counsel for the United Kingdom in that case. For a collection of different views about what the Court said, see L. Boisson de Chazournes and P. Sands, above note 1.

20 *Nuclear Weapons Opinion*, p. 228.

21 The Court also referred to the provisions of the United Nations Charter on the legality of recourse to armed force, human rights law and international environmental law.

22 *Nuclear Weapons Opinion*, p. 266, para. 105(2)(B).

23 *Ibid.*, pp. 249–53, paras 59–63.

popular in some quarters for many years,²⁴ the Court dismissed it as incompatible with the understanding of the terms used at the times the relevant treaties were concluded, as well as with the subsequent practice of the parties to those treaties.²⁵ Finally, the Court held that no customary humanitarian law rule had emerged specifically banning nuclear weapons. In this context, the Court acknowledged the importance of the series of General Assembly resolutions on the subject, which the Court held “reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament”.²⁶ Nevertheless, the Court noted that none of the resolutions concerned suggested that there was a specific prohibition of nuclear weapons in customary international law and that the support which they had received had to be balanced against the substantial opposition they had attracted and the other instances of State practice which contradicted the existence of such a rule. The Court concluded:

The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.²⁷

Secondly, the Court held that the general principles of IHL were applicable to the use of nuclear weapons, even though those principles had become part of customary international law before nuclear weapons technology came into existence.²⁸ In doing so, the Court rejected an argument once vigorously advanced by a number of States and writers, that the use of nuclear weapons would be something that lay outside the scope of IHL unless and until States concluded a treaty to prohibit or regulate that use.²⁹ The Court thus found that the use of nuclear weapons, like the use of any other weapon, in armed conflict was subject to the principle of distinction and the prohibition of unnecessary suffering.³⁰ In doing so, it made reference to the famous Martens Clause.³¹ The Court did not, however, base any findings upon this provision and its failure to do so suggests it did not accept the

24 See, e.g., Nagendra Singh, *Nuclear Weapons and International Law*, Frederick A. Praeger, New York, 1959.

25 *Nuclear Weapons Opinion*, p. 248, paras 53–7.

26 *Ibid.*, p. 255, para. 73.

27 *Ibid.*, p. 255, para. 73.

28 *Ibid.*, p. 259, paras 85–6.

29 It is noticeable, however, that none of the thirty-three States which participated in the proceedings chose to advance this argument.

30 *Nuclear Weapons Opinion*, pp. 257–9, paras 78–84.

31 This clause, which first appeared in the Hague Convention II with respect to the Laws and Customs of War on Land, 29 July 1899 (entered into force 4 September 1900), takes modern form in Article 1(2) of Additional Protocol I of 1977 to the 1949 Geneva Conventions:

In cases not covered by this Protocol or by other international agreements, civilian and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of the public conscience.

Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

suggestion that the Martens Clause is the basis for freestanding obligations which find no other expression in IHL.

Thirdly, when the Court came to apply these principles to a possible use of nuclear weapons, its conclusion was equivocal. After examining the arguments advanced on each side of the debate, the Court explained that it lacked a sufficient basis for a determination of the validity of the view that the use of tactical nuclear weapons might be lawful. The Court went on to state:

Nor can the Court make a determination of the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict – at the heart of which is the overriding consideration of humanity – make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons [...] the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.³²

The Court concluded that:

Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.³³

That conclusion was then reflected, albeit in slightly different language, in paragraph (E) of the *dispositif*, in which the Court, by seven votes to seven on the casting vote of the President, found that:

... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an

³² *Nuclear Weapons Opinion*, pp. 262–3, para. 95.

³³ *Ibid.*, p. 263, para. 97.

extreme circumstance of self-defence in which the very survival of a State would be at stake.³⁴

Of the seven judges who voted against this paragraph of the *dispositif*, four considered that the paragraph went too far in finding limits on the legality of using nuclear weapons, while three thought that the Court should have found that any use of nuclear weapons was unlawful.

The *Wall Opinion*

In this case, the General Assembly asked the Court in 2003 for an opinion on the question:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949 and relevant Security Council and General Assembly resolutions?³⁵

The Court had no doubt that Israel was the occupying Power in the territories situated between the “Green Line” (the Armistice Delimitation Line fixed in 1949) and the former eastern boundary of the Palestine Mandate, including East Jerusalem.³⁶ All of these territories had been controlled by Jordan between 1949 and 1967 and came under the control of the Israeli armed forces during the armed conflict between Israel and Jordan in 1967. At that point, they became occupied territories under customary international law. The Court held that none of the events since 1967 – including Israel’s declaration that East Jerusalem was part of Israel, the 1994 peace treaty between Israel and Jordan and the agreements between Israel and the Palestinian authorities – had altered their status as occupied territory or Israel’s status as the occupying Power. The Court therefore held that Israel was bound by the customary international law of belligerent occupation, including those rules contained in Section III of the 1907 Hague Regulations respecting the Laws and Customs of War on Land, the provisions of which have long been regarded as an authoritative statement of the customary law.³⁷ The 1907 Regulations had been supplemented in 1949 by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, many of the provisions of which are concerned with occupied territory.³⁸

34 *Ibid.*, p. 266, para. 105(2)(E).

35 *Wall Opinion*, above note 11, p. 141.

36 *Ibid.*, p. 167, para. 78.

37 International Military Tribunal Nuremberg, Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946, Official Text in the English Language, Vol. 1, pp. 253–4. Hague Convention IV respecting the Laws and Customs of War on Land, 18 October 1907 (entered into force 26 January 1910).

38 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950).

Israel had, however, long maintained the position that the Fourth Geneva Convention was not applicable to the West Bank and East Jerusalem, although it undertook to apply the “humanitarian provisions” of the Convention.³⁹ According to Israel, the West Bank and East Jerusalem, though controlled by Jordan between 1949 and 1967, had never lawfully been part of the territory of Jordan so that when Israel occupied them in 1967 it was not, in the words of Article 2(2) of the Geneva Conventions, an “occupation of the territory of a High Contracting Party”. This argument attracted almost no support outside Israel⁴⁰ and, indeed, was widely criticized by leading Israeli international lawyers,⁴¹ on the ground that the applicability of the Fourth Geneva Convention was determined by Article 2(1), the conditions of which were manifestly satisfied by the armed conflict between Israel and Jordan. The Court had no hesitation in holding that the Fourth Geneva Convention was applicable. The text of Article 2, taken as a whole, the *travaux préparatoires* and the subsequent practice of the parties all pointed to such a conclusion.⁴²

More unexpected is what the Court said about Article 6(3) of the Fourth Geneva Convention, which provides that:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

The potential application of this provision had generally been ignored or discounted in the literature about the occupation, with most governments and commentators tending to assume that the Convention applied in its entirety.⁴³ The Court, however, held that “the military operations leading to the occupation of the West Bank in 1967 ended a long time ago” and that, consequently, only those provisions of the Convention listed in Article 6(3) were applicable.⁴⁴

This is the first judicial application of Article 6(3), and it is interesting that the Court considered that it was triggered by the close of military operations between contending regular armed forces. The Court reached that conclusion notwithstanding the high level of violence that continued to exist in the occupied territories, which the Court considered did not reach the threshold required of an armed conflict. The result is unfortunate in that the list of provisions which

39 See Meir Shamgar (ed.), *Military Government in the Territories Administered by Israel, 1967–1980: The Legal Aspects*, Hebrew University Jerusalem, Jerusalem, 1982, pp. 31 ff.

40 See, e.g., Christopher Greenwood, “The Administration of Occupied Territory in International Law”, in Emma Playfair (ed.), *International Law and the Administration of Occupied Territories*, Oxford University Press, Oxford, 1992.

41 See, e.g., Yoram Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge, 2009, pp. 20–1.

42 *Wall Opinion*, above note 11, pp. 173–7, paras 90–101.

43 See, e.g., Adam Roberts, “Prolonged Military Occupation”, in E. Playfair, above note 40, pp. 36–9.

44 *Wall Opinion*, above note 11, p. 185, para. 125.

continue to apply is somewhat arbitrary (although the Court cannot be blamed for that). It is difficult, for example, to understand why the duties in relation to education and the provision of food and essential supplies imposed upon the occupying Power by Articles 50 and 55, respectively, or its obligations regarding hospitals and health services under Articles 56 and 57, should cease one year after the close of military operations even though the occupation remains. To a large extent, however, the Court's decision that the occupying Power continues to be bound by the provisions of the International Covenants on Civil and Political Rights and Economic and Social Rights, as well as the Convention on the Rights of the Child,⁴⁵ filled the void left by the inapplicability of those provisions of the Fourth Geneva Convention excluded by Article 6(3). On the nature of the legal regime thus applicable, the Court was careful to point out that:

Whilst the drafters of the Hague Regulations of 1907 were as much concerned with protecting the rights of a State whose territory is occupied, as with protecting the inhabitants of that territory, the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war regardless of the status of the occupied territories, as is shown by Article 47 of the Convention.⁴⁶

Applying the provisions of the humanitarian law on belligerent occupation which it had found to be applicable and the relevant provisions of human rights law, the Court concluded that Israel's construction of the wall in the occupied territory was a breach of its obligations.⁴⁷ In this context, the Court relied, *inter alia*, upon the prohibition on an occupying Power to transfer parts of its own population into the occupied territory (Article 49 of the Fourth Geneva Convention), which it held was violated by the establishment of Israeli settlements in the occupied territory.⁴⁸ It also found that the deprivation of private property involved either in the construction of the wall or as a consequence thereof was a breach of the rules stated in Articles 46 and 52 of the Hague Regulations and the provisions of Article 53 of the Fourth Geneva Convention.⁴⁹ Perhaps most importantly, the Court found that the conditions of life which the wall imposed upon Palestinian residents in the area which it enclosed and the overall deprivation of liberty of movement violated both humanitarian law and human rights principles, including the right of self-determination.⁵⁰

As for the consequences of these violations of the law, the Court held that they engaged the responsibility of Israel, which was under an obligation to cease the violations and to ensure *restitutio in integrum* or, if that was not possible, to make compensation.⁵¹ It could not rely upon either self-defence or necessity to preclude

45 *Ibid.*, pp. 177–81, paras 102–13.

46 *Ibid.*, p. 175, para. 95.

47 *Ibid.*, p. 201, para. 163(3)(A).

48 *Ibid.*, pp. 191–2, para. 134.

49 *Ibid.*, p. 189, para. 132.

50 *Ibid.*, pp. 189–92, paras 133–4.

51 *Ibid.*, p. 197, para. 147 and following paragraphs.

the wrongfulness of its actions. Concerning necessity, the Court considered that, to the extent that humanitarian law permitted reliance upon a concept of necessity, that concept was built in to the specific provisions of the relevant treaty. Hence, it noted that, while there was a limited necessity qualification upon the general obligation in Article 49(1) regarding deportation and transfer of population, no such qualification applied to the obligation in Article 49(6).⁵² On the consequences for States other than Israel, the Court concluded that Article 1 of the Fourth Geneva Convention – by which “the High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances” – placed them “under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by Israel with international humanitarian law as embodied in that Convention”.⁵³

DRC v. Uganda (Armed Activities)

The third major case involving IHL was *DRC v. Uganda*.⁵⁴ Unlike the *Nuclear Weapons* and *Wall* cases, *Armed Activities* was a contentious case, so that there was a far more substantial body of evidence before the Court.⁵⁵ Moreover, the basis for the jurisdiction of the Court in *Armed Activities* was the declarations made by the Parties under the Optional Clause; since these contained no sweeping reservations, the Court was able to consider the full range of allegations about violation of both customary and treaty-based IHL.

In relation to IHL, three points particularly stand out from the 2005 judgment. First, in relation to the applicable law, the Court reaffirmed the approach it had taken earlier in the *Nuclear Weapons* and *Wall* cases that IHL and international human rights law applied in tandem.⁵⁶ In this case, however, it was able to apply a more extensive list of IHL instruments since, for the first time, it was confronted with a case in which both parties to the armed conflict were party to Additional Protocol I to the Geneva Conventions of 1977. The Court also considered the application of the international law on natural resources alongside the specific principles of humanitarian law and human rights law relating to the exploitation of natural resources in occupied territory.

Secondly, the Court applied the law on belligerent occupation in a context very different from that with which it was faced in the *Wall* case. Whereas the *Wall* case had concerned a small, densely populated region with a substantial Israeli military presence and undoubted exercise by Israel of governmental authority, *DRC v. Uganda* concerned a vast area of the Congo in which the numbers of

52 *Ibid.*, p. 192, para. 135.

53 *Ibid.*, p. 200, para. 159.

54 *DRC v. Uganda (Merits)*, p. 168; *DRC v. Uganda (Reparations)*.

55 In addition, the principles concerning burden and standard of proof and their implications for the Court’s findings of fact were applicable. These principles cannot apply in the same way when the Court exercises its advisory jurisdiction; see Christopher Greenwood, “Judicial Integrity and the Advisory Jurisdiction of the International Court of Justice”, in Giorgio Gaja and Jenny Grote Stoutenburg (eds), *Enhancing the Rule of Law through the International Court of Justice*, Brill, Leiden, 2014, p. 63.

56 *DRC v. Uganda (Merits)*, pp. 242–4, paras 216–17.

Ugandan troops present at any given time were comparatively small and the exercise by them of governmental authority far more difficult to establish. Moreover, in marked contrast to the *Wall* case, the occupation here was said to exist at a time when hostilities were still ongoing.

The Court applied the test laid down in Article 42 of the Hague Regulations that territory was considered occupied only when actually placed under the authority of the hostile army and extended only to those areas where such authority had actually been established and could be exercised.⁵⁷ On that basis, it considered that it had to:

... satisfy itself that the Ugandan armed forces were not merely stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration.⁵⁸

The Court held that:

... the territorial limits of any zone of occupation by Uganda in the DRC cannot be determined by simply drawing a line connecting the geographic locations where Ugandan troops were present, as has been done on the sketch map presented by the DRC ...⁵⁹

Only in Ituri, where the Ugandan commander had appointed a governor to administer the territory, did the Court find that Uganda had become the occupying Power. The fact that the commander may have acted without authority did not alter that conclusion.⁶⁰

Thirdly, the Court examined allegations that Uganda had engaged in a practice of looting the natural resources of the occupied territory and other parts of the DRC in which its forces were operating. The Court found insufficient evidence to warrant a finding that this was the product of a policy adopted by the Ugandan Government but held that there had been widespread looting, including of natural resources, in which Ugandan officers and soldiers had engaged.⁶¹ Since Uganda was responsible for all acts of members of its armed forces, irrespective of whether they had acted pursuant to, or in contravention of, their orders,⁶² this looting engaged the responsibility of Uganda and was a violation of the prohibition of pillage in Article 47 of the Hague Regulations and Article 33 of the Fourth Geneva Convention.⁶³ In the occupied area of Ituri, there was also a failure, attributable to Uganda, by the military authorities to take the steps required in exercise of the duty to govern under Article 43 of the Hague

57 *Ibid.*, p. 230, paras 173–4.

58 *Ibid.*, p. 230, para. 173.

59 *Ibid.*, p. 230, para. 174.

60 *Ibid.*, p. 230, para. 176.

61 *Ibid.*, pp. 249–53, paras 237–50.

62 See Hague Convention IV, Art. 3; and AP I, Art. 92; *DRC v. Uganda (Merits)*, p. 242, paras 213–14.

63 *DRC v. Uganda (Merits)*, p. 252, para. 245.

Regulations because those authorities had failed to take steps to prevent looting by private persons, particularly members of Congolese rebel groups.

The Court concluded, by a large majority, that Uganda was responsible for serious violations of IHL and international human rights law, most noticeably in causing – or, in some instances, failing to prevent – the deaths of large numbers of civilians⁶⁴ and in pillaging the natural resources of the DRC.

In 2022, the ICJ followed its earlier decision with a judgment on the DRC's claim for reparations. While the principle that a State which is responsible for breaches of IHL is under an obligation to pay compensation is well established,⁶⁵ with the exception of the decisions of the Eritrea–Ethiopia Claims Commission (EECC),⁶⁶ there have been very few pronouncements by international tribunals on the measure of such compensation. The ICJ had already, in its 2005 Judgment on the Merits, held that Uganda was liable to make reparation for the loss of life and damage which it had caused;⁶⁷ in the 2022 judgment it gave effect to that decision.

The problem which the ICJ faced was similar to that which has arisen in the wake of most major armed conflicts, namely, how to balance the principle that the wrongdoer owes a duty to compensate against the risk that the amount of compensation could cripple the respondent State.⁶⁸ In the proceedings leading to the 2022 judgment, the DRC claimed a total of almost 13.5 billion US dollars. The ICJ insisted that the DRC had to prove that the damage had occurred and had been caused by the violations of IHL attributable to Uganda. In that context, it followed the lead of the EECC in recognizing that in claims involving injury to large numbers of people tribunals had accepted a less rigorous standard of proof but had “reduced the levels of compensation awarded in order to account for the uncertainties that flow from applying a lower standard of proof”.⁶⁹ The ICJ refused, however, to accede to the DRC's submission that it should adopt a broad-brush approach and order Uganda to pay 45% of the total losses suffered by the DRC in a conflict which was part civil war and part the result of a military invasion by a number of States of which Uganda was only one.

In particular, the Court distinguished between the situation in the Ituri area, where it had held that Uganda was an occupying Power, and other areas where Uganda had supported rebel forces and in which its own forces had at times been active but no occupation had been established. In the Ituri area, it held that Uganda had to compensate not only for loss and damage directly

64 *Ibid.*, pp. 239–41, paras 207–11.

65 See, e.g., Hague Convention IV, Art. 3; and the general principle of international law reflected in the International Law Commission Articles on State Responsibility, Art. 36.

66 See Sean D. Murphy, Won Kidane and Thomas R. Snider, *Litigating War: Mass Civil Injury and the Eritrea–Ethiopia Claims Commission*, Oxford University Press, Oxford, 2013; and the collection of decisions in Vol. 135 of the *International Law Reports*. The United Nations Compensation Commission established by the United Nations Security Council in the aftermath of Iraq's invasion of Kuwait has also given a number of interesting decisions.

67 *DRC v. Uganda (Merits)*, p. 257, para. 259, and p. 281, para. 345.

68 The dangers of getting that balance wrong have been all too evident since the Treaty of Versailles of 1919.

69 *DRC v. Uganda (Reparations)*, para. 107.

attributable to its own forces but for the loss and damage caused by third parties, since, as the occupying Power, Uganda had an obligation to maintain law and order and protect the local population and natural resources.

Elsewhere, it required compensation only for losses directly attributable to Uganda.

The ICJ ordered Uganda to pay a total of 325 million US dollars in compensation (less than 2.5% of the amount claimed). That amount was attributable to the loss of civilian lives which the ICJ considered could reasonably be attributed to Uganda,⁷⁰ personal injury,⁷¹ rape and sexual violence,⁷² displacement of people,⁷³ and for the employment of child soldiers,⁷⁴ as well as damage to property⁷⁵ and the taking of natural resources.⁷⁶ It rejected, however, for lack of evidence, claims relating to loss of life of members of the DRC armed forces (on the grounds that a State could be expected to have more reliable evidence of what had happened to its service personnel than to civilians).⁷⁷ The ICJ also rejected a large claim for “macroeconomic damage” for lack of sufficient evidence.⁷⁸

Evaluation of the ICJ’s contribution

The ICJ’s contribution to the development of IHL is neither systematic nor revolutionary. In saying this, in no sense is the Court being criticized. Courts can hear only the cases which are put before them and neither States nor the relevant United Nations bodies have chosen to bring before the Court what would be needed for a systematic development of the law. Moreover, it is not the role of a court in any legal system, but particularly in the international legal system, to be a revolutionary agent of change. The ICJ is charged by its Statute with the interpretation and application of the law. In fulfilling that role, it necessarily has to make choices between competing interpretations or the apparent conflict between different principles and its choices help to shape the law. However, it must not seek to usurp the position of the community of States by preferring what its judges at any one time think the law ought to be over what an intelligent and impartial assessment of the relevant material establishes that it is. When considering a treaty, the Court must always have in mind the agreement which the parties to that treaty chose to make and respect the language in which they expressed it. When considering customary international law, the Court has to be guided by its own comment that: “It is of course axiomatic that the material of

70 *Ibid.*, paras 145–64.

71 *Ibid.*, paras 173–81.

72 *Ibid.*, paras 188–93.

73 *Ibid.*, paras 214–25.

74 *Ibid.*, paras 205–6.

75 *Ibid.*, paras 240–58.

76 *Ibid.*, paras 273–366.

77 *Ibid.*, para. 165.

78 *Ibid.*, paras 381–4.

customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”⁷⁹

These cautionary notes are particularly important in relation to IHL which deals with matters at the heart of the sensitive matter of national security and the ability of each State to defend itself and its people.

To say that the Court’s jurisprudence on IHL is not revolutionary, however, is not to say that it is unimportant. The judgments and advisory opinions considered in this article have made a contribution to the evolution of IHL, which is important at the different levels of general principle, methodology and detail.

With regard to general principle, the Court has helped to resolve a number of problems which have bedevilled IHL for many years. In its *Nuclear Weapons Opinion*, it made clear that the principles of IHL apply to methods and means of warfare even where those methods and means were developed after the relevant principles became part of the law. It did so by rejecting the argument which had been advanced for many years that nuclear weapons were not subject to pre-existing rules such as the prohibitions of unnecessary suffering and disproportionate civilian harm. Its firm rejection of that argument has important implications not only for the subject of nuclear weapons but also for numerous other developments, such as drone and cyber warfare, which are frequently claimed to stand outside the regulation of the existing law and require a new body of rules. New rules may be useful in relation to such phenomena but, until they are adopted, those methods of waging war do not inhabit some kind of legal black hole but are subject to the existing principles of IHL.

The *Nuclear Weapons Opinion*, the *Wall Opinion* and the judgments in *DRC v. Uganda* have also done much to make clear the position of IHL within the broader framework of international law. In *Nuclear Weapons* the Court dismissed attempts to bypass IHL and outlaw nuclear weapons by relying instead upon general environmental treaties adopted for totally different purposes.⁸⁰ In both that Opinion and the *Wall Opinion*, the Court also showed how IHL and human rights law co-exist.⁸¹ This is an important development, given the tendency in some human rights circles to apply human rights treaties in armed conflict without any consideration of IHL as the *lex specialis*.⁸² It has also had the useful effect of filling at least some of the gap left by the somewhat eccentric provision of Article 6(3) of the Fourth Geneva Convention, considered above.

So far as methodology is concerned, the Court’s insistence on the importance of State practice, which led it to reject arguments that there was a specific prohibition of all threat or use of nuclear weapons on the basis of general statements in General Assembly resolutions that ran counter to the actual

79 *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *ICJ Reports 1985*, p. 20, para. 27.

80 *Nuclear Weapons Opinion*, pp. 241–2, paras 29–30.

81 *Ibid.*, p. 240, para. 25; *Wall Opinion*, above note 11, p. 178, para. 106.

82 A good example of the rejection of such a narrow approach to the application of a human rights treaty in armed conflict is the judgment of the European Court of Human Rights in *Hassan v. United Kingdom* (2014), *International Law Reports*, Vol. 161, 2016, which cited both the Opinions.

practice of large numbers of States,⁸³ is a welcome reminder of the need for greater rigour in considering the content of IHL. In this respect, it is interesting to consider what evidence of State practice was before the Court. One particularly significant kind of practice in relation to customary IHL is found in the military manuals published by many States. Their significance was raised during the hearings in *Nuclear Weapons* by a number of States. For example, the Attorney-General for England and Wales (presenting the arguments of the United Kingdom) responded to an assertion by the Foreign Minister of Australia that a prohibition of nuclear weapons had emerged from a series of General Assembly resolutions and the application of general principles by quoting the Commanders' Guide issued to Australian forces which contained an express statement to the contrary.⁸⁴ In its Opinion, the Court made no reference to military manuals as such but its rejection of the Australian argument and its references to the actual conduct of States may reasonably be taken as having embraced manuals as evidence of such practice.

It is also important that the Court's methodology in its 2022 decision in *DRC v. Uganda (Reparations)* drew extensively upon the use of expert reports and the case law of bodies such as the EECC to fashion a decision which took a realistic approach to the evidence which could be expected of a claimant State in circumstances of armed conflict. It is unlikely, indeed probably impossible, that any tribunal faced with the need to evaluate the damage caused by breaches of IHL in a wide-ranging conflict of extraordinary ferocity could calculate damages in the manner of an investor-State tribunal dealing with a claim for expropriation. The ICJ, however, showed that a different approach could be taken without abandoning a reasoned methodology for arriving at a figure for compensation.

Finally, the Court's rulings on the detail of the law of occupation in its *Wall Opinion* and, even more, in its two judgments in *DRC v. Uganda* have helped to flesh out the law on this subject, much of which is of some antiquity, and have helped to show how it can be applied in a modern context. In particular, the Court insisted on actual control as an indispensable element in determining whether or not territory is occupied and its ruling that the occupying Power is responsible not only for what its own forces do but also for violence which it allows others to commit in breach of its duty to provide effective government.⁸⁵ The Court also, in the *Wall Opinion*, authoritatively dismissed the untenable view taken by the Israeli Government that the occupied territories were not subject to the Fourth Geneva Convention. Given the enthusiasm with which States that occupy territory in time of armed conflict seek to avoid their obligations under the Convention, the Court's ruling on this point is likely to have an impact broader than simply within the territories occupied by Israel.

83 *Nuclear Weapons Opinion*, p. 255, para. 73.

84 Sir Nicholas Lyell, QC, MP at CR 1995/34, p. 45, responding to the Hon. Gareth Evans QC at CR 1995/22, pp. 38–42.

85 See, in particular, Hague Convention IV, Arts 42 and 43.

Assessing the authority of the ICRC Customary IHL Study

How does IHL develop?

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Abstract

This article examines the authority of the 2005 International Committee of the Red Cross Study on Customary international humanitarian law within the international legal system by collecting and analysing citations to the Study in documents containing expressions of State positions, in the judgments of international and domestic courts and tribunals and in the outputs of other influential actors. Our analysis establishes that the Study is increasingly seen as a highly authoritative instrument, such that a particular proposition will be found to

* We are very grateful to Adaena Sinclair-Blakemore for her invaluable research assistance on this project. Many thanks also go to Sangeeta Shah for her careful read and feedback on a draft of this piece.

reflect customary international law simply on the basis that the Study says so. We argue that the Study's authority will likely only increase over time.

Keywords: customary international law, international humanitarian law, International Committee of the Red Cross, ICRC, authority, citations, sources of international law.

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Introduction

In 2005, the International Committee of the Red Cross (ICRC) published its two-volume Study of customary international humanitarian law (IHL).¹ The first volume contains a list of 161 succinct rules, each one followed by a commentary containing copious cross-references to supporting practice contained in the (two-part) second volume. The Study was the result of an almost ten-year-long process, mandated by the International Conference of the Red Cross and Red Crescent, which required an imposing amount of work by ICRC lawyers and outside experts.² In the years since, the Study has migrated online, becoming a user-friendly database.³ Furthermore, the Study project has not actually ended, with a team of lawyers based in Cambridge continuously updating the practice section of the database (but not the rules) of the Study.

While upon its publication it was greeted both with acclaim and with criticism (which will be explored further below), today the Study has become a standard reference work for practitioners and academics alike; indeed, as far as academia is concerned, it is probably the single most cited work on IHL.⁴ But how authoritative has the Study really been in practice? This is the question that we hope to answer in this article. That question can be framed and approached from many different angles. We have chosen an empirical one, by collecting and analysing citations to the Study in documents containing expressions of State positions, in the judgments of international and domestic courts and tribunals and in the outputs of other influential actors. Our analysis establishes that the Study is increasingly seen as a highly authoritative instrument, such that a particular proposition will be found to reflect customary international law simply on the basis that the Study says so. In the absence of any concerted pushback, particularly by States – and no such pushback appears to be evident today, even if initially that was not the case and there remains some discontent – the Study's

1 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules and Vol. II: Practice, Cambridge University Press, Cambridge, 2005 (the Study).

2 See Jean-Marie Henckaerts, "Customary International Humanitarian Law: a response to US Comments", *International Review of the Red Cross (IRRC)*, Vol. 89, No. 866, 2007, pp. 473–4.

3 ICRC, *Customary IHL Database*, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (all internet references were accessed in July 2022).

4 As of 25 July 2021, the Study had 1876 total citations (according to Google Scholar). By way of comparison, the Sandoz Commentary on the two Additional Protocols had 891 cites (same source). This is of course just one database, but it is a broadly representative one.

authority will only increase over time, if nothing else then through repetition and force of habit. To be clear, we are not arguing that the Study has attracted some kind of universal acceptance, but that the lack of repeated and consistent opposition, coupled with the Study's usefulness and embrace by numerous influential actors, have created an upwards trajectory of authority.

The article proceeds as follows: we will first provide a theoretical framework for our analysis. We will then explain the design of our empirical analysis and go on to discuss our findings.

Theoretical framework

Methodology of establishing custom

The standard definition of customary international law sees it as arising from the confluence of two elements, State practice and *opinio juris* – or, in the words of Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), “evidence of a general practice accepted as law”. The existence and correctness of various methodologies for establishing custom have been a perennial topic in legal scholarship, from many different viewpoints, e.g. those challenging or defending positivist orthodoxy, or those engaging in normative theories as to what courts and other actors should be doing as opposed to descriptive theories as to what they actually are doing. That bastion of orthodoxy, the International Law Commission (ILC), has had a notable recent foray into this set of issues,⁵ but again academics have discussed them endlessly.

On the descriptive front, which is of greater interest to us here, Stefan Talmon's analysis of the jurisprudence of the ICJ is instructive, showing that the Court takes three different approaches to the identification of a rule of customary international law: an inductive approach, a deductive approach, and assertion.⁶ However, these differing approaches are by no means limited to the ICJ.

The inductive approach refers to a process in which “a general custom is derived from specific instances of State practice”, with *opinio juris* being a secondary consideration.⁷ It is a process which goes “from the specific to the general”.⁸ The inductive approach arguably fits best with the Article 38(1)(b) reference to “general practice accepted as law”. However, only rarely is the practice and *opinio juris* of all States, or almost all States, considered. Instead, a rule of customary international law is usually identified from the practice of a small group of States.

5 ILC, Draft Conclusions on Identification of Customary International Law, with Commentaries, UN Doc. A/73/10, 2018, available at: https://legal.un.org/ilc/reports/2018/english/a_73_10_advance.pdf.

6 See Stefan Talmon, “Determining Customary International Law: The ICJ's Methodology Between Induction, Deduction and Assertion”, *European Journal of International Law*, Vol. 26, No. 2, 2015.

7 Anthea Elizabeth Roberts, “Traditional and Modern Approaches to Customary International Law: A Reconciliation”, *American Journal of International Law*, Vol. 95, No. 4, 2001, p. 758.

8 S. Talmon, above note 6, p. 420.

At other times, a rule of custom is not established through an inductive process but through a deductive one. The deductive approach refers to a “process that begins with general statements of rules rather than particular instances of practice”.⁹ In this way, deduction “is a process of going from the general to the specific”.¹⁰ The ICJ, for example, has described the “rule of state immunity” as “deriv[ing] from the principle of sovereign equality of States”.¹¹

But, as Talmon has argued, “[t]he main method employed by the Court is not induction or deduction but assertion. In the large majority of cases, the Court does not offer any (inductive or deductive) reasoning but simply asserts the law as it sees fit.”¹² Although Talmon makes the point with reference to the ICJ, this again is true also of other bodies, judicial or not.

The key issue for our purposes, however, is in the nature of the assertion – is it bare, or is it supported by citation to authority? A bare assertion, with no citation to some other source, can be made either with regard to a legal proposition that is so uncontroversial that no further discussion is really necessary (e.g. “treaties are binding only on their parties”), or to a more controversial proposition that the decision-maker seeks to establish by virtue solely of its own authority. A supported assertion, by contrast, seeks to both amplify the normativity of the claim being made by invoking the authority of some other source, and spare the decision-maker of the need to do the inductive or deductive work of establishing custom independently.

Thus, for example, when scholars or courts say that “it is a rule of customary international law that the conduct of State organs is attributable to a State”, they will normally not do any independent inductive or deductive analysis themselves. Instead, they will simply cite Article 4 of the ILC Articles on State Responsibility, relying on the ILC’s authority for that proposition and effectively outsourcing the work of establishing custom to the ILC.

Or, to give a more elaborate example, consider the jurisprudence that determined that Article 3 common to the four Geneva Conventions of 1949 reflected customary international law. In *Nicaragua*, the ICJ found that common Article 3 reflected customary international law and was applicable in international armed conflicts and non-international armed conflicts alike.¹³ The ICJ’s holding on this matter consisted of a bare assertion – it set out no inductive or deductive examination, and cited no other authority.

In subsequent judgments, other international courts and tribunals have taken a similar position. But instead of undertaking their own analysis of whether the rules in common Article 3 reflect customary international law, or whether the

9 A. E. Roberts, above note 7, p. 758.

10 S. Talmon, above note 6, p. 420.

11 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, *ICJ Reports 2012*, p. 123, para. 57.

12 S. Talmon, above note 6, p. 434.

13 ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, *ICJ Reports 1986*, p. 114, para. 218: “they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity’”.

scope of the customary rule extends to international armed conflicts, they have chosen to rely on the ICJ's finding in *Nicaragua* or on subsequent cases that themselves relied on *Nicaragua*. In the *Tadić* Decision on Interlocutory Appeal on Jurisdiction, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber relied on *Nicaragua* for the proposition that common Article 3 has passed into customary international law.¹⁴ The Trial Chamber in *Tadić* then relied on the holding of the Appeals Chamber.¹⁵ The International Criminal Tribunal for Rwanda (ICTR) Appeals Chamber in the *Akayesu* case relied on the *Tadić* Decision on Interlocutory Appeal and the *Tadić* Trial Judgment to reach the same conclusion.¹⁶ The Special Court for Sierra Leone (SCSL) relied on the decisions in *Tadić* and *Akayesu* as well as the ICTY Appeals Chamber judgment in the *Delalic* case.¹⁷ All of these were assertions of the customary status and scope of the rule supported by citations to authority, ultimately leading down a chain of citations to *Nicaragua*.

There is nothing particularly objectionable about such reliance (at least if the cited authority actually stands for the proposition for which it is being cited). Indeed, it would be more surprising if each court undertook its own analysis from scratch rather than utilizing the holdings of its peers. This reliance on authority to establish custom might be total, i.e. without any additional investigation on the part of the court or tribunal in question, or partial, that is to say accompanied by some further investigation. Either way, the reliance on authority reflects considerations of both judicial economy and judicial comity. Judge Peter Tomka, then President of the ICJ, observed that:

the Court has never abandoned its view, firmly rooted in the wording of the Statute, that customary international law is “general practice accepted as law”—that is, in the words of a recent case, that “the existence of a rule of customary international law requires that there be a ‘settled practice’ together with *opinio juris*”. However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law

14 ICTY, *The Prosecutor v. Dusko Tadić aka “Dule”*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 98: “some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions, as was authoritatively held by the International Court of Justice (*Nicaragua Case*, at para. 218)”.

15 ICTY, *The Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, para. 609. The reliance is understandable also for internal institutional reasons.

16 ICTR, *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (Chamber I), 2 September 1998, para. 608. Combined with assertion.

17 SCSL, *The Prosecutor v. Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, Case No. SCSL-2004-14-AR72, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict (AC), 25 May 2004, paras 20–3.

Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.¹⁸

We are particularly interested in precisely which bodies are relied upon for their holdings of customary international law. Judge Tomka refers to “States and bodies like the International Law Commission”. The ICJ has historically tended to cite other international courts less frequently than other international courts have cited the ICJ, preferring instead to rely on its own authority. This is probably partly due to the ICJ’s self-regard as the apex court of the international system, partly to avoid criticisms that its sources are selective or biased, and partly due to tradition and institutional inertia.

The example we discussed above relating to common Article 3 concerns findings of international courts. In this article, we will explore how the ICRC’s Study has been used by States, international and domestic courts and tribunals, and other relevant actors, i.e. how the Study is regarded by other influential actors within the system for the purpose of establishing a rule of customary IHL. In doing so we are not making any kind of normative claim that no other actors possess such influence, nor that the influence of all of these actors is equal – far from it. The sample of the real-world reliance on the Study that we have produced is inevitably limited. That said, our sense is that the sample is sufficiently representative of how the various actors in the international legal system perceive and use the Study so that we can draw reliable conclusions.

Degrees and kinds of authority

There are different senses to the word “authority”.¹⁹ It can, for example, convey the general notion that a person can oblige others to do something, regardless of whether that course of action is right or wrong, i.e. the obligation exists independently of its content – the key question there being whether such a claim to authority can ever be legitimate and justified. It can also refer to an essential quality of any legal system, as most notably in the work of Joseph Raz, to the power of law to direct behaviour to the exclusion of other reasons.²⁰ Also it can convey the idea that some persons are epistemic or theoretical authorities, in the sense that they should be trusted with certain matters because they possess

18 Peter Tomka, “Custom and the International Court of Justice”, *The Law & Practice of International Courts and Tribunals*, Vol. 12, 2013, p. 197.

19 See Scott J. Shapiro, “Authority”, in Jules L. Coleman, Kenneth Einar Himma and Scott J. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, Oxford, 2004.

20 For more, see Joseph Raz, *The Authority of Law: Essays on Law and Morality*, Clarendon Press, Oxford, 2011, arguing that law is genuinely authoritative only if it is in service of its subjects, helping them do what they otherwise ought to do.

knowledge and expertise about them which others do not – for example, that an electrician should be trusted on repairing a refrigerator.²¹

To lawyers trained in the common law tradition, the word “authority” can also have the more mundane meaning of the sources which they rely on (and cite) in their briefs, judgments and other instruments. Law is an argumentative practice, but also an authoritative one, in which there is more reliance than in most other fields on the nature of the source of a proposition or an argument than on its content or correctness, which makes sense as to why common lawyers refer to their cited sources as “authorities”.²² A standard distinction in that regard is between authorities that are binding (as the decision of a higher court would be for a lower court in a precedent-based jurisdiction) and those that are merely persuasive (such as the judgments of hierarchically equal courts or the work of academics). As Schauer explains, however, the notion of a “persuasive authority” is oxymoronic. If the reasons given by the source are persuasive, then authority has nothing to do with the process of persuasion. If the reasons given are not persuasive, however, yet the source is still relied on, even despite any substantive disagreement with its views, then it is content-independent authority and not persuasion that does all the work.²³

Schauer thus correctly observes that the notion of “persuasive” authority really refers to the fact that reliance on that type of authority is entirely optional – the courts (or whoever else) can choose whom to cite and rely on.²⁴ In addition, they can exercise this discretion for several purposes.²⁵ First, this discretion can be exercised for genuine persuasion, where the source is cited because of the rigour and correctness of its reasoning. Thus, if a court conducted its own independent examination of whether a particular rule formed part of customary IHL, cited the ICRC Study in support, and in doing so looked in detail at the practice on which the Study based its conclusion about the specific rule, we could say that the court was genuinely persuaded by the Study. Second, this discretion can be exercised for deference to authority. If a court simply asserted that a rule was one of customary IHL and cited the Study to that effect, without actually independently verifying that the Study’s conclusion was correct, that court would be deferring to the expertise, status and mandate of the ICRC, i.e. it would be treating it (and the Study as its product) as an authority. This is essentially no different from, say the two of us, as lawyers by training, choosing to believe in the existence of anthropogenic climate change by trusting the conclusions of climate scientists on this point, which we as non-experts have no way of independently verifying. Third, this discretion can be exercised as a reflection of the law’s inherent conservatism, a denial of novelty, a signal that the court did not just make its conclusions up.²⁶

21 For an extensive discussion, see Linda Trinkaus Zagzebski, *Epistemic Authority: A Theory of Trust, Authority, and Autonomy in Belief*, Oxford University Press, Oxford, 2012.

22 See Frederick Schauer, “Authority and Authorities”, *Virginia Law Review*, Vol. 94, No. 8, 2008, p. 1934.

23 *Ibid.*, pp. 1940–4.

24 *Ibid.*, pp. 1945–7.

25 *Ibid.*, pp. 1947–50.

26 *Ibid.*, p. 1950.

While the first and second reasons for reliance on authority exclude each other, the third can co-exist with them in parallel.

In making these choices about citations, courts potentially enhance the persuasiveness and authority of their own decisions, as assessed by their primary audiences. However, through citation they also equally reaffirm the authority of the sources they approvingly rely on. Authority is reinforced through habit and repetition, through practice, in an “informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted”.²⁷ Thus, the more that international and domestic courts, and other various influential actors in the global legal system, treat an instrument such as the ICRC Study as authoritative, the greater its authority becomes, and the more likely it is for others to start regarding it as authoritative and cite it in their own decisions.²⁸

Perhaps the best contemporary example of such a positive feedback loop is the ILC’s Articles on State Responsibility. Upon their adoption in 2001, David Caron famously and correctly predicted a paradox between their form and authority.²⁹ Despite the fact that the Articles are not in any way formally binding, and have by the ILC’s own admission included a measure of progressive development, they have been cited and relied on by all international courts, including the ICJ.³⁰ They are one of the ILC’s most successful codification projects, and have succeeded in transforming how international lawyers think – and are trained to think – about concepts of State responsibility.³¹ The success of the Articles is due to many factors, including the substantive need for such a product in this particular area, the nature of the ILC’s codification process, the fact that the ILC is a State-empowered entity and that States had substantial input in their making.³² Judge Tomka thus explained the ICJ’s reliance on the ILC as follows:

the codifications produced by the International Law Commission have proven most valuable, primarily due to the thoroughness of the procedures utilized by the ILC. Its texts and instruments are produced at a pedantic pace, entailing numerous reports of one or more (successive) Special Rapporteurs,

27 *Ibid.*, pp. 1956–7.

28 See Sandesh Sivakumaran, “Beyond States and Non-State Actors: The Role of State-Empowered Entities in the Making and Shaping of International Law”, *Columbia Journal of Transnational Law*, Vol. 55, No. 2, 2017. We leave aside here the issue of whether (and when) cited authorities actually influence the decision that the court reaches, or whether (as legal realists would argue) judges reach decisions on the basis of their own priors and then seek to justify them by citations to authority.

29 See David Caron, “The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority”, *American Journal of International Law*, Vol. 96, No. 4, 2002, p. 866.

30 See UN General Assembly, Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Report of the Secretary-General, UN Doc. A/62/62, 1 February 2007; and subsequent compilations UN Docs A/65/76, A/68/72, A/71/80 and A/74/83.

31 For an extensive discussion, see Fernando Lusa Bordin, “Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law”, *International and Comparative Law Quarterly*, Vol. 63, No. 3, 2014.

32 See S. Sivakumaran, above note 28; F. L. Bordin, *ibid.*, p. 549.

discussions among ILC members in plenary session, debates over precise wording in the drafting committee, as well as dialogue with States in the Sixth Committee and the submission of States' written comments and observations prior to the final adoption of a text. Additionally, a number of the ILC's final draft articles have been considered and adopted as conventions at codification conferences, where participating States expressed their views concerning the proposed rules. Throughout this process, the topics under consideration also attract the attention of scholars and practitioners, who also voice their opinions. Such procedures provide for a much more comprehensive examination of a rule of customary law than is possible by the Court in the context of a judicial proceeding.³³

Not all ILC products have, however, been able or will be able to trigger a positive feedback loop of authority.³⁴ The question for us here is whether the ICRC's Study has been able or will be able to do so, bearing in mind that many of the same considerations that warranted the acceptance of the ILC's authority are relevant for the Study as well.

Success or failure in building authority

For the Study to successfully build authority in the international system, it needs to be useful within the parameters of that system. So, this is precisely what the Study sought to do, by filling gaps which as a purely pragmatic matter needed to be filled in contemporary IHL. Simply put, a codification project, i.e. one that is meant to restate existing law without precluding developments in that law, is more likely to succeed if influential actors within the system believe such a project to be necessary. How does the Study achieve this? First, this can be done by reducing largely unwritten custom to text, to rules that are more certain in their content, that can be interpreted and applied in the same way that a treaty rule can be. In doing so the Study inevitably contains a measure of progressive development (the progressiveness of which may well be contested), and reasonable people might disagree about how any given rule is drafted – this is just par for the course. In other words, when reducing customary rules to text, and doing so comprehensively in a sub-field of international law, it is impossible to completely keep separate the codification of existing rules from their development. Second, this can be done by making these rules universally applicable on account of their customary character, thus transcending the difficulties that some treaties that have universal or near-universal acceptance (such as the Geneva Conventions) do not comprehensively cover all of IHL (e.g. do not deal with the conduct of hostilities), whereas other treaties (such as the Additional Protocols) for various reasons have major gaps in their ratification – what Yoram Dinstein has called

33 P. Tomka, above note 18, pp. 202–3.

34 See also F. L. Bordin, above note 31.

the “Great Schism”.³⁵ Finally, the deepest of all gaps that the Study fills is the regulation of non-international armed conflicts, by identifying the vast majority of its rules as applicable to both types of armed conflict, even if many of them under treaty law apply only to international armed conflicts.³⁶

However, in order to make these contributions – to truly succeed as a codification project – the Study’s status must become elevated from that of a mere academic work to a higher degree of authority. Furthermore, that claim to authority is multifaceted. First, in a system, such as the international one, in which States are regarded as the primary lawmakers, the Study’s authority is enhanced by its link to States. That link exists at a number of levels, including regarding the Study’s inception. States have empowered the ICRC as an institution with authority regarding IHL generally. This is apparent from the Geneva Conventions as well as the Statutes of the Red Cross and Red Crescent.³⁷ States also mandated the ICRC to conduct the Study project specifically. Recall that in 1995, the International Conference of the Red Cross and Red Crescent recommended that:

the ICRC be invited to prepare, with the assistance of experts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of IHL applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.³⁸

The recommendation was originally made by the Intergovernmental Group of Experts for the Protection of War Victims, which had met earlier that year.³⁹ That Group, which consisted of “experts, representing 107 States and 28 governmental and non-governmental organizations”, had prepared a series of recommendations on enhancing respect for the law.⁴⁰

The Study’s second claim to authority is epistemic. It is authoritative because it is the ICRC, with its 150-plus years of expertise in IHL that stands behind it. The Study’s claim to authority is based not only on the expertise of the

35 Yoram Dinstein, “The ICRC Customary International Humanitarian Law Study”, *International Law Studies*, Vol. 82, 2006, p. 100. See also Michael Bothe, “Customary International Humanitarian Law: Some Reflections on the ICRC Study”, *Yearbook of International Humanitarian Law*, Vol. 8, 2005, pp. 145–6 (main ambition of the Study to fix loopholes).

36 See Theodor Meron, “Revival of Customary Humanitarian Law”, *American Journal of International Law*, Vol. 99, No. 4, 2005, p. 833. The gap has also been filled through the jurisprudence of the international criminal tribunals and the Rome Statute of the International Criminal Court (ICC).

37 The ICRC has various prerogatives under IHL treaties, e.g. Third Geneva Convention, Arts 3, 9 and 125; Statutes of the International Red Cross and Red Crescent Movement, 1986, amended 1995 and 2006, Art. 5(2).

38 ICRC, International Conference of the Red Cross and Red Crescent, *Resolutions of the 26th International Conference of the Red Cross and Red Crescent*, 7 December 1995, Resolution 1, available at: www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-1-1995.htm.

39 ICRC, “Meeting of Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 23–27 January 1995): Recommendations”, *IRRC*, Vol. 35, No. 304, 1995, p. 34.

40 ICRC, “Meeting of Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 23–27 January 1995)”, *IRRC*, Vol. 35, No. 304, 1995, p. 5.

ICRC itself, but also on the participation of many independent experts in the Study's process of preparation and review and on the exhaustiveness and rigour of that process. The ICRC also engaged in consultations with academic and governmental experts.⁴¹

The Study's claim to epistemic authority is linked to persuasion. Through clear commentaries on the rules and the massive, simply unprecedented amount of practice assembled, the Study seeks to convince its readers that its conclusions are verifiable, and thus correct.⁴² This is enhanced by the rigorous way in which the Study was carried out. The volume on practice, here both an exercise in legal rigour and a conscious effort to prospectively enhance the authority of the Study, is tangible evidence of its authors' expertise and the amount of effort invested. The practice part of the Study is thus not only performative in the "we didn't make this up" sense; it is also a signal that the ICRC's expertise in this domain has few rivals. Indeed, had the rules part of the Study been published with the exact same content but without the practice part, the Study would inevitably have been greatly diminished in authority. This is true even if it turned out that few people today read the practice database and verify that the ICRC's conclusions are correct – its mere existence enhances the Study's authority.

Finally, the Study's authority rests on its subsequent approval by the influential actors of the international system, principal amongst which are States.⁴³ How the Study is received can greatly affect its authority. It can enhance it or diminish it. The more the approval builds up, the more authoritative the Study becomes, and the more likely it becomes that others will see it as authoritative in turn. It is precisely these reactions to the Study that we wish to measure.

Empirical analysis design

The Study's claim to authority has been and will get tested repeatedly and dynamically, the key test being how the Study has been received by what one of us has called the community of international humanitarian lawyers.⁴⁴ No matter

41 Following the resolution of the International Conference, the ICRC convened a steering committee made up of leading academics and research on customary IHL commenced in October 1996. Research was undertaken in national sources, international sources and the ICRC archives. National researchers cooperated in the research of national sources of fifty countries. ICRC delegations and the ICRC Advisory Service on International Humanitarian Law collected and analysed legislation and military manuals of other States. The research and consultations took nearly ten years to complete and involved more than 150 experts. See J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: *Rules*, above note 1, li–lv; Jean-Marie Henckaerts, "Customary International Humanitarian Law: A Response to US Comments", *IRRC*, Vol. 89, No. 866, 2007, pp. 473 and 474.

42 See M. Bothe, above note 35, p. 155: "The conclusions are verifiable. The reader does not have to trust the authors; he or she can scrutinise the way by which the authors arrive at their conclusions. This is part of the persuasive character of the Study."

43 S. Sivakumaran, above note 28.

44 Sandesh Sivakumaran, "Making and Shaping the Law of Armed Conflict", *Current Legal Problems*, Vol. 71, No. 1, 2018.

the gap to be filled, the mass of practice accumulated, or the expertise of the ICRC and associated experts, if the Study had been roundly rejected by key actors following its publication, its claim to authority would have been seriously dented.

The reaction of States is of particular importance. They remain the most influential actor in the international system. We searched for governmental reactions to the Study, including formal statements invoking or disagreeing with the Study that governments have made for external audiences, such as other governments or international organizations. Relevant State reactions can be made in such diverse contexts that there is no feasible way of ensuring comprehensiveness of coverage. We have, however, attempted to make that coverage reasonably representative, including by conducting a keyword search of the ODS database of United Nations (UN) documents, as well as by examining military manuals that have been published since the finalization of the Study.⁴⁵ The easier such reactions are to be found, the more likely they are to influence the authority of the Study. The internal daily practices of States' legal advisors are also of importance but are inaccessible to us; the compendia of practice sometimes published by national journals cannot really capture how the Study is used in, for example, the confidential internal advice produced by government lawyers for their ministers, or that military lawyers give to their commanders.

Also of importance is how the Study has been received by other influential actors, including international and domestic courts, the ILC, the special procedures of the UN Human Rights Council, commissions of inquiry of the UN, and academics. Again, to be clear, we are not saying that the practice of these actors is directly relevant for assessing the status of any particular customary rule – this is simply not the object of our inquiry. We are interested in these actors because their own status in the systems means that citations by them of the Study would gradually enhance the Study's authority.

We have paid particular attention to judicial decisions. Although judicial decisions are only a small part of the practice of international law, they are particularly relevant owing to the centrality of authority in judicial reasoning, the fact that litigation is the most formal type of lawyering as an argumentative practice, and the fact that affirmative judicial decisions may convey further authority on the Study beyond the courtroom, as these decisions then get cited and invoked by various other actors. Judicial citations to specific rules in the Study are thus a useful proxy for measuring the authoritativeness of the Study as a whole, while citations trends can help us predict whether the Study's authority is growing or diminishing.

Our analysis covers the following international courts and tribunals: the ICTY, ICTR, Mechanism for International Criminal Tribunals (MICT), International Criminal Court (ICC), SCSL, Extraordinary Chambers in the Courts of Cambodia (ECCC), Special Tribunal for Lebanon (STL), Kosovo Specialist

45 Our search parameters varied depending on the context; with databases we normally searched for terms such as “customary international humanitarian law”, Henckaerts, “ICRC Study” and variations thereof, depending on the capabilities and coverage of each database.

Chambers (KSC), ICJ, International Tribunal for the Law of the Sea (ITLOS), European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACtHR), African Court on Human and Peoples' Rights and the Ethiopia–Eritrea Claims Commission.⁴⁶ Criminal courts can be expected to apply IHL with the greatest frequency, and therefore engage with the Study in detail, because much of their subject-matter jurisdiction (war crimes) is directly linked with rules of IHL. We could reasonably expect these courts to rely on the Study heavily.⁴⁷ Other bodies, such as ITLOS, will only deal with IHL issues very exceptionally if at all. For feasibility reasons we have decided to confine our search to judgments (including at trial and appeals levels in the criminal context) and arbitral awards, but to exclude various types of interlocutory decisions of which there are a great number but which tend to be lower in importance.⁴⁸ We have also examined any separate opinions in such cases. Data collection was conducted by using the various institutional databases (e.g. HUDOC) for some tribunals and by searching through their cases manually for others, as appropriate.⁴⁹

As for domestic courts, we searched a variety of databases of domestic jurisprudence (Westlaw, International Law in Domestic Courts, WORLDFLII, and the ICRC's national implementation database) and also directly searched the case law of States in which matters of IHL are widely litigated (Colombia, Israel, the UK and the United States).⁵⁰ Our coverage of domestic courts is inevitably partial; there was no practical way of obtaining a genuinely representative sample of domestic judgments without assembling multiple research teams with relevant linguistic and legal abilities, and this we could not do. The sample obtained may be selective, but it is nonetheless instructive.

The timeframe of our examination is from 2005, the year the Study was published, up to 31 July 2021. The results of our research are compiled in three spreadsheets.⁵¹ To clarify, we did not review citations to the Study in the party briefs submitted to the domestic and international courts surveyed. Although we are aware that such citations can also influence the citation practice in the relevant court's decision in a given case, party briefs are not as easily accessible and searchable in the way the judicial decisions are.

We were most interested in how the Study was cited, because this can tell us much about how the relevant actor (e.g. a court) perceived its authority. First, was the Study merely mentioned in some way, or was it used to support an assertion that a specific rule was or was not one of customary IHL? Second, did the actor agree or disagree with the Study, or in any other way express its approval or disapproval? Third, was the Study the sole or primary authority for the assertion that a rule

46 We are treating the KSC and ECCC as international courts for these purposes.

47 See T. Meron, above note 36, p. 833 (Study "will be a significant aid to international criminal tribunals").

48 There are exceptions, e.g. ICTY, *The Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

49 For the keyword searches used, see above note 45.

50 For the keyword searches used, see above note 45. The terms were translated as appropriate.

51 Available at: <https://international-review.icrc.org/articles/annex-1-assessing-authority-of-the-icrc-customary-ihl-study>.

was customary, or was it one among many? Fourth, did the actor cite the rules part of the Study, or the practice part/database, or both, and if the practice part was cited were any of the collected materials actually discussed? Fifth, was there any independent examination that a particular rule was, in fact, customary, or did the actor simply accept the customary status of the rule because the Study (or other authorities) said so? Key to all these questions is the nature of the Study's authority – does it persuade (or not) the relevant actor by the rigour of its reasoning and the density of the practice it assembled and analysed, or is rather the actor treating the Study as an epistemic authority, deferring to the expertise of the ICRC and its authors?

Findings

State reactions

The critical time point for the Study's authority was immediately upon its publication, but, as we have seen, authority builds up in an iterative process of long duration.⁵² Had the Study immediately been met with a concerted negative response, its authority would have been nipped in the bud. Indeed, as the Study came out, it attracted criticism from a number of academics and government and military lawyers, mainly from powerful Western States, either writing officially or, more frequently, in an individual capacity. The criticisms of the Study tended to involve a mix of two types of arguments: first, that the ICRC's methodology was insufficiently rigorous; and second, that the ICRC got specific rules wrong.⁵³ The most notable example – and a

⁵² See M. Bothe, above note 35, pp. 176–8.

⁵³ See, e.g., George H. Aldrich, "Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross", *British Yearbook of International Law*, Vol. 76, No. 1, 2005 (while accepting that most conclusions of the Study are clearly correct, criticizing the drafting of a great many rules in a rather peremptory fashion); Y. Dinstein, above note 35 (arguing that the practice assembled by the ICRC contains too many instances that have no normative value; with regard to specific rules objecting to the Study's rejection of the concept of unlawful combatancy and its approach to the status of civilians taking a direct part in hostilities (Rules 5 and 6); and to some aspects of Rules 35, 45, 55 and 77; his final assessment of the Study was pessimistic (although coloured somewhat by the authors' rejection of his own suggestions) to the effect that it will prove unable to bridge the gap between the parties and non-parties to Additional Protocol I – *ibid.*, p. 110); M. Bothe, above note 35, pp. 163–78 (Study methodologically sound and generally correct in its conclusions; takes issue with formulations of Rules 106 and 147, and on some of the expansion of the various rules to non-international armed conflicts, but generally defends the Study); David Turns, "Weapons in the ICRC Study on Customary International Humanitarian Law", *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006 (criticizing the Study's methodology, and especially lack of rigour with respect to some of the Study's rules on weapons (Rules 72–86) and their extension to non-international conflicts); Robert Cryer, "Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study", *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006 (a broadly positive assessment of the Study, but criticizing some of its engagement with international criminal law cases and instruments, specifically as to Rules 146, 153, 155 and 156); Daniel Bethlehem, "The Methodological Framework of the Study", in Elizabeth Wilmshurst and Susan C. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2007 (criticizing the Study's methodology and its tendency to use assertion ("encyclical") as a way of formulating customary rules; specifically questioning the customary status of Rule 6); Iain Scobbie, "The Approach to Customary

potentially mortal one for the Study's authority – was an official letter sent to the ICRC by John B. Bellinger III and William J. Haynes II, then the top lawyers in the US State Department and Defense Department, respectively, in which they conveyed the US government's "initial reactions" to the Study, accompanied by an extensive annex analysing four specific rules in detail.⁵⁴

The US letter was respectful in tone but harsh in content. It reads like a very bad review, as if the Study was brimming with methodological and substantive flaws. The Study is criticized for frequently failing to rigorously assess State practice; for relying on inappropriate practice and generally giving excessive weight to the practice of non-State entities; for failing to pay due regard to the views of specially affected States (which the United States sees itself as being across the board on account of being involved in a great number of armed conflicts); for inappropriately conflating practice and *opinio juris*; and for oversimplifying "rules that are complex and nuanced". Therefore, the United States considered that "the Study's methodological flaws undermine the ability of States to rely, without further independent analysis, on the rules the Study proposes".⁵⁵

International Law in the Study", in E. Wilmshurst and S. C. Breau, *ibid.* (a generally positive evaluation with a mainly methodological critique); Karen Hulme, "Natural Environment", in E. Wilmshurst and S. C. Breau, *ibid.* (generally positive but doubting the customary status of Rule 45); Steven Haines, "Weapons, Means and Methods of Warfare", in E. Wilmshurst and S. C. Breau, *ibid.* (doubting the customary status of specific rules on weapons that were derived from treaties, similarly to D. Turns above); David Turns, "Implementation and Compliance", in E. Wilmshurst and S. C. Breau, *ibid.* (arguing that the Study in some cases conflates custom with other types of rules, such as general principles of law, and specifically doubting the customary status of Rules 139–43); W. Hays Parks, "The ICRC Customary Study: A Preliminary Assessment", *Proceedings of the American Society of International Law*, Vol. 99, 2005 (considering Rules 78 and 85 to be more "ICRC agenda items" than statements of customary international law and criticizing the focus on and lack of context of statements included in the Study). Needless to say, the genre of initial academic analyses of the Study lent itself to critique – just saying that the Study is great does not make for an interesting read. For generally positive evaluations of the Study with few if any substantive criticisms that the Study went beyond customary law (but sometimes with other criticisms, such as that the Study did not go far enough, that its drafting could have been improved or that it failed to bring clarity to important issues), see Pemmaraju Srinivasa Rao, "Customary International Humanitarian Law: Some First Impressions", in Larry Maybee and Benarji Chakka (eds), *Custom as a Source of International Humanitarian Law*, ICRC, New Delhi, 2006; Djamchid Momtaz, "The ICRC Study on Customary International Humanitarian Law – An Assessment", in L. Maybee and B. Chakka, *ibid.*; and Philippe Kirsch, "Customary International Humanitarian Law, its Enforcement, and the Role of the International Criminal Court", in L. Maybee and B. Chakka, *ibid.*; Dieter Fleck, "International Accountability for Violations of the *Ius in Bello*: The Impact of the ICRC Study on Customary International Humanitarian Law", *Journal of Conflict and Security Law*, Volume 11, No. 2, 2006; Anthony Rogers, "Combatant Status", in E. Wilmshurst and S. C. Breau, *ibid.*; Michael N. Schmitt, "The Law of Targeting", in E. Wilmshurst and S. C. Breau, *ibid.*; Susan C. Breau, "Protected Persons and Objects", in E. Wilmshurst and S. C. Breau, *ibid.*; William J. Fenrick, "Specific Methods of Warfare", in E. Wilmshurst and S. C. Breau, *ibid.*; Françoise Hampson, "Fundamental Guarantees", in E. Wilmshurst and S. C. Breau, *ibid.*; Agnieszka Jachec-Neale, "Status and Treatment of Prisoners of War and Other Persons Deprived of their Liberty", in E. Wilmshurst and S. C. Breau, *ibid.*; Ryszard Piotrowicz, "Displacement and Displaced Persons", in E. Wilmshurst and S. C. Breau, *ibid.*; Charles Garraway, "War Crimes", in E. Wilmshurst and S. C. Breau, *ibid.*

54 US Department of State, "Initial Response of U.S. to ICRC Study on Customary International Humanitarian Law with Illustrative Comments (November 3, 2006)", available at: <https://2009-2017.state.gov/s/l/2006/98860.htm>.

55 *Ibid.*

This was, in a word, a total denial of the Study's authority. Curiously, however, the critique in the illustrative annex to the US letter, which addresses four rules in detail, is often reasonable but hardly devastating. Nor were the rules that the United States chose as examples (and, in particular, its disagreements with the Study's authors) genuinely pivotal to the structure of customary IHL as set out in the Study.⁵⁶ They do not, for example, challenge the Study's main contributions, such as the generalizability of the conduct of hostilities rules or the applicability of most rules to non-international conflicts. The response also served as a placeholder, with the letter promising a follow-up by saying that its response was "initial" and that the United States will continue its review and "expect to provide additional comments or otherwise make our views known in due course".

The authors of the Study of course felt a need to respond to the methodological criticism, themselves dealing with the four controversial rules in the annex only summarily.⁵⁷ The promised US follow-up never came – at least not publicly – although the United States continues to critique the Study.⁵⁸ Nor did other States, including the closest allies of the United States, make remotely similar comments in public, after the Study's publication or since. For example, an unnamed legal adviser of the UK Foreign and Commonwealth Office criticized aspects of the Study's methodology, and pointed to Rules 4 and 45 as examples of rules over which there were doubts. However, the reservations were a little over one page in length and rather general in nature. The statement concluded by noting that:

the Study is an impressive piece of research, and will be a very useful quarry for the future. But we at least will treat the Rules with some degree of reservation. Overall, we feel that they represent too much of what States should do, rather than what they actually do, ie they state not what the law is but what it should be.⁵⁹

This was not, either in content or tone, the total attack on the Study's authority as in the US letter.⁶⁰ For its part, Israel has been more critical of the Study, stating that:

56 These were Rules 31, 45, 78 and 157. The annex states that these rules were selected "from various sections of the Study, in an attempt to review a fair cross-section of the Study and its commentary. Although these rules obviously are of interest to the United States, this selection should not be taken to indicate that these are the rules of greatest import to the United States or that an in-depth consideration of many other rules will not reveal additional concerns."

57 J.-M. Henckaerts, above note 41, p. 473.

58 See ILC, Protection of the Environment in Relation to Armed Conflicts: Comments and Observations Received from Governments, International Organizations and Others, UN Doc. A/CN.4/749, 17 January 2022, pp. 29 and 79; ILC, Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties: Comments and Observations Received from Governments, UN Doc. A/CN.4/712, 21 February 2018, p. 17; ILC, Identification of Customary International Law: Comments and Observations Received from Governments, UN Doc. A/CN.4/716, 14 February 2018, pp. 22, 29 and 42–3; US Department of Defense, *Department of Defense Law of War Manual*, June 2015, updated 2016, available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

59 "Statement of FCO Legal Adviser at the Meeting of National Committees on International Humanitarian Law of Commonwealth States, 20 July 2005", *British Yearbook of International Law*, Vol. 76, 2005, p. 695.

60 Reservations on the part of the UK, expressed a few years later, were along similar lines: the UK government "had reservations about volume I of the study. In particular, some of the examples

[l]ike other States, Israel has serious reservations regarding the methodology applied in the ICRC study on customary humanitarian law, and consequently, regarding many of its conclusions. This methodology is inconsistent in many respects with the [International Law] Commission's own conclusions on the identification of customary international law. More specifically, the ICRC proposition in rule 45 of its study lacks adequate substantiation.⁶¹

Nonetheless, there has not been an accumulation of similarly adverse reactions by other States.

On the contrary, certain other States responded to the Study positively. Malaysia noted that “[p]raise was ... due to ICRC for the publication of the study entitled Customary International Humanitarian Law.”⁶² Sweden, on behalf of the Nordic countries, “welcomed the ICRC study and hoped that States would disseminate it as widely as possible”.⁶³ Australia, on behalf of the CANZ group, noted that the Study “was already proving to be an important resource for States”.⁶⁴ France opined that “[t]he comprehensive study by ICRC of customary international humanitarian law deserved careful study by Member States”,⁶⁵ although on a later occasion it noted cautiously that while “the study constitutes a useful doctrinal work, it could not be used as such against States”.⁶⁶ More neutrally, Tunisia indicated that it “was following with interest the debate inspired by the 2005 publication of the ICRC study”.⁶⁷ And so, in the aftermath of the Study's publication the pushback against it, such as it was, does not seem to have continued, except sporadically and by a small number of States.⁶⁸

Indeed, over the years, we have seen not a pushback but an embrace of the Study, at least on the part of several States. A number of States have cited the Study

provided were not, in its view, properly to be regarded as State practice for the purpose of the rules relating to the formation of customary international law. Furthermore, the study sometimes jumped too quickly to the conclusion that a rule had entered into the corpus of that law without sufficient evidence of State practice. On the other hand, volume 2 of the study was a valuable research tool which brought together a large amount of material that would otherwise be difficult to locate. She welcomed the update of that volume being conducted at the Lauterpacht Centre for International Law, in the University of Cambridge, with funding from the British Red Cross.” Sixth Committee of the UN General Assembly, Summary Record of the 13th Meeting, UN Doc. A/C.6/63/SR.13, 7 November 2008, para. 61.

61 ILC, Protection of the Environment in Relation to Armed Conflicts, Comments and Observations Received from Governments, International Organizations and Others, UN Doc. A/CN.4/749, 17 January 2022, p. 102 (internal citations omitted).

62 Sixth Committee of the UN General Assembly, Summary Record of the 8th Meeting, UN Doc. A/C.6/61/SR.8, 15 November 2006, para. 63.

63 *Ibid.*, para. 34. See also UN Doc. A/C.6/63/SR.13, above note 60, para. 32: “While views clearly differed on the study on customary international humanitarian law conducted by ICRC, it would on the whole be very useful to States.”

64 A/C.6/61/SR.8, above note 62, para. 29: Australia speaking on behalf of Canada, Australia and New Zealand (CANZ).

65 UN Doc. A/C.6/63/SR.13, above note 60, para. 27.

66 UN General Assembly, Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts, Report of the Secretary-General, UN Doc. A/67/182/Add.1, 28 September 2012, p. 3.

67 UN Doc. A/C.6/63/SR.13, above note 60, para. 74.

68 The Study was debated in the UN General Assembly in 2006 and later; the resolutions adopted only contain an anodyne reference to the Assembly “[w]elcoming the significant debate generated” by the Study—see, e.g., UN Doc. A/RES/61/30, 18 December 2006, p. 2.

in a variety of public statements and documents. This includes Armenia,⁶⁹ Azerbaijan, Belgium,⁷⁰ the Democratic Republic of the Congo,⁷¹ Germany,⁷² Greece,⁷³ Malaysia, the Netherlands, Sweden⁷⁴ and Switzerland.⁷⁵

Azerbaijan has referred to the Study extensively over the years in various letters to the UN Secretary-General and describes the Study as “authoritative”.⁷⁶ Malaysia and the Netherlands have cited the rules numerous times and both have treated the rules akin to a binding instrument.⁷⁷ Switzerland has stated that the Study, together with the Rome Statute, “provide indications of the current state of international humanitarian law”,⁷⁸ and that:

- 69 Letter dated 21 October 2020 from the Permanent Representative of Armenia to the United Nations addressed to the Secretary-General, UN Doc. A/75/544-S/2020/1035, 26 October 2020.
- 70 ICJ, Case concerning *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Memorial of the Kingdom of Belgium, 1 July 2010, para. 4.74; ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Reply of the Kingdom of Belgium to the Question put by Judge Greenwood, 28 March 2012.
- 71 ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Verbatim Record, CR2005/13, 25 April 2005, p. 32.
- 72 Convention on Certain Conventional Weapons (CCW) Group of Experts on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, dated 8 March 2005, Response from the Federal Republic of Germany, CCW/GGE/XI/WG.1/WP.9, 29 July 2005.
- 73 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Written Submission of Greece, 3 August 2011, para. 38; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Verbatim Record, 14 September 2011, para. 78.
- 74 Regeringens proposition 2016/17:109: Förstärkt skydd av kulturegendom vid väpnad konflikt och under ockupation, 16 February 2017, pp. 19 and 24, available at: www.regeringen.se/492592/contentassets/805318969a384b8bae0d15898d7b3807/forstarkt-skydd-av-kulturegendom-vid-vapnad-konflikt-och-under-ockupation-prop.-201617109.
- 75 CCW Group of Experts on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Weapons Review Mechanisms, Submitted by the Netherlands and Switzerland, CCW/GGE.1/2017/WP.5, 7 November 2017. See also Federal Department of Foreign Affairs, Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework, Version 1, 2011.
- 76 Letter Dated 10 April 2017 from the Permanent Representative of Azerbaijan to the United Nations Addressed to the Secretary-General, UN Doc. A/71/880-S/2017/316, 26 April 2017, para. 128. See also Letter Dated 30 April 2012 from the Permanent Representative of Azerbaijan to the United Nations Addressed to the Secretary-General, UN Doc. A/66/787-S/2012/289, 3 May 2012; Letter Dated 15 August 2016 from the Permanent Representative of Azerbaijan to the United Nations Addressed to the Secretary-General, UN Doc. A/70/1016-S/2016/711, 16 August 2016; Letter Dated 3 February 2020 from the Permanent Representative of Azerbaijan to the United Nations Addressed to the Secretary-General, UN Doc. A/74/676-S/2020/90, 7 February 2020.
- 77 Letter dated 1 June 2015 from the Permanent Representative of Malaysia to the United Nations Addressed to the Secretary-General, UN Doc. S/2015/402, 2 June 2015. Rather than the Study as such, Malaysia refers to the list of rules in “J. Henckaerts, ‘Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict’, *International Review of the Red Cross*, Vol. 17, No. 857 (International Committee of the Red Cross, March 2005)”. CCW Group of Experts on the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, dated 8 March 2005, Response from The Netherlands, CCW/GGE/XII/WG.1/WP.4, 7 November 2015.
- 78 L’Assemblée fédérale – Le Parlement suisse, Le droit international humanitaire et les conflits armés contemporains, Rapport du Conseil fédéral en réponse au postulat 08.3445 de la Commission de politique extérieure du Conseil des Etats du 20 juin 2008, p. 4: “Aujourd’hui, le Statut de Rome de

Les autorités suisses se sont souvent appuyées sur la pratique du CICR pour attester du caractère coutumier d'une norme de droit international. Malgré son caractère contesté sur le plan international, l'étude du CICR en matière de droit international humanitaire coutumier a été citée à de nombreuses reprises par les autorités suisses. Ces dernières ont notamment souligné que l'étude contribue à clarifier le droit international coutumier dans le domaine humanitaire et à guider la pratique étatique y-relative.⁷⁹

For its part, in one document Israel has taken a more cautious tone, observing that, “[l]ike many other States, Israel does not agree that all of the ‘rules’ stated in the ICRC CIL Study reflect customary international law”,⁸⁰ but Israel does refer to a few of the Study’s rules and cites mainly the practice volume. Similarly, while the UK government expressed reservations about the Study, when it had to make formal submissions to the Baha Mousa Inquiry the lawyers representing the Ministry of Defence expressly noted that the government accepted that Rules 47, 87, 90, 91, 99, 118, 121, 122, 127, 128B and 142 as articulated in the Study did reflect customary IHL and relied on the Study as the primary authority for those propositions.⁸¹

Other States, or parts thereof, refer to the Study in their military manuals. Colombia, Denmark and New Zealand cite the Study extensively in their manuals; and Spain mentions the Study.⁸² There are some 242 references to the Study in the New Zealand manual and, in places, the manual treats the Study akin to a legislative text. The manual explains its use of the Study as follows:

Because customary law is derived from State practice, its exact content is sometimes hard to establish and may be controversial. In 2005, the International Committee of the Red Cross (ICRC) published Customary Rules of International Humanitarian Law. Although it has no legal status, this detailed study provides useful material on which an assessment can be made. Rules from the study are referred to in this manual where they [are]

1998 et l'étude de 2005 du Comité international de la Croix-Rouge (CICR) sur le droit international coutumier fournissent des indications sur l'état actuel du droit international humanitaire.”

79 “La pratique suisse relative à la détermination du droit international coutumier”, available at: https://legal.un.org/ilc/sessions/68/pdfs/french/icil_switzerland.pdf: “The Swiss authorities have often relied on the practice of the ICRC to attest to the customary nature of a norm of international law. Despite its internationally contested character, the ICRC’s study of customary IHL has been cited on numerous occasions by the Swiss authorities. In particular, the latter underlined that the study contributes to clarifying customary international law in the humanitarian field and to guiding State practice relating thereto.” (our translation)

80 The State of Israel, *The Operation in Gaza, 27 December 2008–18 January 2009: Factual and Legal Aspects*, 29 July 2009, footnote 70, available at: <https://reliefweb.int/report/israel/opt-operation-gaza-27-dec-2008-18-jan-2009-factual-and-legal-aspects>.

81 Ministry of Defence, Closing Submissions to the Baha Mousa Public Inquiry on Modules 1–3, 25 June 2010, pp. 28–33, available at: https://web.archive.org/web/20120215220215/http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/sub000947.pdf.

82 Ministerio de Defensa, *Orientaciones. El Derecho de los Conflictos Armados*, Tomo 1, Publicación OR7–004, Edición Segunda, Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, p. 8–4, available at: http://www.cruzroja.es/pls/portal30/docs/PAGE/DIH/MINISTERIO_DEFENSA/OR7_004.PDF.TOMO%20I.PDF.

considered helpful. Omission of reference to a rule does not mean, however, that the NZDF does not accept the validity of that rule.⁸³

Colombia also refers to the rules of the Study throughout but adds a disclaimer that citation does not constitute recognition of the customary rule.⁸⁴ Along similar lines, Denmark refers to the Study extensively – with some 227 substantive references – and likewise approaches it in places like a legislative text. It prefaces its use with a one-page discussion of the Study. The manual recalls that the ICRC “worked for a decade to identify customary law in the field of IHL” (a reference to its rigour and epistemic authority), recounts the criticisms of the Study and concludes its discussion by noting that:

[t]his Manual refers to the SCIHL [Study on Customary IHL] as an indication of the customary international law nature of rules while giving due consideration to and taking into account well-known objections to the validity of the individual rules. Footnote references to the SCIHL may be seen as an indication that the SCIHL has identified a rule of importance but should not be taken as a sign that the Manual necessarily reflects the obligation in the area.⁸⁵

Other manuals demonstrate greater reservations regarding the Study’s authority. For Germany, at the time of publication of its military manual (2013), “[i]t remains yet to be seen whether it [the Study] will come to be regarded as a reliable compilation of customary international humanitarian law.”⁸⁶ The manual of Argentina, which was published after the publication of the Study, does not cite it. For its part, the US Department of Defense Law of War Manual does not cite the Study in its analysis of the various rules of the law of armed conflict, but cites it once at the very end of the Manual to reiterate US criticisms. It does, however, cite the US formal response to the Study at various other points in the Manual.⁸⁷ The absence of citations to the Study is clear evidence of disapproval, in light of the specific context. It expresses the view of the Department of Defense, but it is difficult to assess to what extent that disapproval carries across the many layers of the vast US bureaucracy and armed forces. (This comment is of course valid *mutatis mutandis* for all States and their expressions of approval or disapproval of the Study.)

83 New Zealand Defence Force (NZDF), *Manual of Armed Forces Law*, Vol. 4: *Law of Armed Conflict*, Wellington, 2017, para. 3.4.7 (internal citation omitted).

84 Comando General de las Fuerzas Militares, *Manual de derecho operacional: Manual FF.MM 3-41 Público*, 2009, p. 29, footnote 25: “El presente Manual cita a manera de referencia una serie de normas de derecho consuetudinario recogidas por el CICR, pero no constituye una manifestación de reconocimiento de su valor jurídico como costumbre internacional”, available at: <https://searchlibrary.ohchr.org/record/11642?ln=en>.

85 Danish Ministry of Defence, *Military Manual on International Law relevant to Danish Armed Forces in International Operations*, September 2016, Section 5.4.1, available at: <https://www.forsvaret.dk/globalassets/fko—forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf>.

86 German Federal Ministry of Defence, *Joint Service Regulation (ZDv) 15/2 Law of Armed Conflict – Manual*, 1 May 2013, p. 19, available at: <https://www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf>.

87 US Department of Defense, above note 58.

It is near-certain that the military and government lawyers of many more States use the Study in their day-to-day work behind closed doors. This has been our anecdotal experience from interacting regularly with such lawyers.

In sum, we can see that certain States have embraced the Study, treating it as an authoritative text and relying on it to a significant degree, others use it routinely in various contexts, while a few States are more ambivalent. The United States, or at least the Department of Defense, remains negatively disposed. It is clear, however, that there has not been any concerted pushback on the part of States generally – the Bellinger/Haynes letter did not generate a trend in that regard. While some States are not enthusiastic about the Study, there is no organized attempt to mobilize rejection of the Study among States. This inevitably leaves greater space for the reactions of other leading actors to affect the Study's authority. We turn first to international and then domestic courts.

International courts and tribunals

The Study has been cited by almost all major international and regional courts and tribunals. It has been cited in at least fifty judgments, eighteen separate opinions, and one arbitral award. In many of these outputs, the Study was cited multiple times – the sixty-nine decisions amount to 162 citation records in our spreadsheet.

As expected, the Study has been cited most frequently by the international criminal courts and tribunals. The ICTY has cited the Study in sixteen judgments and four separate opinions, the ICTR in one judgment, the MICT in one judgment, the ICC in six judgments and two separate opinions, the ECCC in two judgments, and the SCSL in four judgments. If we were to go beyond judgments, we would find that the Study has been cited on many more occasions, such as in decisions on interlocutory appeals⁸⁸ and the confirmation of charges,⁸⁹ including by the newest tribunal, the KSC.⁹⁰

The Study has also been cited regularly by the regional human rights courts, except for the African Court which has simply not had the opportunity to pronounce on issues of customary IHL. It is cited in nine ECtHR judgments and seven separate opinions as well as in eleven IACtHR judgments and two separate opinions. The Study has thus been cited in more judgments of the ECtHR and IACtHR than the ICTR and ICC. Although perhaps surprising, the citation frequency can be explained by the number of cases involving an armed conflict

88 E.g. ICTY, *The Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal (Appeals Chamber), 11 March 2005, footnote 54.

89 E.g. ICC, *The Prosecutor v. Bahar Idriss Abu Garda*, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges (Pre-Trial Chamber I), 8 February 2010, footnotes 111 and 130.

90 KSC, *The Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi*, Case No. KSC-BC-2020-05-F00026-RED, Public Redacted Version on the Confirmation of the Indictment against Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi (Basic Court Chamber), 26 October 2020; KSC, *The Prosecutor v. Pjetër Shala*, Case No. KSC-BC-2020-04/F00007/RED/1, Public Redacted Version of the Decision on the Confirmation of the Indictment Against Pjetër Shala (Basic Court Chamber), 12 June 2020.

that are brought before the regional human rights courts, in which they sometimes apply IHL while interpreting the human rights treaties over which they have jurisdiction, as well as the relatively few judgments (as distinct from decisions) delivered by the ICC. Insofar as the ICTR is concerned, relatively few instances of war crimes were adjudicated, the focus of that tribunal tending to be on genocide and crimes against humanity.

Moving beyond the international criminal tribunals and the regional human rights courts, the Study has been cited in three separate opinions to ICJ judgments, all by Judge Cançado Trindade, but not in any judgment of the Court itself.⁹¹ It has been cited in one award of the Eritrea–Ethiopia Claims Commission. There were no citations in judgments of the STL, ITLOS, or the African Court of Human and Peoples’ Rights. This can most likely be explained by the subject matter and the small number of relevant judgments handed down by these bodies. We carefully considered such absences of citation to determine whether the relevant court is silently expressing disapproval of the Study by failing to cite it when such a citation could reasonably be expected, in particular when the court is relying on any rule of customary IHL. We could not find any such instances – for example, the ICJ cases in which Judge Cançado Trindade cited the Study, but the majority did not, were not really dealing with IHL in detail.

Of particular interest to us is how the Study has been used. In all but two instances, the tribunal that cited the Study either agreed with the Study or was neutral – to reiterate, of 162 total citations in sixty-nine decisions there are only two instances of disagreement. In seventy-five citations, the Study is the primary or sole authority for the proposition for which it is cited (most often, but not always, the content of a customary rule). In ninety-nine citations, the court is expressly relying on the Study to establish the existence and content of a customary rule or some broader normative proposition, without conducting any investigation of its own into the customary status of a rule, i.e. without independently evaluating State practice and *opinio juris* supporting that rule. These are the clearest cases of the Study being relied on as an authority. There are only nine examples where the court is conducting some kind of independent assessment, but most often this examination is cursory and relies on the practice assembled in the Study as a source. Some patterns clearly emerge, notably that over time the Study is being regarded as more authoritative. However, let us first address the two instances of disagreement with the Study’s findings.

The first such instance is that of an award by the Eritrea–Ethiopia Claims Commission. The Commission found that:

the provisions of Article 54 [Additional Protocol I] that prohibit attack against drinking water installations and supplies that are indispensable to the survival of the civilian population for the specific purpose of denying them for their

91 Judge Cançado Trindade also cited the Study when he sat as a judge of the IACtHR. See IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru*, Judgment (Merits, Reparations and Costs), Concurring Opinion of Judge Cançado Trindade, 25 November 2006, Series C No. 160, p. 10, para. 36.

sustenance value to the adverse Party had become part of customary international humanitarian law by 1999....⁹²

In reaching this Conclusion, the Commission referred to the Study in a footnote:

The Commission notes with appreciation the new, exhaustive study of customary law by the ICRC, Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005). That study concludes that a broader prohibition than the one stated in Article 54(2) has become customary law. *The Commission need not, and does not, endorse the study's broader conclusion.*⁹³

As can be seen, the Commission goes out of its way to commend the Study, perhaps owing to its disagreement. The Commission notes the Study “with appreciation” and describes it as “exhaustive”. At the same time, the Commission states that it “need not, and does not, endorse the study’s broader conclusion” on the issue in question. Whereas Rule 54 of the Study provides that “[a]ttacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population is prohibited”, the Commission limits the customary prohibition to attacks “for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party”. In other words, the Commission regards the customary rule to be narrower than as defined in the Study, limited by the requirement of a specific purpose.

Of note, this instance of disagreement took place in 2005, the very year the Study was published and thus before it could accrue any greater authority over time. The disagreement is expressed without any contrary analysis of State practice or *opinio juris*, by way of assertion. The “does not” expression of disapproval is particularly curious when a “need not” would have sufficed. One possible explanation for the Commission’s rather firm disagreement – but hardly a conclusive one – is that one of its members was George Aldrich, who wrote a very critical review of the Study that same year in the *British Yearbook of International Law*, in which he did expressly deal with Rule 54 of the Study and its allegedly incorrect encapsulation of custom.⁹⁴

The second instance of disagreement is that of the ICTY *Đorđević* Trial Judgment.⁹⁵ There the Trial Chamber “recalls the principle of international humanitarian law that in case of doubt whether a person is a civilian, that person shall be presumed to be a civilian”. The footnote to that sentence reads:

92 United Nations, *Eritrea–Ethiopia Claims Commission–Partial Award: Western Front, Aerial Bombardment and Related Claims–Eritrea’s Claims* 1, 3, 5, 9–13, 14, 21, 25 & 26, 19 December 2005, para. 105, available at: https://legal.un.org/riaa/cases/vol_XXVI/291-349.pdf.

93 *Ibid.*, footnote 23 (emphasis added).

94 G. H. Aldrich, above note 53, pp. 516–17. We need not, and do not, express any view as to whether his critique is valid.

95 ICTY, *The Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-87/1-T, Judgment (Trial Chamber II), 23 February 2011, para. 2066.

In international armed conflicts, the rule is codified in Additional Protocol I, Article 50(1). While Article 13 of Additional Protocol II does not contain the same text, the Chamber is of the view that the principle also applies in non-international armed conflicts. ... While the ICRC's Customary International Humanitarian Law Study stopped short of finding this to be a customary rule of international humanitarian law given the lack of relevant State practice in regard to non-international armed conflicts, the Study noted that "the same balanced approach [...] with respect to international armed conflicts seems justified in non-international armed conflicts". Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge, Cambridge University Press, 2009), p 24.

The Trial Chamber thus finds a rule of customary IHL that the Study did not endorse in either type of armed conflict, due to substantial controversy surrounding the presumption in Article 50(1) of Additional Protocol I. Furthermore, the Chamber does so in a purely assertive mode. There is no detailed examination of literature, State practice or the actual extent of the difference between its approach and the Study – the Chamber simply preferred to say that the treaty provision codified custom, relying on the Study even while gently disagreeing with it.

If we move beyond instances of agreement or disagreement and dig deeper, we find that different entities have used the Study in different ways. Consider the ICTY. In the period immediately after the Study was published (2005–2008), with some exceptions, the ICTY tended to cite the Study for its compilation of practice. It not infrequently referred to the military manuals and domestic legislation compiled in Volume II of the Study. For example:

According to national practices, war booty includes enemy property or military equipment captured on the battlefield. Personal effects belonging to prisoners of war are an exception.¹¹²

Fⁿ 112: See Argentine, *Law of War Manual* (1969), para. 1020; Australia, *Commanders' Guide* (1994), paras. 712 and 967; Canada, *LOAC Manual* (1999), paras. 27 and 48; Germany, *Military Manual* (1992), paras. 706 and 707; Kenya *LOAC Manual* (1997), pp. 7 and 8; Netherlands, *Military Manual* (1993), p. IV-5; New Zealand, *Military Manual* (1992), paras. 526 and 527; US *Field Manual* (1956), para. 59; UK *Military Manual* (1958), para. 615. Cited in *Customary International Humanitarian Law*, ICRC, Volume II, pp. 992-998.⁹⁶

96 ICTY, *The Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-T, Judgment (Trial Chamber), 15 March 2006, para. 51. See also ICTY, *The Prosecutor v. Mladen Naletilić, a.k.a. "Tuta" and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Separate and Partially Dissenting Opinion of Judge Schomburg (Appeals Chamber), 3 May 2006, para. 15; ICTY, *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006, footnotes 285 and 299; ICTY, *The Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgment (Trial Chamber I), 12 June 2007, footnote 1256.

The ICTY also cited the Study as an academic authority,⁹⁷ and alongside teachings of publicists.⁹⁸ Individual judges relied on the Study also for the methodology of determining customary international law.⁹⁹

Over time, however, the approach of the ICTY to the Study changed. By 2011, the Study was being used in a more authoritative manner that transcends “mere” academic authority or a collection of practice. The ICTY was citing the Study for a variety of statements and propositions.¹⁰⁰ Also it relied on the Study as the sole authority for the customary status of particular rules without any independent assessment. For example, the *Popović* appeal judgment reads:

The Appeals Chamber observes that according to customary international law applicable both in international and non-international armed conflicts “[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control”.¹⁷⁴⁶

Fn 1746 Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, Vol. I, Rule 55, pp. 193-200. See also Article 23 of Geneva Convention IV; Article 70 of Additional Protocol I; Article 18 of Additional Protocol II.¹⁰¹

As can be seen from the passage, the ICTY also cited the Study alongside treaty provisions, placing it at par with binding texts.

The evolution of the Tribunal’s approach was not entirely linear. The ICTY did treat the Study with elevated authority even shortly after its publication. In the 2006 *Hadžihasanović* trial judgment, the Chamber observed that the Study was “considered an authoritative source on the subject”¹⁰² and in the 2007 *Martić* case, the Trial Chamber cited the Study alongside treaty provisions and judicial decisions.¹⁰³ Nonetheless, there is a noticeable shift in approach in the years immediately after the Study was published as compared with some years later.

For its part, the ICC has used the Study in different ways, sometimes in the course of the same judgment. At times, the Study is cited alongside treaty

97 ICTY, *The Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgment (Appeals Chamber), 3 July 2008, footnote 44 (citing the introduction to the Study).

98 ICTY, *The Prosecutor v. Sefer Halilović*, Case No. IT-01-48, Judgment (Appeals Chamber), 16 November 2005, footnote 90.

99 ICTY, *The Prosecutor v. Galić*, above note 96, Partially Separate and Dissenting Opinion of Judge Schomburg, para. 19; ICTY, *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgment (Appeals Chamber), 12 November 2009, Partially Dissenting Opinion of Judge Liu Daqun, paras 6 and 10.

100 E.g. ICTY, *The Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment Volume II of II (Trial Chamber I), 15 April 2011, para. 1779; ICTY, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Public Redacted Version of Judgment (Trial Chamber III), 24 March 2016, footnotes 20404 and 20405.

101 E.g. ICTY, *The Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Judgment (Appeals Chamber), 30 January 2015, para. 615.

102 ICTY, *The Prosecutor v. Hadžihasanović and Kubura*, above note 96, para. 253.

103 ICTY, *The Prosecutor v. Martić*, above note 96, footnote 192.

provisions,¹⁰⁴ indicating that it is on a par with formally binding instruments, or it is cited alongside judicial decisions.¹⁰⁵ Rules of the Study are also cited as accurate reflections of customary international law. For example, in the *Ntaganda* trial judgment, the Chamber stated that:

This definition [of military objectives], through customary international law, has also become applicable to non-international armed conflicts. See Rule 8 of the ICRC Study on Customary IHL, and the underlying State practice referred to in the study.¹⁰⁶

Likewise, in the *Ntaganda* appeal judgment, the Appeals Chamber stated that “[a] similar prohibition exists under customary law and is set out in rule 129 (B) of the ICRC’s compilation of customary rules of international humanitarian law.”¹⁰⁷

On occasion, though, the Study is cited in a footnote alongside academic articles,¹⁰⁸ suggesting that the Study is being treated as akin to teachings of publicists. Also, the language used when describing the Study can be more tentative, suggesting a lesser degree of authority. Thus, in the *Ntaganda* trial judgment, the Chamber stated that “*It has also been considered as a rule of customary IHL, applicable in both international and non-international [armed conflict] by the ICRC: see Rule 15 of the ICRC Study on Customary IHL, and underlying practice.*”¹⁰⁹ Aside from these isolated instances, the Study is cited as authoritative and no independent analyses of its conclusions on customary international law are set out in the judgments.

The IACtHR uniformly affords the Study a high degree of authority. The way in which it is cited suggests that it is seen as comparable to a legislative text. For example, in the *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, the Court stated:

104 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06/2666-Red, Public Redacted Version of Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 Entitled “Judgment” (Appeals Chamber), 30 March 2021, para. 549 and footnote 1073. Also noting that “[t]he relevant customary rule is set out in rule 129(A) of the ICRC study”. See also ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3343, Judgment Pursuant to Article 74 of the Statute (Trial Chamber III), 21 March 2016, footnotes 342 and 353.

105 ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07-3436-tENG, Judgment Pursuant to Article 74 of the Statute (Trial Chamber II), 7 March 2014, footnote 2122.

106 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgment Pursuant to Article 74 of the Statute (Trial Chamber VI), 8 July 2019, footnote 3156. See also ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08-3636-Anx1-Red, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber II’s “Judgment Pursuant to Article 74 of the Statute” (Appeals Chamber), 8 June 2018, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, para. 559.

107 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06/2666-Red, Public Redacted Version of Judgment on the Appeals of Mr Bosco Ntaganda and the Prosecutor against the Decision of Trial Chamber VI of 8 July 2019 Entitled “Judgment” (Appeals Chamber), 30 March 2021, para. 549.

108 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-3121-Red, Public Redacted Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction (Appeals Chamber), 1 December 2014, footnote 607 and Dissenting Opinion Judge Sang-Hyun Song, footnote 12.

109 ICC, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06-2359, Judgment Pursuant to Article 74 of the Statute (Trial Chamber VI), 8 July 2019, footnote 2668 (emphasis added).

In analyzing and interpreting the scope of the provisions of the American Convention in the instant case, in which the facts occurred in the context of a non-international armed conflict, and in keeping with Article 29 of the American Convention, the Court finds it useful and appropriate, as it has on other occasions, to have recourse to ... customary international humanitarian law,¹⁶⁶ as complementary instruments and in consideration of their specificity on this subject.

Fn 166 Cf. International Committee of the Red Cross, Customary International Humanitarian Law, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007.¹¹⁰

The Study is thus treated as an, even “the”, authoritative statement of customary IHL.

This approach is operationalized in the jurisprudence of the IACtHR. For example, throughout the judgment in the *Case of the Santo Domingo Massacre v. Colombia*, the Court refers to the Study as the sole authority for a variety of propositions of customary IHL and does not undertake its own independent analysis.¹¹¹ The same is true of the *Case of Vásquez Durand et al. v. Ecuador*.¹¹² In the *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, the Court states:

According to Rule 7 of Customary International Humanitarian Law, “[t]he parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.” Also, Rule 133 stipulates that “[t]he property rights of displaced persons must be respected.”¹¹³

The “Rules” identified in the Study are treated as if they are rules of international law akin to treaty provisions.¹¹⁴

The approach of the ECtHR is somewhat closer to that of the ICTY. In recent years, the ECtHR has treated the Study as highly authoritative. However, this was not always the case. In the period shortly after the Study was published, the Study was cited in a tentative manner. In the 2008 case of *Korbely v. Hungary*, the Grand Chamber noted that:

110 IACtHR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Judgment (Merits, Reparations and Costs), 25 October 2012, Series C No. 253, para. 141. See also IACtHR, *Rochac Heranández et al. v. El Salvador*, Judgment (Merits, Reparations and Costs), 14 October 2014, Series C No. 285, para. 109. See further, IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, Judgment (Preliminary Objections, Merits and Reparations), 30 November 2012, Series C No. 259, para. 187.

111 IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, *ibid.*, para. 212, referring to Rule 1; para. 214, referring to Rule 14; para. 216, referring to Rule 15; para. 234, referring to Rule 12; para. 271, referring to Rules 8–11; para. 272, referring to Rule 52.

112 IACtHR, *Case of Jorge Vásquez Durand et al. v. Ecuador*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 15 February 2017, Series C No. 332.

113 IACtHR, *Case of the Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 20 November 2013, Series C No. 270, para. 349 (internal citations omitted).

114 See also IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, above note 110, para. 271.

*[i]n the view of the International Committee of the Red Cross (ICRC), the rule that any person hors de combat cannot be made the object of attack has become a customary rule applicable to both international and non-international armed conflicts.*¹¹⁵

In the same paragraph, the Chamber notes that “the ICRC’s study on customary international humanitarian law (2005) *proposes* the following rule ...”.¹¹⁶ The way in which the Study is cited suggests that the views are those of the ICRC and the Grand Chamber does not (necessarily) adopt them. In the 2010 *Van Anraat v. Netherlands* case, the Court cited the Study for its practice set out in Volume II.¹¹⁷

By 2013, after some years had passed and there was time for the Study to become embedded, the ECtHR started to treat the Study in a more authoritative manner. In *Janowiec and Others v. Russia*, the Grand Chamber recounted that “[u]nder customary international humanitarian law, States have an obligation ‘to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and, if appropriate, prosecute the suspects’”¹¹⁸ and refers to the Study, the four Geneva Conventions, and various General Assembly resolutions in a footnote in support of that proposition.¹¹⁹ In the 2015 *Chiragov and Sargsyan* cases, the Grand Chamber referred to Rule 132 of the Study as the sole authority in support of the proposition that:

the right of displaced persons “to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist” is regarded as a rule of customary international law (see Rule 132 in *Customary International Humanitarian Law* by the International Committee of the Red Cross (ICRC)) that applies to any kind of territory.¹²⁰

The Rule is mentioned in brackets in the main text. In neither of those cases is there an independent assessment of the customary status of the rule.

By 2017, and similarly to the approach taken by the IACtHR, the Study was being cited as if it were a legislative text. For example, in the 2017 *Tagayeva* case, the Court observed:

Volume I of the updated version of the International Committee of the Red Cross (ICRC) “Study on Customary International Humanitarian Law” (2005) contains Rule 11, which provides: “Indiscriminate attacks are prohibited”.

115 ECtHR, *Case of Korbely v. Hungary*, Application No. 9174/02, Judgment (Merits and Just Satisfaction) (Grand Chamber), 19 September 2008, para. 51 (emphasis added).

116 See also ECtHR, *Case of Korbely v. Hungary*, *ibid.*, para. 90, referring to “the proposed Rule 47” (emphasis added).

117 ECtHR, *Case of Van Anraat v. Netherlands*, Application No. 65389/09, Decision on Admissibility (Court, Third Section), 6 July 2010, para. 40.

118 ECtHR, *Janowiec and Others v. Russia*, Application Nos 55508/07 and 29520/09, Judgment (Merits and Just Satisfaction) (Grand Chamber), 21 October 2013, para. 27.

119 ECtHR, *Janowiec and Others v. Russia*, *ibid.*, footnote 8.

120 ECtHR, *Case of Chiragov and Others v. Armenia*, Application No. 13216/05, Judgment (Merits) (Grand Chamber), 16 June 2015, para. 97 (internal citation omitted). See also ECtHR, *Case of Sargsyan v. Azerbaijan*, Application No. 40167/06, Judgment (Merits) (Grand Chamber), 16 June 2015, para. 95.

Rule 12, which is entitled “Definition of Indiscriminate Attacks”, reproduces the definition contained in Article 51 § 4 of Protocol I to the Geneva Convention (cited above). Rule 84, which is entitled “The Protection of Civilians and Civilian Objects from the Effects of Incendiary Weapons”, reads: “If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.” The ICRC comment summary to each of those Rules indicates that “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts”.¹²¹

This approach was subsequently followed in key Grand Chamber cases such as *Georgia v. Russia (II)* and *Hanan v. Germany*.¹²² As before, the Study is the sole authority for the customary status of particular propositions and at no time is independent analysis set out in the judgment.

Domestic courts

Turning to domestic courts,¹²³ the Study has been cited in at least 141 judgments. These are: nine judgments from courts in the UK, including two from the Supreme Court; seven US judgments, including one from the Supreme Court, as well as one concurring opinion; and seven Israeli Supreme Court judgments and one from the Military Court of Appeals. It has been cited in one Peruvian judgment, three Swedish judgments, three Dutch judgments, and six German judgments, including one from the Federal Court of Justice and two from the Federal Constitutional Court. It has been cited in at least twenty-six judgments of the Court of Bosnia and Herzegovina; and in seventy-eight Colombian judgments, including eight judgments of the Colombian Constitutional Court and sixty-nine judgments of the Jurisdiction for Peace of which thirty-eight were in separate opinions of Sandra Gamboa Rubiano. The sample is far from comprehensive and is heavily skewed towards those decisions contained in the databases we consulted. A substantial number of other citations would almost certainly be uncovered by a sufficiently large research team with appropriate legal and linguistic expertise.

There are no cases that we could find of outright disagreement with the Study. In one instance, a court expressed some doubt as to the customary status

121 ECtHR, *Case of Tagayeva v. Russia*, Application Nos 26562/07, 49380/08, 21294/11, 37096/11, 49339/08 and 51313/08, Judgment (Court, First Section), 13 April 2017, para. 471.

122 ECtHR, *Georgia v. Russia (II)*, Application No. 38263/08, Judgment (Merits) (Grand Chamber), 21 January 2021, paras 290 and 324; ECtHR, *Hanan v. Germany*, Application No. 4871/16, Judgment (Merits and Just Satisfaction) (Grand Chamber), 16 February 2021, para. 80.

123 Judgments of domestic courts can be taken as the practice of States as well as subsidiary means for determining rules of law. On the dual role of domestic courts, see Anthea Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law”, *International & Comparative Law Quarterly*, Vol. 60, No. 1, 2011.

of Rule 99 of the Study, but did so only by way of assertion without examining any practice or *opinio juris*, and indicated that it did not need to decide the point.¹²⁴

The courts in different domestic systems take different approaches to the authority of the Study. Judgments of the courts of England and Wales tend to treat the Study as a “mere” academic authority. For example, in the Court of Appeal judgment in the *Serdar Mohammed* case, the Study is discussed under the heading “Academic commentaries”,¹²⁵ it is cited in part for the “dominant approach in the international humanitarian law literature”,¹²⁶ and the introduction to the Study by President Jakob Kellenberger is quoted for the proposition that

state practice concerning non-international armed conflicts: “goes beyond what those same states have accepted at diplomatic conferences, since most of them agree that the essence of customary rules on the conduct of hostilities applies to all armed conflicts, international and non-international”.¹²⁷

The *Serdar Mohammed* litigation, in which most of these citations appear, is, however, a peculiar example because it examined the question whether IHL expressly authorized detention in non-international armed conflicts which is not, as such, directly dealt with in the Study but was the subject of academic inquiry.

The position of US courts is mixed. In *Hamdan*, the Supreme Court used the Study to interpret the phrase “regularly constituted court” in common Article 3,¹²⁸ an approach that was followed by the Fourth Circuit Court of Appeals in *Hamidullin*.¹²⁹ Indeed, in the latter case, the Court of Appeals noted that “[a]lthough non-binding, the ICRC’s interpretation of the Geneva Conventions has been treated as persuasive by the Supreme Court.”¹³⁰ The mainstreaming of the Study by the Supreme Court in *Hamdan* clearly enabled further citations by the lower courts. In US district courts, the Study has been used as sole authority for the customary status of particular rules.¹³¹ The US Court of Military Commissions Review has used the Study in an explanatory sense, for example, as authority for the proposition that the conventional law of non-international armed conflict is rudimentary.¹³²

124 High Court of Justice, *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB), Approved Judgment, paras 260–1.

125 England and Wales Court of Appeal, *Mohammed & Ors v. Secretary of State for Defence*, [2016] 2 WLR 247, Judgment, paras 183 and 235.

126 *Ibid.*, para. 183.

127 *Ibid.*, para. 188.

128 United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld*, 126 S.Ct 2749, 29 June 2006, Sections 2796–7, Stevens J Opinion for the Court. See also at Section 2803 for concurrence of Kennedy J.

129 United States Court of Appeals (4th Circuit), *United States of America v. Irek Ilgiz Hamidullin*, 888 F.3d 62, 18 April 2018, pp. 67–8.

130 *Ibid.*, footnote 3.

131 United States District Court (Eastern District of New York), *Oran Almog v. Arab Bank, PLC*, 471 F. Supp.2d 257, 29 January 2007, p. 278; United States District Court (Columbia), *Falen Gherebi v. Barack H. Obama*, 609 F.Supp.2d 43, 22 April 2009, pp. 66–7.

132 United States Court of Military Commission Review, *United States of America v. Ali Hamza Ahmad Suliman Al Bahlul*, 820 F.Supp.2d 1141, 9 September 2011, p. 1165, quoting “Jean-Marie Henckaerts, *1 Customary International Humanitarian Law* xxxiv-xxxv (Cambridge U. Press 2009)”.

By contrast, Israeli courts consistently treat the Study with greater authority. In *Ahmed v. Prime Minister*, the Israeli Supreme Court notes that:

under the rules of customary international humanitarian law, each party to a conflict is obliged to refrain from disrupting the passage of basic humanitarian relief to populations in need of such relief in areas under its control (J. Henckaerts & L. Doswald-Beck, Customary International Humanitarian Law (ICRC, vol. 1, 2005), at pp. 197, 199).¹³³

The Study is treated as an authoritative statement of customary international law on point. Also, in *Public Committee Against Torture in Israel v. Government of Israel et al.*, the Study is cited numerous times and at length.¹³⁴ Again, the way in which it is cited is instructive. For example, the Court notes that:

civilians may not be attacked indiscriminately, i.e., an attack that, inter alia, is not directed at a specific military target (see Art. 51(4) of *The First Protocol*, which constitutes customary international law: see Henckaerts and Doswald-Beck, Customary International Humanitarian Law, supra, at p. 37).¹³⁵

Some UN commissions of inquiry (discussed further below), when citing the Study, refer to the favourable citation of the Study on the part of the High Court of Justice.¹³⁶ This is evidence of the snowballing effect we discussed above.

Along similar lines, the State Court of Bosnia and Herzegovina treats the Study as highly authoritative.¹³⁷ So do certain Swedish cases. It is worth quoting from *Public Prosecutor (on behalf of Behram (Hussein) and ors) v. Arklöf (Jackie)* at length. The Court observes:

It should stand clear that all of the rules indicated here are for all intents and purposes covered by customary law and are thus applicable to the circumstances in the case regardless of whether the parties can be considered contractually bound. In support thereof, we may refer to the list of fundamental international humanitarian rules with customary law status prepared by the International Red Cross Committee (ICRC). The list was drawn up with the collaboration of legal scientists from a large number of countries and expresses their collective understanding. It was published in

133 Israeli Supreme Court, *Jaber Al-Bassiouni Ahmed and Others v. Prime Minister and Minister of Defence*, Case No. HCJ 9132/07, Judgment, 30 January 2008, para. 14.

134 Israeli Supreme Court, *Public Committee Against Torture in Israel v. Government of Israel et al.*, Case No. HCJ 769/02, 14 December 2006, Judgment, paras 23, 29, 33, 34, 40, 41, 42 and 46.

135 *Ibid.*, para. 29.

136 Human Rights Council, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, UN Doc. A/HRC/29/CRP.4, 24 June 2015, footnote 24; Human Rights Council, Report of the Detailed Findings of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, UN Doc. A/HRC/40/CRP.2, 18 March 2019, footnote 56.

137 Court of Bosnia and Herzegovina, *Prosecutor's Office v. Miroslav Anić*, Preliminary Hearing, Case No. S1 1 K 005596 11 Kro, ILDC 1907 (BA 2011), Preliminary Hearing, 31 May 2011, paras 27, 36 and 39; Court of Bosnia and Herzegovina, *The Prosecutor v. Predrag Kujundžić a.k.a. Predo*, Case No. X-KR-07/442, Judgment, 30 October 2009, para. 414.

Customary International Law, Volume 1, ICRC, Cambridge 2005, and in the main takes up the rules referenced above by the Court.¹³⁸

As is evident from the passage, the rules are seen as a reflection of customary international law. The Court also refers to the collaboration with legal experts and to the Study's epistemic authority.

In sum, there is no doubt that the domestic courts we have surveyed treat the Study as an authoritative instrument, but they do so variably. None of them engage in any real independent evaluation of custom, but then again few of the domestic cases actually dealt with the customary status of a specific rule. Many of the citations of the Study are tangential or generally about what IHL requires. Citations of specific rules tend to be to those with which few, if any, would disagree.

UN commissions of inquiry

Citation of the Study is by no means limited to decisions of courts and tribunals. The Study has been cited by a variety of UN commissions of inquiry, a term we use to include commissions, panels of experts, and fact-finding missions. The Study has been cited by *inter alia* the Panel of Experts on Yemen, the International Commission of Inquiry on the Central African Republic, the Commission on Human Rights in South Sudan, the Independent International Commission of Inquiry on the Syrian Arab Republic, the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory, the Independent International Fact-Finding Mission on Myanmar, the Independent Commission of Inquiry established pursuant to Human Rights Council Resolution S-21/1, the International Commission of Inquiry on Libya, the Fact-Finding Mission on the Gaza Conflict, the Commission of Inquiry on Lebanon, the Panel of Experts on Accountability in Sri Lanka, the Panel of Experts on Yemen, and the Panel of Experts on Sudan.

Some commissions utilize the Study extensively.¹³⁹ Commissions have variously described the Study as “authoritative”,¹⁴⁰ “[o]ne repository of the principles of customary IHL”,¹⁴¹ and “as indicative of the existence of customary norms”.¹⁴² They treat the Study in a similar manner to the IACtHR. Particular rules of the Study are cited alongside treaty provisions,¹⁴³ suggesting that they are

138 Stockholm District Court, *Public Prosecutor (on behalf of Behram (Hussein) and ors) v. Arklöf (Jackie)*, Case No. B 4084-04, ILDC 633 (SE 2006), 18 December 2006, para. 138 (translation of International Law in Domestic Courts (ILDC)).

139 E.g. Human Rights Council, Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/CRP.2, 17 September 2018; UN Doc. A/HRC/29/CRP.4, above note 136.

140 UN Security Council, The International Commission of Inquiry on the Central African Republic, Final Report, UN Doc. S/2014/928, para. 601.

141 UN General Assembly, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/21/50, 16 August 2012, footnote 10.

142 UN Doc. A/HRC/29/CRP.4, above note 136, para. 33.

143 E.g. Letter dated 22 January 2021 from the Panel of Experts on Yemen addressed to the President of the Security Council, UN Doc. S/2021/79, 25 January 2021, footnote 72.

at par with binding instruments; as sole authority for the statement that a particular proposition reflects customary international law;¹⁴⁴ and the volumes as a whole are cited as reflective of customary IHL.¹⁴⁵

Only rarely is there comment on the status of the Study. The Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka is exceptional in this regard. The report notes that:

In order to determine the content and meaning of customary international law, the Panel relies upon various sources, including the ICRC's study, *Customary International Humanitarian Law* (2005), which comprehensively analyses state practice and attitudes as well as international and national judicial decisions, and the statute and jurisprudence of international criminal tribunals. While the Panel recognizes some disagreement among States over the customary law status and the scope of some restrictions on the conduct of parties involved in non-international armed conflicts, the rules on which the Panel relies below are all, in its view, beyond dispute as rules of customary international humanitarian law.¹⁴⁶

International Law Commission

Engagement with the Study on the part of the ILC is mixed. The ILC does not refer to the Study as such in its commentaries to the draft conclusions on identification of customary international law.¹⁴⁷ It does, however, refer to the Study in its commentaries to the Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, the Draft articles on Prevention and Punishment of Crimes Against Humanity and the Draft principles on protection of the environment in relation to armed conflicts (the latter adopted on first reading).

In the commentaries to the draft conclusions on subsequent agreements and subsequent practice, the Study is used for its commentary to one rule and its compilation of practice.¹⁴⁸ In the commentaries to the Draft articles on crimes

144 E.g. Human Rights Council, Report of the Commission on Human Rights in South Sudan, UN Doc. A/HRC/43/56, 31 January 2020, para. 25.

145 E.g. UN Doc. S/2014/928, above note 140, footnote 57; Human Rights Council, Report of the International Commission of Inquiry to Investigate all Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, UN Doc. A/HRC/17/44, 12 January 2012, para. 64.

146 UN Secretary-General, Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011, para. 183, available at: www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf.

147 There is perhaps an oblique reference: "Official statements of the International Committee of the Red Cross (ICRC), such as appeals for and memorandums on respect for international humanitarian law, may likewise play an important role in shaping the practice of States reacting to such statements; and publications of the ICRC may assist in identifying relevant practice. Such activities may thus contribute to the development and determination of customary international law, but they are not practice as such" (emphasis added). For draft conclusions on identification of customary international law, see UN Doc. A/73/10, above note 5, Conclusion 4, Commentary, p. 132, para. 9.

148 For draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, see UN Doc. A/73/10, above note 5, Conclusion 6, Commentary, paras 15–18; and footnote 280.

against humanity, the ILC refers to a rule of the Study for a reflection of customary international law on a particular issue.¹⁴⁹ In the commentaries to the Draft articles on protection of the environment, as adopted on first reading, the ILC refers to the Study extensively and uses it in a myriad of ways. Part of one draft article is said to be “based on the first paragraph of rule 43 of the ICRC Study”¹⁵⁰ and, at times, the Study is used as the sole authority for the proposition that a particular rule is of customary status.¹⁵¹ The Study is also used as an academic authority,¹⁵² and for the practice it assembled.¹⁵³ Overall, the Study is used circumspectly, with the ILC noting in numerous places that “[t]he ICRC study on customary law considers that this constitutes a rule under customary international law”,¹⁵⁴ rather than “this is a rule of customary international law” with reference to the Study in a footnote. States at the Sixth Committee had also drawn attention to the Study when discussing the topic.¹⁵⁵

The Study also features in reports of individual special rapporteurs;¹⁵⁶ the approach they take to the Study is also mixed. The Special Rapporteur on formation and evidence of customary international law, Michael Wood, discusses the Study in his first report, but does so in neutral terms, whilst noting also the US and UK reactions to the Study.¹⁵⁷ By contrast, the first Special Rapporteur on the protection of the environment in relation to armed conflicts, Marie Jacobsson, discusses the Study in more positive terms. She notes:

A challenge lies in which method to use in identifying applicable customary law rules. The International Committee of the Red Cross (ICRC) has made an impressive effort in this respect. Its momentous study on customary international humanitarian law (ICRC customary law study) was published in 2005 following some 10 years of compilation of material and analytical work. The ICRC customary law study has no precedent. With its three volumes, 5,000 pages and 161 rules and commentaries and supporting material, it is, to quote one author, “a remarkable feat”. Yet it has been criticized for shortcomings in methodology and reliability. In addition, it should be underlined that the study is, in and of itself, a snapshot of the applicable law

149 ILC, Draft Articles on Prevention and Punishment of Crimes Against Humanity, UN Doc. A/74/10, 20 August 2019, Art. 11, Commentary, para. 7.

150 *Ibid.*, Principle 13, Commentary, para. 12.

151 *Ibid.*, footnote 979.

152 *Ibid.*, footnote 1224.

153 *Ibid.*, footnote 1235.

154 *Ibid.*, footnote 995.

155 ILC, Report of the International Law Commission on the Work of its Sixty-Seventh Session (2015): Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Seventieth Session, Prepared by the Secretariat, UN Doc. A/CN.4/689, 28 January 2016, para. 53.

156 E.g. Seventh Report on Immunity of State Officials from Foreign Criminal Jurisdiction, by Concepción Escobar Hernández, Special Rapporteur, UN Doc. A/CN.4/729, 18 April 2019, para. 161; First Report on Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur, UN Doc. A/CN.4/720, 30 April 2018, footnote 37; Third Report on Crimes Against Humanity by Sean D. Murphy, Special Rapporteur, UN Doc. A/CN.4/704, 23 January 2017, para. 287; Marie G. Jacobsson, Special Rapporteur, Third Report on the Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/C.4/700, 3 June 2016, para. 253.

157 UN General Assembly, First Report on Formation and Evidence of Customary International Law, by Sir Michael Wood, Special Rapporteur, UN Doc. A/CN.4/663, 17 May 2013, paras 52 and 92.

at a given time. To mitigate the latter temporal shortcoming, additional material is continuously placed on the ICRC customary law web page. In the view of the Special Rapporteur, the work by ICRC is far too valuable to neglect or even downplay. It is the most comprehensive compilation of legislative and regulatory measures, along with expressions of *opinio juris*, available in this field. To the extent that reference is made to the ICRC customary law study it is done on the basis of the aforementioned premises.¹⁵⁸

When the Special Rapporteur cites the Study for particular propositions, she too notes somewhat cautiously that the “ICRC considers that State practice establishes this rule as a norm of customary international law”.¹⁵⁹

Other UN bodies

A variety of other UN bodies also cite the Study. These include the UN Secretary-General,¹⁶⁰ special representatives of the UN Secretary-General,¹⁶¹ special procedures of the UN Human Rights Council,¹⁶² the Human Rights Council Advisory Committee¹⁶³ and the Office of the United Nations High Commissioner for Human Rights (OHCHR).¹⁶⁴ Almost without exception, they treat the Study as akin to legislative texts. They frequently cite the rules of the Study as sole authority for the customary status of a particular proposition, and they do not carry out any independent analysis. Of particular note, the UN Secretary-General has observed that the Study has “made a significant contribution to the process of identifying fundamental standards of humanity by clarifying, in particular, international humanitarian law rules applicable in non-international armed conflict”.¹⁶⁵

Academics

We did not wish to conduct an extensive analysis of how the Study is being used by academics – our focus was on actors that are themselves regarded as more

158 Marie G. Jacobsson, Special Rapporteur, Second Report on the Protection of the Environment in Relation to Armed Conflicts, UN Doc. A/CN.4/685, 28 May 2015, para. 7 (internal citations omitted). See also para. 166 and footnote 168.

159 *Ibid.*, para. 175.

160 E.g. UN Economic and Social Council, Fundamental Standards of Humanity, Report of the Secretary-General, UN Doc. E/CN.4/2006/87, 3 March 2006; UN General Assembly, Situation of Human Rights in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine: Report of the Secretary-General, UN Doc. A/HRC/47/58, 27 May 2021.

161 E.g. UN General Assembly, Report of the Special Representative of the Secretary-General for Children and Armed Conflict, UN Doc. A/72/276, 2 August 2017.

162 E.g. UN General Assembly, Report of the Special Rapporteur of the Human Rights Council on Extrajudicial, Summary or Arbitrary Executions: Mass Graves, Highlighting the Multitude of Sites of Mass Killings and Unlawful Deaths Across History and the World, UN Doc. A/75/384, 12 October 2020.

163 E.g. UN General Assembly, Human Rights and Issues Related to Terrorist Hostage-Taking, Report of the Human Rights Council Advisory Committee, UN Doc. A/HRC/24/47, 4 July 2013.

164 E.g. UN General Assembly, Comprehensive Report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, UN Doc. A/HRC/30/61, 28 September 2015.

165 UN Economic and Social Council, Fundamental Standards of Humanity, Report of the Secretary-General, UN Doc. E/CN.4/2006/87, 3 March 2006, p. 2.

authoritative than “mere” scholars. However, the same pattern we have observed for other actors holds here too. The Study is frequently relied on by academics as the sole or primary authority for propositions of customary IHL, most often without independent analysis of State practice and *opinio juris*. Further, while in the years immediately following the Study’s publication, scholarship citing the Study did so mainly for the purpose of providing critical evaluations thereof,¹⁶⁶ few people have done so in the years since. Today the Study is simply being used routinely, as “the” standard reference work for the content of customary IHL. Academic use of the Study is on a general upward trend, as can be seen from the graph in Figure 1, peaking at 186 annual citations in 2019.¹⁶⁷

Textbooks published in recent years also discuss and utilize the Study throughout their pages.¹⁶⁸ The approach of textbooks is particularly important owing to their role in the education of future generations of international humanitarian lawyers. If future lawyers learn when studying the subject that the Study is authoritative or that it reflects customary IHL, they are more likely to adopt that same position when in practice.

Sassòli discusses the Study in a section on “customary law”. He notes that “[t]he ICRC Customary Law Study greatly facilitates the identification of official State practice and the resulting customary rules”¹⁶⁹ and the Study is referenced in footnotes throughout the work. The Study is also discussed at length in educational works published by the ICRC written by Sassòli, Bouvier, Quintin and Grignon, as is the US response to the Study;¹⁷⁰ Melzer notes that “[t]he ICRC’s extensive study on customary IHL is also a widely recognized source of reference in this respect.”¹⁷¹ Melzer also notes that “the ICRC’s study as such is not binding. However, it carries the authority of an organization specifically mandated by the international community ‘to work for the understanding and dissemination of knowledge of international humanitarian law’”,¹⁷² a reference to the epistemic authority of the Study. Kolb and Hyde note that guidance on the content of customary IHL “has to be sought” from the Study, because it “provides a thorough examination of the subject and sets out the norms, outside the universally accepted Geneva Convention of 1949, that can be considered to be part of custom”, and rely on the Study throughout their work.¹⁷³ The Fleck volume includes “CIHL” in its list of abbreviations as shorthand for the Study and the section on sources contains a footnote which reads: “[s]ee generally on

166 See the works cited in above note 53.

167 See https://scholar.google.com/scholar?cites=4141991227391108598&as_sdt=2005&scioldt=0,5&hl=en, custom range search for each calendar year. The search was conducted on 19 June 2022.

168 It is not always clear whether a book is in fact a textbook. We have referred to books that we know to be used in teaching. We have also confined ourselves only to textbooks in English, which inevitably provides only a partial picture.

169 Marco Sassòli, *International Humanitarian Law*, Elgar, Cheltenham, 2019, p. 46.

170 Marco Sassòli, Antoine A. Bouvier, Anne Quintin and Julia Grignon, *How Does Law Protect in War?*, ICRC, available at: <https://casebook.icrc.org/>.

171 Nils Melzer, *International Humanitarian Law*, ICRC, Geneva, 2019, p. 22.

172 *Ibid.*, p. 23.

173 Robert Kolb and Richard Hyde, *Introduction to the International Law of Armed Conflicts*, Hart, Oxford, 2008, p. 58.

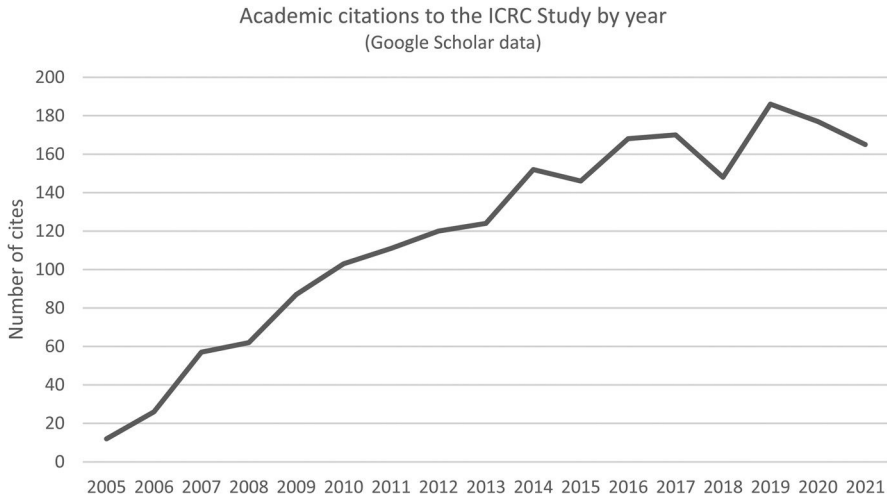


Figure 1. Academic citations to the Study by year (Google Scholar).

the subject of rules of international humanitarian law as customary international law, *CIHL*".¹⁷⁴ The Study is cited regularly throughout the work, for example, in the chapter on the law of non-international armed conflict. The Saul and Akande collection discusses the Study in the chapter on history and sources, which was written by one of the authors of the Study, Jean-Marie Henckaerts.¹⁷⁵ The Study is also cited regularly throughout the volume, often as a reflection of the state of customary international law.¹⁷⁶

Crawford and Pert are more cautious in their use of the Study. In their textbook, they discuss the Study in the section on custom, mention the critiques of the Study, and conclude that:

[t]he approach taken in this text book is one of cautious acceptance of the ICRC *CIHL* Study. Where there is little controversy about the customary status of a particular principle ... the ICRC position will be taken. However, in the case of more controversial positions ... the ICRC position is noted with caution and additional supporting practice is sought.¹⁷⁷

Similarly, Solis notes that the ICRC should be treated as a "respected corporate publicist" and that its Study "should not be overlooked", and does in fact proceed to repeatedly cite the Study in his textbook while generally treating it like an

174 Mary Ellen O'Connell, "Historical Development and Legal Basis", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2021, p. 26, footnote 146.

175 Jean-Marie Henckaerts, "History and Sources", in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, pp. 17–18.

176 See, e.g., Robert McLaughlin, "Fundamental Guarantees", in *ibid.*; Gloria Gaggioli and Nils Melzer, "Methods of Warfare", in *ibid.*

177 Emily Crawford and Alison Pert, *International Humanitarian Law*, Cambridge University Press, Cambridge, 2020, p. 41.

academic work.¹⁷⁸ For their part, Tsagourias and Morrison only cite the Study on two occasions, although they do so approvingly, without any discussion of its status.¹⁷⁹ Dinstein mentions the Study once in passing in the main text, while noting US disapproval, and otherwise uses it in footnotes like any other academic work.¹⁸⁰ Corn *et al.* similarly note US disapproval of the Study, in a work focused primarily on US practitioners.¹⁸¹

Overall, there is clear acceptance of the value of the Study in the textbooks we surveyed, although the degree of authority attributed to the Study is variable. Some authors use the Study as if it were a binding instrument, similarly to the various courts we examined above; others clearly assign it weight over and above “mere” academic scholarship, while a smaller group treats the Study purely as a reference work. All in all, the Study appears to be substantially embedded into the instruction of IHL, which is likely to further enhance its authority as time goes by.

Discussion: a gradual accretion of authority

Our analysis has shown that the Study has steadily gained in authority over time. There is simply no doubt that this accretion of authority has been happening in what Schauer has called an “informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted”.¹⁸² That process has been happening across the board, involving all influential actors of the international legal system, including governments. It is evident, for example, in the way in which it is cited by Azerbaijan and the number of times it is cited in the military manuals of Denmark and New Zealand, even though there clearly are some powerful States that have not embraced the Study’s authority. We have also seen how the Study has become a standard point of reference in reports of UN commissions of inquiry and in discussions of customary IHL in textbooks.

The Study’s accretion of authority is most visible with regard to international courts and tribunals. Today they not only cite the Study routinely, but most often use the Study as the primary or sole source for the proposition for which it is being cited, at a level of authority that is clearly higher than academic works, and without any independent scrutiny. Some tribunals, like the IACtHR and ECtHR, have essentially used the Study as if it was a legislative text. As we

178 See Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, pp. 19–20.

179 See Nicholas Tsagourias and Alasdair Morrison, *International Humanitarian Law: Cases, Materials and Commentary*, Cambridge University Press, Cambridge, 2018, pp. 38 and 107.

180 See Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, Cambridge, 2016, pp. 8 and 25.

181 Geoffrey S. Corn *et al.*, *The Law of Armed Conflict: An Operational Approach*, Kluwer, New York, 2012, p. 58.

182 F. Schauer, above note 22, pp. 1956–7.

have seen, disagreements with the Study in the judgments of both international and domestic courts are exceptionally rare. Also, there are no cases of disapproval by omission – by failure to even cite the Study – in international or domestic decisions, to the extent that we could reliably tell from the sample we surveyed. In particular there are no such cases that analyse the content of customary IHL that do not refer to the Study.

That said, in most of the judgments that we have examined where the Study is cited affirmatively either as a general matter or with regard to its conclusion that a specific rule was customary, the citation would be routine and would not deal with a point central to the resolution of the case. There were few decisions in which the constituent elements of the customary rule were carefully laid out and applied by the court to the specific facts at hand. Even so, despite the shallowness of a great many of these judicial citations, they clearly contribute to the gradual accretion of the Study's authority and enable future reliance on it. Furthermore, this process is set to continue in the absence of concerted governmental pushback and opposition, even if a handful of States remains less than enthusiastic about the Study. The Study may not (yet) have reached the authoritative level of the ILC Articles on State Responsibility, but few codificatory exercises do. The Study is generally perceived far more authoritatively than ordinary academic works, often on par with treaty texts and judicial decisions, in all sorts of contexts and by various influential actors.

That the Study is increasingly being regarded as highly authoritative is, we submit, undeniable. The more difficult question is why courts and other actors are so regarding of the Study, i.e. which of the Study's interconnected claims to authority that we examined above carries the greatest weight. Answering this question is difficult primarily because the Study's users rarely explain their reliance on it – but some conclusions can reasonably be drawn from the various citation patterns that emerge.

First, we can say that in most instances courts and tribunals (and probably other actors as well) do not rely on the Study primarily because they found its conclusions on any given point to have been persuasive on the basis of the practice and *opinio juris* surveyed. If persuasion and the rigour of the analysis in the Study's commentary were the primary drivers of reliance on the Study, we would have seen frequent examples of courts discussing the relevant practice in detail and performing some kind of independent analysis to verify and confirm the Study's conclusions. At the very least we would expect some deeper engagement with the practice compiled and commentary. However, the examples of such independent analysis are exceptionally rare – far more often the existence of a customary rule is simply asserted and the Study is cited in support of that rule. It is possible that the judges did conduct some kind of independent assessment before deciding to endorse the Study's conclusions without spelling that analysis out in their decision, but that seems quite unlikely. Substantial work is rarely done by judges and their clerks only not to be mentioned. Thus, Judge Meron's hope that the Study should be the starting point for judicial analysis but that a prudent court should evaluate the practice collected independently has not,

in fact, materialized.¹⁸³ The Study mainly does its work through (content-independent) authority rather than through persuasion.

Second, we found only a handful of instances in which the Study's authority was expressly grounded in its link to States, and even there only superficially. In the ECtHR case of *Marguš v. Croatia*, the First Section and later also the Grand Chamber noted that the Study had been “[m]andated by the States convened at the 26th International Conference of the Red Cross and Red Crescent”.¹⁸⁴ The Colombian Constitutional Court observed that the Study was carried out by the ICRC “at the invitation of the International Conference for the Protection of Victims of War”.¹⁸⁵ The Swiss Federal Department of Foreign Affairs noted that the ICRC undertook the Study “[a]t the request of the international community”.¹⁸⁶ However, on the whole, reliance on the Study is not justified by reference to State *imprimatur*.

Third, references to the expertise of the Study's authors are somewhat more frequent. For example, in *Public Prosecutor (on behalf of Behram (Hussein) and ors) v. Arklöf (Jackie)*, the court noted that the list of customary rules “was drawn up with the collaboration of legal scientists from a large number of countries and expresses their collective understanding”.¹⁸⁷ In addition, the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory referred to the “extensive, consultative process” that took place.¹⁸⁸

There are, however, frequent references to the Study's overall rigour. Thus, the Eritrea–Ethiopia Claims Commission described the Study as “exhaustive”,¹⁸⁹ although it went on to disagree with the scope of one of the Study's rules.¹⁹⁰ The UK Supreme Court described it as the “ICRC's major international study into State practice”,¹⁹¹ and the England and Wales Court of Appeal as

183 See T. Meron, above note 36, p. 834.

184 ECtHR, *Marguš v. Croatia*, Application No. 4455/10, Judgment (Court, First Section), 13 November 2012, para. 29; ECtHR, *Marguš v. Croatia*, Application No. 4455/10, Judgment (Merits and Just Satisfaction) (Grand Chamber), 27 May 2014, para. 45. See also UN Economic and Social Council, Fundamental Standards of Humanity, Report of the Secretary-General, UN Doc. E/CN.4/2006/87, 3 March 2006, p. 7; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt; the Representative of the Secretary-General on Human Rights of Internally Displaced Persons, Walter Kälin; and the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, Miloon Kothari: Mission to Lebanon and Israel, UN Doc. A/HRC/2/7, 2 October 2006, footnote 22.

185 Constitutional Court, Decision No. C-291/07, 25 April 2007: “El estudio fue realizado en forma minuciosa por el CICR, a invitación de la Conferencia Internacional para la Protección de las Víctimas de la Guerra (Ginebra, 1993) ...”.

186 Swiss Federal Department of Foreign Affairs, *Humanitarian Access in Situations of Armed Conflict, Handbook of the Normative Framework, Version 1.0*, 2011, p. 16, available at: <https://www.alnap.org/system/files/content/resource/files/main/humanitarian-access-in-situations-of-armed-conflict-handbook-on-the-normative-framework-en.pdf>.

187 Stockholm District Court, *Public Prosecutor (on behalf of Behram (Hussein) and ors) v. Arklöf (Jackie)*, Case No. B 4084-04, ILDC 633 (SE 2006), Judgment, 18 December 2006.

188 UN Doc. A/HRC/40/CRP.2, above note 136, para. 58.

189 United Nations, *Eritrea–Ethiopia Claims Commission*, above note 92, footnote 23.

190 See United Nations, *Eritrea–Ethiopia Claims Commission*, above note 93 and accompanying text.

191 United Kingdom Supreme Court, *Mohammed (Serdar) v. Ministry of Defence and Another (No 2)*, [2017] 2 WLR 327, para. 271.

“comprehensive”,¹⁹² while the Hague District Court and the US Court of Military Commissions Review both referred to it as “extensive”.¹⁹³ The UN Secretary-General discussed the Study’s methodology at length.¹⁹⁴ In making these observations about the Study’s rigour, actors will often mention its analysis of practice, but again they will rarely evaluate that practice independently.¹⁹⁵ In short, the idea that the Study’s rules are supported by extensive practice matters more than the reality of whether or not the supportive practice is there.

The Study’s authoritativeness is thus most likely a combination of various factors, including the epistemic authority of the ICRC as an institution, with its long and deep connection with IHL and over 150 years of work in the field, as well as the perceived rigour of the Study project. However, perhaps most importantly, the Study enables courts and other actors to outsource to the ICRC the hard work of establishing custom. It is much easier to assert the existence of a customary rule and to support this assertion with a citation to the Study than it would be to conduct an independent, labour-intensive analysis that could never replicate the amount of work invested in the Study, particularly bearing in mind the scarcity of time, expertise, linguistic ability, access to materials, and so forth. Especially in situations where little is at stake on the existence or the precise formulation of a customary rule, or there is no controversy as to its content, it would make no practical sense for a court, an investigative commission, an academic, or a government lawyer, to engage in inductive or deductive assessments of practice and *opinio juris*. The Study is there, just waiting to be cited. That citation is made much easier because the Study has a degree of state *imprimatur* (and in the absence of determined opposition), because of the ICRC’s special mandate and epistemic authority, because of the rigour of the project, and because of the comforting availability of the practice database that allows for the ICRC’s conclusions to be verified, even if this is rarely actually done. The lawyer citing the Study can not only say “I didn’t make this up”; she can also say that the ICRC didn’t make it up either. Furthermore, citation is made increasingly easier by the fact that various authoritative bodies – especially courts – have repeatedly cited the Study themselves, and have not suffered any criticism for doing so.

192 England and Wales Court of Appeal (Civil Division), *Mohammed (Serdar) v. Ministry of Defence*, [2016] 2 WLR 247, Judgment, para. 241.

193 Hague District Court, Criminal Law Section, *Public Prosecutor v. Joseph Mpambara*, Case Nos 09/750009-06 and 09/750007-07, Landelijk Jurispr BK0520, Judgment of 23 March 2009; United States Court of Military Commission Review, *United States v. Mohammad*, 280 F.Supp.3d 1305, 29 June 2017, Section 1325, quoting Klamberg.

194 Commission on Human Rights, Fundamental Standards of Humanity, Report of the Secretary-General, UN Doc. E/CN.4/2006/87, 3 March 2006, Section 8.

195 See, e.g., *Bemba*, above note 104, footnote 387; SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa (the CDF Accused)*, Case No. SCSL-04-14-A, Judgment (Appeals Chamber), 28 May 2008, para. 404; SCSL, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (“RUF Case”)*, Case No. SCSL-04-15-T, Judgment (Trial Chamber I), 2 March 2009, para. 216. See also Mission to Lebanon and Israel, above note 184, footnote 22; “This study ... is based on an extensive analysis of State practice (e.g. military manuals) and documents expressing *opinio iuris*.”

Conclusion

Our analysis has shown that in the sixteen years since its publication the Study has gradually accumulated authority within the international legal system, moving to a level that clearly exceeds that of a purely scholarly work. In that regard the Study resembles many of the codification efforts of the ILC, even if its impact has not been as transformative as that of the Articles on State Responsibility. The Study's authority is particularly evident from our survey of the judgments of international courts and tribunals, but the accretion of authority is widespread and not confined to them only. The common tendency to cite the Study as a primary or sole authority for the existence of a customary rule, without any independent analysis and often as if it were a quasi-legislative text, is remarkable. In addition, even relatively trivial but approving citations reinforce the feedback loop of authority.

The Study's authority rests not only on its rigour and the ICRC's special mandate and expertise, but also on purely pragmatic grounds. The Study fulfils a variety of otherwise unmet needs. Since its publication no rival project has been even conceived of, let alone implemented, that could meet those needs. The Study is simply useful, either for genuinely fundamental purposes (such as regulating non-international conflicts) or for purely pedestrian ones (finding cites for non-controversial propositions). In addition, because it will remain useful, and because so many international legal institutions have already treated it as authoritative, the process of accretion is highly likely to continue. That process could be disrupted by a concerted, sustained effort by several powerful States. However, destructive opposition would be difficult to justify, especially in the absence of any better alternative. To be clear, we should not be taken as saying that the ICRC and international courts have somehow illegitimately wrested control over customary IHL from States – while some areas of substantial controversy will inevitably remain, the Study is exactly as authoritative as States have allowed it to be.

From the Gilded Age to the Digital Age: The evolution of ICRC legal commentaries

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Abstract

Legal commentaries are a type of secondary source that provides clarity about the meaning of treaty provisions so they can be appropriately interpreted and applied by practitioners. Since 1870, the International Committee of the Red Cross (ICRC) has produced such commentaries on each successive international humanitarian law (IHL) treaty or update to an existing treaty. Over time, who drafts these commentaries and the methodology behind them has evolved, from early commentaries written by a single jurist who had participated in the drafting of the treaty to multi-authored works based on extensive research and the methodology found in the Vienna Convention on the Law of Treaties. The ICRC Commentaries

* This article is based on a blog post by the present authors, "From the Gilded Age to the Digital Age: The Evolution of ICRC Legal Commentaries", *Cross-files*, 8 June 2022, available at: <https://blogs.icrc.org/cross-files/the-evolution-of-icrc-legal-commentaries/>. Many thanks to Jean-Marie Henckaerts, Kubo Mačák, Begümhan İdikut Şimşir and Ismaël Raboud for their comments on an earlier draft.

have always been geared towards those tasked with applying IHL, but this audience has expanded over time, giving them a more global reach, and their reception has evolved accordingly. The most recent iteration of the ICRC Commentaries on the 1949 Geneva Conventions and their 1977 Additional Protocols is currently being produced, with some changes in methodology to guarantee that they remain a practical tool for the interpretation and application of those instruments.

Keywords: international humanitarian law, Geneva Conventions, updated Commentaries, treaty interpretation, International Committee of the Red Cross, Vienna Convention on the Law of Treaties, history of IHL.



Introduction

Treaty provisions are carefully crafted before they are agreed to and adopted by States, but no matter how detailed the language, unexpected circumstances may arise. The context may change, technologies may evolve, or other unforeseen developments may take place. On the other hand, those drafting a treaty may intentionally leave terms vague in order to preserve flexibility in interpretation or to secure the agreement of States that otherwise might not sign up to it. Given these and other challenges, how does one know how a given treaty should be interpreted and applied? One tool that is designed to assist scholars and practitioners in this regard is a commentary.

Commentaries are one of a constellation of types of secondary legal resources. They are different from law review articles or monographs in that they are not meant to be the opinion of an author or authors. They are unlike casebooks or textbooks, which are directed at audiences learning about an area of law, and unlike legal treatises, in that they comment on a specific treaty, group of treaties or other legal instrument¹ rather than providing a comprehensive understanding of a given area of law. They are also unlike legal manuals published by States, in that they are not implementing the law but rather presenting the reader with research into how the law has been interpreted and implemented. The 1949 Geneva Conventions and their 1977 Additional Protocols, which, along with their predecessors, form the core of international humanitarian law (IHL), are no exception to the challenges of interpreting and applying international treaties. As each new treaty was concluded, the International Committee of the Red Cross (ICRC), acting in its capacity as the guardian of IHL, produced a reference commentary discussing its provisions.

1 See, for example, Marie-Louise Tougas, “Commentary on Part I of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict”, *International Review of the Red Cross*, Vol. 96, No. 893, 2015.

Today, the updated ICRC Commentaries on the Geneva Conventions and their Additional Protocols are heirs to this long tradition of legal commentaries published to support the interpretation and application of the cornerstone treaties of IHL.

This article looks back in time, from the origin of the Commentaries produced by the ICRC to the current project to update them, in order to share some insights on their evolution, in terms of authorship, methodology, audience, form and substance. How have 150-plus years of development of IHL and State practice, along with evolving standards for legal scholarship and treaty interpretation, impacted the Commentaries?

The commentators

The long history of ICRC commentaries on IHL treaties can be traced back to 1870, with the publication of a commentary on the 1864 Geneva Convention and its 1868 additional articles by then ICRC president Gustave Moynier.² Since then, the adoption of every new IHL treaty, or revision of an existing treaty, has led to the publication of at least one reference commentary providing an article-by-article interpretation of the law, informed by its drafting history and prior State practice. Most of these commentaries have been written by or under the direction of an authoritative ICRC figure.

In his review essay on commentaries as a genre of international legal scholarship, Christian Djéffal dates their systematization and subsequent proliferation back only to the United Nations (UN) era. “The drafts and treaties produced at diplomatic conferences such as the Hague Peace Conferences of 1899 and 1907 were not accompanied by commentaries, neither were the attempts to codify international law within the framework of the League of Nations”, he notes.³ And so, it seems that, despite the genre’s medieval roots – dating back to the glossators and commentators on the *Codex Justinianus* – and a strong tradition in German legal scholarship, the pre-Second World War ICRC commentaries on the Geneva Conventions were outliers for their time.

Since the publication of such commentaries was not common in the late nineteenth century’s legal landscape, how was this tradition first established within the ICRC, and why? We suggest looking back to the publication of the very first ICRC commentary to find the answer. In 1870, Gustave Moynier published his *Etude sur la Convention de Genève pour l’amélioration du sort des*

2 Gustave Moynier, *Etude sur la Convention de Genève pour l’amélioration du sort des militaires blessés dans les armées en campagne: 1864 et 1868*, Librairie de J. Cherbuliez, Paris, 1870. All the commentaries mentioned in this article are available for consultation in the ICRC Library. Most of them have been digitized and can be downloaded via the library’s catalogue at: <https://library.icrc.org/library/> (all internet references were accessed in September 2022).

3 Christian Djéffal, “Commentaries on the Law of Treaties: A Review Essay Reflecting on the Genre of Commentaries”, *European Journal of International Law*, Vol. 24, No. 4, 2013, p. 1233, available at: <https://academic.oup.com/ejil/article/24/4/1223/606393>.

militaires blessés dans les armées en campagne: 1864 et 1868, a volume that was part legal treatise, part article-by-article commentary on Geneva Convention I (GC I).⁴ Its content, the profile of its author and the time of publication are important clues to understanding the origin of the present-day ICRC Commentaries.

The ICRC's co-founder and president from 1864 to 1910, Gustave Moynier was a lawyer by training. A particularly prolific writer, he authored many works on the birth of the ICRC and the International Red Cross and Red Crescent Movement, and on IHL. His figure loomed large over the early days of the ICRC and over the birth of GC I. Was he the treaty's main drafter? He gave conflicting accounts on this point in his own writings. In a letter from 1864, he wrote that fellow ICRC co-founder General Dufour, who had led the Swiss Confederate forces to victory during the Sonderbund War, had produced the "draft concordat" that later became GC I. In 1900, in an article in the *Bulletin International des Sociétés de la Croix-Rouge*,⁵ he wrote of a joint effort with General Dufour. In his 1902 autobiography, however, he presented himself as the sole author of the draft.⁶ Moynier was strongly invested in making his contribution to the birth of the Red Cross and GC I one for the history books.⁷ His name on the cover page on the first ICRC commentary is thus not a surprise. Why was he best positioned to write such a commentary and put forward an interpretation of the Convention? He asked – and answered – that question himself in the commentary: "[T]here was a story to tell", he explained, "and we were in a better position than anyone else to know how things had happened."⁸ He derived his authority as a commentator from his first-hand experience in the drafting and adoption of the treaty. This position is reiterated throughout the volume, which is very much imbued with Moynier's personal opinions and recommendations for the development of the law.

What could have motivated Moynier to publish such a commentary in 1870? Six years after its adoption, GC I had already been tested on the battlefield. It had been applied during the Austro-Prussian War of 1866, though only on part of the theatre of the war, as three of the belligerents (Austria, the Kingdom of Saxony and the Kingdom of Hanover) were not parties to the Convention. This first test of the treaty's applicability had led to multiple debates on its revision. In 1868, States had agreed on additional articles extending its principles to maritime warfare; these were adopted but failed to secure any ratifications and thus never entered into force.⁹ The treaty had also found its detractors, who

4 G. Moynier, above note 2.

5 The ancestor of the present journal, published by the ICRC between 1869 and 1919.

6 See Ismaël Raboud, Matthieu Niederhauser and Charlotte Mohr, "Reflections on the Development of the Movement and International Humanitarian Law through the Lens of the ICRC Library's Heritage Collection", *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018, p. 153.

7 For a more substantial and nuanced take, see Cédric Cotter, "The Role of Experience and the Place of History in the Writings of ICRC Presidents", *International Review of the Red Cross*, Vol. 101, No. 910, 2019.

8 G. Moynier, above note 2, p. 65 (authors' translation).

9 Nevertheless, in the Franco-German War of 1870–71 and the Spanish-American War of 1898, the parties agreed to observe their provisions. It was not before the First Hague Peace Conference of 1899 that a

argued that it was inapplicable on the battlefield, that its language was too vague, that it went too far, or that it would encourage espionage. These developments likely motivated the publication of Moynier's commentary, and he engaged directly with critics of the Convention in his text.¹⁰ His approach to refuting such criticism was twofold. First, he anchored the Convention in a history of humanitarian progress in order to stress the treaty's legitimacy. He included a comprehensive historical introduction that recontextualized the Convention and presented its adoption as the logical consequence of the evolution of mentalities on warfare and human suffering in war. Second, in his article-by-article commentary, Moynier insisted on the drafters' full grasp of military realities. He pointedly and repeatedly demonstrated how these were balanced with humanitarian concerns in the treaty.¹¹ To stress this point, he derived examples from State practice, presenting benefits gained from the respect of the Convention during the Austro-Prussian War and contrasting them with clear instances of the harms it sought to prevent, from prior to its adoption.

The publication of the 1870 commentary was meant to raise support for the Convention, provide guidance on its application on the battlefield and convince States of its applicability. Moynier also anticipated future developments in this burgeoning body of international law, writing:

To put it frankly, the number of special treaties designed to mitigate the horrors of war will probably increase, those that already exist will call for others, either to improve them or to fill in gaps, and thus international law will come to always better reflect contemporary customs. Perhaps we will even come to a general codification of the law of war.¹²

His will to encourage and help steer this development is apparent in the commentary. He concluded the book with his personal recommendations – he saw it as particularly important for States to agree on the treatment of prisoners of war (PoWs), in order to prevent the repetition of abuses observed in recent conflicts, citing examples from the American Civil War. Prescient if a bit premature, his conclusion looked toward the adoption of an additional convention that would extend the international legal protection granted to wounded and sick soldiers by GC I to PoWs.

Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention was finally adopted and ratified.

10 He engaged in particular with criticism of the Convention published by the Austrian regimental physician Dr Albert Michaëlis in the journal *Allgemeine Militärärztliche Zeitung: Beiträge zur Wiener Medizinischen Presse* (see, for instance, his article 'Gedanken über den Sanitätsdienst im Treffen mit Beziehung auf das bezügliche k. k. Reglement und auf die Berührungspunkte mit den in Genf gemachten Vorschlägen', published in that journal on 18 September 1864). See G. Moynier, above note 2, pp. 63–64, 134–135, 177–182, 191–193.

11 See, notably, G. Moynier, above note 2, pp. 191–196.

12 *Ibid.*, p. 31 (authors' translation). The original quote in French reads: "Pour parler sans figure, les traités spéciaux destinés à atténuer les horreurs de la guerre iront vraisemblablement en se multipliant, ceux qui existent déjà en appelleront d'autres, soit pour les perfectionner, soit pour en combler les lacunes, et ainsi la législation internationale reflétera toujours mieux les mœurs contemporaines. Peut-être même en viendra-t-on à une codification générale du droit guerrier."

Moynier's prediction on the development of IHL proved true, and as the law developed, the publication of legal commentaries on the new or revised treaties became a tradition. From 1870 to 2005, commentaries on the Geneva Conventions and their Additional Protocols were systematically published soon after those instruments' adoption. The commentators benefited from this proximity in time. Like Moynier, they derived their authority from their first-hand knowledge of each treaty's drafting history, on top of their legal expertise and familiarity with State practice. The author of a certain treaty's commentary has in fact quite commonly been one of its main drafters.

GC I, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, was first revised in 1906. The main drafter behind the revision was renowned law professor Louis Renault. The report of the drafting committee, which he presented, actually functioned as the revised treaty's commentary. When reproduced in full in the pages of the *Bulletin International des Sociétés de la Croix-Rouge*, it was introduced as "the only authorized commentary ... which admirably summarizes all the work accomplished".¹³ Two years later, the Swiss Red Cross also published a commentary in German authored by the former secretary-general of the 1906 Diplomatic Conference, Swiss law professor Ernst Röhliberger.¹⁴ The publication was celebrated in the *Bulletin*, as the journal also served to spread the word about all new publications related to the activities of the ICRC and the development of IHL.¹⁵

The next revision of the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field took place in 1929. After the Diplomatic Conference, Paul Des Gouttes, a lawyer and member of the ICRC's governing body, was tasked with writing the commentary on the revised treaty.¹⁶ He was also the author of the Conference's report. In his preface, ICRC president Max Huber explained why Des Gouttes was uniquely positioned to write the commentary:

Everything pointed to him for this task. As assistant to the secretary-general of the 1906 Diplomatic Conference and secretary-general of the 1929 Conference, he followed closely the discussions of both assemblies. In the course of more than thirty years of collaboration with the International Committee of the Red Cross, he had the opportunity to study many questions closely or remotely related to the Convention.¹⁷

Des Gouttes' authority as a commentator was thus based both on his first-hand knowledge of the negotiations behind the successive revisions of the Convention

13 ICRC, "Le Comité international et la Conférence de 1906", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 37, No. 148, 1906, pp. 270–272 (authors' translation).

14 Ernst Röhliberger, *Die neue Genfer Konvention vom 6. Juli 1906*, A. Francke, Bern, 1908.

15 "No one was better qualified than the Secretary General of the 1906 Geneva Conference ... to present, on the content of this pact between nations, a systematic study whose value rests on the author's expertise on international questions." "Ernst Röhliberger – la nouvelle Convention de Genève", *Bulletin International des Sociétés de la Croix-Rouge*, Vol. 39, No. 155, 1908, pp. 254–255 (authors' translation).

16 ICRC, Minutes of Meeting, Plenary Session of the Committee, 26 September 1929, ICRC Archives.

17 Max Huber, "Preface", in Paul Des Gouttes, *La Convention de Genève du 27 juillet 1929: Commentaire*, ICRC, Geneva, 1930, p. xviii.

and on his ICRC experience. In his text, he paid homage to his predecessors, building on Renault and Röthlisberger's works on the 1906 Convention.¹⁸ Showing the importance given to legal commentaries at that time, Des Gouttes owned two copies of the latter's commentary, including one dedicated to him by the author, which were gifted to the ICRC Library by his widow after his passing.

The 1929 Diplomatic Conference also adopted the first Convention relative to the Treatment of Prisoners of War. ICRC member and law professor at the University of Geneva Georges Werner, who had worked in the ICRC's International Prisoners of War Agency during the First World War, was among the drafters of the new Convention. A year prior, his study of the draft PoW Convention had appeared in the collected courses of the Hague Academy of International Law.¹⁹ For the ICRC, he was thus a logical choice of author for the commentary on the new treaty, as agreed on 26 September 1929.²⁰ He was however beaten to the publication by Danish diplomat Gustav Rasmussen, who had also attended the 1929 Diplomatic Conference but was not among the Convention's original drafters. Werner then reviewed Rasmussen's commentary in the *Bulletin International des Sociétés de la Croix-Rouge*, a twentieth-century example of a practice continuing to this day, in old and new media.²¹

The ICRC also collected external commentaries, as well as other types of publications reflecting how States were interpreting and implementing IHL. One interesting example found in the ICRC Library's collections is Dr Alfons Waltzog's commentary on the 1907 Hague Convention (IV) on War on Land and its Annexed Regulations and the two 1929 Geneva Conventions, published in the middle of the Second World War.²² The author worked for the court-martial of the German air force, as *Kriegsgerichtsrat* (judge advocate); his commentary was addressed to the officers and officials of Nazi Germany. ICRC jurist Werner Christ published quite a scathing review of the commentary in the *International Review of the Red Cross*, writing that "there [could] be found ... the reflection of trends in Germany or even of the author's personal opinions, some of which appear to be questionable and which often, in our opinion, deviate from the spirit that inspired the Geneva Conventions".²³ A typewritten in-house translation into

18 He notably borrowed a phrase from Röthlisberger: "It has been rightly said that an ambulance without its equipment is like a knife without a blade." P. Des Gouttes, above note 17, pp. 91–92.

19 Georges Werner, "Les prisonniers de guerre", *Recueil des Cours de l'Académie de Droit International*, Vol. 21, 1928.

20 ICRC, above note 16.

21 Gustav Rasmussen, *Code des prisonniers de guerre: Commentaire de la Convention du 27 juillet 1929 relative au traitement des prisonniers de guerre*, Levin & Munksgaard, Copenhagen, 1931; Georges Werner, "Un commentaire du Code des prisonniers de guerre", *Revue Internationale de la Croix-Rouge*, Vol. 14, No. 159, 1932.

22 Alfons Waltzog, *Recht der Landkriegsführung: Die wichtigsten Abkommen des Landkriegsrecht*, F. Vahlen, Berlin, 1942.

23 Werner Christ, "Die wichtigsten Abkommen des Landkriegsrechts", *Revue Internationale de la Croix-Rouge*, Vol. 27, No. 316, April 1945, p. 309–310 (authors' translation). The original quote in French reads: "On n'y trouve pas l'exposé comparatif des thèses qui se sont fait jour dans les différents pays quant à l'application des dispositions conventionnelles, mais bien surtout le reflet des tendances qui prévalent en Allemagne ou même d'opinions personnelles, dont certaines apparaissent comme contestables et qui souvent, selon nous, s'écarterent de l'esprit qui a inspiré les Conventions de Genève."

French of Waltzog's commentary on the 1929 PoW Convention was also produced, now part of the ICRC Library's heritage collection on wartime captivity. This is indicative of the ICRC's work to collect commentaries and other sources on the interpretation and implementation of IHL treaties, an important factor in the development of the dedicated collections of its Library up to the present day. Throughout history, the ICRC commentators have relied on these collections for their work and have expanded them with their own writings.

The adoption of the four 1949 Geneva Conventions marked, quite logically, a turning point in the history of the ICRC Commentaries: they would no longer be a "one-man job". Under the direction of Jean Pictet, a team of ICRC jurists wrote the Commentaries on the four Conventions, published in French and in English throughout the 1950s.²⁴ These commentators were Frédéric Siordet, Claude Pilloud, René-Jean Wilhelm, Jean-Pierre Schoenholzer, Oscar Uhler and Jean de Preux. The first three, as well as Pictet, had worked on the revision of the Conventions and followed the discussions of the 1949 Diplomatic Conference and the earlier expert meetings.

The foreword of the Commentary on GC I draws attention to the genealogy of the Commentaries. It traces a direct line from Louis Renault's 1906 report to the 1929 commentary by Paul Des Gouttes ("who was such a zealous and eminent authority on the Geneva Conventions"²⁵) and finally to the present Commentary. Notably, this also seems to be the first time that the ICRC resorted to an external specialist: Major M. W. Mouton, naval captain and judge at the Dutch Court of Cassation, assisted in the elaboration of the Commentary on Geneva Convention II, relative to the protection of wounded, sick and shipwrecked members of the armed forces at sea.²⁶

In 1977, the preparation of the Commentary on the Additional Protocols again mobilized a team of ICRC jurists, this time under the direction of Claude Pilloud.²⁷ In the 1950s, Pilloud had been Pictet's right-hand man during the preparation of the Commentaries on the 1949 Geneva Conventions. Director of the ICRC's Department of Principles and Law until 1978, he had taken part in the drafting of the 1977 Additional Protocols. He came back from retirement to work on the Commentaries on the Additional Protocols, until his death in 1984. Most of the commentators working under him had also been part of the ICRC delegation to the 1974–77 Diplomatic Conference. The team comprised ICRC

24 Jean Pictet (ed.), *Commentaires des Conventions de Genève du 12 août 1949*, 4 vols, ICRC, Geneva, 1952–58; Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, 4 vols, ICRC, Geneva, 1952–60.

25 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952 (1952 Commentary on GC I), p. 8.

26 ICRC, Minutes of Meeting, Working Session, 30 April 1953, ICRC Archives.

27 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentaire des protocoles additionnels du 8 juin 1977 aux Conventions de Genève du 12 août 1949*, ICRC, Geneva, 1986; Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987 (ICRC Commentary on the APs).

jurists Jean de Preux, Yves Sandoz, Bruno Zimmermann, Hans-Peter Gasser, Claude F. Wenger and Sylvie-Stoyanka Junod, as well as technical adviser Philippe Eberlin. The latter had been an officer on neutral merchant vessels during the Second World War, before beginning a long career with the ICRC as a delegate in 1945. An expert on the identification of medical transports, he wrote the Commentary on the Regulations Concerning Identification, Annex I to Additional Protocol I (AP I).²⁸ The first woman to author an ICRC Commentary, Sylvie-Stoyanka Junod wrote the Commentary on Additional Protocol II (AP II), relating to the protection of victims of non-international armed conflicts. Like many other ICRC commentators, she was a jurist who would also acquire considerable experience in the field. Her ICRC career spanned over thirty years, both at the organization's headquarters and as a delegate in Latin America, Uganda, Sri Lanka, Georgia, India and Iraq. Jean Pictet, honorary vice-president of the ICRC at the time, presided over the reading committee, which oversaw the drafting of the Commentary.

The Commentaries on the 1949 Conventions and their Additional Protocols of 1977 had been published in French and English only. In 1998, the Commentary on common Article 3 and AP II was published by the ICRC in one volume in Spanish, bringing together a commentary on all articles related to non-international armed conflict. This reflected the increasing importance of the law governing non-international armed conflict, which had become the prevalent form of armed conflict. The stand-alone Spanish translation of the Commentary on AP I followed in 2001.²⁹ Other provisions were perhaps seen as less of a priority for wide dissemination: when Annex I of AP I (containing the regulations for identification of various categories of persons and objects) was amended in 1993, the Commentary on it was amended as well, but the updated Commentary was published only in French³⁰ and has so far not been translated into English.

In 2006, ICRC legal adviser Jean-François Quéguiner – who was a member of the ICRC delegation to the 2005 Diplomatic Conference – wrote the Commentary on the newly adopted Additional Protocol III. This Commentary was published in the *International Review of the Red Cross* in French that year, and translated into English, Arabic, Spanish, Chinese and Russian the next.³¹ This represented a significant expansion in the target audience from the previous

28 Philippe Eberlin, "Underwater Acoustic Identification of Hospital Ships", *International Review of the Red Cross*, Vol. 28, No. 267, 1988, p. 518.

29 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Comentario del Protocolo del 8 de junio de 1977 adicional a los Convenios de Ginebra de 12 de agosto de 1949 relativo a la protección de las víctimas de los conflictos armados internacionales (Protocolo I), Comentario ... sin carácter internacional (Protocolo II) y del artículo 3 de estos Convenios*, 3 vols, ICRC, Bogotá, 1998–2001.

30 Dominique Loye, *Annexe (I) du Protocole (I): Règlement relatif à l'identification (tel qu'amendé le 30 novembre 1993): Commentaire de 2002*, 2002, available at: <https://tinyurl.com/3kkuxbuj>. The 2002 commentary on Annex I, like its 1987 predecessor, comments on the annex article by article.

31 Jean-François Quéguiner, "Commentaire du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à l'adoption d'un signe distinctif additionnel (Protocole III)", *Revue Internationale de la Croix-Rouge: Sélection Française*, Vol. 88, 2006; Jean-François Quéguiner, "Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an

ICRC Commentaries, which were originally produced in English and French only, and much later in Spanish.

Quite a few of the “usual suspects” of the ICRC’s history – from Gustave Moynier to Jean Pictet – have thus left their mark on the history of the Commentaries. But, with the development of the law, State practice and standards for treaty interpretation, there has been a clear evolution towards a more collaborative effort, with the authority of a Commentary resting on its authors’ combined expertise and rigorous methodology, rather than on the profile of a main author.

In 2011, the ICRC decided to update its Commentaries on the 1949 Geneva Conventions and their 1977 Additional Protocols to take into account the State practice and legal developments that had taken place in the decades since the Conventions were adopted.³² The goal of this endeavour is to ensure that the Commentaries are fit for purpose in contemporary armed conflicts and can serve as a useful interpretive tool for practitioners.³³

The current project to update the ICRC Commentaries on the 1949 Geneva Conventions and their Additional Protocols is the work of many contributors, both internal and external to the ICRC.³⁴ Some of the authors of the Commentaries work in the in-house team dedicated to this project, while others work elsewhere in the ICRC. A number of authors do not work for the ICRC. All the authors of the Commentary on a given Convention are on the reading committee, and thus have an opportunity to give feedback on the Commentaries drafted by others. In addition to external authors, there are around fifty external peer reviewers from all over the world for each of the Commentaries, some working on multiple volumes, totalling over 120 peer reviewers (so far). These are practitioners and academics who ensure that a range of professional specialties and geographically diverse perspectives are represented. Lastly, there is an editorial board to provide

Additional Distinctive Emblem (Protocol III)”, *International Review of the Red Cross*, Vol. 89, No. 865, 2007.

32 See, announcing the start of the project, Jean-Marie Henckaerts, “Bringing the Commentaries on the Geneva Conventions and their Additional Protocols into the Twenty-First Century”, *International Review of the Red Cross*, Vol. 94, No. 888, 2012, available at: <https://international-review.icrc.org/articles/bringing-commentaries-geneva-conventions-and-their-additional-protocols-twenty-first>.

33 See, for example, comments by Liesbeth Lijnzaad and Titus K. Githiora in Samuel Longuet, Julien Tropini, Alice Sinon and Pauline Lesaffre, “Conference on the ICRC Updated Commentary on the First Geneva Convention: Capturing 60 Years of Practice”, *Military Law and the Law of War Review*, Vol. 56, No. 1, 2017–18, pp. 178, 211; Steven Hill, “Geneva Convention III Commentary: Implementing POW Convention in Multinational Operations”, *Just Security*, 28 October 2020, available at: www.justsecurity.org/73074/geneva-convention-iii-commentary-implementing-pow-convention-in-multinational-operations/; Tim Wood, “GCIII Commentary: Removing Ambiguity on the Treatment of Prisoners of War”, *Humanitarian Law & Policy Blog*, 29 October 2020, available at: <https://blogs.icrc.org/law-and-policy/2020/10/29/gciii-commentary-removing-ambiguity/>. For video testimony on the utility of the updated Commentaries from practitioners and ICRC staff, see ICRC, “Third Geneva Convention – Updated Commentary”, 8 April 2021, available at: www.youtube.com/watch?app=desktop&v=HoEM7qFUWC4.

34 Lindsey Cameron, Eve La Haye, Heike Nierbergall-Lackner, Jean-Marie Henckaerts and Bruno Demeyere, “The Updated Commentary on the First Geneva Convention: A New Tool for Generating Respect for International Humanitarian Law”, *International Review of the Red Cross*, Vol. 97, No. 900, 2016, p. 1212, available at: <https://international-review.icrc.org/articles/updated-commentary-first-geneva-convention-new-tool-generating-respect-international>.

guidance and support to the project team, made up of a balance of internal ICRC legal experts and external legal experts representing academics, judges and military practitioners.³⁵ Given all this involvement from legal experts within and outside the ICRC, it is clear that we have come a long way from commentaries that represented the personal opinion of a single jurist.

Methodology

Each of the ICRC Commentaries published since 1870 provides

an article-by-article “commentary” or explanation of the meaning of each provision, its paragraphs, terms, and sentences. For each article, a commentary provides elements for the interpretation of that provision. In addition, a commentary explains the links between articles in a treaty or group of treaties, as well as its links with other rules of international law.³⁶

Some Commentaries are organized differently, providing an overview of the topics addressed.³⁷

The early commentaries introduced above followed the most common structure of an “article-by-article” explanation of the treaty, dissecting each provision and defining key terms. This textual analysis was – and remains – informed by each treaty’s drafting history, by State practice and, in more recent history, by the practice of international courts and tribunals. In the case of a revision of an existing treaty, commentators relied on the analysis featured in their predecessors’ commentaries, to pinpoint areas of change and continuity. The ICRC commentators followed closely the legal scholarship related to the treaties, which could also inform their work. Some books passed from one

35 The composition of the Editorial Committee has changed slightly for each Commentary published so far. For the Commentary Geneva Convention I, the Editorial Committee was made up of (in alphabetical order) Knut Dörmann, then chief legal officer and head of the ICRC’s Legal Division; Liesbeth Lijnzaad, a judge on the International Tribunal for the Law of the Sea; Marco Sassòli, professor at the University of Geneva; and Philippe Spoerri, the ICRC’s then director of international law and cooperation. The Editorial Committee for the Commentary on Geneva Convention II was made up of Knut Dörmann, Liesbeth Lijnzaad, Marco Sassòli and Philippe Spoerri. The Editorial Committee for the Commentary on Geneva Convention III was made up of Knut Dörmann, who at that time was the ICRC’s head of delegation in Brussels; Cordula Droeger, the ICRC’s incoming chief legal officer and head of the Legal Division; Helen Durham, the ICRC’s incoming director of law and policy; Liesbeth Lijnzaad; Marco Sassòli; Philip Spoerri, who at that time was the ICRC’s head of delegation in New York; and Brigadier General Kenneth Watkin (ret.), a former judge advocate from the Canadian Armed Forces. For the forthcoming Commentary on Geneva Convention IV, the Editorial Committee consists of Knut Dörmann; Cordula Droeger; Liesbeth Lijnzaad; Nils Melzer, the incoming ICRC director of law, diplomacy and policy; Marco Sassòli; and Wing Commander Tim Wood, chief legal adviser at Headquarters Joint Forces New Zealand.

36 Jean-Marie Henckaerts, “The Impact of Commentaries on Compliance with International Law”, in American Society of International Law, *Proceedings of the 115th Annual Meeting*, 3 March 2021, p. 56, available at: <https://doi.org/10.1017/amp.2021.99>.

37 This is the case for another prominent Commentary on the 1949 Geneva Conventions and their Additional Protocols: Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015.

commentator to the next. A French translation of German jurist and professor Carl Lueder's 1876 volume on GC I, for example, belonged successively to Gustave Moynier and to Paul Des Gouttes.³⁸ As the law developed, ICRC commentators of revised or new treaties were able to build on the work of their predecessors precisely because those sources were collected and preserved, thus passing from one "generation" to the next. Finally, the commentators have also systematically been able to draw from what the ICRC had observed during past conflicts. Because of its dual mandate, the organization has historically been uniquely positioned to comment on what worked, and what did not, in the law and its application. Paul Des Gouttes, for instance, recalled practical examples from the work of the International Agency for Prisoners of War, operated by the ICRC during the First World War, to explain the drafters' intentions on specific provisions of the revised 1929 Geneva Convention. He pointed out how the belligerents' reluctance to repatriate captured sanitary personnel, a situation that the ICRC had denounced during the war, impacted the revision of the related article in the Convention.³⁹ He also presented the new obligation to establish and transmit certificates of death as a direct consequence of the Agency's efforts to get such documentation, so that families could be informed of their loved ones' deaths.

The ICRC Commentaries have thus relied on similar types of sources throughout history. They have also shared a common purpose: to make sense of the treaties and, for each of the treaties' provisions, to help bridge the gap between the letter of the law and its application in concrete situations. However, as both law and State practice developed over time, the amount of information to consider dramatically increased, requiring a more systematic and rigorous approach. GC I had ten articles in 1864 when it was first adopted, thirty-three after the 1906 revision, thirty-nine after the 1929 revision and sixty-four (plus annexes) in its final 1949 version. Quite logically, the Commentary's number of pages almost doubled in size between the 1870 and 1952 publications, and more than doubled again between 1952 and the 2016 update, from 542 to 1,344 pages. This evolution is inevitable if the updated Commentaries are to be truly comprehensive. Today, their clear structure and the possibility of accessing the commentary on a specific article online with a few clicks help to guarantee that they remain an accessible practical tool for practitioners, despite their length.

The ICRC Commentaries' methodology has also evolved over time in line with the development of recognized standards for treaty interpretation. Interestingly, some of the principles of treaty interpretation later codified in the Vienna Convention on the Law of Treaties (VCLT)⁴⁰ can already be found in the very early commentaries, introduced as being derived from common sense by the commentator. Moynier, for instance, fought back against criticism regarding

38 Carl Lueder, *La Convention de Genève au point de vue historique, critique et dogmatique*, ICRC, Geneva, and Eduard Besold, Erlangen, 1876.

39 P. Des Gouttes, above note 17, pp. 72–86.

40 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 22 May 1969 (entered into force 27 January 1980) (VCLT).

the lack of precision of the term ‘force militaire’ in the 1864 Convention by referring to the ‘esprit général’ (general purpose) of the treaty;⁴¹ this is in line with Article 31(1) of the VCLT, which requires treaties to be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context *and in light of its object and purpose*” (emphasis added). Moynier had taken particular care to include a section on the purpose of the treaty in his commentary before starting the analysis of its provisions. Time and time again, he returned to this point to refute interpretations that ran contrary to the drafters’ intentions. Paul Des Gouttes would make a similar point in his text, half a century later: “the general purpose of the Convention must inform all of its application, even in the details”.⁴²

The commentators on the 1864, 1906 and 1929 Conventions present their sources, but are less explicit regarding their methodology; instead, each author’s first-hand knowledge of the treaty’s drafting history was asserted as evidence of the commentary’s reliability. This first changed in Pictet’s era, as he drafted methodological guidelines for the team in charge of the Commentaries on the four 1949 Geneva Conventions. In that document, he stressed the importance of rooting the Commentaries’ analysis in the history of the Conventions, relying on the 1949 Diplomatic Conference’s records and other preparatory works from 1946–48. He saw it as necessary to incorporate in the Commentaries the experiences of past conflicts, especially of the Second World War, in order to make sense of the addition of new provisions or the revision of existing ones. Finally, he stated that

although it [will be] a scientific work, the commentary must be clear and accessible to non-lawyers. The style, therefore, must be simple. It will be impersonal and if the author of the commentary has opinions to which he would like to give a more personal touch, he will mark them clearly in the margin.⁴³

This was a clear departure from earlier commentaries, in which authors did not hesitate to make their personal point of view known, criticize or praise the drafters on terminology choices, and make recommendations for future revisions of the law. It is apparent in these methodological guidelines that Pictet saw the preparation of the new Commentaries as a collaborative effort. He notably requested that the authors share their texts with each other at an early stage. The ICRC Commentary on the 1977 Additional Protocols confirmed this evolution; it was explicitly presented as a collective work, prepared according to a series of

41 G. Moynier, above note 2, pp. 143–144: “On a été jusqu’à prétendre que les corps sanitaires, classés dans beaucoup de pays parmi les combattants, pourraient être considérés comme une force militaire. Mais cet exemple, par son exagération même, nous rassure au lieu de nous alarmer. Confronté avec l’esprit général de la Convention, ne montre-t-il pas à quelles subtilités inouïes la critique est contrainte de recourir pour battre en brèche un texte qui, s’il n’est pas irréprochable, est du moins fort intelligible et serre d’aussi près que possible la pensée des rédacteurs.”

42 P. Des Gouttes, above note 17, p. 191 (authors’ translation).

43 ICRC, “Schéma relatif à l’établissement des Commentaires des nouvelles Conventions de Genève”, Minutes of Meetings, Legal Commission, 14 September 1949, ICRC Archives.

well-defined procedures. The commentary on each article was discussed by a reading committee and went through a minimum of two rounds of edits in order to take into account the committee's remarks and ensure consistency across the board.⁴⁴

The authors of the so-called “Pictet Commentaries” were basing their work on State practice prior to the negotiation of the Conventions, notably during the Second World War, and several of them were present at the negotiations themselves and could therefore provide first-hand insights into what the drafters were thinking. The methodology behind the ICRC's ongoing project to update its Commentaries on the 1949 Geneva Conventions and their Additional Protocols is necessarily different.⁴⁵ First, the updated Commentaries are based on State practice and legal developments in the more than seventy years since the adoption of the 1949 Conventions, rather than practice in the lead-up to their negotiation. There is a significant amount of material to delve into, as evidenced by the comparative length of the updated Commentaries. For example, in the 1960 Pictet Commentary on Geneva Convention III, the commentary on common Article 3 is approximately twenty pages long; by contrast, in the 2020 updated Commentary, the commentary on common Article 3 is over 200 pages. This demonstrates the extensive research behind the commentary on each and every article.

Second, this once-in-a-generation update follows the interpretive tools laid down in the VCLT, using that Convention as its methodology. As stated above, under Article 31 of the VCLT, treaties must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose”. Additional elements that must be taken into account are any subsequent agreements between the parties to the treaty about its interpretation or application, subsequent practice establishing the agreement of all parties regarding the treaty's interpretation (although such unanimous agreement is exceedingly rare for universally accepted treaties like the Geneva Conventions), and other relevant rules of international law that apply in relations between the parties. The VCLT is a comprehensive interpretive tool that must be used as a whole to interpret each treaty provision. In other words, it is not possible to pick and choose which elements to apply – all of them must be used together.

Article 32 of the VCLT refers to supplementary means of interpretation that can confirm or clarify the interpretation of treaty provisions. These include the treaty's preparatory work, State practice that does not fall under Article 31 (the vast majority of State practice referenced in the updated Commentaries), the circumstances of the treaty's conclusion, judicial decisions, and scholarly literature.⁴⁶ In looking at

44 ICRC Commentary on the APs, above note 27, pp. xxv–xxvi.

45 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020, paras 75–123, available at: <https://ihl-databases.icrc.org/ihl/full/GCIII-commentary>.

46 Jean-Marie Henckaerts and Elvina Pothelet, “The Interpretation of IHL Treaties: Subsequent Practice and Other Salient Issues”, in Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law*, Edward Elgar, Cheltenham, 2021, pp. 162–168.

State practice, the drafters of the updated Commentaries are able to rely on the ICRC's first-hand observations, some of which are published in its annual reports, press releases, and the *International Review of the Red Cross*, as well as its vast Archives, both those that are open to the public and those that are still sealed.⁴⁷

In accordance with Article 33 of the VCLT, where a treaty has been authenticated in two or more languages, the text is equally authoritative in each language. In such cases, the different-language versions of the treaty must be interpreted to be consistent with each other. This means that the equally authentic French and English versions of the Geneva Conventions can be compared to clarify the meaning of terms. This task is particularly complex for the Additional Protocols, which are equally authentic in all six official UN languages.⁴⁸

Similar to other contemporary ICRC publications,⁴⁹ the updated Commentaries are more open to a diversity of legal positions, and acknowledge alternate legal interpretations where there is no consensus. They are produced in English, but will be translated into the other five official UN languages, reflecting the fact that this is a global conversation that should be open to all, and indeed must be if it is to provide the best possible guidance for practitioners around the world.

Audience and reception

Who are the ICRC Commentaries written for? Jean-Marie Henckaerts, who leads the ICRC project on updating the Commentaries, clearly specifies that

[a]s a genre, commentaries are addressed specifically to practitioners and can play a significant role in enhancing compliance. The purpose of commentaries is to clarify the meaning of the norms so that they can be applied in a well-informed and coherent manner.⁵⁰

To do this effectively, the ICRC Commentaries have sought to be a practical tool, accessible to practitioners who often operate in the midst of hostilities.

Over 150 years ago, when Moynier's commentary on GC I was featured in Louis-Auguste Martin's *Annuaire philosophique*, it was with the latter's

47 For information on the ICRC Archives, see Valerie McKnight Hashemi, "A Balancing Act: The Revised Rules of Access to the ICRC Archives Reflect Multiple Stakes and Challenges", *International Review of the Red Cross*, Vol. 100, No. 907–909, 2018.

48 The six official UN languages are, in alphabetical order, Arabic, Chinese, English, French, Russian and Spanish. See UN, "Official Languages", available at: www.un.org/en/our-work/official-languages.

49 For instance, the *Review* itself, which has made significant progress in diversifying authorship. See Cédric Cotter and Ellen Policinski, "A History of Violence: The Development of International Humanitarian Law Reflected in the International Review of the Red Cross", *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 1, 2020; Bruno Demeyere, "Editorial: Emerging Voices: Increasing the Diversity of Voices Featured in the International Review of the Red Cross", *International Review of the Red Cross*, Vol. 102, No. 914, 2021, pp. 511–513.

50 J.-M. Henckaerts, above note 36, p. 57.

recommendation that his book “be put in the hands of all army and navy officers, and summarized in a few pages for the instruction of the soldier. No one should be able to claim ignorance.”⁵¹ Because the treaty was to be applied during hostilities, its dissemination among decision-makers in governments and in the armed forces was always perceived to be of the utmost importance. This most certainly motivated the publication of the early commentaries, as evidenced by their authors’ insistence on the drafters’ pragmatic grasp of military realities.

In the 1950s, the original ICRC Commentaries on the 1949 Geneva Conventions were sent out upon publication to various selected governments. Each copy was addressed to the Ministry of Foreign Affairs, which was in turn invited to share the information with all the ministries and services concerned, starting with health, the interior and national defence.⁵² Copies were addressed to National Red Cross and Red Crescent Societies throughout the world. Selected libraries, like the US Library of Congress and the Bodleian Library in Oxford, and key academics and international law practitioners also received copies. The latter category included, notably, Sir Hersch Lauterpacht, Erik Castrén, executive director of the Japanese Society of International Law Juji Enomoto, and the International Law Commission. Finally, the Commentaries were also distributed to a series of law journals. The French edition of the Commentary on GC I, for instance, was sent to fifty-nine journals, including *L’Etat et le Droit Soviétique* in Moscow, the *Boletim da Sociedade Brasileira de Direito Internacional* in Rio de Janeiro, and the *Annales de la Faculté de Droit* of St Joseph University of Beirut. This distribution list was perhaps more restrictive than might be expected given the stated goal of the publication – that is, to be “of service to all who, in Governments, armed forces, and National Red Cross Societies, are called upon to assume responsibility in applying the Conventions, and to all, military and civilians, for whose benefit the Conventions were drawn up”.⁵³ However, in the same period, the ICRC also produced other publications for dissemination purposes, many of them more accessible to the general public than a legal commentary. Practitioners and subject-matter experts were a logical priority for the Commentaries.

Representing the practitioner’s point of view, Colonel W. Hays Parks of the US Army presented the Pictet Commentaries as “an invaluable reference tool and historical record”, attributing to their editor the “invaluable role of the honest broker”. Hays Parks summed up the Commentaries’ impact with these words:

[I]n the development of any legal advice regarding the 1949 Geneva Conventions, they are the first reference to which one resorts; and more than one meeting or discussion has been shortened by the question, “What does Pictet say about this?”⁵⁴

51 Louis-Auguste Martin, *Annuaire philosophique: Examen critique des travaux de physiologie, de métaphysique et de morale accomplis dans l’année*, Vol. 7, Ladrangé, Paris, 1870, pp. 357–358.

52 ICRC Circular Fr563b, 16 March 1959, ICRC Archives, B AG 022 033.03.

53 1952 Commentary on GC I, above note 25, p. 8.

54 W. Hays Parks, “Pictet’s Commentaries”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet*, ICRC, Geneva, and

Other experts have similarly acknowledged the weight that the Pictet Commentaries have acquired over time. For instance Professors Schmitt and Watts call the ICRC Commentaries “leading sources of clarification and background on the Conventions and Protocols for decades”, going on to say that “it is difficult to overstate their influential and nearly authoritative status”.⁵⁵ Because of their widespread acceptance, many scholars rely on the Pictet Commentaries as a matter of course, either expressly calling them “authoritative” or without feeling the need to justify the resort to a work of legal literature.⁵⁶

The original ICRC Commentaries have thus become quite authoritative over time, and in addition to being regularly cited in academic works, have been cited numerous times by various international tribunals,⁵⁷ domestic courts,⁵⁸ and

Nijhoff, The Hague, 1984, p. 496. Hays Parks was then chief of international law in the Office of the Judge Advocate General of the US Army.

- 55 Michael N. Schmitt and Sean Watts, “State *Opinio Juris* and International Humanitarian Legal Pluralism”, *International Law Studies*, Vol. 91, No. 1, 2015, pp. 192–193.
- 56 See, e.g., Mao Xiao, “Are ‘Unlawful Combatants’ Protected under International Humanitarian Law?”, *Amsterdam Law Forum*, Vol. 10, No. 2, 2018, pp. 65, 68, available at: <https://amsterdamlawforum.org/articles/abstract/10.37974/ALF.321/>; Tatiana Londoño-Camargo, “The Scope of Application of International Humanitarian Law to Non-International Armed Conflicts”, *Vniversitas*, Vol. 64, No. 130, 2015, p. 210, available at: <https://revistas.javeriana.edu.co/index.php/vnijuri/article/view/13678>; Fionnuala Ni Aoláin, “*Hamdan* and Common Article 3: Did the Supreme Court Get It Right?”, *University of Minnesota Law Review*, Vol. 91, No. 5, 2007, p. 1539, available at: https://scholarship.law.umn.edu/faculty_articles/73/; Guanzhu Yan, “Analysis of the Scope of ‘Protected Persons’ in the Fourth Geneva Convention of 1949”, *Human Rights*, Vol. 10, No. 1, 2011, p. 9 fn. 5; Alain-Guy Sipowo, “Does International Criminal Law Create Humanitarian Law Obligations? The Case of Exclusively Non-State Armed Conflict under the *Rome Statute*”, *Canadian Yearbook of International Law*, Vol. 51, No. 1, 2013, p. 292 fn. 12, available at: <https://tinyurl.com/uys3n45>.
- 57 See, for example, International Court of Justice (ICJ), *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Separate Opinion of Judge Simma, 19 December 2005, *ICJ Reports 2005*, paras 26, 34, 39; ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Dissenting Opinion of Judge Cañado Trindade, 6 July 2010, *ICJ Reports 2011*, paras 137, 145, 148; International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Blaskić*, Case No. IT-95-14, Decision on the Defence Motion to Strike Portions of the Amended Indictment Alleging “Failure to Punish” Liability (Trial Chamber), 4 April 1997, para. 4(d); ICTY, *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment (Appeals Chamber), 24 March 2000, paras 22, 26–27, 104; ICTY, *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (Appeals Chamber), 20 February 2001, paras 31, 78–79, 96, 132, 143–149, 166, 233, 238, 250, 254–255, 327, 330, 416; ICTY, *Prosecutor v. Vasiljević*, Case No. IT-98-32-T, Judgment (Trial Chamber), 29 November 2002, paras 195, 203, 223; ICTY, *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment (Trial Chamber), 31 July 2003, para. 459; ICTY, *Prosecutor v. Hadzihasanović and Kubura*, Case No. IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal (Appeals Chamber), 11 March 2005, paras 17, 25; ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment (Appeals Chamber), 17 July 2008, paras 167, 173, 176–178, 270, 286–287, 298, 329; International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment (Trial Chamber), 6 December 1999, paras 92, 100; ICTR, *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgment (Appeals Chamber), 1 June 2001, paras 437, 441; ICTR, *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment (Trial Chamber), 15 May 2003, paras 355, 357, 359, 363–364, 366–367; ICTR, *Setako v. Prosecutor*, Case No. ICTR-04-81-A, Judgment (Appeals Chamber), 28 September 2011, para. 260.
- 58 See, for example, US Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defense et al.*, 126 S. Ct. 2749, 2764 (2006), Majority Opinion, Justice Thomas Dissenting and Justice Alito Dissenting, 2006; Republic of Colombia, Jurisdicción Especial Para La Paz, Salas de Justicia Sala de Reconocimiento de Verdad, de Responsabilidad y de Determinación de los Hechos y Conductas, Auto No. 19 of 2021, Bogotá, 26 January 2021.

UN documents such as the reports of the Human Rights Council.⁵⁹ This demonstrates that they serve as a valuable resource, and the hope is that the updated Commentaries will do so even more, as they include many more examples of State practice and refer to diverging viewpoints that may shed light on the law as it has developed since the Conventions were adopted. We can already see tribunals and scholars beginning to rely on the updated Commentaries.⁶⁰

The updated Commentaries are not only an academic resource but above all are intended to serve as a practical tool for military commanders, officers, and lawyers and other practitioners who must apply the Geneva Conventions, such as judges, legislators, policy-makers and humanitarians.⁶¹ They are written in clear language and strive to clarify ambiguity,⁶² while leaving room for nuance and acknowledging different schools of thought on how the Conventions should be interpreted.

Despite questions about how the VCLT's treaty interpretation methodology has been applied⁶³ and whether the Commentaries go too far in suggesting how the law should develop,⁶⁴ as well as many strong reactions to the description of the "duty to ensure respect" contained in common Article 1,⁶⁵ the updated Commentaries have been well received by the international legal community.⁶⁶ As Tania Arzapalo Villón from Peru's Ministry of Justice and Human Rights says:

59 See, for example, Human Rights Council, *"There Is Nothing Left for Us": Starvation as a Method of Warfare in South Sudan*, UN Doc. A/HRC/45/CRP.3, 5 October 2020, paras 34, 37.

60 See, for example, International Criminal Court, *The Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9 (Appeals Chamber), 17 January 2017, para. 50; Katayoun Hosseinnejad and Pouria Askary, "The Obligation to Exercise 'Leniency' in Penal and Disciplinary Measures against Prisoners of War in Light of the ICRC Updated Commentary on the Third Geneva Convention", *International Review of the Red Cross*, Vol. 104, No. 919, 2022. See also the article by Antoon De Baets in this issue of the *Review*.

61 See ICRC, "Updated Commentaries Bring Fresh Insights on Continued Relevance of Geneva Conventions", interview with Jean-Marie Henckaerts, 7 March 2016, available at: www.icrc.org/en/document/updated-commentaries-first-geneva-convention.

62 T. Wood, above note 33.

63 See Michael W. Meier, "The Updated GCIII Commentary: A Flawed Methodology?", *Articles of War*, 3 February 2021, available at: <https://lieber.westpoint.edu/updated-gcii-commentary-flawed-methodology/>; Kevin Jon Heller, "First Thoughts from Academia on the Updated GCI Commentary", *OpinioJuris*, 22 July 2016, available at: <http://opiniojuris.org/2016/07/22/multi-blog-series-first-thoughts-on-the-updated-gci-commentary-from-academia/>.

64 Eric Jensen and Carolyn Sharp, "Non-State Commentaries: Law-Making or Law-Suggesting?", *Articles of War*, 8 April 2021, available at: <https://lieber.westpoint.edu/non-state-commentaries-law-making-law-suggesting/>.

65 Michael N. Schmitt and Sean Watts, "Common Article 1 and the Duty to 'Ensure Respect'", *International Law Studies*, Vol. 96, No. 1, 2020; Verity Robson, "Ensuring Respect for the Geneva Conventions: A More Common Approach to Article 1", *OpinioJuris*, 17 July 2020, available at: <http://opiniojuris.org/2020/07/17/ensuring-respect-for-the-geneva-conventions-a-more-common-approach-to-article-1/>; Elizabeth Stubbins Bates, "Geneva Convention III Commentary: Unpacking the Potential of 'Ensure Respect' in Common Article 1", *Just Security*, 30 October 2020, available at: www.justsecurity.org/73166/geneva-convention-iii-commentary-unpacking-the-potential-of-ensure-respect-in-common-article-1/.

66 See Diane Marie Amann, "Commenting on the ICRC Geneva Commentaries", 15 March 2016, available at: <https://dianemarieamann.com/2016/03/15/commenting-on-the-icrc-geneva-commentaries-30-march-in-d-c/>; Eden Lapidor, "New Developments in ICRC Commentaries to the POW Convention", *Just Security*, 18 June 2020, available at: www.justsecurity.org/70863/pow-geneva-convention-commentary-

In the field of international humanitarian law, especially for actors like us who have the task of promoting its implementation, the Commentaries will give us a solid tool with technical and legal aspects that will [not only] facilitate ... the work with the various actors, but also reinforce and improve our work.⁶⁷

Others have praised the updated Commentaries for their incorporation of a modern understanding of the roles played by women in armed conflict,⁶⁸ as well as how detention is carried out during multilateral operations,⁶⁹ among other things. As Major General Nilendra Kumar points out:

Law is not static or dormant. The facts, interpretation, and applications of law change with the passage of time. This is what makes regular revision of the commentary relevant. It brings out narration and details of new experiences that need to be assessed on the touchstone of the IHL.⁷⁰

Looking beyond the substance of the criticisms (and praise) that have met the updated Commentaries, what is notable is that the legal context itself has changed. As with other ICRC publications like the *International Review of the Red Cross*, as the debates among scholars became more sophisticated, the ICRC began to engage more meaningfully with external legal experts.⁷¹ With the advent of blogs and social media, scholars and practitioners worldwide are able to give almost instantaneous feedback and to engage directly with the project team while the drafting process is ongoing.⁷² This is of course also possible at professional conferences and in other “analogue” or “traditional” ways, but new communication tools have enabled this dialogue on a wider scale and in a more inclusive manner. The Commentaries themselves have also been adapted for the

highlights-of-new-developments/; Keiichiro Okimoto, “The United Nations and the Third Geneva Convention”, *EJLL: Talk!*, 26 October 2020, available at: www.ejlltalk.org/the-united-nations-and-the-third-geneva-convention/. The project to update the ICRC Commentaries was also the subject of the 22nd edition of the Bruges Colloquium, an annual workshop co-hosted by the ICRC and the College of Europe that brings together legal practitioners from around Europe. See Colloquium’s website, available at: www.coe-icrc.eu/en/programme.

67 ICRC, above note 33, at 4:15 (ICRC’s translation).

68 Catherine O’Rourke, “Geneva Convention III Commentary: What Significance for Women’s Rights?”, *Just Security*, 21 October 2020, available at: www.justsecurity.org/72958/geneva-convention-iii-commentary-what-significance-for-womens-rights/.

69 S. Hill, above note 33.

70 Nilendra Kumar, “‘An Important Document to Reiterate Obligations Under Third Geneva Convention’ – Maj Gen Nilendra Kumar”, *ICRC New Delhi Blog*, 15 June 2020, available at: <https://blogs.icrc.org/new-delhi/2020/06/15/important-document-to-reiterate-the-obligations-under-geneva-conventions-maj-gen-nilendra-kumar/>.

71 See C. Cotter and E. Policinski, above note 59, pp. 36–67.

72 See Mikhail Orkin, “In Bruges: The Enduring Relevance of IHL and the Updated Commentaries”, *Humanitarian Law & Policy Blog*, 23 February 2021, available at: <https://blogs.icrc.org/law-and-policy/2022/02/23/bruges-ihl-commentaries/>; Kelisiana Thynne, “GCIII Commentary Symposium: ‘Preparations Have been Made in Advance – GCIII and the Obligation to Respect and Ensure Respect by Preparing for Retaining POWS’”, *OpinioJuris*, 27 January 2021, available at: <http://opiniojuris.org/2021/01/27/gciii-commentary-symposium-preparations-have-been-made-in-advance-gciii-and-the-obligation-to-respect-and-ensure-respect-by-preparing-for-retaining-pows/>; S. Hill, above note 33; K. Okimoto, above note 66.

digital age; they can be consulted online via the ICRC's online IHL Database of Treaties, States Parties and Commentaries⁷³ and IHL mobile app.⁷⁴

Ultimately, exchanges with scholars and practitioners allow the Commentaries to be more accurate and therefore more useful, as evidenced by the addition of new analysis to the commentary on common Article 1 in the Commentary on Geneva Convention III to reflect diverging views following intense debate in the legal literature. The fact that more participants are able to engage in these conversations within a shorter range of time means that the process of updating the Commentaries is more dynamic than the drafting of the original Commentaries was. It is not a single legal scholar opining but a network of scholars working together to reflect how the law is being interpreted and applied.

Concluding remarks

There is a clear continuity in the Commentaries' purpose throughout history. Their methodology, however, has evolved to best fulfil that purpose, in line with the development of the codification of the principles of treaty interpretation and the standards of treaty commentaries as a genre of international legal scholarship.

The ICRC remains in a unique position to put forward such interpretative guidance on the application of the Geneva Conventions and their Additional Protocols. Because of its central role in the development of IHL and because of its humanitarian mandate, it has unparalleled access and insight into the history of the Conventions and their application in armed conflict. Neither the ICRC nor its intended audiences are content to rely on the reputation of a single jurist as a sufficient guarantee of the quality of its Commentaries any longer. Today, its jurists base their analysis on the comprehensive records and resources of its Archives and Library, which document decades of State practice. The ICRC is in a unique position to draw on these records, examine seventy years of the Conventions "in action", and present its findings in a condensed and accessible way. Ultimately, the authority of the updated Commentaries stems from their quality, which in turn comes from the diligent research carried out by the commentators and the application of the robust treaty interpretation methodology found in the VCLT and applied to each individual article of the 1949 Geneva Conventions and their 1977 Additional Protocols.

73 Available at: <https://ihl-databases.icrc.org/ihl>.

74 See ICRC, "IHL App 2.0: International Humanitarian Law and More in Your Pocket", 1 October 2021, available at: www.icrc.org/en/document/ihl-digital-app.

The African Union's humanitarian policies: A closer look at Africa's regional institutions and practice

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Abstract

This article sheds light on the legal instruments and policies adopted by the Organization of African Unity/African Union (AU) in relation to international humanitarian law. It also offers analysis on the role of the AU institutions that provide humanitarian and disaster relief. The article highlights the importance of the institutions established to improve the capacity of regional and national institutions for humanitarian prevention and response. It reflects on the reasons why the AU focuses on early warning systems to address the root causes of conflicts and humanitarian disasters, rather than only adopting reactive policies after the fact, in order to save lives and prevent human suffering.

Keywords: African Union, regional institutions, AU Constitutive Act, OAU Charter, Peace and Security Council, migration, refugees, African Standby Force, internally displaced persons, AU Humanitarian Policy Framework, African Humanity Agency, humanitarian disasters.



Historically and today, Africa has been subjected to heinous violence. Since 1946, it has been the scene of one third of all armed inter- and intra-State conflicts,¹ and since 1989, the site of 75% of the world's conflicts between non-State actors.² The international community's inability to adequately address tragedies like the collapse of the Somali State, the Rwandan genocide, the long-running conflict in the Democratic Republic of the Congo and the crisis in Darfur has animated discussions of emerging African capacities to protect populations at risk of grave human rights abuses³ and international humanitarian law (IHL).

In Africa, 80% of catastrophes are caused by internal conflicts and other forms of socio-political instability that have severe impacts on people's lives and livelihoods.⁴ Moreover, the COVID-19 pandemic has exacerbated problems such as climate change, political instability, conflicts and diseases, combined with an increase in internally displaced persons (IDPs), refugees and migrants.⁵ All these factors contribute to asset losses, infrastructure damage, food insecurity, poverty and hunger that impede future growth and development in the African continent.

In April 1999, the First Organization of African Unity (OAU) Ministers' Conference on Human Rights in Africa, held in Grand Bay, Mauritius, called on the OAU secretary-general to develop appropriate strategies and take measures to sensitize and raise awareness among the African population about human rights and IHL, in the Grand Bay (Mauritius) Declaration and Plan of Action.⁶ Part of this instrument is devoted to discussing how IHL is being put into action across the continent.⁷

The transformation of the OAU into the African Union (AU) augmented the engagement of the organization in the field of IHL. Some aspects of IHL can be traced in the Constitutive Act – the founding document of the AU – and other legal instruments pertaining to the establishment of the AU's organs, as will be detailed later. Moreover, be it in drawing up policies or in action taken on the

1 Lotta Themnér and Peter Wallensteen, "Armed Conflicts, 1946–2013", *Journal of Peace Research*, Vol. 51, No. 4, 2014.

2 Mohammed Ayoob, *The Third World Security Predicament*, Lynne Rienner, Boulder, CO, 1995; Walter Barrows, "Ethnic Diversity and Political Instability in Black Africa", *Comparative Political Studies*, Vol. 9, No. 2, 1976.

3 Kristiana Powell, *The African Union's Emerging Peace and Security Regime, Opportunities and Challenges for Delivering on the Responsibility to Protect*, ISS Monograph Series No. 119, North-South Institute, 2005.

4 W. Alade Fawole, "Review Article: A Continent in Crisis: Internal Conflicts and External Interventions in Africa", *African Affairs*, Vol. 103, No. 411, 2004.

5 "Does Africa Need Its Own Humanitarian Agency?", *ISS PSC Report*, 8 June 2021, available at: <https://issafrica.org/pscreport/psc-insights/does-africa-need-its-own-humanitarian-agency> (all internet references were accessed in July 2022).

6 Grand Bay (Mauritius) Declaration and Plan of Action, 1st OAU Ministers' Conference on Human Rights in Africa, Grand Bay, April 1999, paras 20, 21.

7 *Ibid.*, para. 14.

ground through peacekeeping operations, the AU Commission operates in collaboration with different international institutions working on IHL such as the International Committee of the Red Cross and the Office of the UN High Commissioner for Refugees.⁸

This article will endeavour to take a closer look at the AU's legal instruments and institutions as they relate to the inclusion of IHL, examine the mandates given to different organs of the AU for humanitarian action, and appraise the implementation of the AU's instruments.

The rules and institutions within the AU framework

The Constitutive Act

Due to the political dynamics that led to the establishment of the OAU, especially fighting against colonialism, the organization was founded on respect for sovereignty and the principle of non-intervention in the internal affairs of States. Four of the seven basic principles outlined in Article 3 of the OAU Charter were concerned with African States' sovereignty and territorial integrity.⁹ In practice, the OAU regarded these as cardinal principles prohibiting it or any member State from scrutinizing an African State's domestic activities. Hence, it operated within this State-centric approach based on principles of State sovereignty and non-intervention.

The AU's Constitutive Act marked a complete shift from the OAU's cardinal principles by redefining sovereignty. Sovereignty was no longer considered as absolute, and the right of the organization to intervene in the affairs of its member States found its way to Article 4(h) of the Constitutive Act. This provision mandates the AU to "intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity".¹⁰ This not only establishes the legal foundation for intervention, but also obligates the AU to intervene in order to prevent or stop the commission of such heinous crimes against humanity anywhere in the continent.

Hence, it can be said that the balance of obligations has changed. From honouring the absolute sovereignty of a State, based on the non-intervention principle, Article 4(h) established a collective framework obligating the entire membership of the AU to intervene in the affairs of any member State that failed

8 See, for example, the Algiers Summit of July 1999, calling for a review of the OAU Charter; the Fourth Extraordinary Summit in Sirte in September 1999, which called for the creation of the AU; the Lomé Summit of July 2000, which adopted the Constitutive Act of the AU and the Solemn Declaration on the Conference on Security, Stability, Development and Cooperation in Africa; and the Maputo Summit of July 2003.

9 Charter of the Organization for African Unity, 479 UNTS 39, 13 September 1963 (OAU Charter), Art. III (2).

10 Constitutive Act of the African Union, Lomé, 11 July 2000 (AU Constitutive Act), Art. 4(h).

to protect its citizens from grave violations of IHL, including genocide, war crimes and crimes against humanity.

Consequently, it can be concluded that the Constitutive Act regards that sovereignty comes with obligations, including the responsibility of individual States to protect their civilians against violations of IHL; should a State fail to do so, it is an obligation on the AU member States to intervene. This notion of the collective responsibility to protect civilians was innovative at the time and was later introduced in the 2005 World Summit Outcome resolution adopted by the United Nations (UN) General Assembly,¹¹ known today as the Responsibility to Protect (R2P). Articles 138 and 139 of this resolution, which define the R2P, provide that “[e]ach individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing and crimes against humanity”,¹² and that

[t]he international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council ... in cooperation with relevant regional organizations.¹³

For the AU, the R2P is no longer a guiding principle but an obligation embedded in its founding document, that should be carried out by the member States of the organization. This can be considered a precedent where a governmental regional organization creates a legal obligation on its States to intervene in the affairs of another member of the same organization, in certain situations, contrary to the principle of absolute respect of sovereignty and non-interference in the internal affairs of States.¹⁴

The AU did not stop at finding solutions to conflicts through intervention, but also attempted, in the Constitutive Act, to address the root causes of those conflicts, hence reducing human suffering and the need to resort to IHL. In Article 13(1)(e), the Constitutive Act gives the Executive Council explicit powers to “coordinate and take decisions on policies in areas of common interest to the Member States, including ... environmental protection, humanitarian action, and disaster response and relief”. This was the basis for establishing several specialized agencies within the AU to deal with such matters, as will be detailed later.

11 UNGA Res. 60/1, “2005 World Summit Outcome”, 24 October 2005, available at: www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf.

12 *Ibid.*, Art. 138.

13 *Ibid.*, Art. 139.

14 One of the objectives for the establishment of the AU, as stipulated in Article 4 on the principles of the Union, is to “promote democratic principles and institutions, popular participation and good governance”: AU Constitutive Act, above note 10, Art. 3(g). The Constitutive Act expressed the unwillingness of States to tolerate grave human rights violations such as war crimes, crimes against humanity and genocide, and the responsibility of States to intervene and protect citizens from such violations.

Unlike the OAU Charter, the Constitutive Act also emphasizes human rights. This indicates an inclusive approach towards the protection of humans in the continent. Although it doesn't fall within the ambit of humanitarian law, honouring approved universal human rights law provisions is perceived to limit the root causes of internal violence and conflicts. One of the Constitutive Act's goals is to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments".¹⁵ The AU has carried out studies to protect human rights not only in peace time but also during armed conflicts, including the study entitled *Addressing Human Rights Issues in Conflict Situations*¹⁶ and the "General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: Children in Armed Conflict".¹⁷

The PSC Protocol and related instruments

Following the Constitutive Act, evidence of the promotion of IHL is visible in the provisions of Articles 3, 4, 7 and 13 of the Protocol Relating to the Establishment of the Peace and Security Council (PSC).¹⁸ One of the PSC Protocol's objectives is to prevent conflicts through the promotion and encouragement of democratic practices, good governance and the rule of law, as well as to protect human rights and fundamental freedoms, the sanctity of human life, and IHL (Articles 3(f), 4 (c) and 7(m)).

Additionally, Article 13(13) of the Protocol, which deals with training for the Standby Force, states that "[t]raining on International Humanitarian Law and International Human Rights Law, with particular emphasis on the rights of women and children, shall be an integral part of the training of [Standby Force] personnel". The AU's peace and security plan is incomplete without adherence to IHL, which led to its inclusion in the training of forces as a key element in implementing the rules on the ground.

Moreover, according to Article 11(v) of the Draft Framework for a Common African Defence and Security Policy, one of the policy objectives of the AU is to create a framework for humanitarian action in order to guarantee that IHL is respected during conflicts between and within African nations.¹⁹ This was

¹⁵ *Ibid.*, Art. 3(h).

¹⁶ AU and African Commission on Human and Peoples' Rights, *Addressing Human Rights Issues in Conflict Situations: Towards a More Systematic and Effective Role for the African Commission on Human and Peoples' Rights*, Banjul, 2019, available at: https://www.achpr.org/public/Document/file/English/ACHPR%20Conflict%20Study_ENG.pdf.

¹⁷ AU and African Committee of Experts on the Rights and Welfare of the Child, "General Comment on Article 22 of the African Charter on the Rights and Welfare of the Child: Children in Armed Conflict", Lesotho, 2020, available at: www.acerwc.africa/wp-content/uploads/2020/01/Draft-General-Comment-on-Article-22_English.pdf.

¹⁸ Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002 (PSC Protocol), available at: <https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union>.

¹⁹ Draft Framework for a Common African Defence and Security Policy, AU Doc. EX/EX/CL/2 (III), Sun City, 21–25 May 2003, p. 8.

recommended by the African Chiefs of Defence Staff during their Third Conference in May 2003.²⁰

The Specialized Technical Committee on Migration, Refugees and Internally Displaced Persons

The Specialized Technical Committee (STC) on Migration, Refugees and Internally Displaced Persons was established by Decision Assembly/AU/Dec.227(XII), adopted on 3 February 2009 by the AU Conference of Heads of State and Government, held in Addis Ababa, Ethiopia.²¹ Decision Assembly/AU/Dec.365 (XVII) adopted in principle the *Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.227(XII) on the Specialized Technical Committees*, which detailed the main activities of this STC,²² to deal with matters relating to issues of migration and forced displacement in Africa.²³

This STC meets in ordinary sessions every two years to follow up on developments in relation to all issues pertaining to migration in all forms, including ways to enhance means to protect their rights during times of peace and war, and proposes possible legal instruments or the establishment of new structures to enhance the work of the AU in the field. It is worth noting that the Protocol relating to the Free Movement of Persons was produced by this STC.²⁴

The African Union Humanitarian Policy Framework

The African Union Humanitarian Policy Framework was put in place in 2015.²⁵ Paragraph 19 of the Framework states that the foundation of the Framework is “anchored on the principles of International Humanitarian Law”. The goal of the Framework is to provide the AU, as well as other humanitarian actors and stakeholders, with the strategic approaches and guidelines necessary to improve their capacity for humanitarian situation prevention, preparation, response and mitigation.²⁶ Internally, the Framework entrusts the Humanitarian Affairs

20 See Policy Framework for the Establishment of the African Standby Force and Military Committee, AU Doc. EXP/ASF-MS/2(1), Addis Ababa, 12-14 May 2003 (ASF Framework), p. 42.

21 AU Assembly, Decision Assembly/AU/Dec.227(XII) on the Specialised Technical Committees, AU Doc. EX.CL/496(XIV), Addis Ababa, 3 February 2009, available at: https://au.int/sites/default/files/decisions/9559-assembly_en_1_3_february_2009_auc_twelfth_ordinary_session_decisions_declarations_message_congratulations_motion.pdf.

22 AU Assembly, Decision Assembly/AU/Dec.365(XVII) on the Specialised Technical Committees, AU Doc. EX.CL/666(XIX), Malabo, 1 July 2011, available at: https://au.int/sites/default/files/decisions/9647-assembly_au_dec_363-390_xvii_e.pdf.

23 To date, the STC has not adopted its rules of procedure, so its full mandate has not yet been published.

24 Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons, Rights of Residence and Right of Establishment, adopted by the 30th Ordinary Session of the Assembly of Heads of State and Government, Addis Ababa, 29 January 2018, available at: https://au.int/sites/default/files/treaties/36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf.

25 African Humanitarian Policy Framework, AU Commission, Department of Political Affairs, Refugees and Displaced Persons Division, 20 November 2015, available at: www.peaceau.org/uploads/humanitarian-policy-framework-rev-final-version.pdf.

26 *Ibid.*, para. 14.

Division of the Department of Political Affairs with the mobilization of the “collective African Union response”, in coordination with other organs such as the African Commission on Human and Peoples’ Rights and the AU Rapporteur on the Human Rights of Refugees, Returnees and IDPs.²⁷

The Framework encourages strategies for strengthening capacities and capabilities within the context of the entire agreed-upon set of AU policies and positions.²⁸ It further emphasizes the doctrine of using Africa’s resources for Africa’s humanitarian action to guide humanitarian action on the continent. In addition, it puts responsibility on the AU to come up with predictable and adequate funding for emergency preparedness and humanitarian response as critical for effective and timely humanitarian action, as well as the implementation of the Framework.²⁹ It also encourages member States to put aside 1.5% of their GDP for humanitarian action.³⁰

The African Standby Force

According to its Constitutive Act, the AU is empowered to intervene in situations of severe danger (such as when genocide or war crimes are being committed) in order to protect human life.³¹ The African Standby Force (ASF) is a component of the African Peace and Security Architecture, which was created when the AU was established. The PSC Protocol mandated the creation of the ASF.³² The Foundation Document, which was agreed at the conference of African Chiefs of Defence and Security in Maputo, Mozambique, in May 2003, provides the theoretical underpinning for the ASF.³³

According to the PSC Protocol, the ASF was envisaged to be composed of standby multidisciplinary contingents with civilian and military components in their countries of origin and ready for rapid deployment at the appropriate notice.³⁴ This is why, in accordance with the Protocol, member States were asked to establish standby contingents for participation in PSC- or AU Assembly-approved peace support missions.³⁵ According to the ASF Policy Framework, “Rapid Deployment Capability” was to be established that could intervene in cases of genocide and grave human rights abuses within fourteen days, as envisaged under Article 4(h) of the Constitutive Act.³⁶

However, the AU is still working to have the ASF ready for deployment in crisis situations, though some progress has been made recently. As an important first step, the opening of the ASF’s continental logistics hub in Douala on 5

27 *Ibid.*, para. 32.

28 *Ibid.*, para. 78.

29 *Ibid.*

30 *Ibid.*, para. 80.

31 AU Constitutive Act, above note 10, Arts 4(h), 4(j).

32 PSC Protocol, above note 18, Art. 13.

33 *Report of the Conference of African Chiefs of Defence and Security*, Maputo, May 2003, pp. 2–12.

34 PSC Protocol, above note 18, Art. 13.

35 *Ibid.*, Art. 17(a).

36 ASF Framework, above note 20, para. 2.29.

January 2018 was a success.³⁷ The AU's ability to give logistical support to peace operations will be bolstered by the new base. After the Amani Africa II field training exercise in South Africa,³⁸ the ASF was deemed fully operational by the AU Specialized Technical Committee on Defence, Safety and Security in 2016. For the ASF's military, police and civilian components, AU command post training and exercises have been conducted.³⁹ In 2017, AU heads of State and the PSC tasked a team with verifying the operational readiness of ASF regional standby forces, identifying gaps and issues, and giving suggestions.⁴⁰ However, while West, Southern and East Africa showed great progress in the establishment of their regional standby forces, the team found that Central and North Africa were still far behind in operationalizing the ASF.

The African Humanitarian Agency

The AU Assembly decided in its Decision Assembly/AU/Dec.604(XXVI) of 30 January 2016, in Addis Ababa, Ethiopia, to

establish an African Humanitarian Agency which should be anchored on regional and national mechanisms and funded with Africa's own resources; and to request the [AU] Commission to embark on the process for the establishment of such an architecture anchored on principles of pan-Africanism and African shared values.⁴¹

The African Humanitarian Agency (AfHA) is expected to receive funding from the regular AU budget as well as creative funding sources to ensure local ownership. The AfHA is also designed to thrive on collaborations with numerous stakeholders at various levels.⁴²

When operational, the AfHA would be expected to fill a critical gap in African humanitarian action by effectively coordinating the handling of African humanitarian emergencies.⁴³ This would include contributions at the strategic level, synchronizing and exchanging best practices throughout the continent with member States responsible for the ultimate protection of citizens, either directly or through regional organizations, particularly the Regional Economic

37 PSC, *Communiqué of the 1007th Meeting of the African Union Peace and Security Council on the Status Report/ Roadmap to the full Operationalization of the African Standby Force and the AU Continental Logistics Base*, 8 July 2021.

38 The AU conducted a field training exercise to support and fast-track the operationalization of the ASF. The exercise was organized in coordination with Amani Africa and involved military, police and civilian components of the ASF.

39 *Report of the 9th Ordinary Session of the Specialized Technical Committee on Defence, Safety and Security*, June 2016.

40 PSC, *Report of the 678th Meeting of the Peace and Security Council of the African Union on Its Activities and the State of Peace and Security in Africa*, April 2017.

41 AU Assembly, Decision Assembly/AU/Dec.604(XXVI), 30 January 2016, para. 9(ii).

42 *Ibid.*

43 AfHA, "Concept Note: Validation Meeting of the Report on the Modalities for the Operationalization of an African Humanitarian Agency", Addis Ababa, May 2020, para. 2.

Communities (RECs).⁴⁴ The AfHA is expected to be involved in humanitarian operations in member States in collaboration with emergency response and assessment teams, RECs, regional bodies, and member States.⁴⁵ The AU, through the AfHA, is expected to assist and intervene when nationals of member States are in need. The AfHA will thus combine a strong strategic focus with a modest operational footprint. Collaboration, advocacy (with a focus on humanitarian law), coordination (with a focus on information analysis and management), partnerships, capacity-building and resource mobilization are some of the expected roles of the AfHA.⁴⁶ The AfHA, in collaboration with the UN, civil society and the diaspora, will execute measures to help governments and local authorities strengthen their capacity and fulfil their responsibilities.⁴⁷

AU agencies for the prevention of humanitarian disasters

It was noted at the beginning of this article that conflicts within the African continent are a result of many factors, including natural disasters and national and regional health crises. To address these issues, the AU established several agencies and mechanisms to work together to ensure that appropriate action is taken in time of disasters and to work towards prevention and minimizing the effects of such calamities.

The Africa Centres for Disease Control

Within its efforts towards the prevention of conflicts and conditions conducive to the spread of violations of human rights law and IHL, the AU has created a number of institutions to deal with humanitarian threats and crises that are complex in nature and at times overlapping. These include political instability and conflict, climate change, and the recent COVID-19 pandemic, not to mention Ebola and other outbreaks that the continent has had to deal with. The Africa Centres for Disease Control and Prevention (Africa CDC) is a specialized technical institution of the AU established to support member States' public health initiatives and strengthen the capacity of their public health institutions to detect, prevent, control and respond to disease threats in a timely and effective manner.⁴⁸ Africa CDC assists AU member States in addressing deficiencies in their public health infrastructure, human resource capacity, disease monitoring, laboratory diagnostics, and preparedness and response to health crises and catastrophes.⁴⁹

44 *Ibid.*

45 Draft Statute of the African Humanitarian Agency, Addis Ababa, January 2020, Art. 6.

46 *Ibid.*

47 *Ibid.*, Art. 23.

48 Statute of the Africa Centres for Disease Control and Prevention, 2016 (CDC Statute), Art. 3.

49 *Ibid.*, Art. 3(e).

Africa CDC was established by the 26th Ordinary Assembly of Heads of State and Government in January 2016 and officially launched in January 2017.⁵⁰ It provides an avenue for member States to communicate and exchange information and lessons learned through public health interventions.⁵¹ Africa CDC has been at the forefront in fighting the COVID-19 pandemic; a few months before the crisis took on the magnitude that we eventually witnessed, the AU launched the AU COVID-19 Response Fund, which aims to raise resources to strengthen the continent's COVID-19 response by supporting pool procurement of diagnostics and other medical commodities by Africa CDC for distribution to member States, and to mitigate the pandemic's socio-economic and humanitarian impact on African populations.⁵²

African Risk Capacity

The African Risk Capacity (ARC) Group is made up of the ARC Agency, an AU specialized agency created in 2012 by the 18th Ordinary Session of the AU Assembly, and ARC Insurance Company Limited (ARC Ltd), a hybrid mutual insurer and the Group's commercial affiliate, founded in 2014.⁵³

The ARC Agency was founded to assist African governments in improving their capacity to effectively plan for, prepare for, and respond to natural catastrophes caused by extreme weather occurrences, as well as outbreaks and epidemics.⁵⁴ ARC Ltd, on the other hand, provides complementary risk pooling and risk transfer services. Together, the two organizations provide capacity-building and contingency planning services to member States, as well as access to cutting-edge early warning systems and risk pooling and transfer facilities to help build resilience against natural catastrophes such as droughts and tropical cyclones.⁵⁵

The Special Emergency Assistance Fund

At the 20th Ordinary session of the then OAU, convened in Addis Ababa in November 1984, the heads of State and government decided to establish the Special Emergency Assistance Fund for Drought and Famine in Africa (SEAF).⁵⁶ From 18 to 20 July 1985, the 21st Ordinary Session of the Assembly adopted the SEAF Statute.⁵⁷ There are two main goals for the SEAF: to offer emergency aid to African nations that are suffering from drought or famine, and to support the efforts of African governments in reducing their reliance on foreign aid.⁵⁸ Acts of

50 AU Assembly, Decision Assembly/AU/Dec.499 (XXII), 22nd Ordinary Session, January 2014.

51 CDC Statute, above note 48, Art. 3.

52 See the AU COVID-19 Response Fund website, available at: <https://au.int/en/auccovid19responsefund>.

53 AU Assembly, Decision Assembly/AU/Dec.391-415(XVIII), 18th Ordinary Session, January 2012.

54 Agreement for the Establishment of the African Risk Capacity Agency, 23 November 2012.

55 *Ibid.*

56 AHG/Decl.1-3(XXI) and AHG/Res.136(XXI), 21st OAU Ordinary Session of Assembly of Heads of State and Government, July 1985.

57 *Ibid.*

58 Statute of the Special Emergency Assistance Fund for Drought and Famine in Africa, July 1985, Art. 3.

symbolic support from the SEAF are intended to show cooperation with the afflicted countries and persuade other nations to do their part by providing financial assistance.⁵⁹ Member States, organizations and individuals make voluntary donations to the Fund, while the AU provides a mandatory contribution.⁶⁰

Some observations and recommendations

While, as demonstrated throughout this Article, the AU has robust regional humanitarian laws and institutions, the challenges lie in the lack of implementation. The Constitutive Act and the PSC Protocol have laid down the framework for effective conflict prevention schemes, but there is a lack of political will to enforce those mechanisms. Conflict is increasing the number of IDPs in the continent; for example, in the East African area, there are more than 8.3 million IDPs and more than 4.6 million refugees. Conflicts in Ethiopia, Somalia, South Sudan and Sudan are mostly to blame.⁶¹ Due to the ongoing violence in the north of the nation and the recent climatic catastrophes, Mozambique has more than 1 million IDPs.⁶² Thus, the AU should focus more on preventing crises and less on treating their symptoms; an emergency reaction is more expensive than responding to an early warning that people are at risk. Human security, rule of law, good governance and economic development are all goals that the AU's member States should strive towards. Violent conflicts that result in mass atrocities need a thorough and coordinated approach, as the causes are so complex. Prevention should be the main concern that the AU should focus on in order to encourage member States' adherence to their commitments to avoid mass atrocity crimes, particularly in light of the institutional, financial and political difficulties that the AU faces in implementing Article 4(h) of the Constitutive Act and R2P.

When crises do occur, there exists an all-encompassing strategy to deal with them. Indeed, cognizant of the evolving dynamics of natural catastrophes, threats to livelihoods, growing terrorism and violent extremism, and disease outbreaks across Africa, it is not necessary to build a new structure for the AU. The major challenges facing the organization include a lack of long-term funding, a lack of coordination within and across existing bodies, a failure to apply current normative frameworks, and a lack of commitment from member States. Aside from humanitarian responses, the AU's implementation problem extends to the whole organization – but the AU does not require the creation of a new organization to guide sound policies and effective responses to humanitarian crises in Africa. Instead, it is necessary to examine the current institutions that are accountable for humanitarian action. There are several institutional gaps that need to be

59 *Ibid.*, Art. 6.

60 *Ibid.*

61 Gedifew Sewnet Yigzaw and Endalsasa Belay Abitew, "Causes and Impacts of Internal Displacement in Ethiopia", *African Journal of Social Work*, Vol. 9, No. 2, 2019.

62 "Does Africa Need Its Own Humanitarian Agency?", above note 5.

addressed in order to come up with long-term solutions for effective early response and prevention. As previously noted, securing funding for humanitarian action is a major difficulty: currently, the European Union funds 80% of the AU's programme budget while external players fund 100% of the budget for peace operations.⁶³ It is imperative that the AU look for new sources of finance, especially in light of donor weariness and dwindling humanitarian aid from conventional donors.

An entirely new finance strategy is needed, one that focuses on non-traditional contributors like the private sector and African philanthropists, rather than conventional donors like the US government. Military force should not be equated with, or perceived through the lens of, Article 4(h) intervention; instead, preventative methods of all kinds should be considered.

63 *Ibid.*

Going for a test drive? Some observations on the turn to informality in the laws of armed conflict

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Abstract

This contribution reflects on the development of informal expert manuals in the field of the laws of armed conflict. These manuals are presented as restating existing customary law, perhaps adding a few elements de lege ferenda but not having a straightforward normative intent. The authors of expert manuals state them to be non-binding, and their drafting takes place mostly in self-appointed groups. Although a normative intent may be absent when drafting such informal expert manuals, such rules may obtain normative effect nevertheless. While States are mostly absent in these processes, they seem to have a specific interest in the development of these manuals.

Keywords: Expert manuals, role of governments, development of international humanitarian law, informal lawmaking, military technology.

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* I am indebted to the unknown reviewers of an earlier version of this article, as well as the editors of the *International Review of the Red Cross* for their helpful comments. Mistakes of course remain mine alone.

Introduction¹

Over the past twenty-five years, a great many projects aimed at updating, reinterpreting and clarifying the laws of armed conflict have appeared. These projects have produced compilations of rules – frequently called expert manuals – in areas where the law is either dated or not specifically tailored to contemporary military activity. Various sets of norms have been formulated in informal settings by groups of private experts dealing with distinct chapters of the laws of armed conflict. The development of these informal instruments in the laws of armed conflict appears to have started in the 1990s and has by now risen to an impressive number of instruments, also when compared to informal developments in other fields of international law.

When addressing informality in the laws of war, we tend to mostly look at a few aspects only: what are the substantive rules, who the law is addressed to and who is participating in the process of developing the law. The first question leads to reflections about whether and how newly formulated norms differ from existing law, what their content is and what this implies, as well as whether particular changes are perceived as progress. These substantive aspects will not be discussed here. The second question is about who is addressed by the expert manuals, whether norms have been formulated for use in non-international armed conflicts, and to which groups of fighters such norms apply. A third category of questions is essentially about who has been engaged in these informal processes formulating norms of international humanitarian law (IHL), how such groups operate, and what expertise participants bring. Participation will be looked at further below.

Other issues attract less interest, although they are at the heart of the informality discussion and the reflection about these developments: why does it look as though States are formally absent in these processes of drafting manuals? Will these norms have legal effect in spite of authors claiming that this is not intended? Beyond that lie further questions about the apparent trend towards the formulation of informal rules in the laws of armed conflict, as opposed to formal lawmaking through the negotiation of treaties and other formal legal instruments.

The matter of informal “lawmaking” would not be on our agenda if such documents did not have an impact on debates about the contemporary law of armed conflict. In one way or another, these documents have developed into being authoritative, both for practitioners and for academics. This seems to be a consequence of their existence, which has established them as the norm to argue against. It is necessary to reflect on their potential impact on the development of law. It is the intention for this contribution to make some comments about the turn to informality in the laws of war: what is happening and how to understand it.

1 This contribution is in part based on Liesbeth Lijnzaad, “The San Remo Manual on the Law of Naval Warfare – From Restatement to Development?”, in Natalie Klein (ed.), *Unconventional Lawmaking in the Law of the Sea*, Oxford University Press, Oxford, 2022.

Below, the appearance of informal manuals will be sketched, followed by an overview of the reasons for choosing this format for the formulation or restatement of rules for contemporary military activity. After that, attention will be drawn to the problems of formally changing IHL and the difficulty of newly developed norms that purport not to be legal norms in the traditional sense of international law. At the heart of the issue before us is the presumed absence of States in the process of formulating informal manuals, and an analogy with test driving a car presents itself.

The appearance of informal manuals

At the outset of this contribution it is necessary to define what is meant by informal manuals. The starting point is that international law is created by States – whether through the drafting and ratification of binding written instruments such as treaties and conventions which have been expressly accepted by the States concerned, or through the development of a particular practice that over time becomes accepted as customary law. Apart from these two sources of international law, other sources of international law, such as general principles of law, judicial decisions, and the teachings of eminent scholars of various nations, play a less prominent role. These categories are referred to in Article 38 of the Statute of the International Court of Justice (ICJ), which lists them as the applicable law on which the Court may base its decisions. However, this provision has grown to be understood as an overview of the sources of international law. The law is created by States in a voluntarist system, and the sources of international law have a formal nature. Particularly with respect to written law, the development of the law goes through a process of negotiations in which agreement about legal norms is translated into agreed text to which States adhere individually.

Over time, in the past twenty to thirty years, instruments have started to appear that contain rules that in many respects “look like law”, but are not law as such, as they lack crucial features that could qualify them as binding written norms. There have been extensive discussions in academic literature about the subject, starting out with informal instruments created by States, yet drafted without the intention to create binding law.² Pauwelyn provides a broader analysis, in distinguishing between different forms of informality.³ There may be the absence of an intention to formulate a binding instrument, as the authors simply had no wish for the instrument to become binding as law. This is known as output informality: whatever the content, the end product will remain informal as it does not satisfy the criteria for establishing binding international law. This is the case with expert manuals in the field of the law of armed conflict: all manuals

2 Anthony Aust, “The Theory and Practice of Informal International Instruments”, *International & Comparative Law Quarterly*, Vol. 35, 1986.

3 Joost Pauwelyn, “Informal International Lawmaking: Framing the Concept and Research Questions”, in Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012, pp. 15–22. See also Natalie Klein, “Meaning, Scope and Significance of Informal Lawmaking in the Law of the Sea”, in N. Klein (ed.), above note 1, pp. 6–13.

state that the instrument is not meant to be binding, which is often repeated by their authors. The manuals discussed below are drafted by groups of experts that get together at their own volition out of concern for the absence of specific up-to-date law, rather than by State officials with a clear mandate from States to develop the law. This is a form of actor informality, the participants participating in their own right as private individuals and not as the representatives of States. Often hosted by academic institutions or research institutes, work on expert manuals takes place in an informal setting without rules of procedure, and the end product is drafted and edited by a small group of experts which tends to be understood as process informality.

Klein and Pauwelyn discuss informality in relation to the role of States in the development of informal norms. The expert manuals discussed below are informal in more ways than described by them: they are the work of private experts who meet informally to work on a subject of their choice without any visible participation by States. The role of States will be one of the aspects discussed in the following.

On various aspects of the law of armed conflict, informal restatements have been drafted in the past twenty-five years.⁴ The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, adopted on 12 June 1994 (1994 San Remo Manual), was probably the first such informal document, aimed at a reinterpretation of the law of naval warfare.⁵ It was followed by other collections of norms in specific domains: the 2006 *San Remo Manual on the Law of Non-International Armed Conflict*,⁶ the 2009 Harvard Manual on Air and Missile Warfare,⁷ the 2012 (first) Tallinn Manual⁸ and the 2017 Tallinn Manual 2.0⁹ on cyber and armed conflict. Also worth mentioning are the 2017 Leuven Manual on the International Law Applicable to Peace Operations,¹⁰ and the 2018 Oslo Manual on Selected Topics of the Law of Armed Conflict (an update of the 2009 Harvard Manual).¹¹ Work

4 All the informal documents listed here drafted by groups of experts bear the title of “Manual” (with the name of the city where discussions took place added), as opposed to more varied titles for ICRC documents.

5 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995 (1994 San Remo Manual).

6 Developed under the auspices of the San Remo International Institute of Humanitarian Law: M. N. Schmitt, C. H. B. Garraway and Y. Dinstein, *The Manual on the Law of Non-International Armed Conflict*, International Institute of Humanitarian Law, Sanremo, 2006.

7 Program on Humanitarian Policy and Conflict Research at Harvard University, *HCPR Manual on International Law Applicable to Air and Missile Warfare*, Bern, 15 May 2009, available at: <https://reliefweb.int/report/world/manual-international-law-applicable-air-and-missile-warfare> (all internet references were accessed in September 2022).

8 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013.

9 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017. Technically this does not deal with the law of armed conflict but with attacks below the threshold of armed conflict.

10 Terry D. Gill, Dieter Fleck, William H. Boothby and Alfons Vanheusden (eds), *Leuven Manual on the International Law Applicable to Peace Operations*, Cambridge University Press, Cambridge, 2017.

11 Yoram Dinstein and Arne Willy Dahl (eds), *Oslo Manual on Select Topics of the Law of Armed Conflict*, Springer Open, New York, 2020.

on the Woomera Manual on the International Law of Military Space Activities and Operations is apparently ongoing and nearing completion.¹²

During the same period, the International Committee of the Red Cross (ICRC) has produced the Customary Law Study¹³ and the Interpretative Guidance on the Notion of Direct Participation in Hostilities,¹⁴ as well as (more recently) documents on the law of occupation¹⁵ and guidelines on the protection of the natural environment in armed conflict.¹⁶ These are documents directly linked to the ICRC's role with respect to the interpretation and development of IHL. The 2008 Montreux Document on Private Military and Security Companies during Armed Conflict was produced in a State-led process with the support of the Swiss government.¹⁷ All in all, this makes for a long list of informal instruments, and perhaps it is not even complete.

In all of these informal instruments, the authors stress that it is not their intention to propose new law or argue for how the law should develop (*lex ferenda*). Rather, they see their work as being based on existing law (*lex lata*). These instruments are reformulations, restatements of the law for today's use based on discussions between experts who do not intend to change the law, but merely aim to restate it. The rules are intended to be a reflection of customary law, without any apparent normative intent. Such expressions of the intention to adhere to existing law are understandable in light of the rules concerning the development of international law in which States have a central role (as opposed to informal groups of experts).

The informal manuals discussed here should not be confused with regular military manuals or handbooks drafted as instructions to the armed forces under the authority of their States.¹⁸ Military manuals or handbooks are an interpretation of

12 Adelaide Law School, Australia, Woomera Manual, available at: <https://law.adelaide.edu.au/woomera/>.

13 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. This work was based on a decision by the 1996 International Conference of the Red Cross and Red Crescent Movement.

14 Nils Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

15 ICRC, "Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory", 11 June 2020, available at: www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting.

16 ICRC, "Guidelines on the Protection of Natural Environment in Armed Conflict", available at: www.icrc.org/en/document/guidelines-protection-natural-environment-armed-conflict-rules-and-recommendations-relating. The International Law Commission (ILC) is working on a somewhat related project: protection of the environment in relation to armed conflicts; see ILC, Analytical Guide to the Work of the International Law Commission: Protection of the Environment in Relation to Armed Conflicts, General Assembly Action, Resolution 75/135 of 15 December 2020, available at: https://legal.un.org/ilc/guide/8_7.shtml#fout.

17 Swiss Federal Department of Foreign Affairs and ICRC, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, Montreux, 17 September 2008, available at: www.eda.admin.ch/eda/en/dfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html.

18 On these two distinct types of military manuals, see Earle A. Partington, "Manuals on the Law of Armed Conflict", in *Max Planck Encyclopedias of International Law*, August 2016, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e326?rkey=QJAxQq&result=>

the applicable law as understood by the State concerned, formulated as an instruction to the troops. Such national manuals are approved by the political and military authorities at the highest level of the issuing State. In contrast, the manuals discussed here provide generic norms in specific domains as drafted by groups of independent experts.

The aforementioned is a long list of informal engagements with distinct chapters of the law of armed conflict aimed at reformulating the law, and making the law more accessible for contemporary use. The term “manual” has an operational sound to it, suggestive of a handbook with action-oriented norms ready for use on the battlefield.

Quite remarkably, this series of informal manuals demonstrates a great resemblance in form and style when compared. The structure is one of a set of Rules (formulated on the basis of the work of the experts) which is accompanied by a Commentary that explains the Rules and why they have been formulated as they are. Interestingly, the Rules at the heart of a project are frequently referred to as “black letter rules”, a term with a familiar sound (compare with the notion of “black letter law” for positive rules of law). This structure of Rules and Commentary is user-friendly and undoubtedly helpful for those who want to rapidly access the rules and understand the norms. Also, the experts (irrespective of how they got together) invariably tend to call themselves an “independent group of experts”.

Another observation about this list of informal manuals is that they all seem to predominantly deal with the conduct of hostilities and the permissible methods and means of warfare (the so-called Law of The Hague), as distinct from IHL that seeks to protect those who do not, or no longer participate in, hostilities (the Law of Geneva).¹⁹ An explanation for this may be that the 1949 Geneva Conventions have in part been “updated” through the 1977 Additional Protocols and that a restatement of IHL is perhaps not necessary at this time (even if 1977 is a while ago). The current project on the revision of the (Pictet) Commentaries on the Geneva Conventions functions as an informal updating mechanism as well. Also, any project specifically related to the Red Cross Conventions would clearly depend on the ICRC’s participation.

Lastly, it is fair to say with respect to the rules on the conduct of hostilities that there has not been a general update of the Hague Conventions of 1899 and 1907, which are fragmented and patchy themselves. In 1977, in Part III of Additional Protocol I (AP I), some critical norms on the methods and means of warfare, and provisions on the conduct of hostilities were codified. However, the appearance of new military equipment, such as drones and unmanned aircraft,

¹⁸prd=MPIL. About relying on an informal manual in order to formulate a formal manual, see Steven Haines, “The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared”, in Yoram Dinstein and Fania Domb (eds), *Israel Yearbook on Human Rights*, Vol. 36, Martinus Nijhoff Publishers, Leiden/Boston, MA, 2006.

¹⁹ This distinction is a traditional one. With the 1977 Additional Protocols to the 1949 Geneva Conventions the distinction has to a certain extent disappeared as many roles on the methods and means of warfare have now been included in the Additional Protocols.

cyber or unmanned naval vessels, brought new questions with respect to their use in military operations for which no formal lawmaking has been undertaken by States. While it is correctly suggested that the norms of AP I and equivalent customary law apply, it must be considered whether more precise and specific rules of international law would not be more appropriate.

The growing number of informal manuals

What has been driving this growth in the number of informal manuals on the law of armed conflict? Concerns leading to the restatement of the law of armed conflict may be summarized as follows: the outdated character of (parts of) the existing laws of armed conflict; developments in other areas of international law; and the impact of new technology in militarily relevant areas. All of these concerns are easily understood reasons to revisit existing norms. It should be considered whether existing rules are still relevant, or require a rereading and reinterpretation in order to understand their applicability to contemporary questions. Yet, this does raise the question whether expert manuals are the right solution – or whether the development of new binding rules would be preferable. Let us have a brief look at these concerns.

The existence of legal instruments perceived as being dated, and thus inadequate for application in contemporary conflict, is an obvious concern. While such treaties continue to exist “on the books”, they serve little in the way of instruction to the military today. Such a situation may be perceived as a risk, a lack of clarity about applicable norms will create difficulties when a conflict arises and decisions need to be taken about what would be legitimate military action.

This is particularly the case with respect to the 1907 Hague Conventions regarding the laws of naval warfare: there has not been an update of this chapter of the law of armed conflict for a long time.²⁰ The need for up-to-date rules is clear with respect to the regulation of military technology and related changes in military equipment since the drafting of the original instruments. In more general terms, naval warfare has changed a great deal since 1907, which is not reflected in written law.²¹ Others would consider that naval warfare has not occurred very often since the Second World War, questioning whether any relevant and recent practice to speak of exists at all.

Further reasons for reflecting on the contemporary meaning of norms are substantive changes in related fields of law that may necessitate subsequent changes in the laws of armed conflict. Examples would be the impact of the 1982 Convention on the Law of the Sea on the law of naval warfare, or the question whether the development of detailed norms of international environmental law in the recent

20 Hague Convention (VI) on Enemy Merchant Ships, Hague Convention (VII) on Conversion of Merchant Ships, Hague Convention (VIII) on Submarine Mines, Hague Convention (IX) on Bombardment by Naval Forces, Hague Convention (XI) on Restrictions of the Right of Capture, Hague Convention (XIII) on Neutral Powers in Naval War, all 18 October 1907.

21 Apart from the adoption of Geneva Convention II in 1949 and some provisions in AP I and AP II in 1977.

past may have an impact on the interpretation of the more general norms in AP I (Arts 35(3) and 55(1)) or the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (also called the Environmental Modification, or ENMOD, Convention).²² This points to a more general question as to whether or how rules in a particular field of law – such as the laws of armed conflict – are able to move in step with development in other fields of law without formal amendments.

All law is written on the basis of the reality as perceived at the time of negotiations, and for the laws of armed conflict that includes aspects such as military capacity and military technology available at the time of drafting. Technology develops continuously, requiring a regular reflection on the legal consequences of the use of certain weaponry. This idea gave rise to Article 36 of AP I, which requires that, when developing, acquiring or adopting new weaponry or means or methods of warfare, it must be determined whether its use would be prohibited. Such evaluation of new weaponry can only take place against an understanding of what the law would require in this day and age.

An argument for developing an informal manual (as a fall-back option to formal lawmaking) would be the introduction of new technology if this had not been followed by lawmaking addressing the legal aspects of its use. Developments in the cyber domain are a case in point: as cyberspace and the internet developed, it became clear that this domain also potentially brought uses that could qualify as armed conflict. States did not appear to have the intention to embark on establishing a formal legal framework governing this new domain. If that does not happen, there is an obvious need to reflect on what rules could be deduced from existing law.

The reasons for engaging in the drafting of an informal manual, convincing as they may be, are directly related to the absence of governmental activity where this could have been expected within the international legal system. Many contemporary situations may require an analysis of the current applicability of existing norms, and suggest a need to revisit existing law. The heart of the matter is that States have not taken steps to update written law or to draft specific rules when this would have been necessary in situations where the law became outdated, or in situations that were new and different from those of the past on the basis of which the law of armed conflict was originally developed.²³

States are the primary custodians of the international legal system and formal rules of law developed by States will carry a different weight from those of informal lawmaking, especially when such informal lawmaking does not originate with States. States' reluctance to address current issues in the laws of armed conflict has given academia and groups of independent experts the space to step in and formulate or restate rules, in a domain where the role of the State has

22 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, New York, 10 December 1976, 1108 UNTS 151 (entered into force 5 October 1978).

23 There is some evidence that States have been aware of this issue, but have not persevered in taking it up. See J. Ashley Roach, "The Law of Naval Warfare at the Turn of Two Centuries", *American Journal of International Law*, Vol. 94, No. 1, 2000, p. 77.

traditionally been paramount. The initiative seems to have shifted from States to self-appointed groups of experts who have the freedom to set the agenda. Yet, it remains preferable for States to clarify and change the law of armed conflict if needed, rather than for groups of independent and self-appointed experts to do so.

Mechanisms of change and development

International law knows mechanisms of change, and it is not for lack of procedural possibilities to develop the law that the informal manuals exist.

First, treaties could be amended and updated; international law provides for rules to do so. The starting point is whether States parties to a treaty have established specific rules on an amendments' process for a particular treaty. If so, those rules take priority, and, if no specific rules are available, reference must be made to the general law of treaties. The 1949 Geneva Conventions do not contain specific rules with respect to amendments, nor do they contain rules establishing a regular meeting of States Parties that could be used to discuss questions regarding necessary updates. This means that the generic rules of the law of treaties in the 1968 Vienna Convention on the Law of Treaties (VCLT) provide the fall-back rules for amending treaties in its Articles 39 and 40.²⁴ The 1977 Additional Protocols, on the other hand, contain (identical) provisions on amendments in Articles 97 and 24, respectively, which would need to be followed if amendments were suggested.²⁵ Reading these provisions, it becomes clear that amending will be a burdensome process: a High Contracting Party may propose amendments, which are submitted to the depositary of the Protocols (Switzerland) who will consult with all Parties and the ICRC on whether to convene a conference to discuss the amendment. Once an amendment has been adopted, it will have to be accepted by each Party to a treaty individually. This may mean that for some time a difference may exist between the obligations of the Parties who have ratified an amendment, and those who have not. As a consequence, amendments may lead to a system with distinct rules applying to different States.

Second, some treaties provide for low-key methods for adaptation and change. In the law of the sea, so-called implementing agreements have appeared that, in spite of their name, rather supplement existing rules.²⁶ With respect to developing marine technology, improving safety at sea or preventing pollution, conventions of the International Maritime Organization, for example, often provide for the possibility to include more detailed technical rules in regulations

24 The matter of the (retroactive) applicability of the VCLT will not be elaborated upon here.

25 There are distinct rules with respect to revising Annex I of AP I in Article 98 of AP I which will not be discussed here. See Bruno Zimmermann, "Article 97 – Amendment", in Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, pp. 1093–7.

26 Such as the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982; or the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

attached to the main instruments. Such mechanisms provide a possibility to implement normative change in a much more simple and fast manner. The absence of such low-key mechanisms for change in the laws of war limits the updating or further development of the laws of war, and pushes the debate in the direction of informal lawmaking.

And lastly, if formulating amendments would be too burdensome, States could also begin from scratch and draft treaties with new and updated norms. However, such approaches towards new and improved versions of legally binding texts are rare these days, as the risk of such efforts being counterproductive is perceived to be high.

Change, particularly of major legal instruments, does not really happen that often these days, even if tools are available to either draft new instruments, or to amend existing instruments. There may be good reasons for States to shy away from changing legal instruments. With the United Nations (UN) Convention on the Law of the Sea, for example, it is argued that any suggestion of reopening the Convention might be detrimental to the balance that was achieved during negotiations in the Third UN Conference on the Law of the Sea. With respect to IHL, it is the fear of levelling down the protection offered to victims of armed conflict that leads to a deadlock on even the idea of the development of law.

These are genuine risks indeed that have to be seriously weighed before steps are taken that may be detrimental to what already exists. Reopening substantive discussions on the law of armed conflict brings the awkward possibility that the debate will also be open to attempts to lower, rather than improve, protective standards. This is one of the main reasons why the modernization of the laws of war is difficult. There is an ingrained tension between military interests and humanitarianism, and concern about the balancing between these two poles. This situation is the diplomat's version of the maxim "be careful what you wish for": there is great hesitation about establishing something new and a sense of the possibility of losing more than there is to gain. This is known as the "Pandora's Box dilemma": do not suggest changing the law, because you may be worse off if you do. Others will also present proposals, yet those may prove to be detrimental from a protective perspective, and thus unacceptable. Pandora's Box is better left closed, for fear of demands that other negotiators may bring to the table. The highly politicized environment in which discussions about the laws of war take place, and the views of governments expressed at times of conflict suggest that – even if rationally there is a case to be made for a review – this would be a daunting and dangerous prospect. Such a risk-averse position is both understandable, as much as it is regrettable: it implies that States are withdrawing from their role as custodians of the laws of war.

Change may be legally possible, but is considered risky and thus politically unattractive. This reluctance to embark on change has consequences. When existing texts are considered to be closed to change, other ways of dealing with change will be needed to address new phenomena relevant to the implementation and application of IHL. Formal mechanisms of change may lay dormant; while they are available, it will require political will to embark on a process of change, updating and

improvement. It is against this background that the move to informality must be understood: if no formal steps can be taken, informality may provide what looks like a practical interim solution, particularly when the most pressing need is the clarification of existing norms.

The unwillingness of States to undertake new projects aimed at the formal development of the law limits the reflection on necessary updates and the need to address new phenomena. It pushes such activities into a space outside of governmental debate. The discussion, and indeed setting the agenda, ends up with self-appointed groups of individual experts in a field where the primary role of States used to be beyond doubt. The unwillingness, or the absence, of States not only stalls debate, but also drives it into the private sphere. Needless to say, these self-appointed groups of experts are not accountable for their work other than in the academic domain, nor will they be responsible for its implementation.

Key questions about informal manuals

In recent years, the role of *ad hoc*, informal and non-governmental groups in the process of the elaboration of international law has gained increased attention. A number of traditional non-State expert bodies have had their distinct roles in the development of international law, particularly by elaborating substantive rules for further discussion by States. In particular, the institutional role of the UN's International Law Commission, and the work of long-standing institutions such as the Institut de Droit International or the International Law Association have been important to substantive development.²⁷ However, they differ from the groups of experts that work on manuals, and have a role that is more defined in scope.

Let us take a better look at the key aspects of these informal manuals: their character as informal restatements of the law; the role of independent experts; and the apparent absence of States in the drafting of such manuals. The debate about informal lawmaking in the laws of war is about the nature of the activity, and where to locate it on the scale between formal lawmaking on the one side, and the (re-)interpretation or restatement on the other. When discussing informality in the laws of war it is necessary to determine what is understood as “informal lawmaking”. Types of informality have been referred to above, looking at the distinctions formulated by Pauwelyn.²⁸

Another way of looking at informality is the spectrum between the (absence of) normative intent and normative effect as presented by Klein.²⁹ When the notion of “informal lawmaking” is unpacked, what all of these informal documents have in common is that they formulate rules that purport to be general and authoritative.

27 Anton Orlinov Petrov, *Expert Laws of War: Restating and Making Law in Expert Processes*, Edward Elgar Publishing, Cheltenham, 2020, pp. 32–7.

28 J. Pauwelyn, above note 3.

29 N. Klein, above note 3.

The term “rules” does not necessarily imply that these are legal rules as such, although their origin as an interpretation or restatement of existing law suggests they may as well be. The idea about these processes is that they are not formally making law (as is repeatedly stressed by their authors), but rather restating the law or clarifying what outdated legal rules (such as the 1907 Hague Conventions) may mean in today’s context. “Authoritative” does not necessarily imply legally binding rules, although this may be the case if they are a restatement of earlier rules of law. As to “informality”, this may give the impression that rules have been drafted in a non-State setting (which is not always the case; States also create informal rules at times) and have been drafted without the intent to become binding as such. Formal rules would in international law be understood as rules established on the basis of the consent of States who had the intention to establish formally binding norms, which is not the case with expert manuals. After all, an informal group of experts does not have the authority to establish international law: there cannot have been normative intent *stricto sensu*.

The normative effect of a particular rule is a second stage; it is what happens after the formulation of the norm. The norms that have been formulated as an updated and perhaps elaborated version of older norms, or as a deduction from existing general norms, may become broadly accepted and may obtain normative effect over time irrespective of whether this was intended by their authors. A collection of norms and their publication make them more accessible to users and commentators, which in turn may lead to the development of practice based on such norms that may eventually attract *opinio iuris* and become customary law. Written norms start to shape practice, and the formulation of such informal yet authoritative norms contributes to unifying practice. Even if it may not have been the intention to create law, this may be the effect over time. These written norms may have a predictive impact on the law as it develops.

In practice, at the editorial stage much effort is taken to formulate the rules in an unambiguous manner: they tend to read as if they were legal rules already. Skillful editing has a certain predictive value, as this contributes to the use of the norms: it is all written down in a user-friendly manner. Presumably such processes facilitate newly formulated norms “slipping into” customary law, because of their availability and the clarity of a formulation of the norm. The informal documents have no overt pretention of being legally binding, yet their availability in an accessible form and format will shape and refine practice, and may trigger the development of *opinio iuris* about a rule in its contemporary updated and edited form. The development of normative effect is greatly helped by the formulation and availability of the norm in written form. The accessibility of the rules not only precedes their acceptance as rules of law; it also facilitates this process of acceptance to a large extent.

While the list of sources of international law enumerated under Article 38 of the ICJ Statute is generally accepted as a normative list of sources, the aforementioned article does not really describe how the development of international law takes place. Considering this, Michael Bothe has addressed the informal meetings creating normative documents that started to appear

particularly in the field of the law of armed conflict.³⁰ He discusses in particular the “privatization” of the development of the laws of war through a series of informal processes that address specific fields and concrete issues for which there appears to be no formal or explicit governmental wish for lawmaking. The overwhelming reluctance of States to embark on any formal normsetting in the field of the law of armed conflict leaves space for, as he calls it, “private normative entrepreneurs” (*private Normunternehmer*) to begin a discussion about the adequacy, clarification, refinement or improvement of existing norms.

While there are, at the current juncture, very good reasons for the reticence of States and their determination not to move to the formal development of law, this leaves space for private normative entrepreneurs who wish to address specific chapters of the law of their own choice and from their own perspectives. The organizers of such meetings determine the agenda, frame the project and will be largely responsible for its outcome, and all participants will participate in their private capacity. Not only does this lead to informal documents in specific domains of the laws of armed conflict where the law is treading new ground, but it also implies that setting the agenda is no longer in the hands of governments.

The presumed absence of States

The growth of informal manuals in the field of the laws of war is an intriguing phenomenon, and it is the aim to reflect on these processes, leaving aside a discussion of the substantive norms formulated in these instruments. Why have so many of these collections been formulated on an informal basis, by self-appointed groups of independent experts and what are the consequences of this?

First impressions are that States are absent in the processes of informal “lawmaking”, involving the drafting of a manual on a distinct chapter of the laws of armed conflict. This is in itself unusual, particularly in the laws of armed conflict where governments and the military traditionally claim a dominant role, and may be quite vocal if they do not like the content of such informal products.³¹ However, are governments really absent from the development of such informal manuals?

30 Michael Bothe, “Private Normunternehmer im Völkerrecht: Gedanken zur Fortentwicklung des Völkerrechts durch nicht-staatliche Institutionen”, in Holger H. Hestermeyer *et al.* (eds), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum*, Vol. II, Martinus Nijhoff Publishers, Leiden and Boston, MA, 2012.

31 See, for example, John B. Bellinger III and William J. Haines II, “A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007; or Jane Dalton, “A Comparison between the San Remo Manual and the U.S. Navy’s Commander Handbook”, in Y. Dinstein and F. Domb (eds), above note 18, criticizing a number of rules of the San Remo Manual. Similarly, there has been criticism of the ICRC’s *Interpretative Guidance* (N. Melzer, above note 14), for example: W. Hays Parks, “Part IX of the ‘ICRC Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010; and William Boothby, “Direct Participation in Hostilities – A Discussion of the ICRC Interpretative Guidance”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

Things may not be as they appear from a distance: in reality, there are many ties between governments and the processes that develop such informal manuals. Many of the independent experts participating in the debates and editing the rules and commentaries are senior civil servants or (retired) military officers.³² Their participation is relevant in view of their expertise and knowledge, and they provide valuable input as to the application of existing law in military practice. Yet, they may also serve as informal conduits to their authorities and keep them abreast of ongoing work. Also, States frequently assist projects by either providing funding (for a secretariat, for research, or for the dissemination of the insights and results) or practical support such as making conference facilities available.³³

In turn, these projects reach out to States with questionnaires, and ask States to comment on drafts of their documents with a view to being both transparent as well as inclusive. In a discussion on YouTube, organized by the Australian Attorney-General's office,³⁴ Marko Milanovic (speaking about current work on the Tallinn Manual 3.0) mentioned that the process of drafting these informal documents was an iterative one: academics discussing with States (e.g. State representatives), and States responding. Such informal processes in his view were a useful thing to do, as they "provided assistance to the international community". It is probably an exaggeration to say that governments would necessarily require outside experts to determine what the law is, when one considers the number of participants in these expert processes with a governmental background. Thus, even if their names do not end up on the cover of the book, in reality States do participate, albeit in a non-committal manner. They do so while subscribing to the mantra that nothing is binding or meant to change the law.

However, this does not mean that all States participate, or that participating States are represented at the same level of expertise or seniority. Participation tends to be by invitation only, which implies that specific attention to diversity in participation is required.³⁵ It is well understood that participation in such a process may have a positive impact on the acceptance of the final result.

32 This begs the question whether the idea of these being independent legal experts can be maintained. Looking back at the process that established the 1994 San Remo Manual, L. Doswald-Beck, above note 5, at p. 67, mentions that "Overall, about a third of the participants were academic personnel and the others were governmental personnel attending in their personal capacity". Not only do these groups work on the basis of Chatham House rules on confidentiality, but the experts concerned also make a point of stressing that their views should not be understood as their (former) employers' views. The composition of these groups is not always transparent, particularly when discussions end in discontent and a lack of consensus. Petrov, in discussing the fate of the ICRC's *Interpretative Guidance* (N. Melzer, above note 14), refers to this as "... Mainly Unrevealed Experts". A. O. Petrov, above note 27, pp. 46–8. Other publications give lists of participants and their affiliations; see, for example, L. Doswald-Beck (ed.), above note 5, pp. 47–55; or M. N. Schmitt (ed.), above note 8, pp. x–xiii.

33 See, for example, mentioning support from governments, academia and the Red Cross movement: L. Doswald-Beck (ed.), above note 5, pp. 64–6.

34 Dapo Akande and Marko Milanovic, "International Law and Contemporary Security Challenges", *YouTube*, 2 February 2021, at: www.youtube.com/watch?v=ITZ4Cc7mpU&feature=youtu.be. The discussion has now unfortunately been taken down.

35 This is not the place to discuss the composition of these groups of independent experts in detail. However, a number of people seem to participate in many (if not almost all) of these groups. While this is a

The final result of these projects is a non-committal offer to States; it is “take it or leave it”. Reflection on the state of the law in this day and age has taken place, and can be rejected by States at no cost. The informal nature of the norms once finalized provides States with the possibility of either embracing the end results, or of rejecting these texts with fairly predictable yet convincing arguments.

For acceptable and good texts, the drafters will be congratulated with their fine description of the rules in this domain, and how these rules are a good description of the contemporary law in an area where – regrettably – no formal law exists at this point. The rules, even if informal, will provide useful guidance in the near future. The argument will clearly be that the experts have managed to do a superb job in formulating these norms, also taking into account the excellent credentials of these scholars. On the other hand, when rejecting certain norms or perhaps even all of the results, criticism will underline the misinterpretation of norms, their lack of a customary law character, the absence of a full picture of how a norm should be understood (as the authors have not been privy to classified information), or mistakes made with respect as to who is bound by which norms. Rejection may additionally take the shape of underlining the non-legal and informal character of the process and the absence of a normative effect: States would not have been bound by these rules anyway.

As an aside, informality has an additional advantage for those national systems where the government is under some domestic obligation to announce its intention to negotiate a particular treaty, or indeed to obtain prior parliamentary approval for doing so. Starting out with an informal project is clearly nothing more than starting an informal project, and thus will not require any specific parliamentary oversight. On the other hand, it must be noted that some States have relied upon the content of some of the informal manuals as they have worked on updating their own military manuals.³⁶

Taking a test drive?

The trend towards informal manuals is not necessarily negative for governments. The current pattern in which informal manuals have gained a central role in the development of the law of war is in fact useful for States. What is it that States actually do when they (informally) participate in an informal process leading to

testament to their impressive expertise, it also suggests a lack of inclusiveness as the development of these instruments thus seems to lie in the hands of a limited number of (mostly Western) men. Observing that the outcome of an expert process depends mainly on the individual group members, A. O. Petrov, above note 27, p. 79 at footnote 397, lists four experts who have participated in many processes. This list is perhaps not complete, and frequent participation does not necessarily imply having an impact during group discussions.

36 Such as reliance on the 1994 San Remo Manual by Germany, the United Kingdom and the United States; see Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War*, Vol. I, 3rd ed., ICRC, Geneva, 2011, footnote 289, available at: <https://www.icrc.org/en/doc/assets/files/publications/icrc-0739-part-i.pdf>.

the formulation of informal rules that are explicitly not intended to be binding (but that do look very much like potential formal legal rules)?

The analogy that comes to mind is that of a test drive: one goes to the car dealership and selects a particular car for a test drive – a particular brand, a type, an engine and a favourite colour (you may have been saving for that car for years!). You take the car for a spin, just to see if you like it, how it works and whether it is fast enough or alternatively whether its green credentials do not have a debilitating effect on the performance. If the test drive is unsatisfactory, you will drop the idea of buying this car altogether, and perhaps look around and select another car, a different brand with a better performance. If, on the other hand, the car is a good and satisfactory one, you will negotiate with the car dealer about the price, the colour, the motor and the date of delivery.

It is this type of approach that is used implicitly by States when they work on informal law, and start to apply these rules once the drafting has been concluded. “I am not buying, only looking ...” (“These rules are not legally binding”), and “I just want to see how this car performs” (building up State practice, otherwise known as *usus*). Once the decision has been taken to buy the car, there must have been very good reasons for doing so: “anyone can see that it is a great car”, “it has passed the consumers’ test” (“my allies and friends also agree with these rules”). On the other hand, if we do not like the car and decide to drop the idea of buying it, it is easy to claim that the development of norms was only informal, and that – as anyone knows – it is States and not academic institutions or independent experts that make international law. (“Hey, it was only a test drive, not a commitment to buy.”)

For States, this “test drive” approach to newly formulated rules is an attractive one. It provides a possibility to see how norms will turn out to function in practice, as well as within strategic debates with other States. There is no need to precisely identify their legal status at an early stage, and there is always a possibility of retreating or disavowing; these norms were formulated by experts, not by States. Embracing new norms, or distancing themselves from these new norms, is relatively simple and inexpensive for States, which puts them in a comfortable position. Distancing tends to be fairly explicit and visible, as it should be. There have been clear examples of States, and senior State officials, speaking out against informal documents when the need arose.³⁷ The reason for that is clear: this is not just expressing disagreement with newly formulated rules, it is also the expression of an objection that is intended to preclude that the new norms, if and when they develop into customary law, are opposable to that particular State. This in itself suggests that States are well aware of the possibility of such norms “slipping into” customary law; it is exactly why they may seek to prevent such developments. It is never too early to become a persistent objector.³⁸ Or would one consider that States really require outside assistance to determine what the law is? Sitting back, and following developments is not an uncomfortable position for States.

37 See above note 31.

The starting point may have been the absence of normative intent, as the effort was only one of reformulating and restating rules that existed before but have become unclear or now lack specificity in respect of a contemporary situation or new technology. However, by the time the norms appear to gain normative effect and may become binding, States will be observing this and may want to assert the position of a persistent objector if they do not agree with this development. A further observation is that, for those who have an (implicit) wish for the newly formulated rules to indeed develop normative effect and who understand these processes, there is a pathway as to how to engineer this. It is, after all, not a given that the stated absence of normative intent will prevent the development of normative effect over time.

Conclusions

Informal processes in which contemporary rules of the laws of war are reformulated or restated suggest that these are independent expert processes at a distance from governments, with no intent and no possibility of creating legal rules. Informal expert processes have no place in the theory of the sources of international law, and the authors of the informal manuals are aware that their formal role is limited; these processes are not diplomatic negotiations, but informal discussions that are to a certain extent non-committal.

Yet, governments are aware of them, and to a certain extent participate in these projects. While the formal development of the laws of war appears to have mostly come to a halt, these processes addressing contemporary legal issues on the basis of a review of existing but outdated law are valuable to governments. First, because of the expert reflection on these issues, investigating the application of existing legal rules on newer issues is useful. This discussion is followed by the (tentative) formulation of new norms with additional commentaries clarifying the background of these norms and how they are related to the broader system. If formulated in a sufficiently clear and acceptable manner, such norms will probably be picked up in practice, and may be the basis for the development of customary law. A clearly formulated rule brings with it the potential to be referred to, and to become understood as a legally binding rule. Thus, while normative intent may be absent amongst the legal experts working on these manuals, the effect may be that normative effect will occur over time. The formulation of a new norm may foreshadow its future development.

The development of military technology may touch on the limitations of the existing laws of war, and this is what Article 36 of AP I addresses. In order to evaluate the legitimacy of new weaponry one must understand what the law requires at that point in time. This is difficult in areas where the law is dated, and

38 On the persistent objector, see Olufemi Elias, "Persistent Objector", in *Max Planck Encyclopedias of International Law*, September 2006, available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1455?rskey=DAqgHS&result=1&prd=MPIL>.

military developments have moved well beyond the perspectives as they were when the law was formulated. Reinterpreting rules drafted for conflicts and weapons that no longer exist, towards rules appropriate for contemporary military technology implies both interpretation of underlying principles as well as imagination and creativity.

It could be suggested that informal manuals are perhaps an interim solution, for want of formal legal rules, and in anticipation of governmental steps towards formal lawmaking. They could be understood as a temporary solution in a situation in which contemporary rules are necessary and States remain hesitant about embarking on formal lawmaking. However, the existence of these informal documents restating or identifying contemporary law on the basis of pre-existing norms seems to obviate the need for the drafting of formal instruments.

It is unlikely that such informal documents will ever be recast as formal written law; at any rate, no examples come to mind of where this may have happened so far. Once an expert manual has been agreed upon, that is it. The expert manuals do not seem to trigger a more formal inter-State process of lawmaking; in fact, they appear to take the urgency to do so away. Expert manuals and the research undertaken are not considered as input for a future lawmaking process, because there is none. The reasons for this are the reasons that have led to the use of these informal procedures in the first place: hesitation about the wisdom of embarking on the formulation of norms of the law on armed conflict, together with a certain acceptance of the expert process and the resulting manual as satisfactory. What may happen though is an informal update of an informal instrument which obviates the need for any formal drafting.³⁹

It looks as though the formulation of new norms for new situations, albeit in an informal manner, is more or less the end of the road: the availability of norms in a clear and accessible manner makes the drafting of a formal legal instrument unnecessary. The authority of expert manuals in terms of substantive persuasiveness appears to be sufficiently important. Thus, if the question is whether there will be a treaty or some other kind of formal legal instrument as a follow-up, the answer is probably no. Informality seems to have been creeping into the laws of armed conflict, no so much because of the formulation of the informal manuals, but as a consequence of the absence of States.

39 See the plans to update the 1994 San Remo Manual (started in 2019). The Oslo Manual is an update of the 2009 Harvard Manual on International Law Applicable to Air and Missile Warfare. Also there is the current updating process of the Tallinn Manual 2.0 on Cyber Operations. See, for example, an invitation by the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence (CCDCOE) calling for comments on Tallinn Manual 2.0 in preparation of the Tallinn Manual 3.0, asking for “experts to share their comments and suggestions on how the rules and accompanying commentary of the Tallinn Manual 2.0 should be revised in the light of emerging State practice”. CCDCOE, “The CCDCOE Invites Experts to Contribute to the Tallinn Manual 3.0”, available at: <https://ccdcOE.org/news/2021/the-ccdcOE-invites-experts-to-contribute-to-the-tallinn-manual-3-0/>.

How the *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954* contribute to better protection of cultural property

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Abstract

This article analyzes the contribution of the Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (the Guidelines) to better protection of cultural property in peacetime and in times of armed conflict. The first part of the article introduces the Guidelines within the context of the implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol) and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, and provides examples of UNESCO's other standard-setting instruments such as the 1972 Convention Concerning the

* The present article is based on a number of my previous presentations. The factual information in this article reflects the situation as of 12 May 2022.

Protection of the World Cultural or Natural Heritage, the 2001 Convention on the Protection of the Underwater Cultural Heritage and the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, as well as bodies providing for guidelines for these instruments. The second part underscores the most important advances of the Guidelines in the implementation of the 1999 Second Protocol. The third part focuses on the contribution of the Guidelines as subsequent practice in the application of the 1999 Second Protocol establishing the agreement of the parties regarding its interpretation in the framework of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties. Finally, the fourth part concludes by highlighting the main advantages of the Guidelines in providing better protection for cultural property.

Keywords: cultural property, general protection, special protection, enhanced protection, international assistance, *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954*, 1954 Hague Convention, 1999 Second Protocol to the 1954 Hague Convention, 1972 World Heritage Convention.

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Introduction

This article analyzes the contribution of the *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict* (the Guidelines) to better protection of cultural property in peacetime and in times of armed conflict. It is divided into four parts.

The first part introduces the Guidelines within the context of the implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999 Second Protocol)¹ and the 1954 Hague Convention for the Protection of Cultural

1 The 1999 Second Protocol supplements the 1954 Hague Convention with regard to relations between the parties: see Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999 (1999 Second Protocol), Art. 2, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/590> (all internet references were accessed in June 2022). It provides a number of considerable advances: for example, it elaborates the content of peacetime safeguarding measures through the provision of concrete examples; it clarifies the notion of military necessity with regard to cultural property under both general and enhanced protection by providing for conditions when this notion may be applied, thus preventing its misinterpretation or abuse; it elaborates the notion of precautions in attack and precautions against the effects of hostilities; it improves the protection of cultural property in occupied territory by providing for specific obligations of the Occupying Power; it introduces the notion of enhanced protection with regard to certain categories of cultural heritage (as discussed in the section on “Enhanced Protection” later in this article); it defines the notion of serious violations of the 1999 Second Protocol as well as other violations of this agreement; it improves the protection of cultural property in non-international armed conflicts by providing for the applicability of the 1999 Second Protocol in its entirety to non-international armed conflicts; it establishes the Committee for the Protection of Cultural Property in the Event of Armed Conflict (see the following section below) and a biannual Meeting of the Parties;

Property in the Event of Armed Conflict (1954 Hague Convention), and provides examples of the United Nations Educational, Scientific and Cultural Organisation's (UNESCO) other standard-setting instruments and bodies providing guidelines for these instruments. The second part underscores the most important advances of the Guidelines in the implementation of the 1999 Second Protocol. The third part focuses on the contribution of the Guidelines as subsequent practice in the application of the 1999 Second Protocol establishing the agreement of the parties regarding its interpretation in the framework of Article 31(3)(b) of the 1969 Vienna Convention on the Law of Treaties.² Finally, the fourth part concludes by highlighting the main advantages of the Guidelines in providing better protection for cultural property.

Introduction of the Guidelines within the context of the implementation of the 1999 Second Protocol and the 1954 Hague Convention

Article 27(1)(a) of the 1999 Second Protocol provides, *inter alia*, for the function of the Committee for the Protection of Cultural Property in the Event of Armed Conflict (the Committee), a twelve-member supervisory body of the 1999 Second Protocol and the 1954 Hague Convention³ (for those High Contracting Parties bound by the 1999 Second Protocol⁴) to develop the Guidelines.⁵ Once developed, the Guidelines are to be endorsed by the Meeting of the Parties to the Second Protocol.⁶ Obviously, this provision also relates to the endorsement of subsequent amendments to the Guidelines.

The main objectives of the Guidelines are threefold:

- to provide a concise and practical tool for facilitating the implementation of the 1999 Second Protocol by its parties;

and finally, it establishes the system of international assistance and creates the Fund for the Protection of Cultural Property in the Event of Armed Conflict.

- 2 See also Kevin Chamberlain, *War and Cultural Heritage: A Commentary on the Hague Convention 1954 and its Two Protocols*, 2nd ed., Institute of Art and Law, Bülth Wells, 2013, p. 164.
- 3 The Committee is essentially responsible for the monitoring of the implementation of the 1999 Second Protocol and management of enhanced protection and international assistance. Its functions are set out in Article 27(1) of the Protocol. The Committee is currently composed of Austria, the Czech Republic, Estonia, Greece, Morocco and Nigeria (elected until 2023), and Azerbaijan, El Salvador, Finland, Japan, Qatar and Ukraine (elected until 2025). The current chairperson of the Committee is H. E. Ms Claudia Reinprecht (Austria).
- 4 In conformity with Articles 41 and 42 of the 1999 Second Protocol, only High Contracting Parties may become party to the Protocol. In other words, a State wishing to become party to this Protocol is required to first join the 1954 Hague Convention.
- 5 The 1954 Hague Convention does not establish any supervisory body. The 1954 Hague Intergovernmental Conference considered this issue, but the discussion did not result in the creation of the supervisory body. Article 27(2) of the 1954 Hague Convention provides for the possibility of convening meetings of the High Contracting Parties, the main purpose of which is "to study problems concerning the application of the Convention and of the Regulations for its execution, and to formulate recommendations in respect thereof". The first meeting of the High Contracting Parties took place in 1962. It considered, *inter alia*, the issue of "adequate distance" under Article 8(1)(a) of the 1954 Hague Convention but did not reach any specific conclusions. The last (14th) meeting of the High Contracting Parties took place in 2021.
- 6 1999 Second Protocol, Art. 23(3)(b).

- to provide guidance to the Committee and the Secretariat of UNESCO for the fulfilment of their functions as established by the 1999 Second Protocol; and
- to attempt to embody best practices in the implementation of the 1999 Second Protocol.⁷

The Guidelines are an important *novum* in comparison with the 1954 Hague Convention; the latter does not provide for such tool. The inclusion of the development of the Guidelines in the functions of the Committee was inspired by the *Operational Guidelines for the Implementation of the World Heritage Convention*,⁸ which have been modified on several occasions, most recently in 2021.

It should be stressed that the 2001 Convention on the Protection of the Underwater Cultural Heritage,⁹ the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage and the 2005 Convention for the Protection and Promotion of the Diversity of Cultural Expressions all contain provisions for their specific guidelines (in the first case, the *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*; in the second case, the *Operational Directives for the Implementation of the Convention for the Safeguarding of the Intangible Heritage*;¹⁰ and in the third case, the *Operational*

7 See UNESCO, *Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Paris, December 2019 (Guidelines), paras 1–2, available at: https://en.unesco.org/sites/default/files/1999_Protocol_Guidelines_EN_2020.pdf. Paragraph 3 provides for the possibility of revising the Guidelines to reflect the decisions and recommendations adopted by the Meeting of the Parties and the Committee.

8 The main purposes of the *Operational Guidelines for the Implementation of the World Heritage Convention* are set forth in their paragraph 1, which reads as follows: “The *Operational Guidelines for the Implementation of the World Heritage Convention* ... aim to facilitate the implementation of the *Convention concerning the Protection of the World Cultural and Natural Heritage* ..., by setting forth the procedures for:

- a) the inscription of properties on the World Heritage List and the List of World Heritage in Danger;
- b) the protection and conservation of World Heritage properties;
- c) the granting of International Assistance under the World Heritage Fund; and
- d) the mobilization of national and international support in favor of the Convention.”

Paragraph 2 of the *Operational Guidelines* provides for their periodic revision to reflect the decisions of the World Heritage Committee. See UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, UNESCO Doc. WHC.21/01, 31 July 2021, available at: <https://whc.unesco.org/en/guidelines/> (this web page also contains a section on the historical development of the *Operational Guidelines*).

Regarding the *Operational Guidelines*, Professor Catherine Redgwell has stated: “The Guidelines do not constitute a legally binding instrument, but rather perform a valuable policy function in guiding the implementation of the Convention by the key stakeholders, which include the States Parties, members of the Committee, the Bureau, the Advisory Bodies (ICOMOS, IUCN, and ICCROM), the UNESCO secretariat, and the site managers.” Catherine Redgwell, “Article 2: Definition of Natural Heritage”, in Francesco Francioni (ed.), *The 1972 World Heritage Convention: A Commentary*, Oxford Commentaries on International Law, Oxford University Press, New York, 2008, pp. 66–67.

9 The main purpose of the 2001 Convention’s *Operational Guidelines* under their paragraph 22 is to facilitate the implementation of this Convention by giving practical guidance. Paragraph 23 of the *Operational Guidelines* provides for the possibility of their revision by the Meeting of States Parties to the 2001 Convention whenever deemed necessary. See UNESCO, *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, UNESCO Doc. CLT/HER/CHP/OG 1/REV, August 2015, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000234177>.

10 According to the UNESCO website, available at: <https://ich.unesco.org/en/directives>: “Article 7 of the Convention stipulates that one of the functions of the Committee is to prepare and submit to the General Assembly for approval operational directives for the implementation of the Convention.

*Guidelines of the 2005 Convention*¹¹). It is interesting to note that neither the 2003 Convention's *Operational Directives* nor the 2005 Convention's *Operational Guidelines* contain any specific paragraphs on their main objective.

Finally, the Subsidiary Committee of the Meeting of States Parties to the 1970 Convention¹² also elaborated on the *Operational Guidelines for the Implementation of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property*.¹³ In accordance with paragraph 8, the main purpose of the *Operational Guidelines* is threefold:

- to strengthen and facilitate the implementation of the 1970 Convention in order to minimize risks related to disputes over the interpretation of the Convention as well as to litigation, and thus to contribute towards international understanding;
- to assist States Parties in implementing the provisions of the Convention, including by learning from the best practices of States Parties geared towards enhancing the effective implementation of the Convention; and
- to identify ways and means to further the achievement of the goals of the Convention through strengthened international cooperation.

The General Assembly adopted for the first time the *Operational Directives* in June 2008, and amended them in June 2010, 2012, 2014 and 2016. It will continue to complete and revise them in future meetings.

Among other things, the *Operational Directives* indicate the procedures to be followed for inscribing intangible heritage on the lists of the Convention, the provision of international financial assistance, the accreditation of non-governmental organizations to act in an advisory capacity to the Committee or the involvement of communities in implementing the Convention.”

The *Operational Directives* are also available on the web page cited above.

11 According to the UNESCO website, available at: <https://en.unesco.org/creativity/convention/texts>: “Operational Guidelines of the Convention include a set of texts elaborated by the Intergovernmental Committee and adopted by the Conference of Parties, providing general guidelines for the implementation and application of the provisions of the Convention. They are to be considered as a ‘roadmap’ for understanding, interpretation and implementation of specific articles of the Convention.” The *Operational Guidelines* are also available on the web page cited above.

12 According to the UNESCO website, available at: https://en.unesco.org/fighttrafficking/1970/subsidiary_committee_and_sessions: “The Subsidiary Committee of the Meeting of States Parties to the 1970 Convention is made up of representatives from 18 States Parties (3 per regional group). The election of the Committee follows the principles of geographic representation and fair rotation. The members of the Committee are elected for a period of four years. Every two years, the Meeting of States Parties renews half of the members of the Committee. A member of the Committee cannot be elected for two consecutive terms.

The functions of the Subsidiary Committee are:

- promoting the aims of the Convention;
- reviewing of national reports submitted to the General Conference by States Parties to the Convention;
- preparing and submitting to the Meeting of States Parties recommendations and guidelines that can contribute to the implementation of the Convention;
- identify problematic situations resulting from the implementation of the Convention, including matters relating to the protection and return of cultural property;
- establishing and maintaining coordination with the ‘Return-Restitution’ Committee in connection with capacity-building measures to fight the illicit trafficking of cultural property;
- informing the Meeting of States Parties of the activities that have been implemented.”

13 Available at: <https://en.unesco.org/fighttrafficking/operational-guidelines>.

The most important advances of the Guidelines

In my view, the most important advances of the Guidelines are in three fields: enhanced protection, international assistance, and the reporting system.

Enhanced protection

Before introducing the concept of enhanced protection, it may be useful to introduce two categories of protection under the 1954 Hague Convention: general and special.¹⁴

General protection is granted to all the three categories of cultural property defined by Article 1 of the Convention:

- movable or immovable property of great importance to the cultural heritage of every people such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property just described;
- buildings whose main and effective aim is to preserve or exhibit the movable cultural property mentioned in the previous point; and
- centres containing monuments.

All such property is generally protected under the Convention, regardless of its origin or ownership. It is up to the High Contracting Parties to identify such cultural property situated in their territory.

In addition to general protection under the 1954 Hague Convention, Article 8(1) of the Convention also provides for special protection which may be granted to a limited number of three categories of property:

- refuges intended to shelter movable cultural property in the event of armed conflict;
- centres containing monuments; and
- other immovable cultural property of very great importance.

Thus, movable cultural property may not be granted special protection unless it is stored in a shelter for such property.

Unlike the general protection that is attributed to all categories of cultural property, the granting of special protection is not automatic.¹⁵ Article 8 of the Convention subjects the granting of such protection essentially to two conditions:

14 Further details on the contents of the 1954 Hague Convention and its two Protocols can be found in International Committee of the Red Cross (ICRC), “1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict and Its Protocols”, fact sheet, ICRC Advisory Service on IHL, April 2021, available at: www.icrc.org/en/document/1954-convention-protection-cultural-property-event-armed-conflict-and-its-protocols-0.

15 Further details on general, special and enhanced protection may be found in ICRC, above note 14.

(1) the cultural property in question must be situated at an adequate distance from any large industrial centre or any important military objective constituting a vulnerable point, and (2) such property may not be used for military purposes.

The first condition warrants a question: what is “an adequate distance”? Such a notion is not defined by the Convention and, therefore, is left to the discretion of each State party to the Convention. Its definition will obviously depend on a number of factors such as the location of military units or armament manufacturers, or requirements of national self-defence. There is only one exception to the requirement of adequate distance: if the cultural property in question is situated in the proximity of an important military objective, the special protection may nevertheless be granted if the State concerned undertakes not to use this military objective in the event of armed conflict. The second condition is obvious because cultural property may not be used for military purposes and simultaneously enjoy protection.

Special protection is granted upon a special request of the State where the cultural property concerned is situated. No other High Contracting Party may object; if any objections are lodged and maintained, the special protection will not be granted.

Cultural property under special protection is listed in the International Register of Cultural Property under Special Protection,¹⁶ a special register maintained by the director-general of UNESCO. At present, cultural property in four High Contracting Parties (Germany, the Holy See, Mexico and the Netherlands) has been entered in the Register at the request of those States (a total of four refugees, as well as the whole of the Vatican City State). Two States (Austria and the Netherlands) have withdrawn registrations.

It should be noted that the concept of special protection has never fully developed its potential, given that as of today, only four High Contracting Parties have placed their property under special protection and the last entry in the Register took place in 2015.

There are essentially two reasons why a vast majority of the High Contracting Parties have so far abstained from placing their cultural sites under special protection:

- “the practical difficulties encountered when applying Article 8, in particular with regard to cultural property in the middle of large cities or close to major urban, political, and industrial centres”;¹⁷ and
- “the increasing politicisation resulting from the Cold War and the tensions that pervaded relations between States, including any cultural measures”.¹⁸

¹⁶ A copy of the Register is on file with the author.

¹⁷ Jiří Toman, “The Road to the 1999 Second Protocol”, in Nout van Woudenberg and Liesbeth Lijnzaad (eds), *Protecting Cultural Property in Armed Conflict: An Insight into the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, Martinus Nijhoff, Leiden and Boston, MA, 2010, p. 5. When analyzing the issue of enhanced protection, Jean-Marie Henckaerts and Nout van Woudenberg stress the practical difficulties concerning the notion of “adequate distance” and the issue of cultural property in the heart of large urban, political, and industrial centres (see pp. 32 and 52, respectively, of the above publication).

¹⁸ *Ibid.*, p. 5.

Before analyzing the system of enhanced protection, it should be stressed that items of cultural property are protected as civilian objects.¹⁹

Chapter III of the 1999 Second Protocol introduces a new category of protection: enhanced protection.²⁰ To be eligible for the granting of enhanced protection, the cultural property in question (both immovable and movable) must meet three conditions: it must be of the greatest importance for humanity; it must be protected by adequate domestic legal and administrative measures; and it may not be used for military purposes or to shield military sites. A declaration to this end must be provided. Enhanced protection is granted by the Committee for the Protection of Cultural Property in the Event of Armed Conflict by the entry of the cultural property in question into the International List of Cultural Property under Enhanced Protection (the List).²¹ At the time of writing of this article, the Committee has inscribed seventeen cultural properties of ten parties to the Second Protocol (Armenia, Azerbaijan, Belgium, Cambodia, Cyprus, the Czech Republic, Georgia, Italy, Lithuania and Mali) in the List. Sixteen of them are cultural World Heritage Sites, and the seventeenth – the National Central Library of Florence – is part of the Historic Centre of Florence, a World Heritage Site.

The Guidelines introduce a number of important elements for facilitating the clarification of the criterion of “the greatest importance for humanity”, the preparation of requests for the granting of enhanced protection, and the evaluation of such requests. Furthermore, they also provide for procedural aspects for the submission of the nomination files, thus establishing clarity and predictability in this process.

I will start with the clarification of the criterion of “the greatest importance for humanity”, which is contained in paragraphs 32–37 of the Guidelines.

Paragraph 32 provides for three sub-criteria: exceptional cultural significance of the cultural property concerned, its uniqueness, and the fact that its destruction would lead to irretrievable loss for humanity. These three sub-criteria are disjunctive.

Paragraph 33 stipulates that cultural property of national, regional or universal value may have exceptional cultural significance. It goes on to state that this significance may be deduced from the following indicative criteria: the property in question bears testimony to one or more periods of the development of humankind at the national, regional or global level; it represents a masterpiece of human creativity; it bears an exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; it exhibits an important

19 See Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 52(1): “Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.”

20 See Jean-Marie Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, in N. van Woudenberg and L. Lijnzaad (eds), above note 17.

21 A copy of the International List of Cultural Property under Enhanced Protection is on file with the author.

interchange of human achievements over a span of time or within a cultural area of the world on developments in arts and sciences; and it has a central significance to the cultural identity of the societies concerned.²²

Paragraph 34 clarifies the notion of uniqueness by stating that the property in question is considered to be unique if there is no other comparable cultural property that is of the same cultural significance. Furthermore, it provides that the unique character may be deduced from a variety of indicative criteria, including age, history, community, representativeness, location, size and dimension, shape and design, purity and authenticity in style, integrity, context, artistic craftsmanship, aesthetic value, and scientific value.

Paragraph 35 clarifies the criterion of irretrievable loss for humanity. This criterion is met if the damage or destruction of the cultural property in question would result in the impoverishment of the cultural diversity or cultural heritage of humankind.

Paragraph 36 provides for a presumption of satisfying the condition of the greatest importance for humanity for immovable cultural property inscribed on the World Heritage List. This presumption is not automatic because it is introduced by the term “subject to other relevant considerations”. However, from my own experience from the Bureau and Committee meetings organized by the UNESCO Secretariat, I can state that when a cultural World Heritage Site was submitted for the granting of enhanced protection, there was no substantive discussion of this issue and participants in those meetings unanimously concluded that the site in question complied with Article 10(a) of the 1999 Second Protocol.

Paragraph 37 relates to documentary heritage. It stipulates that the Committee will consider the fact that the cultural property is inscribed on UNESCO’s Memory of the World Register.²³ As of today, no element of this register has been submitted for the granting of enhanced protection.

Paragraphs 44–51 of the Guidelines provide for procedural aspects of the submission of requests for the granting of enhanced protection to the Committee. In conformity with paragraph 45, the request for the granting of enhanced protection is sent by the Permanent Delegation to UNESCO of the party to the Committee through the Secretariat. This provision is important because it ensures that the Permanent Delegation is fully informed of the request, supports it and, if necessary, may coordinate with its relevant national authorities on the submission of further information. This paragraph also stipulates that requests need to be received by the Secretariat by 1 March of each year at the latest in order to be considered at the upcoming meeting of the Committee. The importance of this provision is twofold: it enables the party concerned to plan its work and to coordinate the preparation and completion of the request at the national level within a specific time limit, and it enables the Committee and the Secretariat to

22 These criteria are heavily inspired by criteria (i), (ii) and (iii) set forth in paragraph 77 of the *Operational Guidelines for the Implementation of the World Heritage Convention*, above note 8.

23 A copy of the Register is on file with the author.

optimize their work. For obvious reasons, this rule does not apply in cases of requests for provisional enhanced protection.

Paragraph 46 describes the role of the Secretariat. The Secretariat acknowledges the receipt of the request, checks for completeness and registers the request. It requests any additional information from the party, as appropriate. All such information must be received, preferably, in a single submission of one complete file within two months of the date of the request from the Secretariat. Finally, the Secretariat forwards complete requests to the Bureau²⁴ of the Committee for *prima facie* consideration, together with a review of completeness prepared by the Secretariat.

Paragraph 47 stipulates that the Bureau forwards the request (including the evaluation) to the Committee and may propose a decision.

Paragraph 48 sets out the role of the Committee following receipt of the request. It informs all parties of the request for inclusion in the List.

Paragraph 49 deals with representations related to the entry into the List. To the best of my knowledge, at the time of the writing of this article no representation has been submitted.

Paragraph 52 of the Guidelines introduces the important notion of a “tentative list”.²⁵ The tentative list “means a list of cultural property for which a Party intends to request the granting of enhanced protection”. This paragraph also encourages parties to submit tentative lists for two purposes: to facilitate the Committee’s maintenance and updating of the Enhanced Protection List, and to facilitate the management of requests for international assistance. The last phrase of this paragraph provides that the fact that an item of cultural property has not been previously included in the tentative list does not prevent the party from requesting the granting of enhanced protection for the item. This is an important difference in comparison with the *Operational Guidelines for the Implementation of the World Heritage Convention* because the latter provides in paragraph 63 that “a nomination dossier will not be considered complete unless the nominated property has already been included on the State Party’s Tentative List and has undergone a Preliminary Assessment”.²⁶ Thus, the 1999 Second Protocol’s system gives the parties a choice – either to opt for inclusion of the cultural property concerned in a tentative list and then to submit this property for the

24 The six-member Bureau (the chairperson, the four vice-chairpersons and the rapporteur) is elected in conformity with Rule 16.1 of the Rules of Procedure of the Committee at the beginning of each ordinary session of the Committee. In accordance with Rule 15.1 of the Rules of Procedure of the Committee, the functions of the Bureau are to coordinate the work of the Committee and to fix the dates, hours and order of business of meetings. In addition, under the Guidelines the Bureau plays an important role in the management of requests for the granting of enhanced protection and those related to the granting of international assistance. The current Bureau is composed of H. E. Ms Claudia Reinprecht (Austria), the chairperson; H. E. Mr Imoh Sunday Egbo (Nigeria), the rapporteur; and the four vice-chairpersons from El Salvador, Estonia, Japan and Morocco.

25 The notion of a “tentative list” was taken almost *expressis verbis* from paragraph 62 of the *Operational Guidelines for the Implementation of the World Heritage Convention*, above note 8.

26 *Ibid.*, para. 63.

granting of enhanced protection, or to submit the cultural property concerned directly for the granting of enhanced protection.

Paragraphs 54–61 provide for the content of the request: identification of the cultural property, description of the cultural property, protection of the cultural property, use of the cultural property, information regarding responsible authorities, signature on behalf of the party, and format of the request.

Paragraph 68 introduces an important *novum* – a “Statement of Inclusion of the Property on the List of Cultural Property under Enhanced Protection”²⁷ adopted by the Committee. The Statement confirms that all three criteria of Article 10 of the 1999 Second Protocol are met. The Statement is the basis for the further protection of the cultural property in question.

Paragraphs 76–79 provide for different issues concerning the List. Paragraph 76 stipulates that the List will be divided into two divisions: cultural property under enhanced protection, and cultural property under provisional enhanced protection. Paragraph 77 states that the information is structured in the following way: name and identification of the cultural property; description of the cultural property; location, boundaries, and, as appropriate, immediate surroundings of the cultural property; and other relevant information. In conformity with paragraph 78, other relevant information includes the date of entry in the List, description of an exceptional or emergency situation, decisions and recommendations of the Committee such as time periods, and suspensions or cancellations. Finally, paragraph 79 states that the List is made available by the Secretariat through appropriate means; in practice, this means that the Secretariat will post the List on its website.

To facilitate the preparation and submission of requests for the granting of enhanced protection, the Secretariat prepared an Enhanced Protection Request Form (Annex I to the Guidelines) and a model of the non-military use declaration. This model stipulates that this declaration is to be signed by the representative authorized by the party which has control over the cultural property as competent for this matter. In practice, a number of parties have had this declaration signed either by the minister of defence or a high-level representative of the Ministry of Defence. A model of the non-military use declaration is annexed to the Guidelines.

The Guidelines also provide in Chapter III.E for the distinctive emblem for cultural property under enhanced protection and modalities for its use.²⁸ The most important parts concern basic principles relating to the distinctive emblem (paragraphs 98–102); modalities for using the distinctive emblem – use *ratione materiae* (paragraphs 103–104) and use *ratione temporis* (paragraphs 105–107);

27 See *ibid.*, para. 155, introducing the Statement of Outstanding Universal Value. The 1999 Second Protocol Statement closely mirrors the Statement of Outstanding Universal Value.

28 It should be pointed out that Chapter V (“The Distinctive Emblem”) of the 1954 Hague Convention provides for the distinctive emblem. Its description is contained in Article 16(1) of the Convention, and the modalities for its use in Article 17. Furthermore, Articles 20 and 21 of the Regulations for the Execution of the Convention deal with the issue of the emblem.

modalities for placing the distinctive emblem (paragraphs 108–110); and protection of the distinctive emblem from misuse (paragraphs 111–113).

The distinctive emblem takes the form of a shield, divided per saltire in blue and white (a shield consisting of a royal-blue square, one of the angles of which forms the point of the shield, and a royal-blue triangle above the square, the space on either side being taken up by a white triangle), which is outlined by an external red band that is detached from the shield.²⁹

In accordance with paragraph 98 of the Guidelines, the basic principles relating to the distinctive emblem are essentially twofold: to ensure the recognition and identification of cultural property under enhanced protection, particularly during the conduct of hostilities, with a view to ensuring the effectiveness of the provisions of the 1999 Second Protocol, and, more particularly, to contribute to the effectiveness of Article 12 on the “Immunity of Cultural Property under Enhanced Protection”;³⁰ and to ensure legal certainty with regard to criminal responsibility of belligerents in order to ensure reasonable implementation³¹ of Article 15(1)³² of the Protocol.

Paragraph 99 of the Guidelines states clearly that the marking of cultural property under enhanced protection is declaratory and has no constitutive effect. In other words, in general, a party having a cultural property under enhanced protection is not obliged to mark this property with the distinctive emblem.

Paragraph 100 encourages parties to affix the enhanced protection emblem alone, without any other logo and/or emblem, with due consideration being taken of a combatant’s field of vision when directing an attack from land, sea or air during hostilities.

Paragraph 101 provides for the obligation to use the distinctive emblem in accordance with the relevant rules of international humanitarian law and the

29 Guidelines, above note 7, Annex IV, “Distinctive Emblem for Cultural Property under Enhanced Protection, Including Its Graphic Charter”.

30 “The Parties to a conflict shall ensure the immunity of cultural property under enhanced protection by refraining from making such property the object of attack or from any use of the property or its immediate surroundings in support of military action.”

31 Under the Guidelines, the term “reasonable implementation” means establishing as criminal offences under domestic criminal law of the parties serious violations of the 1999 Second Protocol as set forth in Article 15(2) of the Protocol. Article 15(2) provides the following: “Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.”

32 Article 15(1) stipulates the following: “Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:

- a. making cultural property under enhanced protection the object of attack;
- b. using cultural property under enhanced protection or its immediate surroundings in support of military action;
- c. extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
- d. making cultural property protected under the Convention and this Protocol the object of attack;
- e. theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.”

modalities *ratione materiae* and *ratione temporis* for its use specified in the Guidelines. While this paragraph does not specify the relevant rules of international humanitarian law, in my view, one such rule is the prohibition against perfidy.³³

Paragraph 102 provides for the exception to the voluntary character of the marking. It stipulates that when the Committee is requested to grant enhanced protection under the emergency procedure, it requests the party that has jurisdiction or control over the cultural property to mark the property.

Paragraph 103 contains an important principle: the exclusive use of the distinctive emblem to mark cultural property under enhanced protection. The emblem may not be used for purposes, be they commercial or non-commercial, other than those specified in the Guidelines.

With regard to use *ratione temporis*, in peacetime parties having jurisdiction or control over cultural property under enhanced protection may make preparations to mark such property by using the distinctive emblem (paragraph 105).

In conformity with paragraph 106, in times of armed conflict, the parties to the conflict are encouraged to mark cultural property under enhanced protection by using the distinctive emblem. Finally, in case of suspension or cancellation of enhanced protection by the Committee, parties that have jurisdiction or control over the cultural property concerned are required to remove the distinctive emblem that had been used to mark the property.

Paragraphs 108–110 set forth modalities for placing the distinctive emblem. They may be summarized as follows: the placement of the emblem is at the discretion of the parties' competent authorities; it should be done in a manner benefiting the property; and, subject to availability of resources, technological developments will determine the means used (both in peacetime and wartime) to place the distinctive emblem on cultural property.

Paragraphs 111–113 lay down principles for the protection of the distinctive emblem from misuse. They may be summarized as follows: avoidance of the use of the distinctive emblem that does not comply with principles set out in the Guidelines; encouragement of parties to disseminate information concerning the distinctive emblem and the modalities for its use, both within

33 Article 37(1) of API, above note 19, prohibits killing, injury or capture of an adversary by resort to perfidy. Perfidy is constituted by acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence. Furthermore, the authoritative ICRC study on customary international humanitarian law provides in its Rule 61 for the prohibition of the improper use of other internationally recognized emblems: see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>. This rule is applicable both in international and non-international armed conflicts (see Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", *International Review of the Red Cross*, Vol. 87, No. 857, 2005). Finally, the authoritative commentary on Rule 61 (ICRC Customary Law Study, above, pp. 212–213) states that the distinctive emblem for cultural property is covered by Rule 61 in both international and non-international armed conflicts.

their civilian populations and among military personnel; and encouragement of the parties to enact legislation on the protection of the distinctive emblem and the modalities for its use and/or adoption of other measures, as appropriate, on the protection of the distinctive emblem and the modalities for its use.

To conclude on the enhanced protection emblem, it is necessary to point out that unlike the distinctive emblem of the 1954 Hague Convention, which is foreseen by Chapter V of the Convention (“The Distinctive Emblem”), the enhanced protection emblem was adopted by the Ninth Meeting of the Committee (Decision 9.COM 4) in December 2014 and endorsed by the Sixth Meeting of the Parties (Decision 6.SP 2) in December 2015.

International assistance

The article now turns to the second important advance of the Guidelines: international assistance. Issues of international assistance – both substantive and procedural – are dealt with in Chapter VI of the Guidelines (“International Assistance”). I will begin with the substantive issues.

Paragraph 133 provides for the three categories of international assistance: preparatory measures (essentially taken during peacetime), emergency measures (essentially taken during an armed conflict) and recovery measures (essentially taken after an armed conflict).

Paragraph 134 speaks about three purposes of preparatory measures: support to parties’ overall domestic sustainable efforts related to cultural property, contribution to the preparation and development of administrative or institutional measures, provisions and structures for the safeguarding of cultural property, and contribution to the preparation, development or implementation of the laws, administrative provisions and measures recognizing the exceptional cultural and historic value and ensuring the highest level of protection of cultural property to be nominated for enhanced protection.

Paragraph 135 defines the purpose of emergency measures. They are aimed at ensuring the adequate protection of the cultural property concerned and to prevent its deterioration, destruction or looting.

Paragraph 136 sets forth the purpose of recovery measures. They are focused on ensuring the preservation and conservation of cultural property damaged in connection with the conflict as well as the return of cultural property that has been removed.

Paragraph 138 provides for four considerations by which the Committee is guided when considering requests for the granting of international assistance: the probability that the assistance will have a catalytic and multiplier effect (“seed money”) and will promote financial and technical contributions from other sources; whether the legislative, administrative and, wherever possible, financial commitment of the recipient is available to the activity; the exemplary value of the activity; and the cost-efficiency of the activity.

Procedural aspects of consideration of requests for international assistance provided by the Committee, including financial and other assistance from the Fund

for the Protection of Cultural Property in the Event of Armed Conflict (the Fund),³⁴ are laid down by Chapter VI.E of the Guidelines (“Process of Considering Requests for International Assistance Provided by the Committee, Including Financial and Other Assistance from the Fund”).

The fundamental question to be asked is who may submit a request for international assistance. In accordance with paragraph 157, requests may be submitted either by a party to the 1999 Second Protocol or by a party to a conflict which is not a party to the Protocol but which accepts and applies the provisions of the Protocol. Finally, requests may also be submitted jointly by two or more parties concerned. As of the time of writing of this article, to the best of my knowledge, no joint submission has been made.

Under paragraph 163, requests for all forms of international assistance provided by the Committee are to be submitted to the Committee by or in cooperation with the Permanent Delegation of the party to UNESCO, where appropriate, through the Secretariat. The role of the Secretariat is to acknowledge the receipt and to verify the completeness of the request. If the request is not complete, the Secretariat will ask the applicant to provide the missing information.

The request is to be submitted in writing in one of the two working languages of the Secretariat (English or French) by using the application form and, if possible, in an electronic format (paragraph 171).

Paragraph 164 provides the time frame for the submission of requests. They are to be submitted to the Secretariat at least six months before the meeting of the Committee. The Secretariat forwards the requests to the Bureau of the Committee

34 Article 29 of the 1999 Second Protocol (“The Fund for the Protection of Cultural Property in the Event of Armed Conflict”) reads as follows: “1. A Fund is hereby established for the following purposes:
(a) to provide financial or other assistance in support of preparatory or other measures to be taken in peacetime in accordance with, *inter alia*, Article 5, Article 10 sub-paragraph (b) and Article 30; and
(b) to provide financial or other assistance in relation to emergency, provisional or other measures to be taken in order to protect cultural property during periods of armed conflict or of immediate recovery after the end of hostilities in accordance with, *inter alia*, Article 8 sub-paragraph (a).
2. The Fund shall constitute a trust fund, in conformity with the provisions of the financial regulations of UNESCO.
3. Disbursements from the Fund shall be used only for such purposes as the Committee shall decide in accordance with the guidelines as defined in Article 23 sub-paragraph 3(c). The Committee may accept contributions to be used only for a certain programme or project, provided that the Committee shall have decided on the implementation of such programme or project.
4. The resources of the Fund shall consist of:
(a) voluntary contributions made by the Parties;
(b) contributions, gifts or bequests made by:
(i) other States;
(ii) UNESCO or other organizations of the United Nations system;
(iii) other intergovernmental or non-governmental organizations; and
(iv) public or private bodies or individuals;
(c) any interest accruing on the Fund;
(d) funds raised by collections and receipts from events organized for the benefit of the Fund; and
(e) all other resources authorized by the guidelines applicable to the Fund.”

As of 16 March 2022, the total amount of assets available under the Fund amounts to \$499,409.49. See UNESCO, “Item 4 of the Provisional Agenda: Emergency International Assistance to Ukraine”, UNESCO Doc. C54/22/2.EXT.COM/4, 16 March 2022, p. 3, para. 14, p. 3, available at: https://en.unesco.org/sites/default/files/item.3_ext_international_assistance_en_0.pdf.

for its *prima facie* consideration, together with its review for completeness. The six-month time frame is not applicable in case of requests for emergency measures, which may be submitted at any time. The Committee will consider them as soon as possible on an *ad hoc* basis (paragraph 169).

Paragraph 166 sets out the role of the Bureau in the evaluation of requests. Following their evaluation, the Bureau will forward the request to the Committee for consideration and an appropriate decision, and may offer any relevant observations.

Paragraph 167 provides for the modality of adoption of the decision by the Committee on the granting of requests for international assistance. Such a decision is to be taken by a majority of two thirds of the Committee's members present and voting. To the best of my knowledge, during the period of my being the secretary of the Committee, all decisions on the granting of international assistance were adopted without voting.

Once the Committee has reached a decision on the granting of a request for international assistance, it communicates this decision to the applicant party within two weeks following the decision. In case of granting international assistance, the Secretariat concludes an agreement with the recipient of the international assistance as appropriate (paragraph 168).

Finally, the Committee monitors and evaluates the international assistance that was granted (paragraph 170).

To facilitate the preparation and submission of requests for the granting of international assistance, the Secretariat has developed an International Assistance Application Form, available on the Secretariat's website.

Reporting system

I will now address the third advance of the Guidelines: the reporting system.

Both the 1954 Hague Convention and its 1999 Second Protocol contain specific provisions on the obligation of States party to each instrument to provide periodic reports.³⁵ The main issue with those two provisions is that they do not specify what kind of information should be provided by the parties or High Contracting Parties.

The most important provisions on the reporting system are contained in paragraphs 118–121 of the Guidelines. Paragraph 118 encourages parties to submit their reports on the implementation of the 1999 Second Protocol together with their reports on the implementation of the 1954 Hague Convention. This

35 1954 Hague Convention, Art. 26(2): "Furthermore, at least every four years, they [the High Contracting Parties] shall forward to the Director-General [of UNESCO] a report giving whatever information they think suitable concerning any measures being taken, prepared or contemplated by their respective administrations in fulfillment of the present Convention and of the Regulations for its execution." 1999 Second Protocol, Art. 37(2): "The Parties shall submit to the Committee, every four years, a report on the implementation of this Protocol." For an analysis of the reporting system under the 1954 Hague Convention, see Jan Hladik, "Reporting System under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict", *International Review of the Red Cross*, Vol. 82, No. 840, 2000.

provision is important in two respects: firstly, as all parties are automatically a party to the 1954 Hague Convention and the 1999 Second Protocol develops a number of provisions of the Convention (for example, Article 5³⁶ of the Protocol develops Article 3³⁷ of the Convention), the parties may develop in one single report measures taken both for the implementation of the 1954 Hague Convention and the 1999 Second Protocol. Secondly, the joint submission optimizes the use of resources of the parties because they are not obliged to submit a national report on the implementation of the 1954 Hague Convention within one specific time frame and a national report on the implementation of the 1999 Second Protocol within another specified time frame.

Paragraph 119 stipulates that Parties cover the following items in their periodic report:

Implementation of general provisions regarding protection:

- information on peacetime preparatory measures for the safeguarding of cultural property undertaken or envisaged to be undertaken; and
- information by parties which are Occupying Powers on their compliance with the provisions of the 1999 Second Protocol concerning the protection of cultural property in occupied territory.

Implementation of provisions regarding enhanced protection:

- information on whether the party intends to request the inclusion of cultural property in the List; and
- information on the use of the enhanced protection emblem.

Implementation of provisions regarding criminal responsibility:

- information on national legislation concerning criminal responsibility for serious violations within the meaning of the 1999 Second Protocol, and
- information on national legislative, administrative or disciplinary measures taken to suppress other violations.

Implementation of provisions regarding dissemination:

- information on measures taken concerning dissemination.

36 1999 Second Protocol, Art. 5 (“Safeguarding of Cultural Property”): “Preparatory measures taken in time of peace for the safeguarding of cultural property against the foreseeable effects of an armed conflict pursuant to Article 3 of the Convention shall include, as appropriate, the preparation of inventories, the planning of emergency measures for protection against fire or structural collapse, the preparation for the removal of movable cultural property or the provision for adequate *in situ* protection of such property and the designation of competent authorities responsible for the safeguarding of cultural property.”

37 1954 Hague Convention, Art. 3 (“Safeguarding of Cultural Property”): “The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated within their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.”

Implementation of provisions regarding technical assistance:

- information on any other activities relating to the 1999 Second Protocol, including activities at a bilateral or multilateral level, in order to share experiences or best practices.

Paragraph 120 encourages parties to provide the Secretariat with the name and address of a single national focal point for all official documents and correspondence related to the implementation of the 1999 Second Protocol by their relevant authorities. Unless a party requests otherwise, the presumed focal point would be its Permanent Delegation to UNESCO. The Secretariat will make a list of these addresses available on its website.

Paragraph 121 also encourages parties to inform the Committee through the Secretariat, on a voluntary basis, of all legislative, judicial or other matters relevant to the parties' implementation of the 1999 Second Protocol. In its turn, the Secretariat will register this information in a database.

The Committee last considered national reports on the implementation of the 1954 Hague Convention and/or its two (1954 and 1999) Protocols at its 16th Meeting at UNESCO Headquarters in Paris on 2–3 December 2021. It adopted Decision 16.COM 11,³⁸ which, *inter alia*, took note of the national reports and thanked the sixty parties that provided them.

Before concluding on the reporting system, another innovative aspect of the 1999 Second Protocol having reporting character shall be mentioned: the report of the Committee to the Meeting of the Parties. This obligation falls within the functions of the Committee under Article 27(1)(d)³⁹ of the 1999 Second Protocol.

In conformity with paragraph 124, the Committee takes, at a minimum, the below issues into account in its report:

- parties' requests for inclusion of cultural property in the List;
- parties' requests for international assistance;
- international cooperation; and
- the use of the Fund.

The last submission of the report by the Committee took place at the Ninth Meeting of the Parties to the 1999 Second Protocol, held at UNESCO Headquarters in Paris on 30 November–1 December 2021. The Meeting of the Parties, *inter alia*, took note of the report and thanked all the members of the Committee for their active contribution to its work as well as the members who have been involved in the Bureau and especially the chairperson, Ms Najat Rhandi.⁴⁰

38 On file with the author.

39 Under Article 27(1)(d), the Committee is mandated "to consider and comment on reports of the Parties, to seek clarifications as required, and prepare its own report on the implementation of this Protocol for the Meeting of the Parties".

40 See Resolution 9.SP 5 in UNESCO, *Resolutions Adopted during the 9th Meeting of the Parties to the 1999 Second Protocol*, UNESCO Doc. C54/21/9.SP/Resolutions, Paris, 30 November–1 December 2021, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000380338>.

Contribution of the Guidelines as subsequent practice in the application of the 1999 Second Protocol establishing the agreement of the parties regarding its interpretation in the framework of Article 31(3)(b)⁴¹ of the 1969 Vienna Convention on the Law of Treaties

At its 70th Session in 2018, the International Law Commission (ILC) adopted a set of *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries* (Draft Conclusions).⁴²

In my view, the most important provisions related to subsequent practice in relation to the interpretation of the 1999 Second Protocol with respect to the Guidelines are Draft Conclusions 3, 4, 5, 6, 7, 10 and 11.

Thus, Draft Conclusion 3 (“Subsequent Agreements and Subsequent Practice as Authentic Means of Interpretation”) reads as follows:

Subsequent agreements and subsequent practice under article 31, paragraph 3 (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31.

This provision is of fundamental importance because, *inter alia*, it underscores one important element: the role of subsequent practice as an objective evidence of the understanding of the parties as to the meaning of the treaty and its position as an authentic means of interpretation.

When commenting on this Conclusion, the ILC stressed the reference of the term “authentic” to different forms of “objective evidence” or “proof” of conduct of the parties, reflecting the “common understanding of the parties” as to the meaning of the treaty.⁴³

The ILC also stated that “the common will of the parties, which underlies the treaty, possesses a specific authority regarding the identification of the meaning of the treaty, even after the conclusion of the treaty”.⁴⁴

When clarifying the term “authentic means of interpretation”, the ILC specified that this term encompasses a factual and a legal element. “The factual element is indicated by the expression ‘objective evidence’, whereas the legal element is contained in the concept of ‘understanding of the parties’.”⁴⁵

Draft Conclusion 4 (“Definition of Subsequent Agreement and Subsequent Practice”) relates to the definition of subsequent agreement and subsequent practice. Its paragraph 2 reads as follows:

41 Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3)(b): “There shall be taken into account, together with the context: ... any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”

42 ILC, *Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries*, 2018, available at: https://legal.un.org/ilc/texts/instruments/word_files/english/commentaries/1_11_2018.doc.

43 *Ibid.*, p. 9.

44 *Ibid.*, p. 9, para. 3.

45 *Ibid.*, p. 11, para. 9.

A subsequent practice as an authentic means of interpretation under article 31, paragraph 3 (b), consists of conduct in the application of a treaty, after its conclusion, which establishes the agreement of the parties regarding the interpretation of the treaty.

When commenting on this paragraph, the ILC stated that “[p]aragraph 2 is limited to subsequent practice as a means of authentic interpretation that establishes the agreement of all the parties to the treaty, as formulated in article 31, paragraph 3 (b)”.⁴⁶ It went on to say that such subsequent practice may consist of any “conduct” and “may thus include not only acts, but also omissions, including relevant silence, which contribute to establishing agreement”.⁴⁷

Thus, when the Guidelines and amendments thereto were developed by the Committee and subsequently endorsed by the Meeting of the Parties without any objections or disagreement as to their content, the primary conduct of the Committee members and the subsequent conduct of parties to the 1999 Second Protocol established agreement of the parties regarding the interpretation of the Protocol.

The first paragraph of Draft Conclusion 5 (“Conduct as a Subsequent Practice”) reads as follows:

Subsequent practice under articles 31 and 32 may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions.

This provision is self-explanatory., though the ILC considered it necessary to repeat that the term “any conduct” encompasses actions and omissions.⁴⁸

It is to be submitted that the Guidelines do represent subsequent practice in the application of the 1999 Second Protocol which establishes the agreement of the parties regarding its interpretation.

The first two paragraphs of Draft Conclusion 6 (“Identification of Subsequent Agreements and Subsequent Practice”) read as follows:

1. The identification of subsequent agreements and subsequent practice under article 31, paragraph 3, requires, in particular, a determination whether the parties, by an agreement or a practice, have taken a position regarding the interpretation of the treaty. Such a position is not taken if the parties have merely agreed not to apply the treaty temporarily or agreed to establish a practical arrangement (*modus vivendi*).

2. Subsequent agreements and subsequent practice under article 31, paragraph 3, may take a variety of forms.

When commenting on the first sentence of paragraph 1, the ILC stated that “subsequent practice under article 31, paragraph 3 (b) must be ‘in the application

⁴⁶ *Ibid.*, p. 17, para. 16.

⁴⁷ *Ibid.*, p. 17, para. 17.

⁴⁸ *Ibid.*, p. 22, para. 2.

of the treaty’ and thereby establish an agreement ‘regarding its interpretation’”.⁴⁹ It went on to say:

The relationship between the terms “interpretation” and “application” in article 31, paragraph 3, is not clear-cut. “Interpretation” is the process by which the meaning of a treaty, including one or more of its provisions, is clarified. “Application” encompasses conduct by which the rights under a treaty are exercised, or its obligations are complied with, in full or in part. “Interpretation” refers to a mental process, whereas “application” focuses on actual conduct (acts and omissions). In this sense, the two concepts are distinguishable, and may serve different purposes under article 31, paragraph 3 ... but they are also closely interrelated and build upon each other.⁵⁰

When commenting on paragraph 2 of Draft Conclusion 6, the ILC stated that “[s]ubsequent practice at the international level need not necessarily be joint conduct. Parallel conduct by parties may suffice.”⁵¹

Draft Conclusion 7 (“Possible Effects of Subsequent Agreements and Subsequent Practice in Interpretation”) analyzes, *inter alia*, possible effects of subsequent practice in interpretation. In this regard, paragraphs 1 and 3 are pertinent. They read as follows:

1. Subsequent agreements and subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties.

...

3. It is presumed that the parties to a treaty, by an agreement or a practice in the application of the treaty, intend to interpret the treaty, not to amend or modify it. The possibility of amending or modifying a treaty by the subsequent practice of the parties has not been generally recognized. The present draft conclusion is without prejudice to the rules on the amendment or modification of treaties under the 1969 Vienna Convention and under customary international law.

Draft Conclusion 10 (“Agreement of the Parties Regarding the Interpretation of a Treaty”) focuses on the position of the parties regarding the interpretation of a treaty. It reads as follows:

1. An agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept. Such an agreement may, but need not, be legally binding for it to be taken into account.

⁴⁹ *Ibid.*, p. 28, para. 3.

⁵⁰ *Ibid.*, pp. 28–29, para. 3.

⁵¹ *Ibid.*, p. 35, para. 23.

2. The number of parties that must actively engage in subsequent practice in order to establish an agreement under article 31, paragraph 3 (b), may vary. Silence on the part of one or more parties may constitute acceptance of the subsequent practice when the circumstances call for some reaction.

Finally, it is important to highlight paragraphs 1 and 3 of Draft Conclusion 11 (“Decisions Adopted within the Framework of a Conference of States Parties”). They read as follows:

1. A Conference of States Parties, under these draft conclusions, is a meeting of parties to a treaty for the purpose of reviewing and implementing the treaty, except where they act as members of an organ of an international organization.

...

3. A decision adopted within the framework of a Conference of States Parties embodies a subsequent agreement or subsequent practice under article 31, paragraph 3, in so far as it expresses agreement in substance between the parties regarding the interpretation of a treaty, regardless of the form and the procedure by which the decision was adopted, including adoption by consensus.

Paragraph 1 of Draft Conclusion 11 reflects Article 23(3)(e) of the 1999 Second Protocol, which tasks the Meeting of the Parties “to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate”. Thus, when the Meeting of the Parties endorses amendments to the Guidelines, it approves the subsequent practice related to the interpretation and implementation of the 1999 Second Protocol.

In accordance with paragraph 3 of Draft Conclusion 11, a decision taken on the endorsement of amendments to the Guidelines represents a subsequent practice with regard to both the interpretation and the implementation of the 1999 Second Protocol.

Conclusion

The Guidelines do represent an important *novum* as a subsequent practice in the interpretation and implementation of the 1999 Second Protocol, in particular in the following aspects: enhanced protection (both procedural and substantive), international assistance (both procedural and substantive), and reporting. Their elaboration, adoption by the Committee, endorsement by the Meeting of the Parties and subsequent amendments have enabled Committee members and parties not represented in the Committee to have a significant say in the implementation of the Protocol, thus improving the protection of cultural property both in peacetime and in times of armed conflict. Furthermore, the Guidelines introduce legal certainty and predictability in the granting of

enhanced protection and international assistance, thus providing parties, the Bureau of the Committee, the Committee and the Secretariat with clear guidance as to the preparation and consideration of their nomination files in both cases. It must also be stressed that by involving Committee members and other parties in the elaboration of the Guidelines, those key stakeholders have obtained full control and ownership of this process.

From a procedural point of view, the Guidelines have an important advantage because they may be modified through a very flexible process that does not necessitate amending the 1999 Second Protocol. In my view, any modification of the Protocol would have three negative consequences: (1) it would result in the creation of a two-tier legal regime – the original Protocol and the amended Protocol – which would lead to confusion; (2) it would endanger the achievements of the Protocol because it is quite likely that some parties would wish to reopen discussions on certain issues of the Protocol, such as the notion of military necessity; and (3) prospective parties would most likely await the result of the modification of the Protocol before ratifying it, thus effectively bringing the ratification process of this instrument to a halt.

To conclude, let me express my hope that further elaboration of the Guidelines on the basis of existing practice of all the parties to the 1999 Second Protocol will result in further improvements to the protection of our precious cultural property both in peacetime and in the event of armed conflict.

The ever-existing “crisis” of the law of naval warfare

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Abstract

Although the subject of law of naval warfare was first in modern treaty-making in international humanitarian law (IHL), further treaty-making efforts that comprehensively deal with all matters of the law of naval warfare never really took off. This particular part of IHL has always been primarily governed by custom. Scholarly calls for revision have not pressed States into further treaty-making efforts, which gives the law of naval warfare a semblance of being continuously in a state of crisis. Conveniently for States, the San Remo Manual solved a significant portion of this crisis, but perhaps too successfully, as it may have taken away incentives for States to further develop the law. While the law of the sea has been steadily growing as a – codified – legal regime and protective rules of IHL garnered much attention, the law of naval warfare seems somewhat forgotten and crumbling in its details.

Keywords: Law of naval warfare, Second Geneva Convention, *San Remo Manual*, law of the sea, international humanitarian law at sea.

⋮⋮⋮⋮⋮

Introduction

Naval forces continue to play a role in armed conflict. Navies were part of military operations that include Afghanistan (2001), the Second Gulf War (2003), Lebanon (2006), Gaza (2009), Libya (2011), Ukraine (since 2014) and Syria (2015). The reignited Russian–Ukrainian conflict of 2022 has also seen Russian naval forces

involved in the country's military operations.¹ Whereas, traditionally, the public consciousness imagines naval warfare mainly as “warship-to-warship” engagements, contemporary history and current naval operations predominantly tell a different story. Rather than conflict at sea, naval warfare increasingly involves contributing to armed conflict from the sea, in support of land operations. Illustratively, the Syrian conflict saw Russian warships firing missiles from the Caspian Sea onto Syrian territory,² American warships engaged Syrian airfields from the Mediterranean Sea³ and the UK, during the North Atlantic Treaty Organization's (NATO's) Operation Unified Protector, struck targets in Libya from the sea.⁴

Although naval forces continue to play a role in armed conflict, the law of naval warfare seems to stay behind in efforts to keep current. Ever since the Iraq–Iran War in the 1980s, scholars have been pressing the view that the laws of war applicable to naval warfare are outdated, unclear, to some extent obsolete and in any case in need of revision.⁵ The call for revision has since been a standard theme when discussing this particular subject of international humanitarian law (IHL). Existing treaties on the law of naval warfare regulate only specific portions. As a result, regulation primarily comes in the form of customary international law that has never been codified in treaties. For example, navies still employ blockades, but apart from the one rule in the Paris Declaration (1856), which requires that blockades must be effective,⁶ blockades are completely

- 1 Heather Mongilio, “Russian Navy Taking on Resupply Role Nearly 50 Days into Ukrainian Invasion”, *USNI News*, 11 April 2022, available at: <https://news.usni.org/2022/04/11/russian-navy-taking-on-resupply-role-nearly-50-days-into-ukrainian-invasion> (all internet references were accessed in September 2022).
- 2 Joshua Menks and Michael B. Petersen, “The ‘Kalibrization’ of the Russian Fleet. Destruction of Critical Infrastructure by Long-Range Precision Strikes Has Become the Russian Navy’s Newest Mission”, *U.S. Naval Institute*, May 2022, available at: www.usni.org/magazines/proceedings/2022/may/kalibrization-russian-fleet; BBC, “Russian Missiles ‘Hit IS in Syria from Caspian Sea’”, 7 October 2015, available at: www.bbc.com/news/world-middle-east-34465425.
- 3 U.S. Department of Defense, “Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. Strike in Syria”, 6 April 2017, available at: www.defense.gov/News/Releases/Release/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria/.
- 4 See the pamphlet of the UK Royal Navy, “The Royal Navy & Libya: How Your Royal Navy Contributed to the Tri-Service, Multi-National Campaign in 2011”, available at: www.royalnavy.mod.uk/About-the-Royal-Navy/~/_/media/Files/Navy-PDFs/About-the-Royal-Navy/The%20RN%20Contribution%20to%20Libya.pdf. It mentions that “Nuclear-powered attack submarines *HMS Triumph* and *HMS Turbulent* launched Tomahawk Land Attack Missiles against regime targets ashore. Helicopter carrier *HMS Ocean* operated Apache attack helicopters from 656 Squadron Army Air Corps which were able to target pro-Gaddafi forces with a high degree of precision.”
- 5 For the most recent example, see Andrew Clapham, “Belligerent Rights and the Future of Naval Economic Warfare”, in A. Clapham, *War*, Oxford University Press, Oxford, 2021; see also Andrew Clapham, “Booty, Bounty, Blockade, and Prize: Time to Reevaluate the Law”, *International Law Studies*, Vol. 97, 2021. More classic calls for revision are Natalino Ronzitti, “The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision”, in N. Ronzitti (ed.), *The Law of Naval Warfare: A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff Publishers, Dordrecht/Boston, MA/London, 1988; J. Ashley Roach, “The Law of Naval Warfare at the Turn of Two Centuries”, *American Journal of International Law*, Vol. 94, No. 1, 2000.
- 6 *Declaration Respecting Maritime Law*, 16 April 1856. Rule 4 states: “Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.”

governed by custom.⁷ To date, there has not been a comprehensive treaty governing all the rules of naval warfare. The most recent treaty on the war at sea is the Second Geneva Convention (GC II) on the wounded, sick and shipwrecked of 1949,⁸ which served primarily to update pre-existing treaties on IHL applicable at sea. Next to – or perhaps, because of – the fact that naval warfare has primarily been governed by customary law, soft law instruments, such as the Oxford Manual of 1913,⁹ the Helsinki Principles on the Law of Maritime Neutrality of 1998¹⁰ and the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*,¹¹ adopted in 1994, have attempted to further develop the law. In short, it seems that treaty-making and the rules of naval warfare have never been a good marriage. Why is that the case? This contribution will briefly touch upon this question.

Treaties and naval warfare

Even before the first Geneva Convention of 1864, the Paris Declaration of 1856, which was drafted in the aftermath of the Crimean War, already contained internationally agreed rules on naval warfare. Although the Paris Declaration must be credited as the beginning of modern IHL treaty law, treaty-making around naval warfare did not take off in the aftermath of that first instrument. The Hague Peace Conferences of 1899 and 1907 were the birthplace of most existing treaties on naval warfare: Hague Convention no. III (1899) applied the First Geneva Convention of 1864 to the maritime dimension.¹² This Convention was replaced at the 1907 Conference by Hague Convention no. X, as a result of the revision of the 1864 Convention in 1906.¹³ These treaties provide what I will call “IHL at sea” – that is, they applied certain pre-existing IHL rules to the context of naval warfare. Apart from these protective measures, the 1907 Hague Conference also addressed certain pressing aspects specific to naval warfare, such as naval contact mines,¹⁴ coastal bombardment,¹⁵ maritime neutrality,¹⁶ the

7 See, also, Phillip Drew, “Blockade Law”, in P. Drew, *The Law of Maritime Blockade: Past, Present, and Future*, Oxford University Press, Oxford, 2017.

8 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II).

9 *Manual of the Laws of Naval War*, Oxford, 9 August 1913.

10 Helsinki Principles on the Law of Maritime Neutrality, adopted by the International Law Association at its Taipei Conference, 30 May 1998.

11 *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994 (entered into force 12 June 1994) (*San Remo Manual*).

12 Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899.

13 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907.

14 Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines, The Hague, 18 October 1907.

15 Convention (IX) concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907.

16 Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, 18 October 1907.

status of enemy merchant vessels at the outbreak of hostilities,¹⁷ the conversion of merchant vessels into warships,¹⁸ restriction on the right of capture¹⁹ and an international prize court.²⁰ No general treaty, however, emerged, nor did legal provisions regarding long-standing methods used for the purpose of economic warfare at sea, such as blockades and contraband. The year 1909 nearly saw the conclusion of such a treaty, with the London Declaration of 1909.²¹ The preamble of the Declaration mentioned that the treaty, concerned the establishment of an international prize court, urged States to arrive at an agreement as to what the generally recognized rules would be, “animated by the desire to insure henceforward a greater measure of uniformity in this respect”.²² However, due to the realities of the First World War, the London Declaration never entered into force. Rules set out in that text that were seen as unfit for the aims of belligerent States were set aside or ignored, and the London Declaration was amongst the legal victims of the First World War.²³ Although it has become a reference for both scholars and States on the rules of naval warfare, it was never ratified, rendering also its contents easily debatable. In turn, Hague Convention XII on the establishment of an international prize court was ratified only by one State.²⁴ This means that the courtroom enforcement of prize law measures continues to be a national matter, and, arguably, prone to a diversity of national legal opinions. This is precisely what Hague Convention XII and the London Declaration aimed to address.²⁵

The use of the submarine against merchant shipping during the First World War as a new destructive naval weapon and efforts to limit naval armament after the war pressed States to agree on a Protocol concerning the rules of submarine warfare in 1936.²⁶ This Protocol requires that “in their actions against merchant vessels submarine must conform to the same rules as surface vessels”.²⁷ In addition, the Protocol provides for how to deal with persons and papers of seized merchant vessels that are about to be sunk or otherwise be rendered incapable of navigation.²⁸

17 Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, The Hague, 18 October 1907.

18 Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907.

19 Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War, The Hague, 18 October 1907.

20 Convention (XII) relative to the Creation of an International Prize Court, The Hague, 18 October 1907.

21 Declaration concerning the Laws of Naval War, London, 26 February 1909.

22 *Ibid.*, preamble, para. 5.

23 A. C. Bell, *A History of the Blockade and The Countries Associated with her in the Great War: Austria-Hungary, Bulgaria and Turkey 1914–1918*, Naval & Military Press, Uckfield, 1938, pp. 1–23.

24 The one State was Nicaragua. See ICRC database, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=235.

25 Arthur Effyinger, “A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference”, *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 209–11.

26 Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930 (London, 6 November 1936), available at: www.gov.uk/government/publications/procès-verbal-relating-to-the-rules-of-submarine-warfare-set-forth-in-part-iv-of-the-treaty-of-london-of-april-22-1930-london-6111936.

27 *Ibid.*, Art. 1.

28 *Ibid.*, Art. 2.

GC II, adopted in 1949, is the last treaty that came into force governing naval warfare. As a result of the experiences of the Second World War, this treaty develops the protective, humanitarian side of the rules on naval warfare rather than the belligerent rights. The Convention annuls Hague Convention X (1907)²⁹ and revises its content, establishing a fuller degree of protection for victims of armed conflict at sea.³⁰ It also establishes a comprehensive protective regime for hospital ships and coastal rescue crafts.³¹ Apart from protective measures, the Convention also deals with some other issues regarding hospital ships. Article 31 of GC II, for example, allows belligerents to exercise a right to control and search a hospital ship. Furthermore, Article 29 of GC II allows a hospital ship to leave a port that has fallen into enemy hands.

The drafters of the Additional Protocols to the Geneva Conventions of 1977 kept the law of naval warfare outside the scope of revision. The diplomatic conferences on the Additional Protocols were concerned about undertaking any revisions of the rules of armed conflict applicable at sea, because the conditions of naval warfare during the Second World War and subsequent conflicts had drastically changed, making it difficult to determine exactly which rules still applied.³² As a result, Article 49(3) of Additional Protocol I (AP I)³³ excludes sea-to-sea engagements from the general targeting rules set forth in the rest of the document. Although general targeting rules apply in naval warfare by virtue of custom, existing law leaves room for the existence of belligerent rights and special targeting rules in the maritime dimension, particularly regarding engagements against enemy or neutral merchant shipping and the practice of blockades.³⁴ For example, a vessel becomes liable to attack when a vessel believed to be carrying contraband actively resists visit, search or capture, or when it attempts to break through a blockade.³⁵

The recent treaties on arms control do not specifically touch upon the maritime dimension. For example, the 1997 Ottawa Treaty³⁶ does not affect the use of mines at sea, which is still governed by the 1907 Hague Convention no. VIII. Although arms control treaties, in their application, may affect naval operations as they are in general not bound by any geographical dimensions, no

29 See GC II, above note 8, Art. 58.

30 ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., Geneva, 2017, nos. 75–7.

31 See GC II, Arts 22–37.

32 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, nos. 1894–9.

33 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 35(1).

34 William H. Boothby, “Maritime Targeting”, in W. H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012.

35 See *San Remo Manual*, above note 11, Section 67.

36 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997 (entered into force 1 March 1999) (Ottawa Treaty).

specific treaty has been drafted that deals with banning or controlling any typically naval weapon, such as naval mines or torpedoes.

The law of the sea

Although treaty-making on the law of naval warfare has found itself at a standstill since the end of the Second World War, treaty-making on the international law of the sea has progressed. In fact, the law of the sea has developed and been codified greatly during the second half of the twentieth century. Before that, as Mark Janis notes, “the traditional law of the sea was much more the creature of customary than conventional development.”³⁷ After the four conventions drafted during the first United Nations (UN) Conference on the Law of the Sea in 1958 – dealing with the territorial sea and the contiguous zone, the continental shelf, the high seas and fisheries – in 1982, the UN Convention on the Law of the Sea (UNCLOS) was adopted, aiming to deal with “all matters relating to the law of the sea”.³⁸ UNCLOS, which entered into force in 1994 applies at all times, including situations of armed conflict. While it does not contain any rules on naval warfare – which is part of IHL – it does have an impact on the geographical scope and navigational rules for belligerent naval forces conducting hostilities.³⁹ New issues therefore arose in harmonizing pre-existing rules of naval warfare and the law of the sea, for instance, on belligerent naval operations and the use of mines in international straits⁴⁰ and conducting military operations in exclusive economic zones. It also caused minor definitional issues, such as the possible difference between mere passage⁴¹ and innocent passage and the use of the term “neutral waters” in the law of naval warfare, that does not exist in UNCLOS.

While the law of the sea became extensively codified under international law during the latter part of the 20th century, the law of naval warfare somehow seems to have been of shrinking importance. Notwithstanding existing practice, in particular during the Falklands/Malvinas conflict, the Iran–Iraq War and the Gulf War, academically, in legal handbooks of both the law of war and the law of the sea, the subject of the law of naval warfare appeared to be falling by the wayside.⁴² Even though calls for revision existed, or perhaps because of this repeated idea that this body of law felt outdated, it disappeared from legal parlance, both within the context of the law of the sea and from the perspective of IHL. Subsequently, there

37 Mark W. Janis, *Sea Power and the Law of the Sea*, Lexington Books, Toronto, 1976, p. 76.

38 UN General Assembly Resolution 3067, 16 November 1973, para. 3.

39 Bernard H. Oxman, “The Regime of Warships Under the United Nations Convention on the Law of the Sea”, *Virginia Journal of International Law*, Vol. 24, 1984.

40 Wolff Heintschel von Heinegg, “Minelaying and the Impediment of Passage Rights”, *International Law Studies*, Vol. 90, 2014.

41 See Hague Convention XIII, above note 16, Art 10.

42 In legal handbooks, the law of naval warfare seems diminished to a single chapter, often shared with other legal subjects of naval operations within the wider maritime security scope. See, for example, Donald R. Rothwell and Tim Stephens, “Military Uses of the Oceans”, in D. R. Rothwell and T. Stephens, *The International Law of the Sea*, Hart Publishing, Oxford, 2010; or Yoshifumi Tanaka, “Maintenance of International Peace and Security at Sea”, in Y. Tanaka, *The International Law of the Sea*, Cambridge University Press, Cambridge, 2019.

was a decline of knowledge, and debates focused on more detailed issues of doctrines and rights, such as the doctrine of continuous voyage,⁴³ the right of angary,⁴⁴ the issue of conversion of merchant vessels into warships at sea,⁴⁵ attempted breach of blockade, or the legality of destruction of seized prizes at sea.

The new world order

Apart from a growing focus on the law of the sea, another reason for a diminishing role of the law of naval warfare was the new role that the UN Security Council (UNSC) started playing after the Cold War. In the conflicts that emerged since the 1990s, the UNSC started adopting coercive economic measures based on the UN collective security system. The strategic means of taking economic measures at sea against unwilling States was now brought within the realm of the UN Charter and in the hands of the Security Council. Commodore (UK Navy) Neil Brown mentions that during maritime interdiction operations during the 1991 Gulf War, States took different approaches in identifying the source of their authority.⁴⁶ According to him, while the UK and Australia based authorities on UN Resolution 665, the US Navy in addition sought to “establish the necessary mechanisms to be able to exercise the belligerent rights of visit and search”. For that purpose, “A contraband list was produced, US courts to conduct prize court hearings and special commissioners were identified, and a concept of operations developed.”⁴⁷ Despite the varying interpretations on the legal basis for enforcement authority at sea since the UNSC stepped up in taking economic measures based on the collective security system, the legal construct for the Maritime Interception Force that started operations during the Gulf War in the Persian Gulf at the beginning of the 1990s set a firm precedent for a modus of UN mandated maritime embargo operations for years to come.⁴⁸ During the Libya conflict in 2011, arguably, in addition to maritime enforcement actions at sea under UN resolutions,⁴⁹ the legal character of the conflict between individual NATO States and the governmental forces of Libya would have allowed for taking measures under the law of naval warfare, if one would accept that an international armed conflict (IAC) existed between Libya and enforcing States. Instead, NATO States based their rights at sea on the extant UN resolutions.

43 See, on this doctrine, Phillip Drew, “The Law of Maritime Blockade in the 21st Century”, in Dale Stephens and Matthew Stubbs (eds), *The Law of Naval Warfare*, LexisNexis Butterworths, Chatswood, NSW, 2019.

44 The requisition, on compensation, of neutral vessels when necessary for the defence of a belligerent State. See W. I. Jennings, “The Right of Angary”, *The Cambridge Law Journal*, Vol. 3, No. 1, 1927.

45 Hague Convention VII, above note 18, allows for the conversion of merchant vessels into warships. It does, however, not regulate whether a vessel can be converted while at sea.

46 Neil Brown, “Legal Considerations in Relation to Maritime Operations against Iraq”, *International Law Studies*, Vol. 86, No. 1, p. 133.

47 *Ibid.*, p. 133.

48 See Martin Fink, “The UN Collective Security System and Maritime Interception Operations”, in M. Fink, *Maritime Interception and the Law of Naval Operations: A Study of Legal Bases and Legal Regimes in Maritime Interception Operations*, T.M.C. Asser Press, The Hague, 2018.

49 UN Security Council, Resolution 1971 (2011), UN Doc. S/RES/1971 (2011), 3 March 2011; and UN Security Council, Resolution 1973 (2011), UN Doc. S/RES/1973 (2011), 17 March 2011.

Another implication of UNSC activities involves whether the law of maritime neutrality applies during conflicts in which the UNSC has decided on taking measures against an aggressor State. The law of maritime neutrality regulates belligerent State actions in neutral waters, aiming at ensuring that neutral States do not become unwillingly involved in the conflict and to that end have legal instruments at their disposal. When the UNSC authorizes measures, could, in light of Article 25 of the UN Charter, any State still be seen as neutral? Or, as the UNSC does not oblige but authorizes States to take part in military operations against an aggressor State, can they still make use of maritime neutrality rules?⁵⁰ Could States, for instance, base a decision to forbid warships part of a UN-mandated enforcement operation to use their ports and waters in light of Article 5 of the Hague Convention no. XIII on neutrality in naval war? In any event, as Heintschel von Heinegg notes, State practice reveals “that there is no longer room for automatic application of that law in every international armed conflict”.⁵¹

Practice

With regard to practice, Steven Haines, looking back at naval operations and hostilities at sea since the Second World War, provides a number of observations in relation to the use of the law of naval warfare.⁵² First, all conflicts since the Second World War were limited in naval scope, “with none having strategical naval influence beyond the immediate region of the core conflict”.⁵³ Second, naval operations were all subordinate to land operations. And third, economic warfare has not played a major role in modern wars. These points emphasize the minor role in these conflicts for the use of the law of naval warfare. Haines also notes that naval conflicts have indeed caused debate on legal questions of application of the law of naval warfare, but this “has not caused any discernible trend towards customary development of the law”.⁵⁴ Practice in the last seventy years, in his view, has not surfaced a real need for States to update or revise the law. Interestingly, with regard to the *Mavi Marmara* incident in 2010 during the Gaza blockade, although lively debate existed on the application of the law of blockade, no State concluded that it was time to codify or revise the law of blockade to better deal with issues of blockade in modern conflict. In any case, the fact is that, apart from scholarly debate, these conflicts in the maritime dimension did not create any effort or formal desire from States to codify existing custom or emerging new rules.

50 See, on these matters, Andrea Gioia, “Neutrality and Non-Belligerency”, in Harry H. G. Post (ed.), *International Economic Law and Armed Conflict*, Martinus Nijhoff Publishers, Dordrecht, 1994.

51 Wolff Heintschel von Heinegg, “Current Legal Issues in Maritime Operations: Maritime Interception Operations in the Global War on Terrorism, Exclusion Zones, Hospital Ships, and Maritime Neutrality”, *International Law Studies*, Vol. 80, No. 1, 2006, p. 224.

52 Steven Haines, “War at Sea: Nineteenth-Century Laws for Twenty-First-Century Wars?”, *International Review of the Red Cross*, Vol. 98, No. 902, 2016.

53 *Ibid.*, p. 428.

54 *Ibid.*, p. 429.

During recent decades, military operations conducted during non-international armed conflicts (NIACs) have come more on the foreground than IACs. Although naval forces have also been part of NIACs, the law of naval warfare is left unused because this body of law only applies in IACs.⁵⁵ In essence, applying the law of naval warfare outside IAC would mean that belligerent rights are impermissibly used against vessels of States that are not involved in the conflict. Challenges for the applicability of the law of naval warfare lie in the issue of conflict classification. In some instances, applying instruments allowed under the law of naval warfare caused debate, and in others it never really emerged as an issue. Examples of the former include the Israeli blockade of Gaza and the blockade-type measures taken against Yemen.⁵⁶ An example of the latter is the use of the belligerent right of visit, instrumental to enforcing prize law measures, and the question whether it, in a developing situation of conflict classification, could legally be used during Operation Enduring Freedom to board and search for Al-Qaida terrorists in the context of the war in Afghanistan.

To summarize, while naval operations continue to play a significant role in current conflicts, we appear to have lost track of the law of naval warfare somewhere along the way while developing international law at sea and the law of armed conflict. Considering that the law of naval warfare has never been extensively codified, the rise of the law of the sea, the lack of attention in IHL due to a more protective focus and ambiguity regarding its rules, the manner in which economic enforcement measures are more frequently part of the UN collective security system since the nineties and the non-international character of many of today’s conflicts, the law of naval warfare has disappeared somewhat from both the operational and academic theatres. On the other hand, the law of naval warfare is discussed when it is clearly used. For example, related to the use of blockades in recent conflicts is not without attention and discussion. This is, however, only intermittent and has so far not spurred additional constructive thinking on how to develop and codify the law of naval warfare. It remains to be seen whether these instances and current-day developments in maritime security issues, including an IAC within European borders,⁵⁷ will renew sense of interest for the law of naval warfare.

55 See, e.g., Wolff Heintschel von Heinegg, “The Law of Military Operations at Sea”, in Terry D. Gill and Dieter Fleck (eds), *The Handbook of the International Law of Military Operations*, Oxford University Press, Oxford, 2015, p. 375; Wolff Heintschel von Heinegg, “Methods and Means of Warfare in Non-International Armed Conflict”, *International Law Studies*, Vol. 88, 2014.

56 See, e.g., James Kraska, “Rule Selection in the Case of Israel’s Naval Blockade of Gaza: Law of Naval Warfare or Law of the Sea?”, *Yearbook of International Humanitarian Law*, Vol. 13, 2010; Douglas Guilfoyle, “The *Mavi Marmara* Incident and Blockade in Armed Conflict”, *British Yearbook of International Law*, Vol. 81, No. 1, 2011; Martin David Fink, “Contemporary Views on the Lawfulness of Naval Blockades”, *Aegean Review of the Law of the Sea and Maritime Law*, Vol. 1, 2011.

57 See, e.g., Michael N. Schmitt, “Providing Arms and Materiel to Ukraine: Neutrality, Co-belligerency, and the Use of Force”, *Lieber Institute, West Point*, 7 March 2022, available at: <https://lieber.westpoint.edu/tag/schmitt/page/4/>.

Challenges of revising or codifying the law of naval warfare

As mentioned, the law of naval warfare is an uncrystallized part of public international law, based mostly on custom. A lack or an underdeveloped body of law is, however, by itself not a reason for States to start updating laws. Also, though there have been calls to revise and update the law of naval warfare, it is worth noting that those calls have mostly come from scholars and not from States. If States consider the law of naval warfare to be in a state of crisis, that urgency has yet to be reflected in concrete action in the form of new treaty-making. The reality is that the underdeveloped state of the law is probably insufficient impetus for States. Rather, States arguably work to develop international law when there is a concrete need to do so – when, for example, that development is necessary to promote States' own political goals while balancing international coexistence. In addition to need, some consensus must exist among States that this need can actually develop into rules that are acceptable to relevant States. In other words, there must also be a chance that development of the law will actually succeed. In his report on the centennial commemoration of Hague Conferences, Christopher Greenwood rightly opined that:

While the case for major revision of the law of naval warfare remains a strong one, any attempt to address this issue by means of an international conference would present considerable difficulties and would be doomed unless it had the active support of the major naval States.⁵⁸

The question may therefore also be whether major naval powers are in line regarding their views on the current status of the law, its fundamentals and rules and what it should develop into, or whether these powers hold different, opposing views.

In addition, for States, reference to custom may at times also be a way out for difficult situations. Certain vagueness of rules could become handy in political turmoil. For example, there is no black-letter or generally accepted rule on the question of where exactly a vessel attempting to breach a blockade can be stopped and captured. Must it actually breach the blockaded zone, or is information that there is reasonable cause to believe that the vessel will attempt to breach the blockade while still far out from the blockaded zone enough to capture the vessel? It could leave the lawfulness of actions sometimes unanswered. Non-codification and relying on customary law have not put States in some sort of legal or political trouble, enough to press for change or more clarity between States, by relying on custom. As Janis notes, “States make claims about the nature of the law by way of their own maritime practice.”⁵⁹ In other

58 Christopher Greenwood, “International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899”, in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports & Conclusions*, Kluwer Law International, The Hague, 2000, p. 55.

59 M. W. Janis, above note 37, p. 76.

words, States will have somewhat more grip on what the course of the law should be, which in the case of the law of naval warfare is closely related to political–strategic motives.

Admiral Sir Herbert Richmond wrote in his treatise *Sea Power in the Modern World* (1934) that after the signing of the Paris Declaration “it was widely felt that British sea power had been disarmed”.⁶⁰ This reflects a political–strategic critique of the Declaration and view about law that, as a point of departure, naval warfare should not be constrained by rules in achieving its political and military ends. As they stand, the laws of naval warfare contain a set of belligerent and neutral rights for States, in which the regulated methods of naval warfare primarily aim at economic coercion of the opponent State, through naval instruments such as blockades and contraband warfare. As such economic pressure on other States is a strategic means, the views on what the law should allow is closely linked to States’ political–naval strategy. In that context, the law of naval warfare provides interesting tools for States additional to the use of force. As O’Connell notes, States can exert pressure more vigorously than through diplomacy and less dangerously than through other forms of force through their navies that also can be anywhere at sea, making use of their high seas freedoms.⁶¹ This also means that it would be hard finding generally accepted rules when major (naval) powers are opposed to each other. Crystallizing or developing rules on the law of naval warfare is then very much prone to the right timing of such an effort.

Humanitarian needs, arguably, could transcend the political–strategic motives that have otherwise impeded State action in developing the law. The challenge here is that the core of what is traditionally considered as the law of naval warfare does not contain rules aiming and obliging to protect and respect persons. One can easily imagine that there is no immediate incentive from humanitarian actors to start thinking about applying or crystallizing belligerent rights in IAC or applying them to NIACs, unless those rules directly make an impact on human life. The one example that does come to mind, obviously, is naval blockades. Arguably, naval blockades or other forms of naval control of shipping could also lead to starvation of the population. The debates deriving from the Yemen conflict may serve as an example.⁶² However, apart from this subject, the methods and means within the law of naval warfare are very much a tool for States to use in their military enforcement goals and oriented on economic grounds rather than humanitarian grounds. Also, pressure to regulate from humanitarian actors is perhaps felt to a lesser extent in the maritime dimension in circumstances where sea warfare does not have effect on land, as this is an operational theatre where civilians are transients by definition and no

60 Herbert W. Richmond, *Sea Power in the Modern World*, G. Bell & Sons Ltd, London, 1934, p. 67.

61 D. P. O’Connell, *The Influence of Law on Sea Power*, The University Press, Manchester, 1975, p. 3.

62 Martin D. Fink, “Naval Blockade and the Humanitarian Crisis in Yemen”, *Netherlands International Law Review*, Vol. 64, No. 2, 2017.

one permanently resides. In this context, while GC II contains rules on wounded, sick and shipwrecked, they are mostly limited to members of the belligerent parties.

The alternative: The success of the *San Remo Manual*

The *San Remo Manual*, adopted in 1994, provides an interesting counterpoint in the form of a success story. The *Manual* was the result of an effort by renowned experts on the law of naval warfare to restate the existing law and has made significant strides to silence the cry for treaty updates or development in the law of naval warfare. The *Manual* answered a general feeling that the law of naval warfare needed updating.⁶³ Although not a treaty, it has become a contemporary and complete reference concerning the law of naval warfare. The *Manual* has been widely acknowledged as a source that carries legal weight, at least because of its work to restate current practice.⁶⁴ The International Committee of the Red Cross (ICRC) notes on the *Manual* that it “includes a few provisions which might be considered progressive developments in the law but most of its provisions are considered to state the law which is currently applicable”.⁶⁵ The *San Remo Manual* has been frequently referenced as legal guidance, including during the Gaza-blockade crisis.⁶⁶ In its report on the *Mavi Marmara* incident, the Human Rights Council noted that, while “not authoritative”, the *Manual*’s “codification effort has had a significant impact on the formulation of military manuals and it has been expressly relied upon by Israel”.⁶⁷

The *Manual* not only answered to cries of ambiguity on the law of naval warfare, but also incorporated the legal developments of the law of the sea, combining both strands of laws applicable at sea into a single reference document. This is reflected, for example, in the sections regarding “regions of operations” that have included the UNCLOS maritime zones, but also newly developed concepts of the law of the sea, such as the navigational rights of transit

63 For the process and challenges of development of the Manual, see Wolff Heintschel von Heinegg, “The San Remo Manual – History, Methodology and Future Application”, in D. Stephens and M. Stubbs (eds), above note 43.

64 Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2005, p. 12; UK Ministry of Defence, “Maritime Warfare”, in *The Manual of the Law of Armed Conflict*, Oxford University Press, Oxford, 2005, p. 348; James Kraska and Raul Pedrozo, *International Maritime Security Law*, Martinus Nijhoff Publishers, Leiden/Boston, MA, 2013, p. 859.

65 ICRC, “San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994”, Commentary, available at: <https://ihl-databases.icrc.org/ihl/INTRO/560>.

66 See, e.g., *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, September 2011 (Palmer report), available at: www.un.org/unispal/document/auto-insert-205969/; J. Kraska, above note 56; James Farrant, “The Gaza Flotilla Incident and the Modern Law of Blockade”, *Naval War College Review*, Vol. 66, No. 3, 2013.

67 UN General Assembly, Report of the International Fact-Finding Mission to Investigate Violations of International Law, Including International Humanitarian and Human Rights Law, Resulting from the Israeli attacks on the Flotilla of Ships Carrying Humanitarian Assistance, UN Doc. A/HRC/15/21, 27 September 2012, para. 50.

passage and archipelagic sea lane passage. The *Manual* also sought, where possible, to apply existing principles of IHL in the maritime dimension. It introduced basic targeting discrimination rules based on the rules of AP I. In this effort, it also inserted rules that may not be seen as pre-existing custom. For instance, Sections 102–4 regarding blockade attempt to merge Articles 54 and 70 of AP I and the principle of proportionality with the law of blockade.⁶⁸

The *Manual* is the first of its kind in modern efforts of developing law through an informal process. This has since been emulated by others and has become a sort of practice for subject matter experts to work to define and develop new areas of law. In this process, States appear to have taken on a modified role, which sees them accepting or rejecting proposals and views of experts, rather than developing the law themselves through treaty-making or official State policy and military manuals. States’ reactions to and uptake of the *Manual* have, predictably, varied. A number of States adopted or refer to some rules of the *San Remo Manual* in their military law manuals, officializing them as a State position.⁶⁹ Denmark’s military manual notes that the *San Remo Manual* rules, although not a treaty, “are widely considered to reflect customary international law” and therefore bind Denmark.⁷⁰ Germany’s military manual notes more carefully that “it should not be assumed” that the *San Remo Manual*’s contents “automatically coincide with the positions of the German Government and/or the Federal Ministry of Defence”.⁷¹ The *US Department of Defense Law of War Manual* does not refer to the *Manual* at all.⁷² Likewise, the updated *US Commander’s Handbook on the Law of Naval Operations* contains no references to the *Manual*.⁷³

As noted, the *Manual* has done much to satisfy the call for revision – and has probably also provided enough legal reference for States to avoid meaningfully considering a revision of the law in the near future. It has provided a useful stopgap. In that sense, it has served its purpose perhaps too successfully for a number of reasons. First, the *Manual* is not law and States can easily oppose it or question

68 M. D. Fink, above note 56.

69 E.g. UK, Norway, New Zealand and Canada. For the process of the UK Manual, see Steven Haines, “The United Kingdom’s Manual of the Law of Armed Conflict and the San Remo Manual: Maritime Rules Compared”, in Fania Domb and Yoram Dinstein (eds), *Israel Yearbook on Human Rights*, Vol. 36, Martinus Nijhoff Publishers, Leiden/Boston, MA, 2006.

70 Danish Ministry of Defence, Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, 2016, p. 579, available at: www.forsvaret.dk/globalassets/fko---forsvaret/dokumenter/publikationer/-military-manual-updated-2020-2.pdf.

71 Federal Ministry of Defence, *Law of Armed Conflict – Manual, Joint Service Regulation (ZDv) 15/2*, Berlin, 1 May 2003, para. 131, available at: www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf.

72 Except for in one footnote, where it says that the participants of the *San Remo Manual* opined that hospital ships should be allowed to use cryptographic equipment. US Department of Defense, *Department of Defense Law of War Manual*, Washington, DC, December 2016, p. 482, footnote 324, available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf>.

73 U.S. Navy NWP, U.S. Marine Corps and U.S. Coast Guard, *The Commander’s Handbook on the Law of Naval Operations (NWP 1-14M)*, March 2022, available at: https://usnwc.libguides.com/ld.php?content_id=66321384.

its weight, which is a much smaller concern with traditional treaty-making. Second, the *San Remo Manual* intertwines with provisions of AP I, which is not necessarily accepted by all relevant major naval Powers. Third, the *Manual* has been in existence for more than twenty-five years. Against the background of a high pace of technological evolution of warfare, questions are raised for how long the *Manual* will manage to survive in its current form and what should be done to future-proof it.⁷⁴ One specific example to note on future-proofing is the emergence of unmanned maritime vehicles in relation to the question of belligerent rights of attack and taking prize that are limited to warships. Considering that the definition of a warship⁷⁵ includes a commander and a crew, the question of whether unmanned maritime vehicles also have belligerent rights is still unsettled. Another example is revisiting the sections on zones, which were a significant but still confusing theme during the Falkland/Malvinas and Iran–Iraq War, some years before the efforts of the *San Remo Manual* started. Today, the question of zones might be somewhat more crystallized. Having said that, still there are outstanding questions, for instance with regard to the question whether a zone could be seen as a method of warfare that would also generate belligerent rights.

Treatymaking, on what exactly?

Leaving aside the issue of incentivizing the revision or codification of the law of naval warfare by States or other actors, in order to practically deal with this “continuous crisis” of the state of the law, it is pertinent to consider where to start. Do we start by trying to translate customary international law into treaties and come up with a London Declaration 2.0? Do we take a spade deeper and first question the core principles of the law of naval warfare and whether they are still valid in this day and age? Do we replicate the text of the *San Remo Manual* in treaty form, including its more progressive rules? Or do we leave custom as-is, including its shortcomings and debates, and focus instead on the possible future of conflict and the application of the law of naval warfare? Three remarks can be made on this.

First, is there a clear enough picture of the current state of the law that can be codified? As mentioned earlier, Article 49(3) of AP I has left certain aspects of maritime targeting out of the general law of targeting. This provision could be viewed as a placeholder until such time as we do know how the law of targeting in the naval dimension has developed or should develop. It is invariably used as an opportunity to underline the special targeting rules that have since long

74 Wolff Heintschel von Heinegg, “The Current State of the Law of Naval Warfare: A Fresh Look at the *San Remo Manual*”, *International Law Studies*, Vol. 82, 2006. See also on current initiatives regarding updating the *San Remo Manual*, Wolff Heintschel von Heinegg, “Updating the Law of Naval Warfare”, *Lieber Institute, West Point*, 6 January 2022, available at: <https://lieber.westpoint.edu/year-ahead-2022/>.

75 See UNCLOS, Art. 29, available at: www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

existed in war at sea.⁷⁶ So, has the dust of the Second World War now finally settled to answer the question that the Additional Protocol could not answer? The mentioned retreat of the law of naval warfare from the operational and legal theatres and the continuous call for revision might signal that we could still be at a difficult stage in which, in fact, States no longer know what the rules are. Retracing the existing law, instead of crystallizing or even developing new law, might be the stage where States find themselves. On the other hand, if rules fall into desuetude, it does not automatically mean that they become obsolete or lose their validity. Neither does the age of treaties have such an effect. The same is underlined by the 2017 Commentaries on GC II, of which some provisions have not been used in six decades.⁷⁷ That no practice took place on certain issues in more recent years does not mean that, for example, the 1907 Hague Convention XIII has lost its validity on the basis of desuetude alone. The 2017 update of the ICRC commentary on GC II only very sporadically touched upon the law of naval warfare. The drafters have not been tempted to linger into the law of naval warfare side of IHL at sea. The commentaries do not go beyond a few statements mentioning that certain rules of the law of naval warfare are well established, underlining perhaps its customary character.⁷⁸

Apart from practice and official State policy, some evidence on the status of the law of naval warfare is found in military manuals of States. Some States are elaborate on this subject, such as Germany, the UK and the United States. Others list a few rules reflecting some general notions of the law of naval warfare amongst subjects that mainly reflect the law of the sea.⁷⁹ The listed rules do somehow give a feeling of a lacking degree of detail and are not a comprehensive overview on the laws concerning naval warfare.

Different reasons might exist for this. A State might simply have no explicit views on subjects of naval warfare. The majority of States are not naval powers. There may not be a need to focus on these matters and a lack of (own) practice prevents them from having any views. Unlike fundamental obligatory humanitarian issues of IHL, States can choose not to be involved or not interested in the law of naval warfare, for instance because a State is not likely to be affected by naval strategies of other States. Another reason might be a fading legal knowledge on the subject. In that context, some degree of uncertainty of the

76 W. H. Boothby, above note 34.

77 ICRC, above note 30, paras 65–6.

78 See, for instance, paragraph 2323 and further regarding Article 32 of GC II, referring to well-established rights and obligations of neutrals and belligerents in Hague Convention XIII, or certain paragraphs in Article 33 of GC II.

79 The references used are a collection of (mostly English, French and Spanish) manuals; see U.S Naval War College, Stockton e-Portal: Military Legal Manuals, available at: <https://usnwc.libguides.com/c.php?g=86619&p=557511>. That does, however, not mean that other States, such as Russia, China, Israel and Japan, may not have elaborate chapters on the law of naval warfare, which are inaccessible to me. The Dutch do not have a manual that includes the law of naval warfare. The Netherlands Admiralty Manual on the law of naval warfare, written by M. W. Mouton in the 1950s, is the only official reference known to me. It is unknown, however, whether it is still in force. M. W. Mouton, *Instructie betreffende de toepassing van het internationale en nationale zeeoorlogsrecht tijdens een oorlog, waarin het Koninkrijk der Nederlanden is betrokken*, Ministry of Defence, 1956.

law is not rooted in the law itself, but to a certain extent rooted in the fact that the rules of this body of law are simply unknown, both within relevant ministerial departments and admiralties who only sporadically deal with these issues. The same accounts for the judiciary, whose role is to adjudicate seized prizes. Before the codification of the law during the Hague conferences of 1899 and 1907 and until the Second World War, the laws of naval warfare were, in fact, quite sophisticatedly developed through the jurisprudence of national prize courts.⁸⁰ Even when not at war, the nature of prize law made an impact on neutral States' vessels and goods and was therefore an important issue for States to have views on. Jurisprudence as a legal source, especially for deepening operational detail, has fallen to the background due to a lack of prize cases in current conflicts. The Israeli prize judgments of the *Estelle* and the *Mavi Marmara* are rare recent cases of prize, but do underline that prize courts are not legal history.⁸¹ Also, interestingly, although the incident itself had much attention, the legal endgame in the courts did not garner any attention. Furthermore, international courts do not seem to really pick up on issues of the law of naval warfare even if their might actually be reasons to do so.⁸² With the exceptions of the Israeli cases, in general, crystallization or development of the law through national and international case law has come to a standstill. With not much to turn to, States do not have anything to develop a clear view or position on.

Second, as mentioned above, Greenwood opined that there is a case for a major revision of the law of naval warfare. However, what constitutes a “major revision”? Should States also question whether the fundamental principles underlying the law of naval warfare are still valid today? For example, one of the legal principles is that enemy civilian property can be captured; all enemy merchant vessels can be seized and captured, and goods on board enemy and neutral merchant vessels can, when considered contraband, be taken.⁸³ In addition, actively resisting seizure may not be a breach of the laws of armed conflict, but it does make merchant vessels liable for attack. On this notion of liability of civilian property and belligerent rights, Clapham opines that: “Rather than suggesting that such Belligerent Rights apply in all armed conflicts, we should accept that they no longer can be upheld in the face of States' obligations under the UN Charter.”⁸⁴ In his view, because war is outlawed under the Charter, aggressors should not be able to acquire belligerent rights and keep what they can capture under prize law. Although one might view that, as a principle, civilian

80 See, for instance, James Wilfred Garner, *Prize Law During the World War. A Study of the Jurisprudence of the Prize Courts, 1914–1924*, The Macmillan Company, New York, 1927.

81 Eran Shamir-Borer, “The Revival of Prize Law – An Introduction to the Summary of Recent Cases of the Prize Court in Israel”, in Yoram Dinstein and Jeff Lahav (eds), *Israel Yearbook on Human Rights*, Vol. 50, Koninklijke Brill, Leiden, 2020.

82 One recent case might be the case that came before the International Tribunal for the Law of the Sea on the Kerch Strait incident between Russia and Ukraine.

83 Wolff Heintschel von Heinegg, “Maritime Warfare”, in Andrew Clapham, Paola Gaeta, Tom Haeck and Alice Priddy (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 170–80.

84 A. Clapham, “Booty, Bounty, Blockade, and Prize”, above note 5, p. 1222.

property cannot not be taken, Clapham’s argument, however, seems to blur the distinction between *ius in bello* and *ius ad bellum*. His thought on changing the fundamentals of the law, however, seems exceptional. Scholars on the law of naval warfare do not usually question the fundamental principles on which the law of naval warfare is based and instead repeat what should be seen as special rights conferred on States through long-standing custom. This is convenient for States, as it comes, for instance, with extensive State authorities such as the belligerent right of visit and search, allowing to board vessels without former consent and the possibility to list items on contraband lists, forbidding trade with the enemy on these items and therefore liable to confiscation. In this context, States probably are not likely to review the law in such a thorough manner if they risk losing far-reaching authorities to impact the opponent’s trade.

Third, instead of finding firmer ground for the law of naval warfare through codification of rules that are possibly customary law or reviewing its fundamental principles, States could also choose to look to the future, trying to keep up with current technical and legal challenges. That would in fact continue the practice of treaty-making in this area of the law on only very specific subjects. The aim is then to future-proof the law of naval warfare in relation to challenges such as unmanned warships, unmanned underwater vehicles, smart naval mines, use of cyber tactics in the maritime domain, the use of long-range weapons and the use of air assets at sea. Other more remote issues emerging as a result from technological developments are the legal status of sunken warships and their protection (perhaps also relating to Article 18 of GC II regarding the dead at sea), the protection of submarine cables at sea and the issue of flag-verification in defining a vessel’s enemy in character. Attention could also be brought to the legal regime for the use of methods of naval warfare in NIAC. And, lastly, the law could address new international waterways or canals. These are by virtue of their geographical place maritime spaces that are also of military strategic value and should probably, similar to existing canals such as the Suez, Panama or the Bosphorus, need some governing on military-related issues. All these issues and themes by themselves would give States more than a plateful of legal issues to chew on without having to look back and crystallize and codify custom.

Conclusion

Is there a continuous or ever-existing “crisis” of the law of naval warfare and could treaty-making help to clarify the law? The answer is probably yes, as there is simply no comprehensive treaty on all matters of the law of naval warfare, an unending feeling exists that existing treaties might be out of date, customary rules are known only to a small number of scholars and practitioners, knowledge and discussion on the details of the law are crumbling and, meanwhile, technological developments of warfare at sea are forcing old laws onto new situations. This felt lack of clarity of rules should frustrate any lawyer. Although scholars who are well versed in the law of naval warfare are, in general, fairly consistent in what

the law is, official State positions are a missing link, preferably provided by treaty. On the other hand, viewed from States' perspective, since the development of modern IHL, the law of naval warfare has always been in this uncertain state, has never crystallized into a regime codified in treaties with clear and detailed provisions and has always been and accepted as a creature of customary law. With very few exceptions did States show the need to change this situation. Former, commendable efforts, such as the London Declaration, have never been picked up again. However unclear the law of naval warfare might be, relying on custom with manoeuvre space to support one's own political–strategic position might very well be a suitable and acceptable modus for naval powers. This “continuous crisis” appears to be the normal modus and typical nature for this area of law, which, other than revising soft law instruments, will probably stay as-is.

The well-trodden path of national humanitarian law committees

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Abstract

The road towards effective implementation of international humanitarian law (IHL) is a continuous process where important milestones will be reached at each step. As part of such a process, national committees and similar entities on IHL have played a key driving role. As with most long-haul road trips, one tends to start with an idea of the roads that will be taken and what the end destination will look like. In this case, the common destination is better respect for IHL. While the destination never changes, the different roads to be travelled can multiply, creating new opportunities through events that arise, and actors encountered along the way. Likewise, when the first national IHL committees were formed in the 1970s to advise and assist their States on the domestic implementation of IHL, they undoubtedly followed different roadmaps from those followed today. As IHL has evolved to keep pace with new realities of warfare, so too has the work of national IHL committees. New treaties have been adopted, new interpretations have been agreed upon, requiring new domestic laws and measures. This article will begin by pinpointing where exactly the journey started for national IHL committees, highlighting that the creation of these bodies coincided with important developments across the international landscape which would come to reinforce domestic implementation of IHL. In the second section, the authors will provide a detailed mapping of the roads generally travelled by these entities, with the intention to showcase the multi-faceted nature of their work and the innumerable milestones achieved along the way. The final section will explore the material, political and structural road bumps which are slowing down the work of some national IHL committees and will provide recommendations on how these entities may overcome these hurdles.

Keywords: international humanitarian law, national IHL committees, IHL implementation, coordination of IHL implementation, domestic implementation of IHL, domestic law, drafting of law.

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Introduction

Article 1 common to the four Geneva Conventions, which are universally ratified, requires all States to “respect and to ensure respect” for their provisions “in all circumstances”.¹ Among other things, this requires each State to ensure the full implementation of international humanitarian law (IHL) into their domestic systems. Recognizing the vast scale of this task, 116 States, to date, have created

1 For information on the meaning of this provision, please visit: International Committee of the Red Cross (ICRC), Updated Commentary on Article 1 Common to the Four Geneva Conventions, 2020, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (all internet references were accessed in May 2022).

dedicated expert groups, or similar bodies, often referred to as “National Committees and Similar Entities on IHL” (national IHL committees), to account for the wide range of forms and structures that such committees may take.²

National IHL committees act as advisory bodies which assist their governments in implementing, developing and disseminating IHL at the domestic level.³ They are interdisciplinary and multi-stakeholder in nature, comprising of, for instance, representatives from ministries concerned with IHL,⁴ military personnel, members of the Red Cross or Red Crescent National Society, and, where relevant, experts on IHL such as academics, and civil society members, placing them in a unique position to coordinate IHL implementation amongst numerous actors.⁵

This article seeks to showcase the crucial work of national IHL committees in guaranteeing greater respect for IHL, by focusing on concrete achievements and common traits that have made such achievements possible. As the work of national IHL committees dates back four or five decades, this article will first explore where exactly the journey started for these entities. It aims to demonstrate that no two national IHL committees follow the exact same path, as the work undertaken by these entities must evolve depending on the legal and political climate of the relevant State, as well as national, regional and international priorities and events. Nevertheless, this article will paint a general picture of the roads travelled by national IHL committees and their various accomplishments along the way. Though, among the innumerable milestones that they have celebrated, some national IHL committees have also encountered road bumps concerning their material, political and structural compositions which force them to slow down and reassess their route ahead. This article will present some recommendations for national IHL committees to help them to surface the road bumps and land back on the right path.

How the journey started

The first national IHL committee was created in 1973 within the German Red Cross.⁶ This technical committee on IHL, whose legal basis and functions were set up by the German Red Cross Statutes, primarily serves as a forum for

2 For a full list of national IHL committees across the world, see ICRC, “Table of National Committees and Other National Bodies on International Humanitarian Law”, 26 April 2022, available at: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>.

3 ICRC, *National Committees and Similar Entities on International Humanitarian Law: Guidelines for Success – Towards Respecting and Implementing International Humanitarian Law*, Publication Ref. 4367, 2019, p. 14, available at: <https://www.icrc.org/en/publication/national-committees-and-similar-entities-international-humanitarian-law-guidelines-1>.

4 This typically includes the defence, justice, foreign affairs, interior, culture, health and education ministries/departments, plus others as relevant.

5 ICRC, above note 3, pp. 29–36; ICRC, *Bringing IHL Home: Guidelines on the National Implementation of International Humanitarian Law*, 19 July 2021, p. 19, available at: <https://www.icrc.org/en/document/bringing-ihl-home-guidelines-national-implementation-international-humanitarian-law>.

6 German Red Cross, “National Committee on International Humanitarian Law: Mandate and Legal Basis”, available at: <https://www.drk.de/en/the-grc/mission-of-the-grc/national-committee-on-international-humanitarian-law/>.

consultation and coordination between the German Red Cross and the various departments of the federal government, and aims to focus on developing, disseminating and implementing IHL.

Following Germany's example, the second committee established was in Australia in 1977. Indonesia and New Zealand followed suit in 1980. After Europe, Asia and the Pacific, other continents started developing national IHL committees. Bolivia and Uruguay created the first national IHL committees in Latin America in 1992, Zimbabwe the first on the African continent in 1993, the Republic of Trinidad and Tobago was the first State to have such a committee in the Caribbean in 1997, and Jordan the first in the Arab world in 1998. After that, the number of national IHL committees started to drastically increase, passing the threshold of fifty committees in 2001, and of 100 in 2011. At the time of publication of this article, the International Committee of the Red Cross (ICRC) lists 119 existing national IHL committees and similar entities in 116 States across the globe.⁷

The simultaneous creation of national IHL committees in all continents was not a coincidence. In the early 1990s, the role of such committees started to gain recognition in the international fora, and several key players in the field of IHL started to actively promote their establishment. It is likely that the international environment at that time was prone to developments in international law. By its resolution 44/23 of 17 November 1989, the General Assembly had declared the period 1990–1999 to be the United Nations Decade of International Law. And indeed, the decade was marked by numerous developments in the fields of IHL and related regimes. For instance, a series of ground-breaking IHL treaties were adopted: the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction in 1993; the Fourth Protocol to the Convention on Conventional Weapons, on blinding laser weapons, in 1995; the Ottawa Convention on Anti-Personnel Land Mines in 1997; and the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflicts in 1999. It was also the time of the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the holding of the 1998 Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court, resulting in the adoption of the Rome Statute of the International Criminal Court. In short, the international community was committed to advancing international law and its respect, and it also agreed that such progress would go through the domestic level.

The global recognition of the importance to be played by domestic implementation was illustrated by the parallel focus given to national IHL committees and to the creation of the ICRC's Advisory Service on IHL. A key moment for both was the international conference on the protection of the victims of warfare that took place in Geneva from 30 August to 1 September

⁷ ICRC, above note 2. At the time of publication of this article, the ICRC has listed three States that have two national IHL committees (Italy, Poland and Sweden).

1993. During that conference, Switzerland was given the mandate to gather an intergovernmental group of experts and make recommendations on the promotion of IHL. The work of that group of experts would have a massive influence on the domestic implementation of IHL across the globe for years to come. A first preparatory meeting of that group of experts was organized in September 1994, which led to the drafting of nine recommendations.⁸ They were later adopted by the intergovernmental group of experts during a meeting in January 1995.⁹ Recommendation III suggested that “the ICRC, with the assistance of National Societies, the International Federation of Red Cross and Red Crescent Societies (“the International Federation”) and academic institutions, strengthen its capacity to provide advisory services to States, with their agreement, in their efforts to implement and disseminate IHL”.¹⁰ In parallel, Recommendation V encouraged further work on the way in which governments can benefit from the creation of national IHL committees tasked to provide advice and assistance on measures for the implementation and dissemination of IHL at the domestic level.¹¹

In addition, it appears that such recommendations were generally supported by National Societies of the Red Cross and Red Crescent. In the same year, on 8 and 9 November 1995, lawyers from several National Societies met in Geneva. ICRC’s archives show that they generally considered that the creation of advisory services within the ICRC was worthwhile, and supported the promotion and creation of inter-ministerial national IHL committees in their own countries.¹²

The 26th International Conference then took place in Geneva from 3 to 7 December 1995. Its Commission I – *War Victims and Respect for International Humanitarian Law* – discussed and formally adopted the recommendations from the experts’ meeting. The resolution – *International Humanitarian Law: From Law to Action* – indeed endorsed both the creation of the ICRC’s Advisory Service and of national IHL committees.¹³ From that point onwards, the development and evolution of the ICRC’s Advisory Service and of national IHL committees would go hand in hand, mutually reinforcing one another. For

8 Revue Internationale de la Croix-Rouge, “Document de travail établi par le gouvernement suisse sur la base des neuf recommandations issues d’une réunion préparatoire tenue à Genève (26–28 septembre 1994)”, March 1995, available at: <https://international-review.icrc.org/fr/articles/document-de-travail-etabli-par-le-gouvernement-suisse-sur-la-base-des-neuf-recommandations>.

9 Revue Internationale de la Croix-Rouge, “Réunion du Groupe d’experts intergouvernemental pour la protection des victimes de la guerre (Genève, 23–27 janvier 1995), Recommandations”, March 1995, available at: <https://international-review.icrc.org/fr/articles/reunion-du-groupe-dexperts-intergouvernemental-pour-la-protection-des-victimes-de-la-0>, pp. 37 and 39. See also *International Humanitarian Law: From Law to Action: Report on the Follow Up to the International Conference for the Protection of War Victims: Report of the President of the Intergovernmental Group of Experts for the Protection of War Victims (Geneva, 23-27 January 1995): Commission I: War Victims and Respect for International Humanitarian Law (Item 2 on the Provisional Agenda)*, Geneva, 1995, available at: https://library.icrc.org/library/docs/CI/CI_1995_140_ENG_146.pdf.

10 *Ibid.*, p. 14.

11 *Ibid.*, p. 14.

12 Information from the ICRC’s Archives, available upon request.

13 ICRC, “26th International Conference 1995: Resolution 1”, Resolution, 7 December 1995, available at: <https://www.icrc.org/en/doc/resources/documents/resolution/26-international-conference-resolution-1-1995.htm>.

instance, most of the IHL-related resolutions and plans of action adopted at the successive International Conferences since 1995 have stressed the importance of domestic implementation of IHL, calling on States to strengthen the work of national IHL committees and stressing the availability of the ICRC's Advisory Service to support States in such endeavours.¹⁴

Since 1995, the Advisory Service has also published numerous materials specifically addressed to representatives of national IHL committees, to equip them with actionable recommendations to implement different areas of IHL. This ranges from the publication of ratification kits to model laws and thematic factsheets,¹⁵ and from bilateral capacity-strengthening initiatives to the organization of universal meetings of national IHL committees.¹⁶ It has also regularly supported national IHL committees in drafting compatibility studies on different areas of IHL,¹⁷ and in establishing concrete and realistic plans of action to guide their work. More recently, the ICRC's Advisory Service developed legislative checklists which national IHL committees may use to identify areas that need to be strengthened within their State's domestic legal framework.¹⁸ In this sense, the Advisory Service offers the possibility of continuous roadside assistance to committees on their respective journeys.

The different roads towards better respect for IHL

Each national IHL committee set out on their respective journeys at different moments in history. Just as they started from different points, they also take different routes. Nevertheless, they are all guided by a shared vision of where they are going and what they need to achieve: greater respect for IHL.

The final destination: better respect for IHL

National IHL committees have been and continue to be created by States at different moments in time, following timelines, needs and motivations that are specific to

14 For instance, national IHL committees were mentioned during the 27th International Conference of 1999 (Annex 2 of Resolution 2), the 30th International Conference of 2007, the 31st International Conference of 2011 (Resolution 2), and the 33rd International Conference of 2019 (Resolution 1).

15 ICRC, "National Implementation of IHL: Documentation", available at: <https://www.icrc.org/en/war-and-law/ihl-domestic-law/documentation>.

16 ICRC, "National Committees", available at: <https://www.icrc.org/en/war-and-law/ihl-domestic-law/national-committees>.

17 Legal compatibility studies aim at assessing the harmony between the international legal obligations that are binding on the State and the corresponding laws, regulations, doctrines or mechanisms that have been adopted or established within the domestic legal system.

18 See for instance: ICRC, *Domestic Implementation of International Humanitarian Law Prohibiting Sexual Violence: A Checklist for States and the International Red Cross and Red Crescent Movement*, 2020; ICRC, *Protecting Health Care from Violence: Legislative Checklist*, 2021; ICRC, *Domestic Measures to Implement the Anti-Personnel Mine Ban Convention*, 2020; ICRC, *Checklist: Domestic Measures to Implement the Convention on Cluster Munitions*, 2020.

each State.¹⁹ However, all national IHL committees share the same initial acknowledgement and the same end goal. They are all created because IHL matters, because States continue to believe in the power of IHL to preserve the core of our common humanity in the worst of times. National IHL committees are created with the view to contribute to the fostering of a culture of respect, in the hope that the cumulative efforts made at each national level will create a global force towards better respect for IHL during armed conflict.

In a certain manner, national IHL committees embody the butterfly effect: each small change to the domestic legal system of a State done during peace time, each dissemination session on IHL and each improvement to the provisions of a domestic legislation, can have large-scale effects on the behaviour of belligerents during an armed conflict. This can be seen in Peru following its ratification of the Ottawa Convention in 1998.²⁰ In 2001, Peru's national IHL committee was set up with an objective to be the guardian of the development and fulfilment of Article 9 of the Ottawa Convention.²¹ Indeed, in accordance with this provision, the national IHL committee initiated its government to create a draft law to implement the Ottawa Convention.²² Subsequently, in 2016, it was reported that Peru had undertaken the destruction and clearance of anti-personnel landmines.²³ National IHL committees are, in that sense, a pillar of prevention work: they work tirelessly towards the creation and maintenance of an environment conducive to respect for IHL.

There is an intrinsic link between the international and the domestic levels when it comes to better respect for IHL. Therefore, while efforts at the international level are absolutely needed to continue developing and clarifying the law where and when needed, such efforts can only be meaningful if they are accompanied by a parallel driving force at the domestic level. Furthermore, the work of national IHL committees needs to be acknowledged and strengthened through international recognition. The members of the 33rd International Conference of the Red Cross and Red Crescent highlighted that “much work remains to be done to ensure IHL is effectively implemented, and they have urged for

19 Motivations include, first and foremost, a desire to enhance protection for those affected by armed conflict, as well as political or organizational interests, such as a desire to join global or regional discussions on IHL implementation or ensuring better coordination among various internal stakeholders.

20 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention).

21 Article 9 of the Ottawa Convention describes the national implementation measures which should be adopted by State parties. For more information on the creation of the Comisión Nacional de Estudio y Aplicación del Derecho Internacional Humanitario (CONADIH), please see: “Intervención del Perú en el tema 11 (e) iii Prevención v supresión de las actividades prohibidas v facilitación del cumplimiento”, available at: https://webcache.googleusercontent.com/search?q=cache:ciTrHrEC6oQJ:https://www.apminebanconvention.org/fileadmin/pdf/other_languages/spanish/MBC/MSP/7MSP/update_day_4/Peru_compliance_7MSP_21Sep06_.pdf+&cd=1&hl=de&ct=clnk&gl=ch.

22 “Intervención del Perú en el tema 11 (e) iii”, *ibid.*

23 Peru had reportedly cleared a total of 170,000m² of mined area and destroyed 9265 mines over the five years prior. For more information on Peru's demining actions, please see: IHL in Action, “Peru, Demining Action”, 2016, available at: <https://ihl-in-action.icrc.org/case-study/peru-demining-action>.

continued collective commitment and action”.²⁴ National IHL committees illustrate how to turn individual efforts into a global force. Through their work on the universalization of IHL treaties, the adoption of domestic laws, policies and mechanisms, the dissemination of IHL to various audiences, the sharing of good practices with peers in other States, they continuously contribute to such collective commitment and action, and ultimately to better respect for IHL.

Of course, the road is far from being an easy one to travel. It is a long, almost never-ending journey, with several road bumps along the way, as will be discussed in the next part. Yet, national IHL committees have already travelled quite far, and it is possible to sketch a general picture of what the different roads look like, with key signposts that are common to the work of most, if not all, national IHL committees.

A common starting point: compatibility studies and plans of action

First and foremost, in order to determine the route ahead, national IHL committees need to have an overview of the legal and administrative framework existing in their State.²⁵ Which IHL or other relevant treaties have already been ratified? Which IHL-related topics does the domestic law address? What kind of administrative procedures exist in the national framework which support IHL implementation? What domestic audiences, if any, are trained on IHL?

In order to answer these questions, many national IHL committees have successfully supported, or in some cases led, legal compatibility studies that aim at assessing the harmony between the international legal obligations that are binding on the State and the corresponding laws, regulations, doctrines or mechanisms that have been adopted or established within the domestic legal system.²⁶ For example, in 2019, the national IHL committees of Turkmenistan, Belarus, Moldova, Sri Lanka and Slovenia reported that they have either produced or commissioned a legal compatibility study for this purpose.²⁷ In carrying out these studies, it is not unusual for States to resort to academic circles either to conduct the study or for their significant inputs.²⁸ Even once completed, these studies should be subject to regular reflection in order to assess how the relevant State’s domestic framework has since evolved.

Such legal compatibility studies can be general, covering all aspects related to IHL, or thematic, focusing on specific topics identified as having a particular importance for the State. In both cases, the value of such studies lies in the fact that they allow national IHL committees to uncover what has already been

24 Red Cross Red Crescent Conference, *33rd International Conference of the Red Cross and Red Crescent: Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law*, Background Document, Geneva, October 2019, p. 2, available at: https://rcrcconference.org/app/uploads/2019/10/33IC-Background-document-on-IHL_EN.pdf.

25 ICRC, above note 3, pp. 53 and 54.

26 A model legal compatibility study is available at ICRC, above note 3, pp. 72 and 73.

27 ICRC, above note 3, p. 53.

28 For example, local academics in Tunisia have helped to conduct legal compatibility studies concerning national protections afforded for missing persons.

achieved, as well as in the analysis they include on specific areas that would require further work. On that basis, the national IHL committee can develop a list of concrete actions that national authorities should undertake in order to ensure full harmony with the State's international legal obligations and with good practices developed by other States in the same area.

Whether or not a State has worked on such a compatibility study, one additional good practice observed in many national IHL committees is the drafting and adoption of a “plan of action” setting priorities for the work of the committee.²⁹ For instance, in 2017, the national IHL committee of Burkina Faso developed a plan of action for the years 2019 to 2023, concerning the implementation and evaluation of IHL actions.³⁰ The national IHL committee of the United Arab Emirates (UAE) has also launched its plan of action for 2021 and 2022 which “aims to increase cooperation and knowledge exchange with organizations working in the field of IHL”, and “includes a range of activities, plans and events targeting key sectors in the country, including law enforcement and civil society institutions”.³¹ Thematic plans of action can also be created, covering specific IHL topics. For example, Burkina Faso's national IHL committee developed a thematic roadmap, covering the years 2020–2022, for a study on the identification of cultural property in need of protection during armed conflict and for the implementation of the Hague Convention of 1954, which included the elaboration of a national standard for the punishment of offences concerning cultural property, regardless of the nationality of the perpetrator.³² Though, whilst many committees have indeed published their plans of action, other committees have decided that these documents will be kept for purely internal governmental reflections.

Plans of action may also be elaborated by regional organizations such as the one developed by the Economic Community of West African States (ECOWAS) Commission and its fourteen Member States, in conjunction with the ICRC in November 2018.³³ Thus, plans of action vary in scope, sometimes covering a range of IHL themes or otherwise focusing on a single topic, and they may be developed by a national IHL committee for one State, or otherwise by a regional organization comprising a number of Member States.

29 For example, in 2019, the national IHL committees of Belarus, Georgia, Kyrgyzstan, Turkmenistan, United Arab Emirates (UAE), Kuwait, Egypt, Morocco and Bangladesh reported that they had each created their respective plan of action. The ICRC has created a “model plan of action” which is available at ICRC, above note 3, pp. 74 and 75.

30 This information is contained in Burkina Faso's voluntary report of 2018, at p. 33. This voluntary report is on file with the ICRC's Advisory Service and, with the consent of the national authorities of Burkina Faso, may be shared on demand. Please email GVA_advisoryservice@icrc.org with such requests.

31 UAE Ministry of Foreign Affairs & International Cooperation, “National Committee for International Humanitarian Law Launches 2021–2022 Action Plan”, 22 April 2021, available at: <https://mofaic.gov.ae/en/mediahub/news/2021/4/21/22-04-2021-uae-plan>.

32 This information is contained in Burkina Faso's voluntary report of 2018, see above note 30, p. 35.

33 To view the plan of action created during the ECOWAS–ICRC Annual Review Meeting of 2018, see ICRC, *Implementing IHL in West Africa: Participation of West African Countries in International Humanitarian Law Treaties and their National Implementation*, 18 September 2019, pp. 57–68, available at: <https://www.icrc.org/en/document/implementing-ihl-west-africa-redux>.

Overall, good practices shared by national committees highlight that plans of action should include a step-by-step list of objectives, usually for a one- or two-year period, which are ordered by priority.³⁴ Such plans of action should be the basis for organizing the committee's work over the given period, and should be accompanied with a clear monitoring and evaluation component, to assess the impact of the committee's work on implementing the different objectives. In addition, plans of action should be revised and updated, or reconducted, at the end of the given timeframe.

Individual roads converging towards universalization

The plan of action should mark out a series of objectives and the roads to be taken to achieve these objectives. The first objective usually concerns the ratification or accession to IHL or related treaties which the State is not yet party to.

The main IHL treaties, the Geneva Conventions of 1949, have already achieved universal ratification with a total of 196 State parties.³⁵ The Additional Protocols of 1977 to the Geneva Conventions also count among the most widely ratified treaties, with, respectively, 174 and 169 States parties as of March 2022, and a continuously – though arguably still too slow – progress towards universalization.³⁶ At the time of publication, in 2022, the Additional Protocols are celebrating their 45th anniversary and the ICRC is urging States, that have not already done so, to ratify these conventions. Other core treaties which national IHL committees should consider in their assessment of their State's participation to international instruments include all of the different weapons-related treaties, for instance, the Convention on Conventional Weapons and its Protocols, the Anti-Personnel Landmines Ban Convention, the Cluster Munitions Convention, the Arms Trade Treaty and, more recently, the Treaty on the Prohibition of Nuclear Weapons. The list of treaties to consider also includes those that aim to protect specific categories of persons or objects, such as the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, or the Hague Convention on Cultural Property and its Optional Protocols.³⁷

As part of this work, national IHL committees play a crucial role in that they can produce not only the list of treaties that the State is not yet party to, but also identify and analyse the possible concerns or obstacles that may have prevented the State's accession to a given treaty. On that basis, the committee

34 ICRC, above note 3, pp. 54 and 57.

35 For information on the State Parties, see: ICRC, "Treaties, States Parties and Commentaries", Database, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp>.

36 *Ibid.*

37 For a more comprehensive list of major IHL treaties, see ICRC, "What Treaties Make up International Humanitarian Law?", 2017, available at: <https://blogs.icrc.org/ilot/2017/08/07/treaties-make-international-humanitarian-law/>.

itself offers an ideal platform to have an open discussion among the different governmental agencies, to address those concerns or obstacles, and pave the way to the necessary political will to accede to the remaining treaties. In many instances, national IHL committees have also worked on creating, as part of the roadmaps or plans of action mentioned above, a list of priority treaties that authorities should work on. Such priority-setting exercises create a more realistic pathway to increasing the State's treaty participation record, as they take into account the fact that each ratification or accession process takes time, energy and resources.

A few examples can be mentioned here. For instance, in early 2020, following the adoption of Resolution 1 during the 33rd International Conference of the Red Cross and Red Crescent, Indonesia's national IHL committee adopted its first roadmap to guide its IHL implementation and promotion work for the period from 2020 to 2023.³⁸ During the 5th Universal Meeting of national IHL committees, organized by the ICRC in November and December 2021, Iran's national IHL committee reported that it supported the accession and implementation of various weapons treaties by Iran, having held workshops and seminars, and having approached key decision-making bodies within government to advocate for ratification and implementation of treaties.³⁹

It should be highlighted that the work of national IHL committees does not only benefit the domestic level. Each step taken by a national IHL committee to promote the ratification or accession by its State to an additional IHL treaty is also one step closer to the universalization of such a treaty. As a consequence, it is important to remember that national IHL committees also work to support efforts made at the international level, ensuring that an even greater number of rules are recognized by an increasing number of States. In other words, national IHL committees also very much contribute to making IHL – and international law in general – stronger.

A common driving force: ensuring effective implementation

With each treaty that is ratified, one can imagine that an intersection emerges which signposts the national IHL committee in multiple directions in order to support the implementation of the treaty – the particularity of this journey is that all of the paths are equally important and, more notably, can be travelled simultaneously. Taking one road may involve the harmonization of domestic law and regulations; another road may lead to the adoption of administrative measures; whilst taking another route would allow the national IHL committee to promote the treaty rules amongst relevant actors tasked to apply or interpret it, for instance.

³⁸ ICRC, above note 5, *Bringing IHL Home*, p. 21.

³⁹ ICRC, "Fifth Universal Meeting of National Committees and Similar Entities on International Humanitarian Law", Report, 26 January 2022, available at: <https://www.icrc.org/en/document/fifth-universal-meeting-national-committees>.

One of the most important tasks carried by national IHL committees is the adoption or harmonization of domestic laws in order to implement the treaties that have been ratified by the State, as well as any other customary IHL rules. Implementing legislations are indeed necessary in many States (i.e. those following a dualist constitutional system) to ensure that they become binding domestic law and can be used by the actors in charge of applying them. In addition, ensuring implementation at the domestic level will be necessary for all States, in particular, for rules of customary international law as well as for rules that are not self-executing and hence require clarification on the rights and responsibilities of national actors. The adoption of domestic law also allows the government to translate the treaty terms into the spoken language(s) of the population. National IHL committees are very often instrumental in this process due to their expertise in IHL and therefore they sometimes take the driver's seat in drafting the domestic laws themselves.

For instance, the national IHL committee of Egypt has reported that it is working on a draft law on the protection of cultural property from the effects of armed conflict as the implementing legislation for the 1954 Hague Convention. In 2016, the national IHL committee of Uruguay had also prepared a draft bill to include violations of the Convention on Cluster Munitions in domestic law.⁴⁰ Similarly, the national IHL committee of Mexico had prepared the initial draft of Mexico's legislation on the use and protection of the Red Cross emblem.⁴¹ Otherwise, where the national IHL committee does not draft the bill itself, it may consult relevant government agencies during the deliberation of the bill, which was the role played by the Indonesian committee during the passing of the country's Law on Red Cross Affairs in 2017.⁴² National IHL committees have also played a role in ensuring the participation of additional actors, when relevant, in the drafting of domestic laws. For instance, Croatia's national IHL committee facilitated the involvement of families in the drafting of a law on Persons Who Went Missing in the Homeland War (1991–1995).⁴³ Overall, national IHL committees have played a defining role in the drafting, or at least in the deliberation, of domestic legislations to implement IHL.

For the effective implementation of IHL, it is also important to preserve the advisory role that national IHL committees play with the national

40 ICRC, *Implementing IHL: Participation of the American States in IHL Treaties and their National Implementation – 2016/2017 Report*, 19 December 2018, p. 46, available at: <https://www.icrc.org/en/publication/ihl-participation-american-states-ihl-treaties-national-implementation-2016-2017>.

41 Mexico, *Ley para el uso y proteccion de la denominacion y del emblema de la cruz roja*, 23 March 2007, available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LUPDECR.pdf>, as cited in: Oscar G. Macias Betancourt, "Implementation of International Humanitarian Law: The Work of Latin American International Humanitarian Law Committees", *International Review of the Red Cross*, 11 February 2022, p. 12, available at: <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/implementation-of-international-humanitarian-law-the-work-of-latin-american-international-humanitarian-law-committees/5969B213F95B106AD46119FAB241C9DF>.

42 ICRC, above note 3, p. 15.

43 Croatia, *The Law on Persons Who Went Missing in the Homeland War (1991–1995)*, Official Gazette of the Croatian Republic, No. 70/19, July 2019, available at: <https://www.zakon.hr/z/2123/Zakon-o-osobama-nestalim-u-Domovinskom-ratu>.

authorities.⁴⁴ They are indeed very well placed to keep an eye on the broader international landscape and to ensure a continuous dialogue between the international, regional and national levels. Their work in this respect includes monitoring developments and emerging issues concerning IHL, for instance, on new technologies of warfare, military activities in outer space, cyber-warfare, the compliance of counterterrorism measures with IHL, and so forth. National IHL committees then advise their governments on international debates, developments or clarifications in IHL, such as through the publication of reports. This advisory role is exemplified by the actions of the national commission of France at the domestic level.⁴⁵ Since 1988, the “IHL – Humanitarian Action” group within the French national consultative commission on human rights has been very active in publishing public opinions on different issues related to weapons, in which it presents its analysis of the obligations binding on the State and makes clear recommendations to the French authorities to implement such obligations. For instance, the national commission adopted a public opinion on the use of chemical weapons in 1988,⁴⁶ a declaration on the use of explosive weapons in populated areas in June 2021,⁴⁷ and has since 1998 provided its opinions regarding the elaboration of a European Union code of conduct with common criteria regulating the export of weapons.⁴⁸ In addition, it encouraged France to participate actively in the drafting of the Arms Trade Treaty and made recommendations to the authorities in 2011 and 2013 ahead of the diplomatic conference that adopted the Treaty.⁴⁹

Upon the adoption of domestic law, the road divides off into various directions, revealing new possibilities for implementing this law. Taking one route requires the national IHL committees to adopt measures to ensure that the domestic law is understandable for those who will apply it. Since we are speaking about the law of armed conflict, the actors who may come to mind are those who actually engage in armed conflicts, first and foremost, the military. National IHL committees have advised on the development of military manuals to ensure that IHL is correctly integrated into military operational procedures as was the case, for example, in Belarus.⁵⁰ National IHL committees may engage with the military in other ways, for example, by creating an IHL casebook to support the education

44 This advisory role is sometimes highlighted in the founding documents of national IHL committees, as observed for some Latin American national IHL committees. See O. G. M. Betancourt, above note 41.

45 Commission Nationale Consultative des Droits de l’Homme (CNCDH), “Publications”, available at: <https://www.cncdh.fr/fr/publications>.

46 CNCDH, “Avis sur l’utilisation d’armes chimiques notamment dans le conflit Iran-Irak”, 15 September 1988, available at: <https://www.cncdh.fr/fr/publications/avis-sur-lutilisation-darmes-chimiques-notamment-dans-le-conflit-iran-irak>.

47 CNCDH, “Déclaration ‘Armes explosives en zones peuplées : déclaration pour un engagement politique ambitieux à la hauteur des enjeux humanitaires’”, 24 June 2021, available at: <https://www.cncdh.fr/fr/publications/declaration-armes-explosives-en-zones-peuplees-declaration-pour-un-engagement-politique>.

48 CNCDH, “Publications”, available at: <https://www.cncdh.fr/fr/publications/transfert%2520d%2527armes?retain-filters=1>.

49 CNCDH, “Avis sur le projet de Traité sur le commerce des armes 21 février”, 18 March 2013, available at: <https://www.cncdh.fr/fr/publications/avis-sur-le-projet-de-traite-sur-le-commerce-des-armes-21-fevrier>.

50 ICRC, above note 3, p. 27.

of army staff, as was done in the Czech Republic,⁵¹ or by organizing IHL training for armed forces, as organized by the national IHL committees of Iraq, Morocco, Syria and Uruguay, for example.⁵² Committees may also be a forum for the armed forces to present their training needs and request support. The manner through which a national IHL committee engages with their State military may depend on the military's practices, and also on whether or not the military – often through the ministry or department of defence – is represented in the national IHL committee itself.

National IHL committees must also take steps to ensure that the domestic law is accessible to civilian bodies that implement the law, such as parliamentarians and judges. For example, national IHL committees have provided legal and technical advice for the set up of mechanisms for the clarification of the fate of missing persons in Lebanon, Peru and Zimbabwe, and have advised on the adequate functioning of these mechanisms in accordance with IHL. In other cases, manuals have been drafted which guide civilian actors in implementing the domestic law, such as Nepal's handbook for parliamentarians and other civilian authorities in promoting respect for IHL which was created with the support of the national IHL committee.⁵³ The manner through which national IHL committees have engaged with civilian authorities depends on the subject of the law, the existing expertise of these bodies, and also the working relationships.

Upon creating the necessary domestic laws and measures to help implement the law, national IHL committees support States in making inroads into the full dissemination of applicable IHL within their territories, ensuring that it is known to civilian and military authorities as well as the general public.⁵⁴ Many national IHL committees are even mandated by their governments to disseminate the law as is the case for the national IHL committees of Madagascar and the United Kingdom, for example.⁵⁵ Dissemination efforts include the provision of training courses on IHL for various audiences. For instance, Peru's national IHL committee and the ICRC "jointly organized the first meeting of students of IHL with the aim of creating a network of students interested in IHL to promote the study and dissemination of this body of law and its inclusion in

51 Red Cross Red Crescent Conference, "Promotion and Dissemination of International Humanitarian Law", Pledge, 29 November 2019, available at: <https://rcrcconference.org/pledge/promotion-and-dissemination-of-international-humanitarian-law-2/>.

52 ICRC, above note 3, p. 27; ICRC, above note 40, p. 46.

53 ICRC, "Nepal: Humanitarian Law Handbook Ready for Launch", News Release, 16 March 2015, available at: <https://www.icrc.org/en/document/nepal-humanitarian-law-handbook-ready-launch>.

54 For example, in 2019, the national IHL committees of the following countries had reported such dissemination activities: Algeria, Costa Rica, Ecuador, Jordan, Indonesia, Iran, Iraq, Malaysia, Mauritius, Morocco, Nepal, Peru, Saudi Arabia, Syria and the UAE. "The task of dissemination is a legal obligation under the Geneva Conventions, and its inclusion was based on the conviction of the drafters that knowledge of the law is an essential condition for its effective application. While it is now recognized that knowledge of the law alone will not prevent violations, spreading knowledge of the law is understood to be an 'important element of any strategy aimed at creating an environment conducive to lawful behaviour'." ICRC, Updated Commentary to the First Geneva Convention, Article 47: Dissemination of the Convention, 2016, para. 2750, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E925A7160C083CC9C1257F15004A58D9>.

55 ICRC, above note 3, p. 18.

the curriculum of law faculties in Lima and other cities around the country”.⁵⁶ Other national IHL committees have supported the publication of national webpages which give a simple overview on the law applicable in armed conflicts, whilst others have translated international guidelines on IHL into their national language(s).⁵⁷ These efforts of national IHL committees to disseminate IHL and domestic law have a significant impact on generating knowledge of IHL, an important condition for ensuring its respect.

In order to fulfil all the possible functions and roles described above, one good practice is the creation of specialized or thematic sub-committees within the national IHL committee.⁵⁸ For example, in 2019, Nicaragua’s national IHL committee reported that it had three sub-committees: one on the protection of cultural property, one on legislation and one on IHL training and dissemination.⁵⁹ In the period of 2016–2017, Brazil’s national IHL committee had created a number of sub-committees to focus on identifying cultural property that should be protected during armed conflict, following up on IHL legislative initiatives, and studying the relationship between IHL and new warfare technologies.⁶⁰ In 2019, the national IHL committee of Morocco reported having two sub-committees: one tasked with research and legislation, the other with dissemination and training.⁶¹ Also in 2019, Malaysia’s national IHL committee reported that it had four sub-committees which worked on cultural property, weapons, implementation and dissemination.⁶² Egypt’s national IHL committee has technical sub-committees on the following subjects: legislation, education, research and training, media and dissemination, conferences and international cooperation. These examples illustrate that the number of sub-committees and subjects covered vary.

Creating crossroads between the national, regional and international levels

The work of each national IHL committee, by definition, will be driven primarily by domestic considerations, ranging from political priorities to humanitarian issues faced on the territory or by the armed forces of the State, and will also depend on the type of legal system. At the same time, such considerations will very often find an echo in other countries. It is therefore important to tap into the different streams of influence and different commonalities that may exist between national IHL committees.

One such commonality is found through the legal system under which each national IHL committee operates. Depending on whether they predominantly

56 ICRC, above note 40, p. 39.

57 ICRC, above note 3, pp. 17–18.

58 ICRC, above note 3, p. 56.

59 ICRC, above note 3, p. 55.

60 ICRC, above note 40, p. 45.

61 ICRC, above note 3, p. 55.

62 ICRC, above note 3, p. 56.

follow a civil law, a common law, a mixed system or a system that is influenced by Islamic law, representatives of national IHL committees will find it useful to share challenges as well as ways to overcome them with their peers. As a consequence, the ICRC has maintained several platforms for exchanges among such committees. For instance, every four years, in between the international Conferences of the Red Cross and the Red Crescent, the ICRC partners with the UK national IHL committee, the British Red Cross and the Commonwealth Secretariat to organize a meeting for national IHL committees for Member States of the Commonwealth. In the last edition of such a meeting in April 2021, representatives were given the opportunity to discuss through working groups concrete issues arising when implementing the rules related to the prohibition of sexual violence in armed conflict or the protection of the natural environment, taking into account the specificities of working under a common law system.⁶³

A second possibility for exchanges among national IHL committees is through linguistic groups. For instance, the ICRC and the League of Arab States have for long partnered to organize a conference for Arabic-speaking national IHL committees every few years. This cross-regional event, which is joined by national IHL committees from Mauritania to Oman and from Sudan to Iraq, allows representatives to exchange on good practices in their own working language and hence to take away very concrete recommendations from their peers. This second way of gathering national IHL committees can also be merged with the first one. For instance, the conference for Arabic-speaking national IHL committees usually includes a component on Islamic law and IHL, where representatives discuss how legal regimes that are influenced by Islamic law can integrate specific rules of IHL. For instance, the forthcoming conference of Arabic-speaking national IHL committees is scheduled to take place in Kuwait in September 2022 and will tackle the implementation of rules regarding the missing, the separated and the dead in armed conflict, including by presenting how IHL can be implemented in the different aspects of family law in legal systems influenced by Islamic law.

A third possibility to bring together national IHL committees is simply through regional meetings. These events allow committees to stay abreast of regional events and IHL themes of concern to the region, as well as to delve into the responses given to common humanitarian challenges. The countries represented in these regional events often share similar legal traditions and systems, voting alliances and common contextual challenges, making exchanges amongst regional committees very worthwhile. For example, national IHL committees have attended, and in some cases helped to organize, a number of regional seminars such as the Regional Conference of National IHL Committees

63 ICRC, “Report – Fifth Meeting of Representatives of National IHL Committees of Commonwealth Countries”, 12 July 2021, available at: <https://www.icrc.org/en/document/fifth-meeting-representatives-national-ihl-committees-commonwealth-countries-report>.

of the Americas,⁶⁴ the South African and Indian Ocean Island States Regional Seminar,⁶⁵ the Expert Exchange for the National IHL Committees of Asia and the Pacific⁶⁶ and the Regional IHL Conference for National IHL Committees of Central and South-Eastern Europe.⁶⁷ Such events are often an opportunity for specific regions and sub-regions to agree on common plans of action or roadmaps. For instance, the Regional Conference of National IHL Committees of the Americas has adopted a declaration which details several commitments to further the domestic implementation of IHL in the Americas.⁶⁸ The Annual Review Meeting on the Implementation of International Humanitarian Law Treaties in West Africa, joined by the national IHL committees of the Member States of ECOWAS, is used to adopt a multi-year plan of action on IHL. The last plan of action was adopted at the 2018 conference and covers the period of 2019 to 2023.⁶⁹

On a regional level, peer-to-peer networks have also been developed amongst entities. These relationships allow committee members to exchange experiences, objectives and strategies concerning the implementation of IHL, to strengthen cooperation, and to support one another. For instance, in January 2020, a memorandum of understanding was signed between the national IHL committees of Morocco and Kuwait for these purposes.⁷⁰ There is also an online community of which thirty-six national IHL committees are currently members, as of March 2022, which is managed by the ICRC, and which also seeks to enhance peer-to-peer support.⁷¹ Committees should continue to strengthen regional cooperation through events, memorandums, and through engaging with the online community, which is indeed a commitment made by Latin American national IHL committees in February 2021.⁷²

Through their participation in local, regional and international events, national IHL committees have strengthened their abilities to support their

64 ICRC, above note 40, p. 44; ICRC, “Ecuador: Regional Meeting of National Committees on IHL and Other Similar Entities of the Americas”, 24 February 2021, available at: <https://www.icrc.org/en/document/ecuador-americas-regional-meeting-between-national-committees-and-similar-bodies-ihl>.

65 Red Cross Red Crescent Conference, “Strengthening Implementation of International Humanitarian Law (IHL) by the 19th Southern African and Indian Ocean Island States Regional Seminar”, Pledge, 19 March 2020, available at: <https://rcrcconference.org/fr/pledge/strengthening-implementation-of-international-humanitarian-law-ihl-by-the-19th-southern-african-and-indian-ocean-island-states-regional-seminar/>.

66 Dhaka Tribune, “Discussion to Implement International Humanitarian Law Held”, 15 December 2019, available at: <https://archive.dhakatribune.com/bangladesh/2019/12/15/discussion-to-implement-international-humanitarian-law-held>.

67 ICRC, above note 64, “Ecuador: Regional Meeting”.

68 Organization of American States (OAS), “Declaration of the ‘Regional Meeting of National Committees on International Humanitarian Law and Other Similar Entities of the Americas’”, 5 February 2021, available at: http://www.oas.org/en/sla/dil/docs/declaration_regional_meeting_of_national_committees_on_ihl_of_the_americas_2021.pdf.

69 ICRC, above note 33.

70 Kingdom of Morocco, “National Commission on International Humanitarian Law and Kuwaiti Counterpart Sign MoU”, News, 15 January 2020, available at: <https://www.maroc.ma/en/news/national-commission-international-humanitarian-law-and-kuwaiti-counterpart-sign-mou>.

71 Any national IHL committee who wishes to be a member of this online community may email the ICRC’s Advisory Service on IHL at: GVA_advisoryservice@icrc.org.

72 Above note 68, p. 2.

respective States in reporting on IHL to the international community.⁷³ For instance, the committee of Australia helped its government to prepare its positions and statements in the lead up to the 32nd International Conference of the Red Cross and Red Crescent,⁷⁴ whereas during the period of 2016 to 2017, the national IHL committee of Chile followed up on the pledges made by its government during the 32nd International Conference.⁷⁵ Alongside this, national IHL committees in many States, such as Burkina Faso, Chile, the Dominican Republic and Honduras, have been involved in drafting the submissions of their governments to the United Nations Secretary-General in fulfilment of the United Nations General Assembly resolutions on the status of the Additional Protocols to the Geneva Conventions.⁷⁶ This work demonstrates the increasing, and very present, capacity of many national IHL committees to contribute to the international landscape of IHL, well beyond their traditional roles in supporting national IHL implementation.

To help showcase their State's practices in implementing IHL, a number of national IHL committees have supported their States in drafting voluntary reports. For instance, the national IHL committees of the United Kingdom,⁷⁷ Burkina Faso,⁷⁸ Niger,⁷⁹ Switzerland,⁸⁰ Germany,⁸¹ Bulgaria⁸² and Romania⁸³ took a lead role in drafting such reports on behalf of their States. Whilst there is no legal definition of a voluntary report, for the ICRC, it is any document drafted under the lead or with the strong involvement of a State entity, with the purpose of describing the state of IHL implementation within its domestic legal system, including law, policy and practice. These reports outline harmony between international legal obligations and the domestic system and identify potential

73 ICRC, above note 3, p. 22.

74 ICRC, above note 3, p. 23.

75 ICRC, above note 40, p. 45.

76 ICRC, above note 3, p. 27.

77 For the voluntary report of the United Kingdom, see United Kingdom Government, *Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level*, 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784696/Voluntary_Report_on_the_Implementation_of_International_Humanitarian_Law_at_Domestic_Level.pdf.

78 The voluntary report of Burkina Faso is on file with the ICRC and can be shared on request, with the consent of the national IHL committee of Burkina Faso. See above note 30.

79 The voluntary report of Niger is on file with the ICRC and can be shared on request, with the consent of the national IHL committee of Niger.

80 For the voluntary report of Switzerland, see Federal Council, *The Implementation of International Humanitarian Law by Switzerland: Voluntary Report of the Federal Council*, 12 August 2020, available at: https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/20200812-HVR-Bericht_EN.pdf.

81 For the voluntary report of Germany, see Dt. Komitee zum Humanitären Völkerrecht (German Committee on International Humanitarian Law), *National Implementation of International Humanitarian Law: Document on the Implementation of IHL in the German Legal System*, available at: https://www.nomos-elibrary.de/10.5771/9783748921103.pdf?download_full_pdf=1.

82 The voluntary report of Bulgaria is available at: https://www.mfa.bg/upload/54920/%D0%9F%D0%A0%D0%95%D0%93%D0%9B%D0%95%D0%94%D0%98%D0%9E%D0%A6%D0%95%D0%9D%D0%9A%D0%90_%D0%9C%D0%A5%D0%9F.pdf.

83 For the voluntary report of Romania, see Government of Romania, *Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level*, 2021, available at: https://www.mae.ro/sites/default/files/file/anul_2021/2021_pdf/raport_diu_eng.pdf.

areas requiring further action. A number of States have published such reports, the most recent ones including those of Bulgaria, Romania and the United Kingdom. During the Universal Meeting of national IHL committees and similar entities, hosted in November and December 2021, a number of committees expressed their intention to draft a voluntary report including the committees of Costa Rica and Cyprus.⁸⁴ These reports are usually made public once finalized in order to contribute to sharing good practices on IHL implementation across national, regional and international landscapes.

Furthermore, the lines of communication between the ICRC and national IHL committees have been enhanced over time. On the one hand, these entities collect evidence of IHL-related State practice for the ICRC's public national implementation of IHL database,⁸⁵ whilst on another hand, the ICRC regularly supports the work of national IHL committees, for example, through providing expert legal advice. In order to bring all committees together, the ICRC hosts a Universal Meeting every few years which allows them to have peer-to-peer exchanges on IHL, to discuss achievements, challenges and to support one another.⁸⁶ The ICRC should "continue playing a role as facilitator of these exchanges" between committees on regional and international levels, especially "considering the emerging and critical situations that require specific collaboration";⁸⁷ not least emerging methods of warfare witnessed globally, but also the road bumps encountered by certain entities.

Road bumps encountered along the journey

Whilst the work of national IHL committees has certainly strengthened and evolved over time, some committees face material, political or structural hurdles. Much like road bumps, these challenges require national IHL committees to slow down at certain points along the journey in order to take stock of the situation before progressing forward.

Securing a full fuel tank

Materially speaking, some national IHL committees experience sparse financial and human resources which limit their ability to fulfil many of their functions.⁸⁸ For example, this was expressed during the 4th Universal Meeting of national IHL committees, where different working groups all reported on the challenges posed by the "[I]ack of resources, such as earmarked funding, or a dedicated secretariat,

84 ICRC, above note 39.

85 ICRC, above note 3, p. 21. For the database on the national implementation of IHL, see ICRC, "National Implementation of IHL", available at: <https://ihl-databases.icrc.org/ihl-nat>.

86 The Universal Meetings have taken place in 2002, 2007, 2010, 2016 and 2021. See ICRC, above note 39.

87 OAS, above note 68, p. 2.

88 ICRC, above note 3, p. 42.

as well as appropriate premises”.⁸⁹ Similarly, during the 15th ECOWAS and ICRC Annual Review meeting on the implementation of IHL in West Africa, “many [ECOWAS] member States with national IHL committees spoke of being confronted by a lack of resources to perform the necessary activities”.⁹⁰ While the establishment and work of a national IHL committee do not necessarily create high costs for a State (for instance, it is often only a matter of allocating time reporting for State officials to serve in the committee), States should still consider fuelling the operations of national IHL committees by allocating organizational resources at the moment that these entities are set up, and by assigning an adequate budget to ensure that the entities can run their operations.

In some cases, even where committees are allocated State budgets, their structure may prevent them from receiving the necessary funds. This concern was raised in 2018 by some West African States which highlighted that “as national IHL committees are composed of various ministries, even if State budget or external funds were allocated to the national IHL committee via ministries, it was less likely that the required resources would directly benefit the activities of the committee”.⁹¹ Therefore, “Liberia stated that it proved critical, to the functioning of its national IHL committee, to have a permanent secretariat to which State budget and external funds could be allocated”.⁹² Côte d’Ivoire similarly raised “the important problem of financing the activities” of its national IHL committee, and had similarly created a permanent secretariat in order to enhance sustainability of its work.⁹³ Nigeria also stressed “the importance of having ministries of finance on the committees to ensure avenues for funding”.⁹⁴ Overall, States must assign the necessary organizational resources and budget as a first step, and they must also ensure that the committees have structures which guarantee that they benefit from these funds.

Where government funding is limited, national IHL committees should explore other avenues. These entities may approach regional organizations, or the ICRC, in order to devise their strategies in seeking funding, for instance, in West Africa, States may approach the Permanent Representative of ECOWAS in their States for this purpose.⁹⁵ One strategy, suggested by Liberia in 2018, is that committees “explore the possibilities of joint projects with small arms and light weapons committees, who may benefit from different sources of funding”.⁹⁶ In 2018, ECOWAS mentioned the “importance of working with national planning ministries, as they could help ensure funding”, whereas Senegal’s parliamentary representative suggested that national IHL committees sensitize parliamentarians

89 ICRC, “Enhancing Protection in Armed Conflict through Domestic Law and Policy”, 6 December 2017, p. 7, available at: <https://www.icrc.org/en/document/enhancing-protection-armed-conflict-throughdomestic-law-and-policy-overview-report>.

90 ICRC, above note 33, p. 7.

91 ICRC, above note 33, p. 8.

92 ICRC, above note 33, p. 8.

93 ICRC, above note 33, p. 15.

94 ICRC, above note 33, p. 15.

95 ICRC, above note 33, p. 15.

96 ICRC, above note 33, p. 8.

on the needs of these committees since the parliamentarians often have the responsibility of passing budgets.⁹⁷ Thus, funding strategies may be formulated in instances where the committee does not receive the required resources via State budget.

Whilst national IHL committee members generally have strong expertise in IHL, in some countries IHL expertise may be lacking. One solution usually found in such cases is for the committee to seek the support of the Red Cross or Red Crescent National Society, of the ICRC or of consultants for specific projects it wishes to carry out. However, the lack of IHL expertise may sometimes create challenges; for instance, it may slow down the pace of the committee in reaching its objectives. States must support these members by providing resources, such as training, to allow them to enhance their expertise in order to fulfil their functions. The ICRC, likewise, supports these endeavours in order to enhance IHL expertise. One of the key messages passed as part of the conclusions of the 4th Universal Meeting was that there “must be complementarity between the work of national IHL committees at national and international levels”, which was translated, among other things, into the concrete recommendation of “developing a community of international IHL expertise that can be easily accessed by government agencies, thereby addressing the ‘knowledge gap’ identified by some participants”.⁹⁸

Likewise, selecting the right members for the national IHL committee also means selecting individuals who have the time to devote to this work. Over time, some national IHL committees have become less active, existing on paper but not functioning effectively in reality. This may be a product of lack of time allocated to committee members so that they can follow the journey. This must be considered by States when forming their national IHL committees.

A few steps along the way

Just as national IHL committees can become dormant, or less active, through lack of materials, expertise or time, a national IHL committee may also encounter road bumps due to the domestic socio-political environment. For example, during the 15th ECOWAS and ICRC Annual Review meeting, Côte d’Ivoire had admitted that “the various socio-political crises that the country experienced had disrupted the meeting of the members” of the national IHL committee.⁹⁹ This “lack of functioning was also due to ongoing movements within the government, with the continuous change of personnel and priorities”.¹⁰⁰ In order to reactivate Côte d’Ivoire’s national IHL committee, they had reformed its founding decree,¹⁰¹ and the ICRC had worked closely with the committee in 2019 to revive and re-

97 ICRC, above note 33, p. 15.

98 ICRC, *Enhancing Protection in Armed Conflict Through Domestic Law and Policy: Conference Overview: 30 November–2 December 2016*, Report, Geneva, p. 80, available at: <https://www.icrc.org/en/publication/enhancing-protection-armed-conflict-through-domestic-law-and-policy>.

99 ICRC, above note 33, p. 15.

100 ICRC, above note 33, p. 15.

101 ICRC, above note 33, p. 15.

dynamize its operations. Similar disruptions have been felt across the globe owing to the COVID-19 pandemic which has shifted political priorities and creating barriers to meeting in-person. As restrictions to movements start to be lifted, now would be an opportune moment for committees to re-engage.

Driving with a licence plate

In order to perform its duties with authority, it is usually preferable that national IHL committees be conferred legal status and should be formally documented – much like a vehicle needs a licence plate. However, in some cases national IHL committees are set up without legal status which obstructs their ability to operate.

Legal status can be conferred on national IHL committees in a number of ways, depending largely on the constitutional structure of the given State.¹⁰² Most often, it is conferred by the executive, such as a presidential decree (as was the case in Mexico), a cabinet or ministerial decision (as was the case in Zimbabwe and Sri Lanka), or by government resolution or agreement (as was the case in Kenya, Georgia and the former Yugoslav Republic of Macedonia which established their national IHL committees by gazette status).¹⁰³ In other cases, legal status is conferred by the statutes of the National Red Cross Society which establishes the national IHL committee within the structure of the existing National Society (as was indeed the case within Germany).¹⁰⁴ Irrespective of the precise modalities, the crucial point is that the national IHL committee has the legal status which grants it the authority to perform its functions.

As the work and responsibilities of an established committee evolves over time, the relevant government can take steps to strengthen the committee's legal status. For example, the national IHL committee of Peru was first created in 2001 by virtue of a supreme resolution, thus conferring legal status on the new entity.¹⁰⁵ Following twenty years of work by the committee, the government adopted a supreme decree on 13 May 2021, which introduced relevant reforms to offer enhanced stability for the committee in the years to come.¹⁰⁶ The decree incorporated new members to the committee such as the Ministry of Culture, Ministry of Health, Ministry of Women and Vulnerable Population, and the Joint Command of the Armed Forces,¹⁰⁷ and also expanded the committee's responsibilities.¹⁰⁸ In 2021, Peru's national IHL committee reported that this new

102 ICRC, above note 3, p. 38.

103 ICRC, above note 3, p. 38.

104 ICRC, above note 3, p. 38.

105 Ministerio de Justicia y Derechos Humanos, "CONADIH", available at: <https://www.minjus.gob.pe/conadih/>.

106 El Peruano, *Justicia y Derechos Humanos*, Decreto Supremo, No. 006-2021-JUS, 13 May 2021, available at: <https://busquedas.elperuano.pe/normaslegales/decreto-supremo-que-adequa-la-comision-nacional-de-estudio-y-decreto-supremo-n-006-2021-jus-1952568-8/>.

107 The Supreme Decree preserved the existing membership of the Congress, the Ombudsman Office, institutions which are not part of the executive branch, as well as non-State institutions.

108 New responsibilities of Peru's national IHL committee include: the act of advising the government on topics related to IHL, monitoring State obligations within IHL, drafting reports summarizing IHL

decree had strengthened its entity, demonstrating that reforms to the legal status of an entity over time can indeed enhance its work.

One journey at a time

Legal status alone does not guarantee success if the structural set-up of the national IHL committee is not conducive to optimal working conditions. One potential challenge in this respect is the mandate given to the entity that deals with the implementation of IHL. In some countries, for instance, it is the national human rights institution which is afforded the legal status to promote and advise on the domestic implementation of both international human rights law (IHRL) and IHL.¹⁰⁹ This can be because the national IHL committee has been established as a sub-group or sub-entity within an initial human rights commission, or because the entity is from the start given the mandate to look at both international legal regimes. The existence of such a dual mandate is not in itself problematic. It is true that having one body perform two functions can help save material resources where these are lacking. However, this route may present challenges as there are important differences in the basic functions and characteristics of IHRL and IHL implementation,¹¹⁰ as well as between the functions granted to national human rights institutions, enshrined in the Paris Principles, and those of national IHL committees. These differences include the stakeholders, the differing obligations under IHRL and IHL, and the manner in which compliance is monitored.¹¹¹ Therefore, one recurring recommendation has been that the body set up to implement IHL must be afforded different mandates, functions, compositions and work procedures from the national human rights institution.¹¹²

Additionally, as illustrated in the former section, implementing IHL involves numerous roads (as is also the case for IHRL implementation), and thus should be preferably allocated to a specialized body which can focus on IHL. Allocating too many disparate responsibilities to one body is like sending one vehicle in too many directions at once – it will only slow it down.

Conclusion: Milestones which have paved the onwards journey

As with most long-haul road trips, one tends to start with an idea of the roads that will be taken and what the end destination will look like. With time, this idea often changes shape due to events that arise and actors encountered along the way. Likewise, when the first national IHL committees were formed in the 1970s to advise and assist their States on the domestic implementation of IHL, they

initiatives implemented in Peru, and working on IHL and IHRL standards regarding the use of force. For more information, see *El Peruano*, above note 106.

109 ICRC, above note 3, p. 38.

110 ICRC, above note 3, p. 39.

111 ICRC, above note 3, p. 49.

112 ICRC, above note 3, p. 49.

undoubtedly followed different roadmaps from those followed today. Throughout the 1990s, the work of national IHL committees received widespread recognition across regional and international landscapes, which led States to channel further resources to support their work, such as the creation of ICRC's Advisory Service on IHL in 1995. New treaties were ratified or acceded, new domestic laws and measures were adopted, and strategies for the dissemination of IHL were implemented. The past decades have shown that the journey towards effective implementation of IHL is a continuous process where important milestones will be reached at each step.

What is clear is that throughout this long and evolving journey, national IHL committees have proven themselves to be competent drivers of national IHL implementation. The advanced committees, which have by now accustomed themselves with the various roads, tend to travel the journey at faster rates, taking a few roads in parallel and even supporting their peers along the way. For example, some bodies have simultaneously supported treaty ratifications, the drafting of domestic laws, the establishment of State mechanisms to help implement IHL treaties as well as dissemination activities. Each time the roads are travelled by committees, good practices emerge, which help signal the direction for other committees wishing to take the same or a similar route.

Nevertheless, national IHL committees will sometimes endure road bumps along the journey owing to material, political and structural challenges. Materially speaking, this may include sparse finances, lack of appropriate premises, or insufficient time reporting for staff. In some cases, national IHL committees have the resources but are unable to access these owing to their organizational structure. Politically speaking, national IHL committees sometimes encounter disruptions along the journey owing to changes in the domestic socio-political context in which they work such as situations of violence, armed conflict or pandemics. Structurally speaking, some committees have the means to ride the roads yet lack the legal status to do so. Going forward, it is recommended that the international community seeks to address these issues so that all committees can continue to progress their respective mandates.

Overall, whilst recommendations can be made about the roads which should generally be taken by national IHL committees, it is ultimately down to the committee, together with its State, to decide which route reaps the most rewards and offers the least resistance at a given moment in time. Nevertheless, the hope is that the well-trodden path of national IHL committees will be a source of inspiration for those looking to set out on this journey, as it is lined with an abundance of milestones helping to mark the roads which lie ahead.

Implementation of international humanitarian law: The work of Latin American international humanitarian law committees

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Abstract

Respect for international humanitarian law (IHL) in the battlefield is contingent on the measures undertaken in peacetime. Indeed, satisfactory compliance with IHL rests in the implementation of multiple measures at the domestic level crossing different spheres, including legislative, administrative and educational. In most latitudes, governments and other stakeholders coordinate these measures in what is known as National Committees for the Implementation of International Humanitarian Law. The article addresses the practice of these bodies in Latin America and provides alternatives to enhance their work.

* The author would like to thank Romina Morello and the editorial board for the very helpful suggestions. All mistakes are my sole responsibility.

Keywords: domestic implementation of international humanitarian law, National Committees for the Implementation of International Humanitarian Law, cultural property, enhanced protection, dissemination, 1954 Hague Convention.

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Introduction

Respect for international humanitarian law (IHL) is contingent on the measures undertaken not only during war but also in peacetime. Commanders cannot abide by IHL if they are not properly instructed during peacetime; museums and cultural sites should display the blue shield to deter attacks during wartime; prosecutions against perpetrators of war crimes cannot take place without an adequate criminal legislation, competent tribunals and so on. Indeed, compliance at the battlefield rests in the implementation of measures crossing multiple spheres, including legislative, administrative and educational.¹ In peacetime, it is essential that governments and other relevant stakeholders coordinate these measures as a *condictio sine qua non* to attain, whenever necessary, the ideal of restraining war.

Article 1 common to the 1949 Geneva Conventions mandates States “to respect and to ensure respect for the present Convention in all circumstances.”² This wording is a reformulation of the principle *pacta sunt servanda*, which commands States to honour in good faith their international commitments.³ According to Jean Pictet, “the Government must of necessity prepare in advance, that is to say in peace-time, the legal, material or other means of ensuring the faithful enforcement of the Convention when the occasion arises.”⁴ In this context, one wonders about the nature and scope of the measures to be taken in order to translate international obligations into domestic actions.

In most latitudes, such measures are run by interministerial committees, generically known as “National Committees for the Implementation of International Humanitarian Law” (NCIHLs). Their core task is to facilitate domestic implementation of IHL by bringing together national authorities with other actors, including the International Committee of the Red Cross (ICRC), National Red Cross and Red Crescent Societies (National Societies) and legal academia. In this regard, the work of NCIHLs is cardinal to assess the status of IHL implementation around the globe.

Despite its importance, the binomial “IHL and implementation” is frequently overshadowed by the rules applicable to combat, particularly in

- 1 Cristina Pellandini, “Ensuring National Compliance with IHL: The Role and Impact of National IHL Committees”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014.
- 2 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 1.
- 3 Jean Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 3: *Geneva Convention relative to the Treatment of Prisoners of War*, ICRC, Geneva, 1960, p. 18.
- 4 *Military and Paramilitary Activities in and against Nicaragua Case*, Merits, Judgment, 1986, para. 218.

publications and teaching. The present article pursues two objectives. The first is to facilitate understanding of IHL beyond the battlefield, with specific regard to the practice in Latin America. The second is to contribute to the scholarship dialogue concerning NCIHLs in regional contexts. Specific contextual circumstances and traits of Latin American countries make their practice particularly relevant regarding three categories of IHL implementation policies, namely, the protection of cultural property, capacity building in IHL and other relevant legal frameworks, and legislative measures orbiting armed conflicts.

The sources of information for this text include *inter alia* reports made by the ICRC's Advisory Service on IHL ("the Advisory Service"), public information from governments and the author's professional experiences as an IHL adviser.

National IHL committees

Domestic implementation through NCIHLs was a good practice recommended by a group of experts at the 26th International Conference of the Red Cross and Red Crescent.⁵ These international summits take place every four years and bring governments together with the ICRC and National Societies, in order to find solutions for the existing challenges to humanitarian action. The influential recommendation suggested "the establishment of national committees to advise and assist governments in the implementation and dissemination of IHL, the exchange of information on implementation measures".⁶ Simultaneously, the ICRC responded with the creation of a special unit, namely the Advisory Service, among whose purposes is to partner with NCIHLs pertaining to the binomial "IHL and implementation". Indeed, in support of States' primary responsibility, according to the Statutes of the International Red Cross and Red Crescent Movement, the role of the ICRC includes propelling the understanding, dissemination and development of IHL.⁷ On a regular basis, the Advisory Service, which operates worldwide through ICRC regional delegations, assist governments in their implementation and dissemination efforts. This global network of legal advisers also gathers information and publishes relevant working documents encapsulating experiences and insight from different latitudes. One remarkable tool is their document entitled *National Committees and Similar Entities on International Humanitarian Law: Guidelines for Success* ("Guidelines"), the most recent systemization of best practices from NCIHLs, complemented by other

5 ICRC, *Resolution 1, Annex II: Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23–27 January 1995: Recommendations*, 26th International Conference of the Red Cross and Red Crescent, Geneva, January 1995, available at: <https://www.icrc.org/eng/resources/documents/resolution/26-international-conference-resolution-1-1995.htm> (all internet references were accessed in October 2021).

6 Paul Berman, "The ICRC's Advisory Service on International Humanitarian Law: The Challenge of National Implementation", *International Review of the Red Cross*, Vol. 36, No. 312, May 1996, p. 339.

7 Statutes of the International Red Cross and Red Crescent Movement, Geneva, 1986, Art. 5.2(g).

recommendations.⁸ The advice provided therein stirs from composition and budgetary considerations, to working methods and international cooperation.

Today a total of 116 governments craft their implementation policies through NCIHLs. According to the ICRC database, the first of these entities was created in Germany in 1973, whereas the latest are in Kiribati and Bulgaria during 2019.⁹ There are *sui generis* cases, like Sweden and Poland, which have two entities each that resemble NCIHLs which work in coordination with different governmental agencies.¹⁰

The composition of NCIHLs varies. Traditional formations include the ministries of defence, foreign affairs, interior and justice. Less frequent compositions include other ministries, such as education, health, culture, along with representatives from the legislative and judicial branches. Most NCIHLs allow regional delegations of the ICRC and National Societies to participate, either as members or observers upon invitation. A noteworthy trait of some NCIHLs is the permanent participation of universities or representatives from legal academia. This is particularly relevant since educational commends are a common feature present in the constituting documents of NCIHLs around the world.¹¹

Latin American NCIHLs

NCIHLs are rather recent in the region. Uruguay and Bolivia were the first countries to create them in 1992, whereas the Colombian and Venezuelan are the latest, in 2011 and 2015, respectively.¹² In 2021, a total of twenty countries in the Americas have such committees.¹³

Almost every NCIHL in the region was created through an executive/presidential decree.¹⁴ Such decrees define their integration and mandate. Concerning their integration, Latin American NCIHLs exhibit different schemes

8 ICRC, *National Committee and Similar Entities on International Humanitarian Law: Guidelines for Success*, Geneva, June 2019, available at: <https://www.icrc.org/en/document/national-committees-and-similar-entities-international-humanitarian-law-guidelines-success>. This document supplements two previous guidelines authored by the ICRC's Advisory Service, namely, ICRC Advisory Service on International Humanitarian Law, *Practical Advice to Facilitate the Work of National Committees on International Humanitarian Law*, Geneva, 1997; and ICRC, *Guiding Principles Concerning the Status and Methods of Operation of National Bodies for the Implementation of International Humanitarian Law*, Geneva, 1998.

9 ICRC, *National Committees and Similar Bodies on International Humanitarian Law*, Geneva, 25 January 2021 (Index of National Committees), available at: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>.

10 See Ministry of Foreign Affairs of the Republic of Poland Legal and Treaty Department, *IV Report on the Implementation and Dissemination of International Humanitarian Law in the Republic of Poland for 2012–2018*, available at: <https://www.gov.pl/attachment/17464f70-4973-4755-9f55-d0e339cf86c2>.

11 For committees with diverse composition, see the cases of Australia, Belgium, Costa Rica, France and Namibia.

12 Index of National Committees, above note 9.

13 *Ibid.*

14 See Argentina, *Executive Decree No. 933/94*, 16 June 1994; Chile, *Decree No. 1229*, 31 August 1994; Costa Rica, *Executive Decree No. 32077-RE*, 21 May 2004; Peru, *Supreme Resolution No. 234-2001-JUS*, 1 June 2001; Mexico, *Presidential Decree*, 12 August 2009.

of composition. Take the cases of Costa Rica and Argentina as examples. Whereas the membership of the former includes ministries, a university, other government branches and civil society, the latter is integrated exclusively by ministries.¹⁵ However, narrow integrations do not necessarily exclude dialogue with other actors. As a matter of fact, NCIHLs composed exclusively by ministries often operate through specialized working groups, which include, upon invitation, active participation from the ICRC in the furtherance of common objectives, academia and other national authorities.

Regarding their mandates, despite some minor variations in language, there are common features that can be summarized in the following terms: (1) reviewing domestic legal frameworks; (2) suggesting accession/ratification of IHL treaties; (3) developing policies to fulfil existing IHL treaty obligations; (4) undertaking dissemination and academic activities; (5) providing legal advice to different branches of government concerning IHL and policy.¹⁶

Having explained what NCIHLs are, how they are formed and their objectives, the following section highlights some successful instances of implementation measures taken by NCIHLs in Latin America.

IHL dissemination and capacity building

Dissemination is a necessary condition for compliance.¹⁷ It represents a corollary species of the obligation spelled out in common Article 1 and consists not only in the provision of information, but also in a substantial educational prerequisite for an effective implementation.¹⁸ In fact, the four Geneva Conventions and other relevant IHL treaties contain express obligations aimed at spreading their regulations among armed forces and civilian population both in times of peace and war.¹⁹ Other conventional obligations consist of integrating IHL into programmes of military instruction and training.²⁰ In sum, dissemination covers

15 Other diverse committees in the region are those from Brazil, Ecuador, Guatemala, whereas Mexico and Peru contemplate permanent membership exclusively to ministries.

16 See Index of National Committees, above note 9.

17 Françoise J. Hampson, "Fighting by the Rules: Instructing the Armed Forces in Humanitarian Law", *International Review of the Red Cross*, No. 269, 1989, p. 113.

18 F. J. Hampson, *ibid.*, p. 114.

19 GC I, Art. 47; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Art. 48; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Art. 127; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Art. 144; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 83; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 19.

20 See Convention for the Protection of Cultural Heritage in the Event of Armed Conflict, 216 UNTS 3511, 14 May 1954 (entered into force 7 August 1956) (1954 Hague Convention), Art. 7.

a wide spectrum of measures that should be tailored based on different recipients' profiles.

Regarding the dissemination of IHL materials among civilians, common regional practices include the organization of IHL courses, seminars with academics and moot courts. As an example, the strategy of the Mexican NCiHL (CIDIH-México) consists of at least two IHL courses on a yearly basis. One is open to all audiences with a mandatory participation from members of the armed forces, whereas the second is directed exclusively at university professors.²¹ Since the first course is intended to supplement regular military training, it addresses the latest developments in IHL. In 2018, for instance, that course included sessions on IHL and cyber operations as well as on urban warfare, two topics identified by the ICRC as challenges to contemporary armed conflicts.²² Similar courses take place on a yearly basis in Peru, Bolivia, Colombia, Costa Rica and Ecuador.²³ The second course undertaken by the CIDIH-México intends to facilitate teaching materials to be further disseminated among students. In this course, university professors get to know the teaching tools developed by the Advisory Service and other departments of the ICRC. Such tools include a digital application, ready-to-use workshops and a syllabus for remote teaching.²⁴ The underlying purpose is to promote the inclusion of IHL in university programmes and help professors in the process.

Collaboration schemes with academia facilitate the organization of periodical activities, not affected by changes in government. In countries like Argentina, Costa Rica, Peru and Ecuador, the ICRC regional delegations maintain partnerships with universities, sometimes through academic cooperation agreements.²⁵ From the author's experience, the reasoning behind partnering with academic institutions is to lean on their infrastructure, network and expertise in conducting educational exercises. One clear example is the creation of the *Anuario Iberoamericano de Derecho Internacional Humanitario*, an annual yearbook edited by the University of La Sabana with the support of the ICRC Delegation in Colombia.²⁶

A second regional good practice is the organization of simulation exercises and moot courts for students. These academic activities demand students to argue from different roles including advocates for a country or advisers for different actors. By participating in moot courts or simulations, students get a better sense of advocacy itself and the concrete application of international rules. Such

21 See ICRC, *Implementing International Humanitarian Law: Report 2018/2019*, Geneva, 2020, p. 38 (Report 2018/2019).

22 See ICRC, "ICRC Report on IHL and the Challenges of Contemporary Armed Conflicts", Geneva, 22 November 2019, available at: <https://www.icrc.org/en/document/icrc-report-ihl-and-challenges-contemporary-armed-conflicts>; Report 2018/2019, *ibid.*, p. 38.

23 See Report 2018/2019, above note 21.

24 All ICRC's tools can be found at ICRC, "Learning and Teaching IHL", available at: <https://www.icrc.org/en/what-we-do/building-respect-ihl/education-outreach>.

25 Report 2018/2019, above note 21, p. 35.

26 ICRC, "Academia lanza el primer anuario iberoamericano de DIH", 19 June 2020, available at: <https://www.icrc.org/es/document/academia-lanza-el-primer-anuario-iberoamericano-de-dih-colombia>.

experiences encourage the emergence of passionate professionals looking forward to building a career in IHL or other international law disciplines. This could be illustrated by the results of a survey conducted among former participants of moot courts and simulations in Mexico. The results were transparent: 95% of them considered their experiences in moot courts and simulations as “highly influential” in their professional careers and 91% regarded them as “essential” for law students. Almost 90% maintained that such experiences increased their job opportunities. Also, 65% declared that they contributed to the discipline with either a thesis or a publication.²⁷

As mentioned above, dissemination efforts should be designed depending on the audience. Concerning IHL training to the military, good practices maintain that exercises for the military should involve real dilemmas which soldiers would encounter in combat. The objective is to familiarize such dilemmas, so they can be lawfully addressed in the battlefield.²⁸ In this regard, the ICRC’s department in charge of relations with Armed Forces has experience conducting training to the military. For instance, the Senior Workshop on International Rules Governing Military Operations (SWIRMO) is an international training programme oriented to military personnel from different countries.

Dissemination and capacity building are never-ending, yet core obligations for IHL implementation. Educational efforts continue to be a solid and cost-effective investment to strengthen respect for IHL. These exercises are ideal spaces for all actors to receive feedback from each other and to partner in the consolidation of regional IHL perspectives. This body of the law evolves mutually with the means and methods of warfare; it is essential to keep weaving the intellectual fabric to support adequate policymaking.

Protection of cultural property

Under treaty and customary IHL, cultural buildings and places of religious importance are protected as civilian objects unless they lose that protection.²⁹ In the same way, it is prohibited to use cultural property for military purposes. The Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 (the 1954 Hague Convention) and its two additional protocols envisage a system of protection based on a distinctive emblem: the blue shield and its derivatives. Accordingly, States Parties must prepare, during peacetime, safeguarding measures against foreseeable effects of armed conflicts. Appropriate measures include the signalization of relevant sites, dissemination of the 1954 Hague Convention and bringing the topic of protection of cultural property into military manuals and training.³⁰

27 Survey on file with the author.

28 Elizabeth Stubbins Bates, “Towards Effective Military Training in International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 804.

29 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 38, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule38.

The 1954 Hague Convention and its two additional protocols provide three categories of protection: general, special and enhanced. The first two are contained in the 1954 Convention. The general protection only requires the unilateral signalization by the State, and it is designated to identify: (a) cultural property not under special protection; (b) the persons responsible for the duties of control for the execution of the Convention; (c) the personnel engaged in the protection of cultural property; and (d) the identity cards mentioned in the Regulations for the execution of the Convention.³¹

Differently, the regime of special protection demands a process of registration before a third party, namely the International Register of Cultural Property under Special Protection.³² The emblem consists of the blue shield repeated three times in a triangular formation (one shield below). This category of protection was designed for “a limited number of refuges intended to shelter movable cultural property in the event of armed conflict, of centers containing monuments and other immovable cultural property of very great importance”. In order to be designated as specially protected, the 1954 Hague Convention demands that the cultural property must be “situated at an adequate distance from any large industrial center or from any important military objective constituting a vulnerable point”.³³

The last category of protection, namely enhanced protection, was created by the 1999 Second Protocol and innovated by removing the distance criterion.³⁴ For an object to be listed as property under enhanced protection, the request for inscription shall include a declaration by the State which has control over it, confirming that it will not be used to support military endeavours.³⁵ As a matter of fact, enhanced protection was adopted as a consequence of the criticisms against the 1954 Hague Convention when the Gulf War and the war in the former Yugoslavia witnessed severe instances of destruction and bombardments of monuments, museums and entire historical cities.³⁶ A strong criticism advanced against the previous regime was precisely the requirement of location. Besides the ambiguity of notions such as “adequate distance” and “important military objective”, the distance requirement was hardly met, so the number of sites or buildings specially protected was rather limited.³⁷

30 1954 Hague Convention, Arts 3, 7 and 25.

31 *Ibid.*, Art. 4.

32 *Ibid.*, Arts 16 and 8.

33 *Ibid.*, Art. 8.1(a).

34 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, 249 UNTS I-3511, 26 March 1999 (entered into force 9 March 2004) (1999 Second Protocol).

35 1999 Second Protocol, Art. 10(c).

36 Jean-Marie Henckaerts, “New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict”, in María Teresa Dutli, Joanna Bourke Martignoni and Julie Gaudreau (eds), *Protection of Cultural Property in the Event of Armed Conflict: Report on the Meeting of Experts*, ICRC, Geneva, 2002, p. 41.

37 From 1954 to 1999, only Austria, Germany, the Netherlands and the Holy See listed cultural sites. See United Nations Educational, Scientific and Cultural Organization (UNESCO), *International Register of Cultural Property under Special Protection*, 23 July 2015, available at: <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/Register2015EN.pdf>.

Latin American heritage is incredibly rich. The region harbours the material and immaterial legacies of ancient civilizations, whose preservation is a priority. Through their NCIHLs, Latin American governments have taken different measures to signal and ensure respect to cultural sites, in accordance with the 1954 Hague Convention and its two protocols. The work of the NCIHLs from El Salvador, Argentina and Mexico offers important references.

The cases of El Salvador and Argentina constitute illustrative instances of signalization under general protection. In this respect, El Salvador has been working intensively since its ratification of the 1954 Hague Convention in 2001. From 2002 to 2013, the NCIHL ran a programme, which consisted of three phases, in order to signal multiple historical buildings throughout the country. To execute this programme, El Salvador received funding and orientation from the United Nations Educational, Scientific and Cultural Organization (UNESCO).³⁸

El Salvador articulated its signalization process in a guide for national authorities. The document lays out a scheme of cooperation between different levels of government in order to institutionalize the process of signalization. Instructive references from the guide include the establishment of a network of local governmental officials through committees aimed at identifying relevant cultural property and to operate their signalization. Also, the guide includes the logistic details involved in placing the blue shield as a plaque or as a pedestal.³⁹ The case of El Salvador illustrates how States can adapt and professionalize their institutions to permanently implement IHL.

For its part, in 2012, Argentina created a working group inside the NCIHL aimed at the identification and signalization of cultural property.⁴⁰ This working group has launched an integral campaign which comprises the signalling of several historical places, including memorials, museums, academic institutions and natural sites. By 2019, a total of fifty sites were exhibiting the blue shield across the country.⁴¹

A noteworthy trait of Argentinian signalization efforts is its diffusion component. Their strategy consisted of a documentary series entitled *Motivados por la historia* (Inspired by history), which focuses on a route of sites to be signalled with the blue shield. The series narrates the journey of an elementary school professor, alongside a group of young enthusiasts, in an expedition in the Crossing of the Andes, a transcendent route for the independence of the region in the 19th century. In the series, experts from the Argentinian NCIHL explain the importance of enhancing compliance of IHL, even in contexts outside of armed conflicts, whereas the professor emphasizes the historical resonance of

38 ICRC, *Implementing International Humanitarian Law: Report 2012/2013*, Geneva, 2013, p. 21 (Report 2012/2013).

39 Celina Ganuza Durán, Mario Guillermo Navarro and Ana Mercedes Salazar, *Guía para la fase inicial del proceso de señalización de los bienes culturales de el salvador, con el emblema de protección en caso de conflicto armado. Convención de la Haya de 1954*, Consejo Nacional para la Cultura y el Arte, CONCULTURA, 2006, available at: <https://www.transparencia.gob.sv/instituciones/capres/documents/254996/download>.

40 Report 2012/2013, above note 38, p. 20.

41 Report 2018/2019, above note 21, p. 32.

the route. The campaign was produced with the support from UNESCO and Google.⁴²

Another good example of this practice is the one of Mexico, which is the only country in the region that has registered cultural property under special protection and is undergoing a process to register cultural sites under enhanced protection. In 2012, a specialized working group within the NCIHL began a process of identification and application for the registration of cultural property under special protection. The working group included technical institutions such as the National Institute of Anthropology and History and the National Institute of Statistics and Geography.⁴³ In February 2015, UNESCO confirmed the registration of nine Mexican archaeological sites in the International Register of Cultural Property under Special Protection.⁴⁴

In addition, in 2020 Mexico began the registration of the National Museum of Anthropology in Mexico City in the List of Cultural Property under Enhanced Protection. To facilitate the process, the Mexican government sought technical and financial support from the Secretariat of the 1954 Hague Convention. In fact, Article 29 of the 1999 Second Protocol envisages a fund to provide financial or other assistance in support of preparatory measures to be taken in peacetime.⁴⁵ In the case of the National Museum of Anthropology, the financial support was employed in the development of a risk management plan to ensure that the pieces and the museum itself are protected against any foreseeable risk.⁴⁶

The historical development of the applicable conventions is instructive for adequate policies. After the adoption of the 1999 Second Protocol and enhanced protection, the older framework of special protection can be considered as not being suitable for most cases. Enhanced protection also entails criminal repression for war crimes against cultural property and it ensures that the domestic legal system provides adequate means of protection. Authorities and officials working on IHL should focus on the registration of relevant property in the List of Cultural Property under Enhanced Protection, which to date contains only twelve sites in six countries.⁴⁷

42 ICRC, *Implementing International Humanitarian Law: Report 2016 and 2017*, p. 29. All episodes from *Motivados por la historia* are available online at: https://www.youtube.com/watch?v=O9lO_t0a1wA.

43 Instituto Nacional de Antropología e Historia (México), *Señalizan nueve sitios arqueológicos mexicanos para protección especial de la UNESCO*, 1 October 2015, available at: <https://inah.gob.mx/boletines/2155-senalizan-nueve-sitios-arqueologicos-mexicanos-para-proteccion-especial-de-la-unesco>.

44 See Mariana Salazar Arborno, “The Work of Mexico’s Interministerial Committee on International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 1057.

45 1999 Second Protocol, Art. 29.

46 See UNESCO, “1954 Convention Second Protocol Committee Emphasizes Protecting Heritage for Peace”, UNESCO Press Release, 5 January 2021, available at: <https://en.unesco.org/news/1954-convention-second-protocol-committee-emphasizes-protecting-heritage-peace>.

47 See UNESCO, *List of Cultural Property under Enhanced Protection*, 2017, available at: http://www.unesco.org/culture/1954convention/pdf/Enhanced-Protection-List-2017_EN.pdf.

Legislative work

Adequate legal frameworks are essential preconditions for compliance. After ratification, States are obliged to take all necessary legislative and administrative steps to ensure full implementation of IHL treaties. For example, the Geneva Conventions contain provisions requiring States to create the necessary legislation “[...] to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches.”⁴⁸ In addition, Customary Rule 158 from the ICRC’s customary law database establishes that States must investigate war crimes allegedly committed by their nationals or armed forces, or on their territory.⁴⁹ Moreover, according to the principle of complementarity as defined in the Rome Statute of the International Criminal Court, national judiciaries hold primary jurisdiction to prosecute international crimes, including war crimes.⁵⁰ For all these reasons, it is important that States enact the necessary legislation to allow national authorities to act according to their international obligations: only.⁵¹

According to Dieter Fleck, legislative work for the domestic implementation of IHL can be divided into three categories: (1) laws and regulations providing the application of the Geneva Conventions; (2) legislation to ensure appropriate penal sanctions for grave breaches of IHL; (3) legislative measures to prevent and suppress misuse of the protective emblems.⁵² In addition to that typology, there is also legislation implementing (4) treaties regulating or prohibiting the use of certain weapons. Each of these points can be explained by reference to the work of NCIHLs in Latin America. As mentioned before, the advisory function is a common feature of such committees. This element in their mandates enables them to suggest modifications to national legal architecture.

For instance, the National Committee for the Study and Implementation of International Humanitarian Law from Peru has played an active role in the governmental approach to IHL. This NCIHL has provided recommendations and analysis during the adoption of Law 29166 on the Rules of Use of Force by Armed Forces in National Territory⁵³ and subsequent Legislative Decree 1095.⁵⁴ Both instruments provide the conditions for the use of force during military

48 See GC I, Art. 49; AP I, Art. 85.

49 ICRC Customary Law Study, above note 29, Rule 158.

50 See Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 98 (entered into force 1 July 2002), Arts 1 and 17.

51 Sharon Weill, “Building Respect for IHL through National Courts”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 863.

52 Dieter Fleck, “Implementing International Humanitarian Law: Problems and Priorities”, *International Review of the Red Cross*, No. 281, April 1991.

53 Ley que Regula el Uso de la Fuerza para Miembros de las Fuerzas Armadas dentro del Territorio Nacional [Law Regulating the Use of Force for Members of the Armed Forces within the National Territory], available at: <https://leyes.congreso.gob.pe/Documentos/Leyes/29166.pdf>.

54 Decreto Legislativo que establece reglas de empleo y uso de la fuerza por parte de las Fuerzas Armadas en el territorio nacional N° 1095 [Legislative Decree that Establishes Rules of Employment and Use of Force by the Armed Forces in the National Territory], 2015, available at: <https://www.icnl.org/resources/library/decreto-legislativo-1095-que-establece-reglas-de-empleo-y-uso-de-la-fuerza-por-parte-de-las-fuerzas-armadas-en-el-territorio-nacional>.

operations against armed groups in Peruvian territory. The decree includes notions anchored to IHL, namely, “military objective”, “incidental damage”, “proportionality”, among others. Besides, the same committee promoted the legislation to prohibit child recruitment.⁵⁵

Similarly, the Ecuadorian NCIHL propelled the inclusion of grave breaches to IHL in the national criminal code (Código Orgánico Integral Penal Ecuatoriano).⁵⁶ Consequently, this instrument criminalizes grave violations to IHL and other serious violations of IHL such as the murder of protected persons, use of prohibited weapons, environmental modifications for military purposes, attacks against protected objects and property, among other violations to IHL.⁵⁷

Lastly, regarding the misuse of protected/distinctive emblems, both the Geneva Conventions and customary law prohibit the use of the Red Cross and Red Crescent for purposes unrelated to “the identification of medical and religious personnel, medical units and medical transports, as well as personnel and property of the components of the International Movement of the Red Cross and Red Crescent”.⁵⁸ This rule applies in peacetime as well. Latin American NCIHLs have undertaken the task to assist law making by drafting regulations to ensure respect for distinctive emblems. In the case of Mexico, the NCIHL prepared the initial draft of what later became the Regulation to Implement the Law Concerning the Use and Protection of the Red Cross Name and Emblem, which lays down possible authorized uses of the emblems, which created a system of administrative sanctions in charge of the Ministry of the Interior.⁵⁹ Likewise, Ecuador’s NCIHL presented an initiative to modify Regulations of the Law of Land Transportation, Traffic and Road Safety, in order to set the conditions for use of the Red Cross emblem in private and public ambulances.⁶⁰

Perspectives and final remarks

In December 2019, representatives from different countries met in Geneva for the 33th International Conference of the Red Cross and the Red Crescent Movement. Back then, representatives adopted a resolution entitled “Bringing IHL home: A road map for better national implementation of international humanitarian law”. The resolution calls for strengthening cooperation between NCIHLs on the

55 Tania Elizabeth Arzapalo Villón, “Peru’s National Committee for the Study and Implementation of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 1066. For other contributions from this NCIHL, see: <https://www.minjus.gob.pe/conadih/#:~:text=La%20Comisi%C3%B3n%20Nacional%20de%20Estudio,y%20desarrollo%20del%20Derecho%20Internacional>.

56 ICRC, *Implementing International Humanitarian Law: Report 2014 and 2015*,

57 Ecuador, Código Orgánico Integral Penal (Comprehensive Organic Criminal Code), Official Registry No. 180, 10 February 2014, Art. 111.

58 ICRC Customary Law Study, above note 29, Rule 59.

59 The law concerning the use and protection of the Red Cross name and emblem is available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LUPDECR.pdf>.

60 Cristina Quijano, Ricardo Ruiz, Camila Roberts and Eduardo Guerrero, “Implementación del Derecho Internacional Humanitario en Ecuador”, *USFQ Law Review*, Vol. 5, No. 1, August 2018, p. 274.

international, regional and cross-regional levels, by attending and actively participating in the universal, regional and other regular meetings of such entities.⁶¹ In the same summit, Ecuador and Peru presented a pledge to promote and strengthen the work of NCIHLs, and the exchange of information among them.⁶²

Furthermore, in February 2021 NCIHLs met online to reflect about the horizons for the implementation of IHL in the region.⁶³ The representatives adopted a declaration recognizing the importance of the measures undertaken so far. Equally, the need to develop more effective methods of international networking was again highlighted.⁶⁴ A strong network of NCIHLs is an accessible alternative to enhance their work and IHL itself.

In addition, the ICRC facilitates interactions between NCHILs around the world through an online community. In this platform, governments can voluntarily share information and engage in discussions about different implementation measures. However, by June 2021 only six Latin American countries were members of the community.

Another effective route to enhance IHL implementation is voluntary reporting. This measure “is intended to help to improve understanding of IHL, and to encourage and inform dialogue on IHL issues both at home and abroad”.⁶⁵ There are many States that issue public reports documenting the multiplicity of measures undertaken during a specific period. The creation of this information produces important materials and references for all actors involved in IHL and policy: academia, governments and civil society. With such elements at hand, States and the ICRC can keep better track of their progress, develop indicators, follow up commitments and define further objectives.

Regarding the measures mentioned in this article, three good practices should be highlighted. Firstly, permanent schemes of partnerships with academic institutions ensure better and far-reaching educational activities. Secondly, UNESCO represents an important ally in the fulfilment of the obligations contained in the 1954 Hague Convention and its two additional protocols. In fact, States can resort to the organization for technical advice and economic

61 ICRC, *Resolution: Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law*, 33IC/19/R1, 33th International Conference of the Red Cross and Red Crescent, Geneva, 9–12 December 2019, available at: https://rcrcconference.org/app/uploads/2019/12/33IC-R1-Bringing-IHL-home_CLEAN_ADOPTED_FINAL-171219.pdf.

62 All pledges presented at the 33th International Conference of the Red Cross and Red Crescent are available at: <https://rcrcconference.org/pledge/pledge-on-promotion-and-strengthening-of-the-work-of-the-national-committees-on-international-humanitarian-law-as-well-as-for-the-exchange-of-information-among-them-promesa-sobre-promocion-y-forta/>.

63 ICRC, “Online Community for National Committees and Similar Entities on IHL”, 28 May 2020, available at: <https://www.icrc.org/en/document/online-community-national-committees-and-similar-bodies-ihl>.

64 ICRC, “Ecuador: Regional Meeting of National Committees on IHL and Other Similar Entities of the Americas”, 24 February 2021, available at: <https://www.icrc.org/en/document/ecuador-americas-regional-meeting-between-national-committees-and-similar-bodies-ihl>.

65 Foreign & Commonwealth Office (United Kingdom), *Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level*, London, 11 March 2019, p. 5, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/784696/Voluntary_Report_on_the_Implementation_of_International_Humanitarian_Law_at_Domestic_Level.pdf.

support. Lastly, NCIHLs hold an enormous potential to make legislative improvements. The interplay between human rights law and IHL allows these committees to provide advice and assist policymaking in a variety of topics, including arms control, law enforcement and criminal law.

In conclusion, the successful implementation of IHL is the product of specialized machinery of governments. The previous sections illustrate how compliance at the battlefield is prepared in peacetime and the role that NCIHLs play in this equation. The Geneva Conventions and customary IHL require States to institutionalize IHL within the military establishment and government itself. In this sense, the creation of NCIHLs is a testimony of the governmental efforts behind respecting and ensuring respect for IHL in all circumstances. In Latin America and elsewhere, the institutionalization of IHL through NCIHLs has demonstrated to be an effective way to comply with multiple international obligations anchored to IHL and the ideal of limiting the consequences of war.

The role of National Red Cross and Red Crescent Societies in the development of international humanitarian law: Lessons learned and perspectives based on the Belgian Red Cross experience

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Abstract

National Societies can assist their authorities in the development of international humanitarian law (IHL). This role has been consolidated in their mandate, especially through their auxiliary role in support of public authorities in the humanitarian field. This article recalls the main legal bases from which this role is

* The views expressed by the authors in this article are personal and in no way binding upon the Belgian Red Cross.

derived. Based on the Belgian Red Cross experience, it demonstrates how the National Societies' support to the promotion and national implementation measures of IHL can constitute an incentive for further elaboration of IHL treaties and policies. It also highlights their humanitarian diplomacy work to assist the International Committee of the Red Cross's approach at the international level. Finally, the article shares some thoughts to increase the Movement's collective impact in IHL development.

Keywords: National Red Cross and Red Crescent Societies, International Committee of the Red Cross, International Federation of Red Cross and Red Crescent Societies, auxiliary role, National International Humanitarian Law Committee, implementation of international humanitarian law, humanitarian diplomacy, international humanitarian law treaties, informal networks, international conferences.

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Introduction: The historic role of the Movement

The development of international humanitarian law (IHL) remains the primary responsibility of States, through the negotiation and adoption of treaties or other legal instruments. For the purposes of this article, IHL development refers to any contribution to the elaboration of international legal and policy frameworks, i.e. treaties and soft law instruments, that are negotiated and adopted by States. However, throughout its history, the International Red Cross and Red Crescent Movement (the Movement) has significantly contributed to the development of IHL since its origins. The International Committee of the Red Cross (ICRC) was the first component to be historically involved in this area. The adoption in 1864 of the First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field reflects one of the recommendations made by Henry Dunant, the main founder of the ICRC, in his book *A Memory of Solferino*, published in October 1862.¹ The conclusion of this treaty was achieved in large part due to the vision and determination of the ICRC's founders. The ICRC has subsequently played a consistent and considerable role in this regard by encouraging States to adopt other IHL treaties, including the current Geneva Conventions of 1949 and their two Additional Protocols of 1977 and many other treaties in the IHL field. This expertise has been consolidated in its mandate as conferred by the Movement's Statutes, which recognize that one of the ICRC's main roles is "to work for the understanding and dissemination of knowledge of

1 Henry Dunant, *Memory of Solferino*, ICRC, Geneva, 1986, p. 126: Dunant considered it would be desirable to "formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded". The draft of the Convention was prepared by the Geneva Committee and submitted to the diplomatic conference hosted by the Swiss Federal Council, on the initiative of the Geneva Committee, from 8 to 22 August 1864, for the purpose of adopting a convention for the amelioration of the condition of the wounded in war.

international humanitarian law applicable in armed conflicts and to prepare any development thereof”.²

While the ICRC plays a vital role at the international level, the National Red Cross and Red Crescent Societies (the National Societies) have also progressively contributed to the development of IHL treaties, firstly through their participation in the International Conferences of the Red Cross and Red Crescent. For instance, the first drafts of the future 1949 Geneva Conventions, as prepared by several expert conferences organized on ICRC’s initiative, were presented in 1948 to the XVIIth International Conference of the Red Cross in Stockholm, where further amendments were adopted. These revised drafts then served as the basis for negotiation at the Diplomatic Conference convened by the Swiss Government at Geneva from 21 April to 12 August 1949. It is relevant to notice that National Societies, considering their extensive experience on the battlefield, were requested by the ICRC to provide their views and proposals on the elaboration of the Geneva Conventions from the outset of the drafting process in 1945 and were regularly consulted together with States on the drafts prior to their submission to the XVIIth International Conference of the Red Cross.³ Beyond their participation in these international fora, National Societies have also been able to contribute to the development of IHL in different and complementary ways through their regular and privileged dialogue with their governments. This is based on their auxiliary role in the humanitarian field which entails a specific relationship with their public authorities. This auxiliary role includes the National Societies’ mandate to disseminate and assist their governments in disseminating IHL and cooperate with them to ensure respect for IHL as foreseen in the Movement’s Statutes.⁴

2 Statutes of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross and Red Crescent, Geneva, 8 November 1986 and amended in 1995 and 2006, Art. 5(2)(g), available at: www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf (all internet references were accessed in August 2022).

3 See the “Draft Revised or New Conventions for the Protection of War Victims”, established by the ICRC with the assistance of Government Experts, National Red Cross Societies and other humanitarian associations in May 1948, and submitted to the XVIIth International Red Cross Conference, Stockholm, 20–30 August 1948, pp. 1–3, available at: https://library.icrc.org/library/docs/CI/CI_1948_B3_01_ENG_01.pdf. Assistance of governments and National Societies was already requested by the ICRC in its memorandum dated 15 February 1945 and informing it was undertaking the work of preparing the revision of the Geneva Conventions and the conclusion of new humanitarian agreements. After having received proposals and useful data from numerous governments and National Red Cross Societies, the ICRC started upon its task and continued to consult different stakeholders including National Societies. It submitted its proposals and first drafts to the “Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems Relative to the Red Cross”, held on its initiative in Geneva on 26 July–3 August 1946. Several proposals were made by the National Societies relating to questions which are of their particular competency. Other consultations were then conducted with governmental experts, such as during the “Conference of Governments of Experts for the Study of the Conventions for the Protection of War Victims” on 14–26 April 1947 in Geneva. The drafts were thus gradually developed and finally submitted by the ICRC to the “Commission of National Red Cross Societies for the Study of the Conventions” as appointed by the 1946 Conference. This Commission comprised of thirteen National Society members of the League of Red Cross Societies gave its general approval to the drafts and made some additional suggestions before the texts were submitted to the XVIIth International Conference of the Red Cross in 1948.

This article will focus on this National Societies' role by sharing the experience of the Belgian Red Cross. It will aim to demonstrate the important interlinkages between the international and national levels for IHL development and the role that National Societies can play in complementarity with the ICRC's approach. For that purpose, the authors will first recall how the role of National Societies also covers IHL development according to the relevant legal provisions. Concrete examples will then be given of the way that National Societies can encourage their respective authorities to implement IHL's fundamental rules through the development of their respective domestic legal frameworks, which consequently can influence States' practice and potentially contribute to the development of new IHL treaties or other international initiatives aiming to strengthen existing IHL rules. Furthermore, the article will emphasize that the National Societies' humanitarian diplomacy carried out at the domestic level can substantially support the ICRC's approach towards States, including in the preparation of international conferences. The interlinkage between the national and the international levels can entail multiplier effects if joint or coordinated approaches from National Societies towards their respective governments are encouraged, including on a regional basis. Lastly, the article will raise some considerations on how to better capitalize this interplay between the National Societies and the ICRC and their complementary roles in IHL development.

An inherent component of the National Society's mandate in IHL

The involvement of National Societies in the development of IHL has been consolidated not only in practice, but also through its formulation in several legal bases, mainly the Statutes of the Movement and other resolutions adopted at the Statutory Meetings of the Movement. This role is first and foremost based on the auxiliary role of National Societies, the duty of the ICRC and National Societies to coordinate on IHL matters, and the member National Societies' commitment to give support to the International Federation of Red Cross and Red Crescent Societies (IFRC) in its contribution to the IHL development at the global level. A National Society can also play a proactive role in this area through its participation in the International Conference of the Red Cross and Red Crescent whose one of the main functions is to contribute to the respect for and development of IHL treaties. Additionally, National Societies also participate in the elaboration and implementation of several Movement's positions adopted at the Council of Delegates of the Movement which commit National Societies to engage in a dialogue with their authorities in IHL development.

4 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 3(2)(3).

The auxiliary role as the fundamental legal basis

The contribution of a National Red Cross or Red Crescent Society to IHL development relies first and foremost on its auxiliary role in the humanitarian field. Although this role originally focused on assisting medical services of armed forces and is still enshrined in the First Geneva Convention of 1949,⁵ such as the engagement in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease in the battlefield during armed conflicts, the scope of a National Society's auxiliary function has considerably expanded due to the broad range of situations of emergency and the various humanitarian needs resulting therefrom. The National Societies henceforth "support their public authorities in their humanitarian tasks, according to the needs of the people of their respective countries" as reflected in the Statutes of the Movement.⁶ It is therefore recognized that the National Societies can act as auxiliaries to their public authorities to meet humanitarian needs, whatever they are and in every context, and in accordance with the Fundamental Principles of the Movement. They can provide humanitarian assistance to victims of emergency and crisis situations, as well as develop long-term programmes for the benefit of the population. Whilst a National Society may also act upon its own initiative and not only upon request by the authorities, the auxiliary role constitutes a specific feature as the National Society must be duly recognized by the "government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field" in order to be part of the Movement.⁷

Resolution 2 of the 30th International Conference of the Red Cross and Red Crescent (2007), recalled some fundamental characteristics of the unique relationship between the National Societies and their authorities raised by their auxiliary role in the humanitarian field. First, States have the primary responsibility to fulfil their humanitarian tasks according to their international obligations and their National Societies have the primary purpose to supplement them in this regard. Second, the resolution calls upon National Societies and their respective public authorities "to consolidate a balanced relationship with clear and reciprocal responsibilities, maintaining and enhancing a permanent dialogue at all levels within the agreed framework for humanitarian action". Third, the International Conference recognizes that both States and their National Societies acting as auxiliaries "enjoy a specific and distinctive partnership, entailing mutual responsibilities and benefits" in the humanitarian field.⁸ It is therefore important

5 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Art. 26.

6 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 3(1).

7 *Ibid.*, Art. 4(3).

8 Resolution 2, "Specific Nature of the International Red Cross and Red Crescent Movement in Action and Partnerships and the Role of National Societies as Auxiliaries to the Public Authorities in the Humanitarian Field", adopted at the 30th International Conference of the Red Cross and Red Crescent, Geneva, 23–24 November 2007, paras 1–3, available at: www.icrc.org/en/doc/resources/documents/resolution/30-international-conference-resolution-2-2007.htm.

to note that National Societies shall not assume States' responsibility deriving from their international obligations, but that they commit to assist or provisionally substitute their public authorities in their humanitarian work based on a specific relationship built upon trust and confidence.

This privileged dialogue is also applicable in the IHL field which is one of the main areas where the National Society's auxiliary role is explicitly recognized under the Statutes of the Movement:

[National Societies] disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect. They disseminate the principles and ideals of the Movement and assist those governments which also disseminate them. They also cooperate with their governments to ensure respect for international humanitarian law and to protect the distinctive emblems recognized by the Geneva Conventions and their Additional Protocols.⁹

States are bound by the Geneva Conventions and their Additional Protocols that they ratified.¹⁰ Consequently, they have to adopt all the necessary measures to disseminate and implement these treaties to ensure their respect.¹¹ National Societies can support them in these tasks. It is interesting to highlight that under the Statutes of the Movement, National Societies' assistance is not limited to IHL dissemination through communication, training or awareness activities. It also refers to cooperation with their authorities to ensure respect for IHL, which can include any activities or initiatives aiming to reach this objective. National implementation of IHL is one of the main examples: National Societies may assist their authorities to identify and elaborate the domestic legal and practical measures that must be taken to ensure that the rules of IHL are fully implemented and respected in both wartime and peacetime.¹² Furthermore, this provision does not preclude any

9 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 3(2)(3).

10 All States are bound by the 1949 Geneva Conventions as they are universally ratified. Around 90% of the States have ratified the 1977 Additional Protocols and thus must abide by them.

11 GC I, above note 5, Arts 47–8; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950), Arts 48–9; Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 127–8; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), Arts 144–5; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Arts 80, 83 and 84; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 19.

12 AP I, *ibid.*, Art. 80. The commentary of this article mentions the National Red Cross or Red Crescent Society could be associated with the study and preparation of all necessary measures to be taken by the State Party for the execution of its obligations under the Geneva Conventions and AP I; see Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 931, para. 3996. Several resolutions of the International Conferences of the Red Cross and Red Crescent confirmed this National Societies' role, including: Resolution V, see the Movement, "National Measures to Implement International Humanitarian Law", adopted by the 25th International Conference of the Red Cross and Red Crescent, Geneva, October 1986,

initiatives carried out by National Societies to encourage States in developing new international legal and policy frameworks to ensure a better compliance with existing IHL rules, in cooperation with the ICRC and IFRC, even though IHL development remains under the States' primary role and responsibility.

The National Society's auxiliary role in the field of IHL is also reaffirmed through national legal frameworks,¹³ by some resolutions of the International Conference of the Red Cross and Red Crescent¹⁴ and by the United Nations (UN) General Assembly's biannual resolutions on the "Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts" which systematically note the National Societies' responsibilities "to cooperate with and assist their Governments in the promotion, dissemination and implementation of international humanitarian law". This auxiliary role is furthermore mentioned in these resolutions where the UN General Assembly usually affirms "the necessity of making the implementation of international humanitarian law more effective, *and supports its further strengthening and development*".¹⁵ This confirms the role that National Societies can play in developing IHL.

A complementary role with the other components of the Movement

As mentioned above, IHL is a core part of the Movement's mandate for historical reasons. The Statutes of the Movement thus confer specific missions upon the different components in the field of IHL which are complementary.

As a specifically neutral and independent institution and intermediary in situations in armed conflict, the ICRC works "for the faithful application of international humanitarian law applicable in armed conflicts" and takes "cognizance of any complaints based on alleged breaches of that law". It also works "for the understanding and dissemination of knowledge of international

International Review of the Red Cross, Vol. 28, No. 263, 1988, p. 127, paras 2–3; Resolution 1, "Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law", adopted at the 33rd International Conference of the Red Cross and Red Crescent, Geneva, 9–12 December 2019, para. 2, available at: https://rcrcconference.org/app/uploads/2019/12/33IC-R1-Bringing-IHL-home_CLEAN_ADOPTED_FINAL-171219.pdf.

13 For example, in Belgium, this role is explicitly reflected in the Statutes of the Belgian Red Cross, lastly revised on 23 April 2018, Art. 4; approved by the decree of the government of the French Community on 24 March 2018, *Belgian Official Gazette*, 3 August 2018, p. 61293; by the decree of the Flemish government on 1 June 2018, *Belgian Official Gazette*, 9 July 2018, p. 54866; and by the decree of the government of the German-speaking Community on 20 June 2018, *Belgian Official Gazette*, 24 August 2018, p. 66153.

14 For example, Resolution 3; "Reaffirmation and Implementation of International Humanitarian Law", adopted at the 30th International Conference of the Red Cross and Red Crescent, Geneva, 26–30 November 2007, preamble, para. 15, available at: www.icrc.org/en/doc/assets/files/other/icrc_002_1108.pdf; and for Resolution 1, "Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law", above note 12, preamble, para. 11.

15 Emphasis added. UN General Assembly, Resolution Adopted by the General Assembly on 20 December 2018, UN Doc. A/RES/73/204, 9 January 2019, preamble, recital 13 and para. 7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/457/48/PDF/N1845748.pdf?OpenElement>; UN General Assembly, Resolution Adopted by the General Assembly on 15 December 2020, UN Doc. A/RES/75/138, 22 December 2020, preamble, recital 13 and para. 7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/368/91/PDF/N2036891.pdf?OpenElement>.

humanitarian law applicable in armed conflicts and to prepare any development thereof¹⁶, through the support to the adoption of new treaties or policies to strengthen and complement the existing rules of IHL. The Statutes of the Movement also recognize the complementary role of National Societies and, in that sense, the need for coordination. More specifically, in agreement with National Societies, the ICRC “shall cooperate in matters of common concern, such as their preparation for action in times of armed conflict, respect for and development and ratification of the Geneva Conventions, and the dissemination of the Fundamental Principles of the Movement and international humanitarian law”.¹⁷ It is therefore emphasized that coordination and joint efforts are key elements to successfully assist States in the development of IHL. Due to their auxiliary role enabling a specific relationship with their authorities, National Societies can indeed provide concrete support to the ICRC’s efforts towards States, and thus through their own mobilization efforts.

The Movement can also rely upon the IFRC in IHL development, in line with its mandate to assist the ICRC in the promotion and development of IHL.¹⁸ As members of the IFRC, National Societies have the duty to provide the necessary support to this organization in the pursuit of its general object and functions that include the contribution to IHL development.¹⁹ This membership gives National Societies the opportunity to participate in a more direct manner to the debates on IHL development in international fora. As it is the official representative of National Societies at the international level due to its legal personality and when assisted by the National Societies’ expertise in IHL, the IFRC can make the National Societies’ voice heard and participate with them in a proactive way in discussions on IHL issues at the global level, as has been the case in some international conferences on the follow-up to treaties on weapons.²⁰

The National Society’s participation in the International Conference of the Red Cross and Red Crescent and in the Council of Delegates of the Movement

As already mentioned in the introductory section, National Societies can also contribute to IHL development as a member of the International Conference which constitutes the supreme deliberative body for the Movement.²¹ The latter gathers every four years the three components of the Movement and the States

16 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 5(2)(c) and (g).

17 *Ibid.*, Art. 5(4)(a).

18 *Ibid.*, Art. 6(4)(j); Constitution of the International Federation of the Red Cross and Red Crescent Societies, last amended and adopted by the 22nd Session of the General Assembly, Geneva, 5–7 December 2019, Art. 5(1)(B)(c), available at: www.ifrc.org/sites/default/files/2021-08/01_IFRC-Constitution-2019-EN.pdf.

19 *Ibid.*, Art. 8(1)(B)(e).

20 See the Conclusion of this article.

21 More detailed information on the role of the National Societies at the International Conference can be found in the following excellent article: Michael Meyer, “The Importance of the International Conference of the Red Cross and Red Crescent to National Societies: Fundamental in Theory and in Practice”, *International Review of the Red Cross*, Vol. 91, No. 876, 2009.

party to the Geneva Conventions to discuss, examine and decide upon humanitarian matters of common interest and any other related matter. These include IHL issues. Indeed, one of the main functions of the International Conference is to contribute “to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement”.²²

Unlike the diplomatic conferences involving States and international organizations on new treaties, National Societies enjoy a unique status in the International Conference allowing them to participate and discuss directly and on an equal footing with States on matters relating to the application and the development of IHL. This specific and privileged dialogue with States in this international forum illustrates the National Societies’ auxiliary role in IHL as the latter often assist their respective national authorities in the preparation of and the follow-up to the decisions adopted at the International Conferences, including on IHL commitments to be implemented. In recent years, the International Conference has focused on adopting substantial actions plans on IHL in order to strengthen the respect for existing rules as enshrined in the Geneva Conventions and their Additional Protocols and in Customary IHL. For instance, the 31st International Conference adopted in 2011 a “4-Year Action Plan for the Implementation of International Humanitarian Law” to encourage States, in cooperation with their National Societies and the ICRC, to adopt measures of national implementation and enforcement of international law relevant to access by civilians of humanitarian assistance, the protection afforded to certain categories of persons (in particular children, women and persons with disabilities), the protection of journalists, the repression of serious violations of IHL, and the transfers of weapons in compliance with IHL rules. It may be noted that the commitments in relation to responsible arms transfers were not limited to national implementation measures. They included the incorporation of IHL criteria into national laws or policies and into regional and global norms on arms transfers at a time when the Arms Trade Treaty had not yet been adopted.²³ The “road map for better national implementation of international humanitarian law”, adopted in 2019 at the 33rd International Conference, constitutes another example of a resolution encouraging States to analyse areas requiring further domestic implementation of IHL with the support of their National Societies, and to adopt the necessary legislative, administrative and practical measures for that purpose.²⁴

While the Council of Delegates of the International Red Cross and Red Crescent Movement is not explicitly assigned to contribute to the development of IHL according to the Statutes of the Movement, it also constitutes a forum where decisions on IHL are discussed and adopted with National Societies. The Council of Delegates has indeed a broad mandate on humanitarian issues that include

22 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 10(2).

23 Resolution 2, “4-Year Action Plan for the Implementation of International Humanitarian Law”, adopted at the 31st International Conference of the Red Cross and Red Crescent, Geneva, 28 November–1 December 2011, available at: https://rcrcconference.org/app/uploads/2019/03/R2_4-Year_Action_Plan_EN.pdf.

24 Resolution 1, “Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law”, above note 12.

IHL, as it is “the body where the representatives of all the components of the Movement meet to discuss matters which concern the Movement as a whole”.²⁵ For that purpose, the Council of Delegates shall give an opinion and where necessary take decisions on these matters.²⁶ Several Movement positions and calls upon States have been adopted in the past, and have engaged National Societies with their governments on a number of questions relating to IHL development. For example, in 1995, the Council of Delegates “invites National Societies to intensify contacts with their respective governments in order to obtain a total ban on anti-personnel landmines”.²⁷ In 1999, it “encourages all National Societies to support, particularly through contacts with their government, the adoption of international instruments implementing the principle of non-participation and non-recruitment of children below the age of 18 in armed conflicts with a view to such instruments being applicable to all situations of armed conflict and to all armed groups”.²⁸ In 2011 and 2013, the Council of Delegates appealed to States “to pursue in good faith and conclude with urgency and determination negotiations to prohibit the use of and completely eliminate nuclear weapons through a legally binding international agreement”.²⁹ Resolutions adopted in this regard constituted good incentives for National Societies to engage in a dialogue with their respective authorities and to urge them to take concrete steps leading to the negotiation of legally binding international agreements afterwards, i.e. the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction adopted in 1997, the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict adopted in 2000 and the Treaty on the Prohibition of Nuclear Weapons adopted in 2017.

The impact of the domestic legal framework on the development of IHL at the international level

According to their above-mentioned mandate, National Societies usually assist their authorities to identify and take concrete national measures to implement IHL

25 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 12.

26 *Ibid.*, Art. 14(1).

27 Resolution 10, “Anti-Personnel Landmines”, adopted at the Council of Delegates, Geneva, 1–2 December 1995, para. 3.

28 Resolution 8, “Children Affected by Armed Conflict”, adopted at the Council of Delegates, Geneva, 29–30 October 1999, para. 4, available at: www.icrc.org/en/doc/resources/documents/resolution/council-delegates-resolution-8-1999.htm (emphasis in original). Resolution 8, “Peace, International Humanitarian Law and Human Rights”, adopted at the Council of Delegates, Seville, 25–27 November 1997, Section 1, para. 6, available at: www.icrc.org/en/doc/resources/documents/resolution/council-delegates-resolution-8-1997.htm had already asked National Societies of countries that had adopted the 18-year age limit for recruitment and participation “to encourage their respective governments to participate in and support the process of drafting an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts”.

29 Resolution 1, “Working Towards the Elimination of Nuclear Weapons”, adopted at the Council of Delegates, Geneva, 26 November 2011, para. 3. This appeal was indirectly recalled in Resolution 1, “Working Towards the Elimination of Nuclear Weapons: Four-Year Action Plan”, adopted at the Council of Delegates, Sydney, Australia, 17–18 November 2013, para. 2b.

treaties ratified by the States. Indeed, becoming party to these conventions is not sufficient as such and implies additional efforts to incorporate their provisions into domestic law of the States Parties through new legislations or regulatory measures, or amendments to the existing legal framework. National implementation measures are necessary to ensure that the rules of IHL are fully respected when the State is involved in an armed conflict. However, if National Societies indirectly contribute to the development of domestic frameworks to implement existing IHL rules binding their States or even to go beyond obligations as specifically defined under existing IHL treaty law, they are also able to assist their authorities to develop national legislation that can potentially influence the adoption of new legally binding rules or policies at international level. This work can be carried out by the National Society through its bilateral and confidential dialogue with the relevant authorities (ministries and cabinets), in cooperation with parliamentarians and/or through the National IHL Committee. Two examples will be shared below from the Belgian Red Cross experience with its own authorities. Some lessons learned on the National Societies' role towards the parliamentarians and within the National IHL Committee will be highlighted.

The Belgian Red Cross support to its authorities at the national level for the development of IHL

Belgium has played a pioneer role in the development of IHL rules, notably in supporting the elaboration of treaties on weapons and in the repression of war crimes over the past years. Several initiatives were taken by Belgium, with the support of civil society and the National Society, which was able to share its IHL expertise to that end.

The first example is the leading role played by Belgium in the adoption of the Convention on Cluster Munitions in 2008. Belgium actively participated in the Oslo Process launched in February 2007 by Norway, to address the suffering of civilians resulting from the use of cluster munitions. States were invited to elaborate new rules for that purpose. Since the beginning, Belgium's position was based on three main requirements: the adoption of an international legal instrument which should be legally binding, ambitious, and effectively protect civilians.

This position was consolidated by the fact that Belgium was the first State to adopt in 2006 a domestic law prohibiting activities aiming to develop, repair, sell, transfer, transport, detain or carry cluster munitions.³⁰ During the parliamentary debates pertaining to this draft law, the Belgian Red Cross was invited to participate in a hearing session of the Belgian Senate (Commission of External

30 This prohibition was first incorporated in the Law of 18 May 2006, supplementing the Law of 3 January 1933 relating to the manufacture, trade, and bearing of weapons and to the trade of munitions, concerning the prohibition of cluster munitions, *Belgian Official Gazette*, 26 June 2006, p. 32229. This prohibition was then set out in the Law of 8 June 2006, regulating the economic and individual activities with weapons, *Belgian Official Gazette*, p. 29840, Art. 2, 4°. This law was amended by a Law of 20 March 2007 prohibiting the financing of the manufacture, the use or the possession of anti-personnel landmines and cluster munitions, *Belgian Official Gazette*, 26 April 2007, p. 22122 (see Art. 8(2) of the Law of 2006).

Relations and Defence) in 2005 to share its insights on the humanitarian consequences of the use of such weapons towards civilians and the challenges raised for the compliance with some IHL rules on conduct of hostilities in some circumstances due to their lack of accuracy and of reliability, more specifically the rules of distinction, proportionality and precaution, and the prohibition of indiscriminate attacks. It was also highlighted that self-destruction and self-neutralization mechanisms did not address the humanitarian consequences because of their high failure rate.³¹ This intervention contributed to convince the parliamentarians to adopt a law of prohibition to give an impetus in the stigmatization of these weapons in the hope that an international treaty would be adopted. It is relevant to note that this law was adopted at a time when the ICRC called States to take urgent measures to immediately put an end to the use of non-accurate and non-reliable cluster munitions, to prohibit the use of cluster munitions against military objectives in populated areas, to eliminate stockpiles of non-accurate and non-reliable cluster munitions and to elaborate a new IHL convention to address these weapons.³² This allowed the Belgian Red Cross, in consultation with the ICRC, to continue to support its authorities in the promotion of an international convention on cluster munitions that was finally adopted afterwards.

The second example relates to the integration of war crimes in the domestic legislation with the support of the National IHL Committee. According to the 2000 Royal Decree on the Belgian Interministerial Commission for Humanitarian Law (ICHL), the latter is considered as a permanent advisory body to the Federal Government whose mission consists of proposing national measures necessary for the implementation of IHL, following up on and coordinating these measures, and in preparing opinions and proposals concerning the application and further development of this body of law.³³ Therefore, the Belgian ICHL is the entity that

31 Belgian Senate, Draft Law supplementing the Law of 3 January 1933 relating to the manufacture, trade, and bearing of weapons and to the trade of munitions, regarding cluster bombs – Report made on behalf of the Commission of External Relations and Defence by Mr Lionel Vandenberghe, Documents Parlementaires, Session 2004–2005, No. 3-1152/3, 5 July 2005, pp. 3–4, section III, available at: www.senate.be/www/webdriver?MITabObj=pdf&MIcolObj=pdf&MInamObj=pdfid&MItypeObj=application/pdf&MIvalObj=50334315.

32 ICRC, “The Need for Urgent International Action on Cluster Munitions”, Statement by Philip Spoerri, Director of International Law and Cooperation within the Movement, ICRC, delivered at an ICRC Press Conference on 6 November 2006, available at: www.icrc.org/en/doc/resources/documents/statement/cluster-munition-statement-061106.htm.

33 Under the terms of Article 2 of the Royal Decree of 6 December 2000, relating to the Interministerial Commission for Humanitarian Law, *Belgian Official Gazette*, 12 December 2000, p. 41449, as reviewed by the Royal Decree of 22 June 2016 (*Belgian Official Gazette*, 19 August 2016, p. 52544):

The mission of the Interministerial Commission for Humanitarian Law ... is to:

1. identify and examine the national enforcement measures necessary for the implementation of the rules of international humanitarian law, inform the federal ministers concerned of them and submit proposals to them in this regard;
2. monitor and coordinate the national enforcement measures addressed in point 1;
3. as a permanent advisory body, assist the federal government, on its own initiative or on the request of the latter, with studies, reports, opinions and proposals concerning the application and development of international humanitarian law;
4. ensure the work of the Interdepartmental Commission for Humanitarian Law is carried on and its archives preserved;

prepares the text of draft laws in the area of IHL and submits them to the Federal Government. Indeed, the Commission made proposals that led to the law of 16 June 1993 on prosecuting grave breaches of the Geneva Conventions and Additional Protocols³⁴ (modified on 10 February 1999 and 23 April 2003), which was abrogated and replaced by the law of 5 August 2003 on grave breaches of IHL.³⁵ Since then, a Law of 5 May 2019 inserted three additional incriminations in the Belgian Criminal Code's Article 136 *quater* on war crimes on the initiative of the Belgian ICHL. These incriminations are the transposition of amendments to Article 8 of the Statute of the International Criminal Court on war crimes that were proposed by Belgium and adopted by the Assembly of States party to the Rome Statute on 14 December 2017. The amendments aimed to include among the list of war crimes perpetrated in international and non-international armed conflicts the following acts: employing weapons, which use microbial or other biological agents, or toxins; employing weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays; and employing blinding laser weapons.³⁶ The incrimination of such acts was justified by the fact that considering their nature, using such weapons is in contradiction of fundamental rules of IHL, especially the prohibition of using weapons of a nature to cause superfluous injury or unnecessary suffering, the principle of distinction and the prohibition of indiscriminate attacks. The Belgian Red Cross supported the amendments suggested by its authorities. As mentioned in the 2000 Royal Decree, the National Society is invited to take part in the ICHL's work.³⁷ Given its expertise in the IHL field, the Belgian Red Cross was consulted and able to contribute to the draft legislation from the legal perspective to elaborate the above-mentioned IHL arguments that could support the insertion of these additional war crimes in the Belgian Criminal Code. It is expected that this incorporation in the Belgian domestic law will encourage other States party to the

5. act as a national advisory committee for the protection of cultural property, under the terms of Resolution II of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague on 14 May 1954.

For more detailed information on the Belgian ICHL, see Frédéric Casier and Alix Janssens, "Belgium's Interministerial Commission for Humanitarian Law: Playing A Key Role in the Implementation and Promotion of IHL", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015.

34 Law of 16 June 1993 on prosecuting grave breaches of international humanitarian law, *Belgian Official Gazette*, 5 August 1993, p. 17751.

35 Draft amendments abrogating the law of 16 June 1993 on prosecuting grave breaches of international humanitarian law and transferring its provisions to the Criminal Code and the Code of Criminal Procedure. These texts led to the law of 5 August 2003 on grave breaches of international humanitarian law, *Belgian Official Gazette*, 7 August 2003, p. 40506.

36 Resolution on amendments to Article 8 of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.4, adopted by consensus by the Sixteenth Session of the Assembly of States Parties, New York, 4–14 December 2017. The resolution provides the insertion of new Articles 8-2-b)xxvii) and 8-2-e)xvi), new Articles 8-2-b)xxviii) and 8-2-e)xvii) and new Articles 8-2-b)xxix) and 8-2-e)xviii) in the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002), available at: https://asp.icc-cpi.int/sites/asp/files/asp_docs/Resolutions/ASP16/ICC-ASP-16-Res4-ENG.pdf.

37 Royal Decree of 6 December 2000, above note 33, p. 41449, Art. 4(2).

Rome Statute to ratify and implement these amendments in their respective national legal frameworks in the future.

The National Societies' expertise in IHL and specific position

The above-mentioned experiences in Belgium highlight the relevant role that National Societies can play in cooperation with their authorities in the national implementation of IHL and thus by consequence their potential influence on the development of IHL at the international level.

It is not indeed precluded that National Societies may directly or indirectly support their national authorities in proposing initiatives to develop additional rules to strengthen the existing IHL framework at the international level. When a State considers it is necessary to adopt additional domestic legislative measures to address eventual gaps on the basis of existing IHL rules, these measures can sometimes contribute to influence the national practice of other States and eventually the international legal framework for a better protection of the victims of armed conflicts. The National Society may be contacted by its authorities to clarify the interpretation of the applicable rules of IHL and present its views on the compatibility of the draft legislation with the latter, or it may have the opportunity to proactively advise them on such matters considering its auxiliary role in the IHL field and the specific relationship and permanent dialogue thereof. A bilateral consultation between the National Society and the ICRC may be welcome if any additional legal support is necessary and/or if the National Society is requested to share its official position on the suggested initiative for the sake of coherence in the Movement's approach. This was, for instance, the case when the Belgian Red Cross was asked to give its position on the draft law prohibiting the cluster munitions at the Federal Parliament in 2005 considering that, at that time, the Oslo process had not yet been launched and the ICRC's position was nuanced on this question by expressing its concerns on the compatibility of the use of such weapons with the existing IHL rules in certain contexts. A consultation between the ICRC and the Belgian Red Cross was helpful to avoid any discrepancies within the Movement's position publicly shared at international and national levels.

The National Societies are key players in the IHL field in their respective countries and have the opportunity to bring their expertise on the draft legislations to relevant fora, including National IHL Committees which have the mandate to advise and assist national authorities in implementing, developing and disseminating knowledge of IHL.³⁸ According to the constitutive legal bases in their respective countries, National IHL Committees usually gather representatives of the different ministries involved in IHL implementation, but also other experts, as well as representatives of the National Society, as they possess valuable knowledge and experience in IHL. National Societies can exercise different functions within National IHL Committees from one country to

³⁸ This role has been explicitly acknowledged by Resolution 1; "Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law", above note 12, para. 5.

another, whether in a charring capacity or in providing a secretariat function for the committee, and/or providing advice on IHL issues such as commenting on draft legislation.³⁹

Other channels of communication with the authorities can be used such as confidential and bilateral dialogue with the representatives of relevant ministries (e.g. Ministries of Foreign Affairs, Defence or Justice). Also, with regards to the parliament, a National Society can participate as an expert in hearing sessions and/or maintain a dialogue with some key parliamentarians or with the chairs of relevant commissions (e.g. Defence or External Relations). The National Society's position and recommendations can bring added value to parliamentary debates on draft legislation, as it will contribute from an IHL perspective and with a neutral approach, which is a specificity that is often appreciated by parliamentarians and other policy makers, especially if the draft legislation is subject to tense political debates.

Last but not least, if a State can share its domestic legislation on IHL as good practice with other States to encourage them to adopt similar national measures and potentially develop new international treaties or policies, such initiatives can also be disseminated among National Societies to inspire each other in their humanitarian diplomacy work with their respective national authorities. This can be done, for example, in a bilateral way between National Societies or through the existing regional networks of National Societies' legal advisers within the Movement. Considering the worldwide nature of the Movement and the National Societies "form the basic units and constitute a vital force of the Movement" and carry out their humanitarian activities "in pursuance of the mission of the Movement" at the national level,⁴⁰ sharing examples of IHL domestic legislation between the components of the Movement can also encourage numerous States in the development of IHL.

The National Society's humanitarian diplomacy work at the national level in complementarity with the ICRC approach at the international level

In parallel with their contribution in strengthening the domestic legal framework that can indirectly inspire the development of new international treaties or policies in IHL, National Societies can effectively support their authorities through their specific relationship based on their auxiliary role in IHL, helping the States to play a proactive role in the discussions held in international fora aiming to further develop legal and policy frameworks at the international level on the basis of existing rules of IHL. The difference from the previous approach is the fact that the National Society will take the initiative to contact its

39 ICRC, *National Committees and Similar Entities on International Humanitarian Law: Guidelines for Success – Towards Respecting and Implementing International Humanitarian Law*, Geneva, 2018, pp. 33–4, available at: www.icrc.org/en/document/national-committees-and-similar-entities-international-humanitarian-law-guidelines-success.

40 Statutes of the International Red Cross and Red Crescent Movement, above note 2, Art. 3(1).

authorities because there are some key messages to be disseminated in advance of international meetings where legal or policy frameworks are to be discussed, usually upon the request of the ICRC which actively follows and contributes to the discussions at the international level.

This support can be provided through different approaches, such as: the bilateral and confidential dialogue carried out by National Societies with their authorities or their participation in domestic fora, including the National IHL Committee; the National Societies' participation in the elaboration of the Movement's strategies and policies adopted at the Statutory Meetings (e.g. International Conferences of the Red Cross and Red Crescent and the Council of Delegates); and the joint or coordinated approaches taken by National Societies at the regional level. In recent years the Belgian Red Cross has aimed to adopt a proactive approach towards the Belgian authorities in the framework of international meetings dealing with IHL issues and challenges, through these different fora. The humanitarian diplomacy work conducted by National Societies towards their authorities in their national contexts can substantially support the ICRC approach towards States, especially in the preparation of international conferences. The interlinkage between the national and international levels can indeed entail multiplier effects in the development of IHL.

Ongoing dialogue with relevant ministries

In Belgium, the authorities usually maintain a constructive and open dialogue with civil society and humanitarian organizations on humanitarian issues that are internationally discussed. Due to its specific mandate in IHL, the Belgian Red Cross is part of this dialogue through different channels of communication and regularly takes the initiative for meetings with its authorities.

The Belgian Red Cross maintains a regular dialogue with several ministries, especially the Belgian Ministry of Foreign Affairs, which is a key actor considering its main mission to develop Belgium's foreign policy at the international level by promoting fundamental values and human rights and strengthening the international legal order to contribute to worldwide peace and security.⁴¹ It is therefore a key ministerial department to be reached, as it coordinates Belgium's position on public international law, including IHL issues, at the global level. Information and respective positions are exchanged between the authorities and the National Society (especially by sharing briefing notes and position papers) in preparation of and follow-up to international meetings in relation to IHL, such as meetings of States party to treaties on weapons, including the 1997 Convention on the Prohibition of Anti-Personnel Mines and the 2008 Convention on Cluster Munitions. Discussions can also be held on IHL issues where there could be some different views between the National Society and its authorities, such as the

41 See the missions and goals of the Belgian Ministry of Foreign Affairs, in its Administrative Agreement (Contract of Administration) on its functioning in 2016–2018, Part 2, available at: <https://diplomatie.belgium.be/en/about-us/mission-and-goals>.

question of nuclear weapons. If Belgium's commitment to a world without nuclear weapons and the recognition of the catastrophic humanitarian consequences of the use of such weapons are shared with the Belgian Red Cross position, the way to reach this objective is different in some aspects. This does not hamper the National Society in expressing its views in a constructive and open dialogue with its authorities as an independent humanitarian organization, to continue to share the Movement's position, and to work on the elements of convergence as the support to the promotion and adoption of concrete risk reduction measures in order to prevent the humanitarian consequences resulting from the increasing risk of intentional or incidental use of nuclear weapons, in accordance with the Action Plan of the 2010 Review Conference of the States party to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.⁴²

This main channel of communication is usually reinforced at key moments where Belgium can play a particular influential role at the regional and/or global level. For example, the Belgian Red Cross took an active part in the dialogue of the Ministry of Foreign Affairs with civil society at the time that Belgium fulfilled its mandate as a non-permanent member of the UN Security Council in 2019–2020. The Belgian Red Cross aimed to support by providing legal expertise and views on specific themes to assist the Belgian authorities in the debates around several draft resolutions that covered IHL issues such as the protection of healthcare in situations of armed conflict,⁴³ effective humanitarian access in the context of the COVID pandemic and the protection and respect of humanitarian actors in compliance with the existing rules of IHL, the reaffirmation to maintain a language that ensures the compliance of counterterrorism measures with existing IHL obligations, including rules governing humanitarian activities such as the entitlement of impartial humanitarian organizations to offer their services and the obligation to allow and facilitate humanitarian activities,⁴⁴ and the protection of civilians in war in cities.

Furthermore, when Belgium was chairing the 2021 Group of Governmental Experts on Lethal Autonomous Weapons Systems (GGE LAWS) in the framework of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW),⁴⁵ the Belgian Red Cross proactively shared

42 The National Society's support of the adoption of risk reduction measures is in line with the Movement's "Action Plan on the Non-use, Prohibition and Elimination of Nuclear Weapons 2018–2021" adopted by the Council of Delegates through its Resolution 4 on 11 November 2017 in Antalya, Turkey, available at: https://rcrcconference.org/app/uploads/2017/08/CD-17-R4_clean.pdf; and its "2022–2027 Action Plan on the Non-Use, Prohibition and Elimination of Nuclear Weapons" adopted by the Council of Delegates through its Resolution 7 on 23 June 2022 in Geneva, available at: https://rcrcconference.org/app/uploads/2022/06/CD22-R07-Nuclear-weapons_22-June-2022_EN_FINAL.pdf.

43 Especially the implementation of Resolution 2286 (2016) on "Protection of Civilians in Armed Conflict" adopted by the UN Security Council, UN Doc. S/RES/2286 (2016), 3 May 2016, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/125/06/PDF/N1612506.pdf?OpenElement>.

44 See the example of Resolution 2462 (2019) on "Threats to International Peace and Security Caused by Terrorist Acts: Preventing and Combating the Financing of Terrorism" adopted by the UN Security Council, UN Doc. S/RES/2462 (2019), 28 March 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/090/16/PDF/N1909016.pdf?OpenElement>.

45 High Contracting Parties to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), Technical Decisions by the High Contracting Parties to the Convention on

comments and recommendations based on the ICRC's new position on autonomous weapons systems published on 12 May 2021.⁴⁶ The GGE LAWS was indeed mandated by the High Contracting Parties to the CCW in 2019, to explore possible recommendations in relation to the clarification, consideration and development of aspects of the normative and operational framework on LAWS to be proposed at the Sixth CCW Review Conference that was held on 13–17 December 2021.⁴⁷ More specifically, the Belgian Red Cross recommended the adoption of new legally binding rules that could address the humanitarian, ethical and IHL concerns expressed by the ICRC. It promoted articulating commitments by CCW High Contracting Parties to prohibit certain types of autonomous weapons (unpredictable autonomous weapons and anti-personnel autonomous weapons) and regulating all others with a view to ensuring sufficient human control over critical functions (selecting and applying force to targets). The recommendations were welcomed and carefully considered by the Ministry of Foreign Affairs in the same way as the other suggestions received by the Chair. They were reflected in papers put forward by the Chair, to the extent they were supported by States and other stakeholders. The excellent cooperation and regular consultation between the ICRC and the Belgian Red Cross enabled the mutual support of their respective efforts in promoting the recommendations.

Other national fora of humanitarian diplomacy

There are other national fora where the National Society can disseminate the ICRC and/or the Movement's position on developing new IHL legal or policy frameworks at the international level. These fora are the same as those mentioned in the previous part for the development of domestic legislation: the Parliament and the National IHL Committee. They can also be used in complementarity with the bilateral dialogue conducted with the Ministry of Foreign Affairs as strong leverages to influence the government's position in its international discussions on IHL matters.

Through the adoption of resolutions, the parliament can call upon the government to support any measure or initiative at the international level that aims to develop IHL legal and policy frameworks. In Belgium, the Federal Parliament pays attention to the pioneer role that Belgium can play in the respect and development of IHL. For example, in January 2021, the Belgian Red Cross participated in a hearing session organized by the National Defence Commission of the Belgian Federal Parliament (Chamber of Representatives) in relation to the

Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects on the Work Related to the Convention for 2021, UN Doc. No. CCW/2020/1, 3 May 2021, para. 7, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/100/85/PDF/G2110085.pdf?OpenElement>.

46 ICRC, "Position on Autonomous Weapons Systems", 12 May 2021, available at: www.icrc.org/en/document/icrc-position-autonomous-weapon-systems.

47 Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 13–15 November 2019, Agenda Item 15, Final Report, UN Doc. No. CCW/MSP/2019/9, 13 December 2019, para. 31, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/343/64/PDF/G1934364.pdf?OpenElement>.

topic of the use of explosive weapons in populated areas (EWIPA). This hearing session was held in relation to the debates on a pending national draft resolution on the protection of civilians against the use of EWIPA. The draft resolution aimed to call on the Federal Government to actively participate in the diplomatic consultation process led by the Republic of Ireland since 2019 and to ask for suggesting clear and detailed elements of language for a strong and meaningful Political Declaration on EWIPA at the international level.⁴⁸ Complementing the interventions by other experts from Humanity & Inclusion and from the Ministry of Defence, the Belgian Red Cross focused on the relevant IHL rules and the Movement's concerns on the interpretation and application of these rules when using such weapons in populated areas. It shared its position and recommendations, including the promotion of an avoidance policy, the commitment to consider reverberating effects in military operations and the necessary assistance to be provided to the victims. The final draft resolution was adopted in a plenary session by the Federal Parliament on 6 May 2021 and reflects the main recommendations supported by the Belgian Red Cross.⁴⁹ It is an important decision to which the National Society has regularly referred in its dialogue with its national authorities to encourage Belgium to support ambitious commitments in the Political Declaration which was agreed at the final round of international negotiations on 17 June 2022.⁵⁰

With the support of the National Society, the National IHL Committee can also advise significantly State authorities in international discussions on the development of IHL legal and policy frameworks. For instance, in Belgium, the ICHL, as a permanent advisory body of the Federal Government to assist in the development of IHL,⁵¹ supports Belgium's role in the protection of cultural property at the international level. The ICHL is recognized as the national advisory committee for the protection of cultural property under the terms of Resolution II of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, adopted at The Hague on 14 May 1954, as confirmed by the Royal Decree relating to the ICHL revised in 2016.⁵² Following the ratification of the Second Protocol to the Hague Convention of 26

48 For more information on the diplomatic process on a political declaration to address the humanitarian harm arising from the use of EWIPA, see the Irish Department of Foreign Affairs, "Protecting Civilians in Urban Warfare: A Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas", available at: www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/.

49 Chamber of Representatives, Belgian Federal Parliament, Resolution pertaining to the protection of civilians against the use of explosive weapons with wide-area effects in populated areas, Documents Parlementaires, Session 2019–2020, No. 55 1222/007, 6 May 2021, available at: www.lachambre.be/FLWB/PDF/55/1222/55K1222007.pdf.

50 Irish Department of Foreign Affairs, "Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas", 25 May 2022, available at: www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf.

51 Royal Decree of 6 December 2000, above note 33, p. 41449, Art. 4(3).

52 Resolutions of the Intergovernmental Conference on the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, Resolution II, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=6FA17D44AABA6394C12563CD0051D062>; Royal Decree of 6 December 2000, above note 33, p. 41449, Art. 2, 5°.

March 1999 and its entry into force for Belgium in January 2011, the scope of the mission of the internal working group of the ICHL in charge of the protection of cultural property was expanded. Its aims are: to implement the obligations provided by The Hague Convention and its two Protocols at the national level, and to provide input, on behalf of Belgium, to international meetings pertaining to the promotion and implementation of these conventions as the meetings of States party to these conventions and the meetings of the Committee for the Protection of Cultural Property in the Event of Armed Conflict.⁵³ For that purpose, the working group of the ICHL comprised of all the relevant authorities and associations/organizations in Belgium, including the Belgian Red Cross, regularly assists Belgium in the preparation of international meetings, especially aiming to strengthen the existing rules of IHL protecting cultural property. During Belgium's membership of the Committee for the Protection of Cultural Property in 2011–2015, the ICHL played a substantial role to propose, on behalf of Belgium, the creation of a specific distinctive emblem to identify cultural property under enhanced protection and its modalities of use. This emblem was adopted at the 6th Meeting of States party to the 1999 Second Protocol to the Hague Convention through amendments to the Guidelines for the implementation of this treaty.⁵⁴ It is expected that the use of the emblem will contribute to the effective protection of cultural heritage of the greatest importance for humanity as provided by the Second Protocol to the Hague Convention. The Belgian Red Cross is still regularly consulted within the working group of the ICHL at the Belgian level on other issues in relation to the protection of cultural property under the IHL perspective, such as the discussions currently held in the *ad hoc* Sub-Committee established by the Committee for the Protection of Cultural Property to clarify its supervision and monitoring functions as provided by Article 27 of the Second Protocol to the Hague Convention, including proposed amendments to the above-mentioned Guidelines on a monitoring and supervision mechanism to improve the protection of cultural property.⁵⁵

53 The mandate of this Committee is provided in the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, UNTS 2253 (entered into force 9 March 2004), Art. 27.

54 UN Educational, Scientific and Cultural Organization, “Guidelines for the Implementation of the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict”, Paris, 16 December 2021, especially paras 97–116 and Annex IV, available at: https://en.unesco.org/sites/default/files/1999-secondprotocol_guidelines_2021_eng.pdf. “The present version reflects the amendments endorsed by the 9th Meeting of the Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (Paris, 2021).”

55 UN Educational, Scientific and Cultural Organization, Committee for the Protection of Cultural Property in the Event of Armed Conflict, “Monitoring and Supervision Mechanism for the Implementation of the 1999 Second Protocol”, Paris, 10–11 December 2020, Decision No. C54/20/15.COM/14, para. 7, available at: <https://unesdoc.unesco.org/ark:/48223/pf0000375412>.

The Movement as a supportive network to the National Society's humanitarian diplomacy work

In order to increase the impact of its humanitarian diplomacy work towards its authorities on IHL development, support from other components of the Movement is fundamental. The ICRC's IHL expertise and knowledge of the international context, including the identification of areas where IHL legal or policy framework could be developed in the light of the challenges of application and interpretation of existing rules of IHL in contemporary armed conflicts and the main views of the different groups of States on the issues that are being discussed in international fora, are very helpful for a National Society. The Belgian Red Cross has experienced several opportunities where it could rely upon the availability and assistance of the ICRC in its approach with the Belgian authorities. On the other hand, the National Societies' analysis on their national contexts constitutes an interesting indication for the ICRC on how their recommendations could be considered by the States, including in regional contexts. Therefore, the Movement has a real interest to coordinate efforts at national and international levels to increase its impact towards the States.

Beyond ICRC assistance for specific IHL issues upon its request, the National Society can build its humanitarian diplomacy strategy upon the policies and action plans that are adopted by components of the Movement at the Council of Delegates, which usually represents a key milestone to the next International Conference and upon the resolutions adopted at this meeting with the States party to the Geneva Conventions. These resolutions are humanitarian diplomacy instruments that can help to identify the priorities of the National Society at the national level and the actions that could be carried out towards the authorities on IHL issues in the next years considering the specific national context.⁵⁶ Indeed, they have helped the Belgian Red Cross in the elaboration of its own IHL action plan. It is important to highlight that there is an increasing consultation with National Societies on the draft resolutions so their main concerns and the exchanges with their authorities can be better considered, and they can take ownership of these resolutions by developing concrete action points at the national level.

For the last few years, the role of the Movement's informal networks has also become significant for the humanitarian diplomacy work of the National Societies and for the ICRC. These networks constitute important fora for exchange of information, consultation and cooperation on IHL issues. The authors notice an increasing participation of National Societies in several

⁵⁶ For example: the Movement's "Action Plan on the Non-use, Prohibition and Elimination of Nuclear Weapons 2018–2021", above note 42; the Movement's "2022–2027 Action Plan on the Non-Use, Prohibition and Elimination of Nuclear Weapons", above note 42; and "2022–2027 Movement Action Plan to Prevent and Respond to the Humanitarian Impacts of War in Cities", adopted at the Council of Delegates through Resolution 6 in Geneva on 22–23 June 2022, available at: https://rcrcconference.org/app/uploads/2022/06/CD22-R06-War-in-cities_22-June-2022_FINAL_EN.pdf.

initiatives proposed by the ICRC for developing and/or strengthening the legal and policy frameworks of IHL.

These networks can be established on a specific topic as is the case of the Movement Support Group comprised of National Societies, the ICRC and the IFRC and as established in accordance with Resolution 4 of the 2017 Council of Delegates on the Movement's action plan on nuclear weapons 2018–2021 to support and guide implementation of this action plan. This group proposed several initiatives to be implemented to support the ratification of the 2017 Treaty on the Prohibition of Nuclear Weapons and on the adoption of risk reduction measures in the framework of the implementation of the Treaty on the Non-Proliferation of Nuclear Weapons, including a briefing note on this topic to better inform National Societies on these measures and to encourage them to engage with their authorities.

These informal networks can also have a geographic dimension as the regional legal networks of National Societies' legal advisers. The European Legal Support Group (ELSG) that gathers the National Societies' legal advisers from European countries has developed several coordinated actions towards their respective authorities with the support of the ICRC and the IFRC which are observers in this network. For example, in the preparation, during and after the International Conferences of the Red Cross and Red Crescent where often one or more resolutions on IHL issues are adopted, National Societies can play a constructive role to support the adoption of and follow-up to these resolutions. At the 32nd International Conference in 2019, the ELSG took the initiative to take the floor at the Drafting Committee to defend the essence of several resolutions by delivering statements on behalf of a group of National Societies including on Resolution 1 "Bringing IHL Home". Additionally, in consultation with the ICRC, National Societies coordinated between them and proposed several solutions to address the remarks of States. Furthermore, the adoption of pledges by National Societies jointly with their respective authorities can also be a good starting basis for coordinated actions at the regional level on IHL matters. In 2012, the ELSG launched a standard letter to be adapted by each National Society to its own context and to be addressed to its authorities. The standard letter aimed to invite the authorities to support the adoption of a strong and robust Arms Trade Treaty with the highest possible legally binding standards which would prevent conventional weapons from being used to violate IHL. This initiative was actually based on a pledge jointly adopted by the European Union (EU) Member States and their National Societies at the 31st International Conference of the Red Cross and Red Crescent (2011). This kind of initiative can potentially influence the position of the States to develop strong IHL treaties as they may carefully consider the recommendations made by the National Society if they know that a similar approach has been launched in other countries.⁵⁷

⁵⁷ Considering the success of such pledges and the wish of the ELSG members to continue coordinated actions at the European level, other similar pledges were adopted afterwards. A pledge entitled

Conclusion: Increasing the Movement's collective impact

The Belgian Red Cross experience in IHL development illustrates that National Societies can potentially contribute domestically to this field thanks to their auxiliary role in IHL that entails a specific relationship with their respective authorities. Their mission is complementary to ICRC's one, which consists of disseminating, ensuring respect for and preparing the development of IHL. Cooperation and coordination between the ICRC and National Societies, as provided by the Statutes of the Movement, are more relevant than ever in the current international context where the overview of States' positions on IHL issues is more complex and the National Societies are more involved in the preparation of their authorities for international conferences on IHL matters. Stronger cooperation and coordination may outline the benefits of the respective roles of the ICRC and National Societies in IHL development.

The benefits of a stronger coordinated approach

National Societies have valuable knowledge on the national context, including the debates on IHL matters within the relevant bodies such as the government, parliament and National IHL Committee and the existing domestic legal framework. They can reach out to the relevant authorities to enquire and analyse their States' positions on IHL issues and their rationale. They can also help their authorities to clarify some aspects linked to the ICRC's positions on IHL matters. This knowledge can therefore help the ICRC to better identify IHL topics which are particularly sensitive and those where strong positions can be expected to further develop new IHL legal and policy frameworks if relevant. In this case, National Societies are key actors to elaborate in consultation with the ICRC, additional information papers, commitments to be proposed to States and some elements of language that could be suitable for different national contexts.

On the other hand, the ICRC's experience as observer and expert in IHL in international and regional fora where treaties and policies are discussed, its valuable knowledge on the latest developments of international diplomatic processes and on the main key issues, and its comprehensive overview of the different States' positions and those which can play a key role are very helpful for the National Societies' advocacy work with their authorities. The ICRC's analysis shared with National Societies gives a comprehensive view on the issues at stake and helps to identify the areas where National Societies can still move forward on possible commitments to be suggested at international meetings. Indeed, the international context and the positions of other States in international and regional

"Strengthening Compliance with International Humanitarian Law (IHL) Through its Promotion, Dissemination and Implementation" was jointly adopted by the EU, the EU Member States and their National Societies at the 33rd International Conference of the Red Cross and Red Crescent, Geneva, 9–12 December 2019, available at: <https://rcrcconference.org/pledge/strengthening-compliance-with-international-humanitarian-law-ihl-through-its-promotion-dissemination-and-implementation/>.

organizations broadly influence each country that usually coordinates its position with its regional partners.

These complementary approaches and expertise require more consideration of the interlinkage between the national and international levels. This would aim to consolidate a coherent Movement position in IHL development at the global level. Stronger coordination and cooperation through a continued dialogue between the ICRC and National Societies can ensure that common key messages, comments and recommendations on draft treaties or policies are well understood and disseminated in an accurate way to the States and consolidate the multiplier effects of their respective advocacy works and the credibility of the Movement's position.

Showcasing good practice

Three avenues can be further explored to increase the cooperation and coordination between the ICRC and National Societies. These suggestions are actually based on existing practice experienced by the Belgian Red Cross.

An ongoing dialogue between the ICRC and the National Societies on respective progress made with the authorities in the capitals, and towards the permanent missions of States to the main international organizations is key to ensure a coordinated and cohesive position of the Movement on IHL development. This dialogue could be intensified especially at key moments in the lead up to relevant international conferences or in the consultation process aiming to develop and adopt new IHL legal or policy frameworks. Divergent and convergent views on IHL issues between the concerned States and the Movement's position can be clarified to identify areas where some progress can still be made with the authorities. Communication can be facilitated through exchanges between the National Society and the ICRC to better identify IHL priority topics for humanitarian diplomacy work and possible actions to be carried out jointly or in a coordinated manner.

The development or use of informal networks within the Movement, such as the regional networks of National Societies' legal advisers or thematic consultative groups, can be relevant for exchanging experiences and good practice in humanitarian diplomacy and for initiating coordinated or joint initiatives. These groups aim to address the main concerns and challenges faced by the ICRC at the international level and by National Societies at the national level but also in similar regional contexts, through developing joint or coordinated strategies or actions at key moments (e.g. joint/standard letters, briefing notes, key messages or reactive lines) through the sharing and pooling of respective expertise and resources. These initiatives are opportunities to increase mutual support and the impact of the National Societies' work in their respective national contexts, especially in States whose position could be broadly influenced by the policies of other States members in the same regional organizations.

Even if National Societies have no international legal personality, such as the ICRC, they can still play a proactive role in supporting the recommendations

made by the ICRC during international conferences aiming to adopt new IHL legal or policy frameworks. The National Societies are members of the International Conferences of the Red Cross and the Red Crescent and have an equal right to participate in the elaboration of the resolutions on IHL, including in the Drafting Committee. Coordination with the ICRC before and during the International Conferences has, according to the authors, been improved through informal exchanges, consultation and briefings, not only during the consultation process, but also at the International Conferences. This has contributed to an increase in the cohesive approach of the Movement towards States and the visibility of National Societies. At other relevant international fora on IHL issues that allow the participation of international organizations, the National Societies could also be better represented alongside the ICRC, by participating in the delegation of the IFRC. This practice has increased during the past years including in the review conferences of some treaties on weapons,⁵⁸ and can be strengthened in the future so that National Societies can continue to actively support the Movement's voice in IHL development.

58 For example, the IFRC is directly or indirectly allowed to participate in the Review Conferences on the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, adopted on 18 September 1997 (according to Article 12 (3)) and on the Convention on Cluster Munitions, adopted on 30 May 2008 (according to Article 12 (3)).

How will international humanitarian law develop in the future?

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Abstract

This article tries to imagine how the development of international humanitarian law (IHL) could continue despite current difficulties, increasing the ownership and contribution of States and armed groups in this process. After suggesting that some traditional assumptions about IHL may need to be abandoned, it tries to suggest a new way in which IHL rules could be developed, through States adopting together core obligations and principles and each State and armed group then specifying the details internally, but publicly. Finally, it stresses the importance and difficulties of involving non-State armed groups in this process.

Keywords: international humanitarian law, development, law-making, sources, future, States, armed groups.

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Preliminary remark

This article has been written and submitted – and the ideas expressed in it were developed – before the international armed conflict (IAC) between Russia and Ukraine became on 24 February 2022 a reality that may influence fundamentally how international humanitarian law (IHL) develops in the future. There are both new fears and new hopes. The separation between *jus ad bellum* and *jus in bello* is challenged in many circles. IACs, for which IHL is already best developed, may

* I would like to thank Ms Lizaveta Tarasevich, LL.M., teaching and research assistant and doctoral student at the University of Geneva, for her thorough research for and comments on this contribution.

become again a more important phenomenon. Many States have shown in their discourse an unprecedented commitment to IHL. It is too early to judge whether this will change IHL and how it develops. However, in particular if the IAC in Ukraine remains an exceptional phenomenon and if many central IHL issues, in particular on non-international armed conflicts (NIACs), continue to profoundly divide States, the ideas expressed in this contribution remain relevant.

Introduction

The Nobel Prize in physics winner Niels Bohr is reported to have said: “Prediction is very difficult, especially if it is about the future!” The future of IHL raises questions of substance (which rules will we need and which rules will we be able to get?) and of process (how can future rules of IHL be developed?). In both respects many other branches of international law are currently equally under fire. States are unable to find a consensus on many issues on which the international community has pressing normative needs. They are even unable to agree to start a process that might lead to rules responding to those needs. What is particular about IHL is that ideally it would not need to develop at all, because human societies would no longer engage in organized armed violence and the object that IHL regulates – armed conflicts – would therefore disappear. IHL will thus always remain a pragmatic endeavour.

On the substance we can expect that the development of IHL rules will continue to confront dilemmas along different parameters. First, the need to make a compromise between humanitarian aspirations and realism will continue to exist. Second, a good balance will have to be found between rules meeting new, in particular, technological, challenges and rules on the existing, traditional forms of armed violence, which still affect the greatest number of victims. Third, the tension will persist between stating timeless general principles (which will only protect if belligerents act in good faith) and detailed regulations, which will be quickly outdated and will inevitably turn out to be unrealistic in certain armed conflicts. NIACs will probably also continue to have the greatest humanitarian impact. Mankind must even hope so, because an IAC between great powers may mean its end. The rules regulating NIACs will continue to be limited by States’ reluctance to treat rebels – regularly labelled as “terrorists” – as equals under IHL and the legal, and in many armed conflicts real, inequality between the parties.

This contribution, however, aims to focus on the procedural challenge of how IHL rules can be developed in the future. As all of IHL, the possible processes we explore are either unrealistic or unsatisfactory; they also bear the risk of giving ill-intentioned States an opportunity to weaken the existing law – at least the law as it appears in the treaties and the International Committee of the Red Cross (ICRC) Customary Law Study.¹ Both unfortunately do not correspond

1 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in May 2022).

to the real conduct of most belligerents. At the same time, to adapt the law to the actual conduct of belligerents may be satisfactory from a normative point of view, but not for those affected by armed conflicts.

Even in this framework, a disclaimer is necessary. It may be that the existing processes of (hopefully) adopting new treaties, or, if this is not possible, at least “non-binding” “best practices”, “manuals” in “expert processes”, or “interpretive guidance”, all claimed not to aim at new rules, and hoping that “official” State practice develops new rules of customary law are the best we can get. However, even the methods not aiming at new treaty rules have recently encountered considerable resistance by States. Some assumptions underlying recent attempts that failed or were criticized will be challenged hereafter. The war victims deserve such a reality check and some thinking outside the box in this respect, although such assumptions, which are traditionally also those of the author of these lines, may unfortunately be correct. It may also be that the international atmosphere changes again and States will be ready to adopt new rules as they did after the First and Second World Wars but this time hopefully not after a major war. Some have suggested that the time of unilateral IHL making by States has come.² However, this is incompatible with the very nature of international law consisting of common rules. It would privilege unduly some powerful Western States and will not influence the conduct of their enemies, including armed groups. Alternatively, if all States can and must be involved in such “unilateral IHL making”, this is another description of the traditional, cumbersome and mysterious process of creating customary rules.

I will therefore start this article by challenging some assumptions about the contemporary development of IHL. Next, an additional, new way of how IHL rules could be developed, drawn from experience made in other branches of international law, will be described. Finally, the importance and difficulties of involving armed non-State actors (hereafter: armed groups) in the development of rules addressed to them will be stressed.

Challenging some current assumptions

States do not want to adopt new IHL rules

The current wisdom is that States are no longer ready to adopt new IHL rules,³ in the contemporary political environment, advised by lawyers imagining future

2 Yahli Shereshevsky, “Back in the Game: International Humanitarian Lawmaking by States”, *Berkeley Journal of International Law*, Vol. 37, No. 1.

3 See, e.g., William H. Boothby, *Conflict Law*, Springer, New York, 2014, p. 72; John B. Bellinger III and Vijay M. Padmanabhan, “Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 205; Emily Crawford, “From Inter-state and Symmetric to Intrastate and Asymmetric: Changing Methods of Warfare and the Law of Armed Conflict in the 100 Years Since World War One”, *Yearbook of International Humanitarian Law*, Vol. 17, 2014, p. 112.

circumstances in which they cannot respect a given rule or in which their adversaries, non-governmental organizations (NGOs) or lawyers before domestic courts can exploit those rules for “lawfare” purposes. Like other traditional wisdoms, this is based upon plenty of evidence. Since 1949, the Geneva Conventions could not be replaced, as they had been in the previous eighty-five years, every twenty-five years by an updated series of treaties. Since 1977, outside the case of weapons treaties mentioned below, there has been no more major update of the rules. This is also due to the increase in the number of States and diversity among them, but equally to the fact that there is today a near consensus that the substantive rules are largely adequate and that what is missing is better implementation mechanisms – a field in which IHL has never been strong.

Nevertheless, to mention only progress in the form of treaty rules, and precisely in the field of enforcement, the Rome Statute of the International Criminal Court (ICC) was adopted in 1998 and now has 123 States parties.⁴ True, the Court has many weaknesses, impunity for war crimes is still the rule, and States became much more reluctant towards the ICC when they realized that it may also go after their own leaders. Nevertheless, from a conceptual point of view it nears a miracle for international law, which never accepted compulsory jurisdiction of an ordinary court over its subjects – States – that States parties accepted in the Rome Statute compulsory jurisdiction by a court over non-subjects – individuals, thus piercing the corporate veil of States and their sovereignty in criminal matters, of which they are so jealous. Moreover, the ICC Statute is not alone. States have accepted new treaty rules on such a delicate matter as the arms trade or banning anti-personnel landmines and cluster munitions. Those treaties are still, just as the Rome Statute, far from being universally binding but this does not mean that they do not influence the conduct of States non-parties.

On the other hand, we must remember that even the last major success in updating IHL, the 1977 Additional Protocols, had to be achieved in a profoundly divided international environment, marked by the cold war and the end of decolonization.

Therefore, whenever a window of opportunity arises in world politics, pushed by like-minded States forming coalitions of the willing on a certain subject and Western public opinion sensitive on one subject, the adoption of new treaty rules is still an option, which should not be discarded by cynicism and defeatism. States are cold monsters,⁵ but the State is also us.⁶ It may be that our times and the attitude of most States require “guerrilla tactics with cluster bombs” (that is, hoping that in the spur of the moment one piece of shrapnel will hit and obtain the necessary consent of States to achieve some progress), rather

4 Rome Statute of the ICC, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002).

5 (“Staat heisst das kälteste aller kalten Ungeheuer”): Friedrich Nietzsche, *Also sprach Zarathustra, Ein Buch für Alle und Keinen*, Naumann, Leipzig, 1903, p. 64.

6 Political Report of the Central Committee of the Russian Communist Party for the 11th Party Congress, presented by Vladimir I. Lenin, 27 March 1922.

than pursuing ten-year-long processes aiming at consensus within a profoundly divided international community.

IHL rules must be developed by consensus

A second traditional wisdom, which does not always correspond to a legal requirement, is that IHL rules, and in particular IHL implementation mechanisms, must be adopted by consensus.⁷ The strife for consensus is based upon the idea that IHL rules must be the same for both parties to an armed conflict, because armed forces cannot be trained to respect different rules depending on who is their adversary and because IHL rules adopted by a majority of States never involved in armed conflicts would be meaningless if they were opposed by the few States most often involved in armed conflicts. Such desire for consensus made the recent initiative aimed at enhancing respect for IHL through the adoption of a new implementation mechanism, taken by the ICRC and Switzerland, fail.⁸ A large majority at the International Conference of the Red Cross and the Red Crescent was in favour of a voluntary reporting mechanism leading to non-confrontational, non-politicized and non-contextual discussions on the respect of IHL, but a few States were opposed.

However, the justification that the rules must be the same for both parties is, first, anyway only pertinent for the fortunately few IACs still existing. In such conflicts, the reciprocal applicability of IHL treaties only between their parties ensures that both parties are bound by the same rules. For the most frequent NIACs, the equality of States and armed groups before IHL does not depend on a consensus between States but constitutes a major challenge we have to discuss separately. Second, technically, armed forces even of States parties to all IHL treaties already now have to be trained to comply with at least four different sets of rules: the entirety of IHL treaty law if confronted with another State party to those treaties; the Geneva Conventions and customary rules if confronted with a State not party to Protocol I; Article 3 common to the four Geneva Conventions and customary law of NIACs for some NIACs; common Article 3, Protocol II and customary law of NIACs if confronted on their territory with an armed group which, under responsible

7 See the very accurate description of Swiss and ICRC efforts to get a new compliance mechanism for IHL: Emmanuela-Chiara Gillard, “Promoting Compliance with International Humanitarian Law”, *Chatham House Briefing*, October 2016, pp. 3 and 5, with references. Legally, the consensus ideal is only foreseen for the International Conference of the Red Cross and the Red Crescent in Article 11(7) of the Statutes of the International Red Cross and Red Crescent Movement, 1986, as amended in 2016, and in Rule 19 of the Rules of Procedure of the International Red Cross and Red Crescent Movement, 1986, as amended in 1995; the consensus requirement also exists in disarmament fora.

8 ICRC, “No Agreement by States on Mechanism to Strengthen Compliance with Rules of War”, 10 December 2015, available at: <https://www.icrc.org/en/document/no-agreement-states-mechanism-strengthen-compliance-rules-war>; Helen Durham, “Strengthening Compliance with IHL: Disappointment and Hope”, *Humanitarian Law & Policy Blog*, 14 December 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/>; and ICRC, *Strengthening Compliance with International Humanitarian Law: Concluding Report*, 32IC/15/19.2, Geneva, October 2015, available at: https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-Strengthening-Compliance-with-IHL_EN.pdf.

command, exercise such control over a part of that territory as to enable it to carry out sustained and concerted military operations and to implement Protocol II.⁹ When we take the treaty obligations concerning specific weapons into account, the picture gets even more varied. Third, the consensus approach confers a “triple victory” on those who have been described as “digging the grave of IHL” or, in other words, those who do not want better protection to exist in a given domain. “They slow the process down; they water down the text, and then do not even ratify the treaty once adopted.”¹⁰ They thus leave the States parties that wanted to increase protection with a text that falls short of their original wishes.

To avoid this unsatisfactory situation, some States that genuinely wanted improvement resorted to what is referred to as the “Ottawa process” because it was applied for the first time during the deliberations on the Ottawa Convention banning anti-personnel landmines.¹¹ In this process, only those States that wished to achieve a ban were involved in negotiating the standards that opponents were then free to agree to. This process was successfully repeated for the Oslo Convention banning cluster munitions.¹² This may be an avenue for future negotiations of treaty rules, soft law instruments and on new implementation mechanisms. Even those who act as “grave diggers” in the current processes may become more constructive if they know that their opposition, often justified by bad faith arguments, cannot always prevail. Obviously, the majority behind such new rules must nevertheless be large, representative, and genuine enough.

As States do not want any new development of IHL, normative needs must be met by claiming to interpret or determine existing law

Linked to the previous assumption is the prevailing option taken by all those who want to improve the protection of war victims to claim that they do not want to develop new rules – as if new rules were an obscene suggestion – but only interpret or clarify existing law.¹³ Thus, the ICRC stresses in its Interpretive Guidance on the Notion of Direct Participation in Hostilities that it does not “endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted”.¹⁴ In

9 See Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 1(1).

10 Yves Sandoz, “Le demi-siècle des Conventions de Genève”, *Revue internationale de la Croix-Rouge*, Vol. 81, No. 834, 1999, p. 241 (my translation).

11 See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211, 18 September 1997 (entered into force 1 March 1998) (the “Ottawa Convention”). On the “Ottawa Process”, see, generally, Stuart Maslen and Peter Herby, “An International Ban on Anti-Personnel Mines: History and Negotiation of the ‘Ottawa Treaty’”, *International Review of the Red Cross*, Vol. 38, No. 325, 1998, pp. 693–8.

12 See Convention on Cluster Munitions, 2688 UNTS 39, 30 May 2008 (entered into force 1 August 2010).

13 See, generally, for a critical but detailed assessment of expert processes, Anton Orlov Petrov, *Expert Laws of War: Restating and Making Law in Expert Processes*, Elgar, Cheltenham, 2020.

14 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009, p. 9.

a similar fashion, States themselves stress in the Montreux Document on Private Military and Security Companies that it should “not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law”.¹⁵ This is also what they declared in the Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict,¹⁶ although they changed the law in certain respects.¹⁷ The recent tendency not to separate in some cases law and policy recommendations or reasons¹⁸ similarly manifests this concern not to give the impression to change the existing law, as does the fact that in other cases the ICRC explicitly limits itself to policy recommendations.¹⁹

First, however, in a system without a centralized legislator as is international law the borderline between legislation and interpretation is much more fluid than in domestic law. Second, are States so stupid that they do not realize the trick? If they do, they become reluctant to any interpretation, claim that it – and not only legislation – must be reserved to States,²⁰ and no longer express their understanding of their IHL obligations, fearing that someone will deduce from it customary obligations or subsequent practice relevant for the interpretation of treaty rules.²¹ Some States had the impression that their arms were twisted in some past exercises determining customary law or interpreting rules. They are therefore now sceptical of any interpretation that is not authentic,

- 15 ICRC, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, Montreux, 17 September 2008 (Montreux Document), p. 9, available at: <https://shop.icrc.org/the-montreux-document-on-private-military-and-security-companies-pdf-en.html>. See also International Institute of Humanitarian Law, *The Copenhagen Process on the Handling of Detainees in International Military Operations. The Copenhagen Process: Principles and Guidelines*, 2012, p. 1, para. II, available at: <https://ihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.
- 16 Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict, Global Coalition to Protect Education from Attack, 2014, available at: https://protectingeducation.org/wp-content/uploads/documents/documents_guidelines_en.pdf.
- 17 Marten Zwanenburg, “Keeping Camouflage Out of the Classroom: The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict”, *Journal of Conflict & Security Law*, Vol. 26, No. 2, pp. 257 and 282–3.
- 18 See, e.g., ICRC, *International Humanitarian Law and Challenges of Contemporary Armed Conflicts*, Geneva, October 2011, pp. 21–2 and 48–53, available at: <https://www.icrc.org/en/doc/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>. See, also, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, as Annex 1 to ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Document No. 30IC/07/8.4, Geneva, October 2007, published in *International Review of the Red Cross*, Vol. 87, No. 858, 2005.
- 19 ICRC, “Explosive Weapons: Civilians in Populated Areas Must be Protected”, 26 January 2022, available at: <https://www.icrc.org/en/document/civilians-protected-against-explosive-weapons>.
- 20 Sean Watts, “Interpretation in the Updated GCIII Commentary”, *Articles of War*, 15 December 2020, available at: <https://lieber.westpoint.edu/interpretation-updated-gciii-commentary/>; Michael W. Meier, “The Updated GCIII Commentary: A Flawed Methodology”, *Articles of War*, 3 February 2021, available at: <https://lieber.westpoint.edu/updated-gciii-commentary-flawed-methodology/>; Ronald Alcalá, “*Opinio Juris* and the Essential Role of States”, *Articles of War*, 11 February 2021, available at: <https://lieber.westpoint.edu/opinio-juris-essential-role-states/>.
- 21 Michael N. Schmitt and Sean Watts, “State *Opinio Juris* and International Humanitarian Law Pluralism”, *International Law Studies*, Vol. 91, No. 1, 2015, p. 171.

even if it is made according to the ordinary rules of treaty interpretation of international law.

If IHL was reopened, States would weaken it

I have previously written:

States might take advantage of a new general revision of the IHL treaties 70 years after the Conventions to weaken rather than to improve protection of war victims, especially with regard to those they classify as “terrorists”. This concern was one of the main reasons why in 1977 no new generation of Geneva Conventions was drafted, but only “additional” Protocols that could not open up the existing law to negotiations. I think that Common Article 3 would today no longer be included into generally revised treaties on IHL.²²

Perhaps this assumption is too defeatist or even wrong. True, no consensus could recently be found for a very harmless ICRC initiative to specify the rules of detention in NIACs.²³ Most States, however, participated constructively in those discussions. True, States are reluctant towards any rules which give “terrorists” rights and virtually all armed groups are considered as such at least by the State they are fighting against. Nevertheless, States urged each other both in United Nations (UN) General Assembly (UNGA) and UN Security Council (UNSC) resolutions to ensure that counterterrorism legislation and measures do not impede humanitarian activities or engagement with all relevant actors foreseen by IHL.²⁴ More generally, in the field of international human rights law (IHRL) States have adopted new protective rules, although – contrary to IHL – every State is bound every time in all its activities by IHRL, and human rights interfere at least as much in “internal affairs” as IHL. Thus, States have in recent years been ready to adopt and widely ratify treaties on disappeared persons²⁵ or the rights of persons with disabilities,²⁶ which obliged many of them to change their domestic practices and to proceed to considerable investments. What is more, in 2002 States adopted an optional protocol to the UN Convention against torture that

22 Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 45. See also Michael Bothe, Karl Joseph Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, 2nd ed., Martinus Nijhoff, Leiden, 2013, pp. xxii and 7; Nicolas Michel, “Propos introductif. Le droit international humanitaire, entre frustrations, réussites et interrogations”, in Jean-François Flauss (ed.), *Les nouvelles frontières du droit international humanitaire*, Bruylant, Brussels, 2003, p. 13.

23 ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Concluding Report*, Document No. 32IC/15/19.1, Geneva, October 2015, available at: https://rcrcconference.org/app/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

24 UNGA Resolution 70/291, 15 June 2017; UNSC Resolution 2469, 28 March 2019, para. 24.

25 International Convention for the Protection of All Persons from Enforced Disappearance, 2716 UNTS 3, 20 December 2006 (entered into force 23 December 2010).

26 Convention on the Rights of Persons with Disabilities, 2515 UNTS 3, 13 December 2006 (entered into force 3 May 2008).

adds an innovative mechanism of scrutiny in a very sensitive field.²⁷ Perhaps, we have to admit that once a dynamic exists in favour of dealing with a serious human or humanitarian problem, only a few States want to lose face in front of other States as well as domestic and international public opinion, in particular if negotiations are not conducted in private. It may be that some of the States accepting such rules trust that they only constitute rhetoric and will never be enforced against them. They underestimate, however, the dynamics of public international law and civil society. Even States seriously violating women's rights do no longer dare to speak out to defend gender inequality. Hypocrisy is preferable to rejection because it offers an entry point to obtain improvements in practice.

On the other hand, if the worst-case scenario occurs and States openly declare that they are no longer prepared to accept many detailed protective rules, they could have anyway modified them through customary international law or new treaty rules. In addition, does a clear rejection by States not allow the finding of a new basis and starting new negotiations on rules States are prepared to respect? Are rules which remain in the books, but which are regularly and openly not implemented by States, useful from a protection point of view? Do they not undermine the credibility of IHL?

UN involvement would politicize IHL

The ICRC and Switzerland have fought until recently successfully to keep the development of IHL outside the UN system.²⁸ The 1977 Additional Protocols were among the last very few universal law-making treaties elaborated outside the UN system (if we neglect for a moment international trade law developed in the World Trade Organization context). There are good conceptual reasons for such separation, because under the UN Charter the priority of the UN should be strengthening and enforcing *jus contra bellum*, while IHL of IACs applies when this fails²⁹ and must treat both parties to an armed conflict equally, irrespective of the legitimacy of their cause. The UN has, however, become today the place where international law is developed. It has a mandate and practical experience in human rights and humanitarian matters. As for the fear that in the UN fora debates are politicized, is law-making not always a political exercise? Must it not result from genuine political debates if the results are to be respected by States? Apart from that, how can one expect that States, represented by the same diplomats in the same town, Geneva, keep debates less politicized, more

27 Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 UNTS 237, 18 December 2002 (entered into force 22 June 2006).

28 David P. Forsythe, *The Humanitarians: The International Committee of the Red Cross*, Cambridge University Press, Cambridge, 2005, pp. 251–2.

29 In 1949, the International Law Commission refused to codify IHL because “public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace”. See International Law Commission, *Yearbook of the International Law Commission*, 1949, p. 281.

constructive and conduct them in better faith in one forum than in another forum? The debates on IHL in the last two International Conferences of the Red Cross and the Red Crescent on IHL were very politicized and finally not successful in strengthening IHL. On the other hand, new serious sectoral human rights treaties have been elaborated under the aegis of the UN Human Rights Council³⁰ and even some treaties dealing with IHL matters are the result of deliberations within the UN fora. Since the year 2000, welcomed developments in treaty law in the fields of weapons³¹ and the protection of children³² have resulted from the work in the UN fora, while only one treaty has come out of a Red Cross/Red Crescent forum.³³

If the ICRC engaged in strong advocacy in favour of new IHL rules, it would jeopardize its operational dialogue with major powers

It is the main strength of the ICRC that it combines protection of people affected by armed conflicts through humanitarian activities in the conflict areas and normative action in Geneva and New York. Its priority is nevertheless understandably having access to the conflict victims, to protect and assist them. To get access and to conduct an operational dialogue that leads parties to armed conflicts to better respect persons affected by those conflicts, the ICRC keeps its working modalities neither confrontational nor public. Although normative action in favour of better IHL rules and mechanisms must equally be based on sound legal, technical and humanitarian expertise, one may wonder whether at a certain point it does not need public advocacy and confrontation with those who – in good faith or bad faith – oppose such developments. The problem is that both the humanitarian and the normative action are addressed to States (the former much more than the latter also to armed groups, but this is an aspect we will come back to).

It is therefore understandable that ICRC representatives are reluctant to confront in their normative action the same State whose consent, cooperation and funding they need for their humanitarian action to be successful. It is interesting to notice that in some fields, such as weapons, the ICRC is very

30 See International Convention for the Protection of All Persons from Enforced Disappearance, above note 25; Convention on the Rights of Persons with Disabilities, above note 26; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above note 27.

31 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols), 1342 UNTS 137, 10 October 1980 (entered into force 2 December 1983); Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Protocol V), 2399 UNTS 100, 28 November 2003 (entered into force 12 November 2006).

32 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 UNTS 222, 25 May 2000 (entered into force 12 February 2002).

33 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 2404 UNTS 261, 8 December 2005 (entered into force 14 January 2007).

outspoken and relatively confrontational.³⁴ It advocated strongly and publicly the adoption and ratification of a treaty banning nuclear weapons,³⁵ although its main funders, the most powerful States it is confronted with in its operational dialogue, and the permanent members of the UNSC, are opposed to that treaty. In other, more down-to-earth aspects, such as its failed efforts to strengthen IHL protecting persons deprived of their liberty in NIACs, it has proceeded much more cautiously and confidentially, avoiding access of civil society and even Red Cross and Red Crescent Societies' access to the debates.³⁶ The ICRC feared – fuelled by State representatives – that public advocacy or involvement of civil society would stall the process, which is now stalled even without those factors. True, the reports on the discussions held are publicly available³⁷ but they do not attribute any opinions to individual States – which makes any mobilization of domestic or international public opinion or parliaments impossible.

One may wonder whether the ICRC can convince States to accept again the difference between its operational role, on the one hand, and its general advocacy for the progressive development of IHL and new enforcement mechanisms, on the other hand. In its operational role, the ICRC has excellent reasons to pursue its confidential and cooperative approach. In its role as a guardian and promoter of IHL outside specific operational contexts, the ICRC should try to become consistently an advocacy organization it once was, by mobilizing public opinion against their reluctant governments and cooperating with civil society, as it already does concerning the ban on nuclear weapons³⁸ and lethal autonomous weapons systems.³⁹ It has successfully mobilized public opinion and civil society support in the past when it came to the banning of chemical weapons in the 1920s⁴⁰

34 See, generally, Ritu Mathur, *Red Cross Interventions in Weapons Control*, Lexington Books, New York, 2017.

35 ICRC, “Nuclear Weapons: Overdue Debate on Long-Term Impact Begins”, 13 February 2014, available at: <https://www.icrc.org/en/doc/resources/documents/news-release/2014/02-11-mexico-nayarit-impact-nuclear-weapon-conference.htm>; ICRC, “Why States Must Sign and Ratify the Treaty on the Prohibition of Nuclear Weapons: A Plea for Humanity”, Speech given by Mr. Peter Maurer, President of the ICRC, at the signing ceremony of the Treaty on the Prohibition of Nuclear Weapons, UN, New York, 26 September 2018, available at: <https://www.icrc.org/en/document/icrc-president-why-states-must-sign-ratify-treaty-prohibition-nuclear-weapons-plea-humanity>; ICRC, “Urgency to Rid the World of Most Destructive Weapon Ever Created”, 27 September 2018, available at: <https://www.icrc.org/en/document/icrc-statement-high-level-plenary-meeting-commemorate-international-day-total-elimination>; Robert Mardini, “Op Ed: Nuclear Weapons are Finally Outlawed; Next Step is Disarmament”, 22 January 2021, available at: <https://www.icrc.org/en/document/nuclear-weapons-are-finally-outlawed-next-step-disarmament>.

36 See ICRC, above note 23.

37 ICRC, “Strengthening IHL Protecting Persons Deprived of Their Liberty in Relation to Armed Conflict”, 1 April 2017, available at: <https://www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0>.

38 ICRC, “A Date to Remember: The Banning of Nuclear Weapons in 2021”, 21 January 2021, available at: <https://www.icrc.org/en/document/date-remember-banning-nuclear-weapons-2021>.

39 ICRC, “Autonomous Weapons: The ICRC Recommends Adopting New Rules”, 3 August 2021, available at: <https://www.icrc.org/en/document/autonomous-weapons-icrc-recommends-new-rules>.

40 See ICRC, “The ICRC in WWI: Efforts to Ban Chemical Warfare”, 11 January 2005, available at: <https://www.icrc.org/en/document/icrc-wwi-efforts-ban-chemical-warfare>.

and anti-personal landmines in the 1990s.⁴¹ It may, however, be necessary to build up a coalition with others to be successful, which is obviously impossible when it proceeds confidentially.

More and more detailed rules offer better protection

Over the history of modern, codified IHL, the number of rules in IHL treaties has constantly increased. The Geneva Conventions and Additional Protocols alone comprise nearly 500 substantive articles, several of them with many paragraphs. The ICRC has found 161 rules of customary IHL, out of which 136, arguably even 141, apply in both IACs and NIACs. At least the treaty rules have become more and more detailed. The rules of the two UN Human Rights Covenants are much shorter and more general, although they cover a greater variety of circumstances. It is argued that IHL rules must be so detailed because they must be applied by practitioners, soldiers on the battlefield. However, few soldiers and even officers, but for that matter also ICRC delegates or war victims, often consult the Geneva Conventions. Hopefully, their legal advisors do, if they exist. More serious arguments are that unlike IHRL, IHL rules are more rarely specified by judicial decisions, recommendations, general comments or opinions of treaty bodies. In addition, IHL unlike IHRL consists mainly of objective rules of conduct rather than of subjective rights. There exists also the hope – some would label it an illusion – that the more detailed black-and-white rules are, the less controversies will arise concerning their meaning and interpretation. All this corresponds to a general tendency, that started in Anglo-Saxon legal systems (although it is not due to their common law tradition) and has now also contaminated civil law countries, towards more detailed legislation and contracts, trying to foresee and regulate every possible situation.⁴²

The flip side of this rush to the detail is obviously that rules are more quickly outdated. Furthermore, regulating fifteen situations instead of setting only one principle may be interpreted by parties to armed conflicts as implying that in the sixteenth situation falling under the principle they are free in their conduct. In addition, the more detailed rules are, the easier lawyers advising their State and military practitioners will imagine situations in which they cannot be respected – and therefore advise their State not to accept them or to suggest exceptions, which make the rules even more detailed.

IHL is mainly applied in the field, during armed conflicts, and not by courts

It is not only to explain why IHL rules must be detailed and precise that it is often noted that IHL – contrary for instance to IHRL – is most often applied in combat

41 See Peter Herby, “1997: The Year of a Treaty Banning Anti-Personnel Mines?”, *International Review of the Red Cross*, Vol. 37, No. 317, 1997, pp. 193–5.

42 See, generally, Julian Hermida, “Convergence of Civil Law and Common Law Contracts in the Space Field”, *Hong Kong Law Journal*, Vol. 34, No. 2, 2004. See, also, Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, *American Journal of Comparative Law*, Vol. 15, No. 3, 1966–1967, pp. 424–6.

and by non-lawyers rather than by courts,⁴³ which also reduces the possibility of developing it through precedents, so dear to the common law tradition. This is certainly true for the immediate compliance with many rules, for example on the conduct of hostilities. However, this should not be seen as an axiom. An increasing number of judgments of international criminal tribunals have interpreted and, in many cases, clearly developed IHL – correctly or incorrectly. Astonishingly, States have reacted to them with much less criticism than to the developments suggested by the ICRC. Imagine the ICRC had suggested as the very first, in the commentaries of IHL treaties it publishes or in an interpretive guidance, that IHL of IACs is very similar to IHL of NIACs, that war crimes exist in NIACs, that States have to apply IHL of IACs when fighting an armed group that is under overall control of another State, and that persons in the power of their own State of nationality are protected persons under Geneva Convention IV based upon their allegiance. All this has been decided by the International Criminal Tribunal for the Former Yugoslavia in the Tadić case⁴⁴ and States have either not reacted or accepted such developments, although they are much more revolutionary than the interpretation of the notion of direct participation in hostilities suggested by the ICRC in its often-criticized Interpretive Guidance⁴⁵ – and some of them are unrealistic or even wrong.⁴⁶

It may be that we should build on this phenomenon to develop (and not only enforce) IHL in the future through court cases, adapting it to new developments in warfare. This is not only the case for decisions of international tribunals, but even more so of domestic courts, which develop precedents, a source of law in common law tradition, and which are binding in any State respecting the rule of law upon the executive branch, the administration and even the armed forces. Their judgments are viewed with less suspicion and tend to have a stronger impact on the public opinion of their respective societies.

During ongoing armed conflicts, national courts may be seized to review the compliance of certain State measures with IHL, for instance, relating to the

43 I myself still wrote so in Marco Sassòli, “International Humanitarian Law and International Human Rights Law”, in Ben Saul and Dapo Akande (eds), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, Oxford, 2020, p. 399.

44 See International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Tadić*, Case No. IT-94-1-A, Decision on Jurisdiction (Appeals Chamber), 2 October 1995, paras 96–126 and 128–36, and Judgment (Appeals Chamber), 15 July 1999, paras 115–45 and 163–9, respectively.

45 For criticism of the Interpretive Guidance, see Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, *New York University Journal of International Law and Politics*, Vol. 42, No. 3, 2010; Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010; W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, 2010.

46 For a detailed criticism of the Tadic decisions, see Marco Sassòli, “La première décision de la Chambre d’appel du Tribunal pénal international pour l’ex-Yougoslavie: Tadic (compétence)”, *Revue générale de droit international public*, Vol. 100, 1996, pp. 101–34; and Marco Sassòli and Laura M. Olson, “The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?”, *International Review of the Red Cross*, Vol. 82, No. 839, 2000, pp. 733–69.

law of occupation⁴⁷ or the rules on detention.⁴⁸ In post-conflict situations, it is mainly domestic courts that try individuals and impose reparations for IHL violations.

Admittedly, this avenue meets some obstacles. First, for national courts to be able to enforce IHL rules, dualist States must adopt legislation of transformation, and even monist States must adopt domestic legislation for IHL rules that are not self-executing. Second, immunities under domestic law may bar a national court from exercising jurisdiction over acts committed by an individual during an armed conflict. Third, several doctrines prevent courts from adjudicating certain cases. These include the act of State doctrine, the political question doctrine and the doctrine of *forum non conveniens*.⁴⁹ In some unfortunate instances, national courts are openly apologetic or even legitimize the role of illegal State policies.⁵⁰ This may result in incorrect and harmful jurisprudence that may then be adopted and cited by other courts.⁵¹

To sum up, the role of international and domestic courts deserves to be strengthened. To achieve this, not only judges, but also attorneys, must be trained in IHL. Indeed, the best way to guarantee sound court decisions is making sure that the parties bring forward sound arguments. It is therefore correct that the ICRC prevention strategy puts emphasis on training lawyers and on ensuring that IHL is correctly implemented in domestic law.⁵²

Possible additional ways to develop IHL in the future

Overcoming some assumptions as suggested above, the traditional way to develop IHL may be tried again in the future, although with a slightly modified approach. In addition, when the assumptions mentioned above are overcome and based upon experiences made in other branches of international law described hereafter, a new, additional way of developing IHL may be tried out.

Experience made in other branches

International Labour Organization core labour standards

International Labour Law is a branch of international law codified in much more detail than IHL: in 190 Conventions and 206 Recommendations, some dating as

47 See, e.g., David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, 2nd ed., Oxford University Press, Oxford, 2021.

48 See, e.g., United States Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557 (2006), No. 05.184, 29 June 2006.

49 Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law*, Oxford University Press, Oxford, 2014, pp. 69–81.

50 *Ibid.*, pp. 13–67; D. Kretzmer and Y. Ronen, above note 47, p. 190.

51 S. Weill, above note 49, p. 67.

52 ICRC, *Prevention Policy*, Geneva, 2010, p. 7; ICRC, “Implementing International Humanitarian Law: From Law to Action”, *Legal Factsheet*, 2019.

far back as 1919, and six Protocols. On the initiative and in the framework of the International Labour Organization (ILO), States identified in the 1998 ILO Declaration on Fundamental Principles and Rights at Work four core principles, expressed in eight Conventions, which are binding upon member States independently of their ratification.⁵³ They made, however, a distinction between the existence of an obligation and its scope and specific content,⁵⁴ the latter not being binding upon all member States of the ILO. One of the objectives of the declaration was to encourage the governments, and other actors, such as corporations and financial institutions, to specifically focus on and enforce those standards.⁵⁵ The Declaration establishes a “soft monitoring system”. Member States that are not parties to one or several core Conventions are asked to report on the status of the relevant rights and principles in their country yearly. Such reports are then reviewed by the Committee of Independent Expert Advisers and in turn, their observations are considered by the ILO’s Governing Body. This mechanism does not replace but is additional to the existing ILO treaty monitoring mechanisms.

Interestingly, there is no evidence of a detrimental impact on the attention given to other rights.⁵⁶ The analysis of the ratification rates shows that the decline in ratifications of International Labour Law conventions did not start with the Declaration.⁵⁷ On the contrary, it seems that the Declaration and the “ratification campaign for fundamental conventions” have stimulated the ratifications of other conventions as well.⁵⁸ Apart from that, the general character of the Declaration and its reference to “principles”, that contrast the tradition of detailed prescriptions typical for conventions, do not seem to make protection “so decentralized and elastic as to be meaningless”.⁵⁹ On the opposite, it appears that the general character of commitments in the Declaration stimulated the progress to achieve “rights” going beyond and not limited to the provisions of the relevant instruments. This point can be illustrated by examples. Firstly, while the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) explicitly features only a rather limited number of grounds of discrimination, the Declaration and its follow-up address the range of constantly evolving grounds of discrimination in employment and occupation.⁶⁰ A second example is the new forms of forced labour, for instance, the forced labour dimensions of trafficking, which the Forced Labour Convention, 1930 (No. 29) could not possibly have foreseen and thus cover.⁶¹

53 ILO Declaration on Fundamental Principles and Rights at Work, 18 June 1998, para. 2.

54 Francis Maupain, “Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights”, *European Journal of International Law*, Vol. 16, No. 3, 2005, p. 451.

55 Philip Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime”, *European Journal of International Law*, Vol. 15, No. 3, 2004, p. 488.

56 F. Maupain, above note 54, pp. 458–63.

57 *Ibid.*

58 *Ibid.*, p. 460.

59 *Ibid.*, p. 452, citing P. Alston, above note 55, pp. 518–20.

60 *Ibid.*, pp. 453–4.

61 *Ibid.*

The Paris Agreement on Climate Change

As the 1992 Kyoto Protocol, a traditional instrument in the climate change regime, with detailed obligations and a rigorous monitoring system, failed to reach the goal set in terms of reduction of greenhouse gas emissions, States adopted in 2015, in the framework of the UN Framework Convention on Climate Change (UNFCCC), the Paris Agreement, which has to be read together with the detailed decision to adopt it (both are hereafter referred to as the Paris Agreement) and today has 196 States parties.⁶²

The legal techniques it uses are innovative in several respects.⁶³ It sets the common goal “to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty” and specifies it in three detailed goals (Article 2). The sub-goals are: to limit the temperature increase to 1.5°C above pre-industrial levels; increase the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development; and making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.

By 2020, States had to submit and most actually submitted their plans for climate action – Nationally Determined Contributions (NDCs), on the measures they will take to reduce their greenhouse gas emissions to reach the goals of the Paris Agreement as well as the actions they will take to build resilience to adapt to the impacts of rising temperatures. Every five years, every State party must submit more ambitious NDCs.⁶⁴ In addition, parties should submit – although an insufficient number of States actually did submit – long-term low greenhouse gas emission development strategies (LT-LEDS), which place the NDCs into the context of countries’ long-term planning and development priorities.

It is for our purposes interesting to note that the decision to adopt the Paris Agreement is addressed to a variety of non-State actors with a very diverse legal status, called “non-party stakeholders”,⁶⁵ which include intergovernmental organizations, regions, cities, civil society organizations and the private sector.

As far as monitoring is concerned, the Paris Agreement establishes an enhanced transparency framework (ETF). Under the ETF, starting in 2024, countries will report transparently on actions taken and progress in climate change mitigation, adaptation measures and support provided or received. The information gathered through the ETF will feed into the Global Stocktake, which will assess the collective progress towards the long-term climate goals. This will

62 The text of the decision and the agreement as an annex may be found in UN, Adoption of the Paris Agreement, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

63 Laurence Poisson de Chazournes, “Regards sur l’Accord de Paris – un accord sur le futur”, in Marta Torre-Schaub (ed.), *Bilan et perspectives de l’Accord de Paris (COP 21) – Regards croisés*, Institut de la recherche juridique de la Sorbonne, Paris, 2017, p. 97.

64 Paris Agreement, 12 December 2015 (entered into force 4 November 2016), Art. 4.

65 See UN, Adoption of the Paris Agreement, above note 62, paras 134–7 of the Decision.

lead to recommendations for countries to set more ambitious plans in the next round.

While the actual success of the Paris Agreement in terms of climate change mitigation is still limited and controversial,⁶⁶ the mechanisms established are nevertheless an interesting avenue in cases in which States do not want to take precise binding obligations but agree on an aim.

Features of a possible new way of developing IHL

The branches, the developments of which are described above, are obviously very different from IHL in many respects and their solutions cannot be mechanically transposed into IHL. Nevertheless, some experiences made in those branches may serve as inspiration. They have to be adapted to the specificities of IHL. Following such inspiration, combined with overcoming the assumptions discussed above, and mindful of the necessity and sensitivity of involving armed groups, the following may be a way of how IHL can be developed in the future.

First, based upon the widest possible consensus, but without starting the negotiations announcing that consensus will be needed, States should adopt, in order of preference at an International Conference of the Red Cross and the Red Crescent (which also includes national Red Cross and Red Crescent Societies, the ICRC and the International Federation of Red Cross and Red Crescent Societies), the UNGA, or in the UNSC, a declaration on core obligations and principles of IHL. An adoption by an International Conference of the Red Cross and the Red Crescent has the advantage of keeping such a development in a Red Cross/Red Crescent forum, of taking the unique role of the ICRC into account, and of allowing an active involvement of parts of civil society, National Red Cross and Red Crescent Societies, which may then also have an important role in the national mechanisms discussed below. A UNGA resolution would not be legally binding but could ensure procedural legitimacy and a certain democratic character, in particular if it results from the work of the Human Rights Council, with the largest possible involvement of civil society. A UNSC Resolution would be binding but could meet a veto by permanent members of the Council. Like in the ILO context, the core obligations and principles would not need to be newly invented but could be based upon existing treaty rules,⁶⁷ to which they would refer.

Second, States could undertake, in the Declaration, to individually specify those core obligations and principles, in conformity with their interpretation of their existing IHL treaty and customary law obligations, resulting in detailed rules

66 See, e.g., Ezgi Ediboğlu, “The Paris Agreement: Effectiveness Analysis of the New UN Climate Change Regime”, *University College Dublin Law Review*, Vol. 17, 2017.

67 E.g., Article 48 of Protocol I, reading, “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives”, which should be acceptable also for States not parties to Protocol I, or Article 27 of Convention IV, where the technical term “protected persons” could be replaced either by civilians or by all persons who are in the power of a party.

they undertake to comply with, and make those rules public. This would have important positive side-effects in terms of ownership and dissemination within a State. It would counter the – in my view erroneous – impression in some quarters of the Global South that IHL serves the interests of Western, Christian, rich, (technologically) developed countries, or more basically great power interests. Such national rules would also combat world-wide the erroneous impression that most States do not care about IHL, which is so detrimental to the credibility of IHL and the readiness of arms-bearers to respect it. The International Court of Justice (ICJ) has considered, although admittedly in the much less codified field of international environmental law, that domestic legislation instead of interpretation according to the standard methods of international law, is a normal way of specifying the scope and content of rules of international law.⁶⁸

The ICRC Advisory Services could certainly help States to formulate such rules and to avoid that they reinvent the wheel – the Geneva Conventions and Additional Protocols. However, States would not be barred from modifying existing IHL rules, if they consider that they are not realistic for them or do not provide for the best protection for victims of armed conflicts, as long as those changes are in line with the core obligations and principles. In addition, States would be encouraged to formulate rules on issues not yet covered by IHL that they are ready to comply with. The Declaration could also encourage non-State armed groups involved in NIACs to do the same, or – if such equal treatment between States and armed groups is unacceptable for States – armed groups could be encouraged by the ICRC and/or Geneva Call to do the same – and those organizations could provide armed groups the necessary advice in view of formulating such rules.

Third, each State could create a national mechanism commenting on the rules adopted, including on whether any deviation from existing IHL rules is based upon objective justifications, and their implementation.⁶⁹ Obviously, to fulfil its task meaningfully, such a mechanism should be sufficiently independent from the government services whose work it is commenting upon. Armed groups could do the same. It may be that this third aspect is not immediately acceptable to all States adopting the Declaration and can be implemented only at a later stage.

Fourth, in the future, one could foresee that each national mechanism makes an annual report public, which could then be discussed in a kind of periodic peer review by the body having adopted the Declaration, possibly based upon an evaluation by an expert body. One of the results of such a discussion could be that when the national rules and the reports of national mechanisms show a sufficient support for some new rules and for changing some existing rules, this can be translated into new treaty rules. It may be unacceptable, or even inappropriate, for such a review body composed of States to receive reports from

68 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 20 April 2010, p. 14, para. 205.

69 The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, above note 27, foresees a similar obligation to create a national mechanism, mainly for the purpose of monitoring the treatment of persons deprived of their liberty (Art. 17), but also to “to submit proposals and observations concerning existing or draft legislation” (Art. 19(c)).

mechanisms created by armed groups. In this case, a non-State expert body, e.g. linked to Geneva Call, could receive and review the rules adopted by non-State armed groups and the reports by their mechanisms and condense them into one report to the States' review body, which, without attributing certain rules and practices to certain groups, would identify trends of convergence and divergence and possible new rules.

Such a new way of developing IHL implies admittedly some risks and disadvantages. We have already discussed above the fear that States would take advantage of such a process to diminish and undermine their existing treaty obligations. We have also argued that the disadvantages of general compared to detailed rules are limited. This is particularly so if, as suggested here, the general rules would be specified at the State and armed group levels.

A major question concerns the relationship between the results and existing IHL rules. Several answers are possible. The formal answer of public international law is that, except in the rare case of *desuetudo*, the existing treaty obligations continue to be binding, as do the customary rules, although the latter could much more easily and informally be developed and amended by the process suggested here. Each set, the existing treaty rules and the new implementation rules adopted by each State and armed group would be implemented by their own enforcement systems. The risks of contradictions should not be over-evaluated. The core obligations and principles will, by definition, be drawn from existing IHL. The new domestic rules will simply show what many tried up to now to ignore: major divergences in the interpretation of existing treaty rules and in the assessment of customary IHL. In States governed by the rule of law, the probability that the domestic rules they will adopt will contradict their previously existing understanding of their IHL obligations is small. At best, some additional rules will appear; at worst some treaty rules will not be mentioned or military interests will be strengthened. As for States and armed groups less concerned by the rule of law, the new domestic (or internal) rules will at least show what can be expected from them – without destroying the dream that one day the ICJ can find the State responsible for every violation of its IHL obligations and that (international) criminal tribunals will hold members of both State armed forces and of armed groups accountable for every violation of the existing treaty and customary rules classified as war crime.

The other main disadvantage of the results of the process suggested is that both parties to an armed conflict are no longer necessarily bound by the same rules. Some powerful arguments have been made in favour of differential law for armed conflicts, although in the application of existing norms rather than when new norms are created.⁷⁰ This always risks ending up on a slippery slope, leading to a mixing up of *jus ad bellum* and *jus in bello*. Nevertheless, is equal application of IHL to all parties to a given conflict not an axiom, which does no longer correspond to contemporary reality? A differential IHL does not necessarily imply that *jus ad*

70 See Gabriella Blum, "On a Differential Law of War", *Harvard International Law Journal*, Vol. 52, No. 1, 2011; and Kevin Jon Heller, "On a Differential Law of War: A Response", *Harvard International Law Journal Online*, Vol. 52, 2011.

bellum considerations are taken into account. Even today, under the existing flexible IHL rules, the same conduct is not expected from a State with sophisticated technology at its disposal and its adversary. Even today, few soldiers of modern, well-trained and well-equipped State armed forces engaged in an asymmetric armed conflict against a non-State armed group, a proxy armed group under overall control of a foreign State (which should fight according to IHL of IACs) or even regular armed forces of a weak State really expect that their adversaries will fight according to the same rules they were trained to comply with. They will already consider themselves lucky not to be immediately executed if they fall into the hands of those adversaries. Even today, a State that considers that a war-sustaining function cannot render an object a military objective is supposed not to attack such an object. This is the case even if such object belongs to an adversary who added war-sustaining functions in its definition of military objectives and therefore considers that it may target such objects.

In sum, looking at today's reality, the axiom may be a fiction.⁷¹ Fictions, however, undermine IHL because this body of law deals with the humanitarian consequences of an (undesirable) reality, and it must take reality into account if it wants to have any real impact. Abandoning the fiction, admittedly, risks even further decreasing the willingness of States, armed groups, soldiers and fighters to comply with IHL and starting a race to the bottom under which everyone will argue that they are unable to comply with most rules. This risk should, however, be limited by the core principles and obligations that remain of general application.

Start with mechanisms enhancing the respect of some rules

It is to be hoped that the suggested way of developing IHL, apart from increasing States' and armed groups' ownership of IHL rules, avoiding the impression that IHL rules are imposed from the outside and ensuring that every party has only those obligations it is able to respect, will also enhance its respect. Beyond this, in view of the current stalemate, it may be advisable to (provisionally) abandon the ideal of a mechanism dealing with all IHL rules. It may be better to take advantage of a public outcry on the violation of some IHL rules, which States cannot see as affecting their ability to fight armed conflicts, to adopt, including in a UN framework, a new mechanism aimed at enhancing the respect of those specific rules. First attempts going in this direction have appeared in recent years concerning use of children in hostilities,⁷² sexual violence⁷³ and attacks on hospitals.⁷⁴ They were neither completely successful nor completely unsuccessful.

71 See Marco Sassòli, "Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?", *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

72 See, for the monitoring and "reporting" mechanism to combat six grave violations committed against children in armed conflict established by the UNSC, the website of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict, "Monitoring and Reporting on Grave Violations", available at: <https://childrenandarmedconflict.un.org/our-work/monitoring-and-reporting>.

73 See, e.g., the UK initiative and the follow-up debate, "Preventing Sexual Violence in Conflict Initiative", *Hansard*, Vol. 697, debated on 17 June 2021, available at: <https://hansard.parliament.uk/commons/2021-06-17/debates/55A96907-C7BC-4865-8E74-978F14A461F8/PreventingSexualViolenceInConflictInitiative>. See

From a conceptual point of view this avenue is obviously not ideal because it creates double standards between rules, leads to duplication, contradictions and turf battles. However, it may pave the way to progress based on opportunities, reassure States, and allow comparison of the efficiency and acceptability of different mechanisms by trial and error, and finally to select the best for a future new general mechanism.

The elephant in the room of development of IHL: armed groups

An important part of IHL, which covers the largest number of contemporary armed conflicts, and which is, at least as far as treaty rules are concerned, in the greatest need of new, more detailed and updated regulation, is IHL of NIACs. That part of IHL is not only addressed to States, but also to armed groups. Common Article 3 explicitly requires that “each Party to the conflict” must comply with certain minimum rules. The rules are simply not meaningful if they do not bind more than half of the parties to armed conflicts. From there it appears desirable to involve armed groups in the development of IHL of NIACs.⁷⁵

Involving armed groups in the development of IHL will increase their willingness to comply

Any role of armed groups in developing IHL would increase their sense of ownership of the rules and therefore their willingness to comply with them. Today it is growingly accepted that armed groups must be directly engaged to foster their sense of ownership of IHL rules. The ICRC has always cultivated a dialogue with both State and non-State parties to armed conflicts; it has a “Global Affairs and Non-State Armed Groups Unit” that develops and coordinates approaches to engage with armed groups. The unit conducts an annual global mapping of armed groups to gain a better understanding of them and their perception of the ICRC, with a view of identifying trends and opportunities for strengthening the ICRC’s engagement with them. In 2020 it found that more than 600 armed groups operate in the more than 100 countries where the ICRC works; the ICRC has contact with approximately 465 of them and “engages in protection dialogue” with 32% of them (which implies that it discusses with them their respect of IHL).⁷⁶ A report of key findings on the ICRC’s dialogue with non-State armed groups has recently been published.⁷⁷

also, European Commission, *Call to Action on Protection from Gender-Based Violence in Emergencies*, Brussels, 2019, available at: https://ec.europa.eu/echo/system/files/2019-05/booklet_eu_leadership_c2a.pdf.

74 UNSC Resolution 2286, 3 May 2016.

75 Sophie Rondeau, “Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011.

76 ICRC, *Annual Report 2020*, Vol. I, p. 69, available at: <https://library.icrc.org/library/docs/DOC/icrc-annual-report-2020-1.pdf>.

77 Irénée Herbet and Jérôme Drevon, “Engaging Armed Groups at the International Committee of the Red Cross: Challenges, Opportunities and COVID-19”, *International Review of the Red Cross*, Vol. 915, No. 102, 2022.

The NGO Geneva Call is an institution traditionally focused on armed groups only. Among other things, it tries to obtain concrete commitments from armed groups to respect humanitarian rules and tries to ensure their fulfilment through persuasion and dialogue.⁷⁸ It started its work with the ban on antipersonnel landmines because the Ottawa Convention on Landmines neither addresses armed groups nor allows them to undertake to respect it. Since then, Geneva Call has added the protection of children in armed conflict, the prohibition of sexual violence as well as gender discrimination, and the protection of healthcare to the issues on which it tries to obtain “deeds of commitment”. It has just launched a new one on the prevention of starvation and conflict-related food insecurity.

Involving armed groups in the development of IHL will ensure that the rules of IHL of NIACs are realistic

To involve armed groups in the development of rules of IHL of NIACs would ensure that those rules are realistic. Indeed, such groups are as central to IHL of NIACs as navies are to the law of naval warfare. No one would suggest revising the law of naval warfare without consulting the world’s navies. The success of IHL depends on its effective application by parties to conflicts. Therefore, it must be based on a solid understanding of the problems, dilemmas, and aspirations of all parties to armed conflicts. While States undertake this reality check for themselves as they are the legislators making the rules, they do not and cannot determine whether such rules are realistic for armed groups. Claiming that unrealistic rules apply will not only result in violations of such rules; it will also undermine the credibility and protective effect of *other* rules that an armed group can comply with.

There are several examples of current rules that may be unrealistic for armed groups. First, the tendency to apply rules which originated in IHL of IACs to NIACs either by analogy or as customary law (based upon the practice and *opinio juris* of States exclusively) may lead to certain rules that are not entirely realistic for non-State armed groups.⁷⁹ Second, the increasing integration of IHRL standards into IHL may lead to a similar result. Third, the combination of raising the minimum age to 18 years and an enlargement of the concept of (prohibited) involvement of children with armed groups results in requirements that make it impossible for members of armed groups to remain together with their families and to be supported by the whole population on whose behalf they (claim to) fight.⁸⁰ Fourth, the usual definition of pillage suggested by those who fight against businesses pillaging natural resources in conflict areas is discriminatory against armed groups.⁸¹

78 See Geneva Call’s website, available at: <http://www.genevacall.org>.

79 See Marco Sassòli, “The Convergence of the International Humanitarian Law of Non-International and of International Armed Conflicts: Dark Side of a Good Idea”, in Giovanni Biaggini, Oliver Diggelmann and Christine Kaufmann (eds), *Polis und Kosmopolis, Festschrift für Daniel Thürer, Dike/Nomos*, Zürich/Baden-Baden, 2015, pp. 683–4.

80 See M. Sassòli, above note 22, p. 285.

Practical and conceptual difficulties to overcome

There are serious obstacles in involving armed groups in the development of IHL. First, States are nearly unanimously opposed. They fear that this could confer legitimacy upon non-State actors they fight and label nearly always as “terrorists”. Second, there are serious conceptual and practical obstacles to such involvement. Some are common to all avenues of how IHL could be developed; others are specific to either deliberate law-making through treaties or soft law instruments or to the (mysterious) process of how customary law develops. Concerning the former, States will never allow armed groups to officially sit at the negotiation table.⁸² Thus, it is more realistic that an NGO, such as Geneva Call, represents their views and problems in the drafting process.⁸³ The process suggested above in which core obligations and principles confirmed by States are specified separately by each State and each armed group could also facilitate the involvement of armed groups in the development of IHL of NIACs without facing the difficulties of bringing States and armed groups together, while avoiding discrimination between States and armed groups, to which the latter are allergic.

As for customary IHL of NIACs, there is a large consensus that armed groups’ practice and *opinio juris* do not count.⁸⁴ The ICRC Customary Law Study considers the legal significance of such practice to be unclear.⁸⁵ The underlying doctrinal question is whether customary law rules are based upon the consent of States. I submit rather that customary law rules develop from the conduct and *opinio juris* of the rule’s addressees in the form of acts, omissions, declarations, accusations or justifications for their conduct.⁸⁶ From a purely practical point of view, it is useless to consider a rule to be “customary” law if half of the addressees (non-State armed groups) by hypothesis do not respect it out of a sense of conviction. To ensure that customary rules are realistic for all belligerents, it is important that the practice and statements of armed groups are considered when determining customary rules applicable in NIACs.⁸⁷

81 See *ibid.*, p. 294.

82 The counterexample often mentioned, the admission of national liberation movements to the diplomatic conference which elaborated between 1974 and 1977 the Additional Protocols, has been very controversial and can only be explained by the particular historical situation: see M. Bothe, K.-J. Partsch and W. Solf, above note 22, p. 8.

83 See, e.g., ICRC, *Safeguarding the Provision of Health Care: Operational Practices and Relevant International Humanitarian Law Concerning Armed Groups*, Geneva, 2015; Geneva Call, *In Their Words: Armed Non-State Actors Share Their Policies and Practice with Regards to Education in Armed Conflict*, Geneva, 2017.

84 Thus, categorically, the International Law Commission, Draft Conclusions on Identification of Customary International Law, see International Law Commission, Report of the International Law Commission on the Work of its 68th Session, UN Doc. A/71/10, 2006, pp. 87–9, Conclusion 4(3) and para. 9 commentary to Conclusion 4. However, the ILC admits that it may provoke State practice, which is obviously a different issue.

85 J.-M. Henckaerts and L. Doswald-Beck, above note 1, p. xxxvi.

86 For further details, see Marco Sassöli, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht*, Helbing & Lichtenhahn, Basel, 1990, pp. 32–48.

Admittedly, there are several conceptual difficulties in considering the practice of non-State armed groups in the customary norm-creating process.⁸⁸

First, an armed group, contrary to a State, is not meant to be and does not even want to be permanent, but must inevitably disappear by either victory (becoming the government of a State) or by defeat.⁸⁹ A certain stability and continuity of States as well as the possibility for them to repeat practice and to become in the future both a beneficiary and addressee of a rule are all ingredients of the mysterious customary process that turns what is – practice – into what ought to be – the law. Some of these factors may not apply in the case of non-State armed groups.

Second, in most cases, a non-State armed group has an IHL practice only towards one State or one adverse armed group, and it considers itself less than States as a part of an international society made up of other States (and, in this case, armed groups).

Third, international law presupposes that States have uniform characteristics, and they are indeed much less diverse than armed groups. Should one deduce IHL of NIACs from the practice and *opinio juris* of all armed groups that are parties to NIACs, or should one create categories of groups (for example, according to whether they control territory or want to become the government of a State) and deduce different rules applicable to each category from the practice and *opinio juris* of groups belonging to that category? In the first case, only very rudimentary rules will result, while the second alternative would lead to a further fragmentation of IHL. The second alternative would also raise the question of whether States should also be bound by different rules depending on the category of non-State armed group they are fighting.

Fourth, the question arises of whether the law deduced from the practice and *opinio juris* of armed groups binds only them or whether customary IHL of NIACs for States and armed groups should be based upon the practice and *opinio juris* of both. The first alternative would mean the end of the equality of belligerents before IHL, which may anyway be a fiction. The second alternative would lead to very rudimentary rules even for States that can comply with additional and more complex rules. This consequence, however, is mitigated by the fact that States also remain bound by IHRL. Finally, one must avoid the risk

87 For this purpose, the Geneva Academy of International Humanitarian Law and Human Rights and Geneva Call have undertaken since 2017 a research project “From Words to Deeds: A Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms”. See research outcomes until now: Geneva Academy of International Humanitarian Law and Human Rights, “From Words to Deeds: A Study of Armed Non-State Actors’ Practice And Interpretation of International Humanitarian and Human Rights Norms”, available at: <https://www.geneva-academy.ch/research/our-clusters/non-state-actors/detail/55-from-words-to-deeds-a-study-of-armed-non-state-actors-practice-and-interpretation-of-international-humanitarian-and-human-rights-norms>.

88 See Lizaveta Tarasevich, “Participation of Non-State Armed Groups in the Formation of Customary International Humanitarian Law: Arising Challenges and Possible Solutions”, *Humanitäres Völkerrecht, Journal of International Law of Peace and Armed Conflict*, Vol. 3, No. 1–2, 2020.

89 Zakaria Daboné, *Le droit international public relatif aux groupes armés non étatiques*, Schulthess, Geneva, 2012, pp. 87–8.

that taking the practice of armed groups into account may result in rules that are no longer humanitarian.

Despite all these open questions, some scholars suggest that it is possible for armed groups to play a role in the development of new rules without “downgrading” current international protections by considering the result of their practice and *opinio juris* as “quasi-custom”.⁹⁰ This theory merits further reflection. While research on the actual practice of non-State armed groups is fortunately increasing,⁹¹ proposals on how such practice could contribute to customary IHL are still lacking.⁹²

Conclusion

Currently, the development of IHL seems to be largely stalled and pragmatic alternative ways of adapting the rules to new challenges and increasing the compliance with existing rules have come under criticism. States reclaim ownership of the rules and claim even that they are the sole interpreters. Armed groups, which represent the greatest number of participants in current armed conflicts, never had their say in the development of IHL. We may certainly try time and again to use the traditional methods, in particular if we overcome some assumptions, such as: that IHL rules must be developed by consensus; that States do not want to adopt new IHL rules; that one must therefore claim to interpret or determine existing law; that States would weaken IHL if a discussion on its norms were reopened; that UN involvement politicizes IHL; that the ICRC would jeopardize its operational dialogue with major powers if it engaged in strong advocacy in favour of new IHL rules; that more and more detailed rules offer better protection; and that IHL is mainly applied in the field, during armed conflicts, and not by courts. We have shown some evidence challenging those assumptions. In addition, new ways of developing IHL may be explored, such as the adoption by States of some core obligations and principles, based upon existing IHL, which would then be specified by every State – and armed group – by detailed internal but public rules. This process could be accompanied by a national committee and at a further stage by regular peer review between States. In any case, and although this is politically and conceptually difficult, armed groups must gain more voice in the development of IHL of NIACs. This does not only increase their sense of ownership but also ensures that its rules are realistic for them.

90 Anthea Roberts and Sandesh Sivakumaran, “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law”, *Yale Journal of International Law*, Vol. 37, No. 1, 2011, pp. 141–52.

91 See Geneva Academy of International Humanitarian Law and Human Rights above note 87.

92 See, however, the forthcoming PhD of Ms Lizaveta Tarasevich at the University of Geneva on non-State armed groups and the formation of customary international law and her preliminary thoughts, above note 88.

The crisis in international law and the path forward for international humanitarian law

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Abstract

This article offers a brief review of the forces that have contributed to the contemporary impasse in the formation of new international law and institutions. It identifies areas where development of the law of armed conflict would provide great benefits, yet where current international conditions render formal legal agreements highly unlikely. It then considers how to advance desirable projects nonetheless. In the absence of effective formal international law-making, jurists face a choice. One approach, which I call inspirational, is to propose idealized legal systems based on claims of justice and practicality. Much published work over the last decade seems to take this path. The hope is that the ideas will inspire and thus lead relevant actors to adopt the systems at a time when the obstacles to international agreements recede. The other approach, which I call entrepreneurial and describe here, involves leading States acting as “norm entrepreneurs”. They can propound and in practice adhere to norms with the intention of inducing other States to follow. The entrepreneurial approach entails a State engaging in a practice that it hopes others will emulate, while the inspirational involves an appeal to the international community as a whole, including significant non-State actors.

Keywords: international humanitarian law, cyber-conflicts, non-international armed conflicts, norm entrepreneurs, international lawmaking.

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Introduction

Across the board and around the world, projects to build international law and international institutions have become stuck. The liberal international consensus that seemed to emerge in the 1990s has unravelled.¹ The present moment of crisis has many causes – geopolitical, economic and cultural. What it means as a practical matter is that the formal adoption of new international rules through international agreements faces roadblocks that seem likely to persist for some time.

This article offers a brief review of the forces that have contributed to this impasse. It identifies areas where development of the law of armed conflict would provide great benefits, yet where current international conditions render formal legal agreements highly unlikely. It then considers how to advance desirable projects nonetheless. In the absence of effective formal international law-making, jurists face a choice. One approach, which I call inspirational, is to propose idealized legal systems based on claims of justice and practicality. Much published work over the last decade seems to take this path.² The hope is that the ideas will inspire and thus lead relevant actors to adopt the systems at a time when the obstacles to international agreements recede. The other approach, which I call entrepreneurial, and describe here, involves leading States acting as “norm entrepreneurs”. They can propound and in practice adhere to norms with the intention of inducing other States to follow. The entrepreneurial approach entails a State engaging in a practice that it hopes others will emulate, while the inspirational involves an appeal to the international community as a whole, including significant non-State actors (the invisible college).³

Both approaches have advantages and shortcomings. The inspirational approach pushes toward idealized outcomes, but at the cost of indefinite delay and perhaps disenchantment. The entrepreneurial approach risks the emergence of divergent norms, perhaps dividing the world, as well as inaction. It also favours large States that find themselves facing certain legal issues more frequently than others. In the case of international humanitarian law, we are likely to see entrepreneurial rules favoured by States that project military force into conflicts, either international or non-international, rather than those

- 1 Paul B. Stephan, “Crises Come in Waves: National Populism, the Poisoning of Cyberspace, a New Cold War, and the Pandemic (2015-21)”, in P. B. Stephan, *The World in Crisis and International Law – The Knowledge Economy, System Shocks, National Populism, and the Battle for the Future*, Cambridge University Press, Cambridge, 2022, forthcoming.
- 2 E.g. Ryan Goodman, “The Power to Kill or Capture Enemy Combatants”, *European Journal of International Law*, Vol. 24, No. 3, 2013.
- 3 Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No. 4, 1998; Oscar Schachter, “The Invisible College of International Lawyers”, *Northwestern University Law Review*, Vol. 72, No. 2, 1977.

preferred by States that find armed conflicts unfolding on their territory against their will. Until the consensus approach to international law-making becomes unblocked, however, this seems to be the best we can do.

This paper first describes present obstacles to the conventional international-law-making process by which States come together to make multilateral treaties regulating the conduct in question. It then identifies urgent issues in the law of armed conflict that cry out for regulation. These include rules governing non-traditional armed conflicts, understood as non-international armed conflicts (NIACs) involving armed force directed against a foreign State, and cyber-operations that threaten peace and security but fall short of the use of armed force. The paper describes what an inspiration approach to these issues might look like, and offers by way of contrast an entrepreneurial approach. It argues that not only does the latter approach offer greater promise over the short run, but it opens a path to greater international cooperation over the long run.

Why are we so divided?

The present moment finds the world as dangerously divided and on the edge of international violence as any in the last thirty years. One set of threats involves geopolitical issues, largely those that the end of the Cold War buried but did not settle. Russia's role in the post-Soviet space and the reunification of the two Chinas highlight the list. These threats in turn reflect economic conflicts arising from the breakdown of the liberal internationalist regime put in place in the 1990s. These political and economic challenges have led important States to reject the current international order and called for significant revision of international relations and law. The other set of threats involves the emergence of cyberspace as a place of danger and a platform for harmful acts. These developments have polarized the world, with one camp seeking to defend what they believed was the post-Cold War settlement and the other challenging the contemporary international order.⁴

There are as many explanations for the troubles of the present as there are observers. I offer here a stylized and truncated narrative that focuses on two factors: (1) geopolitical changes related to the use of force in international and non-international disputes, and (2) the achievements of information technology. This is not the entire story, but my account provides a basis for thinking about the future of international humanitarian law.⁵

Geopolitical issues and non-traditional armed conflicts

The end of the Cold War, a moment that began with the June 1989 Polish election that brought the opposition to power and ended with the dissolution of the Soviet

4 President of Russia, "Joint Statement of the Russian Federation and the People's Republic of China on the International Relations Entering a New Era and the Global Sustainable Development", 4 February 2022, available at: <http://en.kremlin.ru/supplement/5770> (all internet references were accessed in April 2022).

5 In this section I draw substantially on my forthcoming book. P. B. Stephan, above note 1.

Union in December 1991, seemed to put an end to the bipolar regime that had governed international security issues since the Second World War. This opened the door to the possibility of a new world order based on the international rule of law. It became possible to imagine a world where international uses of armed force would rest on international consensus, reflected in the actions of the United Nations Security Council, and thus increasingly rare.

An episode occurring right at the end of the Cold War gave people hope about the use of international law as a constraint on the international use of force. Following Iraq's conquest and purported annexation of Kuwait in 1990, the Security Council assumed jurisdiction over the dispute and authorized the international community to use "all necessary means" to resolve it. The subsequent liberation of Kuwait and the imposition of reparations and international supervision on Iraq received the support of the Soviet Union and China, through assent in the case of the former and abstention on the part of the latter.⁶ Worldwide, States walked away from the bipolar structure that had dominated international relations for the previous forty years. Many thoughtful people believed that we found ourselves in a new age of collective security and democratic peace with the international rule of law and peaceful resolution of international disputes replacing the threat of armed conflict and the risk of Armageddon.⁷

Over time, however, the hopes these events raised seemed increasingly hollow. After 1991, armed conflict did not disappear, but shifted. Some wars of national liberation ended with real political change and an end to organized violence, as in South Africa. However, new conflicts, increasingly of a non-international nature, proliferated. The breakup of Yugoslavia was an early illustration: disintegration of the big State led to conflict among the component States that popped up in its place, but the worst of the fighting took place within Bosnia-Herzegovina and Serbia (with respect to Kosovo). Russia's terrible civil war in Chechnya provides another example of a consequential NIAC during this time. The festering wound that is the Palestinian-Israeli conflict got worse during the 1990s, and the breakup of Ethiopia produced atrocities. Overall, we saw very few incidents of war only between States, but a growing number of entrenched and dangerous armed conflicts within States.

Then came the events of 11 September 2001 (9/11) and the forever wars that they spawned. Mass terror attacks in the rich world, Madrid, London and Paris as much as New York, changed the mentality of many people and provoked responses that looked more like traditional international conflict. Coalitions invaded and conquered Afghanistan and Iraq, the former with the Security Council's approval and the latter without. The invaders discovered that conquest did not result in triumph, but instead in prolonged insurgencies that in many

6 United Nations Security Council, Security Council Resolution No. 678, 29 November 1990.

7 E.g. Francis Fukuyama, *The End of History and The Last Man*, Hamish Hamilton, London, 1992; Bruce Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World*, Princeton University Press, Princeton, NJ, 1993.

ways resembled the old wars of national liberation. In 2011 States reprised this behaviour by choosing sides in Syria's civil war, a US-led coalition invoking a right to collective self-defence against non-State organizations operating on the territory of Syria and Russia and Iran introducing forces at the invitation of Syria's government.

These events illustrate what I call non-traditional armed conflicts. These are NIACs that are neither anti-colonial struggles of national liberation nor civil wars confined to the territory of a State. Rather, they involve armed struggle by non-State actors to bring about a regime change in a particular State or region that extends outside the borders of the contested territory. Organizations such as Al-Qaeda and Da'esh embody non-State parties to such conflicts, as did the Liberation Tigers of Tamil Eelam in an earlier day.

The cyber-revolution and international conflict

Around the same time as the end of the Cold War, information technology underwent a revolution. People already had e-mail, list-servs and online databases, but these tools were somewhat clunky and mostly for "wonks". Then in 1994 we got Netscape Navigator, the first general-use web navigator, and the internet became a thing. Suddenly just about everyone had a portal to cyberspace, a wonderful world with an amazing range of images, sounds and writing. Not much more than a decade later we had smart phones and social media that further democratized connections and influence around the world through cyber-activity. These developments transformed our world.

The cyber-revolution, an explosion in connectivity that increasingly allowed people to bypass central authorities to communicate, agitate and organize, unfolded during the first decade of the present century. Visionaries imagined a new world of bottom-up democracy that would bring to account corrupt authoritarian regimes as freedom spread from the virtual space to the physical space. Grass-roots protest campaigns aided by the new technologies ousted leaders in Georgia, Ukraine, Kyrgyzstan, Tunisia, Libya and Egypt. A new world of people power seemed to be being born. Cyber-tactics could defang authoritarian uses of targeted force by enabling elements of surprise and swarming for popular uprisings that resist State-sponsored suppression of protests. The cyber-revolution, in the eyes of some, represented the death knell of violent authoritarian regimes and thus provided yet another path to a democratic peace.⁸

The 2011 Arab Spring, while embodying the potential of the internet revolution, also came to show how these hopes could come to nothing.⁹ In some instances, incumbents were overthrown, but in the majority of places, ruling

8 E.g. Malcolm Gladwell and Clay Shirky, "From Innovation to Revolution: Do Social Media Make Protests Possible?", *Foreign Affairs*, Vol. 90, No. 2, 2011.

9 Zeynep Tufekci, *Twitter and Tear Gas: The Power and Fragility of Networked Protest*, Yale University Press, New Haven, CT, 2017.

regimes held off insurgents. All told, the outcome was mostly a mixture of failed States and humanitarian disasters, rather than reformed societies run by free peoples. Schooled by the fate of their unfortunate peers, authoritarians increasingly exploited the new technologies to surveil and remove their adversaries. Once an instrument of liberation, cyberspace increasingly became the place where States bolstered their defences against dissidents.

The same technologies that gave States greater resources to leverage domestic social control also provided new instruments for prosecuting international conflicts. The tools used to surveil domestic opponents also unlocked foreign databases. Cyber-actors (whether acting on behalf of a State or as independent predators) can disable online systems so as to degrade or destroy their functionality or hold them hostage against ransom. These actors also can infiltrate online media so as to engage in disinformation and psychological warfare. The cyber-tools not only greatly multiply the efficacy of these interventions, but complicate attribution of responsibility. These malign capacities exacerbate both traditional international disputes and the prosecution of non-traditional armed conflicts.

Challenges for international humanitarian law

As the 2020s unfold, it becomes increasingly clear that the liquidation of a bipolar international order did not mean the end of devastating armed conflict, and that the information revolution benefitted incumbents wielding State power at least as much as reformers pushing for freer and less corrupt societies. Both developments breed instability and leverage threats to peace and prosperity. They also raise issues related to international humanitarian law.

With respect to non-traditional armed conflicts, the legal issues include the legal status of people taking part on behalf of non-State actors through extraterritorial attacks. Neither the international humanitarian law applicable to NIACs nor that applicable to international armed conflicts offers a clean fit. Issues arise, such as the status of combatant privilege, culpability for the provision of material assistance, and the existence of a power to detain during hostilities, but satisfactory responses under existing law do not.

A concrete example may serve as an illustration of a general class of problems. Under Article 110 of the Third Geneva Convention, incurably wounded or sick detainees enjoy a right of repatriation. In the case of NIACs, neither the Convention nor the two Additional Protocols address repatriation. In many instances, a person detained in a NIAC is likely to be a national of the detaining power. But in non-traditional conflicts where armed conflict extends to States of which the non-State actors are not nationals, detention may occur somewhere other than the participants' homeland. Yet those detained persons do not serve on behalf of their State of nationality, as participants in an international armed conflict do, and may face severe repercussions were they returned home. How does the principle underlying Article 110, regarding the release from

confinement of persons who, based on medical considerations, no longer present a realistic possibility of a return to combat, apply in such cases?¹⁰

As to cyber-operations, very little international law exists except by way of analogy. Many experts believe that cyber-activity that produces significant material harm to persons and physical things remains subject to international humanitarian law. Thus, crashing an aircraft through means of cyber-intervention would come under this regime. Other general principles of international law such as non-interference presumably apply, although how and to what exactly remain open questions. The law applicable to operations that cause economic but not physical harm, including the destruction of online stored data, is disputed.

To take a salient example, in recent years, increasingly malicious cyber-activity has popped up around the world. Predators either seize control over stored data to shut down normal operations or threaten to make that data public. Attribution of these attacks is unclear, but States subject to them sometimes claim that they emanate from States with which they have geopolitical or even armed conflicts. The disabling of Ukrainian official websites during January–February 2022, a prelude to the later armed invasion and occurring during an ongoing armed conflict between Russia and Ukraine in Ukraine’s Donbas Region, is a recent instance.¹¹

The problems that we face

The world faces many threats that require collective action for an effective response. Climate change, proliferation of weapons of mass destruction, and future pandemics, including those deliberately engineered using cutting-edge technology, may lead the list. We have not seen, but surely can anticipate, the falling of terrible weapons into the hands of non-State actors. Pressing problems in the law of armed conflict also demand our attention and cry out for responses.

This background of growing international tensions and anxieties gives salience to particular issues of international humanitarian law. I focus here on two sets of issues that reflect the transformations in international conflicts and technology that the previous section describes. First, over the last two decades, we have seen an increase in the gravity and prevalence of non-traditional armed conflicts that challenge established concepts such as State involvement and military formations. We need clarity on the rules that bind States as they engage in such conflicts, whether through direct military operations or through

10 See *Al-Qahtani v. Trump*, 443 F. Supp. 3d 116 (D.D.C. 2020) (interpreting Army regulation as implementing Article 110 with respect to Guantanamo detainee).

11 I recognize that some eminent jurists question whether Russia and Ukraine were engaged in an international armed conflict before 24 February 2022. E.g. Bakhtiyar Tuzmukhamedov, “Law is Not Silent, Even When the Guns Speak”, *Nezavisimaya gazeta*, 9 March 2022, available at: https://www.ng.ru/kartblansh/2022-03-09/3_8386_kb.html. The Russian Federation also rejects the characterization of the post-24 February operations in Ukraine as an invasion. I reach the characterizations in text based on my own assessment, appreciating that my conclusions may be controversial in some quarters.

supporting non-State actors, as well as those constraining non-State actors directly. Second, we also need rules governing international cyber-operations, not just those that bring about physical violence but those that cause serious economic or personal harm.

Non-traditional armed conflicts

Recent decades have taught us that both States and organized groups can employ force at a large scale, but not in forms that the traditional law of armed conflict addresses. Non-State actors seeking to bring about regime change can use force to attack States that they perceive as supporting their adversary. The 9/11 (New York), 11 March 2004 (Madrid), 7 July 2005 (London) and 13 November 2015 (Paris) attacks are exemplary. In response, States increasingly use military resources to identify and attack adversaries while relying on analogies rather than rules to determine who may qualify as a lawful target. Increasingly they use remote weapons such as drones, which by limiting the range of violence may be more precise than traditional weapons but not necessarily more accurate, in the sense of finding the intended target. The fiasco during the US evacuation from Hamid Karzai International Airport in August 2021, when a US drone slaughtered a family mistakenly targeted as insurgents deploying an armed attack, illustrates the humanitarian risks of such operations. The attack did not go off course, but the means of determining who was to be killed were flawed.¹² Other issues, among many, include the power to detain participants in these conflicts who are not part of formal military structures and the duties owed to detainees. The host of questions surrounding the Guantanamo detention issue, including the Article 110 question discussed above, illustrate the incompleteness of current international humanitarian law in the face of pressing problems.

At the moment, treaties addressing the law governing NIACs include Article 3 common to the four Geneva Conventions and the 1977 Additional Protocol II.¹³ Even many strong proponents of these instruments would admit that they contain large gaps as well as significant interpretive problems, including fundamental questions of jurisdiction. Moreover, important States have not joined the Additional Protocols. People looking for more law can invoke

12 An initial review of the incident carried out by the US Air Force inspector general concluded that the threat entailed no violation of law, including the law of war, but that “[e]xecution errors combined with confirmation bias and communication breakdowns led to regrettable civilian casualties.” See “Investigation into 29 Aug CIVCAS in Afghanistan”, *Washington Post*, 3 November 2021, available at: <https://context-cdn.washingtonpost.com/notes/prod/default/documents/b72be59f-f01e-4e3a-bdba-8582472b9c83/note/25812926-b3ca-4280-9e69-2e337a8d6a23.#page=1>. For more on the incident and the investigation, see Alex Horton, Dan Lamothe and Karoun Demirjian, “Botched Drone Strike That Killed 10 Civilians in Kabul Was Not a Result of Criminal Negligence, Pentagon Says”, *Washington Post*, 3 November 2021, available at: <https://www.washingtonpost.com/national-security/2021/11/03/kabul-drone-strike-inspector-general-report/>.

13 Other treaty regimes, such as the Rome Statute, also may apply, although jurisdiction over non-parties might require a decision of the Security Council. In the case of the Rome Statute, very few States that regularly engage in armed conflict outside their own territories are State parties.

customary rules.¹⁴ Yet fierce debates persist over the standards for finding and enforcing customary international law in the realm of armed conflict.¹⁵

I have no desire to adjudicate those disputes here. Rather, my point is that, even when the dust settles in the fight over the scope and meaning of treaty and customary law, few believe that we have as fully developed and clearly formulated international law governing the ramifications of non-traditional armed conflicts as we would wish. If one thinks, as I do, that we can expect more and greater conflicts of this sort in the near future, then one should wish for a law-making project to plug the gaps in the *lex lata*, whatever one believes the *lex lata* to be.¹⁶

However, the growing mistrust and adversarial nature of international relations, especially among States most likely to find themselves taking part in a non-traditional international armed conflict, make prospects for treaty formation decidedly bleak. States may reject an otherwise useful formulation of international law if they conclude that such a rule might benefit their adversaries more. They will invest more in maintaining their adversary status than in finding common ground.

A complicating factor is the lack of reciprocity that might otherwise drive States toward cooperation. Conventional NIAC by definition excludes a situation where States find their military organizations directly opposed in a conflict. In a non-traditional NIAC, the non-State adversary, which may or may not receive aid and comfort from other States, typically seeks to challenge more than one particular State regime. The conflict necessarily occurs on the territory of one or more sovereign States, but the State where much of the armed force originates may have little or no capacity to affect events.¹⁷ These non-State actors lack a place at the bargaining table and indeed mostly lack a structure that enables them to make credible commitments through international agreements. Lack of coordination among non-State actors, as illustrated by the present conflict in

14 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

15 Dennis Mandsager, “U.S. Joint Letter From John Bellinger III, Legal Adviser, U.S. Department of State, and William J. Haynes, General Counsel, U.S. Department of Defense to Dr. Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study”, *International Legal Materials*, Vol. 46, No. 3, 2007, p. 514; republished as John B. Bellinger, III and William J. Haynes II, “A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*”, *International Review of the Red Cross*, Vol. 89, No. 866, 2007, pp. 444–5; W. Hays Parks, “The ICRC Customary Law Study: A Preliminary Assessment”, *American Society of International Law Proceedings*, Vol. 99, 2005, p. 212; see W. Hays Parks, “Part IX of the ICRC ‘Direct Participation in Hostilities’ Study: No Mandate, No Expertise, and Legally Incorrect”, *New York University Journal of International Law and Politics*, Vol. 42, 2010, p. 784 (criticizing Part IX of Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, Geneva, 2009, available at: <https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf>).

16 I note here the argument of Samuel Moyn that we should spend less time worrying about the *jus in bello* and look instead to ways to bar use of force in international relations altogether, whether more humane or not. Samuel Moyn, *Humane: How the United States Abandoned Peace and Reinvented War*, Farrar, Straus and Giroux, New York, 2021, pp. 267–311.

17 Ashley S. Deeks, “‘Unwilling or Unable’: Toward a Normative Framework for Extraterritorial Self-Defense”, *Virginia Journal of International Law*, Vol. 52, 2012.

Syria and the forces that expelled the United States-led coalition from Afghanistan, illustrate this. Where bargaining with non-State actors is impossible or extremely difficult, States are not inclined to make concessions to restrict their actions. Under these conditions, we cannot expect new international agreements on the rules governing armed conflict to emerge.

I do not mean to suggest that compliance with international law necessarily requires a prospect for reciprocity. International humanitarian law, for example, rejects reciprocity as a general matter, including a suspension of obligations as a countermeasure.¹⁸ Other factors can explain rule adherence in international relations.¹⁹ States make human rights commitments, for example, without any expectation of reciprocity.²⁰ My point is that, if compliance is costly because it requires a State to give up something that it wants to do, States in general would be less likely to assume and honour international obligations when they expect general non-compliance, and that the lack of possibilities for reciprocity removes a factor that would support an expectation of compliance.

Cyber-operations

When we turn from non-traditional armed conflicts to cyber-operations, we find even fewer legal instruments that might constrain State behaviour.²¹ No multilateral treaties address the issue. Some debate whether general instruments, such as the United Nations Charter, the Geneva Conventions, or the International Covenant on Civil and Political Rights, might provide a few rules of the road, but nothing like a consensus exists around this proposition.²² Instead,

18 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art. 60(5).

19 Paul B. Stephan, "Enforcement of International Law", in Francesco Parisi (ed.), *Oxford Handbook of Law and Economics*, Vol. 3: *Public Law and Legal Institutions*, 2017.

20 Whether States comply with these commitments is another matter. Oona A. Hathaway, "Do Human Rights Treaties Make a Difference?", *Yale Law Journal*, Vol. 111, 2002.

21 I do not address here another lurking problem with cyber-operations, namely the applicability of the *jus ad bellum*. As I have written elsewhere, one might worry that the understandable desire of international lawyers to use the *jus in bello* to limit the harms of these operations might evolve into an argument that these operations qualify as acts of armed force that justify armed non-cyber-responses. The evolution is not inevitable, but neither is it implausible. Paul B. Stephan, "Big Data and the Future Law of Armed Conflict in Cyberspace", in Matthew C. Waxman and Thomas W. Oakley (eds), *The Future Law of Armed Conflict*, Oxford University Press, New York, 2022. See S. Moyn, above note 16.

22 E.g. Australian Ministry of Foreign Affairs, 2019 – *Supplement to Australia's Position on the Application of International Law to State Conduct in Cyberspace*, available at: https://ceipfiles.s3.amazonaws.com/pdf/CyberNorms/LawStatements/2019+Supplement+to+Australia_s+Position+on+the+Application+of+International+Law+to+State+Conduct+in+Cyberspace.pdf; French Ministry of the Armies, *International Law Applicable to Operations in Cyberspace*, available at: https://www.dropbox.com/s/rco3345z42b1em3/Application%20of%20International%20Law%20to%20Cyber%20Operations%20_%20The%20Hague%20Program%20for%20Cyber%20Norms%20_%20March%202020%20incl%20ANNEX.pdf?dl=0; Government of the Kingdom of the Netherlands, *Report to Parliament, Appendix: International Law in Cyberspace*, available at: https://www.dropbox.com/s/rco3345z42b1em3/Application%20of%20International%20Law%20to%20Cyber%20Operations%20_%20The%20Hague%20Program%20for%20Cyber%20Norms%20_%20March%202020%20incl%20ANNEX.pdf?dl=0; New Zealand Office of the Prime Minister and Cabinet, *The Application of International Law to State Activity in Cyberspace*, available at: <https://dpmc.govt.nz/sites/default/files/2020-12/The%20Application%20of%20International%20Law%20to%20State%20Activity%20in%20Cyberspace.pdf>; for Germany, The Federal Government, *On the Application of*

what we find are aspirational, and fairly amorphous, statements by expert committees commissioned by the United Nations, alongside State-initiated but independent expert studies, of which the *Tallin Manuals*, organized but not endorsed by the North Atlantic Treaty Organization (NATO), are the most prominent.²³

A number of States, including Australia, France, Germany, Israel, the Netherlands, New Zealand, the United Kingdom and the United States, have produced statements from leading government lawyers expressing views on the application of international law to cyber-operations.²⁴ A careful analysis of the statements, however, reveals cautious wording designed to avoid specific commitments as to international law alongside general claims about the existence of customary international law. Illustrative is the French statement, which discusses the principle of sovereignty as a limitation on foreign State operations against another State. Although ambiguous, it seems to conclude that “the decision whether or not to respond to such operations is a political one, taken in light of the nature and characteristics of the intrusion”.²⁵ The point, suggested rather than stated, is that the principle of State sovereignty enshrined in the United Nations Charter does not on its own produce any legally enforceable rules governing cyber-operations.

Again, my goal is not to pick and choose among the projects and pronounce on where a sufficient consensus exists to justify a conclusion about particular rules of customary international law. My observation, rather, is that many of the States in the so-called “West” have made statements that might indicate that a body of customary international law governing State actions in cyberspace exists, but that the views of other States are less clear and that even the States that have made declarations agree on few if any specific rules.

This sparsity of law persists in the face of an apparent uptick in offensive cyber-operations during the COVID pandemic.²⁶ I must say “apparent” because

International Law in Cyberspace, available at: <https://www.auswaertiges-amt.de/blob/2446304/2ae17233b62966a4b7f16d50ca3c6802/on-the-application-of-international-law-in-cyber-space-data.pdf>; Roy Schorndorf, *Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations*, available at: <https://www.ejiltalk.org/israels-perspective-on-key-legal-and-practical-issues-concerning-the-application-of-international-law-to-cyber-operations/>; for the United Kingdom, Jeremy Wright, *Cyber and International Law in the 21st Century*, available at: <https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century>; for the United States, Brian J. Egan, “International Law and Stability in Cyberspace”, *Berkeley Journal of International Law*, Vol. 35, No. 1, 2017; for the United States, Paul C. Ney, Jr., “Some Considerations for Conducting Legal Reviews of U.S. Military Cyber Operations”, *Harvard International Law Journal*, Vol. 62, 2020.

23 United Nations General Assembly, Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security, UN Doc. A/76/135, 14 July 2021; Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013; Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2017.

24 See sources, above note 22.

25 French Ministry of the Armies, above note 22, p. 7.

26 E.g. Jenny Jun and Nadiya Kostyuk, “The Pros and Cons of Mandating Reporting From Ransomware Victims”, *Lawfare*, 1 November 2021, available at: <https://www.lawfareblog.com/pros-and-cons-mandating-reporting-ransomware-victims>.

we know only about attacks that governments have acknowledged, attribution of particular attacks to State actors remains contested, and we have every reason to believe that many State-sponsored operations, especially those dedicated to espionage rather than to inflicting economic or social costs, go undisclosed. Moreover, many of these attacks seem the product of geopolitical tensions but not necessarily within armed conflicts. The concern is that, were we to see more armed conflicts, such as the conflict between Russia and Ukraine currently under way, we also would see more of these operations.

Still, we have seen a growing number of civilian activities compromised by suspicious operations in a context where adversary State involvement is suspected, if not proved. An illuminating example is a tit-for-tat exchange between Israel and Iran in the autumn of 2021 in the context of an ongoing, if undeclared, armed conflict between Israel, Hezbollah and Iran. According to the *New York Times*, Israel undertook an operation that shut down the retail automobile petrol distribution system in Iran for the better part of the week, leaving drivers in the lurch. Iran retaliated by hacking Israel websites catering to unconventional sexual practices and then released private and embarrassing information regarding a number of persons, some prominent but unconnected to the government.²⁷ If one may believe the reporters, both States used civilian targets as a means of prosecuting a State-to-State dispute, in each case employing measures that cannot easily be analogized to acts of force but that do entail considerable economic or moral cost.

As the offensive capacities of cyber-operations grow, the need for constraints seems evident. The more economic and social life moves online, the greater the need for security. We already have seen instances of essential medical services shutting down due to ransomware attacks.²⁸ The prospect of crashing financial markets and services, perhaps alongside erasure of financial records, seems to pose a real and substantial threat. Surely, we can find rules that discourage States from launching cycles of action and reaction that generate increasingly burdensome costs on civilian populations, even if the effects are rarely lethal or even physically damaging.

At first sight, reciprocity would seem a good foundation for such agreements. States function as both perpetrators and victims of cyber-operations, and not all operations are carried out by States. Obligations on States to reduce harmful consequences would lower the risk of symmetrical attacks by States that bear the obligation. Win-win deals await.

However, roadblocks to formal agreement remain. First, the blurred lines between public and private in advanced cyber-technology make it extremely difficult to tell when a State should bear responsibility for an operation, just as secrecy and immateriality in cyber-operations complicate attempts to determine

27 Farnaz Fassihi and Ronen Bergman, "Israel and Iran Broaden Cyberwar to Attack Civilian Targets", *New York Times*, 27 November 2021, available at: <https://www.nytimes.com/2021/11/27/world/middleeast/iran-israel-cyber-hack.html>.

28 Danielle Gilbert, "Ransomware Lessons for a Nation Held Hostage", *Lawfare*, 12 September 2021, available at: <https://www.lawfareblog.com/ransomware-lessons-nation-held-hostage>.

which State took part in an attack.²⁹ Without some effective mechanism of holding States to account for cyber-operations, rules are meaningless. But not all bad things that happen in cyberspace rest on acts of State. In some cases, criminal gangs carry out costly actions – ransomware comes to mind – without any State involvement, or at most State indifference. In others, people take the tools developed while working for the State and deploy them for their own purposes. In yet others, people working in State cyber-organs end their official workday and then switch into private mode, using skills and tools attributable to the State to carry out their own projects. An analogy to the old letters of marque and reprisal comes to mind.

Second, States have fundamentally perverse incentives in the carrying out of cyber-operations. As technology has transformed the world, the capacity to undertake offensive activity in cyberspace has become as important as old-fashioned kinetic capability. The fast-changing technology requires practitioners to constantly update their skills, which requires practical experience and experimentation. Restraints cut back on the ability to innovate. This applies as much to defence as offence: a reduction in threats due to State compliance with agreed standards puts persons charged with cybersecurity to fewer tests. As technologists, people who work in cyberspace find formal limits at odds with the fundamental dynamic of their work.

Third, restraint favours defence, yet the fundamental dynamic in the evolution of cyber-capabilities favours offence. If we imagine cyber-operations as a game pitting offence – the authors of the operation – against defence – those seeking to protect information security and frustrate intrusions, the rewards skew heavily in the direction of offence. The authors of an operation know their target and appropriate all the benefits of their success, whether monetary, prestige or power. Defenders must anticipate and take costly measures to lower risks that may never materialize. They seldom get direct benefits from their success in thwarting attacks, even though society as a whole benefits. Rather, they only get to live to fight another day. In theory, States should not care about such incentives, as they are set up to attend to the general welfare – what economists call public goods. Yet States are made up of human beings to whom incentives are meaningful. Accordingly, any international agreements that restrict cyber-operations cut against the grain of the workers who populate these fields.

None of these is an insoluble problem. Indeed, much of the law of armed conflict faces similar dynamics and yet does its job well enough. The first obstacle, however, is specific to cyber-operations – attribution and rules of State responsibility. Cyber-technology over the last fifty years, if not longer, evolved as private activity comprising both profit and non-profit sectors unfolding alongside government-directed research and development. The mix varies over time and in different countries, but almost nowhere does world-class cyber-capability, either offensive or defensive, reside exclusively in State organs.

My general point is that State attribution of cyber-operations arises across a spectrum of activities, from those carried out directly by State organs to those

29 Kristen E. Eichensehr, “The Law and Politics of Cyberattack Attribution”, *UCLA Law Review*, Vol. 67, 2020.

employing resources procured from the State to those where a State simply does not do enough to stop private activity. We cannot have rules regulating cyber-operations without deciding on what point along the spectrum does a State become answerable for what happens. Moreover, we would need to agree on rules of evidence, including presumptions and permissible inferences, to close the gap between observed behaviour and legal assessment.

Building international consensus around such rules seems unrealistic in the absence of high levels of trust and a great sense of urgency. Once one rejects the two poles of the spectrum – State immunity and strict liability – convergence on any particular mix of attribution and evidentiary rules would require a flexibility and a willingness to assume risks of unwanted outcomes that we simply do not see in today’s world. Each of the relevant States in the world of cyber-operations would look at proposals not in terms of overall global benefits, but rather in terms of relative advantage for itself compared to its adversaries. As long as this perspective dominates, agreement seems impossible without a revolutionary change in circumstances or the lapse of a long time.

In sum, the road to formal agreement on rules for non-traditional armed conflicts and international cyber-operations for the present time seems blocked. The remainder of this paper considers what alternatives we might have to bypass the obstacles. These alternatives are, I argue, on the one hand good accounts of where we want to end up and, on the other hand, unilateral State practice that might lead others to follow. The next part describes how the inspirational approach might take on the problems of non-traditional armed conflicts and harmful cyber-operations in the context of armed conflicts. It then compares how an entrepreneurial approach to these issues might play out.

Pathways to new international humanitarian law

Thus far I have identified two areas where more international humanitarian law would be desirable – regulation of non-traditional armed conflicts and the use of cyber-operations in all kinds of armed conflicts – and explained why we should not expect conventional international law-making in these areas any time soon. In this section I compare and contrast the inspirational and entrepreneurial approach to these problems and suggest particular outcomes that might be obtainable.

The inspirational approach

In the United States, we have this phrase, borrowed from a W. P. Kinsella novel: “If you build it, they will come.”³⁰ It is a vivid expression of the concept of socialization:

30 W. P. Kinsella, *Shoeless Joe*, Houghton Mifflin, Boston, MA, 1982. Not only the United States: Kinsella was Canadian. I appreciate that many readers may know this phrase from the movie *Field of Dreams*, rather than from the book on which the film was based.

articulation of a social norm can bring about emulation, independent of any direct rewards and punishments to induce conformity. People need to know that the norm seems desirable and that others will regard it as such. If they believe the second thing, they will comply so as to avoid others perceiving them as anti-social. People value acceptance, so a norm can achieve compliance simply by convincing people that others will esteem them more if they conform.³¹

From this perspective, the best way to bring the world more and better law, including that governing armed conflicts, is to make good proposals. An intelligent, reasoned and persuasive account of why a set of rules will make the world a better place will lead relevant actors to adopt it. It will not matter if the particular actor is unconvinced by the case for the rules as long as it concludes that other relevant actors will be. Desiring inclusion and abhorring others regarding it as a bad actor, the State will embrace the proposal. Naturally, some States will embrace the role of norm-breaker. But as long as most States adhere, the acts of deviance will reinforce and clarify the norm.³²

The principal tools of the inspirational approach to international law-making are words, typically written. To inspire, a proponent of a norm needs an account as to why certain practices or values will make the world better. These accounts can come not only from States, but perhaps even more from non-State actors, including organizations such as the International Committee of the Red Cross (ICRC). Non-State actors can argue that their narrative reflects the general interests of the international community, and not the narrow interests of a particular State. They can make clear what might be latent and subject to doubt, that a particular rule will benefit all and that the State that embraces it will show to the world that it is estimable and benign.

My casual impression is that a large portion of the *jus in bello* scholarship published in English conforms to this model.³³ The effect of socialization is more assumed than stated. Scholars believe that intelligent, reasoned and persuasive proposals are good, without necessarily asking how they will influence State behaviour. Projects like the *Tallin Manuals* exemplify the approach. They rest on a belief that independent experts enjoy a degree of respect and deference that leads official actors to give them a fair hearing. If the hearing goes well, they can expect the official actors to conclude that States generally will buy into the proposal and that they must go along to avoid an unwanted outsider status.

31 Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law*, Oxford University Press, New York, 2013.

32 See, generally, on the social function of deviance, Kai Erikson, *The Sociologist's Eye: Reflections on Social Life*, Yale University Press, New Haven, CT, 2017, pp. 28–9.

33 And not only *jus in bello* scholarship. For a paradigmatic example of the inspirational approach at work in the realm of human rights law, see *Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening)*, International Court of Justice Reports, 3 February 2012, Dissenting Opinion of Judge Cañado Trindade (focusing on publications and conference declarations rather than State acts and explanations), available at: <https://www.icj-cij.org/public/files/case-related/143/143-20120203-JUD-01-04-EN.pdf>.

It is easy to understand why non-governmental organizations of experts would find this perspective attractive. The ICRC, as the foremost such group in the field of international humanitarian law, in particular should embrace it. And, all in all, what is wrong with intelligent, reasonable and persuasive arguments?

The short answer, I think, is that there is nothing wrong with good proposals as long as one appreciates their limits. The premise of the socialization argument, drawn from sociology, is that the international community is every bit as much a society as are other social structures and that nations are as averse to being perceived as anti-social as are people. In times of peace and prosperity, this may make sense. But during periods of political and technological upheaval and growing uncertainty about and alienation from group norms, socialization may do less work than is supposed. More States may define themselves as revisionist in the face of perceived injustices and dysfunction in the international order. These States may seek not simply to deviate from widely accepted norms but to pursue systemic disruption so as to implement a new and different order.

If one believes that the state of the world today is more divided than connected, then marking out one's place along the fault lines may matter more than gaining acceptance. Revisionist regimes may regard their grievances as more significant than their common interests. These actors will resist even reasonable proposals if they regard embracing them as a sign of weakness and a distraction from their overall project of restructuring international relations, not by reason but through power and persistence.

I think we live in such a world today. If I am right, then whatever we build, they will not come for a long time. At a minimum, the proposals would be historically premature.

The problem is not just delay, however. The longer a proposal goes unadopted, the easier it is for people to conclude that the community regards it as lacking social value. This is socialization's symmetrical downside: when enough time lapses, a proposal that does not get taken up becomes an indicator not of other-regardingness, but of the opposite. A State would not join even if it liked the proposal, if it believed that other actors would regard the embrace as anti-social.

Under these conditions, inspiration would be counterproductive and new rules would not emerge. Even international norms that might provide general benefits across conflicting blocs would not gain traction. One side's embrace of a rule as a sensible solution to a general problem would be seen by the other side as a projection of its values and narrative and therefore as unacceptable, however sensible it otherwise might be.

The entrepreneurial approach

The alternative path to the development of an international legal order is to lead by example. A State may insist on a norm that it knows that others do not accept, and indeed will regard as transgressive and destabilizing, if it is convinced of the rightness of its cause. It will bear the opprobrium that results from imposing the

norm if it believes that, over time, evidence will accumulate that the norm does good work and others will embrace it. The outcast will become a prophet.³⁴

The entrepreneurial approach also relies on narratives, but of a different sort from those doing the work of inspiration. It rests on State behaviour and therefore on State acts of self-justification. The entrepreneurial State explains that it not only does not violate international law, but that its actions are those that international law should embrace and perhaps even mandate. The observations of disinterested non-State actors have less of a role, as it is exactly the State's ownership of its choices that provides a pathway for its claim for its choice to become an international norm.

Two examples of this process strike me as compelling. Both involve international economic law rather than humanitarian law. Both involve the United States, which may complicate the story. Perhaps the evolution of the norms in question reflects nothing more than a hegemon's ability to impose its will on the rest of the world. However, a fair reading of these narratives is that the United States anticipated sooner than other States the need for new norms due to changes in the structure of the international economy. After decades of holding out against international resistance, the United States had the satisfaction of seeing other States recognizing that its norm fit a need.³⁵

The first norm involved an adjustment of the principle of territorial sovereignty to facilitate effective responses to international cartels. Membership in a cartel requires a firm to forgo sales it otherwise could make and to adhere to the cartel's territorial allotments. The cartels of the interwar period, for example, carved up the world so that industrial giants within a cartel would not compete with another cartel member in the latter's designated territory. Consumers suffered due to lower competition, high prices and an inferior array of products. Because the cartel members who protect another member's monopoly did nothing on the territory of the country where the victimized consumers lived, their (in)action did not meet the traditional standards for prescriptive jurisdiction of the consumers' State. Yet the consumers indisputably suffered economic injury.

The United States responded by asserting a new norm, that prescriptive jurisdiction extended to action or inaction occurring outside a State's territory if the extraterritorial behaviour had a direct, substantial and reasonably foreseeable effect on the well-being of people in the regulating State. On this ground it imposed criminal anti-competition penalties on foreign firms, beginning with a case commenced near the end of the Second World War.³⁶ Other States fiercely attacked these actions, even imposing criminal penalties on persons who complied with US enforcement measures. By the 1980s, however, most States had come around to the position that international cartels presented an economic threat of common concern and that unilateral acts by injured States did comply

34 See Oona Hathaway and Scott J. Shapiro, "Outcasting: Enforcement in Domestic and International Law", *The Yale Law Journal*, Vol. 121, No. 2, 2011.

35 Paul B. Stephan, "Antibribery Law", in David L. Sloss (ed.), *Is the International Legal Order Unraveling?*, Oxford University Press, New York, 2022, forthcoming.

36 *United States v. Aluminum Co. of America*, 148 F.2d 416, 442-45 (2d Cir. 1945), 12 March 1945.

with customary international law even when the regulated person had not undertaken any positive activity on the territory of the regulating State.³⁷

The second story involves a norm against tolerating the payment of bribes to foreign government officials. The United States applies this rule, enforced by criminal and administrative penalties, not only to its own nationals and to people who use US territory to pay bribes, but also to any firm that seeks access to US capital markets. When the United States adopted this legislation in 1977, no other country had such a rule, and many States treated such bribes as ordinary business expenses eligible for tax deductibility. During the 1990s, the United States pushed the members of the Organization for Economic Cooperation and Development (OECD), a club of mostly rich countries, to take similar action. An implicit threat to take more measures against foreign firms if their home countries did not begin to regulate bribery probably helped lead the way to an OECD Convention signed in 1997 that obligates most of the world's rich countries to embrace this norm. In the twenty-first century the United States remains the foremost enforcer of the anti-bribery norm, but other countries have made great strides.³⁸

If one wants to look beyond a story about US hegemony in the second half of the twentieth century, the factors that explain both these outlaw-to-prophet stories include a change in thinking about the regulated conduct. Many had seen international cartels and bribery of government officials as matters of parochial concern, rather than as systemic threats to an increasing interconnected world economy. The United States was the first country to see these behaviours as undermining the international integrity of advanced capitalism and thus creating general problems for the world economy. Not only did a growing number of States come to accept the US perspective as legitimate, but they also saw US practice in enforcing the anti-cartel and anti-bribery norms as not skewed toward its own parochial interests (unless you see protecting advanced capitalism as an inherently American parochial concern). US practice, in other words, showed that the norms provided systemic benefits and, in the hands of the State that propounded it, did not lead to substantial impairments of the legitimate interests of other States.

These examples may provide a template for development of the law of armed conflict regarding non-traditional conflicts and cyber-operations as well as international humanitarian law generally. To succeed, the programme requires a significant national actor – a State with skin in the game, as the economists like to say – to announce and comply with rules that constrain its behaviour. The constraint must go further in some clear way than other widely acknowledged

37 American Law Institute, Restatement of the Law Fourth, The Foreign Relations Law of the United States, 2018, § 409.

38 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997, Senate Treaty Doc. No. 105-43, 2802 UNTS 225 (entered into force 15 February 1999). See Rachel Brewster, “Enforcing the FCPA: International Resonance and Domestic Strategy”, *Virginia Law Review*, Vol. 103, No. 8, 2017, pp. 1646–7; Daniel K. Tarullo, “The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention”, *Virginia Journal of International Law*, Vol. 44, pp. 668–80.

international rules; the actor must otherwise have the capacity to engage in the behaviour that the rule constrains; and the actor must make a plausible case that compliance with the rule means sacrificing some short-term interests. In other words, the actor must be able to convince others that it is willing to pay a cost as the price of the long-term benefits of the rule. The actor moreover must frame the case for the rule in convincing legal terms: this is the point where the inspiration approach and the norm-entrepreneur approach converge. And to be convincing, the case must show that the rule does not provide one-sided benefits to the norm-entrepreneur State, but rather plausibly anticipates systemic benefits that will substantially exceed the costs of compliance.

A few examples may illustrate how particular norm entrepreneurs might address non-traditional armed conflicts and cyber-operations. Consider first the issue of targeting in non-traditional conflicts. States with the capacity to conduct over-the-horizon operations, typically drone strikes, against persons they believe to be implicated in imminent armed attacks have developed non-trivial standards and rules of evidence to constrain military actors in choosing whom to target. The rules aspire to limit the application of armed force only to persons who pose an imminent risk of loss of innocent life and of excluding, or at least limiting as far as possible, collateral damage. The 2015 film *Eye in the Sky* provides a good and, as far as I know, accurate account of what this process looks like.³⁹ Yet we still have fiascos like the US strike in Kabul on 29 August 2021, to which I referred earlier in this article. The US Air Force Inspector General found that the decisions leading up to this attack did not amount to criminal negligence. The report, the full text of which remains classified, apparently proposes reforms in the rules governing targeting, although we do not know what they are.⁴⁰

For some good to come from this tragedy, it would be helpful if the United States could fix and announce better procedures to guide target assessment for drone strikes. It could then push its allies and friends to do the same. The spread of these practices from States taking part in US-led coalitions, as in Iraq and Syria, to those with whom the United States enjoys friendly relations but which engage in non-conventional conflicts in which the United States does not directly take part, for example Israel, would look very much like the informal creation of a new norm for the law of armed conflict.

Consider next a possible norm that could evolve to constrain a particular type of cyber-operation, namely ransomware. Law aside, nothing precludes a State actor from undertaking an operation with the purpose of extorting payments from the target, but private actors seem at least as willing to profit from these actions. The skills and technology to undertake these attacks may have their origins in the public sector, however, even where the operations are private.

Whether the bandits that run ransomware act on behalf of the State, use capabilities acquired from the State, or rely solely on their own resources and take

39 The film stars my favourite Anglo-Russian actress, Elena Mironova (as it would be in Russian), who her émigré parents named Helen Mironoff and performs under the name Helen Mirren.

40 A. Horton, D. Lamothe and K. Demirjian, above note 12.

no direction from the State, they operate in cyberspace, a place where a number of important States have growing capacities for surveillance and action. With great power comes great responsibility, goes the saying.⁴¹ Perhaps the time has come to develop standards of due diligence applicable to States with significant surveillance capabilities and whose nationals engage in criminal ransomware operations. In June 2021 the White House and the Kremlin established an Experts Group to consider this issue, although its work remains largely protected from public scrutiny.⁴²

Much more needs to be done to develop rules of the road for State cyber-operations. I focus on this example only because it draws on well-developed principles of international law, namely those applicable to State responsibility, yet arises in a technologically dynamic environment with unique as well as constantly changing factual predicates. Perhaps, with trial and error as well as implicit agreements rather than formal statements, the cyber great powers can devise among themselves workable standards implementing an obligation on the part of States to suppress internationally harmful cyber-actions undertaken in places or by people within their jurisdiction.

Conclusion

The main difference between the inspirational and norm-entrepreneur approaches to the development of new rules for international humanitarian law pertains to the kinds of explanations made for the rule and the relative importance of published texts and of the contributions of non-State actors, including prominent jurists. I say “relative” advisedly, because the two approaches can complement each other and both undoubtedly are indispensable. However inspirational a proposal may be, it does little work until States consider and embrace it. Actual practice might matter more than formalities in determining whether the proposal engages and moves the international community. At the same time, the process of propounding and applying new norms gains traction and coherence to the extent that publicists explain, criticize and justify the observed practices.

The general point is that, in a period of conflict in and transformation of international relations, States need to find new ways of discovering points of common interest and signalling willingness to conform to particular norms. This may mean developing rules with which States will comply while maintaining plausible deniability that their compliance represents a broader commitment to cooperation or any indication of the normative pull of the rule of law. As international lawyers, we may wish it were otherwise, but the broader purpose of ameliorating the cruelty and inhumanity of armed conflict may require this. To use my last cliché, half a loaf is better than none.

41 See also Luke 12:48: “To whomever much is given, of him will much be required; and to whom much was entrusted, of him more will be asked.”

42 The White House, “Fact Sheet: Ongoing Public U.S. Efforts to Counter Ransomware”, 13 October 2021, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/13/fact-sheet-ongoing-public-u-s-efforts-to-counter-ransomware/>.

Normative architecture and applied international humanitarian law

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Abstract

Military strategists have begun pivoting from a focus on counterterrorism, counter-insurgency and stability operations to potential peer and near-peer conflict. This shift has profound operational and tactical implications for how future wars will be fought, but equally, it will have a significant impact on how international humanitarian law (IHL) is understood and applied. This article considers the process by which the normative evolution of IHL will occur in response to a battlespace that looks different than it has for decades. To do so, the article introduces two concepts: “normative architecture” and “applied IHL”. It argues that only by understanding the difference between these two concepts, and their relationship to each other, can States and others concerned with how IHL is developing in the face of future conflict positively affect that process.

Keywords: international humanitarian law, customary law, development, State practice.

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This issue of the *International Review of the Red Cross* is dedicated to examining the development of international humanitarian law (IHL). It is an especially timely topic, for, over the past few years, many military strategists have begun pivoting from a focus on counterterrorism, counter-insurgency and stability operations to potential peer and near-peer conflict. That shift, should it occur, has profound operational and tactical implications for how future wars will be fought, but

equally, it would have a significant legal impact. This has motivated two senior US judge advocates to argue that nations must maintain “legal maneuver space” to meet the evolving threat environment.¹ They are correct in the sense that the law with which one goes to war must be fit for purpose. This requires sensitivity to how IHL develops, as well as its vector.

To develop and leverage that sensitivity, it is first necessary to address the question, “which IHL?”. In this thought piece, I suggest that two forms of IHL merit attention when assessing IHL’s development: the “normative architecture” and “applied IHL”. Only by understanding the difference between these two concepts, and their relationship to each other, can States and others concerned with how IHL is developing in the face of future conflict positively affect that process.

The normative architecture

The term “normative architecture” refers to IHL as found in treaties and customary law. In the abstract, it comprises the content of IHL – but there are two problems with stopping there. First, treaties and customary law are insufficiently granular to govern conduct in the battlespace effectively. Treaties are the product of compromise among States that often results in the lowest common denominator of acceptability. The limited content of Additional Protocol II to the 1949 Geneva Conventions, with its sparse eighteen substantive articles to govern non-international armed conflicts, is illustrative. The requirement that State practice and *opinio juris* be widespread has an analogous effect on the breadth and depth of customary law.

To achieve this consensus, it is often necessary to imbue treaty provisions with imprecision, thereby allowing States to read into them what they wish, at least so long as their interpretation is reasonable. The rule of proportionality is paradigmatic.² It is so vague that it is only possible to draw definite conclusions about a strike’s proportionality at the rule’s two extremes. A survey of the International Committee of the Red Cross (ICRC) Customary Law Study’s rules demonstrates that similar vagueness pervades customary law in the field.³

The second problem relates to the first: treaties and customary rules lack contextuality, but their eventual application may demand it. For instance, the requirement to take precautions in attack will operate much differently for an advanced military than for an insurgent group, or in a dense urban fight compared to a confrontation in a remote, unpopulated area. As these examples

1 Charles Pede and Peter Hayden, “The Eighteenth Gap: Preserving the Commander’s Legal Maneuver Space on ‘Battlefield Next’”, *Military Review*, March–April 2021.

2 The rule requires comparing two dissimilar values – harm to civilians and civilian objects and military advantage – that are themselves difficult to evaluate.

3 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1> (all internet references were accessed in August 2022).

illustrate, even if the rules are clear-cut and detailed, those in the field are still left with the difficult task of figuring out how they apply in any given circumstance.

Applied IHL

This is the crux of the notion of “applied” IHL. As Michael Reisman has observed, “law ... is about making decisions”.⁴ Building on this point, applied IHL refers to how the normative architecture operates during armed conflict. It completes the normative architecture based on decisions by States, armed forces and individuals participating in the conflict. In that sense, applied IHL is the “real” IHL. This does not mean the normative architecture is inconsequential, but it is only a framework upon which applied IHL is erected. If we hope to understand how the IHL that resides in the battlespace develops, identify its extant content or assess its developmental vector, we need to grasp how it is applied in practice.

Interpretation drives the transition from normative architecture to applied IHL. Formally, international law contains rules of interpretation, such as those captured in the Vienna Convention on the Law of Treaties⁵ or the Draft Conclusions on Identification of Customary International Law by the International Law Commission.⁶ These rules occupy a place of prominence in international tribunals, scholarly writing and, at times, inter-State relations.

In practice, though, the rules of interpretation seldom influence how legal advisers and military forces interpret IHL and apply it in the field. This is especially the case at the operational and tactical levels of warfare. Instead, applied IHL is the product of the same dynamic that undergirds the initial development of IHL’s normative architecture – a balancing of military with humanitarian concerns.⁷ Those who apply the broadly crafted normative architecture need to understand that the rules were designed to permit States to effectively use military force to preserve vital national interests while minimizing the harm, to the extent feasible, that military operations present to protected persons and objects – and act accordingly.

Of course, it is not uncommon for the sought-after equilibrium to be skewed by those considering how the rules should play out in actual military operations. After all, what one sees depends on where one stands. For example, academics and members of the non-governmental community tend to criticize

4 W. Michael Reisman, “Covert Action”, *Yale Journal of International Law*, Vol. 20, 1995, p. 420. This leads Reisman to famously distinguish between what he calls the “myth system” and the “operational code”: W. Michael Reisman, *Jurisprudence: Understanding and Shaping Law*, New Haven Press, New Haven, CT, 1987, pp. 23–35. For Reisman, the myth system is the law that purportedly applies, in a sense, the law on paper. By contrast, while the operational code refers to the norms that govern in practice, it may depart, sometimes significantly, from the myth system.

5 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969, Arts 31–32.

6 International Law Commission, *Draft Conclusions on Identification of Customary International Law*, 2018, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_13_2018.pdf.

7 Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010.

battlespace operations by skewing the balance (often subconsciously) in favour of humanitarian considerations. At the same time, governments and their militaries have a propensity to assert their freedom of action and defend their actions by skewing the balance in the other direction. This is a positive dynamic at times, because the adversarial process can serve to calibrate the equilibrium. Indeed, the interplay between the two perspectives results in applied IHL, as militaries refrain from conducting operations that offer a military advantage because they either conclude that the operations pay insufficient heed to humanitarian concerns or worry that if they push the envelope too far, costly condemnation will follow.

This is only the case, however, with normatively mature militaries – that is, those that pay attention to IHL. Only the actions of States that endeavour to comply with IHL should affect the development and evolution of applied IHL. To do so, their contextual application of a rule in accordance with their interpretation must reflect a good-faith effort to achieve equilibrium. Of course, the lack of depth and ambiguity of some rules means that such States enjoy a fair margin of appreciation when interpreting and applying the normative architecture. Still, over time, consensus interpretation and application of rules begin to mature among these States.

Importantly, applied IHL sometimes deviates from the formal normative architecture. In other words, applied law can take the form of *de facto*, even if not *de jure*, application of the normative architecture's rules. The normative architecture set forth in Additional Protocol I (AP I) is illustrative. The United States is not a party to the instrument and therefore is only bound by its rules to the extent that they reflect customary international law. For instance, the United States accepts AP I's definition of a military objective and its prohibition on attacking civilians and civilian objects as restating customary law, but it does not consider itself bound by such rules as those prohibiting certain reprisals or safeguarding the environment and installations containing dangerous forces.⁸

Yet, the United States is nearly as operationally constrained by those rules as are parties to AP I. There are two reasons for this. First, the likelihood of the United States engaging in an armed conflict without being in some form of coalition with a party to AP I is low, as most of its key partners are bound by the instrument. These include the so-called Five Eyes countries and most NATO allies.⁹ It is difficult enough to engage effectively in “combined” operations without partners operating with different rules of the game.¹⁰ For operational and legal reasons,¹¹ US commanders must respect the legal limits on partner forces and shape their operations accordingly. Admittedly, US assertions that specific AP I rules do not bind the United States because they do not reflect customary

8 US Department of Defense, *Law of War Manual*, revised ed., Office of the General Counsel, December 2016, Chap. V.

9 The Five Eyes countries are Australia, Canada, New Zealand, the United States and the United Kingdom.

10 “Combined operations” include the armed forces of multiple countries. The term “joint operations” refers to those that involve multiple services.

11 For instance, in a coalition operation, US operations could raise issues of coalition partner responsibility based on breach of obligations of the latter.

law are sometimes correct and, when so, can serve to prevent those rules from crystallizing into customary law, but making these assertions usually has little bearing on their *de facto* effect on operations.

Second, in most cases, the consequences for the United States of conducting operations that violate AP I would outweigh the benefits. First, the party/non-party nuance would likely be lost on domestic and international audiences; condemnation as having violated IHL would result. Moreover, such operations would open the door for the enemy and other adversaries and critics to exploit the situation for lawfare purposes. This is especially the case since the operations in question would be relatively unprecedented given that current US operations are *de facto* AP I-compliant. Indeed, failure to comply with the AP I rules might lead allies and partners to quit cooperating with the United States, as was the case with intelligence-sharing and other forms of military cooperation when reports of US prisoner mistreatment and torture surfaced in the aftermath of the 9/11 attacks.¹² Of course, an argument can be fashioned that these allies would have to do so as a matter of law,¹³ but even if not, most States would not want to be seen as supporting actions that would have violated IHL had their own forces conducted them.

This reality bears on which rules find their way into applied IHL, but with so much leeway to interpret and apply the rules, what matters as much is how parties and non-parties interpret and use them in the battlespace. This process of interpretation and contextual application is highly practice-oriented. To take one example, in 2019, a Naval War College team, drawing on its members' personal experience in the field, attempted to capture how militaries deal with uncertainty during various phases of an attack.¹⁴ Their analysis of qualification as a military objective is instructive vis-à-vis the translation of rules residing in the normative architecture into applied IHL.

Regarding the normative architecture, Article 52(2) of AP I defines military objectives as “objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage”. Article 50(1) further provides that “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian”, while Article 52(3) states:

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

12 Douglas A. Johnson, Alberto Mora and Averell Schmidt, “The Strategic Costs of Torture: How ‘Enhanced Interrogation’ Hurt America”, *Foreign Affairs*, Vol. 95, No. 5, 2016, pp. 125–129.

13 See discussion in Marko Milanovic, “Intelligence Sharing in Multinational Military Operations and Complicity under International Law”, *International Law Studies*, Vol. 97, 2021.

14 Michael Schauss and Michael N. Schmitt, “Uncertainty in the Law of Targeting: Towards a Cognitive Framework”, *Harvard National Security Journal*, Vol. 10, 2019, pp. 153–166.

The Naval War College team agreed that doubt as to the status of persons or objects could also sometimes prohibit an attack under customary law, but the doubt rules provide little practical guidance for those who must apply them.

The team concluded that applied IHL fills the void. In practice, for example, “the greater the value of a target, the more uncertainty may be countenanced in an attack, and vice versa”.¹⁵ Note that this is not the proportionality rule, which only kicks in once the attacker has determined that the target qualifies as a military objective; the calculation is more complex when deciding whether a target is a military objective in the first place. In combat, an attacker making the determination assesses not only the value of the target but also the probability of its correct identification (uncertainty) and the likelihood that even if correctly identified, the operation will successfully achieve the desired definite military advantage (for instance, considering the weapon used).

Similarly, the attacker will consider the degree to which there is a risk of mistaken identification, the nature of the harm to protected persons or objects that could manifest if there is an erroneous identification, and the likelihood of that harm being caused. Failure to consider such issues renders the analysis mandated by the rules of doubt flawed. As is apparent, it is in this applied IHL that the equilibrium between military and humanitarian considerations is maintained.

Or consider the rule of proportionality that prohibits an “attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Found in Articles 52 and 57 of AP I and universally accepted as customary law in international armed conflicts, the rule is the paradigmatic reflection of the balancing of military and humanitarian considerations – yet, at the same time, it is one of the most difficult to apply definitively in the battlespace despite its relatively descriptive text.

The most obvious challenge is the inherent difference between the values to which this rule refers. How, for example, is a soldier or airman to compare a tank’s value to a civilian’s life or damage to a civilian structure? In practice, the application of the rule is always contextual, for no abstract value is assigned to any type or category of military objective.

Instead, military advantage is measured relative to the effect sought by the attack. To illustrate, the military advantage of destroying an enemy air defence asset is comparatively greater for a force that relies on air support than for one that does not; or, a tank that is having difficulty manoeuvring in an urban environment may pose less of a threat than one manoeuvring freely on open terrain, so destroying the same tank in those two circumstances would yield a significantly different military advantage in each case.

Further complicating matters is the issue of uncertainty. As the Naval War College team noted,

¹⁵ *Ibid.*, p. 163.

there is the matter of how uncertainty as to the occurrence and extent of incidental injury to civilians or collateral damage to civilian objects ... should factor into the proportionality calculation ..., and analogously, there is the matter of how doubt that the military advantage will be achieved (and, if it is, the degree to which it is achieved) should affect the proportionality determination.¹⁶

These highly contextual and practice-oriented examples illustrate that applied IHL matters most in achieving equilibrium between military and humanitarian considerations. The normative architecture sets out the framework, but to grasp the development of IHL, one must look to practice in the battlespace. It is the crucible within which the normative architecture takes on meaningful form.

The evolution of IHL

To maintain equilibrium between military and humanitarian considerations, IHL must evolve when those considerations change. This can occur through modifications to either the normative architecture or applied IHL. Timely adjustment is essential to the survivability of IHL, for if the law fails to track States' expectations (and those of other influential actors) as to the appropriate balance, it will lose the respect that undergirds its effectiveness. Therefore, evolution in IHL's content and understanding is usually a positive dynamic.

In this regard, the normative architecture tends to be reactive. It responds to changes in warfare and their consequences, usually following major conflicts. For instance, the 1906 Geneva Convention and 1907 Hague Conventions followed closely on the heels of the 1905 Russo-Japanese War, while the use of gas and maltreatment of prisoners during World War I served as the impetus for the 1925 Gas Protocol and 1929 Geneva Convention respectively. Suffering and destruction during World War II motivated the adoption of the four 1949 Geneva Conventions that protect the wounded, sick, shipwrecked, prisoners of war and civilians. Later, the prevalence of non-international armed conflicts, new methods and means of warfare, and shifting sensibilities about what the law should safeguard led, *inter alia*, to the 1954 Hague Cultural Property Convention, 1977 Additional Protocols I and II, 1972 Biological Weapons Convention, 1976 Environmental Modification Convention, 1980 Conventional Weapons Convention, 1993 Chemical Weapons Convention, 1997 Landmines Convention, 2008 Cluster Munitions Convention, 2017 Nuclear Weapons Treaty, and the establishment of international criminal tribunals to try war criminals from both international and non-international armed conflict, beginning with the conflicts in the Balkans.¹⁷

¹⁶ *Ibid.*, p. 167.

¹⁷ These and other IHL treaties, as well as the statutes of international criminal tribunals, are available on the ICRC's comprehensive database at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByDate.xsp>.

Regardless of how one judges the merits of individual instruments, it is unquestionable that this is an impressive record of achievement. That said, codification can be slow and unwieldy, not least because of the baked-in tension between military and humanitarian considerations that makes negotiations so tricky. In particular, States will always be understandably nervous about tying their own hands with regard to new means and methods of warfare (like cyber, autonomous systems, artificial intelligence, machine learning and space operations) until they fully understand the consequences of doing so. Such hesitancy is not necessarily bad, for it ensures that both the military and humanitarian consequences of agreements are thoroughly vetted. Nevertheless, it does mean that the normative architecture, especially the *lex scripta*, will sometimes lag behind a shift in the equilibrium.

Applied IHL tends to be the more responsive tool for maintaining equilibrium. Consider cyber operations, for example. Adoption of a new treaty governing cyber operations during armed conflict is unlikely in the near term because of such quandaries as the meaning of the word “attack” in IHL, the condition precedent to applying the numerous rules governing attack, and whether data is an object such that civilian data is protected from attack and needs to be considered in proportionality and precautions in attack assessments.¹⁸

What is more likely is that practice, which includes battlespace practice and the verbal practice of States through mechanisms like military manuals, will over time begin to resolve how IHL should be interpreted and applied in these new contexts. It cannot avoid doing so, because once a weapons system or tactic makes its way into the battlespace, the armed forces involved in the conflict necessarily have to decide how to treat it, legally and operationally. In both its military and humanitarian guises, the reality of warfare will demand that the normative architecture take form as applied IHL.

For instance, I doubt that the term “attack” will be understood by military forces as being limited to cyber operations causing physical damage or injury, as States like Israel have argued.¹⁹ Such an interpretation pays insufficient heed to the humanitarian considerations that result from the growing societal reliance on activities in cyberspace. When faced with hostile cyber operations against their own civilian cyber infrastructure, States will want to condemn at least some of such operations as unlawful direct attacks on civilian objects. And irrespective of their legal interpretation of attack, States will refrain from cyber operations against certain civilian cyber infrastructure and activities out of concern over condemnation of such operations as unlawful and enemy use of lawfare. I make this point not to disagree with Israel’s position but rather to demonstrate that applied IHL will have to resolve such matters over time, even if the normative architecture remains unchanged.

18 Michael N. Schmitt, “Wired Warfare 3.0: Protecting the Civilian Population during Cyber Operations”, *International Review of the Red Cross*, Vol. 101, No. 901, 2019.

19 Roy Schöndorf, “Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations”, *International Law Studies* Vol. 97, 2021, pp. 400–401.

Influences on applied IHL

Since the normative architecture finds meaning through the maturation and evolution of applied IHL, it is essential to identify influences on those processes. The most important is operational reality. A provision of the normative architecture that does not make sense on the battlefield as written will be interpreted in a manner that does, a point illustrated by the two provisions on doubt cited earlier. The plain text of the first requires treating an individual as a civilian in the case of doubt, whereas the second creates a presumption of civilian status for certain civilian objects should there be doubt as to status. In fact, individuals are often targeted when there is a degree of doubt, and forces in the field do not apply a presumption of civilian status as such. If these rules were strictly applied, there would be very few attacks because doubt is a pervasive feature of the fog of war; as written, the rules are unworkable operationally. Instead, and as explained earlier, doubt is handled contextually along a continuum so as to respond to both military and humanitarian considerations.

Operational concerns, therefore, can cause applied IHL to shy away from the sometimes bright-line rules that appear in the normative architecture for operational reasons. Consider harm to the environment. Beyond the special rules regarding the environment found in Articles 35 and 55 of AP I for States Parties, there is relative consensus that the environment is a civilian object. For instance, an International Law Association study group that brought together leading experts in the field concluded that since “the environment does not fulfill the definition of a military objective, it must be considered a civilian object (or rather many civilian objects)”.²⁰

However, treating the environment as a civilian object is operationally problematic. Attacks often cause some damage to the environment, as in the case of artillery or aerial attacks against an enemy hiding in a forested area. In practice, armed forces seldom factor such harm into their proportionality or precautions in attack analyses. Instead, environmental damage usually enters their calculations only when particularly severe harm results. From an operational perspective, treating harm to the environment in the same manner as harm to other civilian objects appears, at least in the current operational context, unworkable.

The reality of how IHL operates in the battlespace might lead to criticism on the basis that it allows attackers too much leeway at the expense of humanitarian considerations. This is sometimes a fair criticism, but it also must be acknowledged that indeterminacy infuses the normative architecture with flexibility. That flexibility allows it to remain responsive to either unanticipated circumstances or a broader shift in the military and humanitarian considerations balance. It tempers the risk of rules becoming viewed as unworkable, thereby

20 International Law Association Study Group on the Conduct of Hostilities in the 21st Century, “The Conduct of Hostilities and International Humanitarian Law: Challenges of 21st Century Warfare”, *International Law Studies*, Vol. 93, 2017. I was part of the group and agree with the conclusion.

undercutting IHL's credibility and, consequently, its ability to achieve its humanitarian ends.

Since operational reality is the most potent influence on the transformation from normative architecture to applied IHL, one would expect States to be the key players in IHL's interpretation and application. In a sense, they are, for the armed forces apply the law in the battlespace; yet, as has been observed,²¹ there has been a paucity of verbal State practice and expressions of *opinio juris* regarding the interpretation and application of the normative architecture. States sometimes object when non-State actors like the ICRC opine on IHL, its content, and how it should be interpreted, but they have not engaged the issues aggressively.²²

As a result, interpretation and expectations from beyond the battlespace can catch hold and affect how the normative architecture is ultimately applied. For instance, external expectations have significantly impacted how the rules regarding incidental injury to civilians and collateral damage to civilian objects are applied. Incidental injury and collateral damage that would have been seen as lawful only a few decades ago would not pass legal muster today.

Obviously, the increased accuracy of weaponry and improved transparency of the battlespace have heightened expectations as to the precision of attacks and the ability of attackers to avoid harm to civilians and civilian objects; thus, operational reality has forced an adjustment to the application of the rule. Beyond that influence, technology has made war globally observable, often in real time. In response, armed forces have become more cautious when conducting attacks, lest they turn public opinion against their cause or allow the enemy to engage in lawfare. Over time, such constrained practice motivated by such policy or operational concerns can transform mere sensitivity into applied IHL. This may prove a positive development because applied IHL should reflect the contemporary values underpinning the military and humanitarian considerations equilibrium.

Such external influences are varied; they include non-governmental organizations, academia and the media. Of particular note is the work of the ICRC. To take one well-known example, I agree with much of the ICRC's analysis in its project on direct participation in hostilities.²³ Still, like many others, including some States, I disagree with its restriction of the organized armed group concept to members with a continuous combat function. In my estimation, the limitation reflects neither the normative architecture nor applied IHL, and it makes little operational sense because an attacker will often have difficulty distinguishing those with such a function from those without, especially in groups where all members are uniformed or armed.

21 Michael N. Schmitt and Sean Watts, "State *Opinio Juris* and International Humanitarian Law Pluralism", *International Law Studies*, Vol. 91, 2015.

22 John B. Bellinger III and William J. Haynes, "A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*", *International Review of the Red Cross*, Vol. 89, No. 866, 2007.

23 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

Nevertheless, to its credit, the ICRC has effectively convinced many States and members of the broader IHL community to adopt this approach. Given the opposition to the notion by some key States and numerous prominent IHL experts, it has not become a full-fledged component of applied IHL – but neither can the approach by which all members of an organized armed group are targetable be considered to enjoy that status. And today, for better or worse, the continuous combat function, which appears nowhere in the normative architecture, is slowly becoming part of the *de facto* applied IHL described above. Rules of engagement in combined operations, for instance, have reflected a delicately crafted balancing of the two sides of the debate when coalition partners differ over the issue.

Of course, there are countless other influences on the development of normative architecture and applied IHL. For example, the judgments of tribunals can be influential, although probably less so on applied IHL than commonly thought. Consider the International Criminal Tribunal for the former Yugoslavia's (ICTY) characterization of non-international armed conflict as consisting of protected armed conflict of sufficient intensity between a State and an organized armed group or between armed groups.²⁴ Although necessary to find jurisdiction, it is unlikely that practitioners beyond the courtroom who would not have characterized a conflict as non-international would do so in light of the court's formula, or vice versa. I do not mean to criticize the tribunals, for their work is essential to IHL's viability. I only mean to point out that it is a long journey from a courtroom to a battlespace. Indeed, in my experience, judgments find their way into the hands of operational legal advisers only after having been parsed, summarized and filtered extensively; often, the operational lawyer is unaware of the guidance's judicial pedigree.

International criminal law's deterrent effect further influences the transformation of the normative architecture into applied IHL. The prospect of war crimes prosecution can slow the evolutionary development of applied IHL, lest it gets too far ahead of the normative architecture to which courts will look. Ethical and moral considerations also influence many militaries; indeed, more time tends to be spent on the subject in the US Army Command and General Staff College and War College than on IHL. There is no question that these factors have influenced targeting, as in the case of children tending to be assigned greater weight than adults in proportionality and precautions in attack analyses even though the normative architecture contains no such requirement. And ethics and morality are presently exerting influence on the normative architecture that is slowly being built for cyber, autonomy, artificial intelligence and related technologies. Such influence is perhaps best exemplified in the notion of "meaningful human control" that animates discussions and policies about lethal autonomous weapons systems.²⁵

24 ICTY, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70.

Finally, it has been my experience that the influence of scholarship on applied IHL has been declining dramatically. There are two reasons why this is so. First, there is simply too much of such scholarship to manage. When I started in the field during the Cold War, a small, select group of serious scholars and practitioners occupied the field. The names and their works were familiar to most practitioners and the entire academic community – Baxter, Parks, Levie, Green, Sandoz, Gasser, Fleck, Bothe and Dinstein, to name some of the most eminent. These individuals significantly influenced those responsible for developing and applying the normative architecture and applied IHL. Some participated personally.

Today there are still bright lights in the field, but there are so many scholars writing so many pieces in so many journals that the volume renders much of the work practicably inaccessible. Search engines help, but even then, it is difficult for practitioners to separate the wheat from the chaff. As a result, contemporary practitioners tend to rely on military manuals, guides, and summaries produced by their armed forces;²⁵ ICRC publications; articles in a small group of practice-oriented journals, such as the *International Review of the Red Cross*, *International Law Studies*, the *Military Law Review*, and the *Review of Military Law and the Law of War*; and blogs like *Articles of War*. I do not wish to exaggerate this point, but the reality is that a great deal of scholarship is consumed primarily by scholars, if at all. This is unfortunate because tucked in among this unmanageable flood of academic pieces are incisive works that practitioners should be considering when taking actions that develop the normative architecture and applied IHL.

The second reason is related to the first. Although some scholarship evidences a deep understanding of warfare, the sheer number of individuals working in the field, and the lack of opportunity for all of them to acquire practical experience, means that posts, articles and books frequently lack operational contextuality or address issues in a manner that makes little operational sense. This has led some key practitioners to adopt a sceptical approach to scholarship. Of course, such scepticism is often unmerited; still, there is no denying that many practitioners look askance at the “ivory tower”, especially those coming from States that engage in armed conflict and therefore wield the most significant influence on IHL.

Concluding thoughts

I have suggested that understanding how IHL develops and evolves necessitates distinguishing between the normative architecture and applied IHL, and understanding their relationship. They each play an essential role in governing

25 See documents at United Nations Office of Disarmament Affairs, “Convention on Certain Conventional Weapons – Group of Governmental Experts on Lethal Autonomous Weapons Systems”, available at: <https://meetings.unoda.org/meeting/ccw-gge-2020/>.

26 Ops law handbook.

armed conflict, and they should do so synergistically, given their common goal of achieving equilibrium between military and civilian considerations as IHL operates in the battlespace.

There are, of course, numerous challenges standing in the way of that objective. A major one highlighted above, which is widely recognized, is the need for those participating in the developmental process to recognize the balance between military and humanitarian perspectives objectively. As noted, what one sees depends on where one stands. Respectful tension between those who emphasize one or the other consideration can yield positive results, but States, non-governmental entities and academia need to do better at talking with, instead of at, each other; after all, equilibrium is about balancing differing perspectives.

A second challenge involves understanding the binary nature of IHL. The academic and non-governmental communities tend to focus on normative architecture, while their governmental and military counterparts devote greater attention to applied IHL. Those who straddle both camps, like faculty members at military educational institutions or civilian university faculty with extensive military experience, are often conflicted, with individuals leaning in one or the other direction. However, in that the normative architecture and applied IHL constitute a normative whole that governs armed conflict, each group must develop a greater understanding of IHL's other component.

Unfortunately, many in the academic and non-governmental IHL communities lack more than a wave-top grasp of warfare. Their expertise on how war is conducted tends to diminish as consideration moves from the strategic to the operational and tactical levels of warfare. Few understand combat tactics or weapons system capabilities and uses. They may have a deep understanding of IHL rules in the abstract, but too many lack sensitivity to how those rules work in diverse battlespace contexts. Since their views can have life-and-death implications, these individuals shoulder a responsibility to learn about war. Until they do, they will never grasp applied IHL. In my experience, the ICRC is an exemplar of an organization that understands this need; I don't always agree with its stances, but I always know they are contextually well reasoned.

That responsibility cuts the other way as well. Many in government and the armed forces must better understand the nuances of the normative architecture. This involves knowing not only the treaty text and broad customary rules but also the foundational purposes of IHL, the lineage of the rules and ongoing debates about their meaning. In short, government and military legal advisers who advise on IHL matters have to be experts. Unfortunately, many lack depth beyond that acquired during basic IHL training courses. Of particular concern is the unfortunate belief in some militaries that all legal advisers should be plug-and-play generalists, which means that those militaries never develop a cadre of officers with deep IHL expertise. This is a significant failing because IHL is a complex body of law requiring many years of experience and study to master. As a result, these militaries get out-lawyered time and again by their academic and non-governmental counterparts during negotiations, consultations and expert meetings, and in the public arena. More importantly, it means that their

commanders and operators sometimes get sub-optimal legal advice during hostilities – and advice about IHL is the most important advice that legal advisers can provide to an organization which exists for the primary purpose of engaging in armed conflict.

In this regard, the Israeli Defense Forces (IDF), particularly its International Law Department, is an exemplar of good practice.²⁷ The IDF allows some of its officers to spend years doing international and operational law, invests heavily in their education, ensures they understand combat and other military operations, and sends them out to engage with the broader IHL community. Whether one agrees with the IDF's positions or not, there is little denying that it has the best uniformed international and operational law attorneys in the world.

Thus, moving IHL in a positive direction requires well-developed multi-dimensional expertise among the individuals and entities that make up our diverse IHL community. These individuals and entities must first understand that *both* military and humanitarian considerations matter when crafting, interpreting and applying IHL, and they must equally recognize that this must be accomplished at two levels, thereby requiring sensitivity to *both* the normative architecture and applied IHL.

²⁷ IDF, “International Law Department”, available at: www.idf.il/en/minisites/military-advocate-generals-corps/ild/.

Informal international law-making: A way around the deadlock of international humanitarian law?

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Abstract

Over the last two decades, international humanitarian law (IHL) has seen a stalling with regard to States' willingness to adopt treaties or to be formally involved in the development of IHL. This raises the question of whether holding on to the doctrine of sources as laid down in Article 38 of the Statute of the International Court of

Justice is the only way to meaningfully further develop IHL. Indeed, in recent years IHL instruments have often dispensed with certain formalities that are traditionally linked to (the formal sources of) international law; this phenomenon is also called “informal international law-making” (IIL). The present contribution will analyze IIL as an alternative way forward in light of the current “deadlock” caused by States’ unwillingness to conclude new IHL treaties or to recognize customary IHL. In this article, we will investigate and assess the opportunities, shortcomings and pitfalls offered by informality by looking into examples of IIL within IHL. More concretely, we will look into State practice in relation to (1) the Safe Schools Declaration, (2) the Tallinn Manual and Tallinn Manual 2.0, and (3) the Montreux Document. Most importantly, our findings will assess whether IIL can overcome one of its alleged main disadvantages: its lack of effectiveness.

Keywords: armed conflict, international humanitarian law, law-making, Montreux Document, Safe Schools Declaration, Tallinn Manual, effectiveness, informal international law-making, State practice.

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Introduction

Over the last two decades, international humanitarian law (IHL) has witnessed an increasing reluctance on the part of States to adopt or amend treaties, recognize customary international rules or even become formally involved in the further development of IHL. According to Kessing, this is due to the fact that many States regularly involved in, or affected by, armed conflicts have not ratified any of the Additional Protocols to the four Geneva Conventions of 1949, making other States and the International Committee of the Red Cross (ICRC) hesitant to initiate diplomatic processes for the development of new rules of IHL.¹ At the same time, however, it is well known that the “hard law” regulating today’s armed conflicts, especially concerning non-international armed conflicts (over 95% armed conflicts nowadays),² is outdated and inadequate in many respects.³ Therefore, the question arises as to whether sticking to the traditional sources mentioned in Article 38(1) of the Statute of the International Court of Justice (ICJ) is the only way forward to meaningfully develop IHL.

In 2010, US president Barack Obama highlighted in his National Security Strategy that “[w]e need to spur and harness a new diversity of instruments,

1 Peter Vedel Kessing, “The Use of Soft Law in Regulating Armed Conflict: From Jus in Bello to ‘Soft Law in Bello?’”, in Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone (eds), *Tracing the Roles of Soft Law in Human Rights*, Oxford University Press, Oxford, 2016, p. 130.

2 See, *inter alia*, Marco Sassòli, *International Humanitarian Law*, Edward Elgar, Cheltenham, 2019, p. 16; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 1; Kendra Dupuy and Siri Aas Rustad, *Trends in Armed Conflict, 1946–2017*, Conflict Trends No. 5, Peace Research Institute Oslo, 2018, p. 1.

3 P. V. Kessing, above note 1, p. 129.

alliances, and institutions in which a division of labor emerges on the basis of effectiveness, competency, and long-term reliability”.⁴ The Strategy added that “strengthening bilateral and multilateral cooperation cannot be accomplished simply by working inside formal institutions and frameworks”.⁵ Similarly, in Germany, today’s code of conduct for federal ministries stipulates that, with regard to international treaties, ministries must consider whether drafting and concluding such treaties is absolutely necessary, or whether the objective concerned can also be achieved by other understandings below the threshold of an international treaty.⁶ These citations seem to indicate a desire on the part of States to move away from the formalities traditionally associated with (certain sources of) international law. Indeed, in recent years quite a few IHL instruments have dispensed with some of these formalities. Furthermore, the involvement of non-governmental organizations (NGOs) and international organizations in the development of IHL is on the rise.⁷ Moreover, since the 1949 Geneva Conventions and their Additional Protocols “are an exception among international treaties in that they do not provide that States will meet on a regular basis to discuss issues of common concern and perform other functions related to treaty compliance”,⁸ alternatives for such inter-State meetings as a way to develop IHL have to be found.

The present contribution examines “informal international law-making” (IIL) as an alternative way forward in light of the current deadlock. In this article, we will investigate and assess the opportunities and pitfalls offered by informality by looking into States’ positions regarding examples of IIL within IHL. Most importantly, we will assess whether IIL can overcome one of the alleged main disadvantages that are associated with soft law or informal normative processes: the non-binding character and lack of enforceability, or in short, the alleged lack of effectiveness. In the first section, we will introduce the notion and conceptual framework of IIL. The second section will delve into three examples of informality within IHL: (1) the Safe Schools Declaration, (2) the Tallinn Manual and Tallinn Manual 2.0, and (3) the Montreux Document. While touching upon the Tallinn Manuals, we will also briefly reflect on another recent development in the sphere of cyber warfare, the Oxford Process on International Law Protections in Cyberspace. In the third section, we will evaluate the effectiveness of informality in IHL as an alternative to new treaties or customary international law.

4 White House, “National Security Strategy”, 27 May 2010, available at: https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (all internet references were accessed in July 2022).

5 *Ibid.*

6 German Federal Government, “Gemeinsame Geschäftsordnung der Bundesministerien”, 22 January 2020, para. 72(1), available at: <https://tinyurl.com/bde23rw2>.

7 Marten Zwanenburg, “Keeping Camouflage Out of the Classroom: The Safe Schools Declaration and the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict”, *Journal of Conflict and Security Law*, Vol. 26, No. 2, 2021, pp. 274–277.

8 ICRC and Swiss Federal Department of Foreign Affairs, *Fourth Meeting of States on Strengthening Compliance with International Humanitarian Law: Background Document*, Geneva, March 2015, p. 3.

The concept of informal international law-making

The notion of informal international law-making was developed in a book by Pauwelyn, Wessel and Wouters in 2012.⁹ As further elaborated in an article in the *European Journal of International Law*,¹⁰ these three authors developed the concept of IIL in order to capture the decline in formal international law-making (in particular multilateral treaty-making) that has been noticeable over the past two decades, and to detect and analyze new forms of law-making that do not fit into the traditional toolbox of public international law.¹¹ The present contribution relies on the following definition of IIL given in these publications to analyze the three instruments referred to above:

Cross-border cooperation between public authorities, with or without the participation of private actors and/or international organizations, in a forum other than a traditional international organization (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality) and/or which does not result in a formal treaty or other traditional source of international law (output informality).¹²

In this definition, three forms of informality are distinguished: output informality, process informality and actor informality. Often these forms overlap, and in fact, the three instruments studied below classify as informal in all three aspects. Output informality occurs when the instrument generated does not qualify as one of the traditional sources of international law as listed in Article 38(1) of the ICJ Statute. Often this concerns memoranda of understanding, guidelines, standards, declarations etc.¹³ Process informality refers to international cooperation that does not take place in a traditional international organization, such as the United Nations (UN), or at a traditional diplomatic conference; it instead takes place in a loosely organized network or forum. Having said this, process informality might nevertheless still take place in close relation to a more formal organization.¹⁴ Finally, actor informality refers to cases in which traditional diplomatic actors that have full powers to represent and bind a State under Article 7 of the Vienna Convention on the Law of Treaties are not (solely) engaged in the cooperation at hand. Actor informality in this sense roughly entails two types of informality. On

9 Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Oxford University Press, Oxford, 2012.

10 Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, "When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking", *European Journal of International Law*, Vol. 25, No. 3, 2014, p. 733.

11 See also Jan Wouters, "International Law, Informal Lawmaking and Global Governance in Times of Anti-Globalism and Populism", in Heike Krieger, Georg Nolte and Andreas Zimmermann (eds), *The International Rule of Law: Rise or Decline? Approaching Current Foundational Challenges*, Oxford University Press, Oxford, 2019, p. 242.

12 Joost Pauwelyn, "Informal International Lawmaking: Framing the Concept and Research Questions", in J. Pauwelyn, R. A. Wessel and J. Wouters (eds), above note 9, p. 22.

13 *Ibid.*, pp. 15–17.

14 *Ibid.*, pp. 17–19.

the one hand, in addition to the traditional State actors, other actors such as NGOs or international organizations might be welcomed at the negotiation table and may be involved in the drafting process, or could even sign up to the output document. On the other hand, actor informality could also entail that States send a different representative than the diplomatic actor as foreseen in Article 7 – for instance, a representative who does not have the power to negotiate and sign a binding treaty but merely a non-binding document, or a semi-independent domestic agency or different minister than the foreign affairs minister.¹⁵

Examples of informal international law-making within IHL

The Tallinn Manuals

The *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual) and its successor, the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Tallinn Manual 2.0), are an academic study conducted by experts – i.e., international lawyers and jurists – at the invitation of the North Atlantic Treaty Organization’s (NATO) Cooperative Cyber Defense Centre of Excellence (CCDCOE). Despite the link with NATO, the project was neither State-led nor an official NATO project.¹⁶ However, as many of the experts and reviewers involved were current or former State legal advisers – Sassòli refers to them as “independent” experts¹⁷ – we see it as a form of cooperation between public authorities. In addition, the drafting process of the Tallinn Manual 2.0 involved extensive consultations with States, therefore providing them with the opportunity to have an active role in the process. To facilitate this, the government of the Netherlands and the CCDCOE organized the Hague Process, a series of meetings that brought together legal advisers from fifty States in The Hague to discuss the draft Tallinn rules.¹⁸

The original Tallinn Manual was published in 2013. It was the work of twenty-three experts, four of whom were observers, and was then reviewed by thirteen different experts. Most of the latter were Anglo-American experts and past or present members of the ICRC. This limited diversity in experts and over-reliance on Western legal sources triggered strong criticism of the 2013 Tallinn Manual,¹⁹ and this criticism in large part drove a revision and expansion of the Manual, which was conducted by a second, more diverse group of

15 *Ibid.*, pp. 19–20.

16 Brian J. Egan, “International Law and Stability in Cyberspace”, *Berkeley Journal of International Law*, Vol. 35, No. 1, 2017, p. 171.

17 M. Sassòli, above note 2, p. 534.

18 Asser Institute Centre for International and European Law, “The Tallinn Manual 2.0 and The Hague Process: From Cyber Warfare to Peacetime Regime”, available at: www.asser.nl/media/2878/report-on-the-tallinn-manual-20-and-the-hague-process-3-feb-2016.pdf.

19 Dieter Fleck, “Searching for International Rules Applicable to Cyber Warfare – A Critical First Assessment of the New Tallinn Manual”, *Journal of Conflict and Security Law*, Vol. 18, No. 2, 2013, pp. 335–336; Kristen Eichensehr, “Review of *The Tallinn Manual on the International Law Applicable to Cyber*

experts.²⁰ Under the leadership of Michael Schmitt, twenty-one experts, including one observer, and fifty-nine reviewers completed and published the Tallinn Manual 2.0 in 2017.²¹

The aim of the experts was to give an account of the *lex lata*, not the *lex ferenda*.²² The Tallinn Manuals are a non-binding study which assesses how existing international law, particularly IHL, applies to cyber warfare.²³ Rather than developing an entirely new legal paradigm, the experts tried to extend the scope of existing rules of IHL to new circumstances by way of interpretation and analogy.²⁴ Besides, the Manuals do not exclusively focus on IHL: they include rules on State responsibility and *jus ad bellum*, but also rules of international law applicable to cyber operations which are not of a scale or effect sufficient to constitute a prohibited use of force, or which are executed outside the context of an existing armed conflict. The Tallinn Manual 2.0 includes 154 rules, most of which address the issue of cyber operations in the context of use of force, both *jus ad bellum* and IHL.

Apart from the criticism mentioned above, both the Tallinn Manuals have been subject to considerably academic controversy²⁵ and mixed reactions by States. Most States approach the Manuals very cautiously or remain silent on the matter. Even during the Hague Process, some States involved in cyber operations did not present their legal position, presumably to maintain a high level of operational flexibility.²⁶ Only a few States have issued public national cyber security doctrines;

Warfare (Michael N. Schmitt ed., 2013)", *American Journal of International Law*, Vol. 108, 2014, pp. 588–587.

- 20 Michael Adams, "A Warning about Tallinn 2.0... Whatever It Says", *Lawfare*, 4 January 2017, available at: www.lawfareblog.com/warning-about-tallinn-2-0-%E2%80%A6-whatever-it-says/; Papawadee Tanodomdej, "The Tallinn Manuals and the Making of the International Law on Cyber", *Masaryk University Journal of Law and Technology*, Vol. 13, No. 13, 2019.
- 21 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0), pp. xii–xviii; Dan Efrony and Yuval Shany, "A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice", *American Journal of International Law*, Vol. 112, No. 4, 2018, p. 587.
- 22 Michael N. Schmitt (ed.), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, Cambridge, 2013 (Tallinn Manual), p. 19.
- 23 M. Sassöli, above note 2, p. 534; P. Tanodomdej, above note 20, p. 69.
- 24 D. Efrony and Y. Shany, above note 21, p. 583.
- 25 See, for example, Oliver Kessler and Wouter Werner, "Expertise, Uncertainty and International Law: A Study of the Tallinn Manual on Cyberwarfare", *Leiden Journal of International Law*, Vol. 26, No. 4, 2013; Lianne Boer, "Restating the Law 'As It Is': On the Tallinn Manual and the Use of Force in Cyberspace", *Amsterdam Law Forum*, Vol. 5, No. 3, 2013; D. Fleck, above note 19; K. Eichensehr, above note 19; Michael N. Schmitt and Sean Watts, "The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare", *Texas International Law Journal*, Vol. 50, No. 2–3, 2014; Terence Check, "Book Review: Analyzing the Effectiveness of the Tallinn Manual's Jus ad Bellum Doctrine on Cyber-Conflict, a NATO-Centric Approach", *Cleveland State Law Review*, Vol. 63, No. 2, 2015; Rebecca Ingber, "Interpretation Catalysts in Cyberspace", *Texas Law Review*, Vol. 95, No. 7, 2017; Dinah PoKempner, "Squinting Through the Pinhole: A Dim View of Human Rights from Tallinn 2.0", *Texas Law Review*, Vol. 95, No. 7, 2017; Gary Corn, "Tallinn Manual 2.0 – Advancing Conversation", *Just Security*, 15 February 2017, available at: www.justsecurity.org/37812/tallinn-manual-2-0-advancing-conversation/; M. Adams, above note 20; P. Tanodomdej, above note 20.
- 26 D. Efrony and Y. Shany, above note 21, p. 588.

some of these doctrines, though, include customary international law as incorporated in the Manuals, or refer explicitly to the Manuals.

For instance, the German Federal Government's 2021 position paper mentions the Tallinn Manual 2.0 as an indirect source that was taken into account for the drafting of the position paper and explicitly refers to many of the Manual's rules in its sections on obligation of States under IHL. In a footnote, though, Germany explicitly states that

[t]he Tallinn Manual 2.0 is a paper created by independent experts and constitutes neither a document stating NATO positions nor a position paper by States. In the following, references to the Tallinn Manual 2.0 are made for information purposes only and do not necessarily constitute an endorsement of the referenced text by the German government.²⁷

This clearly illustrates the inspiration purpose that IIL can fulfil (see below). As the US Department of Defence noted in 2020, "resources such as the Tallinn Manual ... can help guide discussions and policies related to cybersecurity strategies".²⁸ Similarly, the French Ministry of the Armed Forces' statement on international law in cyberspace calls the Tallinn Manual 2.0 the most comprehensive statement to date on the applicability of IHL to cyberspace: "The development of this summary also takes into account the reflections currently undertaken in this area by academics and independent experts. Among these, the Tallinn Manual 2.0 represents the most exhaustive work carried out in this field so far." The same statement, however, immediately challenges the Manual's authority with the following caveat: "Even if [the Manual's] authority *remains strongly dependent on the authority awarded to the experts behind this publication*, [the Manual] nevertheless is of a nature that stimulates international reflection on the international law applicable to cyberspace."²⁹

Some States seem to attach more importance to the Manuals than mere illustrative purposes. For instance, the letter by the Dutch minister of foreign affairs to the president of the House of Representatives of 5 July 2019 on the international legal order in cyberspace states that "IHL also lays down specific

27 German Federal Government, *On the Application of International Law in Cyberspace*, Berlin, March 2021, pp. 2, 7–10.

28 US Department of Defence, *Cybersecurity Reference and Resource Guide*, Washington, DC, 20 February 2020, p. 10.

29 French Ministry of the Armed Forces, *International Law applied to Operations in Cyberspace*, Paris, October 2019, p. 5 (authors' translation, emphasis added). Original text: "L'élaboration de cette synthèse tient également compte des réflexions actuellement conduits dans ce domaine par des universitaires et des experts indépendants. Parmi ces dernières, le Manuel de Tallinn 2.0 représente le travail le plus exhaustif mené dans ce domaine jusqu'à présent"; and caveat: "Si son autorité demeure étroitement tributaire de celle reconnue aux experts à l'origine de sa publication, cette initiative est toutefois de nature à stimuler la réflexion internationale sur le droit international applicable aux cyber-opérations". For a more substantive analysis of the similarities and divergences between the Manuals and France's statement, see Michael N. Schmitt, "France Speaks Out on IHL and Cyber Operations: Part I", *EJIL: Talk!*, 30 September 2019, available at: www.ejiltalk.org/france-speaks-out-on-ihl-and-cyber-operations-part-i/; Michael N. Schmitt, "France Speaks Out on IHL and Cyber Operations: Part II", *EJIL: Talk!*, 1 October 2019, available at: www.ejiltalk.org/france-speaks-out-on-ihl-and-cyber-operations-part-ii/.

rules regarding attack aimed at persons or objects, which apply equally to cyber operations carried out as part of an armed conflict”.³⁰ Interestingly, the footnote to this statement refers not only to Article 49 of Additional Protocol I, but also to Rule 92 of the Tallinn Manual 2.0, without including a caveat similar to the German one.³¹ Also, Volume 4 of New Zealand’s *Manual of Armed Forces Law* explicitly refers on numerous occasions to the Tallinn Manuals without any statement that reduces them to mere sources of inspiration or illustration.³²

Nevertheless, States often avoid explicit references to the Tallinn Manuals. For instance, in a speech of 2018, UK attorney general Jeremy Wright confirmed the application of IHL to cyberspace by stating that “the application of international humanitarian law to cyber operations in armed conflicts provides both protection and clarity”, and that “even on the new battlefields of cyber space, the UK considers that there is an existing body of principles and rules that seek to minimize the humanitarian consequence of conflict”.³³ However, no mention whatsoever was made to the Tallinn Manuals in the speech. Similarly, Harold Koh, then the legal adviser to the US Department of State, delivered a speech at the USCYBERCOM Inter-Agency Legal Conference on the Roles of Cyber in National Defense which did not refer to the draft of the first Tallinn Manual at all, despite the draft being released less than three weeks before.³⁴ However, many concordances can be found between the remarks of Koh and the Manual, as explained by Schmitt.³⁵

Certain States go further and reject some of the principles incorporated in the Manuals.³⁶ In 2016, US State Department legal adviser Brian Egan stated with regard to the (then future) Tallinn Manual 2.0 that “the Tallinn Manuals will make a valuable contribution to underscoring and demonstrating this point [that existing international law applies to State behaviour in cyberspace] across a number of bodies of international law, even if we do not necessarily agree with every aspect of the Manuals”.³⁷ In 2020, US admiral Mike Gilday explicitly stated that “we’re not fighting a war where international norms exist” in the cyber realm,³⁸ implying that there are no proper rules that govern armed conflict in

30 Stef Blok, “Letter to the Parliament on the International Legal Order in Cyberspace”, 5 July 2019, available at: <https://tinyurl.com/mu6ubvzp>.

31 *Ibid.*

32 New Zealand Defence Force, *Manual of Armed Forces Law*, Vol. 4, 2008, Section 1 fn. 23, 31, 82, 86, Section 2 fn. 1, Section 4 fn. 122, Section 10 fn. 165, 166–178, 180–182.

33 Jeremy Wright, “Cyber and International Law in the 21st Century”, 23 May 2018, available at: www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century

34 Harold Koh, “International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012”, *Harvard International Law Journal*, Vol. 54, 2012

35 Michael Schmitt, “International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed”, *Harvard International Law Journal*, Vol. 54, 2012.

36 D. Efrony and Y. Shany, above note 21, pp. 584–585.

37 Brian Egan, “Remarks on International Law and Stability in Cyberspace”, Berkeley Law School, 10 November 2016, available at: <https://www.law.berkeley.edu/wp-content/uploads/2016/12/egan-talk-transcript-111016.pdf>.

38 US Cyber Command, *Twitter*, 19 February 2020, available at: https://twitter.com/us_cybercom/status/1229926329254064134?s=21.

cyberspace. A similar stand may have been taken by UN Secretary-General António Guterres, who in 2020 referred to cyberspace as the “Wild West”.³⁹ A more nuanced position can be seen in the French Ministry of the Armed Forces’ statement on international law in cyberspace, which attaches some importance to the Tallinn Manuals, as noted above, but at the same time explicitly states that it does not adhere to their definition of cyber attack, nor to their interpretation of the principle of distinction.⁴⁰

In their renowned article “A Rule Book on the Shelf?”, Efrony and Shany observe that in the eleven cases of inter-State cyber operations that they studied since the adoption of the first Tallinn Manual, not a single State assumed responsibility for the cyber operations or cyber attacks in question.⁴¹ Although the cases and the surrounding discussions rather situate themselves in the realm of *jus ad bellum*, it is interesting to note that the authors claim that the current uncertain and ambiguous state of international law governing cyber operations grants States significant leeway in terms of applying or disapplying international law to their operations.⁴² The underlying point seems to be that the Tallinn Manuals did not remedy this alleged legal vacuum.⁴³ Furthermore, Efrony and Shany describe only two situations in the realm of *jus in bello*. Firstly, they refer to the Shamoon and Triton cyber attacks against Saudi Arabia between 2012 and 2017.⁴⁴ Secondly, they discuss the cyber attacks against the Ukrainian power grids by Russia between 2015 and 2016;⁴⁵ the power grid cyber attack of 23 December 2015 was publicly acknowledged as a cyber operation taking place in the context of an armed conflict.⁴⁶ In neither incident, though, did government officials talk about IHL or the Tallinn Manuals. Efrony and Shany therefore conclude that State support for key rules as enshrined in the Tallinn Manuals is rather limited.⁴⁷ As stressed by the Estonian president Kersti Kaljulaid, in order to advance interpretative efforts in the cyber context and for condemnation to have meaningful normative value, “States do not only have to condemn other States for conducting hostile cyber operations, but they also need to call them violations of international law and specify which specific rule” of international law has been breached.⁴⁸

39 António Guterres, “Remarks to the General Assembly on the Secretary-General’s Priorities for 2020”, New York, 22 January 2020, available at: www.un.org/sg/en/content/sg/speeches/2020-01-22/remarks-general-assembly-priorities-for-2020.

40 French Ministry of the Armed Forces, above note 29, pp. 13–15.

41 D. Efrony and Y. Shany, above note 21, p. 594.

42 *Ibid.*, p. 604.

43 Nicholas Tsagourias, “Symposium on Dan Efrony and Yuval Shany, ‘A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice’: The Slow Process of Normativizing Cyberspace”, *American Journal of International Law*, Vol. 113, 2019, p. 74.

44 D. Efrony and Y. Shany, above note 21, pp. 620–622, 647.

45 *Ibid.*, p. 624.

46 Samuele De Tomas Colatin, “Power Grid Cyberattack in Ukraine (2015)”, *Cyber Law Toolkit*, 4 June 2021, available at: [https://cyberlaw.ccdcoe.org/wiki/Power_grid_cyberattack_in_Ukraine_\(2015\)](https://cyberlaw.ccdcoe.org/wiki/Power_grid_cyberattack_in_Ukraine_(2015)).

47 D. Efrony and Y. Shany, above note 21, pp. 585, 647.

48 Michael N. Schmitt, “Estonia Speaks Out on Key Rules for Cyberspace”, *Just Security*, 10 June 2019, available at: www.justsecurity.org/64490/estonia-speaks-out-on-key-rules-for-cyberspace/.

The lack of acknowledgement of the serious effects of cyber operations on the civilian population and civilian property could also, according to Efrony and Shany, indicate that States only have a limited interest in upholding IHL as interpreted by the Tallinn Manuals, or that they consider the analogous application of IHL to cyber operations as not fit for purpose.⁴⁹ Similar statements are echoed elsewhere – for instance, according to Lamensch, despite the consensus regarding the applicability of international law to cyber operations,⁵⁰ there is a certain amount of “cherry-picking” by States of the specific rules of IHL applicable to the cyber realm.⁵¹ Nevertheless, in relation to later cyber incidents during the armed conflict between Russian and Ukraine, referred to as the Petya and NotPetya attacks in 2016 and 2017 respectively, one notices that some State officials have used IHL terminology. For instance, the White House press secretary depicted the NotPetya attack as not only reckless, but also indiscriminate.⁵² UK defence minister Gavin Williamson stated that “Russia is ripping up the rulebook” – although without explaining what “rulebook” he was referring to exactly – and that Russia wrecked “livelihoods by targeting critical infrastructure”.⁵³

Despite their best efforts, the Tallinn Manuals may not have persuaded States, even though Michael Schmitt calls them the “‘go to’ source for cyber practitioners around the world”.⁵⁴ According to Boer, this failure is due to the form of the Manuals. By calling themselves a “manual” which restates existing “rules”, any discrepancy between the Manuals’ content and State behaviour or lack of reference to the Manuals may make the Manuals fall into desuetude.⁵⁵ Tzagourias offers a persuasive explanation for the lack of State interaction with the Tallinn Manuals: he reminds us that States, “as the primary normative engines of international law, ... refuse to delegate this function fully to others, even if those other actors may influence States’ thinking and actions”.⁵⁶ Perhaps the fact that the documents are called “manuals” discourages States from explicitly accepting them. Maybe States’ acceptance of the Tallinn rules is more

49 D. Efrony and Y. Shany, above note 21, pp. 585, 647.

50 See, for example, UNGA Res. A/68/98, 24 June 2013; UNGA Res. A/RES/68/243, 9 January 2014; European Commission, *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, Brussels, 7 February 2013, p. 16; NATO, *Wales Summit Declaration*, Wales, 5 September 2014, para. 72.

51 Marie Lamensch, “Cyberspace Has Rules: It’s Time to Enforce Them”, *Centre for International Governance Innovation*, 20 October 2021, available at: www.cigionline.org/articles/cyberspace-has-rules-its-time-to-enforce-them/.

52 White House, “Statement from the Press Secretary”, 15 February 2018, available at: <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-25/>.

53 Sarah Marsh, “US Joins UK in Blaming Russia for NotPetya Cyber-Attack”, *The Guardian*, 15 February 2018.

54 Michael N. Schmitt, “Norm-Skepticism in Cyberspace? Counter-Factual and Counterproductive”, *Just Security*, 28 February 2020, available at: www.justsecurity.org/68892/norm-skepticism-in-cyberspace-counter-factual-and-counterproductive/.

55 L. Boer, above note 25.

56 N. Tzagourias, above note 43, p. 74.

subtle than the indications of acceptance that Efrony and Shany investigated.⁵⁷ Furthermore, one has to recall that the cyber sphere is characterized by what Mačák calls the “glass house dilemma”: the most powerful States in the cyber realm are also those most vulnerable to cyber attacks.⁵⁸ This causes a regulatory dilemma for these States as to whether to allow a lot of leeway in order to conduct their own cyber operations, or whether to strictly regulate cyber operations in order to protect their own cyber infrastructure.⁵⁹

Nevertheless, when one looks at the instances of State practice cited over time, one could conclude that there seems to be a positive movement of States towards not only referring to and relying on rules of IHL in the cyber context in a similar manner as the Tallinn Manuals do, but also to actively and explicitly referring to the Manuals themselves. Schmitt observes, although in more cautious terms, that there are positive signs which “include the readiness of States to discuss voluntary, non-binding norms of responsible behaviour when they cannot reach agreement over the legal status of a purported rule, as well as effort to craft confidence building measures in regional fora such as the OSCE, Organization of American States, and ASEAN”.⁶⁰ Furthermore, Efrony and Shany argue that since cyber operations seem to have resulted in only limited loss of life and injury due to their design, States are presumably adhering to certain restraining rules of IHL in their use of cyber operations.⁶¹

A more recent development in the sphere of cyber warfare concerns the Oxford Process on International Law Protections in Cyberspace. This was an initiative started up in 2020 by the Oxford Institute for Ethics, Law and Armed Conflict at the Blavatnik School of Government. Co-sponsored by Microsoft and the Japanese government, it is a study comparable to the Tallinn Manuals which aims at identifying and classifying the rules of international law applicable to cyber operations and at articulating how international law applies to specific sectors and objects.⁶² The Oxford Process publishes Oxford Statements on International Law Protections which articulate how international law, including IHL, applies to the cyber context, both prohibiting and prescribing State behaviour; to date there have been five of these Statements. Contrary to the Tallinn Manuals, the Oxford Process takes a contextual approach and examines international law as it applies to specific objects of protection, focusing on the

57 *Ibid.*, p. 74. In 2018, for instance, the Dutch minister of foreign affairs Stef Blok called the Tallinn Manual a “roadmap” for State accountability. Government of the Netherlands, “Speech by Minister Blok on First Anniversary Tallinn Manual 2.0”, 20 June 2018, available at: <https://perma.cc/XMB5-GTCC>.

58 Kubo Mačák, “Symposium on Dan Efrony and Yuval Shany, ‘A Rule Book on The Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice’: On the Shelf, but Close at Hand: The Contribution of Non-State Initiatives to International Cyber Law”, *American Journal of International Law*, Vol. 113, 2019, pp. 82–84.

59 *Ibid.*

60 M. N. Schmitt, above note 54.

61 D. Efrony and Y. Shany, above note 21, p. 650.

62 Oxford Institute for Ethics, Law and Armed Conflict, “The Oxford Process on International Law Protections in Cyberspace”, available at: www.elac.ox.ac.uk/the-oxford-process-on-international-law-protections-in-cyberspace/.

most pressing needs of the international community.⁶³ The impact of the Oxford Process remains to be seen.

The Safe Schools Declaration

The Safe Schools Declaration is an intergovernmental political commitment developed among UN member States, under the leadership of Norway and Argentina, in 2015. It offers a framework for collaboration and exchange. Endorsement entails a commitment to meet on a regular basis to review the implementation of the Declaration and to use the *Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict* (the Guidelines), which provide clear and simple guidance for armed actors.⁶⁴ The Guidelines themselves are a non-binding tool⁶⁵ that is intended to change armed actors' behaviour in order to increase the protection of schools and universities during armed conflict.⁶⁶ The Declaration and Guidelines go beyond current IHL and aim to prevent armed forces from using schools and universities to support their military efforts. Current treaty and customary IHL do not contain a similar prohibition.⁶⁷

Similar to the Tallinn Manuals, the Safe Schools Declaration constitutes an instance of all three forms of informality. Regarding output informality, the Declaration concerns a non-binding political commitment in the form of a “declaration”, not a treaty as defined by Article 2 of the 1969 Vienna Convention on the Law of Treaties. Process informality, meanwhile, is evident in several ways. Despite being an initiative among UN member States, the Declaration is not a UN instrument, nor was it developed under the auspices of the UN. The four International Conferences on the Safe Schools Declaration, which were only organized after a limited number of States drafted the Declaration (see below), qualify as academic conferences during which the issue was touched upon by speakers representing States, NGOs and international organizations, rather than a process that leads to the adoption of a document. In addition, the reports of the Conferences do not indicate any political negotiations taking place.⁶⁸ Finally,

63 *Ibid.*

64 Global Coalition to Protect Education from Attack (GCPEA), “The Safe Schools Declaration: An Intergovernmental Political Commitment to Protect Students, Teachers, Schools, and Universities from the Worst Effects of Armed Conflict”, 2021, available at: <https://ssd.protectingeducation.org/>; M. Zwanenburg, above note 7, pp. 256, 274–275.

65 The commentary to the Guidelines explicitly minimizes their role as being “intended to serve as a guidance” and states that “they are not legally binding in themselves and do not affect existing obligation under international law”: GCPEA, *Commentary on the “Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict”*, New York, 2019, pp. 4–5. See also GCPEA, above note 64.

66 P. V. Kessing, above note 1, p. 146.

67 The Guidelines, however, while not reflecting existing IHL, do rely on evidence of good practices which are already applied by some parties to an armed conflict: M. Zwanenburg, above note 7, pp. 256, 258–266.

68 Norwegian Ministry of Foreign Affairs, *The Oslo Conference on Safe Schools: Protecting Education from Attack*, Oslo, 28–29 May 2015; GCPEA, *Second International Conference on Safe Schools: Chair’s Summary*, Buenos Aires, 28–29 March 2017; Spanish Agency for International Development Cooperation, *Third International Conference on Safe Schools*, Palma de Mallorca, 27–29 May 2019; GCPEA, *Fourth International Conference on the Safe Schools Declaration*, Abuja, 25–27 October 2021.

actor informality is evident as well: in addition to States, various NGOs and international organizations participated in the drafting process of the Declaration.⁶⁹ Moreover, these organizations were prominently represented during the four subsequent International Conferences.

The drafting of the Declaration and Guidelines involved a limited number of States, but from geographically diverse parts of the world.⁷⁰ Only sixteen States were consulted and involved in the drafting of the Guidelines.⁷¹ Despite the rather limited number of States involved in the drafting process, to date, 114 States have joined the Declaration.⁷² The substantial number of endorsing States suggests that both the Declaration and Guidelines are seen as important and legitimate by States. Moreover, the Declaration is supported by many actors and organizations at the international and regional level. For instance, the UN Secretary-General called upon States to endorse and implement the Declaration in 2017, 2018 and 2020.⁷³ The Special Representative of the Secretary-General for Children and Armed Conflict echoed this call in 2017.⁷⁴ The UN Department of Peacekeeping also includes the Declaration in its list of references as an international norm or standard on children's rights.⁷⁵ The issue has been on the UN's agenda since 2000.⁷⁶ At the regional level, the Peace and Security Council of the African Union has repeatedly encouraged its member States to sign the Declaration since 2016.⁷⁷ Also, the European Union (EU) "recognizes and supports the work of the Global Coalition to Protect Education from Attack and will support initiatives to promote and roll out the Safe Schools Declaration".⁷⁸ When taking these observations together, one could say that the support base for the adoption of the Declaration and Guidelines was already present long before the drafting process was initiated, unlike with other informal law-making instruments.

69 With regard to the international organizations, the drafting process involved UNHCR, UNICEF and UNESCO, which are all part of the GCPEA steering committee: M. Zwanenburg, above note 7, pp. 255, 273–274, 276.

70 The commentary to the Guidelines includes an account of the drafting process: GCPEA, above note 65, pp. 6–8.

71 Argentina, Canada, Côte d'Ivoire, France, Finland, Germany, Liberia, Luxembourg, Nepal, the Netherlands, Norway, the Philippines, Qatar, Senegal and Switzerland: see Norwegian Ministry of Foreign Affairs, above note 68, p. 20.

72 For the most up-to-date list of endorsing States, see: www.regjeringen.no/en/topics/foreign-affairs/development-cooperation/safeschools_declaration/id2460245/; GCPEA, above note 65.

73 *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc. S/2017/414, 10 May 2017, para. 14; *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/72/865, S/2018/465, 16 May 2018, para. 122; *Children and Armed Conflict: Report of the Secretary-General*, UN Doc. A/74/845, S/2020/535, 9 June 2020, para. 232.

74 *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc. A/72/276, 2 August 2017, paras 13, 53.

75 UN Department of Peacekeeping, *Operations Policy on Child Protection in United Nations Peace Operations*, 2017, p. 23.

76 For a brief summary of the increasing attention being paid to this issue, particularly within the context of the UN, see M. Zwanenburg, above note 7, pp. 270–272.

77 GCPEA, above note 65.

78 European Commission, *Communication from the Commission to the European Parliament and the Council on Education in Emergencies and Protracted Crises*, COM (2018) 304 final, 18 May 2018, p. 9.

Interestingly, States are not merely endorsing both documents; they appear to be conforming to the commitments in the documents as well. The Global Coalition to Protect Education from Attack (GCPEA) noted that there was an overall strong decline in the reported use of schools and universities in armed conflicts between 2015 and 2018.⁷⁹ Still, the GCPEA noted that out of the fifty-one States that endorsed the Declaration in 2015, twelve experienced at least one reported incident of military use of schools and/or universities during the same period.⁸⁰ Though this may seem to indicate that the Declaration was violated in more than 20% of the endorsing States, the GCPEA does not specify when exactly these instances took place, or notably whether the incidents from 2015 dated from before or after the endorsement of the Declaration.

There are many examples of States issuing domestic statements, adapting their military manuals or doctrine. According to a review conducted by Human Rights Watch, which assessed the protection of schools against military purposes in certain States, the following States already have legislation in place to protect schools and universities from military use: Argentina, Bangladesh, Croatia, Ecuador, Greece, India, Malaysia, Montenegro, Nicaragua, Nigeria, North Macedonia, Pakistan, Peru, the Philippines, Poland, Singapore, Sri Lanka and Venezuela.⁸¹ The following States have incorporated such protection into their military policy or doctrine: the Central African Republic, Colombia, the Democratic Republic of the Congo, Denmark, Ecuador, Nepal, New Zealand, Norway, the Philippines, South Sudan, Sudan, Switzerland, the United Kingdom, the United States and Yemen.⁸² Also, the trainings provided in Côte d'Ivoire's military schools, academies and training centres include a specific module on the prohibition of occupation of schools and training institutions.⁸³

Lastly, many other States give direct orders to the military in order to put the Declaration into practice as required by Guideline 6.⁸⁴ For instance, in 2015, after the Central African Republic endorsed the Declaration, the UN peacekeeping mission active on that country's territory, MINUSCA, issued a directive which restated much of the Guidelines' text, although it does not refer to the Declaration or the Guidelines explicitly.⁸⁵ In 2016, the Afghan Ministry of Education called upon the Ministry of Interior and the National Security Council for the evacuation of schools by the security forces.⁸⁶ In the context of the conflict with Boko Haram, the minister of basic education of Cameroon referred

79 GCPEA, *Practical Impact of the Safe Schools Declaration*, New York, October 2019, p. 1.

80 GCPEA, "Safe Schools Declaration Endorsements", New York, 2022, available at: <https://ssd.protectingeducation.org/endorsement/>; GCPEA, above note 79.

81 Human Rights Watch, *Protecting Schools from Military Use: Law, Policy and Military Doctrine*, New York, 27 May 2019, available at: www.hrw.org/report/2019/05/27/protecting-schools-military-use/law-policy-and-military-doctrine.

82 *Ibid.*

83 GCPEA, above note 79, p. 2.

84 Article 36, *The Safe Schools Declaration: Reflections on Effective Post-Agreement Work*, London, July 2021, pp. 7–8.

85 MINUSCA *Directive on the Protection of Schools and Universities against Military Use*, UN Doc. MINUSCA/OSRSG/046/2015, 24 December 2015.

86 GCPEA, above note 79, p. 2.

to the Declaration in November 2017 to encourage military personnel working as teachers in schools to carry out their educational activities in civilian clothes and without weapons; he also called upon the governor of the Far North Region to respect the Declaration.⁸⁷ Sudan issued an order in 2017 that prohibited all divisions from using schools for military purposes.⁸⁸ Furthermore, Italy, Luxembourg and Slovenia have announced their intention to update their military manuals and doctrine in order to incorporate the commitments of the Declaration.⁸⁹

The Montreux Document

In 2008, an intergovernmental consultation initiated by the ICRC and Switzerland resulted in the adoption of the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military Companies during Armed Conflict* (Montreux Document) by consensus.⁹⁰ Even though the process primarily involved the seventeen States most affected by the use of private military and security companies (PMSCs) or with direct experience in dealing with them, it also enjoyed the input of industry representatives, academic experts and NGOs.⁹¹ Allegedly this high degree of expertise also resulted in a high degree of support from State delegates.⁹² In Asia, Africa and Latin America, the Montreux Document was disseminated by the ICRC and the Swiss government through bilateral delegations and regional information and follow-up seminars during 2009 and 2010.⁹³ Apart from the Document itself, the process also triggered the creation of the Montreux Document Forum in 2014. This platform aims to provide support for the national implementation of the Montreux Document and to increase the active support for the Document. It allows the participants of the Montreux Document to share good practices, receive contextualized support packages and discuss the challenges that they are facing in regulating PMSCs.⁹⁴

The Montreux Document constitutes a non-binding intergovernmental instrument which guides States in the use and tolerance of PMSCs during armed conflict. The Document also characterizes itself in its introduction as a non-binding instrument by stating that it seeks to “provide guidance on a number of

87 Human Rights Watch, “*These Killings Can Be Stopped*”: *Government and Separatist Groups Abuses in Cameroon’s Anglophone Regions*, New York, July 2018, p. 31; Human Rights Watch, above note 81.

88 GCPEA, above note 79, p. 2.

89 *Ibid.*, p. 2.

90 P. V. Kessing, above note 1, p. 140.

91 ICRC and Swiss Federal Department of Foreign Affairs, *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, Montreux, August 2009, p. 41.

92 James Cockayne, “Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document”, *Journal of Conflict and Security Law*, Vol. 13, No. 3, 2008, p. 421.

93 *Ibid.*, p. 427.

94 See the Montreux Document Forum website, available at: www.montreuxdocument.org/about/the-forum.html.

thorny legal and practical points”.⁹⁵ In its first part, it provides an account of the international legal obligations of the contracting States, territorial States, home States, and all other States in relation to PMSCs and their personnel. The second part contains good practices for States to ensure respect for, *inter alia*, IHL in their relationships with PMSCs.⁹⁶ However, the Document merely provides guidance on a number of ambiguous legal and practical points based on existing law; it does not establish new rules.⁹⁷

As with the Tallinn Manuals and Safe Schools Declaration, the Montreux Document is a prime example of informality in all three forms. Similarly to the Safe Schools Declaration, it concerns a non-binding intergovernmental guiding instrument, and thus exhibits output informality. The involvement of actors other than States, with notably the ICRC playing a prominent role, entails actor informality. No traditional diplomatic conferences were hosted to negotiate and adopt the Montreux Document, nor did it come into existence under the auspices of an international organization, thus indicating process informality.

As stated above, the Montreux Document was accepted by consensus by seventeen States on 17 September 2008,⁹⁸ although the Russian delegation refused to endorse the Document on the same day. Cockayne submits, however, that it was precisely a Russian diplomat who had previously defended the Montreux Initiative in reaction to the question posed by another diplomat of whether the adoption of the Document would trigger a legitimization of the use of PMSCs during armed conflict.⁹⁹ According to Cockayne, who participated in the drafting, one of the US government participants called the Montreux Document “a significant achievement of historic importance” during the drafting process, since it remedied existing legal uncertainty.¹⁰⁰ Allegedly, some States called the Document “pragmatic, modest and therefore realistic”, a “stepping stone”, a “milestone on the way to further discussion”, and “just a start”.¹⁰¹

To date, fifty-eight States support the Montreux Document by virtue of diplomatic consultations of the ICRC and Swiss Department of Foreign Affairs with the non-participating States in the third quarter of 2007.¹⁰² Additionally, three regional organizations have signed up to the Montreux Document with a communication of support: the EU, the Organization for Security and Cooperation in Europe, and NATO.¹⁰³ Furthermore, the Parliamentary Assembly of the Council of Europe has recommended

95 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 5.

96 *Ibid.*, p. 8; M. Sassöli, above note 2, pp. 544–546.

97 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, pp. 5, 9.

98 Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the UK, Ukraine, and the United States. See P. V. Kessing, above note 1, p. 140; ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 31.

99 J. Cockayne, above note 92, pp. 419–420.

100 *Ibid.*, p. 403.

101 *Ibid.*, p. 426.

102 *Ibid.*, p. 419.

103 For a complete list of the States and regional organizations supporting the Montreux Document and the date of their communication of support, see: www.eda.admin.ch/eda/en/home/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html.

that the Committee of Ministers support, on behalf of the Council of Europe, the Montreux Document on Private Military and Security Companies which sums up legal obligations under existing international law and best practices related to PMSCs' activities, and call on member states that have not already done so, to endorse it.¹⁰⁴

Several Latin American States have signed up to the Document,¹⁰⁵ though no Latin American or Caribbean States participated in the drafting process.

A 2013 study analysed State practice in relation to the Montreux Document and concluded that “in terms of demonstrated compliance with legal obligation and the implementation of Good Practices, progress has been mixed. Some States have done well in some areas, whereas other lag behind.”¹⁰⁶ Five years after the adoption of the Document, the study noted that States which have not yet committed to the Document are in particular States that are politically unstable, have PMSCs present on their territories, or whose citizens are working for PMSCs.¹⁰⁷ Therefore, the question arises as to whether the Montreux Document has had much of an impact on the battlefield. However, the study also concluded that no firm conclusions could be made on the effectiveness of the Montreux Document since no comprehensive data to allow such conclusions were available.¹⁰⁸

The alleged lack of effectiveness of informal IHL

As explained in the introduction to this article, the flexibility of the studied cases of informal IHL comes with a major downside: their non-binding character at both the international and domestic level, and their consequential lack of effectiveness. Some authors, such as Aust, define an “informal instrument” of international law as “an instrument which is not a treaty because the parties to it do not intend it to be legally binding”.¹⁰⁹ Eric Westropp refers to informal legal documents as merely a “‘bible’ – a source of extensive doctrine and normative guidance, but with no real implementation or enforcement arrangements to give it teeth”.¹¹⁰ However, though soft or informal at the international level, the domestic implementation of international cooperation might be either hard or soft law.¹¹¹ According to

104 Parliamentary Assembly of the Council of Europe, *Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force*, Recommendation 1858, 2009, para. 15.

105 Ecuador, Chile, Uruguay, Costa Rica and Panama have all joined the Montreux Document: János Kálmán, “The International Regulation of Private Security Providers – a Brief Analysis”, in János Kálmán (ed.), *Legal Studies on Contemporary Hungarian Legal Systems*, Universitas-Győr, Győr, 2014, p. 162.

106 American University Washington College of Law, Center for Human Rights and Humanitarian Law, Initiative for Human Rights in Business and International Institute for Nonviolent Action, “Montreux Five Years On: An Analysis of State Efforts to Implement the Montreux Document Legal Obligations and Good Practices”, 2013, p. 157.

107 *Ibid.*, p. 158.

108 *Ibid.*, p. 157.

109 Anthony Aust, “The Theory and Practice of Informal International Instruments”, *International and Comparative Law Quarterly*, Vol. 35, No. 4, 1986, p. 787.

110 As referred to in J. Cockayne, above note 92, p. 428.

111 J. Pauwelyn, R. A. Wessel and J. Wouters (eds), above note 9, pp. 30–31.

Cockayne, though, significant efforts may be needed by civil society actors to turn the informal instruments discussed above into “an *ad hoc* yardstick against which to measure, criticize or even litigate the conduct of States”.¹¹² In the present section, we will investigate this suggestion.

First of all, all informal IHL instruments which restate existing law highlight and, therefore, remind States of their obligations under IHL. This is in and of itself useful. For instance, the Montreux Document, as pointed out by its commentary, enhances protection of civilians in armed conflict by “raising awareness of the humanitarian concerns at play whenever PMSCs operate in armed conflict”, and it reminds States of their obligations,¹¹³ even if not everyone agrees that it enhances or goes beyond existing law.¹¹⁴

Furthermore, informal IHL instruments such as the Montreux Document and the Safe Schools Declaration’s Guidelines provide States with guidance on how to sensibly deal with the issues at hand.¹¹⁵ Very often State officials look to these instruments for inspiration and guidance on how to meet their international obligations, as can be deduced from the State practice cited above in relation to the Tallinn Manuals.

Nevertheless, the commentary to the Montreux Document also recognizes that, ultimately, enhanced protection is a matter of implementation.¹¹⁶ Amnesty International and the International Commission of Jurists have rightly noted that, “for the Swiss Initiative ultimately to be successful, the content will have to be accepted and applied by all of those who would be expected to make use of its guidance”, and that “if these actors consider that the document falls below standards already established in international law, the document could be discounted and other sources of law invoked, a consequence which no doubt would devalue the currency of the initiative”.¹¹⁷ As can be seen from the State practice presented above, most States implement informal IHL instruments that they have endorsed into domestic legislation and practice. Neither the modest number of States involved in the drafting of the instruments nor the question of their geographical representativeness was considered a reason for non-implementation by non-participating States.

Similar to what can be observed in the past with traditional treaties, if matters have already been on the international agenda for a long time, such as with the protection of schools and universities, States seem more readily willing to endorse or implement the outcome of the informal IHL process. The same holds true for events which shock the international community, such as needless massacres, which seem to spur States’ readiness to commit themselves to endorsing and implementing informal IHL instruments. This has been observed

112 *Ibid.*

113 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 40.

114 See for example J. Kálmán, above note 105, p. 160.

115 ICRC and Swiss Federal Department of Foreign Affairs, above note 91, p. 40.

116 *Ibid.*, p. 40.

117 J. Cockayne, above note 92, p. 423, referring to Amnesty International and International Commission of Jurists, *Comments on the Swiss Initiative Draft Text Dated 13 August 2008*, 29 August 2008.

for both the Montreux Document and the Safe Schools Declaration.¹¹⁸ The same dynamic was at play with the adoption of traditional international law sources such as the 1949 Geneva Conventions and their Additional Protocols, and many treaties banning specific means or methods of warfare. In the case of the Tallinn Manuals, such shocking events were not yet present to induce their endorsement and implementation; States do endorse and implement informal IHL instruments in these circumstances, but the process seems to take longer.

Concerning the Tallinn Manuals and the Montreux Document specifically, as has been seen above, they are in themselves not binding, but give an account of existing international law and how it applies in a particular context. Therefore, while the informal IHL instruments themselves are not binding, the legal obligations that they incorporate are.

Furthermore, in light of the ICJ's 1974 judgment in the *Nuclear Tests* case, one may wonder whether unilateral endorsements or support statements by States may not in the end turn out to be legally binding for them and render them accountable for violations of these informal IHL instruments¹¹⁹; this question also arises when taking into account Principle 1 of the International Law Commission's Guiding Principles on Unilateral Declarations, which were largely inspired by the aforementioned case.¹²⁰ On the other hand, States are nowadays very much aware of such possible consequences. For that reason, they may have become rather reluctant to endorse informal instruments, or may be inclined to add statements that their signature "does not create new commitments".

It is important to note that within IHL one is faced with an inherent lack of compliance mechanisms, contrary to most branches of international law. There is no central body that is competent to monitor compliance and render binding decisions or take persuading measures to force States into compliance, and nor do the general IHL treaties foresee regular meetings of the States Parties, as indicated in the introduction to this contribution. However, with regard to the Safe Schools Declaration, States commit themselves to meet regularly to review the implementation of the Guidelines, and similarly, the Montreux Document was accompanied by the creation of the Montreux Document Forum. Such fora for the international scrutiny of the implementation of an informal IHL document are quite rare; to date, no informal human rights instrument foresees the establishment of a forum comparable to the Montreux Document Forum.¹²¹ Therefore, informal IHL instruments might offer advantages that traditional sources of IHL do not possess. For Ferelli, when analyzing the protection of schools and universities during the Syrian armed conflict, it was clear that the

118 M. Zwanenburg, above note 7, p. 256; J. Cockayne, above note 92, p. 428.

119 ICJ, *Nuclear Tests (Australia v. France)*, Judgment, 20 December 1974, *ICJ Reports 1974*, paras 43, 46, 49.

120 Principle 1 states: "Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected." International Law Commission, *Yearbook of the International Law Commission*, Vol. 2, Part 2, 2006, p. 370.

121 P. V. Kessing, above note 1, p. 150.

Guidelines, in particular Guideline 6, are an adequate means to strengthen legal standards by promoting to implementing them into “national doctrine, military manuals, rules of engagement, operational orders and other means of dissemination”.¹²²

Concluding remarks

This article has provided an account of current State practice related to three informal law-making instruments in the field of IHL: the Tallinn Manuals, the Safe Schools Declaration and the Montreux Document. We have observed that States are endorsing and even implementing these instruments into national legislation without being internationally obliged to do so. Furthermore, regarding their practice on the ground, States are making attempts to abide by the rules and principles as incorporated into these instruments, including those which are not legally binding under current treaty and customary IHL. However, with regard to the Tallinn Manuals, one can observe more hesitancy in their implementation and endorsement, accompanied by a high degree of cherry-picking by States. Nevertheless, when States’ reactions are analyzed over time, they seem to approach the Manuals more favourably and have even started to refer to them directly.

When combining all concerns and observations, it turns out that the alleged “non-binding” character and consequential lack of effectiveness so often ascribed to informal instruments does not entirely hold true. The very existence of these instruments reminds States of their obligations under international law and therefore enhances protection during armed conflict. Additionally, informal instruments sometimes trigger the creation of corresponding implementation review mechanisms. “Naming and shaming” is a very valuable tool within international relations for enhancing compliance with norms. Furthermore, recalling the *Nuclear Tests* judgment of the ICJ, it can be questioned whether endorsing informal instruments will truly not have any legally binding consequences for States.

Interestingly, we have seen that the same dynamics under which States endorse or implement treaties or customary international law are at play for informal IHL instruments. Prior international support bases or events which shock the international community trigger a higher willingness by States to implement or endorse these instruments. Even if such factors are not at hand, as in the case of the Tallinn Manuals, informal IHL instruments are still endorsed or implemented into national legislation, albeit more gradually.

In conclusion, informal international law-making in the field of IHL seems to be, in the present international context, a valuable – albeit imperfect – alternative for fostering the further development of the law.

122 Ashley Ferrelli, “Military Use of Educational Facilities during Armed Conflict: An Evaluation of the Guidelines for Protecting Schools and Universities from Military Use during Armed Conflict as an Effective Solution”, *Georgia Journal of International and Comparative Law*, Vol. 44, No. 2, 2016, p. 363.

International humanitarian law-making and new military technologies

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Abstract

Military technology has developed rapidly in recent years, and this development challenges existing norms. It has produced countless debates about the application of international humanitarian law (IHL) to areas of war and technology including cyber military operations, military artificial intelligence (including autonomous weapons), the use of drones, and military human enhancement. Despite these rapid progressions, the prospect of creating new treaties to specifically regulate their use by militaries and in armed conflicts is very low. This is largely due to the unequal allocation of military technology among States and the differing interests that result from this inequality. The absence of formal regulation means that State and non-State actors are increasingly embracing informal means of law-making. This is similar to other areas of IHL, such as the regulation of asymmetric conflicts, where norms are contested. In such cases, State and non-State actors employ various informal law-making techniques to advance their normative positions through treaty interpretation and the identification of customary international law.

However, the discussion on military technology differs from other contemporary IHL debates. First, due to the rapid development of such technology and uncertainty about how it will be employed in practice, the interests of the various actors are less clear. Second, there are significant challenges in obtaining accurate information about new military technologies. This makes even the informal law-making path in the context of new technologies more challenging.

* I would like to thank David Hughes and Arie Kacowicz for their valuable comments, and Danielle Regev for her excellent research assistance.

This paper explores the dynamics of contemporary international law-making as it relates to the regulation of new military technologies. It identifies the main techniques that are used by the relevant actors and explores the common themes among the various debates over military technology, as well as the potential specific challenges in relation to certain technologies.

Keywords: law-making, military technology, IHL, cyber, autonomous weapons.

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Introduction

At the Second Lateran Council in 1139, Pope Innocent II launched an effort to ban the use of the crossbow, which since its development had had a sizeable impact on the battlefield.¹ This push was driven by ethical and political considerations. On the ethical side, the crossbow was presented as a deadly weapon that defied honourable fighting.² On the political side, the crossbow threatened to alter the power imbalance between different classes in society.³ Though Pope Innocent II's effort ultimately failed, it provides a popular – and poignant – reference point in the history of technology, warfare and law. The effort's failure itself demonstrates the real and continuing challenge of regulating new technologies that prove highly effective on the battlefield.⁴ Technological development has, throughout history, played a key role in shaping how armed conflicts are fought,⁵ and has been subject to debates over its regulation.⁶ Today we are facing a new era of technological development that poses significant challenges to the legal regulation of armed conflicts at an unprecedented pace.⁷ This includes various areas of technological development in war, such as cyber warfare, military artificial intelligence (AI) and more specifically lethal autonomous weapons systems (LAWS),⁸ the use of drones, and

- 1 See, e.g., William H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford, 2009, p. 9.
- 2 Shane R. Reeves and William J. Johnson, "Autonomous Weapons: Are You Sure Those Are Killer Robots? Can We Talk about It?", *Army Lawyer*, Vol. 2014, No. 4, 2014, p. 27.
- 3 Sean Watts, "Regulation-Tolerant Weapons, Regulation-Resistant Weapons and the Law of War", *International Law Studies*, Vol. 91, 2015 (describing political fears regarding the societal revolutionary potential of the crossbow as a reason for the resistance to its use).
- 4 *Ibid.*, p. 568 (describing the failure of the attempts to ban the crossbow due to its effectiveness as a weapon).
- 5 See, e.g., Martin van Creveld, *Technology and War: From 2000 B.C. to the Present*, revised and expanded ed., Free Press, New York, 2010; Max Boot, *War Made New: Technology, Warfare and the Course of History, 1500 to Today*, Gotham Books, New York, 2006; William H. McNeill, *The Pursuit of Power: Technology, Armed Force, and Society since A.D. 1000*, University of Chicago Press, Chicago, IL, 1982.
- 6 For a critical historical account of the attempts to regulate the use of weapons in armed conflict, see Chris af Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War", *Harvard International Law Journal*, Vol. 35, No. 1, 1994.
- 7 Rain Liivoja, "Technological Change and the Evolution of the Law of War", *International Review of the Red Cross*, Vol. 97, No. 900, 2015, p. 1173.
- 8 Also referred to as autonomous weapons, or as killer robots (by their opponents).

military human enhancement. Most of these areas of technological development have been the subject of continuous, complicated and heated debate over their regulation. These debates are part of the long history of law and technology in war but are also shaped by the current conditions of international law-making and the unique challenges of new technologies. Rather than focusing on a specific technological development, this paper offers a general exploration of the contemporary attempts to regulate new technologies in war.

The paper proceeds as follows. The first part of the paper offers a brief discussion of the development and conditions of formal and informal law-making in armed conflicts. The second part addresses four key features of the contemporary regulation of emerging military technologies. The first is the unique aspects of new technologies and their law-making implications, which include uncertainty regarding the ramifications of these technologies and their future development, the secrecy that surrounds their development and use, and scepticism towards technological development in general. The second is the evolution/revolution debate – namely, whether existing norms are sufficient to address the subject or if new norms, or far-reaching interpretations of existing norms, are needed in response to the challenges posed by new technologies. The third issue, which is at the heart of the discussion, is the form and substance of the new informal law-making processes, describing the participants and law-making techniques that are used in various law-making initiatives. The fourth feature relates to the role of States and non-State actors in the development of international law in the context of emerging military technologies, including the implications of power differences between various actors. Finally, the third part of the article offers some concluding remarks.

Formal and informal law-making and the regulation of armed conflicts

During the last two centuries, modern international humanitarian law (IHL) has gradually developed in an attempt to comprehensively regulate the conduct of the warring parties in armed conflicts. This section focuses on the development of IHL. Its first part describes a shift from regulation through formal sources, mainly treaties, to an increased emphasis on informal development of IHL. The second part examines the development of IHL in the context of new military technologies, following the recent shift to informal regulation.

The rise and decline of formal IHL and the emergence of informal IHL

Modern IHL has been shaped to a large extent by international treaties. From the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field to the 1977 Additional Protocols to the four

Geneva Conventions of 1949, IHL treaties have been central in efforts to regulate warfare.⁹

Nonetheless, IHL treaty law is dependent on the ability of States to agree on norms and how they should be articulated and inform regulation. In traditional international armed conflicts between States, the interests of the parties to those conflicts are often similar, and thus it was possible to create a significant body of treaty law that applies to those conflicts.¹⁰ In contrast, where there are significant differences in the interests of the parties to a conflict or where there is significant difference in the law-making capacity of different actors, the creation of treaty law is much more challenging. Differing interests often exist when there are significant power differences between the parties, providing conflicting incentives for the regulation of warfare – often, powerful States have incentives to favour a less restrictive regime that enables them to take full advantage of their capabilities, while weaker states favour a more restrictive regulation that can potentially mitigate the power imbalance. With regard to law-making capacity, States are the primary law-makers in international law, and this allows them to create rules that favour themselves in their armed conflicts with non-State armed groups. As a result, there are significant gaps in the regulation of some areas of armed conflicts that include such differences. Most notably, non-international armed conflicts are severely under-regulated under existing treaty law. In addition, the ability of existing treaty law to adequately address questions regarding new phenomena, such as new military technologies, where significant power differences exist, is limited.

More generally, in the last few decades there has been a significant decline in the role of treaties in the regulation of armed conflicts. The 1977 Additional Protocols were the last formal, multilateral effort to regulate general conduct-of-hostilities rules. Indeed, most contemporary conflicts involve contrasting interests between relevant actors which pose significant obstacles for the creation of new treaties. For example, transnational armed conflicts between States and non-State armed groups often involve significant power differences between the parties to the conflict as well as gaps in the law-making capacity of those parties. As a result, there is general agreement that the prospect of creating new treaties to regulate the conduct of hostilities is low.¹¹

- 9 Steven Ratner, “War/Crimes and the Limits of the Doctrine of Sources”, in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law*, Oxford University Press, Oxford, 2018, p. 916.
- 10 There are clearly exceptions to this tendency even in inter-State conflicts, mainly in relation to power differences between States. The paradigmatic example is the emergence of the Martens Clause as a result of such power differences: see Rotem Giladi, “The Enactment of Irony: Reflections on the Origins of the Martens Clause”, *European Journal of International Law*, Vol. 25, No. 3, 2014.
- 11 See, e.g., Tara Smith, “Critical Perspectives on Environmental Protection in Non-International Armed Conflict: Developing the Principles of Distinction, Proportionality and Necessity”, *Leiden Journal of International Law*, Vol. 32, No. 4, 2019, p. 761; Knut Dörmann, “The Role of Nonstate Entities in Developing and Promoting International Humanitarian Law”, *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2018, p. 714; Yoram Dinstein, “The Recent Evolution of the International Law of Armed Conflict: Confusions, Constraints, and Challenges” *Vanderbilt Journal of Transnational Law*, Vol. 51, No. 3, 2018, p. 708; John B. Bellinger III and Vijay M. Padmanabhan, “Detention Operations

Soft-law literature has long identified that when the negotiating costs of formal rules are high, soft-law initiatives become much more attractive.¹² This is true not only for soft law in the strict sense but for informal law-making more generally.¹³ There is no formal definition of informal law-making¹⁴ – in fact, informal law-making addresses phenomena that are often addressed by scholars and practitioners using other terms, such as soft law or legal interpretation. Informality can relate to the outputs, the process and/or the actors that contribute to the law-making initiatives.¹⁵ This paper assumes a wide definition of informal law-making that encompasses any non-binding text which intends to shape international law. This includes informal law-making by States and a broad spectrum of non-State actors, as well as multilateral and unilateral initiatives such as experts' manuals and like-minded States' positions. This follows a broad, informal approach to the sources of international law, and in particular IHL.¹⁶

Thus, the decline of the formal law-making process due to the above-mentioned challenges incentivizes various interested actors to use informal processes in which these actors advance their normative positions. While not enjoying formal status, informal regulation is a much more feasible path and has the capacity to significantly influence international law. In the last few decades, various informal IHL law-making initiatives have emerged. These include soft-law initiatives such as the Copenhagen Process on the Handling of Detainees in International Military Operations;¹⁷ International Committee of the Red Cross (ICRC) initiatives such as the ICRC Customary Law Study and the *Interpretive Guidance on Direct Participation in Hostilities* (ICRC Interpretive Guidance);¹⁸ joint political declarations such as the Safe Schools Declaration¹⁹ and the draft Political Declaration on Strengthening the Protection of Civilians from the

in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law”, *American Journal of International Law*, Vol. 105, No. 2, 2011, p. 205; Yahli Shereshevsky, “Back in the Game: International Humanitarian Law-Making by States”, *Berkeley Journal of International Law*, Vol. 37, No. 1, 2019, p. 10.

12 Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance”, *International Organization*, Vol. 54, No. 3, 2000.

13 Y. Shereshevsky, above note 11.

14 See, e.g., Nico Krisch, “The Decay of Consent: International Law in an Age of Global Public Goods”, *American Journal of International Law*, Vol. 108, No. 1, 2014; Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds), *Informal International Lawmaking*, Cambridge University Press, Cambridge, 2012; Anthony Aust, “The Theory and Practice of Informal International Instruments”, *International and Comparative Law Quarterly*, Vol. 35, No. 4, 1986.

15 J. Pauwelyn, R. A. Wessel and J. Wouters (eds), above note 14.

16 S. Ratner, above note 9, pp. 913–914.

17 *The Copenhagen Process on the handling of Detainees in International Military Operation: Principles and Guidelines*, 2012, available at: <https://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.

18 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>; Nils Melzer, *Interpretive Guidance on Direct Participation in Hostilities*, ICRC, Geneva, 2005 (ICRC Interpretive Guidance), available at: www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf.

19 The Safe Schools Declaration is a non-binding declaration that was developed in a process led by Norway and Argentina. It is available at: www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf.

Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas;²⁰ experts' manuals such as the *Oslo Manual on Select Topics of the Law of Armed Conflict*,²¹ the *HPCR Manual on International Law Applicable to Air and Missile Warfare*²² and the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*,²³ and State initiatives such as the *US Law of War Manual*,²⁴ the *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*²⁵ and the Israeli report on the 2014 Gaza Conflict.²⁶ It is therefore not surprising that IHL scholarship has demonstrated growing interest in such processes in recent years.²⁷

One partial exception to the tendency to embrace informal law-making remains the regulation of weapons.²⁸ In the last three decades, several formal treaties regulating the use of specific weapons under IHL have been created. These include treaties that prohibit the use of blinding laser weapons,²⁹ anti-personnel mines,³⁰ cluster munitions³¹ and nuclear weapons.³² Interestingly, the regulation of weapons is the clearest example of the regulation of technologies under the laws of armed conflict. In order to appreciate the promise of weapons regulation, it is important to take a step back and address the broad question of such regulation beyond these three specific examples.

The regulation of weapons under the laws of armed conflict is divided into general customary norms and prohibitions of specific weapons. Under general

20 Government of Ireland, "Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas", 2 March 2022, available at: <https://reliefweb.int/report/world/draft-political-declaration-strengthening-protection-civilians-humanitarian>.

21 Yoram Dinstein and Arne Willy Dahl, *Oslo Manual on Select Topics of the Law of Armed Conflict*, Springer, Cham, 2020.

22 Program on Humanitarian Policy and Conflict Research at Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Cambridge University Press, Cambridge, 2013.

23 Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995.

24 Department of Defense, *Law of War Manual*, 2016 (updated version), available at: <https://tinyurl.com/yctsefz>.

25 Danish Ministry of Defence, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations*, Defense Command Denmark, Copenhagen, 2020, available at: <https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

26 State of Israel, *The 2014 Gaza Conflict Report: Factual and Legal Aspects*, May 2015, available at: <https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf>.

27 Emily Crawford, *Non-Binding Norms in International Humanitarian Law*, Oxford University Press, Oxford, 2022; Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law*, Edward Elgar, Northampton, 2021; Y. Shereshevsky, above note 11; Sandesh Sivakumaran, "Making and Shaping the Law of Armed Conflict", *Current Legal Problems*, Vol. 71, No. 1, 2018.

28 K. Dörmann, above note 11, p. 714.

29 Protocol IV (Protocol on Blinding Laser Weapons) to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to have Indiscriminate Effects, 1380 UNTS 370, 13 October 1995.

30 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 2056 UNTS 211, 18 September 1997.

31 Convention on Cluster Munitions, 2688 UNTS 39, 30 May 2008.

32 Treaty on the Prohibition of Nuclear Weapons, UN Doc A/CONF.229/2017/8, 7 July 2017, available at: www.icanw.org/tpnw_full_text.

customary law, the use of weapons that cause superfluous injury and unnecessary suffering and the use of indiscriminate weapons are prohibited.³³ The prohibitions on specific weapons include several treaties that address various categorizations of weapons.³⁴

The distinction between these two types of regulation is closely related to the general notion of technology-neutral and technology-specific regulation.³⁵ Technology-neutral regulation addresses technological challenges broadly, with the aim that “the law will apply effectively and fairly in different technological contexts”.³⁶ In contrast, technology-specific regulation focuses on the challenges of specific technologies. The literature on law and technology features a continuous discussion on the advantages and disadvantages of regulating new technology through a focus on specific technologies. Some authors have addressed these considerations in the context of new technologies in war,³⁷ but in practical terms, the distinction between the two types of regulation seems less relevant to weapons law. The regulation of weapons is one of the most challenging areas of the law of armed conflict, and it often faces very limited success in relation to general prohibitions.³⁸ As the three examples above demonstrate, the heart of contemporary weapons law is found in treaties that address specific weapons.

In this context, it is important to consider possible explanations for the ability to create new weapons treaties. Sean Watts offers a distinction between regulation-tolerant and regulation-resistant weapons.³⁹ He identifies several factors, including effectiveness, novelty, deployment, medical compatibility, disruptiveness and notoriety, as being important in the ability to regulate weapons. Watts recognizes that the history of the regulation of weapons does not provide perfect coherence and consistency in relation to the effect of the various factors. For example, of the four recent successful attempts to regulate weapons, one involves the regulation of a new weapon that has not yet been deployed

33 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 35.

34 See, e.g., the prohibitions on blinding laser weapons, anti-personnel mines, cluster munitions and nuclear weapons cited in above notes 29–32.

35 See, e.g., Paul Ohm, “The Argument against Technology-Neutral Surveillance Laws,” *Texas Law Review*, Vol. 88, No. 7, 2010; Lyria Bennett Moses, “Recurring Dilemmas: The Law’s Race to Keep Up with Technological Change,” *University of Illinois Journal of Law, Technology and Policy*, Vol. 2007, No. 2, 2007.

36 L. Bennett Moses, above note 35, p. 270.

37 Rebecca Crotoft, “Regulating New Weapons Technology”, in Ronald T. P. Alcalá and Eric Talbot Jesnen (eds), *The Impact of Emerging Technologies on the Law of Armed Conflict*, Oxford University Press, Oxford, 2019, pp. 15–17; R. Liivoja, above note 7, pp. 1168–1171.

38 See, e.g., David Turns, “Weapons in the ICRC Study on Customary International Humanitarian Law”, *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, pp. 211–212 (suggesting that there are very few examples in which the general principle had an impact on positions of States regarding the legality of weapons). For a general critical look on the historical regulation of weapons, see C. af Jochnick and R. Normand, above note 6 (suggesting that, in many cases, the banning of specific weapons is a direct result of the limited military effectiveness of those weapons).

39 S. Watts, above note 3.

(blinding laser weapons), and three involve weapons that were deployed and had been created several decades before the treaty (anti-personnel mines, cluster munitions and nuclear weapons).⁴⁰ Other commentators emphasize different factors relating to the aforementioned examples, including the cooperation of NGOs and certain States in promoting the treaty process.⁴¹

Nonetheless, there is one factor that according to Watts is key for the ability to regulate weapons: effectiveness. The more important a specific weapon is to the fighting force that uses it, the more difficult it is to impose significant limitations on the weapon's use. In addition, it seems that unequal distribution of a weapon, or differences in the relative importance of a weapon for particular States, creates significant obstacles for the ability to reach a general agreement on the weapon's regulation. For example, even the relatively successful initiatives to ban anti-personnel mines and cluster munitions do not enjoy the support of major powers such as the United States and China.⁴²

The emergence of informal IHL on new military technologies

The various aspects discussed in the previous section on the general development of IHL shed light on the contemporary regulation of new military technologies. The discussion on new military technologies is relevant to the general regulation of the conduct of hostilities as well as to the specific discussion over the regulation of new weapons. The debate over the use of LAWS, for example, includes discussions regarding a potential ban on their development and production, as well as debates over their actual use during armed conflicts. Currently, there are several institutional inter-State processes in relation to new technologies, most notably the UN Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security (UN GGE), the Open-Ended Working Group on Security of and in the Use of Information and Communications Technologies (OEWG) and the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (GGE on LAWS). These are platforms for discussion on the regulation of these new technologies that could potentially lead to the creation of formal or informal international law.

New technologies often present similar challenges to conduct-of-hostilities issues, as they do in other cases that exhibit conflicts of interests between relevant actors. New technologies are not distributed equally and thus create a potential clash of interests between those who are expected to benefit from their use and those who have much to lose from it. As a result, despite some calls for new regulation dealing with the use of contemporary technologies in armed conflicts,

40 Liivoja calls these types of weapons “newly controversial”: R. Liivoja, above note 7, p. 1175.

41 See, e.g., Margarita H. Petrova, “Naming and Praising in Humanitarian Norm Development”, *World Politics*, Vol. 71, No. 3, 2019; M. Patrick Cottrell, “Legitimacy and Institutional Replacement: The Convention on Certain Conventional Weapons and the Emergence of the Mine Ban Treaty”, *International Organization*, Vol. 63, No. 2, 2009.

42 See S. Watts, above note 3, pp. 584, 594.

there are no treaties that are dedicated specifically to such regulation. Moreover, it seems that in addition to the unequal distribution of technologies such as cyber capabilities and AI, such technologies have the potential to be extremely important to the effectiveness of military campaigns.⁴³ Under these conditions, it is not surprising that there is currently much reluctance to address the issue in the context of weapons law as well. Just recently, an attempt to ban the use of LAWS failed at the Convention on Conventional Weapons (CCW) Review Conference.⁴⁴ While some authors and NGOs believe that it is possible to promote a treaty – similar to those for anti-personnel mines and cluster munitions – outside the CCW’s institutional context,⁴⁵ LAWS, as well as other new technologies, are much more central to contemporary warfare and such attempts will likely face significant challenges. In any case, such attempts are expected to take time, and several powerful States that invest in these technologies are not expected to join a treaty. Under such circumstances, it is unlikely that comprehensive new treaties on emerging military technologies will be created,⁴⁶ and informal regulation of IHL is thus a key avenue for debate over the regulation of such technologies.⁴⁷ The form and substance of such informal regulation of IHL will be further discussed below.

Main features of emerging military technologies and international law-making

The observation that IHL has shifted towards informal regulation of new military technologies is only the starting point of the discussion. Such regulation includes various features that require scholarly attention. This section briefly identifies and addresses key features of the regulation of new military technologies. These are: (1) the unique features of new military technologies that distinguish them from other areas of contemporary debate over the regulation of IHL; (2) the evolution or revolution question, focusing on the extent to which existing laws can adequately address technological change; (3) the form and substance of informal IHL of new military technologies, including the “micro-processes” of informal

43 See, e.g., Jacquelyn Schneider, “The Capability/Vulnerability Paradox and Military Revolutions: Implications for Computing, Cyber, and the Onset of War”, *Journal of Strategic Studies*, Vol. 42, No. 6, 2019; Benjamin M. Jensen, Christopher Whyte and Scott Cuomo, “Algorithms at War: The Promise, Peril, and Limits of Artificial Intelligence”, *International Studies Review*, Vol. 22, No. 3, 2019.

44 Kasmira Jefford, “What Next for Talks on Regulating ‘Killer Robots?’”, *Geneva Solutions*, 21 December 2021, available at: <https://genevasolutions.news/global-news/what-next-for-talks-on-regulating-killer-robots>.

45 Charli Carpenter, “A Better Path to a Treaty Banning ‘Killer Robots’ Has Just Been Cleared”, *World Politics Review*, 7 January 2022, available at: www.worldpoliticsreview.com/articles/30232/a-better-path-to-a-treaty-banning-ai-weapons-killer-robots; Human Rights Watch, “Killer Robots: Military Powers Szymie Ban”, 19 December 2021, available at: www.hrw.org/news/2021/12/19/killer-robots-military-powers-szymie-ban.

46 Michael N. Schmitt and Sean Watts, “The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare”, *Texas International Law Journal*, Vol. 50, No. 2, 2015, pp. 222.

47 Yahli Shereshevsky, “Are All Soldiers Created Equal? On the Equal Application of the Law to Enhanced Soldiers”, *Virginia Journal of International Law*, Vol. 61, No. 2, 2021, pp. 276–277.

IHL-making and the various techniques that international actors use to promote their legal position; and (4) the nuanced relationship between States and non-State actors in the informal development of the regulation of new military technologies, including the role and impact of power differences in such processes.

Unique features of new military technologies

Much of the discussion in this paper is relevant to law-making and IHL in general, rather than exclusively to emerging military technologies. Nonetheless, there are some features that are especially relevant in the context of new technologies. Some of those features are relevant to all emerging technologies and some are relevant to specific technologies. This section focuses on two issues that are common to many emerging military technologies and have an impact on their regulation: the first is uncertainty and secrecy, and the second is technological scepticism. Issues that are relevant to specific technologies are briefly addressed in the next section.

Uncertainty and secrecy

Emerging military technologies involve significant uncertainty in relation to their current implications as well as their potential future development.⁴⁸ At a relatively early stage in their development and deployment, the full potential impacts of such technologies are often not yet fully understood.⁴⁹ In the case of LAWS, for example, there is currently much uncertainty regarding the ability to design such systems with sufficient predictability and understandability.⁵⁰ Such uncertainty significantly affects the willingness and ability of States and other actors to commit to strong legal positions, when their current and future interests are not fully clear. In addition, in many cases secrecy surrounds the development and use of emerging technologies. States may not want to openly reveal their capabilities or to take responsibility for the development, use and as-yet-unknown effects of emerging technologies.⁵¹ This secrecy further complicates the ability of State and non-State actors to fully grasp the potential implications of such technologies and the legal solutions for the concerns that they raise.⁵²

There are three main implications that stem from the uncertainty and secrecy of emerging military technology. First, as several authors suggest, secrecy and uncertainty at least partially explain the reluctance of various States to

48 Steven Ratner, "Persuasion About/Without International Law: The Case of Cybersecurity Norms", in Ian Johnstone and Steven Ratner (eds), *Talking International Law*, Oxford University Press, Oxford, 2021, pp. 109–110; R. Crootof, above note 37, p. 21.

49 R. Crootof, above note 37, p. 21.

50 See Arthur Holland Michel, "In the Debate over Autonomous Weapons, It's Time to Unlock the 'Black Box' of AI", *Bulletain of Atomic Scientists*, 16 October 2020, available at: <https://thebulletin.org/2020/10/ban-regulate-or-do-nothing-the-debate-over-ai-weapons-and-one-path-forward/>.

51 S. Ratner, above note 48, p. 111; M. N. Schmitt and S. Watts, above note 46, pp. 210–211.

52 M. N. Schmitt and S. Watts, above note 46, p. 210.

express their positions on the laws that govern emerging military technologies.⁵³ As further discussed in the section below on “The Form and Substance of Informal IHL of New Military Technologies”, this tendency seems to be shifting in recent years, at least in relation to cyber warfare and LAWS.

Second, secrecy and uncertainty can affect the timing of law-making efforts. It is reasonable to suggest that law-making initiatives with regard to emerging technologies should take place when there is more clarity about the effects and future development of the technology, thus leading to a “wait and see” approach to the regulation of emerging technologies.⁵⁴ Nonetheless, when emerging technologies pose new and significant risks, as is often the case, there is a considerable price associated with adopting such an approach. One of those risks is, of course, that of deploying such technologies without adequate regulation, but well before that stage, other risks emerge: the longer States wait to regulate the technology, the more they will invest in its development, and the less likely they will then be to agree to restrictive regulation. Alternatively, it is possible to push for a precautionary ban on the technology or for pre-emptive regulation.⁵⁵ From a humanitarian perspective, an active approach to the regulation of these technologies, even if premature, seems to be the preferred approach, given the significant danger of the abuse of the under-regulation of specific technology by interested States. It is therefore not surprising that non-State actors are often the first to push for the regulation of emerging military technologies.

Third and finally, if an immediate law-making effort should indeed take place, the dynamic nature of emerging technologies might strengthen the justification to employ informal law-making strategies that allow greater flexibility and easier paths to accommodation and change.⁵⁶

Technological scepticism and law-making

While uncertainty and secrecy have implications for the participation, timing and form of law-making initiatives, technological scepticism primarily affects the substance of normative debates. At its core, IHL aims to balance two principles – military necessity and humanitarian considerations – which, though sometimes mutually reinforcing, often find themselves in tension. In such cases of tension, the IHL community is often divided between the so-called military lawyers and humanitarian lawyers.⁵⁷ To a large extent this divide, similar to other international law controversies, could be framed as an issue of trust. The more a person trusts the genuine willingness of States to apply the law in good faith, the

53 S. Ratner, above note 48, pp. 109–111; Kubo Macák, “From Cyber Norms to Cyber Rules: Re-engaging States as Law-Makers”, *Leiden Journal of International Law*, Vol. 30, No. 4, 2017, pp. 881–882; M. N. Schmitt and S. Watts, above note 46, pp. 223–224.

54 R. Crootof, above note 37, pp. 21–22.

55 *Ibid.*, pp. 22–25.

56 Rebecca Crootof, “Jurisprudential Space Junk: Treaties and New Technologies”, in Chiara Giorgetti and Natalie Klein (eds), *Resolving Conflicts in the Law*, Brill Nijhoff, Leiden, 2019.

57 David Luban, “Military Necessity and the Cultures of Military Law”, *Leiden Journal of International Law*, Vol. 26, No. 2, 2013.

more they will tend to belong to the military necessity camp, and vice versa. In the context of new technologies in war, another factor should be taken into account: the potential divide between those who are sceptical about new technologies, on the one hand, and those who look favourably upon technological progress, on the other. This is also a question of trust, and it will be interesting to explore a potential connection between trust in state behaviour and trust in new technologies.

New technologies can both positively and negatively impact the current state of affairs. Taking LAWS as an example, they pose significant concerns regarding, *inter alia*, unpredictability,⁵⁸ meaningful human control,⁵⁹ responsibility⁶⁰ and “PlayStation mentality”.⁶¹ But LAWS may also be more accurate than alternative weapons, do not suffer from the negative consequences of emotions such as anxiety and fear on the battlefield, and more generally could recognize the nature of a targeted object more reliably than humans and thus reducing suffering in warfare.⁶² However, looking at the contemporary debates over new technologies, it seems that a significant part of the focus is on the dangers of such technologies rather than their promise.⁶³

A potential explanation for the emphasis on concerns regarding new technologies is the prominence of scepticism or fear of new technologies, especially military technologies. Scepticism towards new technologies and its potential regulatory impact are well recognized, even beyond the military context.⁶⁴ There are a variety of potential explanations for fear or scepticism towards technology,⁶⁵ and such scepticism is expected to be greater in the context of new technologies in war, where life and death are on the line. Fear of

58 ICRC, *ICRC Position on Autonomous Weapon Systems*, Geneva, May 2021 (ICRC AWS Position), p. 7, available at: www.icrc.org/en/download/file/166330/icrc_position_on_aws_and_background_paper.pdf.

59 Vincent Boulanin, Moa Peldán Carlsson, Netta Goussac and Neil Davison, *Limits on Autonomy in Weapon Systems: Identifying Practical Elements of Human Control*, ICRC and SIPRI, June 2020, available at: www.sipri.org/sites/default/files/2020-06/2006_limits_of_autonomy.pdf.

60 See, e.g., Russell Buchan and Nicholas Tsagourias, *Autonomous Cyber Weapons and Command Responsibility*, *International Law Studies*, Vol. 96, 2020; Rebecca Crootof, “War Torts: Accountability for Autonomous Weapons”, *University of Pennsylvania Law Review*, Vol. 164, No. 6, 2016; Jack M. Beard, “Autonomous Weapons and Human Responsibilities”, *Georgetown Journal of International Law*, Vol. 45, No. 3, 2014, p. 676.

61 Marco Sassóli, “Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified”, *International Law Studies*, Vol. 90, 2014, p. 317 (referring to the “Game Boy mentality” of the manufacturers).

62 See generally, Eric Talbot Jensen, “The (Erroneous) Requirement for Human Judgment (and Error) in the Law of Armed Conflict”, *International Law Studies*, Vol. 90, 2020.

63 While it is very challenging to demonstrate this argument through a comprehensive survey of the entire body of literature on new technologies in war, a useful example is States’ positions on the regulation of LAWS in which a majority of States emphasized the dangers of LAWS while only a minority discussed their potential positive effects. See Human Rights Watch, *Stopping Killer Robots – Country Positions on Banning Fully Autonomous Weapons and Retaining Human Control*, 2020, available at: www.hrw.org/sites/default/files/media_2021/04/arms0820_web_1.pdf.

64 See Steve Calandrillo and Nolan Kobuke Anderson, “Terrified by Technology: How Systemic Bias Distorts Legal and Regulatory Responses to Emerging Technology”, *University of Illinois Law Review*, Vol. 2022, No. 2, 2022; Dan M. Kahan, “Two Conceptions of Emotion in Risk Regulation”, *University of Pennsylvania Law Review*, Vol. 156, No. 3, 2008.

65 S. Calandrillo and N. Kobuke Anderson, above note 64.

technology is well documented⁶⁶ and is well represented in popular culture⁶⁷ (although such culture also includes, for example, favourable treatment of enhanced soldiers such as Captain America and Wolverine⁶⁸). As a result, there is a strong concern that scepticism towards new technologies might lead to suboptimal regulation, such as a ban on the use of LAWS or enhanced soldiers, even if those technologies can lead to better protection of civilians. There is also potentially the opposite risk that technology enthusiasts might not fully appreciate the costs of emerging military technologies, also leading to suboptimal regulation that does not limit the use of emerging technologies enough – for example, by being overly optimistic about the potential performance of military technologies on an uncontrolled, actual battlefield. However, as mentioned, it seems that the contemporary debate includes more representation of the perils than of the promises of such technologies.

There is no doubt that emerging military technologies present enormous risks that should be carefully considered in any law-making effort. It is an extremely challenging task to differentiate between justified concerns and unsubstantiated fears. Nonetheless, law-making efforts should recognize the potential adverse effect of fear of new technologies and should invest in careful assessment of the costs and benefits of such technologies. It would be helpful if the costs and benefits were acknowledged by both sides of the normative debate over the regulation of armed conflicts.

Evolution or revolution of IHL?

In major debates regarding new phenomena in warfare, there is continuous discussion regarding the adequacy of existing norms in addressing the new challenges involved.⁶⁹ Similar discussions exist in relation to new technologies and international law beyond the context of armed conflicts,⁷⁰ and they are likewise central features in debates over new technologies in war such as cyber warfare and LAWS.⁷¹

All sides of these debates agree that the law needs to accommodate emerging technologies.⁷² The crux of the debate is the ability to address the issue

66 *Ibid.*, pp. 626–628.

67 See, e.g., Daniel Dinello, *Technophobia! Science Fiction Visions of Posthuman Technology*, University of Texas Press, Austin, TX, 2005.

68 For a discussion of the fear of the other in relation to enhanced soldiers in the context of popular culture and its implications, see Y. Shereshevsky, above note 47, pp. 316–317.

69 See, e.g., R. Liivoja, above note 7, pp. 1160–1161; Ganesh Sitaraman, “Counterinsurgency, the War on Terror, and the Laws of War”, *Virginia Law Review*, Vol. 95, No. 7, 2009; Sean D. Murphy, “Evolving Geneva Convention Paradigms in the ‘War on Terrorism’: Applying the Core Rules to the Release of Persons Deemed ‘Unprivileged Combatants’”, *George Washington Law Review*, Vol. 75, No. 5–6, 2007; Roy S. Schöndorf, “Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?”, *New York University Journal of International Law and Politics*, Vol. 37, No. 1, 2005.

70 See, e.g., Yuval Shany and Dafna Dror-Shpoliansky, “It’s the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology”, *European Journal of International Law*, 2022 (forthcoming).

71 See, e.g., R. Crotoof, above note 37; Kristen Eichensehr, “Cyberwar and International Law Step Zero”, *Texas International Law Journal*, Vol. 50, No. 2, 2015.

72 R. Crotoof, above note 37; K. Eichensehr, above note 71.

using interpretation of existing norms, or alternatively through the creation of new norms. In some cases, the application of existing laws is relatively straightforward. Think, for example, about the application of the principle of distinction to attacks by drones (fully controlled by human operators), compared to attacks by fighter jets. The remote nature of the decision-making does not affect the ability to distinguish between lawful and unlawful targets.⁷³ Other cases, such as the definition of a cyber attack, are more complicated.⁷⁴ It seems that in most cases of emerging military technologies, the majority of issues could be adequately addressed by existing laws, while a limited number of unique features lie at the heart of the debate over the need for new laws.⁷⁵ For example, in the context of LAWS, the notion of meaningful human control and the related issue of responsibility for violations of the law by LAWS constitute the heart of the debate over the application of the law to the use of this emerging military technology.⁷⁶ Another example can be seen in the discussion of whether enhanced soldiers could be defined as weapons, and the implications of such a qualification.⁷⁷

It is important to note that the notion of law-making is broader than the creation of new formal rules. Interpretation, for example, is often an act that creates legal meaning rather than one that only identifies the one “true” meaning of a legal rule.⁷⁸ Similarly, as discussed in the next section, identification of customary norms can also serve as a law-making technique.⁷⁹ Dror-Shpoliansky and Shany offer a typology of the evolution of digital human rights that includes both a radical reinterpretation of existing rights and the development of new

73 Michael N. Schmitt, “Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate”, *Boston University International Law Journal*, Vol. 30, 2012 (making a similar comparison, stating that “there are very few legal issues unique to [drones]”).

74 See, e.g., Michael N. Schmitt, “Rewired Warfare: Rethinking the Law of Cyber Attack”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014; Oona A. Hathaway, Rebecca Crootof, Philip Levitz and Haley Nix, “The Law of Cyber-Attack”, *California Law Review*, Vol. 100, No. 4, 2012.

75 K. Eichensehr, above note 71 (following Lois Henkin’s famous statement regarding compliance, Eichensehr suggests that “most law-of-war rules apply most of the time to most new technologies”); Rebecca Crootof, “Autonomous Weapon Systems and the Limits of Analogy”, *Harvard National Security Journal*, Vol. 9, No. 2, 2018 (while accepting Eichensehr’s position, Crootof suggests that autonomous weapons raise some aspects that require us to “explicitly revise rules or create entirely new ones”).

76 GGE on LAWS, *Meeting of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects: Final Report*, UN Doc. CCW/MSP/2019/9, 13 December 2019, Annex III (GGE on LAWS Guiding Principles), available at: <https://undocs.org/CCW/MSP/2019/9>.

77 Rain Liivoja and Luke Chircop, “Are Enhanced Warfighters Weapons, Means, or Methods of Warfare?”, *International Law Studies*, Vol. 94, 2018.

78 Melissa J. Durkee, “Interpretive Entrepreneurs”, *Virginia Law Review*, Vol. 107, No. 3, 2021; Gleider Hernandez, “Interpretive Authority and the International Judiciary”, in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law*, Oxford University Press, Oxford, 2015; Ingo Venzke, *How Interpretation Makes International Law*, Oxford University Press, Oxford, 2012, p. 16; Y. Shereshevsky, above note 11, pp. 11–12.

79 Fernando Luca Bordin, “Reflections of Customary International Law: The Authority of Codification Conventions and the ILC Draft Articles in International Law”, *International and Comparative Law Quarterly*, Vol. 63, No. 3, 2014; Monica Hakimi, “Custom’s Method and Process: Lessons from International Humanitarian Law”, in Curtis A. Bradley (ed.), *Custom’s Future: International Law in a Changing World*, Cambridge University Press, Cambridge, 2016, p. 163; Y. Shereshevsky, above note 11, pp. 12–13.

rights as part of their evolution.⁸⁰ Similarly, Rebecca Crootof has discussed alternative possibilities for legal change in the context of emerging military technologies, exploring the advantages and disadvantages of interpretive approaches versus the creation of new rules.⁸¹ My own position is that even if a new technology poses new and challenging issues, it could often be addressed, if necessary, through far-reaching new interpretations of existing norms rather than through the creation of new formal rules. The choice between the two options can be based on the perception that at some point, extremely far-reaching interpretations can be discounted. But the choice is dependent not only on the nature of the normative challenge, but on the political availability of a formal law-making alternative. As mentioned above, the prospect of creating new, formal rules is low. It is therefore expected that interpretation and identification of customary IHL will offer a key law-making path, even when addressing extremely challenging and divisive issues. Alternatively, new norms can also be promoted through non-binding materials that include entirely new norms, such as soft-law initiatives. The form and substance of the various law-making processes is the subject of the next section.

The form and substance of informal IHL of new military technologies

Platforms of informal law-making

There is a wide array of platforms for informal law-making within the context of new technologies. These include the use of manuals such as the seminal *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Tallinn Manual 2.0),⁸² processes within established institutions such as the UN GGE and the GGE on LAWS, the unilateral law-making initiatives of States and non-State actors such as the ICRC position on autonomous weapons,⁸³ and various positions of States regarding the law of emerging military technologies,⁸⁴ as well as academic scholarship⁸⁵ and non-binding political declarations.

The vast scholarship of informal law-making and especially soft law has significantly contributed to our understanding of the general turn to such

80 Y. Shany and D. Dror-Shpoliansky, above note 70.

81 R. Crootof, above note 37.

82 Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 2nd ed., Cambridge University Press, Cambridge, 2017 (Tallinn Manual 2.0).

83 ICRC AWS position, above note 58.

84 See, e.g., Roy Schöndorf, "Israel's Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations", *International Law Studies*, Vol. 97, 2021; Michael N. Schmitt, "France Speaks Out on IHL and Cyber Operations: Part I", *EJIL: Talk!*, 30 September 2019, available at: www.ejiltalk.org/france-speaks-out-on-ihl-and-cyber-operations-part-i/; Jeffrey Biller and Michael N. Schmitt, "Un-caging the Bear? A Case Study in Cyber Opinio Juris and Unintended Consequences", *EJIL: Talk!*, 24 October 2018, available at: www.ejiltalk.org/un-caging-the-bear-a-case-study-in-cyber-opinio-juris-and-unintended-consequences/.

85 On the role of academic scholarship in law-making processes, see, generally, Sandesh Sivakumaran, "The Influence of Teachings of Publicists on the Development of International Law", *International and Comparative Law Quarterly*, Vol. 66, No. 1, 2017.

regulation in contemporary armed conflicts. Specifically, the literature on formal and informal law-making offers a theoretical account of the considerations affecting the choice between formal and informal regulation.⁸⁶ These considerations have been discussed in the context of emerging technologies and law.⁸⁷ The informal law-making literature also informs our understanding of the authority and legitimacy of informal initiatives, focusing primarily on the identity and behaviour of the States and non-State actors that are involved and the institutional framework of the initiatives.⁸⁸

Ostensibly, established institutions are the main path for law-making initiatives, with the ideal result of formal rules that govern the issue.⁸⁹ Nonetheless, while the two main institutional platforms on new technologies, the UN GGE and the GGE on LAWS, have a significant role to play in the attempts to regulate new technologies in war, they also reveal two important differences from the traditional path. First, the prospect of reaching an agreement through these processes on hard rules is low, and as mentioned, some suggest that alternative paths may yield better results in terms of formal regulation.⁹⁰ Therefore, they serve mainly as platforms for informal regulation in the form of traditional soft-law principles such as the UN GGE's 2015 report and the Guiding Principles of the GGE on LAWS,⁹¹ as well as written legal positions of States and non-State actors.⁹² Second, such platforms are not always the main law-making path. The UN GGE's limited success has contributed to the emergence of various other law-making initiatives, including statements and position papers by States,⁹³ the Tallinn Manual 2.0,⁹⁴ and the ICRC position paper on LAWS.⁹⁵

“Micro-processes” of informal IHL

Informal law-making initiatives are derived, *inter alia*, from the recognition that when the law is unsettled in a specific area, prominent legal outputs that discuss

86 See, e.g., Gregory Shaffer and Mark Pollack, “Hard and Soft Law”, in Jeremy Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations*, Cambridge University Press, Cambridge, 2013; Andrew Guzman and Timothy Meyer, “International Soft Law”, *Journal of Legal Analysis*, Vol. 2, No. 1, 2010; K. W. Abbott and D. Snidal, above note 12.

87 S. Ratner, above note 48, p. 117.

88 Emily Crawford, *Non-Binding Norms in International Humanitarian Law*, Oxford University Press, Oxford, 2022; Heike Krieger and Jonas Püschmann (eds), *Law-Making and Legitimacy in International Humanitarian Law*, Edward Elgar, Northampton, 2021; Sandesh Sivakumaran, “Making and Shaping the Law of Armed Conflict”, *Current Legal Problems*, Vol. 71, No. 1, 2018.

89 S. Ratner, above note 48.

90 C. Carpenter, above note 45.

91 UN GGE, *Report of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security*, UN Doc. A/70/174, 22 July 2015, available at: www.un.org/ga/search/view_doc.asp?symbol=A/70/174; GGE on LAWS Guiding Principles, above note 76.

92 See, for example, the various State commentaries on the GGE on LAWS Guiding Principles, available at: <https://meetings.unoda.org/section/group-of-governmental-experts-gge-on-emerging-technologies-in-the-area-of-lethal-autonomous-weapons-systems-laws-documents-4929-documents-4947/>.

93 See, e.g., R. Schöndorf, above note 84; M. N. Schmitt, above note 84.

94 Tallin Manual 2.0, above note 82.

95 ICRC AWS position, above note 58.

the issue have strong potential to shape the law in that area.⁹⁶ Nonetheless, to date, international legal scholarship has paid little attention to what I call here the “micro-processes” of informal international law-making – namely, the variety of factors that are relevant to the authority and legitimacy of informal law-making processes. It is important to consider the various techniques that the relevant actors use to enhance the authority and legitimacy of their law-making initiatives. These micro-processes include the type of legal argument that is employed to advance an informal law-making initiative as well as the form of the initiative itself. I started to explore these factors in a previous work that relates to informal IHL law-making initiatives which are separate from issues relating to emerging technologies.⁹⁷

Type of legal argumentation

As regards the type of legal argument, very often the law-making initiative is presented as a mere representation of existing law rather than a pure aspirational project regarding future regulation of the issue. This is achieved through either treaty interpretation or identification of customary law as creative ways to advance a novel legal argument. Reliance on existing law is highly attractive for such initiatives since in this way, the initiative benefits from the authority of existing law and has greater potential to influence the international law community. This was done, for example, with the Tallinn Manual 2.0, in which the Manual claims that it

is meant to be a reflection of the law as it existed at the point of the Manual’s adoption by the two International Groups of Experts in June 2016. It is not a “best practices” guide, does not represent “progressive development of the law”, and is policy and politics-neutral. In other words, Tallinn Manual 2.0 is intended as an objective restatement of the *lex lata*. Therefore, the experts involved in both projects assiduously avoided including statements reflecting *lex ferenda*.⁹⁸

In this way, the Manual achieves the benefits of the authority of existing law while being able to recognize the informal nature of the project.⁹⁹ Such forms of legal argumentation are also used by States – for example, Australia’s recent submission to the UN GGE states that “existing treaties and customary international law provide a comprehensive and robust framework to address the threats posed by state-generated or sponsored malicious cyber activity”.¹⁰⁰ Such reliance on treaty interpretation as a law-making technique was recently described by Melissa J. Durkee as “*post hoc* law-making”, a phenomenon that focuses on international law-making initiatives outside of the context of armed conflicts.¹⁰¹

96 Y. Shereshevsky, above note 11.

97 *Ibid.*

98 Tallinn Manual 2.0, above note 82, pp. 2–3.

99 *Ibid.*, p. 2.

100 Australian Government, “Australia’s Submission on International Law to Be Annexed to the Report of the 2021 Group of Governmental Experts on Cyber”, available at: <https://tinyurl.com/58rhswsd>.

101 M. J. Durkee, above note 78.

Other initiatives are more modest in their claims about the legal authority of their text. For example, a recent report by the ICRC entitled *Avoiding Civilian Harm from Military Cyber Operations during Armed Conflict* (Civilian Harm Report) is articulated as a best practices guide for the application of well-established hard law regarding the protection of civilians in armed conflict.¹⁰² Another example is the ICRC position paper on LAWS, which explicitly states that its aim is that its position will lead to the adoption of “new legally binding rules”.¹⁰³ The approach of the ICRC in this regard is interesting, since previous IHL initiatives such as the ICRC Customary Law Study and ICRC Interpretive Guidance have relied on treaty interpretation and the identification of customary law.¹⁰⁴

Techniques to enhance the accessibility and authority of informal law-making initiatives

The best-case scenario for an informal law-making initiative is to become a focal point of reference in any discussion about the relevant rules.¹⁰⁵ The clearest example for such a case is the ICRC Customary Law Study, which is the focal point of reference in any discussion of customary IHL. In the context of new technologies, the Tallinn Manual 2.0 is clearly the most prominent informal law-making initiative, but its success in becoming the focal point of reference is controversial.¹⁰⁶ There are often several accounts of the law that compete to prevail in the legal debate, even after a specific initiative, such as the Tallinn Manual, has reached a central position. The form of the informal initiatives intends to increase the persuasive power of the initiatives compared to potential competing accounts of the law. It is interesting to note that States and non-State actors often use similar persuasion techniques in their law-making initiatives. These include mostly techniques that aim to increase the centrality and legitimacy of the initiatives.

In the broader discussion on informal IHL, States and non-State actors use various techniques to increase the accessibility of their positions, including the choice of language (mostly English), open access online, and presentation at international conferences and special academic events. In addition, they use various techniques to increase the legitimacy and authority of their texts. These techniques are mainly intended to strengthen the perceived neutrality and legal soundness of the position. For this purpose, the initiatives try to demonstrate a wide participation of States and relevant experts in the drafting process, and often use a quasi-academic form including in-depth legal reasoning, the use of

102 Ewan Lawson and Kubo Macák, *Avoiding Civilian Harm from Military Cyber Operations during Armed Conflicts: ICRC Expert Meeting, 21–22 January 2020*, Geneva, 2021 (Civilian Harm Report), available at: <https://shop.icrc.org/download/ebook?sku=4539/002-ebook>.

103 ICRC AWS position, above note 58.

104 ICRC Customary Law Study, above note 18; ICRC Interpretive Guidance, above note 18.

105 Tomer Broude and Yahli Shereshevsky, “Explaining the Practical Purchase of Soft Law”, in Harlan G. Cohen and Timothy Meyer (eds), *International Law as Behavior*, Cambridge University Press, Cambridge, 2021.

106 Dan Efrony and Yuval Shany, “A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice”, *American Journal of International Law*, Vol. 112, No. 4, 2018.

footnotes, and sometimes even publication of the initiative in academic journals.¹⁰⁷

These techniques are also used in various initiatives in the context of new technologies in war. For example, the ICRC Civilian Harm Report is published online with open access and emphasizes the role of various experts in its preparation, including military officials from various States and international law academics.¹⁰⁸ It was also publicized in various ways, including through a blog series, several events, and at a briefing at the UN Security Council. In addition, an executive summary of the report was published in this journal.¹⁰⁹ Finally, a highly interesting and understudied new tool is the use of social media and especially Twitter as a technique for enhancing the visibility of new initiatives – the Civilian Harm Report was heavily promoted through Twitter.

Another example of the use of similar techniques is the Tallinn Manual 2.0. The Manual also emphasized that it was drafted with wide participation and input from international law experts as well as through observations made by States. It is a lengthy project, with a combination of rules and academic reasoning, that contains many footnotes. Finally, it was actively promoted through a series of events and published by Cambridge University Press.

As mentioned, for various reasons, States are more reluctant to explicitly express their in-depth legal views on new technologies compared to other areas of IHL. However, it seems that recently States have begun to take a more active position in relation to new technologies. Interestingly, States also use various techniques to increase the visibility of their positions. To give just one example, Israel recently presented its position on the application of international law to cyber operations. It was delivered through a keynote speech by the Israeli deputy attorney general at the Naval War College's Conference on Disruptive Technologies and International Law. Various attempts were made to increase the visibility of the speech: it was published online in one of the main international law blogs, *EJIL: Talk!*,¹¹⁰ and it was later published in an academic journal, *International Law Studies*, and enjoys open access.¹¹¹ Moreover, the deputy attorney general actively promoted the speech in advance through his professional Twitter account.¹¹²

The use of similar persuasive techniques by States and non-State actors is further developed in the next section, which explores the roles of various actors in informal law-making.

107 Y. Shereshevsky, above note 11, pp. 46–52.

108 Civilian Harm Report, above note 102.

109 “Executive Summary: Avoiding Civilian Harm from Military Cyber Operations during Armed Conflicts”, *International Review of the Red Cross*, Vol. 104, No. 919, 2022.

110 Roy Schöndorf, “Israel’s Perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations”, *EJIL: Talk!*, 9 December 2020, available at: www.ejiltalk.org/israels-perspective-on-key-legal-and-practical-issues-concerning-the-application-of-international-law-to-cyber-operations/.

111 R. Schöndorf, above note 84.

112 Available at: <https://twitter.com/RoySchondorf/status/1336263003734487042>.

States, non-State actors and informal law-making

There are (at least) five important aspects regarding the role of States and non-State actors in informal international law-making initiatives in the context of emerging military technologies.

First, while States are clearly superior law-makers in the context of formal international law-making, informal processes are more balanced, less hierarchical, and allow non-State actors to have a significant role in shaping the law. Often non-State actors produce informal law-making initiatives at an early stage of the law-making process, and thus enhance their influence. The ICRC Customary Law Study is, as mentioned, a seminal example of a highly influential law-making initiative on IHL by a non-State actor. The Tallinn Manual 2.0, although its influence is more controversial, is probably the most notable example in the context of emerging military technologies.

Second, while States are more reluctant to express their positions in relation to emerging military technologies than they are in other IHL contexts, they do engage more often in the debate over such technologies. This is evident by the rise of State positions on cyber operations as well as States' active engagement in the regulation of LAWS through the GGE on LAWS process. In a previous work I suggested that such engagement of States in the law-making process is a result of the understanding that leaving the informal law-making game primarily to non-State actors can push the common understanding of relevant norms away from the positions of various interested States.¹¹³ This applies also to the context of emerging military technologies, and is reflected, for example, in the willingness of interested states to actively participate in the GGE on LAWS process.

Third, it is interesting to note that due to the more horizontal nature of informal law-making, States employ similar micro-processes to those that were employed initially by non-State actors, as described in the previous section. Since a position of a single State (or even two or three States) has limited formal law-making power, for example for the purpose of establishing State practice or *opinio juris*, States must now play the persuasion game, investing in various micro-processes to increase the influence of their positions.

Fourth, while both types of actors employ persuasion techniques, States and non-State actors benefit from different advantages in the persuasion game. States enjoy formal authority but are often perceived as biased actors, while non-State actors are often perceived as less biased but do not have formal authority. In such circumstances, there is a strong incentive for both types of actors to cooperate in informal law-making initiatives in order to compensate for each other's weaknesses. Such cooperation complicates the common narration of a State–non-State actor law-making competition, towards what could be called like-minded State–non-State actor cooperation. Cooperation between States and non-State actors in norm creation is well documented in the international relations/international law literature,¹¹⁴ but it

113 Y. Shereshevsky, above note 11, pp. 40–42.

114 Julia C. Morse and Robert O. Keohane, "Contested Multilateralism", *Review of International Organizations*, Vol. 9, No. 4, 2014; Christine Ingebritsen, "Norm Entrepreneurs: Scandinavia's Role in

often focuses on attempts to push towards more restrictive norms and, in IHL terms, towards the humanitarian side of the equation.¹¹⁵ It is important to stress that such cooperation can be aimed at promoting both sides of the military necessity versus humanitarian considerations debate in IHL, especially in the informal law-making game.¹¹⁶ In the context of emerging technologies, such cooperation can be found, for example, in the micro-process of demonstrating wide participation in the drafting of law-making initiatives. There is also the possibility of more explicit cooperation, as the recent call for cooperation between States and non-State actors to promote a ban on LAWS outside the CCW framework demonstrates, in line with previous successful cooperation between such actors in the context of weapons law.¹¹⁷

Finally, as mentioned, the unequal distribution of emerging military technologies is a key factor that contributes to the difficulty of reaching an agreement over their regulation. Beyond their effect on the interests of the parties to a conflict, power differences also affect the ability to shape international law. While theoretically, all States can participate equally in informal law-making, the unsurprising reality is that powerful States, mostly from the global North, often take a more active role in informal IHL-making.¹¹⁸ It is important to note here that by “powerful States” I refer primarily to these States’ capacity to invest significant resources in law-making initiatives. Recently, a reform in the composition of the UN GGE and the establishment of the OEWG broadened participation in these processes, but it is yet to be seen to what extent these changes will increase the role of less powerful States in the law-making process, and to what extent they are merely part of the struggle between powerful States such as the United States, Russia and China. Still, such processes do hold some promise for more inclusion – for example, it has recently been noted that States from the global South significantly participate in the law-making process under the GGE on LAWS process.¹¹⁹

Conclusion

Emerging military technologies have already altered the nature of warfare and are expected to change it even more in the near future. As a result, they also produce

World Politics”, *Cooperation and Conflict*, Vol. 37, No. 1, 2002; Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, *International Organization*, Vol. 52, No. 4, 1998.

115 See, e.g., Elvira Rosert, “Norm Emergence as Agenda Diffusion: Failure and Success in the Regulation of Cluster Munitions”, *European Journal of International Relations*, Vol. 25, No. 4, 2019; Fen Osler Hampson and Holly Reid, “Coalition Diversity and Normative Legitimacy in Human Security Negotiations”, *International Negotiation*, Vol. 8, No. 1, 2003; M. Finnemore and K. Sikkink, above note 114.

116 Y. Shereshevsky, above note 11, pp. 52–57.

117 C. Carpenter, above note 45.

118 Y. Shereshevsky, above note 11 (focusing on the United States and Israel as the main actors in unilateral law-making initiatives in the context of extraterritorial armed conflicts against non-State armed groups).

119 Ingvild Bode, “Norm-Making and the Global South: Attempts to Regulate Lethal Autonomous Weapons Systems”, *Global Policy*, Vol. 10, No. 3, 2019.

continuous debate over the normative implications of their use and the need for the evolution of IHL to address those implications. This article has not engaged in the normative debate over the regulation of new military technologies; instead, it has focused on the process of the legal evolution itself. The premise of this article is that as a formal change of the relevant legal norms is unlikely, informal law-making initiatives are the main path to advancing legal change. These processes are relevant to various new military technologies, including cyber warfare, autonomous weapons and enhanced soldiers. While the informal path in IHL has been the subject of recent scholarly attention, much less attention has been given to the micro-processes of informal law-making. It is highly important to explore these micro-processes in depth, in order to better understand their potential to shape the future regulation of the battlefield. Specifically, while it is reasonable to assume that the use of the various persuasive techniques described in this article contributes to the effectiveness of informal law-making initiatives, this is an important empirical question that has not yet been adequately studied.

The unilateralization of international humanitarian law

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Abstract

Traditionally, international humanitarian law (IHL) is conceptualized as a body of mutually binding, horizontal international legal rules that are agreed upon by States and that govern the relationships between parties to armed conflicts. Yet, there is discernible evidence that contemporary IHL – and the broader normative environment that pertains to the regulation of armed conflicts in which it is situated – is incorporating elements of unilateralization, manifested in legal and non-legal norms that regulate armed conflicts taking the form of commitments whose validity is not dependent on being reciprocated. This article examines some of the systemic implications of unilateralization of IHL and considers its pitfalls and potential.

Keywords: development of international humanitarian law, unilateral norms, reciprocity, belligerent equality.

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Introduction

Traditionally, international humanitarian law (IHL) is conceptualized as a body of mutually binding, horizontal international legal rules agreed upon by States that govern the relationship between parties to armed conflicts. Its development has been closely intertwined with central notions such as belligerent equality and

reciprocity that continue to exert significant influence on our thinking about what IHL is, how it develops, applies and operates and why it is being complied with. Yet, there is discernible evidence that contemporary IHL – and the broader normative environment that pertains to the regulation of armed conflicts in which it is situated – is incorporating elements of unilateralization, manifested in (legal and non-legal) norms that regulate armed conflicts taking the form of commitments whose validity is not dependent on being reciprocated.

As far as States are concerned, unilateralization has evolved, at least partially, to compensate for their lack of appetite for “traditional” IHL-making through treaty and for their reluctance to clearly articulate their *opinio juris*. *Vis-à-vis* non-State parties to (non-international) armed conflicts, on the other hand, unilateralization speaks to some of the conundrums of conventional and customary IHL, such as why and how they are bound by these sources without being able to assume a role in their creation and how to strengthen their commitment to IHL. In both contexts of States and non-State actors alike, unilateralization is not a novel phenomenon. However, the increasing frequency with which actors resort to unilateral normative commitments suggests that the phenomenon is here to stay and warrants examination.

This article begins with a clarification of the meaning of unilateralization and an illustration of it by some examples. In the same step, the broader context in which unilateralization takes place will be provided. In a second step, the article turns to an analysis of the systemic implications of unilateralization and considers its pitfalls and potential.

Unilateralization defined, exemplified and contextualized

Unilateralization encapsulates the idea that norms that regulate armed conflicts take the form of commitments of one party whose validity are not dependent on being reciprocated, whether it be by its (would be) opponent or by other international actors, most notably States. For purposes of the present analysis, the term “norms” is understood broadly to include all authoritative standards that guide, control and regulate proper and acceptable behaviour of parties to an armed conflict. In other words, they include non-legal norms and norms of domestic law and hence reach beyond international legal norms in the sense of being embedded in the commonly accepted doctrine on sources of public international law, including conventional and customary IHL, general principles of IHL and, somewhat more on the fringes, binding resolutions of international organizations (such as binding United Nations Security Council Resolutions).¹ The all-inclusive term that will be used in the present article to capture all such norms regardless of their (international) legal status is “unilateral normative commitment”. Indeed, unilateral normative commitments often lack international legal force. The

1 See, generally, Jann K. Kleffner, “Sources of the Law of Armed Conflict”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016.

exception to that rule is the situation in which they produce legal obligations under international law. As far as States are concerned, this is the case if and when it can be deduced from the circumstances surrounding a unilateral act that a State intends to be bound as a matter of international law.² Yet, as we will see, in many instances of unilateral commitments that States make, such an intent is not readily apparent, and is frequently more or less expressly rejected. Furthermore, the international legal status of unilateral commitments made by non-State organized armed groups is tenuous,³ with the exception of unilateral declarations made by an authority representing a people engaged in a war of national liberation as envisaged in Article 96(3) of the First Additional Protocol, the legal effects of which are clearly spelled out. However, regardless of whether unilateral commitments are of an international legal nature or not, they share the common feature of providing standards for the evaluation of parties' behaviour during armed conflicts and prescriptions on which their behaviour during armed conflict is based.⁴ They possess normative force and, perhaps even more importantly, establish normative relations between an actor that makes a unilateral normative commitment and other actors (be they an opponent belligerent party or a third party, such as a non-belligerent State, an international organization, a humanitarian actor, the armed forces or the domestic constituency of a State making the unilateral commitment).

Examples of unilateralization

Examples of unilateral normative commitments abound. States have made unilateral declarations on a number of occasions,⁵ some of which may be binding as a matter of international law, whereas others may not be. Such unilateral declarations can either address specific issues (such as the disarmament, demobilization and reintegration of child soldiers)⁶ or be more generic in nature (for example, by declaring that the State commits to the principles of the Geneva Conventions in a non-international armed conflict (NIAC)).⁷ Other than in relation to States, unilateral declarations have taken on a particularly significant role in securing normative commitments by non-State organized armed groups that are parties to

2 See generally, International Law Commission, "Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations", text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). *Nuclear Tests (Australia v. France)*, Judgment, *ICJ Reports 1974*, p. 267, at para. 43.

3 See, for example, International Committee of the Red Cross (ICRC), *Commentary on the First Geneva Convention*, Geneva, December 2016, p. 288, at Section 857; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, pp. 109–10 and 118–24, noting that "each commitment will have to be assessed on its own terms" while suggesting that "[m]any such declarations should also be considered binding as a matter of law".

4 For further discussion of the distinction between legal and non-legal norms, see Michael Bothe, "Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?", *Netherlands Yearbook of International Law*, Vol. 11, 1980; Pieter van Dijk, "Normative Force and Effectiveness of International Norms", *German Yearbook of International Law*, Vol. 30, 1987.

5 See, for example, S. Sivakumaran, above note 3, pp. 113–14.

6 *Ibid.*

7 *Ibid.*

a NIAC. These acts frequently consist of declarations through which the organized armed group in question expresses its intent to be bound by (certain) IHL treaties, commitments made to the International Committee of the Red Cross (ICRC), to United Nations bodies, to Switzerland as the Depository of the Geneva Conventions and Additional Protocols thereto or to the non-governmental organization Geneva Call.⁸ As far as the substance of these declarations is concerned, they can either be of a general nature and include entire IHL treaties, or they can concern particular rules or issues, for instance in the form of “Deeds of Commitment” made under the auspices of Geneva Call on matters ranging from anti-personnel mines and the protection of children to displacement and gender.⁹ Whether these unilateral declarations of organized armed groups are constitutive of international legal obligations or merely declaratory thereof is unclear. The ICRC is of the opinion that “the absence of any such commitment does not reduce the obligations of non-State armed groups to abide by treaty and customary international law”.¹⁰ Conversely, the existence of such commitments would, according to that view, presumably not be able to extend their obligations as a matter of international law, thus seemingly suggesting that the only way in which such groups can become bound as a matter of IHL is through the constructs of bindingness debated in doctrine.¹¹ Yet, some practices of international courts and the United Nations suggest that an answer to the question is perhaps less categorical and that the international legal status of unilateral declarations of organized armed groups must be determined on a case-by-case basis.¹²

Other unilateral normative commitments take the form of policies – understood here broadly to extend to domestic laws, regulations, procedures, administrative actions, incentives, or voluntary practices – that States adopt on a given issue. The US Department of Defense (DoD) *Law of War Manual*,¹³ for instance, is ripe with references to such policies on a range of issues that span from pre- and post-strike measures to address civilian casualties involving the use of force¹⁴ and implementing and enforcing IHL¹⁵ to weapons reviews¹⁶ and media coverage of military operations and the role of journalists.¹⁷ The US DoD

8 *Ibid.*, pp. 118–22.

9 See, generally, Geneva Call, available at: www.genevacall.org (all internet references were accessed in August 2022).

10 ICRC, above note 3, p. 288, at Section 857.

11 ICRC, above note 3, p. 180, at Section 507. For a discussion, see Jann K. Kleffner, “The Applicability of International Humanitarian Law to Organized Armed Groups”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

12 S. Sivakumaran, above note 3, pp. 113–14 and 109–10.

13 US DoD, *Law of War Manual*, Washington, DC, June 2015 (updated December 2016), available at: <https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

14 Administration of Barack Obama, “Executive Order 13732 – United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force”, *Federal Register*, Vol. 81, 1 July 2016, available at: www.govinfo.gov/content/pkg/DCPD-201600443/pdf/DCPD-201600443.pdf.

15 See DoD Directive 2311.01E, DoD Law of War Program (May 9, 2006, Certified Current as of Feb. 22, 2011); DoD Directive 5100.77, DoD Program for the Implementation of the Law of War (Nov. 5, 1974).

16 See US DoD, *Law of War Manual*, above note 13, pp. 337–9, at Section 6.2.

17 See *ibid.*, references on p. 171, at Section 4.24.

Law of War Manual is also instructive in as much as it is one of the few military manuals that address the respective roles of such policies and IHL and the relationship between the two on a number of occasions. It explains that policies shall not be confused with *opinio juris*,¹⁸ and that DoD personnel may be required to adhere to law of war rules, even where the rules do not technically apply as a matter of law.¹⁹ The DoD *Law of War Manual* also articulates the general view that policy may go beyond the minimum restrictions of IHL, but may not be more permissive than what IHL allows.²⁰ When political norms that pertain to the (non-legal) regulation of armed conflicts are being adopted, States usually do so on a non-reciprocal basis regarding the (would-be) belligerent opponent. Such policies henceforth constitute unilateral normative commitments in the present sense.

IHL and policy converge in a variety of instruments, which assume a dual role in articulating unilateral commitments and as restatements of rules of IHL. Besides military manuals, such instruments include internal guidelines, instructions to the armed forces, disciplinary codes and codes of conduct, domestic legislation, *de facto* legislation enacted by non-State organized armed groups and Rules of Engagement.²¹ One of the challenges in examining the extent to which these instruments are declaratory of norms of IHL, of the *opinio juris* of a given State, or instead express unilateral normative commitments consists of disentangling IHL and policy. Rarely²² are States (and even less so organized armed groups) willing to offer detailed views on what they consider as belonging to one or the other realm and go beyond generic statements that IHL and policy must be distinguished from one another.²³

Context: “Delegalization”

The aforementioned examples indicate that unilateral commitments that are binding as a matter of international law are the exception to the rule that they are

18 *Ibid.*, pp. 33–4.

19 *Ibid.*, pp. 36 and 70–1.

20 For example, as far as the treatment of unprivileged belligerents is concerned, *ibid.*, p. 161; and as far as restrictive and protective standards in the conduct of hostilities are concerned, p. 186.

21 At times, some of these instruments also play a role in ensuring coalition coherence, where one coalition partner makes a non-legal unilateral normative commitment that aligns with the legal obligations of another coalition partner. See Dale Stephens and Eve Massingham, “Military Partners and the Obligation to ‘Ensure Respect’ for IHL”, *Articles of War*, 18 November 2021, available at: [https://lieber.westpoint.edu/military-partners-obligation-ensure-respect/?ct=t\(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01\)](https://lieber.westpoint.edu/military-partners-obligation-ensure-respect/?ct=t(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01)).

22 As alluded to, the US DoD *Law of War Manual*, above note 13, is a notable exception.

23 See, for example, UK Ministry of Defence, *The Joint Service Manual of The Law of Armed Conflict*, Joint Service Publication 383, 2004, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf. Explaining the nature of rules of engagement at p. 53, at Section 5.2:

The law of armed conflict must not be confused with rules of engagement (ROE). The latter are “directions for operational commands that set out the circumstances and limitations under which armed force may be applied by United Kingdom forces to achieve military objectives for the furtherance of United Kingdom government policy”.

usually either not, or that they have, an uncertain standing as a source of international law (in the case of unilateral commitments of organized armed groups) or that they are articulated in instruments that constitute concoctions of international legal and policy considerations. As far as States are concerned, the dominance of unilateral commitments of a non-legal nature and the creation of grey zones in which law and policy are interspersed is intimately connected to the phenomenon of – for lack of a better term – “delegalization” of IHL proper and of norms that regulate armed conflicts more broadly.

As far as the process of “delegalization” of IHL proper is concerned, States contest the customary nature of rules of IHL or refuse to become party to a given IHL treaty while emulating the pertinent rules as non-legal unilateral commitment. An example of the latter is the US policy on anti-personnel landmines, which aligns (outside the Korean Peninsula) with a number of the key requirements of the Ottawa Convention, to which the United States is not a party.²⁴ While at other times, the practice to act in accordance with a treaty to which the United States is not a party may be informed by the consideration that the general principles of the treaty have been determined to be declaratory of customary international law,²⁵ the United States expressly rejects that contention in relation to the prohibitions contained in the Ottawa Convention.²⁶ We can therefore safely assume that the United States’ policy is a non-legal unilateral commitment based on other (non-legal) considerations.²⁷

“Delegalization” of norms that regulate armed conflicts more broadly takes the form of non-legal unilateral commitments forestalling the formation of new conventional and customary IHL. Here, a unilateral commitment prevents a new rule of IHL on a given issue to emerge because States commit to it expressly only as a matter of policy. An example is the UK’s policy on not equipping military religious personnel with weapons.²⁸ While the relevant provisions in conventional IHL are silent on the issue, the UK’s clarification that not to arm them is a matter of policy forestalls a claim that it does so out of a sense of legal obligation that may inform a process of customary IHL formation to the effect that the bearing of arms by military religious personnel would be contrary to IHL. “Delegalization” of norms that regulate armed conflicts more broadly has a comparable effect on the adoption of new treaty rules, where States are reluctant

24 See US DoD, *Law of War Manual*, above note 13, pp. 401–2, at Sections 6.12.13 and 6.12.14.

25 *Ibid.*, p. 71, at Section 3.1.1.1: “Reasons for Acting Consistent With a Treaty Rule, Even Though the Treaty Does Not Apply”.

26 See US DoD, *Law of War Manual*, above note 13, p. 402, at Section 6.12.14: “prohibitions do not reflect customary international law”.

27 US DoD, *Law of War Manual*, above note 13, p. 71, at Section 3.1.1.1: “Reasons for Acting Consistent With a Treaty Rule, Even Though the Treaty Does Not Apply”. In the second paragraph of this section:

In addition, it may be important to act consistently with the terms of the treaty because the treaty represents “modern international public opinion” as to how military operations should be conducted. Other policy considerations, including efficacious training standards or close relations with coalition partners, may lead to a policy decision that DoD practice should be consistent with a particular law of war treaty rule, even if that rule does not apply to U.S. forces as a matter of law.

28 UK Ministry of Defence, above note 23, Section 7.30.

to turn their policies on hitherto unregulated issues into legally binding rules of conventional IHL. “Delegalization” and unilateralization are intimately connected, as the former removes norms from the reciprocal relation that IHL gives rise to. The “delegalized” norms take the form of unilateral commitments instead.

As far as States are concerned, unilateralization and “delegalization”, in turn, are manifestations of a broader geopolitical environment that has aptly been described as the multilateral ice age, characterized by a deep sense of mistrust between States in multilateral processes, a tangible fatigue of States to commit to new international legal rules and other multilateral normative commitments, and where the resulting regulatory gaps are partially filled by incremental voluntary measures of individual States.²⁹

In contrast to States, unilateralization is the product of an entirely different consideration as far as non-State organized armed groups are concerned: rather than to “delegalize” IHL proper or norms that regulate armed conflicts more broadly, unilateral normative commitments here assume a role in addressing some of the conundrums caused by IHL’s State-centric features, most notably the exclusion of non-State organized armed groups from the creation of multilateral conventional and customary IHL. We will return to this issue below (see the “Non-State organized armed groups” section).

Systemic implications, pitfalls and potential of unilateralization

What, then, are the systemic implications of unilateralization for the fabric of IHL? What prospect does it hold out to develop IHL further? And what risks does it bear? These questions will be examined by first considering reciprocity and belligerent equality as two closely intertwined fundamental precepts of IHL (“Reciprocity and belligerent equality” section), before addressing the risk of unilateralization leading to a retrogressive trend in IHL as the primary international legal framework to regulate armed conflicts (“The risk of retrogression” section). We will then turn to the role of unilateralization *vis-à-vis* non-State organized armed groups (“Non-State organized armed groups” section).

Reciprocity and belligerent equality

Unilateralization leads to diverging standards between belligerent parties (except in the situation where belligerent parties unilaterally commit to identical rules). A first

29 In the field of IHL, the fate of the IHL Compliance mechanism proposed by the ICRC and Switzerland is illustrative in that regard; see Yvette Zegenhagen and Michael Meyer, “Improving Compliance with IHL: A Long-Term Enterprise”, *Articles of War*, 22 November 2021, available at: [https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/?ct=t\(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01\)](https://lieber.westpoint.edu/improving-compliance-ihl-long-term-enterprise/?ct=t(EMAIL_CAMPAIGN_Biometrics_10_21_2020_COPY_01)); Helen Durham, “Strengthening Compliance with IHL: Disappointment and Hope”, *ICRC Humanitarian Law & Policy Blog*, 14 December 2018, available at: <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/>.

implication for the fabric of IHL is that unilateral norms that regulate armed conflicts are divorced from reciprocity and belligerent equality. Both are traditionally assigned pivotal roles in the development and applicability of, as well as in the compliance with, IHL. Hersch Lauterpacht famously asserted, a few years after the Second World War, that “it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them”.³⁰ The crucial role of reciprocity and belligerent equality that his assertion epitomizes has remained a doctrinal truism of dogmatic proportion and dominates our thinking about IHL, even if more recent scholarship has brought to the fore certain nuances, especially when comparing the role of reciprocity and belligerent equality in international armed conflicts (IACs) and NIACs, respectively (see further, the “Non-State organized armed groups” section below).

Much as in international law more broadly, reciprocity’s role in the creation (and hence development) by States of the two main sources of IHL – treaty and custom – is omnipresent.³¹ Despite occasional affirmations to the contrary expressed in relation to multilateral treaties of a “normative” character in some fields, including IHL, the creation of conventional and customary IHL is quite simply not occurring unilaterally.³² Accordingly, conventional and customary IHL cannot develop through unilateralization (unless unilateral acts can be couched in terms of practice and/or *opinio juris* as part of the process of customary IHL formation). Indeed, to the extent that unilateralization takes the form of non-legally binding unilateral commitments (as it frequently does) it forestalls these norms that regulate armed conflict from entering the realm of international law.³³ Consequently, any instance of non-compliance with such non-legal norms will not be governed by the rules and processes applicable to breaches of international law, including those that international law foresees for the responsibility of States and individuals. This is not to suggest that non-legal unilateral normative commitments cannot feature in a broader framework of accountability that encompasses all processes (also non-legal and/or domestic ones) through which the conduct of parties to an armed conflict are assessed and measured. Indeed, some of them can even entail domestic legal responsibility were these commitments binding as a matter of domestic – rather than international – law.³⁴ States and other actors may be engaged by other States and other actors, including their own domestic constituencies if they do not act in conformity with non-legal unilateral normative commitments. In fact, some of

30 H. Lauterpacht, “The Limits of the Operation of the Law of War”, *British Year Book of International Law*, Vol. 30, 1953, p. 212.

31 See Bruno Simma, “Reciprocity”, in Anne Peters (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2008, paras 3–6.

32 *Ibid.*, para. 6.

33 See also the discussion of unilateralization’s context of delegalization above.

34 See, for example, US DoD, *Law of War Manual*, above note 13, Section 18.7.2.3 which notes, in the context of unilateral commitments that set higher standards as a matter of policy than what IHL requires, that failures to adhere to such more restrictive standards may be punishable under the Uniform Code of Military Justice, but “would not necessarily be violations of the law of war”.

the features of such a broader scheme of accountability may closely resemble, or even be identical to, those of a less formal nature that we are familiar with in IHL, such as when media and public opinion exert pressure and demand that States account for their actions. The important difference remains, however, that States can reject any claim of “responsibility” for a “breach” of a non-legal unilateral normative commitment by asserting its non-legal and unilateral nature.

A separate issue concerns the implications of unilateralization for *de facto* reciprocity in the realm of compliance with IHL. Even though it is not featuring as a legal condition for compliance with applicable rules of IHL,³⁵ reciprocity is regarded as a socio-psychological factor which has an impact on compliance, both in a positive (observance of one party generates observance of its opponent) and a negative sense (violations of one party trigger violations by the opponent).³⁶ *De facto* reciprocity is postulated to constitute such a factor on condition that belligerents are bound by the same rules of IHL, encapsulated in the dogma of belligerent equality,³⁷ which is precisely not the case with unilateral normative commitments, except in the case where the belligerents in a given armed conflict unilaterally undertake to apply the same rules of IHL.³⁸ On that account, unilateralization would bear the risk of making a negative impact on belligerents’ propensity to comply with IHL, because those norms to which a given belligerent has unilaterally committed do not “bind” its opponent. Yet, the suggestion that unilateralization automatically means less compliance needs to be approached with caution for at least the following two reasons.

First, compliance of one belligerent party may bear the potential of inducing the opponent belligerent party to reciprocate such behaviour, even if the behaviour conforms to unilateral normative commitments, as opposed to conventional or customary IHL. If party A to a NIAC unilaterally applies standards that mimic the treatment of prisoners of war, the opponent party B may be induced to reciprocate such conduct. For, the very psycho-sociological mechanisms that are at play when reciprocity is said to have an impact on the conduct of parties to armed conflicts and their individual members are not, or at

35 See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 140, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

36 ICRC, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, Geneva, 2004, pp. 9 and 13.

37 For a discussion of belligerent equality in the specific context of NIACs, see the debate between Marco Sassòli, Yuval Shany and René Provost on whether or not the dogma should be abandoned or modified. Marco Sassòli and Yuval Shany, “Should the Obligations of States and Armed Groups Under International Humanitarian Law Really be Equal?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011; Marco Sassòli, “Introducing a Sliding-Scale of Obligations to Address the Fundamental Inequality Between Armed Groups and States?”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011; Yuval Shany, “A Rebuttal to Marco Sassòli”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011; René Provost, “The Move to Substantive Equality in International Humanitarian Law: A Rejoinder to Marco Sassòli and Yuval Shany”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

38 On such cases of overlapping unilateral commitments, see René Provost, “Asymmetrical Reciprocity and Compliance with the Laws of War”, in Benjamin Perrin (ed.), *Modern Warfare: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law*, UBC Press, Vancouver, 2012, p. 35.

least not primarily, dependent on reciprocal legal relations. Rather, it is the conduct of one party that is reciprocated by its opponent. Whether that conduct is in conformity with reciprocal legal rules (or indeed, whether it conforms to non-legal norms) seems to be of lesser importance in the context of *de facto* reciprocity. Put differently, reciprocal rules would seem not to be a *conditio sine qua non* for *de facto* reciprocity to generate a pull towards compliance: we need to distinguish between norms on which belligerents base their conduct (legal or non-legal, reciprocal or unilateral), on the one hand, and the implications of such conduct for the conduct of the belligerent opponent, on the other.³⁹

Second, *de facto* reciprocity's significance needs to be considered in the broader context of other factors that make an impact on compliance. Pertinent scholarship suggests that factors such as the quest for international and domestic legitimacy,⁴⁰ cultural and religious values, doctrine and ideology, professional (military) ethics and a sense of honour,⁴¹ effective and virtuous leadership within military organizations, and military efficiency more broadly,⁴² exert significant influence on the behaviour of belligerents and their inclination to comply with IHL. Material resources and capacity of a given party to an armed conflict also exert influence. Yet, to the extent that these are internal factors that originate in the "inner life" of a belligerent, they are to a large extent divorced from, and retain their significance irrespective of, the behaviour of an opponent. As a matter of fact, unilateral normative commitments can even be said to befit these factors as modes of articulation, for instance in the form of internal guidelines, instructions to the armed forces, disciplinary codes or codes of conduct. Endowed with the pedigree of internal legitimacy, they may very well bear the potential to further compliance. Surely, it is not suggested here that the potential to generate compliance pulls of *de facto* reciprocity and of internal factors as articulated in unilateral normative commitments are mutually exclusive. Belligerents' motivation to comply with IHL may very well be informed by both. The point remains, however, that an absence of *de facto* reciprocity does not automatically mean non-compliance because internal factors as articulated in unilateral normative commitments can generate compliance pulls.

The risk of retrogression

Unilateralization carries the risk of outright retrogression if States contest rules of IHL or their detailed content and recouch them as non-legal unilateral normative commitments. Here, unilateralization does not take the form of creating "new" (even if non-legally binding) norms. Rather, unilateralization is used as a strategy

39 In this vein, see also, R. Provost, *ibid.*

40 Hyeron Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, Cambridge, 2015, pp. 60–3 and 65–70.

41 Dale Stephens, "Behaviour in War: The Place of Law, Moral Inquiry and Self-Identity", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015.

42 Geoffrey S. Corn, "Contemplating the True Nature of the Notion of 'Responsibility' in Responsible Command", *International Review of the Red Cross*, Vol. 96, No. 895/896, 2015.

to tone down an attempt at delegalization by “re-committing” to a delegalized norm through a unilateral commitment. Admittedly, instances of blatant delegalization of fundamental rules of IHL by attempting to downgrade them from international legally binding rules to non-legal unilateral normative commitments rarely occur. The standards for the treatment of detainees in the so-called War on Terror, where the United States replaced legally required standards of treatment with less exacting non-legal unilateral normative commitments,⁴³ constitute a notorious exception to the rule that IHL’s fundamental principles display a fair degree of stability. Another example is Israel’s position on the applicability of the Fourth Geneva Convention to the Occupied Palestinian Territory, rejecting it *de jure* despite the contrary position of an overwhelming majority of other States, the International Court of Justice⁴⁴ and international organizations, but instead applying its “humanitarian provisions” *de facto*, in an attempt to turn these provisions into unilateral normative commitments that lack legal force.⁴⁵ Although exceptional, these examples illustrate that the risk of retrogression is real even in relation to fundamental precepts of IHL. Also, even less so can the risk of more subtle forms of retrogression in relation to detailed aspects of a given rule be excluded. Again, the US DoD *Law of War Manual* supplies an instructive example, this time in relation to the obligation to take feasible precautions for the protection of civilians and other protected persons and objects. The *Manual* expresses the view that the United States, even though a non-party to the First Additional Protocol, accepts such an obligation.⁴⁶ It also clarifies that the term “feasible” can be used interchangeably with the terms “reasonable” or “practical” and that a determination of whether or not a precautionary measure is feasible has to be made “taking into account humanitarian and military considerations”.⁴⁷ Siding with many States, including State parties to the First Additional Protocol, and with a number of authorities, the authors of the DoD *Law of War Manual* construe the overall precautions requirement as a due diligence obligation. Accordingly, they consider it to require

43 See United States Memorandum from President George W. Bush regarding humane treatment of Taliban and al Qaeda detainees of 7 February 2002, in ICRC, “United States of America, Practice Relating to Rule 87. Humane Treatment”, National Legislation section, para. 3, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_cou_us_rule87:

Of course, our values as a nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva.

44 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 9 July 2004, ICJ Reports 2004, paras 90–101, available at: www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf.

45 See, for an account of Israel’s position and criticism among others, Ardi Imseis, “On the Fourth Geneva Convention and the Occupied Palestinian Territory”, *Harvard International Law Journal*, Vol. 44, 2003, pp. 92–100.

46 See US DoD, *Law of War Manual*, above note 13, Section 5.2.3.

47 *Ibid.*, Section 5.2.3.1.

those precautions to be taken “that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.⁴⁸ The notions of “practicable” and “practically possible”, in turn, denote that the determination of the feasibility or non-feasibility of a given precaution is a fact-driven exercise. If circumstances are such to render a given precautionary measure practical or practically possible, it is a legal obligation under IHL to take such a measure. So far, the construction of the precautions requirement in the US *Manual* corresponds to the widely accepted view. Yet, the US DoD *Law of War Manual* differs from the latter in as much as it posits that:

the determination of whether a precaution is feasible involves significant *policy*, practical, and military judgments, which are committed to the responsible commander to make in good faith based on the available information. In assessing whether the obligation to take feasible precautions has been satisfied after the fact, it will be important to assess the situation that the commander confronted at the time of the decision and not to rely on hindsight.⁴⁹

The *Manual* subsequently reiterates that “it is not the case that the legal requirement to take feasible precautions requires whatever may be done” and confirms the view that “it is possible for precautions to be taken, as a matter of practice or policy, that are not required as a matter of law, and the U.S. military frequently has done so.”⁵⁰ Surely, such a unilateral policy-driven overreach of the legal obligation to take precautions is unproblematic from an IHL perspective. Yet, introducing policy choices (or policy “judgments”, as they are referred to in the *Manual*) into the determination of whether a given precautionary measure is feasible bears the risk of retrogression, if and when such policy choices fall short of what is practical and practically possible under the circumstances.

The risk of retrogression is exacerbated by the failure of an overwhelming majority of States to identify precisely what they consider to be rules of customary IHL, by refraining from positively revealing which of their practice they consider to be accompanied by *opinio juris* as the conviction that it is required or permissible as a matter of IHL. Rather than doing so, States either opt for generic assertions that (their positions on) IHL shall not be confused with their unilateral (non-legal) normative commitments that belong to the exclusive realm of politics and policies or they opt for pronouncements of what they consider not to be the law in the context of specific rules.⁵¹ Thus far, the call for a constructive (re)claiming of the central role of States in the creation of customary IHL by more assertive,

48 See *ibid.*, Section 5.2.3.2; and see ICRC Customary Law Study, p. 54, with references to relevant State practice; Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2010, p. 139; William H. Boothby, *The Law of Targeting*, Oxford University Press, Oxford, 2012, pp. 121–2.

49 US DoD, *Law of War Manual*, above note 13, Section 5.2.3.3: “The Taking of Precautions and Law, Policy, and Practice” (emphasis added).

50 *Ibid.*

51 See, for example, the US response to the ICRC Customary Law Study: John B. Bellinger, III and William J. Haynes, II, “A US Government Response to the International Committee of the Red Cross Study

but also more precise, pronouncements on their *opinio juris* has remained unheeded.⁵² What results is at best a stagnation in the development or clarification of customary IHL, and at worst an attempt at pushing back on existing customary rules of IHL. Unilateralization plays a role in both respects, as unilateral non-legal normative commitments replace clear and precise pronouncements on States' *opinio juris* or are offered as an alternative to existing customary rules. From a positivistic standpoint, such challenges to existing customary rules of IHL are doomed to fail, as long as they are confined to a minority of States. The customary rules of IHL remain legally binding, even upon the State which attempts to push back on them by resorting to unilateralization (or, for that matter, by resorting to other strategies). Yet, in a legal system that remains to a large extent horizontal, engaging the State concerned on the basis of such legally binding rules becomes more difficult, if the standpoint of that State is that the rule in question is merely a unilateral non-legal normative commitment rather than a legally binding rule of IHL. The normative traction of the given customary rule is weakened *vis-à-vis* that State. For, from that State's perspective, unilateralization offers it the option to respond to the invocation of the given rule of customary IHL by claiming that it has committed to the envisaged conduct or result only unilaterally and in a non-legally binding manner.

Non-State organized armed groups

As alluded to, unilateralization assumes a different role *vis-à-vis* non-State organized armed groups than *vis-à-vis* States. While non-State organized armed groups are largely excluded from the process of conventional and customary law-making (with the exception of *ad hoc* agreements, including special agreements concluded in accordance with Article 3 common to the four Geneva Conventions), it has become virtually universally accepted ever since the adoption of common Article 3 that conventional and customary IHL binds them. Unilateral normative commitments have gained prominence in a quest to overcome the doctrinal, practical and humanitarian challenges⁵³ that this enigma entails. Indeed, such unilateral normative commitments often are reaffirmations of rules of IHL that conventional wisdom holds already bind non-State organized armed groups.⁵⁴ At times, they even go further than what a State opponent has accepted as legally binding upon it under IHL and in that sense are constitutive rather than

Customary International Humanitarian Law", *International Review of the Red Cross*, Vol. 89, No. 866, 2007.

52 For such a call, see Michael N. Schmitt and Sean Watts, "State *Opinio Juris* and International Humanitarian Law Pluralism", *International Law Studies*, Vol. 91, 2015.

53 For discussion, see J. K. Kleffner, above note 11.

54 For the Deed of Commitment reaffirming the absolute prohibition of crimes of sexual violence, launched in 2012, see Geneva Call, "Deed of Commitment under Geneva Call for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination", available at: www.genevacall.org/wp-content/uploads/2020/09/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf.

declaratory.⁵⁵ Securing a unilateral normative commitment by a non-State organized armed group is seen as a way of strengthening the sense of ownership of non-State organized armed groups over the norms of IHL, increasing their normative traction, and improving such groups' propensity to comply.⁵⁶ As noted above, the question whether their unilateral commitments are (or can be) constitutive of IHL cannot be answered conclusively. However, unilateralization in the context of non-State organized armed groups is being employed as a strategy to at least confirm the validity of IHL and on occasion even as a strategy to bring them into the reach of IHL in case of rules that would otherwise not apply to them. Unilateralization hence assumes a radically different role than in the case of States.

The systemic implications of unilateralization for the law of NIAC also differ in some important respects from those for the law of IACs. The role of reciprocity and belligerent equality in the latter context cannot be equated with that in the former in at least the following ways. First, the creation of conventional and customary law of NIAC does not occur along reciprocal lines in as much as non-State organized armed groups are systematically excluded from the law-making process. Second, several aspects of the notion of belligerent equality suggest that it is somewhat of a conceptual misfit in the context of the law of NIAC. In IACs, IHL creates a perfect balance between parties to an armed conflict, most notably due to its separation from the *jus ad bellum* and by excluding the possibility of applying domestic (criminal) law to lawful acts of war by virtue of the combatant privilege. In contrast, members of State armed forces and those of non-State organized armed groups are unequal in the sense that the former are granted certain rights and privileges whereas the latter are not. Admittedly, the ensuing inequality is not one under the international law of NIAC, which retains the fiction of equal application. However, the inequality under domestic law that follows from the absence of a shield of immunity as a result of the combatant privilege is an important departure from the law of IAC. Indeed, a lack of compliance with IHL by non-State organized armed groups is not infrequently explained, at least in part, by that inequality, informing the recurring *de lege ferenda* calls for an extension of both *jus ad bellum* and combatant privilege to NIACs.⁵⁷ The question whether and to what extent this assumption withstands rigorous scrutiny aside,⁵⁸ the transposition of belligerent

55 S. Sivakumaran, above note 3, pp. 243–6 (more onerous obligations accepted by non-State organized armed groups in Deeds of Commitments on anti-personnel mines in cases where the States against which they are fighting are not party to the Ottawa Convention).

56 Marco Sassòli, "Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law", *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010.

57 See, amongst others, Claus Kress, "Towards Further Developing the Law of Non-International Armed Conflict: A Proposal for a *Jus in Bello Interno* and a New *Jus Contra Bellum Internum*", *International Review of the Red Cross*, Vol. 96, No. 893, 2014, with further references to other suggestions along similar lines at footnotes 36–8; see also Geoffrey S. Corn, "Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?", *Stanford Law & Policy Review*, Vol. 22, No. 1, 2011, available at: <https://law.stanford.edu/wp-content/uploads/2018/03/corn.pdf>.

58 See, for example, Frédéric Mégret, "Response to Claus Krefß: Leveraging the Privilege of Belligerency in Non-International Armed Conflict Towards Respect for the *Jus in Bello*", *International Review of the Red Cross*, Vol. 96, 2014.

equality into the law of NIAC should be met with a fair degree of scepticism and nuance.⁵⁹ Besides for conceptual reasons, such scepticism is also informed by concerns about the normative overreach that results from belligerent equality in an increasingly dense set of rules of the law of NIACs, which imposes obligations on (some) non-State organized armed groups that are regarded as unrealistic in factual terms. One alternative that has been offered is to tailor the extent and nature of obligations of non-State organized armed groups under the law of NIAC and align them to their factual capacities and capabilities on a “sliding-scale of obligations”.⁶⁰ Another suggestion is to move from formal to substantive equality under the law of NIAC, and replace the idea underlying belligerent equality in NIACs that States and non-State organized armed groups are the same (and hence subject to the same obligations) by a model in which insurgents and the State may be held to distinct obligations.⁶¹ This model foresees the involvement of non-State organized armed groups in the norm creation process, leading to “the identification of a code for insurgents, which can be the pendant of state duties under the laws of war by way of a process that directly and exclusively involves non-state armed groups, and no state at all”.⁶² On both accounts, the ensuing unilateralization is regarded as a means to accommodate non-State organized armed groups better within the fabric of IHL with the ultimate goal of improving their compliance with it.

And yet, as laudable as that endeavour may be, we should not lose sight of the risks that the offered solutions entail. Tying IHL obligations to factual capacities may lead to a race to the bottom, because it would disincentivize non-State organized armed groups to improve their compliance capacities.⁶³ On the opponent’s (State) side, abandoning belligerent equality may also entail the risk of delegitimizing IHL and of doing away with whatever is left of reciprocity as generating a pull towards compliance.⁶⁴ Moreover, several questions would need to be answered in testing the hypothesis that granting non-State organized armed groups a role in the norm-creation process may improve compliance. What if the resulting norms diverge in important respects from IHL as we know it? Are we prepared to take the consent of non-State organized armed groups to a given norm of IHL seriously enough to also accept that a lack of consent means that a given rule of IHL does not bind them? Are some rules of IHL (perhaps for example the fundamental rules as enshrined in common Article 3 and the basic

59 For such scepticism and nuance, see, for example, Adam Roberts, “The Principle of Equal Application of the Laws of War”, in David Rodin and Henry Shue (eds), *Just and Unjust Soldiers: The Legal and Moral Status of Soldiers and Civilians in War*, Oxford University Press, Oxford, 2007, p. 229. Sassòli refers to the concept of belligerent equality in NIACs as a “fiction”: Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, Cheltenham, 2019, p. 51, at Section 4.44. In his view, it should be abandoned. See Marco Sassòli, above note 37.

60 M. Sassòli, above note 37.

61 R. Provost, above note 37, pp. 440–1; R. Provost, above note 38.

62 R. Provost, above note 37, p. 441.

63 Y. Shany, above note 37, p. 433.

64 Y. Shany, *ibid.* See, on that pull, or lack thereof, and the need to contextualize it, the above section “Reciprocity and belligerent equality”.

principles of distinction and protection) sacrosanct and safe from withholding consent?

While both the fact/capacity-driven and the consent-driven alternative models to belligerent equality thus give rise to a number of challenges, a more modest model of unilateralization would be to separate more clearly the rules of IHL proper from unilateral normative commitments of non-State organized armed groups. To secure such commitments may be important to engage non-State organized armed groups and can potentially also be one way to further compliance, but it need not necessarily come at the expense of the already applicable law of NIAC if the latter is understood to retain its validity, albeit in the background. As long as IHL and unilateral normative commitments align or there is a willingness of a non-State organized armed group to go beyond what the law requires, there is no need to let the law take the front seat in engaging a non-State organized armed group, especially if that group assigns more normative traction to its unilateral commitment than to IHL. Obviously, such a model has its limits: if a non-State organized armed group is unwilling or unable to emulate individual rules in unilateral normative commitments, IHL will in all likelihood not provide a very efficient safety net in the background or, for that matter, anywhere else. However, both IHL and unilateral normative commitments can play a mutually enforcing role when engaging with an organized armed group in the quest to change such an attitude or to develop its compliance capabilities. Those aspects of the law of NIAC that are rejected or normatively overreaching the factual capacity of a given organized armed group at a given moment in time might be held off to form the subject of a unilateral normative commitment until the attitude or factual circumstances have changed. This would not mean that the law of NIAC has been inapplicable in the meantime, nor would it mean that such an organized armed group can freely chose not to improve its compliance capabilities. Rather, the law would provide important benchmarks in capacity-building measures, whereas unilateral normative commitments assume the role of emulating the rule(s) of IHL in question when these measures have yielded sufficient results.

Conclusion

Unilateral normative commitments are a feature of contemporary IHL. While one has to be cautious about making predictions for the future, the function that unilateralization fulfils suggests that its relevance will neither stagnate nor decrease. There are no signs that the two main drivers of unilateralization – the fatigue of States to resort to “ordinary” law-making, in particular as regards conventional IHL, and the phenomenon of non-State organized armed groups – are about to disappear. If anything, the current international climate and the reality of NIACs indicate that instances of unilateralization will continue to increase, much as other compensatory responses to the lack of traditional IHL development through treaty and custom – including “informal” law-making

through expert manuals, clarification processes and humanitarian actors (not least the ICRC) claiming some of the space left unoccupied by inactive States.⁶⁵ The point is not whether unilateralization is “good” or “bad”. The point is rather that we consider it in the overall normative landscape of the regulation of armed conflicts and subject it to rigorous scrutiny in the quest to maintain the delicate balance between humanitarian considerations and military exigencies that informs IHL as a whole.

65 On some of these responses, see other contributions in this issue of the *Review*, for example, Yahli Shereshevsky, “International Humanitarian Law-Making and New Military Technologies”, *International Review of the Red Cross*, Vol. 104, 2022; Liesbeth Lijnzaad, “Going for a Test Drive? Some Observations on Expert Manuals in the Laws of Armed Conflict”, *International Review of the Red Cross*, Vol. 104, 2022; and Pauline Charlotte Janssens and Jan Wouters, “Informal International Law-Making: A Way Around the Deadlock of International Humanitarian Law?”, *International Review of the Red Cross*, Vol. 104, 2022. Also see “‘Political Declaration’ Regarding Explosive Weapons in Densely Populated Areas: Interview with Eirini Giorgiou”, *International Review of the Red Cross*, Vol. 104, 2022.

The UN75 Declaration, Our Common Agenda and the development of international law

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Abstract

In the declaration on the commemoration of the seventy-fifth anniversary of the United Nations, Member States requested that the Secretary-General provide recommendations to advance “Our Common Agenda” and to respond to current and future challenges. The Secretary-General issued a report entitled “Our Common Agenda” on 5 August 2021, which, among others, reinforces the role of the United Nations as a place of choice for the development of international law, also putting in context the role and specific prerogatives of the Secretary-General in the promotion of international law. The declaration and “Our Common Agenda” have also presented an opportunity to counter sentiments regarding a supposed general decline in respect for international law.

Keywords: Development of international law, role of the United Nations, Our Common Agenda, UN75 Declaration, crisis of multilateralism, compliance with international law.

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* The views expressed herein are those of the author and do not necessarily reflect the views of the United Nations.

Introduction

On 21 September 2020, the General Assembly at the level of Heads of State and Government adopted a declaration on the commemoration of the seventy-fifth anniversary of the United Nations (UN75 Declaration) setting out a “common agenda”.¹ In the UN75 Declaration, Member States strongly and unequivocally supported international law, declaring that they “will abide by international law and ensure justice”.² They also declared that “[t]he purposes and principles of the Charter and international law remain timeless, universal and an indispensable foundation for a more peaceful, prosperous and just world”,³ and that “[w]e will abide by the international agreements we have entered into and the commitments we have made”.⁴ In particular, Member States reiterated “the importance of abiding by the Charter, principles of international law and relevant resolutions of the Security Council”.⁵ Interestingly, Member States specifically singled out international humanitarian law in the UN75 Declaration, stating that “[i]nternational humanitarian law must be fully respected”.⁶

Member States requested that the Secretary-General provide recommendations to advance “Our Common Agenda” and to respond to current and future challenges.⁷ The Secretary-General reported back to the General Assembly, issuing a report entitled “Our Common Agenda” on 5 August 2021, which also included references to international law.⁸ The General Assembly, in its Resolution 76/6, of 15 November 2021, welcomed the report.⁹ It also requested the Secretary-General “to inform Member States and to engage in broad and inclusive consultations with them, all parts of the United Nations system and other relevant partners on his proposals in the report”¹⁰ and called upon the President of the General Assembly:

to initiate, under his overall guidance, a process of follow-up to enable all Member States to begin inclusive intergovernmental consideration of the various proposals, options and potential means of implementation and on ways to take them forward, in collaboration with all relevant partners through broad and inclusive consultations.¹¹

As far as international law is concerned, the report of the Secretary-General contains a number of statements and proposals which reinforce the role of the United

1 United Nations General Assembly Resolution 75/1, Declaration on the commemoration of the seventy-fifth anniversary of the United Nations, UN Doc. A/RES/75/1, 21 September 2020.

2 *Ibid.*, operative para. 10.

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*, operative para. 9.

6 *Ibid.*

7 *Ibid.*, operative para. 20.

8 Report of the Secretary-General, Our Common Agenda, UN Doc. A/75/982, 5 August 2021.

9 United Nations General Assembly Resolution 76/6, UN Doc. A/RES/76/6, 15 November 2021, operative para. 1.

10 *Ibid.*, operative para. 2.

11 *Ibid.*, operative para. 3.

Nations as a place of choice for the development of international law, also putting in context the role and specific prerogatives of the Secretary-General in the promotion of international law. In addition, the UN75 Declaration and the “Our Common Agenda” report have presented an opportunity to counter sentiments regarding a supposed general decline in respect for international law, in spite of the challenges that multilateralism is facing.

The United Nations as a place of choice for the development of international law

The report of the Secretary-General seeks to address a wide variety of issues under four broad headings, namely: strengthening global governance; focusing on the future; renewing the social contract; and ensuring a United Nations fit for a new era. As far as international law is concerned, his report calls for international cooperation that is guided by international law, noting that “consideration could be given to a global road map for the development and effective implementation of international law”.¹²

Unlike other subjects mentioned in the UN75 Declaration and in “Our Common Agenda”, international law is not, as such, a thematic area entailing programmatic activities. Rather, it is a framework and a tool, which is applicable to most of the questions discussed under “Our Common Agenda”. In other words, the development of international law is not just about the adoption of new normative instruments, but also about processes. Normative development also occurs through the establishment, the activation and/or the use of a set of tools and processes that make possible the preparation of new legal instruments and facilitate the implementation of existing international law. The Secretary-General has a specific role to play in this regard.

“Our Common Agenda” singles out four specific actions as part of a global road map for the development and effective implementation of international law that the Secretary-General could take: (i) encouraging more States to ratify or accede to treaties of universal interest such as on disarmament, human rights, the environment and penal matters, including those for which the Secretary-General is the depositary (of which there are over 600); (ii) urging States to accept the compulsory jurisdiction of the International Court of Justice and to withdraw reservations to treaty clauses relating to the exercise of its jurisdiction; (iii) assisting States in identifying and addressing pressing normative gaps; and (iv) understanding reasons for non-compliance, drawing on the Secretary-General’s role related to compliance mechanisms.¹³ In this regard, it is important to recall that some international humanitarian law treaties, and in particular the Additional Protocols to the Geneva Conventions, which are also of universal interest, have not been universally ratified.

¹² Our Common Agenda, above note 8, para. 96.

¹³ *Ibid.*

Regarding the questions of normative gaps (iii) and of compliance with existing legal regimes (iv), the procedural component is particularly relevant, as the Secretary-General can encourage discussions on normative developments, bearing in mind that the lack of compliance with existing legal regimes does not necessarily mean that new ones are required. Here, too, it appears that the Secretary-General is in a unique position to call upon States to comply with their obligations under international law, and to resolve their disputes in accordance with international law. Most Secretaries-General have done so in a wide range of contexts. Their calls, and reminders, for States' compliance with international law have not only been made publicly but have also been made away from the public eye and to those directly concerned as part of the behind-the-scenes political activity of the Secretary-General. In addition, when encouraging discussions on normative developments, a number of considerations need to be assessed, including the risks of unravelling existing agreements on specific issues.

As part of this road map for the development and effective implementation of international law, "Our Common Agenda" also notes that "[s]tates could consider holding regular inclusive dialogues on legal matters of global concern at the General Assembly".¹⁴ The primary role of States in the development of international law is implicitly acknowledged, and the role of the International Law Commission, established by the General Assembly, is explicitly welcomed, recalling that pursuant to Article 1(1) of its statute, the International Law Commission is entrusted with the mandate of making recommendations for the purpose of "encouraging the progressive development of international law and its codification".¹⁵ Other United Nations intergovernmental bodies, although not specifically mentioned in the Common Agenda, like the Human Rights Council or the United Nations Commission on International Trade Law (UNCITRAL), also contribute to normative developments in specific thematic areas and in accordance with their mandates.

These references, both in the UN75 Declaration and in the report of the Secretary-General, to the development of international law within the United Nations framework reinforce the position of the United Nations as a vital forum for the development of international law. For the last seventy-seven years, the United Nations has demonstrated indeed its unique role both as a place where international law, particularly in the form of multilateral treaties, is developed, and as an actor directly participating in the making and interpretation of international law.¹⁶ The United Nations continues to offer a unique platform and international law framework to address contemporary global challenges being, as it is, the only universal intergovernmental organization with a mandate to maintain international peace and security. It is also the only universal platform

14 *Ibid.*

15 Resolution 174/(II), Statute of the International Law Commission, New York, 21 November 1947.

16 See, in particular, the Conclusions on Identification of Customary International Law, *Yearbook of the International Law Commission*, 2018, Vol. II, Part Two. See the draft Conclusions on Identification of Customary International Law, UN Doc. A/73/10, 2018, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (all internet references were accessed in October 2022).

where to discuss legal questions of global concern in line with Article 1(4) of the Charter, which provides that one of the purposes of the United Nations is to be a “centre for harmonizing the actions of nations”.¹⁷ Within the United Nations, the Sixth Committee, open to all Member States, is the primary forum for the consideration of legal questions in the General Assembly.

The ongoing discussions within United Nations intergovernmental bodies on a number of issues of global concern, such as the use and misuse of information and communication technologies,¹⁸ are an example of Member States’ commitment to the United Nations as a place of choice. Also, the discussions in the framework of the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction¹⁹ underscore the importance of the United Nations as a unique forum specifically for the development of international law.

In some cases, States have held negotiations outside the United Nations framework. In particular, related to international humanitarian law and most particularly to conventional processes on disarmament, the “Ottawa process” relating to anti-personnel mines and the “Oslo process” regarding cluster munitions both took place outside of the framework of the 1980 Convention on Certain Conventional Weapons.

To sum up, the practice of the United Nations, including the most recent one, seems to align with the UN75 Declaration and “Our Common Agenda”, which both favour a robust and international law-based approach to international relations. Such statements and practice also provide some indications regarding the actual role of international law – including international humanitarian law – for multilateralism in contemporary international relations.

International law as a tool for multilateralism

In the UN75 Declaration, Member States stated, among others, that: “[o]ur challenges are interconnected and can only be addressed through reinvigorated

17 Article 1(4) of the Charter of the United Nations: “The Purposes of the United Nations are: [...] 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.”

18 United Nations General Assembly Resolution 73/27, Developments in the field of information and telecommunications in the context of international security, UN Doc. A/RES/73/27, 11 December 2018 (Open-ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security); United Nations General Assembly Resolution 73/266, Advancing responsible State behaviour in cyberspace in the context of international security, UN Doc. A/RES/73/266, 2 January 2019 (Group of Governmental Experts on Advancing responsible State behaviour in cyberspace in the context of international security); United Nations General Assembly Resolution 75/240, Developments in the field of information and telecommunications in the context of international security, UN Doc. A/RES/75/240, 31 December 2020 (Open-ended Working Group on Security of and in the use of Information and Communications Technologies 2021–2025).

19 United Nations General Assembly Resolution 72/249, International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, UN Doc. A/RES/72/249, 24 December 2017.

multilateralism” and that “[m]ultilateralism is not an option but a necessity as we build back better for a more equal, more resilient and more sustainable world”, concluding that “[t]he United Nations must be at the centre of our efforts”.²⁰

The Secretary-General of the United Nations, in his Global Wake Up Call, had already remarked that:

[t]oday’s multilateralism lacks scale, ambition and teeth – and some of the instruments that do have teeth show little or no appetite to bite, as we have seen in the difficulties faced by the Security Council [...] A new, networked, inclusive, effective multilateralism, based on the enduring values of the United Nations Charter, could snap us out of our sleepwalking state and stop the slide towards ever greater danger.²¹

In spite of the challenges that multilateralism is facing, it is important to differentiate them from a supposed general decline in respect for international law. Such reflections are not novel and have been heard before, for instance, in the 1960s and 1970s, when the newly independent States were challenging what had formerly been thought of as established international law; also, after the terrorist attacks of 11 September 2001 (9/11), and after the military intervention in Iraq in 2003. While the decline or decreased use of the International Court of Justice has also been declared in the past, States from all regions of the world continue to initiate proceedings before the Court in a bid to seek the peaceful settlement of international disputes, whether stemming from historical or contemporary crises. In the last decade alone, thirty new contentious cases have been commenced before the Court.²²

Also, it is important to recall that the development of international law has taken different forms and that it cannot be only measured in terms of numbers of treaties adopted. In a number of instances, States have preferred to contribute to its development through soft-law instruments, among others in the field of international humanitarian law.

Those who challenge established rules do so not by rejecting the notion that there is any international law, but by articulating what they claim the law to be, or at the very least what they think the law should be. Others respond, also in the language of international law. In other words, existing rules are reaffirmed or challenged, or they change and adapt, but there is always international law. Thus, what is sometimes perceived as a crisis of international law is often “simply” a lack of consensus among Member States about the current state of the law or about the direction in which it should develop. The practice within the Sixth Committee of the General Assembly of taking decisions by consensus should be recalled. In this regard, the Secretariat has noted that:

20 United Nations General Assembly Resolution 75/1, Declaration on the commemoration of the seventy-fifth anniversary of the United Nations, UN Doc. A/RES/75/1, 21 September 2020, operative para. 5.

21 António Guterres, “Global Wake Up Call”, United Nations Secretary-General, 3 July 2020, available at: www.un.org/sg/en/content/sg/articles/2020-07-03/global-wake-call.

22 As of 19 September 2022, the International Court of Justice had been seized with thirty new contentious cases between 2013 and 2022 (twenty-two between 2003 and 2012; thirty-four between 1993 and 2002).

[i]n the past 10 years, the Sixth Committee has adopted most of its draft resolutions and decisions without a vote. In the exceptional and rare circumstances in which a draft resolution or decision has been put to a vote, the Committee has done so after exploring other possible alternatives for compromise. In some instances, a vote has been requested on a paragraph, while the draft resolution as a whole has been adopted without a vote.²³

Also, international law is, at the very least, the basic common language that States use when they talk to each other. If there is a crisis of multilateralism, then, that does not imply a crisis of international law, or that international law is no longer an appropriate tool for the conduct of international relations. International law actually provides stability, even when and where other processes and tools fail.

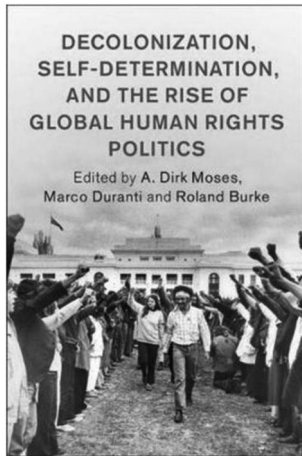
Conclusion

To conclude, while the focus has been in the past on newly emerging situations and the eventual need of new international rules to address them, today, however, there seems to be a recognition that most rules of international law in a traditional sense have not lost their relevance and value. In this regard, it appears that it is not the rules of public international law in general which require fixing, but their implementation both at the domestic and international levels.

Where States consider that eventual normative developments should be discussed, the report of the Secretary-General on “Our Common Agenda” recognizes and recalls, first, the unique position of the United Nations as a key forum for the development of international law, and second, that such development should occur in a principled framework and involve several and diverse stakeholders. Because, ultimately, international law is not only for States but for the benefit of their people.

23 United Nations Secretariat, Note by the Secretariat, Historical and analytical note on the practices and working methods of the Main Committees, fifty-eighth session, Agenda Item 55, Revitalization of the work of the General Assembly, UN Doc. A/58/CRP.5, 10 March 2004, para. 75.

LIBRARIAN'S PICK



Decolonization, Self-Determination, and the Rise of Global Human Rights Politics

Edited by **A. Dirk Moses, Marco Duranti and Roland Burke***

Book review by Charlotte Mohr, ICRC Reference Librarian for the collections on the ICRC's history and activities.

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In 2010, the publication of Samuel Moyn's *The Last Utopia*¹ took a wrecking ball to the well-established narrative of the global history of human rights – a story of constant progress from the US Declaration of Independence (1776) and the French Declaration of the Rights of Man and of the Citizen (1789) to the Universal Declaration of Human Rights (1948). Moyn's revisionist account centred on the thesis that human rights only emerged as the dominant aspirational framework in the 1970s. They broke through, he argued, only after other utopias failed, like that of self-determination embraced by the anti-colonial actors of previous decades. Edited by historians A. Dirk Moses, Marco Duranti and Roland Burke, *Decolonization, Self-Determination, and the Rise of Global*

* Published by Cambridge University Press, Cambridge, 2020. A. Dirk Moses is a historian of global human rights history, particularly in relation to genocide, memory and intellectual history. He is Frank Porter Graham Distinguished Professor in Global Human Rights History at the University of North Carolina at Chapel Hill since 2020. His latest book is *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge University Press, 2021). Marco Duranti is Senior Lecturer in Modern European and International History at the University of Sydney. As a historian of late modern Europe, his research focuses on the origins of international law and organizations. He is the author of *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017). Roland Burke is Senior Lecturer in World History at La Trobe University, Victoria. He is the author of *Decolonization and the Evolution of International Human Rights* (University of Pennsylvania Press, 2010).

ICRC Library

The “Librarian’s Pick” is a regular section of the *Review* in which one of the International Committee of the Red Cross’s (ICRC) librarians picks and writes about their favourite new book relating to international humanitarian law, policy or action, which they recommend to the readers of the journal.

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Human Rights Politics opens with an account of this revisionist history and its influence on recent scholarship in the history of human rights. But the editors soon move on to their volume’s *raison d’être*: bringing out new materials, new primary sources and new case studies in order to investigate the history of human rights on the margins. The book resists recreating a linear narrative of the history of the global human rights regime; instead, it brings to light the plural histories of human rights that emerge when historians zoom in on specific but diverse moments and contexts.

In sixteen case studies, the volume’s contributors take turns looking at sources and actors that have not been put front and centre in the historiography of human rights. Excluding these sources and actors from human rights history, the editors argue, means validating an anachronistic, restrictive definition of the concept of human rights—one which happens to coincide with the definition put forward by (neo)colonial powers in order to isolate human rights from anti-colonialism. It is a sweeping under the rug of part of the history of the concept of human rights as a contested space and the struggles that defined how its meaning became fixed over time.

Refuting a clear-cut opposition between human rights and the right to self-determination, the book investigates how human rights made their way into decolonization rhetorics, activism and policies. The relationship between human

1 Samuel Moyn, *The Last Utopia: Human Rights in History*, Belknap Press of Harvard University Press, Cambridge, MA, 2010.

rights and the fight for self-determination was always complicated by a long tradition of interlocked “humanitarian” and colonial projects, and the use of human rights discourse by colonial powers. Anti-colonial actors of the 1950s and 1960s, it is often argued, wielded human rights rhetorics to frame their fight in terms that could not be opposed on the international scene. This traditional explanation, however, only looks at human rights as an “imported good” in anti-colonialism. It denies anti-colonial actors agency in the making of human rights as a concept and a global movement.

Decolonization, Self-Determination, and the Rise of Global Human Rights Politics aims to look beyond this instrumentalist interpretation of the relationship between human rights and decolonization. It brings the construction of human rights as an ideal under the microscope and explores its linguistic and conceptual shifts through a historical lens. The volume’s case studies analyze the diverse meanings that human rights took in anti-colonial policies and rhetorics, and the counter-efforts made by (neo)colonial powers to confine that meaning. “Human rights were not born from the death of anti-colonialism”, the editors argue; “human rights in the West died as a viable means for expressing any optimistic anti-colonial vision”.² The editors connect this to the refashioning of human rights in the 1970s, when they lost their transformative “bite” and began to take on a more palliative role. Eventually, the book argues against interpretations of the use of human rights rhetorics by anti-colonial actors as pure political staging. It highlights how mobilizing human rights language allowed those fighting for self-determination to connect local or national projects with a global vision.

Divided into three parts, the book’s contributions span Africa, Asia, Europe, Oceania and the Americas, from the 1940s to the present. Chapters in the first part examine how human rights and self-determination became intertwined in the discourse of anti-colonial actors. In the opening contribution, Bonny Ibhawoh argues that self-determination and human rights did not stand in opposition in the eyes of the anti-colonial movement in Africa. Instead, the movement saw the right to self-determination as the first of the human rights, in a conception that emphasized collective rights over individual liberties. Ibhawoh sees the impact of this different prioritization of rights on crucial developments in the global human rights regime, via the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960) and the International Convention on the Elimination of All Forms of Racial Discrimination (1965). He stresses the importance of including grassroots movements in the history of human rights, as well as sources overlooked by historians, like texts in local vernaculars. The over-representation of Western sources and perspectives not only distorts the global history of human rights, he argues, but tends to remove the concept from history altogether, giving it, in retrospect, a meaning more stable and restricted than that which it actually bore through time. In her chapter, Miranda Johnson looks at how indigenous activists

2 Roland Burke, Marco Duranti and A. Dirk Moses, “Introduction: Human Rights, Empire, and After”, in *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, p. 20.

in the Anglo settler States invoked and expanded the language of human rights to articulate their struggle in the 1970s. Indigenous peoples' claims to rights of collective identity and sovereignty may not have fit the 1970s minimalist definition of "human rights", but their framing of the issue as a matter of concern to humanity through human rights language allowed them to internationalize their cause and opened new legal and political avenues for recognition.

The second part of the book looks at the role occupied by human rights in the construction of postcolonial States, both nationally and in their newfound position on the international stage. Cindy Ewing analyzes how human rights were included in the constitutions of the newly independent Burma, Ceylon and India in the late 1940s. She focuses on their codification of the rights of minorities, at a time when such rights were excluded from the Universal Declaration of Human Rights. Raphaëlle Khan's chapter on India provides an enlightening contribution to the historiographical debate on anti-colonialism and human rights in the 1940s. She looks at India's participation in the early days of the UN human rights system as an example of a postcolonial State mobilizing human rights for an issue unrelated to the struggle for independence, in this case the protection of the Indian diaspora.

The third and final part of the book turns to colonial and neocolonial actors' responses to the anti-colonial mobilization of human rights. Miguel Bandeira Jerónimo and José Pedro Monteiro's opening chapter looks at how Portugal navigated human rights taking centre stage at the United Nations. The late colonial power followed a strategy of appropriation of human rights language, with unrelenting efforts to dissociate such language from ideas of self-determination. Roland Burke then investigates South Africa's defence of apartheid on the international scene through the use of internationalist discourses – including the rhetorics of human rights. This pioneering example of a regime putting together a playbook to co-opt and subvert human rights language had long-lasting consequences, Burke argues, and became a blueprint for future regimes attempting to defend the indefensible.

In her chapter, Eleanor Davey investigates the participation of national liberation movements in the development of international humanitarian law (IHL) in the 1970s. Her contribution retraces the history of the International Committee of the Red Cross's (ICRC) engagement with such movements in the lead-up to the 1974–77 Diplomatic Conference and during the consultation process for the drafting of Additional Protocols I and II to the Geneva Conventions. She argues that a convergence emerged between the ICRC's commitment to minimizing suffering during conflict and national liberation movements' will to see the individual protections granted by IHL applied to the conflicts in which they were involved. She sees in the developments of the decade "an opportunity to channel the politics of self-determination into novel constructions of international law and genuine attempts to engage new actors in the process".³

3 Eleanor Davey, "Decolonizing the Geneva Conventions: National Liberation and the Development of Humanitarian Law", in *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, p. 396.

If Samuel Moyn's *The Last Utopia* moved the history of human rights beyond a linear, often triumphalist, narrative ten years ago, *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* now invites the reader to take a step in a new direction. It challenges a historiography that perpetuates the opposition between anti-colonialism and human rights while remaining overly based on Western-centred sources and conceptions of human rights. The volume draws a nuanced and fragmented picture of the history of human rights, fitting for what its editors argue⁴ is an intrinsically diverse subject. The book's main achievement is perhaps to expose our current definition of "human rights" as the product of a long struggle to co-opt the concept's meaning between actors with diverging, if not dramatically opposed, agendas. Eventually, the relationship between decolonization and human rights in history is defined by who is given custody of the concept—who gets to invest it with perennial meaning. Lesser known moments in human rights history—times when human rights bore different meanings and served different causes—become particularly promising objects of study, and this makes *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics* an illuminating pick for any reader interested in challenging his or her preconceptions about the history of human rights.

4 Roland Burke, Marco Duranti and A. Dirk Moses, "Introduction: Human Rights, Empire, and After", in *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics*, p. 31.

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Published in association with
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The *International Review of the Red Cross* is indexed in the Thomson Reuters Journal Citation Reports/Social Sciences Edition and has an Impact Factor. The Review is available on LexisNexis.

This journal issue has been printed on FSC™-certified paper and cover board. FSC is an independent, nongovernmental, not-for-profit organization established to promote the responsible management of the world's forests. Please see www.fsc.org for information.

Printed in Great Britain by Bell & Bain Ltd, Glasgow.

Cover Photo: Pablo Picasso, Guernica, 1937
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High resolution photo provided by:
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Volume 104 Number 920 + 921

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